



POLICY ROUNDTABLES

Competition and Commodity Price Volatility 2012

Introduction

The OECD Global Forum on Competition debated “Competition and Commodity Price Volatility” in February 2012. This document includes an executive summary of that debate and the documents from the meeting: a background note by the OECD Secretariat, contributions from Scott Davenport, Bibek Debroy, Torbjörn Iwarson, and Gustavo Lagos, and written submissions from: Australia, Bulgaria, Colombia, Croatia, Egypt, the European Union, Japan, Kazakhstan, Kenya, Latvia, Lithuania, Mauritius, Mexico, Morocco, Namibia, New Zealand, Pakistan, Peru, the Philippines, Romania, the Russian Federation, Senegal, Chinese Taipei, Tunisia, Turkey, Ukraine, the United States, and CUTS, as well as a summary of the discussion.

Overview

Since 2008 there have been significant increases, and large swings, in prices of primary commodities. Primary commodity prices are inherently volatile and this episode is not historically unusual. Such movements usually reflect markets responding well to conditions of supply and demand. However, competition authorities need to be vigilant in ensuring that the effects are not exacerbated by anticompetitive practices, and also need to be able to deal with pressure from politicians and the media to “do something”. This is especially the case when basic foodstuffs are involved, particularly in poorer countries.

Related Topics

[Price Volatility in Food and Agricultural Markets: Policy Responses \(2011\)](#)

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition and Commodity Price Volatility held by the Global Forum on Competition in February 2012.

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 la concurrence et la volatilité des prix des matières premières qui s'est tenue en février 2012 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

Considering the background papers, discussion by delegates and expert panellists at the Global Forum and countries' written submissions, several key points emerge:

- (1) *Primary commodity prices are inherently volatile and the current and recent episode is not historically unusual.*

All commodity prices - agricultural and mineral - exhibit outbreaks of volatility, during which prices spike up, for example in the 1970s and late 1990s. Supply and demand are both inelastic in the short term, so mis-matches can result in large price movements. In real terms, price spikes in the early 1970s were considerably higher than in the current episode.

Worldwide high and volatile prices reflect global forces of supply and demand that are only slightly responsive to national economic or competition policies – although in some cases, policies such as export bans have exacerbated the problem significantly. Some competition authorities noted that subsidies and mandates for biofuels had raised the prices of associated foodstuffs and, by making supply less elastic, had also contributed to higher price volatility. Speculative activity on commodity markets often anticipates global forces and may result in more short-run volatility but less in the medium term. There is little evidence that such activity influences average prices over a significant period.

There is some evidence that the current and previous episodes of high commodity prices reflect movements of significant proportions of the world population up into the moderate income brackets. Demand rises, stocks are run down, and prices become more sensitive to small changes in supply. However, for some commodities, the structure or practices of the global supply chain may contribute to this 'natural' volatility by reducing elasticities still further.

- (2) *High commodity prices encourage politicians and the media to put pressure on national competition authorities to “do something”. This is especially the case when basic foodstuffs are involved, particularly in poorer countries.*

Lack of competition leads to high prices, but as noted above, high prices do not necessarily signify lack of competition. On the contrary, rapid movements in prices can show competitive markets responding well to changes in supply or demand. Nevertheless, national competition authorities may be requested to investigate particular markets, especially but not only for agricultural products.

High agricultural prices can lead to humanitarian crises in poorer countries, where staple foodstuffs can account for up to 80% of the budgets of the poorest households. Even if the high prices seem to reflect global forces, it is not advisable for competition authorities to refuse to become involved. If they do refuse, they may lose credibility and political support.

- (3) *One approach that is open to national competition authorities when faced with high and unstable commodity prices is the comparatively straightforward one of factual studies, namely price monitoring and market studies.*

The first step in responding to volatility in commodity prices is to understand the causes. It is important to know if commodity price movements within a country faithfully reflect global price movements, or whether there are anomalies. In some countries, retail prices – for example of petroleum products – are routinely monitored by the competition authorities to see if price movements are significantly out of line with changes in global prices. If unexplained movements occur, competition authorities could launch a market study, to understand the drivers of price in a given market.

Such market studies have proved to be a very useful tool. In some cases, they find indications that the competition law may have been breached, leading to enforcement action under competition law. They can also throw valuable light on the influence of national and local regulations on the strength of competition, and allow the competition authorities to make useful proposals in this area. Finally, if a market study finds neither such constraint on competition, it can at least inform Government and the public that price volatility is the result of the market working normally, perhaps helping to avoid inappropriate and inefficient policy responses.

- (4) *In cases where governments are reacting to socio-economic crises sparked off by high commodity prices, for example for agricultural products, national competition authorities can help shape the appropriate response.*

Faced with genuine hardship occasioned by unexpectedly high commodity prices, governments might intervene with emergency measures to change market outcomes. Such measures can include price controls, subsidies to producers, export bans and direct government intervention in the production and distribution of some products.

In some countries, national competition authorities are mandated to give binding advice on measures such as these. In others, governments may be obliged to seek such advice, but not be bound to follow it. In others, there is no such obligation to seek advice, but the competition authority is not prevented from giving it, and should do so.

Price controls represent a significant intervention in the operation of the market, and should be adopted only in limited circumstances, and with care. High prices signal to consumers that their chosen products are expensive to produce, causing them to seek cheaper alternatives if possible. High prices also signal to producers that they should invest to increase production. These responses by consumers and producers together can help to solve the imbalance that caused prices to spike. If prices are artificially held below the levels that reflect the supply/demand balance, neither consumers nor producers will respond like this, and the imbalances might persist. Competition authorities should warn governments of this, perhaps also providing advice on how such effects can be limited if the political need to prevent price rises makes some form of price control necessary. For example, price controls could be limited in scope (to just the most basic goods) and strictly temporary in duration.

In some countries, governments have subsidised the production or importation of the affected commodities. The evidence shows that this policy can be very expensive for the national budget when commodity prices remain high for long periods. If consumers are shielded from the true costs of their decisions, as generous subsidies neither discourage demand or waste, nor encourage search for substitutes, then they will see no reason to reduce their consumption of the subsidised

goods, perpetuating and even increasing the need for subsidy. Again, competition authorities might advise strictly limited and temporary subsidies, for example on basic goods consumed by the poor that do not compete with higher-priced branded goods.

Export bans result in price spikes in importing countries and discourage producers in the exporting countries from investing in new supply. Some countries have eased import barriers – tariffs and quotas – to put downward pressure on domestic prices. In recent years, export bans may have significantly exacerbated the effects of supply/demand imbalances for some agricultural commodities and for one – rice – seem to have been the principal cause of global price rises.

Governments may want to take over all or part of the supply of basic foodstuffs in crisis conditions. Unless there is clear evidence that such direct provision is necessary (for example lack of adequate transport facilities for moving food to where it is desperately needed), national competition authorities should underline that governments are not better than the private sector at running business operations, and that such intervention might deter private sector suppliers from helping to solve the problem.

Competition authorities offering policy advice to governments in such circumstances will usually be operating in a highly sensitive political environment, and must strike a careful balance between maintaining sound and rigorous policy advice and ensuring they are not perceived as out of touch and uncaring. The country contributions in this volume contain examples of policy interventions that have been well-designed to minimise competitive distortions, as well as several illustrations of the damaging effects of badly-designed policies.

(5) *Anticompetitive behaviour in food supply chains can exacerbate the impact of fundamental supply and demand forces on commodity prices.*

Several countries at the Global Forum reported that when they analysed supply chains for agricultural products, they often saw signs of anti-competitive behaviour.

Anticompetitive behaviour at the level of farms is uncommon, presumably because dominance is rare in what are typically homogenous and even global product markets. Government-encouraged co-operation schemes both on the purchasing and marketing side are fairly common, and such co-operation needs to be monitored to ensure that it does not turn into price-fixing.

At the other end of the supply chain, supermarket chains often have significant buying power, which puts pressure on suppliers and small-scale competitors. It was agreed that this need not be a competition problem, particularly if cost savings are passed on to final consumers, and if the chains themselves compete with each other to the extent permitted by local or national regulations – which might not be optimal (see below).

Participants agreed that the most prevalent form of anti-competitive conduct was in the intermediate stages of the supply chain, often for processed foods, and often when a comparatively small number of food processing enterprises dealt with a large number of farms and of wholesalers. Several countries reported cases dealing with such enterprises, including cartel-like activity, and sanctions had been imposed.

Such cartels probably existed before high and volatile commodity prices struck, but became more visible as a result, because of the need for more frequent negotiations between cartel members.

As well as cartel-like activity between the producing and consuming stages, such conduct also occurs at input stages, for example for seeds and fertilisers, as well as transport of produce. In some countries, supply of inputs and/or purchase of outputs (especially for export) can be a government monopoly.

- (6) *Particularly in agricultural and food supply chains, national and local regulations distort and reduce competition, perhaps more so than private anti-competitive conduct.*

In many countries, there appears to be an official mindset that the production, import, export, processing, transport and wholesale and retail distribution of food is too important to be left to the free play of competitive markets. Regulations abound at all levels, particularly in developing countries. International trade in agricultural products continues to be hemmed in by quotas and other restrictions, and distorted by subsidies, particularly in advanced OECD countries.

In several countries, foreign direct investment (FDI) in the agricultural sector is forbidden or heavily restricted, reducing the possibility of introducing new techniques. Even domestic markets for land may be strictly controlled, preventing the emergence of large farms able to exploit economies of scale.

Regulation can also take the form of minimum support prices, regulated marketing arrangements, and government controls and regulations concerning markets for inputs. Because price signals are distorted or non-existent, investment decisions and resource allocation are sub-optimal. Agricultural policies and research tend to be directed towards alleviating the symptoms rather than addressing the fundamental distortions.

At the retail level, local and national regulations often determine whether and how many large-scale and small-scale outlets can locate in a given area. Supermarkets may face size and location restrictions if they are allowed to operate at all. Specialised retail outlets may not be permitted to locate close to existing outlets in the same sector, even though this maximises competition.

Experience shows, however, that in some circumstances very rapid deregulation can create conditions favourable for anti-competitive conduct to emerge. Market monitoring is advisable when governments embark on major liberalisation programmes.

- (7) *Export cartels for metal and mineral commodities represent a continuing problem.*

Production of many mineral and metal commodities is concentrated geographically, making cartelisation simpler, while consumption is scattered world-wide, reducing the potential for offsetting buyer power. Cartels exist, or have existed, for oil, aluminium, tin and potash.

Although competition law forbids cartels to operate domestically, it is generally not illegal for producers to collude to fix prices solely for export. Indeed, insofar as high cartelised export prices result in higher tax revenue in the exporting country, without directly harming consumers there, some governments take a benign view of this. From a global welfare standard, however, such cartels are just as damaging as those forbidden by national competition law. Indeed, as many such cartels increase the prices of essential inputs, they may be among the most damaging price-fixing conspiracies. To the extent that importing jurisdictions are unwilling or unable to act to protect their own consumers, addressing this issue may require action at an international level.

SYNTHÈSE

Par le Secrétariat

L'étude des documents de référence, des communications écrites des pays et des différents points de vue exprimés par les délégués et les experts lors du Forum mondial permet de dégager plusieurs points essentiels :

- (1) *Les prix des produits primaires sont volatils par nature et l'épisode actuel n'est pas rare d'un point de vue historique.*

Les prix des matières premières – agricoles et minérales – présentent tous de brusques accès de volatilité, qui peuvent provoquer une envolée des prix, comme ce fut le cas dans les années 70 et à la fin des années 90, par exemple. L'offre et la demande sont inélastiques à court terme, de sorte que tout décalage entre l'une et l'autre peut entraîner une variation importante des cours. En termes réels, l'envolée des prix du début des années 70 a été beaucoup plus marquée que celle de l'épisode actuel.

Au niveau mondial, les prix élevés et volatils reflètent les mécanismes internationaux de l'offre et de la demande, qui ne réagissent que très légèrement aux politiques économiques et aux politiques de la concurrence des différents pays – bien que des mesures comme les interdictions d'exportation aient parfois sensiblement aggravé le problème. Certaines autorités de la concurrence ont constaté que les subventions et les obligations relatives aux biocarburants avaient fait grimper les prix des denrées alimentaires associées et qu'elles avaient également contribué à renforcer l'instabilité des prix en rendant l'offre moins élastique. La spéculation sur les marchés de produits anticipe généralement les mécanismes mondiaux et peut entraîner une plus grande volatilité à court terme, qui sera toutefois moindre à moyen terme. Il y a peu d'indications qu'une telle activité influence les prix moyens sur une période significative.

À l'inverse, un certain nombre d'éléments tendent à prouver que les épisodes passés et présents de renchérissement des matières premières sont le signe qu'une part notable de la population mondiale se situe dans la tranche des revenus moyens. La demande augmente, les stocks se réduisent et les prix deviennent plus sensibles aux petites variations de l'offre. Pour certaines matières premières toutefois, la structure de la chaîne d'approvisionnement mondiale, ou les pratiques de ses intervenants, peuvent aussi contribuer à cette volatilité « naturelle » en réduisant encore plus l'élasticité.

- (2) *Les prix élevés des matières premières incitent les responsables politiques et les médias à faire pression sur les autorités nationales de la concurrence pour qu'elles interviennent. Cela est notamment le cas pour les produits alimentaires de base, en particulier dans les pays les plus pauvres.*

L'absence de concurrence entraîne une hausse des prix mais, comme on l'a vu, des prix élevés ne dénotent pas nécessairement une absence de concurrence. Au contraire, la fluctuation rapide des prix peut être le signe que les marchés concurrentiels réagissent bien aux variations de l'offre ou de la demande. Néanmoins, il peut être demandé aux autorités nationales de la concurrence

d'enquêter sur certains marchés – en particulier les marchés de produits agricoles, mais pas uniquement.

Des prix agricoles élevés peuvent conduire à des crises humanitaires dans les pays pauvres, où les denrées de base peuvent représenter jusqu'à 80 % du budget des ménages les plus pauvres. Même si le renchérissement des prix semble être l'expression de mécanismes mondiaux, il n'est pas souhaitable que les autorités de la concurrence refusent pour autant d'intervenir. Elles pourraient alors perdre leur crédibilité et le soutien politique dont elles bénéficient.

- (3) *Pour les autorités nationales de la concurrence confrontées à des prix de matières premières élevés et instables, il est relativement plus simple de s'en remettre à l'analyse des faits, autrement dit à la surveillance des prix et aux études de marché.*

Pour pouvoir prendre des mesures en cas de volatilité des prix des matières premières, il convient tout d'abord d'en comprendre les causes. Il est important de savoir si les variations des cours des matières premières dans un pays donné reflètent fidèlement la variation des cours à l'échelle mondiale, ou s'il s'agit d'anomalies. Dans certains pays, les autorités de la concurrence contrôlent systématiquement l'évolution des prix de détail – des produits pétroliers par exemple – pour vérifier si ces variations diffèrent de manière significative de la variation des prix mondiaux. En cas de fluctuation inexplicée, elles peuvent lancer une étude de marché pour comprendre les facteurs de l'évolution des prix sur un marché donné.

Ces études de marché se sont avérées très utiles. Dans certains cas, elles permettent de constater des infractions présumées au droit de la concurrence, donnant ainsi lieu à des mesures répressives. Elles peuvent également apporter un éclairage intéressant sur l'influence des réglementations nationales et locales sur le dynamisme de la concurrence, et permettre aux autorités de la concurrence de formuler des propositions utiles dans ce domaine. Enfin, si l'étude de marché ne relève aucune contrainte concurrentielle, elle peut tout au moins informer le gouvernement et le public que l'instabilité des prix est une manifestation du fonctionnement normal du marché, et éventuellement contribuer à éviter que les pouvoirs publics ne prennent des mesures inappropriées et inefficaces.

- (4) *Lorsque les pouvoirs publics sont confrontés à des crises socio-économiques déclenchées par une flambée des prix des matières premières, par exemple des produits agricoles, les autorités nationales de la concurrence peuvent contribuer à définir la réponse la plus appropriée.*

Les États qui se trouvent confrontés à de sérieuses difficultés économiques et financières en raison du prix étonnamment élevé des matières premières pourraient y faire face en adoptant des mesures d'urgence pour modifier la situation du marché. Parmi ces mesures figurent le contrôle des prix, les subventions aux producteurs, les interdictions d'exportation et l'intervention directe de l'État dans la production et la distribution de certains produits.

Dans certains pays, les autorités nationales de la concurrence sont dans l'obligation de rendre des avis contraignants sur de pareilles mesures. Dans d'autres, les pouvoirs publics sont tenus de solliciter leur avis sans être pour autant obligés de le suivre. Dans d'autres encore, cette obligation n'existe pas et l'autorité de la concurrence est libre de donner un avis et ne devrait donc pas s'interdire de le faire.

Le contrôle des prix est une intervention significative dans le fonctionnement du marché, et ne devrait être utilisé que dans des situations très précises, et avec prudence. Le renchérissement des prix signale aux consommateurs que les produits qu'ils choisissent sont onéreux à produire, et les

incite à chercher si possible d'autres produits moins coûteux. Il indique en outre aux producteurs qu'ils devraient investir pour accroître leur production. Ces réactions conjointes des consommateurs et des producteurs peuvent aider à mettre fin au déséquilibre qui a entraîné la hausse des prix. Si les prix sont maintenus artificiellement en dessous des niveaux qui reflètent l'équilibre entre l'offre et la demande, ni les consommateurs ni les producteurs ne pourront réagir, et les déséquilibres pourraient persister. Les autorités de la concurrence devraient en avertir les pouvoirs publics, tout en leur prodiguant éventuellement des conseils sur la façon de limiter ces effets si, par nécessité politique d'éviter une hausse des prix, ils se trouvent dans l'obligation de pratiquer une certaine forme de contrôle des prix. Le contrôle des prix pourrait par exemple être limité (pour ne porter que sur les produits de première nécessité) et strictement temporaire.

Dans certains pays, l'État a subventionné la production ou l'importation des matières premières concernées. Certaines données montrent que cette politique peut coûter très cher aux finances publiques lorsque les prix des matières premières restent élevés pendant de longues périodes. Si les consommateurs sont protégés contre le coût réel de leurs décisions d'achat, dans la mesure où de généreuses subventions ne découragent ni la demande ni le gaspillage et n'encouragent pas non plus la recherche de produits de remplacement, ils n'auront donc aucune raison de limiter leur consommation de produits subventionnés, pérennisant voire accentuant de ce fait le besoin de subventions. Dans ce cas aussi, les autorités de la concurrence pourraient recommander aux pouvoirs publics d'accorder des subventions strictement limitées dans leur portée et leur durée, circonscrites par exemple aux produits de base consommés par les plus pauvres qui ne concurrencent pas les produits de marque plus chers.

Les interdictions d'exportation entraînent une envolée des prix dans les pays importateurs et dissuadent les producteurs des pays exportateurs de renouveler leur offre. Certains pays ont réduit leurs obstacles à l'importation – droits de douane et contingents – pour exercer une pression à la baisse sur les prix intérieurs. Ces dernières années, les interdictions d'exportation ont pu aggraver de manière significative les effets des déséquilibres entre l'offre et la demande sur certains produits agricoles de base et semblent même pour l'un d'entre eux – le riz – avoir été la cause principale de la flambée des cours mondiaux.

L'État peut aussi être tenté de prendre le contrôle de tout ou partie de l'offre de produits alimentaires de base en période de crise. Sauf si la nécessité d'une telle intervention directe est clairement démontrée (par le manque d'infrastructures de transport adéquates permettant d'acheminer les denrées alimentaires là où les populations en ont un besoin urgent, par exemple), les autorités nationales de la concurrence devraient insister sur le fait que l'État n'est pas mieux placé que le secteur privé pour exercer des activités commerciales, et qu'une telle intervention de sa part pourrait dissuader les fournisseurs privés de contribuer à mettre fin au problème.

Les autorités de la concurrence qui dispensent des conseils aux pouvoirs publics dans de telles situations interviennent généralement dans un contexte politique très sensible, et doivent continuer de prodiguer des conseils sûrs et rigoureux, tout en veillant à ne pas paraître déconnectées de la réalité ou indifférentes. Les contributions des pays présentées dans cet ouvrage contiennent des exemples d'interventions politiques bien pensées, qui ont permis d'atténuer les distorsions de concurrence, ainsi que quelques illustrations des effets préjudiciables que peuvent avoir des mesures mal conçues.

- (5) *Les comportements anticoncurrentiels dans les chaînes d'approvisionnement alimentaire peuvent aggraver l'impact des mécanismes fondamentaux de l'offre et de la demande sur les prix des matières premières.*

À l'occasion du Forum mondial, plusieurs pays ont indiqué que l'analyse des chaînes d'approvisionnement agricole avait souvent révélé des signes de comportements anticoncurrentiels.

Les comportements anticoncurrentiels sont rares au niveau des exploitations agricoles, sans doute parce que les cas d'abus de position dominante sont exceptionnels sur des marchés de produits mondiaux qui sont généralement homogènes, voire uniformes. Il n'est pas rare que les gouvernements encouragent des programmes de coopération portant sur l'achat et la commercialisation de produits, mais cette coopération doit être suivie de près pour veiller à ce qu'elle ne se transforme pas en entente sur les prix.

À l'autre extrémité de la chaîne d'approvisionnement, les chaînes de supermarchés disposent généralement d'une forte puissance d'achat qui pèse sur les fournisseurs et les petits concurrents. Il a été admis que cela ne constituait pas nécessairement un problème pour la concurrence, en particulier si les économies de coûts sont répercutées sur le consommateur final, et si les chaînes elles-mêmes se livrent concurrence dans les proportions – qui ne sont pas forcément les meilleures – autorisées par la réglementation locale ou nationale (voir plus loin).

Les participants ont reconnu que, le plus souvent, les entreprises adoptent des comportements anticoncurrentiels aux étapes intermédiaires des chaînes d'approvisionnement, concernant généralement les aliments transformés, et souvent lorsqu'un nombre relativement peu élevé d'entreprises de transformation de produits alimentaires est amené à traiter avec un grand nombre d'exploitations et de grossistes. Plusieurs pays ont fait état d'affaires impliquant ce type d'entreprises, qui se livrent notamment à des activités assimilables à une entente, et ont indiqué que des sanctions avaient été infligées.

Ces ententes existaient sans doute avant que les prix des matières premières ne soient élevés et volatils mais elles sont devenues plus visibles après, en raison de la nécessité pour les membres de l'entente de négocier entre eux plus fréquemment.

À l'instar des activités assimilables à des ententes menées entre les phases de production et de consommation, ces comportements anticoncurrentiels surviennent également au niveau des intrants agricoles, comme c'est le cas pour les semences et les engrais, ainsi qu'au stade du transport du produit. Dans certains pays, l'offre d'intrants et/ou l'achat d'extrants (en particulier destinés à l'exportation) peuvent constituer un monopole d'État.

- (6) *Dans les chaînes d'approvisionnement agricole et alimentaire en particulier, les réglementations nationales et locales faussent et réduisent la concurrence, peut-être plus encore que les comportements anticoncurrentiels du secteur privé.*

Dans nombre de pays, les pouvoirs publics semblent défendre l'idée selon laquelle la production, l'importation, l'exportation, la transformation, le transport et la distribution en gros et au détail de produits alimentaires sont des questions trop importantes pour être laissées au libre jeu de marchés concurrentiels. Les réglementations abondent à tous les niveaux, en particulier dans les pays en développement. Des contingents et d'autres restrictions continuent d'entraver les échanges internationaux de produits agricoles, également faussés par l'octroi de subventions, en particulier dans les pays avancés de l'OCDE.

Plusieurs pays interdisent ou limitent fortement les investissements étrangers directs (IED) dans le secteur agricole, réduisant ainsi les possibilités d'introduction de nouvelles techniques. Même les marchés fonciers intérieurs peuvent faire l'objet d'un contrôle strict, empêchant l'émergence de grandes exploitations capables de tirer parti d'économies d'échelle.

La réglementation peut également prendre la forme de prix de soutien minimaux, d'accords de commercialisation réglementés ou de contrôles et de réglementations exercés par les pouvoirs publics sur les marchés des matières premières. La fonction indicatrice des prix étant alors dénaturée ou inexistante, les décisions d'investissement et l'affectation des ressources ne sont pas optimales. Or les politiques et les recherches dans le domaine agricole visent plus souvent à atténuer les symptômes du problème qu'à s'attaquer aux distorsions fondamentales du marché.

S'agissant du commerce de détail, les réglementations locales et nationales déterminent souvent si des petites et des grandes surfaces peuvent s'installer dans une région donnée, et dans quelle proportion. Les supermarchés peuvent donc être soumis à des restrictions concernant leur taille et leur emplacement, pour autant que leur existence soit autorisée. L'ouverture de nouvelles boutiques à proximité de boutiques existantes dans un même secteur peut être interdite, alors même que cette ouverture optimiserait la concurrence.

L'expérience montre cependant que dans certaines circonstances, une déréglementation très rapide peut créer des conditions favorables à l'apparition d'un comportement anticoncurrentiel. Le contrôle des marchés est donc recommandé lorsque les pouvoirs publics lancent de grands programmes de libéralisation.

- (7) *Les ententes à l'exportation de matières premières minérales et métalliques demeurent un problème.*

La production de nombreuses matières premières minérales et métalliques est concentrée géographiquement, ce qui facilite la constitution d'ententes, alors que leur consommation est disséminée à travers le monde, ce qui limite les possibilités de neutraliser une éventuelle puissance d'achat. Des ententes existent, ou ont existé, sur les marchés du pétrole, de l'aluminium, de l'étain et de la potasse.

Bien que le droit de la concurrence interdise les ententes au niveau national, il n'est généralement pas illégal pour les producteurs de se concerter en vue de fixer uniquement les prix à l'exportation. En effet, dans la mesure où les prix élevés à l'exportation issus de l'entente ont pour conséquence d'augmenter les recettes fiscales du pays exportateur, sans nuire directement aux consommateurs de ce pays, certains États ne s'en formalisent pas. En prenant pour critère le bien-être mondial, cependant, ces ententes sont tout aussi préjudiciables que celles que proscriit le droit de la concurrence des différents pays. En effet, comme nombre d'entre elles font grimper les prix des intrants de base, elles comptent sans doute au nombre des ententes sur les prix les plus préjudiciables. Lorsque les pays importateurs ne veulent ou ne peuvent agir pour protéger leurs propres consommateurs, des mesures au niveau international peuvent alors s'avérer nécessaires.

BACKGROUND NOTE

*By the Secretariat**

Executive Summary

Governments give particular attention to commodities markets. Many food and agriculture commodities are essential goods and consumers would be unable to survive without access to affordable food staple commodities. In many parts of the world, basic cooking and heating fuel can also be a necessity.

Mineral commodities, too, gain government attention. The grant of exploration and exploitation rights over mineral deposits is particularly important for countries that rely on selling mineral products or who rely on cheap raw material inputs as a key source of comparative advantage upon which to build a diverse economy.

From 2008 and continuing, there have been significant increases in commodities prices and then large and unpredictable movements in commodities prices. These movements have been the combined result of a range of short and long run factors, some of which are likely to be permanent or recurring.

“[H]arvests have been endangered by floods in Pakistan and Australia, fires in Russia and drought in Latin America and China. In addition, geopolitical conflicts and popular uprisings in certain mainly oil-producing Arab countries explain the bulk of the problems to be seen on the oil market.”

“With respect to demand, the strain is also at its utmost. Consumption – whether of energy or other commodities – is being driven by the exponential growth of the emerging countries.”¹

Every significant commodity price movement causes concern for either producers or consumers of commodities and large unpredictable movements, in rapid succession, in both directions (i.e. high levels of volatility) can cause significant concerns for both sides of the market simultaneously. An immediate response is often to attribute the problems arising from price movements to speculation within the market but speculation is much more likely to be a symptom of a demand or supply problem, or even a partial solution to such a problem, rather than a cause.

As discussed in this paper, competition law enforcement and advocacy by competition authorities over a sustained period of years can assist commodities markets to provide sustainable livelihoods for producers, and deliver products affordably to consumers. Removing competitive impediments within markets can also assist producers, processors and consumers to cope as flexibly and quickly as possible to price shocks.

Competition problems in relation to production usually involve government policies rather than breaches of the law by commercial actors because the production of most commodities is highly competitive. However, in upstream markets (e.g. the supply of fertiliser) and downstream markets (e.g. the processing of commodities) there are often smaller numbers of market participants and in concentrated markets, breaches of competition law are typically much more common. Multiple competition problems at successive levels of the production and processing of commodities are particularly damaging to economic performance.

Often, however, competition authorities will be required to act much more quickly.

When prices move significantly in a short period, governments often decide that competition policy alone will not deliver a solution quickly enough if the price movements are considered to be too much for producers or consumers to bear.

* This note was prepared by Nicolas Taylor and Michal Petr, OECD Competition Division Secretariat.

¹ Contribution of Moroccan Ministry of Economic and General Affairs, [DAF/COMP/GF/WD\(2012\)10](#).

There are many different forms that government action can take and in some cases the policies can unwittingly impede competition and lead to significant longer term harm. Therefore, many competition authorities have been involved in advocacy with other parts of government to help select between different policy options (or dissuading government from acting if all the options are damaging) and putting in place a future path for the period following the price shock, to enable the markets to become self correcting in the future.

Following a more detailed discussion of all of the above topics, this paper concludes with some suggestions for competition authorities to discuss at the OECD's 2012 Global Forum on Competition concerning the constructive roles that they can play in assisting their societies cope with the challenges of unpredictable and significant commodity price movements.

1. Introduction

Commodities are any bulk, homogeneous (i.e. uniform) products. Almost all commodities are unprocessed primary products, or products that have had only an initial level of processing, including: (i) bulk agricultural products such as rice or wheat; and (ii) minerals such as iron ore, bauxite or coal.

Also included are products that have only received a very limited amount of processing such as flour milled from wheat or aluminium after bauxite has undergone processing. Other products such as milk, wool and timber are also commoditised products that have usually undergone a limited level of processing by the time they are widely traded in bulk.

To facilitate the discussion by the Global Forum on Competition on 16 February 2012, this paper provides an overview of the history of price movements in agricultural and mineral commodities markets and their apparent causes. It also identifies the nature of government and private sector impediments to the efficient working of markets. The paper then discusses the different policies that governments often use to address crises in commodities markets and finally an analysis is suggested on how the competition authorities can assist in achieving the best possible long run and short run outcomes for the producing and consuming sectors of their communities.

Following the discussion at the Forum, the OECD proposes to distil and publish these suggested proactive and reactive strategies.

This paper is structured as follows:

- Section 2 provides an analysis of price movements in agricultural commodities and mineral commodities over shorter and longer time frames and the causes of these movements;
- Section 3 addresses a number of conceptual issues concerning commodities markets including the importance of storage and inter-regional trade, implications for competition law and policy from the characteristics of the supply chain in commodities markets, role of speculation in commodities markets and the interaction between competition policy and trade policy;
- Section 4 sets out the various competition law enforcement and advocacy initiatives that competition authorities have taken; and
- The conclusion in Section 5 sets out a number of suggestions for discussion on the most constructive roles that competition authorities can play in assisting their societies cope with the challenges of unpredictable and significant commodity price movements.

2. Commodity price movements and their causes

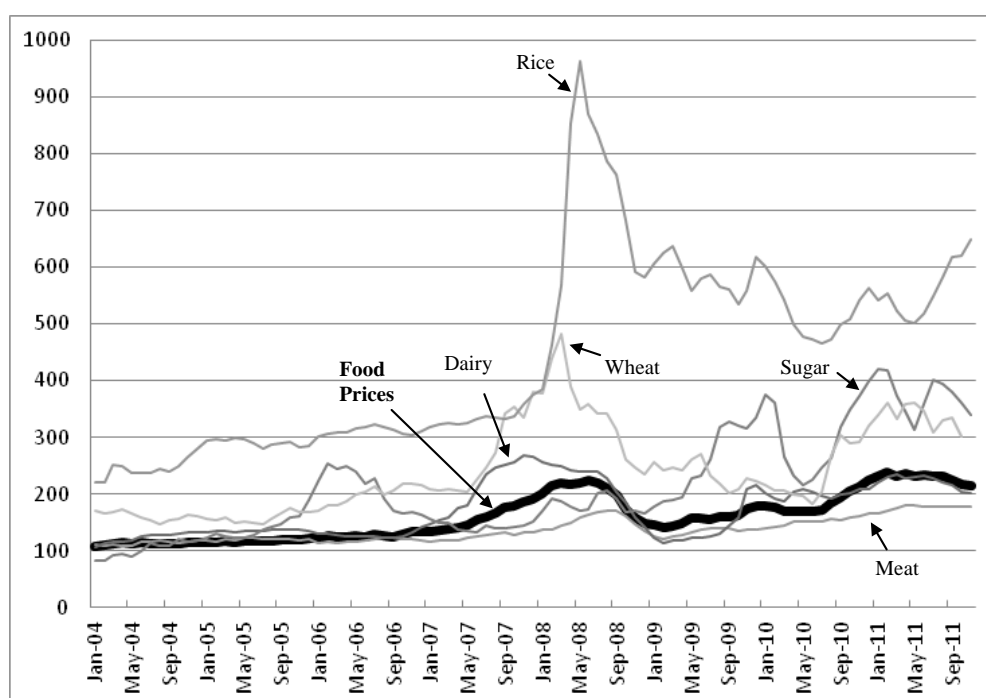
2.1 *Agricultural and food commodity prices and price volatility*

International food and agricultural commodity price peaked in about 2008. Following the peaks, prices tended to remain higher than in the recent past and price levels have been volatile. At their summit in November 2010, G20 leaders requested OECD and other international institutions² develop options for G20 consideration on how to better mitigate and manage the risks associated with the agricultural price volatility, without distorting market behaviour and ultimately to protect the most vulnerable. Following this, “*Price Volatility in Food and Agricultural Markets: Policy Responses*” (the “**Report**”³) was published in June 2011.

The Report explains that “volatility” refers to large variations in prices over time. The technical definition of the term, based on statistical methodology, is put forward in Annex A to the Report. However, the term is more often associated with a vernacular concept in which the community demands action over extreme peaks resulting in consumers suffering or price collapses that significantly reduce rural incomes.

As shown in [Figure 1](#) (updated from the Report), the period since 2006 has been one of extraordinary volatility. Prices rose sharply in 2006 and 2007, peaking in the second half of 2007 for some products and in the first half of 2008 for others; for some products the run-up between the average of 2005 and the peak was several hundred percent. Prices then fell sharply in the second half of 2008, although they remained above the levels in the period just before the run-up began. Tensions re-emerged during 2010 and by early 2011, the FAO food price index was again at the level it had peaked in 2008.

Figure 1. Monthly Agricultural Commodity Price Indices (2002-04=100)



Source: FAO Monthly Prices

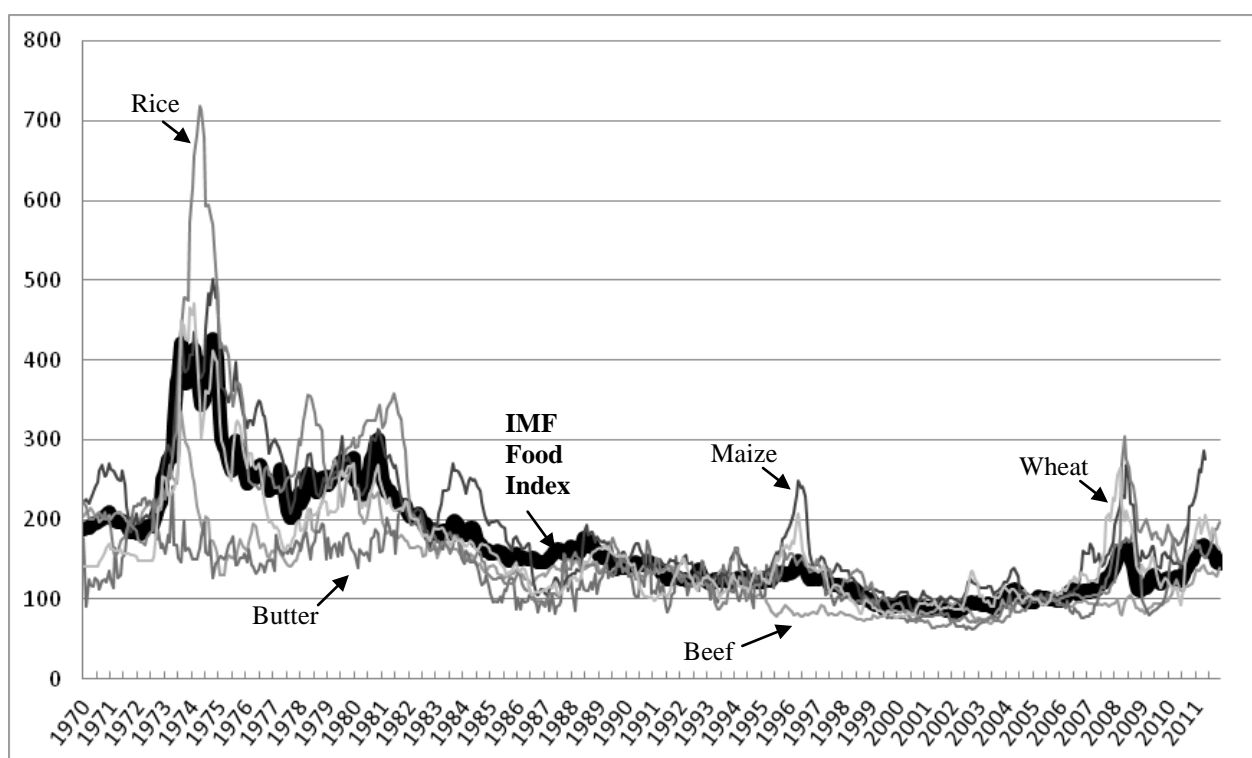
² FAO, IFAD, IMF, UNCTAD, WFP, the World Bank, the WRO, IFPRI and the UN HLTF.

³ A link to the Report can be found on the website for the OECD’s 2012 Global Forum on Competition www.oecd.org/competition/globalforum.

The Report’s primarily policy concern is with variations in prices that are large and *which cannot be anticipated* by producers, consumers and governments. Price volatility is of particular concern when it induces excessive risk adverse behaviour that leads to inefficient investment decisions, such as the hoarding of food commodity stocks. Such hoarded stocks may not be made available for consumption during a price increase and, worse, may degrade in quality such that even in the long run this quantity is permanently removed from circulation. By contrast, prices moving along a smooth and well-established trend reflecting market fundamentals or a predictable seasonal pattern do not pose the same problem.

Taking a longer term perspective (see [Figure 2](#) below), there is no evidence suggesting that the volatility in international agricultural commodity prices is increasing but it has been higher during the decade since 2000 than during the 1980’s and 1990’s.

Figure 2. Agricultural Commodity Prices in Real Terms (2005=100)



Source: IMF eLibrary - Data, except for rice: OECD Secretariat.

The Report explains why agricultural commodity markets have long been volatile:

- agricultural output varies from period to period because of natural shocks such as weather and pests;
- demand and supply are not very price elastic, at least in the short run; in order to get supply and demand back into balance after a supply shock, prices therefore have to vary strongly in order to stimulate more supply or change the pattern of demand; and
- the lagged supply response to price changes can cause cyclical adjustments that add an extra degree of variability to the markets concerned.

The trends described above relate to international prices. Both price levels and degrees of volatility may differ significantly from place to place at any given time. The extent to which global prices are transmitted to domestic markets depends on how strongly integrated the latter are with the former. Both trade policies (such as import duties or export bans) and market structure influence the extent to which price changes in domestic markets mirror those in international markets. This is a key issue for competition authorities which will be a focus of discussion below and during the discussions at the Global Forum on Competition.

The Report identifies several key determinants of the underlying level of food prices and of food price volatility:

- By 2050, world population is expected to have reached 9 billion and income in emerging and developing countries to have grown significantly, thus increasing the demand for food by 70 % to 100 %.
- At least in OECD countries, the production of biofuels has been largely driven by government support policies and the Report recommended that governments should remove provisions of current national policies that subsidize or require the production or use of biofuels. Even so, a further significant growth in demand is expected.⁴
- Whether it is due to crops being substituted between food and biofuel, or because petroleum products are direct and indirect inputs into agricultural production, volatility in agricultural commodity prices has become increasingly correlated with volatility in oil prices.
- It is also believed that climate change will lead to more frequent extreme events such as droughts, heat waves and floods, endangering harvest in effected regions.
- Low stocks relative to use, and uncertainty about stock levels in some parts of the world, are likely to contribute to volatility (as is believed to have happened during the 2007/2008).

The Report found that during 2007 – 2008, some government policy measures (in particular export restrictions and commodity hoarding) contributed to increasing the amplitude of price movements and in some cases provoking price increases that were otherwise inexplicable in terms of the market fundamentals; additionally, private and public actors, responding to general nervousness of the markets or for speculative reasons, engaged in hoarding or precipitated purchases.

The Report concludes that even though the extent of potential future increases in prices and volatility cannot be estimated accurately, the likelihood of higher real prices and increased volatility in the future is significant. It therefore puts forward a set of policy recommendations on both reducing the future price volatility and mitigating its consequences.

It notes that deeper integration of global and regional markets, better defined safeguard mechanisms and improvements in the competitive environment may bring increased trade volume and more suppliers and buyers to markets that are currently very shallow. Since the greatest potential for increasing supply rests with developing countries, investment in increasing the productivity and resilience of agriculture in these countries is indispensable.

⁴ OECD – FAO Agricultural Outlook 2010 – 2019: Biofuels Market Outlook.

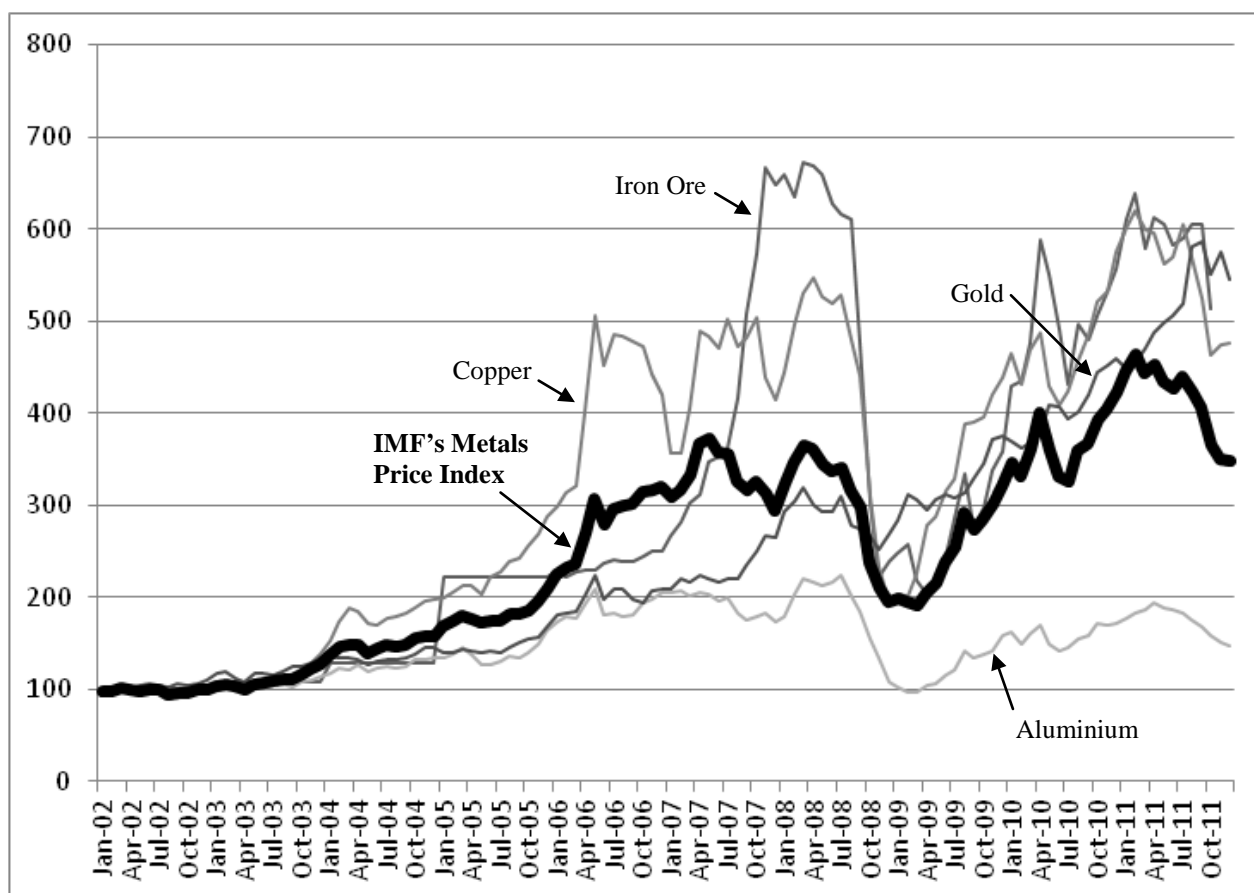
2.2 Mineral commodity prices and price volatility

There are some similarities between agricultural and mineral commodities. Both sets of commodities are globally traded yet have distinct localised price movements. At both geographic levels, short term supply and demand inelasticity causes short run price movements to be very large.

Nevertheless, there are some distinct characteristics of agricultural markets and mineral markets. For example, agricultural commodities markets are influenced in the short term by supply side shocks induced by both predictable and unpredictable weather patterns. By contrast medium term price movements in mineral commodities markets tend to be correlated with the health of the global economy – when it grows, so does the demand and likewise the prices.

Figure 3 below drawn from the contribution of Professor Lagos⁵ illustrates the recent trends in the four significant mineral commodities and the IMF’s Metals Price Index.

Figure 3. Metal Commodity Current Prices (2002-04=100)



Source: UNCTADstat, World databank, IMF per Prof G. Lagos

⁵

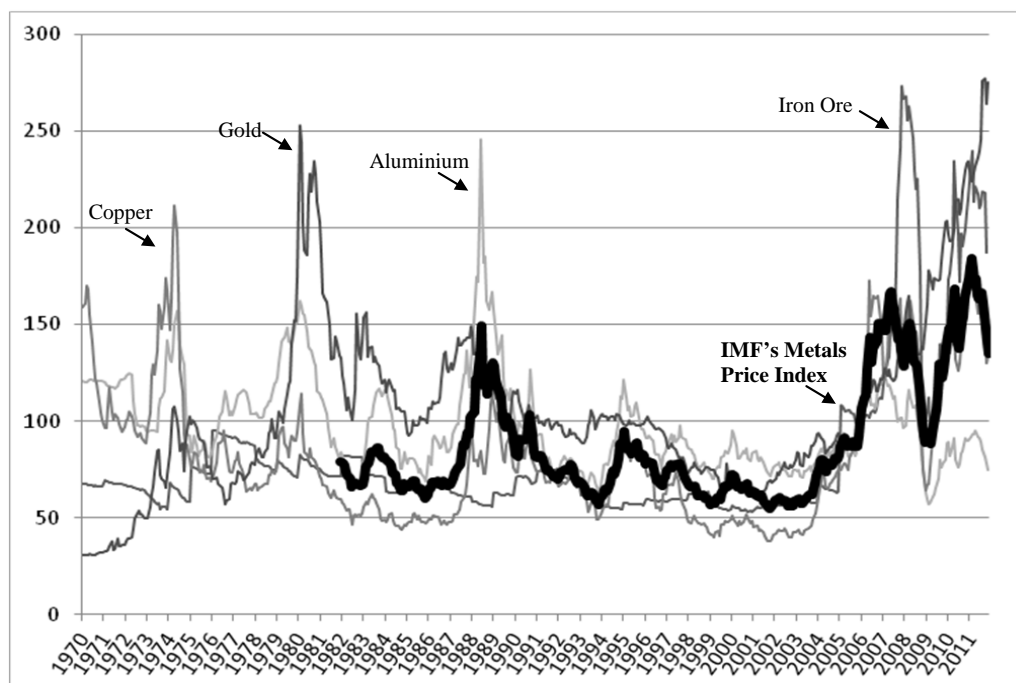
[DAF/COMP/GF\(2012\)4](#).

Professor Lagos considers that the principal causes of price levels and volatility in minerals markets are:

- variation of fundamental forces of the market, namely supply, demand, and stocks of physical metal but the details of these factors vary from one commodity to another:
 - the costs of transport, for example, is one key long run determinant of iron prices;
 - the cost of energy and governmental environmental policies are key long run determinants of aluminium prices;
 - the aggregate level of industrial production and construction are key determinants of the prices of iron, aluminium and copper and in recent times the boom in industrial production and construction in China has been particularly important; and
 - the fundamental drivers for gold are quite different because it is used almost wholly for jewellery (50%), technological uses (38%) and investment (12%) each of which have their own market cycles;
- financial trading affects price levels and volatility, principally (but not solely) by bringing forward anticipated price rises (or falls) due to physical supply and demand factors; and
- changes in the value of the US dollar, because that is the predominant currency in which these commodities are traded – even purchases and sales between other countries.

Professor Lagos' paper also contains detailed statistics about the levels of price volatility in metals in five year bands since 1970. This longer term analysis shows that the recent price volatility is similar to that which existed prior to the 1990's although iron ore appears to have been more strongly affected in the recent bout of volatility while other metals were more strongly affected previously.

Figure 4. Metal Commodity Constant U.S. Dec-2010 Prices (2005-12=100)



Source: UNCTADstat, World databank, IMF. Deflator: U.S. Producer Price Index-Commodities (All Commodities) per Prof G. Lagos.

Finally, Professor Lagos has provided a commentary on the economy wide challenges and possible strategies that governments can adopt when a country depends significantly on a particular mineral commodity that has a volatile price.

3. Conceptual framework

This section of the paper discusses how four areas of analysis are relevant to competition authorities when undertaking their work in relation to commodities markets:

- commodity market outcomes are strongly linked to the performance of related markets for the transport and storage of commodities and these related markets therefore deserve close attention from competition authorities;
- an examination of the production chain in which commodities markets illustrates that there are vastly different levels of concentration at different levels of the production process which implies that any competition problems related to commodities markets are more likely to arise where concentrated ‘bottle-necks’ are apparent;
- whenever there are large price movements, speculation is suggested to be the cause and in some cases this suggestion is framed as a competition concern. The analysis of exchange markets and speculation suggests that concerns about speculation may often be misplaced but that there are some specific areas in which there may be a role for intervention; and
- the distinction between, and complementarity of, competition policy and international trade policy.

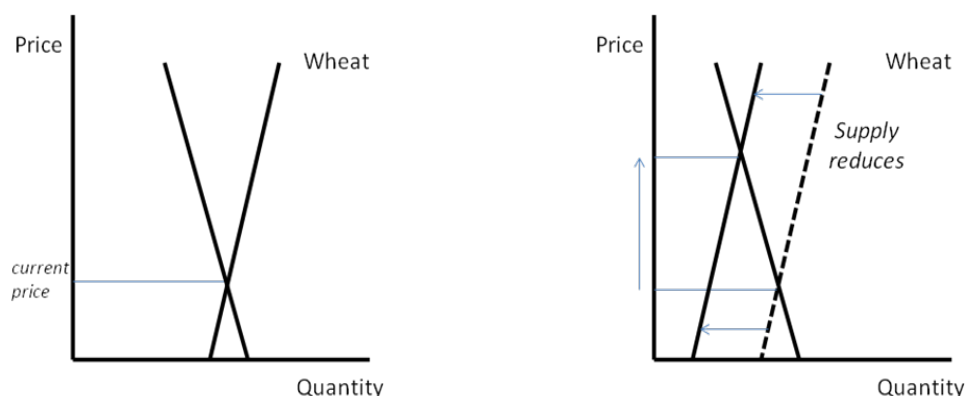
3.1 *The importance of storage and transport to commodity market outcomes*

Although every food commodity is different, in general:

- If prices rise, consumers of any good will usually try to consume less. Compared with many other goods (like houses or refrigerators), however, consumers have very little short term flexibility – each day they have to eat so each week they have to buy; and
- If prices rise, producers try to supply more. For some other goods producers can significantly increase production by paying workers overtime and running their machines longer. However, food commodities producers cannot usually make significant changes until the next spring.

The demand and supply of mineral commodities are somewhat more flexible but not much: customers cannot usually switch to other materials and mines take years to be expanded. In other words, in both agricultural and mineral commodity markets, demand and supply are both *inelastic* in the short term and this can be represented graphically by *steep* supply-demand curves.

Putting the supply and demand curves together in a market we can identify what would be the current price in a freely traded market on the price axis of the graph. The importance of the inelastic nature of supply and demand is apparent on the graph on the right hand side – if there is a drought and the crop size is halved, prices in the wheat market rise a great deal.

Figure 5. Agricultural commodities Supply-Demand Curves

Source: OECD

There are two fundamental improvements that can be made to this situation. The first is to introduce the possibility for **storage**. The effect of storage is that it significantly increases the flexibility of the market. In periods of abundance, the operator of the storage facility will purchase commodities so the price will not fall so low. In periods of shortage, the operator of the storage facility will make additional stocks available above the amount produced that season.

Consequently, supply will be more responsive and the depicted supply curve will be flatter (see the left hand graph below). Of course all storage has limits and eventually it will be exhausted and the curve will again become steep towards the top. The importance can be seen with the previous example in which there is a drought and half of the crop fails. It can be seen that a much smaller price rise occurs with storage *even though demand is still inflexible* (see the right hand diagram below).

Figure 6. Storage Impact on Commodities Supply-Demand Curves

Source: OECD

Although it is not specifically depicted in the graphs above, the same type of improvement can be achieved if there is more flexibility on the demand side too – for example if the consumer has a traditional means of preserving food or preserving jars, the consumers have refrigerators or if canning companies supply tinned food that the consumer can store.

In section 4.8 this paper discusses the experience with the government *acquiring and holding strategic stocks* of food commodities to try and limit price movements that are considered undesirable. The experience with these policies is that they can be very costly and are rarely very successful. Somewhat

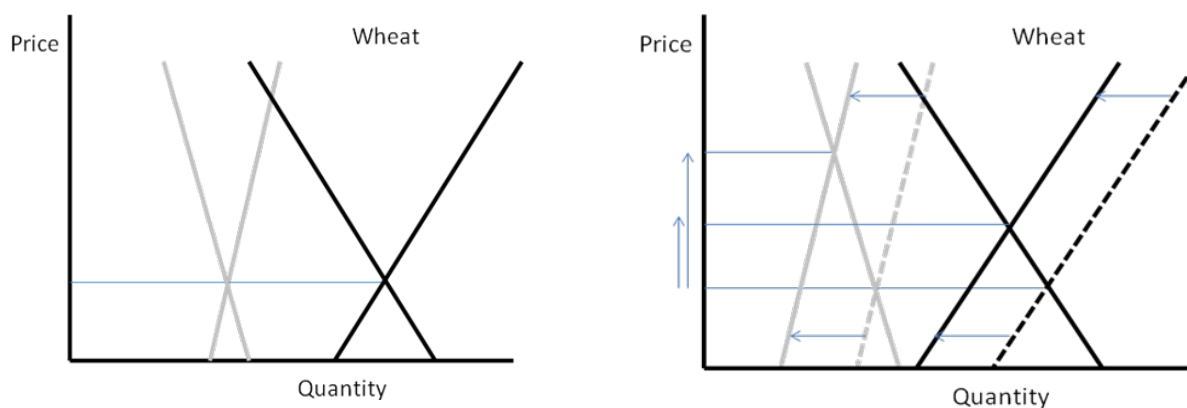
more successful has been the investment by the government in smaller emergency stocks that governments use to directly feed the most vulnerable consumers rather than over-all market prices but rather to be.

However, governments and competition authorities can, and historically have, devoted a great deal of policy attention to improving the working of the markets for the provision of storage by commercial organisations. *Enabling or facilitating market participants* such as co-operatives of farmers to invest in storage, and preventing dominant players from abusing their position in relation to storage can significantly improve commodity market outcomes.

The second important way to improve outcomes concerning price volatility arises from **interregional trade**. The principal advantage of trading is to take advantage of the comparative advantages of different geographic areas. For example, flat plains may be well suited to wheat production while steep rocky terrain may reasonably usable for sheep grazing but difficult to grow grain. In these circumstances, it would be a waste of effort to grow wheat on the hilly terrain and a waste of flat-land to graze sheep. The populations in both regions can benefit through specialising in one agricultural product and trading with each other. However, for the purposes of this discussion, another important role of interregional trade is relevant which relates directly to price volatility.⁶

To illustrate this secondary role of interregional trade, the left hand diagram below shows a highly simplified case of two regions in which neither region has any enduring comparative advantage. The grey lines show the markets in each region without permitting trade and the dark lines show the combined market when trade is permitted between the two regions. Note that in normal times, the price will not be different. At every point along the dark curves, double the quantity appears for any given level of price because two equally sized regions have been linked together. However, an important difference is that by combining the regions, the curves are flatter.

Figure 7. Role of International Trade on Commodities Supply & Demand



Source: OECD

Why is this important? The answer can be seen in the diagram of the right hand side. Imagine, once again, that there is a drought and a failure of half the wheat crop in *one* region (the other region in this hypothetical case is located well away with a different weather pattern). The effect is that the price rise will be a lot less than in an isolated market without trade. The much smaller price increase can be seen by comparing the different sizes of the two up-arrows on the pricing axis.

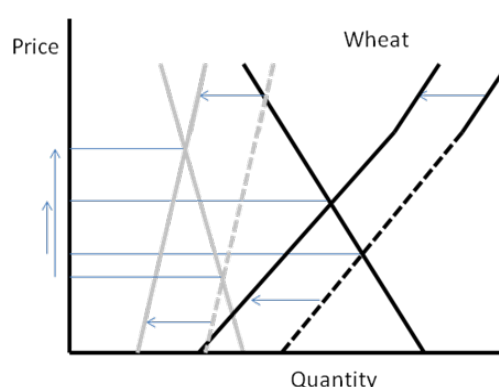
⁶ A third reason why trade can be beneficial is that it can provide a source of competition that does not exist (or in the case of small economies sometimes cannot exist) domestically. This is discussed separately below.

Although there are net gains for the combined regions, note that not everyone wins from trade all the time. In particular, the consumers in the exporting region suffer a price increase (albeit comparatively modest) even though their own region is not suffering any drought. Similarly, the producers in the region experiencing the drought not only have less quantity available to sell due to the drought but the price rise resulting from the drought (and therefore their incomes) are less than if trade had been prevented. This illustrates that some sections of the community may be opposed to trade even if it is over-all beneficial for society in the combined regions but, in fact, even if those who gain compensated those who lose, there would still be a net gain from trade.

In principle, the analysis outlined above can apply the same way between regions within a country; between countries; or even between the principal continental regions of the world. However, the distances involved and the extent of the border controls between locations will affect the extent to which interregional trade is practical.

Of course once inter-regional trade is possible, it would also be possible for two regions to share in the cost of a single storage facility and then whenever either region experiences a drought, the price effect will be much reduced compared with the situation without storage and without trade:

Figure 8. Effect of inter-regional trade and storage on Commodities S & D Curves



Source: OECD

In other words, there may be diversity benefits available specifically from improving storage, additional benefits from improving interregional trade and a third set of benefits that are available from the interaction of the two improvements taken together.

From this discussion, it is evident that a competition authority may be able to assist its country to deal with commodity price volatility by addressing private practices and government regulations that impede competition in any of the following product markets:

- the commodity itself;
- the markets for the provision of storage and the inputs to storage (including infrastructure markets, capital markets and construction materials); and
- the markets for the logistics services and infrastructure (ports, rail, road and their input markets).

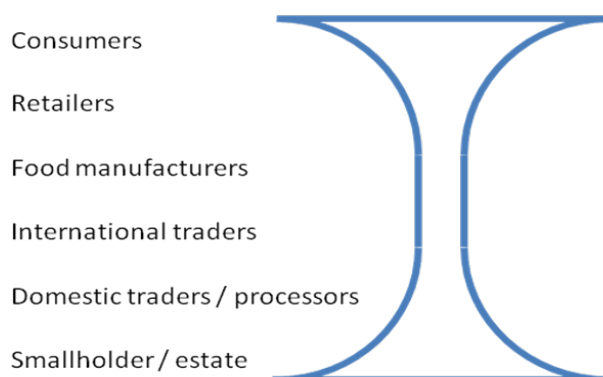
3.2 Different degrees of competition at different levels of the supply chain

In most agricultural markets, both production and consumption is highly atomised. For example, in the grain market in South Africa, 18,000 commercial farmers account for 90 % of grain production, with

the remaining 10 % accounted for by 3 million smallholders⁷ and there are approximately 13 million households in South Africa. Similarly, very large numbers at both the production and consumption levels can be found in most agricultural products.

However, between the growers and the consumers agricultural commodities typically pass through a number of highly concentrated functional markets. For example, between the wheat field and the dining table, wheat passes through each of the following concentrated markets: the market for aggregating, storing and transporting grain, local flour milling markets, bread baking and grocery retail. Similar patterns can be seen in rice, beef, chicken, coffee and many other industries and can be graphically represented as follows⁸:

Figure 9. Common Downstream Bottlenecks in Agriculture



Source: OECD

In fact, a further similar feature can be observed when looking further back in the production chain. Multitudes of growers in many agricultural industries are often caught between both **upstream and downstream bottlenecks**. Growers are often ‘price takers’ both when they are purchasing essential inputs and when they are selling their product. As identified in this paper, competition issues have arisen in the markets for the production and supply of fertilizers, proprietary seed suppliers and other genetic material (like the great-grand parent stock for chicken growing), suppliers of insecticides and suppliers of tractors and other agricultural equipment. Keeping with the example of wheat discussed above, only six transnational corporations controlled more than 75 % of the global pesticide market.⁹

Taking this supply chain analysis further, it is noticeable that there can be multiple layers of functional markets in which competition may be impeded – for example there may be an oligopoly of traders selling to an oligopoly of food manufacturers selling to an oligopoly of retailers before finally the consumer can purchase food.

Although there are notable exceptions, mining commodity industries also tend to exhibit a less extreme but similar supply chain shape. Many mining input markets (for example explosives and specialist mining equipment) are concentrated as are many processing markets (such as steel production and the

⁷ FAO, The State of Agricultural Commodity Markets 2009.

⁸ This diagram is inspired by a diagram concerning the coffee industry which can be found in the contribution of the Consumer Unity & Trust Society (CUTS). See [DAF/COMP/GF/WD\(2012\)17](#).

⁹ Dinham, B. Corporations and Pesticides. In Pretty, J. The Pesticide Detox. Towards a More Sustainable Agriculture. 2005.

production of consumer durables) before the final consumer purchase. By contrast, in many cases (but certainly not all) the activity of mining itself is often significantly less concentrated.

One issue that competition authorities may confront is that at different levels of the supply chain, the geographic dimension of the market may be very different. For example, packaged meat may be a globally traded commodity and any given abattoir may be supplying a workably competitive market for its *sales*. However, the same abattoir may have a dominant position area as the sole *purchaser* of cattle or lambs within a particular geographic area. It may not, therefore, have any negative impact on consumers but it may have a significantly negative impact on small growers, reducing quantities and depressing production and therefore reducing society's total welfare. This difference arises because the transportation of live cattle over long distances may only be economic for particular market niches (for example for Halal butchers) and not for the general market for meat. This issue is very common in agricultural commodity markets and can arise in relation to raw milk and cheese, wheat and collection and storage facilities, barley and hops plants. It can also arise in mineral commodities markets for example in the smelting of ores.

Multi-layered competition problems are worthy of further discussion because they can create particular competition concerns and particular strategies to address these problems. First, consider the problems. An oligopoly at any given level in the production chain can result in:

- single firm monopoly- and monopsony-like conduct (that is independently deciding to constrain output to raise selling prices or reduce purchasing costs); or
- cartel conduct (that is entering an anticompetitive agreement with other firms undertaking the same function to limit supply or raise prices).

The central question is what happens to the overall efficiency of a supply chain when there are two functional markets that are both affected by anticompetitive conduct? Are two monopolised markets better or worse than one? One intuitive response is to say, the more monopolisation there is anywhere up or down the supply chain, the worse it must be. On the other hand, competition authorities are often confronted in merger cases with the argument that it is better to match strength with strength – for example that retailers should be permitted to become stronger so that they can bargain better with food or beverage manufacturers.

To answer this question, it is helpful to start by deconstructing the bargaining power argument. Taking the example of a retail merger in which an argument is presented that it will improve the retail sector's bargaining power against concentrated food manufacturers, this bargaining power can be comprised of either or both of the following:

- efficiency enhancing effects which restore output to competitive levels and the benefits accrue to the economy as a whole (for example enabling the retailer to gain volume and improve the economies of scale for the buyer and the seller or gaining volume that can be used to foster new entry); and
- anticompetitive monopsony effects where the retailer itself also sacrifices volume of throughput in order to take a margin at the expense of the other monopolist or the consumer or both of them.

So when an improved bargaining power argument is put to a competition authority, it is necessary to distinguish between pro-competitive and anticompetitive effects. In fact, when there are multiple layers of anticompetitive conduct, end consumers and the economy generally suffer from an effect known as “double-marginalisation”. “Double marginalisation” occurs when two monopolies exist and one is a

supplier to the other (or similar situations such as two cartels or a monopoly at one level combined with a cartel at another).¹⁰

At the first level, the monopolist may have an incentive to sacrifice some volume to significantly increase the prices and profits earned from selling the product. Two effects are noticeable:

- for the volume that is still purchased, value is transferred from the buyers to the monopolist; and
- by raising the price, the monopolist must usually sacrifice some sales quantity and for this quantity, both the buyer and the monopolist lose some value that would have been gained from the sale of this additional quantity (known as the dead weight loss).¹¹

Now consider the situation in which the above monopolist sells its product to a buyer who itself is also a monopolist. This second monopoly may also be able to profitably sacrifice some volume for a significant increase in price. A 'second round' of similar effects is observable:

- for the volume that is still purchased, value is transferred from the second monopoly's buyers to the monopolist; and
- by raising the price, the monopolist must usually sacrifice some sales quantity and for this quantity, both the buyer and the monopolist lose some value (known as the dead weight loss).

In other words, there are two quantity reducing decisions being made, one by each monopoly. There are two transfers of profits and there are two 'dead weight losses' and the sum of the two dead weight loss is greater than the single dead weight loss than would result from a vertically integrated monopolist. There is another effect going on too – the two monopolists must trade with each other and where they trade with each other, there is a monopoly facing a monopsonist. To some extent, therefore, there will be bargaining tension between them over how much profit each monopoly will extract *vis-à-vis* the other monopolist. If one of the monopolists can undermine or even defeat the other's monopoly power, they may be able to extract a greater share of the transferred portion of surplus.

Strategies that may be available to one monopolist to undermine the other's power may include a decision to vertically integrate forward or vertically integrate backward or to sponsor the entry of a new firm at the other functional level. This type of strategy is likely to be particularly attractive when the other monopolist cannot retaliate by itself expanding vertically into the other monopoly's market. When one either monopoly is defeated, the efficiency of the production chain will be improved even if the other monopoly persists.

On the other hand, the two monopolists' interests may not be wholly opposed and perhaps even more so of two cartels operating at different levels of the supply chain:

- If both monopolies are capable of defeating each other through simultaneous forward and backward vertical integration or other commercial strategies then it may be in their joint interests to come to an explicit or implicit understanding that each of them will not do so.
- Where there are two monopolies facing each other, they may be able to play a role in policing each other's cartel to detect or punish cheating.

¹⁰ Spengler J (1950), "Vertical Integration and Anti-trust Policy." *Journal of Political Economy* v58, p347-52.

¹¹ As the diagram above points out, often monopolists are also monopsonists and similar effects occur on the buying side – a transfer of value from, say, coffee growers and a dead weight loss.

- Where competition law and competition law enforcement are present and it may be in the interests of two monopolies or two cartels to reach an accommodation to avoid detection or hinder the authority from making out a case that the law has been breached.

Indeed it is quite common that when a competition authority finds a cartel at one level of production, there are also cartels at other levels of the production chain. This can partly be explained from the above effects and also by a third point. It is quite common in oligopolistic industries for some businesses to be vertically integrated and not others. Where there is one or more firms that are vertical integrated, they are often observed to be the ring-leader in multiple cartels.

Some observations that may assist competition authorities in fighting against multiple layered competition problems are as follows:

- In merger cases in which the parties argue that their merger will improve their bargaining power against a supplier which itself has market power, the competition authority should take care to “deconstruct” the argument to distinguish between efficiency enhancing and monopsony forms of bargaining power.
- In cartel cases, “amnesty plus” is a feature that can be included in a leniency policy by which the discovery of one cartel can lead to others being uncovered.
- If it is possible to introduce import competition as close to the consumer level as possible it can expose an entire chain of domestic monopolised production to competition.

3.3 *Exchange traded markets and speculation*

At times of high commodity price volatility, it is common for concerns to be raised within the community by a wide range of consumer, business and political figures that speculation has caused or exacerbated the situation. On the other hand, the New Zealand contribution¹² refers to a 2010 initiative undertaken by the NZ stock exchange to introduce a milk futures market precisely designed to assist parties to ameliorate price volatility and the difficulties it can cause. The attached Appendix to this paper explores this apparent contradiction and a number of related issues.

As a general proposition, speculation and speculators in markets tend to assist in stabilising prices by providing liquidity and speeding up price discovery, even though they may at times exacerbate price volatility in the short run. There have also long been repeated concerns expressed that speculation is most profitable (reaping potentially excessive profits) when prices have undergone substantial price swings; however, these swings would have often been even greater if speculation had not dampened them.

Despite this, there have long been repeated concerns expressed about speculation probably because speculation is most profitable when prices have undergone substantial price swings when other market participants are under most pressure. The thesis of the Appendix is that these concerns are largely unfounded because in most cases there would have been even greater price movements if speculation had not been present to ameliorate the magnitude of the movements.

There are only a small number of circumstances in which speculation may be damaging to societal welfare. One notable case is in respect of price gouging practices in relation to basic food items and other necessities during abnormal trading conditions where small parts of the market become isolated during emergencies. Specific profiteering or price gouging laws can be framed to address this issue but the

¹²

[DAF/COMP/GF/WD\(2012\)40](#).

conceptual underpinning and elements of proof should be distinguished from those that apply in a competition law case.

When it comes to conventional competition law cartel or abuse of dominance cases in relation to exchange traded markets or speculation, these are rare indeed and often concern horizontal agreements or alleged abuses of dominance to limit the availability of information about the prices and quantities traded so that particular parties can appropriate the value of this information to the exclusion of their competitors.

3.4 *International trade and competition*

Almost every international trade issue has a competition dimension. Even where two countries both have perfectly competitive domestic markets for the production of a particular good, a ban on trade between them will protect the producers in the country that has a comparative disadvantage of production from their competitors in the country that has the comparative advantage in that good's production. The consumers in the first country, and the producers in the second country, will both suffer from this trade ban and, as the effects flow through the economy of each country, ultimately society in both countries will suffer.

However, almost all countries there are government policy officials who specialise in multilateral and bilateral trade negotiations. For the competition authority to become involved in every trade issue is unlikely to be a good use of its scarce resources. Similarly, the tools of trade negotiations (i.e. multilateral and bilateral agreements) can mandate that a country adopts competition laws but such agreements do not necessarily ensure that the competition regime is well staffed, motivated and effective.

On the other hand, there are clearly many circumstances in which there are strong complementarities between these two specialist areas of policy making which, in the case of competition authorities, most obviously arises in those industries in which a limited number of firms have monopoly power or there is explicit or tacit co-ordination.

For example, if a country pushes for a particular market to be liberalised in trade negotiations and the producers of the liberalised commodity are located hundreds of kilometres behind an international border where a monopoly port and a monopoly train line, there is a risk that privately imposed transport and handling charges will replace government import tariffs. The implication here is that where there are efforts to liberalise trade there may be an important complimentary role for competition authorities to ensure the liberalisation to be fully effective. Discussed below are a number of instances where removals of trade barriers have not resulted in the price reductions (fully) flowing through to consumers and one potential cause of this is that there are anticompetitive market impediments behind the border.

Another example concerns addressing the cumulative damage that can be done from a monopoly protected by an import tariff. As small countries are often acutely aware, in some circumstances even the most effective competition law and advocacy efforts cannot change the fact that some industries may be natural monopolies or the minimum efficient scale may support only a limited number of oligopolistic participants. International trade can be an important (or even the sole) source of competition. In these circumstances, the competition authority has an important role to play in contributing to the development by the country of its trade negotiating position because there may be considerable benefits from liberalisation that does not solely arise from the value created through trade related comparative advantage but also from the elimination of monopoly rents.

A third example concerns export cartels which are discussed further below. For these reasons, many of the competition reforms discussed below have been undertaken jointly with trade reforms.

4. Competition law and policy

Often competition law enforcement is undertaken very separately from competition advocacy before the government to encourage it to remove regulatory impediments to competition. However, it is striking that in commodity markets generally, and agricultural markets in particular, these two activities are closely inter-twined.

As the Chinese Taipei contribution notes¹³, agricultural industries are often excluded from the ambit of competition laws:

“Currently there are ... two types of exemptions ... governing agricultural products market in advanced countries’ competition laws. The first type consists of explicit exemptions in the competition laws; additionally, the provisions of competition laws shall not apply to any acts performed by an enterprise in accordance with other laws.”

Indeed it is very common to have explicit exemptions, particularly when competition laws are first passed. For four years, there was a provision in the Czech competition act that the Act does not apply to the conduct of undertakings concerning production and trade in agricultural commodities, as long as their conduct is in compliance with the EU law. In Hungary, resale below cost of agricultural commodities is prohibited.¹⁴ Article 56 of China’s Antimonopoly Law, for example, provides that the law does not apply to the concerted actions of agricultural producers and rural economic organizations involved in production, processing, sales transportation or storage of agricultural products.

In other cases, laws have been passed that require agricultural products to be sold to statutory marketing boards governed by grower representatives or that set prices for commodity products. A number of these laws are discussed below. Such laws implicitly centralise the determination of prices, quantities and other factors into mandatory state sanctioned frameworks that would be illegal if undertaken privately by competing businesses so that even if there is competition law coverage, there will not be any remaining private conduct upon which it can attach.

As we will see, anticompetitive action in agricultural markets can be as damaging as in any other market so there is no *a priori* reason to treat this industry differently. However, it is also understandable why countries may decide that competition law should first be applied to other parts of the economy. In many developing countries, agricultural industries lag well behind other industries in terms of economic reforms. In many cases property rights remain uncertain, there may be collectivisation, agricultural industries (particularly where barter is the main form of exchange) may not yet be brought within the taxation system and rural populations may not yet be able to fully participate in education or have access to health and other basic services. Sequencing the order and timing of market reforms can be important and it is not necessarily the case that competition law is the first reform to be adopted.

Even in developed economies, agricultural industries are often comprised of very small family businesses who may have limited capacity to apply or adapt to the requirements of competition law. As discussed below, there is often a legacy of market intervention through tariffs or statutory marketing boards that cannot be abolished in a simple one step process and, again, there may be a logic to the sequence of market reforms.

¹³ [DAF/COMP/GF/WD\(2012\)27](#).

¹⁴ DAF/COMP/WD(2005)50.

In other cases, there may not be a strong policy reason for long term lenient treatment of the agricultural industry and the ongoing competition law exemptions or government intervention in the market may simply be the product of strong farming lobby groups (often organised as political parties) who have a better organised way to resist competitive reforms and argue for special treatment and exemptions than other industries.

Nevertheless, all countries should be able to benefit substantially from applying competition principles to agricultural industries for the very same reasons as competition is of benefit in any other industry. The challenge, however, is often to identify and address all the elements of the policy picture that are required for competition to emerge and to introduce reforms in a suitable sequence that enables the participants a reasonable opportunity to adjust.

The discussion below illustrates how closely linked competition law and policy can be in these industries. First, there is a summary of the four areas that commonly raise competition law enforcement:

- Cartels and other horizontal conduct issues (a separate discussion specific to export cartels follows the discussion of cartels and horizontal conduct issues generally);
- Vertical integration both of a beneficial and damaging nature;
- Other forms of abuse of dominance; and
- Anticompetitive mergers.

Perhaps more than in most industries, competition advocacy and reform work is often closely intertwined with the competition law enforcement discussed above. The paper then turns specifically to a discussion of the following competition advocacy topics. Again, advocacy reform focused work in relation to commodities often imply a subsequent or concurrent role for competition law enforcement:

- Pro-competitive reform of commodity industries; and
- The role of competition authorities when governments are confronted with commodity price related crises.

4.1 *Cartels and other horizontal conduct issues*

Hard core cartels, in particular price fixing, market sharing and bid rigging, are considered to be the most egregious violations of competition law, injuring consumers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.¹⁵

Hard core cartels may be concluded in any market. However, as the OECD has observed in the past,¹⁶ there are certain characteristics common to markets where anticompetitive collusion might be expected, in particular:

¹⁵ 1998 OECD Recommendation of the Council concerning Effective Action Against Hard Core Cartels, C/MIN(98)24.

¹⁶ *Detecting Bid Rigging in Public Procurement*. Even though these characteristics were identified specifically with respect to bid rigging, they are applicable to cartels in general.

- *small number of competitors* – the smaller the number of companies, the easier it is for them to reach agreement;
- *little or no entry* – when few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants;
- *market conditions* – significant changes in demand or supply conditions tend to destabilize ongoing collusive arrangements, whereas constant, predictable flow of demand tends to increase the risk of collusion; at the same time, during periods of economic upheaval or uncertainty, incentives for competitors to collude increase as they seek to replace lost business with collusive gains;
- *industry associations*, which can be used as legitimate, pro-competitive mechanisms for members of a business sector to promote standards, innovation and competition, but when subverted to illegal, anticompetitive purposes, may be used by company officials to meet and conceal their discussions about ways and means to reach and implement an anticompetitive agreement;
- *repetitive bidding* – repetitive purchases increase the chances of collusion, as the bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves; in addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him;
- *identical or simple products or services* – when the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure;
- *few if any substitutes* – the colluding undertakings are more secure knowing that their trading partners have few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful; and
- *little or no technological change* - little or no innovation in the product helps firms reach an agreement and maintain that agreement over time.

A far as the **primary production markets themselves**, i.e. the actual growing of agricultural commodities or mining of minerals, are concerned, it may be observed that production of agricultural commodities is inherently less susceptible to anticompetitive collusion, especially due to very high quantity of companies involved, whereas mining business may be more prone to cartelization (see the table below). These observations however apply to private cartels. As will be discussed later, commodities markets are often subject to specific state regulation, which can significantly alter the market characteristics and the motivation and ability of large numbers of growers to act together.

Table 1. Characteristics of Agricultural and Mineral Commodities Markets that Help Support Collusion

	Agricultural commodities	Mineral commodities
Small number of competitors	X Very high number of farmers	√ Limited number of mining companies in several industries
Little or no entry	X Low barriers to entry	√ Expensive investments and long lead times to prove up new deposits
Market conditions	? Generally rising demand	√ Attempts to stabilise fluctuations on the market
Industry associations	√ Usually on national level, concerning specific commodity	√ Usually international, concerning specific commodity
Repetitive bidding	? Generally seasonal sales repeat but often large repeat contracts are not the primary means of trade	? In some industries there have historically been annual contract negotiations e.g. coal, iron ore
Identical or simple products or services	√ Generally interchangeable on commodity level	√ Generally interchangeable on commodity level
Few if any substitutes	? There can be supply side and demand side substitution but it is limited	√ Limited substitution in most commodities
Little or no technological change	? Important changes in farming techniques, seeds, fertilizers occur but incremental changes	? Important changes in mining techniques (e.g. fracking to unlock coal seam gas) but incremental changes

Source: OECD

As discussed in Section 2 of the paper, the most striking feature is that a very large number of producers would usually have to be involved for a commodities cartel to be established. Not surprisingly, it is rare to find cartels amongst growers of agricultural commodities. One example was the case of the poultry breeders in the Czech Republic, who agreed on a price to be achieved in course of negotiations with a major meat processor to be started the next day; the agreement was even publicised in a local newspaper. In this case, fines were imposed on the undertakings concerned.¹⁷

However, competition law exemptions have sometimes been given in these circumstances where authorities have recognised that it is legitimate to strengthen farmers' bargaining position while negotiating with the food processors. Similar agreements to the above Czech example were entered into by chicken growers in several states in Australia, without raising competition concerns. Under the Australian collective bargaining provisions a number of such arrangements between many small poultry growers were formally notified to the Australian Competition and Consumer Commission (ACCC) and, since the ACCC did not find a negative net public benefit from the arrangements, they thus enjoy immunity.¹⁸

Mineral commodity markets are often considerably more concentrated; the top 10 companies constituted approximately one third of global non-fuel minerals production,¹⁹ and for example in iron ore,

¹⁷ The Czech competition authority issued a decision in 2008. The single cartel meeting took place at the end 2006; six local poultry breeding cooperatives, including Agrodrůžstvo Jevišovice or Zemědělské družstvo Petřín, participated.

¹⁸ The Australian competition authority thus authorised, for example, the collective bargaining of chicken growers in South Australia in 2009 or in Western Australia in 2011.

¹⁹ Reuters. Factbox – the world's biggest mining companies. 2008.

three top companies controlled over a third of global production and almost two thirds of seaborne trade.²⁰ Nevertheless, cartels at the production level organised between producers without the assistance of government are only slightly more common than in agricultural industries.

A market sharing cartel of alluvial garnet producers in Australia was uncovered in which the undertakings involved agreed on restrictions in relation to the geographic territories into which each would be permitted to supply alluvial garnet.²¹

In some cases (but nevertheless rare), such cartels are international in scope. A salt cartel involving **Cyprus**^{22 23} and **Israel** is an example. Production and marketing of salt in Israel, for industrial, agricultural and human consumption purposes, was controlled for a long time by a single firm, Israel Salt Industries. Until 2004, it had an agreement with Dead Sea Works, a company with exclusive rights to exploit salt and other minerals of Dead Sea, under which Dead Sea Works undertook not to sell salt for retail purposes to any firm other than Israel Salt Industries, and Israel Salt Industries, in turn, undertook not to export the salt that it had purchased. This agreement was nullified by the Israeli competition authority in 2002.

In 2006, the Israeli competition authority uncovered yet another agreement between Israel Salt Industries and a Cypriot salt production and marketing company MP Theodorou, under which the Cypriot firm undertook to become an agent of the Israeli company and to refrain from exporting salt to Israel. Israel Salt Industries supplied half of the salt consumption of Cyprus, whereas MP Theodorou exported salt to Israel; since 1997, the two companies competed in both Cypriot and Israeli market. Israel Salt Industries threatened that should the Cypriot company not stop its export to Israel, the Israeli firm would dump the Cyprus market with under-priced salt; it exported to Cyprus 1000 tons of salt in 10 days, which constituted 1/7 of the yearly consumption of Cyprus. Subsequently, the agreement was concluded in 1999.

Global cartels in major commodities have also been observed such as the International Copper Cartel which was established in 1935; its members were copper mines, accounting for more than a half of the refined copper market. The cartel was abandoned in 1939.

As with agricultural products (discussed further below), **governments can become involved in establishing cartels**. The International Tin Council was formed by international intergovernmental agreements between tin producing countries and it lasted for most of the 20th century. It collapsed due to debt in 1985, when it announced it was unable to repay its debts or fulfil its contractual obligations, after the member states had refused to pay any of its debts.

In certain circumstances, horizontal co-operation among undertakings in the same market can, however, lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool

²⁰ “The Iron Ore Market 2009-2011”, UNCTAD Trust Fund Project on Iron Ore Information.

²¹ Barton Mines Corporation and Barton International Inc were ordered to pay penalties totalling \$1.525 million by the Federal Court of Australia in an action brought by the ACCC.

²² Footnote by Turkey: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus” issue.

²³ Footnote by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

know-how, stimulate research and development, enhance product quality and variety and launch innovation faster. Private or state organised associations of growers have often been established based, in part, on these pro-competitive considerations.

The presence of associations and **co-operatives of farmers**, usually nation-wide and commodity-specific, is a distinctive characteristic of these markets. They perform a number of functions, from providing services of interest to all of the members, including training, research and development and marketing promotion campaigns. However, there is sometimes a fine line between potentially pro-competitive initiatives such as joint research and development and promotional marketing²⁴ and an association or statutory authority becoming a monopoly seller of the commodity concerned (single-desk selling) and two examples outlined below illustrate this point.

Co-operation, principally in the area of research and development, is frequently supported by governments, both with specific legislation and with funding. In this respect, the Australian system of levies and charges is noteworthy. The government stands ready to organise levies to be paid by growers if an industry representative body comes forward with an identified problem or opportunity facing the industry and the need to respond with collective industry funding. The representative body submits the proposal to the Australian Government; if imposed, the levy or charge is imposed and collected under legislation and paid to recipient bodies to fund their activities. These activities include research and development, marketing and promotion, plant and animal health programmes or residue testing. For example, such a levy was imposed on dairy products; it is transferred to Dairy Australia, a service company for dairy industry, which invests in more than 300 research and development projects for the farm and manufacturing sectors; performs trade policy analysis; promotes health and nutritional benefits of dairy products; collates industry statistics; and manages issues such as criticism of dairy products, environmental concerns etc. Similar organisations are also active in cotton, eggs, pork, wool, fisheries, forestry and grain sectors.

National legislation may, however, also provide implicit or explicit immunity from competition law. The Canadian Wheat Board (CWB) may serve as an example of this. The CWB is a marketer of western Canadian producers' wheat and barley that can be traced to the 1920s when it initially operated on a voluntary basis. In 1935, the CWB was formally established by way of the Canadian Wheat Board Act, with the Canadian government providing financial guarantees for its operations. As a result of this and subsequent legislation, it became the sole body responsible for marketing western Canadian wheat and barley, both for export and for human consumption domestically. The system was mandatory (i.e., the crops could not be exported or sold for human consumption directly by the farmers). The CWB was the largest single seller of wheat and barley in the world (over 80 % of the wheat was exported), co-ordinating the sales of grain produced by 85,000 farmers. Apart from single desk selling, the CWB also negotiated terminal handling and rail-freight agreements on behalf of the farmers; operated a grain testing lab, funded research in areas such as grain storage, product development and variety enhancement; and operated a substantial private weather network.

A similar single desk selling system of Australian Wheat Board (AWB) was abolished in Australia in 2008. The economic analysis suggested that the AWB could command higher prices that would be eroded in the absence of its exclusive trading rights and, although some growers may receive greater returns, some may not be able to access markets that they would like to supply.²⁵ After the monopoly was dismantled, the destinations for Australian wheat exports diversified significantly from 17 countries purchasing Australian wheat before the AWB was dismantled to 41 currently.

²⁴ For example, such associations undertake marketing of the merits of wool compared with proprietary owned branded fabrics such as Gortex.

²⁵ Gans, J. S. Competition and Single Desk Selling of Wheat from Australia: An Economic Analysis. 2000.

On December 15, 2011, the Government of Canada proclaimed new legislation, entitled Marketing Freedom for Grain Farmers Act, which will result in the dismantling of the CWB's monopoly over the purchase and sale of western Canadian wheat and barley for export and domestic human consumption as of August 1, 2012. As of that date, western Canadian farmers have the ability to market their product directly to any purchaser. The legislation includes five Parts, which come into force at different times, in order to transition to an open market for western Canadian wheat and barley. Part 1 amended the Canadian Wheat Board Act to change the governance structure of the CWB as of December 15, 2011. This Part also allows forward contracting to take place in order to permit the purchase and sale of wheat and barley for execution on or after the day Part 2 came into force (August 1, 2012). Part 2 of the legislation repeals the Canadian Wheat Board Act and enacts a new piece of legislation that establishes a new, voluntary Canadian Wheat Board that is expected to remain in place for a maximum of five years. At the end of the five-year (or shorter) period, Parts 3 and 4 of the bill provide for two alternatives: either the privatization or the dissolution of the new voluntary Canadian Wheat Board established by Part 2.

Governments fix production prices in a range of products such as in Pakistan where the price of sugarcane to be processed in the sugar mills is fixed.²⁶ Similarly in India – the second largest producer of sugar (after Brazil) – sugar mills are obliged to buy sugar cane at prices set by the government, the price of processed sugar is however not regulated. In a case closed in November 2011²⁷, the Competition Commission of India dismissed the allegation that the sugar mills did through their associations National Federation of Co-operative Sugar Factories and Indian Sugar Mills Association engage in a price fixing agreement concerning the prices of processed sugar. The Competition Commission concluded that sugar industry is highly controlled and regulated and that sugar prices are not a mere function of demand and supply but that there are complex forces at play which distort and in a way proscribe the market from working in a competitive and free manner. The competition commission therefore suggested that the government should propose a regulatory reform of the sugar sector, which could enhance its efficiency.

As noted in Section 2 of this paper, farm production often needs to be processed, sometimes close to the site of production, before it can enter further levels of trade. Although agricultural commodities markets themselves may be very atomised and therefore difficult to cartelise without the involvement of the government, the links in the production chain for commodities immediately above and below the production of the commodities themselves are often characterised by significantly more concentrated markets and cartels engaged in by these other levels of production are more common.

The first type of cartel to consider are **buy-side cartels** where the prices for the purchase of agricultural products from growers are fixed by processors. For example, the Colombian competition authority's contribution²⁸ demonstrates that it has been very active in this area:

- Rice (2005) – Several companies were found to have entered a price agreement for the purchase of *paddy verde* type rice.
- Sugar Cane (2010) – Eleven sugar mills were found to have entered a price agreement in the purchase of raw sugar cane.
- Cocoa (2009) – Two companies were found to have entered an agreement on the price at which they would purchase cocoa from suppliers.

²⁶ Competition Commission of Pakistan. Competition Assessment Study on the Sugar Sector in Pakistan.

²⁷ Competition Commission of India, *In re Sugar Mills* (Suo-Motu) Order of 30 November 2011, case 1/2010

²⁸ [DAF/COMP/GF/WD\(2012\)21](#).

Sales cartels (as opposed to buy-side cartels) are more frequent in **upstream and downstream markets**. A typical example is the lysine cartel in 1992 - 1995,²⁹ increasing the global prices of lysine, an amino acid added to animal feed. Five principal producers of lysine created a “trade association”, enabling them to organise 25 multiparty and dozens of supplementary bilateral meetings, where prices were set for 13 countries or regions. High market shares of the producers, homogeneity of the product, which itself is only one of many components, and significant barriers to entry, characteristic for this market, are features making a market susceptible to cartelisation. Indeed, other markets exhibiting similar characteristics have been cartelised, for example the methionine (another amino acid added to animal feed),³⁰ animal feed phosphates³¹ or choline chloride (vitamin B4), a feed additive for poultry and pigs.³²

Similar cartels are also common on national levels, for example the fertilizers cartel in South Africa,³³ where principal manufacturers of different sorts of fertilizers concluded a price fixing and market sharing agreement.

Cartels can readily be found downstream of agricultural and mining industries. Food processing markets are characterised by a lot of attributes suggesting cartelisation, and a number of cartels on national or regional level have indeed been reported, for example the collusion of Russian milling companies concerning wheat flower products,³⁴ of South African processors of dairy products, co-ordinating prices of raw as well as processed milk,³⁵ or of Italian³⁶ and Spanish³⁷ raw tobacco processors.

Further downstream, international trade in commodities is also susceptible to cartelization. In the EU, for example, cartels concerning import of bananas³⁸ have been reported. In many instances, however, only

²⁹ The 1992 – 1995 cartel among Archer Daniels Midland Co, Ajinomoto Co, Cheil, Kyowa Hakko and Sewon was prosecuted among others in Canada, EU, Mexico and the United States.

³⁰ The European Commission declared in 2002 that there was a cartel among Aventis, Degussa and Nippon Soda from 1986 to 1999.

³¹ The European Commission declared in 2004 that there was a cartel among a number of companies including Yara Phosphates Oy, Timab Industries or Ercros Industrial, from 1969 to 2004.

³² The 1992 – 1994 cartel among Akzo Nobel, BASF, UCB, Bioproducts, DuCoa and Chinook; the European Commission adopted its decision in 2004.

³³ The cartel was concluded among Sasol, Omnia Fertiliser and Yara South Africa; the case was referred to South Africa’s Competition Tribunal in 2006.

³⁴ Russia’s Federal Antimonopoly Service decided on a price fixing cartel among Tulakhleboproduct, Novomoskovsky Melnichny Kombinat and “ulsky Kombinat Khleboproductov in 2011. The price fixing took effect in July and August 2010, amidst panic growth of wheat prices.

³⁵ The cartel concluded by Lancewood, Parmalat, Ladismith Cheese and Clover Industries, consisting in Exchange of price information, was referred to the Competition Tribunal in 2006.

³⁶ The European Commission declared in 2005 that tobacco processors Deltafina, Transcatab, Mindo (Dimon) and Romana Tabacchi colluded on their overall purchasing strategy, agreeing between themselves purchase prices and allocating on a preferential or exclusive basis their suppliers (both growers and so-called “third packers” i.e. intermediaries who only provide initial conditioning for tobacco) in Italy.

³⁷ The European Commission declared in 2004 that tobacco processors Compañía Española de Tabaco en Rama (Cetarsa), Agroexpansión, World Wide Tobacco España (WWTE), Tabacos Españoles (Taes) and Deltafina colluded on the prices paid to, and the quantities bought from, the tobacco growers in Spain.

³⁸ The European Commission declared in 2008 that Chiquita, Dole and Weichert participated in a cartel between 2000 and 2002, setting of their quotation prices for bananas. In a later proceedings finished in 2011, Chiquita and Pacific Fruit were found to have been operating a price fixing cartel in Southern Europe from 2004 to 2005.

state approved entities are allowed to export or import certain products, as has been demonstrated on the example of the Canadian Wheat Board; similarly, only state trading enterprises may import rice to a number of countries.³⁹ Because of this, states themselves, not the undertakings, sometimes attempt to fix global prices; for example in coffee trade, where the quantity of exported coffee was limited under the International Coffee Agreements in order to keep the price until 1989.⁴⁰ Establishment of Organisation of Rice Exporting Countries (OREC) is reportedly currently being negotiated among Cambodia, Laos, Myanmar, Thailand and Vietnam; the prospective members however claim that their aim is not to create a price fixing cartel.⁴¹

Markets in minerals similarly exhibit more cartelisation upstream and downstream in the production process. Upstream markets, for example explosives or mining machinery, tend to be significantly specialised and thus concentrated as well. Downstream, the primary production is usually vertically integrated with processing. The actual mining is often limited to a few countries; for example, over 97 % of world production of rare earth elements came from China in 2011.⁴²

In South Africa, for example, there was a cartel concerning mining roof bolts, used to provide roof and wall support in underground mines to prevent cave-ins and to keep a mine accessible over extended periods of time;⁴³ under the guise of industry association, the four undertakings divided markets and fixed prices. Similarly, in the United States, several market sharing and price fixing cartels concerning commercial explosives have been reported.⁴⁴

4.2 *Export cartels*

A number of countries have explicit exemptions in their laws for export cartels either without the requirement to notify the competition agency⁴⁵ or with a notification requirement⁴⁶. Other legal systems provide for exemptions where transactions improve the balance of payments position of their country.⁴⁷ Another common aspect of competition laws is that an element of a cartel prohibition is that the illegal

³⁹ FAO Rice Liberalization: Predicting Trade and Price Impacts.

⁴⁰ FAO, Commodity Market Review 2007 – 2008.

⁴¹ Manila Bulletin Publishing Corporation, 28 October 2011. Vietnam opposes rice export “cartel”.

⁴² Humphries, M. Rare Earth Elements: The Global Supply Chain 2011.

⁴³ The cartel concluded by Aveng (Africa), trading as Duraset, RSC Ekusasa Mining, Dywidag-Systems International and Videx Wire Products in the early 1990s was referred to South Africa’s Competition Tribunal in 2009.

⁴⁴ The investigation of regional and national conspiracies to fix prices for certain commercial explosives, such as dynamite, ammonium nitrate, and blasting agents, has resulted in guilty pleas by 14 corporations, including ICI Explosives USA, Dyno Nobel, Mine Equipment and Mill Supply, Explosives Technologies International, and 3 individuals in 1995 to 1997. The commercial explosives subject to these conspiracies were those used in coal and metal mining, quarry operations, construction, and oil and gas production and accounted for about \$1 billion in sales annually.

⁴⁵ For example, the *Competition Act* (Canada) subsections 45(5) and 90.1(8).

⁴⁶ For example, *Webb-Pomerene Export Act* (United States of America), 15 U.S.C. §§ 61–66 and the *Export Trading Company Act* (United States of America) 1982; *Competition and Consumer Act* (Australia) 2010, section 51(2)(g).

⁴⁷ For example Israel (per M Levenstein and V Suslow 2005, “The Changing International Status of Export Cartel Exemptions”, *Am U International Law Review*.)

conduct must result in domestic harm⁴⁸. Indeed virtually all OECD countries fall into at least one of these three categories (and in some cases into more than one category).

It is important not to assume, however, that the effect of an export cartel exemption necessarily provides complete immunity for such cartels – quite to the contrary. In many cases export cartels may be exempt in the exporting country but are caught by the competition law of the importing country.⁴⁹ An important practical consideration may be that the importing country’s enforcement agency may not have access to the key evidence that there has been an agreement between competitors if that evidence is located only in the exporting country. The evidentiary problem is particularly acute for market sharing cartels in which one or more cartelists agree not to have any activities at all in the importing country and therefore the local competition authority may have little or no leverage over those perpetrators to request and obtain the relevant evidence.

The export cartel exception provisions apply to any given market rather than specifically to commodities markets. An example of export cartels within the commodities markets are the cartels for potash in North America which have gained recent attention. These cartels, of course, concern both a mineral commodity (potash) used as an input into the production of agricultural commodities (when potash is applied as a fertilizer). It has been observed⁵⁰, that the cartel results in a substantial transfer from the customer country to the producer country.

A key rationale for inserting the first ever exemption for export cartels in US legislation in 1918 was so that US exporters could compete effectively in an international trade context with cartelised producers from other countries.⁵¹ The same consideration to provide US exporters with equal bargaining power *vis-à-vis* foreign cartelists was a rationale for the further exemptions introduced in 1982 along with a similar consideration of ensuring that US exporters could compete effectively with large foreign state owned companies that were monopolies or dominant in their home jurisdiction.

Export cartels have two effects: an efficiency effect and a redistributive effect. Economic efficiency is the primary focus of competition policy. The argument at a global level against permitting export cartels is exactly the same as the argument at a national level against permitting domestic cartels: if cartels are permitted, they distort the optimal volume of output in the market affected by reducing the volume produced and consumed and a dead weight loss is incurred by society for the lost volume of trade. This efficiency effect is present whether or not the importing country prohibits or permits its own producers to enter into cartels.

A subsidiary argument is that has often been made (and which appears to apply in relation to Potash) is that the benefits of export cartels accrue disproportionately to developed countries and the costs are disproportionately borne by developing countries. This argument concerns the redistributive effects of export cartels.

⁴⁸ For example, the Treaty for the Functioning of the European Union’s Article 101 applies only to conduct that affects competition “within the internal market”; the *Competition Act 2002* (Ireland), section 4.

⁴⁹ For example, Article 2 of the Anti-monopoly Law of the People’s Republic of China 2008 provides that: “This Law shall apply to the conducts outside the territory of the People’s Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.”

⁵⁰ F Jenny and P Metha, 2010.

⁵¹ M Levenstein and V Suslow 2005, “The Changing International Status of Export Cartel Exemptions”, *Am U International Law Review*.

For one reason or the other, there have been vigorous opponents to export cartel exemptions since the very beginning in the US in 1918 and these arguments have commonly resurfaced each time that a major review is conducted for competition law in each given country. At an international level, calls for reform in this area have been made at the OECD (1993), at the WTO's Working Group on the Interaction Between Trade and Competition Policy and in bilateral negotiations such as calls by Mexico in the context of the NAFTA negotiations. It is remarkable, therefore, how very little real traction these arguments have gained with legislators and even less practical effect has been achieved. At the most, changes have involved repealing explicit export cartel exemptions while leaving implicit protection in the law for export cartels.⁵²

One explanation may be that the proposed reforms have usually considered only the issue of explicit exemptions from competition laws for export cartels. However, a fully effective reform in this area may require⁵³:

- A repeal of any explicit exemption for export cartels;
- A review and amendment for all implicit language found variously in substantive prohibitions and definition clauses of competition laws that limit the application of the law to domestic circumstances (e.g. language such as “within the internal market”, “within the State or part of the State”);
- A consideration of whether the coverage of the substantive law should follow that of the exporting country or the importing country or what is regarded as a universal norm;
- A consideration of the appropriate process and sanctions for export cartel conduct⁵⁴;
- A consideration of whether the public enforcement task should be undertaken in the exporting country, the importing country or either of them and whether ‘forum shopping’ for private actions should be possible;
- A consideration of whether there needs to be explicit protection against double-jeopardy (unless the above changes are accompanied by a repeal of the corresponding provisions in the importing country);
- Whether there should be provisions to empower or even require competition agencies in an exporting country to assist the authority of the importing country to collect evidence;
- Whether there should be any transfer of compensation between the countries for the costs of the investigation, litigation and potentially fiscal receipts;
- How competition authorities should prioritise enforcement action wholly for the benefit of foreign producers or consumers against matters of benefit to their own country; and
- What accountability mechanisms suitable to monitor the agency's performance in relation to enforcing competition laws against export cartels could substitute for, or augment, the domestically focused mechanisms that currently exist.

⁵² Such ‘reforms’ include amendments made in Cyprus 2004, Germany 1999, Hungary 2004, Japan 1997, Korea 1999, Netherlands 1998, Switzerland 1995, Sweden 1994 and the UK 1998 (per M Levenstein and V Suslow 2005, “The Changing International Status of Export Cartel Exemptions”, *Am U International Law Review*).

⁵³ These sorts of issues in the broader context of international cooperation will be a key focus of discussion by the OECD's Competition Committee in the next few years.

⁵⁴ For example, if US law was applied to export cartels without amendment, US business executives involved in an export cartel targeting Indian customers would face long jail sentences while Indian executives entering into a cartel to target Indian consumers would not face any personal penalty. New Zealand executives of agricultural companies engaged in an export cartel targeting European consumers could incur substantial personal penalties following a civil rather than a criminal prosecution process.

In bringing about reform in this area, it may be necessary to consider the inherent contradiction that, while global economic welfare would be improved by eliminating export cartels, the benefits of the reform accrue to foreign parties and prohibiting export cartels is adverse to the immediate financial interests of the producers in the exporting country and, via the revenue collection system, also to the exporting country's government(s). A convincing domestic policy reason for the reform therefore may need to be articulated.

It is not unusual for countries to have laws to protect victims located outside their own jurisdiction. For example, the UK Bribery Act prohibits businesses and business people with a substantial connection with the UK from bribing a foreign official. However, an important distinction between the export cartel exemption and the prohibitions on bribing a foreign official is that in the latter cases, protecting foreign victims does not come at any significant domestic cost. By contrast, assuming an export cartel is effective in raising prices and profits, fiscal revenue will flow to the exporting country.

It is not common for countries to agree to adopt policies that are contrary to their immediate financial interests for the greater good of the global economy. Nevertheless, where a way can be found for countries to mutually benefit from the improvements to the global outcome through treaty there has been considerably greater success. Depending on what the optimal arrangements are for what is regarded as illegal, who should investigate, who should make the infringement assessment and how orders are to be enforced, it may also be legally necessary to have a treaty to achieve the desired result.

4.3 Vertical conduct issues

For a range of reasons vertical integration is a significant factor in agricultural and mineral commodities markets and this is often linked closely with economic development.

The production of agricultural commodities, and the extraction of mineral commodities, often first occur in regional and remote areas where there is limited infrastructure. Farmers and graziers typically rely on local infrastructure for their produce to be stored or processed. For example:

- wheat and rice growers require local silos to receive and store grain before transport;
- beef graziers need local abattoirs so that the cattle are not bruised in transit to distant slaughter-houses;
- dairy farmers need local facilities for refrigeration, pasteurisation and production facilities for cheese or yoghurt;
- pineapple growers need to have access to high volume, local canning facilities to handle the sizable influx of excess fruit when it ripens at once; and
- even the need for local stores to supply basic supplies of fertilizer, seed, equipment, fencing, vaccinations and the inventory held in these stores can amount to a significant new investment in a small community.

Almost all agricultural communities rely on good quality roads or rail lines to cities and ports to avoid expensive margins that are otherwise charged by traders and middle-men. Similarly, mining companies rely on extensive rail, road and sometimes power networks to operate substantial mining operations.

The dependence on such local level infrastructure often creates two problems:

- a mutual investment ‘chicken and egg’ or hold-up problem – infrastructure owners may not invest until they know that there will be sufficient commodity volumes produced but large scale production cannot commence without the infrastructure in place; and
- once the infrastructure is in place, within a local area, it will often be a natural monopoly which could engage in exploitative practices.

Consequently it is very common to find vertical integration associated with commodities production, particularly as a particular area undergoes its early stages of development. For example:

- in grazing communities, agricultural co-operatives have commonly been set up to supply farm supplies and undertake the first level of collection, processing and joint marketing;
- in grain growing regions, it is common for grower owned companies to own and operate networks of silos, rail sidings and operate trains; and
- mining companies often own dedicated rail lines and sea-ports.

Box 1. Murray Goulburn (Australia)

In 1950, 14 dairy farms located in northern Victoria were concerned that they were not getting the proper return for their efforts from local proprietary dairy companies. These farmers were returned soldiers who were new to the industry.

They established the Murray Goulburn Co-Operative to collect and process their own dairy products and this business gradually grew to become the largest processor of milk in Australia and the country’s largest exporter of processed food. Supplier / shareholders hold shares the co-operative which entitles them to vote at general meetings, vote for director candidates and receive ordinary dividends from time to time.

Murray Goulburn has a fleet of 170 trucks and 8 processing plants in rural areas processing 3.3 billion litres of milk and manufacturing products which are sold on both domestic and export markets. The co-operative accounts for approximately 9% of world dairy trade.

The co-operative also operates 24 hardware and supplies stores in rural areas which supply all the requirements of the farming community with particular emphasis on dairy hygiene, animal health, pasture improvement, fodder, fertiliser and other specific farming needs.

Sometimes vertical integration between the producers and owning this infrastructure is a *necessary* way to overcome the hold-up investment problem (where contracts cannot achieve this function) and can be *pro-competitive*. To understand why such vertical integration might be pro-competitive, contrast what might happen with and without vertical integration for a small farming community who sits at the end of a long, hot, dusty road to a distant city.

The minimum efficient scale for an abattoir may be 100 head of cattle a day. If the facility produces significantly less than this, its average costs of production will rise (i.e. the per kilogram cost of operating the refrigerator and cleaning out the killing room) and the meat will not be competitive when sold in the city. There may not be enough livestock in the area to support two minimum efficient slaughterhouses and therefore there may be a single natural monopoly facility.

If the cheese factory is owned and operated by the graziers themselves, the incentive will be to keep a high volume to keep costs low and, for that reason and also to keep its grazier/shareholders happy, it will

take the minimum margin between the price it receives for cheese sold in the city and the price it pays its farmer/shareholders for cows or lambs.

However, if the cheese factory is independently owned, its incentives may not be different. In poor seasons it may seek to maximise volume to minimise costs but in a good season, it may have an incentive to take the full normal city price for meat but drop the price it pays for livestock lower and lower. While its profits may increase, the farmers' incomes may drop considerably.

The same considerations could arise in the context of a rail line in a remote area or a monopoly sea-port and a mining operation.

Box 2. Shenhua Group (China)

In the 1980's China began to experience a significant increased demand for coal and a large number of small coal mines were established by regional governments. However, these small scale using old technology were inefficient and in 1995 the Shenhua Group was established.

A key element of this Group's success in significantly improving efficiency and expanding production is to adopt a vertically integrated model that is common in many mining industries around the world.

The company took over the railway and port facilities of another company, Huaneng but invested in significant new infrastructure. It opened additional rail lines called the Shenshuo, Dazhun and Shuohuang rail operations. It also constructed its own port at Huanghua which is the second-largest port in terms of seaborne coal transportation in China along with other port assets.

A competition authority is unlikely to be asked to assess the initial investment in a grower-owned or producer-owned storage, transport or processing facility but it may be asked to deal with cases that arise after the initial investment is made including:

- Arguments between farmers who initially built-up, and continue to be shareholders of, co-operatives against new members about whether they can join and if so on what price and non-price terms.
- Arguments between a new small mining company who wants to disrupt an existing port's operations to expand the facility or even arguments between a small new mining company who wishes to use a large existing mining company's rail line.

Although these issues can be factually complicated, standard competition analyses can be used to address these issues. For example, the conduct of an agricultural co-operative itself in dealing with new farmers and the vertically integrated mining, rail and port operator can be analysed under the abuse of dominance standard either as a refusal to deal or as anticompetitive discrimination. Any agreements between the existing farmers who own an agricultural co-operative may also be analysed under the horizontal agreements framework.

In most cases, the incentive of such co-operatives is to grow the membership to gain scale. However, if a particular co-operative dominated the markets for farm supplies or the purchase of agricultural output in a local area and if it was not dealing fairly with new farmers, competition authorities could require (or at least advise) that such co-operatives adopt non-discriminatory access rules.

In some cases, governments have taken more specific action to facilitate the formation of such co-operatives. For example there are three important sugar growing co-operatives located in Odisha in India. The Government of Odisha has established a specific law under which these co-operatives can be established and there are specific mechanisms to assist in ensuring that the co-operative and its members do not engage in unfair exclusionary practices including the establishment of a specific Tribunal to hear such disputes.

In some cases, such vertical integration issues in the commodities sector have caused some of the most bitterly fought cases. For example in Australia's sparsely populated North Western corner, two of the world's biggest iron ore mining companies (BHP and Rio Tinto) have established dedicated rail lines and train operations serving their own mines. Their operations are surrounded by smaller competitors seeking to establish themselves.

When mining companies are small, start-up operations without proven commercial reserves, they are often called 'junior' mining companies. When they 'prove up' a mineral deposit as commercially viable by demonstrating that it is sufficiently rich in mineral content compared with the costs of extraction, they often go through a difficult transition towards the production stage in which their capital requirements increase enormously and their investors churn from speculative investors to mainstream capital providers. Often the answer is to sell out to an established mining company who already has the necessary infrastructure and further investment capital. However, if the junior miner wishes to pursue an independent strategy, one of the biggest challenges, and opportunities to successfully achieve this transformation, is to cost effectively gain access to existing infrastructure.

A long running dispute⁵⁵ between these established miners and their junior competitors, concerned a refusal by the existing miners to permit the junior mining companies to use their rail infrastructure. The existing mining companies considered their investments to be an integral part of their own production process and that they needed to continue to exclusively control all aspects of the system from train scheduling to the quality of rolling stock and all the capacity on the line. The junior miners viewed this as a classic refusal to deal and the case proceeded through the competition law decision making and appeals process culminating in a complex series of decisions in which the different sides won aspects of the case.

History has shown that these vertically integrated businesses are as active in strategic initiatives and corporate transactions as are any other commercial companies. Often the co-operatives will expand geographically or merge with similar businesses in adjacent geographic areas, again giving competition authorities an important role to play. Such mergers can be analysed under the standard horizontal merger test and may often pose no competition issues where the downstream price is a competitive global price which the firm cannot influence and each upstream local farming or mining area is a separate local market, each with a small monopsony infrastructure owner. It may also be relevant in the merger analysis for the vertical integration to be treated as an additional pro-competitive factor that would limit the firm's incentive to over-price or otherwise engage in anticompetitive conduct.

As a region becomes more developed, generational change occurs or production technologies improve, there are strong drivers for the vertical integration to be un-done through a sale of the infrastructure business. For example, when road or rail networks improve, several different cheese factories, abattoirs or grain silos may become accessible to growers and mining operators. Production technology at the farm or at the infrastructure level may drive greater specialisation or increased minimum efficient scale leading the co-operative infrastructure to no longer being competitive. Generational change in family operated farms and retirement may lead the owners of co-operative property to want to divest their interest in it.

⁵⁵ Documents for the initial regulatory decision and each court appeal can be found from the National Competition Council's website (nca.gov.au) by following the link "Third Party Access to Pilbara Railways".

Box 3. Golden Circle (Australia)

Golden Circle began as a grower co-operative in the 1940s initially producing around 40,000 tonnes of canned pineapple annually, in addition to some canned fruit salad, tropical fruit chutneys and fruit juice cordials. Today the Northgate cannery produces over around 180,000 tonnes per year of canned pineapple and beetroot, fruit juices and cordials, jams and sauces.

However, for a range of reasons the company underwent a series of important changes due to changed customer preferences, the need for new investment, improved infrastructure in pineapple growing regions providing greater choices for growers and changed investment preferences of the growers.

The company divested assets such as the canning factory that had previously been one of the most important reasons for the co-operative to be established and the company opened its shareholding registry so that growers could sell and investors could buy.

Ultimately the company was acquired in 2008 by Heinz who maintains the production operation and the brand within a much larger international organisation. A key reason for this transaction was to enable the product to reach more international markets.

Where transport and storage infrastructure has developed, the geographic market may have expanded substantially and these vertically integrated operations (co-operatives or privately held) may no longer operate natural monopoly infrastructure and in some cases they will come under direct competition from co-operatives or privately owned companies in adjacent regions. In this case, there is unlikely to be a competition problem whether or not the company decides to 'de-mutualise' (i.e. separate from the growers and either take on private shareholders or sell out to larger companies) or demerge.

However, this is not always the case. Sometimes companies who have (or may appear possibly to have) extensive local and regional monopolies or dominant positions elect to de-mutualise which can pose competition concerns. In these cases, the competition authority may be called upon to use its law enforcement or advocacy efforts to improve competitive access to the existing infrastructure in the short run and infrastructure investment in the long run.

Box 4. Mountains of grain (Australia)

For many years the Australian grain industry was dominated by a number of vertically integrated grain co-operatives. In many States the government assisted in establishing either grower owned co-operatives with statutory monopoly powers to purchase, store, transport and market particular types of grain or statutory boards that were technically government organisations but managed by growers. The biggest single grain type produced is wheat and the national government established the Australian Wheat Board with the exclusive right to export wheat.

Over time, a whole series of reforms were undertaken in all these grain trading organisations which resulted in domestic and then export monopoly rights being removed and the ownership arrangements changed so that non-growers could become investors in the company. Although significant improvements in competition emerged between geographical regions, and between grain types in each region, each company typically maintained important areas of strength in particular geographic areas or grain types.

A breakthrough emerged when the international arm of the Australian Wheat Board (under its former management) disgraced itself in the international trading arena and the decision was taken to remove its monopoly. Because all grain companies were interested in the ability to participate in the export wheat, this provided an opportunity for the government to make access to export markets conditional on the companies giving access to the localised natural monopoly infrastructure that they owned.

The government permitted any company to apply for a license to export wheat but if that company owns significant domestic grain handling infrastructure (such as silos, rail sidings or port infrastructure), the licensee must first offer, and have approved, an infrastructure access undertaking acceptable to the competition authority. Through this mechanism, it is hoped that competition can become more vigorous even in areas where companies have inherited strong market positions from former farmer co-operatives.

4.4 *Abuse of dominance*

A number of abuse of dominance matters have already been discussed in the context of the discussion of vertical integration. Again, consistent with the observations made throughout this paper that upstream and downstream markets are generally much more concentrated than the markets for the production of commodities themselves, abuses of dominance are usually perpetrated by suppliers of inputs to primary production or in the processing of primary products.

There are additional examples of other types of abuse of dominance matters. In a private litigation case⁵⁶, a smaller sawmill (Ross-Simmons) filed suit alleging that a large vertically integrated international timber growing and sawmilling corporate group (Weyerhaeuser) drove it out of business by bidding up the price of sawlogs in a particular locality in North America to a level that prevented Ross-Simmons from being profitable but ultimately the plaintiff failed on appeal. Nevertheless, it is an interesting case because it explores in detail how standard predatory sales pricing tests can be applied to an alleged predatory buying price case by a processor of commodities raw materials.

Consistent with the discussion above in relation to horizontal conduct, significant abuse of dominance cases can occur downstream from the raw commodity. The Mauritius contribution discusses an abuse of monopoly case related to the market of block processed cheddar cheese by IBL Consumer Goods (now IBL BrandActiv), the exclusive domestic distributor. The company had abused its dominance by offering retroactive rebates on Kraft branded block processed cheddar cheese in exchange of premium shelf space for its Kraft branded processed cheddar cheese as well as other Kraft branded products, including chocolates, biscuits and powdered juice.⁵⁷

A particular challenge may arise for authorities that have exploitative abuse / excessive pricing abuse powers during short periods in which commodity prices rise significantly, particularly if parts of the market are isolated from interregional or international trade. As discussed in the section on Exchange Traded Markets and Speculation above (and detailed in the Appendix to this paper), it is not generally appropriate to treat short run situations where prices shoot up compared with recent prices for the commodity as exploitative abuse cases. Rather, these are better addressed under specifically tailored price gouging prohibitions.

4.5 *Mergers*

The circumstances in which concerns about anticompetitive mergers emerge tend to mirror the circumstances outlined above with respect to horizontal and vertical arrangements. First, contentious merger cases arise more commonly in relation to the production of mineral commodities than the production of agricultural commodities. A prominent example concerning iron ore mining was the abandoned BHP Billiton and Rio Tinto proposal.

At the beginning of 2008, the acquisition of **Rio Tinto** by **BHP Billiton** was announced. Both merging parties were British-Australian dual-listed companies that mine and market a range of commodities such as iron ore, coal, uranium, aluminium, mineral sands, copper and diamonds, as well as various other base metals and industrial minerals. The proposed merger was notified to a number of jurisdictions, among others Australia, EU, Japan South Africa and the US. It was subjected to an in-depth analysis, in particular with respect to potential competition problems in the markets for iron ore; in South Africa, aluminium posed potential problem. Concerning the iron ore, Rio Tinto and BHP Billiton were number two and three producers; through the merger, they would have become number one, controlling

⁵⁶ Weyerhaeuser Company, Petitioner v. Ross-Simmons Hardwood Lumber Company

⁵⁷ [DAF/COMP/GF/WD\(2012\)7](#). An interesting post-enforcement evaluation is described in the contribution.

with the previous top producer (Companhia Vale do Rio Doce of Brazil) most of the world market, with all other producers being significantly smaller. Though the acquisition was cleared without conditions in Australia and the US, remedies including divestiture were expected in the EU; before the European Commission's decision was adopted, the merger was abandoned. It is noteworthy that the acquisition was announced in time of the commodity markets surge and abandoned at the end of 2008 when the downturn started.

In mid 2009, the joint venture of Rio Tinto and BHP Billiton concerning production of iron ore in West Australia was announced. It was, again, reviewed by a number of jurisdictions worldwide, including Australia, Germany, EU, Korea and Japan, all of them expressing preliminary competition concerns. The project was abandoned by the end of 2010, before any competition authority has decided; it was however expected that far reaching remedies would have been required. At the time the joint venture was abandoned, the prices of iron ore were still rising.

Second, for both agricultural and mineral commodities, it is more common to find cases upstream or downstream of the commodity production activity itself.

At the end of 2011, South Africa's Competition Tribunal blocked the merger of **Pioneer Hi-Bred** and **Pannar Seed**, two companies active in breeding, production and distribution of seeds. Pioneer is a US based company and second largest maize seed producer and supplier in South Africa, Pannar, based in South Africa, the third largest. Hybrid maize seed was the primary area of concern; but for Pioneer and Pannar, there would be only one remaining company distributing these seeds, US based Monsanto.

Hybrid maize seeds are genetically modified. Differences in climate, soil type, pests etc. mean that hybrid seed is bred specifically for a given region, suggesting a geographic market which is national at best and potentially even more localised. More than 75 % of South African maize is grown from hybrid seeds.

The main concern was a possible increase in prices after the merger. Pannar has gained a strong reputation thanks to its extensive experience with local conditions, and its vast and locally adapted germplasm (library of seed varieties) represents a key competitive advantage. Another concern was that the merger would have significantly increased barriers to entry; Pannar is the only local source of locally adapted germplasm and without it, potential entrants would have no access to local seed varieties.

The judgment was appealed to the Competition Appeal Court.

Similar concerns were raised a few years ago in a merger of two multinationals active in plant protection chemicals, i.e. protection products to control plant diseases, pests (insects etc.) and weeds in crops.

In 2002, **Bayer's** acquisition of **Aventis Crop Science (ACS)** was reviewed in Canada, EU and the USA; all these jurisdictions identified competition concerns and cleared the concentration only with remedies, consisting in divestiture of part of the business concerned. In the EU, for example, apart from divestiture of a certain herbicide and providing a licence to a certain molluscicide, an "en-bloc" sale of ACS's insecticides and fungicides business to a single purchaser was agreed.

The insecticides were of global concern, since Bayer and ACS were two out of three multinational corporations fabricating new generation of these products. There were also problems concerning more local markets. For example, Bayer and ACS were the only suppliers of cool weather cotton defoliant in the US; these defoliant are chemical harvest aids designed to remove leaves from cotton plants without drying them out, needed for the economical harvesting of premium grade cotton. The ACS's defoliant business was therefore divested.

Similarly, the markets of agricultural and mining technologies are often world-wide, and merger therein may cause competition concerns. For example, in 1999 a merger between **New Holland** and **Case**, two leading companies creating a worldwide number one in the manufacture and distribution of agricultural machinery and construction equipment, was cleared by the European Commission, the US Department of Justice and many other competition authorities only on condition of divestitures of manufacturing plant and opening of formerly exclusive distribution channels in a number of countries.

The markets concerning processing of commodities are usually more localised, which makes any comparison more difficult. For example in the meat processing industry, the 1988 acquisition of **Brotwick**, a UK company, by Australian **Australia Meat Holdings** was challenged in Australia. The merger was concerned with abattoirs, facilities for large-scale processing of meat, most of which would be exported, in Australian Queensland province. The court hearing the case concluded that Northern Queensland constituted a separate relevant market because abattoirs from southern areas were not substitutes; the case was put that the lack of substitutability arose from transport costs, the loss in condition of fat cattle during transport, the bruising that occurred to fat cattle during transport, the producers' aim to fatten their cattle to prime condition and to have them slaughtered as quickly as possible thereafter and finally the producers' loyalty to local abattoirs. Divestiture of certain abattoirs was ordered in order to remedy the situation in North Queensland, which would have been dominated by the merged entity. Conversely, the Australian Competition Authority did not oppose further mergers on these markets, most recently in 2011 **Teys Meat Group**, Australia's second biggest meat processor, and multi-national **Cargill**, especially due to limited geographic overlap of their activities.

Similarly, after a thorough analysis, the acquisition of **Better Beef** by **Cargill** in Canada in 2004, in the geographic market of Western Canada (and certain US northern states) and Eastern Canada (and certain US north-eastern states) was not opposed, despite the large market share of the merged entity and significant (though passable) barriers to entry, given by economies of scale and established customer relationships. The Canadian Competition Bureau concluded that the threat of entry and countervailing power on the part of retail grocery firms make it unlikely that the merger will result in a substantial prevention or lessening of competition.

In the downstream production chain, the 2004 merger of US **Weyerhaeuser** and Canadian **Domtar**, though creating the biggest North America's fine paper company, was not challenged by the Canadian Competition Bureau and the US Department of Justice. Both undertakings were also active on a number of other markets, including forest management and production of lumber and other wood products.

Similar considerations are taken into account while assessing the vertical effects of mergers. Processing and distribution of dairy products may serve as an example.

In 2000, the Finnish competition authority approved the acquisition of two regional companies processing milk and producing dairy products, **Osuuskunta Maito-Pikka** and **Kainuun Ossusmeijeri**, including their marketing company Aito Maito Fin, to **Valio**, the biggest milk processor in Finland. As a result of the merger, the share of Valio in the purchase of raw milk from producers would have risen up to 80 %; one of the main concerns therefore was how to secure sufficient quantity of raw milk to Valio's competitors. The remedies included, inter alia, the obligation of Valio to sell an annual maximum 150 million litres of raw milk to its competitors at a price equal to the average Valio's purchase price.

Since the Valio's position in several dairy products markets was very significant as well, e. g. over 70 % in liquid dairy products (milk, sour milk, cream etc.) and over 60 % in milk powders, Valio also undertook to offer its logistics services to competitors, as well as dairy processing and packaging services, and also, that any of its production plants under the threat of closure would be offered for sale to its competitors, without any restrictions for use.

Interestingly, similar sort of merger was reviewed in Portugal, with structural remedies being imposed.

In 2007, the Portuguese competition authority cleared a merger, which consisted in the acquisition of **International Dairies** by **Lactogal**. Lactogal was the main Portuguese company in the milk industry, processing raw milk and producing pasteurised milk, UHT milk, cheese, yoghurt, and other dairy products. International Dairies controlled Renoldy, a company distributing its dairy products also collecting and processing raw milk.

The merger would have strengthened the dominant position of Lactogal in a number of relevant markets. In particular, the acquisition of Renoldy and its collection of raw milk would have raised barriers to entry and expansion in the markets of dairy products, due to the difficulties of obtaining raw milk from producers. After the merger, Lactogal would have controlled over 70% of the raw milk; that would have reduced incentives to entry in the milk industry, reducing contestability in these markets, further strengthening the dominant position of Lactogal. As a solution to the competition concerns identified by the Portuguese competition authority, Lactogal proposed to divest Renoldy. This remedy allowed the merger to be cleared.

Vertical effects are often concerned with transportation. When the merger of **United Grain Growers** and **Agricore Co-operative**, grain growing and processing companies in Western Canada, was approved in 2002 by the Canadian Competition Bureau, remedies were imposed, obliging the undertakings concerned to divest several country grain elevators and a port terminal in Vancouver.

Similar concerns were raised in a complex merger of mining companies in Brazil.

Companhia Vale do Rio Doce (CVRD) is the world largest producer and exporter of iron ore and iron ore pellets, an important producer of other minerals and at the same time the largest logistics player in Brazil, which holds operating concessions for a number of freight railway lines and harbour terminal facilities providing services both to its own mines and steel production facilities and to other customers. Some of the customers served by CVRD's lines are competitors in mining or steel production, a circumstance that has led to a series of cases alleging discrimination by CVRD.

Brazilian competition authority jointly analysed seven merger operations involving CVRD, whereby it acquired control over iron mining companies and their associated rail lines. The merger was approved in 2005, on condition CVRD would either divest one of its subsidiaries, giving it control over a strategic railroad, or sell one of its mines.

4.6 Pro-competitive reforms

As noted above, it is quite common for countries to adopt policies that limit or eliminate competition in agricultural commodities markets. In some cases, but less often, governments also intervene to limit competition in mineral commodities markets (particularly in coal, gas and other energy markets).

Once a market is distorted by regulatory intervention, often additional problems are caused and pressure mounts for further and further intervention. For example, if prices are subsidised, it encourages over-production and then, to maintain prices, even more support is required. Similarly, if prices are regulated downwards, producers have a reduced incentive and ability to continue producing and investing in replacement equipment and further shortages often result, adding pressure for further intervention.

Accompanying this background paper, expert panellist Mr. Scott Davenport has provided a paper which notes that⁵⁸:

- In developing countries, there is often extensive regulation hindering competition in commodities markets and reforming regulations which unnecessarily restrict competition provides considerably greater potential for improving economic wealth than law enforcement.
- In fact, there is a danger in central policy agencies:
 - for the enthusiastic embracing of competition law, almost as a *diversion* from addressing significant and longstanding regulatory restrictions on competition; and
 - a strong focus on trade policy to obscure the need also to deal with ‘behind the border’ competition issues such as domestic market restrictions.

Davenport’s paper also explains that there is compelling evidence that market orientated agricultural policy reform leads to higher rural incomes, increased agricultural productivity and reduced rural poverty. The reason is that price signals are the ‘drivers’ of efficient public and private investment, and not just in agriculture, but in other important areas such as support industries, infrastructure development and research.

Ideally countries would take action to remove anticompetitive regulatory impediments before they become so costly that they are unsustainable. However, this is often politically very difficult to do and, as illustrated below, countries often take action only when the costs of the regulations are so great that they are forced to reform. Set out below are:

- two examples (from Australia and New Zealand) that focus on reforms that required a difficult adjustment process for the producers; and
- an example from Israel that focuses on reforms that pose particular adjustment difficulties for consumers.

By the mid-1980’s in **Australia**, anticompetitive government intervention had become widespread within its economy from agricultural industries to manufacturing industries to financial and other services. Government intervention in the market included high international trade barriers, monopoly marketing boards, extensive exemptions and gaps in the coverage of competition law and subsidies. On 14 May 1986 the country’s own chief finance minister, Treasurer Keating, shocked the nation by warning that the country would become a banana republic unless fundamental reforms were undertaken. By 2 December that year, Standard & Poors downgraded the national government’s credit rating from AAA to A+.

Although there was considerable dissent, the prevailing community response was to accept that fundamental change was required. Macroeconomic policies were immediately tightened but without market reforms, decline would have continued. Reforming markets is detailed work which takes time to complete and the task is significantly complicated by the federal structure in which power is shared. Australia’s approach to the problem was to enter into formal inter-governmental agreements⁵⁹ with explicit competition principles, a comprehensive coverage, a timetable for a systematic process of inquiry and analysis in each industry and the financial arrangements to encourage reform.

⁵⁸ See [DAF/COMP/GF\(2012\)1](#).

⁵⁹ Of several such agreements the *Competition Principles Agreement* is the most relevant in this context.

When the dairy industry was scrutinised, very extensive market distortions were found to impose significant economic costs. In the immediate pre-reform period there was free trade in cheese, yoghurt and other processed dairy products but milk destined for human consumption was extensively regulated.

Like many other federal countries, the Australian constitution entrenches a prohibition against action by the Federal and State governments that distorts internal trade. Notwithstanding this, each State had established a monopoly Statutory Marketing Board that provided all dairy farmers within their State to 'fair and equal access' to the market, through a minimum wholesale prices of milk and limited quotas allocated to all dairy farmers to be able to sell a quantity of milk at the regulated price. The costs of the inflated wholesale price were financed through two types of levy (or taxes), one type borne by consumers to subsidise producers and the other type borne by all dairy production to subsidise milk. There was widespread recognition that these arrangements were unconstitutional but a tacit agreement amongst the relevant parties not to challenge the system.

All sorts of costs resulted from these policies:

- consumers paid inflated retail prices due to the prices set and the levy;
- some producers bore more cost in levies than they received;
- the production mix was distorted so that producers sought to produce less cheese, yoghurt and butter (much of which was exported);
- the optimal herd structure was distorted away from high cream producing breeds of cow towards cows that produce higher volumes of less creamy milk;
- in some States land was devoted to dairy farming and expensive milking sheds and refrigeration equipment were installed in regions that were better suited to other forms of agricultural production, while in other states, prime dairy producing land was partly put to less rewarding uses; and
- a great deal of farmers' energies at an individual and collective level were diverted to lobbying for subsidies, claiming and enforcing rights to quotas and secondary market re-trading of quotas.

In recognition of the substantial social dislocation that would result from reform, the national government offered A\$1.7 billion (today's exchange rate is approximately \$A1:\$US1) in assistance to dairy farmers who chose to exit the industry and retrain in another job or who decided to stay within the industry but restructure their production to adapt to the new market system. Legislative action by State governments was agreed to on condition that local farmers receiving national financial assistance. Although the cost of this assistance would amount to a very substantial 11c per litre during the restructuring period, it was still estimated to less than compensate farmers for the costs incurred:

Table 2. Estimate of the effect on farmers profits in Australia

(A\$'000 per financial year)	NSW	Victoria	Qld	SA	WA	Tas
Profits (losses) 2000	19.6	1.3	10.8	15.7	50.7	20.3
Profits (losses) 2001	(30.5)	(2.1)	(31.9)	(15.8)	(31.3)	(1.1)
Adjustment payment	20.3	12.3	15.9	18.2	30.9	8.9
Profits (losses) after assistance	(10.2)	10.2	(16.0)	2.4	(0.4)	10.0
Net change in profits	(29.8)	11.5	(26.8)	(13.3)	(51.1)	(9.7)

Source: P Earl 2003, Australia's Dairy Reforms, Lessons for Canada

An important implicit commitment was that the same principle was being applied to a wide range of other industries and, in time, dairy farmers would benefit from reforms in other industries and, indeed in time they did. As producers buying inputs, and as consumers spending their earnings, dairy farmers benefited from reforms undertaken in the energy industry, the financial services industry, air transportation, professional services, manufacturing industries and many others. Each industry typically received some financial assistance less than full compensation.

At the level of the national economy, market reforms combined with the removal of trade barriers and a sustained fiscal conservatism enabled the economy recover and prosper. One indication of this turnaround was that in 2003 the national government regained its AAA Standard & Poors rating.

In **New Zealand**, agricultural industries were also reformed during the same period. The New Zealand economy is less diversified than the Australian economy and its export revenues depend heavily on the sale of agricultural and food commodities such as dairy products, meat, wool, fruit and seafood.

By 1984, a wide range of government impediments had built up in many industries and these had become unsustainable for the nation in the long term.⁶⁰ Government intervention included exchange controls, tariffs, subsidies to off-set the effects of tariffs and agricultural 'single desk' statutory marketing boards. To obtain acceptance from the New Zealand community for the necessary reforms, an economy wide reform programme was undertaken, the most crucial of which were the agricultural reforms. As the New Zealand contribution notes, the fiscal deficit was 9% of GDP, government debt was at 40% and the consumer price index was at almost 20%. The country could no longer afford to support inefficient sectors, including the agricultural sector.

Many of the subsidies had encouraged over-farming through the intensive use of fertiliser and had encouraged farming on insufficiently productive land. At about this time the fertilizer subsidy was removed, the abundant supply of cheap phosphate exported to New Zealand from Nairu for use as fertiliser was also exhausted resulting in a very substantial increase in key costs of production.

The removal of subsidies and statutory marketing boards in the sheep and beef industries exposed these industries to unbridled market forces. For a period of almost 10 years from 1984-1993 farm profitability declined significantly and drove a very wide range of different structural adjustments and a number of different solutions became apparent:

- some producers increased in size to obtain additional economies of scale and thus reduced costs;
- some producers decreased volume of production but significantly improved the quality of their products thereby increasing the revenue earned;
- some producers switched from producing sheep to instead producing wine or turned their land over to timber plantations both of which were products with rising demand;
- some producers diversified either between different agricultural products or by retaining their farms and themselves taking urban employment and others sold their farms (or part of them) to city workers and the properties became residences combined with hobby farms; and
- some producers diversified into the tourist industry to become working farms combined with holiday accommodation or suppliers of gourmet food using ingredients grown on the farm.

⁶⁰ L Evans 2004, *Structural Reform: the Dairy Industry in New Zealand* (Paper presented to the APEC High Level Conference on Structural Reform).

As can be seen from the above responses, many of these reforms assisted in establishing a more sustainable economic future as well as resulting in a more environmentally sustainable pattern of production.

In a discussion focused on competition, the dairy industry's reforms are important to consider separately and in more detail. In most respects the above discussion applies equally to the dairy industry but, as discussed elsewhere in this paper, a very important part of dairy production is the processing which occurs close to the farm – either simple pasteurisation of drinking milk or the manufacturing of cheese, yoghurt and butter.

As in other industries there was a statutory marketing board, the Dairy Board, that had a monopoly over the export of key products. The Board was owned by four co-operatives, two very large ones and two very small ones and the industry was essentially characterised as a domestic duopoly integrated with an export monopoly. Apart from the removal of subsidies and trade barriers, the key question arose in the reform process as to how to re-organise this structure.

In 2001, with a view to enabling a company to be formed that can compete effectively on international markets, the two large co-operatives and the Dairy Board were merged together to form a farmer owned co-operative, Fonterra. The single desk status was removed so that there is the possibility to by-pass Fonterra in export markets but it retains an extremely high share of New Zealand milk purchases, dairy production and sales.

The initial plan for Fonterra was for it to engage in significant research and development and marketing expenditures whereby the company would be able to compete effectively with large international privately owned dairy companies like Nestle. However, to date the company (and New Zealand dairy farmers) continue to be mainly dependent on sales of commoditised products.

At an aggregate national level, by 2003, the reforms were seen as a very substantial success.⁶¹ Since then, the exposure to world markets has resulted in strong years and not-so-strong years. Nevertheless, the industry is now a major export revenue earner for the country, the industry appears to be sustainable and the level of support received is negligible. However, at an individual farm level, the picture is considerably less certain.

When the reform process first started, farm profitability fell before rising slowly until about 1998 from which time profitability significantly improved at about the time Fonterra was formed and then has oscillated since then. Behind these figures there are hundreds of thousands of individual family owned businesses that have undergone extreme pressures. One illustration of this is a “misery index” established by Pita Alexander⁶² using a survey of farm level financial cost and revenue data and it reflects his assessment of the minimum level of returns that a dairy farm typically needs to deliver a sustainable quality of life for a dairy farmer leaving a sufficient farm surplus to cover the family's living expenses, education expenses, tax, equipment replacement and debt repayment. The level of misery defined this way has increased significantly and by 2005 it had reached 80%.

As noted above, Fonterra is a co-operative owned by dairy farmers. One apparent outcome of this ownership structure, combined with the evident pressure on family owned dairy farming businesses, is that farmers have chosen to extract significant value from Fonterra through fully valued milk pricing. This has raised the question as to whether the business is under-investing in research, development and marketing and the debate continues as to whether there should be further reforms undertaken.

⁶¹ L Sayre 2003, *Farming without subsidies? Some lessons from New Zealand*.

⁶² Per J Donkers, *Operating the Dairy Farm Business for Profit*.

Overall, the New Zealand contribution sums up its reform programme as follows:

“The New Zealand experience with the removal of government support has demonstrated that farming in a de-regulated environment is feasible, and yields a portfolio of activities associated with better resource allocation; within the sector and among sectors. Exposing the sector to international competition has also meant that it has had to innovate and adapt in order to maintain its international competitiveness. Consequently the sector is better able to manage risk, including that associated with price volatility in commodity markets.”

In 2010 in **Israel** there has been an intense consumer focus on the costs of living. Initially concern was expressed over the price of cottage cheese that had increased by almost half following the removal of price regulation. Some members of the public responded by organising a consumer boycott of cottage cheese producers. From this initial starting point, direct consumer action then expanded rapidly, with concerns over a wide range of commodity prices including the prices of gasoline, flour, bread, sugar, cheese, chicken and dairy products and also into the costs of services such as housing and child minding.

The government established a Committee to address the issue of the cost of living (the “Trajtenberg Committee”) which developed a package of measures to address the problem including:

- for the traded goods sector, lowering import barriers and subsidies and expanding the capacity of key seaports to expose domestic producers to competition;
- for the non-traded goods sector (from the construction industry to supermarkets to public transport), enhancing the powers of the competition authority in relation to information gathering and law enforcement and opening government procurement contracts to public tendering;
- reform of the taxation system to make it more progressive (i.e. imposing a higher tax burden on the wealthiest) which targets assistance to those in need and improves consumers ability to afford necessities without distorting markets through subsidising either the production or consumption of particular goods; and
- intervention to support certain services such as housing construction and child minding.

Notably absent from the recommendations was any suggestion to re-introduce price controls on cottage cheese or any other product.

Not surprisingly, many domestic producers in industries that are currently protected were vigorously opposed to the recommendations as were some other sections of the community, some concerned that the recommendations do not go far enough and others concerned they go too far. Nevertheless, government welcomed the report and, with certain modifications, the government has gradually been implementing the recommendations.

In summary, market reforms in commodities markets can significantly improve national economic performance. However, agricultural commodity industries tend to be constituted of a large number of small family businesses who can undergo significant adjustment difficulties. Nevertheless, unless the industry was fundamentally unviable from the outset, it should be possible to find a path for reform which will also ultimately result in a world competitive and profitable agricultural industry even in developed countries with comparatively high labour and input costs. Necessary ingredients for a successful reform appear to include:

- A broad understanding in the community of the economic fundamentals and the need for reform;

- An identification of core principles underpinning the reform and a sense of fairness between the different parts of the community;
- A careful analysis of the specifics of the market;
- A thoughtful sequence of reform steps; and
- Government policies that remove impediments, or actively assist, structural adjustment.

4.7 Governmental policies to limit impact of price volatility – “crisis management”

The volatility of commodity prices, in particular their unexpected increases, may be difficult or impossible for consumers to bare. Therefore, it is not only legitimate but perhaps even an important responsibility for governments to intervene to ensure that unreasonable burdens are not borne by those who cannot do so. The danger is that well intentioned policies can often cause significant collateral costs for the economy or the policies may even be self defeating in over the long term.

Many different short term and long term policies have been used including the following:

- Introducing export restrictions;
- Easing import restrictions;
- Accumulating and releasing ‘strategic’ stocks designed to move market prices;
- Accumulating smaller ‘emergency’ stocks designed to feed consumers in the very short term;
- Price regulation;
- Subsidies for customers;
- Market studies;
- Price monitoring;
- Increasing land availability;
- Promoting “self sufficiency”; and
- Even seeking to control population growth.

When considering and evaluating different policy options, it is useful to identify whether the problem identified is one that is caused by an impediment in the market which, if a long term solution can be found, will be a sufficient policy response; or the problem identified is such that even if the market was functioning market well, it would not be considered to deliver an unacceptable policy outcome.

For example, the problem may be that the poor cannot afford basic foodstuffs. Does that problem arise because the retail price of food is inflated by restrictions or distortions in the market or because the poor cannot afford to buy sufficient food unless there is a redistribution of income or wealth from other parts of society? It may be that there are two problems – inefficient markets and a need for a redistribution of income or wealth.

If the problem can solely be attributed to a dysfunctional market, then any policy response should map out a sequence of initiatives to address the immediate need in a way that provides exit strategies that will remove the market impediments and put the supply chain onto its own sustainable and self correcting.

However, if there is an ongoing need for there to be a redistribution of income or wealth, the task is to identify the most efficient (and therefore least distortionary) way to achieve that transfer. For each

potential government policy, there are likely to be explicit money outlays borne by the government, producers or other parties and implicit costs such as preventing a producer from selling its production to the domestic or foreign buyers willing to pay the highest price. Two questions are helpful in evaluating these policies:

- Is the most appropriate part of society bearing the costs of the transfer to consumers? For example, it may not improve outcomes for society if poor farmers bear the costs of transfers to poor consumers, leaving the farmers in need of income assistance.
- Is the cost of the transfer minimised? For example, a policy (like an export ban) that makes grain cheaply available for everyone within a country may result in benefits being received by rich and poor consumers alike and it may tend to encourage some grain to be wasted. A programme targeted more specifically for poor consumers that still provides accurate signals to those consumers that grain is in short supply, is likely to pose a lower aggregate burden on society and, with careful thought about which policy instruments to use, this lower aggregate burden can ideally be directed to the part of society best able to bear that burden.

The theoretical best option may not always be initially available – for example, transfer payments may be difficult to design and deliver if a country has a large population of people who are not registered with the government and who do not have a bank account. In the short run, a second or third best policy may be all that is available but the government should also consider whether the impediments to adopting a superior policy can be removed.

4.8 *Experience with government policies seeking to address price volatility*

During the last years of intensive price volatility, a lot of countries have resorted to **trade related measures** of two very different kinds:

- Countries that are wholly or partly dependant on imports have reduced import barriers. According to the 2009 FAO study,⁶³ 43 out of 81 developing countries (53 %) reduced import taxes. The contributions of the Philippines⁶⁴ and Morocco⁶⁵, for example, provide details of such policies.
- Many net producers countries have introduced export restrictions and the same FAO study has identified 25 (i.e. 30 %) of developing countries who restricted exports either through a ban, export quotas or export taxes.

Reducing import tariffs assists markets to solve a range of problems. Such policies assist in the immediate affordability of commodities for consumers and also impose competitive pressures on domestic producers. Of course removing a tariff will have a negative impact on the government's budget in the immediate term but it should be possible to replace this revenue through a more efficient means of revenue collection.

For example, in the **Philippines** case, import tariffs on wheat were completely abolished in December 2008, initially for 6 months. A study subsequently commissioned to evaluate the effects of the removal of import tariffs supported an extension of the suspension of import tariffs but revealed that in some periods,

⁶³ Demeke, M., G. Pangrazio and M. Maetz (2009), "Country responses to the food security crisis: nature and preliminary implications of the policies pursued." FAO Initiative on Soaring Food Prices.

⁶⁴ [DAF/COMP/GF/WD\(2012\)9](#).

⁶⁵ [DAF/COMP/GF/WD\(2012\)28](#).

the price of flour was rising even though the prices of wheat decreased, and similarly, price of bread rose irrespective of the price of flour. import restrictions were reduced on both wheat and flour.

Although the countries who have adopted these policies have found them to be useful, it is disappointing to note that there are many instances in which the full benefit of the import tariff reduction was not fully transmitted through the economy to end consumers. Although there is not sufficient information to identify the causes of this, two possibilities would be worth exploring:

- First, the import tariff reductions were temporary reductions, in the Philippines case lasting initially for six months and then extended for a further six months. It is possible that this arrangement did not provide a sufficiently certain or enduring opportunity for new competitors to choose to enter the industry and if the import restriction were permanently removed, a more fulsome transmission may be observed.
- Second, it may be that there are anticompetitive market structures or practices that exist between the national border and the dining table. For example, some of the benefits in the reductions in import tariffs may have been appropriated by the transport, distribution, baking or retailing sectors. In this respect, there may be an important complimentary role for a competition authority to investigate whether such problems exist.⁶⁶

Imposing new limits or impediments on commodities trade by exporting countries is sometimes used to attempt to stabilize the domestic prices, thus sustaining supply at national level. The ability of export barriers to prevent the domestic prices from rising appears to be limited and the policies create a number of other problems for the economy. Firstly, such measures are generally adopted in times when the markets expect further price surges, and those who hold the commodity often defer the sales, expecting higher revenues in future; the prices thus continue to rise. Secondly, the prices of products bought by final consumers do not copy the prices of primary products, as we have already observed with respect to import tariffs. And thirdly, such measures have destabilizing effects on international trade, often amplifying the upward worldwide price movement.

In **Argentina** there is a system of export quotas for wheat. The purpose of the wheat quotas is to ensure that local consumers have access to affordable stocks but producers often express anger that they are not able to access lucrative international sales markets and, indeed, preventing them from selling products at the highest price reduces the potential tax base and therefore the ability of the government to take other measures. During the 2011 election campaign, the President announced that after a technical analysis of increased production and the effects of exports on local prices, the export limit would be increased by 450,000 tons in addition to the previously permitted 9 million tons but many farmers remained angry.

In 2010, **Russia** experienced highest temperatures in 130 years, accompanied by catastrophic drought. The overall harvest of grain was approximately one-third less than in the previous year. As a consequence, the price of grain and staples such as bread surged. In August 2010 the government instituted an export ban, lasting till the summer harvest in 2011. Immediately afterwards, the national grain prices stopped rising, whereas the world prices increased significantly. From September on, however, the national prices began to rise again, generally following the pattern of world prices (though admittedly staying lower, as before the export ban).⁶⁷

⁶⁶ The Philippines currently has competition provisions in its laws but the formation of a competition authority and laws to provide such an authority with investigatory and enforcement powers is currently being debated.

⁶⁷ <http://www.oxfam.org/sites/www.oxfam.org/files/rr-impact-russias-grain-export-ban-280611-en.pdf>

International trade may serve as a buffer for local fluctuations originating in domestic markets. Trade policies designed to insulate domestic prices from world markets are costly for countries employing them, and – especially in the case of larger countries – they increase world price volatility by limiting supply when world prices are high and decreasing demand when prices are low. Frequently, they do not succeed in stopping the price increase, while at the same time, they contribute to the price volatility at global level.

The main problem is that an export control prevents producers from gaining the full potential value for their crops which generally results in them under-investing in future production which makes the problem of scarcity worse in the future. Equally consumers do not experience the full effects of scarcity and, at least the wealthiest consumers, will not economise on consumption. It is always theoretically the case that society can gain from permitting the exports to occur, taxing the profits and directing income assistance payments to consumers in need.

Governments may also attempt to influence the commodity prices by themselves holding, and trading, **‘strategic’ stocks of key commodities**. The experience however shows that in order to be significantly large, such stocks are very costly to operate. A 2009 World Bank study also suggests that releases are frequently made too late to influence the commodity prices and overall,⁶⁸ that these systems are not very effective. For example, before instituting the export ban discussed above, Russian government released 3 million tonnes of grain of its grain reserve into the market; the price nonetheless continued to surge.

On the other hand, relatively smaller food security emergency reserves can be used more effectively and at lower cost to assist the most vulnerable. For example on **Mauritius**, a programme of selling “ration rice”, a basic grade of rice substantially cheaper than basmati rice, was introduced by the government.

Since the indirect measures to stabilize prices through import or export barriers or market interventions are only rarely successful, the governments may also attempt to set the prices directly. In **Kenya**, after the price of maize and meals based on it increased by over 50 % in 2008, there was a proposal to control the prices of some essential commodities, including maize. The proposal was heavily opposed by the Competition Agency, arguing that such a measure is likely to cause emergence of a parallel black market and that farmers would not be able to recoup their production costs. Price regulation for maize was not introduced.

In **Fiji**, the competition authority (the Commerce Commission) sets separate wholesale prices in urban and rural areas on different islands for:

- 26 different packaged rice products;
- 7 different packaged blue pea products and 7 different split pea products;
- salt and garlic;
- 37 packaged milk products;
- 22 packaged tuna products, 11 sardine products and 50 other tinned fish products and 12 tinned meat products;
- 11 packaged tea products; and
- approximately 100 different edible oil products.

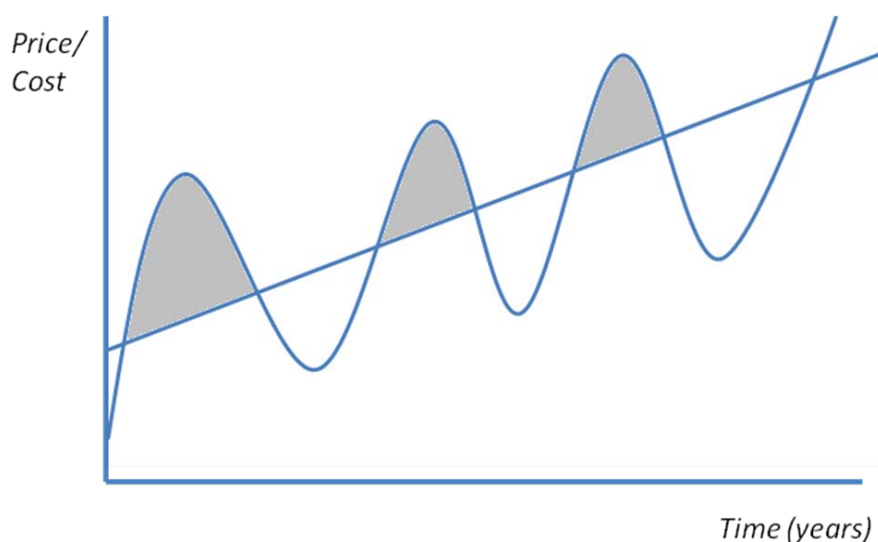
⁶⁸ Wright, B. (2009), “International grain reserves and other instruments to address volatility in grain markets,” *World Bank Policy Research Working Paper* 5028.

Experience of countries where price regulation has not been positive. For example in **Ukraine**, both wholesale and retail prices of a number of food products (flour, bread, macaroni, grits, sugar, beef, pork, poultry, boiled sausages, milk, cheese, sour cream, chicken eggs, oil) were regulated; any price increase was conditional upon governmental approval, granted when the increase was economically justifiable. It was observed that the prices had nonetheless continued to increase and that the regulation stimulated increased expenses and usage of intermediaries, providing the economic “rationale” for final prices to be increased.

In **Egypt**, the government did not directly regulate prices of steel, but ordered producers to include maximum resale price provisions into the agreements with their distributors, despite the Competition Authority’s opposition to such a measure. Contrary to the government’s argument, the prices continued to grow and a parallel black market was created.

All the measures discussed above are aimed at decreasing the prices of commodities during price surges. Wherever producers receive these artificially depressed prices a significant problem is likely to emerge. As noted in the introduction to this paper, commodities prices are volatile. Producers are faced not only with periods of high prices (and profits), but also with times of low prices (and losses); the periods of high prices thus enable the producers to compensate the losses sustained previously. They may do this through saving during the good years or through delaying or timing new investments (for example the purchase of a new tractor or building up their herds from comparatively lean years to comparatively good years. This phenomenon may be demonstrated in [Figure 10](#) below. If government intervention was to remove the peaks in pricing, it would be difficult to recoup the losses in low revenue years or reinvest. The producers will be less inclined to invest and expand their production capacities and, indeed, this may make the problem of scarcity considerably worse in the long run. It has already been observed in **Colombia** that the decrease in international prices of yellow corn reflected into significant decrease of production.

Figure 10. Impact of price volatility on profits and losses



Source: OECD

Another policy that has been adopted is for governments to directly support these vulnerable groups by **subsidizing prices or consumption** of (some) basic commodities for (some) consumers. Indeed, according to FAO, 45 developing countries (55 %) have adopted similar measures.

Even such targeted measures may be very costly. In **Tunisia**, for example, more than 540 mil EUR was spent on such subsidies in 2008 and almost 650 mil EUR in 2011. They are however generally well suited to enable to fulfil the governmental goals without contributing to world price volatility.

In **Morocco**, the government decided to subsidize soft wheat flour, domestically manufactured from imported wheat. The aid was earmarked exclusively for poor rural areas and it amounted to more than 360 mil EUR per year. Similar approach was taken to sugar. Significant subsidies were granted also to oil between 2004 and 2010. The compensation expenditures in individual years constituted from 6.2 % to 16.1 % of the overall governmental budget. According to a study commissioned by the Moroccan government, without the subsidies the inflation would have reached 4.5 % instead of the actual 0.9 % in 2010.

Governmental have also tried **voluntary collaborations with private producers or less intrusive initiatives** to seek to make markets work more effectively. In the **Philippines**, for example, the government initiated an agreement between bakeries and retailers to sell a certain kind of bread at affordable prices. Consumers may also be helped by simply being aware of prices charged by different retailers; in **Mauritius** a Price Observatory was established, monitoring the prices of key consumption items and publicly releasing store-by-store comparison of prices. A similar system operates in Lithuania.

Competition authorities are often consulted before governments adopt some measures aimed at fighting effects of price volatility. Frequently, they are called upon to perform **market studies** of certain sectors of economy where the problems are perceived as particularly dire. **Egypt**, for example, has reported having recently performed eight market studies, including cement, steel, edible oil, raw milk, corn products and nitrogenous fertilizers. Such studies may benefit the competition authorities in two ways. Firstly, they may identify infringements of competition law and start enforcement actions. In Egypt, cartel proceedings were initiated in the cement and raw milk sectors. And secondly, they may detect regulatory problems that can be overcome using advocacy. In Egypt, lack of competition was observed in the steel sector; the Competition Authority persuaded the responsible ministry to issue licences enabling vertical integration (up to then, there had only been one relevant vertically integrated plant) and to lift import barriers on steel rebar; as a consequence, prices went down more than 60 % (admittedly, the world prices also declined significantly during that period).

The experience also seems to suggest that governmental interventions increase the probability of anticompetitive practices; thus, discussions about raw milk prices in Egypt among farmers, packed drinking milk producers and relevant ministries turned into a price cartel.

The rigidity of final prices is often thought to be associated with practices of large retailer chains. On the one hand, their buyer power may enable them to exploit their position vis-à-vis their suppliers, on the other, selling power in the retail market may allow them to set prices. In 2009 in Latvia, due to worsening relations between the biggest supermarket chains and suppliers of milk products, which could have lead to higher consumer prices, the government was even considering **reducing the market power of the supermarket chains** by setting there maximal market shares. These policies, too, pose problems because they may encourage the retailer to *stop* competing and to *raise prices* to ensure that its share does not breach the maximum share threshold.

Since the primary reason behind governmental intervention would often be to protect the most vulnerable fractions of population, the experience suggests that successful arrangements be specifically targeted at such final consumers.

The measures discussed above aim at remedying acute problems of high prices and food shortages. Governments may however decide to employ **long-term policies**, designed to reduce the price volatility. Prominent among these would be governmental activities stimulating production. For example in **Kenya**, the government has increased funding for initiatives aimed at sustaining and increasing supply of maize. These include increasing acreage under irrigation, increasing budgetary allocation for provision of

fertilizers and seed and also for uptake and storage of the maize; the government is also investing in roads and transport infrastructure. In other countries, governmental measures include investments in specific research (e. g. seeds adapted to local conditions). If these initiatives involve removing impediments to the most efficient use of land and investments, then they hold good prospects for a long term solution. However, if the policies involve government subsidies that push farmers and processors into engaging in inefficient activities, they can be very costly and damaging in the long term. For example, it is interesting to note that, as discussed in the previous section, some of the problems that contributed to **New Zealand's** dire situation in the 1980s were subsidies for the use of fertilizer and policies that encouraged farmers to attempt to farm land that was not properly suited to production.

Unfortunately no government intervention appears to be costless. As discussed both in this section and the previous section, policies that seek to directly increase the output (for example by opening up marginally arable land or encouraging the use of large quantities of fertilizer) can stress the land and cause its productive capacity to deplete in the long term.

Table 3. Effects of government intervention

Governmental measures	Pros and cons
Easing import restrictions	Countries have found these policies to contribute to an amelioration of the problems but if they are undertaken only temporarily, they may not be effective. Also experience suggests that there may be an important complimentary role for competition authorities in ensuring that the benefits are transmitted to consumers.
Introducing export restrictions	These policies have been only successful to a limited extent in lowering domestic prices. They have significant negative consequences for domestic producers, via the taxation system, the government and have significantly perturbed international markets to the detriment of other countries.
Strategic stocks	The experience with the government investing in strategic stocks is that it is an expensive use of resources that is rarely effective in significantly ameliorating volatility.
Emergency stocks	Emergency stocks appear to be more useful but only in the very short terms.
Price regulation	Price regulation poses the risk of creating black market or of discouraging producers from making investments that would improve the fundamentals of the market. Additionally there are the costs of calculating and setting the prices, compliance costs and enforcement costs.
Subsidies for customers	This approach avoids the problem of many other initiatives that producers may be discouraged from producing an adequate quantity of the product. However, subsidies tend to encourage over-consumption of the particular products and the costs can very quickly result in a heavy budgetary burden.
Subsidies for producers	This approach avoids the problem of many other initiatives that producers may be discouraged from producing an adequate quantity of the product. However, subsidies tend to encourage over-consumption of the particular products and the costs can very quickly result in a heavy budgetary burden.
Market studies	These hold the possibility to identify anticompetitive practices and regulatory problems. However, it is not necessarily the case that short term (or any) competition improvements will be found.
Price monitoring	These activities are unlikely to be damaging to the market but are not always very effective.
Increasing land availability	If there have been impediments to the efficient use of land, these policies can be helpful. However, if the policies encourage unsuitable land to be cultivated, the policies can be costly for society and environmentally damaging.
Promoting "self sufficiency"	Although these policies may increase long-term supply, they are potentially very costly because these policies unavoidably put burdens on society and ultimately hamper the economy from making the most it can from its most productive industries.

Source: OECD

5. Conclusion

A key purpose of the Roundtable discussion at the Global Forum on Competition will be to identify some suggestions for competition authorities seeking to contribute to addressing the problems of price volatility. This paper is one input into that process and the following tentative propositions are offered for discussion during the roundtable:

- *Suggestion 1:* Competition authorities can usefully undertake some anticipatory monitoring work in the commodities that are the most crucial to their respective countries' small producer and consumer populations.
- *Suggestion 2:* Particular attention should be given to removing impediments through law enforcement or advocacy in the markets for key inputs (such as fertiliser for agricultural production and explosives for mining production) and the markets for processing and distributing commodities such as grain reception facilities, ports, rail, meat abattoirs, dairy processing facilities etc. However, this does not imply that government should directly undertake or subsidise the provision of inputs or storage and transport facilities because to do so is counter-productive by crowding out private initiatives and wasting limited public resources.
- *Suggestion 3:* Pro-competitive reforms such as price deregulation and the removal of trade barriers should be undertaken before the levels of assistance become unsupportable. The more broadly based and principled the reforms, the more likely that they will be viewed as fair and that the burden of restructuring may be partly offset through benefits arising from reforms going on in other parts of the economy.
- *Suggestion 4:* When short run crisis measures are required:
 - the nature of the problem should be properly identified (either being a problem that the market is failing to deliver products at an efficient price or that a transfer of income or wealth is required for consumers to be able to afford basic necessities);
 - for each potential initiative, the costs that would be borne by each part of society (producers, consumers and governments) should be identified and compared by size and the ability of the relevant part of society to bear that cost. In general, the most efficient solution is the one that is applied as close to the problem as possible and enables all the parties the maximum flexibility to respond to the problem efficiently (for example if the problem is that consumers have insufficient income to pay for basic necessities, a targeted support payment to the people most in need would be the least distortionary);
 - any market distortions to optimal market behaviour should be identified such as any encouragement to over-consume or under-produce;
 - consider whether there are complimentary initiatives that should be taken (for example reductions of import duties combined with a focus on competition law enforcement to ensure flow through of the benefits); and
 - a long run and predictable path to move from short term measures to long term solutions should be identified and publicised to ensure that market players can make efficient investment decisions.
- *Suggestion 5:* Conduct post-crisis evaluations of the measures introduced to quantify the costs and benefits. Identify any long run benefits that could be sought (for example if the suspension or reduction of import tariffs had positive effects, perhaps they could be extended) or alternative longer term solutions.

APPENDIX: EXCHANGES, FINANCIAL MARKETS, SPECULATION AND HOARDING

1. Introduction

Speculation in the context of commodities markets consists of trading in a ‘physical’ quantity of a commodity or trading in commodity derivatives on the hypothesis (and exposed to the risk) that:

- the price will move significantly in the future; and
- a profit can be made from selling what has been purchased or re-purchasing what has been pre-sold.

Any trader can engage in speculation, and in reality it is often difficult to separate speculative from hedging activities. However, in the ideal sense of the term “speculators” are traders who neither trade as producers with a net physical position to dispose of, nor as a party seeking to be supplied with a net quantity of a product. Instead a speculator is someone whose core business is to profit through trading and who ultimately seeks to have off-setting physical trades at a profit.

There is often a high degree of resentment or fear directed towards speculation and speculators. Before analysing whether the effects of speculation upon commodity markets are positive or negative, it is worth understanding why this resentment and fear might commonly arise.

In the normal course of events, speculation is profitable¹ if the trader purchases a commodity when the price is low and sells the commodity when the price is high. In other words, speculation is profitable when there are significant price movements and can be most profitable when price volatility is present and a commodity can be re-traded at a profit multiple times in a short period on each change in the direction or the price.

As noted in the introduction to this paper, severe commodity price volatility can cause significant hardship for both the supply and demand side of the market. When there is a significant level of speculation and profits or prices are high this may also be the time when a significant proportion of the available supply of any given commodity is held by ‘speculators’. It is not surprising that there can be a very visceral objection to speculators (i.e. instinctive objection that may not be rational).

There is a very long history of a wide range of different members of society taking vigorous objection to speculations when high prices cause hardship and passions are running high. This can range from populist mob riots² at one end of the spectrum, to, at the other end of the spectrum, a situation in which

¹ Profitable in the accounting sense where the revenues exceed the expenses whether or not the amount gained is an efficient or ‘fair’ return.

² For example the Southern bread riots that occurred during the American civil war which in part targeted speculators or perceived speculators.

normally moderately spoken CEOs of stock market listed multinational companies³ or national political leaders⁴ make public criticisms of market traders.

The defence of the role of speculation and speculators in markets rarely gains as much mass media attention as do attacks on speculation but there is a strong case put in defence of the role of speculation and speculators. The principal contribution that is attributed to speculation is that by arbitrage in time and geography, the activity assists in making markets “deeper” and removing or smoothing market volatility. Secondly, by accepting a degree of market risk, they enable the counterparties (say a grower or a flour mill operator) to avoid that risk.

Undertaking a careful, balanced analysis of speculation can be particularly difficult when derivatives trading is involved because even the financially and economically literate people can find it difficult to understand the nature of an individual derivatives contract let alone how the market for trading multiple derivatives contracts as a whole works and how derivatives trading interacts with physical markets.

Professors Scott Irwin and Dwight Sanders prepared a preliminary study for the OECD which clarifies the role of index and swap funds in agricultural and energy commodity futures markets.⁵

This appendix covers the following:

- What are the characteristics of physical commodities markets, derivatives, derivatives markets and how do they all interact?
- What is the usual business model for speculators and what are the effects of that business model? As we will see, as a general proposition speculation should in fact be beneficial for markets.
- When might exceptional circumstances arise in which speculation could be of concern?

2. Exchange traded commodities markets

Trading in many trade practices markets is undertaken on a bilateral negotiated basis. In other words, a buyer contacts a seller and the two discuss the merits of the transaction and agree the terms between each other. This may work well when the buyers and sellers can contact each other and it is worthwhile to discuss the terms of the transaction such as the merits of the product, delivery location and time, warranty, support services, price and payment terms.

On the other hand, that kind of trading model does not make sense in many (but not all) commodities markets. Commodities are by definition homogeneous or standardised products which are equally attractive to buyers regardless of who produces them and where the producer is located. In these cases, it is usually more efficient to have highly standardised terms of trade (e.g. concerning the description of the grade of quality, place and time of physical delivery and payment terms) and then to provide a mechanism where all buyers and sellers from anywhere in the world can trade with each other. This is commonly

³ For example, on 11 May 2011, the Telegraph newspaper quoted the President of Starbucks, Howard Schultz, as having “attacked speculators for pushing up the price of coffee to a 34-year high”.

⁴ For example in June 2011 President Sarkozy of France expressed a number of concerns about speculators on agricultural markets and later in the month he was joined by Chancellor Merkel of Germany and Prime Minister Papandreou in expressing concerns about speculators on financial markets.

⁵ Irwin, S. H. and D. R. Sanders (2010), “The Impact of Index and Swap Funds on Commodity Futures Markets: Preliminary Results”, *OECD Food, Agriculture and Fisheries Working Papers*, No. 27, OECD Publishing. doi: 10.1787/5kmd40w11t5f-en

achieved through establishing centrally located exchanges in which professional brokers or traders accept and execute trades from buyers and sellers located anywhere around the world.

There are many commodities exchanges around the world who compete with each other or who operate in specialist niches. Prominent exchanges at the international level include the Chicago Board of Trade (which trades in both agricultural commodities and metals and is part of the CME Group that owns and operates large derivatives and futures exchanges in Chicago and New York City as well as online trading platforms), the London Metal Exchange and the Singapore Mercantile Exchange (which trades agricultural and mineral commodities but is particularly well known for trading in oil). However, there are also commodities exchanges located in many emerging countries including several in China, India and even smaller countries such as the Agricultural Futures Exchange of Thailand, the African Mercantile Exchange in Kenya.

On these exchanges, trading is undertaken on a real time basis throughout the opening hours for the exchange with anonymous offers to 'buy' and offers to 'sell' and a transaction occurring each time a trader receives an 'buy' order that can matches the most attractive 'sell' order quoted or vice versa.

Trading in the physical commodity is intuitive and easy to understand in that it usually means that the seller must deliver the product at a fixed time in the near future to a standardised location at a standardised time (or pay a logistics company to do so) from where the buyer takes possession.

However, if all buyers and sellers had to wait until the 'last minute' to buy or sell, it would expose them to substantial risks that the price might rise or fall and this can make it very difficult to run a farming, mining, food distribution or manufacturing business. This is even more important if the buyer or seller is relying heavily on borrowed finance and the financier requires the borrower to have a predictable revenue and cost position. In these circumstances, managing price risk is a significant benefit to both buyers and sellers. This is the role of a derivatives contract.

The simplest derivative contract is a 'futures contract' in which a buyer and seller agree a price today for the delivery of a product in, for example, one year's time. For example, a barley farmer may be concerned that the price of barley next year may fall below the average expected barley price and that this would put the farmer in a difficult financial position. The farmer may wish to sell part or all of their next season's crop at a price that is guaranteed today before any weather or other disruptions start moving the price away from the average expected price.

In comparatively wealthy developed countries it is common for farmers themselves to be given the trading instructions for futures contracts using internet brokers. However, there are also co-operatives and other companies which undertake the exchange trading and which offer to purchase locally or which run 'trading pools' with reasonably stable pricing.

Equally, a large beer brewing company may wish to agree now what price it will pay for the barley it will use over the next year to produce beer. In this case, the grower (or the co-operative or trading company) and the beer producer are natural counterparties and they can mutually obtain substantial benefits from entering into futures contracts.

The New Zealand contribution reports that in 2010 the NZ Stock Exchange launched a dairy futures and options market for the trade in financial products designed to manage risk and smooth out volatility, creating price certainty, transparency and a forward view of market sentiment. It is anticipated that by trading on the futures and options market, dairy participants create price certainty. Although the initiative is very recent the contribution reports that the early signs point towards the market being a success in this respect.

The same occurs in minerals markets where mining companies seek to lock in prices in advance so that they can make long and medium term investment decisions and shorter term decisions on purchasing shipping services or decisions to employ personnel. Similarly, there are a range of parties who seek to lock in their buying prices well in advance – for example a power company may wish to purchase coal now to cover an obligation that they have to sell electricity to consumers over the winter or a copper cable manufacturer or even a cable purchaser who has won a substantial contract to supply cable or build a network.

Futures contracts exist in many varieties, as for every type of grain there are a suite of futures contracts by grade of quality and time of delivery. At any given time, there may be trading going on for contracts in all grades of wheat whose delivery or maturity date is one month, three months, six months or twelve months ahead.

Although the futures contract is the simplest derivative product, there are many other derivatives products. For example, there are contracts in which the agreement is not to sell a particular quantity at a particular time but an *option* (or entitlement without an obligation) for a party to buy a particular quantity of a good at a particular time. This form of contract removes only part of the risk – for example such an option in relation to wheat would protect flour millers from the risk that wheat prices unexpectedly rise because they can exercise the option.

A swap contract is the simplest of these contracts. How this works is that the parties agree a ‘strike price’ of, say, US\$40 per tonne of coal for in six months time. When the contract comes due, if the price is higher (say at \$45) then the seller pays the buyer \$5. This enables the buyer to trade the commodity in the physical market at the going price (say at \$45) and receive \$5 ‘compensation’ from the seller to bring the effective cost for the buyer back to the agreed \$40 strike price. The effective selling price is also \$40 because although the seller earns \$45 through the physical sale of the commodity, the seller has had to pay to the seller \$5 in compensation (i.e. $\$45 - \$5 = \$40$). Of course if the price in the physical market moved in the opposite direction (i.e. down to \$35) then the \$5 compensation payment would travel in the reverse direction from the buyer to the seller and still the effective price paid and received would be \$40 (i.e. $\$35 + \$5 = \$40$).

A final important point to understand about exchange traded commodity products and futures is that they are important not only for the trading that actually occurs on the market but also for the information that an exchange traded market provides to the wider market as a whole. As noted above, not all commodity types are exchange traded and even for those commodities that are exchange traded, a minority of the volume of the product is typically traded ‘on market’. In fact the majority of the volume is usually traded off-market but, importantly, the buyers and the sellers decide what they are willing to pay based on the price that they observe being quoted on the exchange traded market. In most cases a buyer and a seller conducting a private negotiation are able to choose to trade on the exchange if they do not receive the price they want bilaterally and therefore the bilaterally traded price is likely to be close to the exchange traded price. In many cases a bilateral contract may in fact not specify a specific price but instead the parties will enter a contract for the regular delivery of volumes of a commodity over an extended period at prices equal to the prices quoted on the exchange on the day of agreed delivery (plus or minus a fixed margin reflecting delivery or other deal specific costs).

Unlike exchange traded deals, bilaterally negotiated off-market contracts for the real time physical delivery of a commodity, futures contracts and contracts for difference can be enormously varied and constantly undergoing innovation (and the ability for the contract to be clearly expressed). For example two parties might enter into a ‘collar’ contract (i.e. one in which they agree to sell a quantity of product at the going exchange quoted price subject to a particular maximum price or down to a particular minimum price). That collar contract may also be contingent on a particular event or events. For example the buyer

and the seller's businesses may be affected by the weather. In barley, for example, warm weather may both increase crop yields for the grower and increase beer sales for the purchaser of barley and therefore it may make sense to make the contractual provisions only come to life if the temperature is higher than, say, 25 degrees for more than 35 days throughout the summer. If the temperature does not reach this threshold then the deal is effectively automatically cancelled. However, if the temperature is higher than 25 degrees the contract will apply and this is useful to both parties who will be growing and purchasing larger quantities as a result.

3. The usual business model of speculators

Explained above is the role of parties who produce commodities or purchase them for use in their businesses. These are referred to as "natural counter-parties".

However, exchange traded markets are likely to be very 'clunky' and not work well if the only participants in these markets are parties who buy or sell only by reference to the immediate physical needs of their own business. It may be that farmers do not wish to sell at the times and in the quantities that food processors wish to buy. If sellers enter the market in greater volumes at particular times than buyers, prices will fall significantly and vice versa.

To some degree producers and purchasers may be able to delay or bring forward their trades to provide a better match between sales and purchases. However, substantial time differences may expose these parties to significant risks that are not part of their core businesses and which they do not wish to bear.

Consequently, there is an important role for pure traders or speculators to 'fill in the gaps' or enable the original physical sellers and ultimate physical buyers who may enter exchange markets at different times to 'find' each other. Traders and speculators do this by:

- buying whenever spot or futures contract prices are 'low' (relative to the price the trader; expects to re-sell for);
- selling whenever they are 'high'; and
- the difference is the trader's reward.

In this case 'low' and 'high' simply means that the trader is buying at a price that is lower than the price the trader expects to be able to sell the product for. If prices have already been high and the trader expects them to remain so, then the trader may buy whenever there is even a small easing in the price.

There are labour costs and overheads for engaging in trading and there are costs of holding assets and guaranteeing short sold exposures. Trading usually involves taking risk because price movements are unpredictable. Therefore, speculation is only an attractive business activity if high gains on some trades expunge inevitable losses and costs on other trades. Therefore the existence of accounting profits does not necessarily indicate that traders earn excess or economic profits in net terms over time.

In that narrow sense, the financial markets may be considered to have brought about volatility earlier than might otherwise have been the case. However, by doing so, the price rise (or fall) provides much early signals to buyers and sellers to adjust their consumption patterns in a way that should ameliorate the shortage (or glut) and, as a result, in the longer term the price path should be smoother.

There are labour costs and overheads for engaging in trading and there are costs of holding assets and guaranteeing short sold exposures. Trading usually involves taking a controlled degree of risk because price movements are unpredictable. Therefore, speculation is only an attractive business activity if high gains on some trades expunge inevitable losses and costs on other trades. Therefore the existence of accounting profits does not necessarily indicate that traders earn excess or economic profits.

In return for the profits they earn, speculators provide value to the market as a whole and buyers and sellers in particular. They commonly:

- adopt risks that others do not wish to take;
- analyse information and by their ensuing bids or trades quickly convey efficient pricing signals to the market; and
- absorb capital and other holding costs on long positions and fund the cost of prudential arrangements on short exposures.

In summary, therefore, the basic business model of speculators is to:

- buy when buyers are absent and growers are exposed to weak prices (and therefore dampen price decreases and ameliorate the situation for growers); and
- sell when prices are high and food processors are exposed to high prices (and therefore dampen price increases and ameliorate the situation for buyers).

In both cases, the trader or speculator has assisted the market to cope with an over-supply situation or a shortage situation. Therefore, even if sellers resent having to make sales to speculators when prices are low and buyers resent having to make purchases from speculators when prices are high, at least the growers and producers have someone to trade with. It may seem that speculators are making profits ‘off the back of others’ or profiting when others are suffering but speculators earn a reward for the risks they are taking on and for the market smoothing service they provide.

A question naturally arises, however, as to whether traders can expect to extract greater profits than the value they bring to society. In 1900 this question and the necessary anterior question of whether market movements could be predicted by speculators occurred to the French mathematician, Louis Bachelier. His paper “The Theory of Speculation” provided a detailed algebraic explanation of how it was not possible to predict future price movements and, from this, that speculators could profit (or not) by chance but they could not systematically extract excess returns. No further substantial work was done on this question until the 1960’s when his paper resurfaced and triggered a vigorous debate about what might be the exceptions to Bachelier’s conclusions (discussed in the next section).

4. Exceptional circumstances in which speculation could be of concern

The previous section explains how trading by speculators in ordinary circumstances is socially or economically useful (even if it is not always popularly understood as such). Nevertheless there are some exceptional circumstances in which trading and speculation may be able to extract value from the market without producing a corresponding social value.

The first example arises in a short run context where immediate, partially thought-out reactions by traders to the release of time sensitive information results in prices departing from the fundamentals of a fully and fairly rationalised valuation. Within the very short term markets can often have a ‘herd’ mentality

that can rise from ‘group think’ where people influence the way each other understand and interpret information particularly where detailed information cannot be fully digested before trading takes place. There are two observed examples – either under-reaction in the face of information that should substantially shift the market but instead the market appears to be in self-denial (e.g. asset bubbles); or the reverse – the market appears to over-react to the headline message (e.g. the effect on airline manufacturing stocks after terrorist attacks on air travel or the effect on oil prices of the declaration of war in an oil producing country). This is often what is being referred to as market sentiment.

Some writers⁶ consider this and related phenomena to be significant but other researchers who have attempted to measure whether the phenomenon is significant report that the effect is so minor that it is less than the usual spread between the prevailing bid and ask prices.⁷ In other cases, these sorts of anomalous market movements do appear to enable profitable speculation for a limited time before analysts and specialist financial press identify them and once they become widely known and then they quickly dissipate.

The second example (‘market manipulation’ construed narrowly) arises because, as discussed in the previous section, ‘on-market’ exchange trading usually accounts for only a minority of the trade in a particular commodity. The majority of commodities trading occurs bilaterally with the price paid to be the price quoted on the exchange (plus or minus a fixed margin for deal specific costs). In other words, the ‘on-market’ trade is like the tip of an iceberg with a much vaster quantity of trade affected at the price determined by the trade of a comparatively very small quantity of the commodity concerned.

The same parties are often bi-lateral traders and on-market traders. They may have entered into very large bilateral agreements and also be a participant on the exchange. In these circumstances, situations can arise in which it is in a party’s interest to make an unprofitable or irrational on-market trade very close to the end of the trading period in order to change the amount paid on bilateral contracts. For example, if a party has agreed bilaterally to sell 3 million tonnes of coal or of wheat at the price quoted by the exchange at the close of trade, it may provide an incentive to drive the price up by buying ½ million tonnes of the same commodity on market in the minutes running up to the closing bell to push the price up by, say, \$2.00 per tonne. The effect for the trader is that they may have to pay \$2.00 more than the fair price for ½ million tonnes traded on-market (i.e. they suffer an inflated cost of \$1 million) but under their bilateral contract they will receive an extra \$2.00 for all the 3 million tonnes to be supplied (i.e. they will inflate their bilateral sales revenue by \$6 million).⁸

In extreme cases, the same party may enter a thinly traded exchange traded market both as a buyer and a seller through two different brokers, or even the same broker, placing orders to buy and to sell at the same inflated or depressed price which means that there is no real sale yet the quoted price quoted at the end of the day is higher or lower than it would otherwise have been.

The greater the level of competition amongst traders, the more difficult it is for such manipulation to work. However, it will not be possible for competition to be sufficiently enhanced in time and many

⁶ E.g. “Irrational Exuberance”, Shiller (2000); Dreman in Forbes , 5 June 1996.

⁷ “The Efficient Market Hypothesis and Its Critics” Burton (2003); “Many can be explained away. When transactions costs are taken into account, the fact that stock prices tend to over-react to news, falling back the day after good news and bouncing up the day after bad news, proves unexploitable: price reversals are always well within the bid-ask spread. Others, such as the small-firm effect, work for a few years and then fail for a few years. Others prove to be merely proxies for the reward for risk taking.” *Frontiers of Finance Survey*, Economist 10 September 1993

⁸ Similar conduct has been observed in the past for example by Enron trading in natural gas.

countries have specific forms of regulation and regulatory agencies responsible for policing exchange market manipulation.

The third example arises when a government wishes to maintain, or move, a market price to a different level than the market would otherwise settle at. For example, it has often been the case that governments ‘peg’ their currency (or less often a commodity product such as the trading by the Australian Wool Board in the 1980’s) to a particular price for broader social policy reasons. Such broader policy reasons might include a desire to prevent or delay the need for socially painful adjustment to take place within a country as a whole or a specific industry. The government may, for example, wish to first put in place social security measures or stimulate alternative industries for workers who will lose their jobs when markets move.

In these circumstances, speculators (correctly or otherwise) may predict that the government will only be able to hold the price level for a limited period before its resources⁹ or tolerance for spending money to hold a market price is exhausted and at the point the government ceases to support the market price it will move. In this case it will be attractive for traders to trade large volumes of the currency or commodity today on the basis that the government will eventually fail to hold the peg. If they do not have any physical quantities of the currency or commodity to sell, they may even enter into substantial futures contracts to sell quantities of the currency or product that they have not yet purchased (i.e. short selling).

For example, if a government is trying to keep the value of a currency or product above the level at which the market would settle, then speculators will have an incentive to heavily sell the product, thus requiring the government to put even more resources into buying the currency or product. In this situation a ‘breaking point’ may be reached sooner than otherwise – or it may even be the case that a ‘breaking point’ is reached when it would not be reached otherwise.

In this case, the traders will usually have made the markets reach an efficient level more quickly (and in that sense their actions can be viewed as socially desirable) but government resources will be wasted and the broader social policy aims sought to be achieved will fail.

For completeness, a fourth series of related situation in which speculation can be socially damaging is relevant to mention but it relates specifically to stocks rather than non-commodities. Speculative trading can occur in industries such as banking and insurance (and in some cases non-finance industries) where a company’s prospects are partly dependent upon its stock price rather than the usual causal relationship in which the company’s business performance drives the stock price. Banking and insurance stocks (which inherently have a high degree of equity leverage), and some other companies who adopt capital structures in which significant debt financing is dependent on the stock price, dependent on company specific or market-wide stock market confidence. It is also notable that the number of shares on issue for a normal company is finite and therefore susceptible to being affected by large trading positions. It is possible in these circumstances, particularly during times where there is a systematic low in market confidence, for selling side speculation to shatter confidence in particular stocks and trigger an inability for an otherwise viable company to sustain its solvency position. In these situations, short selling combined with creating a ‘run’ on the firm can bring about a self fulfilling, and potentially profitable, prophesy of doom.

None of the above cases directly concern competition authorities. However, there are two cases (sometimes associated with elements of the cases above) in which competition issues do arise. In a market in which physical trading quantities are small relative to the size of the trading positions of producers

⁹ In the case of currency interventions, the resources are normally limited by a country’s central bank’s foreign reserves (including gold); there is an array of academic literature that has studied ‘speculative attacks’ in such context.

and/or speculators, it may be the case that an extremely large trader, or an oligopoly or cartel of a few traders, could ‘corner’ the market through speculation.

Consider a market in which there are few sellers – such as a concentrated market for a particular mineral or a market for a crop (say onions) where a drought has caused a crop to fail. It may be that one very large trader or a small number of traders who have a significant proportion of the available supply may have an incentive to purchase even more of the product in the short term from the few available sources to accumulate a sufficient volume of the good that the trader or traders thereby gain market power.

Having purchased the only significant competing stocks, the trader may then constrain the volume resold to drive the price higher. This may be achieved by stock-piling a proportion of the commodity even though the price is already high or even destroying some product (so that it does not leak back onto the market) or using disposing of it in a sub-optimal use (for example using food grade grain for animal consumption).

Of course if ‘market cornering’ is achieved through traders entering into agreements with each other to withdraw a product from the market or sell it only at an inflated price, the competition authority may be able to take an anti-cartel enforcement case. It may be that a similar result is achieved through contracts between traders and the producers of the product (for example, an agreement by a significant producer to exclusively sell an entire crop to a particular trader who already has a significant holding of the product). The latter kind of agreement is harder to detect because traders can be customers or competitors of parties who are producers of, or customers for, a commodity.

Although such cases are certainly theoretically possible, in practice such cases are very difficult to find because the necessary conditions for market cornering are most unlikely to arise. Most commodity markets are not concentrated and any attempt to monopolise in this way would be defeated though the trading activities of a large number of competing parties. In this case competitors include, of course, actual or threatened trans-shipments into the market from another location or imports from other countries, if they are possible. Competitive responses by customers (such as switching to a different foodstuff) are also relevant.

In most cases it takes very substantial resources to ‘corner’ the market relative to the gains that could be made and there is usually a significant risk that the strategy will fail. In particular, if the initial sellers of a product become aware that a trader or traders are employing a market cornering strategy, they have an incentive not to sell early and instead wait to sell their product at a higher price after the market has been cornered. In other words, if the market cornering strategy is apparent (or suspected) it will usually defeat itself.

So in larger national or internationally traded markets where it may be difficult to detect who is buying up a commodity, ‘cornering’ will usually be impossible due to the low levels of concentration and the very substantial resources required to corner a market. Indeed increased international trade and globalisation make such strategies less likely (but potentially more rewarding).

In smaller isolated markets, where the strategy might initially seem more plausible, it will often be apparent that someone or some people are trying to corner the market and the strategy will be self defeating. Further, in cases where market-cornering profits would cause real hardship, traders often say that they have foregone a profit maximising strategy (at least in its purest form) and to make products more readily available.¹⁰ As a safeguard, many countries have a reserve framework of ‘price gouging’ rules where locally isolated markets supply essential products.

¹⁰ Documentary : Le Tunnel - le secret du siège de Sarajevo (aired 23 November 2009).

Prohibiting ‘price gouging’ can be thought of as a complement to, but distinct from, competition laws. A necessary element of an abuse of dominance or an agreement that substantially lessens competition is usually that any excessive price (i.e. one that is significantly above cost) will be enduring and that given a reasonable time the market will not self-correct. It is important that competition law only intervenes when there is an enduring market effect because otherwise the authorities would be in a state of almost constant intervention in many markets. In other words, in normal circumstances it is not possible for a corner ice cream store to monopolise the market for ice-cream permanently, but, if at all, only temporarily, perhaps on a particularly hot Sunday afternoon.

By contrast, price gouging laws are usually only breached when re-trading is observed over a short run period and this has led to a significant short run price increase over the ‘normal’ price – which is usually defined as an average price over time or a price that was observable immediately prior to the supply disruption. In other words, the ‘normal price’ benchmark is *not* the same as a cost recovery price in an abuse of dominance case.

European and US price gouging laws are discussed in *Excessive Prices (2010, OECD)*. In the context of the OECD’s 2012 Global Forum on Competition, several other jurisdictions have also indicated that they have similar laws. For example, the Philippines has used similar powers in relation to flour in 2010:

“DTI filed separate Complaint-Affidavits against the 11 flour millers before the DTI-National Capital Region for violating Section 5(2) of the Republic Act 7581 or the Price Act defining and prohibiting profiteering as one of the illegal acts of price manipulation. *Profiteering is defined as the sale or offering for sale of any basic necessity or prime commodity at a price grossly in excess of its true worth.*

Preliminary Orders were sent to eleven flour millers ordering them to suspend the distribution and refrain from selling flour at the ex-mill price ranging from P770.00/bag to P790.00/bag and to reduce it to P630.00-P680.00. DTI also conducted ocular inspections at the plants of flour millers.”

There have been a limited number of competition law investigations. There is competition between firms that operate exchange markets themselves such as the London Metal Exchange and its competitors; as well as competition amongst parties actually trading physical and financial products. The former (the operation of exchanges) exhibits network effects because the ‘deeper’ the volume and diversity of buy and sell orders placed on any one market, the more efficient the market and therefore attractive it is to participate in that market. Therefore, there have frequently been competition complaints or investigations. For example, there have been concerns expressed about the provision of access to some aspects of systems operated by exchanges although those investigations have not, on the whole, led to findings of contravention.¹¹

Another common competition concern is in relation to what could be called ‘reverse information cartels’ or an abusive refusal by a dominant firm to supply information. Usually competition authorities are concerned if price and volume information is shared too readily between competitors and this facilitates cartel conduct.¹² However, the reverse concern can arise in exchange traded markets and even privately traded markets. There is a long history of competition concerns where parties that operate exchanges, or

¹¹ See, for example, the UK Office of Fair Trading’s investigation into the London Metal Exchange.

¹² Information Exchanges Between Competitors Under Competition Law

bilateral trading partners, withhold information from other traders about the prices and quantities of their trade in commodities, stocks or derivatives.¹³

The issue is that if certain large traders who are personally involved in a significant portion of the market's trading can 'monopolise' information, and put themselves in a position to profit relative to smaller investors who may not be able to accurately detect market movements in real time.

European Commission (2011)

In 2011 the Commission commenced an investigation focusing on the financial information necessary for trading CDS. The inquiry targeted 16 banks that act as dealers in the credit default swap market who give pricing, index and other essential daily data only to Markit, the leading financial information company in the market concerned. The Commission indicated that this may be the consequence of collusion between them or an abuse of a possible collective dominance and may have the effect of foreclosing the access to the valuable raw data by other information service providers.

In October 2011, the European Commission confirmed publically that the previous day it had commenced undertaking unannounced inspections (i.e. 'dawn raids') at the premises of companies trading financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR) in a range of European countries. The Commission stated that it had concerns that the companies concerned may have violated the provisions that prohibit cartels and restrictive business practices and at the time of writing, the investigation is ongoing.

One approach to the potential concern with reverse information cartels is to mandate the public provision of a minimum level of data¹⁴. However, that approach is controversial both because it is the reverse of the usual concern that too much information may be being shared between competitors and because exchanges need to recover their costs and earn a return for the 'market makers' services they provide. As a matter of public policy, it is not clear whether the most efficient approach to the need for exchanges to recover costs and earn a fair return is for them to raise revenue from:

- transaction fees with the free dissemination of information;
- the sale of information without any transaction fees;
- tying the provision of information to the purchase of trading services to prevent free riding; or
- a combination of these charging mechanisms.

In all cases a question arises as to how to distinguish between the appropriate level of fees and restrictions to enable the recovery of efficient costs and a fair return and what would constitute an inflated price or excess restriction.

¹³ This can arise as an abuse of dominance concern for example where a prominent national stock exchange limit access to the information about trading on its exchange – see for example *Pont Data Australia v ASX Operations* (1990) 21 FCR 285, or cartels of traders who agree not to share information with others – see the example of the European Commission investigation in the box below.

¹⁴ Indeed the European Commission is consulting on proposed regulations that would require the provision of such data; although this is conceived of as a much broader policy initiative than simply one concerned with competition. The other considerations are to bring safety and transparency to derivatives trading.

5. Conclusion

As a general proposition, speculation and speculators in markets tend to assist in stabilising prices by providing liquidity and speeding up price discovery, even though they may at times exacerbate price volatility in the short run. There have also long been repeated concerns expressed that speculation is most profitable (reaping potentially excessive profits) when prices have undergone substantial price swings; however, these swings would have often been even greater if speculation had not dampened them.

Despite this, there have long been repeated concerns expressed about speculation probably because speculation is most profitable when prices have undergone substantial price swings when other market participants are under most pressure. The thesis of this Appendix is that these concerns are largely unfounded because in most cases there would have been even greater price movements if speculation had not been present to ameliorate the magnitude of the movements.

There are only a small number of circumstances in which speculation may be damaging to societal welfare. One notable case is in respect of price gouging practices in relation to basic food items and other necessities during abnormal trading conditions where small parts of the market become isolated during emergencies. Specific profiteering or price gouging laws can be framed to address this issue but the conceptual underpinning and elements of proof should be distinguished from those that apply in a competition law case.

When it comes to conventional competition law cartel or abuse of dominance cases in relation to exchange traded markets or speculation, these are rare indeed and often concern horizontal agreements or alleged abuses of dominance to limit the availability of information about the prices and quantities traded so that particular parties can appropriate the value of this information to the exclusion of their competitors.

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NOTE DE RÉFÉRENCE

*Par le Secrétariat**

Exposé synthétique

Les pouvoirs publics accordent une attention particulière aux marchés de matières premières. De nombreuses denrées alimentaires et agricoles sont des produits essentiels et les consommateurs seraient incapables de survivre s'ils n'avaient pas accès aux produits alimentaires de base à des prix abordables. Dans de nombreuses contrées, les combustibles pour cuire les aliments et se chauffer peuvent également être une nécessité.

Les matières premières minérales retiennent aussi l'attention des pouvoirs publics. L'octroi de licences d'exploration et d'exploitation de gisements minéraux revêt une importance cruciale pour les pays qui dépendent de la vente de denrées minérales ou qui retirent un avantage concurrentiel majeur d'intrants de matières premières bon marché à partir duquel ils pourront construire une économie diversifiée.

Depuis 2008, les cours des matières premières ont connu des hausses significatives, avant de subir des variations importantes et imprévisibles. Ces évolutions sont le résultat combiné de divers facteurs de court et de long terme, dont certains sont probablement permanents ou récurrents.

« [L]es inondations au Pakistan et en Australie, les incendies en Russie, la sécheresse en Amérique latine et en Chine ont mis en péril les récoltes. Par ailleurs, les conflits géopolitiques et les soulèvements des peuples de certains pays arabes principalement producteurs de pétrole expliquent pour une grande part les dysfonctionnements observés sur le marché des produits pétroliers. »

« Du côté de la demande, la tension est également à son comble. La consommation que ce soit en produits énergétiques ou autres est tirée par la croissance exponentielle des pays émergents. »¹

Toute variation significative des cours des matières premières soulève des préoccupations parmi les producteurs ou les consommateurs de denrées ; des fluctuations marquées, imprévisibles et fréquentes, dans un sens et dans l'autre (c-à-d une volatilité élevée), peuvent générer des inquiétudes importantes pour les deux côtés du marché simultanément. La réaction immédiate consiste souvent à imputer à la spéculation les difficultés induites par les variations de cours sur les marchés ; il est cependant beaucoup plus probable que la spéculation soit symptomatique d'un problème du côté de la demande ou de l'offre et qu'elle constitue même une solution partielle à ce problème, au lieu d'en être la cause.

Il ressort notamment de ce document que, sur la durée, l'application du droit de la concurrence et les efforts de sensibilisation des autorités de la concurrence peuvent contribuer à ce que les marchés de matières premières assurent aux producteurs des moyens d'existence pérennes et aux consommateurs des produits à des prix abordables. L'élimination des obstacles concurrentiels au sein des marchés peut également aider les producteurs, les transformateurs et les consommateurs à réagir aussi vite et sagement que possible face aux chocs de prix.

* Ce document a été réalisé par Nicolas Taylor et Michal Petr, Secrétariat de la Division de la concurrence de l'OCDE.

¹ Contribution du Ministère des Affaires Économiques et Générales (Maroc), DAF/COMP/GF/WD(2012)10.

Les problèmes de concurrence qui concernent la production ont habituellement trait aux politiques publiques plutôt qu'à des infractions commises par des entreprises, parce que la production de matières premières est la plupart du temps une activité fortement concurrentielle. Les marchés en amont (production d'engrais, etc.) et en aval (transformation des matières premières, etc.) comptent fréquemment un nombre plus réduit d'intervenants et les infractions au droit de la concurrence se rencontrent beaucoup plus souvent sur les marchés à forte concentration. La superposition des problèmes de concurrence à différentes étapes de la production et de la transformation des matières premières est particulièrement préjudiciable à la performance économique.

Les autorités de la concurrence sont toutefois souvent tenues d'intervenir beaucoup plus rapidement.

En cas de variations significatives des cours dans un laps de temps réduit, il est fréquent que les pouvoirs publics décident que la politique de la concurrence ne pourra à elle seule fournir une solution assez vite, si les variations de cours paraissent trop importantes pour que les producteurs ou les consommateurs puissent y faire face.

L'action des pouvoirs publics peut revêtir des formes très diverses et, dans certains cas, les dispositifs mis en œuvre peuvent avoir des effets pervers pour la concurrence et causer un préjudice important à plus long terme. C'est pourquoi de nombreuses autorités de la concurrence s'efforcent de sensibiliser les autres administrations publiques pour les aider à choisir entre les différentes options qui s'offrent à elles (ou les dissuader d'intervenir si toutes sont préjudiciables) et à instaurer des mécanismes pour qu'après le choc de prix les marchés apprennent à se corriger eux-mêmes à l'avenir.

Ce document explore de façon plus détaillée les sujets que nous venons de mentionner et proposent en conclusion certaines suggestions à l'intention des autorités de la concurrence qui pourront être débattues dans le cadre du Forum mondial sur la concurrence de 2012 de l'OCDE, quant au rôle constructif qu'elles pourront jouer pour aider leur société à faire face aux défis que posent les variations imprévisibles et importantes des cours des matières premières.

1. Introduction

Est une matière première tout produit en vrac présentant une homogénéité (ou uniformité). Les matières premières sont quasiment toutes des produits primaires non transformés ou des produits qui n'ont subi qu'une transformation initiale, tels que : (i) les denrées agricoles en vrac (riz, blé, etc.) et (ii) les minerais (minerai de fer, bauxite, charbon, etc.).

Figurent aussi parmi les matières premières des produits qui n'ont subi qu'une transformation mineure, comme la farine de blé ou l'aluminium de bauxite. D'autres produits comme le lait, la laine et le bois sont aussi des denrées qui ont généralement subi une transformation limitée avant d'être couramment négociées en vrac.

En vue de faciliter les discussions dans le cadre du Forum mondial sur la concurrence le 16 février 2012, ce document fournit un aperçu historique des variations de cours sur les marchés des matières premières agricoles et minérales et de leurs causes apparentes. Il identifie en outre la nature des obstacles à l'efficacité des marchés provenant du secteur public ou du secteur privé. Ce document contient par ailleurs une discussion des différentes approches fréquemment adoptées par les pouvoirs publics face à des marchés de matières premières en crise et, enfin, une analyse de la façon dont les autorités de la concurrence peuvent concourir à l'obtention d'un résultat optimal à court et à long terme pour les filières locales de production et de consommation.

A l'issue du Forum, l'OCDE envisage de synthétiser et de publier les stratégies d'intervention en amont et en aval qui auront été suggérées dans le cadre des discussions.

Ce document est structuré de la façon suivante :

- la section 2 contient une analyse des variations de cours des denrées agricoles et minérales à court et long terme et de leurs causes ;
- la section 3 traite de différentes notions pertinentes pour les marchés de matières premières, telles que l'importance du stockage et des échanges interrégionaux, les implications pour le droit et la politique de la concurrence des caractéristiques de la chaîne d'approvisionnement des marchés de matières premières, le rôle de la spéculation sur les marchés de matières premières et l'interaction entre la politique de la concurrence et la politique des échanges ;
- la section 4 présente diverses initiatives d'application du droit de la concurrence et actions de sensibilisation conduites par les autorités de la concurrence ;
- en conclusion, la section 5 propose plusieurs suggestions de débat sur les rôles les plus constructifs que peuvent jouer les autorités de la concurrence pour aider leur société à faire face aux défis que posent les variations imprévisibles et importantes des cours des matières premières.

2. Les variations des cours des matières premières et leurs causes

2.1 Cours et volatilité des denrées agricoles et alimentaires

Les cours des denrées alimentaires et agricoles ont culminé aux alentours de 2008. Après avoir atteint leur point culminant, ils sont généralement restés plus élevés qu'auparavant et ils ont été volatils. Lors du sommet du G20 de novembre 2010, les chefs d'État ont invité l'OCDE, ainsi que d'autres organisations internationales², à soumettre au G20 les options qu'elles auront élaborées pour mieux atténuer et gérer les risques associés à la volatilité des cours des matières premières, sans introduire de distorsion dans le comportement des marchés et en poursuivant l'objectif ultime de protéger les plus vulnérables. Il s'en est suivi, en juin 2011, la publication d'un rapport intitulé « *Price Volatility in Food and Agricultural Markets: Policy Responses* » (ci-après le « **Rapport** »)³.

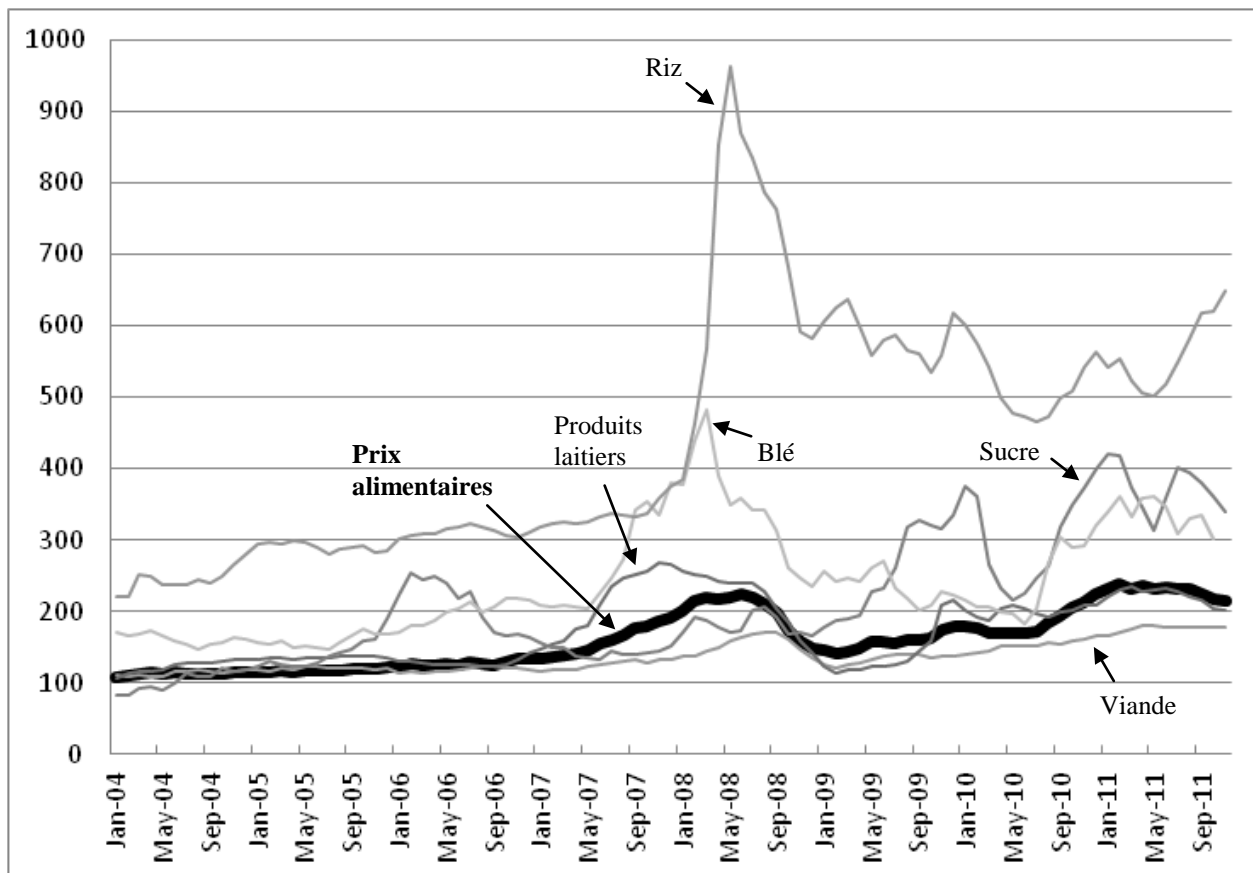
Le Rapport explique que la « volatilité » désigne des variations de cours importantes sur la durée. L'Annexe A du Rapport contient la définition technique de ce terme issu de la méthodologie statistique. Ce terme évoque toutefois plus fréquemment dans le langage courant l'appel à une intervention des pouvoirs publics face à une flambée des prix affectant les consommateurs ou à un effondrement des cours amputant considérablement les revenus agricoles.

Comme le montre le **Graphique 1** (emprunté au Rapport et actualisé), on enregistre depuis 2006 une volatilité exceptionnelle. Les cours des denrées ont fortement augmenté en 2006 et 2007 pour culminer au second semestre 2007 pour certains produits et au premier semestre 2008 pour d'autres ; dans certains cas, la hausse entre le cours moyen de 2005 et le cours le plus haut atteint plusieurs centaines de points de pourcentage. Les prix ont ensuite considérablement diminué au second semestre 2008, tout en restant supérieurs aux niveaux initiaux. Les tensions ont réapparu en 2010 et, début 2011, l'indice des prix de la FAO avait rejoint le sommet de 2008.

² FAO, FIDA, FMI, CNUCED, PAM, Banque mondiale, OMC, IFPRI, Équipe spéciale de haut niveau sur la crise mondiale de la sécurité alimentaire.

³ On trouvera un lien vers le Rapport sur le site Internet du Forum mondial sur la concurrence de 2012 de l'OCDE www.oecd.org/competition/globalforum.

Graphique 1. Indice mensuel des prix des denrées agricoles (2002-04=100)

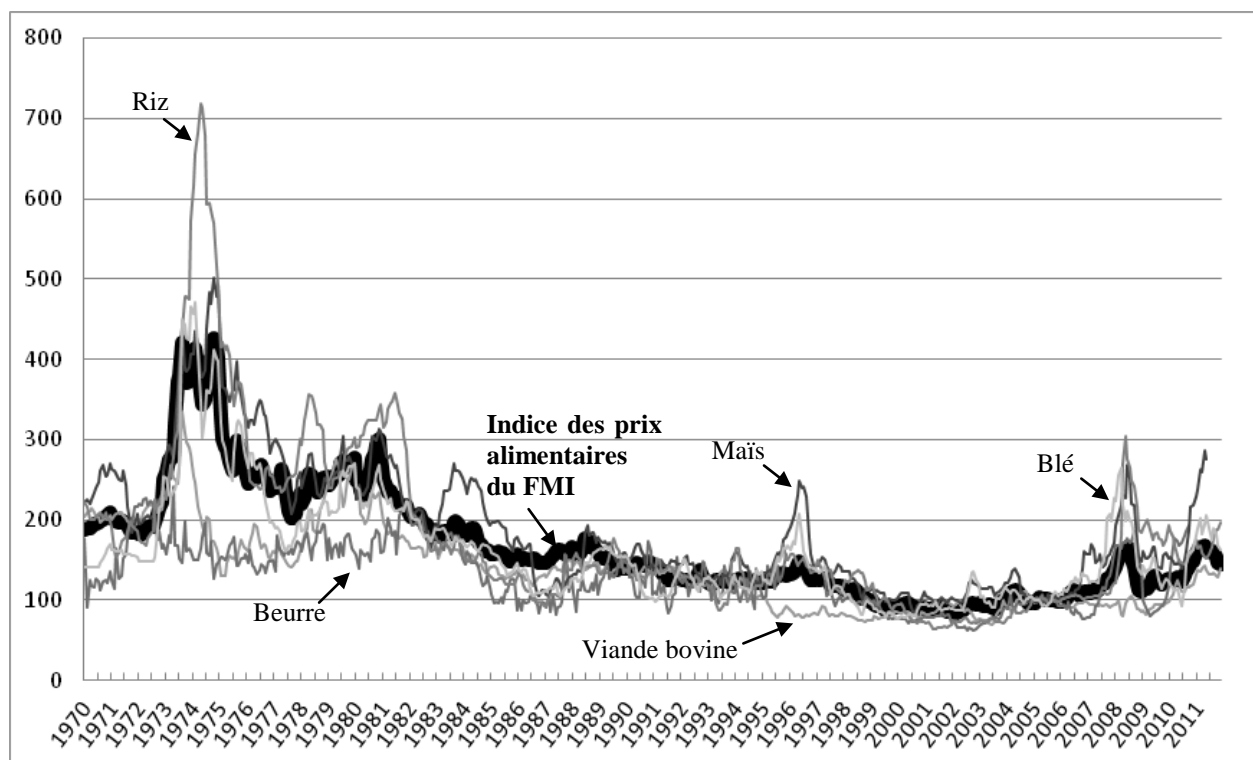


Source : Indice mensuel de la FAO.

Le Rapport cible en particulier les variations de cours importantes et *imprévisibles* pour les producteurs, les consommateurs et les consommateurs. La volatilité des cours est particulièrement préoccupante lorsqu'elle induit un comportement excessivement prudent qui fausse les décisions d'investissement et peut conduire par exemple à la thésaurisation des denrées alimentaires. Ces réserves peuvent manquer aux consommateurs en période de hausse des prix et il peut même arriver qu'elles se gâtent et soient à terme irrémédiablement gâtées. En revanche, les évolutions de prix conformes à des tendances établies reflétant les fondamentaux de marché ou une saisonnalité prévisible ne posent pas de problèmes de ce type.

Sur le long terme (cf. [Graphique 2](#) ci-après), on n'observe pas d'accroissement de la volatilité des cours mondiaux des denrées agricoles ; la volatilité est toutefois plus importante depuis 2000 que dans les années 80 ou 90.

Graphique 2. Prix des denrées agricoles en termes réels (2005=100)



Sources : Bibliothèque électronique du FMI (eLibrary), excepté pour le riz (Secrétariat de l'OCDE).

Le Rapport explique pourquoi les cours des denrées agricoles sont traditionnellement volatils :

- la production agricole varie d'une campagne à l'autre en raison des chocs naturels, comme les conditions météorologiques et les infestations ;
- l'élasticité de l'offre et de la demande par rapport aux prix est faible, en tout cas à court terme. Pour rééquilibrer l'offre et la demande après un choc d'offre, des variations de prix importantes sont donc nécessaires pour stimuler l'offre ou pour modifier la configuration de la demande ;
- enfin, la faible réactivité de l'offre aux évolutions de cours peut induire des ajustements cycliques qui renforcent le degré de variabilité des marchés concernés.

Les tendances que nous venons de décrire caractérisent les cours mondiaux. Les niveaux de prix et le degré de volatilité peuvent différer considérablement d'un lieu à un autre à un moment donné. L'influence des cours mondiaux sur les marchés nationaux dépend de leur degré d'intégration. Les mesures commerciales (comme les droits à l'importation ou les interdictions d'exportation) et la structure des marchés déterminent dans quelle mesure les marchés nationaux reproduisent les variations de cours des marchés mondiaux. Cet aspect, qui revêt une importance cruciale pour les autorités de la concurrence, occupera une place centrale dans ce document et dans les discussions qui se dérouleront dans le cadre du Forum mondial sur la concurrence.

Le Rapport identifie certains facteurs déterminants pour le niveau sous-jacent et pour la volatilité des prix alimentaires :

- en 2050, le monde comptera 9 milliards d'habitants et les revenus auront considérablement augmenté dans les pays émergents et les pays en développement, induisant une augmentation de la demande d'aliments comprise entre 70 % et 100 % ;
- dans les pays de l'OCDE et ailleurs peut-être également, les politiques nationales ont largement favorisé la production de biocarburants. Le Rapport recommande aux pouvoirs publics d'arrêter de subventionner ou de rendre obligatoire la production ou l'utilisation des biocarburants. Cela ne devrait toutefois pas empêcher la demande de croître significativement ;⁴
- la volatilité des denrées agricoles est de plus en plus corrélée à celle des prix pétroliers, que ce soit imputable à l'utilisation des récoltes pour les biocarburants ou pour les aliments ou au fait que les produits pétroliers sont des intrants directs ou indirects dans la production agricole ;
- on s'inquiète en outre de ce que le changement climatique n'occasionne une fréquence accrue des événements extrêmes (sécheresse, canicule, inondations, etc.) qui mettent en péril les récoltes dans les régions concernées ;
- il est probable que la faiblesse des stocks par rapport à l'utilisation et les incertitudes quant à l'ampleur des réserves dans certaines parties du monde contribuent à la volatilité (à l'instar de ce qui aura pu se passer en 2007/2008).

Le Rapport montre qu'en 2007 – 2008, l'action des pouvoirs publics (les restrictions à l'exportation et le stockage des denrées, en particulier) a contribué à accroître l'amplitude des variations de cours et, dans certains cas, a provoqué des hausses de prix que les fondamentaux de marché ne peuvent autrement expliquer ; en outre, les intervenants privés et publics ont constitué des réserves ou anticipé leurs achats en réponse à la nervosité générale des marchés.

Le Rapport conclut que même si l'on ne peut prédire avec exactitude l'importance des prochaines hausses de prix et de la volatilité future, il existe une probabilité élevée de hausse des prix réels et d'accroissement de la volatilité à l'avenir. Il propose par conséquent un ensemble de recommandations à l'intention des pouvoirs publics en vue de réduire la volatilité future des prix et d'en atténuer les conséquences.

Il note que l'intégration plus poussée des marchés mondiaux et régionaux, l'élaboration croissante des mécanismes de sauvegarde et l'amélioration de l'environnement concurrentiel peuvent stimuler les volumes d'échange et attirer davantage de fournisseurs et d'acheteurs sur les marchés aujourd'hui très étroits. Dans la mesure où ce sont les pays en développement qui recèlent le plus fort potentiel d'accroissement de l'offre, il est indispensable d'investir dans ces pays pour renforcer la productivité de l'agriculture et la pérenniser.

2.2 Cours et volatilité des denrées minérales

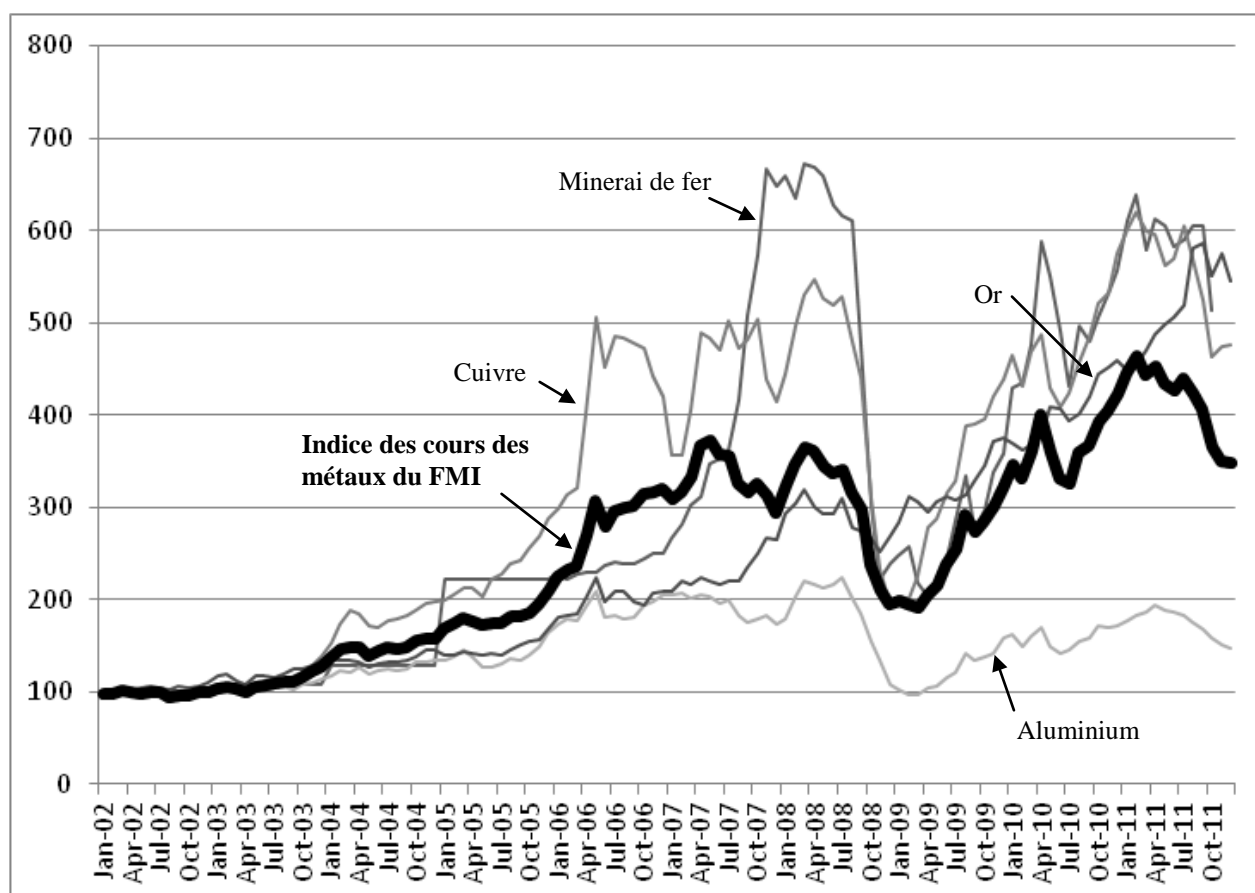
Les denrées agricoles et minérales présentent certaines similarités. Elles s'échangent toutes deux sur les marchés mondiaux, tout en connaissant des variations de cours locales distinctes. A ces deux niveaux géographiques, l'inélasticité à court terme de l'offre et de la demande induit des variations de cours immédiates très marquées.

⁴ Perspectives agricoles de l'OCDE et de la FAO 2010-2019 : perspectives du marché des biocarburants.

Certaines particularités distinguent toutefois les marchés agricoles des marchés de minéraux. Les marchés des denrées agricoles sont par exemple influencés à court terme par les chocs d'offre induits par les phénomènes météorologiques, prévisibles et imprévisibles. En revanche, les variations de cours à moyen terme des denrées minérales sont généralement corrélées à la prospérité économique mondiale, la croissance économique alimentant la demande et, partant, la hausse des prix.

Le **Graphique 3** ci-après, tiré de la contribution du Professeur Lagos⁵, retrace les récentes tendances de quatre denrées minérales importantes et l'indice des cours des métaux du FMI.

Graphique 3. Prix courants des métaux (2002-04=100)



Sources : Statistiques de la CNUCED, base de données mondiales du FMI (extrait de la contribution du Professeur Lagos).

Le Professeur Lagos estime que les niveaux des cours et la volatilité des marchés des métaux sont principalement imputables :

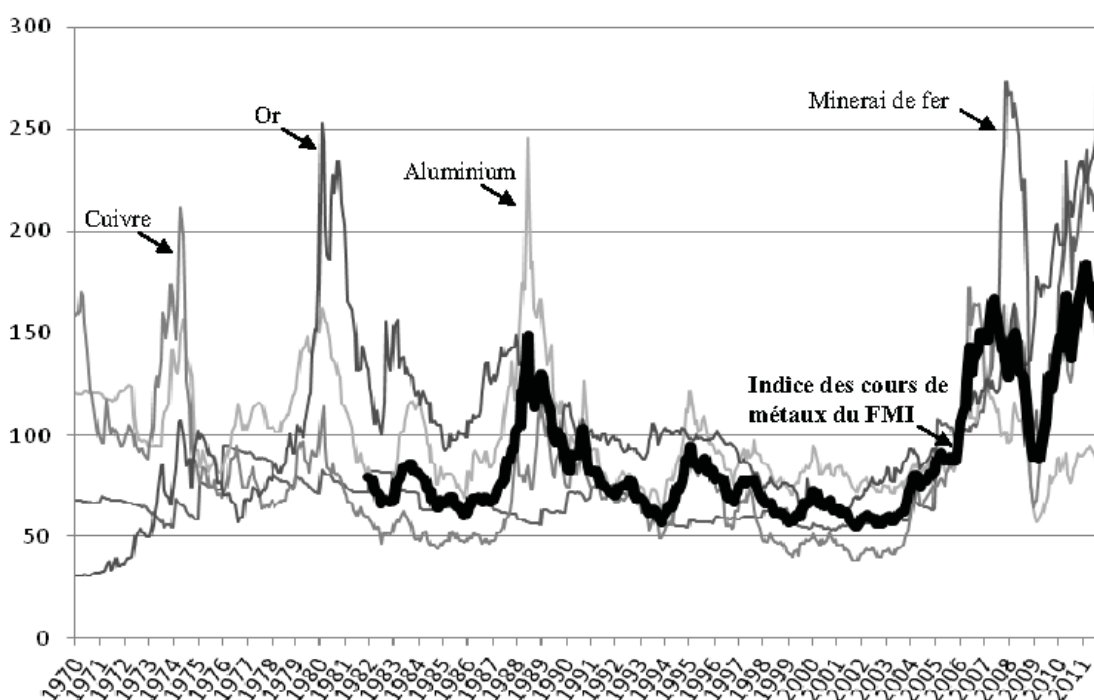
- à l'évolution des forces fondamentales du marché, à savoir, l'offre, la demande et les stocks physiques de métaux, ces facteurs variant cependant dans le détail d'une denrée à l'autre :
 - les coûts de transport constituent par exemple un facteur déterminant à long terme du prix du fer ;

⁵ DAF/COMP/GF(2012)4.

- le coût de l'énergie et les politiques gouvernementales de l'environnement sont des facteurs déterminants à long terme du cours de l'aluminium ;
- la production industrielle et la construction sont, ensemble, des facteurs déterminants du prix du fer, de l'aluminium et du cuivre (sur la période récente, le boom de la production industrielle et de la construction en Chine constitue un facteur particulièrement important) ;
- enfin, le cours de l'or est déterminé par des facteurs distincts parce qu'il est employé presque exclusivement à la joaillerie (50 %), à des applications technologiques (38 %) et à l'investissement (12 %), autant de domaines qui suivent leur propre cycle de marché ;
- aux transactions financières, qui affectent les niveaux de cours et la volatilité, principalement (mais pas uniquement) parce qu'elles anticipent les hausses (ou baisses) de prix dues aux facteurs physiques d'offre et de demande ;
- et aux fluctuations de la valeur du dollar américain, parce que c'est la devise dans laquelle ces denrées se négocient principalement (même les achats et les ventes entre pays tiers).

La contribution du Professeur Lagos contient aussi des statistiques détaillées de la volatilité quinquennale des cours des métaux depuis 1970. Cette analyse à long terme révèle que la récente volatilité des cours est proche de celle observée avant les années 90, même si le minerai de fer semble avoir été davantage affecté par la récente envolée de la volatilité, alors que les autres métaux avaient été davantage touchés par le passé.

Graphique 4. Cours des métaux en dollars constants de décembre 2010 (2005-12=100)



Sources : Statistiques de la CNUCED, base de données mondiales du FMI. Déflateur indice américain des prix à la production – matières premières (toutes matières premières) (extrait de la contribution du Professeur Lagos).

Enfin, le Professeur Lagos s'est penché sur la situation des pays qui dépendent pour une large part d'une denrée minérale particulière dont le cours est volatil, examinant les défis que cela pose pour l'économie toute entière et les stratégies que les pouvoirs publics pourront mettre en œuvre.

3. Cadre conceptuel

Cette section examine la pertinence de quatre domaines d'analyse pour les autorités de la concurrence lorsque leur mission s'exerce en rapport avec les marchés de matières premières :

- la performance des marchés de matières premières est étroitement liée à celle de marchés connexes pour le transport et le stockage des denrées. Les autorités de la concurrence doivent donc s'intéresser attentivement à ces marchés connexes ;
- un examen de la chaîne de production afférente aux marchés de matières premières révèle une grande diversité de niveaux de concentration aux différentes étapes du processus de production, si bien que les problèmes de concurrence affectant les marchés de matières premières tendent à se poser là où les goulets d'étranglement apparaissent ;
- lors de chaque fluctuation importante des cours, on tend à incriminer la spéculation et à la faire apparaître parfois comme une question de concurrence. L'analyse des marchés boursiers et de la spéculation indique que ces préoccupations de spéculation sont souvent infondées, mais que certains domaines spécifiques peuvent justifier une intervention ;
- enfin, la distinction et la complémentarité entre les politiques de la concurrence et des échanges internationaux.

3.1 *L'influence déterminante du stockage et du transport pour les marchés de matières premières*

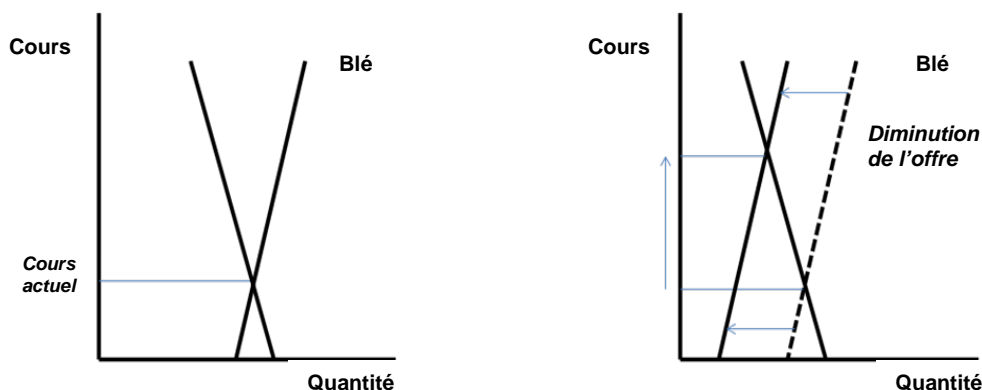
Bien que chaque denrée alimentaire possède ses propres caractéristiques, de façon générale :

- si les prix augmentent, quel que soit le produit, les consommateurs tendront à en consommer moins. Par rapport à un grand nombre d'autres biens (comme les maisons ou les réfrigérateurs), les consommateurs ont peu de flexibilité à court terme car il leur faut manger tous les jours et donc faire leurs courses chaque semaine ;
- si les prix augmentent, les producteurs s'efforcent de produire plus. S'agissant de certaines autres marchandises, les producteurs peuvent accroître considérablement leur production en payant à leurs salariés des heures supplémentaires et en faisant fonctionner plus longtemps leurs machines. Les producteurs de denrées alimentaires ne peuvent cependant généralement pas effectuer de modification significative avant le printemps suivant.

La demande et l'offre de denrées minérales sont un peu plus souples, sans l'être beaucoup plus : les clients ne peuvent généralement pas utiliser d'autres matériaux et il faut des années pour agrandir une exploitation minière. Autrement dit, sur les marchés de denrées tant agricoles que minérales, la demande et l'offre présentent une *inélasticité* à court terme, ce que l'on peut représenter sur un graphique par des courbes d'offre et de demande fortement *pentues*.

En associant les courbes d'offre et de demande d'un marché, l'axe des ordonnées permet de déterminer ce que serait le cours actuel sur un marché déréglementé. Le graphique de droite met en évidence le degré d'inélasticité de l'offre et de la demande (en cas de sécheresse, si la récolte est divisée par deux, le cours du blé augmente considérablement).

Graphique 5. Courbes d'offre et de demande des denrées agricoles

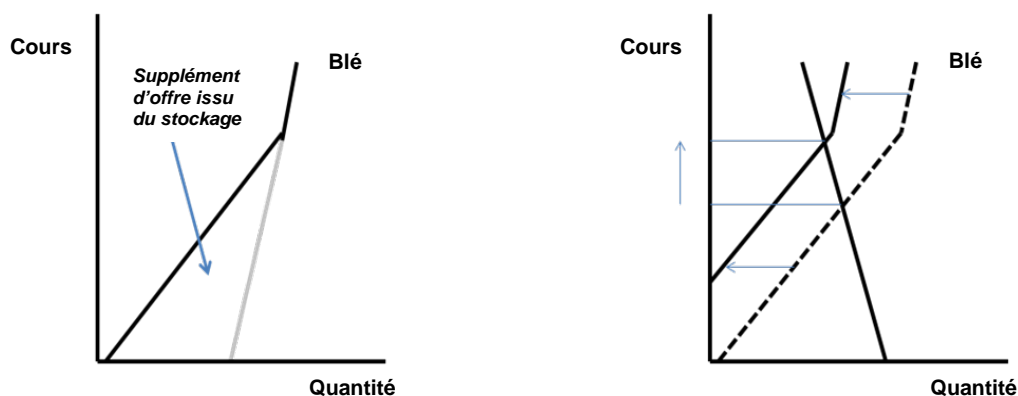


Source : OCDE.

Dans un tel cas, deux améliorations fondamentales peuvent être apportées. La première consiste à introduire une possibilité de **stockage**. Le stockage a pour effet d'accroître considérablement la flexibilité du marché. En période d'abondance, l'utilisateur de l'installation de stockage procède à des achats afin d'empêcher les cours des denrées de chuter autant. En période de pénurie, il puise dans les réserves pour compléter la production de la campagne en cours.

L'offre devient par conséquent plus réactive et, sur le graphique, la courbe d'offre présente une configuration plus aplatie (cf. graphique de gauche ci-après). Le stockage a bien-sûr des limites et il arrivera un moment où les réserves seront épuisées, c'est pourquoi la courbe redevient pentue à son sommet. L'exemple précédent d'une division par deux de la récolte suite à une période de sécheresse montre l'importance du stockage. On observe une augmentation des prix bien plus réduite avec le stockage *même si la demande reste rigide* (cf. graphique de droite ci-après).

Graphique 6. Impact du stockage sur les courbes d'offre et de demande des denrées



Source : OCDE.

Bien que ce ne soit pas représenté dans les graphiques ci-dessus, une amélioration semblable peut être obtenue si l'on accroît la flexibilité de la demande également (par exemple si le consommateur dispose de moyens traditionnels de conserver ses aliments, de bocaux ou de réfrigérateurs ou si des conserveries conditionnent les aliments pour que les consommateurs puissent les stocker).

La section 4.8 de ce document traite de l'expérience des pouvoirs publics dans la mise en œuvre de *stratégies de constitution et de conservation de réserves* de denrées alimentaires visant à limiter les fluctuations de cours considérées comme indésirables. Il en ressort qu'elles peuvent se révéler très

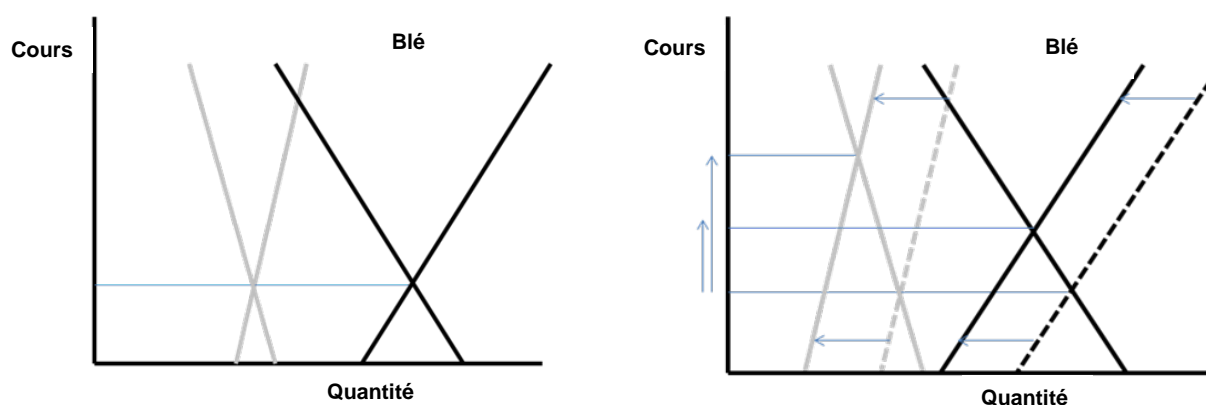
coûteuses et rarement couronnées de succès. Les initiatives publiques de constitution de stocks d'urgence de dimension plus réduite destinés à alimenter directement les consommateurs les plus vulnérables, sans chercher à influencer sur les cours du marché dans son ensemble, semblent avoir rencontré un peu plus de succès.

Les États et les autorités de la concurrence peuvent toutefois déployer des efforts importants pour améliorer le fonctionnement des marchés de fourniture privée d'installations de stockage, et s'y sont historiquement attachés. On peut améliorer considérablement la performance des marchés de matières premières en *permettant à des intervenants de marché* comme les coopératives agricoles d'investir dans le stockage, *ou en facilitant ces investissements*, et en empêchant les acteurs dominants d'abuser de leur position dominante dans ce secteur.

Les **échanges interrégionaux** constituent la deuxième arme majeure dont on dispose face à la volatilité des cours. Le principal avantage du commerce est de tirer parti des avantages concurrentiels des différentes zones géographiques. Les plaines se prêtent par exemple aux cultures céréalières, tandis que les escarpements arides favorisent plutôt l'élevage ovin. Dans ces circonstances, on gaspillerait ses efforts à faire pousser du blé en montagne et les régions fertiles en les employant à l'élevage ovin. Les populations de ces deux types de régions ont intérêt à se spécialiser chacune dans une denrée agricole et à commercer entre elles. Cependant, dans le cadre de notre exposé, un autre rôle important des échanges interrégionaux revêt une pertinence particulière en lien direct avec la volatilité des cours.⁶

Pour illustrer ce rôle secondaire des échanges interrégionaux, le graphique de gauche ci-après montre le cas très simplifié de deux régions dont aucune ne dispose d'un avantage concurrentiel durable. Les lignes claires correspondent aux marchés de chaque région en l'absence d'échanges et les lignes sombres font apparaître le marché combiné lorsque l'on autorise les échanges entre les deux régions. On remarque qu'en période normale, les cours ne sont pas modifiés. A chaque point des courbes sombres, la quantité est double à un niveau de prix donné, parce que deux régions de taille équivalente ont été rapprochées. On remarque toutefois une différence importante : en combinant les deux régions, les courbes se sont aplaties.

Graphique 7. Rôle des échanges internationaux pour l'offre et la demande de denrées



Source : OCDE.

En quoi cela a-t-il de l'importance ? Le graphique de droite fournit la réponse. Imaginons maintenant qu'une sécheresse se déclare et que la moitié de la récolte soit perdue dans l'une des régions (dans notre

⁶ Une troisième raison pour laquelle les échanges peuvent être bénéfiques est qu'ils peuvent introduire sur le marché national une source de concurrence là où il n'en existe pas (ou, dans le cas de petites économies, là où il ne peut parfois pas en exister). Ce point est traité séparément plus loin.

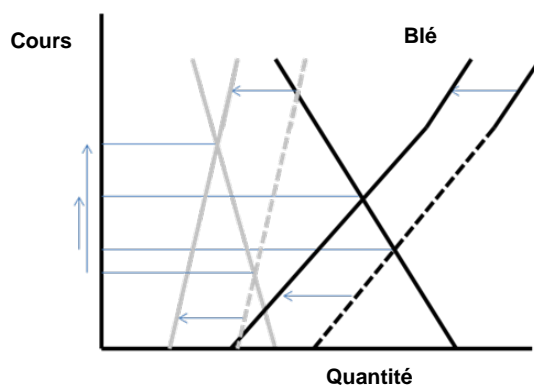
exemple, l'autre région est éloignée de la première et soumise à des conditions météorologiques différentes). La hausse de prix sera bien moindre que dans le cas d'un marché isolé qui ne bénéficie pas d'échanges. Les deux flèches à côté de l'axe des ordonnées mettent en évidence la différence d'impact sur les cours.

Même si les deux régions retirent un bénéfice net de cet échange, il convient de remarquer que les échanges ne favorisent pas tout le monde tout le temps. En particulier, les consommateurs de la région exportatrice pâtissent d'une hausse des cours (bien qu'elle soit comparativement modeste), alors même que leur région a été épargnée par la sécheresse. De la même façon, les producteurs de la région touchée par la sécheresse ont non seulement une quantité plus faible à vendre, en raison de la sécheresse, mais la hausse de prix liée à la sécheresse (et donc leur revenu) est moindre que si l'on avait empêché l'échange. Cela explique que certains fragments de la population puissent être opposés aux échanges, même s'ils sont globalement bénéfiques pour la société dans les régions combinées ; toutefois, même si les gagnants devaient dédommager les perdants, tous continueraient de retirer un bénéfice net de ces échanges.

En principe, l'analyse présentée ci-avant vaut de la même façon pour deux régions d'un même pays, pour deux pays différents et même pour deux continents. Les distances impliquées et l'importance des contrôles frontaliers entre les endroits peuvent faciliter ou compliquer les échanges interrégionaux.

Bien entendu, une fois que les échanges interrégionaux sont possibles, les deux régions peuvent partager le coût d'une installation de stockage unique, si bien que chaque fois que l'une des régions connaît une sécheresse, l'impact sur les cours pourra être bien moindre qu'en l'absence de réserves et d'échanges :

Graphique 8. Effet des échanges interrégionaux et du stockage sur les courbes d'offre et de demande des denrées



Source : OCDE

Autrement dit, on peut retirer divers bienfaits de l'amélioration du stockage, d'autres de l'amélioration des échanges interrégionaux et d'autres encore de l'interaction entre ces deux vecteurs d'amélioration associés.

Il ressort de cette analyse qu'une autorité de la concurrence sera à même d'aider un pays à faire face à la volatilité des cours des denrées en éliminant les pratiques privées et les réglementations publiques qui font obstacle à la concurrence sur l'un ou l'autre des marchés de produits suivants :

- la denrée, elle-même ;
- les marchés des silos et des intrants de stockage (marchés d'infrastructures, marchés de capitaux, matériaux de construction, etc.) ;

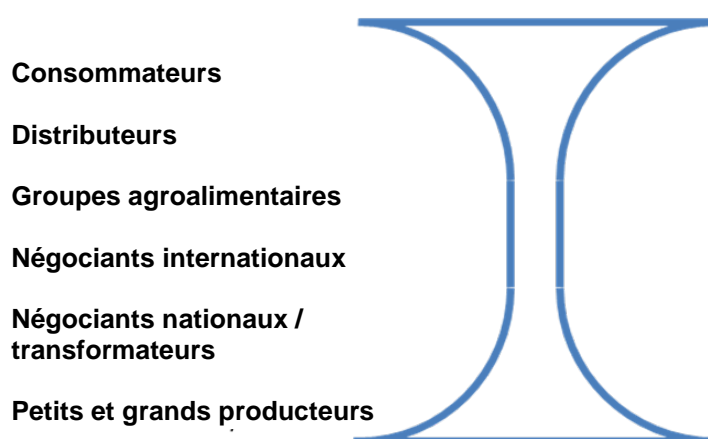
- enfin, les marchés de services et d'infrastructure de logistique (ports, chemins de fer, routes et leurs marchés d'intrants).

3.2 Différents niveaux de concurrence aux diverses étapes de la chaîne d'approvisionnement

Sur la plupart des marchés agricoles, la production et la consommation sont fortement atomisées. Sur le marché sud-africain des céréales, par exemple, 18 000 entreprises agricoles fournissent 90 % de la production, les 10 % restants provenant de 3 millions de petites exploitations⁷, tandis que le pays compte quelque 13 millions de ménages. On recense, de la même façon, pour la plupart des denrées agricoles, un nombre très important de producteurs et de consommateurs.

Entre la culture et l'alimentation, les denrées agricoles passent toutefois généralement par plusieurs marchés fonctionnels fortement concentrés. Entre le champ et l'assiette, le blé franchit par exemple chacun des marchés suivants, à forte concentration : le marché de la collecte, du stockage et du transport des céréales, les marchés locaux de la minoterie, de la boulangerie et de la distribution alimentaire. On observe des schémas similaires pour le riz, la viande bovine, la volaille, le café et de nombreuses autres industries, représentés comme suit⁸ :

Graphique 9. Goulets d'étranglement courants en aval de l'agriculture



Source : OCDE.

On retrouve d'ailleurs un phénomène semblable en amont de la chaîne de production. Dans de nombreuses filières agricoles, des multitudes de producteurs sont pris entre des **goulets d'étranglement à la fois en amont et en aval**. Les producteurs subissent souvent les cours aussi bien quand ils achètent des intrants essentiels et quand ils écoulent leur production. Tels qu'identifiés dans ce document, des enjeux de concurrence se posent sur les marchés de la production et de la fourniture d'engrais, de semences commerciales et d'autres matériaux génétiques (comme les arrière-grands-parentaux pour la production avicole), sur ceux des insecticides, des tracteurs et des autres équipements agricoles. Pour reprendre l'exemple du blé discuté plus haut, le marché mondial des pesticides est contrôlé à plus de 75 % par six groupes internationaux.⁹

⁷ FAO, La situation des marchés des produits agricoles 2009.

⁸ Ce graphique s'inspire d'un diagramme sur le secteur du café qui se trouve dans la contribution de la Consumer Unity & Trust Society (CUTS). Cf. DAF/COMP/GF/WD(2012)17.

⁹ Dinham, B. Corporations and Pesticides. dans Pretty, J. The Pesticide Detox. Towards a More Sustainable Agriculture. 2005.

Poussant plus loin cette analyse de la chaîne d'approvisionnement, il est remarquable que la concurrence puisse être empêchée sur de multiples couches de marchés fonctionnels (un oligopole de négociants pouvant par exemple vendre des produits à un oligopole de groupes agroalimentaires, cédant eux-mêmes leurs produits à un oligopole de distributeurs, avant que le produit ne parviennent finalement au consommateur).

Malgré des exceptions notables, la chaîne d'approvisionnement présente, dans les filières minières, une configuration similaire, bien qu'à un degré moindre. De nombreux marchés d'intrants miniers (comme les explosifs et les équipements d'extraction) sont concentrés, de même que de nombreux marchés de transformation (comme l'aciérie et la fabrication de biens de consommation durables) en amont de la vente des produits aux ménages. En revanche, la concentration est souvent (mais certainement pas toujours) nettement moindre dans l'extraction minière.

Une difficulté à laquelle pourront être confrontées les autorités de la concurrence est que la dimension géographique des marchés peut varier considérablement d'un niveau de la chaîne d'approvisionnement à un autre. La viande conditionnée est par exemple une denrée qui se négocie sur le marché mondial et tout abattoir donné peut *écouler sa production* vers un marché concurrentiel. Ce même abattoir peut toutefois occuper une position dominante en tant qu'*acheteur* unique de cheptel bovin ou ovin dans une zone géographique donnée. Il est par conséquent possible qu'il ne nuise pas au consommateur, mais il peut nuire considérablement aux petits producteurs, diminuant les quantités et amputant la production, amenuisant ainsi la richesse globale de la société. Cette asymétrie vient de ce qu'il n'est rentable de transporter des animaux vivants sur de longues distances que lorsque la viande est destinée à certains créneaux de marché (comme la boucherie Halal). Cette situation, courante sur les marchés de denrées agricoles, se rencontre pour le lait cru et le fromage, le blé et les silos de collecte et de stockage, l'orge et le houblon. Elle peut également se produire sur les marchés de denrées minérales, par exemple pour la fonte des minerais.

Les problèmes de concurrence avec superposition de niveaux appellent une discussion plus poussée parce qu'ils peuvent poser des difficultés particulières du point de vue de la concurrence et nécessiter des approches spécifiques. Considérons d'abord la problématique. La présence d'un oligopole à un niveau quelconque de la chaîne de production peut engendrer :

- un comportement de monopole (et de monopsonne), une entreprise décidant de façon indépendante de diminuer la production afin d'augmenter le prix de vente ou bien de réduire ses coûts d'achat ;
- ou une entente, soit la conclusion d'un accord anticoncurrentiel avec d'autres entreprises exerçant la même fonction, en vue de limiter l'offre ou d'augmenter les prix.

La question centrale concerne l'efficacité globale de la chaîne d'approvisionnement lorsqu'il existe deux marchés fonctionnels et qu'ils sont tous deux affectés par des comportements anticoncurrentiels. Deux marchés à structure monopolistique valent-ils mieux qu'un ? Intuitivement, nous aurions tendance à répondre que plus il y a de monopoles en amont ou en aval de la chaîne d'approvisionnement, pire sera la situation. En même temps, les autorités de la concurrence sont souvent confrontées dans le cadre de fusions à l'argument selon lequel il est préférable d'avoir des rivaux de force égale (raisonnement selon lequel il conviendrait par exemple d'autoriser les distributeurs à devenir plus forts pour qu'ils soient mieux à même de négocier avec les groupes d'alimentation-boissons).

Pour répondre à cette question, on pourra utilement commencer par démonter l'argument du pouvoir de négociation. Prenant l'exemple d'une fusion entre distributeurs et de l'argument selon lequel le pouvoir de négociation du secteur sera renforcé face à la concentration des groupes d'agroalimentaire. Ce pouvoir de négociation peut comprendre au moins un des éléments suivants :

- des effets d'amélioration de l'efficacité restaurant la production à des niveaux concurrentiels et les bienfaits qu'en retire l'économie dans son ensemble (permettre par exemple à un distributeur de gagner des volumes et d'accroître les économies d'échelle pour l'acheteur et le vendeur, ou gagner des volumes qui peuvent servir à faciliter l'arrivée d'un nouvel entrant) ;
- et des effets monopsoniques anticoncurrentiels, le distributeur sacrifiant lui-même des volumes de débit pour gagner de la marge aux dépens d'autres monopoles et (ou) des consommateurs.

En présence d'un argument de pouvoir de négociation, l'autorité de la concurrence devra par conséquent opérer une distinction entre les effets pro concurrentiels et les effets anticoncurrentiels. Dans une situation de superposition de comportements anticoncurrentiels, les consommateurs finaux et l'économie pâtissent d'ailleurs en général d'un phénomène de « double marginalisation ». La « double marginalisation » se caractérise par l'existence de deux monopoles, dont l'un est le fournisseur de l'autre (ou de configurations similaires, comme deux ententes ou un monopole à un niveau et une entente à un autre niveau).¹⁰

Au premier niveau, le monopoleur peut bénéficier d'une incitation à sacrifier des volumes pour augmenter considérablement ses prix et les profits qu'il retire de la vente des produits. On observe deux types d'effets :

- sur les volumes qu'il continue d'acheter, la valeur est transférée des acheteurs au monopoleur ;
- et en augmentant le prix, le monopoleur doit généralement sacrifier une certaine quantité de ventes et sur cette quantité, l'acheteur et le monopoleur perdent tous deux la valeur qu'ils auraient gagnée de la vente de cette quantité supplémentaire (c'est ce que l'on appelle la perte économique).¹¹

Envisageons maintenant que notre monopoleur vende son produit à un acheteur qui est lui-même un monopoleur. Ce second monopole pourra également être en situation de sacrifier rentablement des volumes pour augmenter considérablement ses prix. On observe un « deuxième tour » d'effets similaires :

- sur les volumes qu'il continue d'acheter, la valeur est transférée des acheteurs du second monopole au monopoleur ;
- et en augmentant le prix, le monopoleur doit généralement sacrifier une certaine quantité de ventes et sur cette quantité, l'acheteur et le monopoleur perdent tous deux de la valeur (c'est ce que l'on appelle la perte économique).

Il y a, autrement dit, deux décisions de réduire la quantité, une de la part de chacun des monopoles. Il y a également deux transferts de profits et deux « pertes économiques » dont la somme est supérieure à la seule perte économique qu'aurait produite un monopoleur verticalement intégré. Il y a en outre un autre effet : les deux monopoles doivent commercer ensemble et lorsque cela se produit, un monopole rencontre un monopsonneur. Dans une certaine mesure, donc, se produira entre eux une tension de négociation sur le montant de profit que chaque monopole extraira de l'autre monopoleur. Si l'un des monopoles peut diminuer ou éliminer le pouvoir de monopole de l'autre, il sera en position d'extraire une part plus importante de la portion d'excédent transférée.

¹⁰ Spengler J (1950), "Vertical Integration and Anti-trust Policy." *Journal of Political Economy* v58, p347-52.

¹¹ Comme le montre le graphique ci-dessus, les monopoles sont souvent également des monopsonneurs et des effets similaires se retrouvent du côté acheteur (un transfert de valeur des producteurs de café, par exemple, et une perte économique).

Le monopoleur pourra faire appel à différentes stratégies pour diminuer le pouvoir de l'autre, comme de procéder à une intégration verticale en aval ou en amont, ou de promouvoir l'arrivée d'un nouvel entrant à l'autre niveau fonctionnel. Ce type de stratégie pourrait être particulièrement attrayant lorsque l'autre monopoleur ne peut pas se venger en se développant verticalement sur le marché de l'autre monopoleur. L'élimination de l'un ou l'autre des monopoles améliore l'efficacité de la chaîne de production, même si l'autre monopole persiste.

En revanche, il se peut que les intérêts des deux monopoleurs ne soient pas complètement opposés, surtout s'ils exploitent chacun un maillon distinct de la chaîne d'approvisionnement :

- si les deux monopoles sont en position de s'éliminer l'un l'autre par des intégrations verticales simultanées en amont et en aval ou d'autres stratégies commerciales, il pourrait alors être dans leur intérêt commun de parvenir à un pacte explicite ou implicite de non agression ;
- lorsque deux monopoles se font face, ils peuvent être en mesure de s'entraider pour détecter ou punir les membres de leurs ententes respectives qui renâcleraient à leurs engagements ;
- lorsqu'il existe un droit de la concurrence et qu'il est appliqué, les deux monopoles ou les deux ententes pourront avoir intérêt à conclure un pacte pour éluder la détection ou miner les efforts de l'autorité pour prouver l'infraction.

Il est d'ailleurs assez courant, lorsqu'une autorité de la concurrence détecte une entente à un niveau de production, de trouver d'autres ententes à d'autres niveaux de la chaîne de production. Cela peut s'expliquer en partie par les effets mentionnés et également par un troisième phénomène. Il est courant dans les secteurs oligopolistiques qu'une ou plusieurs entreprises soient verticalement intégrées et que les autres ne le soient pas. Lorsqu'une ou plusieurs entreprises sont verticalement intégrées, elles sont souvent les chefs de file d'ententes multiples.

Les observations suivantes pourront être utiles aux autorités de la concurrence face aux problèmes de concurrence à superposition de niveaux :

- lorsque des entreprises justifient un projet de fusion en arguant qu'il améliorera leur pouvoir de négociation face à un fournisseur qui détient lui-même une puissance de marché, l'autorité de la concurrence pourra s'employer à démonter cet argument en opérant une distinction entre les gains d'efficacité et les formes monopsoniques du pouvoir de négociation ;
- dans les cas d'ententes, « l'amnistie plus » pourra être un élément d'un dispositif de clémence, lorsque la détection d'une entente pourra conduire à la découverte d'autres ententes ;
- introduire, le cas échéant, la concurrence d'importations à un niveau aussi proche que possible du consommateur, pourra permettre de mettre en évidence toute une chaîne de monopoles nationaux de production.

3.3 Les marchés négociés en bourse et la spéculation

En période de forte volatilité des cours des denrées, il est fréquent que les consommateurs, les entreprises et les élus de tous bords s'inquiètent de ce que la situation puisse avoir été causée ou exacerbée par la spéculation. En même temps, la contribution de la Nouvelle-Zélande¹² mentionne une tentative de la bourse néo-zélandaise en 2010 pour créer un marché de contrats à terme sur le lait spécialement conçu

¹² DAF/COMP/GF/WD(2012)40

pour aider les parties à atténuer la volatilité des cours et les difficultés qui en découlent. Cette contradiction apparente et plusieurs questions connexes sont explorées en annexe.

De façon générale, la spéculation et les spéculateurs sur les marchés tendent à aider à stabiliser les cours en apportant de la liquidité et en accélérant la cotation des denrées, même s'il leur arrive parfois à court terme d'exacerber la volatilité des cours. On s'inquiète en outre fréquemment et depuis longtemps de ce que la spéculation soit particulièrement rentable (produisant des profits potentiellement excessifs) lorsque les cours ont connu des fluctuations importantes ; toutefois, ces fluctuations auraient souvent été encore plus marquées si la spéculation ne les avait pas atténuées.

Malgré cela, la spéculation soulève fréquemment et depuis longtemps des préoccupations probablement parce qu'elle est plus rentable quand les cours ont connu des fluctuations importantes quand les autres intervenants sur le marché subissent les pressions les plus fortes. Le point de vue défendu en annexe veut que ces inquiétudes soient en grande partie infondées parce que dans la plupart des cas les variations de cours auraient été encore plus marquées si la spéculation n'avait pas été là pour en atténuer l'amplitude.

Ce n'est que dans certaines circonstances restreintes que la spéculation peut présenter un danger pour le bien-être social. Un exemple notable est celui des prix abusifs pratiqués pour des produits alimentaires de base et autres produits de nécessité en période de conditions de négociation anormales, lorsque des segments du marché se trouvent isolés dans les situations d'urgence. Des lois spécifiques contre les profits ou les prix abusifs peuvent être élaborées pour résoudre ce problème, mais il convient de distinguer les fondements conceptuels et les éléments de preuve de ceux qui s'appliquent dans un contexte de droit de la concurrence.

Les cas traditionnels d'entente ou d'abus de position dominante dans le contexte de la bourse ou de la spéculation sont d'ailleurs rares et concernent le plus souvent des accords horizontaux ou des accusations d'abus de position dominante visant à restreindre la diffusion d'informations relatives aux cours et quantités négociées dans le but de s'approprier la valeur de ces informations pour que les concurrents n'en profitent pas.

3.4 *Échanges internationaux et concurrence*

Presque toutes les questions de commerce international ont trait par certains aspects à la concurrence. Même lorsque deux pays disposent chacun de marchés nationaux parfaitement concurrentiels pour la production d'une marchandise donnée, une interdiction du commerce entre eux protège les producteurs du pays qui pâtit d'un désavantage comparatif de production par rapport à leurs concurrents du pays qui bénéficie d'un avantage comparatif pour la production de cette marchandise. Les consommateurs du premier pays et les producteurs du second subissent tous deux les effets de cette interdiction de commercer, effets qui se répercutent à travers l'économie de chacun des pays et qui pénalisent au bout du compte la société des deux pays.

Cependant, la quasi-totalité des pays dispose de représentants spécialisés dans les négociations commerciales multilatérales et bilatérales. Impliquer l'autorité de la concurrence dans chaque question commerciale constituerait probablement une utilisation peu judicieuse de ses maigres ressources. De même, les outils de la négociation commerciale (à savoir, les traités multilatéraux et bilatéraux) peuvent exiger qu'un pays se dote d'une législation de la concurrence, mais ces accords ne garantissent pas nécessairement un régime de la concurrence doté d'un personnel suffisant, motivé et efficace.

En revanche, ces deux domaines spécialisés de l'action des pouvoirs publics sont clairement très complémentaires dans de nombreuses circonstances, et pour les autorités de la concurrence, particulièrement dans les secteurs où un nombre limité d'entreprises exercent un pouvoir de monopole ou il existe une coordination explicite ou tacite.

Si, par exemple, un pays promeut la libéralisation d'un marché spécifique dans le cadre de négociations commerciales et que les producteurs de cette denrée déréglementée sont situés à des centaines de kilomètres derrière une frontière internationale et desservis par un port ou une ligne de chemin de fer sur lesquels s'exerce un monopole, on peut craindre que des prélèvements privés au titre du transport ou de la manutention ne se substituent aux droits publics sur les importations. Il en ressort que les autorités de la concurrence peuvent être appelées à jouer un rôle complémentaire important lorsque l'on s'efforce de libéraliser les échanges, pour s'assurer que la déréglementation est pleinement effective. Plusieurs cas sont évoqués plus loin dans lesquels l'élimination des obstacles aux échanges n'a pas permis la répercussion (complète) de la baisse des prix jusqu'aux consommateurs, du fait notamment peut-être d'obstacles à la concurrence en aval des frontières.

Un autre exemple concerne les méfaits cumulés d'un monopole protégé par des droits sur les importations. Les petits pays savent souvent trop bien que dans certains cas, même le droit de la concurrence et les efforts de sensibilisation les plus efficaces ne peuvent rien au fait que certains secteurs sont des monopoles naturels ou ne peuvent, pour des raisons d'échelle, faire vivre qu'un nombre limité d'intervenants en situation d'oligopole. Les échanges internationaux peuvent être une source importante (ou même la seule source) de concurrence. Dans ces situations, l'autorité de la concurrence a un rôle important à jouer pour contribuer à l'élaboration par le pays de sa stratégie de négociation commerciale parce que la libéralisation peut engendrer des bienfaits considérables au-delà de la valeur créée par l'avantage comparatif issu des échanges, grâce également à l'élimination des rentes de monopole.

Un troisième exemple concerne les ententes à l'exportation évoquées plus loin. C'est pour ces raisons que de nombreuses réformes de la concurrence mentionnées ci-après ont été entreprises conjointement avec des réformes des échanges.

4. Droit et politique de la concurrence

Il existe souvent une séparation marquée entre l'application du droit de la concurrence et les efforts pour sensibiliser les pouvoirs publics aux bienfaits de l'élimination des obstacles réglementaires à la concurrence. Il est frappant que sur les marchés de matières premières en général et sur les marchés de denrées agricoles en particulier, ces deux activités soient toutefois étroitement liées.

Comme le fait observer la contribution du Taipei chinois¹³, les filières agricoles se trouvent souvent hors du champ d'application de la législation de la concurrence :

« Le droit de la concurrence des pays avancés prévoit actuellement ... deux catégories d'exceptions ... pour les marchés de produits agricoles. La première concerne les exemptions explicites de la législation de la concurrence ; en outre, les dispositions du droit de la concurrence ne s'appliquent pas aux agissements des entreprises conformes à d'autres lois. »

Les exemptions explicites sont en effet monnaie courante, en particulier lorsqu'un pays commence à adopter une législation de la concurrence. Durant les quatre premières années de son application, une disposition de la loi tchèque sur la concurrence prévoyait qu'elle ne s'appliquerait pas au comportement d'entreprises produisant ou négociant des denrées agricoles, tant que leurs agissements n'enfreindraient pas le droit de l'UE. En Hongrie, les ventes à perte de denrées agricoles sont interdites.¹⁴ L'article 56 de la loi chinoise réprimant les monopoles prévoit par exemple que la loi ne s'applique pas aux agissements de concert des producteurs agricoles et des organismes économiques ruraux actifs dans la production, la transformation, la vente, le transport ou le stockage de denrées agricoles.

¹³ [DAF/COMP/GF/WD\(2012\)27](#).

¹⁴ DAF/COMP/WD(2005)50.

Ailleurs, des lois ont été adoptées qui imposent la vente des denrées agricoles à des offices de commercialisation régis par des syndicats de producteurs ou fixant les cours des matières premières. Plusieurs exemples en sont examinés plus loin. Ces lois centralisent implicitement le calcul des cours, des quantités et d'autres facteurs dans un cadre obligatoire sanctionné par les pouvoirs publics qui serait illégal s'il avait été institué de façon privée par des entreprises concurrentes, si bien que même lorsque ces pratiques sont couvertes par le droit de la concurrence, il n'y a plus de place pour des agissements privés auxquels il trouverait à s'appliquer.

On le verra plus loin, les agissements anticoncurrentiels peuvent être aussi préjudiciables sur les marchés agricoles que sur n'importe quel autre marché et il n'y a donc a priori aucune raison pour que ce secteur se voit appliquer un régime particulier. Il est toutefois compréhensible que certains pays puissent décider d'appliquer en priorité le droit de la concurrence à d'autres pans de l'économie. Dans de nombreux pays en développement, les filières agricoles accusent un retard important par rapport aux autres secteurs du point de vue des réformes économiques. Les droits de propriété demeurent souvent incertains ; la collectivisation peut prévaloir et, en particulier là quand le troc est le principal mode d'échange, il est possible que les filières agricoles n'aient pas encore été intégrées à la fiscalité et que les populations rurales ne puissent pas encore avoir pleinement accès à l'éducation, à la santé ou à d'autres services fondamentaux. Il peut être important de procéder par étapes dans la réforme des marchés et le droit de la concurrence ne devra pas forcément être prioritaire.

Même dans les économies développées, les filières agricoles sont souvent composées de très petites entreprises familiales qui pourront être limitées dans leur capacité à appliquer les exigences du droit de la concurrence ou à s'y adapter. Comme évoqué plus loin, il existe fréquemment un historique d'intervention sur les marchés à travers l'imposition de droits ou des offices de commercialisation qui ne peuvent être abolis en une seule étape et là encore il pourra s'agir de respecter la logique du calendrier de réformes.

Dans d'autres cas, il se peut qu'aucune raison majeure d'intérêt public ne justifie de faire bénéficier à long terme les filières agricoles d'un traitement de faveur et que le maintien des exemptions du droit de la concurrence ou la poursuite de l'intervention de l'État sur ces marchés soit simplement le fait de la puissance des lobbies agricoles (souvent organisés en partis politiques), qui sont mieux organisés que dans d'autres secteurs d'activité pour freiner les réformes visant à renforcer la concurrence et plaider pour des traitements de faveur et des exemptions.

Quoi qu'il en soit, dans tous les pays, l'application des principes de concurrence devrait être fortement bénéfique aux filières agricoles exactement pour les mêmes raisons que dans tout autre secteur. Le défi consiste cependant souvent à identifier et rectifier tous les éléments du cadre d'intervention des pouvoirs publics nécessaires pour instaurer la concurrence et fixer un calendrier de réforme permettant raisonnablement à tous les intervenants de s'adapter.

Les sections qui suivent illustrent l'étroitesse des liens entre le droit de la concurrence et l'action des pouvoirs publics dans ces secteurs d'activité. On trouvera d'abord une synthèse des quatre domaines dans lesquels le droit de la concurrence trouve communément à s'appliquer :

- les ententes et autres problèmes de comportements horizontaux (*un paragraphe spécifique est consacré aux ententes à l'exportation à la suite de la section générale sur les ententes et problèmes de comportements horizontaux*) ;
- l'intégration verticale, à la fois comme source de bienfaits et de préjudices ;
- les autres formes d'abus de position dominante ;
- et les fusions anticoncurrentielles.

Ici peut-être davantage que dans la plupart des secteurs d'activité, les efforts de sensibilisation et de réforme sont souvent étroitement associés à l'application du droit de la concurrence telle qu'évoquée plus haut. Le document explore ensuite de façon plus spécifique les aspects suivants de la sensibilisation au droit de la concurrence, sachant une fois encore que dans le domaine des matières premières, les actions de sensibilisation ciblant les réformes impliquent souvent simultanément ou ultérieurement un rôle d'application du droit de la concurrence :

- la réforme proconcurrentielle des filières de matières premières
- et le rôle des autorités de la concurrence lorsque les pouvoirs publics sont confrontés à des crises liées aux cours des matières premières.

4.1 Ententes et autres problèmes de comportements horizontaux

On considère que les ententes injustifiables, en particulier les fixations de prix, partages de marchés et manipulations d'appels d'offres constituent la violation la plus flagrante du droit de la concurrence et lèsent les consommateurs dans un grand nombre de pays en augmentant les prix et en limitant la production, des biens et services étant alors totalement indisponibles pour certains acheteurs et inutilement onéreux pour d'autres.¹⁵

Les ententes injustifiables peuvent intervenir sur n'importe quel marché. L'OCDE a toutefois pu observer par le passé¹⁶ certaines caractéristiques communes des marchés propices aux ententes anticoncurrentielles, qui sont notamment les suivantes :

- *petit nombre d'entreprises* – moins les intervenants sont nombreux, plus il leur est facile de s'entendre ;
- *entrée sur le marché faible ou inexistante* – lorsque peu d'entreprises sont récemment entrées sur le marché ou sont susceptibles d'y entrer parce que cette entrée est coûteuse, difficile ou lente, les entreprises opérant sur ce marché sont protégées des pressions concurrentielles que peuvent exercer de nouveaux entrants ;
- *conditions du marché* – les fortes variations de l'offre ou de la demande ont tendance à déstabiliser les ententes conclues par les entreprises. Si la demande du secteur public est constante et prévisible, le risque de collusion a tendance à s'amplifier. Mais en période de bouleversement ou d'incertitude économiques, l'incitation aux ententes s'accroît également, les entreprises s'efforçant de compenser un moindre volume d'affaires par des gains collusoires ;
- *associations professionnelles* – Les associations professionnelles peuvent constituer pour les membres d'un secteur industriel ou commercial ou d'un secteur des services un mécanisme proconcurrentiel légitime lorsqu'il s'agit de promouvoir des normes, l'innovation et la concurrence. En revanche, lorsque leur objet est subverti au profit d'activités illicites et anticoncurrentielles, ces associations peuvent être utilisées par les dirigeants d'entreprises pour tenir des réunions et dissimuler leurs discussions en vue de la conclusion et de la mise en œuvre d'ententes anticoncurrentielles ;
- *offres répétitives* – les marchés répétitifs augmentent la probabilité de collusion. La fréquence des appels à la concurrence aide les parties à un accord de soumissions concertées à se répartir les

¹⁵ 1998 OCDE. Recommandation du Conseil concernant une action efficace contre les ententes injustifiables, C/MIN(98)24.

¹⁶ *Détection des soumissions concertées dans les marchés publics*. Même si ces caractéristiques ont été identifiées plus particulièrement dans le contexte des soumissions concertées, elles sont applicables aux ententes en général.

marchés. De plus, les parties à la collusion peuvent sanctionner une entreprise qui ne se conforme à l'accord en soumissionnant spécifiquement contre cette entreprise pour les marchés qu'elle devait initialement obtenir ;

- *produits ou services identiques ou simples* – lorsque les produits ou services vendus sont identiques ou très similaires, les entreprises peuvent plus facilement s'entendre sur une structure commune de prix ;
- *peu de substituts, voire aucun* – lorsqu'il n'y a que peu de produits de bonne qualité (voire aucun) pouvant se substituer aux produits faisant l'objet du marché, les entreprises souhaitant se concerter peuvent se livrer plus sûrement à cette pratique en sachant que l'acheteur n'a que peu de solutions de remplacement (voire aucune) et que, par conséquent, elles auront plus de chances d'obtenir des prix plus élevés ;
- *peu ou pas de changement technologique* – peu ou pas d'innovation pour le produit aide les entreprises à s'entendre et à préserver leurs accords dans la durée.

S'agissant des **marchés de production primaire**, c'est à dire la culture des denrées agricoles ou l'extraction des minerais, on remarque que, de façon inhérente et en raison de la multitude d'entreprises concernées, la première se prête beaucoup moins aux ententes anticoncurrentielles que la seconde, qui peut leur être plus propice (cf. tableau ci-après). Ceci vaut toutefois pour les ententes privées. Comme on le verra plus loin, les marchés de matières premières sont souvent régis par des réglementations publiques spécifiques qui peuvent considérablement modifier les caractéristiques des marchés et les motivations et la capacité d'un grand nombre de producteurs à agir de concert.

Tableau 1. Caractéristiques des marchés de denrées agricoles et minérales propices aux ententes

	Denrées agricoles	Denrées minérales
Nombre réduit de concurrents	X Multitude d'agriculteurs	√ Nombre limité d'entreprises d'extraction minière dans plusieurs secteurs
Entrée faible ou inexistante	X Faibles barrières à l'entrée	√ Coût élevé des investissements et longueur de l'exploration avant l'attestation des nouveaux gisements
Conditions du marché	? Généralement, accroissement de la demande	√ Tentatives de stabilisation des fluctuations du marché
Associations professionnelles	√ Habituellement au niveau national, pour des denrées spécifiques	√ Habituellement internationales, pour des denrées spécifiques
Offres répétitives	? Généralement répétition des ventes saisonnières, mais souvent les grands marchés à répétition ne sont pas le principal mode commercial	? Des négociations de marché annuelles ont lieu historiquement dans certains secteurs (charbon, minerais de fer, etc)
Produits ou services identiques ou simples	√ Généralement interchangeables au niveau des denrées	√ Généralement interchangeables au niveau des denrées
Peu de substituts, voire aucun	? Possibilités de substitution du côté de l'offre comme de la demande, mais limitées	√ Substitution limitée pour la plupart des denrées
Peu ou pas de changement technologique	? Évolution importante des techniques agricoles, semences et engrais, mais modifications cumulatives	? Évolution importante des techniques d'extraction (fracturation hydraulique pour libérer le gaz de charbon, etc.), mais modifications cumulatives

Source : OCDE

Comme mentionné à la section 2, la caractéristique la plus frappante est qu'une entente sur une matière première devrait généralement impliquer un très grand nombre de producteurs. On ne s'étonnera donc pas que les ententes entre producteurs de denrées agricoles soient rares. On peut citer l'exemple des producteurs de volailles de la République tchèque, qui s'étaient entendus sur le prix à obtenir dans le cadre de négociations avec une grande entreprise de transformation de la viande qui s'ouvraient le lendemain ; l'accord avait même été publié dans un journal local. Des amendes leur ont été infligées.¹⁷

Des exemptions au droit de la concurrence ont cependant été parfois accordées dans ces circonstances lorsque les pouvoirs publics ont considéré qu'il était légitime de renforcer la puissance de négociation des agriculteurs face aux entreprises de transformation alimentaire. Des accords semblables à l'exemple tchèque cité ci-avant ont été conclus par des producteurs de poulets dans plusieurs États en Australie sans susciter de préoccupations du point de vue de la concurrence. En application des dispositions des conventions collectives australiennes, plusieurs accords de ce type entre de nombreux petits producteurs de poulets ont été officiellement notifiés à la commission australienne de la concurrence et de la consommation (Australian Competition and Consumer Commission - ACCC). L'ACCC ayant conclu que le bilan net de ces accords n'était pas négatif pour l'intérêt général, ils ont bénéficié d'une immunité.¹⁸

Les marchés de denrées minérales sont souvent beaucoup plus concentrés ; les dix premières entreprises du secteur concentrent environ un tiers de la production mondiale de minéraux non combustibles¹⁹ et dans le minerai de fer, par exemple, les trois premiers exploitants miniers contrôlent plus d'un tiers de la production mondiale et près des deux tiers du commerce maritime.²⁰ Les ententes entre producteurs organisées sans l'assistance des pouvoirs publics sont toutefois seulement un peu plus courantes que dans les filières agricoles.

Un accord de partage de marché entre producteurs de grenats alluviaux a été découvert en Australie, par lequel les entreprises concernées avaient convenu de limiter les territoires géographiques que chacun approvisionnerait en grenats alluviaux.²¹

Dans certains cas (qui restent toutefois rares), ces ententes ont une portée internationale. Une entente sur le sel a par exemple impliqué **Chypre**^{22 23} et **Israël**. La production et la commercialisation de sel en Israël à des fins industrielles, agricoles et pour la consommation humaine a longtemps été contrôlée par

¹⁷ L'autorité tchèque de la concurrence a publié une décision en 2008. Une réunion d'entente unique a eu lieu à la fin de 2006 ; six coopératives locales d'élevage de volailles y ont participé, dont Agrodružstvo Jevišovice or Zemědělské družstvo Petřín.

¹⁸ L'autorité australienne de la concurrence a ainsi autorisé, par exemple, la négociation collective d'éleveurs de poulets en Australie-Méridionale en 2009 ou en Australie-Occidentale en 2011.

¹⁹ Reuters. Factbox – the world's biggest mining companies. 2008.

²⁰ "The Iron Ore Market 2009-2011", UNCTAD Trust Fund Project on Iron Ore Information.

²¹ Barton Mines Corporation et Barton International Inc ont été condamnées à un amende totale de 1 525 millions USD par la Federal Court of Australia à l'issue de poursuites engagées par l'ACCC.

²² La note de la Turquie : Les informations figurant dans ce document et faisant référence à « Chypre » concernent la partie méridionale de l'île. Il n'y a pas d'autorité unique représentant à la fois les Chypriotes turcs et grecs sur l'île. La Turquie reconnaît la République Turque de Chypre Nord (RTCN). Jusqu'à ce qu'une solution durable et équitable soit trouvée dans le cadre des Nations Unies, la Turquie maintiendra sa position sur la « question chypriote ».

²³ La note de tous les États de l'Union européenne membres de l'OCDE et de la Commission européenne : La République de Chypre est reconnue par tous les membres des Nations Unies sauf la Turquie. Les informations figurant dans ce document concernent la zone sous le contrôle effectif du gouvernement de la République de Chypre.

une seule entreprise, Israel Salt Industries. Jusqu'en 2004, un accord la liait à Dead Sea Works, une entreprise détenant des droits exclusifs pour l'exploitation du sel et des autres minéraux de la mer Morte, en vertu duquel celle-ci s'engageait à ne vendre de sel à des fins de distribution à aucune autre entreprise qu'Israel Salt Industries, qui s'engageait en échange à ne pas exporter le sel ainsi acheté. Cet accord a été rendu caduc par l'autorité israélienne de la concurrence en 2002.

En 2006, l'autorité israélienne de la concurrence a découvert un autre accord entre Israel Salt Industries et MP Theodorou, une entreprise chypriote de production et de commercialisation de sel, en vertu duquel l'entreprise chypriote s'engageait à devenir l'agent de l'entreprise israélienne et s'interdisait d'exporter du sel vers Israël. Israel Salt Industries fournissait la moitié de la consommation de sel de Chypre, tandis que MP Theodorou exportait du sel vers Israël ; depuis 1997, ces deux entreprises étaient en concurrence tant sur le marché chypriote que sur le marché israélien. Israel Salt Industries a menacé d'approvisionner le marché chypriote en sel à des prix inférieurs au marché si l'entreprise chypriote n'interrompait pas ses exportations vers Israël ; en l'espace de 10 jours, elle a exporté vers Chypre 1 000 tonnes de sel, soit 1/7^{ème} de la consommation annuelle de Chypre. L'accord a ensuite été signé en 1999.

On a également découvert des ententes mondiales pour certaines matières premières clés, comme l'entente internationale du cuivre (International Copper Cartel) fondée en 1935 et qui réunissaient des entreprises minières représentant plus de la moitié du marché du cuivre raffiné. Cette entente a pris fin en 1939.

Comme dans le cas des denrées agricoles (dont il est question plus loin), **les pouvoirs publics peuvent être impliqués dans la création d'ententes**. Le Conseil international de l'étain a été formé par des accords internationaux intergouvernementaux entre pays producteurs d'étain et a été en vigueur pendant la majeure partie du vingtième siècle. Il a succombé à son endettement en 1985, lorsqu'il a annoncé qu'il n'était pas en mesure de rembourser ses dettes ni de remplir ses obligations contractuelles, les États membres ayant refusé de payer une quelconque partie de ses dettes.

Dans certaines situations, la coopération horizontale entre des entreprises actives sur un même marché peut toutefois engendrer des avantages économiques considérables, en particulier si leurs activités, leurs compétences ou leurs actifs sont complémentaires. La coopération horizontale peut être un moyen de partager les risques, d'économiser les risques, d'augmenter les investissements, d'associer des savoir-faire, de stimuler la recherche et le développement, d'améliorer la qualité et la variété des produits et d'accélérer le lancement des innovations. Les associations de producteurs privées ou à l'initiative des pouvoirs publics ont souvent été motivées en partie par ces considérations proconcurrentielles.

La présence d'associations et de **coopératives agricoles**, habituellement à l'échelle nationale et pour des denrées spécifiques, est une caractéristique distinctive de ces marchés. Elles remplissent plusieurs fonctions, comme la prestation de services intéressant l'ensemble de leurs membres (formation, recherche et développement, campagnes publicitaires, etc.). La frontière est cependant parfois étroite entre les initiatives potentiellement proconcurrentielles de partage de recherche et développement et de campagnes publicitaires²⁴, par exemple, et l'acquisition par une association ou un organisme officiel d'un monopole sur la vente d'une denrée (guichet unique de vente), comme l'illustrent les deux exemples ci-après.

Il est fréquent que les pouvoirs publics soutiennent la coopération, principalement dans le domaine de la recherche et développement, à la fois par l'adoption de législations spécifiques et par des financements. Le système australien de prélèvements et de facturations est intéressant à cet égard. Les pouvoirs publics sont préparés à imposer des prélèvements aux producteurs d'un secteur si un organe représentatif du

²⁴ Ces associations peuvent par exemple promouvoir les avantages de la laine par rapport à des tissus brevetés comme le Gortex.

secteur présente un problème identifié ou une opportunité pour le secteur, appelant une réponse qui doit être financée collectivement par ce secteur. L'organe représentatif soumet une proposition au gouvernement australien ; le cas échéant, le prélèvement ou la facturation sont imposés et collectés dans le cadre de la législation et versés aux organismes bénéficiaires pour financer leurs activités. Ces activités incluent la recherche et le développement, la commercialisation et la promotion, les programmes pour la santé végétale et animale ou le dépistage des résidus. Un prélèvement de ce type a par exemple été imposé sur les produits laitiers et transféré à Dairy Australia, une entreprise de services pour l'industrie laitière qui investit dans plus de 300 projets de recherche et développement pour les secteurs agricoles et manufacturiers, conduit des analyses de la politique commerciale, promeut les bienfaits des produits laitiers pour la santé et la nutrition, collecte des statistiques sur le secteur et gère les difficultés comme les critiques contre les produits laitiers, les craintes environnementales, etc. Des organismes semblables sont actifs dans les secteurs du coton, des œufs, du porc, de la laine, de la pêche, des forêts et des céréales.

La législation nationale peut toutefois aussi assurer une immunité implicite ou explicite en droit de la concurrence. La Commission canadienne du blé (CCB) en constitue un exemple. La CCB est un agent de commercialisation du blé et de l'orge des producteurs de l'Ouest canadien créé dans les années 20 selon le principe de la liberté d'adhésion. En 1935, la CCB a été officiellement constituée par la loi sur la Commission canadienne du blé et l'État canadien a apporté sa garantie financière pour son fonctionnement. En raison de cette loi et des suivantes, elle est devenue le seul organisme chargé de la commercialisation du blé et de l'orge de l'Ouest du Canada, tant pour l'exportation que nationalement pour la consommation humaine. La participation était obligatoire, c'est-à-dire que les agriculteurs ne pouvaient pas exporter leurs récoltes ni les vendre directement pour la consommation humaine. La CCB était le premier acheteur de blé et d'orge dans le monde (plus de 80 % du blé était exporté), coordonnant la vente de céréales cultivées par 85 000 agriculteurs. Outre son rôle de guichet de vente, la CCB négociait des accords de manutention et de transport ferroviaire pour le compte des agriculteurs, exploitait un laboratoire d'analyse des céréales, finançait de la recherche dans le stockage de céréales, le développement des produits et l'amélioration des variétés, notamment, et exploitait un réseau privé de stations météorologiques.

Un guichet de vente semblable, l'Australian Wheat Board (AWB) a été aboli en Australie en 2008. L'analyse économique permet de penser que l'AWB était en mesure d'exiger des prix supérieurs à ce qu'ils auraient été s'il n'avait pas eu l'exclusivité du commerce et, même si certains agriculteurs pouvaient percevoir des revenus plus élevés, certains pouvaient ne pas avoir accès aux marchés qu'ils auraient souhaité approvisionner.²⁵ Après le démantèlement du monopole, les destinations d'exportation du blé australien se sont considérablement diversifiées, avec 41 pays acheteurs aujourd'hui contre 17 auparavant.

Le 15 décembre 2011, le gouvernement du Canada a proclamé la nouvelle Loi sur le libre choix des producteurs de grains en matière de commercialisation, ce qui se traduira par le démantèlement du monopole de la CCB sur l'achat et la vente du blé et de l'orge de l'Ouest canadien, tant pour l'exportation que nationalement pour la consommation humaine, dès le 1er août 2012. À partir de cette date, les agriculteurs de l'Ouest canadien ont la possibilité de commercialiser leurs produits directement à tout acheteur. Le projet de loi comprend cinq parties, qui entreront en vigueur à des moments différents, dans le but d'assurer une transition vers un marché libre pour le blé et l'orge de l'Ouest canadien. La Partie 1 a modifié la Loi sur la Commission canadienne du blé afin de modifier la structure de gouvernance de la CCB à partir du 15 décembre 2011. Cette partie permet également des contrats à terme afin de permettre l'achat et la vente de blé et d'orge pour exécution à partir du jour où la Partie 2 est entrée en vigueur (1er août 2012). La Partie 2 de la loi abroge la Loi sur la Commission canadienne du blé et édicte une nouvelle loi qui établit une nouvelle Commission canadienne du blé à participation volontaire, mise en place pour une durée maximale de cinq ans. À la fin de la période de cinq ans (ou d'une période plus courte), les

²⁵ Gans, J. S. Competition and Single Desk Selling of Wheat from Australia: An Economic Analysis. 2000.

Parties 3 et 4 du projet de loi prévoient deux possibilités: soit la privatisation soit la dissolution de la nouvelle Commission canadienne du blé à participation volontaire, établie par la Partie 2.

Les pouvoirs publics fixent les prix à la production d'un éventail de produits, comme la canne à sucre destinée aux sucreries au Pakistan.²⁶ De même, en Inde, deuxième pays producteur de sucre après le Brésil, les sucreries sont tenues d'acheter la canne à sucre au prix fixé par les pouvoirs publics ; le prix du sucre raffiné n'est toutefois pas réglementé. En novembre 2011²⁷, la Commission indienne de la concurrence (Competition Commission of India) a rejeté l'allégation selon laquelle les sucreries utilisaient leurs instances associatives (National Federation of Co-operative Sugar Factories et Indian Sugar Mills Association) pour s'entendre sur les prix du sucre raffiné. La commission de la concurrence a conclu que la filière du sucre était étroitement contrôlée et réglementée et que les prix du sucre ne sont pas simplement fonction de la demande et de l'offre, mais que des forces complexes s'exercent qui faussent et en quelque sorte interdisent le libre fonctionnement concurrentiel du marché. La commission de la concurrence a par conséquent suggéré que le gouvernement propose une réforme réglementaire du secteur du sucre, susceptible de renforcer son efficacité.

Comme indiqué à la Section 2 de ce document, la production agricole nécessite souvent une transformation, parfois proche du site de production, avant d'être commercialisée à d'autres niveaux. Alors que les marchés de denrées agricoles peuvent être très atomisés et par conséquent peu propices aux ententes en l'absence d'intervention des pouvoirs publics, les maillons de la chaîne de production immédiatement en amont et en aval de la production des denrées agricoles sont souvent davantage concentrés et les ententes à ces niveaux sont plus fréquentes.

La première catégorie d'ententes à envisager concerne les **ententes entre acheteurs** par lesquelles les transformateurs déterminent à quel prix ils achèteront la production des agriculteurs. La contribution de l'autorité colombienne de la concurrence²⁸ montre par exemple qu'elle a été particulièrement mobilisée dans ce domaine :

- Riz (2005) – Une entente a été découverte entre plusieurs entreprises pour l'achat du riz *paddy verde* ;
- Canne à sucre (2010) – une entente a été découverte entre 11 sucreries pour l'achat de la canne à sucre brut ;
- Cacao (2009) – une entente a été découverte entre deux entreprises sur le prix auquel elles achèteraient le cacao aux fournisseurs ;

Les ententes entre vendeurs (par opposition aux ententes entre acheteurs) sont plus fréquentes sur **les marchés en amont et en aval**. Un exemple typique est celui de l'entente sur la lysine, entre 1992 et 1995,²⁹ visant à augmenter les prix mondiaux de la lysine, un acide aminé ajouté à l'alimentation animale. Cinq grands producteurs de lysine ont créé une « association professionnelle » qui leur a permis d'organiser 25 réunions multipartites et des dizaines de réunions bipartites supplémentaires dans le cadre desquelles ils ont fixé les prix pour 13 régions ou pays. Des parts de marché importantes parmi les producteurs, l'homogénéité du produit, qui n'est que l'un de nombreux composants, et des barrières

²⁶ Commission de la concurrence du Pakistan. Évaluation de la concurrence dans le secteur du sucre au Pakistan.

²⁷ Competition Commission of India, *In re Sugar Mills* (Suo-Motu) Décision du 30 novembre 2011, affaire 1/2010

²⁸ [DAF/COMP/GF/WD\(2012\)21](#).

²⁹ Des poursuites ont été engagées au Canada, dans l'UE, au Mexique et aux États-Unis, notamment, contre l'entente entre Archer Daniels Midland Co, Ajinomoto Co, Cheil, Kyowa Hakko et Sewon de 1992 à 1995.

élevées à l'entrée, caractéristiques de ce marché, sont autant de facteurs qui ont facilité l'entente. D'autres marchés aux caractéristiques semblables ont d'ailleurs permis des ententes, comme celui de la méthionine (un autre acide aminé ajouté à l'alimentation animale),³⁰ des phosphates pour l'alimentation animale³¹ ou du chlorure de choline (vitamine B4), un additif alimentaire pour les volailles ou les porcs.³²

Des ententes semblables sont également courantes aux niveaux nationaux ; en Afrique du Sud,³³ par exemple, les principaux fabricants de différents types d'engrais ont conclu un accord de fixation des prix et de partage du marché.

Les ententes sont courantes en aval des secteurs agricoles et miniers. Les marchés de la transformation alimentaire présentent de nombreuses caractéristiques propices à la cartellisation. Plusieurs ententes nationales ou régionales ont d'ailleurs été découvertes sur ces marchés, entre les minoteries russes sur les farines de blé³⁴, entre les transformateurs sud-africains de produits laitiers sur le prix du lait cru et du lait transformé³⁵, et entre les transformateurs italiens³⁶ et espagnols³⁷ de tabac brut, par exemple.

Plus en aval, les échanges internationaux de matières premières se prêtent également à la cartellisation. Dans l'UE, par exemple, des ententes ont été découvertes pour l'importation des bananes.³⁸ Il est toutefois fréquent que des entités habilitées par les pouvoirs publics soient autorisées à exporter ou importer certains produits, comme dans le cas de la Commission canadienne du blé ; de même seules quelques entreprises commerciales peuvent importer du riz vers certains pays.³⁹ De ce fait, les États, plutôt

³⁰ La Commission européenne a déclaré en 2002 qu'une entente avait existé entre Aventis, Degussa et Nippon Soda de 1986 à 1999.

³¹ La Commission européenne a déclaré en 2004 qu'une entente avait existé entre Yara Phosphates Oy, Timab Industries et Ercros Industrial, notamment, de 1969 à 2004.

³² Entente entre Akzo Nobel, BASF, UCB, Bioproducts, DuCoa et Chinook de 1992 à 1994 ; la Commission européenne a rendu sa décision en 2004.

³³ L'entente a été conclue entre Sasol, Omnia Fertiliser et Yara South Africa ; l'affaire a été examinée en 2006 par le tribunal de la concurrence de l'Afrique du Sud (South Africa's Competition Tribunal).

³⁴ Les services fédéraux russes de lutte contre les monopoles ont rendu une décision contre une entente de fixation des prix entre Tulakhleboproduct, Novomoskovsky Melnichny Kombinat et « ulsky Kombinat Khleboproduktov en 2011. La fixation des prix est intervenue en juillet et août 2010, en pleine flambée des cours du blé.

³⁵ L'entente conclue entre Lancewood, Parmalat, Ladismith Cheese et Clover Industries pour des échanges d'informations sur les prix a été examinée en 2006 par le Tribunal de la concurrence.

³⁶ La Commission européenne a déclaré en 2005 que les entreprises de transformation de tabac Deltafina, Transcatab, Mindo (Dimon) et Romana Tabacchi s'étaient concertées à propos de leur stratégie générale d'achat, convenant entre elles de prix d'achat et déterminant sur une base préférentielle ou exclusive leurs fournisseurs (agriculteurs et « tiers tasseurs », c-à-d des intermédiaires réalisant uniquement le conditionnement initial du tabac) en Italie.

³⁷ La Commission européenne a déclaré en 2004 que les entreprises de transformation de tabac Compañia Española de Tabaco en Rama (Cetarsa), Agroexpansión, World Wide Tobacco España (WWTE), Tabacos Españoles (Taes) et Deltafina s'étaient concertées sur les prix payés aux cultivateurs de tabac en Espagne et sur les quantités qu'elles leur achèteraient.

³⁸ La Commission européenne a déclaré en 2008 que Chiquita, Dole et Weichert avaient pris part à une entente entre 2000 et 2002, fixant le prix offert pour les bananes. Dans le cadre de poursuites ultérieures closes en 2011, Chiquita et Pacific Fruit ont été reconnues coupables de s'être livrées à une entente de fixation des prix dans le sud de l'Europe entre 2004 et 2005.

³⁹ FAO, Comment prédire l'impact sur les échanges et sur les prix d'une libéralisation du secteur du riz.

que les entreprises, tentent parfois de fixer des prix mondiaux ; dans le commerce du café, par exemple, les quantités exportées ont été limitées jusqu'en 1989 par les accords internationaux sur le café afin de maintenir le cours.⁴⁰ Il semblerait que la création d'une organisation de pays exportateurs de riz Organisation of Rice Exporting Countries (OREC) soit en cours de négociation entre le Cambodge, le Laos, Myanmar, la Thaïlande et le Vietnam ; les futurs adhérents font toutefois valoir que leur objectif n'est pas de créer une entente pour la fixation des cours.⁴¹

Les marchés de minéraux présentent aussi davantage de cartellisation en amont et en aval de la production. On note en amont, sur les marchés des explosifs ou de l'équipement minier, par exemple, une tendance à la spécialisation et donc à la concentration, également. En aval, la production primaire est habituellement intégrée verticalement à la transformation. L'extraction minière en elle-même se limite souvent à quelques pays ; en 2011, par exemple, plus de 97 % de la production mondiale de terres rares a été extraite en Chine.⁴²

En Afrique du Sud, par exemple, une entente a été découverte dans la fabrication des boulons utilisés pour le soutènement des toits et cloisons des galeries minières qui évitent les effondrements et prolongent l'accès aux filons ;⁴³ sous couvert d'une association professionnelle, les quatre entreprises avaient divisé le marché et fixé les prix. De la même façon, aux États-Unis, plusieurs ententes de partage de marché et de fixation des prix ont été découvertes dans les explosifs commerciaux.⁴⁴

4.2 Ententes à l'exportation

Plusieurs pays comptent dans leur législation des exemptions pour les ententes à l'exportation, avec⁴⁵ ou sans⁴⁶ obligation de notification à l'agence de la concurrence. D'autres législations prévoient des exemptions lorsque les transactions améliorent le solde de la balance des paiements de leur pays.⁴⁷ Autre disposition courante du droit de la concurrence, sont réprimées les ententes qui causent un préjudice sur le plan national.⁴⁸ Presque la totalité des pays membres de l'OCDE appartient à l'une de ces trois catégories (et dans certains cas, à plusieurs).

⁴⁰ FAO, Commodity Market Review 2007 – 2008.

⁴¹ Manila Bulletin Publishing Corporation, 28 October 2011. Vietnam opposes rice export “cartel”.

⁴² Humphries, M. Rare Earth Elements: The Global Supply Chain 2011.

⁴³ L'entente entre Aveng (Afrique), exploitant de la marque commerciale Duraset, RSC Ekusasa Mining, Dywidag-Systems International et Videx Wire Products au début des années 90 a été examinée en 2009 par le Tribunal de la concurrence de l'Afrique du Sud.

⁴⁴ L'enquête sur des ententes régionales et nationales de fixation des prix de certains explosifs commerciaux comme la dynamite, le nitrate d'ammonium et d'autres substances explosives, a débouché sur la comparution, avec reconnaissance des chefs d'inculpation, de 14 entreprises, dont ICI Explosives USA, Dyno Nobel, Mine Equipment and Mill Supply, Explosives Technologies International, et de trois personnes physiques entre 1995 et 1997. Les explosifs commerciaux sur lesquels portaient les ententes étaient utilisés dans l'extraction de charbon et de minerais, l'exploitation des carrières, la construction et la production de pétrole et de gaz, et représentaient un chiffre d'affaires annuel de l'ordre de 1 milliard USD.

⁴⁵ Par exemple, la Loi sur la concurrence (Canada) paragraphes 45(5) et 90.1(8).

⁴⁶ Par exemple, *Webb-Pomerene Export Act* (United States of America), 15 U.S.C. §§ 61–66 and the *Export Trading Company Act* (United States of America) 1982; *Competition and Consumer Act* (Australia) 2010, section 51(2)(g).

⁴⁷ Par exemple Israël (per M Levenstein and V Suslow 2005, “The Changing International Status of Export Cartel Exemptions”, *Am U International Law Review*.)

⁴⁸ Par exemple, l'article 101 du Traité sur le fonctionnement de l'Union européenne ne s'applique qu'aux comportements qui affectent la concurrence « au sein du marché intérieur » ; article 4 de la loi irlandaise de 2002 sur la concurrence (*Competition Act*).

Il ne faut toutefois pas supposer qu'une exemption d'entente à l'exportation est nécessairement la garantie d'une complète immunité, bien au contraire. Les ententes à l'exportation peuvent bénéficier d'une exemption dans le pays exportateur, mais elles sont fréquemment réprimées par le droit de la concurrence du pays importateur.⁴⁹ Importante considération pratique, l'agence du pays importateur chargée de l'application du droit peut ne pas avoir accès à des éléments clés pour prouver l'existence d'une entente entre concurrents, si les preuves se trouvent dans le pays exportateur. L'accès aux preuves est particulièrement problématique dans le cas d'ententes de partage de marchés en vertu desquelles un ou plusieurs concurrents conviennent de s'abstenir de toute activité sur le marché importateur. L'autorité locale de la concurrence peut ne disposer d'aucun levier ou d'un levier insuffisant sur les entreprises en cause pour exiger et obtenir des preuves.

Les exceptions concernant les ententes à l'exportation sont applicables à tous les marchés et pas seulement aux marchés de matières premières. Exemples d'ententes à l'exportation sur les marchés de matières premières, les ententes pour la potasse en Amérique du Nord ont récemment retenu l'attention. Elles concernent, bien entendu, à la fois la matière première minérale (la potasse) utilisée comme intrant dans la production de denrées agricoles (où elle sert d'engrais). On a pu observer⁵⁰ que ces ententes entraînaient un transfert considérable du pays consommateur vers le pays producteur.

Une justification majeure de l'insertion de la toute première exemption pour les ententes à l'exportation dans la législation des États-Unis en 1918 était qu'elle visait à permettre aux exportateurs américains de concurrencer efficacement les ententes de producteurs des autres pays sur le marché international.⁵¹ Le même souci de conférer aux exportateurs américains un pouvoir de négociation égal à celui des ententes étrangères a conduit à de nouvelles exemptions en 1982 en vue également de leur permettre de concurrencer efficacement les grandes entreprises étrangères bénéficiant de monopoles ou occupant des positions dominantes sur leur marché national.

Les ententes à l'exportation produisent deux effets : un effet d'efficience et un effet de redistribution. L'efficience économique est l'objectif principal de la politique de la concurrence. L'argument contre les ententes à l'exportation est également le même au niveau mondial que celui contre les ententes nationales sur les marchés intérieurs : si l'on autorise les ententes, elles faussent le volume optimal de production sur le marché affecté en réduisant le volume produit et consommé et la société encourt une perte économique du fait du volume d'échanges perdu. L'effet d'efficience intervient que le pays importateur interdise ou autorise les ententes entre ses propres producteurs.

Un argument secondaire fréquemment avancé (et qui semble s'appliquer au cas de la potasse) est que ce sont surtout les pays en développement qui retirent les bienfaits des ententes à l'exportation et les pays en développement qui en supportent les coûts. Il s'agit de l'effet redistributif des ententes à l'exportation.

Pour l'une ou l'autre raison, les exemptions accordées aux ententes à l'exportation ont été fortement critiquées dès l'origine aux États-Unis en 1918 et ces arguments refont fréquemment surface chaque fois qu'un examen approfondi du droit de la concurrence est réalisé dans chacun des pays concernés. Au niveau international, des appels à la réforme dans ce domaine ont été lancés dans le cadre de l'OCDE (1993), du Groupe de travail de l'interaction du commerce et de la politique de la concurrence de l'OMC et dans les

⁴⁹ Par exemple, l'article 2 de la loi de 2008 de la République populaire de Chine contre les monopoles stipule : « cette loi s'applique aux comportements hors du territoire de la République populaire de Chine s'ils éliminent ou restreignent la concurrence sur le marché intérieur de la République populaire de Chine. »

⁵⁰ F Jenny et P Metha, 2010.

⁵¹ M Levenstein et V Suslow 2005, "The Changing International Status of Export Cartel Exemptions", *Am U International Law Review*.

négociations bilatérales, comme les appels du Mexique dans le contexte des négociations de l'ALENA. Il est par conséquent remarquable que ces arguments aient eu si peu d'impact sur les législateurs et encore moins sur les pratiques. Dans le meilleur des cas, les changements ont consisté à abroger les exemptions explicites accordées aux ententes à l'exportation tout en conservant la protection implicite de ces ententes par la loi.⁵²

Ceci peut tenir à ce que les réformes envisagées n'ont habituellement porté que sur la question des exemptions explicites du droit de la concurrence accordées aux ententes à l'exportation. Une réforme globale effective dans ce domaine pourrait toutefois nécessiter⁵³ :

- l'abrogation de toute exemption explicite pour les ententes à l'exportation ;
- un examen et l'amendement de toutes rédactions implicites des dispositions de fond d'interdiction et de définition du droit de la concurrence limitant l'application de la législation aux cas nationaux (par exemple, les expressions comme « sur le marché intérieur », « dans l'État ou dans une partie de l'État ») ;
- un examen de la question de savoir si la portée du droit matériel doit suivre celle du pays exportateur ou du pays importateur ou ce qui est considéré comme la norme universelle ;
- un examen des processus et sanctions appropriés aux cas d'ententes à l'exportation⁵⁴ ;
- un examen de la question de savoir si la mission de répression doit incomber au pays exportateur, au pays importateur ou à l'un ou l'autre, et si l'on peut autoriser la recherche des juridictions les plus favorables pour les actions civiles ;
- un examen de la nécessité d'une protection explicite contre la double incrimination (à moins que les modifications qui précèdent s'accompagnent de l'abrogation des dispositions correspondantes du pays importateur) ;
- l'opportunité de dispositions autorisant ou contraignant les autorités de la concurrence du pays exportateur à assister l'autorité du pays importateur à réunir des preuves ;
- l'opportunité d'un quelconque transfert de rémunération entre les pays au titre des frais occasionnés par l'enquête, les poursuites et éventuellement les recettes fiscales ;
- la priorité à accorder par les autorités de la concurrence aux actions de répression au seul bénéfice des producteurs ou des consommateurs étrangers par rapport aux interventions qui profiteraient à leur propre pays ;
- et les mécanismes de reddition de comptes appropriés pour évaluer la performance de l'autorité dans la répression des ententes à l'exportation devant remplacer ou compléter ceux déjà en place ciblant le marché intérieur.

⁵² Ces « réformes » recouvrent notamment des amendements effectués par l'Allemagne en 1999, Chypre en 2004, la Corée en 1999, la Hongrie en 2004, le Japon en 1997, les Pays-Bas en 1998, le Royaume-Uni en 1998, la Suède en 1994 et la Suisse en 1995 (per M Levenstein and V Suslow 2005, "The Changing International Status of Export Cartel Exemptions", *Am U International Law Review*).

⁵³ Ce type de questions dans le contexte plus large de la coopération internationale constituera un thème central de discussion au sein du Comité de la concurrence de l'OCDE au cours des prochaines années.

⁵⁴ Par exemple, si le droit des États-Unis s'appliquait aux ententes à l'exportation sans amendement, les cadres des entreprises américaines impliqués dans une entente à l'exportation ciblant des clients indiens s'exposeraient à de longues peines d'emprisonnement, tandis que les cadres indiens participant à une entente ciblant des consommateurs indiens n'encourraient personnellement aucune sanction. Les cadres néo-zélandais d'entreprises agricoles impliqués dans une entente à l'exportation ciblant des consommateurs européens encourraient des sanctions importantes à titre personnel en cas de poursuites civiles plutôt que pénales.

Mener à bien les réformes dans ce domaine pourra exiger de prendre en compte la contradiction inhérente suivante, à savoir que même si l'élimination des ententes à l'exportation améliorerait le bien-être économique mondial, les bienfaits de ces réformes iraient à l'étranger et l'interdiction des ententes à l'exportation nuirait à l'intérêt financier immédiat des producteurs du pays exportateur et, par le biais du système de collecte des revenus, aux gouvernements des pays exportateurs également. Il pourra par conséquent être nécessaire d'élaborer un argumentaire convaincant de politique intérieure pour justifier la réforme.

Il n'est pas inhabituel que les pays adoptent des lois pour protéger les victimes situées en dehors de leur juridiction. Au Royaume-Uni, par exemple, la loi sur les pots-de-vin (UK Bribery Act) interdit aux entreprises et à leurs collaborateurs entretenant des liens significatifs avec le Royaume-Uni de verser des pots-de-vin à des représentants officiels étrangers. Il existe cependant une distinction importante entre les exemptions d'ententes à l'exportation et l'interdiction de verser des pots-de-vin à un représentant officiel étranger : dans ce dernier cas, la protection des victimes étrangères n'implique pas un coût significatif pour les finances nationales. En revanche, si une entente à l'exportation réussit à augmenter les prix et les bénéfices, les revenus fiscaux affluent vers le pays exportateur.

Il n'est pas courant que les pays acceptent d'adopter des mesures qui sont contraires à leur intérêt financier immédiat en considérant l'intérêt supérieur de l'économie mondiale. Toutefois, lorsque les pays peuvent conclure des accords qui leur permettront de bénéficier mutuellement de l'amélioration du fonctionnement des marchés mondiaux, ils ont bien plus à y gagner. Sur le plan juridique, il pourra être nécessaire de conclure des accords selon ce que seront les arrangements optimaux pour définir ce qui sort du cadre de la légalité et à quelles autorités confier les prérogatives d'enquête, l'évaluation de l'infraction et l'application des décisions de justice, pour obtenir l'effet recherché.

4.3 *Problèmes de comportement vertical*

Pour une série de raisons, l'intégration verticale est un facteur important sur les marchés des matières premières agricoles et des minerais, et cela est souvent étroitement lié au développement économique.

La production de matières premières agricoles et l'extraction des matières premières minérales ont souvent lieu dans des zones régionales et reculées où l'infrastructure est limitée. Les agriculteurs et les herbagers dépendent souvent de l'infrastructure locale pour stocker ou traiter leur production. Par exemple :

- les cultivateurs de blé et de riz ont besoin de silos locaux pour accueillir et stocker leurs céréales avant le transport
- les herbagers de bovins ont besoin d'abattoirs locaux afin que le bétail en transit vers les abattoirs ne soit pas blessé
- les producteurs de lait ont besoin d'installations pour la réfrigération et la pasteurisation et d'installations de production pour le fromage ou le yoghourt
- les cultivateurs d'ananas ont besoin d'avoir accès à des installations locales de mise en conserve de grand volume pour traiter le flux entrant de grands volumes de fruits excédentaires arrivés à maturité au même moment
- même la nécessité de magasins locaux pour assurer l'approvisionnement de base en engrais, semences, matériel, clôtures, vaccins, et les stocks conservés dans ces magasins peuvent représenter un nouvel investissement de taille dans une petite communauté.

La quasi-totalité des communautés agricoles dépend de routes et de voies ferrées de qualité vers les villes et les ports afin d'éviter les marges coûteuses appliquées par les négociants et les intermédiaires. De même, les sociétés minières ont besoin de vastes réseaux ferrés, routiers et, parfois, électriques pour mener des opérations d'extraction à grande échelle.

La dépendance par rapport à ce niveau d'infrastructure locale crée souvent deux problèmes :

- un problème de cercle vicieux ou de temps de rétention pour l'investissement mutuel : il se peut que les propriétaires de l'infrastructure n'investissent pas tant qu'ils ne savent pas que les volumes de matières premières seront suffisants, alors que la production à grande échelle ne peut pas débiter tant que l'infrastructure n'est pas en place, et
- lorsque l'infrastructure est en place dans une zone locale, il s'agira souvent d'un monopole naturel qui pourrait donner lieu à des pratiques abusives.

Par conséquent, il est très fréquent de trouver une intégration verticale associée à la production de produits de base, en particulier lorsqu'une région particulière en est aux premiers stades du développement. Par exemple :

- dans les communautés herbagères, des coopératives agricoles ont souvent été créées pour assurer les fournitures agricoles et le premier niveau de la collecte, du traitement et de la commercialisation conjointe
- dans les régions céréalières, il est courant que des entreprises détenues par les cultivateurs possèdent et exploitent les réseaux de silos et les raccordements ferroviaires et les trains, et
- les sociétés minières possèdent souvent des voies ferroviaires et des ports maritimes spécialisés.

Encadré 1. Murray Goulburn (Australie)

En 1950, 14 producteurs laitiers du nord de l'État de Victoria estimaient ne pas être correctement récompensés pour leurs efforts par les entreprises laitières locales. Il s'agissait d'anciens militaires rentrés au pays qui étaient nouveaux dans ce secteur.

Ils ont créé la coopérative Murray Goulburn pour récolter et traiter leurs propres produits laitiers, et cette entreprise a grandi petit à petit pour devenir la plus grande entreprise laitière en Australie et le premier exportateur d'aliments transformés du pays. Les fournisseurs-actionnaires détiennent des participations dans la coopérative qui leur confèrent le droit de voter aux assemblées générales, de voter pour des candidats à la direction et de percevoir occasionnellement des dividendes ordinaires.

Murray Goulburn possède une flotte de 170 camions ainsi que 8 unités de transformation dans des zones rurales, qui traitent 3,3 milliards de litres de lait et fabriquent des produits vendus tant sur le marché intérieur que pour l'exportation. La coopérative représente environ 9 % du commerce des produits laitiers à l'échelle mondiale.

Elle exploite également 24 magasins de matériel et de fournitures dans des zones rurales qui répondent aux besoins de la communauté des agriculteurs, principalement en matière d'hygiène laitière, de santé animale, d'amélioration des pâtures, de fourrage, d'engrais et autres nécessités propres à l'agriculture.

Parfois, l'intégration verticale entre les producteurs et la propriété de cette infrastructure sont des facteurs *nécessaires* pour surmonter le problème du temps de rétention de l'investissement (là où les contrats ne peuvent réaliser cette fonction) et peut être *bénéfique pour la concurrence*. Pour comprendre pourquoi cette intégration verticale pourrait être bénéfique pour la concurrence, il faut opposer ce qui

pourrait se produire avec et sans intégration verticale pour une petite communauté agricole située aux confins d'une route longue, chaude et poussiéreuse menant à une ville lointaine.

L'échelle minimum d'efficacité pour un abattoir est de l'ordre de 100 têtes de bétail par jour. Si l'installation produit sensiblement moins, ses coûts de production moyens augmenteront (c'est-à-dire, le coût par kilo de l'exploitation du réfrigérateur et du nettoyage de la salle d'abattage) et la viande ne sera pas concurrentielle lorsqu'elle est vendue en ville. Il se peut qu'il n'y ait pas assez de bétail dans la région pour exploiter deux abattoirs à l'échelle minimum d'efficacité, et il se peut dès lors qu'il y ait une seule installation, qui constituera un monopole naturel.

Si la fromagerie est détenue et exploitée par les herbagers eux-mêmes, ceux-ci seront incités à garder un volume élevé pour que les coûts restent faibles et, pour cette raison, et aussi pour la satisfaction de ses herbagers/actionnaires, la fromagerie prendra la marge minimum entre les prix qu'elle reçoit pour le fromage vendu en ville et le prix qu'elle paie à ses agriculteurs/actionnaires pour les vaches et les agneaux.

Si, en revanche, la fromagerie est indépendante, il se peut que ses incitations diffèrent. Lors d'une mauvaise saison, elle peut s'efforcer de maximaliser le volume pour réduire les coûts au minimum, mais, dans une bonne saison, elle peut être incitée à appliquer le prix normal complet pratiqué en ville pour la viande mais abaisser de plus en plus le prix qu'elle paie pour le bétail. Si ses bénéfices peuvent augmenter, les revenus des agriculteurs peuvent, eux, baisser considérablement.

Les mêmes situations pourraient se produire dans le contexte d'une ligne de chemin de fer dans une zone reculée ou dans un port de mer ou une exploitation minière monopolistiques.

Encadré 2. Groupe Shenhua (Chine)

Dans les années 1980, la Chine a commencé à connaître une forte augmentation de la demande de charbon et un grand nombre de petites mines de charbon ont été créées par les autorités régionales. Ces petites mines utilisant une technologie surannée étaient toutefois inefficaces et, en 1995, le groupe Shenhua a été créé.

Un élément clé du succès qu'a connu ce groupe en termes d'amélioration notable de l'efficacité et d'extension de la production est l'adoption d'un modèle intégré verticalement qui est commun à de nombreuses industries extractives dans le monde.

L'entreprise a repris les installations ferroviaires et portuaires d'Huaneng, une autre entreprise, mais a investi dans d'importantes infrastructures nouvelles. Elle a ouvert des lignes ferroviaires supplémentaires, les lignes de Shenshuo, Dazhun et Shuohuang. Elle a aussi construit son propre port à Huanghua, le deuxième port de Chine en termes de transport de charbon par mer, ainsi que d'autres installations portuaires.

Il est peu probable qu'une autorité de la concurrence soit invitée à évaluer l'investissement initial dans une installation de stockage, de transport ou de traitement détenue par le cultivateur ou le producteur, mais elle peut être invitée à traiter des cas qui surgissent après que l'investissement initial a été fait, par exemple :

- les différends entre les agriculteurs qui ont constitué initialement des coopératives et en restent actionnaires, d'une part, et les nouveaux membres, d'autre part, concernant le point de savoir si ceux-ci peuvent devenir coopérateurs et, si oui, à quel prix et autres conditions.
- Les différends entre une petite société minière qui souhaite perturber les activités d'un port existant pour étendre ses installations, voire les différends entre une petite société minière nouvelle et une grande société minière existante dont la première souhaite utiliser la ligne ferroviaire.

Bien que, sur le plan de faits, ces problèmes puissent être complexes, il est possible d'utiliser des analyses normalisées de la concurrence pour les résoudre. Par exemple, le comportement d'une coopérative agricole elle-même à l'égard des nouveaux agriculteurs et des exploitations minières, ferroviaires et portuaires intégrées verticalement peut être analysée à la lumière du critère de l'abus de position dominante soit comme un refus de traiter, soit comme une discrimination pour exclure la concurrence. Tout accord entre des agriculteurs existants qui sont propriétaires d'une coopérative agricole peut également être analysé sous l'angle des accords horizontaux.

Dans la plupart des cas, ce qui motive ces coopératives, c'est augmenter le nombre de leurs membres pour passer à l'échelle supérieure. Toutefois, si une coopérative particulière dominait les marchés des fournitures agricoles ou l'achat de produits agricoles dans une zone locale et si elle ne traite pas correctement les nouveaux agriculteurs, les autorités de la concurrence pourraient lui imposer (ou, du moins, lui conseiller) d'adopter des règles non discriminatoires en matière d'accès.

Dans certains cas, les pouvoirs publics ont pris des mesures plus spécifiques pour faciliter la constitution de ces coopératives. Par exemple, il existe à Odisha (Inde) trois importantes coopératives de cultures sucrières. Les autorités publiques d'Odisha ont adopté une loi spécifique permettant la création de ces coopératives et des mécanismes spécifiques sont en place qui contribuent à s'assurer que la coopérative et ses membres ne se livrent pas à des pratiques inéquitables d'éviction, notamment la création d'un tribunal spécifique pour connaître de ces litiges.

Dans certains cas, ces problèmes d'intégration verticale dans le secteur des produits de base ont été à l'origine des affaires les plus âprement disputées. Par exemple, à l'extrémité nord-ouest de l'Australie, à la population clairsemée, deux des plus importantes sociétés d'extraction du minerai de fer au monde (BHP et Rio Tinto) ont créé des lignes et des exploitations ferroviaires spéciales qui desservent leurs propres mines. Leurs installations sont entourées de concurrents de plus petite taille qui tentent de s'établir.

Lorsque les sociétés minières sont de petite taille, de jeunes pousses sans réserves commerciales avérées, elles sont souvent qualifiées de « jeunes » sociétés minières. Lorsqu'elles peuvent faire état d'un gisement de minerai commercialement viable en prouvant que sa teneur en minerai est suffisamment riche au regard des coûts d'extraction, elles connaissent souvent, avant le stade de la production, une passe difficile pendant laquelle leurs besoins en capitaux propres augmentent énormément alors qu'elles connaissent une recomposition de leur actionnariat, les investisseurs spéculatifs cédant le pas à des apporteurs de fonds classiques. La réponse consiste souvent à vendre à une société minière établie qui possède déjà l'infrastructure et le capital d'investissement nécessaires. Toutefois, si la jeune société minière souhaite mener une stratégie indépendante, un des plus grands défis et une des meilleures possibilités de mener à bien cette transformation consistent à accéder à l'infrastructure existante à moindre coût.

Un litige déjà ancien⁵⁵ entre ces sociétés minières en place et leurs « jeunes » concurrentes concerne le refus des premières de permettre aux secondes d'utiliser leur infrastructure ferroviaire. Les sociétés minières existantes ont estimé que leurs investissements faisaient partie intégrante de leur propre processus de production et qu'elles avaient besoin de continuer à contrôler de manière exclusive tous les aspects du système, de l'horaire des trains à la qualité du matériel roulant et toute la capacité de la ligne. Les jeunes sociétés minières ont estimé qu'il s'agissait d'un cas classique de refus et l'affaire s'est poursuivie par une procédure de décision et d'appels au titre du droit de la concurrence pour aboutir à une série complexe de décisions dans lesquelles les deux parties l'ont emporté sur certains aspects de l'affaire.

⁵⁵ Les documents relatifs à la décision réglementaire initiale et à chaque recours en justice peuvent être consultés sur le site Web du Conseil national de la concurrence (nca.gov.au) en suivant le lien « Third Party Access to Pilbara Railways ».

L'histoire a montré que ces entreprises intégrées verticalement sont tout aussi actives en termes d'initiatives stratégiques et de transactions que toute autre société commerciale. Souvent, les coopératives élargiront leur aire d'activité ou fusionneront avec des entreprises similaires dans des zones adjacentes, ce qui confère ici aussi un rôle important aux autorités de la concurrence. Ces fusions peuvent s'analyser à l'aide de la vérification classique appliquée aux fusions horizontales et peuvent souvent ne pas poser de problèmes en termes de concurrence lorsque le prix en aval est un prix concurrentiel à l'échelle mondiale sur lequel l'entreprise n'a pas de prise et que chaque zone d'exploitation agricole ou minière en amont constitue un marché local distinct, chacune avec un petit propriétaire monopsonistique de l'infrastructure. Dans l'analyse de la fusion, il peut aussi être pertinent de traiter l'intégration verticale comme un facteur supplémentaire bénéfique à la concurrence qui limiterait l'incitation de l'entreprise à appliquer des prix excessifs ou à se livrer à d'autres pratiques nuisibles à la concurrence.

À mesure qu'une région devient plus développée, qu'un changement de génération se produit ou que les technologies s'améliorent, les incitations à défaire l'intégration verticale par une vente de l'activité d'infrastructure se font plus fortes. Par exemple, lorsque les réseaux routiers ou ferroviaires s'améliorent, plusieurs fromageries, abattoirs ou silos à grains différents peuvent devenir accessibles aux cultivateurs et aux exploitants de concessions minières. Les techniques de production au niveau de l'exploitation agricole ou de l'infrastructure peuvent stimuler une plus grande spécialisation ou le relèvement de l'échelle minimum d'efficacité, avec pour effet que l'infrastructure coopérative n'est plus concurrentielle. Le changement de génération dans les exploitations agricoles familiales et les départs à la retraite peuvent amener les propriétaires de biens coopératifs à céder leurs intérêts dans ceux-ci.

Encadré 3. Golden Circle (Australie)

Golden Circle a débuté dans les années 1940 en tant que coopérative de cultivateurs produisant initialement 40 000 tonnes d'ananas en boîtes par an, outre des salades de fruit, des chutneys de fruits tropicaux et des eaux-de-vie de fruits. Aujourd'hui, la conserverie de Northgate produit environ 180 000 tonnes par an d'ananas et de betteraves en boîtes, de jus de fruits et d'eaux-de-vie, de confitures et de sauces.

Toutefois, pour un ensemble de raisons, l'entreprise a subi une série de changements suite aux préférences nouvelles des consommateurs, à la nécessité de nouveaux investissements, à l'amélioration de l'infrastructure dans les régions de culture des ananas qui apporte plus de choix pour les cultivateurs, et des nouvelles préférences de ceux-ci en termes d'investissement.

L'entreprise a cédé ses actifs, notamment la conserverie qui avait été précédemment une des raisons les plus importantes de la création de la coopérative, et la société a ouvert son actionariat de sorte que les cultivateurs puissent vendre et les investisseurs puissent acheter.

En fin de compte, l'entreprise a été acquise en 2008 par Heinz, intégrant ainsi l'activité de production et la marque dans une organisation internationale beaucoup plus grande. Une des raisons essentielles de cette opération était de permettre au produit de se positionner sur des marchés plus internationaux.

Là où l'infrastructure des transports et du stockage s'est développée, le marché géographique peut s'être considérablement élargi, et il se peut que ces entreprises intégrées verticalement (coopératives ou privées) n'exploitent plus l'infrastructure en tant que monopole naturel. Dans certains cas, elles viennent à se trouver en concurrence directe avec des coopératives ou des entreprises privées dans les régions adjacentes. Dans ces cas, il est peu probable qu'il existe un problème en termes de concurrence, que l'entreprise décide ou non de se « démutualiser » (autrement dit, de se séparer des cultivateurs et d'admettre des actionnaires privés ou de vendre à des entreprises plus grandes) ou de défusionner.

Ce n'est toutefois pas toujours le cas. Parfois, des entreprises qui ont (ou paraissent avoir) un large monopole local et régional ou une position dominante choisissent de se démutualiser, ce qui pose des problèmes en termes de concurrence. Dans ces cas, l'autorité de la concurrence peut être invitée à faire usage de ses mesures d'application de la loi ou de persuasion pour améliorer l'accès, à des conditions concurrentielles, à l'infrastructure existante à court terme et à l'investissement dans l'infrastructure à long terme.

Encadré 4. Des montagnes de céréales (Australie)

Pendant de nombreuses années, le secteur australien des céréales a été dominé par un certain nombre de coopératives céréalières. Dans beaucoup d'États, les pouvoirs publics ont soutenu la création soit de coopératives détenues par les cultivateurs dotées de pouvoirs monopolistiques légaux pour acheter, stocker, transporter et commercialiser des types particuliers de céréales, soit de commissions réglementaires qui, techniquement, étaient des organisations publiques, mais gérées par des cultivateurs. Le type de céréale le plus important qui est produit est le froment, et le gouvernement national a mis en place un Conseil australien du froment doté du droit exclusif d'exporter le froment.

Au fil du temps, toute une série de réformes ont été opérées dans toutes ces organisations de négoce en céréales qui ont eu pour effet la suppression des droits monopolistiques d'exportation et la modification des régimes de propriété, en permettant aux cultivateurs de devenir des investisseurs dans l'entreprise. Bien que des améliorations non négligeables de la concurrence soient apparues entre les régions géographiques et entre les types de céréales dans chaque région, chaque entreprise a généralement conservé une position de force dans certaines régions géographiques ou pour certains types de céréales.

Une étape importante a été franchie lorsque le bras international du Conseil australien des céréales (sous son ancienne direction) s'est discrédité aux yeux des milieux commerciaux internationaux et que la décision a été prise de supprimer son monopole. Étant donné que toutes les entreprises céréalières étaient intéressées par la possibilité de participer à l'exportation de froment, cette suppression du monopole a offert l'occasion aux pouvoirs publics de subordonner l'accès aux marchés de l'exportation à la condition que les entreprises donnent accès à l'infrastructure monopolistique localisée qu'elles détenaient.

Le gouvernement a permis à toute entreprise de solliciter une licence d'exportation du froment, mais, si cette entreprise possède une installation importante de manutention des céréales dans le pays (comme des silos, des raccordements ferroviaires ou des installations portuaires), le détenteur de la licence doit d'abord offrir et avoir approuvé un engagement d'accès à l'infrastructure qui soit acceptable pour l'autorité de la concurrence. On espère par ce mécanisme que la concurrence puisse devenir plus vive, même dans les zones où les entreprises ont hérité des anciennes coopératives agricoles des positions fortes sur le marché.

4.4 *Abus de position dominante*

Un certain nombre de questions relatives à l'abus de position dominante ont déjà été examinées dans le cadre de la discussion de l'intégration verticale. Ici aussi, comme dans les observations formulées tout au long du présent document concernant le fait que les marchés en aval et en amont sont généralement beaucoup plus concentrés que les marchés pour la production des matières premières elles-mêmes, les abus de position dominante sont ordinairement commis par les fournisseurs d'intrants pour la production primaire ou pour la transformation des produits primaires.

Il existe des exemples supplémentaires d'autres types de questions qui ont trait à l'abus de position dominante. Dans une action privée⁵⁶, une petite scierie (Ross-Simmons) a introduit un recours au motif qu'un groupe d'entreprises international intégré verticalement de culture et de sciage de bois d'œuvre

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Weyerhaeuser Company, requérant, c. Ross-Simmons Hardwood Lumber Company

(Weyerhaeuser) la menait à la faillite en faisant, dans une localité particulière d'Amérique du Nord, monter le prix des grumes de sciage à un niveau qui empêchait Ross-Simmons d'être rentable, mais le plaignant a finalement été débouté en appel. Il n'empêche qu'il s'agit d'un cas intéressant en ce qu'il examine en détail comment les vérifications de fixation de prix de vente d'éviction peuvent s'appliquer à une allégation de cas de pratique de prix d'achat d'éviction par un transformateur de matières premières de bases.

Dans le droit fil de la discussion qui précède concernant le comportement horizontal, des cas importants d'abus de position dominante peuvent se produire en aval des matières premières. La contribution de Maurice se penche sur un cas d'abus de monopole lié au marché du cheddar en blocs par l'entreprise IBL Consumer Goods (actuellement IBL BrandActiv), le distributeur exclusif dans le pays. La société avait abusé de sa position dominante en offrant rétroactivement des réductions sur le cheddar en blocs de la marque Kraft en échange de linéaires privilégiés pour son cheddar Kraft ainsi que pour d'autres produits de la marque Kraft, notamment des chocolats, des biscuits et du jus de fruits en poudre.⁵⁷

Une difficulté particulière peut se présenter pour les autorités dotées de pouvoirs de fixation de prix d'éviction ou excessifs pendant de courtes périodes au cours desquelles les prix augmentent sensiblement, en particulier si des parties du marché sont isolées du commerce interrégional ou international. Comme examiné à la section relative aux marchés négociés en bourse et la spéculation ci-dessus (et présenté en détail à l'Annexe au présent document), il n'est pas indiqué de traiter des situations de courte durée dans lesquelles les prix augmentent subitement par rapport aux prix récents de la matière première comme des cas de pratiques abusives d'exploitation. Il vaut mieux les traiter au titre des interdictions de prix abusifs spécifiquement adaptés.

4.5 Fusions

Les circonstances dans lesquelles des problèmes apparaissent concernant les fusions anticoncurrentielles sont généralement identiques à celles décrites ci-dessus au sujet des mécanismes horizontaux et verticaux. Premièrement, les cas de fusions litigieuses se produisent plus couramment dans le contexte de la production de matières premières minérales que dans celle de produits agricoles de base. Un exemple notable relatif à l'extraction de minerai de fer a été la proposition abandonnée de fusion de BHP Billiton et Rio Tinto.

Au début de l'année 2008, l'acquisition de **Rio Tinto** par **BHP Billiton** a été annoncée. Les deux parties qui fusionnaient étaient des sociétés australo-britanniques cotées sur deux bourses qui extraient et commercialisent une série de matières premières comme le minerai de fer, le charbon, l'uranium, l'aluminium, les sables minéralisés, le cuivre et les diamants ainsi que divers autres métaux de base et minerais industriels. La fusion envisagée a été notifiée à un certain nombre de pays et territoires, notamment l'Australie, l'Union européenne, le Japon, l'Afrique du Sud et les États-Unis. Elle a fait l'objet d'une analyse approfondie, en particulier en ce qui concerne les problèmes potentiels de concurrence sur les marchés du minerai de fer ; en Afrique du Sud, l'aluminium posait un problème potentiel. En ce qui concerne le minerai de fer, Rio Tinto et BHP Billiton étaient respectivement le deuxième et le troisième producteur ; par la fusion, il seraient devenus le premier producteur et auraient contrôlé, avec l'ex-premier producteur (Companhia Vale do Rio Doce of Brazil), la majeure partie du marché mondial, tous les autres producteurs étant sensiblement plus petits. Bien que l'acquisition fût approuvée sans conditions en Australie et aux États-Unis, des recours, y compris la cession, étaient attendus dans l'Union européenne ; le projet de fusion fut abandonné avant l'adoption de la décision de la Commission européenne. Il faut noter que l'acquisition avait été annoncée bien avant la flambée des prix mondiaux des matières premières et abandonnée à la fin de 2008, lorsque le ralentissement économique a commencé.

⁵⁷ DAF/COMP/GF/WD(2012)7. Une évaluation intéressante après application ex post des règles est décrite dans la contribution.

Au milieu de 2009 fut annoncé le projet de coentreprise de Rio Tinto et BHP Billiton pour la production de minerai de fer dans l'Ouest de l'Australie. Ici aussi, le projet a été examiné par un certain nombre de pays et de territoires, notamment l'Australie, l'Allemagne, l'Union européenne, la Corée et le Japon, qui ont tous exprimé des craintes préliminaires concernant la concurrence. Le projet a été abandonné à la fin de 2010, avant toute décision des autorités de la concurrence ; l'on s'attendait toutefois à ce que des mesures correctives radicales fussent exigées. Au moment où le projet de coentreprise a été abandonné, les prix du minerai de fer étaient encore à la hausse.

Deuxièmement, il est plus courant, pour les produits de base agricoles comme pour les minéraux, de trouver des cas en amont et en aval de l'activité de production elle-même.

À la fin de 2011, le Tribunal de la concurrence d'Afrique du Sud a bloqué la fusion de **Pioneer Hi-Bred** et **Pannar Seed**, deux entreprises actives dans la reproduction, la production et la distribution de semences. Pioneer est une entreprise des États-Unis et le deuxième producteur et fournisseur de semences de maïs en Afrique du Sud, Pannar, situé en Afrique du Sud, étant le troisième. Le principal souci concernait les semences hybrides de maïs; mais, à défaut de Pioneer et Pannar, il n'y aurait plus eu qu'une seule entreprise distribuant ces semences, à savoir Monsanto aux États-Unis.

Les semences hybrides de maïs sont génétiquement modifiées. Les différences de climat, de type sol, de ravageurs etc. font que la semence hybride est reproduite de manière spécifique pour une région déterminée, ce qui permet de penser que le marché est, au mieux, national et pourrait même être plus local encore. Plus de 75 % du maïs sud-africain est cultivé à partir de semences hybrides.

La principale préoccupation concernait une possible augmentation des prix après la fusion. Pannar a acquis une solide réputation grâce à sa grande expérience des conditions locales, et son vaste germoplasme (collection de variétés de semences) adapté aux conditions locales constitue un avantage concurrentiel capital. Une autre crainte était que la fusion ait pour effet de renforcer sensiblement les obstacles à l'entrée sur le marché ; Pannar est la seule source locale de germoplasme adapté aux conditions locales et, sans cette entreprise, les nouveaux arrivants potentiels sur le marché n'auraient pas accès aux variétés de semences locales.

Il a été fait appel du jugement devant la Cour d'appel de la concurrence.

Des préoccupations similaires ont été exprimées il y a quelques années par rapport à une fusion de deux multinationales actives dans les produits chimiques phytosanitaires, c'est-à-dire des produits pour la lutte contre les maladies des plantes, les ravageurs (insectes etc.) et les mauvaises herbes dans les cultures.

En 2002, l'acquisition d'**Aventis Crop Science (ACS)** par **Bayer** a été examinée au Canada, dans l'Union européenne et aux États-Unis ; tous ont relevé des problèmes de concurrence et n'ont approuvé la concentration que moyennant certaines mesures correctives consistant en la cession d'une partie de l'entreprise concernée. Dans l'Union européenne, par exemple, outre la cession d'un certain herbicide et l'octroi d'une licence pour un certain molluscicide, il a été convenu d'une vente en bloc à un acheteur unique de l'activité d'ACS dans le domaine des insecticides et des fongicides.

Les insecticides constituaient un souci à l'échelle mondiale, dès lors que Bayer et ACS étaient deux des trois entreprises multinationales fabriquant la nouvelle génération de ces produits. Il y avait aussi des problèmes en ce qui concerne des marchés plus locaux. Par exemple, Bayer et ACS étaient les seuls fournisseurs de défoliants du coton par temps froid aux États-Unis ; ces défoliants sont des aides chimiques à la récolte destinées à enlever les feuilles des plants de coton sans dessécher ceux-ci. Ils sont nécessaires pour la récolte à moindre coût du coton de première qualité. L'activité d'ACS dans le domaine des défoliants a dès lors été cédée.

De même, les marchés des technologies agricoles et extractives sont souvent mondiaux, et une fusion dans ces marchés peut susciter des craintes pour la concurrence. Par exemple, en 1999, une fusion entre **New Holland** et **Case**, deux entreprises de premier plan, qui créait un numéro un mondial de la fabrication et de la distribution de machines agricoles et de matériel de construction, n'a été approuvée par la Commission européenne, le Département de la justice des États-Unis et de nombreuses autres autorités de la concurrence que sous condition de cession de l'unité de fabrication et d'ouverture de canaux de distribution, précédemment exclusifs, dans un certain nombre de pays.

Les marchés de la transformation des produits de base sont d'ordinaire plus localisés, ce qui rend toute comparaison plus difficile. Par exemple, dans le secteur de la transformation de la viande, l'acquisition, en 1988, de **Brotwick**, une entreprise du Royaume-Uni, par l'australienne **Australia Meat Holdings** a été contestée en Australie. La fusion concernait des abattoirs et des installations pour le traitement à grande échelle de la viande, dont la majeure partie serait exportée, le tout situé dans la province australienne de Queensland. Le tribunal saisi de l'affaire a conclu que le Nord Queensland constituait un marché pertinent distinct parce que les abattoirs des zones du Sud ne pouvaient les remplacer ; il a déclaré que l'absence de substituabilité résultait des coûts de transport, de la perte physique subie par le bétail engraisé pendant son transport, des meurtrissures subies pendant le transport, du but des producteurs d'engraisser leur bétail pour atteindre une qualité supérieure et le faire abattre ensuite aussi rapidement que possible et, enfin, de la loyauté des producteurs vis-à-vis des abattoirs locaux. La cession de certains abattoirs a été ordonnée afin de remédier à la situation dans le Nord Queensland, qui aurait été dominé par l'entité fusionnée. À l'inverse, l'Autorité australienne de la concurrence ne s'est pas opposée à d'autres fusions sur ces marchés, dont la plus récente, en 2011, est celle du **Teys Meat Group**, le deuxième transformateur de viande en Australie, et de la multinationale **Cargill**, en particulier en raison du chevauchement géographique limité de leurs activités.

De même, après une analyse approfondie, il n'y a pas eu d'opposition à l'acquisition de **Better Beef** par **Cargill** au Canada en 2004, sur le marché géographique de l'Ouest du Canada (et de certains États du Nord des États-Unis), malgré l'importante part de marché de l'entité fusionnée et des obstacles non négligeables (mais franchissables) à l'entrée, créés par les économies d'échelle et les relations établies avec les clients. Le Bureau canadien de la concurrence a conclu que la menace d'entrée et le pouvoir compensatoire de la part des détaillants du secteur de l'épicerie rendaient peu probable l'empêchement ou la limitation substantielle de la concurrence suite à la fusion.

Dans la chaîne de production en aval, la fusion, en 2004, de l'américain **Weyerhaeuser** et du canadien **Domtar**, bien qu'elle créât la plus grande entreprise de papier surcalandré, n'a pas été contestée par le Bureau canadien de la concurrence et par le Département de la justice des États-Unis. Les deux entreprises étaient aussi actives sur un certain nombre d'autres marchés, notamment la gestion forestière et la production de bois d'œuvre et autres produits du bois.

Des considérations similaires sont prises en compte lors de l'évaluation des effets verticaux des fusions. La transformation et la distribution de produits laitiers peuvent servir d'exemple.

En 2000, l'autorité finlandaise de la concurrence a approuvé l'acquisition d'**Osuuskunta Maito-Pikka** et **Kainuun Ossusmeijeri**, deux entreprises régionales de transformation du lait et de production de produits laitiers, par **Valio**, le premier transformateur de lait de Finlande. Suite à la fusion, la part de Valio dans l'achat de lait cru serait passée à 80 % ; une des principales préoccupations était comment garantir aux concurrents de Valio une quantité suffisante de lait cru. Les mesures correctives ont notamment consisté à imposer à Valio l'obligation de vendre un maximum de 150 millions de litres de lait cru à ses concurrents à un prix égal à la moyenne du prix d'achat de Valio.

Étant donné que la position de Valio sur plusieurs marchés de produits laitiers était également très importante – par exemple, plus de 70 % des produits laitiers liquides (lait, lait aigre, crème de lait) et plus de 60 % des poudres de lait –, Valio s'est également engagé à offrir ses services de logistique aux concurrents, ainsi que ses services de transformation et de conditionnement de produits laitiers, et à ce que toute unité de production de Valio menacée de fermeture soit offerte à l'achat à ses concurrents, sans restriction quant à son utilisation.

Fait intéressant, un type de fusion similaire a été examiné au Portugal, qui a donné lieu à l'imposition de mesures structurelles correctives.

En 2007, l'autorité portugaise de la concurrence a approuvé une fusion, qui consistait en l'acquisition d'**International Dairies** par **Lactogal**. Lactogal était la principale entreprise dans le secteur laitier, transformant le lait cru et produisant du lait pasteurisé, du lait UHT, du fromage, du yoghourt et d'autres produits laitiers. International Dairies contrôlait Renoldy, une entreprise qui distribue des produits laitiers et assure également la collecte et le traitement de lait cru.

La fusion aurait renforcé la position dominante de Lactogal sur un certain nombre de marchés concernés. En particulier, l'acquisition de Renoldy et de son activité de collecte de lait cru aurait augmenté les obstacles à l'entrée et à l'expansion sur les marchés des produits laitiers en raison des difficultés à obtenir du lait cru des producteurs. Après la fusion, Lactogal aurait contrôlé plus de 70 % du lait cru, ce qui aurait diminué les incitations à entrer dans le secteur laitier, réduit la contestabilité sur ces marchés, et renforcé encore la position dominante de Lactogal. Comme solution aux craintes en matière de concurrence exprimées par l'autorité portugaise de la concurrence, Lactogal a proposé de céder Renoldy. Cette mesure a permis d'approuver la fusion.

Les effets verticaux concernent souvent le transport. Lorsque la fusion de **United Grain Growers** et d'**Agricore Co-operative**, des entreprises de culture et de transformation de céréales dans l'Ouest du Canada, a été approuvée en 2002 par le Bureau canadien de la concurrence, des mesures correctives ont été imposées, les entreprises concernées étant tenues de céder plusieurs élevateurs à grain dans le pays et un terminal portuaire à Vancouver.

Des préoccupations similaires ont été exprimées dans le cas d'une fusion complexe de sociétés minières au Brésil.

Companhia Vale do Rio Doce (CVRD) est le premier producteur et exportateur mondial de minerai de fer et de boulettes de minerai de fer, et un producteur important d'autres minerais. Il est aussi le premier acteur dans le domaine de la logistique au Brésil, qui détient des concessions d'exploitation pour un certain nombre de lignes ferroviaires de marchandises et de terminaux portuaires desservant ses propres mines et installations sidérurgiques et assurant ces services pour d'autres clients. Certains clients qui sont desservis par les lignes de CVRD sont des concurrents du secteur minier ou sidérurgique, une situation qui a entraîné une série de cas d'allégation de discrimination par CVRD.

L'autorité brésilienne de la concurrence a analysé conjointement sept opérations de fusion impliquant CVRD, par lesquelles l'entreprise prenait le contrôle de sociétés d'extraction du minerai de fer et de leurs lignes ferroviaires associées. La fusion a été approuvée en 2005 à condition que CVRD soit cède une de ses filiales qui lui donnait le contrôle sur une ligne ferroviaire stratégique, soit vende une de ses mines.

4.6 Réformes bénéfiques à la concurrence

Comme indiqué ci-dessus, il est très courant que des pays aient adopté des politiques qui limitent ou éliminent la concurrence sur le marché des matières premières agricoles. Dans certains cas, moins

fréquents, les pouvoirs publics interviennent aussi pour limiter la concurrence sur les marchés des matières premières minérales (en particulier le charbon, le gaz et d'autres marchés de l'énergie).

Après que le marché a subi des distorsions dues aux interventions réglementaires, des problèmes supplémentaires surgissent souvent, et les nécessités d'interventions supplémentaires répétées se multiplient. Par exemple, si les prix sont subventionnés, le subventionnement encourage la surproduction, avec comme effet que des aides nouvelles sont nécessaires pour maintenir les prix. De même, si les prix sont réglementés à la baisse, les producteurs sont moins incités à continuer de produire et d'investir dans du matériel de remplacement et sont moins à même de le faire, ce qui entraîne de nouvelles pénuries et augmente la nécessité de nouvelles interventions.

Parallèlement au présent document de référence, M. Scott Davenport, un expert membre du panel, a fourni un document qui note ce qui suit⁵⁸.

- Dans les pays en développement, il existe souvent une réglementation détaillée qui entrave la concurrence sur les marchés des matières premières, et réformer des réglementations qui limitent inutilement la concurrence offre des possibilités nettement plus grandes d'amélioration de la richesse économique que l'application de la loi.
- En réalité, il existe un danger dans le chef des organismes centraux qui définissent les politiques :
 - une tendance à adhérer avec enthousiasme au droit de la concurrence, presque comme pour se soustraire à la nécessité de s'attaquer aux restrictions réglementaires de la concurrence, significatives et en place de longue date ; et
 - l'importance accordée à la politique commerciale pour masquer la nécessité de résoudre les problèmes de concurrence « derrière la frontière », comme les restrictions frappant le marché intérieur.

Le document de M. Davenport explique aussi qu'il existe des preuves incontestables que la réforme de la politique agricole orientée vers les marchés débouche sur une augmentation des revenus dans les zones rurales, une productivité agricole accrue et un recul de la pauvreté dans ces zones. La raison en est que les prix constituent les « moteurs » de l'investissement public et privé efficace, non seulement dans l'agriculture, mais aussi dans d'autres domaines importants comme le secteur des services généraux, le développement de l'infrastructure et la recherche.

Idéalement, les pays prendraient des mesures pour lever les entraves réglementaires à la concurrence avant qu'elles ne deviennent à ce point coûteuses qu'elles en sont insoutenables. Il est toutefois souvent politiquement difficile de le faire et, comme illustré ci-après, les pays ne prennent souvent des mesures que lorsque les coûts de la réglementation deviennent à ce point importants qu'ils ont contraints de la réformer. Des exemples suivent :

- deux exemples (d'Australie et de Nouvelle-Zélande) qui concernent des réformes qui nécessitent un processus d'adaptation difficile pour les producteurs ; et
- un exemple d'Israël qui concerne des réformes qui créent des difficultés d'adaptation particulières pour les consommateurs.

Au milieu des années 1980 en **Australie**, une intervention des pouvoirs publics nuisible à la concurrence s'était largement répandue dans l'économie, des secteurs agricoles aux secteurs manufacturiers en passant par les services financiers et autres. L'intervention publique sur le marché

⁵⁸ Voir DAF/COMP/GF(2012)1.

comprenait des obstacles importants au commerce international, des offices de commercialisation monopolistiques, de larges exemptions et des lacunes dans le champ du droit de la concurrence et dans les subventions. Le 14 mai 1986, le trésorier Keating, principal ministre des finances du pays, a choqué le pays en prévenant que celui-ci deviendrait une république bananière si des réformes fondamentales n'étaient pas opérées. Le 2 décembre de cette année-là, Standard & Poors a réduit la notation de crédit du gouvernement de AAA à A+.

Malgré beaucoup de désaccord, la réaction dominante de la communauté était d'accepter qu'un changement fondamental était nécessaire. Les politiques macroéconomiques ont été immédiatement resserrées, mais le recul se serait poursuivi sans réforme des marchés. Réformer les marchés est un travail complexe qui prend du temps, et la tâche est fortement compliquée par la structure fédérale, au sein de laquelle le pouvoir est partagé. L'approche australienne du problème a consisté à conclure des accords formels entre les différents pouvoirs⁵⁹, assortis de principes explicites en matière de concurrence, d'un calendrier pour un processus systématique d'enquête et d'analyse dans chaque secteur, et de mécanismes financiers pour encourager la réforme.

Lors de l'examen du secteur laitier, il a été constaté que de très fortes distorsions du marché entraînaient des coûts économiques non négligeables. Immédiatement avant la réforme, la commerce était libre pour le fromage, le yoghourt, et les autres produits laitiers, à l'exception du lait destiné à la consommation humaine, qui était fortement réglementé.

Comme dans beaucoup d'autres pays fédéraux, la Constitution australienne consacre l'interdiction de toute mesure du gouvernement fédéral et des gouvernements des États qui a un effet de distorsion sur le commerce intérieur. Malgré cela, chaque État avait mis en place un office de commercialisation monopolistique établi par la loi qui assurait à tous les producteurs laitiers au sein de l'État un « accès équitable et sur pied d'égalité » au marché, par des prix minimums de gros pour le lait et des quotas limités attribués à tous ces producteurs afin de leur permettre de vendre une certaine quantité de lait au prix réglementé. Les coûts du prix de gros gonflé étaient financés par deux types de prélèvements (ou taxes), l'un supporté par les consommateurs pour subventionner les producteurs, et l'autre supporté par toute production de produits laitiers pour subventionner le lait. Il était largement reconnu que ces mécanismes étaient anticonstitutionnels, mais, par accord tacite entre les parties concernées, le système n'a pas été contesté.

Ces politiques ont entraîné toutes sortes de coûts :

- les consommateurs payaient des prix au détail gonflés en raison du prix imposé et du prélèvement
- certains producteurs subissaient un coût plus élevé en prélèvements que ce qu'ils recevaient
- la combinaison de produits était faussée, les producteurs s'efforçant de produire moins de lait, de yoghourt et de beurre (dont une grande partie était exportée)
- la structure optimale du cheptel était faussée au détriment des vaches laitières produisant un lait à forte teneur en crème et au profit de celles qui produisent des volumes importants de lait à moindre teneur en crème
- dans certains États, les terres étaient consacrées à l'élevage laitier, et des unités de traite et du matériel de réfrigération coûteux ont été installés dans des régions mieux adaptées à d'autres

⁵⁹ Parmi ces divers accords, le *Competition Principles Agreement* est le plus pertinent dans ce contexte.

formes de production agricole tandis que, dans d'autres États, des terres de qualité pour la production laitière ont été en partie affectées à des usages moins rentables

- une grande partie de l'énergie des agriculteurs au niveau personnel et collectif a été détournée au profit de pressions pour obtenir des subventions, de la revendication et de l'exercice de droits aux quotas, et de la revente de quotas sur le marché secondaire.

Reconnaissant que la réforme aurait un effet important de perturbation sociale, le gouvernement national a offert 1,7 milliard de dollars australiens (le cours de change actuel est d'environ un dollar australien pour un dollar des États-Unis) d'aide aux producteurs laitiers qui décidaient de quitter le secteur et de se recycler pour un autre emploi ou de rester dans le secteur mais de restructurer leur production pour l'adapter au nouveau système de marché. Les mesures législatives prises par les autorités des États ont été approuvées sous réserve que les producteurs locaux reçoivent une aide financière nationale. Bien que cette aide représentât un montant non négligeable de 11 cents par litre pendant la période de restructuration, on a estimé qu'elle ne suffisait pas à dédommager les producteurs pour les coûts subis :

Tableau 2. Estimation des effets sur les bénéfices des agriculteurs en Australie

(en milliers d'AUD par exercice financier)	NSW	Victoria	Qld	SA	WA	Tas
Bénéfices (pertes) en 2000	19,6	1,3	10,8	15,7	50,7	20,3
Bénéfices (pertes) 2001	(30,5)	(2,1)	(31,9)	(15,8)	(31,3)	(1,1)
Versement compensatoire	20,3	12,3	15,9	18,2	30,9	8,9
Bénéfices (pertes) après l'aide	(10,2)	10,2	(16,0)	2,4	(0,4)	10,0
Variation nette des bénéfices	(29,8)	11,5	(26,8)	(13,3)	(51,1)	(9,7)

Source : P Earl 2003, *Australia's Dairy Reforms, Lessons for Canada*

Un engagement implicite important était que les mêmes principes étaient appliqués simultanément à une large gamme d'autres secteurs et qu'à terme, les producteurs laitiers bénéficieraient des réformes dans d'autres secteurs, ce qui fut effectivement le cas. En tant que producteurs achetant des intrants et que consommateurs dépensant leurs revenus, les producteurs laitiers ont bénéficié des réformes opérées dans le secteur énergétique, dans le secteur des services financiers, dans le transport aérien, dans les services généraux, dans le secteur manufacturier et dans de nombreux autres secteurs. En règle générale, chaque secteur a reçu une aide financière inférieure à un dédommagement intégral.

Au niveau de l'économie nationale, les réformes du marché combinées avec la levée des obstacles au commerce et un conservatisme budgétaire soutenu ont permis à l'économie de se redresser et de prospérer. Une indication de ce revirement est qu'en 2003, le gouvernement national a récupéré sa notation de crédit AAA.

En **Nouvelle-Zélande**, les secteurs agricoles ont également subi une réforme au cours de la même période. L'économie néozélandaise est moins diversifiée que l'économie australienne et ses revenus de l'exportation dépendent fortement de la vente de produits agricoles et alimentaires de base, comme les produits laitiers, la viande, la laine, les fruits et les poissons et fruits de mer.

En 1984, un vaste éventail d'entraves d'origine publique s'était accumulé dans de nombreux secteurs, et elles étaient devenues insoutenables pour le pays à long terme⁶⁰. L'intervention du gouvernement portait sur le contrôle du change, les droits de douane, les subventions pour compenser les effets des droits de

⁶⁰ L. Evans 2004, *Structural Reform: the Dairy Industry in New Zealand* (document présenté à la Conférence de haut niveau de l'APEC sur la réforme structurelle).

douane et le monopole de commercialisation des conseils institués par la loi. Pour obtenir l'acceptation de la communauté néozélandaise pour les réformes nécessaires, un programme de réformes à l'échelle de l'économie a été lancé, dont le volet le plus vital était celui des réformes agricoles. Comme le relève la contribution de la Nouvelle-Zélande, le déficit budgétaire s'élevait à 9 % du PIB, la dette publique atteignait 40% et l'indice des prix à la consommation approchait les 20 %. Le pays ne pouvait plus se permettre de soutenir les secteurs inefficaces, y compris le secteur agricole.

Beaucoup de subventions avaient encouragé la surexploitation agricole par l'usage intensif d'engrais ainsi que l'exploitation de terres insuffisamment productives. C'est vers ce moment que le subventionnement des engrais a été supprimé et que l'offre abondante de phosphates bon marché exportés de Nairu en Nouvelle-Zélande pour être utilisés comme engrais s'est tarie, entraînant une très forte augmentation des coûts de production essentiels.

La suppression des subventions et les conseils de commercialisation institués par la loi dans les secteurs ovin et bovin ont exposé ces secteurs aux forces débridées du marché. Pendant près de dix ans, de 1984 à 1993, la rentabilité des exploitations agricoles a fortement diminué et a contraint à procéder à toute une série d'ajustements structurels différents. Un certain nombre de solutions différentes sont apparues :

- certains producteurs sont passés à la taille supérieure pour obtenir des économies d'échelle supplémentaires et réduire ainsi les coûts
- certains producteurs ont réduit le volume de production mais ont sensiblement amélioré la qualité de leurs produits, augmentant ainsi leurs revenus
- certains producteurs sont passés de l'élevage d'ovins à la production de vin et ont transformé leurs terres en plantations de bois d'œuvre, deux produits dont la demande est en augmentation
- certains producteurs se sont diversifiés, soit dans des produits agricoles différents, soit en conservant leurs exploitations et en prenant un emploi en ville, d'autres encore ont vendu leur exploitation (ou une partie de celle-ci) à des travailleurs des villes et les propriétés sont devenues des résidences combinées avec des fermes d'agrément
- certains producteurs se sont diversifiés dans le secteur touristique pour devenir des exploitations agricoles combinées avec des logements de vacances, ou des fournisseurs de produits gastronomiques utilisant des ingrédients cultivés dans l'exploitation.

Comme il ressort de ces réponses, bon nombre de ces réformes ont contribué à créer un avenir économique plus viable et un profil de production plus durable du point de vue de l'environnement.

Dans une analyse centrée sur la concurrence, il est important d'examiner distinctement et plus en détail les réformes du secteur laitier. La plupart des aspects de l'analyse ci-dessus s'appliquent également au secteur laitier, mais, comme évoqué ailleurs dans le présent document, une partie très importante de la production laitière est la transformation qui se déroule à proximité de l'exploitation, que ce soit la simple pasteurisation du lait de consommation ou la fabrication de fromage, de yoghourt et de beurre.

Comme dans d'autres secteurs, il existait un conseil de commercialisation institué par la loi, le Conseil des produits laitiers, qui détenait un monopole de l'exportation des produits essentiels. Le conseil était la propriété de quatre coopératives, deux très grandes et deux très petites, et le secteur était essentiellement caractérisé comme un duopole national intégré à un monopole d'exportation. Outre la suppression des subventions et des obstacles au commerce s'est posée, dans le processus de réforme, la question essentielle de la manière de réorganiser cette structure.

En 2001, afin de permettre la formation d'une entreprise qui puisse être concurrentielle sur les marchés internationaux, les deux grandes coopératives et le Conseil des produits laitiers ont fusionné pour former Fonterra, une coopérative appartenant aux agriculteurs. Le statut de monopole a été supprimé de telle manière qu'il est possible de contourner Fonterra sur les marchés d'exportation, mais que Fonterra conserve une part extrêmement importante des achats de lait néozélandais, de la production et des ventes de produits laitiers.

Le projet initial pour Fonterra était que la coopérative consacre des dépenses importantes à la recherche-développement et à la commercialisation, ce qui permettrait à l'entreprise de concurrencer efficacement les grandes entreprises laitières privées internationales comme Nestlé. Toutefois, l'entreprise continue à ce jour (de même que les producteurs laitiers néozélandais) de dépendre principalement des ventes de produits d'utilisation courante.

À un niveau national global, en 2003, les réformes étaient considérées très largement comme une réussite.⁶¹ Depuis, l'exposition aux marchés mondiaux a entraîné des années prospères et des années qui l'étaient moins. Il n'empêche que le secteur est aujourd'hui une des très grandes sources de revenus d'exportation pour le pays, qu'il apparaît comme viable et que le niveau d'aides dont il bénéficie est négligeable. Toutefois, au niveau des exploitations elles-mêmes, la situation est beaucoup moins certaine.

Lorsque le processus de réforme a débuté, la rentabilité des exploitations agricoles a diminué pour reprendre lentement jusqu'en 1998 environ, date à partir de laquelle la rentabilité s'est sensiblement améliorée à peu près au moment où Fonterra a été créé, et elle a fluctué depuis. Derrière ces chiffres, il y a des centaines de milliers d'entreprises familiales qui ont subi des pressions extrêmes. Une illustration de cette situation est l'« indice de misère », établi par Pita Alexander⁶² en utilisant une enquête sur le coût financier au niveau de l'exploitation et des données relatives aux revenus, et l'indice correspond à son estimation du niveau minimum de revenus dont une exploitation laitière a normalement besoin pour assurer une qualité de vie durable à un producteur laitier en laissant un excédent d'exploitation suffisant pour faire face aux dépenses courantes de la famille, aux dépenses d'éducation, aux impôts, au remplacement du matériel et au remboursement des dettes. Le niveau de misère ainsi défini a sensiblement augmenté et, en 2005, il avait atteint 80%.

Comme indiqué ci-dessus, Fonterra est une coopérative détenue par des producteurs laitiers. Un des résultats apparents de cette structure de propriété, combinée avec la pression évidente sur les exploitations laitières familiales, et que les producteurs ont choisi de tirer une valeur significative de Fonterra en fixant le prix du lait à sa pleine valeur. Cela a soulevé la question de savoir si l'entreprise sous-investit dans la recherche, le développement et la commercialisation, et le débat au sujet de la nécessité de nouvelles réformes se poursuit.

Globalement, la contribution de la Nouvelle-Zélande résume comme suit son programme de réformes :

« L'expérience de la Nouvelle-Zélande en ce qui concerne la suppression de l'aide publique a démontré que l'activité agricole dans un environnement déréglementé est possible et produit un portefeuille d'activités associé à une meilleure affectation des ressources à l'intérieur du secteur et entre secteurs. Exposer le secteur à la concurrence internationale a aussi signifié qu'il était contraint d'innover et de s'adapter pour maintenir sa compétitivité internationale. Il s'ensuit que le secteur est mieux à même de gérer le risque, y compris celui associé à la volatilité des prix sur les marchés des produits de base. »

⁶¹ L. Sayre 2003, *Farming without subsidies? Some lessons from New Zealand.*

⁶² Per J. Donkers, *Operating the Dairy Farm Business for Profit.*

En 2010, les consommateurs en **Israël** attachaient beaucoup d'importance au coût de la vie. Au début, cette préoccupation s'est exprimée au sujet du prix du fromage blanc, qui avait augmenté de près de la moitié après la suppression de la réglementation des prix. Certaines personnes dans le public ont réagi en organisant un boycott de consommateurs à l'encontre des producteurs de fromage blanc. De ce point de départ initial, l'action directe des consommateurs s'est rapidement étendue aux préoccupations suscitées par les prix d'une vaste gamme de produits de base, notamment le prix de l'essence, de la farine, du pain, du sucre, du fromage, des poulets et des produits laitiers, et aussi aux coûts de services comme le logement et la garde d'enfants.

Le gouvernement a mis en place un comité chargé de s'occuper du problème du coût de la vie (le comité « Trajtenberg »), qui a élaboré un ensemble de mesures pour résoudre le problème, notamment les mesures suivantes :

- pour le secteur des produits faisant l'objet d'échanges, réduire les obstacles à l'importation et les subventions et augmenter la capacité des principaux ports de mer afin d'exposer les producteurs du pays à la concurrence
- pour le secteur des produits ne faisant pas l'objet d'échanges (du secteur de la construction aux transports publics en passant par les supermarchés), renforcer les pouvoirs de l'autorité de la concurrence en matière de collecte d'informations, d'exécution de la loi et d'ouverture des marchés publics à l'adjudication publique
- réformer le système fiscal pour le rendre plus progressif (imposer davantage les plus fortunés), orienter l'aide vers ceux qui en ont besoin et améliorer la capacité des consommateurs d'acquérir le nécessaire sans fausser les marchés, en subventionnant soit la production, soit la consommation de certains produits particuliers
- intervenir pour soutenir certains services comme la construction de logements et la garde d'enfants.

Un absent notoire parmi ces recommandations est toute idée de réinstauration du contrôle des prix sur le fromage blanc ou sur tout autre produit.

Comme il fallait s'y attendre, de nombreux producteurs du pays dans les secteurs actuellement protégés étaient fortement opposés aux recommandations, tout comme certains autres groupes de la communauté, certains estimant que les recommandations n'allaient pas assez loin et d'autres, qu'elles allaient trop loin. Le gouvernement a néanmoins salué le rapport et, moyennant certaines modifications, a appliqué progressivement les recommandations.

En résumé, les réformes des marchés des produits de base peuvent sensiblement améliorer les résultats économiques nationaux. Cela étant, les secteurs des produits agricoles de base sont généralement constitués d'un grand nombre de petites entreprises familiales qui peuvent éprouver d'importantes difficultés d'adaptation. Toutefois, sauf si le secteur était fondamentalement non viable au départ, il devrait être possible de trouver une voie de réforme qui, en fin de compte, produira un secteur agricole concurrentiel et rentable à l'échelle mondiale, même dans les pays développés où les coûts de la main-d'œuvre et des intrants sont comparativement élevés. Il apparaît que les ingrédients d'une réforme réussie sont notamment les suivants :

- une large compréhension, dans la communauté, des fondamentaux économiques et de la nécessité d'une réforme
- une identification des principes de base qui sous-tendent la réforme et un sentiment d'équité entre les différentes parties de la communauté

- une analyse méticuleuse des spécificités du marché
- un enchaînement réfléchi des étapes de la réforme
- des politiques publiques qui lèvent les obstacles ou soutiennent activement l'ajustement structurel.

4.7 Politiques publiques qui limitent l'incidence de la volatilité des prix – « gestion de la crise »

La volatilité des prix des produits de base, en particulier leurs augmentations inattendues, peut être difficile, voire impossible, à supporter pour les consommateurs. Il est dès lors non seulement légitime, et c'est peut-être même une responsabilité importante des pouvoirs publics, d'intervenir pour veiller à ce qu'une charge déraisonnable ne pèse pas sur ceux qui ne peuvent la supporter. Le risque, c'est que des politiques bien intentionnées peuvent souvent créer des coûts collatéraux importants pour l'économie, voire que les politiques s'avèrent contreproductives à long terme.

De nombreuses politiques différentes à court et à long terme ont été appliquées, dont les suivantes :

- instaurer des restrictions à l'exportation
- lever partiellement les restrictions à l'importation
- constituer et débloquer des stocks stratégiques destinés à modifier les prix du marché
- constituer des stocks « d'urgence » plus limités destinés à alimenter les consommateurs à très court terme
- la réglementation des prix
- les subventions pour les clients
- les études de marché
- la surveillance des prix
- l'augmentation des terres disponibles
- la promotion de l'autosuffisance
- voire les mesures visant à maîtriser la croissance démographique.

Lors de l'examen et de l'évaluation des différentes options en termes de politique, il est utile de déterminer si le problème identifié est causé par une entrave sur le marché ; si une solution à long terme peut être trouvée, celle-ci constituera une réponse stratégique suffisante ; ou si le problème identifié est tel que, même si le fonctionnement du marché était satisfaisant, on ne considérerait pas qu'il produit un résultat satisfaisant sous l'angle de la politique.

Par exemple, le problème peut être que les pauvres ne peuvent se permettre les produits alimentaires de base. Ce problème se pose-t-il parce que le prix de détail de l'alimentation est gonflé par des restrictions ou des distorsions sur le marché ou parce que les pauvres ne peuvent se permettre d'acheter des aliments en suffisance s'il n'y a pas de redistribution du revenu ou de la richesse en provenance d'autres pans de la société ? Il se peut qu'il existe deux problèmes : des marchés inefficaces, et la nécessité d'une redistribution du revenu ou de la richesse.

Si le problème ne peut être attribué qu'au seul dysfonctionnement du marché, toute réponse en termes de politique devrait définir une succession d'initiatives pour répondre au besoin immédiat, de telle manière

qu'elle fournit des stratégies de sortie qui lèveront les obstacles sur le marché et rendront la chaîne de l'approvisionnement autonome et auto-correctrice.

En revanche, s'il existe une nécessité permanente de redistribution du revenu ou de la richesse, la tâche consiste à trouver la manière la plus efficace (et donc ayant le moins d'effets de distorsion) de réaliser ce transfert. Pour chaque politique publique potentielle, il est probable qu'il y aura des dépenses supportées par l'État, les producteurs ou d'autres parties ainsi que des coûts implicites, comme empêcher un producteur de vendre sa production aux acheteurs du pays ou de l'étranger qui sont disposés à payer le prix fort. Deux questions sont utiles pour évaluer ces politiques :

- La partie de la société qui supporte les coûts des transferts aux consommateurs est-elle la plus indiquée ? Par exemple, si les agriculteurs pauvres supportent les coûts des transferts aux consommateurs pauvres et ont de ce fait eux-mêmes besoin d'aide, l'opération peut ne pas améliorer les résultats pour la société.
- Le coût du transfert est-il réduit au minimum ? Par exemple, une politique (comme une interdiction d'exporter) qui rend les céréales disponibles à bas prix pour chacun dans un pays peut avoir pour effet que les consommateurs riches en profitent autant que les pauvres et encourager le gaspillage d'une partie des céréales. Un programme ciblé plus spécifiquement sur les consommateurs pauvres, qui continue d'envoyer des signaux précis à ces consommateurs indiquant que l'offre de céréales est limitée, est susceptible de faire peser une charge globalement plus faible sur la société et, si le choix des instruments de politique à utiliser a été soigneusement soupesé, cette charge globale plus faible peut être idéalement dirigée vers la partie de la société la mieux à même de la supporter.

Il se peut que le meilleur choix théorique ne soit pas toujours disponible initialement : par exemple, les transferts financiers peuvent être difficiles à concevoir et à exécuter si le pays compte une population importante de personnes qui ne sont pas enregistrées auprès des pouvoirs publics et qui ne possèdent pas de compte en banque. À court terme, la meilleure politique de deuxième ou de troisième choix peut être la seule qui soit disponible, mais le gouvernement doit aussi examiner s'il est possible de supprimer les obstacles à l'adoption d'une politique de rang supérieur.

4.8 *L'expérience des politiques gouvernementales qui visent à résoudre le problème de la volatilité des prix*

Au cours de ces dernières années de forte volatilité des prix, beaucoup de pays ont recouru à deux types différents de **mesures liées aux échanges**.

- Les pays qui dépendent entièrement ou pour partie des importations ont réduit les obstacles à l'importation. D'après l'étude de 2009 de la FAO⁶³, 43 pays en développement sur 81 (53 %) ont réduit les taxes à l'importation. Les contributions des Philippines⁶⁴ et du Maroc⁶⁵, par exemple, détaillent ces politiques.
- Beaucoup de pays producteurs nets ont instauré des restrictions des importations et la même étude de la FAO a relevé 25 pays en développement (30%) qui ont limité les exportations soit par une interdiction, soit par des quotas d'exportation, soit encore par des taxes à l'exportation.

⁶³ Demeke, M., G. Pangrazio et M. Maetz (2009), "Country responses to the food security crisis: nature and preliminary implications of the policies pursued." FAO, Initiative sur la flambée des prix des aliments.

⁶⁴ DAF/COMP/GF/WD(2012)9.

⁶⁵ DAF/COMP/GF/WD(2012)28.

Réduire les droits à l'importation aide les marchés à résoudre une série de problèmes. Ces politiques contribuent à rendre les produits de base immédiatement disponibles pour les consommateurs et exercent par ailleurs des pressions sur les producteurs nationaux. Il va de soi que la suppression d'un droit de douane aura une incidence négative sur le budget de l'État dans l'immédiat, mais il devrait être possible de remplacer ce revenu par un moyen plus efficace de lever des recettes.

Par exemple, dans le cas des **Philippines**, les droits à l'importation sur le froment ont été complètement supprimés en décembre 2008, initialement pour une période de 6 mois. Une étude commandée par la suite pour évaluer les effets de la suppression des droits à l'importation a prôné une prolongation de la suspension des droits de douane à l'importation, mais a révélé que, dans certaines périodes, le prix de la farine augmentait alors que les prix du froment diminuaient et, de même, que le prix du pain augmentait quel que soit le prix de la farine. Les restrictions à l'importation ont été réduites à la fois pour le froment et pour la farine.

Bien que les pays qui ont adopté ces politiques les aient jugées utiles, il est décevant de noter qu'il existe de nombreux cas où l'avantage de la diminution des droits à l'importation n'a pas été intégralement transmis aux consommateurs finals par le biais de l'économie. Bien que l'on ne dispose pas d'informations suffisantes pour déterminer les causes de cette anomalie, deux possibilités méritent d'être étudiées.

- Premièrement, les diminutions des droits à l'importation ont été temporaires. Dans le cas des Philippines, elles ont été appliquées pendant une période initiale de six mois, puis prolongées de six mois supplémentaires. Il est possible que ce système n'ait pas offert une occasion suffisamment certaine ou durable aux nouveaux concurrents de décider d'entrer dans le secteur et que, si la restriction d'importation avait été levée de manière permanente, on eût observé une transmission plus complète.
- Deuxièmement, il se peut que certaines structures de marché nuisibles à la concurrence existent entre la frontière nationale et la table. Par exemple, les secteurs des transports, de la distribution, de la boulangerie ou de la vente au détail peuvent s'être approprié certains des avantages des diminutions des droits d'importation. À cet égard, il peut y avoir, pour l'autorité de la concurrence, un rôle complémentaire important d'enquête pour déterminer si ces problèmes existent.⁶⁶

L'imposition, par les pays exportateurs, de nouvelles limites ou entraves au commerce des produits de base est parfois utilisée pour tenter de stabiliser les prix intérieurs et de soutenir ainsi l'offre au niveau national. La capacité des obstacles à l'exportation d'empêcher les prix intérieurs d'augmenter paraît limitée, et ces politiques créent un certain nombre d'autres problèmes pour l'économie. Premièrement, ces mesures sont généralement adoptées à un moment où les marchés s'attendent à de nouvelles flambées des prix, et ceux qui détiennent les produits de base postposent les ventes, en escomptant des recettes plus importantes à l'avenir ; les prix continuent dès lors d'augmenter. Deuxièmement, les prix des produits achetés par les consommateurs finals ne sont pas alignés sur les prix des produits primaires, comme nous l'avons déjà observé pour les droits d'importation. Et, troisièmement, ces mesures ont des effets déstabilisants sur le commerce international et amplifient souvent les mouvements des prix à la hausse à l'échelle mondiale.

Il existe en **Argentine** un système de quotas d'exportation pour le froment. Ceux-ci ont pour but de veiller à ce que les consommateurs aient accès à des stocks à prix abordables, mais les producteurs s'irritent souvent de ne pas être en mesure d'accéder aux marchés internationaux lucratifs des ventes et, en

⁶⁶ Les Philippines ont actuellement dans leurs lois certaines dispositions relatives à la concurrence, mais le débat est actuellement en cours sur la création d'une autorité de la concurrence et l'adoption de lois pour la doter de compétences d'enquête et d'application de la loi.

réalité, les empêcher de vendre leurs produits au prix le plus élevé réduit l'assiette fiscale potentielle et, partant, la capacité du gouvernement de prendre d'autres mesures. Pendant la campagne électorale de 2001, le Président a annoncé qu'après une analyse technique de la production accrue et des effets des exportations sur les prix locaux, la limite d'exportation serait augmentée de 450 000 tonnes en plus des 9 millions de tonnes permises précédemment, mais beaucoup d'agriculteurs n'ont pas décoléré.

En 2010, la **Russie** a connu les plus fortes températures en 130 ans, accompagnées d'une sécheresse catastrophique. La récolte de céréales a été globalement inférieure d'un tiers à celle de l'année précédente. En conséquence, le prix des céréales et des produits de première nécessité comme le pain se sont envolés. En août 2010, le gouvernement a instauré une interdiction d'exportation qui s'est poursuivie jusqu'à la récolte d'été en 2011. Immédiatement après cela, les prix des céréales ont cessé d'augmenter au niveau national, alors que les prix mondiaux augmentaient sensiblement. Toutefois, à partir de septembre, les prix nationaux ont commencé d'augmenter à nouveau, en épousant généralement le profil des prix mondiaux (mais en restant certes inférieurs à ce qu'ils étaient avant l'interdiction d'exportation).⁶⁷

Le commerce international peut servir de tampon pour les fluctuations locales qui prennent naissance sur les marchés intérieurs. Les politiques commerciales destinées à isoler les prix intérieurs de l'influence des marchés mondiaux sont coûteuses pour les pays qui y recourent et, en particulier dans le cas des grands pays, elles accroissent la volatilité des prix mondiaux en limitant l'offre lorsque les prix mondiaux sont élevés et en diminuant la demande lorsque les prix sont bas. Souvent, elles ne réussissent pas à arrêter l'augmentation des prix tout en contribuant en même temps à la volatilité des prix à l'échelle mondiale.

Le principal problème est qu'un contrôle des exportations empêche les producteurs d'obtenir la pleine valeur potentielle de leurs cultures, ce qui a généralement pour effet qu'ils sous-investissent dans la production future, aggravant ainsi le problème de pénurie à l'avenir. De même, les consommateurs ne subissent pas les pleins effets de la pénurie et, du moins pour ce qui est des plus fortunés, n'économiseront pas sur la consommation. Il reste théoriquement vrai que la société peut avoir intérêt à permettre aux exportations d'avoir lieu, en imposant les bénéfices et en orientant les paiements d'aide aux revenus vers les consommateurs dans le besoin.

Les États peuvent aussi tenter d'influer eux-mêmes sur les prix des produits de base en détenant et en échangeant des **stocks « stratégiques » de produits de base essentiels**. L'expérience montre toutefois que, pour avoir une taille qui fasse la différence, ces stocks sont très coûteux à exploiter. Une étude de 2009 de la Banque mondiale laisse aussi entendre que les déblocages sont souvent effectués trop tard pour influencer les prix des produits de base et, globalement⁶⁸, que ces systèmes ne sont pas très efficaces. Par exemple, avant d'instaurer l'interdiction d'exportation analysée ci-dessus, le gouvernement russe a injecté 3 millions de tonnes de céréales de sa réserve dans le marché ; les prix n'en ont pas moins continué d'augmenter.

En revanche, les réserves d'urgence relativement plus limitées de produits alimentaires peuvent être utilisées plus efficacement et à un coût moindre pour aider les personnes les plus vulnérables. Par exemple, à Maurice, un programme de vente de « riz ration », une qualité de riz sensiblement moins chère que le riz basmati, a été mis en place par le gouvernement.

Étant donné que les mesures indirectes pour stabiliser les prix par des obstacles à l'importation ou par des interventions sur les marchés sont rarement couronnées de succès, les États peuvent aussi tenter de fixer les prix directement. Au **Kenya**, après que le prix du maïs et des repas à base de maïs eut augmenté de plus de 50 % en 2008, il a été proposé de contrôler les prix de certains produits de base essentiels,

⁶⁷ <http://www.oxfam.org/sites/www.oxfam.org/files/rr-impact-russias-grain-export-ban-280611-en.pdf>

⁶⁸ Wright, B. (2009), « International grain reserves and other instruments to address volatility in grain markets », *World Bank Policy Research Working Paper* 5028.

notamment du maïs. Cette proposition s'est heurtée à une vive opposition de l'autorité de la concurrence, au motif que cette mesure risquait d'entraîner l'apparition d'un marché noir parallèle et que les agriculteurs ne seraient pas en mesure de récupérer les coûts de production. La réglementation du prix du maïs n'a pas été adoptée.

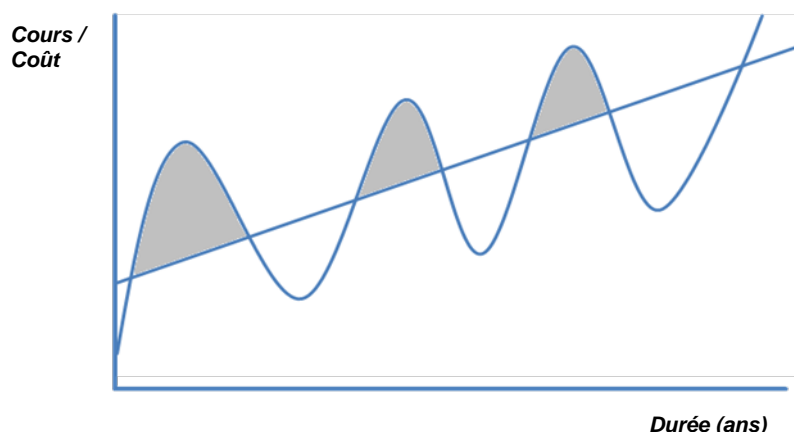
Aux **Fidji**, l'autorité de la concurrence (la Commission du commerce) fixe des prix de gros distincts dans les zones urbaines et dans les zones rurales sur différentes îles pour :

- 26 produits différents de riz conditionné
- 7 produits différents de pois bleus conditionnés et 7 produits différents de pois cassés
- le sel et l'ail
- 37 produits du lait conditionnés
- 22 produits de thon conditionnés, 11 produits de sardines, 50 autres produits de poisson en boîtes et 12 produits de viande en boîtes
- 11 produits de thé conditionnés
- environ 100 produits d'huile alimentaire différents.

Il existe des pays où l'expérience de la réglementation des prix n'a pas été positive. En **Ukraine**, par exemple, les prix tant de gros que de détail d'un certain nombre de produits alimentaires (farine, pain, macaronis, gruaux de maïs, sucre, bœuf, porc, volaille, saucisses bouillies, lait, fromage, crème aigre, œufs de poules, huile) ont été réglementés. Toute augmentation de prix devait être approuvée par le gouvernement et était accordée lorsqu'elle était économiquement justifiable. L'on a observé que les prix avaient malgré tout continué d'augmenter et que la réglementation stimulait des dépenses accrues et le recours aux intermédiaires, ce qui fournissait la « justification » économique de l'augmentation des prix finals.

En **Égypte**, le gouvernement n'a pas réglementé directement les prix de l'acier mais a ordonné aux producteurs d'inclure dans les accords avec les distributeurs des clauses fixant le prix de revente maximal, bien que l'autorité de la concurrence fût opposée cette mesure. Contrairement à l'argument du gouvernement, les prix ont poursuivi leur hausse et un marché noir s'est créé.

Toutes les mesures examinées ci-dessus ont pour but de faire baisser les prix des produits de base pendant les périodes de flambée des prix. Là où les producteurs reçoivent ces prix baissés artificiellement, un problème de taille risque d'apparaître. Comme noté dans l'introduction du présent document, les prix des produits de base sont volatils. Les producteurs sont confrontés non seulement à des périodes de prix (et de bénéfices) élevés, mais aussi à des périodes de prix bas (et de pertes) ; les périodes de prix élevés permettent ainsi aux producteurs de compenser les pertes subies précédemment. Ils peuvent le faire par des économies pendant les bonnes années ou en reportant ou en planifiant leurs investissements (par exemple, reporter l'achat d'un nouveau tracteur ou de nouvelles têtes de bétail des années relativement maigres aux années relativement bonnes). Ce phénomène est illustré à la [figure 10](#) ci-dessous. Si l'intervention des pouvoirs publics consistait à supprimer les pics de prix, il serait difficile de récupérer les pertes des années à faibles recettes ou de réinvestir. Les producteurs seront moins enclins à investir et à étendre leurs capacités de production et, en réalité, cela peut aggraver fortement le problème de la pénurie à long terme. Il a déjà été observé en **Colombie** que la baisse des produits internationaux du maïs jaune se traduisaient par une diminution importante de la production.

Graphique 10. Incidence de la volatilité des prix sur les bénéfices et les pertes

Source : OCDE

Une autre politique adoptée par les gouvernements a consisté à soutenir directement ces groupes vulnérables en **subventionnant les prix ou la consommation** de (certains) produits de base pour (certains) consommateurs. En réalité, d'après la FAO, 45 pays en développement (55 %) ont adopté des mesures similaires.

Même ces mesures ciblées peuvent être très coûteuses. En Tunisie, par exemple, plus de 540 000 euros ont été dépensés pour de telles aides en 2008, et près de 650 000 euros en 2011. Ces subventions sont toutefois généralement bien adaptées pour permettre la réalisation des objectifs gouvernementaux sans contribuer à la volatilité des prix mondiaux.

Au **Maroc**, le gouvernement a décidé de subventionner la farine de blé tendre produite dans le pays à partir de blé importé. L'aide était réservée exclusivement aux zones rurales pauvres et s'élevait à 360 000 euros par an. Une approche similaire a été adoptée pour le sucre. Des subventions importantes ont également été accordées pour le pétrole entre 2004 et 2010. Les charges de compensation pour les différentes années ont représenté 6,2 à 16,1 % du budget global de l'État. D'après une étude commandée par le gouvernement marocain, sans les subventions, le taux d'inflation aurait atteint 4,5 % au lieu de 0,9 % réel en 2010.

Des gouvernements ont également fait l'essai de **collaborations volontaires avec des producteurs privés ou d'initiatives moins intrusives** pour tenter d'améliorer l'efficacité des marchés. Aux **Philippines**, par exemple, le gouvernement a été à l'origine d'un accord entre les boulangeries et les détaillants portant sur la vente d'un certain type de pain à un prix abordable. Il est aussi possible d'aider les consommateurs en les informant des prix pratiqués par différents détaillants ; à **Maurice**, un Observatoire des prix a été mis en place qui surveille les prix de biens de consommation essentiels et publie une comparaison des prix magasin par magasin. Un système similaire fonctionne en Lituanie.

Les autorités de la concurrence sont souvent consultées avant que les gouvernements n'adoptent certaines mesures destinées à lutter contre les effets de la volatilité des prix. Elles sont souvent invitées à réaliser des **études de marché** de certains secteurs de l'économie où les problèmes sont perçus comme particulièrement graves. L'**Égypte**, par exemple, a signalé qu'elle avait effectué récemment huit études de marché, notamment dans les secteurs du ciment, de l'acier, de l'huile alimentaire, du lait cru, des produits de maïs et des engrais azotés. Ces études peuvent être utiles de deux manières aux autorités de la concurrence. Premièrement, celles-ci peuvent identifier les infractions au droit de la concurrence et lancer des mesures d'exécution. En Égypte, des procédures concernant des ententes ont été instituées dans les secteurs du ciment et du lait cru. Deuxièmement, elles peuvent détecter des problèmes de réglementation

qui peuvent être résolus en recourant à la persuasion. En Égypte, une absence de concurrence a été observée dans le secteur sidérurgique ; l'autorité de la concurrence a persuadé le ministère compétent de délivrer des licences permettant l'intégration verticale (il n'y avait eu jusqu'alors qu'une seule unité verticalement intégrée dans ce secteur) et de lever des obstacles importants à l'importation pour les ronds à béton ; en conséquence, les prix ont baissé de plus de 60 % (il faut toutefois reconnaître que les prix mondiaux ont également diminué sensiblement au cours de cette période).

L'expérience semble aussi indiquer que les interventions publiques augmentent la probabilité de pratiques nuisibles à la concurrence ; ainsi, les discussions relatives aux prix du lait cru entre les agriculteurs, les producteurs de lait à boire en cartons et les ministères compétents en Égypte se sont transformées en une entente sur les prix.

On estime souvent que la rigidité des prix finals est associée à des pratiques des grandes chaînes de vente au détail. D'une part, leur pouvoir d'achat leur permet d'exploiter leur position vis-à-vis de leurs fournisseurs, d'autre part, leur pouvoir de vente sur le marché du détail peut leur permettre de fixer les prix. En 2009, en Lettonie, suite à une aggravation des relations entre les plus grandes chaînes de supermarchés et les producteurs de produits laitiers qui aurait pu déboucher sur des prix plus élevés pour les consommateurs, le gouvernement a même envisagé de **réduire le pouvoir sur le marché des chaînes de supermarchés** en fixant leur part de marché maximale. Ces politiques posent également des problèmes en ce qu'elles peuvent encourager le détaillant à *renoncer* à participer au jeu de la concurrence et à *augmenter les prix* afin de s'assurer que sa part n'excède pas la limite de la part maximale.

Puisque la principale raison qui sous-tend l'intervention publique serait souvent la protection des franges les plus vulnérables de la population, l'expérience suggère que les mécanismes performants soient spécifiquement ciblés sur ces consommateurs finals.

Les mesures analysées ci-dessus ont pour but de remédier aux problèmes aigus de prix élevés et de pénuries alimentaires. Les pouvoirs publics peuvent toutefois décider d'user de **politiques à long terme** destinées à réduire la volatilité des prix. Au premier plan de celles-ci figureraient les activités des pouvoirs publics qui stimulent la production. Par exemple, au **Kenya**, le gouvernement a augmenté le financement d'initiatives visant à soutenir et à augmenter l'offre de maïs. Elles concernaient l'accroissement de la superficie cultivée irriguée, et l'augmentation de l'affectation budgétaire pour la fourniture d'engrais et de semences ainsi que pour l'augmentation de la production et le stockage de maïs. Le gouvernement investit actuellement aussi dans l'infrastructure routière et des transports. Dans d'autres pays, les mesures publiques concernent des investissements dans la recherche spécifique (par exemple, les semences adaptées aux conditions locales). Si ces initiatives impliquent la levée des entraves à l'utilisation la plus efficace des terres et des investissements, elles offrent de bonnes perspectives pour une solution à long terme. Si, par contre, les politiques font intervenir des subventions publiques qui incitent les agriculteurs et les transformateurs à se livrer à des activités inefficaces, elles peuvent être très coûteuses et préjudiciables à long terme. Par exemple, il est intéressant de noter que, comme analysé à la section précédente, certains problèmes qui ont contribué à la situation dramatique de la Nouvelle-Zélande dans les années 1980 étaient les subventions pour l'utilisation d'engrais et les politiques qui encourageaient les agriculteurs à tenter d'exploiter des terres impropres à la production.

Malheureusement, il apparaît que toute intervention publique a un coût. Comme indiqué dans la présente section et dans la précédente, les politiques qui visent à augmenter directement la production (par exemple, en ouvrant des terres à peine arables ou en encourageant l'utilisation d'engrais en grandes quantités) peuvent entraîner l'épuisement des sols et dégrader la capacité productive à long terme.

Tableau 3. Effets de l'intervention des pouvoirs publics

Mesures publiques	Avantages et inconvénients
Atténuer les restrictions à l'importation	Des pays ont constaté que ces politiques contribuaient à une amélioration des problèmes, mais, si elles sont appliquées temporairement seulement, elles peuvent ne pas être efficaces. Par ailleurs, l'expérience semble indiquer qu'il peut y avoir un rôle complémentaire pour les autorités de la concurrence, consistant à veiller à ce que les avantages soient répercutés vers les consommateurs.
Instaurer des restrictions à l'exportation	Ces politiques n'ont réussi que dans une mesure limitée à faire baisser les prix intérieurs. Elles ont des conséquences négatives importantes pour les producteurs nationaux et, par le jeu du système fiscal, pour le gouvernement, et elles ont fortement perturbé les marchés internationaux au détriment d'autres pays.
Stocks stratégiques	L'expérience de l'investissement public dans des stocks stratégiques est qu'il s'agit d'une utilisation coûteuse de ressources qui est rarement efficace, s'agissant d'améliorer sensiblement la volatilité.
Stocks d'urgence	Les stocks d'urgence paraissent plus utiles, mais uniquement à très court terme.
Réglementation des prix	La réglementation des prix entraîne le risque de créer un marché noir ou de décourager les producteurs de procéder à des investissements qui amélioreraient les fondamentaux du marché. S'y ajoutent les coûts liés au calcul et à la fixation des prix, les coûts de mise en conformité et les coûts d'application des règles.
Subventions pour les clients	Cette approche évite le problème de beaucoup d'autres initiatives, à savoir que les producteurs peuvent être dissuadés de fabriquer le produit en quantité suffisante. Toutefois, les subventions ont tendance à encourager la surconsommation de certains produits, et les coûts peuvent très rapidement peser lourdement sur le budget.
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Études de marché	Elles donnent la possibilité d'identifier les pratiques nuisibles à la concurrence et les problèmes de réglementation. Elles n'apporteront toutefois pas nécessairement d'améliorations à court terme de la concurrence, voire une amélioration quelconque.
Surveillance des prix	Il est peu probable que ces activités portent préjudice au marché, mais elles ne sont pas toujours efficaces.
Augmenter la disponibilité de terres	S'il y a eu des entraves à l'utilisation efficace des terres, ces politiques peuvent être utiles. Toutefois, si les politiques encouragent la culture de terres inadaptées, elles peuvent être coûteuses pour la société et nuisibles à l'environnement.
Promouvoir l'autosuffisance	Bien que ces politiques puissent augmenter l'offre à long terme, elles sont potentiellement très coûteuses parce qu'elles font inévitablement peser des contraintes sur la société et finissent par empêcher l'économie de tirer le meilleur parti de ses secteurs les plus productifs.

Source : OCDE

5. Conclusion

L'un des objectifs majeurs des discussions du Forum mondial sur la concurrence consistera à identifier certaines suggestions à l'intention des autorités de la concurrence qui s'efforcent de contribuer à résoudre les difficultés posées par la volatilité des prix. Ce document se veut l'un des vecteurs de ce processus et les suggestions suivantes sont soumises pour être débattues dans le cadre de la table ronde :

- *Suggestion 1* : Les autorités de la concurrence peuvent entreprendre utilement certains travaux de suivi anticipatoires sur les matières premières les plus cruciales pour la population des petits producteurs et des consommateurs de leurs pays respectifs.
- *Suggestion 2* : Il convient de cibler en particulier l'élimination des obstacles par la répression ou la sensibilisation sur les marchés d'intrants clés (comme les engrais pour la production agricole et les explosifs pour l'extraction minière) et les marchés de la transformation et de la distribution des denrées, comme les silos à grain, les ports, les lignes de chemin de fer, les abattoirs, les installations de transformation du lait, etc. Ce ne signifie pas toutefois que les États doivent entreprendre directement, ni subventionner, la fourniture d'intrants ou d'installations de stockage et de transport, parce que ce serait contreproductif, compte tenu de l'éviction des initiatives privées et du gaspillage des ressources publiques limitées qui en résulteraient.
- *Suggestion 3* : Les réformes proconcurrentielles comme la déréglementation des prix et l'élimination des obstacles aux échanges devraient être entreprises avant que les niveaux d'aide ne deviennent insoutenables. Plus les réformes seront générales et guidées par les principes, plus elles seront perçues comme équitables et plus le fardeau de la restructuration pourra être compensé en partie par les avantages que procureront les réformes en cours dans d'autres pans de l'économie.
- *Suggestion 4* : Lorsque des mesures de crise sont nécessaires à court terme :
 - il convient de circonscrire clairement le problème (le marché ne fournit pas les produits à un prix efficient ou bien un transfert de revenus ou de richesse est nécessaire pour que les consommateurs aient les moyens de se procurer les produits de nécessité) ;
 - pour chaque initiative potentielle, il convient d'identifier les coûts qui en résulteraient pour chaque composante de la société (producteurs, consommateurs et pouvoirs publics) et d'en comparer l'importance de la part revenant à chacune et sa capacité à l'assumer. De façon générale, la solution la plus efficiente est celle qui est appliquée aussi près que possible du problème et qui laisse à l'ensemble des parties la plus grande souplesse pour répondre au problème de façon efficiente (par exemple, si le problème est que les consommateurs n'ont pas des revenus suffisants pour acquitter le prix des nécessités de base, la mesure qui entraînerait le moins de distorsions consisterait à soutenir financièrement les personnes les plus nécessiteuses) ;
 - il convient d'identifier toute distorsion affectant le comportement optimal du marché, telles qu'une incitation à surconsommer ou à sous-produire ;
 - se demander si des initiatives complémentaires doivent être entreprises (par exemple, associer à une réduction des droits à l'importation des efforts plus soutenus d'application du droit de la concurrence afin de garantir que les bienfaits en seront répercutés) ;
 - et il convient de tracer un projet clair et prévisible sur la durée pour passer des mesures à court terme à des solutions de long terme et d'en assurer la diffusion pour que les intervenants de marché puissent prendre des décisions d'investissement efficientes.
- *Suggestion 5* : A l'issue des crises, réaliser des évaluations des mesures introduites pour en quantifier les coûts et les avantages. Recenser tout bienfait à long terme qui pourrait être recherché (par exemple, si la suspension ou la réduction des droits à l'importation a eu des effets positifs, on pourra envisager la prolongation de cette mesure) ou des solutions alternatives de long terme.

ANNEXE : BOURSES, MARCHÉS FINANCIERS, SPÉCULATION ET THÉSAURISATION

1. Introduction

Dans le contexte des marchés de matières premières, la spéculation consiste à réaliser des transactions sur des quantités « physiques » de denrées ou des produits dérivés en supposant (et en prenant le risque) que :

- le cours évolue de façon significative à l'avenir
- et qu'un gain soit réalisé sur la vente de ce qui aura été acheté ou sur le rachat de ce qui aura été vendu à découvert.

Tout opérateur peut spéculer et il est en fait souvent très difficile de distinguer la spéculation des activités de couverture. Toutefois, dans le sens théorique du terme, les « spéculateurs » sont des opérateurs qui ne réalisent pas des transactions en qualité de producteurs détenant des stocks physiques qu'ils cherchent à écouler, ni en tant que partie cherchant qu'on lui fournisse une quantité nette d'un produit. Un spéculateur est quelqu'un dont l'activité principale consiste à tirer profit de transactions et dont l'objectif ultime est de réaliser des opérations qui s'annulent les unes les autres au niveau des stocks physiques tout en produisant des bénéfices.

La spéculation et les spéculateurs sont souvent la cible d'un fort ressentiment ou de craintes. Avant d'analyser si les effets de la spéculation sur les marchés de denrées sont positifs ou négatifs, il faut s'efforcer de comprendre la raison de ce ressentiment et de ces craintes fréquentes.

En temps normal, la spéculation est rentable¹ si l'opérateur achète une denrée quand le cours est bas et la vend quand il est haut. Autrement dit, la spéculation est rentable en présence de variations de cours significatives et peut l'être d'autant plus que les prix sont volatils et qu'une denrée peut être rééchangée avec profit de nombreuses fois en un laps de temps réduit chaque fois que le cours s'oriente dans une direction différente ou qu'il évolue.

Comme mentionné en introduction à ce document, une forte volatilité des cours des matières premières peut causer un préjudice significatif aux deux côtés du marché, à l'offre comme à la demande. Il peut arriver qu'en période de spéculation active et de profits ou de cours élevés, les « spéculateurs » détiennent justement une proportion considérable de l'offre disponible d'une denrée donnée. Il n'est pas surprenant que les spéculateurs suscitent une réaction viscérale (c-à-d une objection instinctive qui n'est pas nécessairement rationnelle).

Depuis des temps immémoriaux, des personnes de toutes les couches de la société se sont vigoureusement opposées à la spéculation quand des cours élevés créent des situations de détresse et que

¹ Rentable au sens comptable, lorsque les revenus dépassent les charges, indépendamment du fait de savoir si le montant du gain constitue un revenu efficient ou « équitable ».

les passions s'enflamment. Ces réactions englobent à un extrême les révoltes populaires² et à l'autre les critiques publiques proférées contre les opérateurs de marché par des PDG de multinationales cotées³ ou des leaders politiques⁴ aux discours normalement modérés.

La défense du rôle de la spéculation et des spéculateurs sur les marchés retient rarement autant l'attention des médias que les attaques contre la spéculation. Cette défense s'appuie pourtant sur un argumentaire solide. La principale contribution attribuée à la spéculation est que par l'arbitrage temporel et géographique, cette activité contribue à accroître la « profondeur » des marchés et à éliminer ou lisser la volatilité des marchés. En second lieu, en acceptant un degré de risque de marché, les spéculateurs permettent aux contreparties (un agriculteur ou un minotier par exemple) d'éviter ce risque.

Réaliser une analyse précise et impartiale de la spéculation peut être un exercice particulièrement difficile, parce que même des personnes versées dans la finance et l'économie peuvent avoir du mal à comprendre la nature d'un contrat particulier de produits dérivés et a fortiori le fonctionnement du marché de multiples contrats de produits dérivés dans son ensemble ou l'interaction entre les transactions de produits dérivés et les marchés physiques.

Les Professeurs Scott Irwin et Dwight Sanders ont réalisé pour l'OCDE une étude préliminaire qui clarifie le rôle des fonds indiciaires et des fonds de contrats d'échange de produits agricoles de base ou d'énergie sur les marchés à terme.⁵

Cette annexe traite des sujets suivants :

- quelles sont les caractéristiques des marchés physiques de matières premières, des produits dérivés et des marchés de produits dérivés et comment interagissent-ils tous ensemble ?
- quel est le modèle financier courant des spéculateurs et quels en sont les effets ? Comme nous le verrons, de façon générale, la spéculation devrait en fait être bénéfique pour les marchés ;
- quand des circonstances exceptionnelles sont-elles susceptibles de rendre la spéculation préoccupante ?

2. Les marchés boursiers de matières premières

La négociation commerciale a souvent un caractère bilatéral. Autrement dit, un acheteur contacte un vendeur et ils discutent ensemble de l'intérêt de la transaction et s'accordent sur ses modalités. Cela peut fonctionner quand les acheteurs et les vendeurs peuvent se contacter et que cela vaut la peine de discuter

² Les révoltes du pain dans le Sud des États-Unis durant la guerre civile américaine ciblaient par exemple partiellement les spéculateurs ou ceux qui étaient perçus comme tels.

³ Le 11 mai 2011, par exemple, le journal « *the Telegraph* » a indiqué que le Président de Starbucks, Howard Schultz, « s'en était pris aux spéculateurs qui avaient poussé le prix du café à un sommet jamais atteint en 34 ans ».

⁴ En juin 2011, par exemple, le Président français, M. Sarkozy a exprimé un certain nombre de craintes quant à la spéculation sur les marchés agricoles, suivi un peu plus tard, en juin toujours, par le Chancelier allemand, Mme Merkel et le Premier Ministre grec, M. Papandreou, qui se sont inquiétés de la spéculation sur les marchés financiers.

⁵ Irwin, S. H. and D. R. Sanders (2010), "The Impact of Index and Swap Funds on Commodity Futures Markets: Preliminary Results", *OECD Food, Agriculture and Fisheries Working Papers*, No. 27, OECD Publishing. doi: 10.1787/5kmd40w11t5f-en

les modalités de la transaction, comme la qualité des produits, le lieu et le moment de la livraison, les garanties, les services de soutien, le prix et les modalités de paiement.

Cependant, ce modèle de négociation présente peu d'intérêt sur la plupart des marchés de matières premières (mais pas tous). Les matières premières sont par définition des produits homogènes ou standardisés qui présentent le même intérêt pour les acheteurs indépendamment de l'identité de leur producteur ou de leur lieu d'origine. Dans ce cas, on gagne habituellement en efficacité grâce à une standardisation poussée des modalités d'échange (c-à-d description de la qualité des produits, lieu et moment de la livraison physique, et conditions de règlement) et à la mise en place d'un mécanisme permettant à tous les acheteurs et les vendeurs de négocier entre eux, où qu'ils se trouvent de par le monde. Pour ce faire, on crée généralement des marchés centralisés au sein desquels les courtiers ou les négociateurs acceptent et exécutent les opérations d'acheteurs et de vendeurs du monde entier.

De nombreuses bourses à travers le monde se concurrencent les unes les autres ou exploitent des créneaux spécialisés. Figurent parmi les grandes bourses internationales, le Chicago Board of Trade (où se négocient à la fois les denrées agricoles et les métaux et qui fait partie du groupe CME, le propriétaire et l'opérateur d'importants marchés à terme et de produits dérivés à Chicago et à New York, et de plateformes de négociation en ligne), le London Metal Exchange et le Singapore Mercantile Exchange (où se négocient les denrées agricoles et minérales, mais qui est particulièrement connu pour la cotation du pétrole). Il existe toutefois également des bourses de matières premières dans de nombreux pays émergents, dont plusieurs en Chine, en Inde et même dans des pays plus petits, comme l'Agricultural Futures Exchange of Thailand et l'African Mercantile Exchange au Kenya.

Sur ces marchés, la négociation s'effectue en temps réel tout au long des séances de cotation entre des ordres anonymes d'« achat » et de « vente » et une transaction intervient chaque fois qu'un négociateur reçoit un ordre d'« achat » qu'il peut appairer à l'ordre de « vente » le plus attractif coté et vice versa.

La négociation de matières premières physiques est une activité intuitive et facilement compréhensible dans la mesure où il s'agit habituellement pour le vendeur de livrer un produit (ou de payer une société de logistique pour qu'elle le fasse) à un prix déterminé dans le futur proche en un lieu standardisé et à un moment standardisé à partir duquel l'acheteur en prendra possession.

Toutefois, si tous les acheteurs et les vendeurs devraient attendre « le dernier moment » pour acheter ou vendre, ils s'exposeraient à des risques importants de voir le prix augmenter ou baisser, ce qui peut compliquer considérablement la gestion d'une activité agricole, minière, manufacturière ou de distribution alimentaire. Cela d'autant plus que l'acheteur ou le vendeur fera lourdement appel à des fonds empruntés, le prêteur exigeant de l'emprunteur des revenus et des coûts prévisibles. Dans ces circonstances, la gestion du risque de prix procure un avantage considérable tant aux acheteurs qu'aux vendeurs. C'est le rôle des contrats de produits dérivés.

Le contrat de produits dérivés le plus simple est un « contrat à terme » par lequel un acheteur et un vendeur conviennent aujourd'hui d'un prix pour la livraison d'un produit, dans un an, par exemple. Un cultivateur d'orge, par exemple, pourrait s'inquiéter de ce que le cours de l'orge puisse chuter l'année prochaine en deçà du cours moyen attendu, ce qui pourrait le placer dans une situation financière difficile. Il pourra souhaiter vendre tout ou partie de la récolte de l'année prochaine à un prix garanti aujourd'hui avant que les cours ne commencent à s'écarter du prix moyen attendu à cause des conditions météorologiques ou d'autres perturbations.

Dans les pays développés comparativement riches, il est courant que les agriculteurs donnent eux-mêmes les instructions de négociation des contrats à terme par l'intermédiaire de courtiers en ligne. Des

coopératives et d'autres entreprises se chargent également d'échanger des contrats et proposent d'acheter localement ou constituent des groupes de négociation à des cours raisonnablement stables.

De la même façon, un grand brasseur pourra chercher à convenir aujourd'hui du prix auquel il paiera l'orge qu'il utilisera l'année prochaine pour fabriquer de la bière. Dans ce cas, le producteur (ou la coopérative ou le courtier) et le brasseur sont des contreparties naturelles et ils peuvent bénéficier mutuellement de la conclusion d'un contrat à terme.

La contribution de la Nouvelle-Zélande rapporte qu'en 2010, la bourse néo-zélandaise (NZ Stock Exchange) a ouvert un marché de contrats à terme et d'options sur les produits laitiers pour la négociation de produits financiers conçus pour gérer les risques et lisser la volatilité et offrir une certitude sur les prix, de la transparence et un aperçu des anticipations du marché. On pense qu'en négociant sur les marchés de contrats à terme et d'options, les intervenants du marché laitier créeront une certitude sur les prix. Bien que cette initiative soit très récente, la contribution rapporte qu'il semblerait déjà que le marché tienne ses promesses de ce point de vue.

Le processus est semblable sur les marchés de minéraux, les sociétés minières cherchant à fixer les prix à l'avance afin de pouvoir prendre des décisions d'investissement à long et moyen terme pour l'achat de services d'expédition ou des décisions d'embauche. De la même façon, certaines parties cherchent à fixer leurs prix d'achat longterm à l'avance, comme une compagnie d'électricité pourra par exemple souhaiter acheter du charbon maintenant pour couvrir un engagement de vendre de l'électricité à des clients durant l'hiver ou un fabricant de câble coaxial, voire un acheteur de câble qui a remporté un contrat important de fourniture de câble ou de construction d'un réseau, par exemple.

Il existe une grande diversité de contrats à terme, les contrats se déclinant pour chaque denrée selon les qualités et le moment de la livraison. A tout moment donné, des contrats peuvent se négocier pour toutes les qualités de blé, livrables ou arrivant à échéance à un mois, trois mois, six mois ou douze mois.

Même si le contrat à terme est le plus simple des produits dérivés, il en existe beaucoup d'autres. Certains contrats, par exemple, ne portent pas sur la vente d'une quantité donnée à un moment donné, mais sur une *option* (ou un droit, sans obligation) pour l'achat par une des parties d'une quantité donnée d'un produit à un moment donné. Ce type de contrat n'élimine qu'une partie du risque, par exemple, dans le cas du blé, une telle option protégerait les minotiers contre le risque d'une hausse inattendue du cours du blé parce qu'ils pourraient exercer leur option.

Les swaps sont les plus simples de ces contrats. Les parties conviennent d'un « prix d'exercice » de 40 USD la tonne de charbon, par exemple, dans six mois. Quand le contrat arrive à échéance, si le prix est plus élevé (45 USD, par exemple), le vendeur vers à l'acheteur 5 USD. Cela permet à l'acheteur d'échanger le produit de base sur le marché physique au prix du marché (soit 45 USD) et de toucher du vendeur une indemnisation de 5 USD pour ramener le coût effectif pour l'acheteur au prix d'exercice convenu de 40 USD. Le prix de vente effectif est également de 40 USD, parce que même si le vendeur touche 45 USD de la vente physique du produit de base, le vendeur a dû acquitter à l'acheteur une indemnisation de 5 USD (soit $45 \text{ USD} - 5 \text{ USD} = 40 \text{ USD}$). Bien entendu, si le cours sur le marché physique avait évolué en sens contraire (c-à-d chuté à 35 USD), l'indemnisation de 5 USD aurait transité en sens contraire également, de l'acheteur vers le vendeur, et le prix effectif payé et reçu aurait toujours été de 40 USD ($35 \text{ USD} + 5 \text{ USD} = 40 \text{ USD}$).

Un dernier point important à comprendre à propos des négociations en bourse des produits de base et des contrats à terme est que leur utilité va au delà de la négociation qui intervient sur le marché et qu'elles sont également une source d'informations sur le marché plus large dans son ensemble. Comme indiqué ci-avant, tous les types de produits de base ne sont pas négociés en bourse et même pour ceux qui le sont,

seule une partie mineure du volume du produit est généralement échangée « sur le marché ». La majeure partie du volume s'échange généralement en dehors du marché mais, fait important, les acheteurs et les vendeurs décident de fonder le prix de leurs échanges sur le cours de cotation en bourse. Dans la plupart des cas, un acheteur et un vendeur en train de négocier dans un cadre privé ont la possibilité de préférer réaliser leur transaction en bourse s'ils ne peuvent obtenir bilatéralement le prix souhaité. Le prix négocié bilatéralement doit par conséquent être proche du cours coté. Souvent, les contrats bilatéraux n'indiquent d'ailleurs aucun prix spécifique : les parties concluent un contrat pour la livraison périodique de volumes d'un produit de base sur longue période à un prix égal au cours coté le jour convenu pour la livraison (plus ou moins une marge fixe au titre des frais de livraison et autres coûts encourus pour la transaction).

Contrairement aux transactions réalisées en bourse, les contrats bilatéraux négociés de gré à gré pour la livraison physique d'un produit de base en temps réel, des contrats à terme et des contrats de différence peuvent varier énormément et connaissent des innovations constantes (ils permettent en outre une rédaction précise des dispositions des contrats). Deux parties peuvent par exemple conclure un contrat tunnel (« collar ») par lequel l'une des parties s'engage à vendre une quantité d'un produit au cours coté dans la limite d'un plafond ou d'un seuil déterminé. Ce contrat peut aussi être conditionné par un ou plusieurs événements particuliers. L'activité de l'acheteur et celle du vendeur peuvent par exemple être affectées par les conditions météorologiques. Des températures clémentes peuvent par exemple augmenter le rendement des cultures d'orge et stimuler les ventes de bière pour l'acheteur d'orge. Ils ont donc intérêt à prévoir des dispositions contractuelles qui ne prendront effet que si la température atteint par exemple 25 degrés pendant plus de 35 jours au cours de l'été. Si ce seuil de température n'est pas atteint, le contrat devient automatiquement caduc. En revanche, si la température dépasse 25 degrés, il prend effet et sert utilement les deux parties qui produiront et achèteront des quantités d'orge plus importantes.

3. Modèle financier courant des spéculateurs

Nous venons d'expliquer le rôle des parties qui produisent des denrées ou qui les achètent dans le cadre de leur activité. C'est ce qu'on appelle des « contreparties naturelles ».

Les marchés boursiers sont toutefois faits « de bric et de broc » et ils ne fonctionnent pas bien si les seuls intervenants sont des parties qui achètent ou vendent uniquement en fonction des besoins physiques immédiats de leur activité. Il peut arriver que des agriculteurs ne souhaitent pas vendre au moment où les transformateurs alimentaires veulent acheter ou que les quantités ne correspondent pas. Si les vendeurs apportent sur le marché davantage de volumes que les acheteurs n'en demandent, les cours chutent (l'inverse est vrai également).

Dans une certaine mesure, les producteurs et les acheteurs peuvent être en mesure de retarder ou d'anticiper leurs transactions pour mieux équilibrer les ventes et les achats. Des différences temporelles considérables peuvent toutefois exposer les parties à des risques significatifs qui ne font pas partie de leur activité principale et qu'ils ne souhaitent pas prendre.

Les opérateurs purs ou les spéculateurs jouent par conséquent un rôle important en « comblant les manques » ou en permettant aux vendeurs physiques initiaux et aux acheteurs physiques finaux qui peuvent venir sur le marché à différents moments de se « trouver ». A cette fin, les opérateurs et les spéculateurs :

- achètent quand les cours comptant ou des contrats à terme sont « bas » (par rapport aux prix auxquels ils escomptent les revendre) ;
- vendent quand ils sont « hauts » ;
- et empochent la différence.

Ici, « bas » et « haut » signifient simplement que l'opérateur achète à un cours qui est inférieur à celui auquel il pense être en mesure de vendre. Si les cours sont déjà élevés et que l'opérateur anticipe qu'ils le resteront, il peut acheter chaque fois que le prix reflue légèrement.

La négociation implique des frais de personnel et des frais généraux et la détention d'actifs et la garantie des ventes à découvert engendrent des coûts également. La négociation implique aussi habituellement une prise de risque parce que les variations de cours sont imprévisibles. La spéculation n'est donc une activité attrayante que si des gains élevés sur certaines transactions couvrent les pertes inévitables et les frais encourus sur les autres opérations. La présence de bénéfices comptables n'indique pas nécessairement que les opérateurs dégagent un excédent ou un bénéfice économique net sur la durée.

Dans cette acception étroite, on peut considérer que les marchés financiers ont anticipé la volatilité. Toutefois, par ce processus, la hausse (ou la baisse) fournit aux acheteurs et aux vendeurs des signaux avancés leur permettant d'ajuster leurs schémas de consommation de façon à limiter la pénurie (ou la surabondance), ce qui devrait avoir pour effet de lisser les cours sur la durée.

La négociation implique des frais de personnel et des frais généraux et la détention d'actifs et la garantie des ventes à découvert engendrent des coûts également. La négociation implique aussi habituellement une prise de risque contrôlée parce que les variations de cours sont imprévisibles. La spéculation n'est donc une activité attrayante que si des gains élevés sur certaines transactions couvrent les pertes inévitables et les frais encourus sur les autres opérations. La présence de bénéfices comptables n'indique pas nécessairement que les opérateurs dégagent un excédent ou un bénéfice économique.

En échange des bénéfices qu'ils réalisent, les spéculateurs apportent de la valeur au marché dans son ensemble, et aux acheteurs et aux vendeurs en particulier. De façon courante, ils :

- assument les risques que les autres ne veulent pas prendre ;
- analysent les informations et transmettent rapidement au marché des signaux de prix efficients par les ordres qu'ils passent ou les transactions qu'ils réalisent dans la foulée ;
- et absorbent les frais de portage et de conservation des positions longues et financent le coût des arrangements prudentiels sur les expositions courtes.

De façon synthétique, le modèle financier fondamental des spéculateurs consiste à :

- acheter quand les acheteurs sont absents et que les producteurs sont exposés à des cours faibles (ce qui limite les baisses de cours et améliore par conséquent la situation des producteurs) ;
- vendre quand les prix sont élevés et que les transformateurs alimentaires sont exposés à des cours élevés (ce qui limite les hausses de cours et améliore par conséquent la situation des acheteurs).

Dans les deux cas, l'opérateur ou le spéculateur aide le marché à faire face à une situation d'excédent ou de pénurie de l'offre. Par conséquent, même si les vendeurs n'aiment pas être contraints de vendre à des spéculateurs quand les cours sont faibles, ni les acheteurs d'acheter auprès d'eux quand les cours sont élevés, les producteurs comme les transformateurs trouvent en tout cas une contrepartie pour réaliser leurs transactions. Les spéculateurs peuvent paraître réaliser des bénéfices « sur le dos des autres » ou profiter de leur malheur, mais ils gagnent une rémunération pour les risques qu'ils prennent et pour l'huile qu'ils apportent aux rouages du marché.

La question se pose toutefois naturellement de savoir si les opérateurs peuvent escompter des bénéfices supérieurs à la valeur de leur contribution au bien-être social. Le mathématicien français Louis Bachelier s'est interrogé en 1900 sur ce point et sur le point nécessairement antérieur de savoir si les spéculateurs peuvent prédire l'évolution des marchés. Sa thèse intitulée « Théorie de la spéculation » fournit une explication algébrique détaillée de l'impossibilité de prédire les variations de cours, conduisant à la conclusion que les spéculateurs ne peuvent réaliser (ou non) des profits que par hasard, mais ne peuvent pas dégager systématiquement des excédents. Il n'y a pas eu d'autres travaux importants sur cette question avant les années 60, quand cette thèse a refait surface et a suscité un débat animé concernant d'éventuelles exceptions aux conclusions de Bachelier (que nous explorons dans la section suivante).

4. Circonstances exceptionnelles susceptibles de rendre la spéculation préoccupante

La section précédente explique l'utilité sociale et économique des transactions des spéculateurs dans des circonstances ordinaires (même si cette utilité n'est pas toujours comprise du plus grand nombre). Il existe toutefois des circonstances exceptionnelles dans lesquelles les transactions et la spéculation peuvent permettre d'extraire de la valeur du marché sans engendrer une valeur sociale correspondante.

Le premier exemple intervient dans un contexte à court terme dans lequel les réactions immédiates, partiellement réfléchies, des opérateurs à la publication d'informations à péremption rapide entraînent des écarts de cours importants par rapport aux fondamentaux d'une valorisation équitablement et exhaustivement rationnelle. A très court terme, les marchés peuvent se comporter comme les moutons de Panurge comme il arrive lorsque l'on se laisse influencer dans sa façon de penser et d'interpréter l'information, en particulier lorsque les informations détaillées ne peuvent pas être entièrement digérées avant la transaction. On observe deux exemples : soit une réaction insuffisante en présence d'une information qui devrait faire bouger considérablement le marché, au lieu de quoi il semble incapable d'accepter les faits (comme les bulles sur les actifs), ou bien l'inverse, une réaction apparemment excessive aux gros titres (par exemple, l'effet sur les valeurs du secteur de la construction aéronautique d'un attentat terroriste affectant les transports aériens ou l'impact sur les cours du pétrole d'une déclaration de guerre dans un pays producteur). C'est ce que l'on appelle souvent le sentiment de marché.

Certains auteurs⁶ estiment que ce phénomène et d'autres phénomènes liés sont importants, tandis que d'autres, qui ont tenté d'en mesurer l'importance, considèrent que l'effet est si minime qu'il est inférieur à l'écart habituel entre prix offerts et prix demandés.⁷ Dans d'autres cas, ce type d'anomalies dans l'évolution des marchés semble pouvoir engendrer des bénéfices pour les spéculateurs dans un premier temps, jusqu'à ce que les analystes et la presse financière les identifient et une fois qu'elles deviennent connues d'un plus grand nombre, elles se dissipent rapidement.

Le deuxième exemple (la « manipulation du marché » dans son acception étroite) se produit parce que, comme indiqué dans la section précédente, les transactions « sur le marché » ne représentent qu'une petite partie des échanges portant sur un produit de base spécifique. La majeure partie des transactions de matières premières a lieu bilatéralement au cours coté (majoré ou diminué d'une marge fixe pour couvrir

⁶ Par exemple, "Irrational Exuberance", Shiller (2000); Dreman in Forbes, 5 June 1996.

⁷ "The Efficient Market Hypothesis and Its Critics" Burton (2003); "Des explications faciles peuvent être trouvées dans de nombreux cas. Lorsque l'on tient compte des coûts de transaction, le fait que les cours des actions tendent à réagir excessivement aux annonces, retombant au lendemain des bonnes nouvelles et rebondissant celui des mauvaises, se révèle inexploitable : les retournements de cours restent toujours compris dans la fourchette entre cours offert et cours demandé. D'autres effets, comme celui des petites entreprises, fonctionnent quelques années puis cessent de fonctionner, plusieurs années également. D'autres s'avèrent n'être que des substituts pour la rémunération de la prise de risque." *Frontiers of Finance Survey*, Economist 10 September 1993

les frais propres à la transaction). Autrement dit, les transactions « sur le marché » sont le sommet de l'iceberg, un nombre beaucoup plus vaste de transactions étant effectué au cours déterminé par l'échange d'une quantité comparativement très réduite du produit de base concerné.

Les mêmes parties sont souvent à la fois des négociateurs bilatéraux et des opérateurs sur le marché. Ils peuvent avoir conclu des accords bilatéraux très importants et intervenir aussi en bourse. Dans ce cas, il peut arriver qu'ils aient intérêt à réaliser une transaction irrationnelle ou à perte sur le marché à l'approche de la clôture afin d'influencer le prix des contrats bilatéraux. Imaginons qu'un intervenant a conclu un accord bilatéral pour la vente de 3 millions de tonnes de charbon ou de blé au cours de clôture, il pourra avoir intérêt à faire monter les cours en achetant sur le marché 0,5 million de tonnes de la même denrée juste avant que la cloche ne sonne la clôture du marché pour faire augmenter le cours de 2,00 USD la tonne, par exemple. L'opérateur aura été contraint de payer 2,00 USD de plus que le juste prix pour 0,5 million de tonnes achetées sur le marché (il a payé 1 million USD de trop), mais sous l'empire du contrat bilatéral, il pourra toucher 2,00 USD de plus pour les 3 millions de tonnes qu'il écoulera (il augmentera le revenu de ses ventes bilatérales de 6 millions USD).⁸

Dans des circonstances extrêmes, le même opérateur peut intervenir sur un marché peu animé à la fois en tant qu'acheteur et que vendeur par l'intermédiaire de deux courtiers différents, voire du même courtier, plaçant des ordres d'achat et de vente au même cours « gonflé » ou « comprimé », ce qui signifie que sans échange réel, le cours de clôture du marché sera plus ou moins élevé que ce qu'il aurait dû être.

Plus la concurrence sera vive entre les opérateurs, moins une telle manipulation aura de chances de fonctionner. Il n'est toutefois pas possible que la concurrence soit tout le temps suffisamment animée et de nombreux pays se sont dotés de réglementations spécifiques et d'autorités de contrôle pour éviter les manipulations de cours.

Le troisième exemple intervient quand les pouvoirs publics souhaitent maintenir ou faire évoluer un cours à un niveau autre que ce qu'il aurait dû être. Il est par exemple courant que les États ancrent leur devise (ou plus rarement une matière première comme dans le cas de l'Australian Wool Board dans les années 80) à un cours particulier, pour des raisons plus vastes de politique sociale. Il peut par exemple s'agir de tenter d'empêcher ou de retarder des ajustements socialement douloureux dans un pays ou dans un secteur d'activité. Les pouvoirs publics pourront préférer instaurer au préalable des mesures de sécurité sociale ou promouvoir d'autres secteurs pour les travailleurs qui perdront leur emploi quand les marchés évolueront.

Dans ces circonstances, les spéculateurs (à tort ou à raison) peuvent prédire que les pouvoirs publics ne seront en mesure de maintenir le cours que pendant une durée limitée avant l'épuisement de leurs ressources⁹ ou de la tolérance qui les autorise à dépenser de l'argent pour maintenir le cours et qu'au moment où ils cesseront de le soutenir, le cours de marché évoluera. Dans ce cas, les opérateurs pourront avoir intérêt à réaliser de larges volumes de transactions aujourd'hui sur la devise ou la denrée en escomptant que l'État cessera un jour de maintenir l'ancrage. S'ils ne disposent pas de quantités physiques de devises ou de denrées suffisantes à vendre, ils peuvent même conclure des contrats à terme importants pour vendre des quantités de devises ou de denrées qu'ils n'ont pas encore achetées (c-à-d vendre à découvert).

⁸ Des comportements similaires ont été observés par le passé, comme les transactions d'Enron dans le gaz naturel, par exemple.

⁹ Dans le cas des interventions sur les devises, les ressources sont normalement limitées par les réserves de change de la banque centrale du pays (or y compris) ; il existe un corpus d'études sur les « attaques spéculatives » dans ce contexte.

Si, par exemple, les pouvoirs publics s'efforcent de maintenir la valeur d'une devise ou d'un produit au dessus du niveau auquel le marché se stabiliserait, les spéculateurs peuvent avoir intérêt à vendre des quantités importantes, forçant les pouvoirs publics à employer encore plus de ressources pour acheter la devise ou le produit. Dans ce cas, le « point de rupture » pourra intervenir plus tôt ou pourra même être atteint, alors qu'il ne l'aurait pas été autrement.

Dans une telle situation, les opérateurs auront généralement permis au marché d'atteindre l'efficience plus rapidement (en ce sens, leur intervention pourra être perçue comme socialement souhaitable), mais les ressources publiques auront été gaspillées et la poursuite de l'objectif supérieur de politique sociale aura échoué.

Dans un souci d'exhaustivité, on peut mentionner un quatrième type de situation dans lequel la spéculation pourra être socialement préjudiciable, mais il concerne uniquement les actions plutôt que les matières premières. Les opérations spéculatives peuvent intervenir dans des secteurs comme la banque et l'assurance (et dans certains cas dans des secteurs non financiers), lorsque les perspectives d'une entreprise dépendent en partie de son cours de bourse au lieu de la relation causale habituelle par laquelle sa performance guide son cours de bourse. Les valeurs bancaires et d'assurance (qui présentent de façon inhérente un fort effet de levier des fonds propres) et certaines autres sociétés qui privilégient des structures de bilan caractérisées par un endettement élevé dépendant de leur cours de bourse, dépendent de la confiance des investisseurs dans leurs actions en particulier et dans le marché des actions en général. Il convient également de remarquer que le nombre d'actions émises par une société est normalement limité et donc susceptible d'être affecté par des positions de négociation importantes. Dans ces circonstances, il est possible, en particulier en période de déficit systématique de confiance des investisseurs, que des ventes spéculatives puissent ébranler la confiance dans certaines valeurs spécifiques et conduire à l'insolvabilité une entreprise qui serait viable autrement. Dans ces situations, des ventes à découvert associées à l'orchestration d'une « fuite » des investisseurs peut permettre aux spéculateurs de réussir à mener une entreprise à sa perte et même d'en tirer profit.

Aucun des cas mentionnés ci-avant ne concerne directement les autorités de la concurrence. Il existe toutefois deux situations (parfois associés à des éléments des cas précédents) qui posent des questions de concurrence. Sur un marché où les quantités physiquement échangées sont relativement réduites par rapport aux positions de négociation des producteurs et (ou) des spéculateurs, il peut arriver qu'un opérateur extrêmement important, un oligopole ou une entente entre plusieurs opérateurs, puissent « s'accaparer » le marché en spéculant.

Imaginons un marché sur lequel il y aurait peu de vendeurs, comme un marché concentré de minerais ou d'une culture (comme l'oignon par exemple) dont la récolte aura été abîmée par la sécheresse. Il se peut qu'un opérateur très important ou un nombre réduit d'opérateurs qui disposent d'une proportion significative de l'offre disponible aient intérêt à acheter encore davantage de produit à court terme auprès des rares sources disponibles pour accumuler un volume suffisant de la denrée pour accroître sa puissance sur le marché.

Ayant acquis les seules réserves significatives qui lui faisaient concurrence, l'opérateur peut restreindre le volume revendu afin de faire monter le cours. Pour ce faire, il pourra stocker une proportion des denrées, même si le cours est déjà élevé, voire en détruire une partie (pour éviter qu'elle ne filtre sur le marché) ou l'affecter à des applications pour lesquelles des denrées de moindre qualité conviendraient davantage (employer par exemple à la consommation animale des céréales destinées à l'alimentation humaine).

Bien entendu, si les opérateurs parviennent à s'accaparer le marché en se mettant d'accord pour retirer un produit du marché ou pour gonfler les cours, l'autorité de la concurrence pourra être fondée à intervenir

pour réprimer une entente. Il est possible qu'un résultat similaire soit produit par des contrats entre des opérateurs et les producteurs d'une denrée (un accord, par exemple, par lequel un producteur important s'engagerait à vendre exclusivement l'intégralité de sa récolte exclusivement à un opérateur qui détiendrait déjà des quantités importantes de cette denrée). Ce dernier type d'accord serait plus difficile à percer à jour parce que les opérateurs peuvent être des clients ou des concurrents des producteurs ou des consommateurs d'une denrée.

Même si ces cas sont théoriquement possibles, dans la pratique, ils seraient très difficilement réalisables car il est très improbable que les conditions nécessaires à un accaparement du marché puissent être réunies. La plupart des marchés de matières premières ne sont pas concentrés et toute tentative de monopole de ce type échouerait compte tenu du nombre important de concurrents qui réalisent des transactions. Dans ce cas, entrent en concurrence bien entendu les apports réels vers le marché depuis d'autres marchés, ou leur seule menace, et les importations d'autres pays, le cas échéant. Les réactions concurrentielles des consommateurs (comme la substitution d'autres aliments) entrent également en compte.

Dans la plupart des cas, il faut des ressources extrêmement importantes pour accaparer un marché par rapport aux bénéfices qu'on pourrait en retirer et le risque d'échec est généralement élevé. En particulier, si les vendeurs initiaux d'un produit se rendent compte que l'opérateur ou les opérateurs poursuivent une stratégie d'accaparement du marché, ils auront intérêt à ne pas vendre trop tôt, mais à attendre plutôt que le prix monte une fois que le marché aura été accaparé. Autrement dit, si une stratégie d'accaparement est découverte (ou soupçonnée), elle échouera généralement d'elle-même.

Sur les grands marchés nationaux ou internationaux où il est difficile de déceler l'identité des acheteurs, l'accaparement sera donc généralement impossible compte tenu du faible niveau de concentration et de l'importance des ressources que cela exigerait. D'ailleurs, le développement des échanges internationaux et la mondialisation rendent ces stratégies moins probables (mais potentiellement plus rentables).

Sur les marchés isolés plus restreints, où cette stratégie pourrait sembler au premier abord plus plausible, il sera souvent apparent que quelqu'un ou quelques-uns tentent d'accaparer le marché et cette stratégie échouera d'elle-même. En outre, lorsque les bénéfices issus de l'accaparement seraient réellement préjudiciables, les opérateurs disent souvent qu'ils ont laissé passer l'opportunité d'une stratégie de maximisation des bénéfices (au moins dans sa forme la plus pure) et ont accru l'accès aux produits.¹⁰ A titre de précaution, de nombreux pays disposent d'un cadre de règles applicables en cas de cours excessifs de produits essentiels sur des marchés isolés.

L'interdiction des prix excessifs peut être envisagée comme un élément complémentaire, mais distinct, du droit de la concurrence. L'une des caractéristiques fréquentes des cas d'abus de position dominante ou d'accords restreignant considérablement la concurrence est la persistance de cours excessifs (c-à-d très supérieurs aux coûts) et l'incapacité pour le marché de se corriger lui-même raisonnablement vite. Il est important que le droit de la concurrence n'intervienne qu'en cas d'effet durable sur le marché, car autrement, les autorités de la concurrence seraient presque constamment en train d'intervenir sur de nombreux marchés. Autrement dit, dans des circonstances normales, il n'est pas possible qu'un vendeur de glaces au coin de la rue monopolise en permanence le marché des crèmes glacées, même si cela peut éventuellement arriver de façon temporaire un dimanche après-midi où il aura fait particulièrement chaud.

En revanche, les infractions aux lois contre les prix excessifs ne sont généralement constatées qu'en cas de revente immédiate entraînant à court terme une hausse importante par rapport au prix normal, qui

¹⁰ Documentaire : Le Tunnel - le secret du siège de Sarajevo (diffusé le 23 novembre 2009).

est communément défini comme le prix moyen observé sur la durée ou immédiatement avant la perturbation de l'offre. En d'autres termes, le prix « normal » n'est pas *pas* le même que le prix de revient dans le cadre d'une affaire d'abus de position dominante.

Le document « *Excessive prices* » (2010, OCDE) examine les lois européennes et des Etats-Unis contre les prix excessifs. Dans le contexte du Forum mondial sur la concurrence de 2012 de l'OCDE, plusieurs autres juridictions ont également indiqué qu'elles disposaient de lois similaires. A titre d'exemple, les Philippines ont exercé des pouvoirs semblables pour la farine en 2010 :

« Le département du commerce et de l'industrie a constaté l'infraction de 11 minotiers de la région de Manille à l'article 5(2) de loi 7581 de la République sur les prix, qui définit et interdit de s'accaparer les profits de délits de manipulation des prix. *L'accaparement des profits est défini comme la vente ou commercialisation de toute nécessité de base ou matière première principale à un prix excessivement supérieur à sa valeur réelle.*

Des injonctions ont été adressées aux 11 minotiers pour qu'ils interrompent la distribution et cessent de vendre de la farine à des prix compris entre 770,00 PHP et 790,00 PHP par sac départ moulin et abaissent la fourchette de prix à 630,00 PHP – 680,00 PHP. Le département du commerce et de l'industrie a également inspecté les installations des minotiers. »

Il y a eu un nombre limité d'enquêtes de concurrence. Les opérateurs des marchés boursiers comme le London Metal Exchange sont en situation de concurrence entre eux, de même que les opérateurs qui réalisent les transactions sur les produits physiques et financiers. Les bourses bénéficient d'effets de réseau, grâce à l'approfondissement des volumes et à la diversité des ordres d'achat et de vente placés sur le marché. Plus les marchés sont efficaces et plus ils sont attrayants pour les intervenants. Les plaintes et enquêtes de concurrence sont par conséquent fréquentes. On s'est par exemple inquiété des conditions d'accès à certains systèmes de négociations, mais dans l'ensemble, les enquêtes n'ont pas révélé d'infractions.¹¹

Une autre préoccupation courante de concurrence concerne les ententes de « rétention d'information » ou le refus abusif d'une entreprise dominante de fournir des informations. Les autorités de la concurrence s'inquiètent généralement de ce que des concurrents partagent trop facilement leurs informations relatives aux prix et aux volumes, ce qui facilite les ententes.¹² La préoccupation inverse peut toutefois exister sur les marchés boursiers et même sur les marchés de gré à gré. Il existe un historique important de préoccupations de concurrence liées à la rétention entre opérateurs de marchés boursiers ou entre partenaires de négociations bilatérales d'informations relatives aux prix et aux quantités des transactions de matières premières, d'actions ou de produits dérivés.¹³

La question qui se pose est que certains opérateurs importants impliqués personnellement sur une portion significative du marché peuvent « monopoliser » l'information et se mettre en position de tirer des profits auxquels n'auront pas accès des investisseurs plus petits qui ne sont peut-être pas en mesure de détecter les évolutions du marché en temps réel.

¹¹ Cf., par exemple, l'enquête du UK Office of Fair Trading sur le London Metal Exchange.

¹² Échanges d'informations entre concurrents sous l'empire du droit de la concurrence.

¹³ Cela peut donner lieu à la crainte d'un abus de position dominante de la part d'une bourse nationale qui limiterait par exemple l'accès aux informations concernant la cotation sur ses marchés (cf. *Pont Data Australia v ASX Operations* (1990) 21 FCR 285 ou des ententes entre opérateurs convenant de ne pas échanger d'informations entre eux) ; cf. l'exemple de l'enquête de la Commission européenne dans l'encadré ci-après.

Commission européenne (2011)

En 2011, la Commission européenne a entrepris une enquête sur les informations financières nécessaires aux opérations sur CDS. Cette enquête ciblait 16 banques, intervenant comme courtiers sur le marché des « credit default swaps », qui fournissaient des informations essentielles, notamment sur les prix et les indices, exclusivement à Markit, la principale société d'information financière sur le marché concerné. La Commission a indiqué que cela pouvait être la conséquence d'une entente entre ces banques ou d'un abus de position collective dominante susceptible d'interdire l'accès d'autres fournisseurs de services d'informations à de précieuses données brutes.

En octobre 2011, la Commission européenne a confirmé publiquement qu'elle avait commencé la veille à procéder à des inspections surprises (visites sur place) des locaux des entreprises de courtage de produits financiers dérivés liés au taux interbancaire offert pour l'euro (EURIBOR) dans un certain nombre de pays européens. La Commission a déclaré qu'elle s'inquiétait de ce que les entreprises concernées aient pu enfreindre les dispositions interdisant les ententes et les pratiques commerciales restrictives. Cette enquête se poursuit actuellement.

Une solution face à la préoccupation d'ententes éventuelles de rétention d'informations consiste à exiger la divulgation d'un minimum de données¹⁴. Cette approche est toutefois controversée car elle va à l'inverse de la crainte habituelle d'un excès d'informations partagées entre les concurrents et parce que les bourses doivent être en mesure de couvrir leurs coûts et être rémunérées pour les services qu'elles fournissent en tant que teneurs de marché. Du point de vue de l'action des pouvoirs publics, il reste à élucider si l'approche la plus efficace pour permettre aux bourses de couvrir leurs coûts et dégager une rentabilité raisonnable consisterait à générer du chiffre d'affaires par :

- le prélèvement de frais de transaction et la libre dissémination des informations ;
- la vente d'informations sans prélèvement de frais de transactions ;
- l'instauration d'un lien entre la fourniture d'informations et l'acquisition de services de négociation afin d'éviter ceux qui ne sont pas clients ne profitent également de ces informations ;
- ou un panachage de ces différents mécanismes de facturation.

La question se pose dans tous les cas d'être à même déterminer ce qui constitue un niveau approprié de commissions et de restrictions permettant une couverture suffisante des coûts et une rentabilité raisonnable et ce qui constitue un prix ou des restrictions excessives.

¹⁴

La Commission européenne réalise actuellement une consultation sur un projet de réglementation qui rendrait obligatoire la divulgation de ces données, bien que cela s'inscrive dans un cadre beaucoup plus large que celui de la concurrence. Les autres préoccupations concernent la sécurité et la transparence des transactions de produits dérivés.

5. Conclusion

De façon générale, la spéculation et les spéculateurs sur les marchés tendent à aider à stabiliser les cours en apportant de la liquidité et en accélérant la cotation des denrées, même s'il leur arrive parfois à court terme d'exacerber la volatilité des cours. On s'inquiète en outre fréquemment et depuis longtemps de ce que la spéculation soit particulièrement rentable (produisant des profits potentiellement excessifs) lorsque les cours ont connu des fluctuations importantes ; toutefois, ces fluctuations auraient souvent été encore plus marquées si la spéculation ne les avait pas atténuées.

Malgré cela, la spéculation soulève fréquemment et depuis longtemps des préoccupations probablement parce qu'elle est plus rentable quand les cours ont connu des fluctuations importantes quand les autres intervenants sur le marché subissent les pressions les plus fortes. Le point de vue défendu dans cette annexe veut que ces inquiétudes soient en grande partie infondées parce que dans la plupart des cas les variations de cours auraient été encore plus marquées si la spéculation n'avait pas été là pour en atténuer l'amplitude.

Ce n'est que dans certaines circonstances restreintes que la spéculation peut présenter un danger pour le bien-être social. Un exemple notable est celui des prix abusifs pratiqués pour des produits alimentaires de base et autres produits de nécessité en période de conditions de négociation anormales, lorsque des segments du marché se trouvent isolés dans les situations d'urgence. Des lois spécifiques contre les profits ou les prix abusifs peuvent être élaborées pour résoudre ce problème, mais il convient de distinguer les fondements conceptuels et les éléments de preuve de ceux qui s'appliquent dans un contexte de droit de la concurrence.

Les cas traditionnels d'entente ou d'abus de position dominante dans le contexte de la bourse ou de la spéculation sont d'ailleurs rares et concernent le plus souvent des accords horizontaux ou des accusations d'abus de position dominante visant à restreindre la diffusion d'informations relatives aux cours et quantités négociées dans le but de s'approprier la valeur de ces informations pour que les concurrents n'en profitent pas.

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AUSTRALIA

1. Introduction

Within Australia, commodity prices are generally set by markets rather than regulated by government. Australia considers markets that are competitive, so that prices are free to move in response to changes in market conditions, produce more efficient and productive outcomes for businesses and consumers.

Competition in markets creates incentives for businesses to be more efficient, innovative and productive. Furthermore, competitive pressure on businesses acts to ensure that prices closely reflect costs of provision, to the benefit of consumers.

Government intervention, in particular through regulation or other interventions intended to affect the price of goods or services, is generally not preferred. Such regulation should only be relied upon in the event of a demonstrable market failure. Government intervention, in the form of the economic regulation of prices, is invariably difficult and is an imperfect substitute for genuine competition. Economic regulation is very time and resource intensive and the derivation of an efficient price is difficult. Accordingly, it is important that price regulation is used judiciously and only applied to areas where market failures are clearly demonstrated.

Where there are ongoing concerns about the volatility of commodity prices, it is important to understand the underlying cause of the instability before introducing measures to address them.

If the volatility is a result of structural barriers to competition, it is important to understand what the structural barriers are and implement measures appropriate to address them.

- Where the cause appears to be the result of anti-competitive conduct, the Australian Competition and Consumer Commission (ACCC) is able to investigate the conduct and take action under the anti-competitive conduct provisions of the *Competition and Consumer Act 2010* (CCA) (formally the *Trade Practices Act 1974*).
- Where instability is a result of insufficient competitive pressures necessary to achieve efficient prices and protect consumers, prices surveillance powers are available under the CCA. These powers allow the Government to direct the ACCC to undertake a range of monitoring and reporting activities.

Each of these tools will be discussed in more detail in the main body of this submission.

However, competitive markets do not necessarily mean that prices in commodity markets will be less volatile. Equally, price volatility does not necessarily reflect a lack of competition in local markets. Price volatility may reflect a range of global and regional factors, including movements in international commodity prices, changes in demand and the availability of supply.

As a feature of certain markets in Australia, price volatility can be a sensitive issue and a source of public concern. Unstable prices can create uncertainty for businesses and consumers. Further, price

volatility is often viewed as a result of a lack of competition, as the public may perceive price increases to be the result of collusive behaviour between businesses. In some cases, a lack of public information on the operation of markets can contribute to these perceptions.

Consumer concern regarding prices in the fuel and food sectors has often resulted in calls for action to be taken by governments and for competition authorities to investigate the sectors for anti-competitive conduct and/or to regulate prices in the industry.

As a key example, the ACCC currently conducts formal monitoring of retail petrol prices to ensure that prices are being set efficiently in the market and also to inform consumers of the underlying influences on retail fuel prices. Further information on mechanisms to address concerns about price volatility in Australia, including the role of the ACCC in enforcing compliance with competition laws, is outlined in the following discussion.

2. The role of government and competition agencies

Public concerns about unstable prices may generally be addressed through government policy to promote competitive markets. The Government may promote competition through a number of mechanisms, including reducing structural barriers to competition such as barriers to entry, addressing anti-competitive conduct through the investigation and enforcement role of the ACCC or monitoring prices to ensure that the market is working efficiently.

2.1 Addressing structural barriers to competition

Successive Australian Governments have pursued structural reform on a systemic and/or structural basis. Governments play an important role in ensuring that unnecessary regulations do not impede competition or prevent new businesses from entering a market. The ACCC also plays an important role in monitoring competition in markets and providing advice to government where issues arise.

2.1.1 National competition policy

In recent decades, Australia has undertaken significant reforms intended to improve the operation of markets. Australia has benefited from increased competition in a range of industries. In part, this is attributed to the economic reforms that Australia implemented from the 1980s onwards, including the opening of the capital account, floating of the exchange rate and the National Competition Policy reforms.

In 1995 all Australian governments (both state and Federal) agreed to implement a range of competition reforms under the National Competition Policy (NCP) framework. The aim of NCP was to improve Australia's economic performance by promoting competition in previously restricted markets. A range of economy wide reforms were undertaken, including extension of the anti-competitive conduct provisions in the TPA to unincorporated enterprises and government businesses. In addition, a number of sector specific reforms were undertaken in industries such as electricity, gas, water and communications, which were traditionally seen as natural monopolies.

NCP has resulted in significant benefits for Australia. Australia's Productivity Commission estimated that the National Competition Policy reforms directly contributed to productivity growth and price reductions in key infrastructure sectors.¹

¹ Productivity Commission, *Review of National Competition Policy Reforms*, Report no. 33, February 2005

2.1.2 Lowering barriers to entry for grocery supply

In January 2008, in response to community concerns around cost of living pressures, the Government directed the ACCC to undertake a formal inquiry into the competitiveness of retail prices for standard groceries using its prices surveillance powers.²

The ACCC's Grocery Inquiry found that, overall, supermarket retailing is workably competitive but there some specific factors that limited the level of price competition in Australia. These included barriers to the entry and expansion of competitors and limited price competition from independent supermarkets. In particular the ACCC noted the impact of restrictive covenants in leases, and of planning and zoning laws.

The ACCC identified over 700 supermarket leases with clauses that were potentially restrictive, and pursued a program of having the restrictive covenants removed. In 2009, Coles, Woolworths and other leading Australian supermarkets (ALDI, Franklins, SPAR, Foodworks and Metcash/IGA) agreed to court enforceable undertakings to remove restrictive provisions from supermarket leases. In May 2011, another Australian supermarket, Supabarn, agreed not to enter into new restrictive provisions in lease agreements, which concluded the ACCC's program on restrictive leases.

The ACCC also recommended changes to Australian state and local government planning laws to have regard to the potential for competition between supermarkets and to prevent major supermarkets from blocking the entry and expansion of competitors.

Following the ACCC's report, the Government introduced a range of measures to promote more competition in the grocery retailing industry and reduce barriers to entry, including:

- changes in the foreign investment policy to extend the timeframe for the development of vacant commercial land from 12 months to five years;
- clarifying predatory pricing and misuse of market power provisions in the CCA;
- providing information about the Australian retail grocery industry in international trade forums to attract new entrants into the Australian market; and
- introducing a mandatory, nationally-consistent unit pricing regime.

The Government also referred the potentially anti-competitive impacts of state and local zoning and planning laws to the Council of Australian Governments (COAG). In 2009, COAG agreed that planning laws should not unjustifiably restrict competition in grocery retailing. COAG also agreed that the Productivity Commission would undertake a review of planning and zoning systems. The final report of the Productivity Commission was released on 16 May 2011.³ In addition, a number of Australian state governments have made changes to their planning laws or are reviewing them.

All of these measures were designed to increase opportunities for entry into the industry and encourage more competition for the benefit of all consumers. The ACCC considered that ensuring competitors can enter the market and expand would be important to maintaining competitive pressure on the major supermarket chains. Notably, Aldi and Costco have expanded their presence in the Australian market in recent years, with Aldi having opened over 250 stores and Costco about to open its fourth store.

² Australian Competition & Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008.

³ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments Research report*, May 2011.

The ACCC found in its Grocery Inquiry report that prices are usually lower at major supermarket chains in areas where a competitor such as Aldi is present.

2.2 *Addressing anti-competitive conduct*

As indicated previously, rather than seeking to directly regulate market outcomes, Australia has developed a strong competition policy framework, which is underpinned by Australia's Competition and Consumer laws. Specifically, Part IV of the CCA prohibits certain kinds of anti-competitive conduct. Broadly speaking, the kind of conduct prohibited under the CCA includes: cartel conduct, agreements that substantially lessen competition, misuse of market power, supply or acquisition of goods or services on certain restrictive conditions, resale price maintenance, and mergers that would have the effect of lessening competition.

Australia's competition regime is continually being improved to further promote competitive markets. Consistent with reforms in many other OECD countries, Australia has recently introduced criminal penalties for serious cartel conduct where previously only civil penalties were available. Additionally, in 2012 legislation will come into force to clarify Australia's merger provisions with respect to creeping acquisition and to ban anti-competitive price signalling and information disclosures in the banking sector.

The ACCC is the primary body for enforcement and compliance of the competition elements of the CCA. The ACCC can seek various remedies for breaches of the law, including criminal sanctions, financial penalties, disqualification from managing a corporation, injunctions to stop breaches or potential breaches of the competition law, compensation for loss or damage suffered by affected parties, adverse publicity orders, non-punitive orders and divestiture of assets. The ACCC can also accept court enforceable undertakings when a corporation has breached the law.

Consumers and businesses affected by the anti-competitive conduct may also seek remedies including injunctions, compensatory orders and damages through private litigation.

Australia considers that a comprehensive and effective competition law is vital to facilitating competitive markets across the economy, to the ultimate benefit of consumers, in the form of lower prices and greater choice.

2.3 *Monitoring prices and educating the public*

Where there are ongoing consumer and government concerns about unstable or volatile prices, it is open to the Australian Government to direct the formal monitoring of prices to ensure that prices are being efficiently set by the market. Price monitoring reports can also educate the public about the underlying causes of price volatility. Currently, the ACCC monitors prices in a number of sectors. Perhaps the most high profile price monitoring currently being undertaken by the ACCC is the monitoring of retail fuel prices in Australia. The ACCC provides and publishes regular reports which inform the Government and the public of the major underlying influences on retail fuel prices.

2.3.1 *ACCC monitoring of fuel prices*

In Australia, fuel prices were regulated to varying degrees at a state level since the 1940s. The Commonwealth government became more involved in petrol price regulation with the first oil shock in the 1970s when it began to regulate wholesale prices. From 1998, in line with government policy, fuel prices in Australia were deregulated and wholesalers were free to set their own prices according to market conditions.

To observe fuel price movements after deregulation, the ACCC conducted informal monitoring of fuel prices through to 2007. During this time, the ACCC observed that retail petrol prices had diverged from movements in international benchmark prices.

The Government subsequently directed the ACCC to conduct an inquiry into the price of unleaded petrol taking into account the structure of the industry, the extent of competition across the supply chain, the determination of prices across the supply chain and whether there were any impediments to efficient petrol pricing. In focusing on pricing and competition, the ACCC also sought to identify and address any potential anti-competitive activity in the industry after it had taken court action against petrol retailers in 2005 and 2007 for price fixing.⁴

While the ACCC's 2007 inquiry⁵ found the supply and wholesale fuel sectors had a relatively high degree of market concentration, it also found that there was a significant degree of price competition at the retail level. It further identified at the time that there was a significant level of vertical integration that influenced retail pricing and that the main influence on Australian retail petrol prices was the price of the international benchmark (the price for refined petrol in Singapore – Mogas 95). It also commented that there was a significant amount of misinformation in the reporting of petrol prices, which was not supported by evidence. In conclusion, the ACCC highlighted the need for reliable and objective information to be made available to consumers.

In response to the ACCC's findings, the Government directed the ACCC to undertake formal monitoring of the prices, costs and profits of unleaded petrol for a period of three years until the end of 2010. This was later extended until the end of 2012. This monitoring role is in addition to the ACCC's responsibility to enforce anti-competitive conduct and consumer protection laws across Australia, including in the fuel industry.

In performing its monitoring functions, the ACCC collects and examines retail prices of petrol, diesel and automotive LPG in all Australian capital cities and in around 150 regional locations. It reviews these prices and compares them with the respective international benchmarks. It also obtains cost and profit information from the petrol companies and uses this to compare Australian prices, costs and profits against international benchmarks.

If ACCC analysis indicates there are factors impairing competition in fuel markets, it can alert the government and community. As a requirement of the ministerial direction to monitor prices, the ACCC provides detailed reports of its findings to the Government which are also made available to the Australian public.⁶

The key findings of the ACCC's 2011 Monitoring Report include:

- Australian consumers pay a price for petrol that is, on average, reflective of the relevant international benchmark prices.
- Australian pre-tax petrol prices reflect international prices and thus are very similar to prices paid by consumers in other countries.

⁴ Ballarat price fixing, 2005 - *ACCC v Leahy Petroleum* (No. 2) [2005] FCA 254 & *ACCC v Leahy Petroleum* (No. 3) [2005] FCA 265. Brisbane price fixing, 2007 - *Australian Competition and Consumer Commission v Gullyside Pty Ltd* [2005] FCA 1727. Geelong price fixing, 2007 - *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794.

⁵ Petrol prices and Australian consumers: Report of the ACCC inquiry into the price of unleaded petrol, December 2007.

⁶ Monitoring of the Australian petroleum industry: Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia, December 2011.

- ACCC analysis has found that in Australia, as in most developed countries, petrol prices reflect international market prices and the local currency’s value relative to the US dollar.
- Overall, the ACCC has not found evidence of excessive profits in the Australian downstream petrol industry, with rates of return in most sectors comparable to other manufacturing industries and petrol industries in other countries.

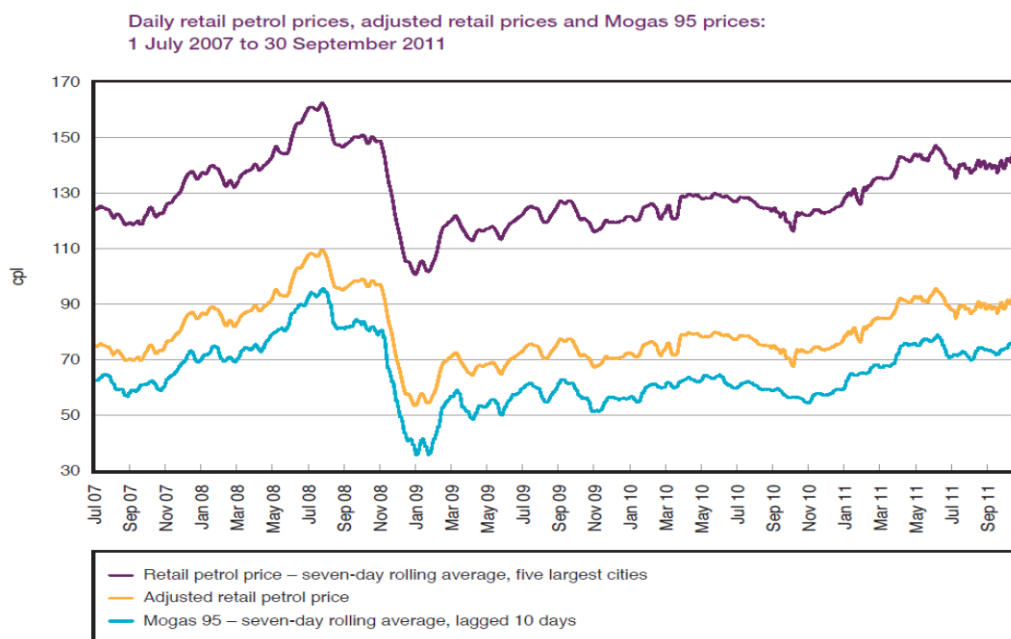
When prices increase, competition agencies often come under pressure to “do something” about prices. This is particularly the case with a high frequency, high profile purchase such as fuel. Calculating the contribution of different factors to retail petrol prices is complicated and not widely understood by the average Australian consumer. The key role that international prices plays in influencing retail petrol prices in Australia has been a key message that the ACCC has attempted to deliver to the public.

While local petrol companies are free to set prices in the market, fuel is an internationally traded commodity and a significant quantity of Australia’s fuel is supplied by imports. As a result, local market prices are primarily influenced by the international price of refined petrol (the import parity price) and tax (excise and GST), which are both outside the control of the local petrol companies. Accordingly, the key drivers of fuel price changes in Australia are changes in international benchmark prices and the exchange rate.

Where price rises are not a result of unlawful practices but reflect increases in commodity prices set by international markets, the ACCC does not have the authority, and nor would it be appropriate, for it to intervene.

The ACCC has made it clear that changes in the international price of refined fuels and crude oil have been overwhelmingly responsible for movements in retail petrol prices. The components of fuel prices attributable to excise and GST and the pricing decisions of local petrol retailers have been relatively stable.

Daily retail petrol prices, adjusted retail prices and Mogas 95 prices: 1 July 2007 to 30 September 2011



Source: ACCC calculations based on Informed Sources, Platts and Reserve Bank of Australia data

As the chart above illustrates, ACCC analysis has shown that petrol prices have generally been in line with the underlying costs of supply and international benchmarks.

By making comparisons with the retail prices in other countries, which show very similar movements in prices, it can be shown that changes in prices are driven by international price movements, not generally by local competition issues.

This may reduce the likelihood that community concern over volatile prices results in competition and regulatory authorities becoming involved in what is in reality the efficient operation of the price mechanism.

3. Conclusion

Australia considers that a robust competition policy framework is a vital tool for ensuring the efficient and effective operation of markets, including commodity markets. Such a framework includes: the evaluation of markets to ascertain whether structural barriers exist, a robust and effective competition law and other policy tools to address impediments to the effective and transparent operation of markets. Such a framework will minimise the need for economic regulation and other tools for monitoring behaviour in specific markets.

In Australia, public concerns about price volatility particularly within the retail fuel market, can translate into calls for new regulations or changes to competition laws. Although unstable prices do not necessarily reflect a competition problem, a lack of public information about the underlying causes of price volatility can create such perceptions.

In addressing public concerns about unstable prices, Australia works to ensure that markets are generally efficient through a range of mechanisms to encourage competition. To this end, the ACCC plays a critical role in promoting competition and protecting consumers from anti-competitive behaviour.

Where price movements in a market largely reflect international factors rather than a lack of local competition, Australia considers that it is important to educate consumers of these factors in order to promote confidence that the market is working effectively.

BULGARIA

Introduction

The subject of agricultural commodities has attracted a mounting public and political attention both in Bulgaria and internationally. The importance of each individual market such as cereals (wheat, flour and bread), dairy products and sunflower oil is obvious; however the continuous price fluctuations have raised a number of discussions concerning the competition within each sector. In this line of observations, the Bulgarian Commission on the Protection of Competition (CPC) has undertaken a number of initiatives, as follows:

1. Initiatives of the CPC in the agricultural commodity sector

1.1 *Cartel Investigations*

1.1.1 *Sunflower cartel - CPC Decision № 1150 of 27.12.2007*

The Commission initiated an investigation of prohibited price fixing agreements/decisions by the producers of sunflower oil and the industry's trade association. The procedure started on September 18th, 2007 and closed on December 27th, 2007; see CPC Decision № 1150, dating 27.12.2007.

Essentially, the cartel targeted horizontal effects within the markets of production and distribution of sunflower seed, procession of seed, and production and trade in sunflower oil. The legal basis was addressed in Art.9 (1) of the LPC (repealed).

The detected conduct concerned the Union of Producers of Vegetable Oils and Oil Products (UPVOOP) that organized regular meetings with members, where the purchased price of sunflower was discussed. The investigation established that the seed of harvest 2006 was directly fixed and the market price for sunflower oil was indirectly fixed as well. The UPVOOP also collected sensitive price information from its members and used it to coordinate their market policies.

The duration of the infringement lasted from 2002 to 2007. The remedies imposed involved fines: UPVOOP was charged a fine of BGN 5 000 (EUR 2 500) and 13 other undertakings – members of the UPVOOP were charged individual fines amounting in total BGN 1 710 000 (EUR 855 000). The then existing LPC, repealed in December 2008, did not provide for a proposal of commitments procedure. CPC's Decision was appealed by the UPVOOP and the relevant undertakings before the Supreme Administrative Court, which upheld the Decision of the CPC but reduced the amounts of fines imposed to individual undertakings to a total amount of BGN 813 000.

The case did not involve any cooperation with foreign competition authorities.

1.1.2 *Bread cartel – CPC Decision № 622 of 22.07.2008*

On July 26th, 2008 the CPC initiated an investigation of prohibited decisions of associations of the following undertakings: 1) Federation of Bread and Pastry Producers in Bulgaria (FBPPB); 2) Association

of Bread and Pastry Producers “Bread for Bulgaria” (ABPPBB); 3) Regional Union of Bread and Pastry Producers – Bourgas (RUBPP).

The cartel targeted horizontal effects within the markets of production and distribution bread. The legal basis was addressed in Art.9 (1) of the LPC (repealed). All of the three associations of bread producers (two operating at the national level and one at the regional level) coordinated the pricing and commercial policy of their members and organized an exchange of price information among them. The associations collected data on retail prices from members and disseminated the information with pricing policy instructions.

The duration of the infringement lasted from 2002 to 2007. The remedies imposed involved fines: 1) FBPPB was charged a fine of BGN 15 000 (EUR 7 500); 2) ABPPBB was charged a fine of BGN 10 000 (EUR 5 000); 3) RUBPP was charged a fine of BGN 10 000 (EUR 5 000). The then existing LPC, repealed in December 2008, did not provide for a proposal of commitments procedure. The CPC Decision was appealed by the three associations before the Supreme Administrative Court, which upheld the Decision against two of the associations (FBPPB and RUBPP) and confirmed the fines imposed, but repealed the CPC Decision with respect to the other association (ABPPBB).

The case did not involve any cooperation with foreign competition authorities.

1.1.3 Dairy Processors Association cartel - CPC Decision №650 of 24.07.2008

In September 2007, the Commission launched an investigation of prohibited decisions of associations of undertakings- the Association of Dairy Processors in Bulgaria (ADPB) and National Association of Dairy Processors (NADP). The cartel targeted horizontal effects within the markets of production and distribution of white and yellow cheese and the related market of purchase of raw cow milk.

The associations organized regular meetings where purchase prices of raw cow milk were discussed and additionally issued recommendations to their members on purchase price setting, bonus and rebates schemes. NADP had adopted a decision on setting a minimum price level of white cheese and raw cow milk. Both associations collected and disseminated sensitive price information to members. The duration of the infringement lasted as follows: 1) ADPB: 2002 – 2007; 2) NADP: 01.12.2006 - September 2007. The imposed fines are: ADPB BGN 15 000 (EUR 7 500) and NADP - BGN 10 000 (EUR 5 000). Under the former LPC, repealed in December 2008, there was no provision for a proposal of commitments procedure. The Decision was appealed by both associations before the Supreme Administrative Court, which upheld the Decision against both associations and confirmed the fines imposed.

The case did not involve any cooperation with foreign competition authorities.

1.1.4 Union of Poultry Breeders - CPC Decision № 601 of 17.07.2008

In September 2007, the Commission initiated an investigation of prohibited agreements of undertakings producing poultry meat and eggs and prohibited decisions of an association of undertakings - Union of Poultry Breeders in Bulgaria (UPBB). The cartel targeted horizontal effects within the markets of production and distribution of poultry meat and eggs, and the related markets of eggs intended for industrial processing.

The infringement concerned the behavior of the association and its members, acting individually or in concert with the UPBB, adopted agreements/decisions in fixing minimum prices of poultry and eggs, production limits and production quotas. In addition, they also shared sensitive information on produced quantities of chicken, poultry meat and eggs in order to monitor their compliance with the abovementioned decisions. The period of the infringement encompassed 2002 - 2007. The sanctions amounted to: 1) UPBB,

a fine of BGN 5 000 (EUR 2 500); 2) 26 undertakings – members of the UPBB, 19 of them active in market for eggs, 5 acting in the market of poultry meat and 2 of them carrying out activities in both markets- individual fines for a total of BGN 288 000 (EUR 144 000).

CPC Decision was appealed by the UPBB and the relevant undertakings before the Supreme Administrative Court (SAC), which upheld the Decision of the CPC and confirmed the fines imposed. The Decision of the Supreme Administrative Court (at the first instance) is being appealed by the undertakings before the cassation instance of the SAC. The case did not involve any cooperation with foreign competition authorities.

1.1.5 Retail stores chains - CPC Decision №121 of 03.02.2011

In May 2009, the CPC initiated investigation of prohibited agreements/concerted practices among large retailers (Metro Cash and Carry Bulgaria, Billa Bulgaria, Kaufland Bulgaria and Co., HIT Hypermarket, Maxima Bulgaria and Piccadilly).

The case was also initiated to investigate possible abuses of dominant positions by large retailers. As none of the retailers was found to hold a dominant position on the relevant markets (supply and retail distribution of fast moving goods- bread, meat and eggs, milk and dairy products, oils and fats, perfumery and cosmetic) the CPC issued a separate decision (CPC Decision No121 of 03.02.2011) on the absence of an infringement under Art.21 of the Law on Protection of Competition.

Proceedings are still pending with respect to prohibited agreements/concerted practices.

CPC finds that a potential cooperation among the biggest names in the fast moving consumer goods sector in Bulgaria could have serious horizontal effects. The relevant market encompasses the supply and retail distribution of fast moving food (bread, meat and eggs, milk and dairy products, oils and fats) and non-food (perfumery and cosmetic) products.

A Statement of Objections was issued on February 3rd, 2011.

The SO addressed allegations against METRO, BILLA, KAUF LAND, PICCADILLY, MAXIMA and HIT accusing them in acting in a concerted practice, by coordination of their behaviour in the market of supply of fast moving food and non-food products. Also, CPC established that similar methods were applied in coordinating actions in the market of retail sales of these products during promotion campaigns. These common coordination practices consist of:

- “most favoured customer” clauses in vertical agreements with suppliers, allowing retailers to coordinate the level of supply prices and rebates, negotiated with their suppliers,
- “hub-and-spoke” information exchange through common suppliers of sensitive commercial information concerning the supply prices for the same products, as well as information concerning the marketing strategies of their competitors (planning of promotion campaigns),
- clauses in vertical agreements with suppliers, limiting the freedom of suppliers to participate in promotional campaigns of competing retailers and affecting the level of their delivery prices and rebates to competing retailers.

The parties are still to formulate their objections to the SO after the Supreme Administrative Court has rendered a decision on issues raised by the parties concerning the access to file to the contents of the SO, which remained undisclosed due to trade secret of the respective parties.

The case did not involve any cooperation with foreign competition authorities.

In all of these cases proceedings were initiated following series of press releases and publications concerning the sharp increase of the prices of bread, cheese, poultry meat and eggs, as well as sunflower oil in the period May - August 2007. In all of these publications senior representatives of national and/or regional trade associations (representing producers of bread, dairy processors, producers of poultry meat and eggs, as well as of sunflower oil) were interviewed giving their comments and statements explaining the reasons and predicting the exact rate and the exact dates for the increase in prices.

Infringements established in the Bread case, Cheese case and the Sunflower Seed and Oil cases involved price fixing, as well as exchange of price information among members of trade associations. In the Poultry Meat and Eggs case, in addition to price fixing and exchange of price information, a separate infringement was identified concerning agreements/decisions on production limits and production quotas allocation for eggs.

The abovementioned practices represent serious restrictions of competition by object as they essentially lead to collusion. During the proceeding at CPC and the appeals before the Supreme Administrative Court, the concerned undertakings and associations pleaded that such acts were necessary in order to stabilize prices and revenues and counter the adverse effects price volatility stemming from dumped imports, or inputs price volatility (raw materials and animal feedstuffs). CPC discussed these claim, finding that the nature and scope of the anticompetitive effects of these agreed restrictions clearly outweighed the competitive benefits claimed by the defendant undertakings and trade associations.

1.2 Sector inquiries – Market studies

In its practice, CPC has performed a number of sector inquiries in the agricultural commodity sector, as follows:

1.2.1 Sector inquiry in the market for milk - CPC Decision №1641 of 29.12.2010

In December 2010, the CPC launched a sector inquiry in the milk sector, focusing on the functioning of the markets of production and buying out of raw cow milk, milk processing and distribution of dairy products. The goal of this research was to clarify the sources of competition concern in a market, undergoing processes of restructuring and consolidation and yet demonstrating a significant level of fragmentation. The last had enabled processors to impose on dairy producers low prices for buying out of milk, in addition to other unfavourable conditions.

The market study was initiated on February 25th, 2010 and finalized on December 29th, 2010. The Commission inquired after the production of raw cow milk; the buying out of raw cow milk by the authorized purchasers/ processing industry; and the supply and distribution of liquid milk and dairy products through traditional wholesalers and retailers, and modern retailers.

The research results established the existence of a gap between primary producer prices for raw milk and processor prices as well as consumer prices for liquid milk and dairy products. Following a steep parallel increase in all prices along the milk supply chain (producer prices for raw milk, processor prices and retail consumer prices for liquid milk and dairy products) in the second half of 2007 and during 2008, price trends in 2009 provided evidence of price stickiness at the level of processor prices and unequal distribution of returns primarily in favour of dairy processors. Despite the significant decline of the farm gate prices of raw milk in 2009, the level of processor and consumer prices for liquid milk and dairy products remained relatively stable, with a slight decline in the level of processor prices and almost no change at the consumption level.

The Commission established that domestic price trends for raw milk in follow the EU market, remaining at the average level of raw milk prices in most of the new member states. The inquiry did not identify evidence of infringement of Art.101 or 102 of the TFEU or of the equivalent national provisions of the Law on Protection of Competition. Infringement of the provisions of national competition law (prohibited decisions of associations of dairy processors) was established in an earlier antitrust investigation (see under Cartel investigations)

The analysis compared the development of farm gate price for raw milk in Bulgaria with its EU counterparts, but did not follow the development of retail prices for liquid milk and dairy products. The inquiry did not identify any buying alliances or buyer power concerns. Such issues related to the existence of buyer power were identified in a separate antitrust investigation on the relations among large trade chains and their suppliers (described in the relevant case sheet). The inquiry did not prompt specific proposals for regulatory or legal changes. The conclusions stressed the need for implementing the existing instruments of the CAP, the provisions of the EU and national competition law to resolve structural problems, resulting from the imbalance in the bargaining power among farmers and the processing counterparty. The analysis did not result in specific structural remedies proposals or proceedings or the identification of other issues leading to competition constraints.

At the beginning of 2011, CPC launched two **sector inquiries** in the food sector.

The first inquiry aimed to analyze the interrelated markets of production and marketing of oil bearing sunflower seeds and sunflower oil. It was initiated on 28.02.2011 and is expected to be finalized in the beginning of 2012. The analysis covers the following related markets: 1) production and trade in sunflower seed; 2) production and trade in sunflower oil.

CPC initiated the sector inquiry in order to study the reasons for the sharp increase in the prices of sunflower oil in the period August - October 2010. The goal is to determine the market structure and to examine whether price trends are grounded by objective economic factors, or due to any distorting anticompetitive practices.

Conclusions are not available at this stage.

The second inquiry is focused on the interrelated markets of bread wheat, wheat flour and bread for mass consumption. It was initiated on 29.03.2011 and expected to be finalized in the beginning of 2012. The inquiry covers the following related markets: 1) production, storage and trade with wheat; 2) production and trade of flour; 3) production and trade of bread.

The reason for launching this sector analysis is the recent increase of bread prices. The CPC has a reason to believe that there could be a particular asymmetry of the price increase for the ingredient flour and the wheat, which requires a close study of the entire production chain. CPC would seek that price increases are objective and market based.

Conclusions are not available at this stage.

Both inquiries were initiated as a result of the sharp increase of prices for end consumers and are aiming to establish whether price trends are due to objective economic factors or potential anticompetitive practices.

1.3 Merger cases

In relation to merger assessments in the fast moving consumer goods sector the CPC adopted 3 decisions during the reporting period. Markets concerned in all three cases are the retail trade with fast moving consumer goods via modern distribution channels (supermarkets, consumer markets, discounters, etc.) and via traditional small-area sales facilities (e.g. neighbourhood store, kiosk, grocery store, minimarket, etc.).

1.3.1 Acquisition by “Maxima Bulgaria” Single Member Ltd. of the “Kaleya” retailer trade chain (CPC Decision No1244/07.10.2010)

The CPC authorized the concentration as there were no concerns that the deal could have had a negative impact on competition.

1.3.2 Acquisition by Lidl Bulgaria GmbH, Germany of “Plus Bulgaria” Single Member Ltd. retailer trade chain (CPC Decision No1199/07.10.2010)

In this case CPC exercised its power under Article 9 (2) of Council regulation No 139/2004 by requesting partial referral of case COMP/M.5790-LIDL/Plus Trei Romania/Plus Trei Bulgaria from the EC to the CPC.

After conducting a preliminary analysis of the data contained in the notification, the CPC decided that the legal criteria of the provision had been implemented and that the deal would have exerted influence on the competition on the number of local Bulgarian markets.

To the extent to which the deal lead to the rise of horizontal effects on the retail market of fast moving consumer goods the EC agreed the case to be partially referred to the CPC in order for it to evaluate the effect of the deal with regard to the territory of the Republic of Bulgaria within the specified deadlines and in accordance with the national legislation.

With its Decision the CPC approved the concentration for the transaction did not seem to lead to establishing or strengthening of a dominant position.

1.3.3 Acquisition by Delhaize ‘The Lion’ Nederlands B.V of “Delta Maxi” Ltd., Serbia, including the retailer chain “Piccadilly” PLC owned by “Delta Maxi” Ltd. (CPC Decision No456/12.04.2011)

Delhaize ‘The Lion’ Nederlands B.V was not active on the Bulgarian market. The contract had no effects on the relevant market in Bulgaria. The CPC authorized the concentration given that there was no change to be expected in the market position of the participants in the transaction after its implementation that is, the transaction would not have given rise to any horizontal or vertical effects or relationships with respect to the markets concerned.

1.4 Advocacy cases

CPC makes extensive use of the competition advocacy tool to address concerns in the food sector.

1.4.1 Minimum retail price of bread

In May 2010, following a request by the Ministry of Finance, CPC adopted an opinion for setting a minimum retail price of bread for mass consumption (Decision No 598/27 May 2010). The request was related to the implementation of an anti-crisis government measure designed to directly regulate markets in order to prevent monopoly pressure on suppliers and to guarantee fair competition.

The CPC took into consideration in its analysis the possible reasons for the introduction of a regulated minimum price of bread, such as the termination of below-cost selling, protection of the interests of producers and consumers, fight against the informal economy in the sector. Ultimately, the Bulgarian authority reached the conclusion that the introduction of a minimum retail price of bread was not justified and its positive effects would not have compensated for the competition harm.

1.4.2 Regulation of the relations between supermarket chains and suppliers

Recently the CPC has been asked on several occasions to give an opinion on the necessity of introducing a regulation that would govern the relations between supermarket chains and suppliers.

By Decision No 495/04 May 2010 the CPC adopted a position statement on the need and expediency of introducing a new legislative regulation guaranteeing loyal competition and non admission of market distortion through exerting monopolistic pressure on the suppliers of goods and services.

The Bulgarian authority examined the experience of other EU Member States, as well as EU initiatives on the supply chain in Europe, in view of the different regulatory approaches and their effect on competition.

One possible approach to the problems in the supplier-retailer relations would be to enforce the existing competition rules. Its disadvantages, however, are rooted in the unfair practices stemming out of the bargaining power rather than the market power of the actors and, hence, as such fall outside of the scope of the competition law and the powers of the CPC respectively. Another possible solution would be to amend the current competition legislation by introducing the concept of “significant market power”.

A third approach would be to design a separate law on unfair legal practices exercised by retailers on suppliers. However, it bears the risk that supermarkets may look into suppliers from neighboring countries, where conditions are less strict. It is also possible that supermarket chains would favour bigger suppliers. Thus, this separate law could have an adverse effect on the small suppliers it would be designed to protect in the first place. Another main problem would be the possible overlap of competences of the competition authority and the authority enforcing this separate law, which would lead to legal uncertainty.

The Bulgarian authority analyzed other possible initiatives, such as launching information campaigns, introducing a code of ethics, strengthening suppliers’ bargaining power through establishing professional organizations, which would protect their collective rights.

Considering the importance of the agricultural commodity sector, the Commission on Protection of Competition makes use of all available tools in order to ensure conditions for effective competition and the protection of consumers’ welfare.

COLOMBIA

1. Background

1.1 *In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down). Are the price volatility in these commodities, and the causes of that volatility, global, regional or domestic?*

Colombia, an exporter of basic materials, was affected by the recent international commodity price shock. The country's economic situation relies strongly on the trade conditions of these products. While commodity exports are a good source of income, they do not generate as much employment as desired.

In addition, as Colombia imports almost all its supply of oil derivatives and other basic materials, an increase in the international prices of these goods affects the country's production costs and its inflation rate¹. For the years 2007 and 2008, the inflation rate exceeded the threshold fixed by Colombia's Central Bank². The behavior of the prices of oil and several agricultural commodities were some of the causes for the inflation rate's raise. In fact, 99.4% of the growth of inflation for the 2007-2008 periods is explained by the increase in the prices of food and regulated products/services such as public services, transportation and fuels³.

Additionally, when international prices of commodities decrease, Colombia's trade conditions are affected. These changes impact the country's available income. Furthermore, if a devaluation of the Colombian *Peso* does not occur as a response to decreasing prices in commodities, the internal prices of the Colombian economy could be affected⁴.

According to Llinás (2002), Oil Sector represents a significant portion of Colombia's income. Nevertheless, the magnitude of this income fluctuates due to the volatility of the price of the commodity. These income variations result in higher macroeconomic instability⁵.

Also, oil's price volatility has effects on the inflation rate, as well as on the productive performance of the country. One of the major impacts of an increase in the price of oil, is a parallel raise in the prices of

¹ Banco De La República (Central Bank). "Report to the Congress". http://www.banrep.gov.co/documentos/junta-directiva/informe-congreso/2008/julio_resumen_2008.pdf. : accessed November 20, 2011.

² Comunidad Andina. "Tema 1. Evaluaciones detalladas de los efectos de la crisis internacional en los países andinos". Enero de 2009: 29. http://www.comunidadandina.org/economia/consejo_11_doc1.pdf. : accessed November 20, 2011.

³ Íbidem.

⁴ Íbidem.

⁵ Llinás, Marco A. "Incidencia de la volatilidad de los precios del petróleo en la determinación del ciclo económico colombiano". September, 2002.: 7.

gasoline and other fuels. Consequently, transportation costs increase affecting the prices of other products, such as food and services⁶. Due to this relation, the agro-industrial sector reported large profits from 2006 to 2008. The buoyant situation can be explained by an increase in the prices of food, a raise in the costs of transportation - as a result of an increment in the price of oil during that time-, and an augmentation in the prices of fertilizers⁷.

The paper “*¿Dutch Disease? Remedies to cure its symptoms*” indicates that, in addition to an increase in the inflation rate and a parallel rise in transportations costs, an increment in the price of oil, produces an indirect impact on the prices of food. This indirect impact affects the prices of fertilizers and, in so doing, raises the costs of production of food and of food itself⁸.

This paper also informs that the large profitability of the oil business and the high prices of the commodity during January and March 2008 had a positive impact on Colombia’s Foreign Direct Investment –FDI-. The FDI grew USD\$284 million from 2007 to 2008⁹.

Between the second semester of 2009 and the first semester of 2010, the low international price of corn influenced –among other factors- the decrease of the cultivated areas of yellow corn. Furthermore, the total production of corn decreased 182.000 tons for that period: 154.000 tons of yellow corn and 38.000 tons of white corn were not produced. Consequently, Colombia reported a significant growth of 15% in its corn imports in 2010¹⁰.

During 2010, while the majority of agricultural and agro-industrial products experienced a decrease in their exports, “*in absolute terms, the greatest declines were those of sugar, palm oil, banana, coffee, bovine meat, vegetables and milk.*” However, as a result of favorable international prices since mid-2010, many producers could counterbalance their income loss¹¹.

According to ANIF,¹² Colombia’s traditional exportations increased by 40%, during August 2009 and August 2010, as result of the recuperation of international prices of commodities¹³.

1.2 Does your agency have any ongoing / pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviors in these markets (both domestic and foreign markets)?

See answer 2.3.

⁶ Ibídem.: 31.

⁷ Arias Vargas, Francisco Javier. “Perspectivas del Agro colombiano frente a la actual crisis financiera”. Universidad Autónoma de Manizales: 2.

⁸ Asobancaria, Semana Económica. “¿Enfermedad holandesa? Remedio para curar sus síntomas”. July, 2008: 3.

⁹ Ibídem : 2.

¹⁰ Sociedad de Agricultores de Colombia. Departamento de Estudios Económicos. “Balance y perspectivas del sector agropecuario 2010-2011”. April, 2011: 17.

¹¹ Ibídem: 31.

¹² Colombia’s National Association of Industrialists

¹³ http://anif.co/sites/default/files/uploads/Oct11-10_0.pdf: accessed November 20, 2011.

2. Competition law enforcement & formal investigation

2.1 *Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities.*

The Superintendence of Industry and Commerce has conducted a great number of investigations of anticompetitive practices on commodity markets. These numerous investigations are explained by the fact that Colombia's economic environment relies strongly in commodity exports; consequently, there has been wide government surveillance on the agricultural sector. Prominent cases that had been analyzed by this Authority will be exposed as follows:

2.1.1 *Mergers assessments*

- *Chicken (2003) - Non-Informed Merger.* Under Resolution No. 8315/2003¹⁴, the Superintendence sanctioned four undertakings active in broiler and egg production and processing, for not informing a merger transaction before it was closed. The operation was completed through the creation of a company in charge of supporting the economic activities of the parties. As the SIC could determine, the parties as well as the created company, were active in the same productive chain, therefore, it imposed a fine that was later on ratified by the Administrative Tribunal in 2005¹⁵.
- *Chicken (2008) - Horizontal Merger.* POLLOS BUCANERO, CAMPOLLO, INCUBADORA SANTANDER, AGROPECUARIA LATINOAMERICANA and HUEVOS ORO, undertakings active in broiler and egg production and processing, informed the SIC of a merger transaction that consisted in the creation of a company for the importation of animal food products. The SIC's assessment determined that the proposed operation was actually a vertical merger and, as such, it would not change the market structure nor the shares of the parties in the markets where they were active.
- *Flowers (2009) - Horizontal Merger.* SUNFLOWER INVESTMENTS LTD. and SINGLETREE CORP informed the acquisition of the 100% of the share of SINGLETREE by SUNFLOWER. The parties were active in international trade operations related to flower exportation activities. As the products and services of the merger had an international destination, the SIC's assessment determined that the proposed transaction would not have an impact in Colombia.
- *EGG (2008) – Horizontal Merger.* The SIC did not oppose to the fusion informed by GRANJA SANTA ANITA S. A. and AVÍCOLA NÁPOLES MEJÍA VILLEGAS CIA, companies with business activities in the egg production industry. The undertakings offered different types of eggs and compost.
- *Coal Transportation System (2009) – Horizontal Merger.* Through this proposed transaction eight coal companies would jointly construct, operate, administrate and maintain a port for coal exportation activities. The objective of the concentration was to incorporate, in an integral port, all operations related to the exportation of the mineral. This port would replace small and inefficient ports as well as other ineffective systems for coal transportation and exportation. The efficiencies generated by the transaction were considered by the Superintendence as an important factor for its approval.

¹⁴ Resolution No.8315 / 2003. Sanctioned undertakings: Super Pollo Paisa S.A., Durán y Tascón, Granja Santa Anita y Cía S.C.A., Pollos el Bucanero S.A

¹⁵ Administrative Tribunal of Cundinamarca, First Division. Sub section B. File No: 200300930-1. Officer: Carlos Enrique Moreno Rubio. August 4, 2005.

- *Aluminum (2008) - Horizontal merger.* Under Resolution No. 19729/2008 the Superintendence, conditioned the acquisition of the 94.8% of the shares of ALUMINIO REYNOLDS SANTO DOMINGO S.A. by INDUSTRIAS ARFEL S.A.S. The conditions were imposed considering that of the parties had dominant position in the national aluminum market, circumstances that rose competition concerns in the market studied. Afterwards, through Resolution No. 19080/2011, the Superintendence declared the non-compliance of one of the conditions for the clearance of the transaction, therefore imposing a fine.
- *Coffee (2009) – Vertical merger.* The Superintendence cleared the transaction in which DESCAFECOL S.A. would acquire a coffee processing plant pertaining to FOODEX S.A. While the parties operated in the same productive chain, their economic activities differed. However, before the transaction, DESCAFECOL supplied the decaffeination process service to FOODEX.

2.1.2 *Cartels and horizontal agreements*

- *Rice (2005) – Price agreement between competitors.* Under Resolution No. 22625/2005 the SIC sanctioned MOLINOS ROA S.A.; MOLINO FLOR HUILA S.A.; ARROZ DIANA S.A.; PROCESADORA DE ARROZ LTDA. y UNIÓN DE ARROCEROS S.A. The companies had a price agreement for the purchase of *paddy verde* rice type. The SIC concluded that the parties increased and decreased the purchase prices of the abovementioned product in the same value, magnitude and proportion at similar dates.
- *Sugar Cane (2010) - Price agreement between competitors.* Under Resolution 6839/2010 the SIC sanctioned eleven sugar mills for a price agreement in the purchase of raw sugar cane, used in the production of sugar and ethanol. The parties argued that the formula utilized for the determination of the purchase price of raw sugar cane depended on external variables – such as the international price of sugar cane – that they could not control. Nevertheless, the investigation conducted, concluded that one of the variables of the referred formula was subject to an indirect agreement among the competitors.
- *Cocoa (2009) - Price agreement between competitors.* The Industry and Commerce Superintendence sanctioned COMPAÑÍA NACIONAL DE CHOCOLATES S.A. and SUCESORES DE JOSÉ JESÚS RESTREPO & CÍA S.A. – CASA LUKER S.A. for an agreement on the price at which both companies purchase cocoa from suppliers. During the investigation period, the prices at which the parties purchased cocoa evidenced a parallel behavior, which was present at different aggregation levels (national and local), and with diverse periodicities (monthly and weekly). Despite the fact that the parties argued that the purchase price of cocoa depended on external variables - such as the international price of the commodity and the country's rate of exchange - the SIC proved that, in many cases, the prices offered by the two companies were exactly the same.

2.1.3 *Vertical restrictions*

- *Tobacco (2009-2010) – Horizontal Merger.* The SIC evaluated the vertical effects of the merger between COLTABACO and PROTABACO, two cigarette producers which also had nation-wide programs to guarantee the supply of tobacco leaves. The Superintendence assessment concluded that the concentration would create a monopsony in the market of tobacco leaves where the integrated entity would have the possibility to impose conditions to tobacco growers. Consequently, the merger was conditioned. Nonetheless, the parties did not complete the operation.

2.1.4 Price control

The Superintendence of Industry and Commerce does not have a regulatory competence over prices. According to the Colombian legal system, the SIC can supervise the compliance of Competition Law through the faculty of Competition Advocacy. This faculty will be described in Section 3 of this document.

2.2 *Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

What started them? Under the agreement between the SIC and the Agricultural Ministry, the Superintendence has carried out sector studies on agricultural products such as cocoa, corn, meat, milk, oil palm, potato, vegetable rice and chicken. These studies have analyzed competition concerns as well as antitrust practices on the corresponding markets. Their conclusions have systematically suggested that, SIC should continue with the surveillance of the agricultural markets with atomized producers and dominant buyers.

2.3 *Has your agency received request from governments or other parts of society to formally investigate commodities markets or request for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behavior? What was the nature and circumstances of the request and how did your agency respond?*

In 2005, the Agricultural Ministry requested the SIC to monitor the companies importing agro-chemical products¹⁶.

The Ministry requested to investigate MONÓMEROS and ABOCOL, two companies presumably engaged in a price agreement. The investigation was closed after the SIC accepted the commitments proposed by the parties. Later on, in 2008, preliminary inquiries were carried out based on the same presumptions; however, the investigation was closed again when the SIC found no merit for its continuation.

The complaints made by Associations as well as those forwarded by common citizens have, many times, started antitrust investigations. In particular, in 1999, the SIC conducted an investigation to determine if the agents in CORABASTOS – food supply central – were engaged in a price agreement for a market allocation. The SIC decided to impose fines on the agents after finding the conduct occurred.

3. Advocacy opportunities and challenges

Article 6 of the Law 1340/2009 appointed the SIC as Colombia's National Competition Authority, with antitrust faculties on every economic sector¹⁷. Particularly, Article 7 of the Law commanded the Superintendence to carry out the duty of Competition Advocacy. By this faculty, the SIC must render previous opinion on every regulatory project that can potentially affect competition.

¹⁶ Fertilizers: UREA, KCL, DAP

¹⁷ There are special exceptions.

3.1 *Has your agency the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy?*

The Superintendence has given many opinions regarding the regulatory projects affecting energetic markets:

- Resolution project to regulate short term electric transactions between Ecuador and Colombia, in accordance with Decision 720 of the CAN (Andean Nations Community): The Superintendence considered that this regulatory proposal did not raise competition concerns in Colombia's electric markets. On the contrary, the SIC considered that the project would stimulate market efficiency while ensuring the national supply of this commodity.
- *Resolution project to adopt a code for the commercialization of Liquefied Petroleum Gas (LPG) in the wholesale market:* The SIC expressed that the regulatory initiative had no impact on the competition of the studied market. The proposal established different means of guaranteeing the concurrence of consumers to the market, and assuring information transparency. Additionally, it also envisaged the international trade of the product.
- *Resolution project to regulate crude oil transportation by pipeline:* The SIC considered that this regulatory initiative would introduce competition into the market by ensuring the access of third parties to transportation infrastructure. Additionally, the Superintendence said that some of the measures would mitigate the asymmetric information issues present in the market.
- *Resolution Project to establish mechanisms to ensure the national supply of natural gas:* The SIC considered that, in general terms, the proposed measures promoted competition in the sector by stimulating the entrance of new competitors and creating additional activities. In addition, the project also introduced a system to coordinate produced quantities and transportation capabilities. The SIC considered that this system would support the coordination of agents and activities in the sector. Nevertheless, the Superintendence made recommendations on two of the articles of the project:
 - The Article 11 of the project indicated that, in exceptional cases, the CREG – Energy and Gas Regulatory Agency- could accredit less value to transportation assets presenting poor technical and economic efficiencies. The SIC recommended that clear standards on these efficiencies as well as the occasions in which this exception applies, should be defined previously. These recommendations headed towards the assurance of legal security and the promotion of confidence for future investors.
 - The Paragraph 4 of the Article 15 of the project prohibited producers to own re-gasification plants. The SIC recommended to eliminate this prohibition since producers are, generally, the agents with the capital required to undertake the construction of these plants.

Additionally, the Superintendence has also given opinion on various regulatory projects that affect agricultural markets.

- Regulatory project to regulate the prices of agricultural inputs.
- Regulatory project by which some fertilizers and pesticides undergo price controls.
- *Regulatory project to establish requirements for the processing and trading of different types of marinated chicken carcasses.* Although the SIC has considered technical requirements as a barrier to international trade, in this case, the formalities were justified since they were intended to protect human health. Furthermore, they also prevented consumer's misleading.

- 3.2 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

Not applies.

- 3.3 *Please describe any pre-emptive steps available to your agency to: (i) Reduce the risk that commodity price volatility becoming a problem in your country? (ii) Reduce the risk that governments or public societies seek policy responses to problematic commodity process volatility that would impede competition?*

In an *ex ante* scenario, the SIC monitors and guards competition through preliminary investigations and advocacy. These previous faculties try to avoid alterations and subsequent harms on the competition of national markets.

CROATIA*

1. Background

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.

The Competition Act (2009)¹ lays down the competition rules and establishes the competition regime, regulates the powers, duties, internal organization and proceedings carried out by the competent authority - Croatian Competition Agency which is entrusted with the enforcement of the Act². The scope of application of the Act are all forms of prevention, restriction or distortion of competition by undertakings within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia³. The Competition Act applies to companies, sole traders, tradesmen and craftsmen and other legal and natural persons who are engaged in a production and/or trade in goods and/or provision of services and thereby participate in economic activity, as well as to state authorities and local and regional self-government units where they directly or indirectly participate in the market and all other natural or legal persons, such as associations, sports associations, institutions, copyright and related rights holders and similar who are active in the market⁴. However, the Competition Act does not apply to the relations between employers and employees, and to the relations that are covered by agreements among employers and labor unions⁵. The Competition Act is aligned to the EU *acquis communautaire* (furthermore: EU *acquis*).

In recent years there has been some volatility in the prices of commodities that are important to the general population, which mostly relate to the trade of goods and services, the probable cause of which is globally influenced, due to the global financial crisis.

* Author: Dr. Sc. Mirna Pavletic-Zupic, Member of the Competition Council.

¹ The Competition Act of the Republic of Croatia (Official Gazette, nr. 79/2009, of 8th July 2009). (Furthermore: Competition Act; CA) was enacted in year 2009, and entered into force on 1st October 2010.; Art.8 of the CA, aligned to Art.101 of the Treaty on the Functioning of the EU.

² Article 1. of the Act.

³ Art.2.

⁴ Art.3, Par.1 and 2.

⁵ Art. 5.

2. Ongoing / pre-emptive activities undertaken by the Competition Agency in monitoring the activities on the market

The Croatian Competition Agency is a legal person with public authority which, as an independent entity autonomously enforces the Competition Act, and is solely responsible to the Croatian Parliament⁶. The work of the Agency is public and any method or form of influence which could impede its independence and autonomy is prohibited by the Law.⁷

The activities of the Competition Agency are following⁸: (i) proposing to the Government of the Republic of Croatia the adoption of the regulation necessary for enforcement of Competition Act; (ii) making decisions on the basis of which the Agency initiates and carries out the compatibility assessment proceedings and the proceedings involving the imposition of fines in respect of infringements of competition rules; (iii) concluding the proceedings and deciding on the adoption of measures (obligations, conditions and deadlines) necessary to restore effective competition and impose fines and respective deadlines for execution of fines; (iv) instructing the expert team to carry out the preliminary investigations in the relevant market; (v) taking a decision on the basis of which the Agency makes a request to the Administrative Court of the Republic of Croatia to issue a warrant authorizing the Agency to conduct dawn raids of business premises, land and means of transport, to examine all records and objects relating to the business, to seal any business premises or records and to seize objects and documents which are subject to a dawn raids; (vi) promoting activities relating to competition advocacy and understanding of the benefits of competition and raising awareness on the role and significance of competition law and policy; (vii) issuing binding opinions on the compliance of proposed draft laws and other legislation with the Competition Act; (viii) defining methodological principles for competition studies and market investigation; (ix) defining of fair competition, measures to eliminate impediments to competition, and other activities aimed at enhancing competition law and policy in the territory of the Republic of Croatia; (x) issuing expert opinions and other statements on the development of comparative practices in the area of competition law and policy; (xi) issuing expert opinions in respect of competition issues upon request of the Croatian Parliament, the Government of the Republic of Croatia, central administration authorities, public authorities, local and regional self-government units; (xii) activities of international cooperation, referring to the realization of the international commitments undertaken by the Republic of Croatia and assigned to the Competition Agency, as well as relating to running the projects of international and European economic integrations and cooperation with international competition authorities and international organizations and institutions; (xiii) adoption of the annual report on the work of the Agency for the previous year which is submitted to the Croatian Parliament.

Administrative and professional activities relating to competition issues are performed by the Competition Agency, which particularly⁹: (a) carries out preliminary investigations in the relevant market with the view to defining possible competition concerns on the basis of which it initiates the proceedings; (b) collects collect data and information from legal and natural persons, professional associations or economic interest groups, associations of undertakings, consumers associations, public administration authorities and local and regional self-government units which may have certain knowledge which contributes to the investigation of the markets and identifying market positions, regardless of the concrete cases handled by the Agency; (c) collects data and information from legal and natural persons, professional associations or economic interest groups, associations of undertakings, consumers associations, public administration authorities and local and regional self-government units which may have certain knowledge

⁶ Art. 26 of the CA.

⁷ Art. 27, Par. 1 of the CA.

⁸ Art. 30 of the CA.

⁹ Art. 32 of the CA.

on market positions in particular markets, and before issuing a procedural order on initiating of the proceedings in a particular case, endeavor to restore effective competition in the relevant market, if this is in the public interest, and unless it involves significant distortion of competition; (d) proposes to the Competition Council adoption of the decisions for the initiation of the proceedings; (e) reports on the facts and circumstances on the basis of which the Council takes a decision pursuant to which the Agency makes a request to the Administrative Court of the Republic of Croatia to issue a warrant authorizing the Agency to conduct dawn raids of business premises, land and means of transport, to examine all records and objects relating to the business, to seal any business premises or records and to seize objects and documents which are subject to a dawn raids; (f) carries out the proceedings in individual cases establishing distortion of competition and the proceedings relating to imposition of fines, whereas after establishing all relevant facts and circumstances for decision making, report to the Council which then decides on the particular case; (g) drafts the final decisions to the proceedings carried out by the Agency, where these decisions may include the establishment of infringement of the provisions of this Act, imposition of fines for the infringements committed, deadlines for execution of fines or adoption of necessary measures (obligations, conditions and deadlines) to restore effective competition; (h) drafts opinions on compliance of proposed draft laws and other legislation with the Competition Act; (i) drafts regulations and bylaws for the implementation of the Competition Act; (j) drafts documents for raising awareness and understanding of competition law and policy and promotion of competition culture; (k) identifies and analyses market conditions with the purpose of further development of effective competition; (l) performs activities in the international cooperation; and (m) drafts the annual reports of the Agency's activities.

3. Competition law enforcement and formal investigations

In further part are provided a brief overview of significant competition law enforcement matters that the Croatian Competition Agency has undertaken in relation to commodities including: (i) merger assessments; (ii) cartels and horizontal agreements; (iii) vertical restrictions; (iv) abuse of dominance actions; and other actions in relation of protection of the free competition on the market.

3.1 Prohibited agreements

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.¹⁰

¹⁰ Art.8 of the CA, aligned to Art.101 of the Treaty on the Functioning of the EU.

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).

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 particularly¹¹: (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.

¹¹ Art. 10 of the CA.

Croatian Law also recognizes the agreements of minor relevance¹² 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.

3.2 *Abuses of a dominant position*

According to the Croatian Law, an undertaking can be presumed to be in a dominant position when, due to its market power, it can act in the relevant market to a considerable extent independently of its actual or potential competitors, consumers, buyers or suppliers and this is particularly the case when an undertaking: (1) has no significant competitors in the relevant market, and/or (2) holds a significant market power in relation to its actual or potential competitors, and particularly relating to the following: (i) its market share and a period of time in which this market position has been held, and/or, (ii) its financial power, and/or, (iii) access to sources of supply or to the market itself, and/or, (iv) connected undertakings, and/or, (v) legal or factual barriers for other undertakings to enter the market, and/or, (vi) the capability to dictate market conditions considering its supply or demand, and/or, (vii) the capacity of foreclosure against competitors by redirecting them to other undertakings¹³. Finally, two or more legally independent economic entities may hold a joint dominant position if they act to a considerable extent independently of their competitors and/or customers and/or consumers on the relevant market¹⁴.

In relation to the said above, any abuse by one or more undertakings of a dominant position in the relevant market is prohibited, particularly if as such it consists in¹⁵:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- making 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.

In such cases when the abuses of a dominant position would be established in the procedure in front of the Croatian Competition Agency, then the Agency would issue a decision in which it would¹⁶: (i) determine that the undertaking in question holds a dominant position on the market, and that it had abused it being engaged in practices by which consequently the competition had been distorted, and at the same time it would be also established the duration of the distortion; (ii) furthermore, it would be order to the undertaking in question to immediately cease with any abusive practice; and (iii) it would be imposed the measures for the undertaking in question, along with the conditions and deadlines for the reinstatement of competition; and (iv) it would be imposed the fines for the infringements of the Law. Additional to the mentioned above, the structural and/or behavioral remedies could also be imposed, but provided that structural remedies could only be imposed, either where there is no equally effective behavioral remedy or

¹² Art. 11 of the CA, Par. 1

¹³ Art 12, Par 1 of the CA; Within the meaning of the CA an undertaking which holds more than 40% of the market share in the relevant market may hold a dominant position (Art.12(2)).

¹⁴ Art. 12, Par. 3 of the CA.

¹⁵ Art. 13 of the CA, aligned with the Art. 102 of the Treaty on the Functioning of the EU.

¹⁶ Art. 14 of the CA.

where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy would be.¹⁷

3.3 *Rules applicable to merger control*

A concept of a concentration in Croatian competition law is defined in a way that a concentration between undertakings shall be deemed to arise where a change of control occurred, on a lasting basis, and if it results from: (1) a merger association of two or more independent undertakings or parts thereof; or (2) acquiring control or decisive influence of one or more undertakings over one or more other undertakings, or of one or more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: (i) an acquisition of the majority of shares or share capital, or (ii) obtaining the majority of voting rights, or (iii) in any other way in compliance with the provisions of the Company Law of the Republic of Croatia and other legal prescriptions.¹⁸

The Law also establishes that a concentration of undertakings which would significantly impede effective competition in the market, in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration shall be deemed incompatible with competition rules and therefore prohibited¹⁹.

An acquisition of control occurs through transfer of rights, based on contracts between undertakings, or by other means, by which one or more undertakings, either separately or jointly, taking into consideration all legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more other undertakings on a lasting basis²⁰. Furthermore, a concentration is constituted by a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity, but a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity which leads to the coordination of the competitive behavior of undertakings that remain independent thereby significantly impeding competition shall not be considered as a concentration and shall therefore be assessed as an agreement among undertakings.²¹

A concentration shall not be deemed to arise in following cases: (1) when credit institutions or other financial institutions or investment funds or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis (not longer than 12 months) securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behavior of that undertaking, whereas the 12 month period may be extended in cases where such institutions or companies can show that the disposal was not reasonably possible within the period set; (2) when the acquisition of shares or interest results from internal structural changes in either the controlled or controlling undertaking (such as merger, acquisition, transfer of legal title etc.); and (3) when the control is acquired by an office-holder or administration officer – relating to bankruptcy, liquidation or winding up – according to the Bankruptcy Law and the Companies Act of the Republic of Croatia²².

¹⁷ Art. 14, Par 2 of the CA, aligned with the EU Regulation on Competition, 1/2003.

¹⁸ Art 15, Par. 1 of the CA.

¹⁹ Art. 16 of the CA.

²⁰ Art. 15, Par. 2 of the CA.

²¹ Art. 15, Par 3 and 6 of the CA.

²² Art. 15, Par 5. of the CA.

The Competition Law also prescribes the conditions that should be met in order to implement the rules for obligatory notification of a concentration, along with the turnover thresholds. Namely, in order to assess the compatibility of concentration, the parties to the concentration are obliged to notify any proposed concentration to the Competition Agency if the following criteria are cumulatively met:

- the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and
- the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements²³.

In relation to the calculating of the parties' turnover it should be mentioned that in the cases where the concentration involves association or merger of a part or parts of one or more undertakings, irrespective of whether or not those parts are constituted as legal entities, the calculation of the shall only include the relevant turnover of the parts which are subject to the concentration. However, two or more transactions which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction.²⁴ Finally, the turnover for banks and other financial institutions, including insurance companies and re-insurance organizations as parties to concentrations, is calculated on the basis of the total turnover from their normal business operations in the financial year preceding the concentration, in a way that for the banks and other institutions which provide financial services, after deduction of direct taxes related to them, the sum of the following points of income shall be taken: (i) income from interest rates and similar income; (ii) income from securities (i.e. shares and other variable yield securities, interests in other economic entities, shares in affiliated economic entities); (iii) commissions receivable; (iv) net profit on financial operations; and (v) other operating income²⁵.

The Law prescribes the obligation for the prior notification of concentration. Namely, any concentration between undertakings shall be pre-notified from the side of the parties to concentration, subject to the following criteria²⁶: (i) in the case where control or decisive influence is acquired over a whole or parts of one or more undertakings by another undertaking, the prior notification of concentration shall be submitted by the controlling undertaking. In all other cases, all undertakings parties to the concentration shall agree on the submittal of one joint notification; and (ii) the prior notification of concentration shall be submitted to the Competition Agency for assessment before the implementation of the concentration in question, following the conclusion of the contract on the basis of which control or

²³ Art. 17, Par 1 of the CA; where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure; also the intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to under the conditions prescribed in the Law.

²⁴ Art. 17, Par. 4 and 5 of the CA.

²⁵ Art. 18, Par. 1 and 2 of the CA; For insurance companies and companies that perform re-insurance activities, the value of gross premiums which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including also re-insurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to amounts of individual premiums or in relation to total premium volume.

²⁶ Art. 19 of the CA.

decisive influence has been acquired by the controlling undertaking, or following the publication of the invitation to tender²⁷.

4. Market studies undertaken by the Agency

In recent years the Agency has undertaken several market studies that provide the inquiries in wholesale sector, particularly in trade of groceries and foods, drinks and domestic products. Beside that, the Agency also has undertaken further market studies in pharmaceutical sector, and in production and trade in diary products. These market studies are undertaken on regular basis each year. Particularly important for this topic is the Market Study on Distribution and Trade in Wholesale of Foods, Drinks, Groceries and Products for Households for the year 2010. The purpose of the subjected Study was to accumulate the data and to establish the market conditions on the markets of the Republic of Croatia. Furthermore, the Study encompassed all relevant sector laws and regulations which are implemented and which regulate the relevant market. The market shares of the entrepreneurs were established on the basis of their incomes in the preceding year. The Study's conclusions were in direction that the market growth in the year 2010 compared with the status in 2009 was in some extent greater and the growth trend was about 2,4 percent. Consistently with the market growth was the income growth of the major entrepreneurs which cumulatively summed about 1,7 percent. Based on the analysis of the concentration of the market (CR), the ratio indicated that the wholesale market in consumer goods in the Republic of Croatia was modestly concentrated, so the conclusions was that the market was well structured with many market players, as well as new entrants, with no anticompetitive restraints. However, the Agency would continue monitoring the respective market and its performances also for the year 2011, for the purposes of early detection of anticompetitive restraints such as abuses of dominant positions and/or cartels among entrepreneurs.

5. Formal requests for starting an investigation(s) in commodities' markets

The Croatian Competition Agency so far did not receive a formal request for starting an investigation of any particular market, which probably originate in the best practices of the Agency which undertook for many years investigations on the so called "sensitive" markets, and it performs such investigations ex officio, according to the daily monitoring of the markets and processing the information obtained from the media, and from the interested parties – citizens' complaints. Agency frequently releases to press some important findings from the market studies performed.

6. Advocacy opportunities and challenges

The Croatian Competition Agency frequently uses competition advocacy tools and best practices in order to improve the efficiency and effectiveness in markets through indicating anticompetitive restraints contained in specific sector laws and other regulations which might cause the restraints of the free competition on the market. Such anticompetitive restraints mostly consist of private and public barriers to

²⁷ Namely, by way of derogation from this rule, the parties to the concentration may submit the prior notification of concentration to the Competition Agency even before the conclusion of the contract or publication of the invitation to tender, if they, *bona fide*, provide evidence of the proposed conclusion of the contract or announce the invitation to tender; furthermore, the implementation of a notified concentration shall be permitted only after the expiry of the time period of 30 days, namely after the receipt of the final decision of the Competition Agency on compatibility or conditional compatibility of concentration in question. Finally, the Competition Agency can in particularly justified cases, upon the request of a party to the concentration, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the time prescribed period of time, and in deciding on such, the Competition Agency would ordinarily take into account all circumstances of the relevant case, particularly the nature and gravity of the damages which might be posed on the parties to the concentration or on third parties, and the effects of the implementation of the concentration concerned on competition.

entry or in particular cases in regulated markets whereas the associations of entrepreneurs tend to regulate the prices of the specific industries. In recent years such examples occurred in taxi associations, civil engineering and architects associations and other, and the Agency reacted with opening the investigative proceedings against said entrepreneurs under the allegation of price fixing.

Further instruments of the competition advocacy established by the Law mainly relate to the issuing of the expert opinions, where the Agency issues expert opinions at the request of the Croatian Parliament, the Government of the Republic of Croatia, central administration authorities, public authorities in compliance with separate rules and local and regional self-government units, regarding the compliance with this Act of draft proposals for laws and other legislation, as well as other related issues raising competition concerns. Additional to the mentioned afore, the central administration authorities or other state authorities may be requested to communicate to the Agency draft proposals for laws and other legislation for the purpose of assessment and issuing expert opinions on their compliance with the Competition Law, if it finds that they may raise competition concerns. Finally, the Agency shall issue expert opinions assessing the compliance of the existing laws and other legal acts with this Act, opinions promoting competition culture and enhancing advocacy and raising awareness of competition law and policy and give opinions and statements relating to the development of the comparative practice and case law in the area of competition law and policy to the authorities mentioned above.²⁸

7. Addressing the pressing concerns about commodity prices based on Governments proposals

7.1 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

Based on the prescriptions of the Article 25 of the Competition Act (2009), the Croatian Competition Agency issues expert opinions, at the request of the Croatian Parliament, the Government of the Republic of Croatia, central administration authorities, public authorities in compliance with separate rules and local and regional self-government units, regarding the compliance of draft proposals for laws and other legislation with the Competition Act, as well as other related issues raising competition concerns. Beside that, the central administration authorities or other state authorities may be requested to communicate to the Agency draft proposals for laws and other legislation for the purpose of assessment and issuing expert opinions on their compliance with the Competition Law, if there is a possibility that it might raise competition concerns. Furthermore, the Competition Agency issues expert opinions, of other kinds, including specialized reports mainly concerning on the specific topics covering performances on the targeted product markets, where was detected some kinds of competition concerns, either originating from the already opened complaints in cases in front of the Agency or following the other kind of interventions, i.e. from individual complainants, from the media, or ex officio.

²⁸

Art. 25 of the CA.

8. Possible pre-emptive steps available

8.1 Please describe any pre-emptive steps available to your agency to: (i) Reduce the risk that commodity price volatility becoming a problem in your country? (ii) Reduce the risk that governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?

Croatian Competition Agency has broad empowerments in regards to competition advocacy, which is described in previous parts of this paper. Advocacy tools inter alia also include undertaking of targeted market studies or sector enquiries which would be aimed at fast detecting the risks of problematic areas in relations to the obstacles to the fair competition on the market.

EGYPT

Introduction

Price volatility and more precisely price increase of staple food and construction industries is one of the most critical subjects in Egypt, whether before the January 25 revolution or thereafter. A wide spectrum of Egyptian citizens perceives that, under market economy, the price of basic products can go up but it never, or at least rarely, goes down. A part of the media and some senior governmental officials that appertain to the socialism era still believe that one of the main functions of the Egyptian Competition Authority (“ECA”) should be to stamp out the high prices, especially when it concerns staple food and construction industries, through direct action¹.

As such, ECA is pleased to share, through this submission paper, its limited (five years) experience on one of the most challenging area to the Competition Policy in Egypt, namely, price volatility of commodities.

1. Background

Since its inception in January 2006, ECA received various governmental requests to study the reasons behind the allegedly price increase of various commodities (steel, cement, raw milk, meat and edible oil). Besides, ECA initiated a number of investigations as a result of some newspapers reports claiming that there were anti-competitive practices undertaken in some given markets resulted in significant prices increase of certain basic products (nitrogenous fertilizers, white sugar and rice).

1.1 *Steel*²

ECA conducted a market study on steel rebar used in the construction industry to stand on the allegedly exponential price increase thereof. The study covered the period from January 2002 through December 2006. ECA found out that the market was highly concentrated (HHI Index: 3863 in 2006; CR4: 90,7% in 2006). The cost of producing one ton of steel rebar has increased by 90% throughout the study period. As for rebar prices, it has increased by 92% for the same period. The average profit margin went from 7,99% in 2002 to 9,21% in 2006. Such significant price increase can be largely attributed to the fact that Steel rebar cost of production is highly dependent on the cost of Billet (an intermediary product) that varies with the production stages undertaken in each plant. Cost of Billet accounts for 74% of the manufacturing costs of one ton of steel rebar in the integrated plants and 85% in the semi-integrated plants and 92% in rolling mills. Steel producers imported 75% of their billet needs in 2005 and 59% in 2006.

¹ For more elaboration on the political and economic environment of Egypt and the challenges to its Competition Policy, kindly see OECD report on “Competition Law and Policy in Egypt” available at DAF/COMP/GF(2011)2/REV1.

² Steel, study requested by Minister of Trade and Industry 16/7/2006, concluded on 27/1/2009.

1.2 *Cement*³

ECA conducted a market study on ordinary Portland cement to cover the period 2002-2006. ECA found out that each cement producer has exclusive exploitative rights over its own quarry. Albeit this fact, the average increase in prices of cement was always higher than its average increase in costs. The gap between costs and prices were increasing especially since 2003. The price increase couldn't be justified by the increase of production cost especially in 2006 where the average cost decreased by 3% and average prices increased by 14%.

1.3 *Edible oil*⁴

The edible oil sector is a key sector in Egypt. In 2005, it was accountable for 15% of the overall investment in food industries and 25% of the overall manpower (50000 employees) in food industries. The main types of edible oils consumed by the Egyptian end users are: Corn Oil, Sunflower Oil, and Blended Oil. Blended oil represented the highest market share in the edible oil market with 68%. Cotton seed and soybean oil were the main components of blended oil.

There are three stages to produce edible oil: Crushing⁵, refining⁶ and packaging⁷.

It should be noted that Egypt imports around 90% of its needs from crude and semi refined oils.

Where conducting its study on edible oil that covered the period 2004-2009, ECA concluded that the fully refined and packed Blended oil is the relevant product.

As a result of the world food crisis and the increasing usage of vegetable oils for bio-fuel during the period 2007-2008, the production cost of one ton Blended oil climbed by 60%; then it went down by 33% in 2009.

1.4 *Raw Milk*⁸

ECA studied the raw milk during the period 2006-2009. The product market was the cow raw milk produced by farms to be used in bottled drinking milk. This market is characterized by two phenomena: The presence of immense informal sector up to 80% of the total output of the said relevant product; and Governmental intervention in the pricing process. Akin to the edible oil case mentioned hereabove, the usage of vegetable for bio-fuel affected raw milk production cost. The animal feed (which includes the corn oil) is accountable for approximately of 60% of the production cost of 1 kg of the relevant product. The afore mentioned factor together with the occurrence of anti-competitive practices resulted in driving incumbent farms out of the market and in hindering the entry of new ones. The Milk case will be discussed in more details in next section.

³ Cement, study requested by Minister of Trade and Industry 16/7/2006 concluded on 2/10/2007.

⁴ Edible oil, study requested by Minister of Trade and Industry 26/12/2007, concluded on 30/8/2010.

⁵ It consists on crushing the oilseeds. Cottonseeds are the major oilseeds crop. Sunflower and soybeans are the other oilseeds crops. Around one third of the total crushing capacities are not utilized due primarily to the limited availability of oilseed crops.

⁶ It consists on refining the crude oil or semi refined oil to produce edible oil. Around 25% of total refineries capacities are not utilized due primarily to the exponential price increase of crude and semi refined oils.

⁷ Edible oil is packed to be sold to households. All the refineries are packing all or part of their edible oil production. Not all crushing companies are producing edible oil.

⁸ Raw Milk study request by Minister of Trade and Industry 26/12/2007, concluded on 7/3/2011.

1.5 Nitrogenous fertilizers⁹

Subsequent to media reports asserting that nitrogenous fertilizers prices exponentially increase, ECA initiated an investigation to stand on the accuracy of such statements. After concluding that the nitrogenous fertilizer is the relevant product, ECA found out that this market is de facto regulated. All output quantities, distribution channels and prices are regulated via ministerial decrees. All the claims concerning the unjustifiable price increase is due to the fact that traders were breaching such Decrees and selling fertilizers in the black market. ECA couldn't deal with such phenomenon and contented to close its investigation on the ground that such Decrees did not open any room for competition and any breach thereof should be sanctioned in accordance with the foregoing Decrees.

1.6 White sugar¹⁰

Following media reports purporting that the white sugar prices increased dramatically as a result of anticompetitive practices in this market, ECA initiated a study thereon.

The case is still under investigation; the preliminary findings showed that the white sugar could be manufactured from beet sugar or cane sugar. Consumers do not distinguish between both; hence the relevant product is white sugar (whether extracted from beet sugar or cane sugar). The beet sugar is cultivated and produced in Nile Delta, while cane sugar is cultivated in Upper Egypt. As per 2009 statistics, Sugar consumption in Egypt is accountable for 2.6 million tons annually (Million ton goes to Subsidies Card Holders¹¹). As for Sugar production in Egypt, it represents 1.6 million tons annually. The gap is filled out through importing either raw sugar/refined sugar to be refined in the domestic producers' facilities or white sugar.

In 2006, the Minister of Industry and Trade formed a Committee¹² aiming at designing policies to ensure filling in the sugar gap in the local market, monitoring the international and local sugar prices, setting indicative/recommended white sugar selling prices. In practice, the price volatility of raw sugar and white sugar throughout the period 2006-2009 (duration of the study) seemingly affects both the market and the measures taken by the said Committee. ECA investigation is still underway.

In light of the above, we can infer that the causes behind such price volatility are diverse: In the **Steel** case, the main reason was the price increase of imported billet. In the **Cement**, it was purely domestic; cement producers cartelized altogether to raise the price as will be later discussed in more details. In **Raw Milk** case, it was due for combined factors that significantly affected the market (increase of animal feed cost due to the usage of corn oil for bio-fuel, coupled with other domestic factors like the existence of monopolistic practices, the informal sector and nature of the product which is perishable very quickly). In **Edible Oil** case, the world food crisis affected the vegetable oil prices in Egypt. In turn, the **fertilizer** market is distorted due to Governmental interference and traders breach of Ministerial Decrees. As for **White Sugar** case, there is at least one factor can be taken into account; it is the imported price of raw sugar.

⁹ Nitrogenous Fertilizers, Study initiated by ECA May 2007, concluded on 26/5/2007.

¹⁰ White Sugar, study initiated by ECA 30/8/2009, PENDING.

¹¹ For more details on State Aid and Subsidies in Egypt, kindly see Egypt contribution in Competition, State Aids and Subsidies at OECD Global Forum on Competition, available at DAF/COMP/GF/WD(2010)9.

¹² By virtue of Decree no.98 for the year 2006 with regard to the establishment of the Committee in charge of monitoring the free sugar.

ECA, since its establishment, is vigilant that its main role is to ensure that markets are operating competitively and efficiently. For this purpose, ECA set up **the Market Monitor Department** in order to measure the effectiveness of its enforcement action. As such, the freshly established Department made two comparative studies on **Cement** sector to appraise whether its enforcement actions drove prices down. The said studies, using structural indicators and assessing market behavior, concluded that market concentration is reduced in terms of sales volume and value as a result of the Court sentence to fine cartellists along with the issuance of new licenses for new cement producers.

Relatedly, the Department is currently preparing a study on the **Steel** market to evaluate ECA advocacy efforts undertaken in this sector to resolve the competitive problem that will be later discussed in more details in this paper.

2. Competition law enforcement & formal investigation

ECA investigated various commodities markets and succeeded to build, at least to an extent, a credible enforcement record especially in food industries and construction sectors.

2.1 *Cement case*¹³

- **Facts:** ECA received a request from the Minister of trade and Industry to study the reasons behind the exponential price increase of Cement. ECA conducted its investigation to cover the period from January 2002 through December 2006.

ECA found out that there is a pool of nine cement producers (12 companies) that they have agreed on fixing the cement price and limiting the marketing thereof since 2003.

- **Decision:** ECA Board took a per se approach where scrutinizing the said agreement. The Board based its decision on the following evidence: Witness statements, price/cost correlation (price increase and cost decrease), stable local market shares and volatile exports market share.

The district Court¹⁴ fined the violators 200 million Pounds¹⁵.

The afore-mentioned verdict was upheld by the court of Appeal¹⁶ and the Court of Cassation respectively.

The cement Cartel case is the first judicial precedent.

2.2 *Sugar cane molasses case*¹⁷

- **Facts:** A state owned company was dominating the sugar cane molasses market with a market share of 100%. There were no close substitute, no imports and high barriers to entry.

¹³ Cement, supra note 3.

¹⁴ Case no. 2900/2008 Misdemeanors of Madinit Nasr Awal (25/8/2008).

¹⁵ 1 USD= 5,99 Egyptian Pounds, based on Central Bank exchange rate on 8/12/2011, www.cbe.org.eg.

¹⁶ Appeal no. 22622/2008 East Cairo, Prosecution vs. Suez Cement group, La Farge titan Group, Al-Amreya Simpre Group, Simx Egypt (Assyout Cement), Egyptian Cement, Sinai Cement, Misr-Bani Suf for Cement, National Cement Company.

¹⁷ Molasses, Complaint EGY-Belge Co. Vs. Sugar and Egyptian Integrated Industries Co. 16/5/2007, concluded on July 2008.

The said Dominant firm was engaged into a price discrimination scheme. It was selling the sugar cane molasses to its two sister companies (i.e. two other public enterprises) 20% higher than to their competitor (private company) in the yeast market. The one ton of sugar cane molasses is accountable for more than 50% of the production cost of one ton of yeast.

Such discrimination between firms having equivalent transactions resulted in the limitation of the private company ability to compete effectively in the yeast market against the two other sister companies.

- **Decision:** ECA Board issued an injunction (cease & desist order) against the violator (the sugar cane molasses dominant firm) to rescind all discriminatory schemes between yeast producers.

The violator abided by ECA decision and has eliminated all kind of discrimination.

The case was further referred to the prosecution which closed the file on the ground that there were practical substitutes and high potential entry.

ECA believes that the prosecution erred in its assessment.

2.3 *Raw milk case*¹⁸

- **Facts:** A series of Ministerial Decrees (mainly issued by the Minister of Agriculture¹⁹ and last Decree is jointly issued by both Ministers of Agriculture and Trade & Industry²⁰) were issued since 2001 through 2009 and formed a Committee composed of both Farms and Packed Drinking Milk producers to agree on recommended pricing formula of raw milk. Such Committee is headed by a Ministerial Representative to act as a “facilitator”.

Packed Milk producers were convening in their Business Association before Committee’s meetings to agree on purchasing prices to be imposed on farms in the then upcoming Committee meetings.

ECA raided Ministry of Agriculture and got smoking gun evidence with regard to packed milk producers’ agreement on raw milk purchasing prices.

ECA considered that the agreements that took place among the Buying Group either inside the Committee or at the Food Industries Chamber are violating article (6) of the Law. ECA believes that the said Ministerial Decrees are in breach of the Competition Law on the one hand and that such agreements were anti competitive on the ground that the cost effective realized by the Buying Group (reducing the purchasing price of raw milk) did not pass on consumers in the downstream market (packed drinking milk). Further, such practice resulted in the depression of farms output; as such several farms exit the market. Moreover, ECA considered that in the event the Government wants to regulate raw milk prices, this should be carried out through the mechanism of article (10) of the Competition Law²¹ not via Ministerial Decrees.

¹⁸ Raw Milk, supra note 5.

¹⁹ Agriculture Ministerial Decree no. 146 for the year 2001 as amended.

²⁰ By virtue of joint Decree no. 375 for the year 2009.

²¹ Article (10) of the Competition Law provides that “*The Cabinet may, after taking the opinion of ECA, issue a Decree determining the selling price for one or more essential products for a specific period of time. Any*”

- **Decision:** ECA Board took a per se approach and considered that such type of horizontal agreements is violating article (6) of the Law. The Board did not take into account the fact that such agreements are concluded under governmental auspices and rejected the Buying Group claims that there were forced to make such agreements. The Board concluded that the companies wills were free from any defect based on the following factors: The non-Binding nature of the Decree (the Decree was calling for recommended pricing formula, and there was no sanction stated in the Decree in the event that participants did not abide by the agreed “recommended” prices); the Buying Group were holding meetings outside the Committee to agree on raw milk prices to be imposed on farms ; and the ability of the Buying Group to reject suggestions or to impose others on farms as illustrated in the Committee’s meeting minutes.

On a different note, The Board recommended that, in order to undermine raw milk output depression, packed milk producers should apply the formula of “milk to feed ratio” where dealing with farms. The largest buyer with a market share of approximately 65-70% in both upstream (raw milk) and downstream (packed drinking milk) markets welcomed ECA recommendation and started up to apply it. The second and the third largest buyers chose to be vertically integrated to ensure security of supply of raw milk.

- **Comment:** This case covers two significant aspects: First one consists in incriminating all types of agreements that will take place under Governmental auspices in the event that it contradicts with the mechanism provided for in article (10) of the Law. The other reflects ECA Board effort to remedy the shortcoming of the wording of article (6) of the Law. The said article does not really distinguish between hard-core cartels (object Contract) and non hard-core cartels (effect contract). The reading of such article suggests that all agreements that lie thereunder will be treated as per se illegal. In order to mitigate such effect, the Board announced that it took a per se approach; meanwhile they added a story of harm, namely, that such agreements did harm consumers.

The practice showed that there are three mechanisms to conduct market studies by ECA. First one is to receive a request from the Ministry of Trade and Industry to study a given sector where there is a suspicion that monopolistic practices took place therein; such type of market studies has, usually, an enforcement purpose²² (Steel, Cement, Milk, Edible Oil, and Meat). The second is to receive a request from the Ministry of Investment to opine on the privatization of an SOE (Phosphate, Corn Products); such type of market studies reflects the advocacy purpose thereof. Last is to initiate ex officio a market study by ECA; it can cover either an enforcement purpose (Fertilizer, White Sugar) or advocacy one (Domestic Flights).

2.4 *Steel case*²³

- **Facts:** As mentioned above, the study covered the period 2002-2006. There were around 20 market players; only two firms were integrated and the others are either semi-integrated or rolling mills. ECA concluded that one of the two integrated firms has monopoly power. ECA concluded the dominance based on the following findings:
 - Market share around 60%;
 - Output capacity market share was accountable for 44% of the total market output capacities;

agreement concluded by the Government for the purposes of the implementation of these prices shall not be considered an anticompetitive practice”.

²² Nothing in Law or in Fact prevents ECA to add an advocacy purpose (like urging Government to cancel or modify Decrees or Regulations that impair competition) to the enforcement one.

²³ Steel, supra note 2.

- Cost effective;
 - Significant customer loyalty especially among consultant engineers;
 - Entered into *de facto* exclusive dealings with the main wholesalers; and
 - The existence of Governmental restrictions and economic barriers that prevented the entry of new integrated firms.
- **Decision:** Despite the fact that the *de facto* exclusive dealing undertaken by a dominant firm can be considered as *per se* illegal under the Competition Law, ECA Board dismissed any allegation of violation. The Board adopted an effects based approach where scrutinizing the dominant's agreements. The Board did not want to refer the case to the Competent Minister²⁴ to bring it before the Court to avoid an "over-enforcement".

2.5 *Meat case*²⁵

- **Facts:** ECA has defined the relevant product as the imported boneless frozen red meat (all cuts whether from cow or buffalo). The geographic area was determined as Egypt in addition to the international market (depending on the countries' diseases situations defined by the World Organization for Animal Health).

ECA has examined the existence of any cartels in the relevant market by applying the guidelines of the ICN concerning the factors facilitating cartels; where it found that only two factors apply: the homogeneity of the products and the same production costs for all the competitors. In addition to the aforementioned result, ECA has studied in details two indicative companies from the cost structure, prices and the correlation therebetween together with the margins of profits, which were ranging from 4 to 8%.

ECA has studied the two types of vertical relationships in the market and inferred the following: The relationship between the importers and the slaughterhouses on the one side and the relationship between the importers and the distributors and the factories on the other were not restrictive to competition even through different exclusive dealings did exist in the market.

ECA concluded that none of the sample (it included the major market players whose the combined market shares were accountable for 65%) studied by ECA was in a dominant position.

- **Decision:** The Board concluded that there was no violation carried out during the study period.

2.6 *Corn products*²⁶

- **Facts:** ECA has received a request from the Ministry of Investment to study the potential effects on competition that might arise from privatizing an SOE, the main producer of yellow corn products in Egypt. ECA concluded that the relevant products are Standard Glucose, Glucose High Maltose, Fructose 55 + Sugar, Fructose 42, Fehd, Protein Sources, Starch, and Crude Corn Oil.

²⁴ It is worth mentioning that the power of initiating criminal lawsuits and to settle with violators is vested in ECA Chairman by virtue of Prime Ministerial Decree no. 1410 for the year 2011. Such Decree becomes effective as of 18th of November 2011.

²⁵ Meat, study requested by the Minister of Trade and Industry 26/12/2007, concluded on July 2009.

²⁶ Corn Products, Advisory Opinion request by Minister of Investment 27/6/2007, concluded on 15/12/2009

The study has concluded that the SOE enjoyed a dominant position in the markets of Fructose 42, Fahd, and Starch. Thus, ECA concluded that if the company is to be privatized, the following might take place:

- Create a dominant firm in the markets of Fructose 42, Fahd, and Starch
 - That dominant firm may impact the prices and/or the supplies of the aforementioned products.
 - The change in price, or supply of the aforementioned products could result in negative impacts on dependant industries, e.g. production of sweets.
- **Decision:** ECA Board recommended that the SOE should not be sold given the fact that its privatization might harm consumers by charging them higher prices coupled with the potential negative impacts on related markets as a result of this prospective privatization.

The Ministry of Investment followed ECA recommendation and decided not to sell the company.

In practice, all market studies conducted by ECA (whether requested by the Ministry of Trade and Industry or Ministry of Investment, or initiated by ECA) had as objective to ascertain allegations of unjustifiable price increase to be occurred in given markets.

Relatedly, ECA received two requests from Consumer NGOs to study both Steel and Edible Oil markets for the same reason (unjustifiable price increase). None of the two requests was accompanied by documents or evidence. Such requests did not have value added from a practical standpoint since ECA were already investigating the markets at stake.

3. Advocacy opportunities and challenges

ECA is engaged into advocacy activities in order to make markets more competitive.

In the **Steel**²⁷ case, ECA found out that the main reason behind the lack of competition in this key sector resides in the absence of sufficient integrated plants to compete effectively with the dominant firm and to be cost effective, hence to reduce the industry marginal cost. The study showed there was only one integrated plant (besides the dominant firm) with a market share of 0.5%; this was due for various reasons (financial, managerial and structural problems). As such, ECA conducted advocacy efforts with the Ministry of Trade and Industry to re- open licenses for new integrated plants which had been blocked for several years. Accordingly, the Ministry made a bid and awarded four new licenses in 2008.

In a similar vein, ECA recommended the Ministry to ease the entry of imported steel rebar especially that the Egyptian specs seem to be tighter than other countries. Hence, the Ministry took several measures to facilitate the importation of rebar, including reducing customs tariff to zero, changing the specs, shortening the administrative procedures from 30 days to 1 day. Consequently, the amount of imports climbed in one year (2009) from 1% to 23%, prices went down from 8000 EGP per ton to less than 3100 EGP²⁸ a ton and the then dominant firm decreased by 10%.²⁹

²⁷ Steel, Supra note 2.

²⁸ It should be noted that the billet prices also went down internationally; hence such price decrease should be attributed to both factors (ease of importation and reduction of billet price).

²⁹ A part from the Steel study conducted by Market Monitor Department as illustrated in section 1.3 above, ECA is investigating then dominant firm conduct during the period 2007-2010.

In the **Raw Milk** case,³⁰ ECA recommended that each Packed Milk Producers adopts a “milk to feed ratio” formula where dealing with farms.

The rationale behind such recommendation is due for the reason that the prices of raw milk are, since 2007, equal 1,5 to the cost of animal feed (which is accountable for 60% of the total production cost of 1 kg of raw milk). As per the international standards, such ratio should be at least 2,5 to maintain the business. The milk to feed ratio should allow Egyptian farms to maintain their businesses and should prevent the output depression. Furthermore, ECA, in order to ensure that the price increase of raw milk will not significantly affect consumer price in Packed Drinking Milk, assigned a foreign expert to study the potential effects of raw milk price increase on selling price of packed drinking milk. The paper submitted by the expert, using a probit regression model, concluded that the potential 10% increase in the upstream market will trigger a potential average increase of 2,5% in the downstream market.

The main buyer power (approximately 65% market share) announced that he will apply the Milk to Feed Ratio Formula.

In 2008 ECA was confronted by Ministerial request to exempt Steel producers from any antitrust liability in the event that they have applied a maximum RPM system with their distributors and such RPM restricted competition. From the Ministry vantage point, this RPM system should reduce consumer price, at least in the short run, taking into account prices of Steel rebar were expected to go up given the increasing price of billet at that time.

ECA rejected the said request on the basis that, first, the Competition Law does not empower ECA to issue such exemption. Second, given the steel rebar market structure, the fact to impose on steel producers the adoption of an RPM will be infective and may create a black market. Since there is a cost differential between the dominant firm (who is heavily relying on oxide pellet and is benefiting from the security of supply of raw materials) on the one hand and the rolling mills (who are usually buying the billet from spot market and are subject to billet price volatility) on the other, it is unlikely that retailers will abide by the maximum RPM even in the short run.

As such, the Minister of Trade and Industry issued a Decree³¹ compelling Steel producers to impose a maximum RPM. The rebar prices, however, continued to go up and a black market was created by retailers and contractors.

ECA is employing a number of channels to mitigate the risk of price volatility to become a nationwide problem. First, ECA, as previously mentioned, formed a new Department to monitor whether the enforcement actions taken by ECA were effective to solve the competitive problem or not. Second, ECA started up to distribute a questionnaire on businesses in the margin of its workshops on business compliance program. The attendees should answer questions with regard to barriers (either legal or practical) they are encountering where carrying on business.

Moreover, in the context of ECA’s political parties program³², ECA is advocating the necessity to balance between the Competition Policy and other Governmental Policies whenever the Government is considering a Regulation Policy option.

³⁰ Raw Milk, supra note 5.

³¹ Decree no. 419 for the year 2008.

³² This Advocacy Program has been established in September 2011 with the purpose of introducing the concept of Competition Policy and its effects on economic development to a wide spectrum of Political Parties whom should be the upcoming decision makers.

Last but not least, the Competition Law encompasses an Advocacy provision³³ by virtue of which ECA is empowered to opine on draft laws with regard to competition. ECA, in the context of the aforementioned Political Parties Program, is trying to activate such provision.

4. Conclusion

Since its inception, ECA is striving to address the price volatility of commodities in a satisfactory manner. In spite of the fact that ECA fulfilled some successful enforcement and advocacy actions; the way is still far long.

There is an ever-increasing acknowledgment from both the Government and the public at large that ECA can and should play a positive role in finding a suitable remedy to the subject in question.

On the other hand, major hurdles, namely, lack of sufficient and experienced staff, State intervention in free markets, lack of competition culture among different stakeholders and the presence of important informal sector need to be overcome in due course. Otherwise, ECA credibility in solving the competitive problems arising from price volatility of commodities can be jeopardized.

³³ Article (11)/5 of the Law.

EUROPEAN UNION

1. Introduction

Over the past couple of years, prices for commodities have globally fluctuated widely. This is an issue the European Commission (EC) has been actively working on for the last few years. To illustrate the EC's activities, this paper will focus on the food supply chain and highlight in particular the competition related aspects.

The food industry sector is one of the largest and most important manufacturing sectors in Europe. It is the second largest (after metal) in the manufacturing industry, with 14.5% of total manufacturing turnover (€17bn for the EU-27). The employment in the food industry represents about 14% of the total manufacturing sector. However, the food industry is characterised by fragmentation. There are few European multinational companies competing worldwide with a wide variety of products, but 99% of all enterprises in the food sector are small and medium sized enterprises (SME's). As a matter of fact, Europe's food market is made up of about 310.000 companies, and 4.8 million employees. With an annual turnover in excess of €00 billion, this diverse sector is a strong exporter and is responsible for countless end products in extremely competitive domestic and international markets

From mid-2007 to mid-2008, agricultural commodity prices rose sharply, which resulted in increased consumer food prices and higher inflation levels overall. Since then, prices of many commodities have come down to levels comparable to, or even lower than those reached before the start of the price surge. However, consumer food prices continued to increase and only started declining in May 2009, raising concerns about the functioning of the food supply chain. These changes have caused considerable hardship for agricultural producers and imply that consumers are not getting a fair deal.

The food supply chain connects three important sectors of the European economy – agriculture, the food processing industry and the distribution sectors – that together make more than 5% of European value-added and 7% of employment. Moreover, its performance has direct consequences for all European citizens, since food represents 16% of European households' expenditures.

The functioning of the food supply chain takes on increased importance in the path towards recovery from the current economic and financial crisis. High food consumer prices are a source of concern because they put pressure on household incomes in particular now at a time when an increase in consumption is needed. They are particularly hard on the most vulnerable households who spend a considerably greater proportion of their income on food. In the longer run, a better functioning food supply chain is crucial for consumers and for ensuring a sustainable distribution of value added along the chain, thus contributing towards raising its overall competitiveness. Improvements are needed urgently to avoid an escalation of consumer food prices as the recovery sets in.

The EC has been following developments in food prices as part of a market monitoring exercise launched within the context of the November 2007 Single Market Review which aims to provide policy remedies to identified causes of malfunctioning. In December 2008, the EU published an interim report on "Food prices in Europe" and set out a roadmap identifying the key directions for policy actions.

In October 2009 the EU issued a Staff Working Document focussing in particular on competition issues in the food chain. This document will be discussed in more detail in the next section, complemented by a section on recent efforts of the EC in sanctioning cartels in the Food sector.

The Staff Working Document accompanies the EC Communication of 2009 on "a better functioning food supply chain in Europe". The EC Communication of 2009 contains a number of policy initiatives to improve the functioning of the food supply chain which are currently being discussed in the framework of the High Level Forum for a Better Functioning Food Supply Chain, set up by the Commission in July 2010.

2. Competition in the food supply chain

Competition policy plays a key role in maintaining a level playing field in the food supply chain. Ensuring that competition is not distorted in the food sector by any market player operating within the chain, i.e. producers, processors, traders, wholesalers and retailers is therefore of the utmost importance. For this reason, the roadmap set out in the EC Communication on "Food Prices in Europe" of December 2008 called for a pro-active monitoring of the food supply chain and, where necessary, for a vigorous and coherent enforcement of competition rules in food markets by the EC and National Competition Authorities.

As a follow-up to this Communication, and in order to implement its roadmap, the EC launched a fact-finding exercise involving stakeholders and National Competition Authorities (NCA's) with a view to better understand the competitive structure, interplay of actors and degree of competition in food markets. Firstly, the EC held meetings with relevant European associations of producers, processors, traders, wholesalers and retailers representing several food sub-sectors, so as to obtain insights into recent economic developments and specific factors influencing competition within different food supply chains, including cereals and breakfast cereals, milk and dairy, livestock and meat processing, pasta, confectionery, branded foodstuffs and beverages, fruit and vegetables, oils and oilseeds, sugar, poultry and eggs.

Secondly, given the national or regional scope of food retail markets, the EC strengthened its dialogue with NCA's on food related issues in the framework of the European Competition Network (ECN). In particular, ECN members exchanged information on recent enforcement, monitoring and advocacy initiatives undertaken at national and EU level, as well as on policy issues raised by recurrent commercial practices which may affect the functioning of food supply chains.

As evidenced by the significant efforts deployed over the last years by competition authorities, ECN members have granted due priority to case by case investigations, as well as to broader inquiries regarding food markets, which has led to the finding of an appreciable number of serious infringements, such as cartels and resale price maintenance cases. These infringements were swiftly remedied through cease-and-desist orders, accompanied where appropriate by substantial fines. Such cases spanned a variety of product markets, such as the dairy, milk, flour, bakery, pasta, eggs, poultry, beef, vegetables, fruit, olive oil, chocolate and herbs markets. A number of abuses of dominance cases targeted at the food industry have also been assessed in different Member States but remained limited in scope. Where NCA's applied EC competition law, the EC ensured a consistent and coherent application of the rules. Over the last years NCA's have also undertaken a significant number of sector inquiries and other market monitoring actions in the food sector which have provided detailed insights as to how food markets work.

Moreover, the information shared with the EC by stakeholders and NCA's confirms the view that, depending on the type of products involved, food supply chains are characterized by a high degree of complexity and diversity in terms of market structures, number of intermediaries operating at different

stages within each chain, size and market power of incumbent producers and retailers, degree of concentration, entry barriers and other factors liable to affect competition in the relevant markets. Such product-specific structural differences are further amplified by diverse market conditions prevailing across Member States. To reflect such diversities, an important distinction should be made between supply chains for non-processed food (agricultural produce, perishable) and processed food (stockable).

Overall, supply chains for non-processed food are generally characterized by atomized suppliers and stronger buyers who are in most cases intermediary operators, and more rarely retailers. Such buyers are often unavoidable trading partners for the weakest producers. Given farmers' difficulties in aggregating their output with complementary products so as to supply retailers directly with the required product ranges, such an aggregation function is still largely being performed by intermediaries who, however, operate mostly at local level and sometimes at sub-optimal scale. Where it still exists, such an overlap of several layers of wholesaling may result in structural inefficiencies which, in turn, may influence negatively price transmission to end consumers.

By contrast, within supply chains for processed food, negotiations generally take place directly between producers and large retailers. While suppliers of leading brands tend to hold a relatively strong bargaining position vis-à-vis retailers, a significant number of SME's active in agro-food industries also enter into direct supply relationships with retailers, which adds to the complexity of the competitive interactions between producers and retailers within supply chains for processed food. These transactions may entail restrictions of competition depending on the nature of the agreements concluded between the parties and on whether the supplier, or the buyer, has sufficient market power to maintain prices at a supra-competitive level to the detriment of consumers.

As regards the retail sector, it is generally characterised by strong concentration ratios in many Member States even though different market structures and business models (hypermarkets, supermarkets, hard-discounters, networks of independent retailers, etc.) also prevail at national level. The existence of entry barriers stemming from regulatory constraints, such as zoning or planning laws, has been generally identified as a factor having an impact on competition in retail local markets.

Against this backdrop, it appears that the ability of suppliers and/or buyers to exercise their market power in a manner that would distort competition to the detriment of consumers depends, primarily, on the type of supply chain and on local market conditions which, in turn, are the result of structural factors and regulatory barriers specific to each Member State. NCA's are therefore well placed to tackle possible restrictions of competition which could affect the functioning of certain food supply chains.

In accordance with its Communication of 2009, the EC has also examined the relevance of certain commercial practices both in terms of their likelihood to arise and their ability to raise competition concerns within the relevant food supply chains. In addition to classic cartels and resale price maintenance, other practices were quoted by certain stakeholders as deserving special attention by Competition Authorities in appropriate cases, and requiring a careful balancing of efficiency enhancing and potentially anti-competitive effects. Such practices include joint commercialization agreements, tying and bundling, joint purchasing agreements (buying alliances) and the increasing use of private labels. NCA's converge in recognizing that a case-by-case analysis is required for such practices, based on the specificities of local market conditions.

In supply chains for non-processed food, joint commercialisation or joint selling agreements occur with relative frequency in the context of producer organisations. Such agreements may raise concerns for competition when they lead to price fixing. However, when they entail an integration of complementary assets, they may help the supply of agricultural produce to become more efficient by cutting some of the intermediary stages that lengthen the supply chain and drive prices upwards. Competition Authorities can

therefore assess such agreements in a way that can help farmers to grasp the efficiencies of their cooperation, whilst ensuring that benefits are passed onto end consumers.

For processed food, tying and bundling, often involving branded goods marketed by major industrial suppliers, are quoted by certain stakeholders as potential sources of concern. In certain situations, such practices may lead to anticompetitive foreclosure effects in the tied market, the tying market, or both at the same time, and may also lead to higher prices for consumers. In addition, foreclosure of competing suppliers may have a knock-on effect on the revenues of upstream producers of agricultural products by strengthening the market power of their industrial customers and, as a result, by weakening their capacity to negotiate prices with the latter. At the same time, however, tying obligations may help to produce efficiencies arising from joint production or joint distribution, and may also help to ensure a certain uniformity and quality standardisation. In absence of market power, such efficiency gains could be passed on to consumers in the form of lower prices or better products.

Additionally, certain stakeholders also refer to the development of transnational buying alliances, pointing out that, in certain circumstances, such forms of cooperation between large retailers may reduce the participants' incentives to expand into each other's domestic markets or may contribute to a standardisation of their purchasing policies, which could have a negative longer term impact on product variety and/or the ability of food suppliers to innovate. While joint purchasing agreements may give rise to important efficiencies, the extent to which such benefits are passed on to consumers depends on the specificities of each market, as well as on the scope and type of cooperation that takes place within each buying alliance.

Lastly, another concern raised by some stakeholders is the increased use of private labels enabling retailers to compete with established brands. In principle, private labels provide retailers with a way to satisfy consumer demand for cost-efficient alternatives to branded products, while ensuring value for money and quality products. Also, they are the expression of a competitive dynamic which may contribute to rationalizing the food supply chain by allowing retailers to enter into direct procurement and purchasing negotiations with their suppliers and participate in the productive process. However, when the extensive use of private labels leads a retailer and its competing leading brand supplier to coordinate their respective pricing and assortment strategies, in-store competition between brands may be restricted and, absent a sufficient competitive pressure from other retailers, consumers may suffer from higher prices or reduced choice for the relevant products.

It stems from the above that, as regards these practices, no sweeping generalisation can be made and a case by case analysis is necessary in order to establish the existence of a possible competitive harm. Competition Authorities will continue to ensure a rigorous enforcement of the rules in all cases where, after a careful balancing of efficiency enhancing and potentially anti-competitive effects, it appears that a significant harm for European consumers could result from these practices, be it at Community or national level.

For this purpose, and as explained above, NCA's play a key role in ensuring the application of competition rules to anti-competitive practices affecting both non-processed and processed food markets. Given the national or regional scope of such markets, the EC considers that the ECN is the appropriate forum to further develop an efficient and coherent policy to ensure sound competition in food markets throughout the EU. Therefore, further improvements in the cooperation between Member States and the EC within the ECN will facilitate the development of a common approach to relevant competition issues, the swift identification of problematic cases and an efficient allocation of tasks amongst the ECN members.

In order to make the best use of the resources and competition expertise of the ECN, the EC has invited NCA's to consider the possibility of creating where appropriate joint working teams dedicated to the analysis of specific practices and markets which may be critical for the functioning of the food supply chain. Going beyond the mere exchange of information, this approach would encompass monitoring, advocacy and enforcement actions geared towards specific product markets and coordinated by the EC with a view to steering the collection of relevant information, identifying best practices for the prosecution of possible infringements. Through these comprehensive efforts, the EC and NCA's should be able to better detect endemic problems specific to food markets and promptly coordinate future actions, so as to improve the functioning of the food supply chain to the benefit of European consumers. In this context, over the last years the EC and NCAs have strengthened their close cooperation on competition issues in the food sector in the framework of the ECN Food Subgroup.

3. Recent efforts in sanctioning cartels in the food sector

The EC's own enforcement practice in the food sector has primarily focused on tackling hard core cartels. In the context of the economic crisis and rising food prices, detecting and sanctioning collusive behaviour in the food supply chain has indeed become more important than ever. In 2011, the EC concluded its investigation into the price fixing practices in the EU –wide marketing of, and trade in, bananas. In 2011 the EU Courts also rendered decisions on appeals in cartel cases in the agriculture sector previously decided by the EC.

3.1 *Banana cartels*

Bananas are bought all year around by a large proportion of EU consumers, and the EU is the largest consumer and importer of bananas in the world. According to EUROSTAT in 2010 the EU consumption of bananas was approximately 5 million tonnes, of which 12 % were of domestic production.

As imports dominate the EU banana market, it is not surprising that marketing and trade are at the forefront of competition enforcement in the sector. The banana market is highly concentrated with five major multinationals (Dole, Del Monte, Chiquita, Fyffes and Noboa/Pacific Fruit/Bonita) controlling more than 80% of all internationally traded bananas, and at least 50 % in the EU fresh banana markets. Furthermore, the trade in bananas during the period of the infringements was characterised by significant trade flows between Member States. For instance, bananas imported into a few ports located along either the Northern or Southern European shipping routes could distribute throughout the region or transported elsewhere.

In its decision of 12 October 2011 the EC concluded an investigation into the banana market which had started in 2005 on the basis of an immunity application made by Chiquita and sanctioned a cartel operated by this company and Pacific Fruit, both major importers and sellers of bananas in the EU (case COMP/39482 - Exotic fruit). From at least July 2004 to April 2005, the companies had fixed weekly sales prices for bananas and exchanged price information in relation to their respective brands in Italy, Greece and Portugal. The EC imposed a fine of €8, 9 million on Pacific Fruit while Chiquita, as the immunity applicant, was granted immunity from fines.

In October 2008, the EC also fined Dole and Weichert/Del Monte €60 million for price fixing in Northern Europe (case COMP/39188 – Bananas). It found that in the period 2000-2002 the companies had engaged in bilateral pre-pricing communications during which they discussed banana price-setting concerning Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.

3.2 Dutch beer cartel

Beer is one of the most important beverage items in EU household expenditure and it is particularly important for HoReCa services. In 2010 approximately 343 million hectolitres of beer worth were sold in the EU. Most beer (ca 63 %) was sold in retail outlets, but about 70 % of expenditure on beer occurred in the HoReCa.

In its decision of 18 April 2007 (Case COMP/B/37.766 - Dutch beer market), the EC had fined Dutch brewers Heineken, Grolsch and Bavaria with a total of €273 million for operating a price-fixing cartel in the beer market in the Netherlands. The InBev group was granted immunity under the EC's leniency programme. The four brewers coordinated prices, and price increases of beer in the Netherlands, both in the on-trade segment of the market (where consumption is on the premises) and the off-trade market segment (consumption off the premises, mainly sold through supermarkets), including private label beer. The EC also found that in both segments the brewers had coordinated commercial conditions offered to individual customers and allocated customers, while in the on-trade market segment the companies had coordinated the rebates granted to pubs and bars.

The companies concerned subsequently appealed the decision before the General Court, seeking annulment of the EC's decision or a reduction in their fines.

The General Court largely upheld the EC's fines for Bavaria and Heineken (see Judgments of the General Court of 16 June 2011 in Cases T-235/07 Bavaria NV v EC and T-240/07 Heineken Nederland BV and Heineken NV v EC (Dutch Beer Cartel)). The General Court annulled the part of the decision relating to Grolsch in full. The judgment finds that the EC did not adduce sufficient evidence to establish the direct participation of Grolsch in the cartel (see Judgment of 15 September 2011 in Case T-234/07 Koninklijke Grolsch NV).

3.3 Tobacco cartel

Italy is an important producer of raw tobacco in the EU and has significant exports to other Member States.

Between 1995 and 2002, the leading tobacco processors in Italy colluded on their overall purchasing strategy in the raw tobacco procurement market, agreeing between themselves purchase prices and allocating their suppliers (both growers and intermediaries). They also rigged their bids in respect of public auctions between 1995 and 1998. In 2005 the EC imposed fines totalling €56 million on four raw tobacco processors for breach of Article 101 TFEU (EC decision of 20 October 2005 (C (2005) 4012 final, COMP/38.281 – Italian raw tobacco). Despite the conditional immunity granted to Deltafina, the EC found that the company had infringed the obligation to cooperate as applicant for immunity. Therefore the EC granted it a reduction of its fine of 50% instead of a complete reduction. The case was the first in which the EC did not grant final immunity from fines to the first undertaking that revealed the existence of a cartel.

The General Court upheld the EC decision entirely as far as Deltafina was concerned (see Judgment of the General Court of 9 September 2011 in Cases T-12/06 Deltafina and T-25/06 Alliance One v. EC). In its judgment of 5 October 2011 concerning the actions brought by Romana Tabacchi, Mindo and Transcatab, the General Court reduced the fine imposed on Romana Tabacchi from €2,5 million to €1 million, as it considered that the EC had not sufficiently proved in part the duration of Romana Tabacchi's participation (see Judgments of the General Court in Cases T-11/06 Romana Tabacchi Srl v EC, T-19/06 Mindo Srl v EC and T-39/06 Transcatab SpA v EC. The General Court did not adjudicate the action by Mindo and dismissed the action by Transcatab).

JAPAN

1. Introduction

In this written contribution, we would like to present a case in which the JFTC reviewed a plan to establish a joint venture in the production of iron ore as a commodity, while taking the global iron ore market into account¹.

BHP Billiton Plc and BHP Billiton Limited (hereinafter, referred to as “BHP Billiton”) and Rio Tinto Plc and Rio Tinto Limited (hereinafter, referred to as “Rio Tinto”), each engaged in the business of mining and sales of iron ore, etc., planned to establish a joint venture to produce iron ore in Western Australia (hereinafter referred to as the “JV”). In response to prior consultation on the establishment of a JV from both parties concerned, the JFTC commenced its review. The provision applied to this case is Article 10 of the AMA. After finishing the primary review and in the process of the secondary review, the JFTC pointed out its concerns to both parties on 27 September 2010. Thereafter, the JFTC closed the review concerning prior consultation because both parties publicly announced the withdrawal of their plan to establish a JV on 18 October 2010.

The following is the view expressed by the JFTC at the time when the concerns were pointed out to the parties. Therefore, the following view is not the final judgment by the JFTC in response to the submission of their counter opinion.

2. The scheme of the JV

In this JV, BHP Billiton and Rio Tinto planned to commission the control and management of the iron ore production business in Western Australia to a management company established with the capital investment by both parties concerned. The iron ore produced by the JV is generally allocated to each of the parties concerned in the following manners 1 through 4.

1. The management company gives both parties an estimate of the maximum production capability for each term (6 months) with respect to each brand of iron ore.
2. Each party notifies the management company of the rates relative to the maximum production capability with respect to each brand of iron ore. (The term “rate” in this context refers to what each party wishes to receive during a specific term).
3. The management company allocates iron ore, according to the given rule(s), with respect to each brand of iron ore (e.g., when both parties wish to receive iron ore exceeding 50% of its maximum production capability, each party receives the iron ore corresponding to 50% of the maximum production capability, etc.).
4. Regardless of the allocation rate, each party bears 50% of the necessary production costs.

¹ In this written contribution, only the summarized results of the review are presented because of the allocated numbers of pages. If you would like more detail of the review results, see Case 1 of “Major Business Combinations in FY 2010”, (published on 21 June 2011 and available at <http://www.jftc.go.jp/pressrelease/11.june/110621zirei.pdf> (Japanese only). They will also be downloaded from the English website of the JFTC at http://www.jftc.go.jp/en/policy_enforcement/mergers/index.html).

3. Particular field of trade

3.1 Product range

Like iron ore used in producing steel products by blast furnace methods, the products traded between suppliers and users are typically classified into three types:

- Lump ore (lump iron ore which is directly loaded into blast furnaces)
- Powdered ore (powdered iron ore which is loaded into blast furnaces after forming lumps called “iron ore sinters” by coagulation and annealing with limestone, etc.), and
- Pellets (products obtained by mixing fine-powder iron ore with limestone to form ball-shape iron ore and annealing)

Since there is no substitute for either supply or demand among these three types of iron ore (“lump ore”, “powdered ore”, and “pellets”), the product ranges are defined for each type of iron ore².

3.2 Geographic range

Since iron ore is not mined in Japan, all the iron ore traded in Japan is supplied through sea borne trade. Therefore, it is advantageous for suppliers to sell iron ore to users near their mines in consideration of their marine transportation costs. On the other hand, it is disadvantageous for suppliers to sell iron ore to users far from their mines. Nevertheless, iron ore suppliers all over the world, practicing through seaborne trade, basically supply users in any region.

Moreover, while users procure quite a lot of iron ore from the suppliers near their blast furnaces because of the costs related to seaborne trade, iron ore users can select from a plurality of procurement sources all over the world. In reality, the steel companies which operate their businesses in East Asia and West Europe and who depend on seaborne trade have procured iron ore from a plurality of suppliers all over the world.

For these reasons, the geographic range is defined as a “global seaborne trade market.”

4. Characteristics of the demand curve and supply curve in the iron ore market

Production of pig iron by means of the blast furnace method requires continuous operation of blast furnaces in order to maintain the production efficiency constant, and there is no product that can be substituted for iron ore as a raw material. On the other hand, steel companies, as iron ore users, generally do not change one type of iron ore for another type of ore in order to keep the production of their blast furnaces constant even in cases where the price of a certain type of iron ore relatively increases. For these reasons, the price elasticity of demand with respect to lump ore is very small and therefore, its demand curve is considered almost vertical.

Like lump ore suppliers, there are enterprises, including both parties concerned (hereinafter referred to as “low-cost/large-scale suppliers”) capable of supplying large amount of products at low cost. On the other hand, there are enterprises operating small-scale mines at a high marginal cost. Generally, the

² “Pellets” were not subject to this review because the share held by both parties was low and the expected impact due to a JV on competition seemed to be negligible. In addition, the result of the review concerning powder ore is omitted in this contribution because of the limited number of pages.

marginal costs of iron ore suppliers are substantially constant up to their maximum production capability, and low-cost/large-scale suppliers are located on the left side of the supply curve. Inversely, the enterprises operating their small mines at a high marginal cost are located on the right side of the supply curve.

The prices of lump ore are determined at the point of the intersection between the demand curve and the supply curve and at the level equal to the marginal costs of suppliers producing products at the point of the intersection (note that such suppliers are called “marginal suppliers.”). Therefore, in determining the price level of lump ore, the important thing is the level of quantity of production by the suppliers (low-cost/large-scale suppliers) located on the left side of the supply curve, such as both parties concerned.

5. Impact of the establishment of a JV on Competition

5.1 Impact of the establishment of a JV on competitive behavior between both parties concerned

The establishment of a JV anticipates an expansion of production capabilities through negotiations between both parties, as opposed to a self-motivated decision by one party.

In addition, after the establishment of a JV, since both parties concerned share supply characteristics in terms of brands of lump ore, supply quantity, costs, etc., they can easily agree on their preferred supply quantity. At the same time, under a JV, neither party can change the amount of iron ore it receives flexibly during a term, which would reduce the uncertainty about each other’s activity. This would facilitate both parties to coordinate the alignment of the supply amount.

Moreover, each party so far adopts a different sales strategy for competition, but it is supposed that establishing a JV would significantly decrease their incentive to take on a competitive business behavior in terms of the sales process because (i) of their inability to flexibly control the quantity of production, (ii) they deal with the same brands and (iii) they share production costs under this JV scheme.

In light of the above-described circumstances, it is concluded that the establishment of a JV between both parties decreases incentives to take on a competitive business behavior, and as a result, a coordinated relationship between the parties might be formed.

5.2 Market share and competition status of the global seaborne trade of lump ore

The market share held by Rio Tinto in 2008 was approximately 30 to 35% and is ranked in 1st place, and on the other hand, the market share held by BHP Billiton was approximately 25 to 30% and is ranked in 2nd place. The combined market share held by both parties is approximately 55 to 60% and is ranked in 1st place. After the establishment of a JV, the HHI would be approximately 3,750 to 3,850 and the increment of the HHI would be approximately 1,750 to 1,850.

The mines owned by both parties are located in Western Australia and are close to East Asia which holds most of the demand for the global seaborne trade market. Therefore, both parties are in an advantageous position in comparison with competitors in terms of marine transportation costs. And since both parties are peers in terms of products’ quality and marine transportation costs, and at the same time they are the substitutable suppliers to each other for steel manufacturers, both parties are the most important competitors to one another.

The market share held by other competing supplier is only 10 to 15% and much smaller compared to both parties. In addition, lump ore suppliers, except for both parties, do not have their own mines to produce large amounts of lump ore at low costs. For this reason, no supplier can compete against both parties effectively.

5.3 *New entry/New expansion by small-scale suppliers*

There are a variety of plans for new entry into the iron ore market by small-scale suppliers as well as new expansion by existing small-scale competitors. However, it will take several years before becoming profitable. Furthermore, not only is there a need to expend vast costs to establish infrastructures, such as, railways, shipping ports, etc., but also to secure a considerable amount of working force. These facts reveal that there are practical obstacles for newcomers. Moreover, there exist institutional obstacles to entry such as, acquisition of approvals/licenses from government authorities. For this reason, it is difficult for newcomers to enter the iron ore market pursuant to their plans and also for existing competitors to realize their business expansion. Moreover, since small-scale suppliers do not have their own mines and thus abundant high-quality iron ore, not only might the scale for new entry and new business expansion be small but also they need to bear high mining costs. For the above reasons, if both parties concerned with the JV limit their amount of iron ore supply, it will be difficult for small-scale suppliers to offer supplies with sufficient low costs to cover the reduction of supplies by both parties.

5.4 *Competitive pressure from users*

As described in the discussion on the shape of the demand curve in the above 4, since iron ore is indispensable to steel manufacturing using blast furnaces, it is impossible for steel manufacturers to use alternative materials in place of iron ore.

Moreover, not only a recent shortfall of supply due to a rapid increase in demand for iron ore in East Asia but also a supply-side oligopoly allows iron ore suppliers to take initiative in the negotiation of the pricing system and prices. Therefore, it is supposed that competitive pressure from users does not function well.

5.5 *Efficiency*

Both parties concerned alleged that the purpose of establishing a JV was to integrate the production business of iron ore in Western Australia and thus allow them to achieve efficiency amounting to over 10 billion U.S. dollars. However, it seems that a JV would create a situation similar to a monopoly on the lump ore market. As a result, it is supposed that achieving the efficiency alleged by both parties will not bring about competitive behavior and for this reason, does not justify the JV.

Furthermore, the JFTC scrutinized the efficiency alleged by both parties from the following three viewpoints:

- “Whether or not the improvement of efficiency is specific to the JV (merger-specificity)”,
- “Whether or not the improvement of the efficiency is feasible (feasibility)”, and
- “Whether or not the improvement of efficiency contribute to the interests of users (possibility of increasing the users’ welfare)”

The results of scrutiny revealed that a merger-specificity, feasibility, and possibility of increasing the users’ welfare could not be found.

5.6 *Assessment from the viewpoint of the AMA*

5.6.1 *Substantial restraint of competition through unilateral conduct*

Establishing a JV brings about a coordinated relationship between both parties, each having their own infrastructures and a lot of mines with abundant deposits in the future. The combined market share of lump

ore held by both parties in the global seaborne trade market is approximately 55 to 60% and is ranked in 1st place. After the JV, the HHI is very high, able to reach approximately 3,750 to 3,850. The increment of the HHI is large enough to reach approximately 1,750 to 1,850. The market share held by the competing suppliers other than both parties remains approximately at 10 to 15%, and the difference in the market shares between both parties and other supplier is large.

The demand in the East Asia region is expected to continuously lead the world's demand. The mines owned by both parties are located in Western Australia which is close to East Asia occupying most of the iron ore demand. Therefore, both parties are in an advantageous position for marine transportation costs in comparison with competitors. Also, both parties are not only peers in terms of iron ore quality and their marine transportation costs but also substitutable suppliers to each other for steel manufacturing. For these reasons, it is important to maintain competition between both parties. Both parties have been competing with one another by adopting different sales strategies so far. Under such circumstances, forming a coordinated relationship by establishing a JV has a significant impact on the competition of lump ore in the global seaborne trade market.

As discussed in the above (a), the combined market share held by both parties by establishing a JV is high enough to account for approximately 55 to 60% in the global seaborne trade market of lump ore. The difference between both parties and other suppliers in regard to the market shares is large. Moreover, the period required for expanding production capability of iron ore takes long. For these reasons, it is supposed that if both parties make specific strategies to restrain competition, such as to reduce the amount of their production, in the phase of determining the amount of production in respective terms or to determine sales strategies, other suppliers cannot compete against them effectively. Furthermore, the suppliers in question are located far from East Asia where most of the demand exists, and therefore they are in a disadvantageous position for marine transportation costs in comparison with both parties. In addition, it is supposed that the suppliers in question do not have an excess supply capacity. Moreover, there is not only a recent shortfall of supply due to a rapid increase in demand for iron ore but also a supply-side oligopoly results in a situation where competitive pressures from users do not function. For these reasons, it is considered that competition of lump ore in the global seaborne trade market will be substantially restrained.

The period required for expanding production capability of iron ore is generally long. In light of this consideration, it should be discussed whether there are suppliers capable of playing a role of "effective deterrence" against both parties in the long term. First, only the mines belonging to both parties produce a lot of lump ore at low costs in terms of deposits and costs while other suppliers do not own such mines. Other suppliers are in a disadvantageous position for marine transportation costs as well. In addition, it is difficult for small-scale enterprises to newly enter into this field of business or to expand their production capabilities because there are many practical obstacles to entry as well as institutional obstacles to entry for small-scale enterprises. Therefore, it is quite unlikely that the suppliers other than both parties implement enough expansion of their production capability if both parties postpone or suspend expansion of their production capability. For these reasons, there is no supplier who can be an "effective deterrence" against them in the long term.

5.6.2 Substantial Restraint of Competition through Coordinated Conduct

Since there is no supplier who can be an effective deterrence against both parties in the global seaborne trade market of lump ore, it is not necessary to discuss the substantial restraint of competition through coordinated conduct between both parties and other suppliers.

6. Conclusion

In light of the above circumstances, the JFTC pointed out the problem that may arise in the establishment of a JV and how it could substantially restrain competition in a particular field of trade, and in response thereto, both parties concerned announced revocation of the plan in question.

KAZAKHSTAN

1. Background: Answers to OECD Questionnaire

1.1 *In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).*

No, no important commodity price volatility happened in Kazakhstan.

From the beginning of 2008, there was seasonal price volatility for some commodities (flour, bread, sugar, vegetable oil, meat and vegetables), also for fuel products. Usually, commodity price increases happen in winter and spring time, commodity price decreases happen in summer and autumn. Due to bad buckwheat crop in Russia, there was a price increase for buckwheat products in Kazakhstan since September, 2010. However buckwheat is not basic commodity in our country.

1.2 *Are the price volatility in these commodities, and the causes of that volatility, global, regional or domestic?*

There was no price volatility in Kazakhstan.

1.3 *Does your agency have any ongoing / pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviours in these markets (both domestic and foreign markets)?*

The Agency does not provide constantly commodity price monitoring.

According to the Law “On Competition”, Agency provides analysis and monitoring of business activities that hold dominant position in sensitive market in order to set high (low) monopoly price.

Currently, in State register of market players that hold dominant position, there are 174 companies in food producing market:

- wholesale of vegetable oil 18 companies;
- wholesale of eggs 4 companies;
- wholesale of sugar 31 companies;
- wholesale of bread 54 companies;
- wholesale of flour 52 companies;
- wholesale of milk 2 companies;
- wholesale of tea 2 companies;

The Agency participates in the Workgroup that was created by the Government on 2010. Its primary objectives are monitoring of price in domestic and foreign food producing markets, providing ideas about food production safety, stabilization of prices and guaranteeing safety in domestic market that proved efficient and systematic steps in order to stabilize prices for basic provisions.

Agency of Statistics and Ministry of Agriculture that in the part of Workgroup also provide monitoring prices of food productions.

2. Competition law enforcement & formal investigations

2.1 *Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities including:*

*Merger assessments;
Cartels and horizontal agreements;
Vertical restrictions;
Abuse of dominance actions;
Any price control or other actions to regulate prices.*

Please explain how the matter came to the attention of the agency, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).

Facts of price collusion and abuse dominant position in 2011 were brought several administrative cases on food producers and impose administrative penalty.

For example, in the markets of five oblast of Kazakhstan were determined 32 anticompetitive actions of vegetable oil and buckwheat producers. Those producers without any objective economic justifications unreasonably increase prices of unchangeable cost of those goods. Those producers were imposed administrative penalty by Court of Justice.

In one of the regions of our country, nine bread producers was imposed to administrative penalty because of anticompetitive collusions in corresponding market. Bread producers simultaneously increase the selling prices of bread by having flour in stock from previous delivery that brought by old prices. Those actions help them to produce bread by old prices without any losses. Two flour producers was imposed to criminal case because of anticompetitive collusions in 2010.

Relying on the fact of establishing of the monopolistic prices by including unfounded expenses to the price of product the Agency initiated the legal case against the Bakery complex/firm on abuse of the dominant position. In accordance with the "Competition Law" the initiation of formal investigation shall be based on the information of public authorities the applications of individual or legal persons, information received from media-representatives and in the result of analysis provided by the Agency.

The investigation shall be carried out within period not exceeding two month and its results shall be discussed/heard at the Agency's Board Meeting. The Board has 5 members; they are the Chairman, his/her two deputies and two representatives from the Government.

2.2 *Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

Yes, according to the "Competition Law" of the Republic of Kazakhstan the Agency provides analysis and assessment of the competitive environment in the commodities market.

In the course of analysis the market subjects, having monopolistic or dominant position are to be determined and to be included to the Agency's State register of entities with a dominant or monopolistic position.

For instance, the Agency investigated a case of an anticompetitive behavior between 8 major milk suppliers in the territory of Almaty city, where the cumulative market share of milk sales amounted for more than 90%. Milk suppliers unreasonably increased wholesale prices by 5-37% without any justified reason and received additional revenues by the concerted practices. In relation to those entities the legal cases on administrative violations of the antimonopoly law by the price establishing and price maintenance have been brought. In the course of investigation some of the milk suppliers have lowered their prices and it also confirms the unreasonable price establishing. At the moment, some of those milk suppliers are already appealed by the court to an administrative responsibility.

2.3 *Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behavior? What was the nature and circumstances of the request and how did your agency respond?*

Yes, the Agency receives formal requests from the Government to investigate the increase of prices (fuel markets, commodities market – sale of bread).

In this case the Agency conducts market analysis and in case of discovering of anticompetitive behavior/ or restriction of competition the measures of antimonopoly response shall be applied. The results of investigation will be submitted to the Government/ or any requesting part.

3. Advocacy opportunities and challenges

3.1 *Has your agency had the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy? For example, have you had the opportunity to recommend or advice on commodity price deregulation? Have you had the opportunity to advise on the reform of government or private sector monopolies for the purchase or sale of particular commodities for domestic consumption or export (i.e. single desks)? Have you had the opportunity to advice on the reform of regulations that fix or control prices or quantities? What was the commodity, the nature of the reform and the outcome?*

Yes, the Agency has such opportunity. The Chairman of the Agency participates in the Government meetings and may express his/her opinion on the issues relating or concerning competition policy or the functioning of commodity markets. Moreover, the Agency agrees the adoption of legal acts.

For instance, by the proposal of the Agency some changes are made to “The Law on regulation of trade activity”. Marginal levels of the trading extra change have been established. Control over these levels is established by local executive bodies.

3.2 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

Yes, the Agency had received the Government's proposal to investigate high levels of price increases on the bread market. Therefore, the Agency has analyzed the bread markets of three regions of Kazakhstan and has brought legal cases against certain producers and sellers of bread.

3.3 *Please describe any pre-emptive steps available to your agency to:*

- *Reduce the risk that commodity price volatility becoming a problem in your country?*
- *Reduce the risk that governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?*

Within the framework of activities of the Workgroup on Foods Pricing situation on the domestic and external markets the Agency participates in drafting of prompt and systematic measures aimed at the stabilization of price for foods and provisions. In addition, the power of the law compliance of acts that may affect competition is vested in the Agency. Moreover, the Competition Development Programme for 2010-2014 years is adopted by the Government. According to the Programme the Agency makes annual inventory of legal acts with an aim to identify and eliminate norms and regulations that may restrict competition.

KENYA^{*}

1. Background

Kenya's economy is largely dependent on agriculture and its linkage industries. In 2010, the sector's contribution to GDP was 24% making it the second largest source of income after the services sector. Notwithstanding the notable decline in dependency on agriculture from a high of 85% in the 1980's and 75% in the 2000's, the economy remains vulnerable to commodity supply shocks meaning that any market failure in the agriculture sector always has serious ramifications to the country's economic growth.

The major staple in Kenya is maize [corn]. Maize farming is mostly rain-fed therefore making the activity susceptible to the vagaries of weather which have in the recent past become very common. For example, in 2004 and 2010, acute rain shortage led to a dip in the supply of maize. This led to volatility in prices of the commodity and its by-products i.e. maize flour, corn oil and animal feeds. In 2008, the competition agency conducted a study of the maize sector after the prices of maize and maize meal prices increased by over 50%. The study findings linked the price hikes to supply constraints which were caused by several factors: the destruction of maize in stores and the interruption of maize planting activities following the political unrest linked to the disputed 2007/8 general election; increased costs of inputs such as diesel and fertilizer which minimized mechanized farming and utilization of fertilizer to boost yields and productivity; refusal by most farmers to supply grain to the largest buyer, the National Cereals and Produce Board, (NCPB), which is also the statutory strategic grain reservoir, due to what they termed as non-commensurate prices; additionally, NCPB which enjoys the monopoly on importation of strategic food such as maize could not assuage the situation mainly because it lacked adequate capacity, in terms of budget and systems, to mitigate the price increases. This scenario was further aggravated by the long and bureaucratic process of maize importation, high demurrage costs due to congestion at the only sea port of Mombasa, and other infrastructural inefficiencies which were passed on to consumers in the form of high prices.

The price escalations were also attributed to external factors such as the economic cycles linked to the growing demand for commodities from major economies, notably the BRIC countries for use in bio fuel and cattle feed production. In addition, exchange rate fluctuations played a role, as major commodity markets denominate prices in USD or Euro. Speculative activities by investors who deal with commodities and commodity derivatives accelerated and amplified the number and magnitude of price swings that were unrelated to market fundamentals.

Price fluctuations have also been significant in the energy sector where the price of petrol and petroleum products have increased dramatically in the past decade owing to the rising international crude prices, the inefficient refinery, lack of adequate alternative sources of energy e.g. geothermal, solar and wind power, and also infrastructure inefficiencies - the national pipeline company lacks sufficient transport capacity and the railway system is not a credible alternative. The high prices in this sector also contribute to increased prices of agricultural commodities e.g. maize, since diesel is used by tractors and gasoline is used in transporting agricultural products to the markets. The infrastructure bottlenecks in the port of Mombasa have also had some ramifications in prices in the neighbouring countries which import their

^{*} By Francis W. Kariuki, Acting Director-General and Ms. Beldine A. Omolo, Acting Head of Consumers Affairs Division, Competition Authority of Kenya. The views expressed herein are generally the writers'.

commodities through the port. These countries also have similar climatic conditions as Kenya's, which means that their commodity prices are also usually high making it difficult for Kenya to rely on them for any kind of assistance.

2. Involvement of the Competition Agency

2.1 Maize sector study

The competition agency undertook two investigations, one at its own initiative following the increased maize and maize flour prices in 2008 and the other in 2011 on the directive issued by the Minister for Finance¹, following 'increased costs in the prices of essential commodities'. The need to undertake the study of 2008 was buttressed by a media report alleging that cereal millers were operating a cartel since *"75% of the milling firms belonged to three families who also controlled the importation, transportation and distribution of maize and wheat besides having vast interest in other food items such as rice. In addition to hoarding allegations, the families were also planning to build a second bulk grain handling facility at the port of Mombasa to gain control of the food market and therefore deter small and medium firms from participating in the sector"*²

In cognizance of the fact that maize is a local staple and the public outcry was likely to degenerate into a national security matter, the competition agency intensified investigations in the sector narrowing on leads that the millers' trade Association could have been responsible for propagating anti-competitive conduct. The study revealed that the milling sector had 98 firms, most of which were operating below capacity because of shortage of maize caused by reasons highlighted in chapter 1 above.

Specific sections of the trade Association's constitution were found to have anticompetitive effects. For example, the main object of the Association was *'to create a forum for millers of wheat and other cereal crops with a view of harmonizing, monitoring, evaluating and stabilizing, marketing, distribution and pricing of products arising there from'*. Specific clauses also allowed for sharing of market data. Another anomaly was that the trade association was registered under the Companies Act as a private company limited by shares. This meant that membership was limited to fifty (50) members. Additionally, membership was restricted to millers with a milling capacity of at least 50 metric tons per day. This portrayed the Association as an exclusive membership club and not a trade association. The exclusivity clause was used to unjustifiably lock out eligible and willing persons from joining the Association and was therefore in breach of the competition law.

The investigations further unearthed 3 merger transactions that had been consummated without the agency's authorization. The agency is reviewing these transactions with an objective of invoking the provisions of the law. The agency also ordered for the deletion of the contentious clauses contained the Association's Articles and Memorandum. The Association was required to register itself under the appropriate law, the Societies Act, in tandem with its activities as a trade association.

Notwithstanding the above achievements, some legislators attempted to introduce a Bill in Parliament to control prices of essential commodities e.g. maize as a way of addressing the price challenge. This move was opposed as populist and not workable by the Competition Agency, sections of Government, consumer bodies and other stakeholders.

¹ Business Daily Newspaper April, 2011.

² Daily Nation Newspaper March 21, 2009.

2.2 *Petroleum sector study*

A number of studies have been undertaken in this sector as a result of allegations of ‘cartel activities.’ The allegations are made by politicians whenever local prices increase regardless of their cause. Two studies conducted in 2005 and 2008 by an inter-ministerial taskforce and the competition agency respectively shed more light on the market dynamics.

The studies were also carried out owing to the importance of petroleum as the leading source of commercial energy that accounts for about 80% of the country’s energy requirements. The study revealed that the sector continues to face several challenges such as inefficient refinery, poor roads and rail network to facilitate quick transportation, and a capacity constrained national pipeline company.

Other findings of the two studies indicated that the petroleum market is oligopolistic. Nonetheless, a number of independent oil marketers which had entered the market were subjecting the big firms to price competition. The study demystified the cartel allegation after it found out that prices differed across similar outlets and different geographic markets suggesting that there was some level of competition. The study recommended that the Government should, among others, facilitate the entry of independent oil marketers and enhance the upgrading of infrastructural facilities, right from the port of entry to the regional depots. The government was also urged to explore alternative energy sources to mitigate effects of dependence on international crude.

3. **Advocacy activities and challenges**

The Agency, through these studies, highlighted the importance of a strong and modern competition regulatory framework to realize the benefits of a market based economy. This led to the review of the then competition law resulting in the enactment of the current Competition Act, and a new regulatory agency.

The agency also persuaded the Executive to oppose the initiative by the Legislature to impose controls on the price of maize because it was likely to lead to emergence of parallel markets and also attract a lot of resentment from farmers who needed to recoup their production costs through better prices.

However in 2011, the Government, due to increased pressure from the Legislature, introduced price regulation for petroleum products. A formula to calculate prices and which is provided for under the Energy Act was invoked by the sector regulator, the Energy Regulatory Commission (ERC). The competition agency advised against this move when it was brought up for discussion. It advocated for the empowerment of independent oil marketers because of their role in moderating fuel prices. It also recommended for improvement of the supply chain infrastructure, from the port to the regional collection depots.

Despite the use of the formula, petroleum prices have continued to increase reflecting the prevailing market conditions. Currently there are calls by the same Parliamentarians³, for the disbandment of ERC because it is believed to have failed to tame the rising fuel prices. Fortunately, there are initiatives towards improving the petroleum supply chain, through increased funding to improve the port jetties and the pipeline capacity. Also, the government is investing in the exploration of alternative sources of energy, especially wind, geothermal and solar.

In the maize sector, the Government has undertaken measures to ensure adequate supply of maize, rather than setting prices. This has been through increasing (a) the budget for provision of affordable inputs [maize seed and fertilizer]; (b) the acreage under irrigation farming rather than relying on rain fed

³ Daily Nation 17th November 2011.

agriculture and (c) the uptake of maize reserves and storage facilities. Due to the fact that these measures are long-term, Legislators re-introduced The Essential Goods Act, with the aim of controlling the retail prices of essential commodities e.g. maize flour, petrol, rice and edible oils. However, through the agency's initiative, and the support of the Executive, the Law was watered down by requiring the Minister for Finance to consult 'the industry while setting the maximum prices'. The Constitutionality of the Act is also a matter of discussion in some quarters since the new Constitution recognizes a market-based economy.

4. Challenges and the way forward

The main challenge facing the agency in its advocacy initiatives is the demand by politicians for quick solutions to price increases even when the causes are not related to lack of competition. Nevertheless, the competition agency has proposed measures to be undertaken in respect of addressing supply shocks in the two sectors to ensure that the prices volatilities are managed.

In the petroleum sector, the Agency has successfully advocated for the improvement of the supply chain infrastructure which, due to its inefficiency, has been causing prices to rise. Also, the refinery, which is a toll-refinery, will be transformed into a merchant refinery and the jetties used in offloading the products at the port of Mombasa are earmarked for modernization. The agency has also approved three acquisitions in this industry **with conditions**, to tame possible abuse of dominance by the larger oil marketers. In addition, the Government has increased the budgetary allocation and also provided guarantees towards the development of alternative sources of energy. This will minimize demand for petroleum products and hence temper the price spikes.

Regarding maize production, the Government has increased funding for initiatives aimed at increasing and sustaining supply and also minimizing its demand. These measures include increasing acreage under irrigation; increasing budgetary allocation for provision of fertilizers and seed and also for uptake and storage of the maize. The government is also investing heavily on roads to facilitate quicker access to markets and to minimize the cost of transporting maize grain from the farms to the markets. To facilitate marketing and to guard against exploitative middlemen, the Government is encouraging the formation of cooperatives for small scale farmers.

However, the above measures, in the case of maize, are facing serious challenges due to fast pace of population growth that has put a lot on strain on agricultural land. Farms have been subdivided to small acreages that are not efficient for production. Similarly the over use of the same land has diminished the fertility of the soils further reducing crop yields. Government has therefore to step up its population control campaigns, while encouraging land consolidation where possible.

The fuel price problem has also affected agricultural production because costs of production have increased. This translates to higher output prices.

LATVIA

Background

In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).

Since year 2004 Competition Council of Latvia (CCL) monitored the situation in the sectors of grain, bread, milk, sugar, fruits and vegetables. In the sectors of grain, milk and edible oil CCL analyzed among other things the tendencies of prices and the reasons for them. As refers to the significant volatility in the prices of the mentioned commodities we have to mention the following about the most important commodities:

1. Grain and downstream products

In the last years the significant increase in grain price took place in the beginning of 2007.⁴ In January 2008, food wheat prices compared with January 2007 and January 2006 have increased by 70% and 111%. Feed wheat prices – by 42% and 108%, feed barley – by 32% and 93%. In April 2008 prices compared with April 2007 have increased by 70%, but compared with 2005 they have increased by 184%. The average prices for feed barley in April 2008 compared with April 2007 and April 2005 have increased by 54% and 152%. The wheat price culmination in Latvia was April 2008. In May and June 2008 prices have decreased.

Increase in food wheat has resulted in increase of flour and in the final – bread prices. The data received during the market inquiry done by CCL shows that flour price forms 30-60% of bread price (depending on the technology). In the period of time from 2006 and 2007 as bread producers have informed the prices of flour from the food wheat and rye increased regularly, during 2006 by 8% and during 2007 by approximately 43%. From the beginning of 2007 the retail prices growth rate of bread was has been higher than the purchase price of flour increases, so that it can be concluded that the bread price growth rate was not proportional to the increase in flour prices⁵.

In 2009 the increase and reduction of bread consumption price took place. In January the prices of bread have increased by 197,5% compared with the level of price in 2005, and in the end of 2009 there was the reduction by up to 186,2% compared with the level of price in 2005.

In the end of summer 2007 there was significant – up to 100% – and rapid increase in price of buckwheat. Short before this increase there was the deficit of this product in the market.

⁴ Informative report of the Ministry of Agriculture „On the situation in the grain sector”, 2008. http://www.lilka.lv/attachments/056_situacija_graudkopiba.doc

⁵ Competition Council, Report on the supervision on the bread market (For the period of 2006-2007). Public version. http://www.kp.gov.lv/uploaded_files/KPPP038MaizesUzraudziba.pdf.

1.1 Milk and related (downstream) products

CCL observed the situation in the milk sector in 2004-2005 and in 2006-2007.

After relatively long period of stability (from 2000 till 2003) milk purchase and retail prices have increased in 2003. Comparing with the 2000 in 2004 prices increased by 30% and in 2005 – by 50%. Besides also milk purchase prices have increased significantly in the period of July-December of 2007. The increase was from 160-180 Ls/t (~230-260 EUR/t) to 230-250 Ls/t (~330-360 EUR/t) or by about 40%. The purchasing price forms about 60% in the price of milk, offered by milk processors, and about 40% in the price of milk, offered by retailers. CCL compared the increase in the purchase price and retail price and established that the increase in the retail price was higher than increase in the purchase price of milk.

1.2 Edible oil

In summer 2010 there was noticeable increase in price of edible oil in wholesale and retail. We have not define the precise value of increase, because there were a lot of sorts of edible oil and prices have increased differently.

1.3 Are the price volatility in these commodities, and the causes of that volatility, global, regional or domestic?

1.3.1 Grain (flour, bread)

Price increase was global, according to the information published by Ministry of Agriculture the reasons for price increase was the poor cereal harvest in Ukraine, Hungary, Romania, Bulgaria, USA, Australia, and also the fact that the big part of grains were used for the producing of bioenergy. In the sector of grain as producers of flour say the price tendencies are global and the main index for the price volatility in local markets is the prices in European and world's exchange of commodities. The real costs of production are not the main factor which affects the prices. The increase in the price of buckwheat was local (Latvia) due to poor harvest in Latvia and to more attractive prices for buckwheat in Poland and Lithuania.

1.3.2 Milk

The purchase price increase in 2007 was likely regional (European); as it is mentioned in CCL Report on the supervision on the milk market (for the period of 2006-2007) there was the lack of raw milk in all the Europe and at the same time the crisis in energy sector took place, which affected the prices as well.

1.3.3 Edible oil

CCL paid special attention to the rapeseed oil as there was noticeable increase in retail price. As rapeseed oil is the exchange commodity so increase in price was global, said the wholesalers. The data from the Rotterdam exchange shows that the increase began in May 2010 and stopped in January 2011.

1.4 Does your agency have any ongoing / pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviors in these markets (both domestic and foreign markets)?

CCL does not monitor the prices of commodities routinely in the lasting base. Firstly because CCL is the small authority and it does not have enough resources for such monitoring and secondly the price increase does not mean automatically that the violations of the competition rules occur. CCL follows the

situation in the market and if it sees the necessity to obtain more information on the situation in the markets, it opens market supervision procedure. During the market supervision accordingly to the aims of this process CCL can obtain and analyze the information on prices, quantities, behavior of market participants from different levels of supply chain. It is not problematic for CCL to collect the data from the domestic market, but if the information from foreign markets is necessary, CCL need to cooperate with national competition authorities. Receiving information from foreign market participants in the market supervision procedure may be problematic.

2. Competition law enforcement & formal investigations

2.1 *Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities including: Merger assessments; Cartels and horizontal agreements; Vertical restrictions; Abuse of dominance actions; Any price control or other actions to regulate prices. Please explain how the matter came to the attention of the agency, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

Please see the answer in Annex. Relating to the price control or other actions to regulate prices CCL does not control them and can not affect them, it is outside of competence of CCL.

2.2 *Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

Yes, as it is mentioned above CCL regularly undertakes the market supervision. Usually the reason for undertaking of market supervision is the need to survey the situation in the market, because of perceived market malfunctioning, complaints, political calls. The types of analysis undertaken in the process of market supervision depend on the specialties of the aim of the supervision – what is the subject which CCL wants to learn. As a rule CCL analyses structure of the market, level of competition, barriers, supply chain, sales/purchase channels, dynamics of prices, structure of price and reasons for price increase, sales/purchase volumes and agreements between market participants.

CCL can not impose any remedies to the market participants in the frame of market supervision. If CCL sees any indication of possible violation of CCL it opens a case against market participants, or if necessary can inform the public person responsible for policy making in the sector. If necessary CCL sends to the market participants its recommendations for making the business more compatible with the competition rights, indicating the risks from the Competition Law point of view.

2.3 *Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behavior? What was the nature and circumstances of the request and how did your agency respond?*

CCL at least from 2004 has not received formal requests from the government or public organizations to investigate commodities markets or to put downward pressure on prices. However informal pressure is made by the society through the mass media. Mass media reflects the events in the markets including the forecasts on the price increase and sometimes these publications forces CCL to react.

In 2009 government put the special attention to the problems in the milk sector. Particularly the problem was in the worsening relations between the biggest supermarket chains and suppliers of milk products which could lead to higher consumer prices in retail. The government asked the Ministry of

Economy to analyze the situation and to evaluate the possibility to reduce the maximal market shares of the biggest retailer forcibly or apply other measures in order to limit the market power of retailers and supplier's dependence on retailer. CCL participated in the analysis and gave its report on the situation. At that time CCL was already aware of the problems in the Latvian food retail because a number of market supervisions in the commodity sectors have been already finished.

3. Advocacy opportunities and challenges

3.1 *Has your agency had the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy? For example, have you had the opportunity to recommend or advice on commodity price deregulation? Have you had the opportunity to advise on the reform of government or private sector monopolies for the purchase or sale of particular commodities for domestic consumption or export (i.e. single desks)? Have you had the opportunity to advice on the reform of regulations that fix or control prices or quantities? What was the commodity, the nature of the reform and the outcome?*

Firstly we would like to note that the processes related to the transformation of economy and transition to the market relations are finished more then 15 years ago. The commodity price deregulation, commodity markets demonopolization are not actual issues now as well other market functioning conceptual matters. There are no state/private monopolies in the commodity markets, the prices are not regulated. Although, of course, CCL sees room for improvements – CCL always uses the opportunities to reach the market participants or government with its recommendations, warnings, and risks indications if it sees the possibilities for improvements. In the formal decisions even if the violation is not established CCL uses to indicate activities which are prohibited by competition rules, activities which in relevant circumstances could be considered like infringements, recommendation for better understanding of the responsibility of market participants which are in dominant position. CCL in last years much attention pays to the markets of milk and also the retail sector, which is very concentrated with at least two leading chains.

3.2 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

At beginning of 2009 during the discussions on possible retailers' abuse of their bargaining power in respect of suppliers as well as possible too huge markups of retailers there were discussions on possibility to regulate the markup of unspecified commodity goods. However further direction of this draft law in parliament was stopped already initially. There were no other similar proposals.

3.3 *Please describe any pre-emptive steps available to your agency to: i) Reduce the risk that commodity price volatility becoming a problem in your country? ii) Reduce the risk that governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?*

In case of price increase CCL can open a formal procedure (market supervision or, if there are suspicions on the violation of Competition Law – administrative procedure) and clarify the reasons of the price increase. Steps available to CCL to diminish the mentioned risks depend on the reasons of price volatility. Economy of Latvia is small and opened, so if the commodity (like grain, sugar, edible oil etc.) price increase follows the international tendencies CCL does not have any tool to prevent this influence. The price is shaped in result of demand and supply, CCL can not reduce the speculations in exchanges as well CCL can not restrict the market transparence and information inflow about prices in exchanges to

Latvian producers. If the reason of price increase is related to the specific regulation of the market, CCL will refer to the responsible ministry with a proposal to preclude possible obstacles with negative impact on prices. For example regarding sugar market CCL requested the European Commission to find appropriate solution to this market.

ANNEX. ANSWER TO THE QUESTION REGARDING COMPETITION LAW ENFORCEMENT & FORMAL INVESTIGATIONS

Mergers					
No.	Products, markets	Date of notification and clearance	Type of merger	Names of companies	Decision
1.	Distribution markets of the vodka, brandy, cognac, liquor, sparkling wine and another alcohol markets in territory of Latvia.	N: 08.06.2007. C: 08.10.2007.	Vertical	1.,,S.P.I. Worldwide Trade Limited" 2. SIA „AV&D" 3. SIA „Interlat"	Clearance with commitments
2.	Breast milk substitute-market, market of the porridge	N: 15.06.2007. C: 10.10.2007.	Vertical	1. Nutricia International B.V. 2. SIA „Amajja"	Clearance
3.	Frozen and /or chilled food distribution market and ice cream market in Latvian territory	N: 27.06.2007. C: 24.10.2007.	Horizontal	1. SIA „Rīgas Piensaimnieks" 2. a/s „FFL"	Clearance
4.	Quark products market and yogurt market in the territory of Latvia	N: 21.11.2007. C: 18.12.2007.	Horizontal	1. Alta Capital Partners S.C.A SICAR 2. AS „Tere" 3. AS „Kalev Chocolate Factory" 4. AS „Kalev Paide Tootmine"	Clearance
5.	Daily consumer goods retail market in supermarket sector in Latvia.	N: 12.12.2008. C: 18.12.2008.	Horizontal	1. SIA „Palink" 2. SIA „Ozolu nams" 3. SIA „Nelda" 4. SIA „A.F.P. of North America Inc." 5. SIA „LSU"	Clearance
6.	Distribution markets of the vodka, brandy, cognac, liqueur, sparkling wine and common alcohol market in territory of Latvia.	N: 27.03.2009. C: 19.06.2009.	Horizontal	1. SIA „SPV Distributor" 2. SIA „S.D.V." 3. SIA „L.D.V." 4. SIA „MONO M" 5. SIA „S.Alko"	Clearance with commitments
7.	Meat products market, which is further divided into the following segments: boiled sausages, sausages, half-smoked and dried starch sausage, smoked meat, sausages, grilled sausages, meatballs, ravioli.	N: 03.03.2010. B: 08.06.2010.	Horizontal	1. AS „Rīgas Miesnieks" 2. AS „Jelgavas gaļas kombināts"	Clearance with commitments
8.	Daily consumer goods retail market in the supermarket sector in Sigulda, Sigulda region, as well as part Līgatne, Krimulda, Inčukalns county area, at the same time also evaluating the undertakings concerned competitiveness in the Latvian territory.	N: 14.07.2010. C: 11.11.2010.	Vertical	1. SIA „Plesko Real Estate" [Rimi groep] 2. SIA „Ilga-Sigulda"	Clearance with commitments, case is in the court procedure

Cartels and Horizontal Agreements							
No.	Date of initiation and closure	Source of information for the initiation	Markets, products	Type of infringement	Short description of conduct	Analysis undertaken	Remedies
1.	Initiation: 07.05.2003. Closure: 20.12.2004.	Information in mass media that the biggest producer of eggs called to other producers not to apply discounts in Eastern celebration period	Egg distribution market in territory of Latvia	Cartel – price fixing	A concerted practice of price fixing and exchange of information existed between 1 Latvian egg producers. The coordinated action aimed at increasing the sales price of eggs and retaining the desired level. By joint planning of specific price increases for eggs of hens, the egg producers' goal was to eliminate the risks that inevitably would result if each company individually for egg price increases. In view of the evidence in the file, CC concluded that egg producers have participated in concerted practices aimed at the competition restriction.	Price dynamics analysis for the long period of time in connection with the dates when the producer's meetings in the association were held. Price dynamics analysis – is the price is such that one must be taking into account the seasonal diminish of demand.	CCL imposed fines to 11 companies
2.	Initiation: 14.10.2005. Closure: 11.04.2007.	Information in mass media – flour producers have said that have plans to increase the prices	Flour distribution market in territory of Latvia	Cartel – price fixing	In the case was the suspicion of a horizontal price fixing agreement between flour producers	Correlation between purchasing price of grain and selling price of flour. Purchase and sales channels. Communication between competitors.	Infringement was not found
3.	Initiation: 14. 05.2008. Closure: 19.12.2008.	Application from the former employee, who informed that he was the witness of the conversation between the members of the boards of competing undertakings on the price increase for beer and other products	Beer distribution market in territory of Latvia.	Cartel – price	In the case was the suspicion of a horizontal price fixing agreement between 3 producers	Total sales volumes of beer and market shares of competitors, dynamics of these indexes. Price for different clients, dynamics of prices, effect of seasonality. Factors which effect the price, cost structure, producing capacity	Infringement was not found

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4.	Initiation: 11.02.2009. Closure: 12.12.2009.	Information collected in the process of market supervision – evidences that producers exchange with commercial sensitive information (budgets, costs, prices, sale volumes etc.)	Egg distribution market in territory of Latvia	Cartel, other horizontal cooperation	In the case was found that involved egg producers have exchanged information on hen egg prices and marketing rules, production and sales volumes. The aim of the concerted action was to restrict competition.	Analysis to define how much the exchange of information can influence the market and distort competition: market structure and concentration, import.	CCL imposed a fine.
5.	09.12.2010.	Testimony	Flour distribution market in territory of Latvia	Cartel – client allocation	Suspicion that two flour producers agreed on client allocation. The case is still pending	Migration of clients, sales volumes, production capacity, communication with clients, price dynamics.	
6.	09.09.2011.	Information from the cartel case (received in down raid) mentioned in the point 5	Flour and other grain product supply for the public procurement	Cartel – collusion in public procurement	Suspicion that two flour producers agreed to divide the procurement (by subcontracting each other) in order to achieve the highest price. The case is still pending	Analysis of agreements, prices, communication, production capacity, sales volumes in general and sales volumes to private purchasers, real ability to deliver.	
7.	15.06.2011.	Information from market supervision – e-communication between raw milk producer and processor	Raw milk sales	Cartel – price fixing	Suspicion that two raw milk cooperatives form their sale price policy jointly. The case is still pending	Analysis of price offers for purchasers, cooperation between involved parties in the joint project of milk factory building.	
Vertical restrictions							
1.	Initiation: 12.05.2004. Closure: 03.11.2004	Information obtained in the sugar market supervision – agreements	Sugar distribution market in territory of Latvia	Resale price maintenance	AS „Liepājas cukurfabrika” (sugar factory) limited SIA „Greis Logistics” (wholesaler) freedom to set resale prices of sugar and limited SIA „Greis Logistics” ability to compete with other distributors operating in the market. Consequently, it was concluded that the agreement was designed to affect the resale price, which is a restriction of competition.	Analysis of agreements	CCL imposed a fine

2.	Initiation: 25.02.2005 Closure: 29.03.2006.	Own observations in the market (references of end price in packages indicated that the relevant sort of bread were sold at the same price in all the retail)	Bread distribution market in territory of Latvia	Resale price maintenance	A/S „Hansas maiznīcas” (bread producer) limited the retailers’ freedom to define certain kinds of bread resale price. The goal of such activities was to influence the resale price, so that such action constitutes a restriction of competition.	Analysis of agreements. As violator pushed that the same price was just a short term marketing action, the analysis was undertaken on how long period of special price could be recognized as special marketing action. CCL established that special price which was applied for 4 months should be considered like regular price but not like short term action price.	CCL imposed a fine.
3.	Initiation: 07.11.2007. Closure: 23.01.2008.	Information received in the merger case mentioned in point 1 in the table part “Mergers” of this annex.	Alcohol distribution market in territory of Latvia.	Resale price maintenance	Analysis of agreements	Analysis of agreements	CCL imposed a fine.
4.	Initiation: 09.09.2010. Closure: 08.04.2011.	Complaint from the market participant	Rental of retail space in shopping centres market in one administrative area	Exclusion of competitor	CCL established a prohibited agreement between retail chain (RIMI group) and lessor of selling space in shopping malls Mamo J Ltd. Agreement took place as prohibition to lease selling spaces to other undertakings without the permission of RIMI group and as restricting the ability of competing specialised food shops to commence economic activity in particular shopping malls	Definition and analysis of relevant market (defining the commercial space in shopping malls separate from all commercial space), analysis of how the agreements affect suppliers, small competitors, consumers	CCL imposed a fine, the case is in the court procedure

Abuse of dominant position							
1.	Initiation: 29.04.2009. Closure: 30.11.2010.	Information received in market of retail supervision	Daily consumer goods retail market in supermarket sector in Latvia	Abuse case, unjustified payments for the placement in the shop	The new conception – dominant position in retail – was put into practice and developed in this case. Dominant position in retail is a special position of retailer when it is dominant only on the supply side. It was established that retailer RIMI Latvia Ltd (one of two biggest retailer in Latvia) abused dominant position in retail trade by imposing unjustified payments (discounts) on Valmieras piens JSC (milk processor) for the placement of its goods in low price shops Supernetto owned by RIMI Latvia Ltd.	Definition and analysis of relevant markets (procurement market, market in which supplier is dependent on retailer), definition and analysis of the position of RIMI, analysis of is the supplier dependent on RIMI, analysis of cooperation (agreements) between retailer and suppliers, analysis of volumes sold in RIMI, Supernetto and other shops in supermarket sector, analysis of supply prices and discounts.	CCL impose a fine to RIMI, case is in the court procedure
2.	Initiation: 21.05.2009. Closure: 13.01.2011.	Information received in market of retail supervision	Daily consumer goods retail market in supermarket sector in Latvia	Abuse case – applying unjustifiably lengthy payment period for the delivered products	It was established that one of the two biggest retailers – Maxima Latvija – abused its dominant position in retail by applying unjustifiable lengthy payment period for the production delivered by small supplier- bakery Siguldas Maiznieks Ltd.	Definition and analysis of relevant markets (procurement market, market in which supplier is dependent on retailer), definition and analysis of the position of Maxima, analysis of is the supplier dependent on Maxima, analysis of cooperation (agreements) between retailer and suppliers, analysis of payment periods in general, analysis of financial situation of Siguldas Maiznieks (debts). Maxima instead of making payments in fair and reasonable period, for the period have paid the percentage of sum which should be paid for products. It was analysed whether these interest payments could compensate that the supplier did not receive all the sum in fair period.	CCL impose a fine to RIMI, case is in the court procedure

3.	Initiation: 24.02.2011. Closure: 11.08.2011.	Complaint of the supplier of milk and milk products	Daily consumer goods retail market in supermarket sector in Latvia	Abuse case, applying of unjustified payments (discounts) to the supplier	RIMI has a dominant position in the retail trade. The complaint was about the RIMI requirement for the suppliers to give higher discounts. The supplier refused to give the greater discounts. After some time the supplier initiated to increase the prices for some products, RIMI refused the price increase, the supplier considered that RIMI pressed it to deliver on the old price (almost below costs). CCL established that RIMI would have rights to require the greatest discounts if the sales volumes would be greater then in the previous period. RIMI does not have the obligation to purchase the production from the suppliers on any price, established by suppliers.	Analysis of the volumes and prices and discounts of production purchased by RIMI from some milk processors.	No infringement established.
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LITHUANIA

1. Background

1.1 In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).

There has indeed been some volatility in the prices of commodities in Lithuania. The Competition Council of the Republic of Lithuania (the “CC” or the “Competition Council”) has been primarily concerned with the volatility of prices in the groceries (mainly milk and other dairy products, flour, etc.) and fuel sectors (both wholesale and retail level). These two sectors have also been the major concern of the government and the general population.

With regard to the fuel sector there have been significant retail price fluctuations (increases) during a period before the end of 2009 until 2010, which led to Competition Council opening an investigation as to the possible anti-competitive agreements between the market players.

After having observed substantive price increases in August – September 2010 in the groceries sector the Competition Council, after having done some preliminary market overview, has opened an investigation into the possible anti-competitive behaviour in the groceries sector.

1.2 Are the price volatility in these commodities, and the causes of that volatility, global, regional or domestic?

The Competition Council has not conducted any specific investigation as to the “territorial” nature of the causes for price volatility, however, the formal investigations and market studies into the issue have indicated that there might be both global and domestic causes for the observed fluctuations. In the fuel sector the global tendencies mainly include fluctuations in crude oil prices (Platts index) while the domestic reasons are primarily related to the regulatory conditions. For instance, the regulatory limitation on the oil stock reserves and quality requirements (which are addressed in more detail in the answer to the question No 2.1. below) significantly limit the competitive pressure on the local market players and therefore allow for a slower or no pass-through of the reduced prices for input products to the final domestic consumers.

With regard to groceries, the Competition Council has in 2010 completed a study concerning price volatility across a wide range of groceries. The purpose of the investigation was to identify the causes of the recent changes in prices for groceries.

The information collected in the course of the investigation led to a conclusion that the price increase trend had been observed both in Lithuania and in other neighbouring markets and the causes for price volatility had not been limited to the national territory. The investigation has also revealed the price fluctuations are also dependent on the number of intermediaries operating in the food product chain, the competitive structure of the elements of the chain and the differences in the bargaining power of the parties.

1.3 Does your agency have any ongoing / pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviours in these markets (both domestic and foreign markets)?

Competition Council is currently conducting monitoring activities both in relation to the groceries and the retail fuel sector.

1.3.1 The fuel sector price monitoring

The monitoring of fuel prices has been initiated 1 December 2009 following an increase in the retail price of fuel. The Competition Council collects daily information on global crude oil prices, the wholesale and retail prices of A-95 gasoline and diesel in certain gas stations. The analysis of the collected data includes assessment of the changes in prices compared to the previous day, impact of crude oil prices on wholesale and retail prices and possible causes of price changes. In addition, Competition Council prepares weekly internal monitoring report on fuel prices in all EU member states and monthly analysis of changes in excise duties and value added tax for fuel.

1.3.2 Groceries price monitoring system

- Cooperation with other state agencies

Since 2010 and with a view to inform the public about food product prices in retail chains, the CC has contracted the State enterprise “Agricultural Information and Rural Business Centre” for the collection and management of information from retail chains. Such information is later published on a specifically established website www.produktukainos.lt.

The website contains weekly data on weighted average retail prices and margins at each level of production and distribution of the 10 most popular food products (milk, butter, curd, ham, sausages, eggs, flour, potatoes, white and dark bread) and price changes of these products over the last period (week, year). In addition to the above, the website also contains more detailed information on weighted average retail price of each item in 5 food groups (meat and meat products, poultry and eggs, cheese and dairy products, grain foods and cereals, potatoes, fruit and vegetables) – 45 products in total with indications of price changes of these over the previous period. The weekly information on average prices of the same food products is provided by each of the 4 major Lithuanian retail chains.

Together with the data on retail prices, the website also contains data on the most important changes in wholesale or production prices of some of the monitored food products in Lithuania and the EU member states as well as average price comparisons among the EU member states and the main reasons of these price differences.

Additionally, the CC has also entered into a cooperation agreement with the Lithuanian Institute of Agrarian Economics in order to carry out an analysis of the price structure of the retail sales of groceries marketed in Lithuania, the elements of the price structure of those products (VAT, processing, retail) and other related aspects.

1.3.3 Monitoring pursuant to the Law on the Prohibition of Unfair Practices of Retailers

Another means for supervising behaviour at the retail level, in particular the retail groceries sector, has been vested in the Competition Council through the adoption of the Law on the Prohibition of Unfair

Practices of Retailers (the Law) in April 2010¹. The main purpose of the Law is to ensure the balance between the interests of suppliers and retailers having a significant market power.

Acting in accordance with the provision of the Law which vests in the CC the power to carry out monitoring and to report annually to the Government on the achievements of objectives sought by this Law, the CC initiated an inquiry into the retail chains. The first report was submitted 1 March 2011. This report concluded that all clauses prohibited by the Law were removed from the contracts with suppliers. However, the analysis revealed that some contracts contained additional clauses regarding fixed discounts that did not depend either on the amount of supplier's goods sold, or on reasonable transportation or advertising costs, etc. Another important finding was that some contracts contained a provision regarding the application of a basic price for all retailers. On the basis of these findings, amendments to the Law are currently under consideration in the Government.

2. Competition law enforcement & formal investigations

2.1 *Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities: Please explain how the matter came to the attention of the agency, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

2.1.1 *Merger assessments*

The Competition Council has been assessing a number of notified mergers in relation to commodities. The markets assessed included, among others, retail and wholesale trade of pesticides, seed, grain, production of flour, distribution and retail sale of oil. There have, however, been no merger prohibitions in relation to commodities and one instance, where the merger was abandoned following the preliminary findings of the CC.

One of the merger cases, namely, the *AmberTrust/Litagros chemija (2005)*, between undertakings directly or indirectly active of the markets for the purchase, storage of grain cultures and sale of flour meant for bread and bakery products was cleared, in particular relying on the fact that upon Lithuania's entry into the EU, the duties upon import of grain and flour have significantly decreased, and duties on imports from the EU Member States have been eliminated and so were the customs barriers. The Competition Council concluded that even taking into account significant share of the market that would have been covered by the merged entities following the merger, there would be no unilateral decisive influence arising as a result of the transaction due to a strong countervailing buyer power from the retail chains and other players of the bread and bakery market.

Assessment of the merger in the market for oil and oil products *PKN Orlen/Klaipėdos nafta (2009)* carried out by the Competition Council in 2009 resulted in the merger being abandoned following the findings that such merger could result in a dominant position on the market. The concerns were primarily raised due to the fact that AB Klaipėdos nafta was established with a view to organise an alternative supply of oil and oil products (dark and light). One of the major segments of the operations of the company is storage of oil and oil products and loading services. The assessment of the infrastructure operated by AB Klaipėdos nafta, and its technical facilities led to a conclusion that the company could have potentially become a competitor of PKN ORLEN in supply of oil products to the Lithuanian market. Therefore, it was concluded that the intended concentration could have resulted in a restrictive effect upon efficient

¹ Law of the on the Prohibition of Unfair Practices of Retailers, 22 December 2009 – No XI-626 http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=406491

competition as it could have strengthened the dominant position of AB Mažeikių nafta in the wholesale market of oil products.

When assessing the competitive effect the CC has also taken into consideration the anticipated changes in supply of raw material after the decommissioning of the Ignalina Nuclear Power Plant, which would result in an increased demand for fuel oil received from Mažeikiai, as well as through AB Klaipėdos nafta (which is a less costly and more efficient supply method than the railway transportation of oil from other States). The CC concluded that the acquisition by PKN Orlen S.A. directly or through AB Mažeikių nafta (ORLEN Lietuva) of AB Klaipėdos nafta would further strengthen the dominance of AB Mažeikių nafta in the Lithuanian energy sector by also affecting the power generation sector.

AB Klaipėdos nafta itself had the necessary capacity to supply fuels both to small and the large retail trade networks trading in fuel. By importing fuels through AB Klaipėdos nafta major retail gas trading networks could create an efficient competition to PKN ORLEN, affect the prices of PKN ORLEN and such price reduction could eventually be passed through to consumers. The acquisition by PKN Orlen S.A. of the control of AB Klaipėdos nafta would significantly reduce the alternative possibilities for other networks engaged in trading in oil products to purchase all kinds of oil products. After the analysis of the possible effect of the transaction, the CC filed to the Economics Committee of the Lithuanian Parliament (Seimas) that such concentration could not be authorised.

2.1.2 *Cartels and horizontal agreements*

In 2007 Competition Council has finalised two investigations on anti-competitive agreements relating to commodities, both concerned groceries. Additional two investigations are still ongoing.

- The Dairies case – exchange of commercially sensitive information

The first investigation concerned an exchange of commercially sensitive information among milk processing companies (*Dairies II*). The investigation has been triggered by the increase in prices of food products in the middle of the year and the interim findings of the analysis of the price increase conducted by the experts of the Competition Council.

This investigation involved analysis of the different levels of dairy products supply chain – purchasing of raw milk and marketing of various dairy products. As a result of the investigation, the Competition Council concluded that having regularly exchanged sensitive information which provided milk producers with data on prices on the procurement of raw milk, as well as quantity data, the undertakings active on the milk and dairy processing market were able to precisely monitor the activities and strategic decisions of their competitors and align their behaviour accordingly.

- Meat processing market

In 2007 Competition Council also closed an investigation into possible anticompetitive agreements between meat producers and their association. There was a trend of price increases on the market for processed meat products and a preliminary market analysis suggested that undertakings engaged in the meat processing activities as well as their association could have coordinated their actions related to setting the price and also could have exchanged confidential information. However, the Competition Council did not gather substantial evidence that would have allowed it to conclude that a price-fixing agreement has been concluded between the undertakings active in the meat processing market.

- Investigation into the pricing practices in the milk, milk products, flour and bakery products markets

After having observed substantive price increases in August – September 2010 in the groceries sector and having received additional information from the Ministry of Agriculture, the Competition Council has conducted an assessment of the change in the key input prices as well as the wholesale and retail price for dairy and grain products. Such analysis showed that the change in the input price alone did not fully account for the extent of the increase in the retail prices for dairy and grain products in the country. The CC's analysis revealed that the prices for groceries had not increased exclusively for objective economic reasons and that the fluctuations could have emerged due to a weakening of competition. Based on these findings, the CC initiated investigations under the national Competition Law. The investigation, which is still ongoing, is aimed at assessing whether a number of undertakings engaged in the production and/or marketing of food products (milk and milk products, flour, bakery goods, i.e. processed goods) have participated in anti-competitive agreements or concerted practices that could have possibly led to the increase in retail prices of mentioned products.

- Investigation into the horizontal agreement in the fuel sector

Following a substantial increase of retail fuel prices the Competition Council has started an investigation into the possible anti-competitive price-fixing agreements in the market for retail sales of fuel through the gas stations. The investigation did not reveal price-fixing practices between the majority of the gas stations and therefore was terminated with regard to most of the gas station owners. The investigation with regard to a few remaining undertakings is still ongoing.

2.1.3 *Abuse of dominance actions*

The major abuse of dominance case concerning commodities was carried out in the market for oil and oil products. The dominant undertaking (domestic oil refinery undertaking) granted annual loyalty rebates and non-compete obligations as well as imposed restrictions upon parallel import and resale possibilities. The infringement included instances of discriminative discounting with a view of preventing import of oil products into the Lithuanian territory. This conduct was found to have infringed Article 102 TFEU and its national equivalent. The final decision is currently under appeal.

2.1.4 *Any price control or other actions to regulate prices.*

Pursuant to the Article 4 of the Law on Competition, the Competition Council is entitled to examine whether certain provisions of the laws or other decisions adopted by public authorities are in compliance with the Law on Competition. Article 4 of the Law on Competition prohibits adoption of laws or other decisions that grant privileges or discriminate against any undertakings which may bring about differences in competitive conditions for competitors in the relevant market.

In 2010, the Competition Council carried out an investigation concerning the actions of the Ministry of Energy (the "Ministry") that refused to issue an authorisation to UAB "Lukoil Baltija" to accumulate and store the oil products reserve in the Republic of Latvia. The investigation led to a conclusion that such actions of the Ministry infringed Article 4 of the Law on Competition.

The CC noted that by unreasonably refusing the authorisation to UAB "Lukoil Baltija" to store part of its fuel reserve in another country and by not providing any reasonable grounds for such a refusal, the Ministry has not only restricted the possibilities of the company to procure the storage service outside Lithuania, but has also prevented the it from acquiring the storage service at a lower cost. Since at that

particular time there were no vacant storage facilities in Lithuania, the company was prevented from acquiring the service outside the country. As a result of such actions by the Ministry import of fuels into Lithuania was artificially restricted and competition conditions in the wholesale fuel market were adversely affected, as Lithuanian consumers were forced to purchase fuels from a single producer only. Furthermore, it produced a negative effect upon the undertakings operating in the retail fuel markets, since they were prevented from price competition.

2.2 *Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

There have been two market analyses assessing the fuel sector. Both of them were primarily concerned with the regulatory environment and its implication for the competitive structure on the fuel markets.

First, simultaneously with the investigation of the decision of the Ministry of Energy refusing to grant UAB "Lukoil Lietuva" an authorisation to store part of its required oil reserves in Latvia, the CC in 2010 carried out an investigation concerning the compliance of the Rules on the formation, management, accumulation and control of State oil and oil products reserve (the "Rules"), adopted by the Lithuanian Government in 2002, with the requirements of Article 4 of the LC. The decision of the CC concluded that the rule under which only 10 percent of the State oil and oil products reserve could be stored outside of the Lithuanian territory was not sufficient in order not to restrict the oil products import and ensure a smooth functioning of the Lithuanian market, as well as an efficient competition in the wholesale market of trade in oil products. Furthermore, the CC also concluded that the regulation was ambiguous and did not clearly define the basis for calculation of the State reserve allowed to be stored in other States.

The CC concluded that the analysed provision of the Rules infringed Article 4(1) of the LC and, with a view to ensuring enhanced transparency of the decision-making process, recommended the Government to establish a clear and unambiguous procedure for the recognition of oil and oil products as part of State reserve as well as a procedure for the issuance of authorisations to store oil and oil product reserves in other Member States.

During the period of the investigation, the Government has amended the Rules according to which the percent of the State reserve to be stored in other countries was increased from 10 to 30.

At the time of this submission, the Government has also already made a reform allowing 100 percent of the State reserve to be stored in other States from the 1 January 2012.

Second, the Competition Council has also undertaken a market study into the fuel market in the years 2010 and 2011. The trigger for the study was the increase in fuel prices that led to openly expressed concerns by Government and the general public. Competition Council analysed the fuel prices in the retail market in the Republic of Lithuania and in neighbouring countries as well as the tax burden applicable to the retail fuel sector.

The study assessed fuel prices in Lithuania, Latvia, Estonia and Poland during a short period between March 2011 and May 2011 and concluded that the rising price trend was common to all of the assessed countries, while the order of countries according to the level of price varied from month to month. The study also included the assessment of the regulatory burden that revealed legal provisions that might have direct effect on the level of competition in the oil market in Lithuania.

One of the provisions related to the already mentioned limitations as to the amount of oil reserves that could be kept outside of the territory of Lithuania. Second provision, identified by the market study

revealed that substantial quality requirements for the oil products that can be imported to Lithuania could be a reason for higher level of oil price in Lithuania. The study also took account of the fact that there is only one gasoline producer in the country.

2.3 *Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behaviour? What was the nature and circumstances of the request and how did your agency respond?*

The Competition Council occasionally receives applications from representatives of the Government, members of the Parliament or active members of the society reporting about possible competition infringements. These requests are often triggered by the announcements in the media regarding price increases for certain products. As previously described, Competition Council has prepared several reports on monitoring activities regarding prices of food products and fuel in order to clarify the situation. The main problem of these requests is lack of actual evidence of anti-competitive conduct.

Formal investigations opened based on the requests or information from the government or other parts of society are described in more detail in the answer to the question No. 2.1. above.

3. Advocacy opportunities and challenges

3.1 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

Due to the increases in food prices in autumn 2010, a group of members of the Lithuanian Parliament (Seimas) proposed amendments to the Law on Prices of the Republic of Lithuania that concerned imposing a limit on the retail price mark-up. The proposal caused heated debate in the society and divergent views within the legislative system. However, after discussions the proposed amendments have not been adopted. One of the arguments put through by the CC and some other groups was that mark-up regulation might have a negative impact on competition in the retail trade sector and be a cause for additional future price increase. Additionally, the mark-up limitation was thought to also have the ability to drive certain commodities out of the market.

3.2 *Please describe any pre-emptive steps available to your agency to: i) Reduce the risk that commodity price volatility becoming a problem in your country? ii) Reduce the risk that governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?*

The main tool that the Competition Council possesses and that could be used to as a pre-emptive step to reduce the risk of commodity price volatility and prevent any premature responses to this problem mainly includes advocacy. Competition Council plays an important role in the legislative process and is often being consulted by public authorities when new legislation is being adopted.

The CC is currently preparing Guidelines for the Regulatory Impact Assessment that are expected to be passed by the Competition Council in the early 2012. The purpose of these guidelines is to ensure that public authorities active in the legislative process take into account potential competition concerns that could be created as a result of the proposed legislation.

MAURITIUS

1. Introduction

Like most market economies, Mauritius has experienced significant commodity price increases in recent times. Prices of some commodities have risen as much or more than 30% within a year. These price increases have raised pressures on the Competition Commission (CCM) to take actions or to better explain the actions it has taken. As this report shows, the CCM has devoted significant attention and resources to commodity markets. This attention is a reflection of the importance of commodities to the economy of Mauritius, which must import many of the commodities for domestic use rather than producing them domestically.

In the early months of 2011, price inflation of basic food commodities was regularly in the news. The primary products which have attracted attention are basic foodstuffs, such as rice, cooking oil, chicken, petrol and cement. Mauritius has a significant part of its population living on low income and increases in the prices of such basic commodities have substantial impacts on pocketbooks. A peaceful public rally to express dissatisfaction with price levels occurred in April 2011 and attracted substantial crowds.

The public debate about commodity pricing involved the competition authority. For example, the government instituted a Ministerial Committee on the Pricing of Essential Commodities which the CCM was attended.¹ The CCM was repeatedly called upon to justify a supposed lack of responsiveness in the face of rising food prices. Many of the demands for action came from a misunderstanding about what is encompassed in the Competition Act (2007). The CCM explained, in multiple forums, that it was not a price regulator but rather a body that can act only when it has made a finding that a breach of the Competition Act has been committed. The CCM further explained that mere similarity of prices does not constitute proof of a breach of the law. The CCM stated regularly that if world prices rise, Mauritian prices would also be expected to rise and that such price rises are not a competition law violation.

The CCM encouraged the government to respond by helping to improve consumer information and promote careful consumption. Comparisons of price for rice, for example, show that basmati rice can differ in price substantially from the cheapest to the most expensive brands. Rice was not alone in experiencing significant variations between prices for relatively similar products. The government instituted a Price Observatory that would regularly take prices of key consumption items from more than 20 stores and publicly release the store-by-store comparison in prices. The government has thus sought to increase price sensitivity of consumers. The government also provided temporary income supports, reduced tax on gasoline and continued its program of selling “ration rice”, a basic grade of rice that is substantially cheaper than basmati rice.

2. Processed block cheese

Food products have constituted a basic element of the CCM’s law enforcement agenda since its earliest days. The first competition law case of the CCM concerned contracts between the supplier of the

1 The first meeting was held on 24 March 2011.

main brand of block processed cheese and supermarkets. Among other effects, the contracts were found to create barriers to entry for other brands of block processed cheese. The case arose from a complaint.

On 09 September 2010, the Competition Commission of Mauritius (CCM) concluded its abuse of monopoly situation case (INV 001) related to the market of block processed cheddar cheese in Mauritius. IBL Consumer Goods (now IBL BrandActiv), the exclusive domestic distributor, was found to have infringed Section 46 of the Competition Act. As a remedy, IBL Consumer Goods was directed to, inter alia, cease the practice of offering retroactive rebates on Kraft branded block processed cheddar cheese in exchange of premium shelf space for its Kraft branded processed cheddar cheese as well as other Kraft-branded products, including chocolates, biscuits and powdered juice.

On 18 November 2011 the CCM published an ex post evaluation on this case. The scope of this evaluation was restricted to the primary market of block processed cheddar cheese (250g). Block processed cheddar cheese represents more than 90% of the total cheese market in Mauritius.

The evaluation finds that after the CCM issued a direction to stop these agreements, new entry occurred within a year, and prices for block processed cheese began to fall. The HHI fell from 8,200 to a point in the range of 4,000 and 5,000. The annual average price increase for block processed cheese during the pre-CCM intervention period, i.e. from September 2007 to August 2010 was 16.5%. During this time, the report found that the wholesale costs of cheddar cheese in Australia were relatively stable, in terms of Mauritian currency value. In addition, following the entry of two new brands in February and April 2011 respectively, the average price of the two incumbents fell by 4.5%. Moreover, the average lowest price among all processed block cheeses declined by 12.7% compared to the 2010 average price. Consumer benefits from this intervention have been estimated as lying between Rs 130m and Rs 600m.²

3. Cement

The CCM launched a market study, at its own initiative, into the cement market in July 2010 to understand the conditions of competition and recommend action by the Government, if necessary. In 2011, a number of actions occurred: the CCM published the final version of its market study, the Government announced plans to liberalise the cement market, the CCM held a hearing on a plan to liberalise the market, the Government liberalised the market and the CCM issued a recommendation to the government.

Mauritius is a cement importing country, with estimated annual demand at 650,000 tonnes or roughly 500 kg per capita. This is a highly concentrated market with only Lafarge (Mauritius) Ltd and Holcim Cement (Mauritius) Ltd in the distribution of Ordinary Portland Cement Grade 42.5N at the wholesale level. Before liberalisation, the market was subject to State intervention through three interlinked mechanisms: (i) price controls on bagged cement; (ii) imports of cement by the State Trading Corporation (STC); and (iii) import control. Regulations provided that the State determines the total quantity of cement to be imported into the country, of which 50% was ordered by the STC via open tender. The STC did not take delivery but instead required the two incumbent firms to purchase the ordered cement.

The CCM assessed the impact of the regulatory framework on the conditions of competition in the cement market and, to a limited extent, other barriers to entry. The CCM found that competition in the market was constrained by State interventions, mainly by deterring new entry, preventing expansion of existing companies and restricting cement to only one variety.

² See ex post evaluation study Evaluation of CCM Case: *IBL Consumer Goods Sales Contracts with Retail Stores* (18 November 2011) available at <http://www.gov.mu/portal/sites/ccm/pdf/INV001-EvaluationReport-Non-Confidential.pdf>.

The options for reforms included (i) complete liberalisation (i.e. price deregulation and imports liberalisation) which can bring considerable benefits in terms of different varieties of cement on the market, new entry and expansion and encourage innovation; (ii) price liberalisation with import quotas; and (iii) import liberalisation with price controls.

Liberalisation of prices without removing import controls was deemed unlikely to result in benefits for consumers, as importers would have little incentive to compete for one another's customers if they were constrained in their ability to source cement. Liberalisation of imports without removing price controls was more feasible, but the price controls might have deterred new entry, and an alternative approach to assessing world market prices would then need to be found.

The major issue for the CCM and thereafter for recommendation to the Government was on the sequencing of the liberalisation. On one hand, liberalisation prior to entry would increase the risk of price increases in a highly concentrated market. On the other hand, price controls would discourage entry of firms that is expected to make the market more competitive.

The Government chose to liberalise the market completely, via price deregulation and import liberalisation.

The CCM held a hearing in June 2011. After the hearing, the CCM issued a recommendation to the Government that, during the liberalisation, significant attention should be given to ensuring that new importers can physically bring in cement by ensuring appropriate access to port facilities, prompt issuance of import permits and ensuring that certification of imported cement does not become a barrier to new entrants. The market was liberalised on 1 July 2011. While a number of entrants have announced plans to enter, no entrant has yet brought cement into the market as creating the infrastructure for doing so takes time. The historical operators have raised prices by 7%. The CCM has been encouraging the Port Authority and others to ensure conditions are favourable towards new entry and that potential new entrants are consulted as new contracts for cement-importing ships are implemented. If new entry does not occur, the government has retained the ability to purchase cement. After the price increase mentioned, the STC held a tender to determine whether it could obtain cement at a lower price.

4. Other sectors

The CCM has also issued advice to a Ministry concerning another agri-food product. The Ministry proposed creating an import monopoly and the CCM recommended that alternative means existed to ensure the policy objectives sought by the Ministry could be achieved. The Ministry is currently seeking alternatives.

5. Conclusion

The CCM is empowered to conduct market studies and to investigate and give directions concerning abuse of monopoly, collusion and merger situations. The CCM views all of the tools in its legal armoury as legitimate when considering commodities. Commodities have been and will remain an essential point of focus for the CCM.

MEXICO

1. Background

1.1 In recent years has there been significant volatility in the prices of commodities that are important to general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).

In recent years, international corn (or maize) prices have been subject to a sharp upward trend as a result of several factors. In particular, the growing demand from the biofuel sector, adverse climatic conditions, and even fluctuations in the foreign exchange markets that have made international prices of this commodity to rise sharply. The corn price index for the period from December 2006 to December 2011 rose in 60.9%.

Price volatility of corn is particularly harmful for Mexican consumers since maize is a basic ingredient for a wide range of food products, mainly corn tortillas. The maize dough and maize tortillas are an integral part of the Mexican households' food consumption. In fact, in 1998, according to the ENIGH¹ 2008, households in the poorest decile spent 9% of their food expenditure in tortillas, compared with 6% spent by the average household. Therefore as maize, and hence tortilla's prices, increase the impact on poorest households' food security is significant.

Maize tortilla dough is made from maize dough (nixtamal), maize flour, or a mixture of both. The tortilla market is served by almost 65 thousand tortilla shops (tortillerías).

To meet the annual domestic demand of maize dough and maize tortilla, 8.7 million tons of corn grains are required.

Within this context, the Mexican Federal Competition Commission's (CFC or Commission) main concern is not directly related with price volatility or price increases but rather with the competition conditions in the markets of maize dough and maize tortilla. And the reason for this is simple: the absence of competition in these markets not only is likely to increase the aforementioned problems but also is likely to amplify their effects.

In the maize dough and tortilla markets, therefore, Commission has made use of its advocacy powers to promote policies that protect and encourage competition, without undermining its actions to investigate and sanction practices that violate the Federal Law of Economic Competition (FLEC).

1.2 Are the price volatility in these commodities, and causes of that volatility, global, regional or domestic?

The pass-through from international prices to México's domestic prices, to a great extent, is caused by the degree of substitution among varieties of maize. Thus, internal shocks in the prices of white maize are

¹ National Survey of Households' Income/Spending (ENIGH for its acronym in Spanish).

caused by external shocks in the prices of yellow maize. Furthermore, the domestic crop losses because of frost, drought and other adverse weather conditions intensify the upward trend in prices of white maize.

According to SAGARPA estimates, in the period from June 2010 to June 2011, the wholesale price of white maize increased 65%, affecting the price of tortillas, which increased 25%.

1.3 *Does your agency have any ongoing /pre-emptive monitoring activities in relation to these sensitive commodities? For example do you routinely monitor prices, quantities of behaviors in these markets?*

No. FLEC does not empower the CFC to perform such activities. PROFECO is responsible for carrying out surveillance activities related to industrial and maize tortilla dough and constantly monitor the prices of their products. PROFECO prevents abusive practices against consumers through the National Monitoring and Verification of Commodities Prices Program, designed on the basis of the National Information System and Market Integration of the Ministry of Economy.

2. Competition law enforcement and formal investigations

2.1 *Please provide a brief overview of significant law enforcement matters that your agency has undertaken in relation to commodities including: i) Merger assessments , ii) Cartel and horizontal agreements, iii) Vertical restrictions, iv) Abuse of dominance, v) Any price control or other actions to regulate prices. Please explain how the matter came to the attention of the agency, the substance of allegation and the remedies imposed.*

As mentioned above, the Commission foremost concern is to prevent or eliminate competition problems in the maize and tortilla markets that may amplify the effects of exogenous factors (such as price volatility or increases in the international markets) that, to a great extent, are beyond their control.

Until the mid-1990s the maize dough and maize tortilla markets were subject to a wide range of instruments to promote supply and development of national distribution networks and control of prices for final consumers. During the second half of the 1990s price controls were eliminated to enable competition and reduce distortions that arose from price controls. In addition, trade barriers were reduced and several public companies dedicated to storage and distribution of maize were privatized.

Since markets liberalized, the Commission has been particularly active in the identification of anti-competitive practices to ensure that benefits of competition are delivered to consumers. The remaining part of this section describes the Commission's enforcement actions related to merger assessments, cartel and horizontal agreements, and abuse of dominance.

2.1.1 *Merger assessments*

The FLEC prohibits mergers which objective or effect is to reduce, distort or hinder competition. The FLEC requires that the CFC, in assessing mergers, consider whether the merging parties would be allowed to unilaterally fix prices, substantially restrict competitors' access to the market, or enable them conduct anti-competitive practices. From 1996 to 2010, the most relevant cases reviewed by the Commission in the markets of maize and tortilla were as follows.

In 1996, the Mexican company Gruma and the American company Archer-Daniels Midland Co. (ADM) proposed a strategic alliance in the business areas of maize and wheat flour. Gruma is a Mexican company dedicated to the production and marketing of maize flour, tortillas and related activities. The CFC approved the merger subject to the condition that the merging parties provided a review of the exclusivity

clauses. In response to this provision, aspects of non-intervention, directly or indirectly of ADM in the manufacturing, distribution and sale of machinery to produce wheat and corn tortillas were eliminated. This prevented the potential barriers to the entry of new competitors.²

In 1999 the companies Asgrow Mexicana and Cargill de México notified its intention to merge. The companies coincided in the hybrid seed markets for maize and sorghum. The risks to competition in horizontal aspects were the potential high level of market concentration derived from the transaction and the existence of entry barriers in the form of R&D. Under this scenario the Commission approved the merger subject to the divestiture of certain brands and assets and the transfer to public research institutes of the inputs required for the development of hybrid seed maize and sorghum.³

In 2006, the Commission rejected a merger between Gruma and Agroinsa, two Mexican companies engaged in the production and marketing of maize meal on the grounds that the transaction had the potential to result in a firm with substantial power that could displace competitors or prevent access to relevant markets of maize flour in the Northeast region and in the West / Midwest of the country. Also, the Commission had evidence that Gruma had entered into agreements for the purpose of conditioning the sale of maize flour and machinery and spare parts to small competitors.⁴

2.1.2 *Cartel and horizontal agreements*

In the case of maize tortilla, the Commission has been particularly active in preventing price agreements established by trade associations which, as they did for decades, have sought to become price regulators to the detriment of consumers.

In 1997, the Union of Maize Tortilla of the Mayan Zone and other independent producers promoted concerted practices to distribute the market for these products. The agreement was supported by the municipal authority and intended to maintain exclusivity for certain producers in geographic areas in the municipality of Carrillo Puerto in Quintana Roo. The firms tried to stop the distribution of tortillas in the municipality by the owners of two stores. The Commission decided that the concerted action of the firms and the performance of the Municipal Authority constituted violations to the FLEC. In this case, the Commission sanctioned individuals and advised the government of Quintana Roo to abstain from participating and supporting actions that would harm competition in the tortilla market.⁵

In 1999, the Commission carried out in Baja California and the region of the Comarca Lagunera two investigations against tortilla producers for agreeing to fix prices. The agreements were facilitated by regional business organizations. The Commission determined that the maintenance of these mechanisms eliminated price competition. Both investigations were concluded after the associations involved agreed to, to inform their members about their freedom to set prices for their products.⁶

In 2001, the company Club Cadena Maíz Tortilla, SA de CV (Camato), which gathers producers, millers and manufacturers of maize tortilla, suggested its affiliates to fix the price of maize tortillas in the Federal District and metropolitan area. At that time, Camato represented 17 thousand producers and millers of maize, which supplied 10% of the domestic market and 5.8% of 12 thousand tortillerías of Mexico City.

² File: CNT-076-1995.

³ File: CNT-114-98.

⁴ The case was challenged in the judiciary and the courts did not uphold the Commission's decision.

⁵ File: IO-041-1996.

⁶ Files: IO-001-1999 and IO-002-1999.

The Commission determined that Camato members could not be regarded as a single economic agent and therefore, instructions or suggestions on the price of the tortilla issued by that Organization constituted an infringement to the FLEC. The Commission ordered the suspension of the practice and imposed a fine.⁷

In 2002, the government of the state of Yucatan filed a complaint before the Commission against leaders of the Trade Association of Tortilla Manufacturing in Yucatan for publishing in the local media a new price for maize tortillas in the region. The FLEC provides that recommendations of trade associations to its members intended to fix, raise, agree or manipulate the price of goods or services, or exchange information with the same purpose are evidence of an infringement to the FLEC. During the investigation, the leaders recognized that the trade association had no power to fix or establish official prices of maize tortillas, and reported not knowing the accuracy of newspaper's reports. However, the Commission got access to several transcripts of the trade association meetings proving that its members had gathered to exchange information on the sales and price of maize tortillas and as a result of such meetings had agreed on the sale price of the good. Also, from information published by the Bank of Mexico and price monitoring conducted by the Federal Attorney's Office of Consumer Protection, it could be established that the price of maize tortillas in several municipalities of Yucatan had increased after the trade association published the new price for maize tortillas.. This provided the evidence that the producers had agreed increases in the price of tortilla. The investigation ended with the commitment by the leaders of the trade association to cease the anti-competitive agreements, and report to its members that the association had no authority to regulate prices of maize tortilla and that that agreements among competitors to fix prices constituted a violation of the FLEC. Finally, the group pledged to monitor the behavior of its members in order to prevent agreements among competitors. Also, the trade association agreed to send to the Commission a copy of the meetings minutes.⁸

2.1.3 *Abuse of dominance*

In 2001, the Commission found that the company Harinera Yucatan, a subsidiary of Grupo Industrial Maseca (Gimsa), and the associations of mills and tortilla of two municipalities in the state of Yucatan held agreements that stipulated the distance among tortillerías. In these agreements, the Harinera Yucatán committed not to sell machinery and flour tortilla to those tortillerías that did not follow the aforementioned agreements. From the analysis of the relevant market, the CFC concluded that Harinera Yucatán had substantial market power in Yucatán, and it was responsible for establishing exclusive distribution of goods or services. In establishing the amount of the fine, the Commission took into account that Harinera Yucatan committed to suspend the practice.⁹

2.2 *Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any)*

In 2008 the Commission conducted a market study to assess the distributive and spatial effects of monopoly power in the Mexican economy. Such study was supported by the Organization for Economic Cooperation and Development (OECD) and by the participation of a local expert supervised by the CFC.

The study estimated the loss of welfare for different social groups, both in rural and urban areas, that stemmed from the exercise of market power in seven markets of basic consumer goods: i) maize tortillas, ii) processed meats, iii) egg and chicken, iv) milk, v) soft drinks, bottled water and juice, vi) beer and vii)

⁷ Files: IO-02-2000 and RA-40-2001.

⁸ File: DE-07-2002.

⁹ File: IO-11-2000.

pharmaceuticals. It was concluded that, as a consequence of inadequate regulation and inefficient institutional design that maintain market structures that hinder competition and deteriorate the competitiveness of the Mexican economy, more than 30% of household spending in Mexico is destined to markets with competition problems. It also found that Mexican consumers spend in these products and services about 40% more than they would spend if competition existed in these markets. Additionally, it was shown that the situation is worse for low income groups and the southeast region of the country, which happens to be the poorest. For example, households IN Chiapas State have an average welfare loss 277% times bigger than households of Baja California State, which in that moment was the least affected entity by the lack of competition.

2.3 *Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anti-competitive behavior? What was the nature and circumstances of the request and how did your agency respond?*

Given the importance of the maize dough and maize tortilla markets for Mexican consumers, the Commission often receives requests to investigate competition concerns in these markets. Probably because the lack of familiarity with competition law, in most of these cases the Commission has been asked to regulate prices. Faced with these pressures, the Commission has made clear that it does not have the power to regulate prices and that such a measure is likely to introduce market distortions that could harm consumers in these markets.

3. Advocacy opportunities and challenges

3.1 *Has your agency had the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy? For example, have you had the opportunity to recommend or advice on commodity price deregulation? Have you had the opportunity to advise on the reform of government or private sector monopolies for the purchase or sale of particular commodities for domestic consumption or export? Have you had the opportunity to advice on the reform of regulations that fix or control prices or quantities? What was the commodity, the nature of the reform and the outcome?*

The CFC is empowered to issue opinions on regulation, issued by different government bodies, which could affect market access and competition conditions. In the exercise of this power, the Commission has identified municipal regulations that have or may have the effect of unreasonably restricting new participants' access to the markets and the growth of established ones.

As a consequence, the Commission has issued several non-binding opinions on several local regulations that unduly restrict competition in the production and commercialization of wheat and/or maize tortillas.

In addition, in 2010 the CFC issued guidelines aimed at ensuring that the regulatory framework promotes vigorous competition in the production, commercialization, and distribution of tortillas. This guideline was addressed to all municipal and state governments, and to federal entities involved in the regulation of the tortilla markets.

The guidelines included four specific recommendations for municipal governments, aimed at avoiding the most common regulatory barriers that hinder competition in the markets of maize dough and corn tortilla:

- Eliminate minimum distances and other restrictions to the number of competitors. It is frequent that local regulations forbid the establishment of a new tortilla business close to another vending location, thus limiting the total number of tortilla businesses in a locality. Also, home delivery businesses are often prohibited. The Commission stated in the guidelines that these types of regulation reduce consumer options and leave buyers at the mercy of a small number of suppliers who use their market power to charge artificial high prices.
- Eliminate provisions that allow established businesses to have a say on the entrance of new participants and market prices. Some local regulations oblige the authority to consult tortilla associations on the entrance of a new competitor to the market. In other cases, the regulations provide for consultations with trade associations on prices and business hours, etc. that all tortilla business must abide to. The Commission stated in the guidelines that this type of regulation hinders the entry of new suppliers (who require the authorization from other suppliers to operate), facilitate collusion among tortilla businesses, and limit competition among them.
- Local authorities should respond to market access requests based on transparent and public criteria that favor market access. Some local regulations do not clarify the requirements or time needed for a tortilla business to obtain an authorization to operate. The discretion with which market access requests are handled –probably because of pressure from other tortilla business– has led to requests that have never been solved, or requests hindered with additional paperwork. The Commission stated in the guidelines that the effect of the lack of a prompt and transparent mechanism to grant business licenses in this market is to limit artificially the number of tortilla businesses and consumer’s choice.
- Eliminate minimum quota requirements of local production inputs. Some municipal regulations require the use of specified proportions of local production inputs (e.g. maize), and therefore restrict the tortilla business capacities to obtain them at better quality and prices. The Commission stated in the guidelines that by raising the cost to tortilla business these regulations also harm consumers.

3.2 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

The Mexican Federal Government has tried several times to prevent the rises in tortilla prices and to mitigate the effects of the volatility in the international prices of maize. For example, in 2007 “The Agreement to Stabilize Tortilla Prices” - which was signed, among others, between the Ministries of Economy, Agriculture, and Social Development - increased import quotas to tariff-free maize; assisted the industrial maize-tortilla production chain to increase its competitiveness and, most importantly, set maximum retail prices for tortillas. From the outset, the Commission fiercely lobbied against this agreement arguing that it introduced distortions in the markets reducing the competitive pressures between rivals and maintaining a fragmented market structure. Unfortunately, the Commission could not persuade the government from adopting the agreement. Nevertheless, it was in place for a very short time and tortilla prices were again liberalized.

Although not directly related with the maize dough and tortilla market, recently the Government of Mexico City issued a regulation that prohibits the establishment of convenience stores and supermarkets in areas nearby street markets. In the light of this, the Commission issued a non-binding opinion that pointed out the negative effects the measure could have on competition and consumer welfare in those areas. More precisely, the opinion highlighted that the regulation could result in the creation of barriers to entry for new competitors that could offer their products at more competitive prices.

3.3 *Please describe any pre-emptive steps available to your agency to: - Reduce risks that commodity price volatility becoming a problem in your country? - Reduce risk that governments or public societies seek policy to problematic commodity price volatility that would impede competition*

The FLEC does not include provisions directly aimed at preventing price volatility of commodities. However, as mentioned above, it does empower the Commission to prevent market distortions that may amplify this problem.

In addition to the enforcement powers mentioned in the preceding section, the FLEC provides the Commission with the power to significantly influence markets. In particular, the law gives the Commission two key attributions. On the one hand, enables it to prevent the creation and implementation of Federal or State regulations that restrain competition in the markets. In this sense, the FLEC empowers the CFC to issue opinions where recommendations are provided to prevent market distortion. On the other hand, includes provisions related to prices that are aimed at preventing market distortions from price regulation. Thus, Article 7 of the FLEC allows the Federal Executive to control prices of products and services deemed necessary for the popular consumption, only after the CFC has declared that such controls are necessary and will correct and do not create market distortions.

MAROC (CONSEIL DE LA CONCURRENCE DU MAROC)

-- Version Française --

La très grande instabilité des prix des produits de base, très perceptible depuis quelques années, a pris la forme d'une flambée de plus en plus inquiétante depuis quelques années, particulièrement en 2007/2008. Après une relative accalmie constatée jusqu'au milieu de 2010, on assiste à une reprise qui ne cesse d'impacter inexorablement les cours mondiaux.

Ainsi, les prix des produits alimentaires se sont envolés de nouveau au cours du premier trimestre 2011 sous les effets conjugués de plusieurs facteurs : les phénomènes météorologiques extrêmes survenus dans certains grands pays exportateurs de céréales (sécheresse et incendie en Russie et en Ukraine, inondations aux USA), les restrictions sur les exportations, l'utilisation accrue de produits agricoles dans la fabrication de biocarburants et le faible niveau des stocks. Comme le confirment les statistiques publiées par la Banque Mondiale en 2011¹, les prix mondiaux des produits alimentaires ont augmenté de 36% par rapport à leur niveau il y a un an. En tête des hausses majeures enregistrées depuis un an, figurent celles du maïs (+74), du blé (+69%), du soja (+36%) et du sucre (+21%). En revanche, les prix du riz sont restés stables. La Banque Mondiale a constaté également que dans de nombreux pays, les prix des fruits et légumes, des viandes, des huiles de tables ont poursuivi leurs hausses. Cette hausse est non seulement confirmée par la FAO, mais elle serait selon cette organisation onusienne spécialisée, une tendance lourde pour la décennie à venir ; « le niveau élevé des prix alimentaires et la volatilité des produits de base sont des phénomènes durables... »². La flambée des prix alimentaires est aussi liée à celle des prix des combustibles : les cours du pétrole brut ont augmenté de 21% au premier trimestre 2011 à la suite des troubles survenus au Moyen Orient et en Afrique du Nord et l'année 2011 se termine avec un record inégalé.

Dans ce contexte général, il serait intéressant de voir dans quelle mesure, le gouvernement marocain a répliqué ou a réussi à contrer ou du moins à atténuer les répercussions de ces hausses sur les marchés intérieurs du pays. Par la même, il serait également intéressant de voir à quel niveau la contribution du Conseil de la Concurrence du Maroc s'avérerait édifiante pour dynamiser les marchés de ces produits.

1. Mesures gouvernementales visant à limiter l'impact de l'instabilité des marchés mondiaux des produits de base sur l'économie nationale

A l'instar des pays en voie de développement non producteurs du pétrole, le Maroc a subi de plein fouet les perturbations enregistrées sur les marchés mondiaux des produits de base, notamment celui du pétrole, des céréales, du sucre et des huiles de table. Structurellement, deux factures creusent le déficit commercial du pays : la facture pétrolière et la facture céréalière.

¹ Le groupe d'étude « Food Price Watch » de la Banque mondiale a publié en avril 2011 à Washington, son indice des prix des produits alimentaires, qui mesurent les prix mondiaux, qui a enregistré une hausse de 36% par rapport à son niveau il y a un an.

² Rapport publié en 2011 par la FAO et l'OCDE sous l'intitulé « Perspectives agricoles de l'OCDE et de la FAO 2011-2020 ».

Pour limiter l'impact des hausses des cours mondiaux de ces produits, le gouvernement marocain a opté pour un système de subventionnement ciblé des prix de certains d'entre eux à travers le budget de l'État. Celui-ci transfère des ressources de plus en plus importantes à la caisse de compensation³. Le fait que le cours du baril se maintienne au dessus des 100 dollars, fait exploser les charges de compensation inscrites au budget de l'État. Celles-ci viennent de dépasser les 40 milliards de dirhams, soit 10 milliards de plus que l'enveloppe ré-estimée et 23 milliards de plus que le budget initial. A ce sujet, il y a lieu de noter qu'entre 2004 et 2010, le poste des charges de compensation représente bon an mal an entre 1,5 et 4,5% PIB, 8 à 20% des dépenses ordinaires ou encore 6,2 à 16,1 du budget global de l'État. C'est dire l'ampleur et la grande volatilité de ces charges qui sont liées aux évolutions des marchés mondiaux dont celui du pétrole et qui joue un rôle particulièrement sensible avec des effets de remous et de contagion sur l'ensemble de l'espace de la formation des prix.

La facture pétrolière a littéralement explosé en 2008 pour atteindre 30,8 milliards de dirhams, soit 20% des recettes des exportations des biens du pays. Mais avec le relâchement des cours mondiaux en 2009, elle a fondu de près 44% pour s'établir à 17,62 milliards de dirhams⁴.

Toutefois et malgré les tensions ayant marqué le marché international au cours des dernières années, les prix intérieurs des produits pétroliers n'ont pas enregistré une forte augmentation. L'État, à travers son budget, a continué à soutenir les prix des produits pétroliers et à consacrer des fonds importants à la caisse de compensation et ce, en prenant en charge totalement ou partiellement les augmentations des prix sur le marché. Ces subventions ont été multipliées presque par dix en l'espace de 5 ans, passant de 3,6 milliards de dirhams en 2005 à plus de 30 milliards en 2011. Désormais, un sérieux problème se dresse face aux marges du budget de l'État sachant que ce montant représente plus de 80% du budget d'équipement du pays (hors établissements publics). Cependant, il ya lieu de souligner que grâce à ces subventions, le consommateur marocain a été épargné et les effets sur l'économie nationale se sont limités à un alourdissement des charges du budget de l'État et une aggravation du déficit commercial.

Les autres produits subventionnés par le budget de l'État concernent la farine nationale de blé tendre, fabriquée essentiellement à partir du blé importé vu l'insuffisance de la production locale en ce produit. Le volume subventionné a été limité à 10 millions quintaux annuellement et destiné en exclusivité aux zones rurales démunies. La charge de compensation réservée à ce produit ne dépasse guère les 3 milliards de dirhams par an. La même enveloppe est consacrée au sucre dont la production nationale ne couvre pas l'ensemble des besoins croissants du pays.

Par ailleurs, il serait édifiant de rappeler les conclusions d'une étude⁵ commanditée par le gouvernement, à travers le Ministère délégué auprès du Premier Ministre chargé des affaires économiques et générales. Celle-ci relève que sans les efforts consentis par l'État pour atténuer les effets des hausses des cours mondiaux sur les marchés intérieurs des produits de base, le niveau de l'inflation serait de 4,5% en 2010 au lieu et place des 0,9% enregistrés. L'analyse détaillée de la structure de l'indice du coût de la vie (ICV), principale mesure du niveau de l'inflation, a permis aux auteurs de cette étude de conclure que les produits de base (dont les céréales) constituent à côté des produits pétroliers les principaux déterminants de cet instrument.

Précisons enfin que l'une des conséquences du renchérissement du coût de la vie a été le relèvement assez satisfaisant des salaires durant ces dernières années. Conséquence d'une telle situation : il faut

³ Il s'agit de l'organisme public chargé de la gestion des subventions de l'État des produits de base.

⁴ Rapport de l'office des changes sur les importations 2010.

⁵ Il s'agit de l'étude réalisée par une équipe d'universitaires marocains sous la direction du Professeur N. El Aoufi sur la réforme du système de compensation intitulée « le Maroc solidaire ».

mentionner que le déficit budgétaire qui avoisinait pendant longtemps les 3% du PIB, pourrait dépasser les 7% fin 2011. Mais malgré ces données quelque peu inquiétantes, il y a lieu de signaler que les taux de croissance réalisés par notre économie au cours de cette période de turbulence des marchés internationaux des produits de base sont restés honorables variant entre 4,5 à 5% en moyenne annuelle.

2. Actions entreprises par le Conseil de la Concurrence pour dynamiser les marchés des produits de base

En l'état actuel de la réglementation marocaine⁶, les compétences reconnues jusqu'ici au Conseil de la concurrence ne font pas de lui une instance investie de prérogatives directes dans ce domaine. Néanmoins et par le biais de son rôle consultatif, il n'a pas manqué d'y contribuer.

Le Conseil de la Concurrence a été consulté en 2010 par le gouvernement sur le maintien ou non d'une liste de produits et de services dont les prix continueront d'être réglementés par l'État. Cette liste a été arrêtée au départ comme une mesure provisoire permettant à l'État de libéraliser progressivement les prix de certains biens et produits de base notamment, sur une période de 5 ans. Ainsi, le nombre des biens, services et produits figurant sur cette liste a été ramené de 31 à 15. Mais arrivé à échéance légale et n'ayant pas terminé la libéralisation totale des prix comme le prévoyait la loi 06-99 sur la liberté des prix et de la concurrence, le gouvernement s'est trouvé dans l'obligation d'introduire un amendement à la loi susvisée pour solliciter un nouveau délai de 4 ans qui court jusqu'à fin 2014. Cet amendement fait référence à une liste sur laquelle le Conseil devait se prononcer dans un délai de 2 mois.

Dans son avis n°10/10 du 12 juillet 2010, le Conseil de la Concurrence a attiré l'attention du gouvernement sur le fait que la liberté des prix demeure le principe de base de l'économie de marché et qu'elle joue un rôle fondamental dans l'instauration des règles et des mécanismes d'une concurrence libre et loyale sur les marchés. Partant de là, il a été fait remarquer au gouvernement que toute intervention permanente, directe ou indirecte, de l'administration dans la fixation des prix des biens, produits et services, est considérée comme contraire aux principes de la liberté des prix et de la concurrence et pourrait réduire considérablement l'efficacité économique aussi bien au niveau micro que macroéconomique. Toutefois et compte tenu des conditions sociales prévalant dans le pays et celles relatives à la sécurité des approvisionnements des marchés notamment en produits de base, le Conseil de la concurrence a donné son accord sur le maintien des 15 biens, produits et services, sur la liste soumise à son avis pour une période provisoire de 4 ans prenant fin en 2014. En effet, le Conseil a considéré que les raisons et les motifs justifiant le maintien ou non de cette liste réside en réalité dans le fait de savoir si les marchés de ces biens et produits remplissent les conditions de développement d'une concurrence libre à même de multiplier les offres à des meilleurs prix et qualité.

Parallèlement à cette décision, le Conseil a recommandé au gouvernement la mise à profit de la période provisoire pour une remise en cause des conditions de l'octroi des subventions ainsi que la réglementation des prix pour cibler uniquement ceux qui en ont vraiment besoin. Pour ce faire, le Conseil a estimé qu'il est nécessaire de procéder à des enquêtes et analyses sur les marchés concernés par ces biens et produits en vue de maîtriser les conditions de leur concurrentiabilité et de développer la concurrence en leur sein.

Joignant le geste à la parole, le Conseil a pris l'initiative de lancer une étude en interne sur la concurrence des les marchés des biens et produits de base subventionnés par le budget de l'État. Cette

⁶ La loi marocaine 06-99 sur la liberté des prix et la concurrence n'a donné au Conseil de la Concurrence que des compétences consultatives. Avec la nouvelle constitution, le conseil a été élevé au rang d'une autorité constitutionnelle indépendante dotée de prérogatives étendues. Un projet de la loi modificatif a été déposé auprès du gouvernement pour intégrer cette nouvelle donne.

étude, qui est à un stade avancé, a permis de relever un certain nombre de dysfonctionnements des marchés en question. Elle a notamment mis en évidence une certaine opacité et un manque flagrant d'information sur le fonctionnement de ces marchés, ce qui représente en soi une source de gaspillage non négligeable pour le budget de l'État. Cette absence de transparence crée des situations de rente préjudiciables pour l'économie nationale en décourageant les investissements nécessaires à l'amélioration de l'offre et de la productivité dans les secteurs d'activité économique concernés. Enfin, l'étude ne manquera pas de formuler un certain nombre de recommandations précises et détaillées sur les voies et les moyens possibles à mettre en œuvre pour supprimer les mesures qui faussent la production et les échanges des biens et produits de base tout en prenant en considération les situations des personnes vulnérables et la réalité des marchés mondiaux.

En conclusion, il paraît évident que le Maroc subit de plein fouet l'augmentation des prix d'un certain nombre de produits de consommation de base. Il doit donc concilier deux objectifs difficiles : s'orienter vers la liberté des prix des produits de base et en même temps tenir compte du fait que ces produits touchent d'abord les économiquement faibles. Comment donc assurer une saine situation du marché tout en préservant le pouvoir d'achat des plus démunis, si ce n'est à travers la recherche de solutions qui ne bénéficieraient qu'à ceux qui en ont vraiment besoin à l'exclusion de toute rente pour les autres catégories sociales. A ce propos et en l'état actuel des choses, le Conseil de la Concurrence du Maroc reste fondamentalement consultatif et donc sans pouvoir d'initiative en la matière. Précisons cependant que les choses sont en train de changer et que les autorités publiques, après la constitutionnalisation de notre Conseil, sont en train de préparer l'adoption d'un nouveau texte faisant du Conseil de la Concurrence une véritable autorité indépendante dotée de compétences générales et des pouvoirs décisionnaires, d'enquête et d'auto saisine.

MOROCCO (COMPETITION COUNCIL)

-- English Version --

The great instability in commodity prices, which has been obvious now for several years, was marked by a particularly alarming price spike in 2007-2008. After a period of relative calm until the middle of 2010, world prices are again climbing inexorably.

Prices for foodstuffs began to soar again in the first quarter of 2011, under the combined impact of several factors: extreme climate events in some major cereals exporting countries (drought and fire in Russia and in Ukraine, flooding in the United States), export restrictions, the increased use of agricultural products in the manufacture of biofuels, and low stocks. As confirmed in the statistics published by the World Bank in 2011¹, world food prices rose by 36% over their level a year earlier. Leading the way in price increases over the last year were maize (+74%), wheat (+69%), soybeans (+36%) and sugar (+21%). On the other hand, prices for rice have remained stable. The World Bank also reports that in many countries the prices for fruits and vegetables, meat, and vegetable oils have risen further. Not only are these increases confirmed by the FAO but prices are likely, according to that specialised UN organisation, to remain on a sharp upward trend for the coming decade: "high levels for food prices and commodity volatility are persistent phenomena"². Soaring food prices are also linked to the cost of fuels: crude oil prices rose by 21% in the first quarter of 2011, in the wake of disturbances in the Middle East and North Africa, and are ending the year at record levels.

In this setting, it would be interesting to see to what extent the Moroccan government has responded or has succeeded in countering or at least cushioning the repercussions of these higher prices on the country's domestic markets. At the same time, it would be interesting to see how useful has been the contribution of the Moroccan National Competition Council in making markets for these products more dynamic.

1. Government measures to limit the impact of global commodity market instability on the national economy

As is the case for non-oil-producing developing countries, Morocco has felt the full force of the disruptions on world commodity markets, particularly those for oil, cereals, sugar and vegetable oils. Structurally, two factors account for the country's trade deficit: the oil bill and the cereals bill.

To limit the impact of rising world prices for these products, the Moroccan government has opted for a system of targeted subsidies for certain products, funded from the State budget. The government is transferring greater resources to the compensation fund (*caisse de compensation*)³. With the price of oil above \$100 a barrel, the budgetary burden of compensation has exploded. Outlays have now exceeded 40 billion dirhams, or 10 billion more than the re-estimated envelope and 23 billion more than the initial budget. On this point, it should be noted that between 2004 and 2010 compensation expenditures represented between 1.5 and 4.5% of GDP, depending on the year, or 8 to 20% of ordinary spending and

¹ The Global Food Price Index published by the World Bank's "Food Price Watch" working group in April 2011 was 36% above its level a year earlier.

² OECD-FAO Agricultural Outlook 2011-2020.

³ The government agency responsible for managing State commodity subsidies.

6.2 to 16.1% of the overall government budget. These figures illustrate the size and volatility of these expenses, which are related to trends on world markets, including oil, and which play a particularly sensitive role, sparking popular unrest and contagion across the entire spectrum of price formation.

The oil bill literally exploded in 2008, reaching 30.8 billion dirhams, or 20% of receipts from the country's goods exports. But with the easing of world prices in 2009, it dropped by nearly 44%, to 17.62 billion dirhams⁴.

Yet despite the tensions that have gripped the international market in recent years, domestic prices for oil products have not recorded a sharp increase. The government, through its budget, has continued to contain prices for oil products and to devote significant resources to the compensation fund, by covering market price increases fully or partially. These subsidies have increased by a factor of close to 10 in the space of five years, rising from 3.6 billion dirhams in 2005 to more than 30 billion in 2011. A serious budgetary problem now looms, as this amount represents more than 80% of the country's material supply budget (excluding public institutions). However, it must be noted that, thanks to these subsidies, the Moroccan consumer has been spared and the impact on the national economy has been confined to a greater burden on the government budget and a worsening of the trade deficit.

Other products subsidised by the State budget include soft wheat flour, which is domestically manufactured essentially from imported wheat, as local production falls short of needs. The subsidised volume has been limited to 10 million quintals a year, and is earmarked exclusively for poor rural areas. The compensation cost for this product barely exceeds 3 billion dirhams a year. The same envelope is devoted to sugar, domestic output of which is not sufficient to cover the country's growing needs.

It is useful to recall the conclusions of a study⁵ commissioned by the government, through the Prime Minister's office for economic and general affairs. That study showed that, without the government's efforts to cushion the effects of rising world prices on domestic commodity markets, inflation would have been 4.5% in 2010 instead of the 0.9% recorded. A detailed analysis of the structure of the cost of living index, the main measure of inflation, led the authors of the study to conclude that commodities (including cereals) are, along with oil products, the main determinants of that index.

Lastly, one of the consequences of the rising cost of living has been to boost wages and salaries by fairly appreciable amounts in recent years. As a result of that situation, the budget deficit, which hovered for a long time at around 3% of GDP, could exceed 7% by the end of 2011. Yet despite these somewhat alarming figures, it should be noted that growth rates in our economy over this period of international commodity market turbulence have been quite respectable, averaging between 4.5% and 5% a year.

2. Actions taken by the Competition Council to make commodity markets more dynamic

Under current Moroccan regulation⁶, the powers hitherto accorded the National Competition Council do not give it direct prerogatives in this area. Nevertheless, it has certainly made contributions through its advisory role.

⁴ *L'office des changes*, report on imports 2010.

⁵ This was a study, prepared by a team of Moroccan academics under the direction of Professor N. El Aoufi, on reforming the compensation system, entitled "*le Maroc solidaire*".

⁶ The Moroccan Law 06-99 on free prices and competition gave the Competition Council merely advisory powers. With the new constitution, the Council has been raised to the rank of an independent constitutional authority with extended prerogatives. A draft bill of amendment has been submitted to the government to recognise this new situation.

The government consulted the Competition Council in 2010 on whether to maintain a list of products and services for which prices should continue to be regulated by the State. That list was drawn up initially as a provisional measure allowing the government gradually to liberalise the prices of certain basic goods and commodities over a period of five years. The number of goods, services and products on the list has been reduced from 31 to 15. But the legal deadline has now passed and the process of liberalising prices in accordance with Law 06-99 on free prices and competition has not been completed. The government has therefore been obliged to introduce an amendment to that law, seeking a four-year extension of the deadline to the end of 2014. This amendment refers to a list on which the Council is to issue an opinion within two months.

In its opinion no. 10/10 of 12 July 2010, the Competition Council drew the government's attention to the fact that pricing freedom remains the underlying principle of the market economy and that it plays an essential role in instituting rules and mechanisms for free and fair market competition. Recognising that, the Council has warned the government that any permanent State intervention, direct or indirect, in setting the prices for goods, products and services runs counter to the principles of pricing freedom and competition and could considerably reduce economic efficiency at both the micro- and the macroeconomic levels. However, bearing in mind the social conditions facing the country and the issue of security of market supply, especially for commodities, the Competition Council has agreed to keep 15 goods, products and services on the list submitted for its opinion for a provisional period of four years ending in 2014. In fact, the Council considers that the rationale for maintaining this list must in reality depend on whether the markets for these goods and services are fulfilling the conditions for the promotion of free competition in such a way as to expand supply at better prices and quality.

Along with that decision, the Council has recommended that the government should take advantage of the provisional period to reconsider the conditions for granting subsidies as well as the regulation of prices, so as to target only those where there is a real need. To this end, the Council has recommended surveys and analyses of the markets for these goods and products in order to understand the conditions for competitiveness and to foster competition in those markets.

Combining action with words, the Council took the initiative to launch an in-house study on competition in the markets for goods and commodities subsidised by the State budget. That study is now well advanced and has already revealed a number of dysfunctional features on the markets in question. In particular, it has highlighted a glaring lack of transparency and information about the functioning of these markets, something that is in itself a significant source of waste from the government budget. This lack of transparency creates situations of rent seeking that are harmful to the domestic economy and are discouraging the investments needed to boost supply and productivity in the economic sectors concerned. Lastly, the study will make some precise and detailed recommendations on the ways and means for eliminating measures that distort the production and exchange of goods and commodities, while taking into account the situation of vulnerable persons and the reality of global markets.

In conclusion, it is clear that Morocco is feeling the full force of price increases in a number of basic consumer products. It must therefore reconcile two difficult objectives: to maintain the goal of free pricing for commodities and at the same time to recognise that these products have a particular impact on the economically weak. The only way, then, to ensure a healthy market situation while preserving the purchasing power of the poor is to find solutions that will benefit only those in real need, and will eliminate rent windfalls for other social categories. As things stand, the Moroccan National Competition Council remains essentially an advisory body with no power to take initiatives. We may point out, however, that things are changing and that the authorities, after giving our Council constitutional status, are now preparing for adoption a new law that would make the Competition Council a truly independent authority with general responsibilities and powers to make decisions, conduct inquiries, and take initiatives.

MAROC (MINISTÈRE DES AFFAIRES ÉCONOMIQUES ET GÉNÉRALES) *

-- Version Française --

La volatilité des cours des matières premières et leur instabilité, sont et restent parmi les grands défis de ces quatre dernières années pour plusieurs pays. Les prix internationaux des denrées alimentaires de base (sucre, céréales, produits gras, riz, maïs...), du pétrole, des minerais ont enregistré des records non atteints depuis une trentaine d'années. L'année 2008 a été inéluctablement le témoin de cette évolution erratique et irrationnelle des marchés mondiaux, le baril du pétrole, pour n'en citer que ce marché, ayant percé le plafond de 145 \$ en juillet 2008 a vertigineusement touché le plancher de 40 \$ peu de mois après.

L'accalmie vécue au cours des premiers mois de 2009 n'a été que d'une courte trêve pour une nouvelle reprise de cette flambée fin 2010. La volatilité des marchés des matières premières submerge le monde d'un voile d'incertitude et de crainte amplifiée par les prémisses d'un essoufflement économique dont les symptômes s'éclaircissent et s'affirment de jour en jour.

Les débats sur les causes de cette flambée font bon train. Cependant, chacun s'accorde à reconnaître un déséquilibre croissant entre l'offre et la demande. La multiplication des catastrophes naturelles a indiscutablement joué un rôle de déclencheur dans la perturbation de l'offre en matières premières. Ainsi les inondations au Pakistan et en Australie, les incendies en Russie, la sécheresse en Amérique latine et en Chine ont mis en péril les récoltes. Par ailleurs, les conflits géopolitiques et les soulèvements des peuples de certains pays arabes principalement producteurs de pétrole expliquent pour une grande part les dysfonctionnements observés sur le marché des produits pétroliers. Du côté de la demande, la tension est également à son comble. La consommation que ce soit en produits énergétiques ou autres est tirée par la croissance exponentielle des pays émergents.

Une offre menacée de raréfaction par la multiplication des catastrophes naturelles et par, une demande qui explose : la hausse des prix se comprend aisément. Cependant, la rapidité de l'envolée, ainsi que l'intensité des fluctuations, laisse penser que des facteurs spéculatifs sont également à l'œuvre.

Le Maroc étant un pays non producteur du pétrole et dont les ressources naturelles sont limitées subit de plein fouet la flambée des prix internationaux. Sa forte dépendance du marché extérieur pour la couverture d'une grande partie de ses besoins en produits de base accentue sa vulnérabilité face aux contraintes dictées par la volatilité des marchés mondiaux.

Effectivement, 97% des besoins du royaume en produits pétroliers sont importés, plus de la moitié des consommations en sucre brut proviennent de l'extérieur, le secteur des huiles de table importe presque 90% de ses besoins en graines de soja, de tournesol et en huiles brutes nécessaires à la production des huiles alimentaires raffinées. Les importations des céréales quant à elles restent très tributaires des années agricoles et peuvent atteindre plus 70 % en blé certaines années.

* Contribution soumise par M. El Hassane Bousselmame, Directeur de la Concurrence et des Prix, Ministère des Affaires Économiques et Générales (Maroc).

Hormis sa dépendance, le Maroc est parmi les pays les plus consommateurs de certains produits de base spécialement le sucre raffiné, avec 35 kg/habitant contre une moyenne mondiale de 22 kg, les céréales qui constituent l'essentiel de l'alimentation du marocain sans oublier les huiles alimentaires, en plus des produits énergétiques dont personne ne pourrait contester l'importance primordiale à la marche du moteur de l'économie d'un pays.

Certes, ces secteurs sont stratégiques. Cependant, l'envolée des cours mondiaux accouplée à de fortes consommations en font un lourd fardeau pour le pays que se soit au niveau de la balance commerciale, des factures d'importations ou de l'impact généré pour le budget de l'État.

La réaction des autorités marocaines face à l'emballement du marché international a été rapide et séquentielle. Ainsi la Direction de la Concurrence et des Prix relevant du Ministère des Affaires Économiques et Générales ayant la délicate mission de coordonner entre la politique du gouvernement en matière des prix et la mise en œuvre de la politique de la concurrence s'est trouvée en plein milieu de cette problématique.

Dés fin 2007, un ensemble de mesures ponctuelles de court terme a été mis en place pour pallier à l'urgence que revêt la situation. L'objectif primordial était de prémunir le consommateur au même titre que les producteurs de tout surcoût qui pourrait compromettre le pouvoir d'achat du premier ou la compétitivité du second dans une optique jugée à l'époque conjoncturelle et limitée dans le temps.

La stratégie consista à activer un ensemble de dispositifs a même d'amortir le choc du marché international. La première action menée à ce niveau a été d'ordre tarifaire et portait sur la réduction voire la suspension des droits de douanes sur tous les produits touchés par la flambée des prix et dont les importations sont soumises à d'importants niveaux de protection. Les secteurs bénéficiaires étaient les céréales, le beurre et le sucre.

Or, si ce dispositif a prouvé une certaine efficacité pour certains secteurs, il n'en a pas été de même pour d'autres dont le niveau de protection est au minimum : le cas des huiles alimentaires et des produits pétroliers, et semble insuffisant pour certains d'autres. Il fallait y conjuguer d'autres mesures palliatives pour un résultat palpable et plus significatif.

Le deuxième niveau d'intervention des autorités marocaines pilotée par la Direction de la Concurrence et des Prix en coordination avec les ministères de tutelle des différents secteurs a été l'instauration d'un système de restitutions sur les coûts d'importations d'un ensemble de produits notamment les importations du blé tendre et du sucre brut.

Le budget de l'État se charge de rembourser aux opérateurs dans les secteurs concernés, le différentiel entre le coût réel d'importation du produit en question et le coût estimé adéquat aux prix des produits finaux correspondant à ces intrants.

Ainsi, des restitutions ont été déboursées sur les importations du blé tendre et sur celles du sucre brut pour maintenir les prix de la farine et ses dérivées, du pain, ainsi que ceux du sucre raffiné à des niveaux compatibles avec le pouvoir d'achat du consommateur. Ce système de restitution est opéré chaque fois que le besoin s'y presse notamment en cas où les cours de ces produits sur le marché international atteignent des niveaux exorbitants.

Un troisième niveau d'intervention des pouvoirs publics a été le soutien direct des prix à la consommation. Historiquement, le royaume du Maroc, s'est inscrit très tôt dans l'orientation de la libéralisation de son économie, la loi 06/99 sur la liberté des prix et la concurrence a consacré le principe de la liberté des prix tout en maintenant 15 groupes de produits et services réglementés. Ces produits qui restent réglementés représentent des biens et services considérés comme stratégiques ou socialement

sensibles et dont les secteurs ne présentent pas assez de concurrence par les prix. En parallèle au dispositif de réglementation des prix, le Maroc dispose d'une caisse de compensation dont les prérogatives consistent à veiller à la stabilité des prix internes via la subvention et le soutien des prix de certains produits à vocation sociale. L'objectif étant de garantir une certaine cohésion et une certaine protection pour les catégories de population les plus défavorisées. Les produits concernés sont le sucre, un type exceptionnel de farine intitulée la farine nationale de blé tendre et le gaz butane.

La conjoncture internationale et l'envolée continue des cours mondiaux spécialement du baril de pétrole qui a frôlé les 150 \$ en 2008 et qui n'est pas passé en dessous des 100 \$ tout au long de l'année 2011 ont poussé à l'élargissement du champ d'action de la caisse de compensation pour subventionner en plus des produits classiques d'autres produits notamment les carburants (gasoil et essence), le fuel industriel et le fuel utilisé pour la production d'électricité.

La caisse de compensation est dotée par le budget de l'État des fonds nécessaires pour mener cette mission. Avec la persistance de la flambée des prix des matières premières et des niveaux importants des cours mondiaux, cette opération devient de plus en plus délicate eu égard aux sommes faramineuses des subventions à déboursier pour ces produits et qui ont atteints des niveaux alarmants au cours de ces deux dernières années. Ainsi la charge de compensation est passée **12,4 milliards de dirhams** en 2006, à **16,8 milliards de dirhams** en 2007, à **32 milliards de dirhams** en 2008. La relative accalmie du marché international en 2009 a permis de ramener ce montant à **12,8 milliards de dirhams** qui est passé à **31,5 milliards de dirhams** en 2010 et pour battre tous les records au cours de l'année 2011 ou en s'attend à une charge de **45 milliards de dirhams soit à peu près de 5 milliards US dollars**.

Parallèlement à la stratégie de soutien intensif des prix adoptée pour l'amortissement des chocs des marchés extérieurs et se référant à sa mission de régulateur économique et du veilleur sur le bon fonctionnement des marchés et leur concurrenciabilité, la Direction de la Concurrence et des Prix a opéré un ensemble d'actions réglementaires et opérationnelles pour conforter et renforcer les mesures déjà adoptées

Sur le plan réglementaire, une circulaire relative à l'obligation et les modalités d'affichage des prix a été élaborée et publiée pour une consécration de la transparence dans les relations entre les opérateurs et les consommateurs et pour une meilleure information de ce dernier en période de flambée des prix. La loi n° 30-08 modificative de la loi 06-99 sur la liberté des prix et de la concurrence vient en réponse au contexte de hausse des prix internationaux en mettant en place un nouveau dispositif de contrôle des prix ciblant la rapidité d'action de l'administration dans la lutte contre la spéculation et l'augmentation des niveaux de sanctions comme meilleur moyen de dissuasion.

Le renforcement des opérations de contrôle et de suivi des prix sur les différents marchés a été opéré par la création d'une commission interministérielle centrale épaulée par des commissions régionales dont la mission consiste en un suivi régulier des marchés en vue de lutter contre les pratiques restrictives de la concurrence et de déceler les indices de pratiques anticoncurrentielles et en proposant de mesures adéquates pour faire face à tout dysfonctionnement qui pourrait être observé au niveau de ces marchés.

Sur le plan opérationnel, la direction de la concurrence et des prix a mené des investigations et des enquêtes voire des études sur les secteurs les plus exposés. Ainsi des enquêtes concurrence ont été lancées dans certains secteurs ayant fait l'objet de mesures tarifaires ou de soutien du budget notamment le secteur du beurre et celui des farines. En plus de la recherche d'indices sur des pratiques enfreignant la concurrence, ces enquêtes avaient pour objectifs une évaluation des effets des mesures adoptées par les pouvoirs publics.

Une attention particulière et un suivi régulier ont été consacrés à l'évolution des marchés des huiles de table notamment du comportement des opérateurs du secteur, dont des antécédents d'atteinte aux règles de la concurrence, ont été relevés par la Direction de la Concurrence et des Prix antérieurement. Le secteur sucrier, en raison de sa position de monopole, a également fait l'objet d'un suivi des autorités de la concurrence. Une étude sur les circuits de distribution du sucre a été menée en coordination avec l'opérateur pour une meilleure appréhension de sa politique commerciale et pour plus de transparence dans les agissements menés par la seule entreprise qui opère dans ce secteur.

Enfin l'optimisation des secteurs compensés a été également l'un des grands chantiers sur lequel s'est attelé la direction au cours de cette conjoncture. Un meilleur ciblage des efforts financiers du budget de l'Etat, un réaménagement des structures des prix visant une rationalisation des différents coûts et charges et l'instauration d'une transparence dans la formation des prix ont été entrepris pour le secteur des produits pétroliers et celui de la farine.

Il est bien évident que le défi imposé par la flambée des matières premières met à l'épreuve le budget de l'État par la charge lourde et évolutive de la compensation de même qu'il interpelle les autorités de la concurrence par une remise en cause des principes de la liberté d'actions des marchés par la création de distorsions causées par la montée de l'interventionnisme des pouvoirs publics dans la formation et le contrôle des prix. Au delà des actions palliatives dont les effets ne peuvent être que de court terme, ce défi ne pourrait être débouté qu'en adoptant une vision stratégique globale de long terme.

Le royaume du Maroc s'est déjà lancé dans sa stratégie qui s'articule en trois principaux axes. La réduction à terme de la dépendance des secteurs stratégiques du marché international, la rationalisation de la consommation des produits de base et la confortation des infrastructures de stockage ainsi que le renforcement des autorités de la concurrence.

Le lancement des stratégies nationales de grande envergure et sur de longues années : la stratégie énergétique visant la diversification du bouquet énergétique par la réduction progressive de la consommation des énergies fossiles et l'introduction des énergies renouvelables en adoptant un cadre réglementaire et opérationnel incitatif au développement de ces nouvelles énergies, la stratégie du Maroc vert visant une amélioration de la production nationale en sucre, céréales, huiles, viandes, lait..... par la mise en œuvre d'une panoplie de contrats programmes entre gouvernement et interprofession objectant la mise à niveau de ces filières.

La mise en place d'un cadre réglementaire de l'efficacité énergétique ainsi que les différentes actions qui l'ont accompagnées dans plusieurs secteurs dont l'habitat et le transport met en exergue l'intérêt que revêt l'optimisation de la consommation des produits de base spécialement les produits énergétiques dans la politique des pouvoirs publics. D'autres programmes d'incitation à la rationalisation de l'énergie ont été établis pour l'électricité : la généralisation de la lampe à basse consommation et le système d'économie de 20-20 n'en sont que quelques exemples. Dans le même objectif, un grand encouragement est accordé aux investissements publics et privés dans les infrastructures de stockage et de réception notamment portuaires pour une modulation de la politique d'approvisionnement du pays en accentuant l'approvisionnement en produits stratégique en cas de baisses des prix sur le marché international et en constituant les stocks nécessaires.

Par ailleurs, nul ne peut nier qu'en périodes de crise ou de difficultés, la bonne gouvernance est d'un grand apanage dans l'amortissement et l'adoucissement des retombées de la situation. La bonne gouvernance a un important rôle dans la gestion des difficultés de l'instant. Elle ne pourrait être possible sans un cadre législatif adéquat et sans institutions de gouvernance fortes et indépendantes. S'inscrivant dans cette logique, le Royaume a mis en place une nouvelle législation en donnant aux autorités de la concurrence notamment, le conseil de la concurrence jusqu'à aujourd'hui consultatif, plus de pouvoirs et

plus d'indépendance pour une meilleure participation à la gestion des période de crise et pour une meilleure efficacité dans la consécration de la culture de la concurrence et de lutte contre l'économie de rente.

En effet, soucieux de l'importance que peut jouer le Conseil de la Concurrence dans la régulation du marché, le Gouvernement par le biais de Ministère des Affaires Économiques et Générales n'a cessé d'insister du la nécessité d'activer ce conseil. Chose concrétisée en 2008 par la nomination du nouveau président et des nouveaux membres.

La nouvelle équipe du Conseil a, dès sa prise de fonction, déployé d'énormes efforts en matière de sensibilisation aux avantages du droit de la concurrence, a lancé de études sur la concurrentiabilité de plusieurs secteurs stratégiques et a organisé des conférences internationales auxquelles ont participé d'éminents experts connus mondialement.

Considérant toujours l'importance du Conseil de la Concurrence comme organe de moralisation de la vie économique du Maroc, ce conseil a été élevé au rang d'institution constitutionnelle dans la nouvelle constitution marocaine.

MOROCCO (MINISTRY OF ECONOMIC AND GENERAL AFFAIRS) **-- English Version --***Introduction**

The volatility and instability of commodity prices have been among the major challenges of the last four years for many countries, and they still are. World prices for basic foodstuffs (sugar, cereals, fats, rice, maize and so on), oil and ores have set records not reached for three decades. Two thousand eight was inescapably a reflection of these erratic and irrational global market trends, with a barrel of oil – to cite just this one example – breaking through the USD 145 ceiling in July 2008 and then plunging dizzily to a floor of USD 40 just months later.

The respite experienced during the early months of 2009 was but a fleeting pause before the sharp upswing resumed at year-end 2010. The volatility of commodity markets is shrouding the world in uncertainty and fear accentuated by the harbingers of economic downturn, the symptoms of which are growing clearer and more distinct with each passing day.

Debate over the causes of these soaring prices has been brisk. However, it is universally acknowledged that there is a growing imbalance between supply and demand. The succession of natural disasters has unquestionably played a role as a trigger in disrupting commodity supplies. Thus have harvests been endangered by floods in Pakistan and Australia, fires in Russia and drought in Latin America and China. In addition, geopolitical conflicts and popular uprisings in certain mainly oil-producing Arab countries explain the bulk of the problems to be seen on the oil market. With respect to demand, the strain is also at its utmost. Consumption – whether of energy or other commodities – is being driven by the exponential growth of the emerging countries.

With supply threatened by the scarcity induced by successive natural disasters, and with demand exploding, it is easy to understand why prices are rising. And yet, the swiftness of the spike and the intensity of the fluctuations would suggest that speculative factors are at work as well.

Morocco, as a non-oil-producing country with limited natural resources, is bearing the full brunt of soaring world prices. Its heavy dependence on foreign markets to meet much of its commodity requirements has accentuated its vulnerability to the constraints imposed by global market volatility.

As a matter of fact, 97% of the Kingdom's petroleum-product requirements are imported, as is over half of the raw sugar that Morocco consumes; the table oil sector imports almost 90% of the soya and sunflower seeds and crude oils that are needed to produce refined edible oils. Cereal imports are highly dependent on harvests and in some years can peak to over 70% of aggregate wheat consumption.

Apart from its dependence, Morocco is one of the greatest consumers of certain commodities, and especially of refined sugar, with 35 kg per capita as compared to a world average of 22 kg, the cereals that

* Contribution submitted by Mr. El Hassane Bousselmame, Director of Competition and Prices, Moroccan Ministry of Economic and General Affairs.

constitute the staple of the Moroccan diet, as well as edible oils and energy, which is unquestionably vital to driving the country's economy.

Clearly these sectors are strategic. Nevertheless, soaring world prices coupled with high consumption constitute a heavy burden for the country in terms of its trade balance, import expenditures and resultant impact on the State budget.

The Moroccan authorities' reaction to the global market surge was swift and sequential. As a result, the Ministry of Economic and General Affairs' Directorate for Competition and Prices, having the delicate mission of co-ordinating government price policy and implementation of competition policy, found itself squarely in the middle of the problem.

By year-end 2007, a series of one-off, short-term measures were instituted to cope with the urgency of the situation. The overriding objective was to shield consumers and producers alike from any excess cost that could jeopardise consumer purchasing power or producer competitiveness, in a stance that at the time was deemed one-off and limited in time.

The strategy consisted in triggering a set of mechanisms that would be able to cushion the global market shock. The first of these actions targeted tariffs and reduced if not eliminated customs duty on all products affected by surging prices and imports of which are subject to substantial levels of protection. The sectors benefiting from these measures were cereals, butter and sugar.

And yet, while this mechanism proved fairly effective in some sectors, the same could not be said for other sectors in which the level of protection is either at a minimum – as in the case of edible oils and petroleum products – or insufficient. Other remedial measures had to be combined in order to yield a tangible and more significant result.

The second level of intervention by the Moroccan authorities, led by the Directorate for Competition and Prices in co-ordination with the ministries responsible for the various sectors involved, was to institute a system of import-cost restitution for a whole set of products, and particularly for imports of soft wheat and raw sugar.

The State budget assumed the expense of reimbursing sector operators for the difference between the actual import cost of each product and the theoretical costs of these inputs that would be appropriate for the prices of the corresponding final products.

As a result, restitutions were paid out in respect of tender-wheat and raw-sugar imports in order to keep the prices of flour and its derivatives, bread and refined sugar at levels compatible with consumer purchasing power. This restitution system is triggered whenever necessary, and in particular when world market prices for these products reach exorbitant heights.

A third level of government intervention was direct support for consumer prices. Historically, the Kingdom of Morocco opted very early to liberalise its economy, with Act No. 06/99 on freedom of pricing and competition enshrining the principle of freedom of pricing while at the same time preserving 15 groups of regulated products and services. These products that are still regulated represent goods and services that are considered strategic or socially sensitive, and for which there is insufficient price competition in the sectors involved. In parallel with the price regulation mechanism, Morocco operates a compensation fund which ensures domestic price stability by subsidising and supporting the prices of certain social goods, the aim being to guarantee a certain social cohesion and degree of protection for the most disadvantaged segments of the population. The products in question are sugar, a special type of flour known as national soft-wheat flour and butane gas.

The international economic situation and steadily spiking world market prices, especially of oil, which neared USD 150 a barrel in 2008 and did not dip below USD 100 a barrel at any point in 2011, have prompted expansion of the compensation fund's scope of application to subsidise products other than the conventional ones, and in particular automotive fuel (diesel and petrol), industrial fuel and fuel used to generate electricity.

The State budget endows the compensation fund with the financial resources needed to accomplish this mission. With the persistence of soaring raw materials prices and high levels of world market prices, this operation is becoming increasingly delicate in view of the phenomenal amounts of subsidies expended for these products and which have reached alarming levels over the past two years. As a result, the total compensation bill rose from **12.4 billion Moroccan dirhams (MAD)** in 2006 to **MAD 16.8 billion** in 2007 and **MAD 32 billion** in 2008. The relative calm in world markets in 2009 eased this amount back down to **MAD 12.8 billion**, which then rose to **MAD 31.5 billion** in 2010, and for 2011 the projection is for an all-time record-breaking **MAD 45 billion, or approximately USD 5 billion**.

In parallel to the strategy of intensive price support that has been adopted to buffer foreign market shocks, and with reference to its mission as an economic regulator and monitor of proper market workings and competitiveness, the Directorate for Competition and Prices has undertaken a set of regulatory and operational initiatives to consolidate and strengthen measures already adopted.

On a regulatory level, a circular on compulsory price labelling and the mechanics thereof was prepared and published to enshrine transparency in relations between operators and consumers, and to improve consumer information during periods of sharply rising prices. Act No. 30-08 amending Act No. 06-99 on freedom of pricing and competition was a response to the backdrop of rising world prices by instituting a new price control mechanism, targeting the speed of government intervention in combating speculation and raising the level of sanctions as a better means of dissuasion.

Price controls and monitoring operations were bolstered on the various markets via the creation of a central interministerial commission backed up by regional commissions with a mission of regular market monitoring in order to combat practices that restrict competition, and to detect evidence of anti-competitive practices and propose appropriate measures to cope with any problems observed in the workings of the markets in question.

On an operational level, the Directorate for Competition and Prices has carried out investigations and surveys, if not studies, on the most highly exposed sectors. Competition surveys were therefore launched in sectors in which tariff or budget support measures had been introduced, including the butter and flour sectors. Along with looking for evidence of anti-competitive practices, the surveys also sought to evaluate the effects of the measures taken by the authorities.

Special attention and regular monitoring were focused on trends in the market for edible oils, especially as regards the behaviour of operators in the sector, whose infringements of the rules of competition had been noted in the past by the Directorate for Competition and Prices. The sugar sector, because of its monopoly, has also been monitored by the competition authorities. A study of sugar distribution circuits was carried out in co-ordination with the operator to get a better understanding of its marketing policy and to achieve greater transparency in the dealings of the lone enterprise operating in this sector.

Lastly, optimisation of compensated sectors has also been one of the Directorate's major projects in the current economic climate. Better targeting of State budget appropriations, a restructuring of prices to rationalise the various costs and expenses, and the institution of transparency in pricing were undertaken in the petroleum and flour sectors.

Clearly, the challenge posed by soaring raw materials prices is straining the State budget because of the burdensome and ever-changing compensation expense, while at the same time it is putting the competition authorities to the test as principles of market freedom are jeopardised by distortions caused by the government's mounting interventionism in formulating and controlling prices. Apart from stop-gap measures whose effects are necessarily only short-term, this challenge can be overcome only by adopting a comprehensive long-term strategic vision.

The Kingdom of Morocco has already launched a strategy having three major components: ultimately reducing strategic sectors' dependence on world markets; rationalising commodity consumption and bolstering storage infrastructure; and strengthening the competition authorities.

Far-reaching national strategies have been launched with long-term time frames: a strategic diversification of the energy mix by gradually reducing consumption of fossil fuels and introducing renewable energies and adopting a regulatory and operational framework conducive to the development of such new energies, the "Green Morocco" strategy promotes improvements in national production of sugar, cereals, oils, meat, milk, and so forth by implementing a panoply of programme contracts between the government and inter-professional alliances with an objective of bringing these industrial segments up to standard.

Implementation of a regulatory framework for energy efficiency, along with the various actions accompanying it in multiple sectors, including housing and transport, highlights the benefit to government policy of optimising the consumption of commodities, and of energy products in particular. Other programmes to foster energy rationalisation have been established for electricity: generalisation of low-consumption lamps and the Eco 20/20 system are but two examples. Along the same lines, public and private investment in storage and receiving infrastructure, and ports in particular, is being strongly encouraged to modulate the country's supply policy by accentuating supplies of strategic products when world market prices drop and constituting the necessary inventories.

In addition, no one can deny that in periods of crisis or difficulty, good governance goes a long way towards buffering and lessening impacts. Good governance plays an important role in managing the difficulties of the moment. It cannot be possible without an appropriate legislative framework and without strong and independent governance institutions. Accordingly, the Kingdom has instituted new legislation that invests the competition authorities, and the previously advisory-only Competition Council in particular, with greater powers and more independence for increased participation in managing crisis periods and enhanced effectiveness in enshrining a culture of competition and combating a rent-seeking economy.

Keenly aware of the important role that the Competition Council can play in regulating the market, the government has continually stressed, through the Ministry of Economic and General Affairs, the need to activate the Council. This was finalised in 2008 with the appointment of a new Chair and new members.

As soon as it took office, the newly constituted Council undertook enormous efforts to build awareness of the advantages of competition law, launched studies on the competitive capabilities of a number of strategic sectors and held international conferences in which eminent experts known round the world took part.

In view of the Competition Council's importance as a moral influence on Moroccan economic life, Morocco's new constitution elevated the Council to the rank of a constitutional institution.

NAMIBIA

The Namibian economy is closely linked to the South African economy in many ways. Namibia Imports about 80% of its total imports from South Africa. The country's economy is not well diversified despite the potential it has. Its economic activities are concentrated around primary sector activities such as extraction and processing of minerals for export which accounts for a large portion of the country's GDP, commercial livestock farming, and fishing. It is highly vulnerable to world market price fluctuations of diamonds and uranium, prices and demand.

The most observed volatility in prices over recent years has been in prices of minerals, mainly diamonds, zinc, copper and uranium. The mining sector as the backbone of the country's economy was the one severely hit by the 2008/09 financial crisis. Since the crisis, the prices of most mineral had been able to recover to their pre-crisis level. Uranium on the other hand suffered a drop in prices around April 2011 as a result of reduced demand due to the Japan nuclear incident.

Volatility in mineral prices is caused by external factors as prices are determined on the international market. Namibia exports all of its minerals in raw form or with minimal value addition.

The United States is Namibia's biggest export destination for diamonds. Reduced demand as a result of the crisis in importing countries causes a drop in prices.

The agricultural sector is a very important source of livelihood for many Namibians both at commercial and communal level. The country produces about 40% of its maize requirement. However, most of the country's food requirements come from South Africa.

During 2008 / 09, general food prices increased as a result of the global economic downturn. The government in during that period introduced zero-rating on basic food commodities such as bread, milk, maize meal, beans, cooking oil, fat, bread and cake flour. This was in an attempt to help reduce the burden on the poor as well as to cater to the needs of the consumer.

The Commission does not provide any commodity price monitoring and has not been approached by the government or any other body to help influence prices of commodities. The Namibian economy operates on a free market basis and does not consider price control as an overarching economic objective. There is however a new statistics body, the National Statistics Agency that monitors price movements and inflation.

The Commission does not have direct influence over prices of commodities but regulates strictly on competition issues (mergers and acquisitions and restrictive business practices) as per its Act and hopes to influence prices by promoting greater competition.

With the recent oil was recently discovered in Namibia, the Commission has received a high number of mergers in oil exploration which involved foreign and Namibian exploration companies. Most of these mergers were approved without conditions. The Commission has received mergers on base metals and minerals as well.

One such case was the 100 per cent acquisition of Jupiter Petroleum, owner of prospective oil and gas interest off the coast of Namibia, by Global Petroleum, a UK registered company. The Commission was notified in line with Section 44 of the Act. In its analysis, the Commission found that there were no great competition concerns and approved on condition that the necessary approval was obtained from the government.

In the agricultural industry, allegations of cartel activities have come to the Commission as of recent. The complainant has lodged a complaint on a confidential basis as per Rule 13 (1) of the Rules established under the Act. A decision was taken to investigate in May 2010. However, due to capacity constraints, the investigation process has not started as yet.

The Commission so far has not undertaken any market studies except in the cement market, where the Commission is currently in the process of conducting such study. The Commission aims to do a post merger research on the entrance of a major retailer, Walmart into Namibia.

There had been no complaints in minerals or agricultural commodities. However, there have been complaints from the public about high cement prices and its implications on consumer protection.

No great advocacy efforts have taken place since the establishment of the Commission. Since its inception, the Commission has placed more focus in making impact in its core activities and ensuring that competition law is understood and complied with in terms of mergers and acquisition and restrictive business practices. It has not had the opportunity to advice on reform of government of private sector monopolies, deregulation of markets etc. The year 2012 has been ear marked as the year the Commission will carry out its awareness and advocacy efforts.

NEW ZEALAND

As a small economy that is geographically distant from major markets and heavily dependent on agriculture, New Zealand has always been affected by price movements in commodities that are essential inputs into the agricultural production process, as well as price movements in agricultural commodities. Until the mid 1980s, the government provided support to the agricultural sector through subsidies, largely as compensation for the high tariffs on inputs that farmers faced. This support was rapidly removed during the period in 1984-1990 as part of a broader economy wide liberalisation process. As a consequence New Zealand's agricultural sector was exposed to international competition almost overnight. Since that time there has been an on-going process of reform and adjustment, which has resulted in a more diversified sector, increased innovation and improved productivity. Today the sector is more exposed to external shocks and price volatility but the reforms have resulted in a sector that is better able to manage risk including price volatility. New Zealand's floating exchange rate also enables the New Zealand dollar to adjust to changes in (particularly agricultural) commodity prices, given the New Zealand economy's dependence on agriculture, and so often mitigates against price volatility. This paper provides a brief summary of some of New Zealand's experiences.

New Zealand has a long history of trade in agricultural products. The first exports were consignments of cheese that were shipped to Australia in the 1840's. The advent of refrigerated transport at the end of the nineteenth century enabled New Zealand to sell beef and sheep in offshore markets. Following the Second World War, New Zealand had guaranteed access to the British market and good terms of trade. New Zealand's agriculture producers were sheltered from international markets and competition, and the country developed a high standard of living under favourable conditions.

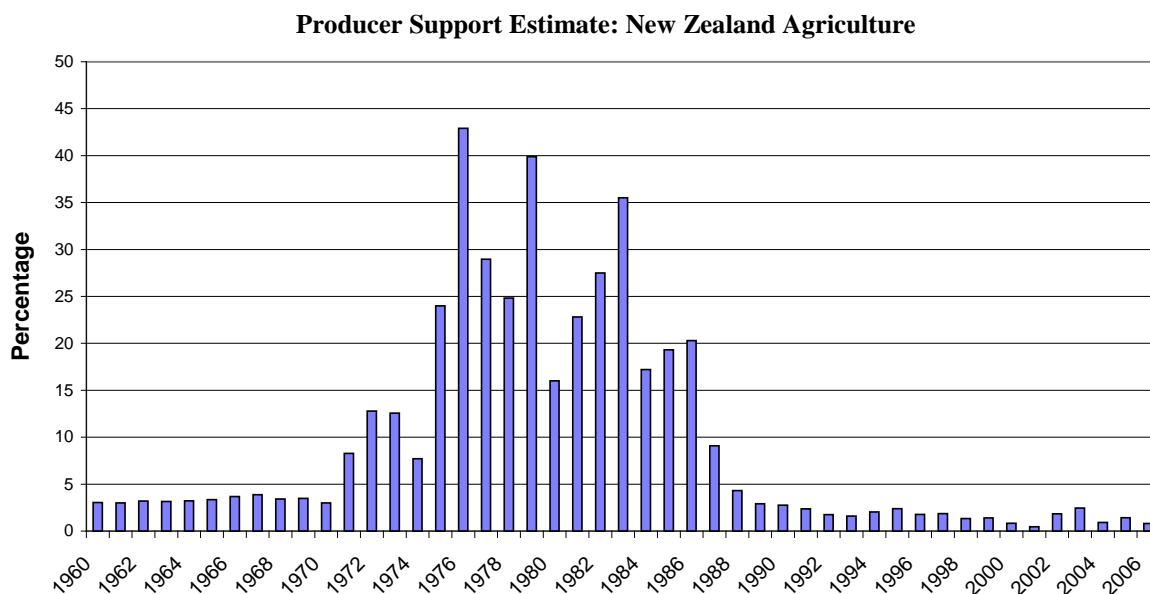
In 1973 Britain joined the European Economic Community limiting market access for New Zealand exporters and consequently agricultural products became exposed to other markets and returns were more volatile.

Over the same period, government protection of the manufacturing sector with import quotas and tariffs had resulted in a high cost structure for agriculture. By 1984, the level of government support to the sector was around 30 percent of total agricultural sales. Farmers were making investment decisions not based on movements in international markets and consumer demand but on the level of government support. In other words, government support had resulted in higher, but inefficient, production (with inefficient use of subsidised products, services and land). It had reduced the competitiveness of New Zealand farmers in international markets and concentrated the risk of poor farming decisions solely on the government.¹

The 1984 reforms were spurred by widespread dissatisfaction with the government's economic management and intervention. The fiscal deficit was 9% of GDP, government debt was at 40% and the consumer price index was at almost 20%. New Zealand could no longer afford to support inefficient sectors, including the agricultural sector. Almost overnight, sweeping changes were made across the economy. These included floating the exchange rate and ensuring that monetary policy targeted inflation,

¹ Evans, L, *Structural Reform: The Dairy Industry in New Zealand*, APEC Conference on High Level Structural Reform, April 2004.

eliminating government support including subsidies and significantly reducing tariffs. A number of sectors, including agriculture, were exposed to international competition.



Source: New Zealand Ministry of Agriculture

The reforms had a significant effect on farmers. Land prices and profits dropped substantially, costs rose and incomes fell. Nevertheless, the reforms were supported because they were being undertaken across the entire economy and overtime it was expected that the costs of inputs into the production process, such as labour and manufactured items, would decrease and enable agricultural products to once again become internationally competitive.

The reforms continued into the 1990s because although subsidies had been removed, producer boards remained. One of the main functions of a producer board was to market products in internationally. Until that time greater scale and coordination in production and marketing was seen as advantageous so producer boards also limited the rights of companies to export on their own account. However, the small size of the domestic market and the single desk export policy made it difficult for any new entrant to obtain the production efficiencies needed to be competitive. Furthermore, in some sectors the producer board structure led to overproduction because farmers received a bundled price and as a result were not able to distinguish between the cost of producing the raw product and the return on processing plant and equipment. Although the benefit associated with producer boards were considered on a case by case basis, for many agricultural products they inhibited competition and innovation.

Today production decisions are driven by domestic and overseas markets, not by government. As a result, sheep numbers have fallen from 70 million to 32 million as farmers have diversified and expanded into dairy, deer, goat, horticulture and forestry. Large farms still tend to be specialised to take advantage of the scale and scope. Small farms are more likely to produce a range of products to protect themselves from external shocks.

Currently, the government provides limited assistance but only for:

- general spending only for research, sanitary and phyto-sanitary measures and pest/disease control; and
- direct support only for large scale emergencies, climatic events and erosion control

To maintain its global competitiveness, New Zealand has continued to consider ways that it can improve productivity in the agricultural sector. These days such innovations are generally spurred by the private sector.

One such example is the recent launch of a dairy futures and options market by the NZ Stock Exchange. Dairy futures and options are designed to manage risk and smooth out volatility, creating price certainty, transparency and a forward view of market sentiment. It is anticipated that by trading on the futures and options market, dairy participants create price certainty. The market was established in 2010 so it is still developing, however, all signs point towards it being a success.

The New Zealand experience with the removal of government support has demonstrated that farming in a de-regulated environment is feasible, and yields a portfolio of activities associated with better resource allocation; within the sector and among sectors. Exposing the sector to international competition has also meant that it has had to innovate and adapt in order to maintain its international competitiveness. Consequently the sector is better able to manage risk, including that associated with price volatility in commodity markets.

PAKISTAN

1. Background

Price volatility can simply be defined as sharp fluctuations in prices of commodities. Others define it as “a directionless measure of the extent of the variability of a price or quantity”¹. Volatility is a symptom of structural problems of varying stocks levels. Both high and low levels of commodities can increase the vulnerability of prices to volatility. Some economists also distinguish between the one-off production shortfalls or gains and variable stocks over a longer period.

Commodity prices vary generally with the forces of supply and demand, both of which can be affected by several factors. The impact of commodity price volatility is felt differently in each separate commodity market and is based on the extent to which the given production and consumption shocks translate into price volatility depends on supply and demand elasticities, that reflect the responsiveness of producers and consumers to changes in prices. These elasticities are generally low over the short run.

Professor Barrett² places more emphasis on boosting production and improving distribution systems to increase the supply of food and controlling prices. According to him, food price volatility gets addressed automatically as food supplies expand, bringing down prices and encouraging expansion of price-stabilizing stocks.

Stabilizing prices and maintaining an ample supply of essential commodities is an important concern for the Government of Pakistan as well. Therefore in an attempt to maintain and stabilize prices, the government of Pakistan has legislated the “Price control and prevention of profiteering and hoarding act, 1977”. The main aim of the Act is to secure equitable distribution of essential commodities and their availability at fair prices to the common man.

In 1967, the Government established the Trading Corporation of Pakistan (TCP), as a premier international trading house, which is the principal trading arm of the Government of Pakistan. The Corporation gradually moved from barter, through commodity exchange to cash trade. TCP’s main aim is to undertake import of essential commodities to help ensure their availability to the common man at affordable prices. It intervenes in the market in the larger public interest to ensure fair price to growers, as well as to preempt hoarding and profiteering. TCP’s operations largely complement the private sector in meeting the demand for essential commodities in the country. It also facilitates the private sector by making its vast storage areas available to them on favorable terms, thus considerably helping improve the supply chains.

As part of its mandate, the TCP imports and supplies essential commodities at reasonable rates to the Utility Stores Corporation of Pakistan (USC) and the Canteen Stores Department (CSD) for purchase by the public. USC is an organization that operates chain stores throughout Pakistan that provide basic commodities to the general public at rates which are lower than the open market. The CSD is a chain of

¹ Gilbert, C. L., and C. W. Morgan. "Food Price Volatility." *Philosophical Transactions of The Royal Society* 365: 3023-034. Web. http://www.cepii.fr/anglaisgraph/communications/pdf/2011/10110111/S5_Ch_Gilbert.pdf

² Christopher Barrett is a Professor of Applied Economics at Cornell University.

retail stores run by the Pakistani Ministry of Defence with presence in all major military Cantonments operated by the Pakistan Armed Forces. The CSDs sells a wide variety of products, procured in bulk and sold at concessional rates, compared to retail prices.³

1.1 *In recent years there has been significant volatility in the prices of commodities that are important to the general population in your country?*

Yes. The floods of both 2010 and 2011 destroyed infrastructure, crops and livestock, resulting in price volatility as demand outstripped supply. However, the floods were exceptional circumstances in the last two years. The country has also seen price volatility as a result of inflation.

Following the 1998-99 crisis, when the country was on the brink of default, international reserves were depleted, economic growth was anemic, debt ratios were alarmingly high and confidence of the investor community was at its lowest, inflation was reduced to below 5% by 2000 and remained stable through 2003. A tight monetary policy combined with fiscal consolidation contributed to this low-inflation.

With monetary growth picking up, inflation increased sharply in late 2003, and since then, has remained in double digits. This has had a considerable impact on price volatility as can be noted in the State Bank of Pakistan's *Inflation Monitor*⁴. According to the Inflation Monitor, Headline CPI inflation in December 2011 was 9.7% compared to 15.5% in December 2010.⁵ However in recent years commodity prices have again witnessed sharp increases due to various factors. Prices of food commodities (wheat, rice, oil and sugar) increased due to global production shortages and panic buying by the importers in anticipation of high prices. In the non-food group, rising crude oil prices was a result of bullish sentiments regarding the global economic recovery and partially due to political unrest in Egypt and Tunisia.

1.2 *Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down.*

Fixing of prices and output are universally recognized as having the most detrimental effects on competition, and at times responsible for price volatility. In Pakistan for example sugar industry is overly regulated and is also prone to engage in anti-competitive activities making the price of sugar fluctuate irrespective of market forces.

Generally Pakistan has seen considerable volatility in both food and non-food commodities in the recent period. There is pretty much no category of food commodities that have not remained untouched by volatility and oil prices have had their concomitant impact on inflation and volatility in the country.

1.3 *Are the price volatility in these commodities, and the causes of that volatility, global, regional or domestic?*

Yes there has been price volatility in these commodities. For Pakistan, the causes of this volatility have both domestic and foreign reasons as mentioned in this document. The major domestic contributory to volatility was the floods of the 2010 and 2011 in which considerable agricultural output was destroyed. There are certain other domestic factors briefly highlighted below.

³ <http://www.tcp.gov.pk/Home.aspx>

⁴ The most recent Inflation Monitor is at the time of writing is dated December 2011 and is available at HTTP://www.sbp.org.pk/publications/Inflation_Monitor/2011/ec/IM_Dec_2011.pdf. The price movement can be seen on page 5.

⁵ See note 8, page 1.

- Cartelization/collusion among market forces

Collusion in the relevant market may result in price fixing agreements between the relevant markets. Restricting the production or quantity of a certain product may also result in price volatility in the relevant market which eventually causes distortion to the free and fair competitive play of the market forces. The Commission has identified collusive behavior in a number of sectors and action has been taken against the parties involved.

- Energy crisis

Power shortages are also a contributing factor towards price volatility. The current energy crisis in Pakistan has an impact on the production of consumer goods. The shortage of goods leads to increase in prices. Also constantly changing energy prices create uncertainty regarding the future path that prices will take which causes consumers to delay consumption of certain consumer durables which will eventually have an effect on prices of those commodities⁶. The energy crisis directly affects the productivity of labor. Since the fixed cost remains constant and production decreases drastically the cost per unit of a product increases immensely and therefore this leads to increase in prices of the end product. The world oil prices contributed to the energy crisis which also had a lagged impact on commodity prices⁷.

- Other factors

The distance that consumers have to travel to buy a certain commodity is also a factor which impacts the demand of a good and in turn will affect its price. For instance there are certain local markets i.e. mandis which are situated away from residential areas which may reduce the number of customers. Fuel costs also have a direct bearing here, as explained below.

Internationally, agricultural commodities have been witness to global production shortages and speculative trading, in addition to factors such as widespread fluctuations in petroleum prices that have a trickle-down effect on the prices of various essential items. Crude oil is also treated as an intermediate input in domestic production hence having an effect on the prices of consumer products and therefore contributes to the overall price volatility. Increase in the petroleum prices worldwide also means that the cost of other petroleum products including jet fuel, diesel fuel, heating oil, gasoline etc. will also increase. Variations in prices of some of these petroleum products will adversely affect price volatility as they are commonly used sources of fuels by the masses. Crude oil prices directly have an impact on the cost of transportation which yet again affects prices.

This is also reflected in the prices of perishable commodities such as fruits, vegetables and dairy products.

Since Pakistan is an agricultural country, climatic changes have a considerable impact on production and crop yield. Weather has an impact on the supply side as well as demand side dynamics of prices of products. Unfavourable weather conditions may lead to a low crop yield which will create shortages in the market and hence have a direct impact on prices. On the other hand favourable weather conditions may even produce a bumper crop which may decrease prices in the market.

⁶ Kilian, Lutz. *Oil Price Volatility: Origins and Effects*. Working paper. World Trade Organization Economic Research and Statistics Division. Web. http://www.wto.org/english/res_e/reser_e/ersd201002_e.pdf

⁷ <http://www.infopak.gov.pk/EconomicSurvey/07-Inflation.pdf>

On the demand side, the consumption patterns also change according to the weather. Some items become more expensive in winters for example whereas other items may be more expensive in summers due to a rise in seasonal demand. For instance, dry fruits, nuts and eggs are expensive in winters because of a rise in weather-driven demand of such products.

1.4 Does your agency have any ongoing / pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviors in these markets (both domestic and foreign markets)?

CCP does not routinely monitor prices, quantities or behaviors. However, the Commission has conducted various sectoral studies to assess competition concerns in the relevant commodity markets.

2. Competition enforcement and formal investigation conducted by Competition Commission of Pakistan

Following are a few significant law enforcement matters that CCP has dealt with in relation to commodities.

2.1 Pakistan Poultry Association- Cartelization

CCP took notice of media reports regarding an unprecedented hike in the prices of poultry products and possible cartelization, and initiated a *suo moto* enquiry. The Enquiry Report concluded that there was, *prima facie*, violation of Section 4 of the Act by the PPA.

It was observed during the hearings that the PPA had taken various decisions through its central and zonal committees and sub-committees, which had the object or effect of restricting, reducing, preventing or distorting competition through price fixing and production control in the relevant markets of parent stock, day old chicks, broiler chicken, table eggs and poultry feed. The Bench passed an Order in which it imposed a penalty of Rs. 50 million on PPA for violation of Section 4 of the Act.

2.2 Pakistan Jute Mills Association & Member Jute Mills- Cartelization

CCP, as part of its initiative to detect bid rigging in public procurement, sought information from Pakistan Agriculture Storage and Supply Corporation Limited (PASSCO) regarding tenders and bidding over the last few years. Scrutiny of the information received from PASSCO raised suspicion of bid rigging. CCP, taking *suo moto* notice of the information, initiated an enquiry that concluded that the PJMA had *prima facie*, taken decisions, and the jute mills had entered into an agreement, with respect to production, pricing and tendering of Pakistan Grain Sacks (PGS) to public procurement agencies, in violation of Section 4 of the Act.

Show cause notices were issued to the PJMA and its member mills. After hearing the parties, the Bench concluded that based on the evidence on record and the admission of the jute mills, an agreement existed between the Jute Mills with regard to the production, supply and pricing of PGS to procuring agencies, which amounted to collusive bidding for tenders in violation of the Act.

The Bench took into consideration the admission of PJMA and jute mills that their actions had inadvertently resulted in non-compliance with the Act. A total penalty of PKR 23m was imposed on PJMA and 10 jute mills engaged in collusive activities.

2.3 Price fixing agreement between all Pakistan Sugar Mills Association and Ministry of Industry and Production

The Competition Commission of Pakistan noticed news items appearing on August 19, 2009, in leading newspapers of the country, reporting an agreement between All Pakistan Sugar Mills Association (“APSMA”), representing all the sugar production stakeholders and Ministry of Industries and Production (“MOIP”), on behalf of the Government of Pakistan, fixing the ex-mill rate of sugar at Rs.48/- per kg in Sindh and Rs.49.75/- per kg in Punjab (the “Agreement”).

The implementation of such agreements under the auspices of the Government manifests legitimization of practices prohibited under law. The Commission was of the view that the Government must not provide any patronage to anticompetitive practices and measures that in effect promote and encourage collusive behavior on the part of the sugar mills through the platform of APSMA. Fixing of prices, output etc are universally recognized as having the most detrimental effects on competition; eradicating or seriously reducing the benefits that competitive markets deliver for consumers. While the Commission noted reports of alleged attempts to create artificial shortages of sugar, the Commission was of the opinion that this stop gap measure of ‘fixing price’ can at best provide temporary relief to cap the excessive price increase. However, this measure fails to benefit the sector or the economy at large. The short term benefit of fixing prices does not justify the long term loss caused by such anti-competitive policies.

Accordingly, the Commission recommended that the Government terminate the agreement at the earliest and desists from entering into arrangements that have the effect of encouraging collusive behaviour on the part of economic agents in any sector. However the case is still pending with the Sindh High Court.

2.3.1 Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).

CCP has not conducted market studies into specific commodity markets. However various sectoral studies have been conducted to assess competition concerns regarding products and relevant markets.

2.3.2 Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behavior? What was the nature and circumstances of the request and how did your agency respond?

The Commission has to date not yet received any requests from the Government or other parts of society to formally investigate commodities markets. However the Commission has received various requests from the private sector regarding competition concerns in different product markets which the Commission has taken notice off and proceeded with further investigation.

3. Advocacy opportunities and challenges

Initiatives taken by CCP to recommend or advice on commodity price deregulation:

3.1 Opinion on fixing a minimum price in the cigarette industry sent to Federal Board of Revenue

CCP took suo moto notice of advertisements, published in June 2008, by leading tobacco companies of Pakistan pertaining to pack prices of cigarette brands. The Commission also took notice of an advertisement by Federal Board of Revenue (FBR) printed in August 2008, declaring a minimum price for

cigarettes and rendering it illegal to sell cigarettes below such minimum price. In the light of the subsequent public hearing and submissions made by the parties, the Commission was of the opinion that the conflict did not exist in the legal framework but rather it arose when FBR overstepped the mandate envisaged under law. The Excise Act empowers FBR to fix minimum prices only for the purposes of levying and collection of taxes and duties, and not for the purpose of determining a selling price. The restriction imposed by FBR on manufacturers and other persons associated with the cigarette business of not selling cigarettes below its prescribed minimum price is not envisaged under the law. While FBR may legally set a minimum price on cigarettes to impose tax upon, it may not stop the manufacturer's wholesalers or retailers from selling the cigarettes below that price. Thus it is the implementation and not the law that is giving rise to an anomalous situation.

A similar situation arose when FBR required manufacturers to print their retail prices in the newspapers, creating an automatic mechanism for manufacturers to monitor prices of their competitors, thereby preventing and restricting competition. Sharing of information such as price tables may facilitate anti-competitive behaviour since it is likely to eliminate uncertainty as to the future conduct of competitors in the relevant market and inevitably may affect future commercial policies of the undertakings. The Commission therefore recommended that all parties immediately desist from advertising cigarette prices in the print media. In the Commission's view, the imposition of such a restriction by the FBR resulted in prescribing minimum retail prices at two levels; first by FBR itself, and subsequently, by the manufacturers who while printing the manufacturer's recommended price use FBR's minimum retail price as a benchmark and prescribe the recommended price over and above FBR's minimum retail price. A random market survey revealed that in most cases, the actual retail price of different brands of cigarettes is above the manufacturer's recommended price printed on cigarette packs and published in advertisements as a result of which the manufacturer's recommended price then operates as a minimum price, enabling retailers to sell over and above such price. In this entire process neither FBR nor the consumer benefits in any manner.

The Commission was of the view that where manufacturers enjoy dominance in the relevant market, printing either minimum or maximum prices may have anti-competitive effects. However, if a choice has to be made, the maximum price is a better option as it has some pro-competitive effects. Perusal of the tax laws in Pakistan indicated that cigarette manufacturers are supposed to print maximum prices on cigarette packs. However, a misconception has emerged in the market that the prices printed on the cigarette packs is a minimum retail price set by the manufactures. Moreover, the retail prices published in the newspaper advertisement are likely to be misconstrued as the fixed retail price of cigarettes rather than manufactures recommended price. This appears to be in contravention of Section 10 (2) (b) of the Ordinance, which deems distribution of information lacking reasonable basis related to the price of goods as deceptive marketing. The consumer must, be clear as to what Retail Price/ MRP stands for.

CCP advised FBR and the manufacturers to stop publication of advertisements pertaining to minimum retail price with immediate effect. FBR, however, is empowered to intimate to the concerned undertaking what it deems the minimum price for the purposes of levying tax on the concerned goods and collect the same accordingly. Moreover, FBR may require the undertakings to print on the cigarettes packs in unambiguous terms the maximum retail price. The Commission believes that the printing of a maximum retail price on cigarette packs would have a threefold advantage. Firstly, it would not in any manner impact FBR's attempt to plug the loopholes in the current tax collection system as FBR can continue to prescribe the minimum retail price for the purposes of levying and collecting tax. Secondly, it would prevent retailers from overcharging consumers because the price would be capped at the maximum retail price. Lastly, if at all placing the maximum price has an impact on pushing prices up that may help in deterring and discouraging consumers from use of cigarettes, thus catering for consumer protection as well as addressing Health Ministry concerns

3.2 *Opinion on exemption of regulatory duty on the import of ware potatoes by international fast food chains franchisees*

The Federal Board of Revenue (FBR) had made an exemption on 3rd February 2009 for the IFFC Franchises from paying the 25% regulatory duty on importing ware potatoes imposed on 29th January 2009. The Commission took notice of an article in the media on 10th March 2009 wherein the Lahore Chamber of Commerce and Industry expressed concern about the withdrawal of this regulatory only from International Fast Food Chains Franchisees (IFFC) on the and not local fast food chains which placing them at a competitive disadvantage.

In an open hearing held on the matter on 11th June 2009, the participants were given an opportunity to express their views on the imposition of regulatory duty on ware potatoes and its subsequent withdrawal only in favour of IFFC franchises. Representatives of IFFC franchises affirmed that the SRO is discriminatory and that they have no objection if zero regulatory duty given is rescinded by the FBR.

The SRO issued gives the Federal Government power to impose a regulatory duty on all goods imported or exported, as specified in the First Schedule. A mere perusal of section 18(3) makes it clear that the power to levy a regulatory duty is to be exercised in relation to goods specified in the First Schedule. The Federal Government cannot, at least under section 18(3) of the customs act, carve an exemption from paying the regulatory duty for a selected group of importers/exporters. Moreover, the regulatory duty of 25% on local importers raises the price that they have to pay vis-à-vis IFFC franchises.

In order to ensure free and healthy competition, and to create a level playing field for all market players, it is essential that all undertakings are treated at par. Therefore it was recommended that regulatory duty on ware potatoes should be imposed equally across the board and the notification SRO be put in its original form.

3.2.1 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result.*

The Commission has not yet been confronted by a government proposal of such nature.

3.2.2 *Please describe any pre-emptive steps available to your agency to: Reduce the risk that commodity price volatility becoming a problem in your country?*

The section 4 (prohibited agreements) of the Competition Act 2010, restricts and prohibits agreements and associations regarding production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.

3.2.3 *Reduce the risk that governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?*

Section 29 (competition advocacy) of the Competition Act 2010 states that the Commission shall promote competition through advocacy which includes measures such as creating awareness promoting a competition culture. Reviewing policy frameworks for fostering competition, holding open hearings on any matter affecting the state of competition in Pakistan and affecting the country's commercial activities, are some of the other activities that the Commission conducts regularly as part of its advocacy mandate. It also

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posts on its website decisions made, inquiries under review and completed merger guidelines and educational material regarding competition regime in Pakistan.

PERU

1. Background

1.1 In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).

Peru has been affected by the unexpected and sustained increase in international prices of major agricultural commodities¹ and crude oil. The volatility in prices has brought a negative impact on food security and an increase in domestic price levels².

The instability in the international price of products such as rice, wheat, soybean oil and sugar caused a strong impact in the internal production costs of packed rice, bread, noodles, wheat flour, edible vegetable oil and refined sugar. As a consequence, between 2007 and 2008 consumer prices exhibited large increase; for instance, in this period the annual consumer price of edible vegetable oil increased in 44,3%, packed rice in 27,2%, wheat flour in 19,5% and bread in 11,8%. A similar fluctuation was observed in 2011, when international prices increased again.

The international price volatility showed the presence of problems related to the presence of asymmetries in the pass-through of price fluctuations into the domestic market, mainly against positive shocks³. For example, even though since mid-2008 international prices registered a sharp fall, domestic prices only showed a slow decrease.

So far the only market in which Peruvian government has decided to implement any measures to mitigate the effects of the commodity price instability is crude oil⁴. In 2004, the government implemented a stabilization fund to mitigate the negative effects generated by the rising price of crude oil in the domestic market⁵. The fund should have had a temporary term, but became permanent because the

¹ According to FAO et al. (2011), food prices reached their highest nominal prices between 2007 and 2008, and later experienced a major correction in mid-2008. In 2010 food prices rose again quickly, and remain high and volatile up to date. Joint report available in: http://www.theaahm.org/fileadmin/user_upload/aahm/docs/Interagency_Report_to_the_G20_on_Food_Price_Volatility.pdf. Accessed January 3, 2012.

² According to BCRP (2011), imported inflation associated with the increase in food prices and fuel contributed to the temporary falling of inflation above the target range in 2007, 2008 and 2011. Available report in: <http://www.bcrp.gob.pe/eng-docs/Monetary-Policy/Inflation-Report/Inflation-Report-September-2011.pdf>. Accessed January 3, 2012.

³ Upward cost shocks are passed through faster than downward cost shocks.

⁴ For more detailed information about the stabilization fund, please refer to: <http://www.bcrp.gob.pe/docs/Publicaciones/Revista-Moneda/Moneda-132/Revista-Moneda-132-04.pdf>. Accessed January 3, 2012.

⁵ Another measure implemented was the reduction of the excise tax on fuel.

volatility in prices remained unchanged. It is important to highlight that the maintenance of this fund represents a high fiscal cost to Peruvian government⁶.

Lastly, it is clear that Peru, as a net importer of food and crude oil, is highly exposed to fluctuations in commodity prices. However, it is worth noting, for instance, that the increase in the price of raw materials also had a positive impact for the country, because it boosted the growth of mining exports of gold, silver and copper, in addition to attracting new investment in exploration and exploitation. Actually, the mining sector became the main source of foreign currency and tax revenues for the country.

1.2 *Are the price volatility in these commodities, and the causes of that volatility, global, regional or domestic?*

Although, the National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) has not conducted a general investigation to explore the causes of price instability, it is well-known that many of the facts that contributed to price volatility had a global dimension⁷. Among the most cited factors are imbalances in supply and demand, the devaluation of the U.S. dollar, the rise on energy prices, increased global demand for bio fuels, adverse weather conditions and protective policies adopted by some exporting and importing countries.

On the other hand, as a consequence of the international price instability, an asymmetric pass-through on prices has been evidenced in certain markets in Peru. Possible explanations for this situation range from menu costs, consumer inertia, transaction costs, explicit or implicit collusion and inventory management by producers or sellers; however, none of these hypotheses have been studied or tested in depth yet.

1.3 *Does your agency have any ongoing / pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviours in these markets (both domestic and foreign markets)?*

Since 2010, Indecopi conducts a monthly monitoring report of consumer and wholesale prices. This report shows the variations in prices of certain food, construction, manufacturing and fuel products. To monitor the behaviour of consumer and wholesale prices, the series are seasonally adjusted and corrected for fluctuations related to inflation. The aim is to detect those products that show sustained deviations from their historical real prices.

The products are classified into three groups according to their degree of deviation from their past trend. The first group (“red group”) consists of products that in the past three months showed deviations in their average prices of more than two standard deviations. The second group (“amber group”) comprises those products that have deviated from their average prices in more than two standard deviations for one or two months. The last group is composed of products which may not have shown deviations but are of major concern to the general population.

⁶ In December 2011, the amount of fiscal transfer was S/. 610 million (US\$ 226 million). See December 23, 2011 <http://elcomercio.pe/economia/1351947/noticia-fondo-combustibles-recibio610-mlls-evitar-alza-precios>. Accessed January 4, 2012.

⁷ For more detailed information about of factors contributing to the price instability, please refer to: FAO *et al.* (2011) http://www.theaahm.org/fileadmin/user_upload/aahm/docs/Interagency_Report_to_the_G20_on_Food_Price_Volatility.pdf; USDA (2008) http://www1.eere.energy.gov/biomass/pdfs/global_agricultural_supply_and_demand.pdf; EIA (2007) <http://www.eia.gov/forecasts/steo/special/pdf/2007-oil-prices.pdf>; EIA (2006) http://www.eia.gov/oiaf/aeo/otheranalysis/aeo_2006analysispapers/efhop.html.

The results are reported to the Defense of Free Competition Commission and the Anti-dumping and Countervailing Duties Commission of Indecopi which further assesses the need of a more in depth investigation. Although we do not monitor international prices, reports published by the Food and Agricultural Organization and the World Bank are routinely reviewed.

2. Competition Law Enforcement & Formal Investigation

2.1 *Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities including:*

In the last decade, INDECOPI has initiated several investigations and procedures for suspected anticompetitive practices⁸ related to commodity products. Some significant evaluations are listed below.

2.1.1 *Cartels and horizontal agreements*

- *Sugar (2004 & 2006) - Price agreement between competitors.* Due to a price increase of sugar, an *ex officio* investigation was initiated in 2004 in order to determine the existence of a national cartel on sugar market. The investigation concluded that the upward pressure on sugar prices was caused by a reduction in output⁹ and no company under investigation was fined. Later, in 2006, a new investigation was initiated due to some suspected anticompetitive behaviour. Nevertheless, the procedure showed no evidence of a horizontal agreement, but an asymmetric behaviour of the companies under investigation¹⁰.
- *Cotton (2004) - Price agreement between competitors and refusal to deal.* After a complaint filed by a cotton producer, an administrative procedure was initiated against four textile manufacturers for an alleged agreement to set the purchase prices of cotton and to deny the cotton ginning service to cotton producers. The Defense of Free Competition Commission found that most of the defendants did not deny the ginning service and that variability and increases of prices do not support the hypothesis of collusion by themselves. Accordingly, none of the defendants was fined. The Defense of the Competition Chamber of Indecopi upheld this decision.
- *Palm oil (2005) – State aid.* The General Secretariat of the Andean Community authorized Peruvian government to apply measures to imports of palm oil from Colombia, since its government had established a subsidy fund for Colombian palm oil exporters. Although the procedure was held by the General Secretariat of the Andean Community, the Defense of Free Competition Commission of Indecopi had an active participation in developing the point of view of the Peruvian government.

2.1.2 *Vertical restrictions*

- *Cement (2010) – Exclusionary practice.* There is a still ongoing procedure that has been opened by an alleged vertical restraint in the form of boycott and concerted refusal to deal in order to

⁸ Currently, there is currently no merger control system in Peru, except for the electricity sector. Furthermore, price controls or actions to regulate prices are not allowed under Peruvian law.

⁹ In turn, this reduction was caused by water shortage, cessation of operations of some producers, storage for export and lower imports.

¹⁰ Higher prices observed in this period would have been the result of a reduction in output caused by water shortage and cessation of operations of some producers.

impair the opportunities of a new competitor in the regional cement market. The procedure is still pending decision.

2.1.3 *Abuse of dominance actions*

- *Liquefied petroleum gas - LPG (2002 & 2006) – Refusal to deal.* After a complaint filed by a distributors association, an administrative procedure was initiated against a state-owned oil company and a company that contracted its storage capacity for LPG. The Defense of Free Competition Commission found that both defendants, acting together, discriminated against members of the association. Therefore, the Commission found the defendants liable and fined them. The Defense of the Competition Chamber of Indecopi upheld this decision. Later, in 2006, a procedure was initiated against an oil company due to an alleged refusal to sell LPG to members of a LPG distributors association. The Defense of Free Competition Commission found that, despite having a dominant position, the defendant contracted with several members of the association. Accordingly, the defendant was not found liable.
- *Jet fuel (2006) – Refusal to deal.* After a complaint filed by a wholesaler, an administrative procedure was initiated against a state-owned oil company due to an alleged refusal to deal “Turbo A1” jet fuel. The Defense of Free Competition Commission found that despite having a dominant position and that the refusal to deal was not justified, no anticompetitive effects were caused in the relevant market. Therefore, since an essential element of the practice was missing, the defendant was not found liable.
- *Wheat flour & Oats (2003) – Resale price maintenance: ceiling.* A complaint was filed against major wheat flour and oat company by an edible wholesaler, because the former was advertising price caps to its wheat and oat bags, preventing wholesalers to charge higher prices. Considering that the complainant failed to meet the legal requirements to file a complaint and that no evidence of negative impact on competition and consumer welfare was submitted, our Defense of Free Competition Commission decided not to initiate an administrative procedure.
- *Coffee (2005) – Exclusive dealing.* A complaint was filed by an edible wholesaler against a company that was allegedly requiring its distributors not to sell its competitor’s coffee. Considering that the complainant failed to provide any information supporting the hypothesis of dominant position of the provider, our Defense of Free Competition Commission decided not to initiate an administrative procedure.

2.2 ***Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).***

Indecopi developed five market studies (fuel¹¹, wheat, rice, fertilizer and edible vegetable oil), with the aim of analyzing the competitive structure of the selected markets, which were strongly affected by the impact of the volatility of international prices, generating an unexpected increase in domestic prices.

The main findings were: (1) a strong dependence of inputs imported by the domestic market, situation that increased the exposition of the domestic market to international fluctuations, (2) domestic prices have a faster response to an increase than to a decrease in the international price, and (3) the existence of few

¹¹ The fuel market study was carried out by external consultants at request of Indecopi (José Távara and Arturo Vásquez, 2007, *La industria del petróleo en el Perú: Contexto regional, condiciones de competencia y asimetría en las variaciones de los precios de los combustibles*).

producers with a large market share (an exception was found in the rice market, where there are a large number of little producers).

2.3 *Has your agency received request from governments or other parts of society to formally investigate commodities markets or request for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behaviour? What was the nature and circumstances of the request and how did your agency respond?*

Indecopi has received requests from government authorities to formally investigate several markets, some of them related to commodities. Nevertheless, whenever there is no information or evidence suggesting anticompetitive behaviour, the Defense of Free Competition Commission and its Secretariat have duly responded that, even though they are always monitoring those markets, they have no authority to intervene in the free development of markets, unless there is any evidence or information suggesting anticompetitive behaviour.

For instance, after a complaint from the Ministry of Agriculture, in early 2008 a Congressman asked Indecopi about the measures taken to control a supposed cartel on several products, including corn, wheat and sugar. Indecopi responded that a sole increase in prices did not constitute sufficient evidence in order to initiate an administrative procedure against the companies involved. Also, Indecopi informed that, according to statements of experts in the media, the increase of the prices of such products could be caused by several facts, including an increase on the demand of those products for manufacturing biofuels.

3. *Advocacy opportunities and challenges*

3.1 *Has your agency the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy?*

Indecopi has not had the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy yet.

3.2 *Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?*

Indeed, Indecopi has received government proposals (mainly bills) that address concerns about prices in several markets, some of them related to commodities. Nevertheless, Indecopi has always maintained its technical approach to all of those proposals, according to its legal duties.

For instance, in 2009 a Congressman asked Indecopi its technical opinion about a bill that sought to protect Peruvian production and consumption by abrogating regulations that increased tariffs to subsidized products from industrialized countries. Considering the distortions over the markets that could result from an increase in tariffs and that no economic research supported the proposal, Indecopi responded that, if approved, the bill could generate unreasonable entry barriers, and therefore an increase in prices and harm to consumers' welfare. The bill was ultimately rejected.

Similarly, in 2011 a Congresswoman asked Indecopi its technical opinion about a bill that sought to strengthen Peruvian steel industry by imposing higher tariffs to steel imports. Taking into account the commodity nature of steel and that there would be alternative options to strengthen our steel industry without an unreasonable constraint to competition, Indecopi responded that, if approved, the bill would

only cause harm to consumers welfare, because of a restraint in the supply and the higher prices they would have to pay. The bill is still pending approval or rejection.

3.3 *Please describe any pre-emptive steps available to your agency to: i) Reduce the risk that commodity price volatility becoming a problem in your country? ii) Reduce the risk that governments or public societies seek policy responses to problematic commodity process volatility that would impede competition?*

The main pre-emptive step employed by Indecopi is preliminary investigation. The monthly newsletter which monitors consumer and wholesale prices may be employed to suggest which product or market needs more attention. Advocacy is another pre-emptive step that may be used to mitigate the potential risks associated with the instability of commodity prices.

PHILIPPINES*

1. A paper on flour: Background

The increasing prices in the recent years especially food have caused serious concerns around the world. Global prices have been rising brought about by different factors. Consumers are already battling to cope with the increase in prices especially on food.

The Philippines is among the countries that is experiencing the effect of the increasing food prices. One of the commodities which have drawn the attention of the agency because of its price volatility is flour.

Flour is one of the commodities that have been considered as volatile in the Philippines. Price of flour heavily depends on the cost of imported wheat, the major cost component in the production. Other factors such as: foreign exchange rate, freight and local raw materials used in the production of flour also affect the price of flour in the market.

This paper will focus on the effect of the fluctuating price of wheat on the price of locally milled flour. It aims to provide an overview of the flour milling industry in the Philippines and the price movements of flour in relation to wheat. It also includes the actions undertaken by the government particularly the Department of Trade and Industry (DTI) to address the increasing prices of commodities such as flour and bread.

For this study, DTI utilized the data on monthly prices of hard flour to represent the variable flour price and price of hard spring wheat for wheat price. Price of Wellington hard flour that will be used in this paper will be based on the monitored prevailing prices in the National Capital Region and price of hard spring wheat is based on the data of the US Wheat Associates.

1.1 Flour

Flour is a finely ground powder prepared from grain or other starchy plant foods and used in baking. There are two types of flour: hard flour which is used in making high-rise bread like pan de sal and loaf; soft flour which is used in pasta, and cookies among others.

Although flour can be made from a wide variety of plants, the vast majority is made from wheat. Wheat is the most important crop among the cereals by area planted. Most wheat is consumed in the form of baked goods, mainly bread; therefore wheat grains must be milled to produce flour prior to consumption.

The movement in the price of wheat had greatly influenced the price of flour in which in turn affects also the price of loaf breads and pan de sal. The pricing and supply of flour has drawn the attention of the government throughout the years.

* Prepared by Victorio Mario A. Dimagiba, Director, Bureau of Trade Regulation and Consumer Protection, Department of Trade and Industry, Philippines.

In the international wheat market, the U.S. wheat producer is regarded as one of the most innovative and productive in the world. Currently, more than half of the U.S. wheat produced is exported to overseas customers.¹

Wheat is grown in most of the 50 states of the United States. The kind of wheat grown and the quantity vary widely from one region to another. Wheat has two distinct growing seasons: winter wheat and spring wheat. The many varieties of winter and spring wheat are classified into six classes. Wheat classes are determined by its hardness, the color of its kernels and by planting time. Each class has its own uniform characteristics related to milling, baking or other food use.²

1.2 *Types of wheat*

- Hard Red Winter (HRW)-bread wheat which accounts for nearly half of US production.
- Hard Red Spring (HRS)-bread wheat that have good milling and baking characteristics and has the highest protein content, usually 13-14%.
- Hard White (HW) - used for noodles, yeast breads and flat breads. It is used primarily in domestic markets with limited quantities being exported.
- Soft White (SW) - preferred wheat for flat breads, cakes, pastries, crackers and noodles. It is a low protein wheat usually about 10%.
- Soft Red Winter (SRW) - high yielding wheat, but relatively low in protein, usually about 10%. It is used for cakes, pastries, flat breads, crackers and snack foods.
- Durum- the hardest of all U.S. wheat which provides semolina for spaghetti, macaroni and other pasta products.³

1.3 *The flour milling industry*

Republic Flour Mills (RFM), the first milling company in the Philippines started its operation in 1958. It was established to address the need of the country to be self-sufficient in a basic food commodity like flour. RFM was the pioneer of the flour-milling industry in the Asian region and it evolved from a single company producing bags of flour, to a multi-company enterprise managing a chain of branded products. Its first flour mill is located on a seven-hectare land in Mandaluyong, Metro Manila.

Because of the success of the Republic Flour Mills, competitors were attracted to join the flour milling industry. At present, there are twelve companies engaged in the manufacturing of flour which is affiliated with two industry organizations namely the Philippine Association of Flour Millers (PAFMIL) and the Chamber of Philippine Flour Millers (CHAMPFLOUR). PAFMIL is composed of RFM, Liberty Flour Mills, Wellington Flour Mills, Pilmico Foods Corporation, General Milling Corporation, Universal Robina Corporation and the Philippine Flour Mills. CHAMPLOUR on the other hand is composed of San Miguel Mills, Philippine Foremost Milling Corporation, Morning Star Milling Corporation and Delta Milling Corporation.

¹ From Farm to Port: U.S. Wheat Information, 27 August 2007 from 67.212.164.118/assets/pdf/farm_to_port.pdf

² Ibid.

³ Ibid.

- **Liberty Flour Mills** – a stock corporation incorporated in 1958, engaged in the business of manufacturing of various kinds of bakery flour and flour related products. Its flour products include El Superior and LFM Bakers which is flour used for making bread, Pine Tree and LFM Soft Flour used for the manufacture of biscuits and cookies, and Maya all-Purpose Flour.
- **Wellington Flour Mills**- started its operation in February 1360. Its brands are Wellington and Doña Salustiana and Filipina.
- **Pilmico Foods Corporation**- Pilmico Foods Corporation started operating in 1962 engaged in the manufacture of wheat flour and wheat by-products.
- **General Milling Corporation**-started its operation in Cebu in 1961. Their brand of flour is known as General Flour.
- **Universal Robina Corporation**- traces its beginning all the way back to 1954. In the early 1970s, Continental Milling Corporation was formed for flour milling and production. URC Flour produces and sells Hard and Soft Flour to both commercial and institutional accounts.
- **San Miguel Mills**- produces and markets flour with its mill in Mabini, Batangas. Its brands for flour are: Emperor Premium Bread Flour, Pacific, Emperor Hard Wheat Flour, King Hard Wheat Flour, Monarch Hard Wheat Flour and Count Hard Wheat Flour, Queen Soft Flour and Countess Soft Wheat Flour.
- **Philippine Foremost Milling Corporation**-was established in 1989 and was the first flour mill plant in Western Visayas. Its brands for hard flour are Montana Spring, Dakota Champion, and Washington Gold and for soft flour, Gold Key and Amigo Gold.
- **Morning Star Milling Corporation**- started in 1988 with the objective of producing quality flour and downstream products that were lacking in the Philippine market.

1.4 *Price movements*

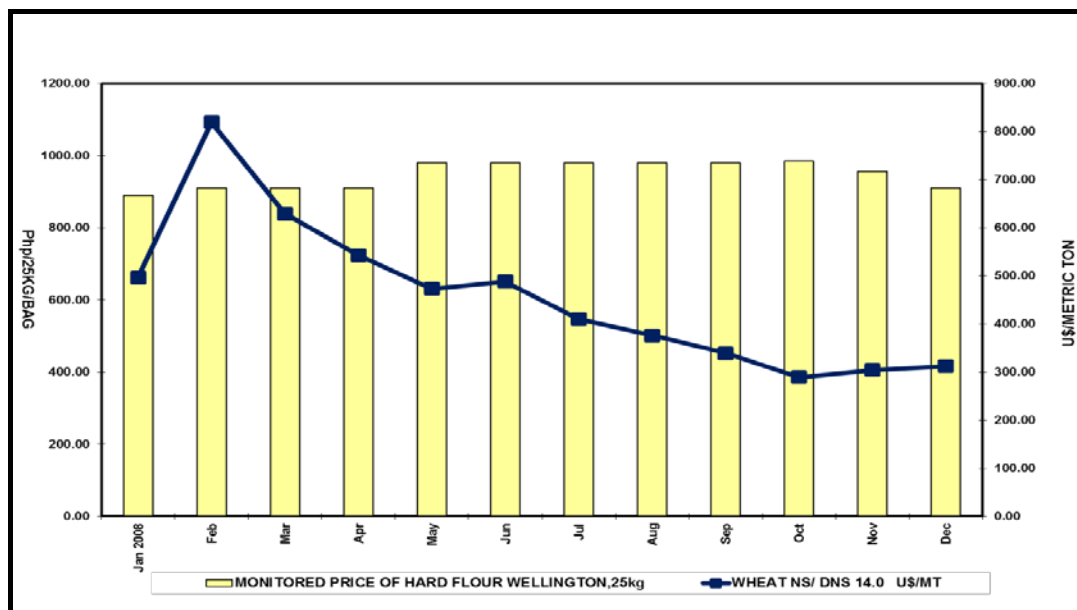
According to the flour milling industry, the main sources of wheat are United States, Canada and Australia. It takes 30 days to transport wheat from the source to the Philippines. Upon arrival, it takes another two months before flour is supplied in the market, one month in the silo and another month for the production.

Based on the handbook of the agribusiness manuals prepared by the Food and Agriculture Organization (FAO), world prices of wheat nearly doubled over the period 2007-2008 but fell sharply from their records high due to increased production, prompted by earlier price increases and weaker demand combined with the global economic crisis. Due to the irregular shortages in wheat supply, wheat prices have been highly volatile.⁴

Any change in the price of wheat in the world market will result to change in the price of flour. Whenever there is a change in the price of flour, it may or may not affect the price of bakery product. According to bakers, for every P40.00 increase in flour prices, there is a corresponding increase of P1.00 in the price of loaf bread and P0.50 cents in a 10-piece pack of pan de sal.

⁴ Food and Agriculture Organization: Agribusiness Handbook Wheat, Flour from www.fao.org/docrep/012/al376e/al376e.pdf

Figure 1. Monthly Prices of Wheat (US\$/mt) and Flour (PhP/25kg bag) in 2008⁵



Average price of wheat was US\$497.00/mt in January 2008. It peaked in February 2008, increasing by a hefty 64.79% to US\$819.00/mt.

Based on the special report released by the US Wheat Associates, world wheat production increased in 2007/08. With stocks beginning at 14% less than 2006/07 and significant production problems in Canada, Australia and the European Union (EU) and Ukraine, world wheat prices steadily increased. Because of this, many exporting countries closed their doors in an effort to control prices of breads. This further pushed prices of wheat which reached its highest peak in February 2008. Combined with this, demand remained firm brought by higher per capita income in developing countries and the fear of possible shortage. In the midst of high price of wheat and freight rates and weak US dollar, US exports increased to 34.5 million metric tons (MMT), the highest level in 15 years. World trade in 2007/08 increases to 1147MMT, the US accounting for nearly one third of all exports.⁶

Price dropped to about half of February’s level in August 2008 to US\$376.00/mt following the news that world inventories were set to rise after growers increased seeding to capitalize on rising prices in 2007. From July to December 2008, movement in the price of wheat was on a downward trend. In October 2008, price of wheat was US\$289.00/mt, the lowest price recorded in that year.

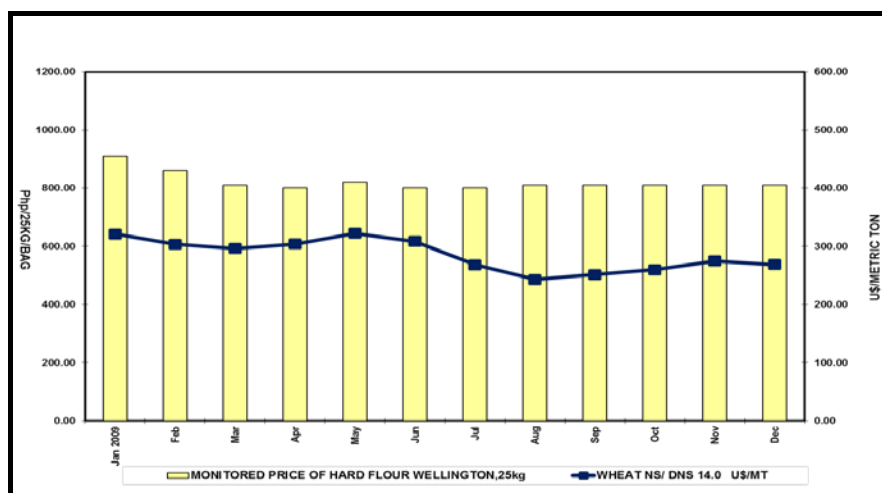
Following the peak in the price of wheat in February 2008, monitored prevailing price of Wellington Hard Flour increased from P890 per 25 kg in January 2008 bag to P910.00/bag in February 2008. It increased by 7.69% (P980.00/bag) in May 2008. It again increased by P5.00 (P985.00/bag) in October 2008.

Monitored prevailing price of flour fell to P955.00/bag in November 2008 which further declined to P910.00/bag in December 2008.

⁵ Source: NCR Monitoring Report 2008 and US Wheat Associates.

⁶ US Wheat Associates: US Wheat Associated Annual Report 2007/08 from 67.212.164.118/assets/pdf/farm_to_port.pdf.

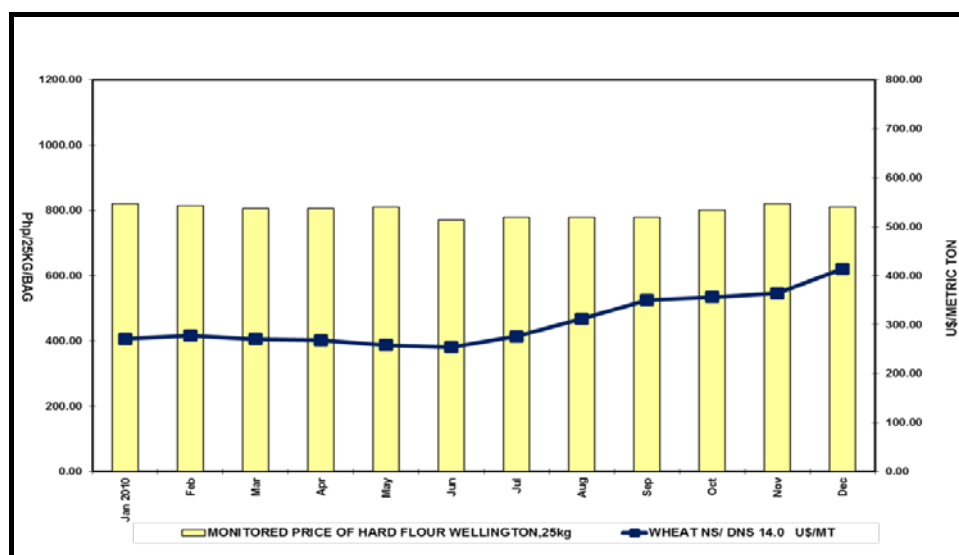
Figure 2. Monthly Prices of Wheat (US\$/mt) and Flour (PhP/25kg bag) in 2009⁷



Price of wheat in 2009 was much lower compared to January 2009 at US\$321.00/mt compared in February 2008. In March 2009, price fell down to US\$296.00/mt. It rose to US\$322.00/mt in May 2009. Price fell during the second half ranging from US\$243.00/mt to US\$275.00/mt.

From P910.00/bag in January 2009, monitored prevailing price of flour went down to P860.00 in February 2009. Another decrease was noted in March and April at P810.00/bag and P800.00/bag respectively. Price spiked in June at P980.00 and declined to P810.00/bag in September 2009. Price remained at this level until December 2009.

Figure 3. Monthly Prices of Wheat (US\$/mt) and Flour (PhP/25kg bag) in 2010⁸



⁷ Source: NCR Monitoring Report 2008 and US Wheat Associates.

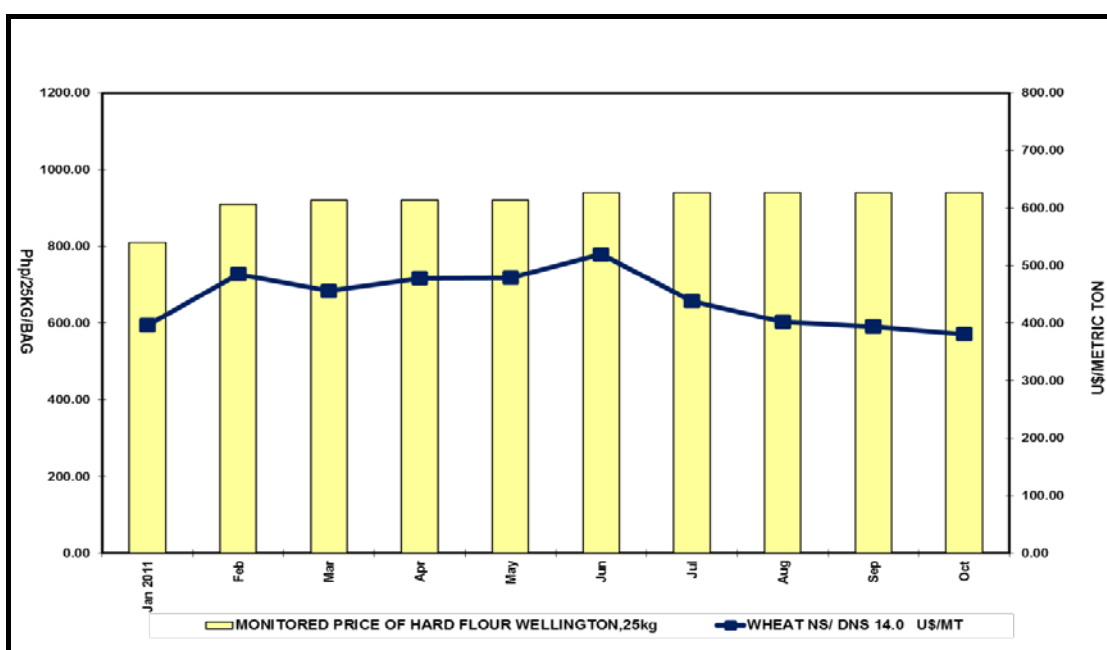
⁸ Source: NCR Monitoring Report 2008 and US Wheat Associates

Price of wheat remained to be stable in the seven months of 2010. In January, average price of wheat reached US\$271.00/mt, declined to US\$254.00/mt in July 2010. Price started to increase in August at US\$312.00/mt, which further increased to US\$364.00/mt in November 2010. At the end of the year, price climbed to US\$414.00/mt.

The increase in the wheat prices in the middle of the year is a result of the Russian ban on exports after a drought destroyed crops, tightening global supplies.

From P810.00/bag in January 2010, monitored prevailing price of flour decreased to P780.00/bag in April 2011 and P770.00/bag in July 2010. As a result of the price hike in wheat in August 2010, price of flour went up to P805.00/bag. Price of flour further increased recording a P820.00/bag at the end of the year.

Figure 4. Monthly Prices of Wheat (US\$/mt) and Flour (PhP/25kg bag) in 2011⁹



For 2011, price of wheat remained to be high at US\$396.00/mt in January. Price increased to US\$485.00/mt in February 2011 but decreased to US\$478.00/mt in April 2011. Price rallied to US\$519.00/mt in June 2011. It decreased to US\$402.00/mt in August and US\$381.00/mt in October 2011.

Monitored prevailing price of Wellington Flour was P810.00/bag in January 2011. It went up to P920.00/bag in March 2011. This price remained until May 2011. In June 2011 price climbed to P940.00/bag. Despite the decrease in the price of wheat in August and October, price of flour remains at P940.00/bag.

⁹ Source: NCR Monitoring Report 2008 and US Wheat Associates

2. Competition law enforcement & formal investigation

2.1 *Reduction in the duty of imported wheat*

Following the continued increases in the price of flour in 2008, bakers petitioned to DTI to restrain flour millers from further increasing the price of flour. They requested DTI to take steps to stop any further increase on the price of flour since the price of wheat in the world market has decreased.

As early as the first quarter of 2008, the three Baker's Associations namely: the Philippine Baking Industry Group, Inc. (Philbaking), the Filipino Chinese Bakery Association, Inc. (FCBAI) and the Philippine Federation of Bakers Association, Inc. (PFBAI) and flour importers appealed for the lifting of tariff on imported wheat and flour. This was triggered by the continuous increase in the price of wheat which pushed the prices of flour up.

Because of this situation, President Gloria Macapagal signed Executive Order 765 entitled *Temporarily Modifying the rates of import duty on wheat under Section 104 of the Tariff and Customs Code of 1978* on 7 November 2008. In the said EO, tariff rate of wheat was reduced to 0% for a period of six months. This is to stabilize the price of bread and other baked products and to prevent technical smuggling of wheat. It took effect on 21 December 2008 and ended in June 2009.

Upon the implementation of EO 765, decreases in the prices of locally milled flour were observed.

The Philippine Association of Flour Millers, Inc. (PAFMIL) requested for the extension of the 0% tariff of wheat for another six months or until December 2009. According to the flour millers, this extension will cushion the country from increasing bread prices once the 3% tariff is reimposed due to the continuing crisis in the world economy and it will allow the consumers continued accessed to high quality, reasonable priced flour milled from wheat grains imported at zero.

The tariff commission thru the Tariff and Related Matters (TRM) Committee in which the DTI is the Chairman conducted a review to determine if there is a need to extend EO 765. Flour millers claimed that the 0% tariff on wheat resulted to lower prices of flour and bakery products.

The Committee recommended the extension of the zero duty on wheat for duration of another six (6) months. The NEDA Board approved the recommendation of the TRM on 07 July 2009 and Executive Order No. 818 entitled "*Extending the Effectivity of the Zero Rate of Import Duty on Milling Wheat Under Section 104 of Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of 1978*" was signed on 10 July 2009. The EO aims to help stabilize the prices of bread and flour-based products.

On 26 January 2010, the TRM endorsed to the NEDA board their recommendation to implement the zero duty on wheat for another six (6) months, subject to further review. This supports efforts to lower the cost of producing wheat flour thereby stabilizing the prices of bread and other bread products. It will also help temper price hikes on bread and bread products arising from increases in the cost of other inputs.

EO 863 was signed in 19 February 2010 and expired on 26 August 2010.

The Department of Trade and Industry thru the Board of Investments (BOI) in coordination with Bureau of Trade Regulation and Consumer Protection (BTRCP) was tasked to make a study on the extension of the zero tariff on wheat under EO 863. The findings of the study which was conducted on September 2010 were the following:

- Prior to the implementation of EO 765 in November 2008, the price of wheat was already on the downward trend, however, monitored price of flour continued to increase.
- EO 765- The price of wheat was stabilizing at the level of September 2008. This was accompanied by a downward trend in the price of locally milled flour.
- EO 818- The prices of wheat were at relatively low levels (considering the period of study). However, it can be observed that the prices of locally milled flour were moving upwards during this period.
- EO 863- Lowering in the prices of wheat up to the month of June 2010 was noticed. Similar movement was noticed in the prices of flour. Starting July 2010, prices of wheat picked up and a corresponding increase in the price of locally milled flour was observed.

On the impact of prices of flour on bread, the following findings were noted:

- EO 765- the price of 25 kg bag of Hard Flour Wellington decreased from a high of P985.00 in October 2008 to P910.00 in December 2008. A decrease in the ex-mill price was also noted, from P945.00 to P930.00. However, no change in the price of a 400g loaf bread was observed.
- Significant drop in prices of flour was noted in 2009. From P910.00 in January 2009, price went down to P880.00 in June 2009. Despite this decrease, the price of a 400g loaf bread increased from P38.00 to P41.00.
- EO 818- The price of Wellington Hard Flour increased from P800.00 in July 2009 to P820.00 in January 2010. While the ex-mill price and the price of loaf bread remained at P790.00 and P41.00 respectively.
- EO 863- The price of Wellington Hard Flour decreased from P815.00 in February 2010 to P780.00 in September 2010. The price of loaf bread increased from P41.00 to P42.50.

During this period, the price of sugar, another major component of bread also recorded an upward trend. Considering the rising prices of wheat and sugar, BOI recommended that the zero tariff on wheat be extended.

The TRM approved the extension of 0% tariff on milling wheat on 30 September 2010 and endorsed it to the Cabinet TRM. The Cabinet TRM approved the recommendation and endorsed it to the NEDA Board on 28 October 2010.

EO 21 or “Reducing the Rate of Import Duty on Milling (Food) Wheat to Zero Under Section 104 of Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of 1978 as amended, as provided for under Section 3 of EO NO. 863, Series of 2010 was signed on 14 January 2011.

2.2 Profiteering

On 11 May 2010 in a news article published in the Manila Bulletin, entitled “Bakers bat for reduction in flour prices”, bakers pressed for the reduction in the price of locally milled flour by as much as P170/bag as price of wheat in the international market went down to US\$300/MT. Bakers said that the price reduction in flour would lead to a rollback in the price of bread and pan de sal.

The average price of wheat decreased by 3.25% from US\$277/mt in February 2010 to US\$268/mt in April 2010. The ex-mill price of Wellington Flour remained at P790.00/bag from March 2009 to May 2010. Monitored prevailing price decreased by 1.83% from P820.00/bag in January 2010 to P815.00 in February 2010. It remained at P805.00/bag from March to May 2010.

Compared to 2007, the price of wheat in January 2007 was US\$219/MT which fluctuated and increased up to US\$277/MT in August 2007. The ex-mill price of Wellington flour in 2007 was P610.00 from January 2007 to February 2007 and P620.00 from March 2007 to August 2007. On the other hand, the monitored prevailing price was P630.00/bag from January 2007 to February 2007 and P640.00/bag from March 2007 to August 2007. Compared to the current prices of flour with a zero Tariff on wheat, the 2007 prices are significantly lower.

Based on the above findings, DTI sent letters to 11 flour millers asking them for clarification why ex-mill prices of flour are not reduced accordingly despite the decrease in the price of wheat in the international market, freight cost, foreign exchange rate and the imposition of zero (0) tariff. Only seven flour millers responded to the letters sent by DTI. Some of the reasons given were:

- The manufacturing costs including power cost and wage have gone up from 2007 to 2010.
- The difference in the price of flour within the span of three years (Jan-May 2007 and Jan-May 2010) reflects the price movement of wheat in the world market and covers their cost of operation.
- With the very competitive market for flour and with the industry experiencing an excess capacity, market forces will eventually continue to dictate the prevailing prices in the market.

Some of the millers reduced their prices but because these reductions were not within the DTI recommended price range, DTI filed separate Complaint-Affidavits against the 11 flour millers before the DTI-National Capital Region for violating Section 5(2) of the Republic Act 7581 or the Price Act defining and prohibiting profiteering as one of the illegal acts of price manipulation. *Profiteering is defined as the sale or offering for sale of any basic necessity or prime commodity at a price grossly in excess of its true worth.*

Preliminary Orders were sent to eleven flour millers ordering them to suspend the distribution and refrain from selling flour at the ex-mill price ranging from P770.00/bag to P790.00/bag and to reduce it to P630.00-P680.00. DTI also conducted ocular inspections at the plants of flour millers.

3. Role of the Department of Trade and Industry

Because of the fluctuating movement in the prices of flour in the market, the Department continuously coordinates with the flour milling industry to discuss the price and supply situation of flour. Under Republic Act 7581, the Department of Trade and Industry is mandated to come up with programs to stabilize prices and supply of basic necessities and prime commodities which includes flour.

Flour is included in the list of products that are monitored weekly to ensure that prices are within the reasonable prices. Prices of wheat are updated on a weekly basis to monitor the movement in the prices of wheat in the world market. Whenever the Department sees that there is a need to bring down prices of flour, millers are notified to review their prices. Holding talks with millers and appealing to them to decrease their prices are also done to limit price increases.

The Department is also being notified by the millers whenever there is an increase in the prices of flour. To validate the increases, millers are asked to submit their ex-mill prices and justifications for any price increase.

To support consumers on the increasing prices of loaf bread and pan de sal, three big bakery associations in the Philippines (Philippine Baking Industry Group, Philippine Federation of Bakers Association, Inc. and Filipino-Chinese Bakers Association, Inc.) in cooperation with the Department of Trade and Industry and in partnership with various convenience stores and supermarkets came up with a Pinoy Tasty and Pinoy Pan De Sal Project. This is to provide consumers with tasty loaf and generic pan de sal that is within the reach of the Filipino consumers.

Because of the high price of flour in the market, the Department intensified its monitoring on the movement of prices of wheat in the world market and locally milled flour. DTI is looking on the possibility of setting a Suggested Retail Price (SRP) if price of flour remains to be high despite the decrease in the price of wheat in the world market.

ROMANIA

According to the 2009 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions - *A better functioning food supply chain in Europe*, over the past couple of years, prices along the food supply chain have fluctuated widely. Thus, from mid-2007 to mid-2008, agricultural commodity prices rose sharply at EU level, which resulted in increased consumer food prices and higher inflation levels overall. After mid-2008, under the verge of the global economic crisis, prices of many commodities have come down to levels comparable to or even lower than those reached before the start of the price surge. However, the Communication underlined that consumer food prices continued to increase and only started declining in May 2009 raising concerns about the functioning of the food supply chain. These fluctuations have affected both the agricultural producers and the consumers.

Under this backdrop, this paper is organised as follows. Section 1 describes the situation in Romania with respect to the evaluation of the link between agricultural commodity prices and changes in consumer food prices. Section 2 identifies the main challenges faced by the food supply chain in Romania. Section 3 presents a number of Romanian Competition Council's policy initiatives aimed at overcoming them and Section 4 concludes.

1. Evaluation of the link between agricultural commodity prices and changes in consumer food prices in Romania

Over the past 20 years, the Romanian agro-food sector has experienced winding developments related to the structural changes and to certain external influences over the sector. The land restitution, the privatization, the price liberalization, the need to adapt to the Community requirements and to other specific policy measures have put its mark on the current national efficiency of the sector and on the international competitiveness.

In Romania, agricultural prices increased by 28% in December 2007, compared to December 2006, and decreased by 22% in August 2008 relative to December 2007. Consumer prices increased by 9.3% in December 2007 relative to December 2006. Overall, that means that consumer prices have been more stable over time, while agricultural prices have had very great fluctuations from one period to another. On the contrary, in the period when agricultural prices decreased, following the month of May 2008, the consumer prices continued to slowly increase or stagnated in the best case, while the production prices experienced a significant drop.

The volatility of agricultural prices seems to be higher in the case of crop products, on the average, compared to that of animal products. A research paper made by a Romanian expert shows that over the period 2006-2010, the products with the highest price volatility are mainly those that are based on vegetable agricultural products, namely: oils (16.9%), milling and baking products (8.4%) to which we add the products from the group milk, dairy, eggs (9.6%), vegetables (8.9%) and fruit (8.2%).

As concerns the volatility of producer and consumer prices, the latest statistics from Eurostat show that the producer food price increased by 69.74% in August 2011 compared to 2005 which means an increase by 28.13% than the value recorded in August 2009 relative to August 2008.

Compared to other EU Member States, in August 2011, Romania recorded the most accelerated dynamics of food producer prices, ahead with 48.28 % of the European average, virtually being last-ranked in EU-27. On the contrary, the dynamics of food consumer prices was much lower, but still on a rising trend, i.e. from 21.22% (in August 2009 compared to 2005) to 30.82% (in August 2011 compared to 2005). The increase by 30.82% in consumer prices ranks Romania on the 20th rank, out of the 27 EU Member States.

If at European level, consumer prices raised slowly than producer prices by only 2.90 %, in Romania, consumer price hike was 38.92% below producer price hike, in August 2011 compared to 2005.

This specific situation from Romania shows that price transmission along the agro-food chains has an asymmetric character i.e. the production price increases even when the agricultural price decreases while the consumer price increases at a much slower pace than producer price.

Against this backdrop, one may conclude that the prices along the agro-food chains in Romania feature a higher volatility in the primary stage of chains (agriculture), while in the consumer stage the volatility is lower. This raises certain questions with regard to the operation of downstream markets and mainly to the competition on these markets.

2. Challenges faced by the food supply chain in Romania

Given the economic and social importance of the sectors involved in the agro-food chains, the need to identify market failures and, of course, to detect and correct the potential anticompetitive issues, the Romanian Competition Council (hereinafter referred as *RCC*) launched a series of sector inquiries in the field over the last years.

The bread cereals (wheat) and the cow milk – the producer-processor economic sector inquiries finalized by *RCC* in 2009, respectively 2010 revealed that the adaptation by farmers to a market environment characterised by a volatility of demand and prices is a great challenge in Romania, especially in the context of the economic downturn and the resulting sharp drop in agricultural commodity prices in mid-2008.

The distortions in price variation transmission along the food supply chain presented above may be mainly due to three major problems signalled by *RCC* in the Romanian agro-food sector, with direct impact on the competitiveness and performance of the sector. First, the current high fragmentation of the agricultural exploitations is being reflected in the existence of a large number of individual farms (very small).

Second, the asymmetry of the negotiation power between the economic operators on the agro-food chains and the farmers in most cases leads to unilateral price setting for the agricultural products, to the imposition of unfavourable conditions to farmers, to the lack of contracts, or where they exist, they are in beneficial net terms only for one party; Moreover, the Romanian milk producers are in a weaker position in terms of bargaining power because they do not hold shares in the downstream industry, i.e. within the processing firms as it happens in other EU Member States; all these issues affect directly or indirectly the final price received by farmers for the goods they offer;

Third, a study on the “*Competition in the food retail sector*” - as a follow-up of the 2009 food retail sector inquiry, - published in the 2010 Annual Report¹ entitled “*The challenges of the single market and the competition in sensitive sectors*” revealed that distortions in the agro-food chain may be due as well to the low level of performance of the processing industry, the increase of imports of cheaper agricultural products and the need of alignment with the EU requirements. That is why the world and European market evolutions in the sector are directly felt by the Romanian consumers.

¹ http://www.consiliulconcurentei.ro/uploads/docs/items/id6479/the_challenges_of_the_single_market_and.pdf

Thus, a significant part of the consumed food products in Romania comes from import, for example vegetables, fruit, even cereals in some poor agricultural years. This situation is due to certain deficiencies invoked by the large Romanian retailers in relation with the national producers. The Romanian producers do not meet the minimum standards required for commercialising fruit and vegetables through the retail networks. In general, they have no equipment for sorting their products, no storage capacity and no appropriate packaging. In addition, the production of Romanian vegetables and fruit records a maximum peak during the summer, the offer for the remaining seasons remaining insignificant. This state of affairs automatically leads to imports.

Fourth, the study also pointed out that price growth transmission to final consumers may be much attenuated in Romania, due to the competitive pressures exercised at the level of retail sector. Final consumer's weaker purchasing power in Romania may have played as well an important role in attenuating the full pass-through of the excessive variations of agricultural prices into the consumer prices. Although foodstuffs are basic commodities and have a relatively inelastic demand, it becomes apparent that in the case of an excessive price increase of these products, consumers will switch to cheaper products or to self-consumption, in particular in the rural areas. Moreover, most foodstuffs are perishable products. Therefore, the operators in the retail sector have no reason to increase selling prices very much when the agricultural prices explode, and they do not decrease them either when the agricultural prices significantly decline.

Finally, some regulatory features have as well an impact over the productivity growth in the sectors involved along the agro-food supply chain. We shall further expand on this issue when discussing *RCC*'s policy interventions in the sector

3. *RCC's Policy Interventions*

3.1 *Advocacy measures*

The *RCC* has undertaken over the last 3 years a series of policy initiatives aimed at addressing distortions along the agro-food chain.

In order to resolve the bargaining power imbalances of the parties involved along the agro-food chain, *RCC* recommended that farmers should associate under different forms allowed by competition law that range from joint commercialisation, such as the use of a common broker, to joint production agreements, including the development of agro-food cooperatives as long as they are not used to fix prices. This measure linked to the CAP support measures was considered by *RCC* as helpful for addressing the sector current challenges.

The *RCC* has also advocated for an increase oversight and overall transparency of agricultural commodity derivatives markets to encourage competition and improve its resilience to price volatility. Thus, each manufacturer could have accurate and timely information about the prices in the region provided that the local authorities would get involved in the monitoring process and in the dissemination of information related to agricultural product prices.

Regarding retail prices, a 2011 initiative of the Ministry of Economy (not yet finalised and therefore the *RCC* hasn't had the opportunity to give advice on the matter) proposed the establishment of a Price Observer, that would closely monitor the prices in 1400 locations in order to properly inform the consumers. However, this initiative did not materialize yet since it was poorly received by the stakeholders involved.

Since 2010, *RCC* has started to collect and process data on average monthly retail prices of most popular food products (milk, eggs, bread, flour, pork meat, beef meat, poultry) in the biggest retail chains in Romania through its territorial units spread throughout the country. The purpose of this exercise is to grasp the main reasons behind retail price changes and the use of the findings for initiating ex-officio

investigations under the National Competition Law given the local nature of food markets. Until now, several investigations have been opened, in order to assess whether a number of undertakings engaged in the marketing of food products, in particular bakery goods have participated in anticompetitive agreements or concerted practices.

The findings of the milk market (in the economic segment producer-processor) inquiry were made publicly available during the 2010 October event hosted by RCC and entitled *Competition in sensitive sectors of Romanian economy*. On that occasion, RCC underlined that one of the purposes of the sector inquiries performed by RCC is to ensure the smooth functioning of market mechanisms, with direct effects on the final consumer. But, to achieve better functioning markets, to limit or even eliminate any possible anticompetitive practices, the involvement of all decision makers, not only from the food sector, is necessary.

The examination of the milk market highlighted as well that the functioning of the Romanian milk market (the producer-processor segment) is constrained by the statutory rules, largely related to the EU policies in the field and that the provisions of the Competition Law fully applies on the Romanian milk market (there are no legal exceptions for agricultural or for the agro-food sector). Regarding these issues, the competition authority is currently involved in discussions with the Ministry of Agriculture and Rural Development to identify solutions that will lead to a balanced milk market, including in terms of the competition rules.

As competition authority, the Competition Council focused constantly on monitoring the regulations in the field, in order to eliminate the potential anticompetitive provisions from the normative acts.

Concerning the superior negotiating power of great retail chains, mostly over the small and medium-sized producers, as a result of the 2009 RCC's inquiry on the market of food products commercialization in Romania, some rules have been established in the Supermarkets Code of Practice² endorsed by RCC that stated general rules for an improved relationship between the two parties.

The Code was translated into a law³ that mainly followed the conditions of the code but, in addition, settled new payment terms for different types of food products (starting from 12 days). The RCC has issued a recommendation that the proposed payment terms should not be regulated since a standardisation of the contents of the contracts would run counter the principle of contractual freedom and negotiation between parties. The national legislation on the payment time limits is currently producing negative effects for the Romanian producers, certain large retailers confirming already that the regulation of fixed payment terms is encouraging the imports of products because the related invoices enjoy more attractive payment terms (not subject to the restrictions established by Law no.321/ 2009 concerning the sales of food products).

The Competition Council intervened as well for eliminating the ban on selling below cost and for eliminating the definition of an acquisition cost level below which market prices must not go down, because these principles are contrary to the provisions of the Competition Law. The direct effect of such legislation is that of perpetuating a system that does not allow certain retail chains to decrease substantially the shelf prices. Actually, the RCC has militated against forbidding selling and reselling at a loss, ever since 2000, when the Emergency Ordinance⁴ was first issued. Also, the RCC has recommended that the time criterion for price reductions should be abolished. In fact, in the current form of the normative act, selling below cost is prohibited, except in certain specific situations, specifically mentioned⁵.

² On 26th of March 2008.

³ Law no. 321/2009 concerning the sales of food products.

⁴ No 99/2000 concerning the sale of goods and services on the market.

⁵ These exceptions are provided by article 16 of Government Ordinance nr.99/2000, namely: a) liquidation sales; b) temporary reduced price sales; c) the selling made within specific structures, named factory shops or factory warehouses; e) the selling of products to meet occasional needs of consumers, after an event has

Yet, certain conclusions and recommendations of the Competition Council have already had the desired effect.

First, *RCC* welcomed the proposal of eliminating the MFN⁶ clause from the retailers' contracts by means of an article introduced in the Law no.321/2009 concerning the sales of food products aiming at maintaining a normal competitive environment for all the reselling traders in the market and protecting the welfare of the final consumers. It deserves to be mentioned in this context that *RCC*'s investigation on the market of food products commercialization finalized in 2009 showed that the MFN clause jointly with the shelf tax charged by certain store chains would have induced additional artificial costs for the traditional trade hindering its ability to compete with the modern trade operators.

Second, another recommendation of *RCC* (resulting from the same inquiry on the market of food products commercialization) taken up by the Romanian legislator is that addressing the superior negotiating power of great retail chains over the small and medium-sized producers. Thus, the Law no.321/2009 provides that the retailers should not charge the suppliers for compensation in the cases of increasing the selling surface, opening new stores, refurbishing and changes in the bar codes.

Third, *RCC* signalled in the autumn of 2010 that the restrictive establishment rules in the current legal framework are in contradiction with the provisions of the EU Services Directive, unjustifiably protects the existing retail outlets and hamper the opening of new stores and thereby the diffusion of innovation. In fact, art. 8 of the Government Decision nr. 1454/2004⁷ states that the authorisation of retail structures should take into account some criteria among which "the favourable influence of the retail price level, the impact on existing commerce, the number and size of competitors, the protection of existing retail structures, the avoidance of competition disfunctionalities etc". The Decision further states that a commission will be established that should comprise, among representatives of local authorities, also representatives of economic agents set in the immediate vicinity of the proposed structure. Also, there are several factors that need to be met, such as the structure's location in areas with low commercial activity, usually outside towns. As a result of its advocacy efforts in this area, the above mentioned regulatory barriers are about to be eliminated through a Government Decision amending the previous one.

Last but not least, the *RCC* has issued a negative point of view to the Agency for Government Strategies for starting a campaign called "Buy Romanian", considering that any Member State should avoid such protectionist and discriminatory measures, and that an open market is a quintessential condition for the ones that find business opportunities could grow and provide jobs that would help with the overcoming of the crisis.

3.2 *Enforcement measures*

Alongside these advocacy measures, another important tool of *RCC* is the vigorous application of the competition rules aiming at fighting against the anticompetitive practices that may affect the proper

ended and when it is obvious that the products can no longer be sold in normal commercial terms; f) the selling of products which were not sold over a period of three months from the supply moment; g) accelerated selling of products likely to deteriorate rapidly or that can no longer be preserved until the end of their validity; h) selling of a product at a price aligned to the level of the legal price practiced by other traders for the same product and in the same shopping area, as it resulted from the interaction with the competition environment; i) selling of products with identical characteristics, whose resupply prices felt.

⁶ Most favored customer clause, called the *anti-discrimination clause*, or *MFN clause* („*Most Favoured Nation*"), is a promise of a party, e.g. a supplier, to deal with a buyer (retailer) just as it treats its best customer. If the supplier reduces the prices offered to one of its customers, then prices for all customers benefiting from this clause will be reduced at the same level.

⁷ For approving the criteria for implementation of retail structures of great surface and the definition of types of retail structures.

functioning of the supply chain to the detriment of consumers and for ensuring a level playing field for all economic operators along the agro-food chain.

Thus, in 2007, the RCC opened investigations for cartel behaviour in a few local bread markets finding evidence that producers were harming consumers with anticompetitive agreements to increase their profits (see Decision no.61/7.12.2009⁸ on the infringement of art. 5(1)(a) of Competition Law no.21/1996, republished, by the 17 undertakings operating on the bread market of the Maramureş County and Decision no.62/07.12.2009⁹ on the infringement of art. 5(1)(a) of Competition Law no.21/1996, republished, by the 31 undertakings operating on the bread market of the Vrancea County.

For instance, in Vrancea County, the evidence showed that 31 undertakings raised bread prices almost in the same day (13% to 70% increase compared to the preceding month's price). Price increases followed meetings of bread producers, during which they discussed the levels of selling prices applied in their County. The total of the fines applied to undertakings in this County in 2009 was around EUR 1.35 million. It was estimated that the harm for consumers during the cartel period was around EUR 2 million.

Another investigation on the wheat storage market finalized by RCC in 2009 proved that the Association of the Romanian Wheat Traders and Depositors (former Romanian Employers' Association of the Wholesalers of Cereals) intervened in the commercial activity of its members by means of its decision of 22.07.2004 aiming among others at fixing among its members the level of future tariffs for the services provided in connection to certain wheat storage operations. The value of the fine for the Association represented 8% of the association's incomes in 2008. In respect to the 17 undertakings, members of the Association, *RCC* didn't find enough evidence for proving the infringement of art.5 (1) (a) of Competition Law no.21/1996, republished (see Decision no.63/07.12.2009 on the infringement of art. 5(1)(a) of Competition Law no.21/1996, republished, by the Romanian Wheat Traders and Depositors on the wheat storage market).¹⁰

Moreover, the findings of the sector inquiry in the market of food products commercialization finalized in 2009 made *RCC* to initiate certain investigations on the possible law infringements in the sector of food products retail. Conclusions of these investigations are not available at this stage.

In relation to merger assessment, it deserves to be highlighted that a series of acquisitions have started to take place in the Romanian fast moving consumer goods sector proving thus the particular vulnerability of the retail and distribution markets to the effects of the financial and economic downturn.

As the economic downturn is likely to continue in Romania, we will probably continue to see the trend of consolidation of the retail or distribution of fast-moving consumer goods continuing. Accordingly, *RCC* will pay due attention to a careful merger control analysis to ensure that the efficiency effects of the consolidation process would not be countervailed by its negative effects.

4. Conclusions

As shown throughout the paper, *RCC* has intensively made use of its advocacy and enforcement tools in order to ensure that the benefits of any efficiency gains upstream are being passed in the supply chains downstream, to end consumers.

⁸ Available on the website of the Competition Council at: www.consiliulconcurentei.ro/documente/oficiale/concurenta/decizii/bunuri_de_consum/61.

⁹ Available on the website of the Competition Council at: www.consiliulconcurentei.ro/documente/oficiale/concurenta/decizii/bunuri_de_consum/62

¹⁰ Available on the website of the Competition Council at: www.consiliulconcurentei.ro/documente/oficiale/concurenta/decizii/bunuri_de_consum/63.

RUSSIAN FEDERATION

1. Background

In the frameworks of global economic crisis the FAS Russia pays particular attention to issues of compliance with competition conditions in socially important markets, especially on the food commodities market, the price situation on which dictates the welfare of the citizens of the Russian Federation.

The Federal Antimonopoly Service (the FAS Russia) especially focuses on control over ensuring of compliance with the antimonopoly legislation on infrastructural and structure-creating markets, where violations of the antimonopoly legislation affect increasing price pressure on the prime commodities (oil and petroleum products markets, artificial fertilizers markets, carriage services markets and etc.).

Such a focus is predetermined by state policy conducted by the Government of the Russian Federation to support low-income and socially disadvantaged groups of population.

The FAS Russia and its regional offices on a regular basis carry out **quarterly monitoring of prices for the group of socially important food commodities**: flour, bread, sunflower oil and other commodities in this interconnected chain of its production of these food commodities. The data shown in the present analysis were provided for by the biggest producers/suppliers of the aforementioned food commodities in certain regions of the Russian Federation.

The results of such monitoring demonstrate that the price situation in the food commodities markets is formed mostly under the influence of objective factors, and in comparison with other factors of economy, to lesser extent depends from the behavior of economy participants.

Differences in natural and climatic conditions on different territories influence productivity of the soil, and as a sequence - the supply of food commodities, especially of the crop output (big part of Russia lies in the zone of high- risk agriculture). Sustainability of the agricultural production is significantly lower than other activities due to **changing meteorological conditions**, which dictates significant volatility of volumes of the products supply during different periods. Moreover, the **seasonality of the production** causes irregular sales of goods within a year. **Significant share of perishable food commodities** (vegetables, milk) is to be sold as soon as possible, which triggers prices decrease when these commodities re sold in the market on a massive scale.

Moreover, the Russian market is still **dependent on import supplies** of the food commodities with major part of the principal food commodities, which is an additional factor impacting fixation of prices on the internal market.

However, in practice, apart from the objective reasons for the prices increase the antimonopoly bodies face **price growth caused by violation of the antimonopoly legislation**.

Deterioration of environmental conditions (abnormal heat) in the summer of 2010 became a principal cause of prices increase for buckwheat. The price of manufacturers for buckwheat in December, 2010 in comparison with December, 2009 increased by 225 % (about 16,13 rub/kg to 52,44 rub/kg or in 3,25 times), the consumer prices- by 155 % (about 27,02 rub/kg to 69,03 rub/kg or in 2,55 times), while,

according to Rosstat (the Federal State Statistics Service of Russia) the consumer price index on food commodities in total for the same period was 112,9, and a price index of manufacturers of agricultural products – 138,3.

However, in the frameworks of monitoring the principal socially important markets as of October 6, 2011 conducted by the FAS Russia and its Regional offices, more than 35 cases on the signs of violation of the Law on Protection of Competition in the market of peeled buckwheat were initiated (3 cases under Article 10 of the Law on Protection of Competition – abuse of dominant position, 32 cases under Article 11 of the Law on Protection of Competition – agreements and the concerted practices which lead to restriction of competition). In the majority of cases the violations were connected with concerted practices of economic entities in the markets of wholesale and retail sale of the buckwheat, with the purpose to fix and maintain prices. The revealed violations were mainly concerned regional and local markets.

2. Application of the Law on Protection of Competition and official investigations

2.1 Vertical restrictions

On June, 22 2010 the FAS Russia found that actions of a group of persons, as a part of the Company RusSol Limited, Bassol OJSC, Iletsksol LLC and Russol Trading LLC, constituting conclusion of a forbidden "vertical" agreement by Russol Trading LLC with Bassol OJSC and Iletsksol LLC which led to fixation of the prices for resale of the goods, violated Article 11 of the Federal Law on Protection of Competition.

The Commission of the FAS Russia found that supply contracts, in accordance with which all the volume of salt made by Bassol OJSC and Iletsksol LLC was transferred to Russol Trading LLC, were concluded between RusSol Limited, Bassol OJSC and Iletsksol LLC.

According to Point 19 of Article 4 the Law on Protection of Competition, a "vertical" agreement is an agreement between economic entities that don't compete among each other, one of which acquires the commodity or is its potential purchaser, and the other gives the commodity or is its potential seller.

After the conducted analysis and estimation of competition conditions on the market of salt the FAS Russia concluded that the cumulative share of Bassol OJSC and Iletsksol LLC on the market of salt, suitable for the use in food, amounted to about 30 %, and on the market of technical salt for chemical transformations with the subsequent use for production of other products or for the industrial purposes, not used in food, in the established geographical and products boundaries amounted to more than 30 %.

During the legal investigation it was revealed that manufacture of salt by Bassol OJSC and Iletsksol LLC was highly profitable.

Nevertheless, Russol Trading LLC carried out the salt resale to further consumers at the price of purchase of a similar kind of salt, which exceeded by 76,6 % - 98,3 % the price for other types of salt.

Decision made by the FAS Russia was appealed. Commercial courts of two instances upheld the FAS Russia's decision. Russol Trading LLC as the assignee of Bassol OJSC and Iletsksol LLC paid the turnover fine in amount of 706 754 US dollars.

2.2 Abuse of dominant position

On March, 4 2010 the FAS Russia found that Novorossisk Grain Terminal OJSC (NGT OJSC), entering into a group of persons as a part of Novorossisk Grain Terminal OJSC and Novorossisk Sea

Trading Port OJSC (NSGT OJSC), had violated Part 1 Article 10 of the Law "On Protection of Competition".

The proceedings were initiated both upon the results of examination (carried out by the FAS Russia together with the Regional office of the FAS Russia in Krasnodar) of activity of the economic entities rendering services of transfer of grain and olive cultures for export, and also upon the statement of the Russian Grain Union, which resorted to the FAS Russia concerning tariffs of NGT OJSC on transfer grain for export.

The Commission of the FAS Russia found that the group of persons as a part of NGT OJSC and NSGT OJSC held a dominant position on the market of transfer of grain and olive cultures for export within the boundaries of deep-water ports of the Azov and the Black Seas pool.

While analyzing the competition conditions on the aforementioned commodities market, the FAS Russia found that the share of the aforementioned group of persons held more than 50 %, though the originally established tariff for transfer of grain and olive cultures within 2009 increased twice which considerably (for more than 4 times) exceeded actual expenses of NGT OJSC for transfer of 1 ton of grain and olive cultures during the corresponding periods.

Profitability of sales from the total profit of NGT OJSC in 2008 was 73 %, and after 9 months' period of 2009 it increased to 79,8 %.

The Commission of the FAS Russia recognized such price level as monopolistically high.

NGT OJSC and NSGT OJSC were instructed, *inter alia*, to fix the tariff for transfer of grain and olive cultures for export, including the sum of expenses to render this service and profits which would guarantee reception of profits by NGT OJSC (from the total profit gained as a result of the economic activities), which did not exceed 50 %.

NGT OJSC disagreed with the decision made by the Commission of the FAS Russia, and attacked it in court as well as the Instruction in question. The Decision and Instruction made by the FAS Russia were cancelled by court.

2.3 Other actions for price regulation

Under the Federal Law of the Russian Federation "On the Basic Principles of State Regulation of Trading Activities in the Russian Federation", the Government of the Russian Federation is empowered to fix limited retail prices for certain types of socially important prime food commodities sold on the territory of certain subject of the Russian Federation or territories of subjects of the Russian Federation, for the term of no more than 90 calendar days if within 30 calendar days running the growth of retail prices for food commodities amounts to 30 and more percent on territory of a certain subject of the Russian Federation or territories of subjects of the Russian Federation.

The list of such food commodities and rules for fixation of prices are defined by the Order of the Government of the Russian Federation No. 530 of July, 15 2010.

However, the Government of the Russian Federation has never exercised the aforementioned right.

3. Competition advocacy

Alongside with application of measures of antimonopoly regulation, the FAS Russia actively participates in elaboration of other measures of regulatory policy, directed to restrain increase of prices on socially important markets.

Thus, the FAS Russia participated in elaboration of **operating rules for realization of the state purchasing and commodity interventions** for regulation of the agricultural products, raw materials and food commodities market. The primary goal of the FAS Russia was non-admission of creation of advantages for certain economic entities due to the state interventions which were guaranteed at the expense of interventions through exchange mechanisms.

Taking into consideration dependence of the domestic market of food commodities on import supplies, the FAS Russia actively participates in elaboration of measures of **customs tariff regulation** of, *inter alia* the markets of agricultural products.

Thus, for the purposes of non-admission of increase of prices for sugar on domestic markets during the period of growth of the world prices for given products, the FAS Russia initiated amendments to the regulation treatments of the raw sugar import.

The FAS Russia supported, and in certain cases initiated elaboration of urgent measures of customs-tariff regulation undertaken by the Government of the Russian Federation and directed at expansion of import supplies of certain types of agricultural products, which production considerably suffered from abnormal heat of summer of 2010. Thus, import duties on potato, green-head cabbage and buckwheat were cancelled. The given measures allowed to soften drought and poor harvest consequences, to liquidate an excessive demand, to slow down essentially increase of prices for food prime commodities, and in some cases to decrease them.

So as to ensure competition conditions on the market of meat, the FAS Russia repeatedly proposed to introduce exchange mechanisms for distribution of the tariff quotas, established for import of meat among importers, which would provide potential possibility for new participants to enter this market.

SENEGAL**-- Version Française --*

L'envolée des prix des matières premières agricoles, commencée en 2003, s'est poursuivie jusqu'au premier semestre de l'année 2008 où elle a atteint son plus haut niveau. Cette période fut caractérisée par des hausses promptes et brutales. De fait, selon la FAO, «entre janvier 2006 et avril 2008, les cours du maïs, du soja, du blé et du riz ont augmenté respectivement de + 175%, +120%, +125% et de + 168%... avant de retomber au cours du deuxième semestre 2008 ». Cette ébullition se manifeste aussi dans d'autres marchés de matières premières (étain, nickel, pétrole.) Le prix du baril de pétrole a atteint, pour la première fois, le 02 janvier 2008, la « barre » des cent (100) dollars.

Après l'accalmie notée dans le deuxième semestre de l'année 2008, « des tensions sur les prix des denrées alimentaires sont observées depuis mi-2010 » et la FAO prévoit «une flambée des cours mondiaux du riz, du blé, du maïs et des oléagineux pour la période 2015 – 2020 ». Durant cette période, « ces cours seront supérieurs de respectivement 40%, 27%, 48%, et 36% à ceux de la période 1998 – 2003 ».

Plusieurs causes sont indexées : les aléas climatiques, une demande mondiale accrue, notamment de la part de pays à forte croissance, la viscosité de l'offre, la fabrication de biocarburants, les liens étroits entre matières premières de sorte que la demande de biocarburants fait non seulement monter le prix du maïs mais aussi celui des autres produits auxquels il sert d'intrants (produits laitiers...), la forte spéculation due à une financiarisation et à une interconnexion des marchés : ainsi la crise des subprimes a eu des répercussions sur des produits tels que le café, le cacao.

L'augmentation brusque et d'une forte amplitude des denrées de base est à l'origine d'une grave crise alimentaire et des émeutes de la faim dans certains pays. Elle a eu aussi de fortes incidences sur les recettes et sur les projets de développement, surtout du côté des pays importateurs.

Chaque État, à sa façon, a essayé de trouver des solutions pour faire face à la situation d'extrême urgence dont étaient confrontées ses populations les plus vulnérables.

Dans de telles circonstances, les questions qui se posent à une Autorité de Concurrence sont les suivantes :

- les mesures prises par les États pour faire face à la crise due à la volatilité des prix sont-elles toujours conformes ou non au droit et à la politique de la concurrence ? Y'a-t-il un moyen, par le biais d'une politique de concurrence, celle-ci impliquant, ici, la mise en œuvre du droit de la concurrence, de prévenir ou d'enrayer la volatilité des prix des matières premières ? Autrement dit, les autorités de concurrence doivent-elles se borner à observer passivement le caractère erratique des prix le temps qu'ils reprennent leur cours normal ou ont-elles des solutions à proposer qui soient propres au droit et à la politique de la concurrence ?

* Contribution soumise par M. Mouhamadou Diawara, Président de la Commission Nationale de la Concurrence du Sénégal.

Pour tout dire, la concurrence peut-elle être un remède à la volatilité des prix des matières premières ? Les réponses à ces questions sont difficiles et doivent faire l'objet d'études approfondies. Mais il est établi, d'ores et déjà, que dans la plupart des pays, ce sont les États qui ont réagi promptement prenant souvent des mesures qui ne sont pas toujours dictées par des soucis de concurrence (Partie 1). Il en est ainsi de la région ouest-africaine où les autorités de concurrence régionale ou nationale ont, apparemment, peu réagi aux fluctuations des prix. Pourtant, les Autorités de concurrence doivent être au premier plan pour prendre en charge de telles questions (Partie 2).

1. Les mesures administratives ayant une incidence sur la concurrence

En réaction à la volatilité des prix des matières premières agricoles, certains États ont pris des mesures à caractère protectionniste. D'une façon générale, bien des pays, comme le SENEGAL, ont pris un certain nombre de mesures pour réduire l'incidence de la volatilité des prix extérieurs sur le marché intérieur.

1.1 Les mesures à caractère protectionniste

Sans véritablement retourner au protectionnisme qui a fait suite à la crise de 1929, certains États, pour se protéger, ont pris des mesures qui restreignent le commerce et peuvent avoir des incidences sur la concurrence internationale.

Peuvent entrer dans cette catégorie :

- les décisions de certains pays interdisant ou limitant les exportations de certaines matières premières agricoles (ex. fixation de quotas à l'exportation ou à l'importation, fixation de taxes à l'exportation.) La FAO indique que l'interdiction d'exporter des céréales a contribué à une hausse des prix et à leur volatilité sur les marchés internationaux.
- le versement de subventions publiques aux entreprises nationales.
- la mise en place de barrières non tarifaires ou le renforcement des règlements sanitaires ou de sécurité.

1.2 Les mesures temporaires pour réduire l'incidence de la volatilité des prix extérieurs sur le marché intérieur : l'exemple du SENEGAL

Face à la montée brusque et brutale des prix des matières premières, l'État du SENEGAL a pris des mesures fiscales et réglementaires pour freiner ou amortir les hausses des prix. Ces mesures ont consisté, en 2008, en la suspension des droits de porte et de la TVA pour certains produits alimentaires consommés à grande échelle (riz, blé, lait). Dans le même temps, elle a augmenté la subvention des produits alimentaires (prix du riz) et de ceux du secteur de l'énergie (électricité, gaz butane). Des compensations ont été opérées avec certaines entreprises. C'est le cas notamment avec la SUNEOR à la suite du gel de l'augmentation du prix de l'huile.

La subvention des prix a eu des répercussions sur le budget national. Le montant de cette subvention, pour certains produits, est passé, en 2007, de 40 milliards à 116 milliards de francs CFA.

Il faut dire que le législateur sénégalais, au moment de la rédaction de la loi sur la concurrence en 1994, s'était inspiré de la législation française en permettant à l'État, pour des raisons sociales et économiques, de fixer, par voie législative et réglementaire, les prix de certains biens, produits et services (art-42.L94-63 du 22 août 1994 sur les prix, le commerce et le contentieux économique).

Surtout, l'article 43, lui permet, pour une durée qui ne peut excéder deux mois renouvelable, de prendre des mesures temporaires contre les hausses excessives des prix motivées, entre autres, par une situation de calamité ou de crise. En ce cas, l'avis de la Commission de la concurrence est donné dans les deux premiers mois d'application des mesures restrictives.

C'est fort de ce texte qu'un arrêté portant blocage des prix de certaines denrées de première nécessité (sucre, huile, riz...) a été pris le 01 février 2011. Mais, dans la prise de ces mesures, les pouvoirs publics sénégalais ont laissé une certaine latitude à la concurrence en bloquant seulement les prix à « un niveau plafond ». Ils ont raison car la concurrence est un outil indispensable pour le bien-être des consommateurs et les autorités de concurrence se doivent de prendre en charge les questions suscitées par la volatilité des prix des matières premières.

2. La prise en charge par les autorités de concurrence de la volatilité des prix des matières premières

Ce paragraphe sera abordé sous trois aspects : les rapports entre la volatilité des prix des matières premières, notamment agricoles, avec le droit et la politique de la concurrence, la faible réaction des autorités de la concurrence dans la région ouest-africaine, et le rôle que celles-ci doivent continuer à jouer.

2.1 *Les rapports entre droit et politique de concurrence et volatilité des prix des matières premières agricoles*

Le droit et la politique de la concurrence ont, en charge, la lutte entre les pratiques anticoncurrentielles : les ententes illicites et les abus de position dominante. Ils sont aussi en charge du contrôle des concentrations.

Sous cet angle, il est, peut-être, légitime de s'interroger sur le rôle et/ou les pouvoirs des autorités de concurrence lorsque la volatilité des prix des matières premières agricoles est due à des aléas climatiques, à la culture de biocarburants, à une insuffisance ou à une baisse des stocks, à la spéculation des bourses dans les marchés financiers agricoles.

Une vue étroite pourrait faire penser que les solutions se trouveraient en dehors du droit et de la politique de la concurrence (Que peut une autorité de concurrence contre une volatilité ayant pour cause des calamités naturelles ou une forte spéculation ?) Le rôle de la spéculation sur la volatilité des prix fait l'objet de controverses. Elle aurait peu d'influence sur la volatilité qui ne refléterait que les variations de l'offre et de la demande. De fait, des solutions ne faisant pas référence (au moins expressément) au droit et à la politique de la concurrence sont données, certains spécialistes préconisant même la création d'une organisation internationale de l'agriculture. Mais, une analyse approfondie montre, en revanche, que l'existence de prix erratiques peut résulter de manipulations de volontés humaines organisées dans le cadre d'accords entre entreprises au niveau international comme au niveau national.

Le processus conduisant à des hausses promptes et brutales peut être le fait de cartels (cartels à l'exportation pour certains produits: ex. riz).

Au niveau national, les firmes et autres entreprises peuvent profiter de la morosité internationale pour susciter ou maintenir des variations de prix qui leur sont favorables dans le cadre d'accords passés entre elles.

Certains marchés de matières premières, concentrés du fait de l'existence d'un petit nombre d'acteurs, pourraient être des lieux propices de collusion.

C'est pourquoi, les marchés nationaux et internationaux méritent une surveillance continue des autorités de concurrence et une réelle et efficace coopération entre elles.

Soulignons, sur ce point, que l'étude de la FAO révèle que la volatilité des prix trouve son origine soit sur les marchés nationaux soit sur les marchés internationaux.

Les autorités de la concurrence doivent s'impliquer dans la résolution des problèmes créés par la volatilité des prix. Cette implication n'était vraiment pas perceptible, dans la région ouest-africaine, lors de la crise alimentaire 2007-2008.

2.2 *La faible réaction des autorités de concurrence ouest-africaine face à la volatilité des prix des matières premières agricoles*

Les autorités de concurrence, régionales comme nationales des pays de la CDEAO et de l'UEMOA, ont peu réagi à la crise née de la volatilité des prix des matières premières agricoles.

Cette faible réaction est due à leur faiblesse structurelle et à l'absence de moyens pour faire, à titre d'exemples, des études de marché, des enquêtes préventives pour identifier les distorsions potentielles de concurrence. Elles ne disposent pas d'un système d'information en temps réel de manière à pouvoir proposer aux pouvoirs publics des ajustements adaptés.

Mais, en tout état de cause, les autorités de concurrence ne peuvent ni ne doivent être passives durant les périodes de volatilité des prix puisqu'elles ont pour mission première ou principale, l'intérêt des consommateurs. Il faut, en conséquence, qu'elles soient mises dans de bonnes conditions et qu'elles exercent de façon permanente leur mission de surveillance du marché.

2.3 *Rôle des autorités de concurrence face à la volatilité des prix des matières premières*

Les autorités de concurrence ont une mission permanente de régulation dans les divers marchés. En tout temps, elles ont, en plus de leur pouvoir de sanction, une mission de veille concurrentielle pour déceler tous les dysfonctionnements liés aux pratiques anticoncurrentielles. Cette mission ne change pas mais elle appelle plus d'attention et de vigilance dans les périodes de crise. Les oscillations soudaines des prix des matières premières doivent être observées précautionneusement en amont et en aval pour en déceler les véritables causes et y apporter les solutions idoines.

La tentation de retourner à la vieille économie administrée ou de recourir à ses méthodes resurgit toujours dans les périodes de crise.

Mais il appartiendra toujours aux autorités de concurrence de sensibiliser, par l'outil du plaidoyer, les pouvoirs publics et leur faire comprendre que la première arme de lutte contre les prix élevés, qui peuvent résulter d'une volatilité organisée ou maintenue, est l'instauration d'une bonne politique de concurrence.

Les programmes de conformité aux règles de concurrence par les entreprises pourraient aussi y aider.

L'existence d'une période de volatilité des prix ne peut justifier aucune entorse à la concurrence.

Sur ces points, l'avis, donné par l'Autorité de la concurrence française sur la compatibilité avec le droit de la concurrence de l'insertion de clauses de révision de prix et de lissage de prix (pour ajuster, dans ce dernier cas, le prix en fonction de la volatilité des prix des matières premières agricoles) dans les contrats commerciaux, est à souligner.

L'Autorité de la concurrence française dit que de telles clauses sont possibles mais « que la fixation des prix doit se faire de façon autonome en fonction de coûts propres des opérateurs parties au contrat sans que la liberté de négociation des parties ne s'en trouve altérée ».

Ce rôle d'avant-garde et de vigie doit être aussi le nôtre.

Selon le ministre du Commerce du Sénégal, « la politique des prix pour les années à venir va être une politique de production pour atteindre l'autosuffisance alimentaire combinée à une politique de maîtrise des coûts ».

Nous ajoutons, à sa suite, qu'en raison des gains d'efficacité qu'elle induit, une bonne politique de concurrence est le meilleur outil pour atteindre ces objectifs.

Aussi, importe-t-il d'aider, de doter davantage de moyens l'autorité nationale de concurrence et de la mettre, pour faire face aux enjeux de sa mission, dans les conditions d'avoir accès à des bases de données toujours actualisées sur l'évolution des prix.

En définitive, il y'a peu d'informations sur les marchés des matières premières agricoles et la transparence n'est pas leur vertu première. Les marchés dérivés des matières premières ne disposent pas d'un cadre de régulation spécifique adapté. Mais, s'il faut convenir avec certains que « la réponse à la volatilité des prix des denrées alimentaires ne consiste pas à faire le procès des marchés ou en bloquer le fonctionnement mais à mieux les utiliser », il faut aussi admettre que la régulation par la concurrence y serait appropriée pour dénicher les cartels qui s'y cacheraient et tous les groupements de quelque nature qu'ils soient qui, par leur pouvoir économique et financier, influenceraient négativement l'évolution des prix sur les différents marchés de matières premières.

SENEGAL*

-- English version --

The surge in agricultural commodity prices, which began in 2003, continued until the first half of 2008, when it peaked. This period was marked by sudden and sharp spikes. In fact, according to the FAO, between January 2006 and April 2008 the prices of maize, soy beans, wheat and rice increased by 175%, 120%, 125% and 168% respectively before slackening in the latter half of 2008. The same turmoil could be seen in other commodity markets as well (such as those for pewter, nickel and oil). On 2 January 2008, the price of a barrel of oil reached the \$100 threshold for the first time.

After the easing noted in the second half of 2008, pressures on foodstuff prices were observed as from mid-2010, and the FAO has forecast that world prices for rice, wheat, maize and oilseeds would surge between 2015 and 2020. Over that period, it is projected that these prices will be respectively 40%, 27%, 48% and 36% greater than between 1998 and 2003.

Multiple causes have been catalogued: climate fluctuations; rising global demand, on the part of rapidly growing countries in particular; supply-side bottlenecks; the manufacture of biofuels; the close interactions between commodities, such that demand for biofuels pushes up the prices not only of maize, but also of other products for which it is an input (*e.g.* dairy products, etc.); and the extensive speculation due to the financialisation and interconnection of markets (the sub-prime crisis, for example, had repercussions on products such as coffee and cocoa).

The sudden and sharp spike in the prices of basic foodstuffs lies at the root of a serious food crisis and hunger riots in some countries. It has also had major impacts on revenue and development projects, especially in importing countries.

Each State has tried in its own way to find solutions for coping with the extremely urgent situation facing the most vulnerable segments of its population.

Under such circumstances, the questions facing a competition authority are the following:

- Are the steps that States take to cope with the crisis arising from price volatility always consistent with competition law and policy? Is there some way, via competition policy – thus in this case implying implementation of competition law – to prevent or reverse commodity price volatility? In other words, should competition authorities limit themselves to passive observation of the erratic fluctuations until prices return to normal, or do they have solutions to propose which competition law and policy alone can provide?

Can competition in fact be a remedy for commodity price volatility? Such questions are difficult to answer and require extensive research. But it is already an established fact that in most cases it was States that reacted promptly, often taking measures not always dictated by competition-related concerns (Part 1). Such was the case in West Africa, where regional and national competition authorities apparently had little

* Contribution submitted by Mr Mouhamadou Diawara, President of the National Competition Commission of Senegal.

reaction to price fluctuations. And yet competition authorities should be at the forefront to take charge of issues such as this (Part 2).

1. Administrative measures having an impact on competition

Reacting to the volatility of agricultural commodity prices, certain States took protectionist measures. More generally, many countries – including Senegal – took a number of steps to lessen the domestic-market impact of external price volatility.

1.1 Protectionist measures

Without actually reverting to the protectionism that followed the 1929 crisis, certain States did, in order to protect themselves, take measures that restrict trade and can have repercussions on international competition.

Among the measures falling into this category are:

- Certain countries' decisions to prohibit or limit exports of certain agricultural commodities (*e.g.* setting export or import quotas, imposing export taxes). The FAO has stated that bans on grain exports contributed to a price increase and to volatility on international markets.
- Government subsidies to national enterprises.
- Establishment of non-tariff barriers or tightening of health or safety regulations.

1.2 Temporary measures to reduce the domestic-market impact of external price volatility: the example of Senegal

Responding to the sudden and sharp spikes in commodity prices, the Senegalese State imposed tax and regulatory measures to slow or to offset price increases. These measures consisted, in 2008, in suspending customs duty and VAT on certain widely consumed foodstuffs (rice, wheat, milk). At the same time, it increased subsidies on food (rice prices) and energy (electricity, butane gas). Some businesses were afforded compensation, as was the case with Suneor after the oil price increase was frozen.

Price subsidies had repercussions on the national budget. The amount of these subsidies, for selected products, increased in 2007 from 40 billion to 116 billion CFA francs.

It must be said that the Senegalese parliament, when drafting the 1994 Competition Act, drew inspiration from French legislation by authorising the State, on social and economic grounds, to set the prices of certain goods, products and services via legislative and regulatory means (Sec. 42.L.94-63 of 22 August 1994 on prices, trade and economic disputes)

Above all, Sec. 43 allows the State to impose temporary measures, for a renewable period of no more than two months, against excessive price increases on grounds such as a calamity or crisis situation. In such cases, the Competition Commission shall make its opinion known within the first two months of application of any restrictive measures.

Pursuant to this Act, a decree capping the prices of certain foodstuffs (including sugar, oil, rice and so on) was enacted on 1 February 2011. Yet in taking these measures, the Senegalese authorities left a certain leeway to competition by only imposing a ceiling on prices. They were correct, because competition is a vital tool for the welfare of consumers, and the competition authorities need to take charge of issues raised by commodity price volatility.

2. The competition authorities' response to commodity price volatility

This section will focus on three aspects: the interconnections between commodity price volatility, for agricultural commodities in particular, and competition law and policy; the fact that commodity price volatility prompted little reaction by competition authorities in the West Africa region; and the role that these authorities must continue to play.

2.1 *The interconnections between competition law and policy and agricultural commodity price volatility*

Competition law and policy are instituted to combat anti-competitive practices such as illegal cartels and abuse of dominant positions. Another of their functions is to control concentration.

From this standpoint, it is perhaps legitimate to ask questions about the roles and/or the powers of the competition authorities when agricultural commodity price volatility is caused by climatic fluctuations, biofuel production, a lack or decrease in inventories and stock-market speculation in agricultural financial markets.

Taking a narrow view might suggest that the solutions would lie outside the realm of competition law and policy. (What can a competition authority do against volatility triggered by natural disasters or intense speculation?) The role of speculation in price volatility is controversial. It might be thought to have little influence over volatility, which merely reflects variations in supply and demand. Solutions making no reference (at least explicitly) to competition law and policy have in fact been put forward, and some specialists are even calling for creation of an international agriculture organisation. But extensive analysis shows, however, that the existence of erratic prices can result from manipulations of human will, in connection with agreements between business enterprises at both the international and national levels.

The process leading to sudden and sharp rises may be the result of cartels (cartels for the export of certain products, such as rice).

At the national level, businesses and other enterprises can exploit a gloomy international climate in order to prompt or maintain price variations that are beneficial to them, through agreements concluded among themselves.

Some commodity markets, which are concentrated by virtue of their small numbers of players, may be ripe for collusion.

This is why national and international markets warrant continuous monitoring by competition authorities, and genuine and effective co-operation between them.

On this score, it should be emphasised that the FAO study reveals that the root cause of price volatility can be found in either domestic markets or international markets.

The competition authorities must get involved in solving the problems created by price volatility. Such involvement was not really perceptible in the West Africa region during the 2007-08 food crisis.

2.2 *Agricultural commodity price volatility prompted little reaction from West African competition authorities*

The crisis arising from agricultural commodity price volatility prompted little reaction from either regional or national competition authorities of the ECOWAS or WAEMU countries.

The very limited reaction was due to structural weakness and a lack of resources to conduct such activities as market studies or preventive surveys to identify potential distortions of competition. They do

not have the real-time information system that would enable them to present the government with suitable adjustments.

Even so, however, competition authorities cannot and must not remain passive during periods of price volatility because their primary mission is to look out for the interests of consumers. Consequently, they must be put in a strong position and continuously exercise their market-monitoring mission.

2.3 *Role of the competition authorities with regard to commodity price volatility*

The competition authorities have an ongoing regulatory mission in their various markets. In addition to their power to impose sanctions, they also perform a competition-watch mission in order to detect any market failures arising from anti-competitive practices. This mission does not change, but it calls for greater attention and vigilance in periods of crisis. Sudden fluctuations in commodity prices must be observed with precaution, both upstream and downstream, in order to detect the real causes and propose appropriate solutions.

The temptation to revert to an old-fashioned centrally planned economy, or resort to its methods, always comes back in periods of crisis.

Yet it will always be the competition authorities' responsibility to make the government aware, using its powers of persuasion, that the paramount weapon in combating the high prices that can result from organised or persistent volatility is the institution of sound competition policy.

Programmes of corporate compliance with the rules of competition can also help.

The existence of a period of price volatility can justify no deviation from the rules of competition.

With regard to these points, the opinion handed down by the French competition authority on the compatibility of competition law with the inclusion in trade contracts of price adjustment and smoothing clauses (in the latter case to adjust prices in response to agricultural commodity price volatility) warrants emphasis.

The French competition authority has said that such clauses were possible, but "the prices must be set independently, with reference to the actual costs of the contracting parties and with no alteration of those parties' freedom of negotiation".

This pioneering and vigilant role must also be ours. According to the Minister of Trade of Senegal, "Price policy for the years ahead is going to be a policy of production to achieve food self-sufficiency, combined with a policy of cost control."

We would add that because of the efficiency gains it induces, a good competition policy is the best tool for achieving those objectives.

It is therefore important to assist the national competition authority and endow it with greater resources to carry out the challenges of its mission, such that it can have access to continuously updated databases on price movements.

In the final analysis, there is scant information on agricultural commodity markets, and transparency is not their greatest virtue. Derivative commodity markets do not have a suitable special regulatory framework. But while it must be agreed with the view of some that "the answer to volatility of foodstuff prices is not to accuse markets or prevent them from working, but to make better use of them", it must also be acknowledged that regulation via competition would be appropriate to uncover any cartels that might be hiding therein, along with any other groupings of any sort whose abuse of their economic and financial power may have a detrimental impact on price trends in the various commodity markets.

CHINESE TAIPEI

1. Introduction

Chinese Taipei will focus on issues related to agriculture commodities. In this report, agricultural commodities are taken as an example to illustrate Chinese Taipei's position, regulations and competition law enforcement and formal investigation for price increase as well as to point out advocacy opportunities and a related competition law case involving dairy products in Chinese Taipei.

2. Background

2.1 *The Fair Trade Commission's position*

The rise and fall, or fluctuation, of prices is a general expression of overall economic activities. Currently no legal emergency price control framework has been instituted in Chinese Taipei; rather, an approach consisting of monitoring and responding has been adopted, wherein various competent agencies adopt appropriate measures to monitor prices and respond to fluctuations in line with statutory regulations and organizational authority.

The Fair Trade Commission (FTC) is in charge of the Fair Trade Act and has the responsibilities to protect the effective operation of market mechanisms, ensure fair competition, and investigate and tackle any conduct in violation of the Fair Trade Act. In the monitoring of prices, pursuant to its tasks and responsibilities the FTC actively investigates and handles, upon complaints or *ex officio*, variations in volume and pricing of commodity purchase, inventory, and delivery to prevent suspected enterprises from engaging in concerted actions by means of mutual understanding to jointly determine the price increases. It is also the responsibilities of the FTC to impose sanctions when any enterprise's competition restriction or unfair competition conduct is confirmed over the course of investigations.

The FTC collects market information regarding the prices of vital necessities (such as wheat, flour, soybeans, cooking oil, oil products, corn, dairy products, liquefied petroleum gas, iron products, and agricultural and animal husbandry products) and monitors the developments in the corresponding markets on a regular basis, comparing these findings with international conditions. In addition, the FTC maintains a close watch on the fluctuations in the prices of agricultural and farm products and relief materials during times of natural disasters. The imbalance of supply and demand precipitated by such outside factors as typhoons or other natural disasters causes prices to rise. This is an unavoidable phenomenon of the market regulation process; however, violations of the Fair Trade Act such as concerted actions cannot be ruled out as a factor in unusual market price fluctuations. The FTC actively investigates such circumstances, imposing sanctions where evidence of unlawful conduct is discovered. This investigation further has a deterrent effect on enterprises with unlawful intent, thereby indirectly stabilizing prices.

2.2 *The applicable provisions in the Fair Trade Act for price increase enforcement*

Subparagraph 2, Paragraph 1, Article 10 of the Fair Trade Act states, "No monopolistic enterprises shall improperly set, maintain or change the price for goods or the remuneration for services."

Article 14 of the Fair Trade Act states, "No enterprise may have any concerted action." The term "concerted action," 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 price 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 to restrict each other's business activities. The act of a trade association to restrict activities of enterprises by means of its charter, a resolution of a general meeting of members or a board meeting of directors or supervisors, or any other means, is also deemed as horizontal concerted action.

Article 19 of the Fair Trade Act states, "No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition: ... 4. causing another enterprise to refrain from competing in price, or to take part in a merger or a concerted action by coercion, inducement with interest, or other improper means."

Article 24 of the Fair Trade Act states, "In addition to what is provided for in this Act, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order." Further, Article 7 of the Guidelines on the Application of Article 24 of the Fair Trade Act states, "the 'obviously unfair' described in Article 24 refers to engaging in competition or commercial transactions by obviously unfair means...most common types include: 1) where an enterprise provides imperfect substitutes for basic necessities or services or does business in a manner contrary to business ethics or public order and good morals during a time when market mechanisms failed and market supply and demand are not in equilibrium." As the legislative purpose of the Fair Trade Act respects the market mechanism and places emphasis on free competition in the market, the FTC will only investigate enterprises that engage in transactions that breach business ethics or public order and good morals during short-term, emergency, unexpected unusual circumstances under which the market mechanisms failed and market supply and demand are not in equilibrium.

2.3 *Delineation of authority and responsibilities between FTC and other government agencies*

Under the free market, enterprises must take market acceptance into consideration, and are subject to the constraints of market forces when setting pricing; the market will inevitably eliminate deliberately high prices. If the rise and fall of commodity prices is determined by the natural operation of the laws of market supply and demand, there is no room for the intervention under the Fair Trade Act concerning price issues.

Similarly, under the free market, an individual enterprise cannot make excessive profit through hoarding, as the purpose of hoarding is to remove a commodity offered for sale from the market to cause artificially induced scarcity as the basis for raising its price. However, under the pressure of market competition, while individual enterprises reduce supply through hoarding, the resultant rise in price induces other competitors to increase their supply. Consequently, the hoarder not only fails to yield excessive profit, but must also bear the risk of lower sales volume. In other words, market competition can serve a self-adjusting mitigating function toward hoarding of materials and price gouging.

The purpose of the Fair Trade Act is to allow the market's self-adjusting functions to work smoothly by protecting competition. The price determination and high or low inventory levels made by individual enterprises does not regulate under the scope of the Fair Trade Act, except where excessive prices from monopoly enterprises are concerned, or jointly setting of prices or limits to production among horizontal competitors by means of contracts, agreements, or other means.

Regulation of such conduct as hoarding, price gouging, and market manipulation is governed by the legal codes of the respective competent industry authorities, or by specialized statutes for handling emergencies. For example, Article 6 of the Agriculture Products Market Transaction Act states, "The transaction of agricultural products shall not be monopolized, price manipulation, or purposely change the quality/quantity, to obtain an unjustified profit." As the Presidential Decree on Emergency issued in response to the biggest earthquake of the past half a century on 21 September 1999, Paragraph 1, Article

11 of that Decree punishes those who interfere with disaster rescue efforts, hoard goods, or engage in price gouging with a criminal liability of imprisonment of no less than one year and no more than seven years. At the same time, violators may be fined up to 5 million New Taiwan Dollars.

In accordance with the Hoarding Enforcement Plan for Price Stabilization passed by the Cabinet on 29 May 2008, in addition to continued adherence to existing procedures for strengthening interdiction by concerned government agencies and prosecutorial and police units, competent agencies across various industries shall follow regulations and organizational authority, and with reference to the standard of judgment in the Ministry of Justice's explanatory letter¹ on Hoarding, and deem in accordance with its duties and responsibilities whether the information gathered during investigation constitutes hoarding, and adopt appropriate measures accordingly. The local district court prosecutor shall refer cases suspected of criminal culpability for investigation and prosecution. In other words, if unlawful conduct is ascertained, the agency responsible for hindering daily necessities from hoarding shall make its own decision in accordance with governing regulations and authority, with reference to the standard of judgment in the Ministry of Justice's explanation letter on Hoarding.

3. Competition law enforcement and formal investigation

3.1 General issues

Chinese Taipei has a free-market economic system. With the exception of a small number of controlled commodities or services, such as water and electric power utilities for which the government controls prices, the price of other general products is determined autonomously by individual enterprises in consideration of operating costs and the competitive environment. This is the market mechanism at work. Consequently, if price fluctuations result from the decisions of individual enterprises in consideration of such factors as operating cost, market supply and demand, revenues, and marketing strategy, commodity price adjustments cannot be deemed unlawful. Only when enterprises are involved in jointly price increase, disrupting the competition mechanism, and damaging the interests of consumers, can the FTC intervene to address the situation under the Fair Trade Act.

3.2 *In 2008 the FTC conducted its own study and published a report entitled "A Study on Chinese Taipei's Vegetable Production Structure, Marketing Channels, and Transaction System"*

Motivations and purpose of study: due to the seasonal nature of rotation growing and climatic conditions, vegetable production in Chinese Taipei has long been beset with the issue of surplus production and resultant price collapses during the winter, and the instability of supply unable to meet demand during the summer months. In particular, following each typhoon or heavy rain, wholesale and retail vegetable markets at all levels exhibit an undersupply and galloping prices, placing high expectations in the FTC to respond appropriately in a timely fashion. Accordingly, the FTC conducted a comprehensive survey of the production structure, marketing channels, and trading system in vegetable markets, and strengthened cooperation with competent agricultural agencies to gain thorough and timely information of supply and demand at wholesale vegetable markets in growing and consumption areas in order to quickly respond in an appropriate manner following natural disasters such as typhoons and other emergency situations.

Scope and methodology: The study covered domestic vegetable production, vegetable import and export trade, the farmers' organization cooperative marketing system, fruit and vegetable wholesale market

¹ An explanatory letter issued by the Ministry of Justice on 9 November 2000 provided that the government shall consider whether there are non-merchants or merchants not in their main business who are purchasing large quantities of commodities needed by people in disaster regions, or whether the merchants in their main business are purchasing, storing, and holding from sales, or sales at prices patently above reasonable profits for those commodities.

functions and price setting methods, as well as information on competition laws and regulations governing agriculture products market transaction in foreign countries to aid analysis. Research methodologies include: 1) collecting and studying foreign and domestic contributions related to the topic; 2) consulting with scholars and competent agricultural agencies for their views to better understand vegetable market marketing conduct, the transaction system, and industry policies of competent agricultural authorities; 3) conducting interviews at wholesale markets to learn about practices such as transaction flow, price negotiation, and auctions.

Study findings are as follows:

Due to the seasonal nature of produce production and sales and its inherent instability of supply and demand due to susceptibility to changing natural conditions, the produce market supply chain from upstream to mid- and downstream involves numerous producers and consumers. As a result, generally speaking the production region markets and end consumption markets are largely close to perfect competition. The exception herein is the distribution channel market at the wholesale state, which tends to be concentrated, so that the concentration of the upstream, midstream, and downstream markets take on an hourglass shape. Compounded with the limited production volume of individual producers and resultant reduction in consumption volume, both farmers and general consumers become weak competitors in the produce market, bearing the brunt of the damage and gaining nothing during times of dramatic price fluctuation. Governments around the world institute various degrees of protection policies in response, and have set certain conduct exempted from applying their respective competition laws.

Currently there are generally two types of exemption codes governing agricultural products market in advanced countries' competition laws. The first type consists of explicit exemptions in the competition laws; additionally, the provisions of competition laws shall not apply to any acts performed by an enterprise in accordance with other laws.

In the effort to expand production and scope of distribution, reduce distribution costs, and improve the capacity of cooperative agricultural organizations to negotiate market prices, legislation from advanced countries should be emulated, to provide a suitable degree of exemption in the interest of striking maximum balance between the competitive order and the state's obligations to safeguard citizens' existence.

3.3 *FTC response to requests for price reduction*

Paragraph 1, Article 41 of the Fair Trade Act states that the FTC may order any enterprise that violates any of the provisions of this Act to cease therefrom, rectify its conduct or take necessary corrective action within the time prescribed in the order, and that it may assess upon such enterprise an administrative penalty of not less than fifty thousand nor more than twenty-five million New Taiwan Dollars. An enterprise that fails to cease therefrom, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the Fair Trade Commission may continue to order such enterprise to cease therefrom, rectify the conduct or take any necessary corrective action within the time prescribed in the order, and each time may successively assess thereupon an administrative penalty of not less than one hundred thousand nor more than fifty million New Taiwan Dollars until its ceasing therefrom, rectifying its conduct or taking the necessary corrective action. To ensure adherence to the administrative measures under the Fair Trade Act, the FTC has the power to order an enterprise to cease or rectify certain conduct, or take necessary corrective action within a prescribed period, imposed fines, and successively assessed fines. In addition, where the unlawful conduct of an enterprise whose unlawful conduct infringes upon the rights and interests of consumers or competitors, the injured party may appeal for ordinary courts pursuant to Articles 30 and 31 of the Fair Trade Act.

Concerning whether a price should be reversed to the pre-violation level after firms engaging in collusive or abusive pricing behavior having been sanctioned by the FTC, should be addressed by returning to market supply and demand, rather than being subject to direct price controls by government. Owing to the fluidity of the market, the “original price” is not always the most reasonable price at any given time, not to mention the government cannot calculate the “proper” price for businesses. In order to inform the general public about which related merchandise are not impacted by price increases, government departments may list businesses that have not raised prices to allow consumers to make comparisons and make wise choices. At the same time, publication of related market information can facilitate market competition and help businesses set more reasonable prices. Further, the purpose of enforcing the Fair Trade Act is to eliminate factors that impede market operation, not for the government to decide for the market what price certain products are sold for. The government must nevertheless monitor market variations, and in the event that a sanctioned enterprise continues to engage in jointly price increase agreements, the FTC may continue to impose fines and initiate legal action in a court of law.

The Fair Trade Act empowers the FTC to take actions against cartels, but it does not allow the FTC to order enterprises to adjust pricing. If the FTC extends its power to set the prices for industries, such actions will contravene the purpose of the Fair Trade Act. How to regulate commodity pricing could be addressed in two ways. First, investigation of cartel cases by the competition authority tends to sanction existing cartels and deter other cartels from forming. Beyond this approach, it is difficult to expect the competition authority to directly stabilize prices. Second, where a cartel results in price increase, making price adjustment necessary, the competent industry authority should step forward to address the situation. The potential issue of harmonizing competition policy and industry policy could be resolved via the design of the legal system or inter-agency interaction and communication.

3.4 Case study: Milk

On 5 September 2011 the National Animal Industry Foundation announced an increase in the purchase price of raw milk of NT\$1.9 per kilogram, effective from October 1. In response, the FTC immediately initiate investigation, issuing letters two times to dairy companies to inform them and provide related information, and notify sales channel operators and the domestic three largest dairy companies to appear and make statements at the FTC regarding matters that could lead to major controversies.

After investigation, the FTC found that three largest dairy companies, namely Wei Chuan Corp., Uni-President Enterprises, and Kuangchuan Corp., had 80 percent market shares in the domestic fresh milk supply market. Although the price increase of NT\$1.9 per kilogram in the purchase price of raw milk exerted pressure on cost, the three largest dairy companies jointly and consistently increase the recommended retail price of fresh milk and the extent of increase in the retail price reflected the raw milk cost increase to an excessive degree. Taking a 1-liter carton of fresh milk as an example, the price of Wei Chuan’s Lin Feng Ying milk grew from NT\$77 to NT\$83, while Uni-President’s Rui Swei milk increased from NT\$76 to NT\$82 and Kuang Chuan’s Ru Hsiang Shih Chia milk rose from NT\$76 to NT\$82. All three products set pricing differently and all three dairy companies offered different reasons for their increases, but all underwent a price hike of the same scale of NT\$6 per liter.

Moreover, the price rises among competing branded products remained consistently within the specified price range, for example, 1-liter package of fresh milk price rose from NTD\$77 to NTD\$83 and 2-liter package of fresh milk price rose from NTD\$149 to NTD\$160. Upon careful comparison of previous documents and files, the FTC found that current increase in recommended retail prices among the concerned companies showed a high similarity, and that the extent of recommended retail price increase in fresh milk was several times higher compared to the previous raw milk purchase price increase of 2007, for which there was no rational explanation absent a mutual understanding to refrain from price competition. (i.e. when the purchase price of raw milk was increased in 2007 by NT\$3.5 per kilogram, recommended

retail prices in fresh milk rose by NT\$7 to NT\$8 per liter. But in 2011, when the purchase price rose NT\$1.9 per kilogram, recommended retail prices in fresh milk increased by NT\$6 per liter.)

To collect evidence, in addition to contracts or agreements, the FTC has also applied indirect evidence in the past to support its decisions against concerted actions. The supreme administrative court upheld the reasonable presumption the FTC used in determining if concerted action exists. In this case, the FTC made its decision at its Commissioners' Meeting on 19 October 2011 that the three biggest dairy companies, Wei Chuan, Uni-President, and Kuangchuan, engaged in jointly raising the recommended retail price of fresh milk in violation of Paragraph 1, Article 14 of the Fair Trade Act prohibiting concerted actions. Administrative fines of NT\$ 12 million, NT\$ 10 million, and NT\$ 8 million were imposed on Wei Chuan, Uni-President and Kuangchuan, respectively.

4. Advocacy opportunities and challenges

4.1 *Jurisdiction issues*

Pursuant to the Administrative Procedure Act, in the event of any controversy between or among different administrative authorities over the issue of jurisdiction, it shall be determined by the common superior authority thereof. When the regulatory agency amends its current laws or drafts the new law, the FTC can express its opinion during consultation meetings in order to facilitate the incorporation of competitive mechanisms and harmonize both sides' disagreements over policy objectives. In addition, where the matters provided for in the Fair Trade Act concern other authorities, the FTC could consult with the relevant authorities to deal with the conflicting issues pursuant to Article 9 of the Fair Trade Act.

4.2 *Harmonization of agricultural and competition policies*

The stated objectives of Chinese Taipei's agricultural policy are: 1) reduce agricultural product price fluctuation; 2) raise the usage efficiency of resources (especially land); 3) maintain reasonable farmers' share; 4) food security and raise self-sufficiency; 5) sustainable development.

The FTC's basic position on agriculture is as follows: 1) as agricultural product price fluctuation is a pure consequence of variation in supply and demand, it is deemed part of normal operation of market mechanisms; 2) supervision and management of agricultural product marketing, adjustments to supply and demand of agricultural products, or failure of agricultural product middlemen to conduct transactions in accordance with the Agricultural Products Market Transaction Act is the purview of competent agricultural supervisory agencies; 3) such unlawful means as the use of intimidation or threats to engage in transactions shall be investigated by prosecutorial agencies to ascertain criminal responsibility; 4) the FTC addresses such situations as abuse of monopolistic position by agricultural businesses, price fixing, and improper setting of resale price.

The FTC has organized an advocacy meeting on Regulations Governing Agricultural Product Market Transaction Conduct, during which it expressed to agricultural enterprises and competent agricultural authorities that competition policy does not conflict with agricultural policy, and that it should even be a component of agricultural policy. In line with the Fair Trade Act, the FTC may promote upstream essentials (e.g. fertilizer and feed) market competition, and prevent the concentration of the downstream market (such as merger review of the food industry), and further has the authority to investigate and sanction concerted monopolization (monopsony or monopoly) by distributors. Consequently, the use of advocacy to eliminate unnecessary regulations and restrictions can grant agricultural enterprises greater operational flexibility to ensure a win-win situation for both agricultural producers and consumers.

**TUNISIE (DIRECTION GÉNÉRALE DE LA CONCURRENCE
ET DES ENQUÊTES ÉCONOMIQUES)**

-- Version Française --



REPUBLIQUE TUNISIENNE
Ministère du Commerce et du Tourisme
Direction Générale de la Concurrence
et des Enquêtes Économiques

**Forum mondial de l'OCDE sur la concurrence
16, 17 février 2012**

**Concurrence et volatilité des prix des
produits de première nécessité**

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INTRODUCTION:

- La volatilité des prix affecte surtout les pays en développement et les économies émergentes.
- A l'instar de ces pays, la Tunisie n'est pas à l'abri de la volatilité des prix des matières premières.
- Les industries tunisiennes de transformation tiennent une place importante dans l'économie tunisienne.

- Quelles sont les causes de la volatilité des prix, leur impact et les mesures adoptées par la Tunisie pour faire face à ce phénomène, et quel rôle peuvent jouer les autorités de la concurrence?

INTRODUCTION:

- vers la fin 2006, commence une période d'augmentation des prix de tous les produits stratégiques et sensibles:
 - Produits alimentaires de base
 - Energie
 - Matières premières
- ➔ Une augmentation spectaculaire des prix
- ➔ Imprévisible, non maîtrisée par les experts
- ➔ Déstabilisation des économies

1- Les causes de la volatilité des prix

Des causes structurelles

Des causes conjoncturelles

1- Les causes de la volatilité des prix:

1-1 les causes structurelles:

- Augmentation de la demande mondiale et déséquilibre entre offre et demande
- Augmentation de la consommation des pays émergents (chine et inde)
- Production de biocarburant
- La flambée des prix du pétrole (comme facteur de production)
- Le Marché mondial de ces produits est non concurrentiel et non soumis aux règles de commerce mondiale
- Existence d'organisme internationaux qui fixent les règles de production et de commercialisation de certaines matières premières (exp: opep)
- Domination des multinationales (l'augmentation moyenne des prix due à des cartels internationaux est de l'ordre de 25 à 30%)

1- Les causes de la volatilité des prix

1-2 les causes conjoncturelles:

- Aléas climatiques
- Restrictions à l'exportation (priorités nationales)
- Spéculations au niveau des marchés financiers
- Instabilité politique
- Dépréciation du dollar et des taux d'intérêt
- Prise de mesures protectionnistes par plusieurs pays:
 - Instauration des taxes à l'exportation tels que en Ukraine, en Russie...
 - Instauration de système de quota à l'exportation dans quelques pays.

2- Impact sur l'économie nationale

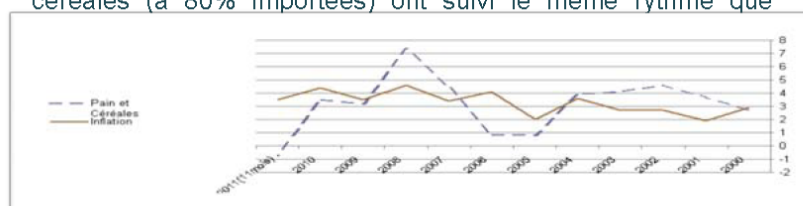
- L'impact de la volatilité des prix diffère d'un pays à l'autre.
- La réaction est en fonction de la structure de l'économie nationale
- Généralement la volatilité des prix sur les économies nationales a des impacts divers:
 - Pression inflationniste
 - Accentuation du déficit de la balance commerciale
 - Pression budgétaire

2- Impact sur l'économie nationale

2-1- Pression inflationniste:

L'ampleur de l'inflation liée à la hausse des cours mondiaux dépend des modalités de la transmission de ces prix aux économies nationales:

- Le risque inflationniste est d'autant plus important que les produits importés dont les prix ont augmenté constituent encore une part importante dans les produits finis consommés.
- Le tableau montre que l'évolution du prix du pain et des céréales (à 80% importées) ont suivi le même rythme que



Année	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011 (11mois)
Pain et Céréales	2,7	3,7	4,6	4,1	3,9	0,8	0,8	4,4	7,3	3,2	3,5	-0,7
Inflation	2,9	1,9	2,7	2,7	3,6	2	4,1	3,4	4,6	3,5	4,4	3,5

2- Impact sur l'économie nationale

Évolution des prix des produits importés:

\$/tonne

	2007	2008	2009	2010	2011
Blé tendre	286	390	215	225	318
Blé dur	437	597	342	306	455
Orge	264	312	189	213	295
Huile végétale	693	1161	942	848	1220
Café vert	1967	2464	1768	1916	2830

2- Impact sur l'économie nationale

l'analyse de l'indice des prix montre que la hausse des prix enregistré au cours de ces dernières années a concerné surtout:

- les produits agricoles
- les produits sensibles
- les produits frais
- matériaux de construction
- carburants
- médicaments

2- Impact sur l'économie nationale

2-2- Accentuation du déficit de la balance commerciale

- La Tunisie est structurellement importatrice des produits agricoles de première nécessité (céréales, huiles végétales, sucre, café...)

		Total des produits (MD)	Taux de couverture %
2006	Exp	15558,1	77,8
	Imp	20003,5	
	Solde	-4445,4	
2007	Exp	19409,6	79,4
	Imp	24437,3	
	Solde	-5027,7	
2008	Exp	23637	78,2
	Imp	30238,8	
	solde	-6601,8	
2009	Exp	19469	75,2
	Imp	25877,6	
	solde	-6408,4	
2010	Exp	23519	73,9
	Imp	31817,1	
	solde	-8298,1	

2- Impact sur l'économie nationale

2-3 Accentuation du déficit budgétaire:

- ◆ les mesures prises par les autorités tunisiennes pour compenser les effets de la hausse des prix internationaux et maintenir les prix intérieurs à des niveaux bas ont fait que la facture budgétaire a connu une hausse depuis 2007:

	2007	2008	2009	2010	2011
Charges de la CGC (en MD)	598	1048	800	730	1250

- ◆ Le montant alloué aux céréales a dépassé les 80% des charges de la CGC.

Déficit Budgétaire:

	2006	2007	2008	2009	2010
Taux %	2,9	2,9	3	2.7	2.6

3- Mesures prises par la Tunisie

3-1 Politique de subvention:

- la Tunisie a choisi une politique de subvention des produits de base, via une caisse de compensation.
- Il y a des produits subventionnés par le budget (carburant, électricité, gaz, céréales) et des produits subventionnés à travers les entreprises publiques (engrais, médicaments, sucre, café, ...).
- la hausse des prix internationaux se répercute directement sur le budget de la caisse.
- le coût de la hausse des cours mondiaux est plus budgétaire qu'inflationniste.

3- Mesures prises par la Tunisie

3-2 Règles de régulation du marché:

- Démantèlement tarifaire (huiles végétales, pâtes, viandes, aliments pour bétails), baisse des taux.
- Facilitation des procédures d'importation.
- Diversification des produits sur le marché.
- Libéralisation des importations de certains produits en monopoles : huiles végétales, orge .

4- Rôle des autorités de concurrence

- Limites du droit de la concurrence national
- Secteurs non soumis aux règles de la concurrence
- Absence de cadre institutionnel mondial
- Absence de coopération internationale pour limiter les atteintes à la concurrence dans ces secteurs
- Absence de volonté de sanctionner les cartels qui ne touchent pas les intérêts des pays développés (cartel aluminium USA-Russie)

Quel rôle pour les autorités de concurrence tunisienne? Ont-elles un rôle spécifique pour contrecarrer le phénomène de la volatilité des prix?

4- Rôle des autorités de concurrence

- Règles dérogatoires au principe de la concurrence: par la fixation conjoncturelle des prix de certains produits sensibles.

L'article 4 de la loi tunisienne relative à la concurrence et aux prix prévoit que: « des mesures temporaires contre des hausses excessives des prix motivées par une situation de crise ... peuvent être prises par arrêté du ministre chargé du Commerce(1) et dont la durée d'application ne peut excéder six mois »

- Fixation des marges bénéficiaires
- Garantie de la régularité de l'approvisionnement.
- Protection du pouvoir d'achat (ajustement modéré des prix contrairement aux autres pays).
- Contrôle du marché:
 - **Transparence**
 - **Éviter le trouble social**
 - **Assurer les équilibres globaux**

4- Rôle des autorités de la concurrence

- Concertation avec la profession pour adhérer à l'effort de maîtrise de prix (accords de modération).
- Campagne de rationalisation de la consommation (énergie, céréales,...).
- Implication de la société civile (sensibilisation).

4- Rôle des autorités de concurrence

- * Rôle de régulateur du marché
- * Garantie du respect des règles de concurrence (comme pour les autres secteurs)
- * cibler les interventions des autorités de la concurrence dans les secteurs les plus exposés à la flambée des prix (surtout que les entreprises peuvent procéder à des pratiques anticoncurrentielles leur permettant de préserver leurs marges de profit ou même d'augmenter les prix)

**TUNISIA (DIRECTORATE-GENERAL FOR COMPETITION
AND ECONOMIC SURVEYS)**

-- English version --



INTRODUCTION

- The greatest impacts of price volatility are on developing countries and emerging economies
- Like those countries, Tunisia is not immune to commodity price volatility
- Tunisian processing industries play a large role in the country's economy

- What are the causes of price volatility, what is its impact, what action has Tunisia taken to cope with the issue, and what role could the competition authorities play?

INTRODUCTION

- Year-end 2006 saw the onset of a period in which the prices of all strategic and sensitive products began to rise:
 - Basic foodstuffs
 - Energy
 - Raw materials
- ➔ A spectacular rise in prices
- ➔ Unpredictable, beyond experts' control
- ➔ Destabilisation of economies

1- The causes of price volatility

Structural causes

Short-term causes

1- The causes of price volatility

1-1 Structural causes

- Rising global demand and imbalance between supply and demand
- Rising consumption by emerging countries (China and India)
- Biofuel production
- Spiking prices of oil (as a production factor)
- A global market for these products that is non-competitive and not subject to world trade rules
- International organisations that set rules for producing and marketing certain raw materials (e.g. OPEP)
- **Domination by multinationals** (the average price hike due to international cartels is approximately 25 to 30%)

1- The causes of price volatility

1-2 Short-term causes

- Climate fluctuations
- Export restrictions (national priorities)
- Financial market speculation
- Political instability
- Depreciation of the dollar and interest rates
- Protectionist measures taken by a number of countries
 - Introduction of export taxes in Ukraine, Russia, etc.
 - Introduction of export quota systems in certain countries

2- Impact on national economies

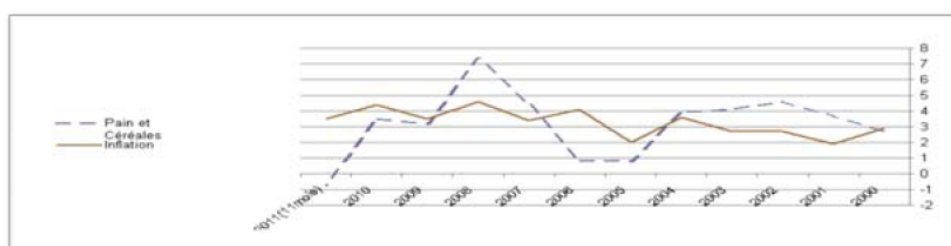
- The impact of price volatility differs from one country to another
- The reaction depends on the structure of the national economy
- Price volatility generally has a variety of impacts on national economies
 - Inflationary pressure
 - Aggravation of trade-balance deficits
 - Budgetary pressure

2- Impact on national economies

2-1- Inflationary pressure

The extent of inflation stemming from rising world prices depends on how those prices are passed on to national economies

- The risk of inflation is greater if imports whose prices are rising still account for a substantial share of finished-product consumption
- The table below shows that price trends for bread and cereals (80% of which are imported) mirror those for overall inflation



Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011 (11 mos.)
Bread and cereals	2.7	3.7	4.6	4.1	3.9	0.8	0.8	4.4	7.3	3.2	3.5	-0.7
Inflation	2.9	1.9	2.7	2.7	3.6	2	4.1	3.4	4.6	3.5	4.4	3.5

2- Impact on national economies

Import price trends

\$/tonne

	2007	2008	2009	2010	2011
Soft wheat	286	390	215	225	318
Durum wheat	437	597	342	306	455
Barley	264	312	189	213	295
Vegetable oil	693	1 161	942	848	1 220
Raw coffee	1 967	2 464	1 768	1 916	2 830

2- Impact on national economies

Price-index analysis shows that the price increases of recent years stem primarily from

- Agricultural products
- Sensitive products
- Fresh products
- Building materials
- Fuels
- Drugs

2- Impact on national economies

2-2- Aggravation of trade balance deficits

- Tunisia is a structural importer of agricultural commodities (cereals, vegetable oils, sugar, coffee, etc.)

		Total products (TND million)	Coverage ratio %
2006	Exp	15558.1	77.8
	Inp	20003.5	
	Balance	-4445.4	
2007	Exp	19409.6	79.4
	Inp	24437.3	
	Balance	-5027.7	
2008	Exp	23637	78.2
	Inp	30238.8	
	Balance	-6601.8	
2009	Exp	19469	75.2
	Inp	25877.6	
	Balance	-6408.4	
2010	Exp	23519	73.9
	Inp	31817.1	
	Balance	-8298.1	

2- Impact on national economies

2-3 Aggravation of budget deficits

- ◆ The steps taken by the Tunisian authorities to offset the impact of international price increases and keep domestic prices at lower levels have caused the budgetary burden to rise since 2007

	2007	2008	2009	2010	2011
CGC outlays (TND million)	598	1 048	800	730	1 250

- ◆ The amount allocated to cereals exceeded 80% of aggregate outlays of the General Compensation Fund (*Caisse générale de compensation* – CGC).

Budget deficit:

	2006	2007	2008	2009	2010
Rate %	2.9	2.9	3	2.7	2.6

3- Steps taken by Tunisia

3-1 Subsidisation policy

- Tunisia has opted for a policy of commodity subsidisation via a compensation fund
- Certain products are subsidised by the budget (fuel, electricity, gas, cereals) and others are subsidised through public enterprises (fertilisers, drugs, sugar, coffee, etc.)
- International price increases have a direct impact on the fund's budget
- The cost of global price increases is more budgetary than inflationary

3- Steps taken by Tunisia

3-2 Rules for market regulation

- Tariff dismantling (vegetable oils, pasta, meat, animal feed), rate decreases
- Facilitation of import procedures
- Diversification of products on the market
- Liberalisation of imports of certain monopoly products: vegetable oils, barley

4- Role of the competition authorities

- Limits of domestic competition law
- Sectors exempt from the rules of competition
- Absence of a global institutional framework
- Absence of international co-operation to limit infringements of competition in these sectors
- Lack of will to punish cartels that do not impact on the interests of the developed countries (USA/Russia aluminium cartel)

What is the role of the Tunisian competition authorities? Do they play a special role to counter price volatility?

4- Role of the competition authorities

- Rules derogating from the principle of competition: short-term fixing of the prices of certain sensitive products

Section 44 of the Tunisian Competition and Prices Act stipulates that “Temporary measures against excessive price increases prompted by a crisis situation ... may be decreed by the Minister for trade (1) and remain in effect for no more than six months”

- Setting profit margins
- Ensuring the regularity of supply
- Protecting purchasing power (moderate price adjustments, unlike other countries)
- Control of the market
 - **Transparency**
 - **Avoiding social unrest**
 - **Ensuring overall equilibria**

4- Role of the competition authorities

- Working together with the profession to enlist support for price controls (moderation agreements)
- Campaign to rationalise consumption (energy, cereals, and so on)
- Involvement of civil society (awareness building)

4- Role of the competition authorities

- ✿ Regulate the market
- ✿ Enforce compliance with the rules of competition (as for other sectors)
- ✿ Focus interventions on sectors most exposed to price spikes (especially since businesses can resort to anti-competitive practices enabling them to preserve their profit margins and even to raise prices)

TURKEY

1. Introduction

The main objective of this brief contribution is to provide a sound understanding about meat price changes in Turkey and to demonstrate how the Turkish Competition Authority (TCA) approached and evaluated this emerging situation.

Being one of the basic commodities for consumers, meat has indisputable importance for human nourishment. Due to its increasing importance with population growth, any competition infringement in the meat market and other related and interacting markets outstretching in a large array such as milk, leather, wool, fodder plants may have geometrically increasing negative effects on consumers.

In April 2010, upon various complaints from different sources of stakeholders such as Consumer Association Organization among others, alleging that some prominent meat producers had stocked meat obtained from cattle and marketed that meat after prices increased due to a cartel agreement, TCA launched a preliminary inquiry. In this process, no evidence could be found proving the existence of an anti-competitive agreement. However, in the sector inquiry conducted subsequently by TCA, some structural problems affecting meat prices in upward direction were detected. These findings are briefly discussed below.

2. Meat sector inquiry

2.1 *Meat price movements*

According to data regarding the period between 2005 and 2010, meat producer price for cattle increased approximately from 9 TL/kg (5.026 USD/kg) to 17 TL/kg (9.494 USD/kg). Similarly, meat consumer price for cattle increased approximately from 12 TL/kg (6.702 USD/kg) to 23 TL/kg (12.845 USD/kg)¹.

For the same term, meat producer price for sheep increased approximately from 8 TL/kg (4.468 USD/kg) to 14 TL/kg (7.819 USD/kg) and meat consumer price for sheep reached approximately from 11 TL/kg (6.143 USD/kg) to 22 TL/kg (12.287 USD/kg).

2.2 *Decline in the number of livestock*

The number of the livestock declined dramatically during the period between 1980 and 2008 in Turkey. Whereas there were 15.5 million cattle, 46 million sheep, 18.7 million goats and 1 million water buffalo in 1980, these numbers decreased respectively to 10.8, 23.9, 5.6 million and 86 thousand, implying a 30%, 48%, 70% and 91% loss. The number of cattle and ovine per person also declined through the same term even if the effect of tourism is not taken into account.

¹ The statistical information referred to in this text is obtained from the sector inquiry report entitled "Turkey Red Meat Sector and Competition Policy" which is available at <http://www.rekabet.gov.tr/dosyalar/sektorraporlari/sektorrapor5.pdf>

This situation has become more striking when compared with the data of Food and Agricultural Organization (FAO) about world red meat production amount as a demonstrator of animal number concerning the term between 1990 and 2005. According to this data, cattle meat production increased 12%, sheep meat production increased 17.9%, goat meat production increased 73.6%, and water buffalo meat production increased 37.5%.

2.3 *The quality of livestock*

Not only the quantity but also the quality of the stock is very important. There are three types of races that can be ranked according to their efficiency levels: local race at the bottom, hybrid race in the middle and the so-called culture race at the top. Breakdown of the races is 24.2% local, 41% hybrid race and 34.7% culture race. In this regard, it should be noted, as a phenomenon causing cattle breeding for meat to take back seat compared to cattle breeding for milk, that efficient incentive and support mechanisms have been created for the latter.

2.4 *Changes in red meat production*

Data referring to the period between 1990 and 2005 purports that meat production amount regressed at a ratio of 19%. On the other hand, it is understood that meat productivity per animal has an increasing trend.

Although an increase could be observed for 2006 and 2007, again a drop was experienced in 2008 due to unfavorable weather conditions directly affecting fodder utilities and global economic crisis. This shrinkage continued in 2009 and a reduction of 12.2% for cattle meat, 22.9% for sheep meat, 15.1% goat meat and 24.6% for water buffalo meat occurred. Here, it should be noted that a considerably high ratio of 40% informal economy is in question, causing unreliability about the data.

2.5 *The Structure of the undertakings and the integration level of the market*

Before evaluating the structure of the undertakings operating in the market, it should be mentioned that it is hard to talk about specialized stockbreeding. Only 0.5% of 3 million undertakings are working exclusively in the field of stockbreeding.

In respect of the structure of the undertakings, small family run, multi partial and unintegrated character is dominant. Even though undertakings dealing with ovine stockbreeding have larger herds enabling them to benefit from scale economies, the situation is not so bright for those dealing with cattle stockbreeding. 60% of those undertakings have 1-4 animals, 99.2% of them have 1-49 animals, and only 1.2% of them (corresponding to 411 undertakings) have 150 and more animals and therefore are qualified as having large herds. When compared to EU with 30 animals on average per undertaking, it seems hard to attain the cost advantages that the economies of scale will create.

Lack of integration of these undertakings results in the expansion of the margins between producer and consumer prices because each additional intermediary adds his own profit and this weakens the relationship between producer profit and retail selling price. In addition, the pressure on the price that is occurring in wholesale markets has increased as well due to structural transformation experienced in fast moving consumer goods sector and expansion in the buying power of retailers gaining the control of the channel. That pressure increases further because of the rising demand for meat products in nourishment in parallel with the increase in welfare; relative decrease in livestock stock and cost increases. And this situation considerably stifles the activities of the stockbreeding undertakings which do not have enough capital and financial power. This evaluation may be illustrated with the data between 1999 and 2007. In 1999, the ratio of consumer prices to retail prices was 32.5/26.2 and in 2007, this ratio was 14/55.7.

2.6 *Course of fodder costs*

Fodder costs constitute 70% of all costs of the producers. Efficiency decrease caused by global aridity in 2007, global crisis and increase in energy prices supporting biofuel production in 2008 lead to considerable increases in fodder prices. Especially in 2007, it was almost impossible to afford the cost of fodder with the profit obtained. By 2009, fodder prices have started to decline.

2.7 *Decline in the breeding animal stock*

Milk gets the largest portion from the animal production value in Turkey. Therefore, as the source of milk, cows have importance for the future course of livestock. However, due to increases in dairy cattle feed costs in 2007 that exceeded milk prices, owners preferred to sell their animals especially in Feast of Sacrifice (Eid al-Adha) even though the insufficiency of the cow race causes obtaining 50% less meat. Over 400 thousand cows were sold at that period purporting a decline in birth rate and a great problem for the feature of breeding animals.

2.8 *Meat and livestock import*

Increases in meat prices that emerged in 2007-2008 and that could not be overcome with the current regulations caused public authorities to take new measures. By a number of cabinet decisions within certain conditions, permission was given for the import of meat and livestock. Although legal barriers constraining the import of both livestock and meat have been considerably decreased, it is seen that the expected decline in prices has not been realized with effect of this import. Further, it may be stated that imports will have more negative effects in long run.

2.9 *Increase in sheep export*

Turkey exported 37,351 and 80,750 sheep (respectively 1,810,830 kg and 4,363,710 kg) in 2008 and 2009.

Taking into consideration that sheep meat is a close substitute to cattle meat, it may be concluded that switching from supply to export affected the rise in red meat prices.

3. *Meat market investigation*

Besides the above-mentioned issues associated with some structural problems, TCA also has concerns about the activities of undertakings operating in meat and meat products markets. Following a preliminary inquiry, based on the allegations that some undertakings stocked meat and thus caused artificial supply restraints with a view to increasing prices, which was closed due to lack of evidence, an ex-officio investigation was launched in August 2010 about four meat producers supplying meat and meat products especially to chain hotels (catering firms were also getting product from these firms, but their total demand was low when compared to hotels so they were not evaluated and no other proof could be obtained regarding other regions) in Aegean and Mediterranean regions to determine whether meat and meat products' prices were fixed and whether there was market allocation between these firms between October 2007 and December 2009. Although it was determined that there was a relationship between the prices of these producers and general price fluctuations, at the end of the process two undertakings were fined approximately TL 1.2 million because they shared information and future price lists.²

² TCA Decision date and number: 17.11.2011, 11-57/1510-538. The decision of TCA has not been judicially reviewed yet.

4. Conclusion

In the context stated above, it can be concluded that increases in meat prices have structural causes, and the effect of global economic and climatic conditions should be considered as well. Nevertheless, it should also be indicated that TCA ex officio conducted an investigation through 2011 and punished some producers with the accusation of infringing Article 4 of the Act on the Protection of Competition no 4054 regarding cartels.

UKRAINE

In the recent years, considerable price hikes have taken place in the food product markets of Ukraine. First and foremost that concerned essential food products, such as sugar, dairy products, grits, meat, oil, and the like.

2008-2009 saw price hikes for a number of products caused by crisis events and other reasons. By way of example, in 2009, in connection with flu epidemics in Ukraine, prices for such food products recommended by doctors for prevention of flu, as lemons and garlic, grew by more than 100%. In order to determine those "guilty" of growth in prices for lemons, the experts traced the chain from importers of those fruits to the retail chains, which sell them to the ultimate buyers. The analysts estimated that wholesale suppliers were specifically responsible for raising the prices in the *importer/wholesale suppliers/retail* chain. The Anti-Monopoly Committee of Ukraine in the period of speculative demand started investigation in relation to such price hikes for the said products. As a result, "G" LLC, one of Ukraine's largest wholesale suppliers of lemons, was fined UAH 100 thousand. The Committee found that the said company, abusing their monopoly, started unreasonably setting excessive sales mark-up of 80-300 percent for lemons, which they used to sell to supermarkets in batches. Based on the conclusions of the investigation, such behavior of wholesale suppliers became one of the root causes for growth in retail prices for lemons. In the course of examination of the case, "G" LLC lowered the release prices for lemons to the economically reasonable level and the representatives of the company publicly admitted the violation and committed to not engage in such behavior in future.

We should note that Ukraine introduced government regulation of prices for broad range of food products (flours, bread, macaroni foods, grits, sugar, beef meat, pork, poultry, boiled sausage products, milk, cheese, sour cream, butter, chicken eggs, and oil) and services of their wholesale and retail sales. Such regulation shall be provided in compliance with the Law of Ukraine "On the prices and pricing" and in compliance with the Cabinet of Ministers of Ukraine Resolution No. 1548 dd. 25 December 1996 "On setting of powers of executive authorities and executive bodies of city councils in relation to regulation of prices (tariff)"

The central executive authority in Ukraine assigned to control the pricing situation in the core socially important markets is the Ministry of Economic Development and Trade of Ukraine, which supervises the State Inspectorate for Price Control that provides ongoing monitoring of prices for socially important food product markets in retail.

In compliance with the Cabinet of Ministers of Ukraine Resolution No. 1222 dd. 17 October 2007 "On the approval of the Procedure of declaration of changes in wholesale and release prices for food products" wholesale and release prices set by business entities engaged in business of food production, in the event of change in prices for food products by more than 1 percent within one month shall declare such changes.

That being the case, a business entity shall always obtain a written conclusion of the State Inspectorate for Price Control (Derzhztsininspektsiya) that such changes are economically reasonable and have its declaration approved with the authorized agency (the Council of Ministers of the Autonomous Republic of Crimea, regional, Kyiv and Sevastopol city state administrations).

We should note that the introduced government regulation of prices for food products fails to provide appropriate restraints of their unjustified growth and, not infrequently, provokes artificial growth in expenses, increase in the number of intermediaries between food producers and retailers that, in turn, results in unjustified growth in prices.

The price fluctuations, which took place in 2008-2011 in Ukraine and the relevant actions of the Antimonopoly Committee of Ukraine related to termination of the violations of the competition law, are best illustrated with the situation, which existed in sunflower oil market as one of the most consumed products forming part of the core diet of Ukrainian consumers.

The oil and fat market is one of the most promising sectors of agricultural production. Oil products are in increasingly higher demand in the world market. This, in turn is caused by re-focusing the diet to oil and fats of vegetable origin due to their physiological benefits and more affordable prices in comparison with animal fats and dynamic growth in production of biodiesel fuel in the world based on oil against the background of progressing growth in prices for mineral energy resources and reduction in their natural reserves.

Ukraine's share in the world market of oil production (all oil types) in 2010/2011 was more than 21%, i.e. second only to the EU countries. The dominant consumers of oil in the world market include the EU, countries of Near East, North America and the CIS.

A comparative analysis of retail prices for sunflower oil in the 2011's Ukraine and other countries of the world demonstrated that the prices are generally lower than in the surveyed countries (1.3 USD/liter in Ukraine, 1.4 USD/liter in Russia, 3.1 USD/liter in France, 2.25 USD/liter in Argentina, and 4.6 USD/liter in Turkey).

The domestic market demand for sunflower oil is met completely. The consumption in the domestic sunflower oil market remains nearly the same and amounts to nearly 400 thousand tons of oil a year. In accordance with the Ministry of Health requirements, the level of sunflower oil consumption per person a year is 13 kg.

The total consumption includes oil consumed directly as commodity by ultimate consumers (population) via the retail and oil used as a raw material for manufacture of other food products (mayonnaise, margarine products, bread and bakery products, confectionary products, and the like). In the recent 10 years domestic consumption has never exceeded 20% of the total sunflower oil production in Ukraine. The rest of the produced sunflower oil (over 80%) is exported from Ukraine. In other words, a conclusion may be made that sunflower oil market in Ukraine is export-oriented.

Ukraine is a leader in export of sunflower oil (over 2.6 million ton), providing 65% of the global exports to 63 countries of the world. No considerable fluctuations in prices for these socially important products take place in the world; however, the ever increasing demand for oil, failures of oil-bearing crops in other countries, except for favorable factors, also adversely affect the pricing situation in Ukrainian domestic market.

Therefore, in the period of unfavorable climatic factors, poor harvest of sunflower seed in Russia and South America, unsatisfied demand for oil, high worldwide prices for oil in the late 2010 Ukrainian producers greatly increased export of oil. Such actions broke the demand/supply balance in domestic sunflower oil market whereby December 2010 to January 2011 retail prices for sunflower oil in Ukraine grew rapidly by more than 20 percent.

The recent years have also seen changes in product range of consumption by general public sunflower oil from non-refined loose sunflower oil to refined packaged (bottled) sunflower oil and, therefore, the

AMCU in their investigation defined this market segment as a separate refined bottled sunflower oil market.

Of more than 40 oil extraction plants operating in Ukraine, 25 largest ones produce more than 90% of total sunflower oil and most sunflower seed processing capacities (nearly 75%) are owned by 15 companies, which have material impact on market formation, its pricing and export policy.

In 2009-2010, the main participants in refined bottled sunflower oil market were "S" Subsidiary Company with Foreign Investment (*foreign investment*), "K" LLC, and "P" CJSC. The total share of those three largest market participants until spring 2011 was 60% and, whereas the shares of other market participants are considerably lower and marginal, refined bottled sunflower oil market structure can be defined as oligopoly.

"S" Subsidiary Company with Foreign Investment supplies refined sunflower oil under own trademarks "OK", "OV", "OI" packaged in plastic bottles in the range from 0.5 liter to 5 liter, has extensive distribution system operating throughout the territory of Ukraine. "S" Subsidiary Company with Foreign Investment once started producing sunflower oil under social brand "R" to support socially vulnerable population groups.

"K" LLC via extensive distribution system sells oil trademarked "SchD", "S", "ChD", "ChZ", "L", Private Label "P" for FOZZY GRUP corporation and Natura Verde, store chain of METRO Cash and Carry Ukraine LLC, and produces sunflower oil under social brand "G".

We should note that another company, which fills oil in considerable volumes, "KG" PJSC became one of the leaders in 2010/2011 marketing year.

The AMCU provides ongoing monitoring of changes in pricing situation in that market and operation of the main participants of the market.

Such monitoring has become the subject of price investigation the AMCU in sunflower oil market. A number of actions were taken based on the results of the completed investigation, in particular:

In 2008, the Committee examined a case on violation of the law on protection of economic competition by business entities operating in the sunflower oil market, on the fact of fast and considerable growth in prices for sunflower oil. In the period from the late July to mid-October 2007, the average weighted prices in Ukraine for vegetable sunflower oil grew by virtually 60 percent. The revealed circumstances demonstrated existence of collective monopoly in the sunflower oil market and behavior of those business entities dominating the market showed elements of abuse of monopoly (dominant position). Based on the findings of the case examination, the acts of "S" Subsidiary Company, "K" LLC, which included unjustified increase in wholesale and release prices for sunflower oil in July–August 2007, were recognized as abuse of monopoly (dominance). "K" LLC and "S" Subsidiary Company admitted the violation and paid a fine in the amount of UAH 2,000 thousand. In pursuance of the Committee's recommendations, the said companies lowered the wholesale release prices for oil by 10-15 percent.

In future, with a view to preventing steep unjustified growth in prices for sunflower oil and destabilization of the situation in the entire market, the AMCU, upon review of the materials provided by the State Inspectorate for Price Control, in the event of market trend towards gradual growth in retail prices for sunflower oil in case of lowering or stable purchase prices for sunflower seed, made recommendations, which their addresses are bound to consider, in relation to prevention of unjustified increase in prices.

In **November 2008**, in order to prevent violations of the law on protection of economic competition by the Committee were provided **recommendations to be considered** by "S" Subsidiary Company with

Foreign Investment, "K" LLC and "P" CJSC to take action in relation to lowering the wholesale release prices for sunflower oil to the appropriate level stipulated by the purchase prices for sunflower seed.

In order to prevent violations of the law on protection of economic competition **in 2009** one of the AMCU's regional territorial departments provided recommendations to 2 business entities, which operated in sunflower oil sale (distribution) services market in relation to prevention of unjustified increase in prices for oil in the region, which they complied with.

In **2010**, another territorial department of the AMCU provided recommendations to a state-owned enterprise with foreign investment in relation to taking action to remove consequences of actions of using and dissemination of information, in particular, in advertisements and labels of sunflower oil bottles under trademarks "Oleyna" with a note "Oleyna is a cholesterol-free oil", which showed elements of the violation qualified under Article 15¹ of the Law of Ukraine "On the protection from unfair competition" that is to say: dissemination of misleading information, in the form of communication by a business entity to undefined group of parties by means of advertising incomplete and inaccurate information, which would affect the intent of such parties in relation to purchasing the products of such business entity. The recommendations so given were observed.

In **2010**, with a view to preventing the adverse pricing situation in the sunflower oil market, the AMCU gave "S" Subsidiary Company with Foreign Investment and "K" LLC recommendations (which the addressees are bound to consider) to take action in relation to refraining from unjustified increase in prices for sunflower oil of the most common trademarks of the social brand. These recommendations were provided in pursuance of the requirements laid down in the instruction of the First Deputy Prime Minister of Ukraine dd. 27 August 2010 in relation to unconditional compliance with the Government's resolutions on the matters related to food products supply to general public at affordable prices and stable functioning of the food market.

In **January 2011**, the AMCU examined the case based on the elements of the violation by 3 dominant suppliers of sunflower oil in Ukrainian retail by abuse of dominance in the sunflower oil market by setting the product sale prices, which would have been unable to set if considerable competition had existed in the market. Based on the results of analysis of information obtained in the course of examination of the case, defendants were found to have no sufficient economic grounds for simultaneous significant increase in wholesale sale prices for bottled (packaged) sunflower oil from September 2010 to January 2011. One of the reasons, which would give rise to such synchronous growth in the said prices, is unjustified setting of prices for sunflower oil dominant suppliers oil in the retail chain.

Under such conditions, in the course of examination of the case with a view to increasing supply in Ukrainian domestic market, the AMCU permitted 14 business entities to take a concerted action in the form of *Concerted Competitive Behavior Agreement* between the said business entities in sunflower oil market for 3 months. The subject was making of the agreement in compliance with the Concerted Action Memorandum between the Cabinet of Ministers of Ukraine and major companies operating in oil and fat market in relation to prevention of growth in prices for sunflower oil in domestic market. The expiry date of the agreement is 15 May 2011. The sunflower oil producers have undertaken to draft the action plan in relation to stabilization of prices for bottled sunflower oil in domestic market. Within the framework of the Memorandum, the producers have also undertaken to ensure stable and uninterrupted supply of oil to the domestic market and to avoid shrinking of production and supply of oil in the domestic market. In turn, the Cabinet of Ministers of Ukraine promised the producers to facilitate provision of stable situation in the oil and fat product market and introduce no export quotas for sunflower oil.

As the share of concerted actors in the nation-wide sunflower oil market far exceeded 35 percent and the said concerted action in compliance with Ukrainian legislation are related to setting of prices and other

terms for purchase or sales of products, limitation of production, markets, distribution of markets, they might result in restraint of competition in the nation-wide sunflower oil market. In other words, such actions show a potential of restriction. That being said, they would be allowed subject to availability of the relevant terms and conditions, such as improvement of product sales and rationalization of production.

The concerted actors provided rationale for positive impact of their actions, which will facilitate a socially significant effect that domestic prices for oil in Ukrainian consumer market stabilize and total product supply to the domestic market will become higher.

As a result of taking the said action, Ukrainian markets saw more business entities, which sold sunflower oil in domestic market whereby the oil sales in domestic market grew and the prices for packaged oil reduced. As the permit for such concerted action was given only for 3 months (until 15 May 2011), they resulted in no durable change in the commodity market structure and, hence, significant restraint of competition in that market.

Therefore, the activities of the Anti-Monopoly Committee not only facilitated stabilization of the situation in oil market and increase of supply and entry of other oil producers to the domestic market.

The violations of the law on protection of economic competition in sunflower oil market were terminated in a total of 7 cases in 2008-2011 (2 in nation-wide markets) with recommendations given to 8 business entities. In 7 cases, the subject was sunflower oil price hikes.

Among the seven violations detected and terminated in that market, 3 were qualified as abuse of monopoly, 1 as anti-competitive concerted action, 2 as unfair competition, and 1 as failure to furnish information on request of the AMCU.

UNITED STATES

1. Background

1.1 In recent years has there been significant volatility in the prices of commodities that are important to the general population in your country? Please briefly provide details (e.g., among others, on the product(s), market(s) and adjacent market(s) concerned and the magnitude and duration of this volatility, be it prices going up or down).

Pursuant to the call for contributions, this submission focuses on price volatility of agricultural and mineral commodities and the role of the U.S. antitrust agencies (Department of Justice “DOJ” and the Federal Trade Commission “FTC,” collectively the “Agencies”) in evaluating price volatility and addressing competitive concerns in these commodities markets. Given agency expertise, the DOJ activities described center on the agricultural sector, whereas the FTC activities described focus on the gasoline sector. The Agencies generally do not evaluate price volatility outside of specific investigations in which price volatility appears to arise from anticompetitive behavior. However, as we explain below, the FTC has entered into an ongoing price evaluation exercise concerning the gasoline market.

In particular instances, such as in certain agricultural commodities sectors, the DOJ has heard from market participants and from some academics that price volatility has been a concern in recent years. For example, in 2010, the DOJ and the U.S. Department of Agriculture held a series of public outreach hearings on issues in agricultural markets, including the seed, livestock, poultry, hog, and dairy sectors.¹ The DOJ’s role in these hearings was to listen to and learn from market participants and academics about the issues market participants face in these industries and to promote the value of competition in these sectors. Common complaints that arose in these hearings included high input (e.g., food and fuel) prices, low commodity prices, and price volatility.

1.2 Are the price volatility in these commodities, and the causes of that volatility, global, regional, or domestic?

The causes of price volatility for commodities can be global, domestic, or regional, depending on the commodity. For example, factors that determine gasoline prices are complex, involving international crude oil inventories, national wholesale product price discounting, and domestic retail competition. Among the factors driving prices, the most important is the world price of crude oil—FTC staff has concluded that changes in crude oil prices account for approximately 85 percent of the variations in gasoline prices in the United States.² Crude oil prices are determined by global supply and demand conditions, most notably by production levels set by OPEC countries. In regional gasoline markets, price changes can also occur due to a unique combination of local supply and demand conditions. The amount of gasoline that can be supplied to a particular region can be inflexible due to various factors, including limitations of refining,

¹ For more information about the hearings, see <http://www.justice.gov/atr/public/workshops/ag2010/>.

² See Federal Trade Commission, Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition (2005), at p. 7, available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>. See also Federal Trade Commission, Gasoline Price Changes and the Petroleum Industry: An Update (2011), at p. 7, available at <http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf>.

transportation and storage capabilities or product requirements unique to that region. Therefore, sudden supply shortages, perhaps due to a refinery fire or pipeline rupture, can cause a sharp increase in price.

1.3 Does your agency have any ongoing/pre-emptive monitoring activities in relation to these sensitive commodities? For example, do you routinely monitor prices, quantities or behaviors in these markets (both domestic and foreign markets)?

In 2002, the FTC began a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities.³ Today, this project tracks retail gasoline and diesel prices in some 360 cities across the U.S. and wholesale prices in 20 major U.S. urban areas. The FTC's Bureau of Economics staff regularly receives and reviews data from a private oil price data collection company, as well as from the U.S. Department of Energy and other sources. An econometric model is used to determine weekly whether current retail and wholesale prices are anomalous compared to historical data.

The Monitoring Project alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, staff consults with the Energy Information Administration of the Department of Energy. FTC staff also contacts the offices of the appropriate state Attorneys General to discuss the anomaly and appropriate potential actions, including opening an investigation.

While the DOJ typically does not undertake preemptive monitoring activities with regard to price volatility, it participates with the FTC and other federal agencies in the Presidentially-mandated Oil and Gas Price Fraud Working Group that monitors oil and gas prices for illegal activity.⁴

Both the FTC and DOJ investigate anticompetitive behavior that, in some circumstances, may lead to price volatility.

2. Competition law enforcement and formal investigations

2.1 Please provide a brief overview of significant competition law enforcement matters that your agency has undertaken in relation to commodities including: (i) Merger assessments; (ii) Cartels and horizontal agreements; (iii) Vertical restrictions; (iv) Abuse of dominance actions; (v) Any price control or other actions to regulate prices. Please explain how the matter came to the attention of the agency, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).

In recent years, the Agencies have investigated several matters involving agricultural and mineral commodities.

2.1.1 Grain

In 1999, the DOJ challenged the proposed merger between the second and third largest grain traders in North America, Cargill, Incorporated and Continental Grain Company. The DOJ was concerned that the proposed acquisition might result in farmers and other suppliers receiving lower prices for their grain and oilseed crops, including corn, soybeans, and wheat. The area of particular concern was the grain terminals ("elevators") owned by the merging firms. The DOJ's complaint alleged that wheat, corn, and soybeans each constituted a relevant product market and that many farmers and other suppliers located within overlapping Cargill/Continental draw areas depended solely on competition among Cargill, Continental,

³ See http://www.ftc.gov/ftc/oilgas/gas_price.htm.

⁴ See <http://www.justice.gov/opa/pr/2011/April/11-ag-500.html>.

and perhaps a small number of other nearby grain companies to obtain a competitive price for their products. The merger, the DOJ alleged, would significantly lessen that competition. In July 1999, the case was settled with a judicial consent decree that required the merging companies to divest a number of port terminals to third parties in several regions, including the Pacific Northwest, California, and Texas.⁵

2.1.2 Cattle

In October 2008, the DOJ filed suit to block the proposed acquisition by JBS S.A., at that time the third-largest U.S. beef packer, of National Beef Packing Company LLC, the fourth-largest U.S. beef packer.⁶ The DOJ alleged that the proposed merger, combining two of the top four U.S. beef packers, would lessen competition among packers in the production and sale of USDA-graded boxed beef throughout the United States and would lessen competition among packers for the purchase of fed cattle (cattle ready for slaughter) in certain regions of the United States. As a result of this lessened competition, the merger would have resulted in lower prices paid to cattle suppliers and higher beef prices for consumers. In February 2009, the parties abandoned their merger.

2.1.3 Chickens

In May 2011, the DOJ filed a complaint challenging chicken processor George's Family Farms' consummated acquisition of a competing Tyson Food's processing plant.⁷ The acquisition reduced from three to two the number of local processing plants in the Shenandoah Valley area of Virginia and West Virginia. The complaint alleged that George's acquisition of the Tyson plant had the potential to lessen competition between the remaining processors and might allow George's to exercise monopsony power by limiting the amount or types of compensation offered to local farmers. In June 2011, the DOJ entered into a settlement with George's pursuant to which the company agreed to make certain capital investments in the former Tyson plant, which would enhance George's ability and financial incentive to operate the acquired plant at a greater scale than Tyson had done.⁸ The DOJ reasoned that the increase in output at the plant resulting from the required improvements would minimize the risk that farmers would be harmed.

In 2011, the DOJ investigated, but declined to challenge, another proposed acquisition in the chicken processing industry.⁹ In that matter, Perdue Farms Inc.'s parent company, FPP Family Investments, acquired Coleman Natural Foods. The DOJ's investigation focused on the potential effects of the transaction on competition among chicken processors for the purchase of services from chicken growers. The DOJ determined that the merger would not enhance market power on the buying side of the market because Perdue's and Coleman's facilities did not overlap in any local regions. The DOJ also considered whether the transaction might increase the possibility of coordination under several theories, including a

⁵ Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Cargill's Acquisition of Continental Grain (Jul. 8, 1999), available at http://www.justice.gov/atr/public/press_releases/1999/2554.htm.

⁶ Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit to Stop JBS S.A. from Acquiring National Beef Packing Co. (Oct. 20, 2008), available at http://www.justice.gov/atr/public/press_releases/2008/238382.htm.

⁷ Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Challenging George's Inc.'s Acquisition of Tyson Foods Inc.'s Harrisonburg, Va., Poultry Processing Complex (May 10, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-at-593.html>.

⁸ Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with George's Inc. (Jun. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/June/11-at-829.html>.

⁹ Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Perdue's Acquisition of Coleman Natural Foods (May 2, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-at-555.html>.

“multi-market contact” theory, which suggests that firms may find it more feasible to coordinate on terms, such as payment for grower services, as they interact in more numerous regions. The DOJ determined, however, that adding an additional point of contact was not likely to increase the risk of coordination in this case. In a closing statement, the DOJ indicated that, while the multi-market contact theory did not apply given the specific facts of this matter, the DOJ will continue to consider its application in future transactions, especially those involving agricultural markets where processors interact in numerous local markets for the purchase of goods or services from producers.

2.1.4 Milk

In January 2010, the DOJ filed a civil antitrust lawsuit against Dean Foods Company, challenging its April 2009 acquisition of Foremost Farms USA’s Consumer Products Division, alleging that the merger eliminated substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores, and other retailers in Illinois, Michigan, and Wisconsin.¹⁰ Dairy processors, such as Dean and Foremost, purchase raw milk from dairy farms and agricultural cooperatives to pasteurize and package. The processors then distribute and sell the milk to school districts, supermarkets, grocery stores, and other commercial customers. In the school milk market, the DOJ alleged that the merger left many districts with a monopoly provider and in others reduced the number of bidders from three to two. In the market for sale of milk to supermarkets, grocery stores, and other commercial customers, the DOJ alleged that the acquisition eliminated the substantial competition between Dean and Foremost and that it made it easier for Dean to coordinate with the remaining milk processors. In March 2011, the DOJ reached a settlement with Dean that required it to divest a significant milk processing plant and related assets that it acquired from Foremost, as well as a popular brand name.¹¹

In April 2003, the DOJ filed a civil antitrust lawsuit challenging Dairy Farmers of America’s (DFA’s) significant partial investment in two rival dairies (Flav-O-Rich and Southern Belle).¹² DFA is a multi-billion dollar cooperative of thousands of dairy farmers. Its primary mission is to secure a steady sale of raw milk for its farmers at the highest price. Prior to February 2002, DFA held a 50% equity stake in the company that owned and operated the Flav-O-Rich dairy. The other 50% equity stake was held by the Allen Family Limited Partnership. In February 2002, DFA acquired 50% of the voting stock of Flav-O-Rich’s biggest competitor, the Southern Belle Dairy. The DOJ alleged that DFA’s partial acquisition of Southern Belle gave it both the economic incentive and the ability to reduce competition between the dairies. The complaint alleged that the dairies were the only two competitors for a significant number of customers, that entry or expansion would not prevent increased prices and a reduction in service, and that the transaction yielded no efficiencies to outweigh the likely competitive harm. Following dismissal by the district court of the DOJ’s original complaint, a successful appeal by the DOJ to the court of appeals, and remand of the case to the district court, the DOJ and DFA entered into a settlement agreement requiring DFA and the Allen Family Limited Partnership to sell the Southern Belle dairy plant to another firm.¹³

¹⁰ Press Release, U.S. Dep’t of Justice, Justice Department Files Antitrust Lawsuit Against Dean Foods Company (Jan. 22, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/254435.htm.

¹¹ Press Release, U.S. Dep’t of Justice, Justice Department Reaches Settlement with Dean Foods Company (Mar. 29, 2011), available at <http://www.justice.gov/opa/pr/2011/March/11-at-388.html>.

¹² Press Release, U.S. Dep’t of Justice, Justice Department Files Lawsuit Against Dairy Farmers of America Inc. and Southern Belle Dairy Co. LLC to Restore Competition in School Milk Sales (Apr. 24, 2003), available at http://www.justice.gov/opa/pr/2003/April/03_at_253.htm.

¹³ Press Release, U.S. Dep’t of Justice, Justice Department Obtains Dairy Processor Divestiture in Settlement with Dairy Farmers of America (Oct. 2, 2006), available at http://www.justice.gov/opa/pr/2006/October/06_at_672.html.

2.1.5 Gasoline

On June 20, 2011, in light of recent increases in crude oil and refined petroleum product prices and profit margins, the FTC disclosed an investigation to determine whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged or are engaging in practices that have lessened or may lessen competition—or have engaged or are engaging in manipulation—in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency.¹⁴ This pending investigation serves as an example of how pricing behavior may trigger an investigation of whether anticompetitive practices are involved.

In June 2005, the FTC acted to save consumers hundreds of millions of dollars in higher gasoline prices by accepting two consent orders to resolve the Commission's administrative monopolization complaint against Union Oil Company (Unocal) and competition concerns arising from Chevron's proposed \$18 billion acquisition of Unocal.¹⁵ The settlements focused primarily on resolving allegations of monopolization through anticompetitive abuses of the regulatory process related to California reformulated gasoline in connection with certain Unocal patents. However, the merger also raised concerns that Chevron could use information obtained through patent licenses to facilitate coordinated interaction among itself and other refiners and marketers, leading to higher prices for reformulated gasoline. By the terms of the order, the combined firm agreed not to enforce its relevant patents or collect royalties on those patents.¹⁶

2.2 *Has your agency undertaken a market study into any commodity or commodities? Please explain what triggered the market study, the substance of the allegation, the analysis undertaken and the remedies imposed (if any).*

The Federal Trade Commission Act ("FTC Act") explicitly authorizes the FTC to "gather and compile information concerning . . . the organization, business, conduct, practices and management" of persons and of corporations.¹⁷ As commentators have noted, "the gathering of information and its dissemination has long been one of the chief justifications for the existence of the Federal Trade Commission."¹⁸

The FTC often initiates studies at the request of the U.S. Congress, the President, and Congressional oversight committees. Although to some extent these requests determine the scope of an inquiry, the FTC refines further the focus of the study in light of the substantial cost of undertaking a study and other considerations. In response to higher gasoline prices during the spring and summer of 2006, the FTC completed an extensive, Congressionally-mandated investigation to determine whether gasoline prices were being affected by illegal "manipulation" or "cheating." The investigation "revealed no evidence that

¹⁴ See <http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf>.

¹⁵ See FTC, Dual Consent Orders Resolve Competitive Concerns About Chevron's \$18 Billion Purchase of Unocal, FTC's 2003 Complaint Against Unocal, available at <http://www.ftc.gov/opa/2005/06/chevronunocal.shtm>.

¹⁶ The FTC has investigated several mergers in the petroleum industry, including *Shell/Texaco*, *BP/Amoco*, *Exxon/Mobil*, *Chevron/Texaco*, and *Phillips/Conoco*. For a list of FTC merger enforcement actions in the petroleum industry since 1981, see http://www.ftc.gov/ftc/oilgas/charts/merger_enforce_actions.htm.

¹⁷ 15 U.S.C. § 46(a).

¹⁸ See William Breit and Kenneth G. Elzinga, "Information for antitrust and business activity: line of business reporting," in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 98 (Kenneth W. Clarkson & Timothy J. Muris eds. 1981).

refiners conspired to restrict supply or otherwise violated the antitrust laws”¹⁹ and found, rather, that the “price increases were caused by a confluence of factors reflecting the normal operation of the market.”²⁰

The FTC also performs studies on its own initiative of industries, such as gasoline, that are of particular importance to consumers. These studies frequently build on experience the agency has gained in enforcement matters. For example, as noted above, the FTC published its market study on gasoline price changes in 2005,²¹ which the FTC Bureau of Economics updated in 2011.²²

The DOJ does not have statutory authority to conduct general market studies.

2.3 *Has your agency received requests from governments or other parts of society to formally investigate commodities markets or requests for the competition authority to put downward pressure on prices where there has not been information or evidence suggesting anticompetitive behavior? What was the nature and circumstances of the request and how did your agency respond?*

From time to time, the Agencies receive requests from government components or market participants to investigate anticompetitive behavior, such as the Congressional mandate that the FTC perform a gasoline-sector investigation in response to higher gasoline prices in 2006. When it appears that the cited behavior may raise antitrust concerns, the Agencies will open an investigation. However, input prices, commodity prices, or price volatility that result from market forces, rather than anticompetitive practices, are not the concern of the U.S. antitrust laws. The U.S. antitrust laws are not price-control statutes, and any responses to price volatility, outside of ensuring a competitive marketplace, would require legislative involvement.

3. Advocacy opportunities and challenges

3.1 *Has your agency had the opportunity to improve the efficiency and effectiveness in commodities markets through advocacy? For example, have you had the opportunity to recommend or advise on commodity price deregulation? Have you had the opportunity to advise on the reform of government or private sector monopolies for the purchase or sale of particular commodities for domestic consumption or export (i.e. single desks)? Have you had the opportunity to advise on the reform of regulations that fix or control prices or quantities? What was the commodity, the nature of the reform and the outcome?*

Has your agency been confronted by a government proposal to address pressing concerns about commodity prices that did impede competition (or would have impeded competition if it had been introduced)? What was the nature of the problem that the government was seeking to address? What was the timing and political constraints upon your opportunity to provide advocacy? What advice did the agency provide and what was the result?

Please describe any preemptive steps available to your agency to: (i) Reduce the risk of commodity price volatility becoming a problem in your country? (ii) Reduce the risk that

¹⁹ Federal Trade Commission, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases*, at 3, available at <http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf>.

²⁰ *Id.* at 26.

²¹ See Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition* (2005), at 7, available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>.

²² See Federal Trade Commission, *Gasoline Price Changes and the Petroleum Industry: An Update* (2011), at 7, available at <http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf>.

governments or public societies seek policy responses to problematic commodity price volatility that would impede competition?

Advocating for competition is an important part of the Agencies' missions. This advocacy takes a number of forms, including providing testimony or comments on proposed federal and state legislation and regulations, advising Executive Branch components on competition issues, and advocating for competition principles in public fora. The Agencies aim their advocacy at a broad range of industries across the economy, including various commodities sectors. For example in 2010, the DOJ, along with the U.S. Department of Agriculture, held a series of public outreach hearings on issues in agricultural markets, including the seed, livestock, poultry, hog, and dairy sectors. As noted above, the DOJ's role in these hearings was to listen to and learn from market participants and academics about the issues participants face in these industries and to promote the value of competition in these sectors. Volatility in commodity prices, particularly in recent years, was one issue market participants and academics touched on in these hearings. Similarly, the FTC has testified before U.S. Congressional committees about the role of market forces and competitive dynamics in petroleum markets and its initiatives to protect a competitive marketplace.²³

The Agencies rely on their competition advocacy efforts to reduce the risk that the federal government or state governments will seek policy responses to issues in various markets, including the commodities markets, that would impede competition. To the extent that legislative or regulatory proposals addressing the commodities sector, or other sectors, may implicate competition issues, the Agencies may, through formal channels or informal consultation, provide views to legislators or regulators. For example, in 2004, the DOJ filed a post-hearing memorandum before the U.S. Department of Agriculture opposing a proposed federal marketing agreement that would have authorized an administrative committee to control the quantity of hops, grown in certain states, that producers could market.²⁴ The DOJ argued that the hops industry was competitive and that the proposal to allow the committee to artificially restrict the hops supply would lead to non-competitive pricing effects and resource misallocations. The Department of Agriculture ultimately determined not to promulgate the hops marketing agreement.²⁵

The Agencies in certain instances also express support for proposed legislation that would benefit consumers by protecting or promoting competition. In 2010, FTC staff submitted comments to the New Jersey State Senate expressing support for a bill that would modify the law to allow gasoline retailers to set their prices below cost in certain circumstances. New Jersey law prohibited a "retail dealer" from selling motor fuel "at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses."²⁶ The proposed legislation would change New Jersey law to allow below-cost pricing to meet competition, so long as such prices are not set "with intent to injure competition or destroy or substantially

²³ See <http://www.ftc.gov/ftc/oilgas/testimony.htm>. See also <http://www.ftc.gov/ocr/testimony/index.shtml>.

²⁴ Post-Hearing Memorandum from the U.S. Dep't of Justice on Proposed Marketing Order No. 991, Hops Produced in Washington, Oregon, Idaho, and California, to the United States Dep't of Agriculture, Docket No.: AO-F&V-991-A3; FV03-991-01 (Feb. 18, 2004), available at <http://www.justice.gov/atr/public/comments/202477.htm>.

²⁵ United States Dep't of Agriculture, News Release, USDA Terminates Proposed Hops Marketing Order Proceeding (June 20, 2005), available at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateU&navID=LatestReleases&page=Newsroom&topNav=&leftNav=&rightNav1=LatestReleases&rightNav2=&resultType=Details&dDocName=STELDEV3004036&dID=42805&wf=false&description=USDA+Terminates+Proposed+Hop+Marketing+Order+Proceeding+>.

²⁶ See <http://www.ftc.gov/os/2010/09/100928gasolineretailers.pdf>.

lessen competition.”²⁷ The FTC staff explained that because below-cost pricing can benefit consumers, and because the proposed legislation would allow New Jersey gasoline retailers to compete more aggressively on price, New Jersey consumers will likely benefit from the proposed legislation.

By working with and advising federal and state legislators and regulators, the Agencies promote competition and, when appropriate, raise awareness of the potential competitive impact of particular proposed laws and regulations, including in the commodities sector.

²⁷

Id.

CUTS*

**CARTELIZATION IN GLOBAL COMMODITY MARKETS,
GOVERNANCE CHALLENGES AND WAY FORWARD**

1. Introduction

Developing countries are rapidly increasing their share of manufactured trade. Their shares have been rising not just in labour-intensive products, but also in capital- and skill-intensive ones. However, manufactured exports remain highly concentrated with a few of these countries; most developing countries still depend on primary products for their export earnings. In some cases, commodities account for over 60 per cent of their merchandise exports. Yet, the share of developing countries in the world export of primary products remains smaller than that of the developed countries (Table 1).

Table 1: Exports of primary products by region, 2009

Region	Share in regional exports (%)		Share in world exports (%)	
	Agricultural products	Mineral and fuel	Agricultural products	Mineral and fuel
North America	11.2	13.6	15.33	9.61
Latin America	30.5	38.2	11.95	9.27
EU	10.5	9.6	45.19	29.45
CIS	8.7	62.9	3.35	9.42
Africa	10.2	64.0	3.34	8.30
Middle East	2.6	68.0	1.55	14.2
Asia	6.3	10.8	19.29	17.8
World	9.6	18.6	100.0	100.0

Source: WTO (2010)

This could primarily be attributed to restrictions on the trade of commodities in the form of licensing, quotas, export restrictions¹, tariffs, packaging regulations and other non tariff barriers by developed countries (Jain et al. 2010). In part, this could also be due to anti-competitive practices of international and

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¹ Export restrictions may be imposed on raw materials for a number of reasons, including for security, revenue and conservation purposes. Export restrictions in the form of export duties are permissible under Article XI: 1 of the WTO Agreement as well as enjoy some exemptions under Article XX of the Agreement. Despite the domestic welfare objectives, export restrictions on raw materials such as food, metals, minerals etc. have been seen to be responsible for the increasing commodity prices in the international markets and a major contributory factor for price volatility in the primary commodities market. For example, export restrictions on grains were one of the key drivers of the food crisis and price spikes during the 2007 – 2011 period.

domestic export cartels. Since the mid 1990s there has been a resurgence of interest in economic and legal studies of cartels, in particular international cartels. It is found that the export cartels have had a large impact on the international trade of developing countries, on developing country consumers and producers (Levenstein et al, 2003). This paper examines the role of export cartels in exclusionary practices and obstructing the free play of market forces in the export of primary products, and documents the existing regulatory framework for cartels. It finds that the existing national policy institutions are limited in their ability to address or prevent this kind of harm to their economies. We discuss policy options that could ameliorate this situation, governance challenges and the way forward. There is plenty of scholastic debate on the welfare enhancing and reducing/ monopoly promoting impacts of export cartels. Many countries have also had differing positions on the subject. But due to the lack of incentives for exporting countries to curb the ills of export cartels, little has been done on this matter. As a result, the issue of export cartels rarely comes up in international initiatives on enforcement actions against cartels.

2. Export cartels in primary products: A brief analysis

Cartels are arrangements between private enterprises and sometimes between governments to control the production and sale of homogeneous products in an oligopolistic setting largely. There are basically two types of cartels: domestic and international cartels.

An international cartel consists of a group of producers of a certain commodity located in various countries, who agree to restrict competition among themselves in matters of markets, price, terms of sale etc. Connors and Helmers (2006) define an international cartel as “a conspiracy in restraint of trade that has or is alleged to have one or more corporate or individual participants with headquarters, residency, or nationality outside the jurisdiction of the investigating antitrust authority”. **Domestic cartels** on the other hand are agreements among competing firms in a particular sector in the same country.

We focus on international export cartels which are further classified into three types (OECD, 2011). Type 1 cartels are “hard core” cartels which are made up of private producers from at least two countries who cooperate to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers or territories. 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.

There is considerable literature on the industrial patterns, formation, duration and effects of cartels (Dick, 1996; Audretsch 1989. Folster and Pelzman 1997, Gallo et al., 2000; Connors, 2002; Levenstein and Suslow 2006). In the absence of appropriate data, however most studies focus on selected cartels. In a recent study, Connors and Helmers (2006) have developed a dataset that provides detailed information on the *members, markets, monetary sanctions, and other* economic dimensions of all modern international cartels discovered by antitrust authorities through 1990 to 2005. There are a total of 283 private international cartels in the sample. Of this, eight (3 percent) operate in the primary sector affecting 2.3 percent of sales in the sector. The leading cartelised industries are in manufacturing (79 percent of sales) followed by services. Apparently, the least important are primary products. However, these figures need to be used with caution for several reasons. First, these figures pertain to private cartels that have been discovered. It is a well known fact that cartels are of clandestine nature. The majority of private cartels never come to light. The figures presented are therefore an underestimate. Second, inter-government cartels which may play an important role in the primary sector (as discussed later) are excluded from the purview of these figures. Third, the number of cartels in this sector does not reflect their impact on trade, domestic producers and consumers. Finally, historical evidence suggests that there are sporadic cartel episodes in the primary sector. They are disrupted and then are re-formed several times within a very short span of years, Tea cartel for instance appeared and disrupted seven times over a time of 50 years between

1925 and 1978. In what follows, we examine theoretical propositions and empirical studies to analyse whether cartels can succeed in the primary sector.

3. Can cartels succeed in the primary sector?

3.1 *Industry characteristics*

The likelihood that an industry chooses to establish a cartel depends on the industry structure and characteristics that determine the expected profits associated with colluding, benefits of cheating, and the extent of repeated interaction. One of the biggest challenges cartels face is the possibility of entry. If the barriers to entry/exit are low, the market would attract more, newer players and render the collusive behaviour among a few players as unprofitable. Theoretically therefore firms are more likely to collude in concentrated and industries with high entry barrier (Zimmerman and Connors 2005). Viewed from this perspective, producers in primary products should have no incentives to collude. The primary sector is characterised by product homogeneity, a pre-condition for the absence of imperfect competition. Furthermore, production techniques are more or less standardised and entry barriers are believed to be low. Does that rule out cartel formation and success? Two things need to be observed here. One, the relationship between concentration and cartel formation is not unambiguously positive. While most contemporary international cartels are in concentrated industries, cartel formation in un-concentrated industries is not infrequent. In unconcentrated industries, trade associations, large multinationals or even national governments play a key role in organising and implementing the agreement. Historically, the number of participants has been rather high in primary product cartels. Levenstein and Suslow (2006) show that in the Coal cartel, the number of participants varied between 70 and 100 while in tea it was 349 across three countries. In this scenario, the participation of governments, trade associations and large multinationals remains key to cartel formation in these sectors. Two, the primary sector is characterised by natural entry barriers. These barriers arise from the natural limitations of primary products and their uneven geographical distribution. While they are found in abundance in few places, in many they are scarce. This attracts rent-seeking behaviour among a few who control the majority share of supply to collude to set higher prices to exploit the global dependence and heavy demands. In addition, primary product markets involve several associated costs such as costs of extraction and transportation. These act as entry barriers for players as many may lack the resource capacity to undertake such activities and bear the heavy financial costs. Finally, locating a supply is not enough, it takes long to develop it into a tangible, usable asset. The cost of extraction of these naturally found commodities may be technologically complex, expensive and therefore challenging. These factors are entry deterrent and can create an incentive to form cartels.

Many argue that the cartels in the primary sector are short-lived with a few exceptions. Empirical findings also show that primary sector industries are associated with significantly shorter cartel duration (Zimmerman and Connor 2005; Suslow 2001; Marquasz 1992). Nonetheless, there are exceptions. In the sample of cartels used by Levenstein et al (2006), one can observe up to hundred years' duration of cartels as in diamonds; 20 years in coal and 10 years in sugar. Further, there have been repeated efforts by primary producers to collude. Alexendar (1964) argues that in many industries, cartel formation in initial phases is marred by bargaining issues. Over time firms learn to cooperate and manage to sustain long lived cartels. This was the case with the copper, sugar, and potash cartels in the primary sector. Evidence suggests that in the case of copper cartel each period of cartelisation was longer than the previous period (Levenstein et al. 2006).

3.2 *Product characteristics*

Theoretically one would expect collusion to be more prevalent in industries with relatively inelastic demand (Pindyck, 1979). Primary products are largely essential in nature lacking in many substitutes. As a result, the demand for such products is less responsive to changes in price and offers little incentive for

cartel members to cheat. This is an important feature determining the success of a cartel. Taking the example of success of OPEC oil cartel, it has been argued that the success of cartelisation depends on the inelasticity of demand and supply of the products. In contrast, a relatively high elasticity of copper was instrumental in the failure of copper cartel to raise prices. The copper cartel constituted in 1967 known as Council for Copper Exporting Countries (CIPEC) dissolved in 1988 after being unable to raise high prices as intended. Scholars have argued that this was because they were unable to restrict the output due to the relatively higher elasticity of demand of the product. Thus cartel formation is likely to succeed in the products where demand is price inelastic.

3.3 Business shocks

Business shocks play a critical role in cartel stability. Industries that are stable are characterised by cartels of longer durations (Levenstein et al. 2006). Viewed from this perspective, one can argue that the primary sector is less likely to have cartels. This sector is characterised by volatile business shocks. Many countries globally have suffered the escalating highs and depressing lows of commodity prices, a phenomenon popularly understood as commodity crisis. This would ensure that cartels are short lived. One cannot however rule out the possibility of their re-emergence. Further, as discussed above, firms develop organisational capabilities over time to survive these fluctuations to increase the duration of their collusive activity.

3.4 Large customers

Stigler (1964) hypothesised that the presence of large customers increases the incentive to cheat and defect and contribute to the cartel instability. Large buyers can use their bargaining power to lower input prices and encourage defection and cheating. This hypothesis suggests that cartels in primary products may not be sustainable because commodity markets are largely seen to have a structure resembling a monopsony/oligopsony that mainly means a handful or a single buyer intermediary leading to market concentration. Large buyer power in agricultural markets is one such example. Agricultural sector in developing countries is marked by excessive buyer power in the intermediary chain between primary producers and end consumers that consists of traders, processors, transporters and retailers. These large buyers can undermine cartel stability. There are however instances that large customers benefit from the existence of a cartel if they perceive preferential pricing relative to their small competitors and can contribute to the stability of the cartel.

The upshot is that to the extent that natural resources are geographically concentrated in a handful of countries or one country and demand for these products is price inelastic, the potential profits from collusion can create powerful incentives to collude. Restricting the volume of exports by way of a cartel would raise commodity prices. However, a large number of participants, possibility of entry, large buyers, bargaining issues and demand shocks may affect the stability of a cartel. These factors do not however undermine firms, trade associations or national governments to collude. If conspiring firms believe that they would be able to raise prices significantly even for a short duration before it is undercut by the entry of a new market player into the relevant market or before the conspirators get tempted to cheat, collusion might be regarded as more profitable than competition. A concern that world commodities will be dominated by cartelisation has gained significant ground ever since the success of Organisation of the Petroleum Exporting Countries (OPEC) in quadrupling the oil prices and International Bauxite Association (IBA) in tripling that of bauxite (OTA Report, 1990).

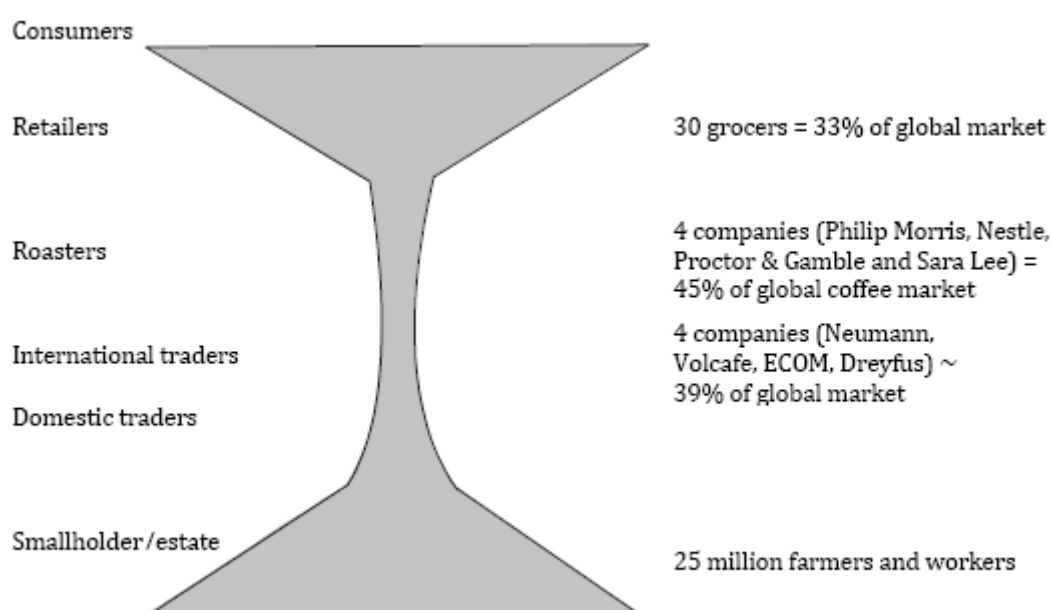
4. Cartelisation of downstream industries and the primary sector

There has been global concern regarding the concentration of economic power by industries along value chains which has been seen to affect the profitability and livelihoods of small primary producers. For

example, four multinationals (Kraft, Procter & Gamble, Sara Lee, and Nestlé) dominate the processed coffee market. In the early 1990s the earnings of coffee exporting countries were around US\$10-12 billion out of the retail sale of around US\$3 billion, i.e., less than 30 per cent of the retail sales were appropriated by the coffee-producing countries; the rest had been captured by coffee-processing countries. It was seen that later in 2000s when the retail sales increased, the earnings of the producing countries fell down even further. In fact, in 2002, retail sales exceeded US\$70 billion, but the earnings of the coffee-producing countries increased to only US\$5.5 billion. This means their share in total earnings fell to a mere eight per cent (Action Aid International Report, 2005).

The main reason for this divergence is that coffee distribution is a roaster driven chain and four big roasting companies control 45 per cent of the global market. The situation is illustrated in the following diagramme.

Figure 1: The global coffee bottleneck



Source: Mehta and Nanda, CUTS²

This huge gap between the producer surplus and what the customers pay is due to market structure dysfunctions in the vertical chain of agricultural commodity products. This chain is regulated and governed by the private sector and is characterised by long-term vertical coordination between producers, supplier-integrators, processors and retailers. Anticompetitive practices such as abuse of dominance of a few large firms among these intermediary both upstream and downstream of the sector cause market distortions and act as blockades in transferring the benefits of competitive market efficiency.

A World Bank report estimated that divergence between producer and consumer prices may have cost commodity-exporting countries more than \$100 billion a year, and suggests that imperfect competition at the intermediary level—the international trading companies—is a key factor. (Morriset, 1997). Secondly, the resulting buyer chains have barriers to entry, including ‘voluntary’ standards, codes and benchmarks, which can profoundly affect farmers’ access to (and entry into) markets. In the 1990s, trade liberalisation

² [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf/\\$FILE/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf/$FILE/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf)

in Brazil paved the way for many prominent global dairy products firms such as Parmalat, Royal Numico, and Nestlé who started imposing new private standards in quality and safety for local milk producers, their transport and monitoring activities etc. (Goldmark et al 2005). As a result thousands of smaller dairy farms were excluded and were forced to enter informal markets in some isolated regions. Finally, the retail-driven agribusiness revolution that is seen in the form of supermarket dominance in agri-food might be seen as promoting market efficiency and frees up wealth to spend on non-food items. However scholars have argued that supermarkets have been growing towards a concentrated structure with more power and leverage with the retail ends of the supply chain that are closer to the consumers and are better able to manage the supply chain, leaving the primary producers out of these multi layered transactions for the most part. Ultimately, the gains of trade liberalisation in these sectors tend to disproportionately go to intermediaries and processors engaging in cartelisation and other anticompetitive practices along the value chain.

5. Economic consequences of export cartels

Economic analysis of export cartels began from the 1990s. Since then there has been a great amount of debate on the impact of export cartels. The main question being: are export cartels welfare enhancing or reducing. Empirical research is not unambiguous and can be classified into two categories. While one set of studies find cartels welfare reducing, another set of studies come to the conclusion that they may enhance economic welfare. Based fundamentally on the neoclassical view the former observe that cartels fix prices, reduce production and worsen allocative efficiency. Export cartels can also influence domestic production and pricing if the export quantity influences utilisation of capacity especially if members of the export cartel have a substantial share of the domestic production, as their export decisions will spill over and influence domestic suppliers and prices. Operating such cartels in the home country can also create a potential situation of “conscious parallelism” when sensitive price information is shared to set prices for foreign markets. Another domestic effect is the exclusion of competition between export traders. The European Union stated in 2000 that export cartels “had a clear distortionary effect on international trade as well as a harmful impact on development”. In less developed countries where the domestic industries are not very competitive, export cartels are especially more successful as they are able to gain greater market power in these foreign markets. The entrance of a foreign cartel into the importing country whether there is no domestic production or there is an existing domestic oligopoly, would have welfare reducing effects if the foreign cartel restricts its sales in the importing country (Bhattacharjea, 2004; Levenstein and Suslow 2006). Additionally, such cartels hurt world trade among partners. A good example is the case of the infamous fertiliser cartel which has been examined by CUTS (Mehta and Nayak, 2011). Canpotex is an exporter of potash and phosphate, and an offshore company for three North American firms: Agrium, Mosaic and Potash Corp of Saskatchewan. Canpotex coordinates with Belarusian Potash Co in the world market of potash formed by member companies: Belaruskali and Uralkali. Canpotex is an export cartel because Saskatchewan’s three major potash producers use it to set prices for foreign potash buyers and to control supply. Canpotex has an explicit exemption pursuant to section 45(5) of the Competition Act (1985) of Canada. It further coordinates with Belarusian Potash Co and PhosChem, a U.S. based export cartel to together control about 70 percent of the world trade in two key fertilisers: potash and phosphate. Due to their agricultural production needs and reliance on fertiliser imports, countries such as India, China, Brazil and Australia have to buy from these transnational companies despite the high international prices set by them. Since potash and phosphate are essential fertilisers for agricultural production, most countries such as India, Brazil, China and others that are import reliant on potash have no option but to pay the high monopoly rents of the supplier cartel. Mehta and Nayak (2011) argue that the huge fertiliser subsidy bills do not translate into a proportionately high volume of fertiliser use in India. During 2002-07, 88 percent of the reported increase in subsidies was due to the sharp rise in international fertiliser prices while only 12 percent was a result of enhanced consumption of fertilisers. A study by noted economist Frederic Jenny highlighted the overcharge paid by India due to anti-competitive practices in the global potash market. Under a competitive scenario, the price of potash would decline from \$574 per tonne in 2011 to \$217 by 2015, and subsequently increase to \$488 by 2020. However, in the continuing presence of fertiliser cartels,

the price of potash would steadily increase from \$574 per tonne in 2011 to \$734 in 2020. Given this, it is far from surprising that when the high tax revenues made by Canpotex were threatened by a takeover bid of Potash Corp. by BHP, the Canadian government blocked such a takeover under the Investment Canada Act claiming that the takeover did not provide ‘net benefit’ to Canada. No specific reasons were deliberated upon. Another example of export cartel exemption which has caused huge costs for developing countries is the case of maritime transport. (Fink, Mattoo and Neagu, 2001) concluded in a study that a breakup of price-fixing arrangements among private carriers could reduce transport prices by 20 percent on U.S. routes and a fall in the import bill of developing countries by \$2.3 billion. Becker (2007) highlights that “export cartel exemptions lead into a downwards spiral of anticompetitive measures and counter-measures taken by governments and market participants”

Advocates of cartels on the other hand argue that cartels stabilise process at profitable levels in industries characterised by high fixed costs; and the possibility of cut-throat competition and volatile business shocks (Scherer, 1980). One of the early studies addressing this question was Dick (1990). His study revealed that of the sixteen commodities under study, foreign consumers benefited from six and were adversely affected in three. Hence, raising doubts about the blanket criticism on the negative impact of export cartels. His findings have been endorsed by many. Observations of an American attorney, John Magnus have also reflected on some of the benefits of export cartels such as cost sharing and economies of scale leading to market growth and lower costs for consumers globally (Magnus, 2005). This experience has been shared by Finnish industries in national export cartels for wood pulp and paper. Scholars have argued in this case that such export cartels were needed for the growth of Finnish industries that were too small to compete independently with large foreign rivals. Through such arrangements, it was seen that the industries shared risks, organised shipping, collected information about trading conditions, economic and political developments as well as new technological advances for their members, and reaped many such benefits that helped them grow and prosper (Jensen-Eriksen, 2010). Benefits of export cartels have been recognised by many developing and least developed countries as well. Some countries such as India, Thailand and China argued before the “Working Group on Interaction Between Trade and Competition Policy” at the WTO that export cartels consisting of small companies should be exempted from new government restrictions as they lack the capacity to compete independently with foreign competitors at an equal footing and hence need this exemption to overcome barriers to market entry and survival. Furthermore, for most LDCs, primary commodities form the majority of the export earnings compared to industrialised nations. Therefore, in these countries, export commodity cartels may have significant implications for GDP growth. In order to assess the impact of an export cartel on an importing country, Bhattacharjea (2004) advocates ‘a rule of reason case by case analysis’ taking into account some core factors. These are: market structure, demand elasticity of the product, degree of import penetration, prevailing tariff levels in the importing country, and whether the cartel is a new entrant.

Apparently, there is need for more careful studies with explicit counterfactual analysis. This in turn requires improvement in data quality and the sharing of information between competition authorities across different countries.

6. Treatment of cartels in national competition policy and need for international rules against export cartels

While empirical research on the effects of export cartels remains inconclusive no country has a strong incentive to ban export cartels unilaterally provided they do not adversely affect competition in domestic economies, either explicitly or implicitly. Implicit exclusions are as good as an explicit one as far as action by the home authorities is concerned. Studies have shown that fifteen countries maintain these exemptions. It may well be inferred from this treatment of export cartels under a competition regime that the same activity would be illegal if it were pursued domestically but since the exported quantities affect foreign markets and generate revenue in the process, they are exempt from the competition regime of the

country (Sokol, 2008). Or in other words, while monopoly rents accrue to the home country, the consumer loss due to high prices is mostly felt in the foreign (importing) countries leaving little incentive for exporting countries to regulate such activity.

The approach of governments to collusive cartels for production and exportation in resource rich countries is paramount to note here. In some cases, governments of resource-rich countries are closely involved in collusive export arrangements while in others they may simply allow collusive practices among exporters as long as they do not affect domestic markets. In 1918, the United States Congress passed the Webb-Pomerene Act (WPA) with the mandate of helping domestic firms in facing competition from foreign international cartels. The Act exempted the export activity of associations for trade in goods. In 1982, the Export Trading Companies Act was additionally passed to include export of services. While the rationale for orchestrating such exemptions for export associations were well founded, an OECD study carried out in 1994 revealed that 87 of 97 of these export cartels acted as hard-core cartels i.e. either through price-fixation, co-ordinated bids or allocation of customers. Yet the United States continues to grant explicit exemption to export cartels to this day since they do not harm the domestic market. Another country that follows explicit exemptions to export cartels is Australia. On the other hand, EU grants implicit exemption to export cartels as the provisions under EU competition law (Articles 101 and 102, formerly 81 and 82) regulate activities that 'distort competition within the common market' only.

The rationale adopted by the Webb Pomerene is often duplicated by many national export cartels. The rationale for permitting export cartels is that it may facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade. Critics however argue that the export cartel exemptions represent nothing but a beggar thy neighbour policy where the home country where the cartel originates gains while the foreign country loses. Studies have revealed lack of evidence indicating that export cartels were necessary as an instrument of countervailing power against cartels of foreign competitors or foreign buyers. Besides, many export cartels such as the Canadian potash cartel, Canpotex, have been seen to comprise of large companies to enter markets where there is no domestic production of potash hence hardly any domestic competition (Waldie, 2010). Another reason why governments exempt export cartels lies in strategic trade theory (Sokol, 2008). Export cartels have the effect of restricting the volume of exports and raising the export price which ultimately helps in shifting rents from foreign firms to domestic ones and improving their terms of trade. Scholars have also argued that the continuation of exemptions granted to export cartels despite their welfare reducing impacts can also be partly explained through the public choice theory (Sokol, 2008), that is to say, that the people that are affected by such cartels are foreign consumers and do not have the same lobbying power as the firms participating in the export cartels to influence political decision making in their favour.

A few researchers who applied the prisoner's dilemma theory to the export cartels issue highlight the need for international cooperation in formal enforcement actions against cartels. Sweeney (2007) for instance argues that the incentives to discipline export cartels present a prisoner's dilemma in the sense that a country currently prohibiting export cartels can always make itself better off by allowing them and a country that currently permits export cartels can make itself worse off by prohibiting them. He concludes that "in the absence of an agreement, the world's trading nations are in equilibrium when they permit export cartels. Durand, Galarza, and Mehta (2004) endorse his findings. They examined the welfare effects of banning or allowing export cartels.

Their study revealed that when a country chooses to allow export cartels while the other country still bans this practice, the welfare level it reaches is higher than when it also chooses to ban them. The authors conclude the study holding that if countries could co-ordinate their antitrust policy to prosecute export cartels they would all reach a higher welfare level".

Clearly, while the potential loss to total welfare and consumer welfare caused by hard-core cartels has been globally recognised, the global fight against the gravest antitrust infringement excludes from its ambit similar impacts that may arise from the operation of exempt cartels such as those formed to control exports. This issue has been discussed at length in the forthcoming sections. It discusses the governance challenges posed by export cartels in primary products that may be especially damaging due to the nature of these commodities leaving importing countries with little options to combat extra-territorially against the ills of such exempt cartels.

7. International commodity agreements and cartels

Export cartels in particular in the primary sector have been exempted from control in some countries due to the volatile nature of commodity prices and dependence of many countries on commodity exports for their export earnings and GDP growth. In the past, many countries entered into international commodity agreements (ICA), a form of public international cartel between governments to manage the price of a commodity through interventions. Prior to 1945, these agreements were entered into by major economic powers to provide them with increased revenue and to promote their national industries; the colonies which produced these commodities were not the chief beneficiaries of these agreements (Chimni 1987).

The commodity issues were reviewed at the Havana Conference in 1947. A special treatment was given to such cartels under the draft Havana Charter treaty enacted in 1948 which exempted them from its main anti-cartel thrust such agreements to set and stabilise the prices of primary commodities. Chapter VI of the Final Act, devoted to inter-government commodity agreements, specified the objectives of ICAs and defined the circumstances in which they could be entered into. Its content was heavily influenced by the perception of the US which viewed an ICA as a necessary evil (Chimni 1987). The manner in which these agreements worked was essentially that if demand and supply pressures caused a commodity's price to move outside a range pre-determined by free market forces, an elected or appointed manager would enter the market to buy or sell the commodity to bring the price back into range. The manager would correct the upward and downward price movements by operating a buffer stock. While the Havana Charter was never brought into force, the principles of ICAs were adopted.

The 1970s saw a brief period of 'commodity power' (1973–79), which put control of supply in the hands of developing country exporters and which culminated into the adoption of IPC by UNCTAD. The very first session of the UNCTAD adopted a number of resolutions to address the problems of developing countries in primary commodities' trade. The most significant resolution was " ICAs and Removal of Obstacles and Expansion of Trade" which laid down the guidelines for the negotiations on future ICAs. It was envisaged that ICAs would have within themselves mechanisms for regulation of production, supply and demand and prices at the world commodity markets. Collective action was taken first for phosphates and then, in 1973–74, for crude petroleum (Page and Hewitt, 2001). Similar agreements were formulated for agricultural products such as coffee, rubber, wheat, tea etc. Unfortunately, most such agreements were dissolved due to their failure to achieve the mandated objective of commodity price stabilisation. Historically, only three ICAs (on coffee, on cocoa, and on natural rubber) were reasonably successful over limited periods of time (UNCTAD website). In October 1999, the International Agreement on Natural Rubber - at that time the last remaining ICA with a price-regulating mechanism - terminated its activities. At present, all ICAs (on cocoa, coffee, cotton, grains, olive oil and table olives, sugar and tropical timber) are administrative in nature, serving as fora for producer-consumer cooperation and consultations, market transparency, development projects and sources of statistics. They are not attempting to regulate markets by supply or price management mechanisms.

Views on ICAs are fragmented. While some see ICAs as successful tools in stabilising prices of commodities in the world market, many have argued these as a doomed policy tool. There were criticisms about market intervention through export quotas and a buffer stock which many argued had mainly

managed to keep prices high instead of stabilising them. Besides this, the agreement ran into severe implementation challenges as reaching decisions on export quotas and buffer stocks collectively was difficult given the varying vested interests. Furthermore, scholars have argued that such an agreement that fixed the maximum and minimum prices of part of the total volume of a commodity was likely to give rise to more violent price fluctuations than would otherwise occur as their sharp rise and fall had the potential to lead to a longer term instability of world commodity markets. For example, the OPEC cartel raised oil prices massively in 1973-74 which contributed materially to the world-wide recessions of 1975 and the early 1980s (LeClair, 2000).

The most profound criticism of ICAs is that while these were brought in to stabilise the commodity prices on the world market, the buffer stocks and other such arrangements for price stabilisation effectively became vehicles for cartelisation and monopoly price maintenance (Pindyck, 1979). Empirical studies have revealed the dangerous extent of changes in market structures brought about by such agreement. An empirical study conducted after the dissolution of the coffee cartel revealed that of the 75 percent drop in the price between 1988 and 2001 since the breakdown of the international commodity agreement (ICA) for coffee in 1989, the breakdown of the ICA explains 49 percent points and only the remaining is attributable to weather and other shocks as well as entrance of a new market player (Igami, 2010). This shows that economically significant market power was maintained by the agreement and the fluctuation leading to the commodity crisis was attributable to the changes introduced in the market structure of coffee beans as a result of the presence and later disappearance of the coffee cartel. A contradictory opinion was voiced by Oxfam which viewed the International Coffee Agreement as a ‘golden era of good and stable prices.’

The era of international cartels for commodity export continues. In 2008, Thailand attempted to create a rice cartel with four other Southeast Asian countries: Vietnam, Burma, Laos and Cambodia. The purpose of the cartel was to control products and set prices modelling the OPEC cartel. This arose from Thailand’s concern of its distorted terms of trade resulting from operation of oil cartels such as OPEC that exported oil at such high prices as well as the export restrictions on rice by India and Vietnam which had led to tripling of the prices of rice in less than four months. The proposal was met with great opposition from the rest of the world that apprehended the formation of an oligopoly and hurt consumers globally by charging high prices for an essential commodity like rice. Eventually it was dropped due to such overwhelming global response concerning the negative impact of such a cartel at a time of global food insecurity.

In addition to the long standing practice of exemption of export cartels for the practices that may be severely punishable if directed to the domestic economy, export cartels also interestingly find no remedy under the multilateral trading agreement which is quite stringent on other forms of export restrictions.

8. Trade - Competition interface and export cartels

The importance of the interface between trade and competition has been growing in times of enhanced international market integration where competition is international and one of its major aims is to make markets internationally contestable. Both trade and competition policies aim at facilitating economic growth. Despite this commonality, there are instances of conflict in their respective applications. This is so because while trade policies focus on achieving efficient allocation of resources between countries, competition policies are directed towards achieving these ends within countries. Due to these differences, trade measures such as voluntary export restraints, quantitative restrictions and antidumping are used extensively to ensure fair trade while export cartels flourish unnoticed and continue to distort competition in international trade.

To explain the interface discussed above, let us first look at some examples of trade policy induced cartelization. Generally speaking, monopolies and cartels operating freely within the domestic market engage in price discrimination or what is termed as dumping that involves selling output at prices lower in

export markets than in the home market (Scherer, 1996). Dumping occurs when firms sell products abroad at below costs or significantly below prices in the home market. In order to seek remedy for the injury suffered by the domestic industries of the importing country, duties are imposed on exports and also by way of negotiations such as voluntary restraint agreements and other means of regulating exports as per which exporting countries decide to raise the prices of exports and/or restrict output which invariably takes the form of an exempt export cartel (Scherer, 1996, Immenga 1995). Similarly, trade policy tools such as export controls and measures to regulate exports introduce a strong discretionary element in the trading system through quota allocation arrangements which often encourages the formation of powerful de facto export cartels (Piermartini, 2004). At other times, export taxes that lead to higher commodity prices give a legitimate justification for governments to get into such arrangements with an objective to “exchange information and prevent apprehended price wars”.³

It is important to note here that export cartels are also a form of export restriction in trade much like taxes, bans, quotas, restricting licencing etc. which are imposed under the trade policy of both developing and developed countries to meet certain objectives both economic (to raise revenue) and non-economic (environmental, political, social etc.) The most frequently employed export restrictions are those on agricultural products and raw materials. These have received great scrutiny over the years. While there may be important national security or other policy reasons for using export controls, in general, the consensus in the economic literature is that export controls distort market prices⁴. In addition, they impose net-welfare losses to a domestic economy that uses them. Consequently, many recent trade agreement negotiations have been used as platforms to strengthen the WTO disciplines on export restrictions. However, little is done to address the same rent seeking behaviour of export cartels under WTO rules.

Cartels also incentivise other distortions in trade. For instance, they force governments of foreign countries to provide state aid/subsidies so as to be able to compete at an equally footing internationally, a trade policy tool that is being increasingly looked upon as trade distorting. For example, a significant overcharge that India pays for the import of potash due to the global potash export cartel is financed to a large extent (50-100 percent) from a \$1.5-billion (Rs. 68,400 crore) annual subsidy granted by the government to the fertiliser industry (Jenny, 2011) which has been making headlines because of the huge subsidy bills that have been burdening the exchequer. Often times cartels lead to growth of more cartels. Scholars have described this situation as “tendency of cartels to beget other cartel”. For example, customers may unite to set up buyers’ cartels. Export cartels may inspire setting up of other export cartels as well. For example, quoting the statement of spokesman of the government of Thailand, Vichienchot Sukchokrat, in the case of Thailand’s attempts to form a rice cartel with four other Southeast Asian, “*With the oil price rising so much, we import expensive oil but sell rice very cheaply and that's unfair to us and hurts our trade balance*”.⁵ Similarly, inspired by the success of OPEC in the 1970s, when Zambia, Zaire, Chile and Peru, members of a cartel called the Intergovernmental Council of Copper Exporting Countries (CIPEC) announced plans to reduce shipments of the metal by 10 percent, other countries started gearing up to together try to lift prices. Countries that possessed iron ore (including Venezuela and Brazil) and seven bauxite producers (Guinea, Guyana, Jamaica, Sierra Leone, Surinam, Australia and Yugoslavia) started discussing plans about forming cartels.

Another OPEC inspired cartel also known as the OPEC of natural rubber that deserves some mention here is the Southeast Asian natural rubber cartel formally called the International Rubber Consortium

³ Statements of Cambodia's government spokesman Khieu Kanharithhttp reported in <http://news.bbc.co.uk/2/hi/7379368.stm>.

⁴ Insert reference to a CUTS paper.

⁵ Statements of spokesman Vichienchot Sukchokrat, Thailand as reported in <http://news.bbc.co.uk/2/hi/7379368.stm>.

(IRCo). IRCo comprises of the three largest producers of rubber, Thailand, Malaysia and Indonesia. When the natural rubber prices hit an all time low in 2008, IRCo agreed to reduce the amount they were exporting to increase the cost of rubber. The consortium met in 2008 and jointly agreed to reduce production by limiting plantations and tree tapping, and asking businesses not to sell rubber at prices that would defeat their goals. The cartel's goal was to cut production by a sixth of what was originally planned, by approximately 915,000 tonnes. The Global Trade Alert estimated the total trade that could be affected by this measure at US\$ 26.322 bn and across a total of 105 trading partners. The hope was to keep prices high and maintain constant income levels through this measure, just as the Organisation of Petroleum Exporting Countries (OPEC) although it ultimately failed to implement these measures due to several other factors such as the growing demand from tyre industries in China and India and more importantly, abundant production of natural rubber by Vietnam. Rubber prices fell again in 2011 recently and the IRCo is likely to take similar measures to curb rubber exports. Furthermore, IRCo countries have requested Vietnam to join the consortium. If Vietnam decides to accept this proposal, together the four countries could control about 84 per cent of the global supply for natural rubber. Availability of cheap natural rubber may become a thing of the past. This may have critical consequences for global automobile industry to say the least.

9. TRIPs and export cartels

There is a complex relationship between intellectual property rights (IPRs) and competition which has been greatly debated. It has been argued that inadequate protection of IPRs leads to distortion of a level playing field as protection of IPRs provide incentives to innovate which is a necessary condition for competition (Cottier, 1991).

There are provisions in the TRIPs agreement for fair use, compulsory licensing, measures to prevent abusive practices as well as provisions such as Article 40 that allow members to prohibit anti-competitive licensing practices. Therefore, some of the principles of competition have been incorporated in the TRIPs Agreement designed for IPR protection.

There are many interfaces between IPRs and competition laws such that they both impact each other. To substantiate this point, let us take the example of how export cartels reinforce the anticompetitive outcomes associated with IPRs (Gonta, 2010).

As per the doctrine of national exhaustion which many countries follow, an IPR holder's right to control movement of a good or service is only extinguished by the first sale or marketing of a good or service within the territory of that country as opposed to the doctrine of international exhaustion which allows for a better flow of international trade across borders once the good or service has been first sold in any part of the world (UNCTAD Report, 2004). There is much debate on the doctrines from the point of trade liberalisation and Article 6 of the WTO grants member countries the right to choose the policy of exhaustion that they would like to adopt. Nonetheless, scholars have argued that operation of export cartels reinforces the doctrine of national exhaustion leading to market segregation which inhibits the flow of trade globally, prevents parallel imports and works against free market and competition leading to differential and higher pricing. Cottier and Meitingner (1998) use an illustration to explain this link. For example, an export cartel in country A among producers I, II and III exports to countries B, C and D. Each of the producers is allocated a market in these countries that he must strictly confine to. Now if these countries apply doctrines of national exhaustion, they argue that such an export cartel can even be enforced in down-stream markets, and buyers can be prevented from parallel importing such products in these countries. In other words, competition is eliminated and this is likely to result in higher and differential pricing of the product. They make a good case, therefore, in arguing that a multilateral discipline on export cartels would therefore also address the anti-competitive outcomes of intellectual property protection.

Giving due appreciation to the relationship between trade and competition, The Havana Charter enacted in 1948 made the first initiative to draft provisions to regulate restrictive business practices that frustrate market access. Unfortunately the efforts did not come to fruition. Thereafter again in 1996, shortly after the World Trade Organisation was formed, a structured effort was made towards addressing this interface by setting up a Working Group on Interaction between Trade and Competition Policy at its ministerial conference in Singapore. This effort was drawn from Article 9 of the Agreement on Trade Related Investment Measures which has an inbuilt agenda to recommend the adoption of an investment policy and a competition policy. The agenda was duly acknowledged and incorporated in the Doha Ministerial Declaration in 2001. Paragraph 23 of the Doha Declaration voiced the need for a multilateral framework to enhance the contribution of competition policy to international trade and development. Unfortunately, even though countries recognised the relationship between trade and competition, they were divergent on their views of multilateralising competition rules. While EU and Canada and few other countries supported this idea, many developing countries opposed it for want of greater policy space to pursue their developmental industrial policies and their capacity and implementation constraints. The US had its own opposing views but decided to go along to support a package of WTO reforms.

Almost a decade after the Doha Round, anticompetitive practices have been affecting the world trade severely. To illustrate this point, we can refer to the famous Kodak-Fuji case when in May 1995, Kodak filed a Section 301 petition under U.S. trade law that requires the USTR to determine whether trade practices by a foreign country are unreasonable and discriminate against U.S. exporters. The petition claimed that Kodak's 7-10 per cent market share in Japan was not a result of consumer choice and marketing efforts but rather a result of four principle Japanese wholesalers, backed by the Japanese government, that are exclusive Fujifilm supporters. In a news conference in Tokyo in July, Kodak's Ira Wolf said that "We understand the risks inherent in going ahead with a 301 case, especially given the feelings of the average Japanese consumer about 301. But we decided there was no alternative....The Office of the Trade and Investment Ombudsman (Japan) is too weak and the Geneva-based World Trade Organization does not cover competition policy."⁶

10. Policy options and governance challenges

10.1 Seeking a unilateral solution

10.1.1 Application of the "effects doctrine"

According to this doctrine, the "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. This empowers governments in affected countries to take action directly against those cartels, as the United States and the European Union have done. In recent years we have seen several countries, especially South Korea, Mexico, and Brazil, take steps in that direction (Levenstein et al. 2003). However, Hoekman argues that weak competition enforcement may allow incumbent firms to block or attenuate foreign competition and even though in principle, countries may enforce their domestic antitrust laws against an export cartel extraterritorially through the application of "effects doctrine" it is often difficult to do so (Hoekman, 2003). Further, this is a hugely complex provision which would require access to information about foreign exporters which is data often unavailable in addition to challenging the exemption or immunity enjoyed by them. Often this is matched with lack of resources financial and legal for many countries to engage in this exercise effectively (Levenstein et al., 2003). Application of "effects doctrine" is especially challenging in case of countries that have no notification requirement for registration of export associations/cartels within

⁶ Kyodo News Service, 26 July, 1995. The World Trade Organization, which eventually presided over the court decision, announced on January 30, 1998, a "sweeping rejection of Kodak's complaints" about the film market in Japan.

their domestic territories and hence no data is available for the importing country to work on. E.g. information on their geographic coverage, products and extent is nil (World Bank, 2003). Therefore, even if the exemptions for export cartels are not completely banned, provided the notifications are made mandatory and the process is carried out to ensure transparency, it would enable the antitrust authorities and agencies of the importing countries to assess the anti-competitive impact of the cartel on their economy (Sokol, 2008). For example, the Irish Competition Authority (ICA) has used this approach in cases against United States. In assessing the anticompetitive conduct of foreign firms in Ireland, the ICA referred to the filings of the US export cartel associations (Van Geyn, 2011). Finally, developing and least developed countries do not have capabilities and resources to prosecute international cartels. They should be granted technical assistance from their richer trading partners in fighting the menace of export cartels who may provide them the necessary resources and skills as well as help them with various mechanisms and procedures involved in filing such cases.

10.1.2 Private actions for damages

Consumers may be given powers to sue cartel conspirators for damages in their national courts. According to Levenstein et al (2003) private actions for damages resulting from violations of competition law are permitted in over 20 countries, It is however costly and cumbersome to sue especially in the absence of data. Further, there are significant legal and procedural hurdles to such suits in many countries. Such private suits in practice are observed to be extremely rare.

10.2 Seeking solution through multilateral trade rules

10.2.1 Adopting a global welfare approach

Inclusion of National Treatment Principle (de facto and de jure) on foreign and domestic firms as well as consumers so as to ensure equal treatment to both is the globally recommended approach by most policy makers in the new globalised economic order (Nagaoka, 1998). This principle mandates a level playing field among domestic and foreign competitors and must be imbibed in a country's competition regime. Its application would help do away with the exemption for export cartels. It is important to note here however, that the provision of national treatment only applies to the internal market of a Member state. Therefore, merely incorporating such a provision as it is within competition regimes of countries would not be sufficient and some modifications need to be made to the provision to ensure its applicability to the case of export cartels.

10.2.2 Strict disciplines on export restrictions that tighten global supply of commodities

A growing concern in these markets relates to measures imposed by certain countries through export restrictions that create distortions in the world markets and create further uncertainties in the supply of primary commodities. Such export restrictions that have the effect of restricting the volume of exports and tightening global supply further aggravate the problem of cartelization as discussed earlier in the paper. These measures particularly affect low income countries which may be particularly dependent on imports of agricultural and raw materials and hence may lose a great deal from the absence of strict multilateral disciplines on measures such as export taxes, voluntary export restraints, quota allocations and other forms of export controls adopted by countries to better their terms of trade while worsening that of the others.

10.2.3 Remedies at the WTO against injury caused by export cartels

The damage caused by export cartels is in a way similar to the incidence of dumping. Scholars have termed this as a case of reverse dumping which may be penalised as such. Although material injury in such instances would be hard to show, facts such as abnormal high import prices, registration of export cartels and other factors may be taken in order to create a rebuttable presumption of reverse dumping leaving the

burden of proof with the exporting country to show that it has not been selling like products at prices much higher than the normal value (Bhattacharjea, 2004).

- **Counter measures:** Another measure may be by way of cross retaliatory counter-measures authorised by WTO as seen in the case of US-Upland Cotton. Cross retaliations are often useful where it is determined that the suspension of concessions in the same sector will have no effect or will not be efficient or in the case when the respondent country is a developed one and the complainant a developing one, such measures may often prove to be more harmful for the developing complainant country. Brazil threatened to impose these measures in the intellectual property sector in response to the damaging cotton subsidies granted by the United States. This was viewed upon as a good strategy as it would benefit the Brazilian consumers, its generics industry, domestic sector and thereby compensate effectively for the losses suffered by the illegal US subsidies as well as threaten a colossal damage to the entertainment, biotechnology, pharmaceutical and other important U.S. industries, thereby forcing compliance from the powerful trading partner. The success of the strategic measure was seen when In April 2010 the two countries came up with a Memorandum of Understanding (MOU) as per which Brazil would not make use of the authorised cross-retaliatory measures and in turn U.S. agreed to take a few corrective measures. Hence this may be another effective remedy that injured importing countries may be able to invoke.
- **A potential for remedy also lies in the Agreement on Safeguards.** Article 11.1(b) provides that Members shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side. A footnote to this provision further provides examples of such measures and includes export moderation, export price monitoring systems, surveillance, and discretionary export licensing schemes, any of which afford protection (Becker, 2007). It would be logical to argue that export cartels can fall within the ambit of this provision and hence appealed on grounds before the WTO Dispute Settlement.

All these measures would require re-negotiations on various agreements and would have practical problems. As discussed above, governments and trade associations are likely to play a key role in the formation of cartels in the primary sector. This clearly implies that any re-negotiation would involve political dynamics and would require political will power.

10.3 Formation of countervailing buyer cartels

Former petroleum minister of India, Mr. Manishankar Aiyer proposed formation of an OPEC-like organisation among Asian oil buying countries and negotiate hard with Saudis and OPEC for better prices, including eliminating the Asian premium of \$1.5-2 a barrel. Such a cartel to be formed as a countervailing power as opposed to a monopoly cartel may be a strategy that buying countries may use in order to counter the exploitative forces of powerful trading partners. Another such countervailing cartel may be formed by consumer countries such as India, China, Brazil and others against the Canpotex Potash Cartel (Mehta and Nayak 2011).

10.4 Multilateral agreement on competition

This is not a new proposal. As mentioned earlier, an effort in this regard had been already made in 1996 at the Singapore Ministerial when the Working Group on Interaction between Trade and Competition Policy (WGTCPP) was formed. This was one of the very first occasions when the issue of export cartels was discussed at the multilateral level and all the Members were able to exchange their views on the matter. The main structural difference between rich and poor countries, was that the rich wanted a multilateral agreement *on* competition, which would have meant some degree of harmonization of domestic

competition laws with the international standards. However, developing countries perceived this as a market access push by the rich. Because, if competition laws were designed and operated on the lines of rich country laws, it would have meant providing a level playing field for rich country firms. On the other hand, the poor countries wanted a multilateral agreement *for* competition, i.e. something which could help them to deal with competition violations of rich country firms.

On the whole, there were divergent country positions. While some called for an outright ban of exemptions granted to export cartels, developing countries were of the view that this would be a one size fits all approach and not support the interest of lesser developed countries for whom export cartels may be a huge source of export earnings. Unfortunately countries were unable to reach a consensus on the matter. The Cancun Ministerial Conference ended in a deadlock, due to this very issue, and the General Council of the WTO dropped competition policy from the Doha agenda in 2004 (Hufbauer and Kim, 2008).

Nonetheless, the WGTCP succeeded in building awareness on competition issues and initiating a new wave of analytical thinking about competition issues and the interface between trade and competition. A good example is the case of India which started preparing a new competition law and also incorporating competition clauses in its bilateral trade agreements. Many other countries also started designing and adopting competition laws after this period. Over 106 countries have adopted a competition law as of today as against only 35 countries who had a competition law in 1995 when the WTO came into being.

In today's globalised era where the practices of one country have externalities beyond its own borders, it is necessary to re-visit multilateralisation of competition rules which would effectively address the negative externalities caused by anticompetitive practices of a country beyond its borders. Such a body would also provide a set of rules and intervene when markets fail and the players are caught in a "prisoners' dilemma" which is usually the case in the issue of export cartels.

10.5 *Special and differential treatment*

Such a multilateral rule have the potential to hurt lesser developed countries, an option may be to provide special and differential treatment to developing and least developed countries that need export cartels to promote national growth and hence allowing for them to operate such export cartel exemptions albeit for small and medium firms alone while banning such exemptions for industrialised nations. This had been argued before at the WGTCP. Alternatively, if this is not a likely solution then a good way to accommodate the interests of less developed countries so that such a rule does not hinder their export led growth strategy when it bans cartelization of export activities could be to replace antidumping rules with predatory pricing standards in adjudicating trade disputes. The competition policy rule might permit export prices, consistent with rational price discrimination, to fall all the way to marginal cost and a price less than the home market price would not be construed automatically as a dumping price (Scherer, 1996). This would insulate such countries from reduced export earnings as a result of the multilateral rule and enable them to make the best out of their export led growth strategies and sell at lower prices in export markets without attracting anti-dumping duties. Some argue that there are practical limitations of any multilateral agreement that amounts to a requirement for standardised domestic competition policy rules on the part of developing countries. As a result, a WTO requirement for such policies is bound to have limited impact. There is therefore need for a tailor made approach as opposed to a one size fits all approach. It is needless, however, to say that such provisions would however require intensive effort and negotiation which is a challenge that developing and least developed countries will be faced with as well.

10.6 *Creation of an international competition authority*

In view of the limitations of the WTO agreement, some propose that an International Competition Authority may be established - independent of the WTO - to maintain fair competition in the world

economy and keep markets contestable by ensuring that barriers to entry to late-industrialisers are kept at low levels. Critics however argue that even with this authority developing countries may not be able to restrain anti-competitive behaviour by large multinationals due to lack of capabilities in implementing such laws.

11. The way forward

Agreements on information sharing: There may be agreements between countries for sharing information in competition cases. Levenstein et al (2003) report that there have been such agreements between the US and Brazil. Recently such agreements have been concluded between Canada, EU and Australia. Australia and New Zealand already have one. Such agreements may facilitate the enforcement of domestic competition laws and the effects doctrine.

Diversification of exports: Several recent studies have implied that countries especially the least developed ones should be ill-advised in relying too heavily upon primary commodities as a foundation for economic growth, since the growth rate of real gross domestic product appears to be negatively correlated with the extent of reliance upon primary commodity exports. It is necessary for countries to diversify their exports on the whole and in commodities in particular given the volatility of the primary commodities market. With diversification of exports, the incentive to cartelise is low. We take the case of Malaysia to explain this point. When 43 percent of Malaysia's export earnings depended on tin and rubber, its interest in the global market for these products, susceptibility to price fluctuations as well as interest in international cartels was very high in 1974. Gradually it began to diversify, its exports and its dependence on tin and rubber for export earnings came down to negligible 4.9 percent by 1990. It was then unaffected by changes in prices of tin and rubber in the world market. Also, its interest in cartels was much less. At the same time, this diversification of exports also made it difficult for cartels to negotiate with Malaysia to be a party to the collusive arrangement (LeClaire, 2000).

Competition and capacity building reforms: Building domestic producer capacity and addressing anti-competitive practices across the value chain. Amartya Sen has argued for many years that famines in different countries are not due to food scarcity but because of the manipulation of food prices and supply by those with power in the supply chain. As discussed in previous sections, the agricultural commodity market is characterised by imperfect market structure, buyer concentration and anti-competitive behaviour among the players in the form of price fixing cartels, market allocations etc.. These are some of the main reasons behind the high prices of commodities in these markets. What is needed therefore is for domestic governments to correct such market distortions by building the capacity of small commodity producers in order to reduce the impact of asymmetries in power relations between the small producers and large intermediaries/suppliers across the value chain.

In addition to this, the governments need to strengthen the domestic laws relating to anti-competitive behaviour. This would correct the imperfections prevailing in the commodities market structure responsible for the high prices. It would further ensure entry of these producers as new market players in the world supply chain on equitable terms and threaten the survival of monopoly commodity cartels. This may be a good attempt to bring about some balance in the supply and demand dynamics of the world primary commodity market. Becker (2007) argues that although a multilateral competition policy would be best suited to challenge export cartels, the current state of the political debate makes it more likely that second-best solutions such as capacity building in lesser developed target states will have to be established.

The case of natural soda ash cartel is illustrative here. In 1999, Chemsolve, a unit of South African chemicals group AECI (AFEJ.J), and Botswana's Botash lodged a complaint with the South African Competition Commission that the American Natural Soda Ash Corporation (ANSAC) and its local partner CHC Global were fixing the price of soda ash for export. ANSAC admitted to price fixing and agreed to

halt exports to South Africa and in a settlement agreed to pay a 9.7 million rand (\$996,900) fine, or 8 percent of soda ash annual sales in South Africa, in 2008. In India also, the Alkali Manufacturers' Association of India (AMAI) complained to the Indian Competition Authority (MRTPC) that ANSAC was acting as a cartel and that it was charging lower prices to eliminate Indian competitors as it has done so in a few other countries in the past. The MRTPC granted an injunction on imports from ANSAC as a cartel. However, ANSAC challenged the MRTPC decision in the Supreme Court. The Supreme Court, in its interim order, upheld the MRTPC decision. However, in its final verdict in the case, the Supreme Court has held otherwise, saying that the MRTPC had no extra territorial jurisdiction. Thus the case against ANSAC was lost. This contrasting experience of India and South Africa highlights the need to strengthen the competition law, which has since been done when India adopted the new Competition Act, 2002 which has extra territorial jurisdiction.

Technical assistance by the WTO: The WTO could also assist lesser developed countries through its Aid for Trade initiative especially in supporting the diversification efforts of these commodity dependent countries by meeting the adjustment costs of their trade reforms. It should also help build their capacity in terms of building a strong competition regime which would help them fight the negative externalities of the beggar thy neighbour policies of their trading partners.

International Competition Fund: CUTS⁷ has argued that there is a need for having an International Competition Fund sourced from the fines imposed by (developed country) governments on international cartels, which have a direct impact on developing countries, and making it available for building capacity of developing country stakeholders, who are not compensated for the impacts of these international cartels, given that competition agencies in these countries are either absent or ineffective, and certainly not capable of prosecuting an international cartel led by developed country firms.

⁷ For more about it please see: http://www.incsoc.net/pdf/Better-Cartel-Deterrence-International-Solidarity_en.pdf. INCSOC is an international network with its Secretariat in CUTS.

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COMPETITION ISSUES IN AGRICULTURAL SUPPLY CHAINS

*By Scott Davenport **

Abstract

Concerns about the effects of commodity price volatility on developing countries and their causes have been well documented. A key causal factor is agricultural supply chains and prices being poorly integrated with domestic and international markets. The result is often under-developed and unsophisticated agricultural sectors, incapable of effectively responding to contemporary market demands and growth opportunities.

The paper explores the important role that competition plays in ensuring efficient price transmission in agricultural supply chains, which in turn drives efficient public and private investment in agriculture.

1. Introduction

Commodity price volatility impacts adversely on developing countries because food makes up a significant component of the household budget of poor consumers.

Price volatility will continue due to factors such as adverse seasonal conditions and climate change, however, poorly designed supply chain regulation in both developed and developing countries is a further important causal factor.

An important part of the solution therefore lies in striving for more efficient price transmission in agricultural supply chains. Prices that are unnecessarily impeded by poorly designed regulatory constraints limit the ability of agriculture to respond to growing and changing consumer demands, and importantly, act as a disincentive for efficient public and private sector investment which could otherwise mitigate price risk and uncertainty.

With traditional agriculture policy having its origins in the historical ‘development’ objectives of governments, it is almost universally the case that agriculture has been heavily subsidised and protected from competition by way of input subsidies, subsidised commodity prices, regulated marketing arrangements and border protection.

While these measures may have been appropriate at certain stages of agricultural development, they now act as impediments. Price signals not in tune with international and domestic demand are at odds with sustainable development and provide incentives for inefficient public and private investment, and limited sectoral adjustment, innovation and productivity.

It is inevitable therefore that progressive governments will increasingly focus on, and build capacity in, assessing how supply chain regulation impedes competition and price transmission. The following sections contain initial discussion about how traditional agricultural policy settings impact on competition

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with reference to work recently completed in India and funded by the Australian Centre for International Agricultural Research (ACIAR).

2. Competition policy, regulatory reform and competition law

Discussions about competition policy often focus on the application of competition or trade practices law which is at the formative stages of development in most developing countries. Competition policy is, however, a term also applied to that separate government activity of regulatory, or microeconomic, reform. Here the focus is on removing regulation which unnecessarily restricts competition, guided by 'market failure' principles.

Competition law relates specifically to regulating the anti-competitive behaviour of businesses, whereas regulatory reform involves removing those impediments to competition which advantage certain sectors in their 'bidding' for labour and capital resources.

It is nevertheless the case that there are close linkages and synergies between the application of trade practices law and competition based regulatory reform. In particular, both need to be progressed together to facilitate an orderly transition from traditional 'industrial policy' to trade practices law, where appropriate.

On a less positive note, recent observations and concerns in relation to progressing balanced competition policy programs are:

- a tendency for the enthusiastic embracing of competition law, almost as a diversion from addressing significant and longstanding regulatory restrictions on competition; and
- the focus of competition policy otherwise often being driven by external international pressures and consequently focussing on partial aspects, such as reducing border protection or deregulating certain sectors, rather than on building internal capacity to consider 'behind the border' reforms that are in a countries own interests to progress.

3. Supply chains, price transmission, competition impediments & productivity

3.1 Productivity 'drivers'

There is compelling evidence that market orientated agricultural policy reform leads to higher rural incomes, increased agricultural productivity and reduced rural poverty. The reason is that price signals are the 'drivers' of efficient public and private investment, and not just in agriculture, but in other important areas such as support industries, infrastructure development and research. It follows that if supply chain regulation is poorly designed and price signals are distorted, then public and private investment will be inefficient and inconsistent with exploiting a countries natural, competitive, production advantages.

Useful discussion on this issue has been made by Australia's Productivity Commission ([Annex 1](#)) with the clear message that policy reform, policy review processes and the 'openness' of economies, hold the key to productivity gains, rather than simply increasing expenditures on subsidies and R&D.

The Commission usefully identifies changes in prices (terms of trade/pressure on profit margins) as an important 'driver' of innovation and productivity, whereas factors such as new technology, the ability of farmers to apply those technologies and RD&E are identified as 'enablers' (i.e. the enabling responses that price changes stimulate).

A clear understanding and appreciation of the role that prices play as 'drivers' of productivity is critically important to effective public policy prescription. All too often we continue to hear largely

technical public policy solutions (more research, the further development of irrigation schemes, etc) being proposed to problems such as price volatility, declining agricultural productivity and poverty. It follows that research and rural infrastructure investments need to be ‘directed’ by price pressures and opportunities, otherwise they simply load-up the input side of the agriculture productivity equation.

An outcome of the present lack of reliance on efficient pricing is decelerating agricultural productivity growth in many developing countries (see discussion of productivity developments in developing and transition economies in Annex 1). This is the result of ever increasing quantities of private and public inputs being applied to a fixed set of ‘favoured’ agricultural enterprises, resulting in progressively lower levels of supply response. Unfortunately, this phenomenon is also often being associated with increasing levels of environmental degradation.

This naturally leads to the conclusion that competition reforms which enhance the efficiency of price transmission are perhaps one of the highest priorities for addressing price volatility and international food security. But unfortunately, much international and domestic policy prescription continues to reflect an ongoing fascination with technical solutions. Competition and institutional reforms tend to come a poor second, reflecting a widespread lack of appreciation of (or disinterest in) the dynamic capacity of pricing reform to drive and determine efficient levels of productive activity and investment.

A related concern is that in an environment where agricultural production in many countries remains heavily distorted, the possibility arises that well-meaning research efforts focussed on improved farm practices and developing new technologies, may in some cases be acting to insulate farmers from international and domestic price pressures, and in so doing, are acting to reduce pressures on governments to engage in regulatory supply chain reform.

It follows that an important focus for competition policy includes the efficiency of administrative processes by which public resource are allocated to agriculture in areas such as international research and infrastructure development.

Finally, it is worth noting that an indicator of the ongoing technical focus of much agricultural policy is the desire of many countries to have agricultural growth targets as the centrepiece of rural policy. Such targets are nearly always linked to ongoing subsidy programs intended to ‘drive’ or ‘force’ growth, instead of growth outcomes being autonomously determined by the ‘efficiency’ of policy settings.

3.2 *Poor regulation unnecessarily impedes competition and resource allocation*

In implementing competition policy regimes it is important to appreciate both the positive and negative effects that government regulation can have on price transmission and resource allocation.

For example, typical forms of intervention in agricultural supply chains include input subsidies (electricity, water, fertilizers, etc), output subsidies (minimum support prices), statutory wholesale marketing arrangements, the activities of government trading authorities and various forms of border protection. Some comments on each of these follow, drawing on recent research.

Input and output subsidies, now prevalent in many countries and argued on either food security or farm income grounds, distort resource use by maintaining and attracting resources into agriculture. Put another way, they act as a disincentive for labour and capital adjustment within agriculture, between agriculture and other sectors of the economy, and between countries. They also provide recipients with a competitive advantage over other businesses that ‘bid’ for capital and labour, and so have the further adverse and often unforeseen effect of bidding up input prices, lowering the competitiveness of other industries and lowering national and international growth and income.

When argued on equity or income support grounds, again, subsidies are highly inefficient due to the bulk of assistance going to large farmers least in need of assistance, and by impeding sectoral growth, a secondary effect is to in fact lower current and prospective farm incomes, which ironically is the opposite of their stated objective.

Statutory wholesale marketing arrangements, such as those established under India's Agricultural Produce Marketing Acts, have a certain level of intuitive appeal, but have been found to unnecessarily restrict competition through licensing arrangements which protect wholesale marketing agents. These policy settings result in commission agents extracting 'above-normal' wholesale margins resulting in increased consumer and lower producer prices. By distorting consumer prices and depressing producer prices and acting more broadly to increase marketing costs and impeding direct sales, this regulation also appears to be having the effect of depressing rather than enhancing agricultural development in India.

Similarly, the Food Corporation of India (FCI), established to (i) provide Minimum Price Support to farmers; to (ii) distribute food grains to the poor through the Public Distribution System; and to (iii) manage the buffer stock, has been found to be highly inefficient and working against the interests of food consumers and producers. McCorrison & MacLaren (2011a) find, for example, that the first two FCI objectives could be addressed by more efficient (less restrictive of competition) policy mechanisms. They found that if a deficiency payment scheme replaced FCI procurement based on Minimum Support Prices, and a food stamp program replaced the Public Distribution Scheme, social welfare would increase by as much as 82 percent due to lower consumer and higher producer prices.

Border protections such as the onion export ban imposed by the Indian Government in 2010 to lower consumer prices is also highly distortionary and contradictory to promoting domestic food security. McCorrison & MacLaren (2011b) found that the burden of the ban fell heavily on domestic onion producers in the form of lower onion prices. Of critical interest, however, from a regulatory reform perspective, were the further findings that:

- more competitive domestic supply chains, as would be achieved by reform to wholesale farm markets and the FCI, would have decreased onion prices to consumers by as much as 44-58 percent and increased producer prices by 15-19 percent, making the export ban unnecessary; and
- while the export ban achieved no change in the underlying level of consumer price variability, increasing the efficiency of firms operating within domestic supply chains would deliver a 46 percent reduction in domestic consumer price variability.

Finally, it must be said that while these various agricultural supply chain regulations individually act to depress agricultural development, their combined effects are potentially alarming, with an ongoing and persistent legacy of subsistence dominated agriculture and regional poverty.

4. Competition policy

Competition policy requires regulations to be subject to regular review in accordance with competition (or 'public benefit') principles. This generally requires (i) the objectives of regulation to be clearly identified; (ii) an assessment of whether those regulatory objectives clearly relate to addressing accepted forms of market failure; (iii) an assessment of whether the regulation is that which least restricts competition; and (iv) an assessment of whether the benefits of the proposed regulatory intervention are likely to exceed the costs.

If this test were applied to each of the traditional forms of industry regulation discussed previously, the conclusion would likely be that none of them effectively address any form of market failure (i.e. information deficiencies, anti-competitive behaviour, externalities or the provision of public goods) and

consequently, by distorting prices and competition, in most cases they will have had a range of unintended effects (costs) culminating in escalating food price inflation and decelerating productivity growth.

This doesn't mean, however, that government should not intervene in agricultural supply chains. It just means that there are better ways to do it, which generally require governments to stop 'dabbling' directly in the affairs of farm businesses, and to instead focus on strengthening the markets in which farm businesses operate. Some very positive, pro-competition, examples of government intervention include the following.

- Many problems faced by the farm sector relate to information deficiencies, particularly in areas such as technology adoption, environmental management and commodity marketing. In developing countries where farm adjustment has been impeded, it follows that any move to more market based regulation will require a significantly increased and ongoing effort in this area.
- Anti-competitive behaviour can be efficiently addressed through competition or trade practices law. Unfortunately, traditional regulation has tended to focus on differences in 'market power' between buyers and sellers. It is now well accepted, however, that differences in market power per se do not represent a market failure, but are a normal characteristic of markets. A legitimate market failure, however, is that of 'market power abuse', which tends to be sporadic rather than continuous, and will normally relate to particular businesses rather than industry as a whole. It follows that statutory marketing arrangements, such as those involving price setting, over-regulate the problem and so give rise to a range of attendant resource use distortions (costs).
- Externalities, such as adverse water and pollution costs imposed on agriculture by other industries, and biosecurity threats to agriculture, can often be addressed effectively by a combination of information and regulatory programs.

Supply Chain Reform and New Opportunities for Agriculture

An interesting aside here is the possibility that with new research and policy efforts, agriculture could play an important role in helping to address externalities such as global warming. Various forms of carbon farming and the recognition of agricultural carbon offsets could lower GHG mitigation costs for other sectors and offer agriculture new income streams that could also facilitate policy change away from existing subsidy regimes (see Gujral, Davenport & Jayasuriya 2010).

- Public (and industry) goods, such as the provision of infrastructure, provide extensive opportunities for governments to support agriculture in ways that directly increase industry competitiveness and growth. There are also a range of efficiency increasing investments where, in the absence of industry funding arrangements, individual businesses will tend to under-invest, such as in certain types of research and development and pest and disease control.
- Governments also have an important role to play in addressing the social equity and welfare needs of the poor, and for many developing countries decoupling government assistance from agricultural input and output prices may cause some level of distress, particularly in the short term. Managing this transition is therefore an important focus for public policy and an area where the success or otherwise of welfare programs in developing countries warrants close scrutiny and information sharing.

It is also the case, however, that for most developing countries the best form of welfare support will be the growth and adjustment opportunities that come with regulatory reform of domestic agricultural supply chains. Note also that this will be complimented by the removal of regulatory impediments limiting labour adjustment out of agriculture and into other sectors of the economy.

When taken together, it can be seen how an ‘agricultural policy’ based upon these types of market based government initiatives can be viewed as a portfolio of complimentary government interventions, able to be adapted over time to changing market conditions, and which constantly add value to the sector in the form of ongoing market efficiency dividends.

4.1 Competition policy: institutions, principles and public policy research

Competition reforms are ‘sensitive’ because they involve the redistribution of income away from certain well represented interest groups, to the broader community. Institutions and processes therefore need to be established which are capable of identifying and communicating these trade-offs in a way that positively engages with stakeholders and the broader community.

An important issue which therefore warrants more attention in a developing country context, is the effectiveness of alternative institutional arrangements by which competition policy can be implemented. In Australia for example, National and State governments agreed to a process whereby (i) the additional tax revenues flowing to the national government as a result of a future program of efficiency increasing reforms were estimated, (ii) the forward schedule of national and state regulatory reforms was developed and agreed to; (iii) followed by the development of an annual payment schedule to the states for the successful review and implementation of the agreed reforms.

A National Competition and Consumer Commission was also established to monitor the rigour with which legislation reviews were conducted, with penalties imposed on state governments in the form of the national government withholding competition payments where they judged the States as having breached their review obligations (Davenport, 2007).

In addition to effective institutions and a commitment to the ongoing scrutiny of agricultural (and other) regulation that significantly restricts competition, review processes will be complimented by government efforts aimed at engaging with and changing the attitudes of the broader community, such as:

- the regular monitoring of farm incomes and sectoral productivity to demonstrate the impacts of reform (or lack of reform); and
- ongoing programs of independent public policy research aimed at identifying key reform opportunities and evaluating reform efforts to date in order to enhance the welfare and productivity dividends of the government’s regulatory portfolio.

5. Conclusions

Reforming regulatory impediments in agricultural supply chains offers perhaps the greatest gains in addressing commodity price volatility and international food security. However, the importance of competition to efficient price transmission and the fundamental role prices play in ‘directing’ efficient public and private investment continues to be under-emphasised.

There is therefore a strong case for competition policy and associated public policy frameworks to be re-visited and re-emphasised, with a strong focus on developing appropriate institutional arrangements and on striking a better ‘balance’ between competition based regulatory reform and the application of competition law.

There is also a strong case for much higher profile international efforts in researching and communicating those factors explaining agricultural productivity on a country by country basis, and for the

adoption of a less ambiguous economic framework in relation to the ‘drivers’ and ‘enablers’ of productivity and income growth.

Finally, in recognition of the need for significant supply chain regulatory reform in many countries and accelerated rates of adjustment, it will be appropriate to also closely scrutinise the extent to which administratively/technically determined international and domestic assistance and research programs are ‘dampening’ efficient agricultural supply chain price signals.

ANNEX 1: POLICY REFORM AND PRODUCTIVITY

-- Extract from Chadha & Davenport (2010) - Agricultural Policy in the BRICS Countries --

The 'drivers' of agricultural productivity have long been the subject of research, however, analysts have struggled to develop a useful public policy framework which well captures the causal factors involved.

Australia's Productivity Commission has gone some way to correcting this problem with its 'theme chapter' in its 2007-08 Annual Report titled *Enhancing Australia's Productivity Growth* (Productivity Commission, 2008). The paper identifies Australia's increasing multifactor productivity growth (MFP) through the 90's and the subsequent slowing post 2000, with agriculture being one of the sectors most affected. The Commission notes that in the late 80's and 90's market competition increased due to factors such as:

- international trade reform;
- increased labour market flexibility;
- macroeconomic stability;
- financial market efficiency; and
- better regulation of infrastructure providers.

This enabled the reorganisation of production and work practices which allowed firms to reduce costs and take advantage of technology developments. They then posed the question of whether these reforms and associated productivity gains have run their course, with the prognosis that "further policy reforms are needed if Australia is to continue to improve living standards while meeting the challenges of demographic and environmental change".

The productivity framework developed by the Commission identifies 'incentives', 'flexibility' and 'capabilities' as underpinning innovation.

Understanding Innovation

Incentives – the external pressures and disciplines on organisations to perform.

Flexibility – the ability to make changes to respond effectively to market pressures (incentives).

Capabilities – the human knowledge capital, as well as infrastructure and institutions, that are needed to make the necessary changes.

Importantly, the Commission highlights that innovation is not just about research and development spending, but about continual learning and experimenting by firms and responding to client needs, and therefore incentives, flexibility and capabilities are highly interactive.

The supply-side driven R&D model is questioned on the basis that incentives are required to drive change, to present opportunities and to apply capabilities. They conclude that “competition provides the fundamental incentive for organisations to pursue changes necessary to succeed, through innovation and productivity gains”.

Relevant to agricultural policy, the Commission notes that while barriers to international trade and domestic contestability can dull incentives for innovation and productivity, so too can production and investment subsidies which insulate firms from more competitive rivals.

Further evidence presented by the Commission in support of the framework is that much of the innovation on which productivity improvements at the firm and economy-wide levels depend, does not involve technologies developed by innovating organisations. For the bulk of innovation activity, they therefore argue that competition provides sufficient incentives for private enterprises, without the need for taxpayer support. So, while recognising the importance of factors such as appropriate levels of education and R&D as necessary conditions, they are not sufficient conditions, and of themselves will not directly ‘drive’ productivity. Instead, incentives such as those presented by policy reform are found to be the fundamental drivers of productivity growth.

The Commission’s public policy framework is therefore of fundamental importance to unlocking further rounds of productivity improvements in the agricultural sector of many developing and transition economies. The clear message being that policy reform, policy reform processes and the ‘openness’ of economies hold the key to these gains, rather than simply increasing expenditures on subsidies and R&D.

The link between policy reform and productivity: Some recent studies

Fuglie and Schimmelfennig (2010) consider agricultural productivity growth in China, India, Indonesia, the former Soviet Union and Eastern Europe on the basis that these countries are large agricultural producers and therefore important to international food security. In reference to a range of studies, they report that India and China have experienced accelerated rates of multi-factor productivity growth following policy and institutional reforms, but that China has experienced much greater growth which is attributed to more fundamental institutional changes and greater structural transformation of their economy.

In Indonesia, an important source of productivity growth has been the increasing opportunity associated with “greater diversification into high-valued and export commodities and declining reliance on growth from traditional food staples”. In the former Soviet Socialist republics and Eastern Europe, productivity growth was found to be aligned with the various transition stages of these economies, with all countries showing a close link between productivity growth and the pace of economic and institutional reforms.

They further reported that for the 1978-2004 period, agricultural output grew by 4.6 percent in China, 4.0 percent in Indonesia and 2.5 percent in India. Circumstances contributing to these outcomes were the reduced rates of growth of rural populations in China and Indonesia due to improved absorption rates into other sectors of their economies, which contrasted with India’s expanding rural population.

The Key Conclusion

“In all three countries institutional and policy reforms that strengthened peasant agriculture and liberalised markets are considered important by creating incentives for farmers to allocate resources more efficiently and exploiting their sectoral comparative advantage. This has proved to be a pivotal source of productivity growth in the agricultural sectors of these countries”.

Fuglie and Schimmelfennig (2010)

Nin-Pratt et al (2009) provide further insights into the agricultural productivity performance of China and India by correlating structural breaks in TFP for the two countries with policy reforms. They too found strong acceleration in agricultural TFP in China after 1979 and in India after 1974, but found that China's agricultural sector has clearly outperformed India's due to more fundamental policy and institutional reforms.

In China, growth in the manufacturing sector was found to be important in absorbing agricultural labour, and in so doing, provided incentives for labour saving technology adoption in agriculture. The very limited changes to Indian agricultural and manufacturing policy are therefore found to explain India's slower productivity growth. They further found that as a result of policy reform in the two countries, GDP per capita more than doubled in India and increased seven-fold in China.

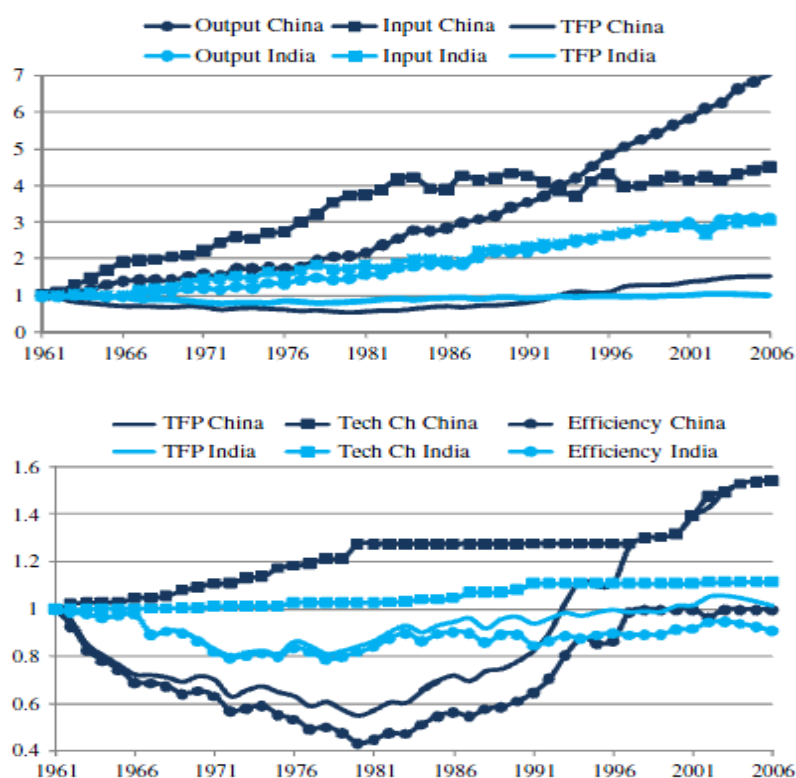
After the reforms in both countries, the authors report further differences, with China's growth linked to growth of the industrial sector, reduced trade barriers and foreign investment. India's reforms during the 80's were less aggressive, with an important outcome being 10 percent of China's population remaining below the international poverty line of one dollar per day, compared to more than one third of India's population.

From Figure 1 it can be seen that in China, TFP growth is low during the 1974-83 period, but strongly accelerates during the 1980's and 90's to around 5 percent per annum. In India, agricultural TFP was negative prior to 1974, and then increased gradually to only 0.3 percent over the 1991-2006 period. India's TFP growth was constrained due to a lack of improvement in technical efficiency which declined from 1961 to the late 1980's, but then increased slowly. In 2006 they found that agricultural production efficiency was 20 percent less than what it could be and similar to the 1960's. Significantly, the authors find that the data contradict the expected positive effect on India's agricultural productivity of the early green revolution period from 1965-1966 to the mid-1970s.

Results for the reform period in India and China are therefore found to be markedly different. They find that:

...agricultural growth benefited from more fundamental institutional reforms in agriculture that transformed the sector, increasing efficiency and accelerating technical change. No equivalent change is found in India, where agricultural policy changes were mainly adjustments to reduce the negative effects of policies that were not favourable for agriculture, in most cases by increasing subsidies for inputs, credit etc. After the 1991 reforms, the negative effects of macroeconomic policies on agriculture were substantially reduced, but no major policy changes toward agriculture were put in place. In contrast with China, no structural change in India's agricultural TFP series could be found during the reform years.

Figure A1. Cumulative agricultural productivity growth and its decomposition into technical change and efficiency in China and India



Source: Nin-Pratt et al (2009)

A further study linking policy reform with agricultural productivity is that titled ‘Reforms and agricultural productivity in Central and Eastern Europe and the former Soviet Republics: 1989-2005’ (Swinnen and Vranken, 2009). Importantly, the authors found that the reform of regulations associated with the communist era initiated major readjustments in factor allocations and consequent productivity growth.

A particularly important finding was that factor adjustments and the associated growth and productivity gains are critically dependent on certain preconditions, such as factor market reforms elsewhere in the economy. This in turn gives rise to some sense of ‘efficient reform sequencing’ as being highly relevant to how agricultural sector reforms are considered in transition economies.

These reform preconditions include:

- the ability of other sectors to absorb surplus agricultural labour thereby reducing labour availability in agriculture and encouraging new technology adoption;
- land reforms and privatisation which reduce adjustment costs in response to commodity deregulation and which enable the gains from agricultural policy reform to be distributed more efficiently; and
- access to commercial credit to enable efficient farm level capital upgrading decisions to be made in response to further policy reforms.

Reflecting the importance of these preconditions, the authors found that for each of Central Europe, the Balkans, the Baltics and the European CIS, partial productivity indicators fell following the policy reform period followed by recovery, with the extent of the declines and recoveries related to the extent of pre-reform distortions.

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LES PROBLÈMES DE CONCURRENCE DANS LES CHAÎNES D'APPROVISIONNEMENT AGRICOLES

*Par Scott Davenport **

Résumé

Les problèmes que posent les effets de la volatilité des prix des matières premières sur les pays en développement ainsi que leurs causes ont été largement décrits. Un facteur causal essentiel est le fait que les chaînes d'approvisionnement des produits agricoles et leurs prix sont mal intégrés aux marchés intérieurs et internationaux, ce qui produit souvent des secteurs agricoles sous-développés et sommaires, incapables de répondre efficacement aux demandes des marchés actuels et aux possibilités de croissance.

Le présent document se penche sur le rôle important que joue la concurrence, s'agissant d'assurer une transmission efficace des prix dans les chaînes d'approvisionnement agricoles et de stimuler ainsi l'investissement public et privé dans l'agriculture.

1. Introduction

La volatilité des prix des matières premières a des effets négatifs sur les pays en développement par le fait que l'alimentation constitue une composante importante du budget des consommateurs pauvres.

La volatilité des prix se poursuivra, à cause de facteurs comme les conditions saisonnières défavorables et le changement climatique. La réglementation mal conçue des chaînes d'approvisionnement dans les pays tant développés qu'en développement constitue toutefois un facteur causal supplémentaire important.

Par conséquent, une partie importante de la solution consiste à tendre à une transmission plus efficace des prix dans les chaînes d'approvisionnement agricoles. Les prix qui sont inutilement bridés par des contraintes réglementaires mal conçues limitent la capacité de l'agriculture à répondre aux demandes croissantes et changeantes des consommateurs et, surtout, ont un effet dissuasif sur l'investissement du secteur public et du secteur privé qui, sans cela, pourrait atténuer le risque et l'incertitude liés aux prix.

La politique relative à l'agriculture traditionnelle a son origine dans des objectifs de « développement » historiques. Presque partout, dès lors, l'agriculture a été fortement subventionnée et protégée de la concurrence par le subventionnement des intrants, les prix des matières premières subventionnés, des mécanismes de commercialisation réglementés et la protection des frontières.

Ces mesures étaient peut-être indiquées à certains stades du développement agricole, mais elles constituent aujourd'hui des entraves. Les signaux en termes de prix qui ne sont pas en accord avec la demande intérieure et internationale vont à l'encontre du développement durable, constituent des

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incitations à l'investissement public et privé inefficace et limitent l'ajustement, l'innovation et la productivité du secteur.

Il est dès lors inévitable qu'à l'avenir, les gouvernements progressistes vont s'employer de plus en plus à évaluer comment la réglementation des chaînes d'approvisionnement entrave la concurrence et la transmission des prix et vont développer leurs capacités d'évaluation dans ce domaine. Les sections qui suivent présentent une première analyse de la manière dont les environnements traditionnels de la politique agricole influent sur la concurrence, en se référant aux travaux menés récemment en Inde et financés par l'Australian Centre for International Agricultural Research (ACIAR).

2. Politique de la concurrence, réforme réglementaire et droit de la concurrence

Les discussions relatives à la politique de la concurrence sont souvent centrées sur l'application du droit de la concurrence et des pratiques commerciales, qui est au tout premier stade de son élaboration dans la plupart des pays en développement. La « politique de la concurrence » est toutefois une expression qui s'applique aussi à l'activité publique distincte de réforme réglementaire ou micro-économique. L'accent est mis ici sur l'abrogation de la réglementation qui restreint inutilement la concurrence et s'inspire des principes de « défaillance du marché ».

Le droit de la concurrence concerne de manière spécifique la réglementation du comportement anticoncurrentiel des entreprises, tandis que la réforme réglementaire implique la levée des entraves à la concurrence qui avantagent certains secteurs dans leurs « enchères » pour l'acquisition de ressources humaines et de moyens de production.

Il est néanmoins certain qu'il existe des liens et des synergies étroits entre l'application du droit des pratiques commerciales et la concurrence fondée sur la réforme réglementaire. Il faut, en particulier, mener les deux de front si l'on veut faciliter la transition harmonieuse de la « politique industrielle » au droit des pratiques commerciales, pour autant que de besoin.

Sur une note moins positive, les observations et les préoccupations récentes concernant la promotion de programmes de politique de la concurrence équilibrés sont :

- une tendance à adhérer avec enthousiasme au droit de la concurrence, presque comme pour se soustraire à la nécessité de s'attaquer aux restrictions réglementaires de la concurrence, significatives et en place de longue date ; et
- l'importance accordée à la politique de la concurrence, pourtant souvent le résultat de pressions internationales extérieures et, dès lors, centrée sur des aspects partiels comme la levée partielle de la protection des frontières ou la dérégulation de certains secteurs plutôt que sur le développement de la capacité intérieure à envisager des réformes « derrière la frontière » qui correspondent aux intérêts mêmes du pays en termes de progression.

3. Chaînes d'approvisionnement, transmission des prix, entraves à la concurrence et productivité

3.1 « Moteurs » de la productivité

Il existe des preuves incontestables que la réforme de la politique agricole orientée vers les marchés débouche sur une augmentation des revenus dans les zones rurales, une productivité agricole accrue et un recul de la pauvreté dans ces zones. La raison en est que les signaux envoyés par les prix constituent les « moteurs » de l'investissement public et privé efficace, non seulement dans l'agriculture mais aussi dans d'autres domaines importants comme le secteur des services généraux, le développement de

l'infrastructure et la recherche. Il s'ensuit que, si la réglementation de la chaîne d'approvisionnement est mal conçue et si les signaux envoyés par les prix sont faussés, l'investissement public et privé sera inefficace et ne cadrera pas avec l'exploitation des avantages des pays en termes de ressources naturelles, de concurrence et de production.

La Commission australienne de la productivité s'est livrée à une analyse utile de cette question (annexe 1) comportant un message clair : la réforme de la politique, les processus de révision de celle-ci et le caractère « ouvert » des économies constituent la clé des gains de productivité, et non pas la simple augmentation des dépenses en termes de subventions et de recherche-développement.

La Commission désigne utilement les changements des prix (termes de l'échange/pression sur les marges bénéficiaires) comme un « moteur » important de l'innovation et de la productivité, tandis que des facteurs tels que les nouvelles technologies, la capacité des agriculteurs à les appliquer et la recherche-développement et l'ingénierie sont désignés comme des « catalyseurs » (c'est-à-dire comme les réponses propices que stimulent les changements de prix).

Une compréhension et une appréciation claires du rôle que jouent les prix comme « moteurs » de la productivité revêt une importance vitale pour une détermination efficace de la politique à mener. On entend trop souvent proposer des solutions de politique publique largement techniques (plus de recherche, développement accru des systèmes d'irrigation, etc.) à des problèmes comme la volatilité des prix, le recul de la productivité agricole et la pauvreté. Il s'ensuit que les investissements dans la recherche et dans l'infrastructure rurale doivent être « orientés » par les pressions exercées par les prix et par les possibilités qui s'ouvrent, faute de quoi ils ne font qu'alourdir le terme « intrants » de l'équation de la productivité agricole.

Un résultat de l'absence de recours à une fixation efficace des prix est le ralentissement de la croissance de la productivité agricole dans beaucoup de pays en développement (voir l'analyse des évolutions de la productivité dans les économies en développement et en transition à la pièce jointe 1). Il résulte des quantités sans cesse croissantes d'intrants privés et publics qui sont actuellement appliqués à un ensemble fixe d'entreprises agricoles « favorisées », ce qui entraîne une baisse progressive de la réponse en termes d'offre. Malheureusement, ce phénomène va souvent aussi de pair avec des niveaux croissants de dégradation environnementale.

Ce qui précède mène naturellement à la conclusion que les réformes de la concurrence qui améliorent l'efficacité de la transmission des prix constituent peut-être une des priorités premières pour résoudre le problème de la volatilité des prix et garantir la sécurité alimentaire. Malheureusement, une grande partie de ce que prescrit la politique internationale et intérieure continue de traduire une fascination pour les solutions techniques. Les réformes de la concurrence et des institutions n'arrivent généralement qu'en deuxième place, ce qui traduit une absence très générale d'appréciation (ou de manque d'intérêt) pour la capacité dynamique de la réforme des prix pour stimuler et déterminer des niveaux efficaces d'activité productive et d'investissement.

Un souci connexe est que, dans un environnement où la production agricole reste largement faussée dans beaucoup de pays, il existe une possibilité que, dans certains cas, les efforts de recherche bien intentionnés centrés sur l'amélioration des pratiques agricoles et sur la création de nouvelles technologies aient pour effet d'isoler les agriculteurs par rapport aux pressions des prix intérieures et internationales et, de ce fait, ont pour effet de réduire les incitations pour les États à s'engager dans une réforme réglementaire de la chaîne d'approvisionnement.

Il s'ensuit qu'un aspect important pour la politique de la concurrence est notamment l'efficacité des processus administratifs par lesquels des ressources publiques sont affectées à l'agriculture dans des domaines comme la recherche internationale et le développement de l'infrastructure.

Enfin, il est intéressant de noter qu'un indicateur du centrage technique permanent d'une grande partie de la politique agricole est le souhait de beaucoup de pays d'avoir des objectifs chiffrés de croissance agricole comme élément central de la politique rurale. Ces objectifs sont presque toujours liés à des programmes permanents de subventions destinés à stimuler ou à forcer la croissance, alors que les résultats en termes de croissance devraient être déterminés de manière autonome par l'efficacité des contextes stratégiques.

3.2 Une réglementation défaillante entrave inutilement la concurrence et l'affectation des ressources

Il est important, lors de la mise en œuvre des régimes de politique de la concurrence, d'évaluer les effets tant positifs que négatifs que la réglementation publique peut avoir sur la transmission des prix et sur l'affectation des ressources.

Par exemple, parmi les formes courantes d'intervention dans les chaînes d'approvisionnement agricoles, il y a les subventions aux intrants (électricité, eau, engrais, etc.), les subventions aux extrants (subsidies (prix de soutien minimums), les mécanismes légaux de commercialisation en gros, les activités des autorités publiques du commerce et diverses formes de protection des frontières. Quelques remarques suivent pour chacune d'elles, fondées sur la recherche récente.

Les subventions aux intrants et aux extrants, désormais courantes dans beaucoup de pays et justifiées par des motifs de sécurité alimentaire ou de revenu agricole, faussent l'utilisation des ressources en maintenant les celles-ci dans l'agriculture ou en les attirant vers elle. En d'autres termes, elles ont un effet dissuasif sur l'ajustement de la main-d'œuvre et du capital au sein de l'agriculture, entre l'agriculture et les autres secteurs de l'économie, et entre les pays. Elles fournissent aussi à ceux qui en bénéficient un avantage concurrentiel par rapport à d'autres entreprises qui « enchérissent » pour acquérir le capital et la main-d'œuvre et ont ainsi l'effet supplémentaire et souvent imprévu, par le jeu de l'enchère, de faire augmenter les prix des intrants, de diminuer la compétitivité d'autres secteurs et d'affaiblir la croissance et le revenu nationaux et internationaux.

Vues sous l'angle des motifs d'équité ou de soutien des revenus, les subventions sont extrêmement inefficaces du fait que la majeure partie de l'aide va aux gros agriculteurs qui en ont le moins besoin et, en entravant la croissance sectorielle, a pour effet secondaire de diminuer en réalité les revenus actuels et futurs de l'agriculture, ce qui, curieusement, est l'effet inverse de leur but déclaré.

Les mécanismes légaux de commercialisation en gros, comme ceux instaurés par les lois sur la commercialisation des produits agricoles en Inde, ont un certain attrait en termes intuitifs mais se sont avérés restreindre inutilement la concurrence par des régimes de licences qui protègent les agents de commercialisation en gros. Ces contextes de politique ont pour effet que des intermédiaires ont pu s'arroger des marges de gros supérieures à la normale, ce qui fait augmenter les prix pour les consommateurs et diminuer les prix aux producteurs. En faussant les prix aux consommateurs et baisser les prix aux producteurs, et en agissant globalement pour augmenter les coûts de commercialisation et entraver les ventes directes, il apparaît aussi que cette réglementation a pour effet de ralentir plutôt que d'améliorer le développement de l'agriculture en Inde.

De même, la Food Corporation of India (FCI), créée en vue i) de fournir un soutien aux agriculteurs sous la forme d'un prix minimum ; ii) de distribuer des céréales alimentaires aux pauvres par

l'intermédiaire du régime public de redistribution et iii) de gérer le stock régulateur, s'est avéré extrêmement inefficace et contraire aux intérêts des consommateurs et des producteurs de denrées alimentaires. McCorrison et MacLaren (2011a) concluent, par exemple, que les deux premiers objectifs de la FCI pourraient être atteints par des mécanismes stratégiques plus efficaces (moins restrictifs de la concurrence). Ils ont estimé que, si un système de paiement différentiel remplaçait les marchés de la FCI fondés sur des prix de soutien minimums et si un programme de bons d'alimentation remplaçait le régime public de redistribution, le bien-être social pourrait augmenter de pas moins de 82 % suite aux prix plus faibles aux consommateurs et plus élevés aux producteurs.

Les protections des frontières, comme l'interdiction d'exportation des oignons imposée par le gouvernement de l'Inde en 2010 en vue d'abaisser les prix aux consommateurs, sont aussi fortement génératrices de distorsion et contraires à la promotion de la sécurité alimentaire. McCorrison et MacLaren (2011b) ont conclu que le poids de l'interdiction pesait lourdement sur les producteurs nationaux d'oignons sous la forme de prix plus bas des oignons. Vu sous l'angle de la réforme réglementaire, toutefois, les conclusions qui suivent sont essentielles :

- des chaînes d'approvisionnement intérieures plus concurrentielles, comme les produirait la réforme des marchés agricoles de gros et la FCI, auraient fait baisser les prix des oignons aux consommateurs de pas moins de 44 à 58 %, et augmenter les prix aux producteurs de 15 à 19 %, rendant ainsi inutile l'interdiction d'exportation ; et
- bien que l'interdiction d'exportation n'ait changé en rien le degré de variabilité des prix aux consommateurs, augmenter l'efficacité des entreprises actives au sein des chaînes d'approvisionnement intérieures produirait une diminution de 46 % de la variabilité des prix intérieurs à la consommation.

Enfin, il faut dire que ces diverses réglementations de la chaîne d'approvisionnement agricole agissent chacune séparément pour inhiber le développement de l'agriculture, mais que leur effets, quant ils sont combinés, sont potentiellement inquiétants, avec un héritage permanent et persistant d'une agriculture essentiellement de subsistance et de pauvreté régionale.

4. Politique de concurrence

La politique de la concurrence implique que les réglementations fassent l'objet de révisions régulières conformément aux principes de la concurrence (ou du « bénéfice collectif »). Il faut généralement pour cela i) que les objectifs de la réglementation soient clairement définis ; ii) qu'il soit évalué si ces objectifs réglementaires se rapportent clairement aux solutions à apporter aux formes acceptées de défaillance du marché ; iii) que l'on vérifie si la réglementation est celle qui restreint le moins la concurrence ; et iv) que l'on évalue si les avantages de l'intervention réglementaire sont susceptibles de l'emporter sur les coûts.

Si cette vérification était appliquée à chacune des formes traditionnelles de réglementation du secteur examinées précédemment, la conclusion serait probablement qu'aucune d'elles ne répond efficacement à une forme quelconque de défaillance du marché (défaillances en termes d'information, comportement anticoncurrentiel, externalités ou fourniture de biens publics) et, par conséquent, en faussant les prix et la concurrence, elles auront eu dans la plupart des cas une série d'effets non voulus (en termes de coûts) aboutissant à une escalade de l'inflation des prix des denrées alimentaires et au ralentissement de la croissance de la productivité.

Cela ne signifie toutefois pas que les pouvoirs publics ne doivent pas intervenir dans les chaînes d'approvisionnement agricoles, mais simplement qu'il existe de meilleures manières de le faire, qui nécessitent généralement qu'ils cessent de s'ingérer directement dans les affaires des entreprises agricoles

et se concentrent plutôt sur le renforcement des marchés sur lesquels elles opèrent. Suivent ci-dessous des exemples d'intervention des pouvoirs publics extrêmement positifs et favorables à la concurrence.

- Beaucoup de problèmes auxquels est confronté le secteur agricole concernent les défaillances en termes d'information, en particulier dans des domaines comme l'adoption de technologies, la gestion environnementale et la commercialisation des matières premières. Dans les pays en développement où l'ajustement de l'agriculture a été entravé, il s'ensuit que tout passage à une réglementation davantage orientée vers les marchés nécessitera des efforts sensiblement accrus et permanents dans ce domaine.
- Le comportement anticoncurrentiel peut être efficacement résolu par la législation sur la concurrence ou les pratiques commerciales. Malheureusement, la réglementation traditionnelle s'est généralement attachée aux différences de position de force sur le marché entre les acheteurs et les vendeurs. Il est toutefois bien admis aujourd'hui que ces différences ne constituent pas en soi une défaillance des marchés mais qu'elles sont une caractéristique normale de ceux-ci. En revanche, une défaillance légitime des marchés est celle de l'abus de position dominante, qui est généralement sporadique plutôt que permanente et concernera normalement certaines entreprises en particulier plutôt que l'ensemble du secteur. Il s'ensuit que ces mécanismes législatifs concernant les marchés, comme ceux qui concernent la fixation des prix, surréglementent le problème et donnent ainsi lieu à une série de distorsions de ressources inhérentes (coûts).
- Les externalités, comme les coûts négatifs en termes d'eau et de pollution imposés à l'agriculture par les autres secteurs, et les menaces qui pèsent sur l'agriculture en terme de biosécurité, peuvent souvent être résolues par une combinaison de programmes d'information et de réglementation.

Réforme de la chaîne d'approvisionnement et nouvelles perspectives pour l'agriculture

Une parenthèse intéressante ici est la possibilité que, suite aux nouvelles initiatives en matière de recherche et de politique, l'agriculture puisse jouer un rôle important en contribuant à s'attaquer aux externalités comme le réchauffement de la planète. Diverses formes de séquestration du CO₂ dans les sols agricoles et la reconnaissance du fait que les compensations carbone agricoles pourraient diminuer les coûts de réduction des GES pour d'autres secteurs et offrir à l'agriculture de nouveaux flux de revenus pourraient aussi faciliter le changement de politique dans le sens du renoncement aux régimes de subventions existants (voir Gujral, Davenport et Jayasuriya 2010).

- Les biens publics (et industriels), comme la mise en place de l'infrastructure, offrent de larges possibilités aux pouvoirs publics pour soutenir l'agriculture par des mesures qui augmentent directement la compétitivité et la croissance du secteur. Il existe par ailleurs un éventail d'investissements renforçateurs de l'efficacité dans lesquels, en l'absence de mécanismes de financement du secteur, les différentes entreprises auront tendance à sous-investir, comme certains types de recherche-développement et de lutte contre les parasites et les maladies.
- Les pouvoirs publics ont également un rôle important à jouer en termes de réponse aux besoins d'équité sociale et de bien-être des pauvres et, pour bon nombre de pays en développement, découpler l'aide publique des prix des intrants et extrants agricoles peut entraîner certaines difficultés, en particulier à court terme. Gérer cette transition est dès lors un aspect important pour la politique publique et un domaine dans lequel la réussite ou l'échec des programmes d'aide sociale dans les pays en développement mérite d'être examiné de près et de faire l'objet d'échanges d'informations.

Toutefois, il est aussi certain que, pour la plupart des pays en développement, la meilleure forme d'aide sociale sera constituée par les perspectives de croissance et d'ajustement qui vont de pair avec la réforme réglementaire des chaînes d'approvisionnement agricole du pays. On notera aussi que ces perspectives seront complétées par la suppression des entraves réglementaires qui limitent la migration de la main-d'œuvre agricole vers d'autres secteurs de l'économie.

On voit comment, globalement, une « politique agricole » basée sur ces types d'initiatives publiques orientées vers les marchés peut être considérée comme un portefeuille d'interventions publiques complémentaires susceptibles d'être adaptées au fil du temps aux conditions changeantes du marché et qui ajoute constamment de la valeur au secteur sous forme de dividendes permanents apportés par l'efficacité du marché.

4.1 Politique de la concurrence : institutions, principes et recherche en politiques publiques

Les réformes de la concurrence sont « sensibles » parce qu'elles impliquent la redistribution des revenus au détriment de certains groupes d'intérêts bien représentés et au profit de la communauté en général. Des institutions et des processus doivent dès lors être créés qui soient capables d'identifier et de communiquer ces arbitrages de manière à engager un dialogue positif avec les parties prenantes et la communauté au sens large.

Une question importante et qui justifie dès lors plus d'attention dans un contexte de pays en développement est l'efficacité des mécanismes institutionnels nouveaux par lesquels la politique de la concurrence peut être mise en œuvre. En Australie, par exemple, le gouvernement national et ceux des États ont convenu d'un processus par lequel i) les recettes fiscales supplémentaires dont bénéficie le gouvernement national suite à un programme futur de réformes augmentant l'efficacité ont été estimées ; ii) le calendrier des futures réformes réglementaires des gouvernements national et des États a été établi et convenu ; iii) un calendrier annuel de paiements aux États est fixé pour l'examen et la mise en œuvre réussie des réformes convenues.

Par ailleurs, une commission nationale de la concurrence et des consommateurs a été créée en vue de vérifier la rigueur avec laquelle les révisions de la législation ont été menées. Des sanctions sont prévues pour les gouvernements des États : le gouvernement national peut suspendre les paiements au titre de la politique de la concurrence lorsqu'il juge que ceux-ci n'ont pas respecté leurs obligations de révisions (Davenport, 2007).

Outre des institutions efficaces et la volonté de soumettre à un examen permanent la réglementation agricole (et autre) qui limite sensiblement la concurrence, les processus de révision seront complétés par des initiatives gouvernementales visant à engager le dialogue avec la communauté au sens large et à modifier les attitudes de celle-ci, notamment :

- le suivi régulier des revenus agricoles et de la productivité du secteur en vue de mettre en évidence les effets de la réforme (ou de l'absence de réforme) ; et
- des programmes permanents de recherche indépendante portant sur les politiques publiques, dans le but d'identifier les possibilités essentielles de réforme et d'évaluer les mesures de réforme déjà prises à ce jour afin d'améliorer les dividendes du portefeuille réglementaire du gouvernement en termes de bien-être et de productivité.

5. Conclusions

La réforme des entraves réglementaires dans les chaînes d'approvisionnement agricoles offrent peut-être les possibilités d'avancées les plus importantes en termes de réponse à la volatilité des prix des matières premières et de sécurité alimentaire internationale. Pourtant, l'importance de la concurrence pour une transmission efficace des prix et le rôle fondamental que jouent les prix, s'agissant d'orienter l'investissement public et privé, demeurent sous-estimés.

Tout plaide dès lors en faveur du réexamen et de la revalorisation de la politique de la concurrence et des cadres de politique publique associés, en mettant fortement l'accent sur des mécanismes institutionnels adéquats et sur un meilleur équilibre entre la réforme réglementaire fondée sur la concurrence et l'application du droit de la concurrence.

Il existe aussi d'excellentes raisons de relever fortement le niveau des efforts internationaux de recherche et de communication relatives aux facteurs qui expliquent la productivité agricole pays par pays et d'adopter un cadre économique moins ambigu en ce qui concerne les « moteurs » et les « catalyseurs » de la productivité et de la croissance des revenus.

Enfin, compte tenu de la nécessité d'une réforme réglementaire significative de la chaîne d'approvisionnement dans de nombreux pays et d'une accélération des rythmes d'ajustement, il conviendra également d'examiner attentivement dans quelle mesure le caractère administratif et technique des programmes d'aide et de recherche internationaux et intérieurs atténue actuellement les signaux en termes de prix qu'envoie la chaîne d'approvisionnement agricole.

ANNEXE 1: RÉFORMES DES POLITIQUES ET PRODUCTIVITÉ

-- Extrait de Chadha & Davenport (2010) – La politique agricole dans les pays du groupe BRIC --

Les « moteurs » de la productivité agricole font depuis longtemps l'objet de recherches. Toutefois, les analystes se sont employés à mettre au point un cadre de politique publique utile qui rende correctement compte des facteurs causaux concernés.

La Commission australienne de la productivité a contribué à corriger ce problème par le chapitre thématique de son rapport annuel 2007-2008 intitulé « Enhancing Australia's Productivity Growth » (*Améliorer la croissance de la productivité en Australie*) (Commission de la productivité, 2008). Ce document analyse la croissance multifactorielle de la productivité de l'Australie en augmentation dans les années 1990 et le ralentissement qui a suivi après l'année 2000, l'agriculture étant un des secteurs les plus affectés. La Commission note qu'à la fin des années 1980 et au cours des années 1990, la concurrence sur le marché s'est avivée en raison de facteurs tels que :

- la réforme du commerce international
- la flexibilité accrue du marché du travail
- la stabilité macroéconomique
- l'efficacité des marchés financiers
- une meilleure réglementation des fournisseurs d'infrastructure.

Ceci a rendu possible la réorganisation des pratiques de production et de travail, ce qui a permis aux entreprises de réduire les coûts et de tirer profit de l'évolution des technologies. La Commission s'est ensuite demandée si ces réformes avaient suivi leur cours, en prédisant que « d'autres réformes de la politique sont nécessaires si l'on veut que l'Australie continue d'améliorer son niveau de vie tout en relevant les défis des changements démographiques et environnementaux ».

Le cadre de productivité établi par la Commission cite les « incitations », la « flexibilité » et les « capacités » comme étant les facteurs qui sous-tendent l'innovation.

Comprendre l'innovation

Incitations – les pressions et les disciplines externes qui incitent les organisations à être performantes.

Flexibilité – la capacité d'opérer des changements pour répondre efficacement aux pressions du marché (incitations).

Capacités – le capital de connaissances humaines ainsi que l'infrastructure et les institutions qui sont nécessaires pour opérer les changements requis.

Surtout, la Commission souligne que l'innovation n'est pas simplement une question de dépenses en recherche-développement mais aussi d'acquisition de connaissances et d'expérimentation permanentes et

de réponse aux besoins des clients et, par conséquent, les incitations, la flexibilité et les capacités sont des facteurs fortement interactifs.

Le modèle de recherche-développement conditionné par l'offre est remis en question, parce que des incitations sont nécessaires pour stimuler le changement, offrir des possibilités et appliquer les capacités. La Commission conclut que « la concurrence offre l'incitation fondamentale aux organisations pour opérer les changements nécessaires pour réussir, par l'innovation et les gains de productivité ».

En ce qui concerne la politique agricole, la Commission note que les obstacles au commerce international et la contestabilité intérieure peuvent éteindre les incitations à l'innovation et à la productivité, mais que c'est aussi le cas pour les subventions à la production et à l'investissement, qui isolent les entreprises de leurs rivales et concurrentes.

Les autres preuves apportées par la Commission à l'appui du cadre concernent notamment le fait qu'une grande partie de l'innovation dont dépendent les améliorations de la productivité aux niveaux de l'entreprise et de l'ensemble de l'économie n'inclut pas des technologies mises au point par des organisations innovantes. Pour la majeure partie de l'activité d'innovation, la Commission affirme dès lors que la concurrence fournit suffisamment d'incitations pour les entreprises privées sans nécessiter l'aide du contribuable. Par conséquent, tout en reconnaissant l'importance de facteurs tels qu'un niveau d'études et de recherche-développement adéquat comme conditions nécessaires, celles-ci ne sont pas suffisantes et ne stimuleront pas à elles seules la productivité. Les moteurs fondamentaux de la croissance de la productivité sont bien plutôt ceux présentés par la réforme de la politique.

Le cadre de politique publique de la Commission revêt donc une importance fondamentale, s'agissant de débloquer de nouveaux cycles d'amélioration de la productivité dans le secteur agricole de nombreuses économies en développement et en transition. Le message clair est que la réforme des politiques, les processus de cette réforme et le caractère « ouvert des économies » sont la clé de ces gains de productivité, et non pas la simple augmentation des dépenses en matière de subventions et de recherche-développement.

Le lien entre la réforme des politiques et la productivité : quelques études récentes

Fuglie et Schimmelfennig (2010) analysent la croissance de la productivité agricole en Chine, en Inde, en Indonésie, dans l'ex-Union soviétique et en Europe de l'Est, pays qui sont d'importants producteurs de produits agricoles et qui sont donc importants pour la sécurité alimentaire internationale. Se référant à une série d'études, ils signalent que l'Inde et la Chine ont affiché des rythmes accélérés de croissance multifactorielle de la productivité après des réformes de la politique et des institutions, mais que la Chine a connu une croissance de loin supérieure, qui est attribuée à des changements institutionnels plus fondamentaux et à une plus grande transformation structurelle de son économie.

En Indonésie, une source importante de croissance de la productivité a été constituée par les perspectives croissantes associées à « une plus grande diversification en matières premières d'exportation à forte valeur et à la diminution de la dépendance par rapport aux cultures alimentaires traditionnelles ». Dans les républiques de l'ex-Union soviétique et en Europe de l'Est, ils concluent que la croissance de la productivité est alignée sur les divers stades de transition de ces économies, tous les pays présentant un lien étroit entre la croissance de la productivité et le rythme des réformes économiques et institutionnelles.

Ils signalent en outre que, pour la période 1978-2004, la production agricole a augmenté de 4,6 % en Chine, de 4 % en Indonésie et de 2,5 % en Inde. Les circonstances qui ont contribué à ces résultats étaient les taux de croissance réduits des populations rurales en Chine et en Indonésie suite aux taux d'absorption améliorés dans d'autres secteurs de l'économie, contrairement à la population rurale de l'Inde, en expansion.

La conclusion essentielle

« Dans les trois pays, les réformes des institutions et des politiques qui ont renforcé l'agriculture paysanne et libéralisé les marchés sont considérées comme importantes en ce qu'elles ont créé des incitations, pour les agriculteurs, à affecter plus efficacement les ressources et à exploiter leur avantage sectoriel comparé. Cela s'est avéré être une source capitale de croissance de la productivité dans les secteurs agricoles de ces pays. »

Fuglie et Schimmelfennig (2010)

Nin-Pratt et al. (2009) fournissent d'autres indications sur la performance en termes de productivité agricole de la Chine et de l'Inde en corrélant les ruptures structurelles dans la productivité totale des facteurs (« PTF ») pour les deux pays qui ont mené des réformes des politiques. Eux aussi ont conclu à une forte accélération de la PTF en Chine après 1979 et en Inde après 1974, mais que le secteur agricole de la Chine l'a clairement emporté sur celui de l'Inde parce que les réformes des politiques et des institutions y ont été plus radicales.

En Chine, ils ont conclu que la croissance du secteur manufacturier est importante pour l'absorption de la main-d'œuvre agricole, ce qui fournit des incitations à l'adoption de techniques économes en main-d'œuvre dans l'agriculture. Ils en ont conclu que les changements très limités de la politique agricole et manufacturière en Inde expliquaient la croissance plus lente de la productivité dans ce pays. Ils ont conclu en outre que, suite à la réforme des politiques dans les deux pays, le PIB par habitant a plus que doublé en Inde et a septuplé en Chine.

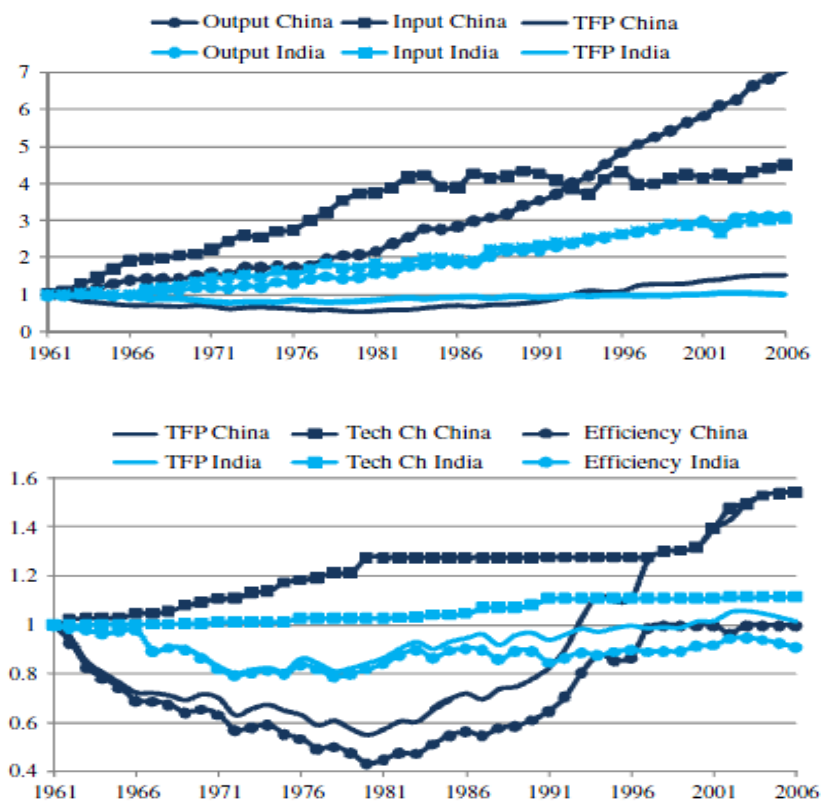
Après les réformes dans les deux pays, les auteurs signalent d'autres différences, la croissance de la Chine étant liée à celle du secteur industriel, à la levée partielle des obstacles aux échanges et à l'investissement étranger. Les réformes opérées par l'Inde dans les années 1980 ont été moins agressives. Un résultat important est que 10 % de la population chinoise demeure sous le seuil international de pauvreté d'un dollar par jour, contre plus d'un tiers de la population de l'Inde.

On voit à la figure 1 qu'en Chine, la croissance de la PTF est faible au cours de la période 1974-1983, mais qu'elle s'accélère fortement dans les années 1980 et 1990 pour atteindre environ 5 % par an. En Inde, la PTF était négative avant 1974, puis elle a augmenté progressivement pour atteindre 0,3% à peine au cours de la période 1991-2006. La croissance de la PTF en Inde a été inhibée par l'absence d'amélioration de l'efficacité technique, qui a baissé entre 1961 et la fin des années 1980, mais a augmenté lentement ensuite. En 2006, les auteurs concluent que l'efficacité de la production industrielle était inférieure de 20 % à ce qu'elle aurait pu être et qu'elle est similaire à celle des années 1960. Surtout, les auteurs concluent que les données contredisent l'effet positif attendu sur la productivité agricole de l'Inde du début de la période de la révolution verte, des années 1965-1966 au milieu des années 1970.

Les auteurs concluent que les résultats de la période des réformes en Inde et en Chine sont sensiblement différents. Ils estiment qu'en Chine

...la croissance agricole a bénéficié de réformes institutionnelles plus fondamentales en agriculture qui ont transformé le secteur, augmenté l'efficacité et accéléré le changement technique. On ne trouve aucun changement équivalent en Inde, ou les changements de la politique agricole ont consisté principalement en ajustements pour réduire les effets négatifs de politiques qui n'étaient pas favorables à l'agriculture, dans la plupart des cas en augmentant les subventions pour les intrants, le crédit, etc. Après les réformes de 1991, les effets négatifs des politiques macroéconomiques sur l'agriculture ont été sensiblement diminués, mais aucun changement majeur de politique n'a été mis en place pour l'agriculture. Contrairement à la Chine, l'on n'a pu constater aucun changement structurel dans les séries de PTF pendant les années de la réforme.

Figure A1. Croissance cumulée de la productivité agricole et sa décomposition en changement technique et efficacité en Chine et en Inde



Source : Nin-Pratt et al (2009)

Une autre étude reliant la réforme des politiques à la productivité agricole est celle intitulée « Reforms and agricultural productivity in Central and Eastern Europe and the former Soviet Republics: 1989-2005 » (*Réformes et productivité agricole en Europe centrale et orientale et dans les républiques de l'ex-Union soviétique*) (Swinnen et Vranken, 2009). Les auteurs ont formulé la conclusion importante que les réformes des réglementations associées à l'ère communiste ont été à l'origine de réajustements majeurs dans l'affectation des facteurs et de la croissance de la productivité qui a suivi.

Une conclusion particulièrement importante était que l'ajustement des facteurs et les gains de croissance et de productivité associés sont fortement dépendants de certaines conditions préalables, notamment les réformes du marché des facteurs ailleurs dans l'économie, ce qui donne à penser que « l'enchaînement efficace des réformes » est fortement pertinent par rapport à la manière dont les réformes du secteur agricole sont envisagées dans les économies en transition.

Ces conditions préalables des réformes sont :

- la capacité d'autres secteurs d'absorber la main-d'œuvre agricole excédentaire, de réduire ainsi la disponibilité de main-d'œuvre en agriculture et d'encourager l'adoption de nouvelles technologies
- les réformes agraires et la privatisation, qui réduisent les coûts d'ajustement et réponse à la dérégulation des matières premières et permet de répartir plus efficacement les gains résultant de la réforme des politiques agricoles

- l'accès au crédit commercial pour permettre des décisions efficaces de modernisation des moyens de production agricoles en réponse aux réformes nouvelles des politiques.

Compte tenu de l'importance de ces conditions préalables, les auteurs ont conclu que, pour chacun des pays d'Europe centrale, des Balkans de la Baltique et des pays européens de la CEI, les indicateurs partiels de productivité ont baissé après la période de réforme des politiques pour se redresser ensuite, l'ampleur des baisses et des redressements étant lié au degré des distorsions existant avant les réformes.

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COMPETITION ISSUES IN THE AGRICULTURE SECTOR

*By Bibek Debroy**

1. Introduction

In national income accounts, there is a simple classification of sectors into primary, secondary and tertiary.¹ For purposes of this paper, we will interpret primary products and agriculture both in a narrow sense and in a wide sense. We will interpret it in a narrow sense because we will exclude forestry and fishing. But we will interpret it widely because we will include not only agriculture, as defined for purposes of national accounts, but also inputs (seeds, fertilizers, agro-chemicals, bio-technology), processing, storage, trade and distribution. It is necessary to make this point because general equilibrium theory has a definition of competitive markets and assumptions on competition. In looking for a sector where those assumptions might be somewhat true, one often points to the agricultural sector. This is simply not true. Apart from other elements in the supply chain, with domestic and foreign investments and corporate entry into agriculture, it is not even true of the production process.

Both agriculture and competition policy have figured in international trade negotiations, multilateral, regional and bilateral. Since these negotiations involve countries, the focus has been on cross-border measures. However, barriers to competition aren't invariably cross-border. Indeed, in a sector like agriculture, anti-competitive policies are fundamentally internal and are often a function of government policies that prevent competition. Using examples from India, which find parallels in other developing countries too, this paper documents government intervention in output and input markets that prevent competition in agriculture. With some liberalization, competition policy instruments have begun to focus on some aspects of the agro distribution chain that involve the private sector. While this is important, complete competition also requires elimination of government intervention that prevents competition.

Before the Uruguay Round (1986-94) of negotiations, agriculture was outside the ambit of trade liberalization. Whether it is in the Uruguay Round agreement or in subsequent negotiations under the Doha Development Agenda (DDA), the focus has been more on trade, such as exports and market access. Trade and non-trade distinctions can be artificial and indeed, domestic support also forms part of the WTO framework. However, the point is that negotiations through WTO, during the Uruguay Round and through DDA, are not really meant to address issues of non-trade competition in agriculture, since those tend to be domestic in nature. At best, they can be addressed only if they distort trade. Having said this, there is a difference between existing WTO members and newly acceding countries. In the latter case, disciplines can often be imposed that cannot be imposed on existing members. Bulgaria (1996), China (2001), Armenia (2003), Cambodia (2004), Vietnam (2007) and Ukraine (2008) are examples of this.

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¹ It is worth bearing this in mind when one considers figures like shares of agriculture in GDP or shares of population employed in agriculture. These may be declining, even in developing countries. However, interpreted in the broad sense of an agricultural supply chain that extends from the farm to the fork, the importance of food and agriculture does not decline commensurately.

There is an analogy with competition policy too. Within WTO, competition policy issues are presently dormant. But even if they were to be discussed, they would at best be restricted to questions of interaction between trade and competition policy. Trade negotiations, multilateral, regional or even bilateral, can at best provide triggers for pro-competitive reform in agricultural markets. However, this has been compounded by a food security issue. At one level, food security is posed as a balance of payments problem, that is, a country's ability to pay for its required imports of food. However, more commonly, food security is defined as an individual household's access to food, or its lack, falling short of chronic instances of famine. Food security has become even more of an issue because there has been switch of farmland to bio-fuels, world oil prices have increased, there has been the phenomenon of population growth, agricultural land has been lost to urbanization and industrial development, there have been climate change effects, soil degradation and increasing growth-related consumption demand from countries like China and India. A quote will illustrate the problem. "Rising food and fuel prices both have adverse effects on poverty; however, for the direct poverty impact, the main concerns typically relate to the higher cost of food especially for the urban poor. The main reason is that the share of household expenditure spent on food typically far exceeds the direct share of oil-related products and services, particularly in emerging and developing economies. In large emerging economies, the share typically exceeds 25 percent, and in developing economies, it is often above 50 percent... In advanced economies, the share of household expenditure on food in total income is much lower, but still above 10 percent... Within countries, the urban poor are the most affected by high food and fuel prices, as the rural poor are more likely to be at least partially self-sufficient in food supplies. Low-income households are least able to protect their income from inflation, but domestic distributional issues are important in analyzing the most vulnerable groups, not only to higher inflation, but equally as important, to changes in relative prices. The urban poor, together with food-deficit farmers, are the worst affected by food price inflation, because they rely on food purchases for their food supply. Although better protected, even food-surplus farmers may not benefit from the food price surge, as the pass-through of higher input costs (fuel, fertilizer, and transportation) is often faster than that of world market prices for food. Finally, the share of undernourished could rise rapidly above the current 40 percent of total population in developing countries."² There is also a trade-off, because higher food prices raise incomes of those who sell food, such as those in rural areas. But they hurt net food consumers, such as the urban poor. The effects vary from commodity to commodity and country.³

Logically, the phenomenon of food price inflation should trigger and stimulate pro-competitive agricultural reform, so that supply-side changes can occur. But in practice, it often leads to greater distortions and State intervention, at least in the short-term. This is perverse. The underlying reasons behind higher food prices aren't going to go away. Therefore, the supply-side responses require pro-competitive agricultural reform. The rest of the paper focuses on these issues.

2. Cross-border distortions

In this section, we flag cross-border distortions. But we will deliberately gloss over these, since there is plenty of literature, through the WTO and DDA negotiations, on tariffs, tariff rate quotas (TRQs), safeguards, misuse of sanitary and phytosanitary measures, export subsidies, export controls, export taxes, State trading and other NTBs (non-tariff barriers). For example, Table 1 shows instances of export controls in developing countries.⁴ In the developing country context, distortions caused by State trading are

² *Food and Fuel Prices – Recent Developments, Macroeconomic Impact, and Policy Responses*, IMF, 30 June 2008, <http://www.imf.org/external/np/pp/eng/2008/063008.pdf>.

³ See the simulations in Maros Ivanic and Will Martin, "Implications of Higher Global Food Prices for Poverty in Low-Income Countries," *Policy Research Working Paper*, World Bank, No. 4594, April 2008.

⁴ The export bans/licensing and export duties/taxes lists are compiled from "Recent Trends in Export Restrictions," J. Kim, *OECD Trade Policy Working Papers*, No.1, OECD, July 2010. However, in the

even more important for imports. China, Indonesia, India, Mexico and Pakistan are instances. Food-grains and dairy are sectors usually characterized by the prevalence of State trading.

Table 1: Export controls in developing countries

Export bans/licensing	Argentina, Bahrain, Bangladesh, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Brunei, Burundi, Cameroon, China, Congo, Costa Rica, Djibouti, Dominican Republic, Ecuador, Fiji, Ghana, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Jordan, Kenya, Lesotho, Madagascar, Maldives, Mali, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Namibia, Nicaragua, Niger, Nigeria, Oman, Qatar, Pakistan, Panama, Peru, Philippines, Senegal, Sierra Leone, Solomon Islands, South Africa, St. Kitts and Nevis, St Lucia, St. Vincent and the Grenadines, Tanzania, Thailand, Turkey, Uganda, Zambia
Export duties/taxes	Angola, Argentina, Barbados, Belize, Benin, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, China, Colombia, Congo, Costa Rica, Djibouti, Ecuador, Fiji, Gambia, Ghana, Guatemala, Guinea, Guyana, Kenya, India, Indonesia, Madagascar, Malaysia, Mexico, Mongolia, Mozambique, Namibia, Niger, Nigeria, Pakistan, Panama, Paraguay, Philippines, Solomon Islands, Sierra Leone, Sri Lanka, St Kitts and Nevis, Suriname, Swaziland, Tanzania, Thailand, Togo, Turkey, Uganda, Uruguay, Zambia
State trading	Ethiopia, Indonesia, India, Malawi, Mali, Tanzania, Tunisia.

The pertinent issue is the following. Free cross-border trade encourages competition and brings efficiency. Trade also performs the function of reducing price volatility. However, food price increases and volatility, spliced with non-movement on DDA, have led to incremental distortions in agricultural trade. Despite on-going reforms there are still significant barriers to trade in agricultural commodities among developing countries and between developing and OECD countries. They contribute to the “thinness” of international markets that has been blamed for some of the volatility experienced in recent years. Average tariffs on agricultural and food are high for middle income and high income countries, 25% and 22% respectively. Protectionism on agricultural products is not only higher than on non agricultural products (by a factor of four), it is also much more volatile. Agricultural trade policies are designed to insulate domestic prices from world markets and lead to pro-cyclic effects: protection decreases when prices are high, increasing demand on world markets, and increases when world prices are low – effectively operating as a variable levy. Therefore, large country trade policies increase world price volatility and create negative externalities for smaller countries. A conclusion of the Doha Round will reduce the scope to implement destabilizing policies on world markets by reducing the bound level of tariffs and subsidies.”⁵ In response to the price volatility encountered in 2007-08, out of 81 developing countries surveyed by FAO, 43 reduced import taxes and 25 banned exports or increased export taxes.⁶

A policy brief by the International Food Policy Research Institute (IFPRI) underlines the nature of the problem.⁷ “Price controls and changes in import and export policies may begin to address the problems of

export bans/licensing category, we have excluded prohibitions that are explicitly on grounds of safety, health, environment or protection of endangered species. The State trading list is based on Agricultural state trading enterprises and developing countries: some issues in the context of the WTO negotiations,” R. Pearce and J.A. Morrison, FAO Commodities and Trade Division, <http://www.fao.org/DOCREP/005/Y3733E/y3733e07.htm#fn58>, and is not as comprehensive a list. However, it is meant to be illustrative. State trading is not a developing country phenomenon alone.

⁵ *Price Volatility in Food and Agricultural Markets: Policy Responses*, June 2011, http://www.wto.org/english/tratop_e/agric_e/report_g20_foodpr11_e.pdf

⁶ *Ibid.*

⁷ “Rising Food Prices, What Should Be Done?” Joachim von Braun, *IFPRI Policy Brief*, April 2008, <http://www.ifpri.org/sites/default/files/publications/bp001.pdf>

poor consumers who find that they can no longer afford an adequate diet for a healthy life. But some of these policies are likely to backfire by making the international market smaller and more volatile. Price controls reduce the price that farmers receive for their agricultural products and thus reduce farmers' incentives to produce more food. Any long-term strategy to stabilize food prices will need to include increased agricultural production, but price controls fail to send farmers a message that encourages them to produce more. In addition, by benefiting all consumers, even those who can afford higher food prices, price controls divert resources toward helping people who do not really need it. Export restrictions and import subsidies have harmful effects on trading partners dependent on imports and also give incorrect incentives to farmers by reducing their potential market size. These national agricultural trade policies undermine the benefits of global integration, as the rich countries' longstanding trade distortions with regard to developing countries are joined by developing countries' interventions against each other." This quote spills over from cross-border issues to the domestic. And indeed, in the agricultural context, policy-induced distortions that prevent competition are more internal and domestic. In subsequent sections, we now turn to these issues.

3. Anti-competitive policies in domestic output markets

Let us digress a bit on the Indian experience, because it is symptomatic of what happens in many developing countries. Development is correlated with a reduction in the number of people who are employed in agriculture. In relatively richer parts of the world, people have been pulled out of agriculture and into more productive activities. Indeed, there are several different types of movements that happen. People who remain in agriculture move away from producing food-grains to other forms of crop output, such as horticulture. There is commercialization and diversification. Others move away to allied activities like aquaculture, dairy-farming, floriculture and poultry. Still others move away from farm activities entirely to non-farm activities, such as rural industry and services. Out India's rural labour force of roughly 300 million, 72.7% still earns a living from agriculture.⁸ This may have declined from 81.4% in 1983, but is still inordinately high. The decline hasn't been fast enough. But some comments are in order about such figures. First, these refer to usual principal and subsidiary status, implying that there may be a secondary occupation outside agriculture. Indeed, with the seasonal nature of the bulk of India's agriculture, that is invariably the case. Second, there are wide variations across States and the pace of decline also varies across States. Third, there are gender differences. The farm to non-farm transition happens first for males and a feminization of the agricultural work force occurs. Fourth, out of those who are in agriculture, roughly two-thirds (64%) describe themselves as self-employed, that is, they are farmers. The remaining roughly one-third (36%) are wage workers, almost invariably on casual basis. Fifth, 13.1% of rural households are landless and only 11.2% have medium or large holdings, defined as those that are more than 2 hectares. 44.8% of land-holdings are sub-marginal (0.01-0.40 hectares), 18.7% are marginal (0.41 to 1 hectare) and 12.2% are small (between 1 and 2 hectares). This kind of smallholder agriculture cannot exploit economies of scale and scope and is subsistence-level, inefficient and relatively unproductive. For development to happen, there must be a graduating out and a movement up the value chain of productivity.

Since people always want to better their lives, there must be a reason why this farm to non-farm transition doesn't happen and there are several distortions that are policy-induced. All these tend to prevent competition. In output markets, these policies segment markets, or lead to perverse price signals. First, there are physical government-imposed restrictions on production, marketing and distribution. These are usually through the Essential Commodities Act (ECA) and the Agricultural Produce Marketing and Control (APMC) Acts. The ECA was originally enacted in 1955 and traces its origins to scarcities created by World War II. This is legislation, "to provide, in the interest of the general public, for the control of the

⁸ *Report on Conditions of Work and Promotion of Livelihood in the Unorganized Sector*, National Commission for Enterprises in the Unorganized Sector, August 2007.

production, supply and distribution of, and trade and commerce, in certain commodities.”⁹ In 1981, more teeth were added to ECA through the Essential Commodities (Special Provisions) Act, to permit action against black-marketing and hoarding. While ECA covers several products, most of these tend to be agricultural and orders under ECA can be issued to control production, supply and distribution, and the purview also extends to price control. The statute itself defines some commodities as “essential”. But this is not comprehensive, in the sense that the Central government and State governments can declare other commodities to be “essential.”¹⁰ In particular, the food-grain trade is distorted because of ECA, since limits are imposed on stocking food-grains. Private traders need to obtain permits before food-grains can be transported out of a State, or even a district. There are also zonal restrictions, so that private trade in food-grains is prohibited across broad zones. Second, there are minimum support prices and procurement policies in favour of food-grains. This means procurement of food-grains through the Food Corporation of India (FCI), not only to maintain buffer stocks, but also for distribution to consumers through the inefficient public distribution system (PDS). Other than the crowding out of the private grain trade, this also creates perverse price signals for producers. Third, there are the APMC Acts. Stated simply, APMC Acts require buying and selling of agricultural products to be done through regulated markets, with mandated fees to be paid to Market Committees.¹¹ Marketing Boards are meant to use these fees for developing infrastructure in rural markets. Though the fee collection does happen, the extent to which fees collected have been used for developing infrastructure is debatable. Cold storage and grading facilities exist in few of the markets. In addition, a regulated market can be quite far away and a requirement that a farmer should only transact through a regulated market does no particular service to the farmer. Unless amended, the APMC Acts prevent direct marketing or contract farming and work against corporate sector involvement.¹² Fiscal constraints have meant reductions in public expenditure on research and development and extension services. It is by no means obvious that a market failure exists in either. Fourth, there is a lack of harmonization of indirect taxes on agricultural products across States. Not only does this exist for VAT (value added tax) and GST (goods and services tax), but there are also specific entry taxes for specific locations, such as when entering cities or the boundaries of municipal corporations. Fifth, because of ECA, APMC and fiscal anomalies, there are physical check-posts, which are particularly serious for perishable agricultural produce. In addition to these, there are physical checks on trucks thanks to environment-related laws like the Indian Forests Act, the Forest (Conservation) Act and Rules, the Air (Prevention and Control of Pollution) Act and Rules, the Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms/Genetically Engineered Organisms or Cells Rules, the Wildlife Protection Act and Rules and the Biomedical Waste (Management and Handling Rules) and lack of uniformity under the Motor Vehicles Act and its assorted rules. The problem is with multiplicity, rather than clearances per se.¹³

One should mention the example of Gujarat, usually identified as a State with a strong manufacturing base. Gujarat’s agricultural performance, especially since 2000, has often been commented upon.¹⁴ Gujarat’s agriculture has grown at more than 9.6% since 2000. “Cotton, the high value segment (livestock, fruits and vegetables) and wheat are identified as the main sources of growth as they have grown rapidly both in production and value terms. Private sector has driven the cotton boom; but public sector has also

⁹ <http://chdfood.gov.in/Word%20Documents/EssentialAct1955.pdf>

¹⁰ Some of these restrictions were eased in 2002 and 2003. But they were imposed again in 2006.

¹¹ Throughout the country, there are around 8000 regulated markets. While there is a range, an average market fee is around 10%.

¹² States like Andhra Pradesh, Tamil Nadu and Orissa have permitted direct marketing outside APMC.

¹³ For instance, the National Permit system doesn’t work for trucks and it takes a truck 2 hours to cross an inter-State border. The average distance covered by a truck is 200 km per day.

¹⁴ “Agriculture Performance in Gujarat Since 2000,” Ashok Gulati, Tushaar Shah and Ganga Sreedhar, International Water Management Institute and International Food Policy Research Institute, May 2009.

played an important role. Besides favorable monsoons in the past few years and past investment in rural roads, active role of public sector through [a] mass based water harvesting and groundwater recharge; [b] reform of rural power system through Jyotigram Scheme; [c] reform of agricultural marketing institutions; [d] revitalized and reinvented agricultural extension system are among the factors that have contributed to Gujarat's impressive performance in agriculture."¹⁵ The moral of the Gujarat story thus is - rural roads, water harvesting and groundwater recharge, rural power, agricultural marketing and extension services can drive high rates of growth. "Gujarat has slowly followed suit as it one of the few states to have implemented reforms to the Model Act 2003 and all amendments to the Agricultural Produce Marketing Committee (APMC) Act in 2007 allowing direct marketing, contract farming and markets in private/co-operative sectors...But be it a cooperative or private-sector led model, linking farmers to markets is crucial to promote agricultural growth and raise farmers' incomes...The corporate sector can play an important role by setting up back end operations like rural service hubs which supply inputs and extension services to farmersFarmers can also come together in farmers cooperatives, companies or clubs to reduce the transaction cost of doing business and also correct the balance of power within the stakeholders (organized retailers, processors and farmers) in negotiating the terms of doing business...The state government has also worked with various institutions like state agricultural universities, NGOs/civil society organizations and companies in bridging the knowledge gap i.e. making agricultural technology and know-how available to farmers."¹⁶

The Mid-Term Appraisal of the Eleventh Five Year Plan (2007-12) states the following.¹⁷ "The Department of Agriculture and Cooperation had formulated and circulated a Model Agricultural Produce Marketing Committee (APMC) Act in 2003 on marketing of agricultural produce for guidance and adoption by the State Governments. The model legislation provides for establishment of Private Markets/Yards, Direct Purchase Centres, Consumer and Farmers Markets for direct sale and promotion of Public Private Partnership in the management and development of agricultural markets in the country. The Act also provides for constitution of State Agricultural Produce Marketing Standards Bureau for promotion of Grading, Standardisation and Quality Certification of agricultural produce. This would facilitate pledge financing, direct purchasing, forward and future trading and exports." It goes on to add, "Improving marketing conditions and encouraging private sector participation require reforming the Agricultural Produce Marketing Committee (APMC) Act and abolishing the Essential Commodities Act (ECA). What started as a protective regime to prevent exploitation of farmers in marketing their produce and ensuring fair price has resulted in excessive government control. Cleaning up these archaic provisions can trigger private sector investment in developing regularised markets, logistics and warehouse receipt system, futures markets, and in infrastructure (such as cold storage, grades and standards, quality certification, etc.)" Suffice to say that there hasn't been sufficient movement on any of these. Distrust of competition and the private sector also spills over into credit, insurance and land markets. For example, fears about alienation of land are understandable. But that doesn't explain why markets for leasing of land should not be opened up, or why there should be resistance to futures markets, or opening up retail trade to competition.¹⁸ A Commission on Centre-State relations was set up and submitted a report in 2010.¹⁹ One of the sub-reports focused on the lack of a harmonized domestic market in agricultural products. This

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ http://planningcommission.gov.in/plans/mta/11th_mta/MTA.html

¹⁸ FDI in retail is a limited issue, though it has been a contentious issue in India. It has recently been opened up to 100% foreign equity for single-brand retail, but not multi-brand retail. A 2009 study by ICRIER (Indian Council for Research on International Economic Relations) discusses the issues connected with this, <http://www.icrier.org/page.asp?MenuId=24&SubCatID=25>

¹⁹ http://interstatecouncil.nic.in/ccsr_report_2010.htm

highlights the high compliance costs because of the factors mentioned earlier and the fragmentation of markets, leading to lack of economies of scale and cartels and monopolies. The sub-report has the following kind of numbers from unification and harmonization of agricultural markets.

- Reduction of post-harvest losses by 5-7% for food-grains and 25-30% for fruits and vegetables.
- Static gains of 10% through harmonizing standards of agricultural products across States.
- Static efficiency gains of up to 20% because of dis-intermediation of distribution chains, resulting in higher prices for farmers and lower prices paid by consumers. The welfare gains are roughly distributed in a ratio of 40% for farmers (producers) and 60% for consumers.
- Savings in compliance costs by 5% consequent to fiscal unification. Savings of up to 20% if there is a transition to a complete and unified GST and revenue gains of 25%. The tax/GDP ratio will increase by 1%.
- Reduction in transportation costs by 30%.
- Incremental growth in agriculture and allied activities by 2% because of static gains alone.
- Static increment to GDP growth by 1% because of removal of inter-State barriers alone. Increment by 2% if broader agricultural cum rural sector reforms are undertaken.
- Increase in export volume (not value) of agricultural products by 20%.
- Additional direct employment generation by 5 million a year. If one includes indirect employment, additional employment generation by 12 million a year.

One can quibble about the modeling used or the specific numbers in this sub-report. But the broad thrust of anti-competitive policies in domestic output markets remains. A Draft National Competition Policy has now been prepared for India.²⁰ This also states, “It has been observed that certain policies and laws at the state level sometimes tend to artificially segment markets in India. Policies and/or laws, which interface with a large section of the country’s population such as agriculture, power etc, may erode substantial benefits potentially emanating from a national market and the presence of competition across all sectors.”

India may be large and heterogeneous. Consequently, some of these inter-State or inter-regional problems may not find a resonance in every developing country. But let us take the key question. This is one of investing in agriculture and the rural sector and injecting competition into market access by farmers, reducing intermediation. At this level, producer price controls exist in several developing countries. Triggered by food price increases, across a range of countries, there have been interventions on the consumption side, including price controls, consumption subsidies, food aid, food for work, cash transfers and the elimination of taxes on consumption. Are these fiscally sustainable? Do they lead to additional distortions? Do they lead to supply-side adjustments or are they knee-jerk reactions? To take but one example, in several countries, minimum support prices (MSPs) for agricultural commodities have been increased. Apart from contributing to food price inflation, this increases the spread between prices paid to producers and subsidized prices charged to consumers, increasing the fiscal burden. Since MSPs need not always extend to all agricultural commodities and public procurement need not cover all commodities either, this creates perverse price signals and distorts resource allocation. To add to the policy-induced

²⁰ http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf

distortions, do government policies encourage intermediation between the prices farmers receive and the prices consumers pay? Cotton in Zambia, tobacco in Malawi, coca in Cote d'Ivoire, tea in Mauritius, sugar in Nepal, Pakistan and Zimbabwe, soybean in Bangladesh, food-grains in Laos and food-grains, onions and cotton in India are examples.²¹ To the extent that monopolies and cartels are not *de jure* mandated by government policy, but exist *de facto*, do competition policy instruments address these? Several countries have introduced competition policy instruments. These are typically based on structure (market shares, mergers), conduct (restrictive and unfair trade practices) and performance (prices, profitability). At the risk of some generalization, it is fair to say that these have tended to initially focus on industry, with services increasingly being brought in. Again at the risk of some generalization, agriculture hasn't constituted a core of competition policy, primarily because agricultural markets were subjected to tight government controls. However, evidence suggests that attempts at dis-intermediation often tend to temporarily increase abuse of dominance, unfair practices and price fixation. In the case of India's Competition Commission, "During the year 2010-11, total 71 cases were received u/s 19(1)(a) of the Competition Act, 2002 from various informants. Maximum cases were received from the Entertainment, Banks & Finance, Electricity, Pharmaceuticals and Real Estate Sectors. The Commission has also initiated 05 Suo-Moto cases on Sugar price, Onion price, Airlines Air fare, Aluminum Phosphide and Gas Cylinder Manufacturers during the year 2010-11."²² With the exception of sugar and onions, this substantiates the point that the thrust of competition policy has been on manufacturing and services. This is understandable, because competition policy intervention has worked in tandem with liberalization. As agriculture is liberalized and opened up to competition, this focus should also change.

4. Anti-competitive policies in domestic input markets

Competition in agriculture isn't only about the farm to fork supply chain. It is also about input markets. Seeds, pesticides, herbicides, agro-chemicals and fertilizers are obvious examples. Power and water belong to a slightly different category. On the face of it, the issue is simple enough. Agricultural inputs are resource intensive and are increasingly produced by the private sector. Because they are resource and research intensive, there are barriers to entry and concentrated market structures are understandable. To ensure R&D does take place and high fixed costs of research and development are recouped, in the trade-off between static efficiency and dynamic efficiency, intellectual property rights (IPRs) are granted, creating the potential for abuse of dominance. Therefore, competition policy must address such issues.

While this is a fair point, there are several problems that complicate the India story. In general, distortions are created by input subsidies on power, water, seeds and fertilizers. In the case of fertilizers, this works through a Fertilizer Control Order of 1985, that controls pricing, distribution and imports. Potash-based fertilizers are entirely imported. Feedstock and raw material requirements for potassic and phosphate fertilizers are imported. Natural gas and LNG are imported for urea. Therefore, there are government controls on imports (other than gas, urea, ammonia, phosphoric acid, rock phosphate, sulphur, DAP, MOP) and prices of imported inputs. Through a complicated pricing scheme, the difference between the maximum retail price (MRP) paid by farmers and the cost of fertilizers at the farm-gate is paid as a subsidy to fertilizer companies.²³ A straightforward analysis of market shares of different fertilizer

²¹ See, *Competition Issues in the Market on Farm Goods*, CUTS-CIER Policy Brief No.2, 2005, <http://www.cuts-ccier.org/pdf/2-2005-HKCOM.pdf>

²² *Annual Report 2010-11*, Competition Commission of India, <http://www.cci.gov.in/May2011/Advocacy/EnglishAnnualReport201011.pdf>

²³ There are valid arguments that this subsidy benefits fertilizer companies rather than farmers and within farmers, it benefits only larger farmers. Therefore, one should switch away from a system of public expenditure on input subsidies. There have been recent (2010) attempts to switch some fertilizer subsidies directly to farmers. But that is irrelevant for present purposes.

companies in segments like urea, DAP, SSP or MOP therefore misses the core issue, one of distortions created by government policy. In addition, the channel of distribution to farmers is not direct sales by fertilizer companies, but through dealers and distributors. This point of distribution also extends to seeds. As with fertilizers, seeds were historically controlled through the Seed Act of 1966, the Seeds Control Order of 1983 and the Seeds Policy of 1988. This was liberalized through a National Seeds Policy of 2002 and restrictions through industrial licensing and FDI caps have also been removed. While the public sector exists, private sector presence in seeds has increased significantly and within the private sector, there have also been mergers and acquisitions. While the debate about intellectual property rights and yields of better-variety seeds is a valid one, the core issue remains that of distribution channels between seed companies and farmers. As in the case of output markets, that link in the distribution chain is one on which there has been limited research and is the one that should be the focus of competition policy intervention.

LES PROBLÈMES DE CONCURRENCE DANS LE SECTEUR AGRICOLE

*Par Bibek Debroy**

1. Introduction

En comptabilité nationale, il existe une classification simple des secteurs d'activité qui s'organise en primaire, secondaire et tertiaire¹. Pour les besoins de ce document, nous adopterons une définition à la fois étroite et large des notions de « produits primaires » et d' « agriculture ». La définition sera étroite parce que nous excluons la sylviculture et la pêche. Elle sera large car nous y intégrerons non seulement l'agriculture, telle que définie par les principes de comptabilité nationale, mais également les intrants (semences, engrais, produits agrochimiques, biotechnologies), les activités de transformation, le stockage, la commercialisation et la distribution. Il est nécessaire d'apporter cette précision car la théorie d'équilibre général propose une définition des marchés concurrentiels et avance des hypothèses sur la concurrence. Et l'agriculture est souvent citée comme exemple d'un secteur où ces hypothèses peuvent plus ou moins s'avérer. C'est tout simplement faux. À part certains autres éléments de la chaîne d'approvisionnement, avec les investissements intérieurs et étrangers et l'entrée des entreprises dans l'agriculture, ces hypothèses ne se confirment même pas dans le processus de production.

Tant l'agriculture que la politique de la concurrence ont fait l'objet de négociations commerciales internationales, multilatérales, régionales et bilatérales. Ces négociations étant menées par des pays, l'accent a été mis sur les mesures transnationales. Pourtant, les obstacles à la concurrence ne sont pas inévitablement transnationaux. De fait, dans un secteur comme celui de l'agriculture, les politiques portant atteinte à la concurrence sont fondamentalement internes et résultent souvent d'une action publique qui bride la concurrence. En s'appuyant sur des exemples pris en Inde, qui trouveront des parallèles dans d'autres pays en développement, ce document analyse l'intervention des pouvoirs publics, sur les marchés des produits et des intrants, qui paralyse la concurrence dans l'agriculture. Couplés à des mesures de libéralisation, les instruments de la politique de la concurrence ont commencé à s'attacher à certains aspects de la chaîne de distribution agricole impliquant le secteur privé. Il s'agit d'un élément important, mais l'exercice du libre jeu de la concurrence nécessite également la suppression de toute intervention publique susceptible d'en fausser les règles.

Avant le cycle de négociations d'Uruguay (1986-94), l'agriculture n'entrait pas dans le champ de la libéralisation des échanges. Lors des Accords du Cycle d'Uruguay, ou des négociations ultérieures dans le cadre du Programme de Doha pour le développement (PDD), l'accent a été davantage mis sur les échanges, notamment les exportations et l'accès aux marchés. La distinction entre les mesures relevant ou

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¹ Il convient de garder ceci à l'esprit lorsque l'on se penche sur certains chiffres, comme la part de l'agriculture dans le PIB ou la part de la population employée dans le secteur agricole. Ces chiffres peuvent être en baisse, même dans les pays en développement. Toutefois, dans une acception très large de la chaîne d'approvisionnement agricole allant de la production à la consommation, l'importance de l'alimentation et de l'agriculture ne recule pas dans les mêmes proportions.

non des échanges peut être artificielle et de fait, le soutien interne fait également partie du champ de compétences de l'OMC. Le fait est que les négociations dans le cadre de l'OMC, que ce soit pendant le Cycle d'Uruguay ou de Doha, n'ont pas réellement vocation à soulever des questions de concurrence ne relevant pas des échanges dans le domaine de l'agriculture, puisqu'il s'agit de questions généralement, par nature, intérieures. Au mieux peuvent-elles être soulevées si elles ont des effets de distorsion des échanges. Une fois ceci posé, précisons toutefois qu'il existe une différence entre les membres actuels de l'OMC et les nouveaux adhérents. Ces derniers peuvent en effet se voir soumis à des règles qui ne peuvent pas être imposées aux « anciens » membres. La Bulgarie (1996), la Chine (2001), l'Arménie (2003), le Cambodge (2004), le Viêt-Nam (2007) et l'Ukraine (2008) en sont des exemples.

Il en est de même pour les politiques de la concurrence. Dans le cadre de l'OMC, les questions de politiques de la concurrence sont actuellement en suspens. Mais même si ces points revenaient à l'ordre du jour, les débats se limiteraient, au mieux, à des questions d'interactions entre les échanges et la politique de la concurrence. Les négociations commerciales, qu'elles soient multilatérales, régionales ou même bilatérales, peuvent au mieux aboutir à une réforme prônant la concurrence sur les marchés agricoles. La situation a toutefois évolué sous l'effet de la question de la sécurité alimentaire. D'un côté, la sécurité alimentaire est présentée comme un problème de balance des paiements, c'est-à-dire, la capacité d'un pays à payer les importations de produits alimentaires qui lui sont nécessaires. Toutefois, le plus souvent, la sécurité alimentaire est définie comme la capacité des ménages à accéder aux produits alimentaires, ou l'incapacité, en l'absence de périodes chroniques de famine. La question de la sécurité alimentaire devient plus préoccupante depuis que des terres arables sont consacrées à la production de biocarburants, et que les prix du pétrole ont augmenté. Par ailleurs, sous l'effet de la croissance de la population mondiale, des terres agricoles ont été sacrifiées au profit de l'urbanisation et du développement industriel, les conséquences du changement climatique se font sentir, les sols se sont dégradés, et la demande de consommation tirée par la croissance, émanant de pays comme la Chine et l'Inde, ne cesse d'augmenter. Une citation illustre ce problème : « L'augmentation des prix des produits alimentaires et du pétrole a des conséquences préjudiciables sur la pauvreté ; mais l'augmentation des prix des produits alimentaires a l'impact le plus direct sur la pauvreté, notamment pour les populations défavorisées des zones urbaines. Cela s'explique essentiellement par le fait que la part des dépenses des ménages consacrées aux produits alimentaires est généralement bien supérieure à la part directe des produits et services liés au pétrole, notamment dans les pays émergents et en développement. L'alimentation représente souvent plus de 25 % des dépenses des ménages dans les grandes économies émergentes, et plus de 50 % dans les pays en développement... Dans les pays avancés, la part des dépenses d'alimentation par rapport au revenu global du ménage est nettement moindre, mais reste supérieure à 10 %... Au sein des pays, les pauvres des zones urbaines sont les plus touchés par l'augmentation des prix des produits alimentaires et du pétrole, les populations des zones rurales étant plus susceptibles d'être au moins partiellement autosuffisantes sur le plan alimentaire. Les ménages à faible revenu sont les plus exposés à l'inflation, mais il est important d'étudier la répartition dans chaque pays, pour analyser les groupes les plus vulnérables, non seulement à l'inflation, mais aussi, à l'évolution des prix relatifs. Les populations défavorisées des zones urbaines, ainsi que les agriculteurs non auto-suffisants, sont les plus touchés par l'inflation des prix alimentaires car ils doivent acheter leur nourriture. Même s'ils sont plus protégés, il est également possible que les agriculteurs auto-suffisants ne bénéficient pas des hausses des prix des produits alimentaires, car l'augmentation des coûts des intrants (carburant, engrais et transport) se répercute plus rapidement que celle des prix du marché mondial des produits alimentaires. Au total, la proportion de personnes sous-alimentées dans l'ensemble de la population des pays en développement peut rapidement dépasser le niveau actuel de 40 %². » Précisons que d'un côté, l'augmentation des prix alimentaires se répercute sur les revenus de ceux qui vendent ces produits, notamment dans les zones agricoles ; de l'autre, elle est préjudiciable aux

² *Food and Fuel Prices – Recent Developments, Macroeconomic Impact, and Policy Responses*, FMI, 30 juin 2008, <http://www.imf.org/external/np/pp/eng/2008/063008.pdf>.

consommateurs nets de produits alimentaires, comme les pauvres des zones urbaines. L'incidence de l'augmentation des prix diffère en fonction des produits et des pays³.

Selon toute logique, le phénomène d'inflation des prix des produits alimentaires devrait déclencher et stimuler une réforme agricole allant dans le sens d'une concurrence accrue, de sorte que des changements du côté de l'offre puissent intervenir. Mais dans la pratique, il se traduit souvent par plus de distorsions et plus d'interventionnisme de l'État, au moins à court terme – ce qui est une erreur. Les causes sous-jacentes de l'augmentation des prix alimentaires ne tendent pas à disparaître – aussi, les réponses du côté de l'offre appellent une réforme agricole faisant la part belle à la concurrence. La suite de ce document développe cette réflexion.

2. Les distorsions transnationales à la concurrence

Cette partie est consacrée aux distorsions transnationales, mais, volontairement, nous ne les étudierons pas en détail puisqu'il existe une abondante littérature sur le sujet, issue des négociations dans le cadre de l'OMC et du PDD, sur les droits de douanes, les contingents tarifaires, les mesures de sauvegarde, le mauvais usage des mesures sanitaires et phytosanitaires, les subventions à l'exportation, l'encadrement des exportations, le commerce d'État et autres obstacles non tarifaires (ONT). Le tableau 1 recense des exemples de régulation des exportations dans les pays en développement⁴. Dans ces pays, les distorsions provoquées par le commerce d'État se font encore plus sentir sur les importations. La Chine, l'Indonésie, l'Inde, le Mexique et le Pakistan en fournissent quelques illustrations. Les céréales vivrières et les produits laitiers sont des secteurs habituellement caractérisés par une prédominance du commerce d'État.

Tableau 1: Encadrement des exportations dans les pays en développement

Licences/ interdictions d'exportations	Afrique du Sud, Argentine, Bahreïn, Bangladesh, Barbade, Belize, Bénin, Bolivie, Botswana, Brésil, Brunei, Burundi, Cameroun, Chine, Congo, Costa Rica, Djibouti, Équateur, Fidji, Ghana, Grenade, Guatemala, Guyane, Haïti, Honduras, Îles Salomon, Inde, Indonésie, Jamaïque, Jordanie, Kenya, Lesotho, Madagascar, Malaisie, Maldives, Mali, Maroc, Maurice, Mexique, Mongolie, Mozambique, Namibie, Nicaragua, Niger, Nigéria, Oman, Ouganda, Pakistan, Panama, Pérou, Philippines, Qatar, République Dominicaine, Sénégal, Sierra Leone, Saint-Kitts-et-Nevis, Sainte-Lucie, Saint-Vincent-et-les-Grenadines, Tanzanie, Thaïlande, Turquie, Zambie
Droits d'exportations/ taxes à l'exportation	Angola, Argentine, Barbade, Belize, Bénin, Botswana, Brésil, Burkina Faso, Burundi, Cameroun, République centrafricaine, Chine, Colombie, Congo, Costa Rica, Djibouti, Équateur, Fidji, Gambie, Ghana, Guatemala, Guinée, Guyane, Kenya, Inde, Indonésie, Madagascar, Malaisie, Mexique, Mongolie, Mozambique, Namibie, Niger, Nigéria, Pakistan, Panama, Paraguay, Philippines, Îles Salomon, Sierra Leone, Sri Lanka, Saint-Kitts-et-Nevis, Surinam, Swaziland, Tanzanie, Tchad, Thaïlande, Togo, Turquie, Ouganda, Uruguay, Zambie
Commerce d'État	Éthiopie, Indonésie, Inde, Malawi, Mali, Tanzanie, Tunisie.

³ Voir les simulations dans le document : Maros Ivanic et Will Martin, « Implications of Higher Global Food Prices for Poverty in Low-Income Countries », *Policy Research Working Paper*, Banque mondiale, n°4594, avril 2008.

⁴ Les listes de licences/interdictions d'exportations et des droits d'exportation/taxes à l'exportation sont extraites du document intitulé « Évolutions récentes des restrictions à l'exportation », J. Kim, *Document de travail de l'OCDE sur la politique commerciale*, n°1, OCDE, juillet 2010. Toutefois, dans la catégorie des interdictions/licences d'exportation, nous n'avons pas mentionné les interdictions relevant explicitement de la sécurité, de la santé, de l'environnement et de la protection des espèces menacées. La liste relative au commerce d'État est extraite de : « Les offices nationaux de commercialisation de produits agricoles des pays en développement et leur rôle dans le contexte des négociations de l'OMC » R. Pearce et J.A. Morrison, Division des produits et du commerce mondial, <http://www.fao.org/DOCREP/005/Y3733E/y3733e07.htm#fn58>. Il ne s'agit pas d'une liste exhaustive, mais elle a vocation à illustrer notre propos. Le commerce d'État ne concerne pas uniquement les pays en développement.

Le problème qui nous occupe est le suivant. La liberté des échanges internationaux favorise la concurrence et est source d'efficacité. Le commerce exerce également une fonction de stabilisation des prix. Toutefois, l'augmentation et la volatilité des prix des produits alimentaires, domaines sur lesquels achoppent les négociations de Doha, ont créé des distorsions supplémentaires aux échanges agricoles. Malgré les réformes en cours, les obstacles au commerce de matières premières agricoles restent nombreux dans les pays en développement, comme entre ces pays et les membres de l'OCDE. Ils entretiennent l'« étroitesse » des marchés internationaux, jugée partiellement responsable de la volatilité observée depuis plusieurs années. Les droits de douanes moyens sur les produits agricoles et alimentaires sont élevés dans les pays à moyen et haut revenu (respectivement 25 % et 22 %). Le protectionnisme sur les produits agricoles est non seulement plus élevé que sur les produits non agricoles (d'un facteur 4), il est également beaucoup plus volatil. Les politiques commerciales agricoles sont conçues pour décorrélérer les prix intérieurs des marchés mondiaux et s'accompagnent d'effets pro-cycliques : le protectionnisme diminue lorsque les prix sont élevés, stimulant la demande sur les marchés mondiaux, et augmente lorsque les prix mondiaux sont bas – opérant efficacement comme un prélèvement variable. En conséquence, les politiques commerciales des grands pays alimentent la volatilité des prix dans le monde et créent des externalités négatives pour les petits pays. L'une des conclusions du Cycle de Doha permettra de limiter la possibilité de mettre en œuvre sur les marchés mondiaux des politiques déstabilisantes en réduisant le niveau consolidé de tarifs douaniers et de subventions⁵. Sur 81 pays en développement interrogés par la FAO sur les mesures prises en réponse à la volatilité des prix observée en 2007-2008, 43 ont réduit les taxes à l'importation et 25 ont instauré des interdictions d'exportation ou augmenté les impôts à l'exportation⁶.

Dans un document d'orientation, l'Institut international de recherche sur les politiques alimentaires (IFPRI) expose la nature du problème⁷. « Le contrôle des prix et l'évolution des politiques d'encadrement des importations et exportations permettront peut-être de se pencher sur le problème des consommateurs pauvres qui découvrent qu'ils n'ont plus accès au régime alimentaire nécessaire pour vivre en bonne santé. Mais certaines de ces politiques pourraient avoir des effets contraires à ceux attendus en réduisant le marché international et en le rendant plus volatil. Lorsque les prix sont contrôlés, l'agriculteur vend ses produits moins chers, ce qui ne l'incite pas à produire davantage de produits alimentaires. Toute stratégie à long terme visant à stabiliser les prix alimentaires doit s'appuyer sur une augmentation de la production agricole, mais le contrôle des prix envoie un message contraire aux agriculteurs. En outre, en profitant à tous les consommateurs, y compris à ceux qui ont les moyens de payer les produits alimentaires plus cher, le contrôle des prix détourne les ressources au profit de ceux qui n'en ont pas besoin. Les restrictions aux exportations et les subventions aux importations sont préjudiciables aux partenaires commerciaux dépendants des importations et ont un effet dissuasif sur les agriculteurs en réduisant leur part de marché potentielle. Ces politiques commerciales agricoles à l'échelle nationale compromettent les avantages de l'intégration mondiale, dans la mesure où, aux distorsions des échanges pratiquées depuis longtemps par les pays riches envers les pays en développement, s'ajoutent les interventions des pays en développement entre eux. » Cette citation démontre que les politiques transnationales ont des répercussions à l'échelle nationale. Et de fait, en matière d'agriculture, les distorsions provoquées par des actions publiques faussant le jeu de la concurrence sont davantage nationales et internes, comme nous le verrons dans les chapitres suivants.

⁵ *Price Volatility in Food and Agricultural Markets: Policy Responses*, juin 2011, http://www.wto.org/english/tratop_e/agric_e/report_g20_foodpr11_e.pdf

⁶ *Ibid.*

⁷ « Rising Food Prices, What Should Be Done? », Joachim von Braun, *IFPRI Policy Brief*, avril 2008, <http://www.ifpri.org/sites/default/files/publications/bp001.pdf>

3. Les politiques anticoncurrentielles sur les marchés intérieurs des produits

Attardons-nous quelque peu sur le cas de l'Inde, qui est symptomatique de la situation dans de nombreux pays en développement. La réduction du nombre de travailleurs agricoles est l'un des corollaires du développement. Dans les endroits du monde comparativement plus riches, les individus ont été extraits du secteur agricole pour être affectés à des activités plus productives. Dans les faits, on observe plusieurs types de mouvements. Certains restent dans l'agriculture mais se détournent des céréales vivrières au profit d'autres formes de productions végétales, comme l'horticulture. Il y a alors commercialisation et diversification. D'autres se tournent vers des activités connexes comme l'aquaculture, l'élevage laitier, la floriculture et l'élevage de volailles. D'autres encore abandonnent totalement les activités agricoles pour se reconverter dans l'industrie et les services ruraux. Sur les quelque 300 millions de personnes qui composent la main-d'œuvre rurale en Inde, 72.7 % vivent encore de l'agriculture⁸. Un chiffre certes en recul par rapport aux 81.4 % enregistrés en 1983, mais encore exceptionnellement élevé. La baisse n'est pas assez rapide. Ces chiffres suscitent toutefois quelques commentaires. Premièrement, ils font référence au statut principal et secondaire, ce qui implique que les personnes peuvent exercer une activité complémentaire, extérieure à l'agriculture. Or, compte tenu du caractère saisonnier de la grande majorité de l'agriculture indienne, c'est toujours le cas. Deuxièmement, il existe une grande disparité entre États et le rythme de recul des activités agricoles varie également en fonction des États. Troisièmement, il existe une différence en fonction du sexe. Ainsi, la transition vers des activités non agricoles concernant avant tout les hommes, on assiste à une féminisation de la main-d'œuvre agricole. Quatrièmement, au sein des professions agricoles, près des deux-tiers (64 %) des personnes se décrivent comme non-salariés, c'est-à-dire qu'ils sont agriculteurs. Le tiers restant (36 %) est constitué des salariés, qui sont, presque invariablement, des travailleurs temporaires. Cinquièmement, 13.1 % des ménages ruraux ne possèdent pas de terre et seuls 11.2 % possèdent des moyennes ou grandes exploitations (plus de deux hectares). 44.8 % des parcelles sont sous-marginales (entre 0.01 et 0.40 hectare), 18.7 % sont marginales (de 0.41 à 1 hectare) et 12.2 % sont petites (entre 1 et 2 hectares). Ce type d'agriculture à petite échelle ne peut pas bénéficier d'économies d'échelle ni d'économies de gamme, il assure juste le minimum vital, est inefficace et relativement improductif. Pour que le développement soit possible, il faut une évolution progressive et une ascension sur la chaîne de valeur de la productivité.

Puisqu'il est humain d'aspirer à une vie meilleure, la question se pose de savoir pourquoi la transition vers des activités non agricoles ne s'opère pas et pourquoi plusieurs distorsions résultent de l'action publique. Autant de facteurs qui tendent à fausser les comportements des marchés. Sur les marchés des produits, ces politiques de la concurrence opèrent une segmentation du marché ou envoient des signaux trompeurs en termes de prix. Premièrement, il existe des restrictions physiques imposées par le gouvernement sur la production, la commercialisation et la distribution. Elles proviennent généralement de la Loi sur les produits essentiels (Essential Commodities Act, ECA) et des lois sur le contrôle et la commercialisation des produits agricoles (Agricultural Produce Marketing and Control Acts, APMC). L'ECA, adopté en 1955, trouve son origine dans les pénuries créées par la Seconde guerre mondiale. Cette loi a pour objet « d'organiser, dans l'intérêt de la population, le contrôle de la production, de l'offre et de la distribution, des échanges et du commerce, de certaines matières premières⁹ ». En 1981, son champ d'application est élargi par l'introduction de dispositions spéciales visant à lutter contre le marché noir et la thésaurisation de stocks. L'ECA couvre plusieurs produits, pour la plupart agricoles, et des décrets peuvent être émis au titre de cette loi pour contrôler la production, l'offre et la distribution ; son champ d'application s'étend aussi à l'encadrement des prix. Le texte lui-même qualifie certains produits d'« essentiels ». Mais la liste n'est pas exhaustive dans la mesure où le gouvernement central et les

⁸ *Report on Conditions of Work and Promotion of Livelihood in the Unorganized Sector*, National Commission for Enterprises in the Unorganized Sector, août 2007.

⁹ <http://chdfood.gov.in/Word%20Documents/EssentialAct1955.pdf>

gouvernements des États peuvent y inscrire d'autres produits¹⁰. Ainsi, l'ECA a un effet de distorsion du marché des céréales vivrières puisqu'elle en limite le stockage. Les négociants privés doivent obtenir des autorisations pour pouvoir faire transporter des céréales vivrières en dehors d'un État ou même d'un district. Il existe des restrictions géographiques, de sorte que le négoce privé de céréales vivrières est prohibé sur des zones entières. Deuxièmement, les autorités ont mis en place des prix de soutien minimum et des politiques d'achat pour les céréales vivrières. Ce qui signifie que la société indienne de produits alimentaires (Food Corporation of India, FCI) achète des céréales non seulement pour constituer des stocks régulateurs, mais aussi pour en assurer la distribution aux consommateurs par l'intermédiaire de l'inefficace régime public de redistribution (PDS). Outre le fait de créer un phénomène d'éviction sur le marché privé des céréales, cette situation envoie également des signaux de prix décourageants pour les producteurs. Troisièmement, il existe des lois sur les comités des marchés des produits agricoles (APMC Acts). Ces lois prévoient que l'achat et la vente des produits agricoles s'opèrent sur des marchés régulés, moyennant le versement de commissions aux Comités de marchés¹¹. Des Offices de commercialisation ont pour rôle d'utiliser ces fonds pour le développement d'infrastructures sur les marchés ruraux. La collecte des commissions a bel et bien lieu, reste à déterminer dans quelle mesure elles sont utilisées pour le développement d'infrastructures. Des entrepôts frigorifiques et les installations de calibrage existent sur un petit nombre de marchés. En outre, le premier marché régulé accessible peut être éloigné et la nécessité de ne traiter que sur un marché régulé n'est pas particulièrement pratique pour les agriculteurs. Sauf modification, l'APMC interdit la vente directe ou l'agriculture contractuelle et freine la participation du secteur privé¹². Les contraintes budgétaires ont conduit à des réductions des investissements publics dans la recherche-développement et les services de vulgarisation agricoles. Il apparaît clairement qu'il y a dans ces deux domaines une défaillance du marché. Quatrièmement, on observe l'absence d'harmonisation des impôts indirects sur les produits agricoles dans les différents États. C'est notamment le cas pour la TVA (taxe sur la valeur ajoutée) et la taxe sur les biens et les services (GST), sans oublier des droits de porte à certains endroits, notamment pour entrer dans les villes ou pour franchir les limites des municipalités. Cinquièmement, corollaires de l'ECA, de l'APMC et de certaines anomalies budgétaires, des postes de contrôle physiques ont été mis en place, ce qui est particulièrement préjudiciable pour les denrées périssables. Qui plus est, des contrôles physiques sont réalisés sur les poids lourds, au titre de lois sur la protection de l'environnement : loi sur les forêts indiennes (Indian Forests Act) ; loi et règlements sur la préservation de la forêt (Forest (Conservation) Act and Rules) ; loi et règlements sur la prévention et le contrôle de la pollution de l'air (Air (Prevention and Control of Pollution) Act and Rules) ; loi et règlements sur la fabrication, l'utilisation, l'importation, l'exportation et le stockage de micro-organismes dangereux/de cellules ou d'organismes obtenus par génie génétique (Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms/Genetically Engineered Organisms or Cells Rules) ; loi et règlement sur la protection de la faune (Wildlife Protection Act and Rules) ; règles sur le traitement et la manipulation des déchets biomédicaux (Biomedical Waste (Management and Handling Rules)). À ceci s'ajoute une absence de cohérence de la loi sur les véhicules motorisés (Motor Vehicles Act) et de ses règlements connexes. La difficulté réside davantage dans la multiplicité des lois que dans les formalités douanières¹³.

Prenons l'exemple du Gujarat, un État généralement considéré comme disposant d'un important secteur manufacturier. Le dynamisme de son secteur agricole, notamment depuis 2000, a souvent été

¹⁰ Certaines de ces restrictions ont été assouplies en 2002 et 2003, puis rétablies en 2006.

¹¹ L'Inde compte environ 8000 marchés régulés. La fourchette est large, mais, en moyenne, les commissions sont de l'ordre de 10%.

¹² Certains États comme Andhra Pradesh, Tamil Nadu et Orissa ont autorisé la commercialisation directe en dehors des comités des marchés des produits agricoles.

¹³ Ainsi, le système d'autorisation nationale ne s'applique pas aux poids lourds ; il faut deux heures à un camion pour passer d'un État à l'autre. La distance moyenne parcourue par un poids lourd est de 200 km par jour.

commenté¹⁴. L'agriculture du Gujarat a progressé de plus de 9.6 % depuis 2000. « Le coton, les activités à forte valeur ajoutée (élevage, fruits et légumes) et le blé ont été identifiés comme les principaux vecteurs de croissance, puisqu'ils ont progressé rapidement tant en termes de production qu'en valeur. Le secteur privé a été moteur dans l'essor du coton, mais le secteur public a également joué un rôle important. Outre des moussons favorables les années précédentes et les investissements consentis dans les infrastructures routières rurales, le rôle actif du secteur public dans [a] la récupération de l'eau de surface et la recharge des nappes souterraines ; [b] la réforme du système électrique via le programme Jyotigram ; [c] la réforme des organes de commercialisation des produits agricoles ; [d] la relance et la refonte du système de vulgarisation agricole, compte parmi les facteurs ayant contribué aux progrès impressionnants réalisés par le Gujarat dans le secteur agricole »¹⁵. La morale de l'histoire du Gujarat est donc que l'aménagement des routes, la collecte de l'eau et l'alimentation des nappes souterraines, l'alimentation électrique des zones rurales, la commercialisation des produits agricoles et les services de vulgarisation agricole peuvent se traduire par une forte croissance. « Le Gujarat suit lentement l'exemple, puisque qu'il compte parmi les rares États à avoir mis en œuvre la réforme de la loi-type de 2003 et toutes les modifications de la loi sur les comités des marchés des produits agricoles (APMC) en 2007, autorisant la commercialisation directe, l'agriculture contractuelle et les marchés dans les secteurs privé/coopératif... En tout état de cause, il est vital de relier les agriculteurs aux marchés, qu'ils soient privés ou coopératifs, afin de promouvoir la croissance de l'agriculture et d'augmenter les revenus des agriculteurs... Le secteur privé a également un rôle à jouer en intervenant en amont en mettant en place des plateformes de distribution des intrants aux agriculteurs ou en assurant les services de vulgarisation agricole. Les agriculteurs peuvent également se rassembler en coopératives, sociétés ou associations agricoles afin de réduire les coûts de transaction de leurs activités mais également de rééquilibrer les pouvoirs entre les parties prenantes (revendeurs organisés, transformateurs et agriculteurs) dans les négociations... Le gouvernement de l'État a également collaboré avec différentes institutions, comme les universités agricoles d'État, des ONG/organisations de la société civile et des entreprises pour combler le déficit d'information, c'est-à-dire ouvrir l'accès aux technologies et savoir-faire agricoles pour les agriculteurs¹⁶. »

L'évaluation à mi-parcours du 11e Plan quinquennal indien (2007-12) fait le constat suivant¹⁷ : « Le ministère de l'Agriculture et de la Coopération a formulé et diffusé une loi-type sur les comités des marchés des produits agricoles (APMC) en 2003 portant sur la commercialisation des produits agricoles, pour informer et orienter les gouvernements des États. Cette loi-type prévoit l'établissement de marchés/halles privés, de centres d'achat direct, de marchés pour vente directe du producteur au consommateur, et préconise le partenariat public/privé dans la gestion et le développement de marchés agricoles dans le pays. La loi prévoit également la constitution d'un bureau officiel de normalisation de la commercialisation des produits agricoles, chargé du calibrage, de la normalisation et de la certification qualité des produits agricoles. Celui-ci facilitera le financement par crédits cautionnés, la vente directe, le commerce et les exportations à terme et à livraison différée. » Le texte poursuit : « Pour améliorer les conditions de commercialisation et favoriser la participation du secteur privé, il faut réformer la loi sur les comités des marchés des produits agricoles (APMC) et abolir la loi sur les produits essentiels (ECA). Ce qui se voulait initialement un régime protecteur, destiné à prévenir l'exploitation des agriculteurs dans la commercialisation de leurs produits, en garantissant un prix juste, s'est mué en un contrôle excessif de la part des pouvoirs publics. En faisant table rase de ces dispositions archaïques, il est possible d'inciter le

¹⁴ « Agriculture Performance in Gujarat Since 2000 », Ashok Gulati, Tushaar Shah et Ganga Sreedhar, International Water Management Institute et Institut international de recherche sur les politiques alimentaires (IFPRI), mai 2009.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ http://planningcommission.gov.in/plans/mta/11th_mta/MTA.html

secteur privé à investir dans le développement de marchés, d'installations logistiques et de stockage, de marchés à terme normalisés et dans des infrastructures (entrepôts frigorifiques, calibrage et normalisation, certification qualité, etc.) ». Inutile de préciser que les progrès n'ont pas été suffisants dans ces domaines. La défiance envers la concurrence et le secteur privé touche également les marchés du crédit, de l'assurance et du foncier. Par exemple, les craintes relatives à l'aliénation des terres sont compréhensibles, mais elles n'expliquent pas pourquoi les marchés de la location de terrains ne sont pas davantage ouverts, ni pourquoi les marchés à livraison différée ou l'ouverture à la concurrence du commerce de détail suscitent des réticences¹⁸. Une commission récemment créée, chargée des relations entre l'administration centrale et les États, a rédigé un rapport en 2010¹⁹. L'un des rapports annexes pointait l'absence d'harmonisation du marché intérieur des produits agricoles – ce qui met en lumière le niveau élevé des coûts de conformité en raison des facteurs cités précédemment, et de la fragmentation des marchés, qui freine les économies d'échelles et favorise les cartels et les monopoles. Ce rapport annexe avance les chiffres suivants pour ce qui concerne l'unification et l'harmonisation des marchés agricoles :

- Réduction des pertes après récolte de 5 % à 7 % pour les céréales vivrières et de 25 % à 30 % pour les fruits et légumes.
- Gains statiques de 10 % par le biais de l'harmonisation des normes relatives aux produits agricoles dans les différents États.
- Jusqu'à 20 % de gains d'efficacité statique par la désintermédiation des circuits de distribution, se traduisant par des prix de vente plus élevés pour les agriculteurs et des prix de vente plus bas pour les consommateurs. La répartition de ce gain socio-économique se fait globalement selon un ratio de 40 % pour les agriculteurs (producteurs) et de 60 % pour les consommateurs.
- Les économies sur les coûts de la discipline fiscale s'établissent à 5 % en conséquence de l'unification fiscale. Elles atteignent 20 % en cas de transition vers une taxe sur les biens et services (GST) complète et unifiée s'accompagnant de gains de chiffre d'affaires de 25 %. Le coefficient de pression fiscale (impôts/PIB) augmenterait de 1 %.
- Réduction de 30 % des coûts de transport.
- Croissance dans l'agriculture et les activités connexes de 2 % grâce aux seuls gains statiques.
- Croissance stable du PIB de 1 % du seul fait de la suppression des barrières entre États. Augmentation de 2 % si de vastes réformes du secteur agricole et rural sont entreprises.
- Augmentation de 20 % des exportations de produits agricoles en volume (pas en valeur).
- Création de 5 millions d'emplois directs supplémentaires par an ; 12 millions d'emplois supplémentaires par an si l'on inclut les emplois indirects.

On peut certes ergoter sur la modélisation utilisée ou sur les chiffres cités dans ce rapport. Mais les grandes lignes des politiques faussant la concurrence sur les marchés intérieurs des produits demeurent. Un projet de politique nationale de la concurrence a été préparé en Inde²⁰. Il fait également le constat suivant : « Il a été observé que certaines politiques et certaines lois au niveau des États ont parfois tendance à

¹⁸ L'IDE dans la distribution est une question pointue, et controversée en Inde. Les participations étrangères à hauteur de 100% ont récemment été autorisées pour les distributeurs à marque unique, mais pas pour les distributeurs multimarques. Une étude de 2009 du conseil indien pour la recherche sur les relations économiques internationales (ICRIER) fait le point sur les questions soulevées dans ce contexte : <http://www.icrier.org/page.asp?MenuId=24&SubCatID=25>

¹⁹ http://interstatecouncil.nic.in/ccsr_report_2010.htm

²⁰ http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf

segmenter artificiellement les marchés en Inde. Les politiques et/ou les lois, qui touchent une grande partie de la population, comme celles relatives à l'agriculture, l'électricité, etc., peuvent éroder les avantages potentiels conséquents que présentent un marché national et l'exercice du libre jeu de la concurrence dans tous les secteurs. »

L'Inde est certes un pays vaste et hétérogène. En conséquence, certains des problèmes inter-états ou interrégionaux qu'il rencontre peuvent ne pas trouver de résonance dans tous les pays en développement. Mais concentrons-nous sur le cœur du problème. Celui de l'investissement dans le secteur de l'agriculture et le milieu rural et de l'introduction de la concurrence dans l'accès au marché par les agriculteurs, en réduisant l'intermédiation. À ce niveau, le contrôle des prix à la production existe dans plusieurs pays en développement. Sous l'effet de l'augmentation du prix des denrées alimentaires, dans de nombreux pays, des interventions ont eu lieu du côté de la consommation : encadrement des prix, subventions à la consommation, aide alimentaire, distribution de denrées alimentaires en rémunération du travail, transferts monétaires, suppression des taxes sur la consommation... Ces mesures sont-elles viables sur le plan budgétaire ? Créent-elles de nouvelles distorsions ? Donnent-elles lieu à des adaptations du côté de l'offre ou sont-elles des réactions pavloviennes ? Prenons un exemple, celui du relèvement des prix de soutien minimums des produits agricoles. Outre le fait que cette mesure contribue à l'inflation des prix des denrées alimentaires, elle creuse l'écart entre les prix payés aux producteurs et les prix subventionnés imposés aux consommateurs, alourdissant la charge fiscale. Puisque les prix de soutien minimums ne couvrent pas toujours tous les produits agricoles, et que les achats publics ne concernent pas non plus tous les produits, cette mesure envoie des signaux de prix trompeurs et fausse l'allocation des ressources. Face aux distorsions créées par les politiques publiques, est-ce que celles-ci favorisent l'intermédiation entre les prix perçus par les agriculteurs et les prix payés par les consommateurs ? Le coton en Zambie, le tabac au Malawi, la coca en Côte d'Ivoire, le thé à Maurice, le sucre au Népal, au Pakistan, au Zimbabwe, le soja au Bangladesh, les céréales vivrières au Laos, et les céréales, les oignons et le coton en Inde en sont des illustrations²¹. Dans la mesure où les monopoles et les cartels ne sont pas organisés *de droit* par la politique publique, mais existent *de fait*, est-ce que les instruments de la politique de la concurrence apportent des solutions ? Plusieurs pays ont mis en place des instruments de politique de la concurrence. Ils s'appuient généralement sur la structure (parts de marché, fusions), le comportement (pratiques commerciales restrictives ou déloyales) et les résultats (prix, rentabilité). Au risque de généraliser, il convient de reconnaître que, globalement, ces instruments ciblaient initialement l'industrie, les services y étant progressivement rattachés. Toujours sans vouloir généraliser, l'agriculture ne constituait pas un secteur phare des politiques de la concurrence, avant tout en raison du fait que les marchés agricoles étaient fortement contrôlés par les pouvoirs publics. Pourtant, l'expérience montre que les tentatives de désintermédiation se sont souvent soldées par une augmentation des abus de position dominante, des pratiques déloyales et des prix fixés. « Au cours de l'exercice 2010-2011, [la commission indienne de la concurrence] a été saisie de 71 affaires au titre de l'article 19(1)(a) de la loi sur la concurrence de 2002, de la part de différents informateurs. Les affaires concernaient le plus souvent le secteur des loisirs et les secteurs bancaire et financier, énergétique, pharmaceutique et immobilier. La commission a également enquêté de sa propre initiative sur cinq affaires relatives au prix du sucre, des oignons, aux tarifs aériens, à un fabricant de phosphore d'aluminium et à un fabricant de bouteilles de gaz au cours de ce même exercice²². » À l'exception du sucre et des oignons, cette citation confirme que la priorité de la politique de la concurrence était donnée au secteur manufacturier et aux services. Ce qui est compréhensible puisque l'intervention publique dans le domaine de la concurrence va de pair avec la libéralisation. À mesure que l'agriculture sera libéralisée et s'ouvrira à la concurrence, cette priorité devra elle aussi évoluer.

²¹ Voir : *Competition Issues in the Market on Farm Goods*, CUTS-CIER Policy Brief n°2, 2005, <http://www.cuts-ccier.org/pdf/2-2005-HKCOM.pdf>

²² *Annual Report 2010-11*, Commission de la concurrence indienne, <http://www.cci.gov.in/May2011/Advocacy/EnglishAnnualReport201011.pdf>

4. Les politiques anticoncurrentielles sur les marchés intérieurs des intrants

La concurrence en agriculture ne se joue pas uniquement sur la chaîne d'approvisionnement qui relie l'agriculteur au consommateur. Elle concerne également le marché des intrants. Les semences, les pesticides, les herbicides, les produits agro-chimiques et les engrais en sont des exemples évidents. L'électricité et l'eau relèvent de catégories quelque peu différentes. Dans ce contexte, le problème est simple. Les intrants agricoles mobilisent des ressources considérables et sont de plus en plus fabriqués par le secteur privé. Parce qu'ils nécessitent beaucoup de ressources et de recherche, les barrières à l'entrée et la concentration des structures de marché sont compréhensibles. Pour favoriser la R-D et la couverture des coûts fixes de R-D, tout en assurant un compromis entre gains d'efficacité statique et gains d'efficacité dynamique, les droits de propriété intellectuelle sont garantis, créant les conditions potentielles d'un abus de position dominante. C'est pourquoi la politique de la concurrence doit s'attacher à cette question.

Cette réflexion est juste, mais la situation est plus compliquée en Inde. En général, les distorsions sont créées par des subventions sur les intrants, notamment sur l'énergie, l'eau, les semences et les engrais. Dans le cas des engrais, l'ordonnance de contrôle des engrais (Fertilizer Control Order) de 1985, encadre les prix, la distribution et les importations. La totalité des engrais potassiques utilisés est importée. Les matières de base pour les engrais potassiques et les engrais phosphatés sont importées. Le gaz naturel et de gaz naturel liquéfié (GNL) utilisés pour la fabrication d'urée sont importés. Les importations (autres que le gaz, l'urée, l'ammoniaque, l'acide phosphorique, le phosphate naturel, le soufre, le diphosphate d'ammonium, le chlorure de potasse) et les prix des intrants importés sont donc contrôlés par les autorités. Au moyen d'un dispositif complexe de fixation des prix, l'écart entre le prix de détail maximal (MRP) payé par les agriculteurs et le coût de production des engrais, est compensé par une subvention versée aux fabricants d'engrais²³. Une simple analyse des parts de marchés des différents fabricants d'engrais sur des segments comme l'urée, le diphosphate d'ammonium, le superphosphate simple ou le chlorure de phosphate passe à côté de la question clé, celle des distorsions créées par l'intervention publique. En outre, les engrais ne sont pas vendus directement aux agriculteurs par les producteurs d'engrais, mais par l'intermédiaire de revendeurs et de distributeurs. Cette question de la distribution concerne également les semences. Comme les engrais, les semences ont été, au fil de l'histoire, contrôlées par plusieurs textes : la loi sur les semences (Seed Act) de 1966, l'ordonnance de contrôle des semences (Seeds Control Order) de 1983 et la politique des semences (Seeds Policy) de 1988. Le marché des semences a été assoupli grâce à la politique nationale sur les semences (National Seeds Policy) de 2002, et des restrictions (licences d'exploitations industrielles, plafonnement de l'investissement direct étranger) ont été supprimées. Le secteur public est certes présent, mais le secteur privé a largement gagné du terrain sur le segment des semences et connu plusieurs fusions-acquisitions. Le débat sur les droits de propriété intellectuelle et les rendements de meilleures variétés de semences est pertinent, mais la question centrale reste néanmoins celle des circuits de distribution entre les semenciers et les agriculteurs. Comme dans le cas des marchés des produits, peu de d'études ont été consacrées à ce maillon de la chaîne de distribution – c'est précisément sur celui-ci que devra se concentrer l'action publique en matière de concurrence.

²³

Des arguments valides donnent à penser que cette subvention bénéficie davantage aux producteurs d'engrais qu'aux agriculteurs et, parmi ces derniers, uniquement aux grandes exploitations agricoles. C'est pourquoi il conviendrait de sortir d'un système de subventions des intrants. Il y a eu en 2010 certaines tentatives visant à reporter les subventions versées aux producteurs d'engrais directement sur les agriculteurs. Mais ce point est annexe à l'objet de ce document.

REFLECTIONS ON THE CAUSES OF COMMODITY MARKET PRICE CHANGES AND VOLATILITY

*By Torbjörn Iwarson**

Introduction

Commodity prices, which were more or less unchanged during the 1980s and 1990s, started to rise in the period 2000-2005. Consumers have found that “things” have become more expensive, in particular as incomes, mostly in the developed part of the world has not increased at the same pace as commodity prices. Some people react to this increased feeling of resource scarcity by calling for a “sustainable” attitude towards natural resource use in the fear of resource depletion. Others fear that financial and when in collective form, anonymous, financial flows into the markets for contingent claims on commodity prices such as futures contracts and commodity index funds increase resource scarcity by increasing price or by at least increasing volatility.

1. The role of futures markets

The three most important functions of a centralized, futures market is usually mentioned as being:

- A source of price discovery
- A place for producers to unload price risk and investors to carry their price risk
- A place to store surplus inventory

Most futures markets are modeled on the Chicago Board of Trade, which came into existence in 1848 as necessity called for more order in commercial activity. The discussion on the role of speculation has a long history at the CBOT.

2. The role of speculation

Speculation is the task of assessing current and forecasting future supply and demand. The task is to find the price which balances supply and demand in the future with all known information – and the correct interpretation of such information. The objective is to avoid scarcity and to avoid wasteful overproduction. The incentive for guessing right is a profit, the compensation for the work. In any society, this task has to be performed and in a free market economy it is the role of the speculator. But who is the speculator in a free market economy? Of course the speculator is every person free to make consumption or production or storage choices. On a personal note, I remember that my mother used to buy potatoes in the fall, as she always thought it would be more expensive in the winter.

People who criticize speculation usually think of someone cornering the market, which almost always when it has been done, has involved the physical market. Or they may think of someone creating rents, at the expense of someone else. The creation of rents almost always requires political decisions or some other cause of special market power such as monopsony or monopoly, i.e. deficiencies in competition.

* Note prepared by Mr. Torbjörn Iwarson (Head of Commodities, SEB Merchant Banking, Sweden).

There is also the fear of “bubbles” of high prices based on thoughtless speculation in a movement of herd or crowd behavior. Knowledge of such manias is widespread in society. Examples of instances of herd behavior of the financial kind are The South Sea Bubble, the tulip mania and many other described e.g. by Mackay¹ and perhaps in more recent time, the “IT bubble”. Popular delusions and crowd behavior are however not limited to peoples’ investments. In other parts of society; it is well known that waves of such policy affecting thinking or lack of thinking, can exist. And these instances can be far more damaging than speculative manias.

One such popular delusion, may be that very high commodity prices are caused by speculation. This is belief is by no means new. One does not have to refer to popular films such as James Bond in “Goldfinger”, where the character Auric Goldfinger had secretly cornered the market for gold to get immensely rich and powerful by the push of a button, at the expense of a peaceful and unsuspecting world. In a movement that existed in the late 1800s called the “Agrarian movement”, the House of Representatives and Congress in the USA was nearly in majority to de facto outlaw futures markets. The accusation then was that speculation depressed prices. This episode is described by Lurie² and two quotes can illustrate the mood at the time

“We are profoundly impressed with the conviction that the gigantic gambling device known as short selling, in which one party agrees to sell what never did and never will exist, and the other agrees to buy what he knows is never to be delivered to him, has been a potent cause in producing the ruinous agricultural depression from which the country has suffered”, from a print 1892

“By the combined action of certain persons... organised into... Boards of Trade, the prices of all kinds of farm products are so manipulated and depressed that they cannot be produced except at a loss to the farmer”, the Hurricane Grange No. 359.

Two bills were presented by the agrarian movement. The first was the Butterworth Bill of 1890, where a dealer would have to pay \$1000 pa for the privilege to trade in futures and options, and for transacted volume, 5 cents / lb of cotton, and 20 cents / bu of grain bought or sold.

The second bill was the Hatch Bill of 1892: where a dealer would have to pay \$2000 pa + 20 cents / bu of grain. This bill passed the House easily and was sent to Congress. Congress approved it with a few amendments and it was sent back to the House for them to approve. Due to shortness of time, it was hurried to decision and failed to get the required 2/3 majority with a small margin in 1893. These two bills had such large costs to transactions and market participants, that the market had ceased to exist.

Meanwhile, the popular mood had changed. The CBOT wrote on “produce gambling”, which was common in the form of “bucket shops”, an older version of today’s online betting sites, that it

“bears about the same relation to legitimate commerce and speculation... that the froth and foam of the Niagara do to the almighty volume of water underneath. It is the bubble and fuss and fury, the froth and foam upon the surface that offends, not commerce itself”, DP April 29, 1890.

The magazine the Northwestern Miller, wrote in January, 1892 about the agrarian movement bills:

“How in the world a farmer can be benefited by the passage of such a measure... is beyond us”

Farmers themselves were quite active speculators, Prairie Farmer wrote on Dec 27, 1884:

“What is wanted now, is for farmers to hold back all the grain they possibly can, and hold on to it”.

¹ Memoirs of Extraordinary Popular Delusions and the Madness of Crowds, Charles Mackay, 1852.

² Jonathan Lurie, The Chicago Board of Trade 1859-1905, University of Illinois Press, 1979.

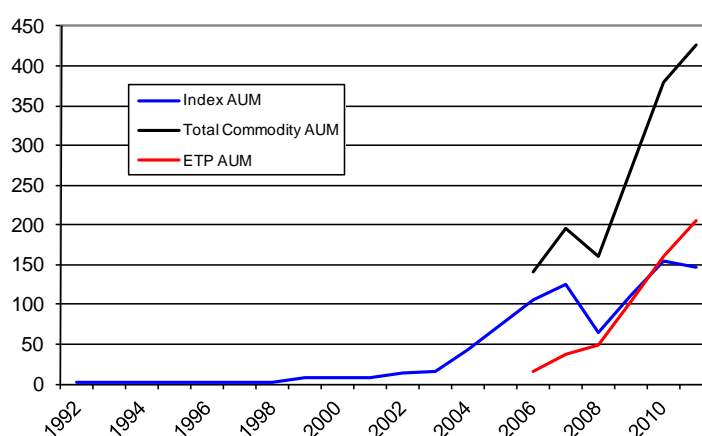
The reason most cited for not interfering in the commodities markets was that

“the ethical distinctions involved between legitimate and illegitimate speculation are not easily reducible to exact legal definition”, Newman Smyth, Forum 19, 1895.

This is still today true. Thus, as was written at even an earlier date, there is nothing new under the sun.

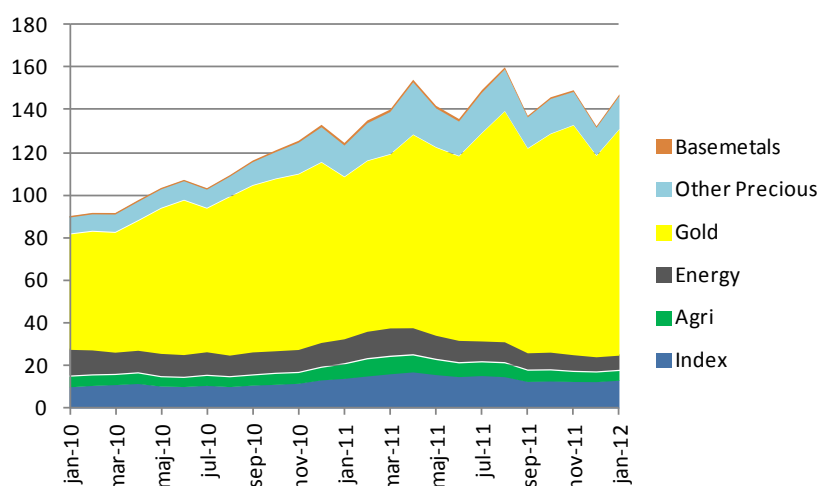
3. Today, how much money is investing in futures contracts on commodities?

The amount invested in commodity futures and commodity markets is by Barclays Capital³ estimated to more than 400 billion US dollars. Most of this is now invested in Exchange Traded Products (“ETP”), that is, as notes or fund units which are traded at low cost on the infrastructure of stock exchanges and custody accounts built up during the stock market boom of the 1980s and 1990s. Below we see a diagram of Assets Under Management (“AUM”) in USD bn.



Source: SEB Commodities, Barclays Capital

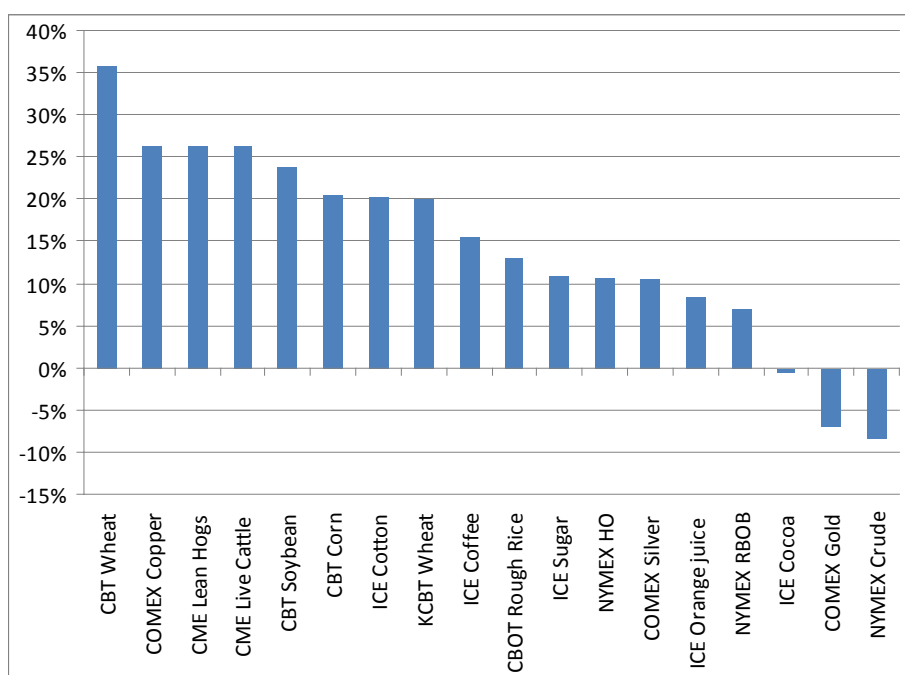
We can also study AUM of ETPs only, where it is easy to get data. Below we see how AUM is split between sectors of the commodity market, updated to the end of January 2012.



Source: SEB Commodities, Bloomberg

³ The commodity investor, Barclays Capital, December 20, 2011.

We see that most of AUM is in gold, which does not behave as a commodity, but as a financial asset. While stocks of crude oil may last for a couple of weeks of consumption if production stopped, stocks of gold would last for nearly 50 years. We also see that the “financialisation” of base metals is not happening. Whatever goes on in base metals markets that seem curious, is created by industrial agents and governments. Agriculture products are also quite a small part of the total. In certain, fairly small qualities, such as the soft red winter wheat futures market traded in Chicago, there can be a large proportion of index investors. There is however arbitrage possibilities to the much larger markets of hard red winter wheat in Kansas City. It is slightly myopic to just look at the share of index investors in Chicago wheat. Below we see the share of “swap dealers” net position of open interest in a selection of US commodity futures markets.



Source: SEB Commodities, CFTC, Bloomberg

Note that swap dealers who is thought to represent financial investors is net short cocoa, gold and crude oil. Should we interpret this as that “savers” are in fact “borrowers”? If we sum up AUM in ETPs that invest in crude oil, do we find a negative number? Obviously the answer is no. Maybe the CFTC swap dealer data is not all that reliable to make inferences about commodity investment flow as one may have believed.

In any case, there are many producers exposed to the risk of falling prices and operational loss. To insure against this risk, they turn to futures and OTC swap markets and banks to sell forward and get a fixed price and thereby unloading risk. No one carries this risk for free. There is a risk premium. This was described by Keynes in his book “A Treatise on Money” in 1930⁴. Futures prices are lower than the expectation is that the spot price will be in the future. Keynes called this “the theory of normal backwardation”. The risk premium lies in this discount to spot prices that exist over time in futures prices. For products such as wheat, the price risk is the largest source of income variation between years for a

⁴ John Maynard Keynes, “A Treatise on Money: The Pure Theory of Money and The Applied Theory of Money. Complete Set”, Martino Fine Books, 2 June 2011.

grain grower, for example in Sweden. There is a demand for buying insurance against this risk, i.e. to sell forward. For consumers in Sweden, the exposure to wheat prices is negligible. There is little demand from them to hedge wheat consumption costs. Hence, someone else must act insurance company and these are for example savers. However, savers are exposed to price risk on “things” such as wheat, because for example pension funds save money that will be consumed by someone in the future and among things consumed are wheat. If “things” get more expensive there is a risk reduction to be gained by investing in commodity markets. Both producers and savers are better off when they can help each other over the futures exchange.

4. Why invest in commodities?

There are many reasons why people invest in the commodities market through futures contracts. The first is that the risk premium offered by producers who sell futures contracts to protect themselves against price risk has been attractive and at the same level as the risk premium in the stock market. There is also a low or sometimes even negative correlation between commodity price changes and stock markets. An investment into the commodity market for someone who already has stocks and bonds will reduce the risk in the portfolio and make it safer. It is possible to get the same high return but at a lower risk. A further reason why people invest in commodities is that commodities as a group has a positive correlation to inflation, while both stocks and bonds have a negative correlation. We have a situation today with record high government debts and record low interest rates. This combination has always lead to inflation, i.e. the loss of purchasing power of savings. Investment in commodities gives some protection against this risk. The final and perhaps most important reason why people invest in commodities is that half the world’s population is growing, notably China. As a country goes from poor to developed, there is a growing demand for everything from dishwashers to modern houses with plumbing. There is a demand shock temporarily driving the commodity markets.

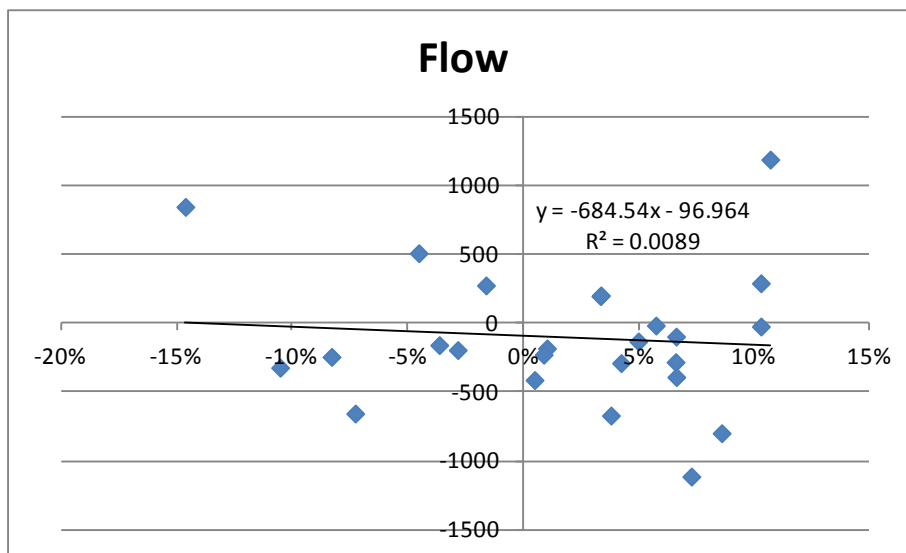
5. Does financial flow affect commodity prices?

A number of studies for example by EDHEC Risk Institute⁵ and the agricultural economist Scott Irwin⁶ and Dwight Sanders, have been done during the recent years, mainly using weekly Commitment of Traders data from the US markets published by the CFTC. Naturally, organizations such as the IMF, the FAO and the OECD has studied and published reports. These have found correlation between financial flows and price changes. The causation does however seem to go from fundamentally-caused market price changes to purchases or sales of futures contracts by financial actors. There is little evidence that financial flow cause prices to move, at least over a time horizon relevant for the economy at large. If financial actors had superior information one would actually expect them to move price permanently and this would be a good thing, but there is no evidence of this. Anyone who has ever entered a limit order into an order book for a futures contract or a common stock knows that one can momentarily change the best bid or best offer price, but that is not the same thing as permanently moving the market as other people with a different view of the right price have time to react.

⁵ EDHEC Risk Institute, “Has There Been Excessive Speculation in the US Oil Futures Markets? What Can We (Carefully) Conclude from New CFTC data?”, November 2009.

⁶ Scott H. Irwin and Dwight R. Sanders, “The Financialization of Commodity Futures Markets or: How I Learned to Stop Worrying and Love the Index Funds”, October 2010 (<http://ssrn.com/abstract=1699793>).

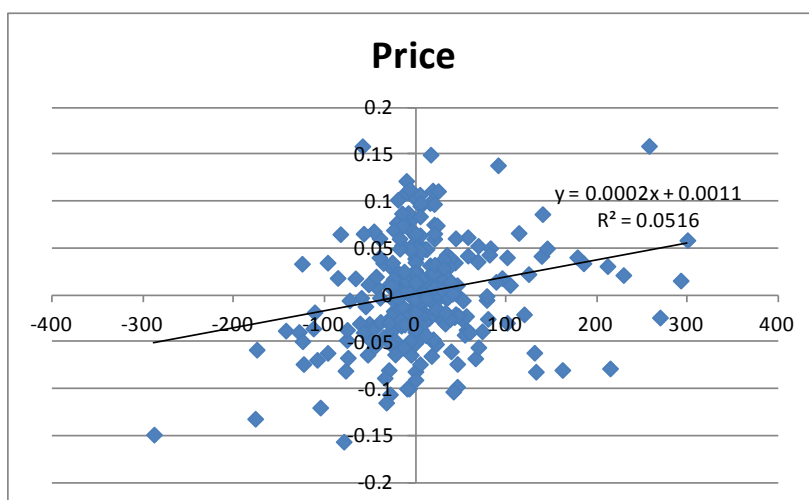
Instead of analyzing CFTC data, one can look at flow into and out of an exchange-traded fund. The largest energy-related ETP listed and with data available on the Bloomberg information system has had the following relationship between flow (in million dollars) to the percentage change in the price of crude oil, on a monthly basis the last two years:



Source: SEB Commodities, Bloomberg

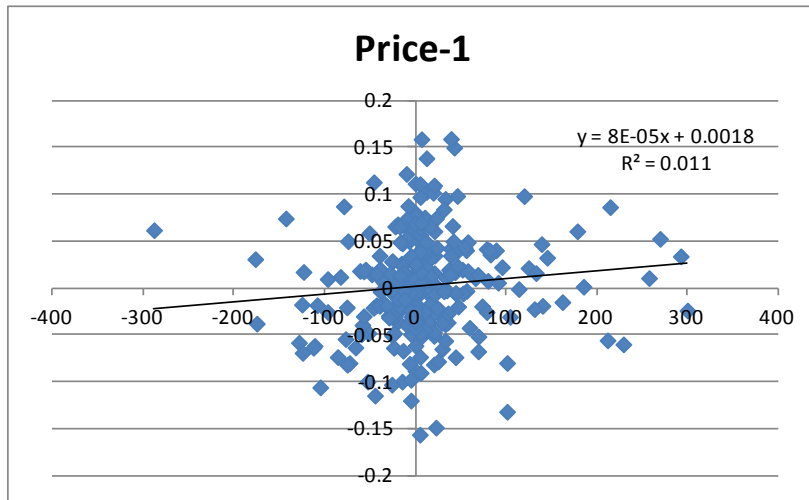
There is in other words, with such a low R2, no relationship at all.

If one turns to the largest ETP on agricultural products (futures) it is the Powerhares DB Agriculture, listed on NYSE. Using weekly data for assets under management and weekly changes in the price of wheat on CBOT, we find the following relationship between change in price and change in AUM for the same week. This does however, not say anything about causation.



Source: SEB Commodities, Bloomberg

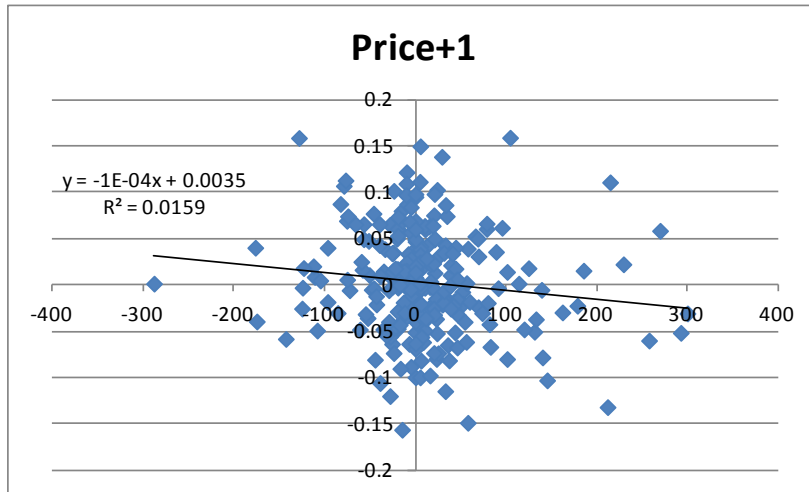
We can now look at the relationship between the price change the week before and the change in AUM for the current week:



Source: SEB Commodities, Bloomberg

We see that this has if anything a positive relationship, but the R2 is certainly not high. An increase in the price last week made investors buy the following week.

Now we finally look at the relationship between a change in AUM the current week and the change in price the next week:



Source: SEB Commodities, Bloomberg

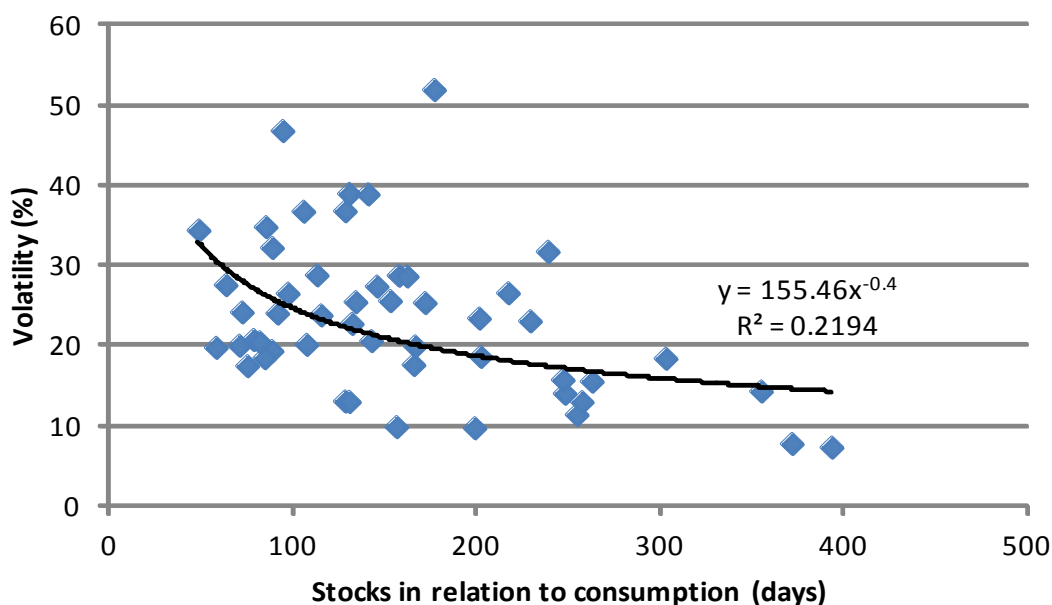
This has if anything a negative effect. An investment in this the largest ETP on agricultural products has tended to be followed by lower prices, not higher.

We must also note how extremely insignificant the explanatory power of investment flow is, even on a weekly basis. There is clearly no support for claims that investment flow increases prices for commodities when explanatory power is microscopic and if anything the effect has the opposite sign, as we saw in the examples above.

6. Some causes of volatility today

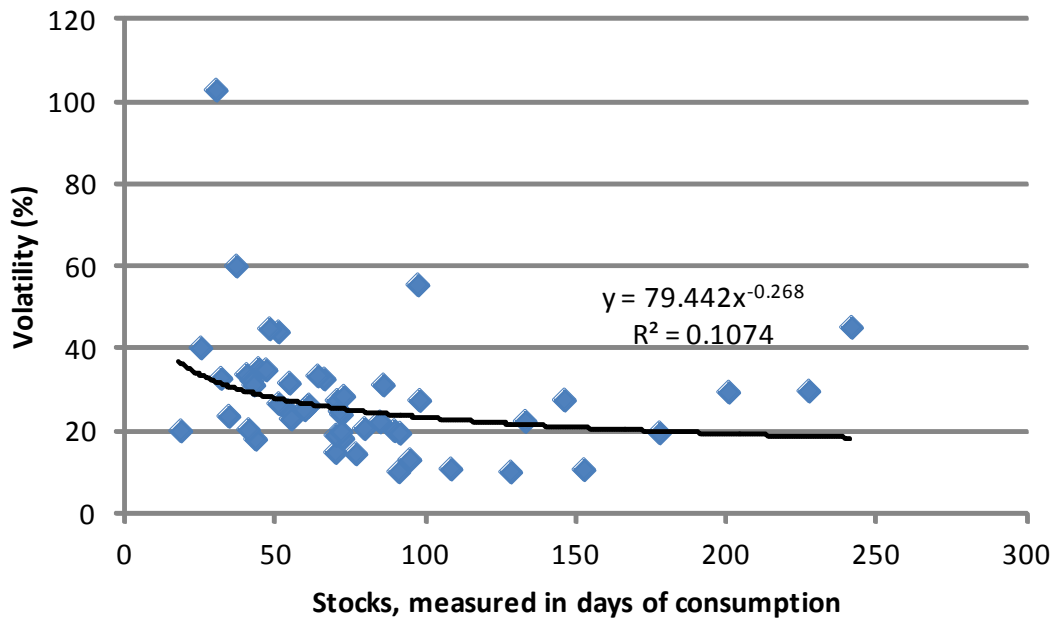
The textbook cause of price change or price variability is change in supply or demand. The end result of supply and demand for agricultural products, where we more or less consume what we produced in the same annual production and consumption year, is carryover, or carry out stocks. That level is a key factor and forecasts and changes in forecasts about the level of carry out stocks have a large impact on markets. Commodity markets have the institution of “storage”, which no other market, such as the equity or bond market has. Storage is filled when prices are low and emptied when prices are high (in relation to long term production costs) and prices are temporarily changed due to short term disturbances in consumption or for agricultural products, mostly due to production disturbances such as drought. Storable commodities where storage is inexpensive, have low price variability. The spot price of electricity, impossible to store, has a high volatility and the need to manage exposure to such price risk via futures markets and contingent claims in general, is high. The price of wood has a very low price volatility, since logging can be moved 10 years earlier or later without much cost to optimal production. Stocks are huge. There is no market for contingent claims on wood, since price risk is not much of a risk.

It is a well-known characteristic of commodity price volatility, that up-moves in price tend to be larger in size than down-moves. People fear higher prices or the scarcity higher prices reflect. Markets for financial assets such as stocks and bonds behave in the opposite way, with larger down-moves than up-moves. Fear to lose hard-earned savings dominates. For commodity markets one would expect scarcity, i.e. low stocks, to be related to high prices. We can take a look at annual data from the USDA on US stock levels for corn and wheat, compared to 90-day historical volatility to see that this is indeed the case. Below we see the annual relationship between 90-day historical price volatility of the shortest to maturity CBOT wheat contract and carry out stocks in the USA, in relation to consumption, measured in days of consumption, for wheat from 1960.



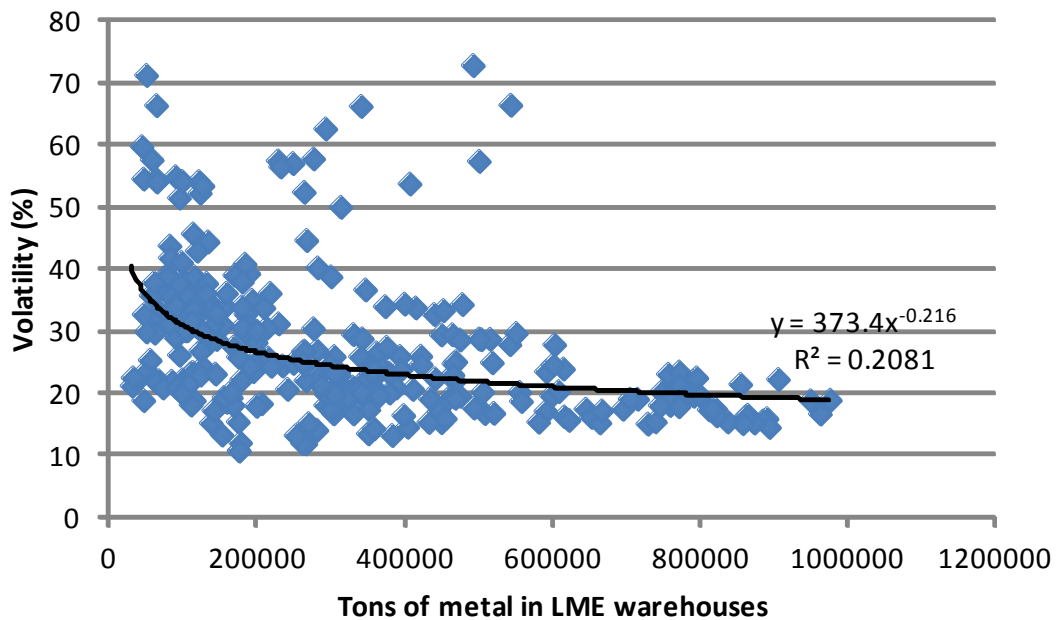
Source: SEB Commodities, Bloomberg

Below we see the same chart for corn:



Source: SEB Commodities, Bloomberg

We may even extend this to LME Copper, where stocks are measured in metric tons, and see the same relationship on weekly data from 1986 to 2011.



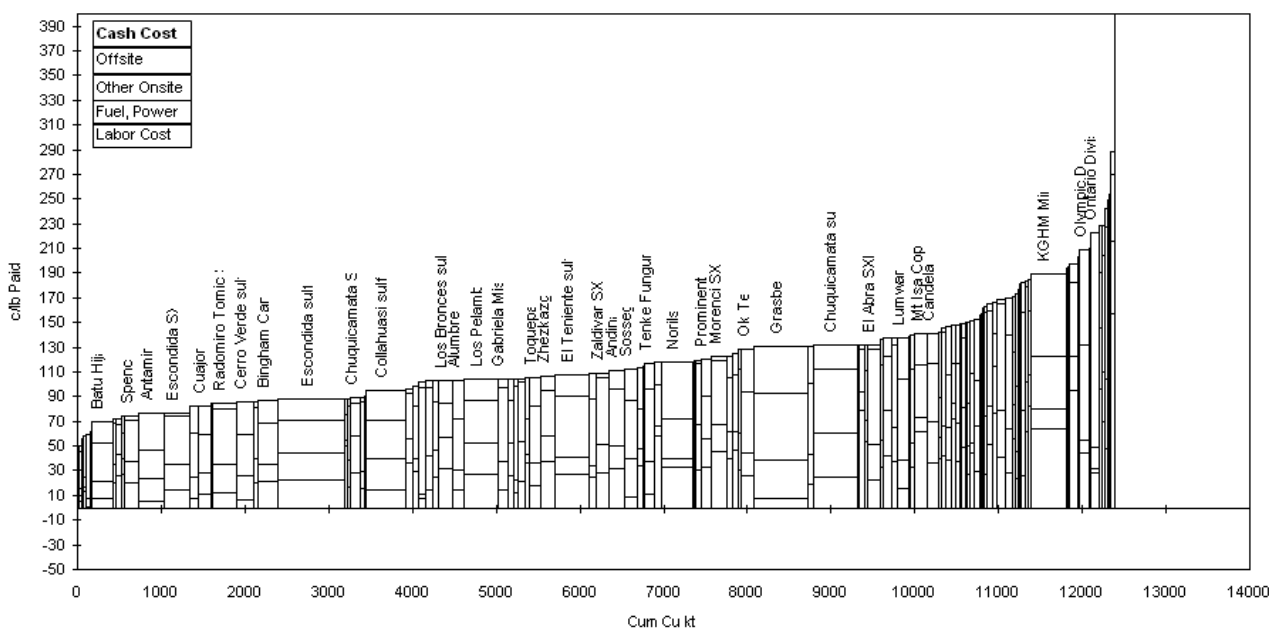
Source: SEB Commodities, Bloomberg

Note that the explanatory power of stocks, the end result of supply and demand, is not insignificant, even as we are using a fairly crude measure of volatility. So, is volatility high now because stocks are low?

Well, stocks of for example corn are at the lowest level since 1973 when measured in relation to consumption. The price is high, due to increased consumption and weather-related low production. The high price will, however, stimulate increased production.

Another reason that price variability is higher when price is higher is that the production cost curve is steeper at higher marginal cost of production. A change in demand when almost all capacity is used has a larger effect on cost and therefore in equilibrium, price. Below we see a production cost curve for copper. Note the steeper curve to the right, towards 100% production capacity utilization.

Copper Cash Operating Cost 2010 – No Credits



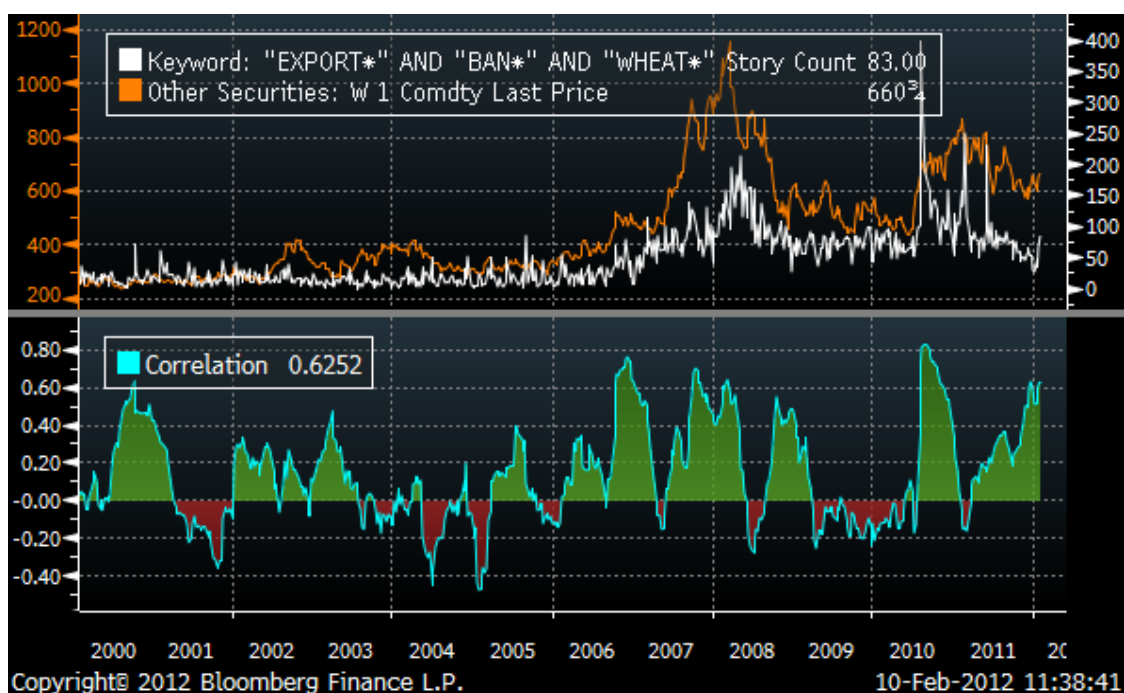
Source: SEB Commodities, various sources

7. What if we misinterpret the high price as caused by “speculation”

It has been attempted to control the market price to make “things” affordable, thus with the objective to make a social gain. One of the best known examples of this was the price ceiling on crude oil in the US up to 1973, which made it uneconomical to produce crude oil domestically and as global prices increased, made it uneconomical to import and sell the product domestically. Another example was the price limit on electricity in California, which Enron got the blame for shutting down. California had not built a single power station for decades and was dependent on imports from other states. When grid prices including transportation costs for energy increased, who would buy it more expensively outside California and sell it at a loss in California? In both these cases, deliveries stopped. The policy error was on the side of government policy in both cases.

Another such reaction, particularly in agricultural market, is the “temporary” introduction of export taxes or export bans. The purpose is to protect the own country against a food scarcity as rationed by a high price. The effect on the global market and countries dependent on imports can be severe. Government policy of export bans clearly is both the result of high prices and also worsens the situation for all other consumers dependent on the global market. Below we see a diagram of the price of wheat and the number of news articles containing all the words “wheat”, “export” and “ban”. We also see that the correlation

between high prices and the popularity of these words is quite high, particularly when wheat prices were high due to drought in 2007 and 2010.



Source: Bloomberg, weekly data

Export bans are unfortunate, because an export ban for a country with a large farming community makes the free market price which is a reflection of scarcity, not reach the farmer. A high price would stimulate the farmer to plant more on marginal land or use more intensive farming methods that would otherwise not be profitable. It is a saying in farming that the best cure for a high price is the high price. Disconnected from the real price caused by real supply and demand, production cannot respond to solve the scarcity situation and bring the price down when the domestic price is artificially low compared to the global equilibrium. Does this have to do with speculation? In a way, because the speculation made, is that scarcity will be temporary and somehow solve itself in the long run. And the speculation is made by a government, who has created a rent.

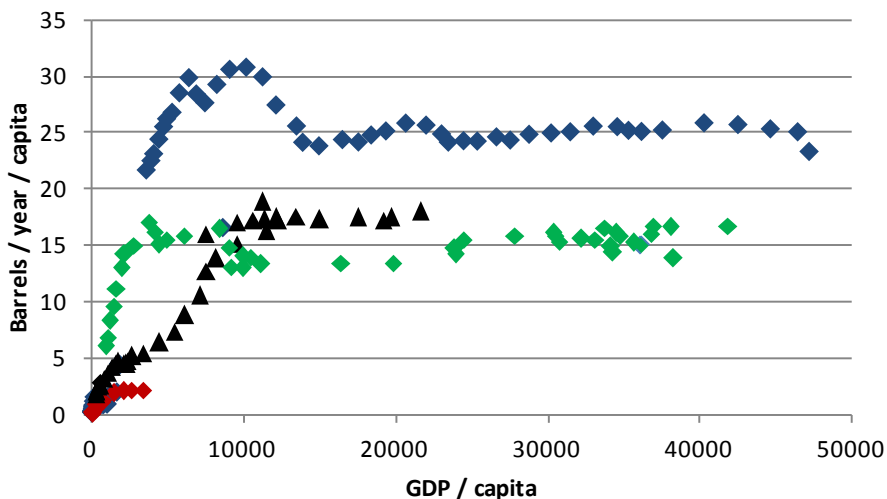
Hence, we have seen that attempting to cure the symptom (a high price) with government imposed price fixing either explicitly or indirectly through export bans, is no long term solution and causes harm. Likewise, a ban or a restriction on free trade in risk movement instruments such as futures contracts with the purpose of curing the symptom of a high (or as was the case 120 years ago, a low) price, is probably not a good idea either because there is no evidence of causality going from financial flows to prices and the explanatory power of such flows is in all practicality zero.

8. What other cause of low stocks is there?

There was a huge commodity price boom in the 1970s. There was the same discussion of resource scarcity and the fear that this would lead to the “limits to growth”. This proved wrong. Production caught up with consumption growth and commodity markets became quiet in the 1980s and 1990s.

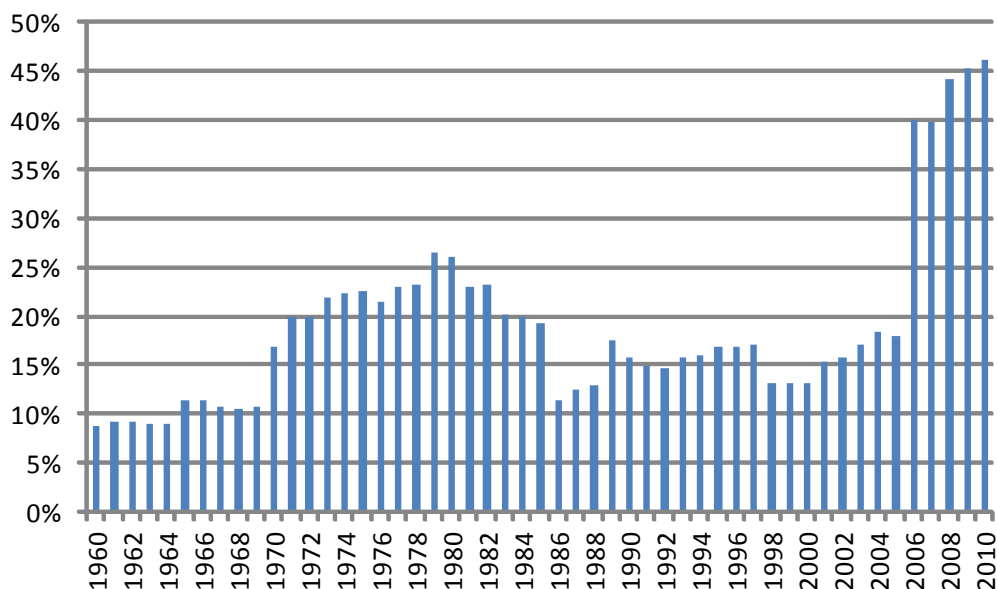
As countries develop from poor to rich, there is a phase where a GDP change has a large effect on the demand for “things”. We can study OECD countries which have gone through this phase and find that this

commodity-demand-heavy range can be defined as the period when, in current USD, GDP per capita is between 2000 and 13000 dollars. We see an example of this below in the consumption of oil per capita per year and the level of GDP per capita on an annual basis.



Source: SEB Commodities, World Bank data, BP Statistical Review, Bloomberg

With World Bank data we can see the share of the global population (where GDP was reported) having between 2000 and 13000 USD as GDP / capita. We see this below:



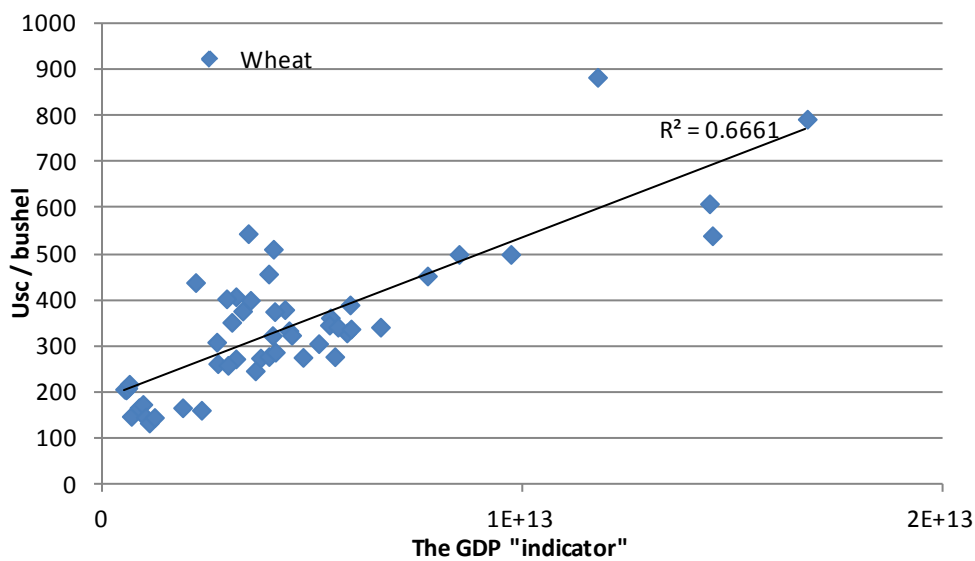
Source: SEB Commodities, World Bank data

Here, we clearly see the reason for the commodities boom during the 1970s and we also see why there is a commodities price boom since about 2005. There is also hope that this period with increased demand, low stocks and high prices will be followed by bust – but the solution is absolutely not regulation of the high price, that will not stop development.

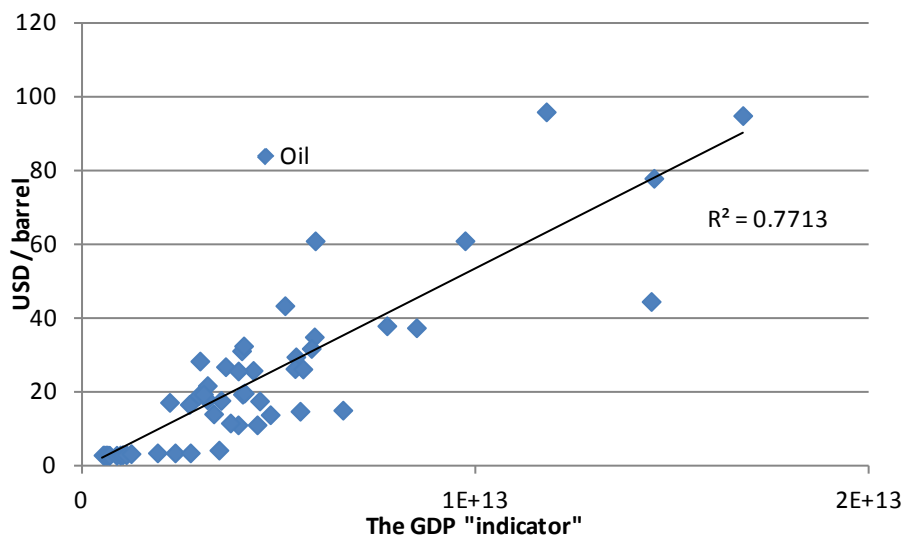
The solutions may be a choice of increased production and adaptation via rationing and substitution – and the purchasing of insurance against higher prices of “things” (lower purchasing power of savings) through commodity investment in futures.

The popularity of futures investment, also increases the possibility to make certain the selling price for producers. It makes production safer as a business endeavour, thus making it more attractive to produce; more is produced, which is a solution too.

We can construct a commodity demand indicator, for example with the sum of the GDP (in current USD) for all countries with a GDP per capita between 2000 and 13000 current USD per capita. This indicator looks very similar to the population graph above. We can compare it to the price of oil / barrel and the price of wheat / bushel and we get the following diagrams:

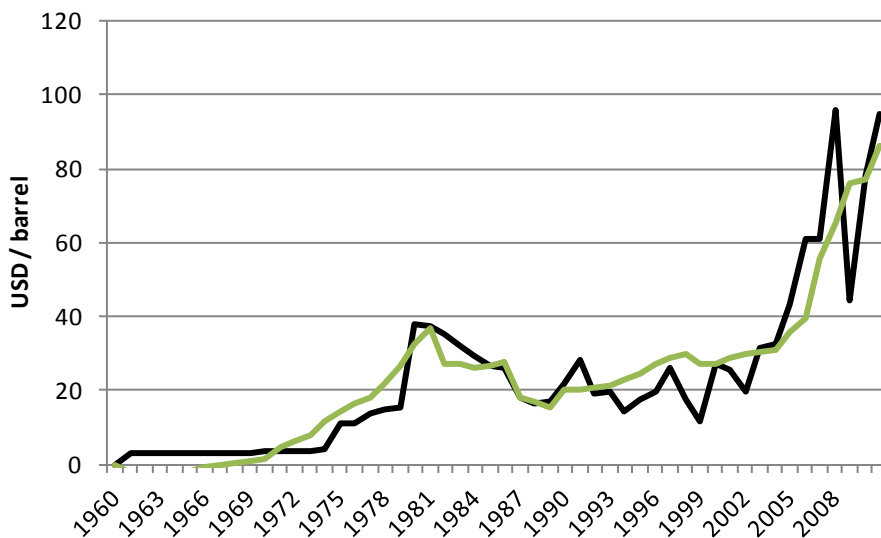


Source: SEB Commodities, World Bank data.



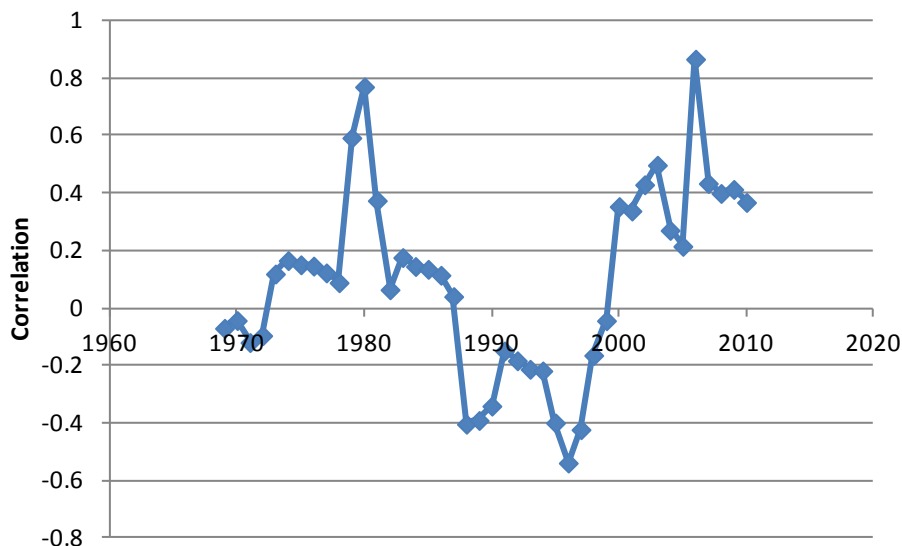
Source: SEB Commodities, World Bank data.

A simple linear regression model with this “indicator” and US CPI (to adjust for changes in the purchasing power of the US Dollar) as explanatory variables, gives the following estimated “synthetic” oil price, plotted with the actual price:



Source: SEB Commodities

Since there is a relationship between high prices and volatility (the fear of scarcity), we would expect to see a relationship between this indicator and volatility of for example, the CBOT wheat price, and this is also the case, as we see in the diagram below of rolling 10 year correlations.



Source: SEB Commodities, World Bank data, Bloomberg

We clearly see a strong relationship between “modernization” of emerging economies and commodity market price volatility.

It may be interesting to look at the populations, their size and for how long time they were in this commodity demanding phase. That we see below:

Country	Population (mill)	>2000 \$ GDP/capita	>13000 \$	Years in boom phase
USA	307	1950s	1980	25
Sweden	9	1961	1985	24
Europe	600	1970s	Early 80s	25
Germany	82	1970	1985	15
Japan	128	1971	1985	14
Korea (South)	49	1983	2002	19
Brazil	194	1987	2011	24
China	1330	2006		
Indonesia	230	2008		
India	1200	2012		
Average, years				20.9

The 70s commodity boom was thus created by Europeans, eastern and western, the USA and Japan. This was tackled with inflation. Now there are larger populations going through “industrialization” and if the movement continues, there will probably be commodity demand increases for a long time still, until boom turns to bust in the commodity markets.

9. Summary

High commodity prices, and the volatility associated with scarcity and high prices, are not caused by the insurance market for price risk that derivatives markets are. A misunderstanding of the causes of high prices, can lead to decisions that make the situation worse by cutting off the signaling value of a high price to producers to produce more. An example of this is export bans for grain. The industrialization of large populations in the world is behind the commodity boom, high prices and high volatility, and this is likely to continue for many years.

RÉFLEXIONS SUR LES CAUSES DES FLUCTUATIONS ET DE LA VOLATILITÉ DES PRIX SUR LE MARCHÉ DES MATIÈRES PREMIÈRES

*Par Torbjörn Iwarson**

Introduction

Les prix des matières premières, qui sont restés plus ou moins inchangés au cours des années 80 et 90, ont amorcé une hausse entre 2000 et 2005. Les consommateurs ont découvert que les produits de base coûtaient plus cher, notamment parce que les revenus, surtout dans les pays développés, n'ont pas progressé au même rythme que les prix des matières premières. Certains réagissent à ce sentiment de raréfaction des ressources en plaidant en faveur de leur utilisation « durable », par crainte qu'elles s'épuisent. D'autres craignent que des flux financiers, anonymes lorsqu'ils sont considérés collectivement, investis sur les marchés de créances conditionnelles sur les prix des matières premières, comme les contrats à terme et les fonds indiciaires sur marchandises, aggravent la pénurie de ressources en augmentant les prix ou du moins leur volatilité.

1. Rôle des marchés à terme

Les trois principales fonctions d'un marché à terme centralisé sont les suivantes :

Une source de détermination des prix

5. Un lieu permettant aux producteurs de se protéger contre le risque de prix et aux investisseurs de reporter ce risque.
6. Un lieu permettant de conserver des stocks excédentaires.

La plupart des marchés à terme sont conçus sur le modèle du Chicago Board of Trade (CBOT), créé en 1848 afin de mieux discipliner l'activité commerciale. Sur le marché CBOT, l'analyse du rôle de la spéculation ne date pas d'hier.

2. Le rôle de la spéculation

La spéculation consiste à prévoir la situation future de l'offre et de la demande sur la base de la situation actuelle. L'enjeu est de déterminer le prix d'équilibre entre l'offre et la demande à l'avenir, en réunissant toutes les informations disponibles et en les interprétant correctement. L'objectif est d'éviter la pénurie comme la surproduction. Si ce travail est effectué correctement, il génère un bénéfice. Aucune société ne peut faire l'économie de cette tâche et, dans une économie de marché, c'est le rôle du spéculateur. Mais qui est le spéculateur dans une économie de marché ? Il s'agit de toute personne en mesure de faire des choix de consommation, de production ou de stockage. Personnellement, je me souviens que ma mère achetait des pommes de terre à l'automne, pensant qu'elles vaudraient plus cher l'hiver venu.

Ceux qui critiquent les spéculateurs les imaginent sous les traits de personnes qui accaparent le marché, pratique qui, lorsqu'elle a lieu, concerne presque toujours le marché physique. Ils peuvent

* Note préparée par M. Torbjörn Iwarson (Chef du secteur Matières premières, banque SEB, Suède).

également se représenter la création de rentes au détriment d'autrui. La création de rentes nécessite presque toujours des décisions politiques ou une autre forme d'emprise sur le marché, comme un monopsonne ou un monopole, c'est-à-dire une défaillance de la concurrence.

D'aucuns craignent également qu'une spéculation irraisonnée entraîne la formation de « bulles » de prix élevés, sous l'effet d'un comportement moutonnier ou de mimétisme. De tels épisodes de folie collective sont très répandus. Parmi les exemples de comportements moutonniers de nature financière, on peut citer la Bulle des Mers du Sud, la tulipomanie et bien d'autres événements décrits par exemple par Mackay¹ et, plus récemment peut-être, la « bulle informatique ». Néanmoins, l'aveuglement populaire et les comportements moutonniers ne se limitent pas au domaine de l'investissement. Dans d'autres sphères de la société, on sait bien que des forces qui influent sur la pensée ou la paralysent peuvent se déployer, avec des conséquences beaucoup plus dévastatrices que les folies spéculatives.

L'idée que les prix très élevés des matières premières résultent de la spéculation fait partie de ces illusions populaires. Cette croyance n'est absolument pas nouvelle. Il n'est pas nécessaire d'évoquer des films populaires, comme James Bond dans « Goldfinger », où le personnage d'Auric Goldfinger a secrètement accaparé le marché de l'or pour devenir immensément riche et puissant, aux dépens d'un monde paisible et qui ne se doutait de rien. Lors du « mouvement agraire » aux États-Unis à la fin du 19^e siècle, il s'en est fallu de peu pour qu'une majorité se dégage à la Chambre des Représentants et au Congrès pour proscrire de facto les marchés à terme. On accusait alors la spéculation de faire baisser les prix. Cet épisode est décrit par Lurie², dont l'ouvrage illustre l'humeur de l'époque :

« Nous sommes fermement convaincus que ce mécanisme de jeu à grande échelle connu sous le nom de vente à terme, dans lequel une partie s'engage à vendre ce qui n'a jamais existé et n'existera jamais, et l'autre partie s'engage à acheter un bien qui ne lui sera jamais livré, est l'une des causes déterminantes de l'effondrement ruineux des marchés agricoles dont souffre le pays », extrait d'une édition de 1892.

« Par l'action combinée de certaines personnes ... organisées au sein de ... bourses de marchandises, les prix de toutes sortes de denrées agricoles atteignent un niveau si bas que le fermier qui décide d'en produire le fera à perte », the Hurricane Grange n° 359.

Deux projets de loi ont été soumis par le mouvement agraire. Le premier, celui de Butterworth datant de 1890, prévoyait qu'un opérateur devrait payer 1000 dollars par an pour obtenir le droit de négocier des contrats à terme et des options, et pour chaque transaction, acquitter 5 cents par livre de coton et 20 cents par boisseau de céréale achetés ou vendus.

Le deuxième projet de loi, celui de Hatch Bill, date de 1892 ; il disposait qu'un négociant devrait payer 2000 dollars par an, plus 20 cents par boisseau de céréale. Ce projet a été facilement adopté par la Chambre des Représentants et soumis au Congrès. Le Congrès l'a approuvé en procédant à quelques modifications, avant de le renvoyer devant la Chambre pour approbation. Faute de temps, elle a dû se prononcer dans l'urgence et, en 1893, a échoué de justesse à obtenir la majorité requise des deux tiers. Ces deux projets de loi imposaient des coûts si élevés aux participants du marché et aux transactions que, s'ils avaient été adoptés, le marché aurait cessé d'exister.

Entre-temps, l'opinion publique avait changé. À propos des « paris sur les denrées agricoles », couramment pratiqués dans les officines clandestines, ancienne version des sites de paris en ligne actuels, la CBOT écrit qu'ils :

¹ Memoirs of Extraordinary Popular Delusions and the Madness of Crowds, Charles Mackay, 1852.

² Jonathan Lurie, The Chicago Board of Trade 1859-1905, University of Illinois Press, 1979.

« peuvent être comparés au lien entre commerce légitime et spéculation... l'ordre de grandeur est le même qu'entre l'écume des Chutes du Niagara et les énormes volumes d'eau sous la surface. C'est le tapage et l'agitation, les remous et l'écume à la surface qui posent problème, pas le commerce proprement dit », DP du 29 avril 1890.

Concernant les projets de loi du mouvement agraire, le magazine *Northwestern Miller* écrit en janvier 1892 :

« On ne voit absolument pas en quoi l'adoption de telles mesures pourrait être profitable aux exploitants agricoles »

Les exploitants eux-mêmes étaient des spéculateurs très actifs, comme l'écrit le *Prairie Farmer* le 27 décembre 1884 :

« Ce qu'il faut maintenant, c'est que les exploitants agricoles stockent toutes les céréales qu'ils peuvent, et les conservent le plus longtemps possible ».

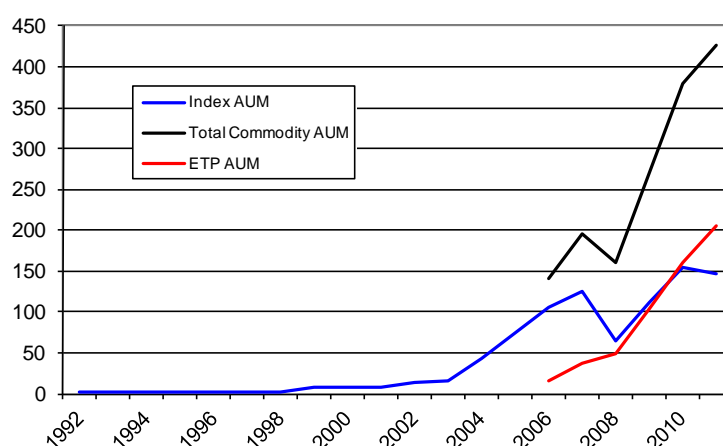
La raison la plus fréquemment citée pour ne pas intervenir sur le marché des produits de base était que

« les distinctions éthiques qui existent entre spéculation légitime et illégitime ne sont pas aisément réductibles à une définition juridique précise », Newman Smyth, Forum 19, 1895.

C'est toujours vrai aujourd'hui. Comme d'autres l'ont écrit avant moi, il n'y a rien de nouveau sous le soleil.

3. Aujourd'hui, à combien se chiffrent les investissements dans les contrats à terme de matières premières ?

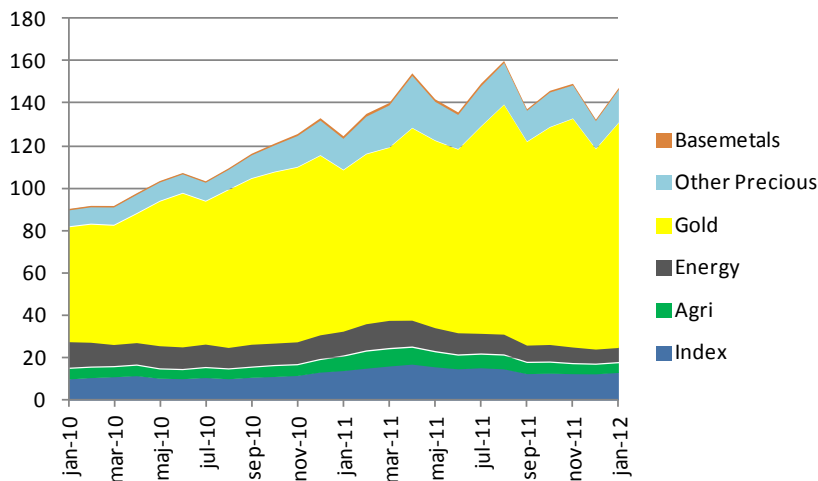
Barclays Capital³ estime que le montant investi dans les contrats à terme et sur les marchés de matières premières dépasse 400 milliards USD. L'essentiel de ce total est aujourd'hui investi dans des *Exchange Traded Products* (« ETP »), des certificats ou des parts de fonds qui sont négociés à bas coût en profitant de l'infrastructure des bourses et des comptes de garde créés pendant l'essor des marchés d'actions des années 80 et 90. Le graphique ci-dessous illustre les fonds sous mandat de gestion (« AUM ») en milliards de USD.



Source : SEB Commodities, Barclays Capital

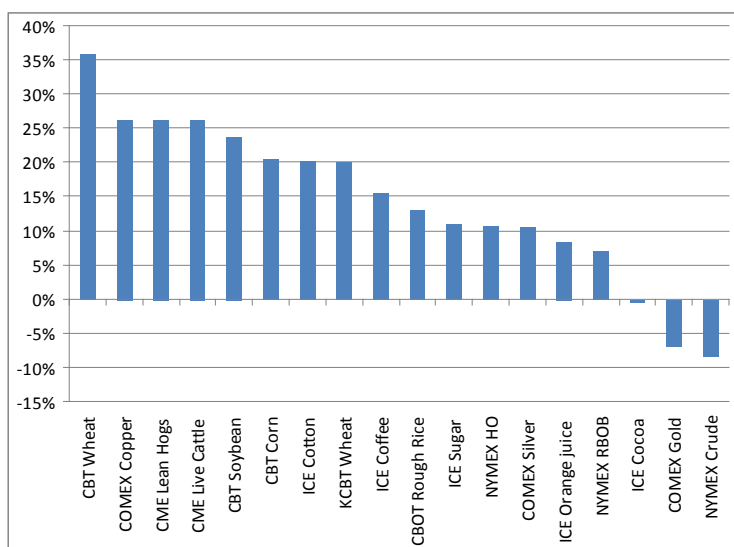
³ The commodity investor, Barclays Capital, 20 décembre 2011.

On peut également se concentrer sur le seul segment des ETP sous mandat de gestion, pour lequel il est facile de se procurer des données. Le graphique ci-dessous illustre la ventilation des AUM entre catégories du marché des matières premières, sur la base de données datant de fin janvier 2012.



Source : SEB Commodities, Bloomberg

On constate que la plupart des AUM portent sur l'or, qui de par son comportement ne s'apparente pas à une matière première, mais à un actif financier. Alors que les stocks de pétrole brut pourraient couvrir deux semaines de consommation en cas d'arrêt de la production, les stocks d'or dureraient près de 50 ans. On voit également que les métaux de base échappent au phénomène de « financiarisation ». Les phénomènes qui semblent curieux sur les marchés des métaux de base sont le fait d'acteurs sectoriels et des pouvoirs publics. De même, les produits agricoles ne représentent qu'une toute petite partie du total. Sur certains segments très spécialisés, comme le marché à terme du blé farineux rouge d'hiver négocié à Chicago, l'investissement indiciel peut occuper une large place. Il existe néanmoins des possibilités d'arbitrage sur les marchés beaucoup plus étendus du blé tendre de haute qualité de Kansas City. Il serait réducteur de se cantonner à la part de l'investissement indiciel dans le blé négocié à Chicago. Le graphique suivant illustre la part des positions ouvertes nettes des « opérateurs sur contrats d'échange » sur une sélection de marchés à terme de matières premières aux États-Unis.



Source : SEB Commodities, CFTC, Bloomberg

Il faut observer que les opérateurs sur contrats d'échange censés représenter les investisseurs financiers ont une position nette, sauf pour le cacao, l'or et le pétrole brut. Doit-on en déduire que les « épargnants » sont en fait des « emprunteurs » ? Si l'on additionne les fonds sous mandat de gestion constitués d'ETP qui investissent dans le pétrole brut, obtient-on un chiffre négatif ? La réponse est bien évidemment non. Peut-être la fiabilité des données relatives aux opérateurs sur contrats d'échange de la CFTC n'est-elle pas aussi bonne qu'on aurait pu le penser, et ne permet pas de tirer de conclusions sur les flux d'investissements en matières premières.

Quoi qu'il en soit, de nombreux producteurs sont exposés au risque de chute des prix et de perte d'exploitation. Pour se couvrir contre ce risque, ils ont recours aux marchés à terme et de gré à gré, ainsi qu'aux banques, pour vendre à terme en contrepartie d'un prix fixe, et ainsi se protéger. Personne n'assume ce risque gratuitement. Il existe une prime de risque, décrite par Keynes dans son ouvrage « Traité sur la monnaie » en 1930⁴. Les cours à terme sont plus bas que le prix au comptant escompté à l'avenir. Keynes parle de « théorie du déport normal ». La prime de risque réside dans cet écart de prix dans le temps. Pour des produits comme le blé, le risque de prix est la principale cause de fluctuation du revenu d'une année sur l'autre pour un producteur, en Suède par exemple. Il a donc besoin de se couvrir contre ce risque en procédant à une vente à terme. Pour les consommateurs suédois, l'exposition aux prix du blé est négligeable. Ils ne chercheront guère à se prémunir contre une augmentation des coûts d'achat du blé. Il faut donc qu'un tiers assume la fonction de couverture, les épargnants par exemple. Néanmoins, les épargnants sont exposés à un risque de prix sur les denrées telles que le blé, par exemple parce que les fonds de pension accumulent de l'argent qui sera dépensé à l'avenir, entre autres choses pour acheter du blé. Si le prix des « denrées » augmente, on peut diminuer le risque en investissant sur les marchés des matières premières. La situation des producteurs comme des épargnants s'améliore s'ils s'entraident sur le marché à terme.

4. Pourquoi investir dans les matières premières ?

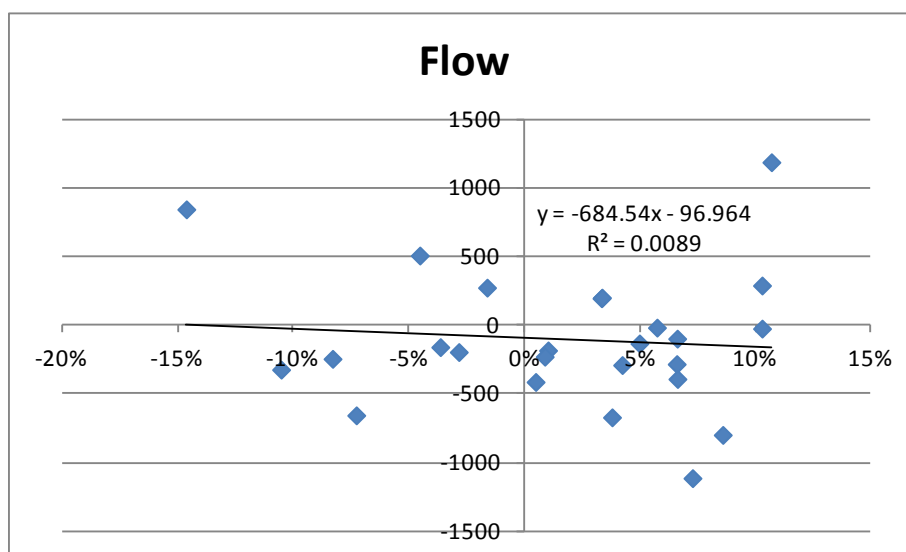
De nombreuses raisons justifient d'investir sur le marché des matières premières par le biais de contrats à terme. La première est que la prime de risque offerte par les producteurs qui vendent des contrats à terme pour se protéger contre le risque de prix est attractive et au même niveau que la prime de risque sur le marché d'actions. Par ailleurs, il existe une corrélation faible, parfois même négative, entre les variations des prix des matières premières et les marchés d'actions. Une personne détentrice d'actions et d'obligations qui décide d'investir sur le marché des matières premières réduira le risque de son portefeuille et en accroîtra la sécurité. Il est possible d'obtenir un rendement aussi élevé, mais à moindre risque. Une autre raison pour investir dans les matières premières est qu'en tant que catégorie, les matières premières sont positivement corrélées à l'inflation, tandis que les actions et obligations lui sont négativement corrélées. La situation actuelle se caractérise par des dettes publiques à un niveau record et des taux d'intérêt historiquement bas. Cette combinaison a toujours été source d'inflation, et donc de perte de pouvoir d'achat de l'épargne. L'investissement dans les matières premières procure une certaine protection contre ce risque. La dernière raison, peut-être la plus importante, est qu'en moyenne, la population mondiale augmente, en Chine notamment. Lorsqu'un pays pauvre se développe, la demande de toutes sortes de biens de consommation s'accroît, depuis les lave-vaisselles jusqu'aux maisons modernes à la plomberie dernier cri. Il y a donc un choc sur la demande qui soutient temporairement les marchés des matières premières.

⁴ John Maynard Keynes, « Traité sur la monnaie : La Théorie pure de la monnaie et La Théorie de la monnaie appliquée. Ouvrage complet », Martino Fine Books, 2 juin 2011.

5. Les flux financiers ont-ils une incidence sur les prix des matières premières ?

Un certain nombre d'études ont été réalisées ces dernières années, comme celle de l'EDHEC Risk Institute⁵ et des économistes spécialisés en agriculture Scott Irwin⁶ et Dwight Sanders, principalement basées sur les relevés hebdomadaires des Commitment of Traders sur les marchés américains publiés par la CFTC. Naturellement, des organisations comme le FMI, la FAO et l'OCDE ont étudié la question et publié des rapports. Elles ont constaté une corrélation entre les flux financiers et les variations des prix. Néanmoins, ce sont les variations des prix liées à des facteurs fondamentaux qui semblent influencer les achats ou les ventes de contrats à terme par des acteurs financiers. Il ne semble guère établi que les flux financiers fassent varier les prix, du moins sur un horizon temporel pertinent pour l'économie au sens large. Si les acteurs financiers détenaient des informations uniques, on pourrait s'attendre à ce qu'ils aient une influence permanente sur les prix, ce qui serait une bonne chose, mais cette hypothèse n'est pas corroborée par les faits. Quiconque a déjà passé un ordre limité dans un carnet à ordres pour un contrat à terme ou pour une action ordinaire sait qu'on peut momentanément changer le meilleur prix acheteur ou vendeur, mais que cela n'aura pas d'influence durable sur le marché dans la mesure où d'autres participants ayant une appréciation différente du juste prix ont du temps pour réagir.

Au lieu d'analyser les données de la CFTC, on peut examiner les flux entrants et sortants d'un fonds indiciel. Sur la base des données disponibles dans le système d'information Bloomberg, le plus grand ETP coté dans le domaine de l'énergie, affiche la relation suivante entre les flux (en millions de dollars) et la variation en pourcentage du prix du pétrole brut, sur une base mensuelle au cours des deux dernières années :



Source : SEB Commodities, Bloomberg

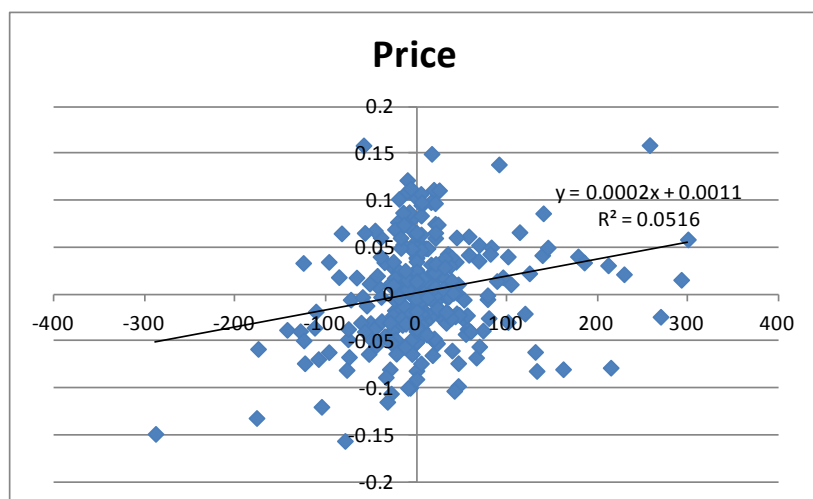
En d'autres termes, le R^2 étant si faible, on ne décèle aucune relation entre les deux composantes.

On peut examiner le plus grand ETP en produits agricoles (contrats à terme), le Powerhares DB Agriculture, côté à la bourse de New York. En s'appuyant sur des données hebdomadaires relatives aux

⁵ EDHEC Risk Institute, « Has There Been Excessive Speculation in the US Oil Futures Markets? What Can We (Carefully) Conclude from New CFTC data? », novembre 2009.

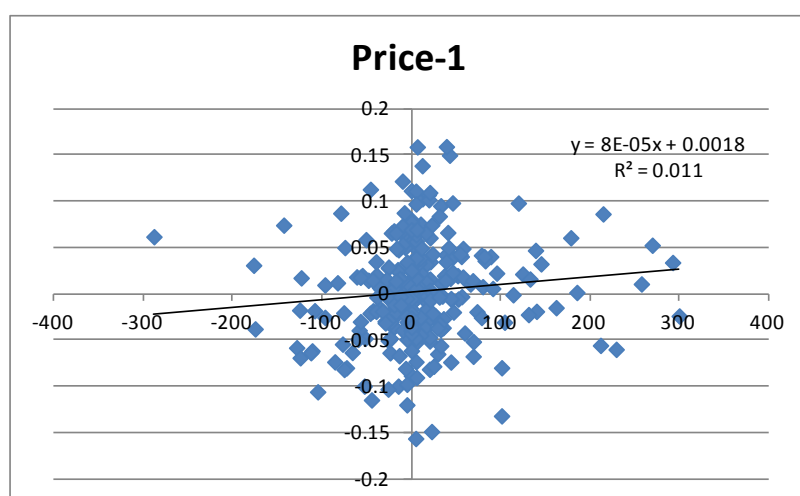
⁶ Scott H. Irwin et Dwight R. Sanders, « The Financialization of Commodity Futures Markets or: How I Learned to Stop Worrying and Love the Index Funds », octobre 2010 (<http://ssrn.com/abstract=1699793>).

fonds sous mandat de gestion et sur les variations hebdomadaires du cours du blé CBOT, on constate la relation suivante entre la variation du prix et l'évolution des AUM la même semaine. Toutefois, on ne peut rien en conclure sur un éventuel lien de cause à effet.



Source : SEB Commodities, Bloomberg

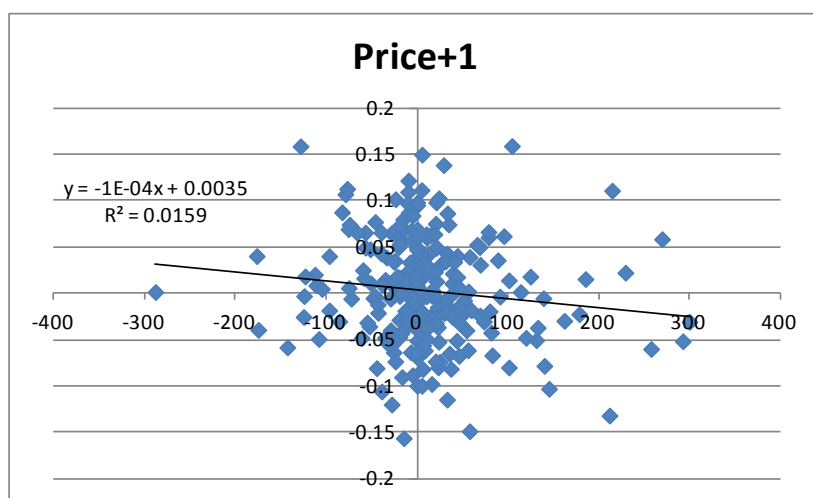
On peut également étudier la relation entre la variation du prix une semaine avant et l'évolution des AUM la semaine en cours :



Source : SEB Commodities, Bloomberg

On observe une relation plutôt positive, mais le R^2 n'est pas élevé. Une augmentation du prix la semaine précédente a incité les investisseurs à acheter la semaine suivante.

Enfin, examinons la relation entre une variation des AUM la semaine en cours et la variation du prix la semaine suivante :



Source : SEB Commodities, Bloomberg

On constate un effet plutôt négatif. Un investissement dans le plus grand ETP en produits agricoles est généralement suivi d'une baisse des prix, et non d'une hausse.

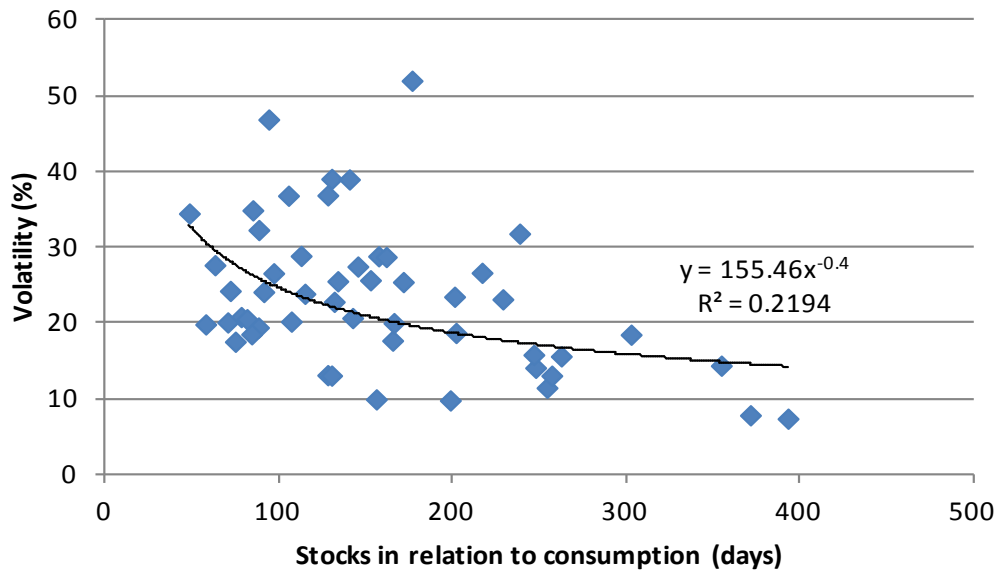
Il faut également observer que la valeur explicative des flux d'investissement est extrêmement faible, même sur une base hebdomadaire. À l'évidence, aucun élément ne confirme l'hypothèse selon laquelle les flux d'investissement augmentent les prix des matières premières, dès lors que la valeur explicative est insignifiante et que l'effet, si tant est qu'il existe, est de signe opposé, comme le montrent les exemples ci-dessus.

6. Quelques causes de la volatilité aujourd'hui

La cause théorique de la fluctuation ou de la variabilité des prix est un changement de l'offre ou de la demande. Pour une année donnée, selon la part consommée de la production annuelle, l'offre et la demande de produits agricoles aboutissent un stock de report. Le niveau du stock de report est un facteur décisif, et les prévisions concernant ce niveau ainsi que leurs révisions ont une incidence marquée sur les marchés. Les marchés de matières premières se caractérisent par une fonction de « stockage », à la différence des autres marchés, qu'il s'agisse de celui des actions ou des obligations. Des stocks sont constitués lorsque les prix sont bas, et prélevés lorsque les prix sont élevés (par rapport aux coûts de production à long terme) ; les prix subissent des fluctuations temporaires induites par des perturbations de la production à court terme, ou pour ce qui est des produits agricoles, principalement causées par des perturbations de la production, une période de sécheresse par exemple. La variabilité des prix des matières premières qui peuvent être stockées à moindre coût est faible. Le prix au comptant de l'électricité, qui ne peut pas être stockée, est très volatil, et la nécessité s'impose de gérer l'exposition à ce risque de prix via les marchés à terme et les créances conditionnelles en général. Le prix du bois est très peu volatil, car il est possible d'avancer ou de reculer de 10 ans la coupe de bois sans grande conséquence sur une production optimale. Les stocks sont considérables. Il n'existe pas de marché de créances conditionnelles sur le bois, car le risque de prix est quasiment inexistant.

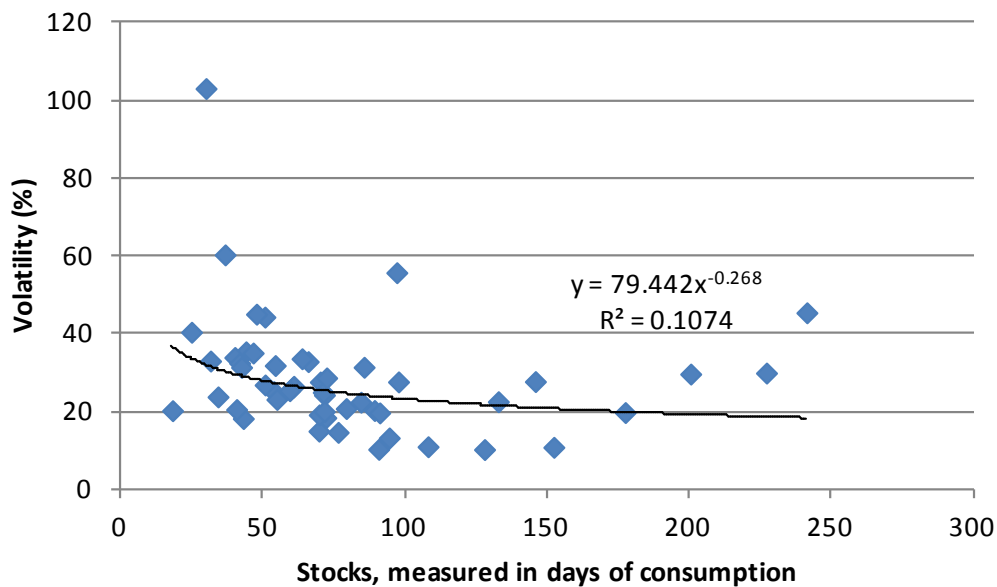
Une caractéristique bien connue de la volatilité des prix des matières premières est que les hausses de prix sont généralement plus prononcées que les baisses de prix. On craint une nouvelle hausse des prix ou la pénurie que ces hausses reflètent. En revanche, les marchés des actifs financiers, comme les actions et

les obligations, ont le comportement inverse, avec des baisses plus marquées que les hausses. La crainte de perdre une épargne durement gagnée prédomine. Sur les marchés des matières premières, on pourrait s'attendre à ce que la rareté, c'est-à-dire un bas niveau de stocks, soit liée à des prix élevés. Examinons les données annuelles fournies par l'USDA concernant les niveaux de stocks de maïs et de blé aux États-Unis, en les comparant à la volatilité historique sur 90 jours, pour déterminer si c'est effectivement le cas. Le graphique ci-dessous illustre la relation annuelle entre la volatilité historique des prix sur 90 jours du contrat CBOT sur le blé ayant l'échéance la plus courte et les stocks de report aux États-Unis, rapportés à la consommation, et mesurés en jours de consommation, pour le blé depuis 1960.



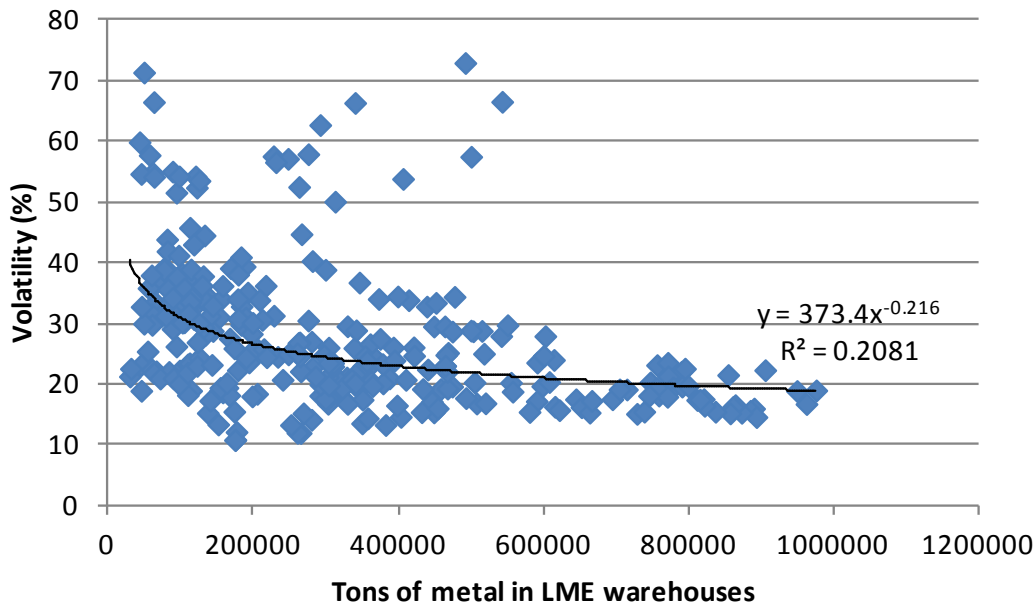
Source : SEB Commodities, Bloomberg

Voici le même graphique pour le maïs :



Source : SEB Commodities, Bloomberg

Si l'on étend cette analyse au cuivre (LME Copper), dont les stocks sont mesurés en tonnes métriques, on constate la même relation sur la base des données hebdomadaires allant de 1986 à 2011.

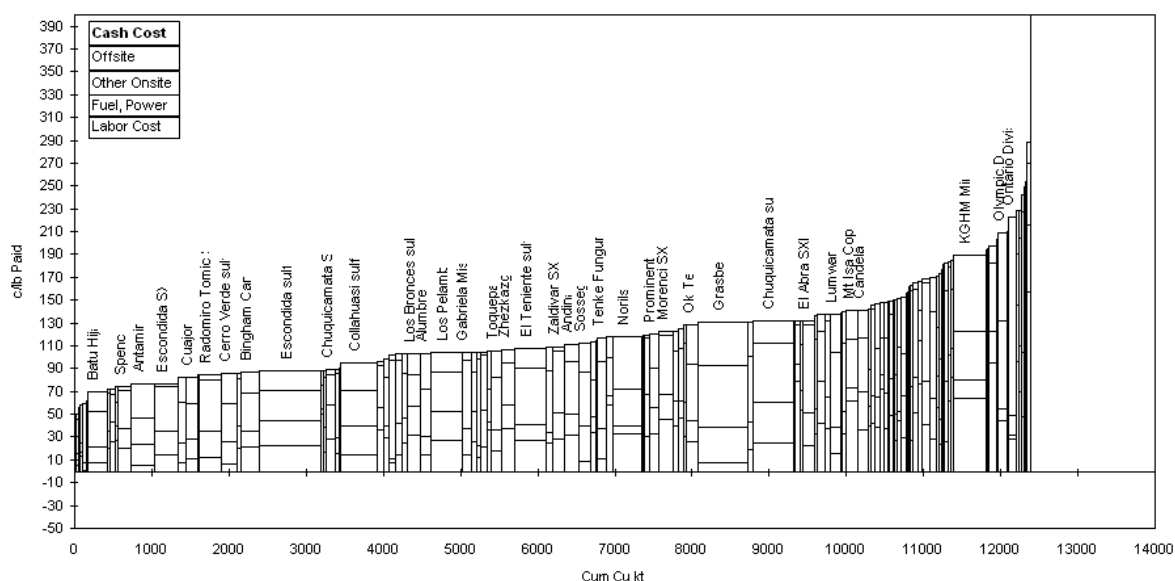


Source : SEB Commodities, Bloomberg

La valeur explicative des stocks, qui sont le produit final de l'offre et de la demande, n'est pas négligeable, même en utilisant une mesure assez grossière de la volatilité. Peut-on dire que la volatilité est élevée parce que les stocks sont bas ? Mesurés par rapport à la consommation, les stocks de maïs par exemple sont à leur plus bas niveau depuis 1973. Le prix est élevé en raison d'une augmentation de la consommation et d'une faible production due aux mauvaises conditions climatiques. Néanmoins, le prix élevé favorisera un accroissement de la production.

La pente de la courbe des coûts de production est plus forte lorsque le coût marginal de production est plus élevé, ce qui explique aussi pourquoi la variabilité des prix est accrue lorsque les prix sont plus élevés. Une variation de la demande lorsque la quasi-totalité des capacités sont employées a un effet plus marqué sur les coûts et donc sur le prix d'équilibre. Le graphique ci-dessous représente une courbe des coûts de production du cuivre. La pente de la courbe est plus forte vers la droite, lorsqu'on se rapproche d'une utilisation intégrale des capacités de production.

COPPER CASH OPERATING COST 2010 - NO CREDITS

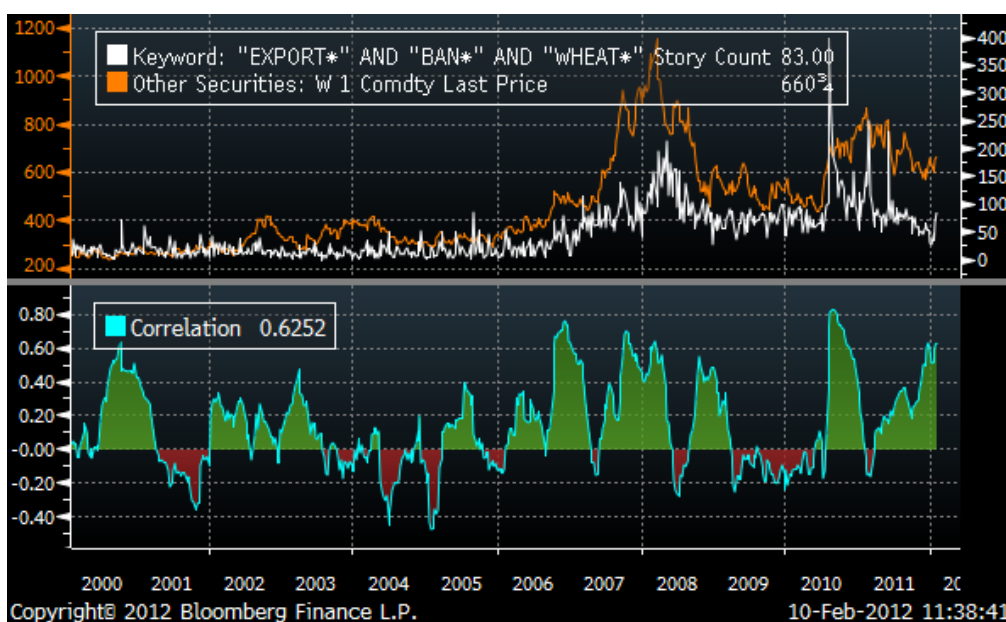


Source : SEB Commodities, diverses sources

7. Quelles conséquences si la spéculation est considérée à tort comme la cause des prix élevés ?

Des tentatives ont été faites pour contrôler les prix sur le marché et rendre les produits de base abordables, avec l'objectif de procurer un avantage à la société. L'un des exemples les plus connus est le plafonnement du prix du pétrole brut aux États-Unis jusqu'en 1973, qui rendait non rentable la production de pétrole brut dans le pays et, lorsque les prix mondiaux se sont mis à augmenter, rendait non rentables l'importation de pétrole et sa revente aux États-Unis. Autre exemple : la limitation des prix de l'électricité en Californie, alors qu'Enron a été rendu responsable des coupures de courant. La Californie n'avait pas construit une seule centrale électrique pendant des décennies et dépendait des importations d'autres États. Lorsque les prix de l'énergie, y compris le transport, ont augmenté, personne n'était prêt à en acheter au prix fort hors de Californie et à en revendre à perte en Californie. Dans ces deux exemples, les livraisons ont cessé. Dans un cas comme dans l'autre, ce sont les pouvoirs publics qui ont fait les mauvais choix.

Une autre réaction de même nature, notamment sur les marchés agricoles, consiste à instaurer « temporairement » des taxes à l'exportation ou une interdiction d'exportation. L'objectif est de protéger le pays contre une pénurie alimentaire. L'effet sur le marché mondial et sur les pays tributaires des importations peut être très marqué. Une politique publique d'interdiction des exportations est de toute évidence le résultat de prix élevés, et aggrave la situation de tous les autres consommateurs qui dépendent du marché mondial. Le graphique ci-dessous illustre le prix du blé et le nombre d'articles de presse contenant tous les mots « blé », « exportation » et « interdiction ». On observe que la corrélation entre prix élevés et popularité de ces mots est très forte, surtout en 2007 et 2010, lorsqu'une période de sécheresse a fait monter les cours du blé.



Source : Bloomberg, données hebdomadaires

Les interdictions d'exportation sont une mauvaise chose parce que dans un pays comptant de nombreux exploitants agricoles, ceux-ci n'ont plus accès au prix sur le marché libre, qui reflète la rareté. Un prix élevé inciterait l'exploitant à cultiver des terres marginales ou à recourir à des méthodes d'exploitation plus intensives qui sinon ne seraient pas rentables. En agriculture, un adage dit que le meilleur remède à un prix élevé, c'est le prix élevé. Déconnectée du prix réel qui résulte du jeu de l'offre et de la demande, la production n'est pas en mesure de résoudre la situation de pénurie et de faire baisser les prix lorsque le prix intérieur est artificiellement bas par rapport à l'équilibre mondial. Existe-t-il un lien avec la spéculation ? En un sens oui, parce que sous l'effet de la spéculation, cette pénurie sera temporaire et se résoudra d'une manière ou d'un autre à long terme. Et la spéculation est le fait de l'État qui a créé une rente.

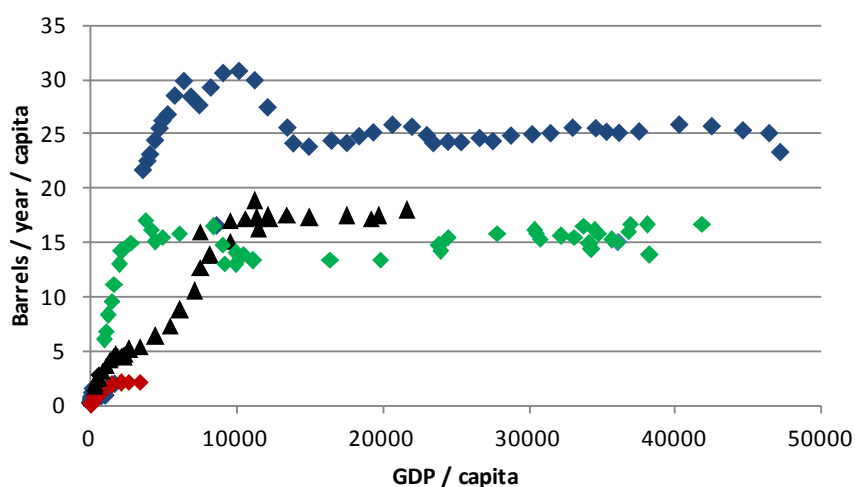
Nous avons vu que les tentatives pour soigner le symptôme (un prix élevé) par une réglementation explicite des prix par les pouvoirs publics ou implicite par une interdiction d'exportation n'apportent pas de solution à long terme et sont préjudiciables. De même, une interdiction ou une restriction du libre échange d'instruments de gestion des risques comme les contrats à terme afin de traiter le symptôme d'un prix élevé (ou d'un prix bas, comme il y a 120 ans), n'est probablement pas une bonne idée non plus, parce que rien ne prouve qu'il existe un lien de cause à effet entre les flux financiers et les prix, et la valeur explicative de ces flux est presque toujours nulle.

8. Quelles sont les autres causes d'un bas niveau de stocks ?

Dans les années 70, les prix des matières premières sont montés en flèche. On assistait au même débat sur la pénurie de ressources, avec la crainte qu'elle « bride la croissance ». Cette crainte s'est avérée infondée. La production a rattrapé la croissance de la consommation, et les marchés des matières premières se sont stabilisés dans les années 80 et 90.

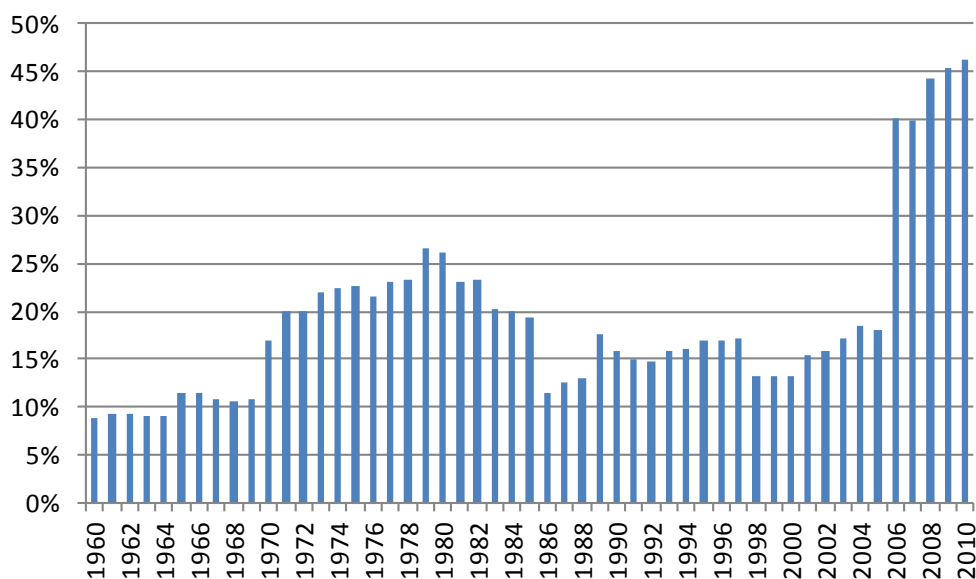
Quand un pays pauvre s'enrichit, il passe par une phase durant laquelle l'augmentation du PIB a un effet marqué sur la demande de « produits de base ». Si l'on examine les pays de l'OCDE qui ont traversé cette phase, on constate que la forte demande de matières premières coïncide avec la période durant laquelle, en USD courants, le PIB par habitant est compris entre 2 000 et 13 000 dollars. Le graphique

ci-dessous en donne un exemple en ce qui concerne la consommation de pétrole par habitant et par an et le niveau du PIB annuel par habitant.



Source : SEB Commodities, données de la Banque mondiale, BP Statistical Review, Bloomberg

Les données de la Banque mondiale permettent de connaître la part de la population mondiale (dès lors que le PIB est disponible) dont le PIB par habitant se situe entre 2 000 et 13 000 USD :



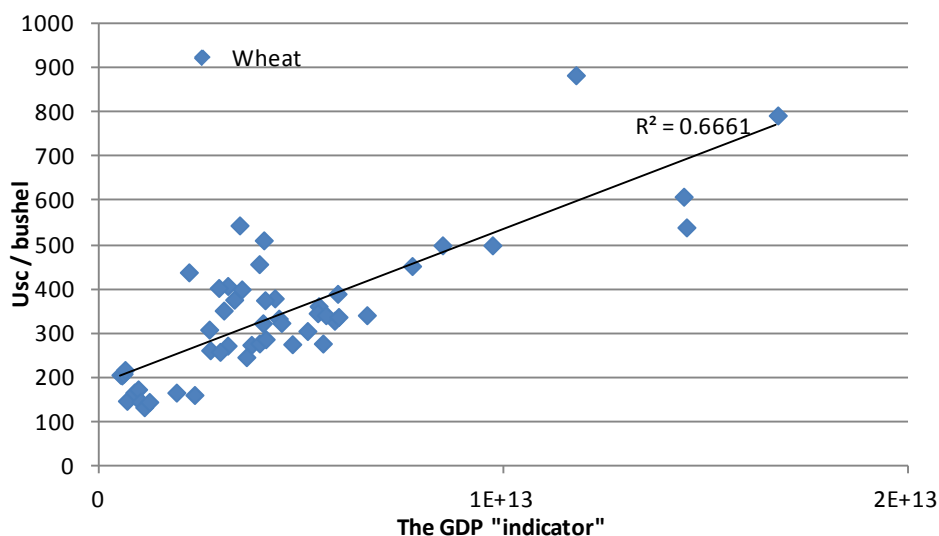
Source : SEB Commodities, données de la Banque mondiale

On perçoit clairement la raison de l'essor du marché des matières premières dans les années 70 ainsi que la cause de la flambée de leurs prix depuis 2005 environ. On peut espérer que cette période caractérisée par une hausse de la demande, de faibles stocks et des prix élevés sera suivie d'une phase de décrue, mais la solution ne consiste sûrement pas à réglementer les prix élevés, ce qui de toute façon n'interrompra pas le développement.

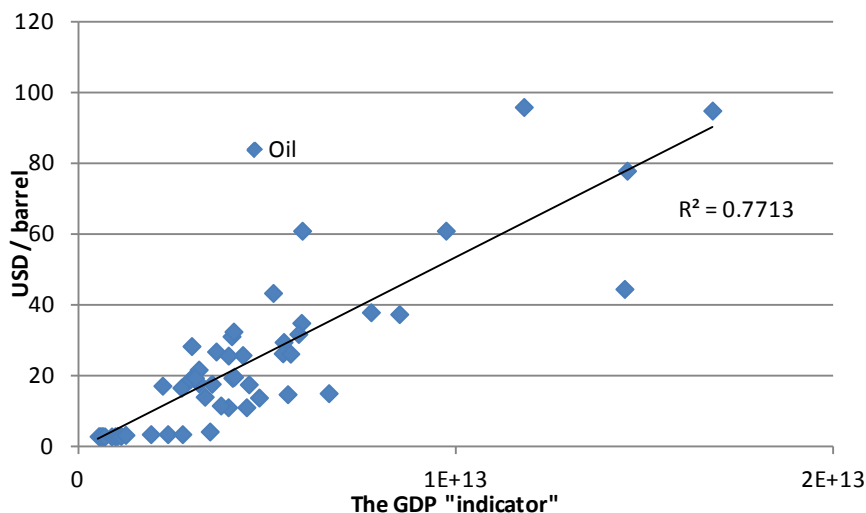
La solution peut passer par un effort accru de production et d'adaptation, par le rationnement et la substitution – et l'achat d'une protection contre une hausse des prix des « produits de base » (diminution du pouvoir d'achat de l'épargne) en investissant dans des contrats à terme.

La popularité des investissements dans les contrats à terme augmente les possibilités de garantir le prix de vente des producteurs. Elle sécurise la production qui devient ainsi plus attractive ; les volumes produits augmentent, ce qui constitue aussi une solution.

Il est possible d'élaborer un indicateur de la demande de matières premières, par exemple en additionnant les PIB (en USD courants) de tous les pays dont le PIB est compris entre 2 000 et 13 000 USD courants par habitant. Cet indicateur est très similaire au graphique de population ci-dessus. On peut alors le comparer au prix du pétrole par baril et au prix du blé par boisseau, et obtenir les diagrammes suivants :

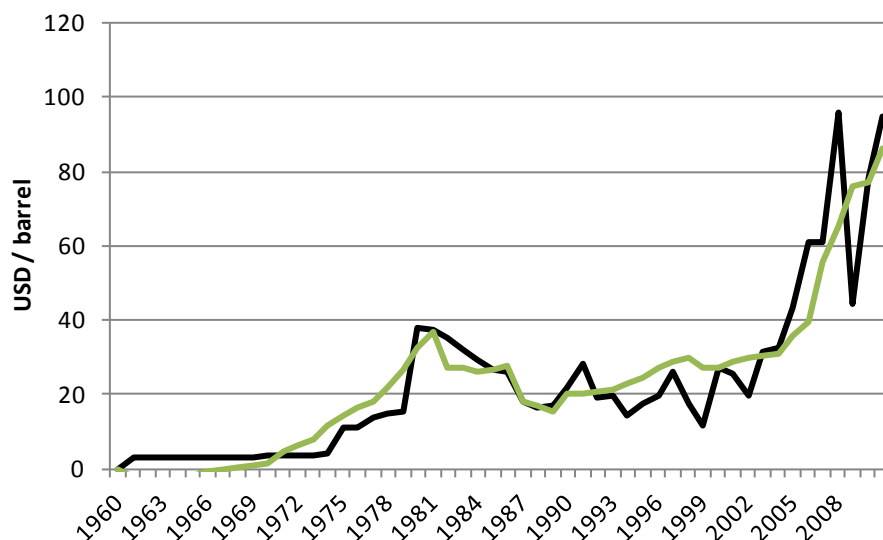


Source : SEB Commodities, données de la Banque mondiale.



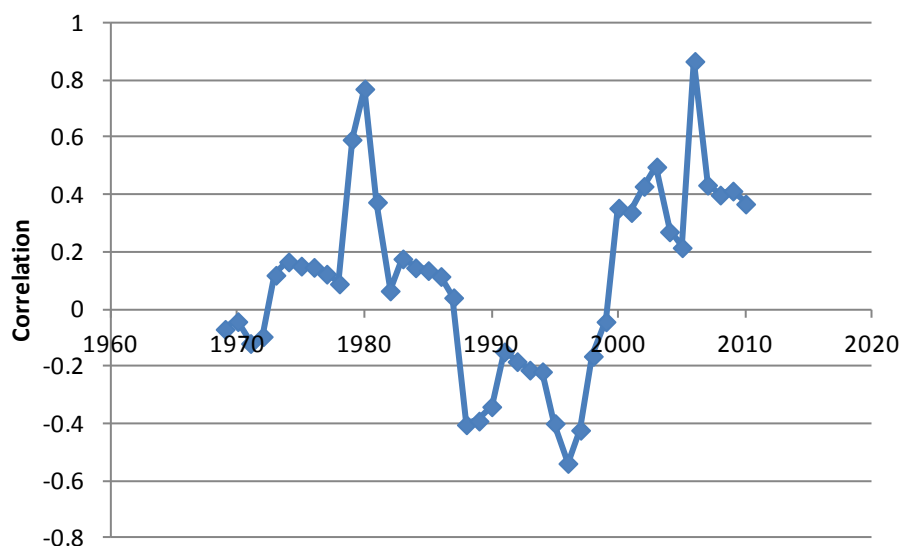
Source : SEB Commodities, données de la Banque mondiale.

Un modèle de régression linéaire simple intégrant cet « indicateur » et l'IPC aux États-Unis (pour tenir compte des variations du pouvoir d'achat du dollar américain) comme variables explicatives aboutit à l'estimation suivante du prix du pétrole « synthétique », comparé au prix effectif :



Source : SEB Commodities

Étant donné qu'il existe un lien entre prix élevés et volatilité (la peur de la pénurie), on peut s'attendre à ce qu'il existe aussi un lien entre cet indicateur et la volatilité, par exemple du cours du blé CBOT, ce qui est le cas, comme le montre le diagramme ci-dessous illustrant les corrélations sur des périodes mobiles de 10 ans.



Source : SEB Commodities, données de la Banque mondiale, Bloomberg

On voit clairement qu'il existe une relation forte entre la « modernisation » des économies émergentes et la volatilité des prix sur le marché des matières premières.

Il peut être intéressant d'examiner les populations, leur taille et la durée de la phase de forte demande en matières premières, comme l'illustre le tableau suivant :

Pays	Population (millions)	PIB/habitant >2000 \$	>13000 \$	Années de la phase d'expansion
États-Unis	307	1950s	1980	25
Suède	9	1961	1985	24
Europe	600	Années 70	Début des années 80	25
Allemagne	82	1970	1985	15
Japon	128	1971	1985	14
Corée (du Sud)	49	1983	2002	19
Brésil	194	1987	2011	24
Chine	1330	2006		
Indonésie	230	2008		
Inde	1200	2012		
			Moyenne, années	20.9

L'essor des années 70 était donc le fait de l'Europe (Est et Ouest), des États-Unis et du Japon, et s'accompagnait de l'inflation. Aujourd'hui, des pays comptant une population plus nombreuse sont en phase d'industrialisation, et si cette tendance se poursuit, la demande de matières premières continuera probablement de croître longtemps encore, jusqu'à ce que l'essor sur ces marchés laisse place à un repli.

9. Synthèse

Le marché des instruments dérivés, qui permet de se prémunir contre le risque de prix, n'est pas responsable des prix élevés des matières premières et de la volatilité associée à la pénurie et à ces prix. L'incompréhension des causes des prix élevés peut conduire à prendre des décisions qui aggravent la situation, en supprimant le signal d'alerte ainsi envoyé aux producteurs afin qu'ils produisent plus. Les interdictions d'exportation de céréales en sont un exemple. C'est l'industrialisation de vastes pans de la population mondiale qui est à l'origine de l'essor sur les marchés des matières premières, des prix élevés et de la forte volatilité, et cette situation devrait se poursuivre de nombreuses années encore.

COMPETITION AND COMMODITY PRICE VOLATILITY

*By Gustavo Lagos**

1. Introduction

Iron ore, aluminium, copper and gold make up close to 80% of the economic value produced in mines in 2010 of all the major metals, including additionally, zinc, silver, molybdenum, nickel, and lead.

Over the last two decades, the price volatility for copper, iron and aluminium has been greater than prices of goods and services and higher than that of gold prices.

The effect of price volatility for countries that produce these commodities has been diverse, depending on their stage of economic development, on the export fraction represented by the commodities in each of the producing countries, on the fiscal income resulting from taxes collected by the state, and on the subsequent investment generated. Volatility of these prices is thought to have negatively affected economic growth of the producing developing countries with significant export of mineral commodities.

When a country has a large fraction of its exports dominated by one or more mineral commodities, the price cycles drive the currency valuation up with respect to the US dollar when prices are high, and low when prices fall. When the local currency is stronger this results in the nation's other production more expensive to produce and export, making the manufacturing and other sectors, including agriculture, less competitive. This is denominated the Dutch Disease. This can affect even developed countries, specially large exporters of oil, that have more diversified economies. The Dutch Disease is linked to another theory called the Resource Curse¹.

There is enough evidence worldwide that the “Resource Curse” is valid only for some countries over selected periods of time. Canada, Australia, Finland, and other developed countries relied heavily on the export of mineral commodities at the beginning of the twentieth century, yet they could maintain a reasonable rate of economic growth through time. Chile has shown the same capability in the late twentieth century.

This paper examines some of the causes and effects of volatility of the prices of copper, iron, aluminium, and gold, on competition and on the economies of producing countries that are dependent on the export of these commodities.

* Note prepared by Mr. Gustavo Lagos, Professor at the Department of Mineral Economics, Catholic University of Chile.

¹ The resource curse theory affirms that those countries with an abundance of non renewable and fuels natural resources have lower economic growth than countries with fewer natural resources. This happens because of a decline in the competitiveness of other economic sectors (caused by the Dutch Disease), volatility of revenues from the natural resource sector, corruption, government mismanagement of resources, or weak, ineffectual, unstable or corrupt institutions (possibly due to the easily diverted actual or anticipated revenue stream from extractive activities).

2. Price volatility of mineral commodities

The causes of price volatility of mineral commodities such as iron ore, copper and aluminium, are many, but two of them are the main ones.

First is the variation of fundamental forces of the market, namely supply, demand, and stocks of physical metal. It is well known that these drivers can generate short and long term volatility.

The determinants of supply for each of the four commodities under the scope are different. Iron and aluminium are two of the four most abundant elements in the earth crust. Therefore discovery and development of new deposits should not be as important as for the case of copper and gold. Long range transport of iron ore, in massive amounts, has been one of the key players in competitiveness due to differing distances from producers and main consumers. From this perspective Brazil is at a disadvantage with respect to Australia and India. For aluminium the key is abundant and cheap energy, since alumina must be refined to aluminium, process that involves passing three electrons for each unit weight of this metal, one of the lightest. For copper and gold the toughest barriers are exploration, extraction and process technologies. A relevant difference between copper and gold is that while about 37% of the latter used is recycled, less than one fifth of the former is recycled.

For gold and aluminium, important environmental concerns exist, the first metal linked to cyanide leaching, and the second to the use of huge amounts of energy as well as the emissions of fluorine gases. The use and management of water is an environmental concern linked to the exploitation of all mineral commodities.

Construction, the manufacture of industrial goods, and the generation and transmission of electricity, govern demand for iron, aluminium and copper. Industrial production and construction are very good indicators to estimate the consumption or use of these metals. Jewellery annually uses about one half of gold, 38% corresponds to technological uses, and 12% is used in investment, via ETFs (Exchange Traded Funds). A particular feature of this industry is that part of the demand can be readily transformed in supply, i.e., jewellery and reserves held by Central Banks.

Some examples of volatility generated by market fundamentals. In recent years, for instance, the uncertainty about unreported Chinese copper stocks is thought to have driven volatility up because the overall consumption of this country cannot be anticipated.

Another example of the effect of market fundamentals on price is that shortly after the great Chinese economic boom was globally acknowledged in 2003, the capacity of the copper industry to produce mine copper was exhausted. This happened in 2005. After that time all the predictions of supply for the following year overstated what really happened afterwards. A deficit between 2 and 5% of physical metal with respect to what was thought would be produced in December of the previous year was generated. This trend is likely to continue while industry is at full capacity, adding long term volatility. The reason for this is that giant mines operating now in several parts of the world are subject to large unanticipated disruptions such as land slides (Grasberg, Indonesia), caving (Chuquicamata, Chile), large equipment failure (Collahuasi and Escondida in Chile), and strikes (which should be accounted for in predictions). The fact that Chile has been unable to increase its output of copper in the last 6 years is no coincidence, and certainly is not the result of a concerted action by companies. It is the result of operating giant complex operations which are subject to a larger degree of technical and natural phenomenon production disruptions than was previously thought.

A second cause of volatility is the financial market: speculation, hedging, pension funds investment, commodity trading advisors. In traditional cycles inventories are required to fall to low levels before the

price takes off. But since the 1990's funds anticipated fundamentals. The fall and rise of prices in the Global financial crisis of 2008 show the effect of funds, which sold out quickly, generating a fast fall of prices, and shortly afterwards the same funds bought commodity future instruments contributing to a fast recovery of prices. The funds act faster than the forces of supply and demand of physical metal. The fall of prices in 2008 was faster for most commodities than in any crisis recorded before. Interestingly, financial instruments, except the intervention of pension funds, which are mostly long term investments, shorten cycles by anticipating the fundamentals, picking the turning point. These instruments do not have overall impact on the long term price, whereas investment by pension funds elevates the long term price. Arbitrage between the LME and the Shanghai Exchange is understood to increase volatility because the wide differences created must be corrected by transport of metal in either direction.

No validated predictive models of the movement of financial markets have been created up to the present time. When stocks are very low, as they were for copper between mid 2005 and 2007, the price no longer responded in a meaningful way to variations of stocks. After the 2008 Global financial crisis, we have seen copper prices increasing with increasing stocks in several occasions, and then, suddenly changing direction to accommodate the traditional dependence of price on stocks. Almost random price walks. The European economic crisis, which lowered all commodity prices considerably in mid 2011, is another example of market guessing. At that time, the price of copper tumbled from more than 4 US/lb to less than 3.5 US/lb in a short time. And there it remained for months, without any evidence that this was caused by a change in stocks. Why has copper not climbed up again to more than 4 US/lb since the European crisis began? Due to lower expectations of China's growth?

The weakening of the US dollar is a third cause of volatility because it elevates the value of mineral commodities. This adds to short and long term volatility, in spite of the fact that the changes in value of the US dollar are usually minor in comparison to the other two causes of volatility.

Volatility generates numerous effects for mineral commodities. Commodities with greater volatility exhibit slower rates of consumption growth than commodities with smaller volatilities. An example was aluminium consumption growth from 1940 to 1970 which was almost double that of copper. At that time aluminium had stable producer pricing, whereas copper was the first metal traded in the LME in the XIX century.

Commodities that are traded in market exchanges or are benchmarked according to the market have, usually, greater price volatility than those commodities where the price is defined by producers (producer price). Such is the example of aluminium, whose volatility was very low prior to being traded on the LME (in the mid seventies). It is also the case for gold, whose price was fixed by the US Government before 1974, and of iron ore, whose recent change of pricing method (2010) generated much greater volatility than existed before, when basically the companies Vale, Rio Tinto and BHP defined annual prices.

The production of the four commodities under examination is not thought, generally, of being subsidized. Some of the sub products and processes may receive direct or indirect subsidies nevertheless. Tax advantages for smelters in China and Japan are an example of direct subsidies, whereas ecological dumping is an example of indirect subsidies introduced by governments that apply lower environmental and health standards than what is "acceptable" globally. Subsidies for small mining are general in many developing countries, but the overall contribution of this segment to the total production is negligible.

Changes in terms of trade (i.e., value of mineral commodity exports) and profit margins (i.e. fiscal income via taxes) are considered drivers of innovation and productivity. Understanding this is critical to public policy. In many developing countries it is still thought that controlling mineral commodity prices has a long term benefit for the country. The opposite proves right as shown by many experiences of failed cartels, some of which ended dramatically, such as the Tin Agreement in the 1980's. There is abundant

literature regarding the effect of terms of trade change and volatility on the economic growth of countries. This factor governed policies of many countries throughout the world last century. It reveals conflicting views and its discussion is beyond the scope of this paper.

Intervention of governments in order to overcome the effects of volatility on economic stability and growth of developing countries has been approached with different solutions.

Creation of Social Welfare Funds (SWFs) is the prevailing policy applied in many developing economies, including most of oil exporting countries, and many developed countries.

A second policy is the diversification of the economy, policy actively encouraged in Chile and successful until the Great Chinese economic boom began. Before this time mineral exports in Chile were less than 50% of total exports, and some years it reached below 40%. However, recent prices of mineral commodities implied mineral exports surpassing 60% many years.

A third policy pursued in many cases was the intervention of Central Banks in order to smooth out and to ameliorate variations of local currency. These policies may have been successful in some cases, but are generally disregarded because of their high cost and ineffectiveness.

A fourth policy consists of the intervention of the government clearly defining and controlling externalities, building of public works that facilitate the job of industry and the public, and contribution to the social welfare of the population, specially the populations located close to the mines. The latter has acquired much relevance in the last decade, and many times it is unclear where the border line between the action of governments and of companies is, even understanding that these two sectors may have common ground.

As regards the control of competitive behaviour by the mining industry, the “effective” agencies are located in the developed countries, mainly the USA and the European Union. There have been many controls established in the last years by USA and European agencies over competitive behaviour by mining companies, including the merger of Rio Tinto and BHPBilliton, which was delayed by the European Union until the crisis of 2008, and this attempt obviously was extinguished by market reasons. Other examples are the potential collusion of companies to establish prices for smelting and refining of copper which was investigated in the last decade.

3. Estimation of volatilities

Table 1 shows the volatility over five year periods for iron ore, aluminium, copper and gold, calculated with average annual nominal prices. We consider the World Bank’s iron ore price data, which is annually based contract data before 2005, and spot prices from 2005.

Volatility was calculated using:

$$Vol_t = \sqrt{\frac{1}{n-1} \sum_{i=1}^n (u_i - \bar{u})^2} \quad \text{where}$$

$$\bar{u} = \frac{1}{t} \sum_{i=1}^t u_i \quad \text{and}$$

$$u_i = \ln\left(\frac{P_t}{P_{t-1}}\right), \quad P_t \text{ is the price at time } t.$$

It is observed that from 2005 the highest price volatility was that of iron ore, followed by copper, aluminium and gold. For previous years the trend changed quite dramatically, especially for iron ore. Previous to 2010, since the majority of transaction prices were fixed by the main producing companies on annual basis, BHPBilliton, Rio Tinto and Vale.

The global financial crisis of 2008, however, changed this, because the spot market price was below the benchmark annual price in that period, and Chinese steelmakers chose to save money by trading on the spot market. Since China had emerged as the main user of iron ore in the early 2000, the annual benchmark pricing system formally collapsed in 2010, and the main producing companies adopted a quarterly pricing system based on the spot market, which provided more transparency and closeness to the supply demand situation.

Table 1 also shows that volatility of iron ore, copper and aluminium prices increased steeply since the beginning of the great commodity boom, originated by China's economic boom in 2003. Gold, however remained a low volatility price metal with an increasing trend in its price since the beginning of the boom.

Table 1: Volatility estimated on the basis of annual nominal prices

	Volatility Iron ore	Volatility Aluminium	Volatility Copper	Volatility Gold
1970-1974	11,2	16,2	28,4	21,8
1975-1979	15,1	26,3	32,6	27,1
1980-1984	13,6	27,9	14,4	39,7
1985-1989	7,2	32,7	17,0	15,3
1990-1994	11,8	19,1	14,1	5,6
1995-1999	7,4	16,0	22,0	7,3
2000-2004	7,2	11,4	23,0	8,5
2005-2009	50,4	27,0	33,7	9,1
2010-2011	32,6	11,8	16,0	0,9

Aluminium prices were particularly stable before the mid 70's when this metal was incorporated to the London Metal Exchange trading system. From 1975 until the end of the 80's the volatility of aluminium increased dramatically even surpassing that of copper. However, both industries are radically different. The former is the third most abundant crustal element, whereas copper is relatively scarce. Therefore, as stated by Simon Strauss in his book *Trouble in Third Kingdom* (1986, Mining Journal Books Ltd.) the cost of exploration for copper and the difficulty in finding world class deposits made a difference in the number of deposits developed for production. This was shown after 2000 when China decided to develop some high cost bauxite deposits, changing the structure of supply, and reducing volatility. Figure 1 shows constant US\$ 2010 prices for aluminium, copper, iron ore and gold, with base 100 in April 2002, indicating that the price of aluminium fell behind those of copper, iron ore and of gold.

The annual volatility of gold prices was comparable to those of the other three commodities before 1985, and it has been very low since then. At times of high economic risk such as 2008-2011 gold provides a shelter for investors and many authors have indicated that the price of gold will continue to increase in the future.

A recent study (Shahriar Shaffiee and Erkan Topal, 2010) has shown that the gold price experienced two shocks in the last 50 years, the first with the Iran revolution and the war between Iran and Iraq in 1980, and the second one with wars in Afghanistan and Iraq in 2007. These events also generated price shocks for oil. Eleven barrels of oil were worth one ounce of gold in 1968 and in 2008, and the correlation between gold and oil prices were around 85% in this period. The first shock lasted seven years while the

second one has not ended yet, and between the two shocks, the price of gold was relatively stable, below 250 US nominal/ounce.

The price of gold is influenced in the short term by the need for refuge of investors in the face of economic crisis, and by hedging of large conglomerates. In the long term the price of gold is controlled by three factors. First, mine production, whose costs have grown in the last few years and the difficulty to discover new massive deposits. South Africa declined its gold production to one fourth in the last 40 years. Second by “rational” expectations of investors, and third by the ease to buy and sell gold via the Exchange Traded Funds (ETFs).

4. Mineral commodity prices

Figures 1 and 2 show constant US\$ 2010 price for aluminium, copper, iron ore and gold, with base 100 in April 2002 and December 2005 respectively. It can be observed that both copper, iron ore and gold prices fared better than the average IMF’s metal price index. The price of iron ore fell as much as twice the price of copper during the 2008 global economic crisis, while the price of gold anticipated the crisis and then the recovery of commodity prices. It is interesting to observe that the gold price also seems to have anticipated the European crisis in 2010. The FMI commodity index considers Copper with a relative weight 2.8, Aluminium 3.9, Iron Ore 1.3, Tin 0.2, Nickel 1.1, Zinc 0.6, Lead 0.2, and Uranium 0.5.

Figure 2 shows the prices of these four commodities since 1970. It is observed that aluminium hit its top price in the last 50 years in 1989 signalling that the overcapacity present in today’s industry was non existent then. This figure also shows the record prices obtained by gold in 1979-1980, exhibiting a much greater volatility than what is observed at present.

Figure 1: Constant US\$ 2010 price for aluminium, copper, iron ore and gold, with base 100 in April 2002

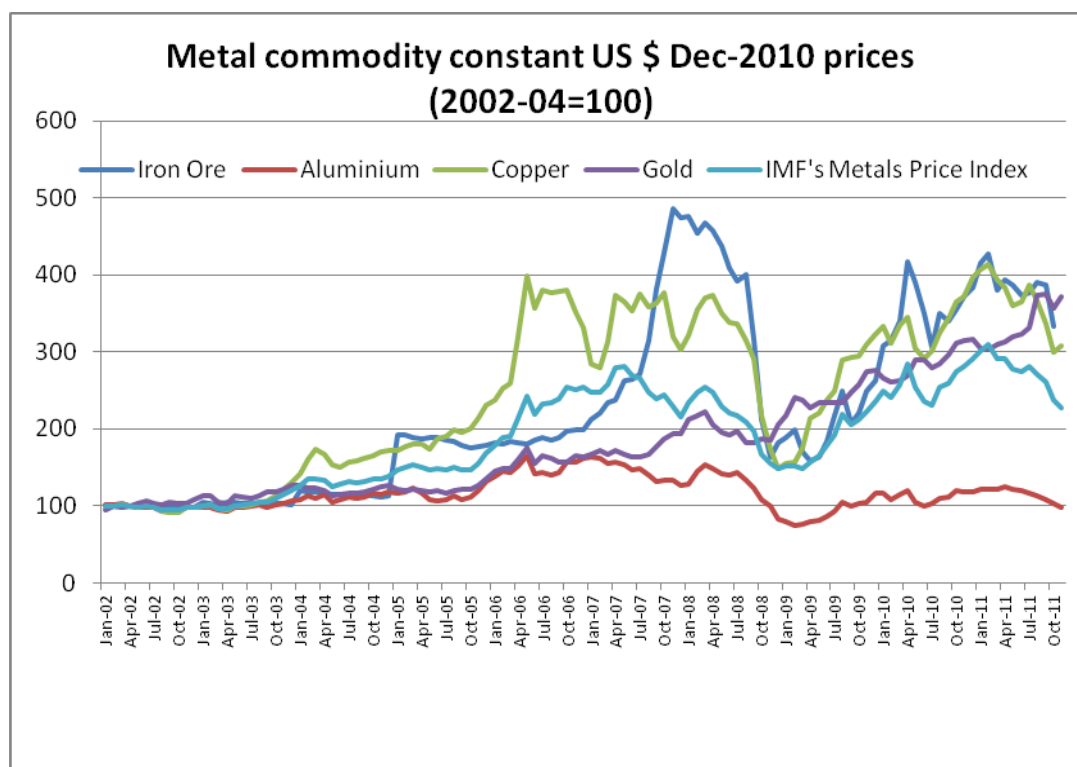
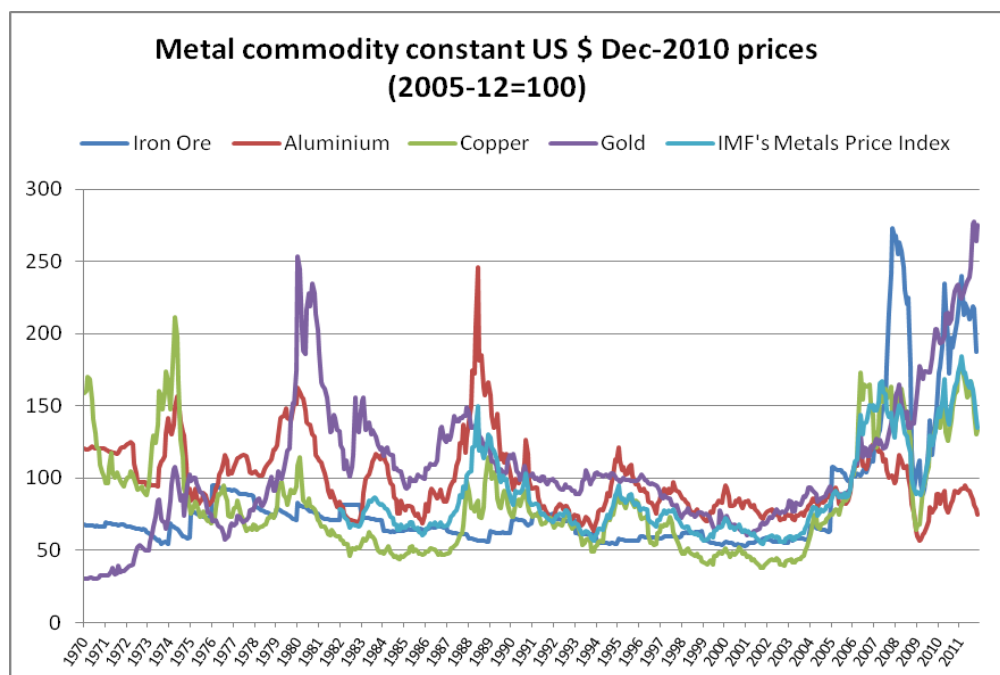


Figure 2: Constant US\$ 2010 price for aluminium, copper, iron ore and gold, with base 100 in December 2005

5. Mineral commodity prices and national economies

The volatility of metal commodity prices usually has important effect on those countries where the export of these commodities represents a large fraction, typically more than one third, of their total exports and of their fiscal income. It is relevant to review first which are these countries for aluminium, copper, iron ore and gold.

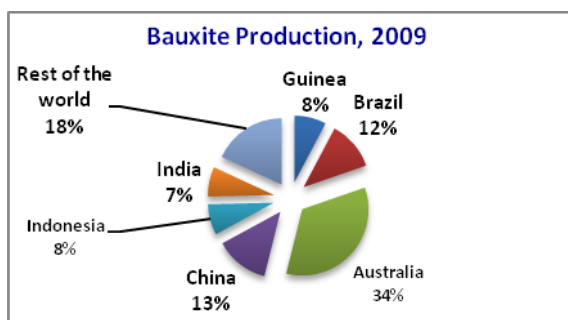
Figure 3 shows that the production of bauxite and of iron ore is concentrated in a few countries, whereas the production of copper is more spread out over several countries, and after the decline of gold production of South Africa, the production of this commodity is well disseminated in medium and small producers. China is a large producer of all four metals considered in this paper, Indonesia is a relevant producer of bauxite, copper and gold, whereas the CIS and Australia are relevant producers of two of the four metals considered. Australia's exports of bauxite, aluminium, iron ore and copper represents close to one fourth of total exports. Indonesia's exports of these four commodities represent about 6% of its total exports, while Brazil's exports of bauxite, aluminium, iron ore and copper were less than 15% of its total exports in 2010. In the case of Russia, India, China, and the U.S.A., their exports of these four commodities is less than 2% of their total exports. South Africa's exports of gold were a negligible fraction of their total exports.

In Figure 3-a it is observed that 6 countries produce 82% of the world's bauxite. Bauxite is processed into alumina usually in the same location as bauxite mining takes place. Alumina refining requires large amounts of energy, reason for which alumina refining is performed in locations with abundant and cheap energy. This mineral provides close to 80% of exports of Guinea, a country that has about one third of its world reserves.

Copper represented more than 50% of the exports of Zambia, Chile and close to this value in the case of Peru. Ghana's gold exports were one third of its total exports in 2010.

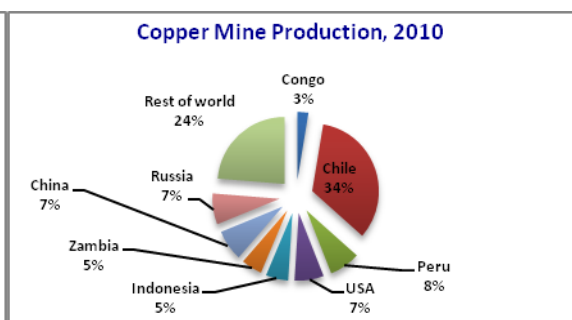
In sum, price volatility of these four commodities may affect the total exports, and consequently, availability of foreign currency and fiscal income, of a limited number of countries, namely Zambia, Chile, Peru, Ghana and Guinea. The effect of the price volatility of these commodities would be much less obvious in the case of Australia, Brazil, Indonesia, and negligible in the case of the other main producing countries.

Figure 3a: Production of Bauxite, 2009



Source: World Bureau of Metal Statistics.

Figure 3b: Copper Mine Production, 2010



Source: Chilean Copper Commission.

Figure 3c: Production of Iron Ore

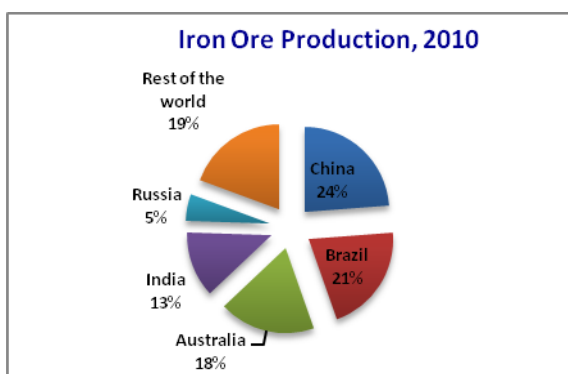
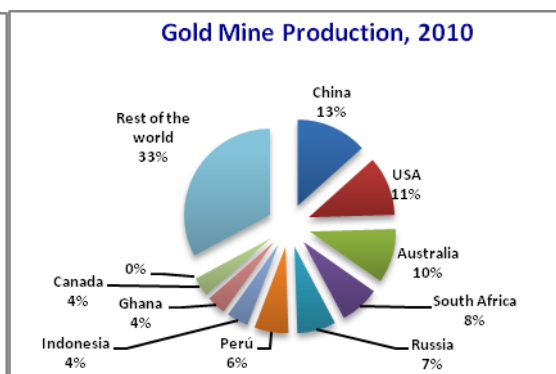


Figure 3d: Production of Mine Gold



6. Policies and practices for handling price volatility in developing countries.

In the case of Chile and over many decades the currency exchange policy maintained an overvalued local currency, thus generating deficits in the export/import balance. The country was always thirsty for hard currency. This led to increasing the import tariffs so as to protect national manufacturing industry, which had important consequences on the competitiveness of this industry. This has also been the case for the other countries considered here, namely, Peru, Ghana, Guinea, and Zambia.

This phenomenon started in Chile after the Great Depression, when the economic policy changed from outward driven to inward driven, subsidizing national manufacturing industry. This coincided with the time when the Anaconda and Kennecott, the two US companies that had built the mines of Chuquicamata and El Teniente, respectively, finished paying their investment. The value of the national currency was usually fixed by the government in order to protect the national industry, thus reducing incentives for competitiveness. These type of policies prevailed until after the world recession of 1982, after which the currency was managed more closely linked to international markets.

It was not until the 90's that the currency was totally floated on the basis of other international hard currencies. There is much evidence that the copper price has been linked to the value of the Chilean peso throughout the period when floating currency existed, even in recent years, since the great Chinese

economic boom began. However there are periods when this influence is greater, which makes it difficult to predict the variability of the currency. In spite of this economists have stated many times that the “Dutch Effect” was not experienced by Chile since the 90’s.

The fiscal income contributed to the State of Chile by the mining industry varied greatly from the 1930’s to the nationalization process in 1971. But the variations of fiscal income derived from copper continued after this time up to 2011. In 1941 the contribution of copper to the fiscal income was 14%, reaching a maximum of 41.5% in 1952. During the last decade fiscal income from copper, this time contributed not only by the State Company but also by private mining companies, varied between 5 and 30%.

The changes in fiscal income resulting from the volatility of the price of copper from year to year generated serious problems for the elaboration of the budget. Usually the budget had to be readjusted by Congress when the variations of the copper price were severely downwards.

As a result of the influence of copper taxes on fiscal income, in 1986 the Copper Stabilization Fund was created, establishing a reference price for the budget, above which the fund would accumulate income, while if the price was below the reference, there would be a transfer from the stabilization fund to the treasury. In spite of the fact that there is no literature evaluating the effect of this fund it can be generally said that it improved the management of the economy. Also, in 1987 the copper price increased and remained high, except for one year, up to the Asian crisis in 1997. From 1998 to 2003 the price of copper and other mineral commodities was low, and some times, very low. The copper stabilization fund helped at this time since it had built a considerable amount of currency.

In 2006 the Chilean Government created the Economic and Social Stabilization Fund (SWF (Social Welfare Fund) or FEES in Spanish), incorporating the income accrued by the Copper Stabilization Fund (CSF) (2.5 billion US), which reached its end. The aim of this fund was ampler than that of the CSF since it included funding social and economic programs. The same year the Pension Reserve Fund was created, obtaining income from the Government, from the Central Bank to a minimum amount of 0.2% of the GDP, and from the SWF.

The SWF obtained 13.1 billion US\$ derived from the old copper Stabilization Fund plus the savings of copper taxes not assigned to previous budgets. Up to November 2011, the FEES had 13.2 billion, and had transferred 9.4 billion to the Government for ameliorating the economic effects of the 2008 Global Economic Crisis. Almost all funds of the SWF were contributed by copper taxes obtained from Codelco and from the private mining companies. The latter contributed 12.3 billion US (nominal) in taxes from 2006 to 2010, which shows that without this contribution the balance of the SWF would have been zero.

Peru does not have a mechanism similar to that of Chile for saving surplus originated in mining. This is partly due to the fact that the overall fiscal income obtained from mining has not been as large as that of Chile and has been spent in social welfare and other purposes. With the present growth of the mining sector of Peru, it is likely that such savings may be originated in the future.

The case of Zambia is similar to that of Chile before the 1980’s. Mining, mainly copper and cobalt, make up 10% of the GDP and 70% of its exports. A strong Dutch Disease effect is acknowledged historically, which has created aversion to investment in the local currency (Kwacha) in other sectors of the economy. Handling of the exchange rate of the Kwacha varied historically in Zambia. From 1964 to 1976 there was fixed exchange rate, convertible in sterling and later in US dollars. Afterwards degrees of floating currency have been established. But Zambia still does not an SWF. Neither do Guinea and Ghana, but Ghana is considering the creation of a fund to handle revenues of its new oil project which will generate about 2 billion per year income.

In fact Chile may be the only non-ferrous mineral producing country without oil that has managed a successful SWF to manage its mineral exports surplus in times of boom.

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CONCURRENCE, MATIÈRES PREMIÈRES ET VOLATILITÉ DES PRIX

*Par Gustavo Lagos**

1. Introduction

En 2010, le minerai de fer, l'aluminium, le cuivre et l'or représentaient près de 80 % de la valeur économique produite dans les mines de tous les principaux métaux, dont aussi le zinc, l'argent, le molybdène, le nickel et le plomb.

Au cours des deux dernières décennies, la volatilité des prix du cuivre, du fer et de l'aluminium a été plus forte que celle des prix des biens et services et que celle des cours de l'or.

La volatilité des prix a eu des effets variables sur les pays qui produisent ces matières premières, en fonction du stade de leur développement économique, de la part des matières premières dans les exportations de chacun des pays producteurs, des recettes fiscales issues des taxes perçues par l'État et de l'investissement qui en a résulté. La volatilité de ces prix aurait pesé sur la croissance économique des pays en développement producteurs qui exportent massivement des matières premières minérales.

Lorsque les exportations d'un pays sont en grande partie dominées par une ou plusieurs matières premières minérales, les cycles des prix provoquent une hausse de la valeur de la monnaie par rapport au dollar américain quand les prix sont élevés et une baisse de cette valeur quand les prix diminuent. En cas d'appréciation de la monnaie locale, les autres produits du pays deviennent plus chers à fabriquer et à exporter, ce qui entraîne une érosion de la compétitivité de l'industrie manufacturière et d'autres secteurs, dont l'agriculture. Il s'agit du « syndrome néerlandais », qui peut même toucher des pays développés, en particulier de grands exportateurs de pétrole, dotés d'une économie plus diversifiée. Le syndrome néerlandais est lié à une autre théorie appelée « malédiction des ressources » ou « paradoxe de l'abondance »¹.

Tout porte à croire que la théorie de la « malédiction des ressources » est valable uniquement pour certains pays et pendant des périodes ponctuelles. Le Canada, l'Australie, la Finlande et d'autres pays développés dépendaient énormément des exportations de matières premières minérales au début du vingtième siècle. Pour autant, cela ne les a pas empêchés d'enregistrer un taux de croissance raisonnable au fil du temps. Le Chili a pu en faire de même à la fin du vingtième siècle.

* Note préparée par M. Gustavo Lagos, Professeur, Département d'économie minérale, Université Catholique du Chili.

¹ La théorie de la « malédiction des ressources » stipule que les pays dotés d'abondantes ressources naturelles non renouvelables comme les combustibles affichent une croissance économique plus faible que celle des pays moins favorisés par la nature. Plusieurs facteurs expliquent ce phénomène, parmi lesquels une érosion de la compétitivité des autres secteurs d'activité (imputable au « syndrome néerlandais »), l'instabilité des recettes tirées des ressources naturelles, la corruption, la mauvaise gestion des ressources par les pouvoirs publics ou encore des institutions fragiles, inefficaces, instables ou corrompues (sans doute en raison de la facilité avec laquelle les recettes effectives ou attendues des activités extractives peuvent être détournées).

La présente note analyse certaines des causes et des conséquences de la volatilité des prix du cuivre, du fer, de l'aluminium et de l'or sur la concurrence et sur l'économie de pays producteurs tributaires des exportations de ces matières premières.

2. Volatilité des prix des matières premières minérales

Les causes de la volatilité des prix des matières premières minérales comme le minerai de fer, le cuivre et l'aluminium sont nombreuses mais deux d'entre elles l'emportent sur les autres.

La première est l'évolution des mécanismes fondamentaux du marché, à savoir l'offre, la demande et les réserves de métaux physiques. Il est bien connu que ces moteurs peuvent être source de volatilité à court et long terme.

Les déterminants de l'offre pour chacune des quatre matières premières abordées dans cette étude sont différents. Le fer et l'aluminium font partie des quatre éléments les plus abondants dans la croûte terrestre. Par conséquent, la découverte et l'exploitation de nouveaux gisements ne revêtent pas une aussi grande importance que pour le cuivre et l'or. Le transport longue distance de minerai de fer, en quantités massives, est l'un des principaux facteurs de compétitivité en raison des différences de distance entre les producteurs et les principaux consommateurs. De ce point de vue, le Brésil est désavantagé par rapport à l'Australie et à l'Inde. Concernant l'aluminium, le facteur clé est l'abondance d'une énergie bon marché. En effet, l'alumine doit être transformée en aluminium, procédé qui fait intervenir trois électrons pour chaque unité de poids de ce métal, qui est l'un des plus légers. S'agissant du cuivre et de l'or, les principaux obstacles sont l'exploration, l'extraction et les technologies de traitement. Le cuivre et l'or présentent une grande différence : si environ 37 % de l'or utilisé est recyclé, ce pourcentage est inférieur à 20 % pour le cuivre.

L'or et l'aluminium suscitent de grandes préoccupations environnementales, pour le premier en raison de la lixiviation au cyanure et pour le second du fait de l'utilisation de quantités massives d'énergie et des émissions de fluor gazeux. L'utilisation et la gestion de l'eau constituent une préoccupation environnementale liée à l'exploitation de toutes les matières premières minérales.

Le secteur du bâtiment et des travaux publics, la fabrication de biens industriels et la production et le transport d'électricité conditionnent la demande de fer, d'aluminium et de cuivre. La production industrielle et le BTP sont de très bons indicateurs pour estimer la consommation ou l'utilisation de ces métaux. Chaque année, environ 50 % de l'or sont utilisés par le secteur de la bijouterie, 38 % servent à des applications technologiques et 12 % sont destinés à l'investissement via des fonds négociés en bourse. L'une des particularités de ce secteur est qu'une partie de la demande peut être facilement transformée en offre, par exemple la bijouterie et les réserves détenues par les Banques centrales.

Quelques exemples de volatilité induite par les fondamentaux du marché. Par exemple, ces dernières années, l'incertitude entourant les réserves de cuivre non déclarées par la Chine aurait provoqué une hausse de la volatilité en raison de l'impossibilité d'anticiper la consommation globale du pays.

Autre exemple de l'impact des fondamentaux du marché sur les prix : peu après la prise de conscience par le monde entier de l'essor remarquable de l'économie chinoise en 2003, l'industrie cuprifère a dû faire face à un épuisement des capacités de production de cuivre minier. Cela s'est produit en 2005, après quoi toutes les prévisions d'offre pour l'année suivante ont surévalué ce qui est réellement advenu par la suite. Concrètement, un déficit compris entre 2 et 5 % de métal physique par rapport aux prévisions de production en décembre de l'année précédente a été enregistré. Cette tendance est susceptible de se poursuivre alors que l'industrie tourne à pleine capacité, ce qui accentue la volatilité à long terme. En effet, les mines gigantesques qui sont actuellement en activité dans plusieurs régions du globe subissent de fortes perturbations non prévues comme des glissements de terrain (Grasberg, Indonésie), des éboulements

(Chuquicamata, Chili), des pannes matérielles géantes (Collahuasi et Escondida au Chili) et des grèves (qui devraient être prises en compte dans les prévisions). L'incapacité du Chili à accroître sa production de cuivre ces six dernières années n'est pas une coïncidence et n'est certainement pas la conséquence d'une initiative concertée de compagnies. Elle s'explique par le fait que les immenses sites complexes qui sont exploités font l'objet d'un plus grand nombre de désorganisations de la production imputables à des phénomènes techniques et naturels qu'estimé initialement.

Une deuxième cause de la volatilité est le marché financier, à savoir la spéculation, les opérations de couverture à terme, les investissements des fonds de pension et le conseil en opérations à terme sur marchandises. Pendant les cycles traditionnels, les stocks doivent retomber à des niveaux bas avant que les prix ne décollent. Or, depuis les années 1990, les fonds ont anticipé l'évolution des fondamentaux. La baisse et la hausse des prix durant la crise financière mondiale de 2008 mettent en évidence l'impact des fonds. Ceux-ci ont rapidement liquidé leurs positions, provoquant ainsi une chute brutale des prix, avant d'acheter peu après des contrats à terme sur marchandises, contribuant dès lors à un redressement rapide des prix. Les fonds sont plus réactifs que les forces de l'offre et de la demande de métal physique. La chute des prix en 2008 a été plus rapide pour la plupart des matières premières que pendant toutes les crises antérieures. Fait intéressant, à l'exception de l'intervention des fonds de pension, qui sont pour l'essentiel des investissements de long terme, les instruments financiers raccourcissent les cycles en anticipant l'évolution des fondamentaux et en choisissant le point de retournement. Ces instruments n'ont aucune incidence sur les prix à long terme, alors que les investissements par les fonds de pension les font monter. L'arbitrage entre la Bourse des métaux de Londres et la Bourse de Shanghai accroîtrait la volatilité, puisque les grandes différences créées doivent être corrigées par le transport de métal dans un sens ou dans l'autre.

Aucun modèle validé de prévision de l'évolution des marchés financiers n'a été créé jusqu'à présent. Lorsque les stocks sont très bas, comme cela fut le cas pour le cuivre entre mi-2005 et 2007, le prix ne réagit plus de manière logique aux variations des stocks. Après la crise financière mondiale de 2008, les cours du cuivre ont augmenté parallèlement à l'accroissement des stocks à plusieurs reprises, avant de repartir subitement à la baisse pour tenir compte de la relation de dépendance traditionnelle entre les prix et les stocks. Les prix variaient de manière pratiquement aléatoire. La crise économique en Europe, qui a entraîné une baisse significative des prix de toutes les matières premières mi-2011, est une autre illustration de ce caractère aléatoire. À l'époque, le cours du cuivre a chuté, passant de plus de 4 USD/livre à moins de 3.5 USD/livre en peu de temps. Il s'est maintenu à ce niveau pendant des mois, rien ne permettant de penser que cela était dû à une variation des stocks. Pourquoi le prix du cuivre n'est-il pas repassé au-dessus de la barre de 4 USD/livre depuis le début de la crise européenne ? En raison de la révision à la baisse des prévisions de croissance chinoise ?

L'affaiblissement du dollar américain est une troisième cause de la volatilité puisqu'il entraîne une appréciation des matières premières minérales. Cela a pour effet d'accentuer la volatilité à court et long terme, bien que les fluctuations du billet vert soient en général limitées par comparaison avec les deux autres facteurs de volatilité.

La volatilité a de nombreux effets sur les matières premières minérales. Les matières premières plus volatiles affichent des taux de croissance de la consommation inférieurs à ceux des matières premières moins volatiles. À titre d'exemple, la croissance de la consommation d'aluminium entre 1940 et 1970 a pratiquement été deux fois plus soutenue que celle du cuivre. À l'époque, le prix à la production de l'aluminium était stable, alors que le cuivre est le premier métal qui a été échangé à la Bourse des métaux de Londres au dix-neuvième siècle.

En règle générale, les matières premières qui se négocient en bourse ou sont comparées au marché affichent une volatilité des prix plus importante que celles dont le prix est défini par les producteurs (prix à

la production). Tel est le cas de l'aluminium, dont la volatilité était très faible avant qu'il ne soit négocié à la Bourse des métaux de Londres (au milieu des années 1970). C'est aussi le cas de l'or, dont le prix était fixé par le gouvernement américain avant 1974, et du minerai de fer, le récent changement de mode de détermination des prix (2010) ayant induit une volatilité nettement plus forte qu'auparavant, lorsque les compagnies Vale, Rio Tinto et BHP fixaient pour l'essentiel les prix annuels.

En général, la production des quatre matières premières étudiées ici n'est pas considérée comme étant subventionnée. Certains des produits dérivés et des procédés peuvent toutefois bénéficier de subventions directes ou indirectes. Les avantages fiscaux accordés aux fonderies en Chine et au Japon sont des exemples de subventions directes, alors que le dumping écologique est une forme de subvention indirecte mise en place par les gouvernements qui appliquent des normes environnementales et de santé moins contraignantes que ce qui est « acceptable » à l'échelle mondiale. L'octroi de subventions aux petites compagnies minières est généralisé dans de nombreux pays en développement mais la contribution globale de ce segment à la production totale est négligeable.

L'évolution des termes de l'échange (à savoir la valeur des exportations de matières premières minérales) et des marges bénéficiaires (à savoir les recettes fiscales via les taxes) est considérée comme un moteur de l'innovation et de la productivité. Il est essentiel de bien comprendre cela pour l'action des pouvoirs publics. Dans de nombreux pays en développement, d'aucuns pensent encore que le contrôle des prix des matières premières minérales a des effets positifs à long terme sur les pays en question. L'inverse est exact, comme le montrent de nombreux cas d'ententes qui ont échoué et pour certains connu une fin tragique, à l'instar de l'Accord international sur l'étain dans les années 1980. Pléthore d'ouvrages se penchent sur l'impact de l'évolution des termes de l'échange et de la volatilité sur la croissance économique des pays. Ce facteur a conditionné les politiques de nombreux pays tout au long du siècle dernier. Il fait apparaître des opinions contradictoires et son analyse déborde du cadre de cette étude.

Les pouvoirs publics ont envisagé différents modes d'intervention pour vaincre les effets de la volatilité sur la stabilité économique et la croissance des pays en développement.

La création de Fonds de protection sociale est la stratégie la plus couramment mise en œuvre dans de nombreux pays en développement, dont la plupart des pays exportateurs de pétrole, et bon nombre de pays développés.

Une deuxième tactique consiste à diversifier l'économie. Cette démarche, qui est vivement encouragée au Chili, a porté ses fruits jusqu'au début de l'essor remarquable de l'économie chinoise. Auparavant, les exportations de minéraux au Chili représentaient moins de 50 % des exportations totales, voire moins de 40 % certaines années. Toutefois, compte tenu des prix récents des matières premières minérales, la part des exportations de minéraux a dépassé 60 % pendant de nombreuses années.

Une troisième méthode très souvent employée a été l'intervention des Banques centrales afin de lisser et d'améliorer les fluctuations de la monnaie locale. Ces initiatives se sont peut-être révélées concluantes dans certains cas mais elles ont en général été négligées en raison de leur coût élevé et de leur inefficacité.

Une quatrième démarche réside dans l'intervention des pouvoirs publics pour définir clairement et contrôler les effets externes et exécuter des travaux d'intérêt public qui facilitent le travail de l'industrie et de la population, ainsi que dans la contribution à la protection sociale de la population, en particulier des citoyens situés à proximité des mines. Ce dernier point a pris une grande importance au cours de la dernière décennie. Très souvent, il est difficile de déterminer où se trouve la frontière entre l'action des pouvoirs publics et celle des sociétés, même en sachant que ces deux secteurs ont peut-être des intérêts communs.

S'agissant du comportement concurrentiel de l'industrie minière, les « véritables » organismes de contrôle sont localisés dans les pays développés, essentiellement aux États-Unis et dans l'Union européenne. Ces dernières années, des organismes américains et européens ont procédé à de nombreux contrôles du comportement concurrentiel des compagnies minières, notamment du rapprochement entre Rio Tinto et BHPBilliton. La fusion des deux groupes a été retardée par l'Union européenne jusqu'à la crise de 2008 et ce projet a manifestement avorté pour des raisons liées au marché. Autre exemple : la collusion potentielle entre compagnies pour fixer les prix de la fusion et du raffinage du cuivre a fait l'objet d'une enquête au cours de la dernière décennie.

3. Estimation de la volatilité

Le Tableau 1 fait apparaître la volatilité sur des périodes de cinq ans du minerai de fer, de l'aluminium, du cuivre et de l'or, calculée à partir des prix nominaux annuels moyens. Nous nous fondons sur les statistiques du prix du minerai de fer de la Banque mondiale, qui correspondent aux données contractuelles en base annuelle avant 2005 et aux cours au comptant à partir de 2005.

La volatilité a été calculée ainsi :

$$Vol_t = \sqrt{\frac{1}{n-1} \sum_{i=1}^n (u_i - \bar{u})^2} \quad \text{où}$$

$$\bar{u} = \frac{1}{t} \sum_{i=1}^t u_i \quad \text{et}$$

$$u_i = \ln \left(\frac{P_t}{P_{t-1}} \right), \quad P_t \text{ étant le prix à l'instant } t.$$

À compter de 2005, il apparaît que le métal affichant la volatilité la plus élevée est le minerai de fer, suivi du cuivre, de l'aluminium et de l'or. Pour les années antérieures, la tendance a évolué de manière assez spectaculaire, surtout pour le minerai de fer. Avant 2010, les prix des transactions étaient en majorité fixés par les principales compagnies productrices, à savoir BHPBilliton, Rio Tinto et Vale, sur une base annuelle.

Cependant, la crise financière mondiale de 2008 a changé la donne. En effet, le prix au comptant était inférieur au prix annuel de référence pendant cette période et les aciéristes chinois ont choisi de réaliser des économies en optant pour des transactions sur le marché au comptant. Comme la Chine était devenue le premier utilisateur de minerai de fer au début des années 2000, le mécanisme de fixation d'un prix de référence annuel a officiellement disparu en 2010 et les principales compagnies productrices ont adopté un mode de détermination du prix trimestriel sur la base du marché au comptant, ce qui a permis une plus grande transparence et une plus grande proximité avec l'équilibre offre / demande.

Le Tableau 1 montre aussi que la volatilité des prix du minerai de fer, du cuivre et de l'aluminium s'est brutalement accrue depuis le début du boum spectaculaire des matières premières, qui a découlé de l'expansion de l'économie chinoise en 2003. En revanche, la volatilité du prix de l'or est restée faible, son prix ayant eu tendance à augmenter depuis le début de l'essor.

Tableau 1 : Volatilité estimée sur la base des prix nominaux annuels

	Volatilité Minerai de fer	Volatilité Aluminium	Volatilité Cuivre	Volatilité Or
1970-1974	11.2	16.2	28.4	21.8
1975-1979	15.1	26.3	32.6	27.1
1980-1984	13.6	27.9	14.4	39.7
1985-1989	7.2	32.7	17.0	15.3
1990-1994	11.8	19.1	14.1	5.6
1995-1999	7.4	16.0	22.0	7.3
2000-2004	7.2	11.4	23.0	8.5
2005-2009	50.4	27.0	33.7	9.1
2010-2011	32.6	11.8	16.0	0.9

Les cours de l'aluminium étaient particulièrement stables avant le milieu des années 1970, à l'époque où ce métal a été intégré au système de cotation à la Bourse des métaux de Londres. Entre 1975 et la fin des années 1980, la volatilité de l'aluminium s'est sensiblement accrue au point de devenir supérieure à celle du cuivre. Ces deux métaux sont néanmoins radicalement différents. L'aluminium est le troisième élément le plus abondant dans la croûte terrestre, alors que le cuivre est relativement rare. Par conséquent, comme l'indiquait Simon Strauss dans son ouvrage *Trouble in Third Kingdom* (1986, Mining Journal Books Ltd.), le coût de l'exploration du cuivre et la difficulté à trouver des gisements de classe internationale ont eu une incidence sur le nombre de gisements exploités à des fins de production. Cela est apparu après 2000, lorsque la Chine a décidé d'exploiter des gisements de bauxite à coût élevé, ce qui a modifié la structure de l'offre et réduit la volatilité. Le Graphique 1 représente les prix en dollars américains constants de 2010 de l'aluminium, du cuivre, du minerai de fer et de l'or, avec une base 100 en avril 2002. Il montre que le prix de l'aluminium est devenu inférieur à celui du cuivre, du minerai de fer et de l'or.

La volatilité annuelle des cours de l'or était comparable à celle des trois autres matières premières avant 1985. Depuis cette date, elle a été très faible. En période de risque économique élevé comme entre 2008 et 2011, l'or joue le rôle de valeur refuge pour les investisseurs. De nombreux auteurs indiquent que le prix de l'or continuera à s'inscrire en hausse à l'avenir.

Une étude récente (Shahriar Shaffiee et Erkan Topal, 2010) a montré que le prix de l'or avait subi deux chocs ces cinquante dernières années, le premier au moment de la révolution en Iran et de la guerre entre l'Iran et l'Iraq en 1980 et le second lors des guerres en Afghanistan et en Iraq en 2007. Ces événements ont aussi provoqué des chocs des cours du pétrole. Onze barils de pétrole valaient une once d'or en 1968 et en 2008 et la corrélation entre cours de l'or et du pétrole était d'environ 85 % à cette époque. Le premier choc a duré sept ans, alors que le second n'est pas encore terminé. Entre ces deux chocs, le prix de l'once d'or a été relativement stable, inférieur à 250 dollars en valeur nominale.

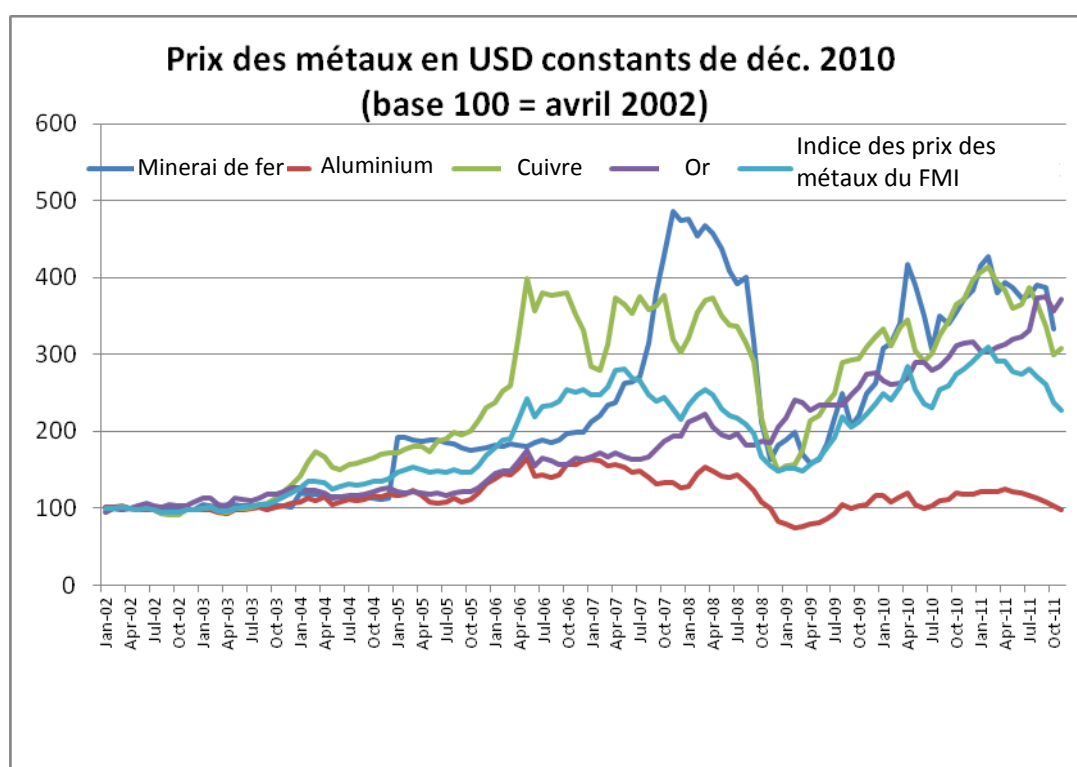
Deux facteurs influent sur le prix de l'or à court terme : la nécessité pour les investisseurs de trouver des valeurs refuges en cas de crise économique et les opérations de couverture des grands conglomérats. À long terme, trois facteurs déterminent le prix de l'or. Le premier est la production des mines, dont les coûts ont augmenté ces dernières années, et la difficulté à découvrir de nouveaux gisements immenses. L'Afrique du Sud a réduit sa production d'or à un quart ces quarante dernières années. Le deuxième correspond aux anticipations « rationnelles » des investisseurs et le troisième à la facilité à acheter et à vendre de l'or via les fonds négociés en bourse.

4. Prix des matières premières minérales

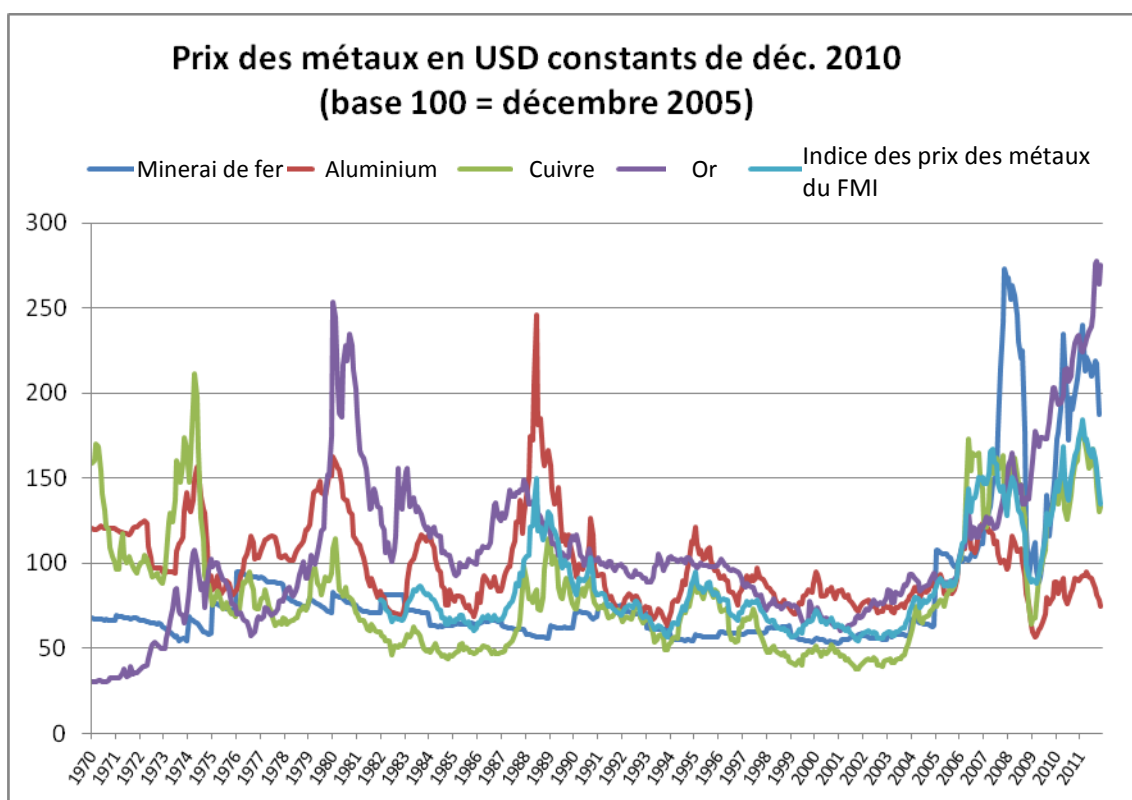
Les Graphiques 1 et 2 représentent les prix en dollars américains constants de 2010 de l'aluminium, du cuivre, du minerai de fer et de l'or, avec une base 100 respectivement en avril 2002 et en décembre 2005. On peut observer que les prix du cuivre, du minerai de fer et de l'or se sont mieux comportés que l'indice moyen des prix des métaux du FMI. Le prix du minerai de fer a accusé un repli deux fois plus prononcé que celui du cuivre pendant la crise économique mondiale de 2008, tandis que celui de l'or a anticipé la crise puis le redressement des prix des matières premières. Il est intéressant de noter que le prix de l'or semble aussi avoir anticipé la crise européenne en 2010. Les pondérations relatives des métaux au sein de l'indice des matières premières du FMI sont les suivantes : 2.8 pour le cuivre, 3.9 pour l'aluminium, 1.3 pour le minerai de fer, 0.2 pour l'étain, 1.1 pour le nickel, 0.6 pour le zinc, 0.2 pour le plomb et 0.5 pour l'uranium.

Le Graphique 2 fait apparaître les prix de ces quatre matières premières depuis 1970. On observe que l'aluminium a atteint son prix le plus élevé des cinquante dernières années en 1989, ce qui indique que la surcapacité qui caractérise le secteur aujourd'hui n'existait pas alors. Ce graphique montre aussi les niveaux records atteints par les cours de l'or en 1979-1980 et leur volatilité beaucoup plus forte qu'actuellement.

Graphique 1 : Prix en dollars américains constants de 2010 de l'aluminium, du cuivre, du minerai de fer et de l'or, avec une base 100 en avril 2002



Graphique 2 : Prix en dollars américains constants de 2010 de l'aluminium, du cuivre, du minerai de fer et de l'or, avec une base 100 en décembre 2005



5. Prix des matières premières minérales et économies nationales

En général, la volatilité des prix des métaux a une forte incidence sur les pays dans lesquels ces matières premières représentent une part importante, le plus souvent supérieure à un tiers, des exportations et des recettes fiscales totales. Il est intéressant d'examiner d'abord quels sont ces pays pour l'aluminium, le cuivre, le minerai de fer et l'or.

Le Graphique 3 montre que la production de bauxite et de minerai de fer est concentrée dans quelques pays, alors que celle de cuivre est mieux répartie entre plusieurs pays et que celle d'or, après la diminution de la production en Afrique du Sud, est bien répartie entre des pays de moyenne et petite taille. La Chine est un grand producteur des quatre métaux analysés dans cette étude. L'Indonésie est un important producteur de bauxite, de cuivre et d'or. La CEI et l'Australie sont de grands producteurs de deux des quatre métaux étudiés. En Australie, les exportations de bauxite, d'aluminium, de minerai de fer et de cuivre représentent près d'un quart des exportations totales. En Indonésie, les exportations de ces quatre matières premières équivalent à environ 6 % des exportations totales du pays. Quant au Brésil, la part des exportations de bauxite, d'aluminium, de minerai de fer et de cuivre dans les exportations totales était inférieure à 15 % en 2010. S'agissant de la Russie, de l'Inde, de la Chine et des États-Unis, les exportations de ces quatre métaux correspondent à moins de 2 % de leurs exportations totales. En Afrique du Sud, les exportations d'or représentaient une part négligeable des exportations totales.

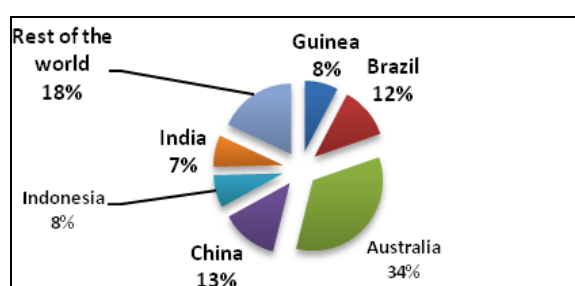
Le Graphique 3-a montre que six pays produisent 82 % de la bauxite mondiale. En général, la bauxite est transformée en alumine à l'endroit même où elle est extraite. Le raffinage de l'alumine nécessite de grandes quantités d'énergie ; c'est pourquoi cette opération se déroule sur des sites renfermant

d'abondantes sources d'énergie bon marché. Ce minéral représente près de 80 % des exportations de la Guinée, pays qui détient environ un tiers de ses réserves mondiales.

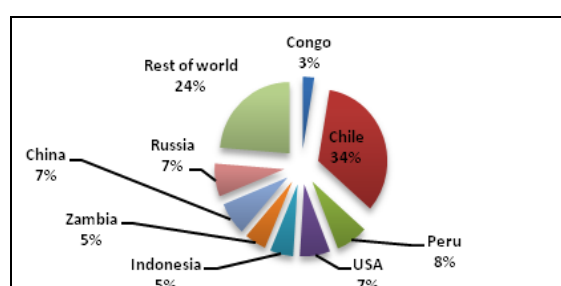
Le cuivre représentait plus de 50 % des exportations de la Zambie et du Chili et près de 50 % de celles du Pérou. Les exportations d'or du Ghana correspondaient à un tiers de ses exportations totales en 2010.

En résumé, la volatilité des prix de ces quatre métaux peut influencer sur les exportations totales, et donc sur la disponibilité des devises et des recettes fiscales, d'un nombre limité de pays, à savoir la Zambie, le Chili, le Pérou, le Ghana et la Guinée. L'impact de la volatilité des prix de ces matières premières est nettement moins flagrant dans le cas de l'Australie, du Brésil et de l'Indonésie et négligeable pour les autres principaux pays producteurs.

Graphique 3a : Production de bauxite, 2009 **Graphique 3b : Production des mines de cuivre, 2010**

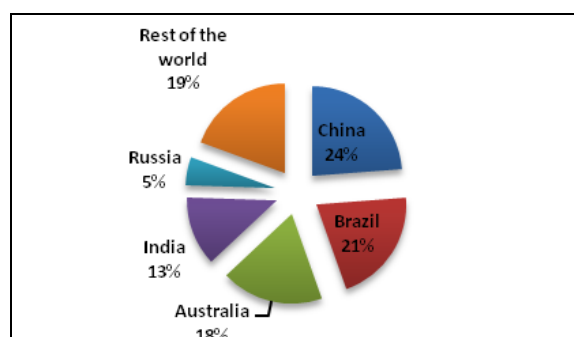


Source : Bureau mondial des statistiques des métaux.

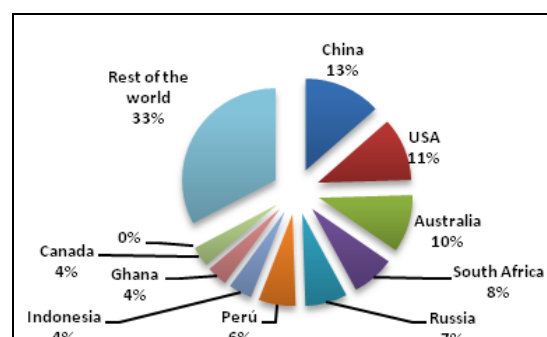


Source : Commission chilienne du cuivre.

Graphique 3c : Production de minerai de fer



Graphique 3d : Production des mines d'or



6. Méthodes et pratiques de gestion de la volatilité des prix dans les pays en développement

Au Chili, pendant de nombreuses décennies, la politique de change s'est traduite par une surévaluation de la monnaie locale, d'où une balance commerciale déficitaire. Le pays avait toujours soif de devises fortes. Il en a résulté une augmentation des tarifs douaniers afin de protéger l'industrie de transformation nationale, ce qui a eu un impact significatif sur sa compétitivité. Cela a également été le cas pour les autres pays étudiés ici, à savoir le Pérou, le Ghana, la Guinée et la Zambie.

Ce phénomène a débuté au Chili après la Grande Crise de 1929, à l'époque où la politique économique axée sur l'extérieur s'est tournée vers l'intérieur, en subventionnant l'industrie de transformation nationale. Cela a coïncidé avec le moment où les deux sociétés américaines Anaconda et Kennecott, qui avaient construit les mines de Chuquicamata et El Teniente respectivement, ont terminé de payer leur investissement. La valeur de la monnaie nationale était en général fixée par le gouvernement afin de protéger l'industrie nationale, ce qui a donc réduit les mesures visant à promouvoir la compétitivité.

Les mesures de ce type ont été appliquées jusqu'à après la récession mondiale de 1982. Par la suite, la gestion du taux de change a été plus étroitement liée aux marchés internationaux.

Il a fallu attendre les années 1990 pour que la monnaie soit totalement flottante sur la base des autres devises fortes internationales. Tout porte à croire que le prix du cuivre a été lié à la valeur du peso chilien tout au long de la période de flottement de la monnaie, même ces dernières années, depuis le début de l'essor remarquable de l'économie chinoise. Toutefois, cette influence est plus forte à certaines périodes, d'où la difficulté à prévoir les fluctuations de la monnaie. Malgré cela, les économistes ont affirmé à maintes reprises que le Chili n'avait pas été touché par le « syndrome néerlandais » depuis les années 1990.

Le montant des recettes fiscales versées à l'État du Chili par l'industrie minière a considérablement varié entre les années 1930 et le processus de nationalisation en 1971. Cela dit, les recettes fiscales tirées du cuivre ont continué à fluctuer par la suite, et ce jusqu'en 2011. En 1941, la part du cuivre dans les recettes fiscales s'élevait à 14 %. Elle a atteint un maximum de 41.5 % en 1952. Au cours de la dernière décennie, les recettes fiscales tirées du cuivre, cette fois versées par la compagnie publique mais aussi par les compagnies minières privées, ont varié entre 5 et 30 %.

Les fluctuations des recettes fiscales découlant de la volatilité du prix du cuivre d'une année sur l'autre se sont révélées très problématiques pour l'élaboration du budget. En général, le Congrès devait corriger le budget lorsque le prix du cuivre était orienté en forte baisse.

Compte tenu de l'incidence sur les recettes fiscales des taxes sur le cuivre, un Fonds de stabilisation du cuivre a été institué en 1986. Un prix de référence a été fixé pour le budget, au-dessus duquel le fonds accumulait les recettes. À l'inverse, en cas de prix inférieur à la valeur de référence, un transfert s'opérait du Fonds de stabilisation vers le Trésor. Bien qu'aucune publication n'évalue l'impact de ce fonds, on peut globalement affirmer qu'il a contribué à améliorer la gestion de l'économie. En outre, en 1987, le prix du cuivre a augmenté et est resté élevé, à l'exception d'une année, jusqu'à la crise asiatique en 1997. De 1998 à 2003, le prix du cuivre et d'autres matières premières minérales a été bas et parfois très bas. Le Fonds de stabilisation du cuivre a joué un rôle positif à l'époque puisqu'il avait accumulé une très grande quantité de devises.

En 2006, le gouvernement chilien a créé le Fonds de stabilisation économique et sociale (Fonds de protection sociale ou FEES en espagnol). Il a englobé les recettes accumulées par le Fonds de stabilisation du cuivre (2.5 milliards USD), qui touchait à sa fin. L'objectif de ce fonds était plus vaste que celui du Fonds de stabilisation du cuivre car il intégrait le financement de programmes sociaux et économiques. Cette même année, le Fonds de réserve pour les pensions a été institué. Il a été alimenté par le gouvernement, la Banque centrale (à hauteur d'un montant minimum de 0.2 % du PIB) et le Fonds de protection sociale.

Le Fonds de protection sociale a obtenu 13.1 milliards USD issus de l'ancien Fonds de stabilisation du cuivre ainsi que les économies sur les taxes sur le cuivre non affectées aux budgets antérieurs. Jusqu'en novembre 2011, le FEES était doté de 13.2 milliards et avait transféré 9.4 milliards au gouvernement afin d'améliorer les conséquences économiques de la crise économique mondiale de 2008. Pratiquement toutes les ressources du Fonds de protection sociale provenaient des taxes sur le cuivre payées par Codelco et les compagnies minières privées. Ces dernières ont versé 12.3 milliards USD (en valeur nominale) de taxes entre 2006 et 2010, si bien que, sans cette contribution, le solde du Fonds de protection sociale aurait été nul.

Le Pérou ne possède pas de mécanisme comparable à celui du Chili pour l'excédent d'épargne résultant de l'exploitation minière. Cela s'explique en partie par le fait que les recettes fiscales totales au titre de l'exploitation minière n'ont pas été aussi élevées que celles du Chili et ont été dépensées à des fins

de protection sociale notamment. Au regard de la croissance actuelle du secteur minier au Pérou, des économies de cette nature sont susceptibles d'être réalisées à l'avenir.

Le cas de la Zambie est similaire à celui du Chili avant les années 1980. L'exploitation de mines, essentiellement de cuivre et de cobalt, représente 10 % du PIB et 70 % des exportations du pays. Un fort syndrome néerlandais a été diagnostiqué historiquement, ce qui a créé une aversion pour l'investissement dans la monnaie locale (le kwacha) dans d'autres secteurs d'activité. La gestion du taux de change du kwacha a évolué au fil du temps en Zambie. De 1964 à 1976, le pays a adopté un taux de change fixe et la monnaie a été convertible en livres sterling puis en dollars américains. Par la suite, un certain flottement de la monnaie a été institué. Cependant, la Zambie ne s'est pas encore dotée d'un Fonds de protection sociale, ni d'ailleurs la Guinée et le Ghana, même si ce dernier envisage de créer un fonds pour gérer les recettes de son nouveau projet pétrolier, qui s'élèveront à environ 2 milliards par an.

En réalité, le Chili est peut-être le seul pays producteur de minéraux non ferreux dépourvu de pétrole qui est parvenu à mettre en place avec succès un Fonds de protection sociale pour gérer son excédent d'exportation de minéraux en période d'essor.

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SUMMARY OF DISCUSSION

By the Secretariat

1. Introductory speeches

The Plenary Session of the Global Forum was preceded by opening remarks by the OECD Secretary-General, speeches by keynote speakers, and introductory comments by the Chairman of the OECD Competition Committee.

1.1 OECD Secretary-General, Angel Gurría

Mr Gurría underlined the importance of pro-competition reforms to help economic recovery and promote long-term strong, sustainable, and inclusive growth. Competition is good for consumers, good for the economy and good for fostering clean government. The crisis has reduced potential output by 3%, and pro-competition reforms can help make up the shortfall by removing barriers to entry and creating a level playing field for entrepreneurs.

Volatile commodity market prices are an important issue. Higher food prices drive millions into poverty. Governments have to act, but they need good advice. They may be tempted to impose price controls on food, for example, but this will discourage investment in extra supply.

1.2 WTO Director-General, Pascal Lamy

Mr Lamy underscored that strong competition policies contribute to rising living standards for all, and play a crucial role in ensuring that the benefits of trade opening are not undermined by collusion between firms or other anticompetitive practices. Although commodity price volatility undoubtedly reflects changing climate conditions and rapid growth in emerging economies, it is important for credibility that these markets be monitored for anticompetitive practices. Market forces must work within an appropriate set of laws, policies and institutions so that citizens retain confidence in globalisation and the market economy. Major competition agencies have acted successfully against primary product cartels, but the penalties imposed have been low relative to the harm they do. There are important interactions between private anticompetitive conduct and government measures in the primary product sector. The latter can involve anticompetitive subsidies, international commodity agreements, price regulations or monitoring, and anticompetitive measures that limit market entry. Neither trade measures nor competition measures alone can deal with such issues, a synergistic approach may be needed.

1.3 World Bank Vice-President, Otaviano Canuto

Mr Canuto emphasised that the topic is important because primary products contribute to meeting basic needs of people all over the world. Globalisation is raising new competition issues, as value chains in the transformation of commodities are characterised by imperfect competition, including international cartels. What matters here is whether buyer power in these chains leads to higher consumer prices, whether cost savings are passed on. Competition problems are more likely to arise in mineral and metal markets than in agricultural products, because the former are dominated by a small number of large firms, often with links to the State. But the food price hikes in recent years, and the current low stock levels, underscore

the need in low income countries for greater competition in their agribusiness supply chains. Other distortions can arise because of subsidies, transfers to state-owned enterprises, opaque licensing systems and other barriers to entry. A World Bank report on sub-Saharan Africa highlights further problems that limit competition in the sector, while Kenya is a good example of the benefits to countries that liberalise their fertiliser imports. Profit margins fell and use of fertilisers and crop yields increased. Liberalisation of the maize market in that country also led to lower prices.

Buyers of agricultural products in developing countries, which can be state-run, often possess buyer power, but they may also supply credit and seeds to the small farmers. Eliminating them sometimes prevents farmers from taking advantage of the higher export prices they might enjoy. A level playing field is needed, and the implementation of pro-competition sector policies that eventually eliminate price controls, minimise state aids, and get rid of sector-specific barriers to entry. The competition authorities should play a major role in monitoring the behaviour of dominant players and advocating for liberalisation and opening key markets to competition.

1.4 *OECD Competition Policy Committee Chairman, Mr Frédéric Jenny*

Mr Jenny said that the previous speakers had usefully raised the topics of this Global Forum on Competition, noting that there are links between competition, growth, poverty and international trade. There are 4 challenges when looking at commodity prices. The first is reconciling the analysis of price levels with that of price volatility – or static and dynamic. The second challenge is coherence of economic policies. Various factors contribute to price instability, and also to prices higher than competition would produce. While it is true that climate affects agricultural production, for example, and one can do little about that, policies can exacerbate the effects. We must consider economic policies in the broad sense as well as their interactions in order to deal with problems of volatility. The third challenge consists in the limits to international policies. They do not forbid certain types of strategic national policies that increase volatility or price levels. Similarly, competition laws do not always allow the sorts of co-operation that would help eliminate some factors that contribute to price volatility. The fourth challenge is the links between the implementation of competition policy – the daily activity of the competition authorities around the table – and competition policy and economic policy in general. Indeed, it was this challenge that persuaded us to launch this forum, the difficulty that the competition authorities are faced with when politicians ask what they have done to stop commodity prices rising. When they reply that it might not be a competition problem, the response can be that they are useless and the government will re-introduce price controls. In this difficult dialogue, the lack of response by the competition authorities arises from the difficulty of formulating a reply that will be listened to, because it has to be both subtle and convincing about the importance of competition, while explaining that competition policy cannot always solve every problem.

He concluded by thanking the nearly 100 national delegations and more than 15 international organisations and development banks that were participating in the forum. A long-time goal of the Global Forums has been to establish a true dialogue between member and non-member countries, by choosing themes which are of mutual interest. He was struck by the fact that just as the US competition authority was sometimes convoked by their political masters to ask what they were doing about high petroleum prices, the competition authorities of some non-member countries were similarly asked what they were doing about high bread or cereal prices. So it is not a problem that depends on the size of the country, but a more general one, and it is in our interest to try and develop a coherent discourse, and also see what can be done.

2. Plenary session: sources and effects of, and responses to, commodity price volatility

2.1 *Introduction and presentations by selected panel speakers*

The Chairman began by welcoming the Delegates from 90 countries and 15 International Organisations. Twenty nine written contributions had been received, and the discussion would be guided by the presentations from the panel of experts: Carmel Cahill (Senior Counsellor, OECD Trade and Agriculture Directorate); Gustavo Lagos (Professor, Catholic University of Chile); Scott Davenport (Executive Director, NSW Department of Trade and Investment, Australia); Bibek Debroy (Professor of Economics, CPRIMI, India); Torbjörn Iwarson (Head of Commodities, SEB Merchant Banking, Sweden); and the Chairman himself, Frédéric Jenny. The Chairman recalled that there are several reasons why commodity prices can be high and/or volatile. Disequilibrium between supply and demand is one, with sudden surges in demand or negative supply shocks resulting in price spikes. Stocks normally play a buffering role, but if they are exhausted, prices react vigorously to slight disequilibria. Another influence can be vertically integrated supply chains, or monopolistic elements, which reduce price elasticities. Transnational commodity cartels, whose actions may not fall within the jurisdictions of either the exporting or importing countries, will result in high and possibly volatile prices.

The Chairman explained that the plenary session in the morning would explore all these factors, followed by the impact of price volatility on countries and then the role for the competition authorities. There would be three break-out sessions at the beginning of the afternoon, after which the chairs of those sessions would report back to the reconvened plenary session. The OECD Secretariat would then draw lessons from that day's forum meeting, and propose steps to be taken as a result.

2.1.1 *Policy report by international organisations*

The Chairman then called on Ms Cahill to present the findings of the report "Price Volatility in Food and Agricultural Markets: Policy Responses", a collaborative effort by the OECD's Trade and Agriculture Directorate and nine other international organisations (IOs) at the request of the G20 leaders at their November 2010 summit meeting.

Ms Cahill showed¹ that the 2007-2011 episode of food price volatility was neither unique nor exceptional: average agricultural commodity prices were far higher and more volatile in the early 1970s, for example. Indeed, individual agricultural prices are characterised by volatility. There are two reasons why this is a concern. Even if the volatility is around a relatively stable average level, it can deter investment in new supply and hence lead to higher average prices in future. Volatility combined with high average prices makes planning difficult and has a negative impact on poverty. Whereas in richer countries, food accounts for less than 15% of the average household budget, that swells up to 70%-90% in some poorer countries.

Government reactions to this issue include both trade and domestic policies. Producing countries faced with high prices at home may restrict or tax exports, even though the reason for high prices is global rather than domestic shortages. Research shows that in recent years, 33 countries introduced 87 measures along these lines. Such export-restricting actions can have a major impact on prices, and the recent spike in rice prices is believed to have resulted from export curbs in some countries. Importing countries tend to manipulate import barriers in a procyclical manner, reducing tariffs and raising quotas when prices are high, and vice versa. Both governments and households can resort to panic buying, resulting in higher volatility and sometimes lower longer-term supply because of deterioration of the stocks. In this context,

¹ Cahill, C. (2012), "Competition and Commodity Price Volatility", presentation to the 2012 Global Forum on Competition. Available at: www.oecd.org/competition/globalforum.

speculative purchases on commodity markets are often blamed for price rises, but to the extent that speculators correctly estimate that prices will be even higher in future, when they intend to sell, they are a stabilising force. Governments may also subsidise agricultural production in the interest of security of supply, although this damages producers in lower-cost countries. Overall, OECD countries seem to be the worst offenders as regards official support to agricultural producers, although less so than 20 years ago. The subsidies and mandates for bio-fuel production have resulted in a less elastic demand and have driven up the prices of certain food commodities, with major impacts on the poorest segments of the world's population.

The policy recommendations were threefold: short-term market information needs to be improved; more information and transparency in futures and over-the-counter (OTC) markets is desirable; subsidies and mandates on bio-fuels should be removed; and discipline needs to be strengthened in all trade-distorting measures, including domestic measures that distort trade. To deal with the consequences of volatility, the IO report suggests improving emergency reserve stocks, permitting the free movement of humanitarian supplies and improving their financing, as well as contingent financing for poorer importing countries, and developing market-based risk management options at the household and country levels. History shows that buffer stock mechanisms do not work and can be very costly. In all cases, policies should focus on aiding the poorest people, who suffer the most from high and volatile agricultural prices.

2.1.2 *The workings of the international commodity markets*

The Chairman next called on Mr Iwarson to discuss financial flows in primary commodity markets.

Mr Iwarson showed² that the value of commodity-based financial assets under management has enormously increased over the past two decades and especially in the last 5-10 years. Gold and other precious metals currently account for about 80% of the total. Investment in commodity assets has become popular because the returns are similar to equity, but not correlated with them. He emphasised the differences between informed speculation, "cornering the market" and creating rents. Speculation and speculators are often accused of creating volatility, too high or too low prices, and shortages or surpluses, but to the extent that speculators profit by buying when prices are relatively low and selling when they are relatively high, they provide a stabilising function. In addition, since they are the commodity market counterparties to hedgers, they permit producers and consumers to insulate themselves from uncertain future prices. Statistical analysis shows that the correlation between trading flows on the oil and major non-oil markets and price movements is essentially negligible, whereas there is a strong correlation historically between the growth of the share of the global population with moderate income levels, between \$2000 and \$13000, and the level and volatility of commodity prices. Quickly rising incomes translate into rising demand, lower stocks, lowered elasticities, and more volatility. His conclusion is that the role of financial flows in the commodity markets in creating high and unstable prices is very limited, whereas that of rising incomes, especially in Asia, does not get the attention it should.

2.2 *Sources of volatility: Changes in supply and demand*

The Chairman agreed that speculation is not an important source of volatility compared with trade policy, regulation and disequilibrium between supply and demand. He then asked a Kenyan delegate to describe the findings of the competition authority there in their study of the domestic market for maize, a staple in the Kenyan diet.

² Iwarson, T. (2012), "Financial Flows in Commodity Markets", presentation to the 2012 Global Forum on Competition. Available at: www.oecd.org/competition/globalforum.

2.2.1 *The Kenyan maize market*

A delegate from Kenya explained that the competition authority had conducted a market study in 2008 of the market for maize, whose prices had sharply increased. There were several reasons why maize prices had risen sharply: political unrest in 2007 that resulted in the destruction of some stocks and interruption of planting; drought; population growth that had led to increasing sub-division of arable land and soil exhaustion; higher fertiliser prices; hoarding by farmers and their unwillingness to sell to the National Cereal and Produce Board (NCPB) at what they considered to be too-low prices; and a lack of storage facilities. Imports were hindered by bureaucratic delays, insufficient finance available to the NCPB, the monopoly importer, and congestion at the main port. Rising demand for maize by the BRIC countries for conversion into bio-fuels in any case made imports expensive. Transport costs rose because of higher oil prices.

The 2008 study was launched after media reports that three families controlled 75% of milling firms as well as imports, transportation and distribution of maize. The authority found that milling was cartelised by the millers' trade association, membership of which was limited to 50 firms by virtue of being registered as a private company. Some mergers had not been reported to the authority. The authority requested the Association to register itself under the Societies Act and delete some contentious clauses in its Articles. The lessons learned from this episode include government encouragement to households to diversify their diets, discouraging population growth, encouraging irrigation, improving transportation infrastructure and boosting the finances of the NCPB. Farmers have been asked to form cooperatives, to benefit from economies of scale in purchasing fertilisers and marketing their produce.

The Chairman noted that lack of adequate transportation facilities can lead not only to volatile prices, but also local famine. He then asked the Turkish delegation to report on oligopoly behaviour in the meat sector in that country.

2.2.2 *The Turkish meat market*

A delegate from Turkey explained that the Turkish Competition Authority (TCA) had acted on complaints that the meat producing sector, regulated by the Ministry of Agriculture, was cartelised, resulting in high prices. The TCA found no evidence of systematic anti-competitive behaviour there, the main problems seemed to stem from structural and institutional problems throughout the supply chain, exacerbated by declining herds of cattle and sheep, and rising demand worldwide. But these did not raise competition issues. In response to a question from the Chairman, the delegate said that the structural problems had been reported to the appropriate ministries, but there is confusion in Turkey concerning the mandates of the competition authority and the sectoral authorities.

2.2.3 *The market for vegetables in Chinese Taipei*

A delegate from Chinese Taipei reported on the problems in the seasonal vegetable sector where there is surplus production and low prices in winter and shortages in summer. Recently the supply swings were exacerbated by the severe flooding. The Fair Trade Commission (FTC) was asked to investigate to see if there were competition issues. The FTC routinely monitors prices in vital foodstuff markets, comparing them with global prices, and it is to be expected that faced with a severe supply shock, prices will react sharply. Nevertheless, violations of the Fair Trade Act in such conditions cannot be ruled out. The FTC made a comprehensive survey of the production structure, marketing channels and the trading system in vegetable markets. In co-operation with the Council of Agriculture, they improved their information on supply and demand in major producing and consuming areas. They found that although the very large numbers of independent producers and of consumers preclude any anticompetitive behaviour, the upstream distribution channel at the wholesale level was highly concentrated, resulting in harm to both farmers and

consumers. As in many other countries, exemptions are granted in agricultural production to better enable agricultural cooperatives to negotiate prices. The lessons to be learned are that distribution should be improved, and easing imports would help smooth supply shocks. More information needs to be collected and disseminated so that consumers can see where to pay reasonable prices for their vegetables.

The Chairman next asked the EU delegate to explain their 2008-2009 initiative called “*a better functioning supply chain in Europe*”, which distinguishes between perishable and non-perishable foodstuffs.

2.2.4 *The EU food supply chain*

An EU delegate said that a task force had been set up to analyse the functioning of the European food supply chain after the price hikes of 2007-2008. They surveyed food producers, processors, traders, wholesalers and retailers in order to identify competition concerns. The market for non-processed foods is characterised by many producers and several layers of intermediaries. There is little evidence of cartelisation and the competition issues are related to joint commercialisation schemes. These can raise efficiency by cutting out some intermediaries, but possibly also lead to price fixing. The scope for anticompetitive behaviour is greater in the processed food sector, where products are stockable and where the major retail chains have market power, but so do also the major producers, especially those of large brands. Whether this structure results in lower or higher prices for consumers depends on particular conditions and barriers to entry in individual countries and regions. There are also grey areas, such as cereals, which are non-processed, but can be stocked. There is little evidence of cross-border cartelisation in the food supply chain and it is the national competition authorities that play the major role, assisted by the European competition network. In response to a question from the Chair, the delegate said that the initiative, which is now being finalised, was intended to map issues and exchange lessons across countries. Most enforcement actions have been dealt with by the national competition agencies, and a few by the Commission.

2.2.5 *The Romanian food supply chain*

Romania, which had participated in the EU initiative described above, had also reported issues in the food supply chain. A delegate explained that the competition authorities had investigated the bread and milk sectors, in which prices were more volatile at the beginning of the chain, and much less so at the end. The main reasons are the very fragmented producer structure with a large number of small farms; the buying power of the processing firms (in which farmers own no shares); and the inefficiency of the processing sector combined with the need to adhere to EU regulations, which has made imports more competitive. Faced with asymmetric bargaining power, farmers and producers in general are at a disadvantage. Consumers have not suffered too much because of competition at the retail level. The Romanian Competition Council also found that some regulations reduce productivity growth, for example establishment rules for retail outlets. They have been discussing eradicating such regulations with the ministries of agriculture and the economy. A conference in 2010 discussed supply-chain issues and possible solutions. Their policy recommendations, which do not have legally binding power, are to encourage small farm units to enter into joint commercialisation and production agreements, provided that they do not lead to price fixing.

The Chair asked Morocco to discuss the measures taken by the authorities there to limit the impact of rising prices for basic food products, whether the competition authority was consulted, and what were the results.

2.2.6 *Food price controls in Morocco*

A delegate from Morocco explained that, as a non-oil producing developing country, Morocco had been hit hard by rising cereal and oil prices, and the government had taken the decision to subsidise certain basic foodstuffs. The budgetary cost has been high: between 1.5% and 5% of GDP, and between 6% and 16% of the state budget. But inflation had been contained at less than 1% rather than the estimated 4.5% in the absence of subsidies. In addition, wages and salaries have been raised to offset higher living costs. As a result, the public sector deficit is estimated to be a high 6.5% of GDP, considerably reducing the new government's room for manoeuvre. The competition authority's advice is consultative only, they have no power to intervene directly, and they were given too little time to make a thorough analysis. They gave a green light for a temporary 4-year extension of the subsidy measures, warning the government that prices should be market based, and that all interventions reduce efficiency. They also encouraged the government to take advantage of this period to reassess the utility of subsidies and price controls.

2.3 *Sources of volatility: Domestic anticompetitive regulations*

The Chairman called on Professor Bibek Debroy to discuss how domestic regulations can distort competition and lead to price volatility.

2.3.1 *The food market in India*

Professor Debroy emphasised that supply chain problems are often the result of government regulations, with India as an illustrative example. Private investment in agriculture, including FDI, is often forbidden, for example. Food security policies have led to higher and more volatile prices. There are also cross-border measures, in the form of tariffs, quotas, export subsidies and controls. State trading monopolies for example in cereals and dairy products in China, Indonesia, India, Mexico and Pakistan distort the markets. Free cross-border trade in principle reduces volatility, but distortions have increased, so thinner markets have resulted in more volatility. In the particular case of India, domestic output markets are also distorted via legislation that controls production, stocking and distribution. There is legislation that forbids direct selling between farmers and producers, and because India is a federal country with differing levels of indirect taxes, environmental laws and motor vehicle legislation across the states, there is not even free trade in agricultural products within India. Markets for ownership or renting of land are not open, there are restrictions on creating futures markets and retail trade has not generally been opened up to competition. Hence for a large country like India, cross-border measures are only a small part of the jigsaw of government measures that prevent competition. A committee was set up a while ago to assess the potential gains from reforming such legislation using a modelling technique. One can quibble about the details, but it is clear that there are substantial welfare gains to farmers and consumers from harmonising and integrating markets.

The recommendations are to invest in rural agriculture, reduce dis-intermediation, and move away from consumption subsidies. Be vigilant when reforming regulations on the output side, because that can be followed by abuse of dominance and price fixing. On the input side, one also needs to look carefully at the markets for pesticides, herbicides, fertilisers and agro-chemicals. One should not focus too narrowly at the end-points of the chains, for example the market shares of the fertiliser companies, one needs also to look at the distribution chains. For both inputs and outputs, that is where the real anticompetitive policies exist.

The Chairman then invited the Lithuanian delegation to explain their actions when faced with a regulatory requirement in the oil industry, which the authority felt was increasing the volatility of oil prices.

2.3.2 *Storage of oil in Lithuania*

A delegate from Lithuania explained that when their oil refineries were being privatised in the late 1990s, the government restricted oil storage to within Lithuania to raise the selling price of the refineries. But the storage facilities were inadequate, and the competition council complained that this was raising the costs of storage. They brought a case against the Ministry of Energy and proposed allowing oil storage abroad, for example in Latvia. The government is now considering the possibility of storing 100% of oil requirements abroad, allowing companies to store oil where they choose. This is a good example of both enforcement and democracy. The result may be to reduce the price of oil by a few cents.

2.4 *Sources of volatility: International cartels*

2.4.1 *The potash cartel*

At this juncture, the Chairman noted that the recent interventions showed that public interventions can raise prices and volatility, and he himself acting in a personal capacity would present a case study of the internationally cartelised market for potash. Potash is widely used throughout the world as a fertiliser, but with output mostly concentrated in Canada and Russia, which together account for 65% of world market supply. The issue here is not so much public intervention as lack of it. Mr Jenny illustrated his case study with a PowerPoint presentation³.

The Potash Corporation of Canada is the largest producer, and organises sale prices and volumes outside the US and Canada via its marketing arm, Canpotex, a jointly-owned subsidiary with the other major Canadian producers, Mosaic and Agrium. “Market discipline” is relied upon to control the volume of sales in the US and Canada, where any cartel action to control prices would be illegal. In Russia, the major producers Silvinit and Uralkali recently merged, and the latter and Belaruskali sell through the same agency. The Canadian and Russian producers together account for 70% of world supply, and the major consuming countries are China, India, Brazil, Malaysia and Indonesia. In the past few years, the Russian producers have followed the Canadian example, tacitly or explicitly colluding with them on production levels to keep prices high and have openly said that this makes for much better business.

Historically, world potash prices were around \$100 per ton but in 2007-2008, the two groups restricted output and prices shot up to over \$800 per ton, well above their target range of \$500-\$600. At the time of writing, prices are around \$480 per ton. In January 2012, Potash Corp announced that they would cut production by 10%, and the other producers in the cartel also said they would cut back by 10%, rather than try to gain market shares at Potash Corp’s expense. The potash cartel is an extreme example of a successful cartel that continues to exist because its actions are not illegal in the exporting country, while the competition authorities in the importing countries have no jurisdiction.

The international mining company, Broken Hill Proprietary, made a hostile takeover bid for Potash Corp in 2008. They said that if their bid was successful, they would leave the cartel. The Canadian government refused authorisation for the takeover after the Canadian Conference Board examined the probable impact on prices if the new owner did, or did not, continue to operate in the cartel. If Potash Corp broke ranks and the other producers followed, prices would likely fall back to a little over \$200 per ton, rising again towards \$500 by 2020 as capacity constraints cut in. If the international cartel persisted, prices would remain above \$600 per ton, rising to \$730 per ton by 2020. The Canadian government rejected the bid on the grounds that it did not “provide net benefits for Canadians” i.e. tax and royalty income would fall if the cartel was dissolved.

³ Jenny, F. (2012), “Price Instability and Competition Law: the Case of the Potash Cartel”, presentation to the 2012 Global Forum on Competition. Available at: www.oecd.org/competition/globalforum.

If the cartel continues, the cost for importing countries will be high, of the order of \$ 1 billion annually for India and China. In the case of India, this is broadly equal to the subsidy given to farmers to purchase potash, and which ends up as rent for the producers. China is believed to have successfully negotiated discounts from the cartelised price, and it is estimated that the extra cost for China, even with a 30% discount, is around half a billion dollars annually.

Because the potash cartel is an export cartel, competition law does not apply to it in Canada under Article 45 of the Competition Act. Nevertheless, when the BHP bid was announced, the competition agency did look into the proposed merger, and reached the conclusion that it would not oppose it. Two plaintiffs brought a case in the US on the grounds that the cartel was also raising prices there, but it was rejected because the court panel ruled that a cartel directed at other countries could not be proved to influence prices in the US. However, the Court agreed to review the case *en banc* (i.e. all the judges would re-hear the case, not a panel of them), and the Justice Department has filed an *amicus curiae* to say that the court's interpretation was excessively narrow. India has decided not to use its competition law against the cartel, because it is wholly dependent on imports from them and thus cannot apply sanctions. Its only response is to stop buying, which it did in 2008 when there was the price spike and is doing now until July. The cost is reduced agricultural productivity, of course. In the case of China, they have some domestic production, but they did not use their competition law against the cartel perhaps because China has some export cartels of its own. It did threaten to disallow the Silvinit-Uralkali merger unless the cartel agreed to sell the quantities China wanted and at a discounted price.

Clearly there is a gap between trade law and competition law, and maybe in co-operation between countries in competition law. The conclusion is that a better multilateral framework on export cartels is needed, as is more co-operation between national competition authorities.

Leading on from this, the Chairman asked the representative from the Jaipur-based Consumer Utility and Trust Society (CUTS) to give their views on export cartels.

2.4.2 *The views of CUTS*

The delegate from CUTS said that an interesting dimension of the potash case was coordination, where India, China and Brazil worked together as a kind of buyers' alliance to combat the sellers' cartel. The problem is that agricultural seasons vary across countries and so it might not be possible to coordinate the buyers' alliance. Secondly, what kind of international co-operation could be brought about, provided that countries are willing to recognise that export cartels do not promote global welfare? On the other hand, export subsidies in the US and Europe are also a major bottleneck for trade stabilisation. For example, the Indian trade minister once asked cotton importers why they did not import from West Africa, whose producers are adversely affected by the US export subsidies. The importers replied that their job was to buy at the lowest price, not to further welfare goals.

2.5 *The effects of commodity price volatility on countries' economies*

2.5.1 *Mineral and metal commodities*

The Chairman said it was now time to turn to discussing the impact of commodity price volatility on countries' economies, and invited Professor Lagos of Chile, one of the panel speakers, to discuss the effects of mineral commodity price volatility on the economies of countries that are dependent on such exports.

Prof. Lagos said that he would discuss the cases of copper, iron, aluminium and gold⁴ focusing on: the causes of volatility; the historical record of volatility; which countries have been affected; and some proposed solutions. The fundamentals of physical supply and demand for commodities are of course the underlying cause of volatility. Oversupply resulting from excessive investment characterised the 1990s, and is still the case with aluminium, whereas there is a shortage of copper at present. Gold is a financial commodity mainly, where production and consumption are not very important, and where demand can change into supply, for example with jewellery and central bank stocks. But financial markets also influence volatility. Much is said about speculation, but the view of experts is that it is difficult to differentiate between speculation, hedging, and long-term investments by pension funds. Financial markets anticipate the trends of fundamentals, and they act more rapidly than the fundamentals. Hence commodity trading on financial markets may result in higher volatility but also shorter price cycles, for example in 2008, although no models have been able to predict or explain the forces of financial markets on prices.

It is interesting that since the US stopped controlling the gold price, there have been two episodes of gold price spikes and volatility, one at the end of the 1980s and one currently, and that there is a high correlation between the gold price and the oil price. Each period coincided with conflicts or wars in Iran, Iraq or Afghanistan. So perhaps there is a limited length of time where the gold price and the oil price will be high.

If one looks at countries for whom mineral exports are more than 30% of the total, there are not many: Peru, Chile and Zambia for copper, Ghana for gold, and especially Guinea for aluminium. Other countries can be more important as producers, but their mineral exports are less than 30% of the total. For countries where mineral exports are important, price volatility can have a major impact on their exchange rates and trade balances. Four solutions have been tried: sovereign wealth funds; diversification of the economy; exchange rate intervention by the central bank; and cartels. The latter have not been successful. Diversification is a long-term strategy and has been successful in Chile and perhaps Peru. Central bank intervention can work in the short term but not in the long term. Building a sovereign wealth fund is apparently a good solution, but only Chile of the five countries mentioned above has built one. Such funds must be handled transparently and be accountable. Of course most oil-exporting countries have such funds. A final conclusion is that it is not only important to get the rents from mining activities, it is also important to spend them properly.

The Chairman then asked the Mexican delegation to share their experiences with price hikes and volatility in the market for maize, which is a staple of the Mexican diet, and of which Mexico is a net importer.

2.5.2 *Agricultural commodities in Mexico*

A delegate from Mexico explained that the price of maize had risen by 60% in 5 years, with a consequent major impact on consumers, especially the poor. Some reasons were structural, for example growing demand for bio-fuels, but there were weather-related factors and exchange rate movements. Price volatility is not by itself necessarily a competition issue, most of the price influences come from the international market for corn, but the competition authority has routinely investigated the structure of the tortilla sector for possible anti-competitive behaviour. Cartel-like behaviour by tortilla producers has been investigated and the competition authority found that municipal regulations can reduce competition between tortilla producers. They issued a public opinion, a type of advocacy instrument, sent to 100 municipalities asking them to avoid such regulations, for example minimum distances between tortilla sellers, or preference for locally grown maize.

⁴ Lagos, G. (2012), "Competition and Commodity Price Volatility", presentation to the 2012 Global Forum on Competition. Available at: www.oecd.org/competition/globalforum.

2.6 *The role of the competition policy authorities*

The Chairman said that the Mexican intervention was a good transition to the last part of the roundtable, namely what the competition authorities can do, and advocacy is certainly one of those things. He would start the discussion with the case of Senegal.

2.6.1 *Limited options in Senegal*

A delegate from Senegal said that the country had greatly suffered from volatile commodity prices, especially for basic agricultural products. Subsidies to compensate for high commodity prices had tripled in value in 2007. Volatility had certainly worried the government and consumers, but also the competition authority. Why? Because people feel that the role of the authority is to stop prices rising, and if prices rise, what is the authority doing about it? But the problem is that the Senegalese competition authority, like all others in the West African region, lacks the means to monitor and analyse commodity markets. Their role is to investigate anti-competitive behaviour. They tried to see in a general sort of way if volatility was a result of such practices. The questions that arise are what to do if the volatility arises from natural causes or from speculation, even though the experts say that speculation is stabilising. Should one do nothing? They thought not, because some of these markets are concentrated, and thus favourable to collusion. Advocacy was a possible response, and they had told the President that price manipulation was a possibility but in the end, self-sufficiency was the goal to be achieved via a policy of increased output and lower costs. Applying competition rules is always the best way to discourage anticompetitive behaviour. They feel that lack of information about market transparency both nationally and internationally is general, and better information is necessary.

The Chairman observed that the Senegal authority felt isolated, but there is one area where competition authorities are less so when faced with trans-national market issues, namely control of concentration. He asked the Japanese delegation to explain their experience concerning the impact of the proposed merger between BHP Billiton and Rio Tinto on the trade in iron ore.

2.6.2 *Japanese review of Australian merger proposal*

A delegate from Japan said that the two companies had twice entered merger discussions related to setting up a joint venture (JV) concerning their iron ore operations in Western Australia. The 2008 proposal was abandoned after review by the JFTC and other competition authorities, but they re-opened the question in 2010. Since Japanese steel producers rely entirely on imported iron ore, and Australia is a major source, the JFTC reviewed the potential impact of such a JV on the global sea-borne trade market. Since the companies are located outside Japan and have no branches there, enforcing the Anti-monopoly Act would have been difficult. A request for information pertaining to the 2008 proposal was not responded to and the JFTC needed to try to deliver the official document through the consulate in Australia and then deliver by public notice based on the provision of the Antimonopoly Act. But an amendment to the merger notification system in 2009 entails prior notification of mergers that could have a major impact on Japan, and the parties submitted information in compliance with the JFTC's request. Since the proposed merger would have global consequences, other competition authorities were also interested, and the JFTC shared information with them based on the consent of the party. As a consequence, the potentially anticompetitive JV was effectively blocked.

2.6.3 *Enforcing domestic competition law in commodity markets: Colombia*

The Colombian delegation was then invited to tell the forum about their investigations of cartelised purchasing of agricultural commodities.

A Colombian delegate explained that with the co-operation of the Ministry of Agriculture, they had taken action against purchasing agreements in the rice and sugar cane markets, and there is one under way in the cocoa market. The processing sector is highly concentrated and the competition authority found that they acted as cartels, aiming at keeping domestic end-product prices high. They found also that domestic oil prices did not fall when international oil prices were falling.

The Chairman then turned to the Ukraine delegation to explain why they permitted exporters of sunflower oil, of which the Ukraine is a major producer, to “take concerted action” in the market for three months.

2.6.4 *Enforcing domestic competition law in commodity markets: Ukraine*

A delegate from the Ukraine explained that the country is a major producer and exporter of sunflower oil, and when international prices rose in 2010, there were domestic shortages and rising prices. The Ukraine sunflower oil market is oligopolistic with the three largest producers holding 60% of the market. When the competition authority started to investigate, the producers agreed to ensure sufficient domestic supply to keep prices stable, and in return, the government waived export quotas. The Anti-Monopoly Committee agreed to the agreement for a 3-month period in the interests of domestic price stability. It should be noted that legislation also exists to control prices of certain basic foodstuffs such as bread, sugar, meat, milk and sunflower oil.

2.6.5 *Advocacy and deregulation*

At this juncture, the Chairman called upon Mr Davenport, of the NSW Department of Trade and Investment, and a panel speaker, to give his views on the role of regulatory reform in promoting price stability.

Mr Davenport’s view⁵ was that competition-based regulatory reform has much potential to address the issue of commodity price volatility and contribute to efficient price transmission in the supply chain. Because of regulation, there is a lack of integration between domestic and international markets and producers. The result is that in emerging and developing countries, unsophisticated agricultural sectors cannot respond adequately to consumers’ demands, and investment in the sector is inefficient because it is not driven by efficient price signals. There are regulations throughout the supply chain in the form of restrictions on FDI, minimum support prices, input subsidies and regulated wholesale markets. If price signals are not efficient, research into sector issues will focus only on the *symptoms* of poor regulation and reduce pressure for reforms. A challenge for reform programmes is that as industrial policies are phased out, competition laws have to be applied to avoid anticompetitive outcomes. Market failures of various kinds exist, but when looking at proposals for addressing them, one has to ask if they are the least restrictive of competition and with a positive benefit cost ratio. The aim is to pull government out of actually running agricultural businesses and making their role one of shaping the business environment to facilitate rather than impede efficient price transmission.

Efficient prices also help to drive productivity, which is often seen as a technical problem with technical solutions on the input side, but there are falling marginal returns. Governments often have growth targets, but these are a sign of poor agricultural policies. Growth should be an autonomous outcome of good policies. Efficient price transmission leads to efficient agricultural production and investment, but this is generally under-emphasised and not well understood relative to technical solutions that are proposed instead. Governments justify technical solutions in the form of input and output subsidies on the grounds of

⁵ Davenport, S. (2012), “Competition Issues in Agricultural Supply Chains”, presentation to the 2012 Global Forum on Competition. Available at: www.oecd.org/competition/globalforum.

farmers' welfare, but other approaches are possible. Institutions to promote regulatory reform are not being developed, there is a focus on competition law as though it would be the solution to everything. There is a need to be more pro-active in developing a forward-looking research programme.

2.7 *Monitoring prices and educating the public*

The Chairman said that the final topic that morning would be the monitoring of prices and the way in which the competition authority is used in that area. He invited Australia and the US to intervene on this topic.

2.7.1 *Monitoring the petroleum market in Australia*

A delegate from Australia explained that the country produces 77% of its petroleum requirements, the remainder being imported, so that domestic prices reflect global prices. The ACCC had published a lengthy report on petrol and diesel prices in Australia explaining this, but some people still think that high prices reflect domestic competition issues. The ACCC would like to see reports on retail petroleum pricing in other OECD countries, so that the competition agencies can show that they reflect international prices and are not necessarily domestic competition issues.

2.7.2 *Monitoring the petroleum market in the US*

A delegate from the US said that the Federal Trade Commission has a congressional mandate since 2002 to monitor wholesale and retail prices of gasoline in order to detect anti-competitive behaviour. Data are collected from several hundred outlets, and an econometric model is used weekly to detect any anomalies. If there are unusual movements that do not appear to reflect market-driven causes, they consult with the Department of Energy and can contact the offices of the appropriate state Attorneys General to discuss the anomaly and appropriate potential actions, including opening an investigation.

Closing the morning session, the Chairman commented that there seems to be a variety of instruments that the competition authorities do use. Although they cannot eliminate volatility in commodity prices, they have used enforcement, merger control, international co-operation, advocacy on regulatory reform, market studies and monitoring to at least improve matters.

3. *Plenary session: Reports by the chairs of the breakout sessions*

Delegates broke out into three sessions to discuss competition authorities' experience with law enforcement and advocacy. Upon reconvening in plenary session, the Forum heard reports from chairs of each of these breakout sessions.

3.1 *Report by Dr Joseph Wilson, Competition Commission of Pakistan*

Dr Wilson reported that two issues had been addressed: advocacy by competition authorities; and the buying power of supermarkets. He noted that in Colombia, the authority must comment in a non-binding fashion on all regulatory proposals and on every piece of legislation to ensure that there are no competition issues. In Mexico, the authority's recommendations to other federal agencies are binding. In the case of South Africa, we were told that deregulation of the retail sector in 2006 was followed by anticompetitive behaviour, so the lesson from there is not to deregulate overnight, but do it cautiously.

The discussion of buying power revealed that there can be a fine line between it and abuse of dominant position. Bulgaria was an interesting case where the authority felt it desirable to have special powers in this area to deal with supermarkets. In Australia, the authority monitors retail prices, but does

not overreact to complaints filed by small-scale retailers. He called upon the Egyptian delegate to share experience in advocacy.

3.1.1 The raw milk market in Egypt

A delegate from Egypt reported that the authority was asked to investigate the regulated raw milk market where production was falling and farms exiting despite the existence of a tripartite committee to control prices in the formal sector, which accounts for 25% of raw milk output. They found that the buying cartel is per se illegal, and commissioned an econometric study which found that there was little probability of an increase in the downstream milk price if the raw milk price was increased. They proposed that a pricing formula be adopted by the farms and the manufacturers, and the largest buyer accepted a “milk to feed ratio”. Other major firms opted for vertical integration. Raw milk prices rose and farms did not exit any longer.

Dr Wilson invited the Bulgarian delegation to report on dealing with buying power of supermarkets.

3.1.2 Supermarket buying power in Bulgaria

A delegate from Bulgaria said that suppliers had complained that supermarket chains put a lot of pressure on them and kept purchase prices too low. The authority initiated an abuse of dominance case, but abandoned it as there was insufficient evidence. But they continued with their investigations and found that there were information-sharing agreements and most-favoured customer clauses. At least three chains had sufficient market power to enforce lowered prices on their suppliers without necessarily passing them on to the public. The case is continuing, with a national debate and an uncertain outcome.

The Australian delegation was then invited to report on their experience with price monitoring in the market for groceries.

3.1.3 Price monitoring in the Australian food market

An Australian delegate explained that two retailing chains possess 80% of the market between them, and the authority had been asked two years ago to monitor retail prices for a temporary period. They posted the results on the web so that consumers could easily compare prices. The site was popular at first but consumers rapidly lost interest. Subsequently there was a more detailed enquiry looking at regulations affecting supermarkets. They found that factors such as restrictive covenants and zoning laws are important determinants of competition in that sector, and that market power is not necessarily bad if consumers benefit.

The Chairman then asked Mr Kusha Haraksingh of the CARICOM Competition Commission to report on the discussion in the next breakout group.

3.2 Report by Mr Kusha Haraksingh, CARICOM Competition Commission

Mr Haraksingh reported that their group had looked at 3 areas: market studies; enforcement in downstream markets; and the role of advocacy regarding price regulation. Market studies are a very powerful tool for competition enforcement, especially for basic foodstuffs consumed by the rural poor. Mexico, Lithuania and Kenya had made such studies. They found that such studies also highlighted such issues as municipal or domestic restrictions. Studies that go beyond national boundaries into regional markets are also important and he invited the UNCTAD delegation to speak on their experience.

3.2.1 *Regional sectoral studies in Latin America*

An UNCTAD delegate said that they had made more than 20 sectoral studies in Latin America, examining competition in the production and commercial chains, identifying barriers to entry in economically important sectors. One example was a study of the grains supply chain in Nicaragua, in which integration was very low because of the large numbers of small producers. They recommended the creation of micro-producers associations to facilitate price negotiations.

Mr Haraksingh invited the Latvian delegation to report a case of downstream anti-competitive conduct in the egg market.

3.2.2 *Latvian egg market*

A delegate from Latvia explained that their action was prompted by an advertisement by the biggest producer inviting rivals not to practice low egg prices before Easter. The competition authority found that egg producers met regularly to fix prices. Eleven producers were punished. A second case was opened when they saw that eggs of one producer were being sold in retail outlets by another producer, and they found that there was a sharing of sensitive commercial data. They also won that case.

Mr Haraksingh reported that several delegates in that group had raised the issue of advocacy in relation to governmental price regulation. Kenya had convinced the government not to support a proposed control of maize prices, while Latvia and Lithuania had managed to block proposed regulation of retail price mark-ups. He invited the Mauritius delegation to inform the group about intervention in the sugar market.

3.2.3 *Mauritian sugar market*

A delegate from Mauritius said that the production of sugar is a very important industry there, though much less so nowadays than previously. Most sugar is exported, while domestically it was sold at a subsidised price until 2010, and subsequently at an at-cost price. The sugar syndicate, which also paid the pensions of dockworkers who had previously worked in the sugar exporting sector, was *de facto* a monopoly supplier. A local businessman proposed to import sugar at a lower price but the agro-food ministry reacted by proposing the creation of a monopoly and the authority was asked to investigate. The authority found that there was no justification for a monopoly, and that either there should be a common taxation treatment irrespective of the seller, or that the government should pay the dockworker pensions. The Minister agreed that there should be domestic entry and imports.

The Chairman thanked Mr Haraksingh and invited Mr Francis Kariuki of the Competition Authority of Kenya to report on the discussions in his group.

3.3 *Report by Mr Francis Kariuki, Kenya Competition Authority*

Mr Kariuki said that five issues were discussed in the group: trade restrictions; price monitoring; pricing laws; advocacy; and enforcement. He called upon Tunisia to report on a compensation fund set up to mitigate price volatility that has had budgetary costs, and associated trade measures.

3.3.1 *Price controls in Tunisia*

A delegate from Tunisia said that cereal products were directly subsidised by the State and international price variations were absorbed. Fuels and electricity are treated similarly, while state enterprises subsidise products that are totally imported such as sugar, coffee and tea. The fiscal cost of all these subsidies had tripled between 2006 and 2011. Other measures included reducing import tariffs on

products such as vegetable oils, animal feedstuffs and barley, and facilitating import procedures. Measures were also taken to liberalise the markets for barley and vegetable oils, which had been state monopolies.

Mr Kariuki then asked the Peruvian delegation to explain their “red, amber and green” price monitoring system.

3.3.2 Price monitoring in Peru

A delegate from Peru said that INDECOPI monitors retail and wholesale prices monthly, collecting data from the National Statistics Institute and correcting them for inflation and seasonal factors. Then they examine to what extent prices deviate from historical trends, classifying them as “red” if the deviation exceeds 2 standard deviations (SDs) over 3 months, “amber” if the deviation exceeded 2 SDs over one to two months, and “green” for products of interest for which the deviations have been small. Products in the red group are reported to the competition commission.

Mr Kariuki invited the Pakistani delegation to comment on its success in persuading the Supreme Court there that some commodity prices should not be fixed.

3.3.3 Intervention against price fixing in Pakistan

A delegate from Pakistan said that there were reports in the media in 2009 that there was a “sugar mafia” cartelising the market. The government fixed the price at 36 rupees per kilo, and the sugar mills said they could not operate at that price. The High Court raised the price to 40 rupees, and this was challenged before the Supreme Court, which asked the competition authority to carry out a cost analysis. They explained that the market should be free, that fixing the price would distort the market. However, they carried out the analysis and discovered various anomalies, and recommended against fixing the price. Indeed, while the price was fixed at 40 rupees, sugar became unobtainable. They also found that the government was consulting only with trade associations when fixing a price, and they advised the government, which does have the legal power to fix prices, to rather carry out independent research. The parties went to the court and asked for a stay of judgement before the decision was recorded. The competition authority reacted by passing a provisional order saying that the parties were guilty and to impose a maximum penalty. The case is pending.

4. Plenary session: next steps

The Chairman thanked the chairs of the breakout sessions and invited John Davies, Head of the OECD Competition Division, to synthesise what had been learned, and what kind of advice could be given to competition authorities on its basis.

4.1 Proposals by the OECD Secretariat

Mr Davies said that he would focus on the next steps, drawing on the discussions to illustrate what was being proposed. Then there would be time before the end of the meeting for a general discussion and he would welcome feedback. As usual, the Secretariat would subsequently pull everything together into one big book containing all the country submissions as well as the initial presentations and the Secretariat background paper. But given the topicality of the issue and the political and media interest, the Secretariat would also produce something much shorter and punchier for competition authorities that they could refer to if asked by a politician or journalist what they could or should do about commodity prices. There are several responses:

- First the factual background on what is happening in the world, not just in that country, and how volatility has come about, focussing on real causes and not blaming speculation.

- Second, there are global competition problems in the form of export cartels and export bans, and they can exacerbate price volatility.
- Next there is the question of subsidies, and some governments have incurred, and continue to incur, huge budgetary costs, although New Zealand in the past is an example of a country that succeeded in doing something about it. As regards price controls, one cannot be too dogmatic and say they should never be used, because they might be appropriate for essential goods for poor households as a temporary emergency measure, but they can be designed better and limited.
- Then there is the role of policy advocacy, including advocacy directed at deregulation and regulatory reform, and the meeting probably heard more about that than about cases. It needs to be said that advocacy needs to happen at the local level, not just at the national level.
- As to cases, the meeting heard a lot about cartels, but there did not seem to be very much in the cases discussed that was strongly linked to the crisis. The cartels did not seem to form when prices rose, but had probably existed for some time. Perhaps they are easier to spot during price spikes because their members need to be more active in renegotiating.
- The role of market studies was shown to be unexpectedly important. It is not comfortable to say in response to a request for action that you need to do a study first, but they do show up everything that might be wrong with the market. For example the Kenyan case showed that there was not only price fixing but also anticompetitive regulations and infrastructure problems. So a study is not just a way of looking busy, but worth carrying out and the booklet could emphasise that.
- Finally, *ex post* studies need to be carried out. The Egyptian submission said that the competition authority warned the government what would happen if they tried to control the price of steel, they went ahead anyway, and the warnings came true. Those sorts of experiences are very valuable.

He suggested that the booklet should show competition authorities some of the things they should be warning governments against doing, some of the things that governments should be doing and how they should be doing them. It should also cover what the competition authorities might be doing on cases and also on market studies, making the point that market studies are a good response to a price spike. The brochure should look just at price spikes, not price falls. Although falls in the prices of exports can cause significant problems, this seems to be less of an issue specifically for competition authorities

It is hoped to be able to produce the brochure within a few months.

4.2 *Comments by participants*

4.2.1 *The Chairman*

The Chairman said that as well as market studies, he felt that price monitoring and information gathering activities appeared to be very useful, they are not really enforcement, and if done *ex ante*, before a crisis, they can be used by the competition authority to prepare an answer when the crisis is about to emerge. He gave the floor to Australia.

4.2.2 *Australia*

A delegate from Australia emphasised that the competition authorities should make it clear that competition will not necessarily make prices fall, but will make them lower than they otherwise would be. Otherwise people will say that when prices rise, competition is not working, and that the competition authorities should be doing something about it.

4.2.3 *South Africa*

A delegate from South Africa noted that there are different circumstances in different countries. For example, in South Africa, deregulation was poorly managed, and it would have been better to regulate than in effect have the market regulated by the private sector. Although market enquiries are useful and giving powers to the competition authorities to collect information could be very helpful, but in different markets distortions may occur because of things happening inside the country or outside the country. One needs to recognise divergence.

4.2.4 *Namibia*

A delegate from Namibia said that he was trying to get a better sense of the relation between competition and commodity price volatility. Whether prices are high or low, it depends on what is making them so, is it the fundamentals or is it distortions. Does lack of competition lead to commodity price volatility, or is it an effect?

4.2.5 *Pakistan*

A delegate from Pakistan said that it was important to understand what is an unreasonable price increase from a legal viewpoint. There is little jurisprudence there because competition authorities deal with cases of abuse of dominant position. Secondly, the report by the international organisations⁶ on page 18 says that policies need to be legitimate and broadly owned by the relevant stakeholders. But what is a legitimate policy? And broad ownership may not ensure reduced price volatility. Pakistan broke up two cartels in which there were 82 companies competing against each other, but there was still cartelisation. Hence the recommendations might not be true for all.

4.2.6 *Japan*

A delegate from Japan underlined that advocacy and information gathering are useful, but enforcement is the best form of advocacy.

4.2.7 *CUTS*

The delegate from CUTS said that one important aspect of competition on commodity markets, namely futures trading, had not been discussed. In India at present, there is an ongoing investigation into collusion for commissions by the market traders. In practice, the competition authorities can do very little about it, such issues are the exclusive preserve of the futures trading regulators.

⁶ FAO, IFAD, IMF, OECD, UNCTAD, WFP, The World Bank, WTO, IFPRI, and UN HLTF (2011), "Price Volatility in Food and Agricultural Markets: Policy Responses". Available at: http://www.wto.org/english/news_e/news11_e/igo_10jun11_report_e.pdf

4.2.8 *The Chairman*

Before turning the floor back to John Davies, the Chairman observed that the Committee had already looked at the issues raised by the Pakistan delegation at the September 2011 Roundtable on “Excessive Prices”⁷. As regards the South Africa intervention, the Chairman did not want the proposed brochure to be in any way prescriptive. It should reflect the exchange of experience on cases, for example that strong enforcement had been useful in some cases, market studies in others. The Committee had decided long ago that it was not going to negotiate texts that would be agreed by all countries, that would take too long and be inappropriate. We will map out the different issues reflecting the experience of different countries, but not going so far as to say that among all the options, this is the one that we recommend. Cases should be emphasised, but no conclusion. It will be up to the competition authorities to decide how they want to use the information.

4.2.9 *Response by the OECD Secretariat*

Mr Davies underlined that the purpose of the brochure was not to single out particular policy prescriptions, but rather to consider what sorts of policy instruments could be used in an emergency. There had been discussions of subsidy and price control schemes, and it was important that the competition authorities get involved to help design something that would work well and be non-distortionary. The brochure will focus on what can or has worked when there have been price spikes and volatility, and a few examples of what has not worked very well.

Namibia had asked a good question on what is really the link between competition and price volatility. Mr Davies’ view was that if markets work well, they should be self-correcting, and if not, or if volatility is extreme, maybe they are not working well, and this may reflect inappropriate national or international policies that try to suppress supply or demand responses.

Pakistan had asked, what was meant by a legitimate policy, and popular support for it? Mr Davies thought that it meant that one should not be too purist, not have technocratic solutions that look good to economists, but do not reflect the realities of politics and public opinion.

Closing the session, Mr Jenny noted in response to CUTS that perhaps the regulation of futures markets was beyond the scope of the proposed brochure, and in response to Namibia that the theoretical link between competition and volatility is unclear, but there is a link between volatility and pressure on the competition authority to do something.

⁷ OECD (2011), “Excessive Prices”. Available at: www.oecd.org/competition/roundtables

COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

1. Discours d'introduction

La séance plénière du Forum mondial a été précédée d'observations liminaires du Secrétaire général de l'OCDE, des discours des orateurs principaux et des remarques introductives du Président du Comité de la concurrence de l'OCDE.

1.1 *M. Angel Gurría, Secrétaire général de l'OCDE*

M. Gurría souligne qu'il importe d'engager des réformes en faveur de la concurrence pour contribuer à la reprise économique et promouvoir une croissance forte, durable et inclusive à long terme. La concurrence est bénéfique pour les consommateurs et pour l'économie, et pour favoriser l'intégrité de l'État. La crise a réduit la production potentielle de 3 % et les réformes favorables à la concurrence peuvent contribuer à combler ce déficit en supprimant les obstacles à l'entrée et en créant des conditions de concurrence équitables pour les entreprises.

La volatilité des prix des matières premières est une question importante. Une hausse des prix alimentaires peut condamner des millions de personnes à la pauvreté. Les États se doivent d'agir, mais ils ont besoin de conseils avisés car ils pourraient être tentés d'imposer un contrôle des prix des denrées alimentaires, par exemple, ce qui serait de nature à décourager les investissements susceptibles d'accroître l'offre.

1.2 *M. Pascal Lamy, Directeur général de l'OMC*

M. Lamy souligne que des politiques de la concurrence énergiques peuvent contribuer au relèvement du niveau de vie de tous, et qu'elles jouent un rôle essentiel pour veiller à ce que les avantages que procure l'ouverture des échanges ne soient pas amoindris par des ententes entre entreprises ou par d'autres pratiques anticoncurrentielles. Bien que l'instabilité des prix des matières premières soit incontestablement liée aux changements climatiques et à la croissance rapide des économies émergentes, il est important, s'ils veulent être crédibles, que ces marchés soient surveillés pour prévenir toute pratique anticoncurrentielle. Les mécanismes du marché doivent fonctionner au sein d'un ensemble approprié de lois, de politiques et d'institutions, de sorte que les citoyens continuent d'avoir confiance dans la mondialisation et l'économie de marché. Les principales autorités de la concurrence ont lutté efficacement contre les ententes sur les marchés de produits primaires, mais les sanctions infligées ont été faibles comparativement aux préjudices causés. Il existe des interactions importantes entre les pratiques anticoncurrentielles du secteur privé et les mesures prises par les pouvoirs publics dans le secteur des produits primaires. Ces dernières peuvent prendre la forme de subventions anticoncurrentielles, d'accords internationaux sur les produits de base, d'une réglementation ou d'un contrôle des prix ou encore de mesures anticoncurrentielles visant à limiter l'entrée sur le marché. À elles seules, les mesures relatives aux échanges et celles relatives à la concurrence ne peuvent pas régler ces questions ; une approche reposant sur des synergies peut donc s'avérer nécessaire.

1.3 M. Otaviano Canuto, Vice-président de la Banque mondiale

M. Canuto souligne l'importance de la question, dans le sens où les matières premières permettent aux gens du monde entier de satisfaire leurs besoins élémentaires. La mondialisation pose de nouveaux problèmes de concurrence, du fait que les chaînes de valeur associées à la transformation des matières premières se caractérisent par une concurrence imparfaite, et notamment par l'existence d'ententes internationales. Ce qui importe en l'occurrence, c'est de savoir si le pouvoir de l'acheteur exercé tout au long de ces chaînes entraîne une hausse des prix à la consommation, et si les économies de coûts sont répercutées. Les problèmes de concurrence risquent davantage de survenir sur les marchés des minéraux et des métaux que sur les marchés des produits agricoles, du fait que les premiers sont dominés par un petit nombre de grandes entreprises qui entretiennent souvent des liens avec l'État. Mais la hausse des prix alimentaires ces dernières années et le faible niveau actuel des stocks soulignent qu'une plus grande concurrence est nécessaire dans la chaîne d'approvisionnement de l'industrie agricole des pays à faible revenu. D'autres distorsions peuvent être liées aux subventions, aux transferts en faveur des entreprises publiques, à l'opacité des régimes d'octroi de licences et à d'autres obstacles à l'entrée. Un rapport de la Banque mondiale sur l'Afrique subsaharienne met en lumière d'autres problèmes qui limitent la concurrence dans le secteur, et cite les avantages que la libéralisation des importations d'engrais procurent aux pays qui la pratiquent, comme le Kenya, où les marges bénéficiaires ont chuté et où l'utilisation des engrais et le rendement des cultures ont augmenté. La libéralisation du marché du maïs dans ce pays a également entraîné une baisse des prix.

Dans les pays en développement, les entreprises qui achètent des produits agricoles, lesquelles peuvent être gérées par l'État, disposent souvent d'une puissance d'achat mais peuvent aussi fournir des crédits et des semences aux petits agriculteurs. Leur suppression empêche parfois les agriculteurs de tirer profit d'une hausse des prix à l'exportation dont ils pourraient bénéficier. Des règles du jeu équitables sont nécessaires, tout comme la mise en œuvre de politiques sectorielles favorables à la concurrence qui, à terme, supprimeront le contrôle des prix, limiteront au maximum les aides publiques et élimineront les barrières sectorielles à l'entrée. Les autorités de la concurrence devraient jouer un rôle majeur en matière de surveillance du comportement des acteurs prédominants et pour promouvoir la libéralisation et l'ouverture à la concurrence des marchés essentiels.

1.4 M. Frédéric Jenny, Président du Comité de la concurrence de l'OCDE

M. Jenny a trouvé utile que les précédents intervenants attirent l'attention sur les thématiques de ce Forum mondial sur la concurrence, en notant qu'il existait des liens entre la concurrence, la croissance, la pauvreté et les échanges internationaux. L'examen des prix des matières premières pose quatre grands défis. Le premier consiste à rapprocher les résultats de l'analyse – statique ou dynamique – des niveaux de prix et de la volatilité des prix. Le second tient à la cohérence des politiques économiques. Différents facteurs contribuent à une instabilité des prix et à une augmentation des prix supérieures à celles que la concurrence aurait engendrées. Il est vrai, par exemple, que le climat a une incidence sur la production agricole, sans que l'on puisse y faire grand-chose, mais certaines mesures peuvent en exacerber les effets. Pour résoudre les problèmes de volatilité, nous devons examiner les politiques économiques au sens large et leurs interactions. La troisième difficulté concerne les limites qu'imposent les mesures internationales et qui n'interdisent pas certains types de mesures stratégiques prises par les différents pays ayant pour effet d'accroître la volatilité des prix ou de les faire monter. De la même façon, le droit de la concurrence n'autorise pas toujours les types de coopération qui permettraient d'éliminer certains facteurs propices à l'instabilité des prix. Le quatrième défi tient aux liens qui existent entre la mise en œuvre d'une politique de la concurrence – c'est-à-dire les discussions au quotidien des autorités de la concurrence – et la politique de la concurrence ou la politique économique en général. En fait, c'est ce dernier défi qui nous a convaincu de lancer ce forum, à savoir les difficultés auxquelles les autorités de la concurrence sont confrontées lorsque les responsables politiques leur demandent ce qu'elles ont fait pour freiner la hausse

des prix des matières premières. Si elles répondent qu'il pourrait ne pas s'agir d'un problème de concurrence, leur action risque d'être jugée inutile et les pouvoirs publics risquent de réinstaurer un contrôle des prix. Dans le cadre de ce dialogue difficile, l'absence de réaction de la part des autorités de la concurrence tient à leur difficulté à formuler une réponse qui sera entendue, dans le sens où cette réponse doit être à la fois subtile et convaincre les pouvoirs publics de l'importance de la concurrence, tout en expliquant que la politique de la concurrence ne peut pas toujours résoudre tous les problèmes.

Le Président conclut en remerciant les quelques 100 délégations nationales et 15 organisations internationales et banques de développement qui participent au forum. Le Forum mondial a depuis longtemps pour objectif d'instaurer un véritable dialogue entre les pays membres et non membres, en retenant des sujets d'intérêt commun. Le Président est frappé par le fait que, de même que l'autorité américaine de la concurrence est parfois convoquée par les dirigeants politiques pour savoir ce qu'elle fait pour lutter contre l'envolée des prix du pétrole, les autorités de la concurrence de certains pays non membres sont de la même façon interrogés sur les mesures qu'elles prennent ou non face à la flambée des prix du pain ou des céréales. Le problème ne dépend donc pas de la taille du pays, mais se pose d'une façon plus générale, et il est de notre intérêt d'essayer d'élaborer un discours cohérent, et de définir ce qui peut être fait.

2. Séance plénière : causes et effets de la volatilité des prix des matières premières et mesures à prendre pour y faire face

2.1 Introduction et communications d'un échantillon d'intervenants

Le Président accueille tout d'abord les délégués des 90 pays et 15 organisations internationales représentés. Vingt-neuf contributions écrites ont été reçues, et les débats s'inspireront des communications des experts suivants : Mme Carmel Cahill (Conseillère principale, Direction des échanges et de l'agriculture de l'OCDE), M. Gustavo Lagos (Professeur, à l'Université catholique du Chili), M. Scott Davenport (Directeur exécutif, ministère du Commerce et de l'Investissement de Nouvelle-Galles du Sud, Australie), M. Bibek Debroy (Professeur d'économie, CPRIMI, Inde), M. Torbjörn Iwarson (Chef du secteur Matières premières, Banque SEB, Suède) et le Président lui-même, M. Frédéric Jenny. Celui-ci rappelle que plusieurs raisons concourent à expliquer la hausse et/ou la volatilité des prix des matières premières. Le déséquilibre entre l'offre et la demande en est une, sachant que des hausses soudaines de la demande ou des chocs négatifs de l'offre peuvent entraîner une envolée des prix. Les stocks jouent en principe un rôle d'amortisseur, mais s'ils sont épuisés, les prix réagissent énergiquement au moindre déséquilibre. Les prix subissent aussi l'influence de l'intégration verticale des chaînes d'approvisionnement ou de l'existence d'éléments de monopole, qui réduisent l'élasticité-prix. Les ententes transnationales relatives aux produits de base, dont les actions peuvent ne pas relever de la compétence des pays exportateurs ou importateurs, peuvent entraîner une hausse des prix, voire leur volatilité.

Le Président explique que la séance plénière du matin sera consacrée à l'étude de l'ensemble de ces facteurs, puis de l'impact de la volatilité des prix sur les pays et du rôle des autorités de la concurrence. Trois sous-sessions seront organisées en début d'après-midi, dont les présidents présenteront un compte rendu aux participants du forum, de nouveau réunis en séance plénière. Le Secrétariat de l'OCDE tirera alors les enseignements de cette journée de réunion, avant de proposer des mesures à adopter.

2.1.1 Le rapport des organisations internationales

Le Président invite donc Mme Cahill à présenter les conclusions du rapport intitulé « Price Volatility in Food and Agricultural Markets: Policy Responses » [Volatilité des prix sur les marchés alimentaires et agricoles : mesures prises par les pouvoirs publics], fruit des travaux de la Direction des échanges et de

l'agriculture de l'OCDE et de neuf autres organisations internationales, menés à la demande des dirigeants du G20 lors du sommet de novembre 2010.

Mme Cahill a mis en évidence¹ que l'épisode d'instabilité des prix alimentaires de 2007 à 2011 n'était ni unique ni exceptionnel : la moyenne des prix des produits agricoles de base était de loin plus élevée et plus volatile au début des années 70, par exemple. À vrai dire, la volatilité est une caractéristique des prix agricoles pris isolément. Ce point est préoccupant pour deux raisons. Même si le niveau moyen de la volatilité est relativement stable, il est susceptible de décourager les investissements dans de nouvelles offres et, partant, d'entraîner une hausse ultérieure des prix moyens. La volatilité conjuguée à une hausse des prix moyens complique la planification et a un effet négatif sur la pauvreté. Alors que dans les pays riches, les produits alimentaires représentent moins de 15 % du budget moyen des ménages, cette proportion grimpe jusqu'à 70 %-90 % dans certains pays les plus pauvres.

L'action des pouvoirs publics face à ce problème prend la forme de mesures commerciales et de mesures nationales. Les pays producteurs exposés chez eux à des prix élevés peuvent limiter ou taxer les exportations, même si les causes du renchérissement des denrées sont à rechercher au niveau mondial plutôt que dans des pénuries du marché intérieur. Les études montrent que, ces dernières années, 33 pays ont adopté 87 mesures en ce sens. Ces mesures restrictives à l'exportation peuvent avoir un impact important sur les prix, et on estime que la récente flambée des prix du riz a été le résultat d'une restriction des exportations dans certains pays. Les pays importateurs ont tendance à agir sur les obstacles à l'importation de manière pro-cyclique, en réduisant les droits de douane et en augmentant les contingents lorsque les prix sont élevés, et vice versa. Les pouvoirs publics et les ménages peuvent procéder à des achats de panique, ce qui se traduira par une plus forte volatilité et parfois même par une diminution de l'offre à long terme, en raison de la dégradation des stocks. Dans ce contexte, les achats spéculatifs sur les marchés de matières premières sont souvent rendus responsables de la hausse des prix mais, dès lors que les spéculateurs estiment à juste titre que les prix seront encore plus élevés à l'avenir, au moment où ils auront l'intention de vendre, ils deviennent une force de stabilisation. Les pouvoirs publics peuvent également subventionner la production agricole par souci de garantir la sécurité des approvisionnements, bien que cela soit préjudiciable aux producteurs des pays à moindre coût. Globalement, les pays de l'OCDE semblent figurer parmi les pires contrevenants en matière d'aide publique aux producteurs agricoles, même s'ils le sont moins qu'il y a 20 ans. Les subventions et les obligations de production de biocarburants se sont concrétisées par une demande moins élastique et ont fait grimper les prix de certains produits alimentaires de base, ce qui a eu de graves conséquences sur les segments les plus pauvres de la population mondiale.

Les recommandations sont au nombre de quatre : il est nécessaire d'améliorer les informations sur les marchés à court terme ; il est souhaitable d'améliorer les informations sur les marchés à terme et les transactions de gré à gré et de renforcer leur transparence ; il faudrait supprimer les subventions et les obligations relatives aux biocarburants ; et il faut renforcer la discipline concernant l'ensemble des mesures qui ont des effets de distorsion des échanges, notamment les mesures prises par les différents pays et qui nuisent aux échanges. Pour s'attaquer aux conséquences de la volatilité, le rapport des organisations internationales suggère d'accroître les stocks de réserves d'urgence, ce qui permettra la libre circulation des approvisionnements humanitaires et l'amélioration de leur financement, d'adopter des mécanismes de financement conditionnel pour les pays importateurs plus pauvres et de mettre sur pied, au niveau des ménages et des pays, des options de gestion des risques fondés sur le marché. L'histoire montre que les mécanismes d'amortissement par les stocks ne fonctionnent pas et peuvent s'avérer très coûteux. Dans tous

¹ Cahill, C. (2012), « Competition and Commodity Price Volatility » [La concurrence et la volatilité des prix des matières premières], présentation au Forum mondial sur la concurrence de 2012. Consultable à l'adresse suivante : www.oecd.org/competition/globalforum.

les cas, ces mesures devraient avoir pour priorité d'aider les populations les plus pauvres, qui souffrent le plus de la flambée et de la volatilité des prix agricoles.

2.1.2 *Le fonctionnement des marchés internationaux de matières premières*

Le Président invite ensuite M. Iwarson à parler des flux financiers sur les marchés des matières premières.

M. Iwarson montre² que la valeur des actifs financiers sous gestion fondés sur des produits de base a considérablement augmenté au cours des vingt dernières années et tout particulièrement ces 5 à 10 dernières années. L'or et d'autres métaux précieux représentent actuellement près de 80 % du total de ces actifs. L'investissement dans les actifs liés aux produits de base s'est popularisé en raison du fait que les rendements sont comparables à ceux des actions, sans leur être corrélés. Il souligne les différences qui existent entre hypothèse éclairée, « accaparement du marché » et création de rentes. La spéculation et les spéculateurs sont souvent accusés d'être à l'origine de la volatilité, des prix trop élevés ou trop bas, des pénuries ou des excédents, mais dès lors que les spéculateurs font des profits en achetant au moment où les prix sont relativement bas et en vendant quand ils sont relativement élevés, ils assument alors une fonction de stabilisation. Qui plus est, puisqu'ils sont, sur le marché des matières premières, les contreparties des opérateurs en couverture, ils permettent aux producteurs et aux consommateurs de se protéger contre une évolution future incertaine des prix. Des analyses statistiques montrent que la corrélation entre les flux commerciaux sur les marchés du pétrole et les grands marchés hors pétrole et la variation des cours est au fond négligeable, alors qu'il existe une corrélation étroite d'un point de vue historique entre la croissance de la population mondiale située dans la tranche des revenus moyens – entre 2000 et 13000 USD – et la fluctuation et la volatilité des prix des matières premières. Une augmentation rapide des revenus se traduit par une augmentation de la demande, une baisse des stocks, un amoindrissement de l'élasticité et une volatilité accrue. M. Iwarson conclut en indiquant que le rôle des flux financiers dans la création de prix élevés et instables sur les marchés de matières premières est très limité, alors que l'on n'accorde pas suffisamment d'attention à celui de la hausse des revenus, notamment en Asie.

2.2 *Les sources de la volatilité : les variations de l'offre et de la demande*

Le Président convient que la spéculation n'est pas une source importante de volatilité, comparée aux politiques commerciales, aux réglementations et au déséquilibre entre l'offre et la demande. Il demande ensuite à un délégué du Kenya de faire part des conclusions de l'autorité nationale de la concurrence présentée dans l'étude qu'elle a menée sur le marché intérieur du maïs, denrée de base de l'alimentation kenyane.

2.2.1 *Le marché kenyan du maïs*

Un délégué du Kenya explique que, en 2008, l'autorité de la concurrence a mené une étude sur le marché du maïs, dont les prix avaient brusquement augmenté. Plusieurs raisons expliquaient cette soudaine augmentation : l'agitation politique de 2007, qui a causé la destruction de certains stocks et l'arrêt des plantations ; la sécheresse ; la croissance démographique, qui a entraîné une augmentation de la répartition des terres arables et l'épuisement des sols ; la hausse des prix de l'engrais ; la rétention de la production par les exploitants et leur refus de vendre au National Cereal and Produce Board (NCPB) à des prix jugés trop bas ; et le manque d'installations de stockage. La lenteur bureaucratique, les ressources financières insuffisantes du NCPB, l'importateur monopolistique et la saturation du port principal ont contribué à

² Iwarson, T. (2012), « Financial Flows in Commodity Markets » [Flux financiers sur les marchés de matières premières], présentation au Forum mondial sur la concurrence de 2012. Consultable à l'adresse suivante : www.oecd.org/competition/globalforum.

entraver les importations. En tout état de cause, la demande croissante de maïs de la part des BRIC en vue de sa transformation en biocarburant a renchéri les importations et les frais de transport ont augmenté sous l'effet de l'envolée du prix du pétrole.

L'étude de 2008 a été lancée lorsque les médias ont fait savoir que trois familles contrôlaient 75 % des minoteries, de même que l'importation, le transport et la distribution du maïs. L'autorité a conclu que l'association professionnelle des minotiers, dont l'adhésion était limitée à 50 entreprises du fait de son statut de société de droit privé, avait formé une entente. Certaines fusions n'avaient pas été notifiées à l'autorité. Celle-ci a demandé à l'Association de s'immatriculer, en application de la Loi sur les sociétés, et de supprimer certaines clauses litigieuses de ses statuts. Cet épisode a convaincu les pouvoirs publics d'encourager les ménages à diversifier leur alimentation et de prendre des mesures pour modérer la croissance démographique, promouvoir l'irrigation, améliorer les infrastructures de transport et augmenter les ressources financières du NCPB. Ils ont demandé aux producteurs de se regrouper en coopératives, de façon à pouvoir bénéficier d'économies d'échelle lors des achats d'engrais et de la commercialisation de leurs produits.

Le Président relève que le manque d'installations de transport adéquates peut entraîner non seulement la volatilité des prix, mais également la famine au niveau local. Il demande ensuite à la délégation turque de rendre compte des comportements oligopolistiques constatés dans son pays dans le secteur de la viande.

2.2.2 *Le marché turc de la viande*

Un délégué de la Turquie explique que l'autorité turque de la concurrence a enregistré des plaintes concernant le fait que le secteur de la production de viande, réglementé par le ministère de l'Agriculture, faisait l'objet d'une entente qui avait entraîné une hausse des prix. L'autorité de la concurrence n'a trouvé d'élément prouvant l'existence d'un comportement anticoncurrentiel systématique, les principaux problèmes semblant tenir à des difficultés structurelles et institutionnelles tout au long de la chaîne d'approvisionnement, aggravées par la diminution des cheptels bovins et ovins, et l'augmentation de la demande au niveau mondial. Cela étant, elle n'a relevé aucun problème de concurrence. En réponse à une question du Président, le délégué précise que les difficultés structurelles ont été signalées aux ministères concernés, mais qu'il existe une certaine confusion en Turquie quant aux attributions de l'autorité de la concurrence et des autorités sectorielles.

2.2.3 *Le marché des légumes du Taipei chinois*

Un délégué du Taipei chinois fait état des problèmes que le secteur des légumes, saisonnier par nature, qui connaît une production excédentaire et des prix bas en hiver et la pénurie en été. De graves inondations ont récemment accentué les variations de l'offre. Les autorités ont demandé à la Fair Trade Commission (FTC) d'examiner si la situation soulevait des problèmes de concurrence. La FTC, qui contrôle régulièrement les prix sur les marchés de denrées alimentaires de base en les comparant aux prix mondiaux, doit s'attendre à ce que les prix réagissent brusquement en cas de choc important de l'offre. Néanmoins, l'hypothèse d'une violation de la Loi sur les pratiques commerciales équitables dans ces conditions ne peut être totalement exclue. La FTC a donc mené une vaste étude sur la structure de production, les circuits de commercialisation et le régime commercial des marchés de légumes. En coopération avec le Conseil de l'agriculture, elle a amélioré son information sur l'offre et la demande dans les principales régions de production et de consommation. Elle en a conclu que, même si la présence d'un très grand nombre de producteurs indépendants et de consommateurs excluait tout comportement anticoncurrentiel, le circuit de distribution en amont, au niveau des opérateurs de gros, était très concentré, ce qui nuisait à la fois aux producteurs et aux consommateurs. Comme dans de nombreux autres pays, des exonérations sont accordées à la production agricole pour permettre aux coopératives agricoles de mieux négocier les prix. La leçon à retenir est que la distribution devrait être améliorée et que l'assouplissement

des conditions d'importation permettrait d'atténuer les chocs de l'offre. Il faut recueillir davantage d'informations et les diffuser pour que les consommateurs puissent savoir où acheter leurs légumes à un prix raisonnable.

Le Président invite ensuite le délégué de l'UE à expliquer l'initiative de 2008-09 intitulée « *Une chaîne d'approvisionnement alimentaire plus performante en Europe* », qui établit une distinction entre denrées alimentaires périssables et non périssables.

2.2.4 *La chaîne d'approvisionnement alimentaire de l'UE*

Un délégué de l'Union européenne indique qu'un groupe d'étude a été constitué pour analyser le fonctionnement de la chaîne alimentaire européenne après la flambée des prix de 2007-08. Le groupe d'étude a sondé des producteurs de denrées alimentaires, des entreprises de transformation, des négociants, des grossistes et des détaillants afin d'identifier d'éventuelles préoccupations du point de vue de la concurrence. Le marché des produits alimentaires non transformés se caractérise par le grand nombre de producteurs et la présence de plusieurs niveaux d'intermédiaires. La constitution d'ententes ne semble guère avérée et les problèmes de concurrence sont liés aux accords conjoints de commercialisation. Ces accords peuvent améliorer l'efficacité économique en supprimant certains intermédiaires, mais pourraient également conduire à une entente sur les prix. Les possibilités de comportement anticoncurrentiel sont plus grandes dans le secteur des produits alimentaires transformés, qui peut stocker les produits et où les grandes chaînes de distribution, tout comme les grands producteurs, sont en position de force sur le marché, surtout ceux détenteurs des grandes marques. Le fait de savoir si cette structure entraîne une baisse ou une augmentation des prix pour les consommateurs dépend des conditions particulières et des obstacles à l'entrée pratiqués dans chaque pays ou région. Il existe également des zones d'incertitude, concernant par exemple les céréales, qui ne sont pas transformées, mais qui peuvent être stockées. L'existence d'une entente internationale dans la chaîne alimentaire n'est guère avérée, le rôle majeur à cet égard revenant aux autorités nationales de la concurrence avec le concours du Réseau européen de la concurrence. En réponse à une question du Président, le délégué déclare que cette initiative, désormais en voie d'achèvement, vise à recenser les problèmes et à permettre aux différents pays d'échanger leurs données d'expérience. Les autorités nationales de la concurrence et, dans une moindre mesure, la Commission se sont chargées de la plupart des mesures d'application.

2.2.5 *La chaîne d'approvisionnement alimentaire roumaine*

La Roumanie, qui participe à l'initiative de l'UE décrite ci-dessus, a elle aussi constaté des problèmes dans la chaîne alimentaire. Selon un délégué, les autorités de la concurrence ont procédé à une enquête dans les secteurs du pain et du lait, où les prix étaient plus volatils en début de chaîne et beaucoup moins à l'autre extrémité. Cela est principalement dû à la structure très fragmentée de la production, attribuable au grand nombre de petits exploitants, à la puissance d'achat des entreprises de transformation (dans lesquelles les producteurs ne détiennent aucune part) et à l'inefficacité du secteur de la transformation, combinée à la nécessité d'observer les réglementations de l'UE, qui ont rendu les importations plus concurrentielles. Ce pouvoir de négociation asymétrique tourne en général au désavantage des agriculteurs et des producteurs. Les consommateurs n'en ont pas trop souffert en raison de la concurrence qui s'exerce au niveau de la distribution au détail. Le Conseil roumain de la concurrence estime également que certaines réglementations limitent la croissance de la productivité, à l'exemple des règles d'établissement des points de vente. Il étudie actuellement, avec les ministères de l'Agriculture et de l'Économie, l'idée d'une abrogation de ces réglementations. Les problèmes liés à la chaîne alimentaire et les solutions possibles ont été abordés lors d'une conférence en 2010. Les recommandations du Conseil, qui ne sont pas juridiquement contraignantes, visent à encourager les petits agriculteurs à conclure des accords conjoints de commercialisation et de production, pour autant qu'ils ne donnent pas lieu à une entente sur les prix.

Le Président demande au Maroc de commenter les mesures prises par les autorités pour limiter l'impact de la hausse des prix des produits alimentaires de base, d'indiquer si l'autorité de la concurrence a été consultée, et de faire part des résultats de ces mesures.

2.2.6 *Le contrôle des prix des produits alimentaires au Maroc*

Un délégué du Maroc explique que, en tant que pays en développement non producteur de pétrole, le Maroc a été durement touché par l'envolée des prix des céréales et du pétrole, et que le gouvernement a pris la décision de subventionner certaines denrées alimentaires de base. Pour les finances publiques, le coût budgétaire a été élevé : de 1.5 % à 5 % du PIB et de 6 % à 16 % du budget de l'État. Mais l'inflation a été limitée à moins de 1 % au lieu des 4.5 % prévus en l'absence de subventions. Par ailleurs, les traitements et salaires ont été augmentés pour compenser l'augmentation du coût de la vie. En conséquence, le déficit du secteur public s'élève, selon les estimations, à 6.5 % du PIB, ce qui réduit considérablement la marge de manœuvre du nouveau gouvernement. L'avis de l'autorité de la concurrence n'est que consultatif, elle n'a pas le pouvoir d'intervenir directement et elle a disposé de trop peu de temps pour procéder à une analyse approfondie. L'autorité de la concurrence a donné son feu vert à une extension temporaire des mesures de subvention pour une durée de 4 ans, en avertissant le gouvernement que les prix devraient être fondés sur le marché et que toutes ses interventions diminuaient l'efficacité économique. Elle l'a également encouragé à profiter de cette période pour réexaminer l'utilité des subventions et du contrôle des prix.

2.3 *Les sources de la volatilité : les réglementations anticoncurrentielles nationales*

Le Président invite M. Bibek Debroy à rendre compte de la manière dont les réglementations nationales peuvent fausser la concurrence et conduire à une instabilité des prix.

2.3.1 *Le marché indien des produits alimentaires*

M. Debroy souligne que les problèmes liés à la chaîne d'approvisionnement sont généralement le résultat de réglementations publiques, comme l'illustre le cas de l'Inde. Les investissements privés, y compris les IDE, sont généralement interdits dans l'agriculture, par exemple. Les mesures de sécurité alimentaire ont conduit à une augmentation et à une volatilité accrue des prix. L'Inde applique également des mesures transfrontalières, sous la forme de droits de douane, de contingents, de subventions à l'exportation et de contrôles. Les monopoles commerciaux d'État, par exemple dans le secteur des céréales et des produits laitiers en Chine, en Indonésie, en Inde, au Mexique et au Pakistan, faussent les marchés. En principe, le libre-échange transfrontalier réduit la volatilité, mais les distorsions de concurrence ont augmenté, ce qui a entraîné une plus grande volatilité sur les marchés devenus plus étroits. Dans le cas particulier de l'Inde, les marchés intérieurs de biens de production sont également faussés par la législation qui régit la production, le stockage et la distribution. Des dispositions législatives interdisent par exemple la vente directe entre agriculteurs et producteurs et, du fait que l'Inde est un État fédéral où s'appliquent différents niveaux d'impôts indirects et différentes lois environnementales et législations sur les véhicules à moteur d'un État à l'autre, le secteur des produits agricoles ne connaît même pas le libre-échange au sein même du pays. Les marchés de l'acquisition ou de la location foncière ne sont pas ouverts, il n'existe aucune limitation à la création de marchés à terme et le commerce de détail n'est généralement pas ouvert à la concurrence. Par conséquent, pour un vaste pays comme l'Inde, les mesures transfrontalières ne représentent qu'une part infime de l'ensemble des mesures faisant obstacle à la concurrence qui sont prises par l'État. Un comité a été constitué il y a quelque temps pour évaluer, à l'aide d'une modélisation technique, les avantages potentiels qu'il y aurait à réformer une telle législation. Certains détails de ce raisonnement sont peut-être discutables, mais il est indéniable que l'harmonisation et l'intégration des marchés entraînent des gains de bien-être substantiels pour les producteurs et les consommateurs.

Il est recommandé d'investir dans l'agriculture rurale, de réduire la désintermédiation et de renoncer à subventionner la consommation. S'agissant des extrants, la réforme de la réglementation réclame une attention particulière, sachant qu'elle peut donner lieu à des situations d'abus de position dominante et d'entente sur les prix. Concernant les intrants, il est également nécessaire d'étudier attentivement les marchés des pesticides, des herbicides, des engrais et des produits agrochimiques. Il convient aussi de ne pas se concentrer trop exclusivement sur les extrémités de ces chaînes, par exemple sur les parts de marché des sociétés productrices d'engrais, pour s'intéresser aussi aux chaînes de distribution, car c'est là que sont mises en œuvre les mesures véritablement préjudiciables à la concurrence, aussi bien pour les intrants que pour les extrants.

Le Président invite ensuite la délégation de la Lituanie à présenter les mesures prises par l'autorité de la concurrence de ce pays face à l'obligation réglementaire en vigueur dans le secteur pétrolier, dont elle estimait qu'elle augmentait la volatilité des prix du pétrole.

2.3.2 *Le stockage du pétrole en Lituanie*

Un délégué de la Lituanie explique que lorsque les raffineries de pétrole du pays ont été privatisées à la fin des années 90, le gouvernement a circonscrit au territoire de la Lituanie le stockage du pétrole en vue d'augmenter le prix de vente appliqué par les raffineries. Les installations de stockage étant cependant insuffisantes, le Conseil de la concurrence a déposé une plainte au motif que cette mesure augmentait les coûts de stockage. Il a formé un recours contre le ministère de l'Énergie et proposé d'autoriser le stockage de pétrole à l'étranger, par exemple en Lettonie. Le gouvernement étudie actuellement la possibilité de stocker à l'étranger 100 % des besoins en pétrole du pays, ce qui permettrait aux entreprises de stocker le pétrole où elles le souhaitent. Il s'agit là d'un bon exemple de mesures d'application et de démocratie. Le prix du pétrole pourrait ainsi être réduit de quelques cents.

2.4 *Les sources de la volatilité : les ententes internationales*

2.4.1 *L'entente sur le marché de la potasse*

À ce stade de la discussion, le Président note que les précédents exposés ont montré que les interventions publiques pouvaient accroître les prix et leur volatilité. Il annonce qu'il présentera, à titre personnel, une étude de cas consacrée à l'entente internationale sur le marché de la potasse. La potasse est largement utilisée comme engrais dans le monde entier, même si sa production est surtout concentrée au Canada et en Russie, qui représentent à eux deux 65 % de l'offre sur le marché mondial. Le problème ici n'est pas tant l'intervention des pouvoirs publics que leur inaction. M. Jenny illustre son étude de cas à l'aide d'un document PowerPoint³.

La Potash Corporation of Canada, premier producteur de potasse, organise les prix et les volumes de vente en dehors des États-Unis et du Canada par le biais de sa société de commercialisation Canpotex, filiale commune avec d'autres grands producteurs canadiens, Mosaic et Agrium. Elle se sert de la « discipline de marché » pour contrôler le volume des ventes aux États-Unis et au Canada, où toute entente visant à contrôler les prix serait illégale. En Russie, les principaux producteurs Silvinit et Uralkali ont récemment fusionné, ce dernier commercialisant par ailleurs ces produits par l'intermédiaire du même organisme que Belaruskali. Ensemble, les producteurs canadiens et russes représentent 70 % de l'offre mondiale, et les principaux pays consommateurs sont la Chine, l'Inde, le Brésil, la Malaisie et l'Indonésie. Ces dernières années, les producteurs russes ont suivi l'exemple canadien, en s'entendant tacitement ou

³ Jenny, F. (2012), « Price instability and competition law: the case of the potash cartel » [Instabilité des prix et droit de la concurrence : le cas de l'entente sur le marché de la potasse], présentation au Forum mondial sur la concurrence de 2012. Consultable à l'adresse suivante : www.oecd.org/competition/globalforum.

explicitement avec eux sur les niveaux de production pour maintenir les prix à la hausse et ont ouvertement déclaré que les affaires n'en étaient que meilleures.

Historiquement, les prix mondiaux de la potasse avoisinent les 100 USD par tonne mais en 2007-08, les deux groupes ont limité leur production et les prix ont grimpé pour atteindre plus de 800 USD par tonne, bien au-delà de leur fourchette cible de 500 à 600 USD. À la date de rédaction de la présente note, les prix avoisinent les 480 USD par tonne. En janvier 2012, Potash Corp. a annoncé une réduction de la production de 10 % et les autres producteurs de l'entente ont indiqué qu'ils feraient de même plutôt que de chercher à gagner des parts de marché à ses dépens. Le cartel de la potasse est un exemple extrême d'entente fructueuse, qui se perpétue du fait que ses actions ne sont pas illégales dans le pays exportateur et que les autorités de la concurrence des pays importateurs n'ont pas compétence pour intervenir.

La société minière internationale, Broken Hill Proprietary, a lancé une offre publique d'achat hostile sur Potash Corp. en 2008. Elle a fait savoir que si son offre était retenue, elle quitterait l'entente. L'État canadien n'a pas autorisé cette prise de contrôle, après l'examen par le Conference Board du Canada de son incidence probable sur les prix, selon que le nouveau propriétaire continuerait ou non à participer à l'entente. Si Potash Corp. se désolidarisait et que les autres producteurs en faisaient autant, les prix seraient sans doute ramenés à un peu plus de 200 USD la tonne, pour revenir à 500 USD en 2020 quand les contraintes de capacité seraient moindres. Si l'entente internationale était maintenue, les prix resteraient supérieurs à 600 USD la tonne pour atteindre 730 USD la tonne en 2020. Les pouvoirs publics canadiens ont rejeté l'OPA au motif qu'elle ne « conférait pas d'avantages nets aux Canadiens », à savoir que les recettes fiscales et les redevances baisseraient s'il l'entente était dissoute.

Si l'entente se perpétue, le coût pour les pays importateurs sera élevé, de l'ordre de 1 milliard USD par an pour l'Inde et la Chine. Dans le cas de l'Inde, cela équivaut à peu près à la subvention accordée aux producteurs pour acheter de la potasse, subvention qui s'assimile en fin de compte à l'octroi d'une rente. On croit savoir que la Chine a réussi à négocier des remises sur le prix pratiqué par l'entente et que les frais supplémentaires pour le pays, même avec une remise de 30 %, représentent encore près d'un demi-milliard de dollars chaque année.

Cette entente étant un cartel d'exportation, le droit de la concurrence du Canada ne s'applique pas à elle au Canada, conformément à l'article 45 de la Loi sur la concurrence. Néanmoins, lorsque l'offre publique d'achat lancée par BHP a été annoncée, l'autorité de la concurrence a bien étudié la proposition de fusion avant de conclure qu'elle ne s'y opposerait pas. Deux demandeurs ont formé un recours aux États-Unis, estimant que l'entente était également à l'origine d'une hausse des prix de la potasse dans leur pays, mais ils ont été déboutés, le tribunal ayant jugé qu'il était impossible de prouver qu'une entente visant d'autres pays puisse avoir une influence sur les prix pratiqués aux États-Unis. Le tribunal a toutefois accepté d'étudier l'affaire en séance plénière (c'est-à-dire que l'affaire doit être de nouveau entendue par tous les juges, et pas seulement par un groupe de juges). Le ministère de la Justice a demandé, de son côté, à intervenir comme *amicus curiae* pour dire que le tribunal avait retenu une interprétation trop restreinte. L'Inde a décidé de ne pas opposer son droit de la concurrence à l'entente, sachant qu'elle est totalement tributaire des importations de ses membres et qu'elle ne peut dès lors leur appliquer aucune sanction. Sa seule parade consiste à cesser d'acheter, ce qu'elle a fait en 2008 quand les prix se sont envolés et fait encore actuellement, jusqu'en juillet. Elle en a bien entendu payé le prix avec une perte de sa productivité agricole. En ce qui concerne la Chine, ce pays a une certaine production de potasse, mais n'applique pas son droit de la concurrence à l'encontre de l'entente, peut-être en raison du fait qu'elle compte elle-même quelques ententes à l'exportation. Elle a menacé de désavouer la fusion Silvinit-Uralkali à moins que l'entente n'accepte de lui vendre à moindre prix les quantités qu'elle souhaitait.

De toute évidence, il y a un manque d'articulation entre droit commercial et droit de la concurrence, et peut-être un déficit de coopération entre les pays en matière de droit de la concurrence. En conclusion, il

est nécessaire de renforcer le dispositif multilatéral relatif aux ententes à l'exportation et d'appeler à plus de coopération entre les autorités nationales de la concurrence.

Pour aller plus loin sur ce point, le Président invite le représentant de l'ONG « Consumer Unity and Trust Society International » (CUTS) de Jaipur à faire part de son point de vue sur les ententes à l'exportation.

2.4.2 *Le point de vue de la CUTS*

Le délégué de la CUTS déclare que le cartel de la potasse est un cas intéressant de coordination entre pays, où l'on a vu l'Inde, la Chine et le Brésil œuvrer conjointement, dans une sorte d'alliance d'acheteurs, pour lutter contre l'entente des vendeurs. Le problème tient au fait que les saisons agricoles varient d'un pays à l'autre et qu'il n'est pas toujours possible de coordonner l'action d'une alliance d'acheteurs. Ensuite, quel genre de coopération internationale pourrait être mis en place, en admettant que les pays soient prêts à reconnaître que les ententes à l'exportation ne contribuent pas au bien-être mondial ? Par ailleurs, les subventions à l'exportation accordées aux États-Unis et en Europe constituent également un frein important à la stabilisation des échanges. Le ministre indien du Commerce a ainsi demandé un jour aux importateurs de coton pourquoi ils n'importaient pas de coton venant d'Afrique de l'Ouest, où les producteurs sont pénalisés par les subventions à l'exportation américaines. Les importateurs ont lui répondu que leur métier consistait à acheter au meilleur prix, pas de promouvoir les objectifs de bien-être.

2.5 *Les effets de la volatilité des prix des matières premières sur l'économie des pays*

2.5.1 *Les matières premières minérales et métalliques*

Le Président déclare qu'il est maintenant temps d'examiner l'impact de la volatilité des prix des matières premières sur l'économie des pays et invite donc l'un des intervenants, M. Gustavo Lagos, du Chili, à commenter les effets de la volatilité des prix des matières premières minérales sur l'économie des pays qui sont tributaires de ces exportations.

M. Lagos précise qu'il abordera le cas du cuivre, du fer, de l'aluminium et de l'or⁴ en mettant l'accent sur les causes de la volatilité, l'évolution de la volatilité, les pays qui ont été touchés et qu'il proposera quelques solutions. Les paramètres fondamentaux de l'offre et de la demande physiques de produits de base sont évidemment les causes structurelles de la volatilité. Les années 90 ont été caractérisées par un excédent de l'offre dû à des investissements excessifs, l'offre d'aluminium étant encore excédentaire actuellement, alors qu'il y a pénurie de cuivre. L'or est surtout une matière première financière, dont la production et la consommation ne sont pas très importantes, et dont la demande peut se changer en offre, selon par exemple les demandes du secteur de la bijouterie et l'évolution des stocks des banques centrales. Cela étant, les marchés financiers peuvent également avoir une incidence sur la volatilité. On parle beaucoup de la spéculation, mais selon les experts, il est difficile de faire une distinction entre la spéculation, les opérations de couverture et les investissements à long terme des fonds de pension. Les marchés financiers anticipent l'évolution des paramètres fondamentaux et sont plus rapides qu'elle. Par conséquent, le négoce des matières premières sur les marchés financiers peuvent conduire à une plus forte volatilité mais également à une réduction des cycles des prix, comme en 2008 par exemple, bien qu'aucun modèle n'ait été en mesure de prévoir ou d'expliquer les forces exercées par les marchés financiers sur les prix.

⁴ Lagos, G. (2012), « Competition and Commodity Price Volatility » [La concurrence et la volatilité des prix des matières premières], présentation au Forum mondial sur la concurrence de 2012. Consultable à l'adresse suivante : www.oecd.org/competition/globalforum.

Il est intéressant de constater que, depuis que les États-Unis ont cessé de contrôler le prix de l'or, le pays a connu deux épisodes d'envolée et de volatilité des prix de l'or, l'un à la fin des années 80 et l'autre en ce moment même, et qu'il existe une corrélation étroite entre le prix de l'or et le prix du pétrole. Chaque épisode a en effet coïncidé avec une période de conflit ou de guerre en Iran, en Iraq ou en Afghanistan. Ainsi peut-être, le prix de l'or et le prix du pétrole ne seront-ils élevés que pendant un laps de temps limité.

Les pays dont les exportations de minerais représentent plus de 30 % des exportations totales sont peu nombreux : le Pérou, le Chili et la Zambie pour le cuivre, le Ghana pour l'or et surtout la Guinée pour l'aluminium. Les autres pays peuvent jouer un rôle plus important en tant que producteurs, mais leurs exportations de minerais représentent moins de 30 % de leurs exportations totales. Pour les pays dont les exportations de minerais sont importantes, l'instabilité des prix peut avoir un impact majeur sur leurs taux de change et leur balance commerciale. Quatre solutions ont été envisagées : les fonds souverains, la diversification de l'économie, l'intervention de la Banque centrale sur les taux de change et les ententes. Ces dernières n'ont pas donné les résultats attendus. La diversification est une stratégie à long terme qui a porté ses fruits au Chili et peut-être au Pérou. L'intervention de la banque centrale peut être efficace à court terme mais pas à long terme. La création d'un fonds souverain est en apparence une bonne solution, mais sur les cinq pays mentionnés ci-dessus, seul le Chili en a créé un. Ces fonds doivent être gérés de manière transparente et responsable. Il va de soi que la plupart des pays exportateurs de pétrole disposent de tels fonds. Disons, pour finir, qu'il n'est pas seulement important de se créer une rente minière, encore faut-il la dépenser à bon escient.

Le Président demande alors à la délégation mexicaine de faire part de l'expérience du Mexique en matière d'envolée et de volatilité des prix sur le marché du maïs, qui est une denrée de base de l'alimentation mexicaine, dont le pays est un importateur net.

2.5.2 Les produits agricoles de base au Mexique

Un délégué du Mexique explique que le prix du maïs a augmenté de 60 % en 5 ans, ce qui a eu une incidence majeure sur les consommateurs, en particulier les populations pauvres. Les causes de cette augmentation sont en partie structurelles, comme la demande croissante de biocarburants, mais elle s'explique aussi par des facteurs climatiques et les variations de change. Le marché international du maïs étant à l'origine de la majeure partie des facteurs ayant une incidence sur les prix, l'instabilité des prix ne pose pas nécessairement un problème de concurrence en soi, mais l'autorité de la concurrence suit de près la structure du secteur de la tortilla, en quête de possibles comportements anticoncurrentiels. Les comportements assimilables à des ententes qu'adoptent les fabricants de tortillas ont fait l'objet d'enquêtes de l'autorité de la concurrence, qui a conclu que les réglementations municipales pouvaient limiter la concurrence entre les fabricants. Elle a publié un avis public, sorte d'instrument de sensibilisation, qu'elle a envoyé à 100 municipalités en leur demandant d'éviter ces réglementations, notamment sur la distance minimum à observer entre deux vendeurs de tortillas ou sur la préférence accordée au maïs cultivé localement.

2.6 Le rôle des autorités de la concurrence

Le Président déclare que cette intervention offre une bonne transition vers la dernière partie de la discussion, consacrée à ce que peuvent faire les autorités de la concurrence, les activités de promotion en faisant assurément partie de leurs possibilités d'action. Il ouvre la discussion avec le cas du Sénégal.

2.6.1 Les options limitées du Sénégal

Un délégué du Sénégal indique que le pays a considérablement souffert de la volatilité des prix des matières premières, notamment des produits agricoles de base. Le montant des subventions destinées à

compenser la hausse des prix des matières premières a triplé en 2007. La volatilité a certainement inquiété le gouvernement et les consommateurs, mais également l'autorité de la concurrence. Pour quelle raison ? Parce que les gens pensent que le rôle de l'autorité est de stopper l'augmentation des prix et qu'ils s'interrogent sur ce qu'elle fait lorsque les prix augmentent. Mais le problème est que l'autorité sénégalaise de la concurrence, comme tous ses homologues d'Afrique de l'Ouest, n'a pas les moyens de surveiller et d'analyser les marchés de matières premières. Leur rôle est d'enquêter sur les pratiques anticoncurrentielles. Elles ont donc tenté de déterminer, de manière générale, si la volatilité est un effet de ces pratiques. La question se pose donc de savoir si la volatilité a des causes naturelles ou si elle résulte de la spéculation, même si les experts affirment que la spéculation est un facteur de stabilisation. Devrait-on ne rien faire ? Ce n'est pas ce que pensent les autorités de la concurrence, du fait que certains de ces marchés sont concentrés, et par là même très propices à la collusion. La promotion de la concurrence est une réponse possible et elles ont indiqué au Président que la manipulation de prix en est une autre, mais en fin de compte, l'objectif à atteindre est l'autosuffisance, à travers une politique d'augmentation de la production et de réduction des coûts. L'application des règles de concurrence constitue toujours la meilleure façon de décourager les pratiques anticoncurrentielles. Les autorités de la concurrence ont le sentiment que le manque d'informations sur la transparence des marchés, au plan national et international, est général et qu'une meilleure information est nécessaire.

Le Président note que l'autorité du Sénégal se sent isolée, mais que les autorités de la concurrence le sont beaucoup moins lorsqu'elles sont confrontées à des problèmes liés au marché transnational, à savoir au contrôle des concentrations. Il demande à la délégation japonaise d'évoquer l'expérience du Japon concernant l'impact de la proposition de concentration entre BHP Billiton et Rio Tinto sur le marché du minerai de fer.

2.6.2 L'examen par le Japon de la proposition de fusion australienne

Un délégué du Japon déclare que les deux entreprises ont, à deux reprises, entamé des discussions en vue de leur fusion afin de créer une coentreprise pour leurs activités de production de minerai de fer en Australie-Occidentale. La proposition de 2008 a été abandonnée après que la JFTC et d'autres autorités de la concurrence l'ont examinée, mais la question a de nouveau été évoquée en 2010. Étant donné que les producteurs d'acier japonais sont entièrement tributaires du minerai de fer importé et que l'Australie est une source majeure d'approvisionnement, la JFTC a étudié l'impact potentiel d'une telle coentreprise sur le marché mondial du commerce maritime. Vu que les entreprises sont situées en dehors du Japon et qu'elles n'y ont pas de filiales, il aurait été difficile de faire respecter la Loi antimonopole. Une demande d'informations relative à la proposition de 2008 est restée sans réponse et la JFTC a donc dû adresser le document officiel par le biais de son consulat en Australie puis émettre un avis public s'appuyant sur la Loi antimonopole. Toutefois, suite à une modification du système de notification intervenue en 2009, prévoyant la notification préalable des concentrations qui pourraient avoir un impact important sur le Japon, les parties ont communiqué les renseignements, faisant ainsi suite à la demande de la JFTC. Dans la mesure où la concentration proposée aurait eu des conséquences mondiales, d'autres autorités de la concurrence étaient également intéressées et la JFTC leur a donc fait part des renseignements en sa possession, après avoir recueilli le consentement de la partie concernée. En conséquence de quoi, la coentreprise potentiellement anticoncurrentielle a été effectivement bloquée.

2.6.3 L'application du droit national de la concurrence sur les marchés de matières premières : l'exemple de la Colombie

La délégation colombienne est alors invitée à rendre compte au forum des enquêtes concernant une entente sur les achats de produits agricoles de base.

Un délégué colombien explique que, en coopération avec le ministère de l'Agriculture, les autorités colombiennes ont pris des mesures à l'encontre des accords d'achat en vigueur sur les marchés du riz et de la canne à sucre, et qu'un accord est actuellement en place sur le marché du cacao. Le secteur de la transformation est très concentré et l'autorité de la concurrence estime qu'il a mené des activités assimilables à celles d'une entente dans le but de maintenir à la hausse les prix intérieurs des produits finals. Elle a conclu par ailleurs que les prix intérieurs du pétrole n'ont pas suivi la baisse des prix internationaux du pétrole.

Le Président se tourne ensuite vers la délégation de l'Ukraine pour qu'elle explique les raisons pour lesquelles les exportateurs d'huile de tournesol, dont l'Ukraine est un grand producteur, ont été autorisés à « prendre des mesures concertées » sur le marché pendant trois mois.

2.6.4 *L'application du droit national de la concurrence sur les marchés de matières premières : l'exemple de l'Ukraine*

Un délégué de l'Ukraine explique que le pays est un grand producteur et un grand exportateur d'huile de tournesol, et que la hausse des prix internationaux en 2010 a entraîné des pénuries et une augmentation des prix sur le marché intérieur. Le marché ukrainien de l'huile de tournesol est oligopolistique, les trois principaux producteurs en détenant 60 %. Lorsque l'autorité de la concurrence a commencé ses enquêtes, les producteurs ont accepté de garantir une offre intérieure suffisante pour maintenir la stabilité des prix, en échange de quoi le gouvernement a renoncé aux contingents d'exportation. Le Comité antimonopole a accepté d'entériner l'accord pendant une période de 3 mois, par souci de maintenir la stabilité des prix intérieurs. Il convient également de noter qu'une législation prévoit le contrôle des prix de certaines denrées alimentaires de base telles que le pain, le sucre, la viande, le lait et l'huile de tournesol.

2.6.5 *Promotion de la concurrence et déréglementation*

À ce stade de la discussion, le Président invite M. Davenport, du ministère du Commerce et de l'Investissement de la Nouvelle-Galles du Sud, ainsi qu'un autre intervenant, à exprimer leur point de vue sur le rôle de la réforme de la réglementation en matière de promotion de la stabilité des prix.

Selon M. Davenport⁵, la réforme de la réglementation ayant la concurrence pour fil conducteur offre d'importantes possibilités de régler le problème de la volatilité des prix des matières premières et de contribuer à une transmission plus efficace des prix dans la chaîne d'approvisionnement. La réglementation est à l'origine d'un manque d'intégration entre les marchés et les producteurs nationaux et internationaux. Il s'ensuit que, dans les pays émergents et en développement, les secteurs agricoles peu élaborés ne peuvent pas convenablement répondre aux besoins des consommateurs et que l'investissement dans le secteur est inefficace, car il n'est pas guidé par des indications appropriées fournies par les prix. Il existe des réglementations tout au long de la chaîne d'approvisionnement, qui prennent la forme de restrictions aux IDE, de prix de soutien minimaux, de subventions aux intrants et de réglementation des marchés de gros. Si les indications fournies par les prix ne sont pas assez pertinentes, les études consacrées aux problèmes du secteur ne porteront que sur les *symptômes* d'une réglementation inadaptée et atténueront les pressions en faveur des réformes. L'un des problèmes des programmes de réforme tient au fait qu'avec la suppression progressive des mesures industrielles, le droit de la concurrence doit s'appliquer pour éviter des pratiques anticoncurrentielles. Il existe plusieurs types de défaillances du marché, mais il convient de se demander, lors de l'examen des mesures proposées pour y remédier, si ces mesures sont bien les moins restrictives pour la concurrence et si elles présentent un bon rapport coûts/avantages.

⁵ Davenport, S. (2012), « Competition Issues in Agricultural Supply Chains » [Problèmes de concurrence dans les chaînes d'approvisionnement agricole], présentation au Forum mondial sur la concurrence de 2012. Consultable à l'adresse suivante : www.oecd.org/competition/globalforum.

L'objectif est d'écarter le gouvernement de la gestion effective des exploitations agricoles et de faire en sorte que sa mission principale consiste à influencer sur les conditions de l'activité des entreprises de façon à favoriser, et non à empêcher, une transmission efficace des prix.

Des prix efficaces favorisent également la productivité, souvent considérée comme un problème technique qu'il faut résoudre à l'aide de solutions techniques concernant les intrants, mais les rendements marginaux sont en baisse. Les pouvoirs publics fixent généralement des objectifs de croissance, mais ceux-ci témoignent de l'inadaptation des politiques agricoles. En effet, de bonnes politiques devraient spontanément engendrer de la croissance. Une transmission efficace des prix se traduit par une production agricole et un investissement plus efficaces mais, par rapport aux solutions techniques proposées par ailleurs, cet aspect ne bénéficie souvent que de peu d'attention et n'est pas toujours bien compris. Les pouvoirs publics justifient par le bien-être des producteurs les solutions techniques qu'ils adoptent et qui se présentent sous la forme de subventions à la production et aux intrants. D'autres solutions sont toutefois possibles. Aucune instance ayant pour objet de promouvoir la réforme de la réglementation n'est à ce jour en cours d'élaboration et toute l'attention se porte sur le droit de la concurrence, comme s'il s'agissait de la solution à tous les maux. Il est donc indispensable de prendre davantage les devants en élaborant un programme d'étude tourné vers l'avenir.

2.7 Le contrôle des prix et l'éducation du public

Le Président indique que le contrôle des prix et la façon dont les pouvoirs publics recourent aux autorités de la concurrence dans ce domaine sera le dernier thème de la matinée. Il invite l'Australie et les États-Unis à intervenir sur le sujet.

2.7.1 Le contrôle du marché du pétrole en Australie

Un délégué de l'Australie explique que le pays produit 77 % de ses besoins en pétrole, le reste étant importé, si bien que les prix intérieurs reflètent les prix mondiaux. L'ACCC a publié un long rapport sur les prix de l'essence et du gazole en Australie qui décrit bien cette situation, mais certaines personnes pensent néanmoins que les prix élevés s'expliquent par des problèmes de concurrence au niveau national. L'ACCC souhaiterait voir d'autres pays de l'OCDE publier des rapports sur la fixation des prix de l'essence au détail, de manière à permettre aux autorités de la concurrence de démontrer que ces prix reflètent les prix internationaux et qu'ils ne sont pas nécessairement liés à des problèmes de concurrence nationaux.

2.7.2 Le contrôle du marché du pétrole aux États-Unis

Un délégué des États-Unis déclare que la Federal Trade Commission (FTC) est chargée par le Congrès depuis 2002 de contrôler les prix de gros et de détail de l'essence pour détecter d'éventuels comportements anticoncurrentiels. Les données sont collectées à partir de plusieurs centaines de points de vente, et un modèle économétrique est appliqué toutes les semaines en quête d'anomalies. En cas de mouvements de prix anormaux, qui ne semblent pas être déterminés par des causes imputables au jeu du marché, la FTC consulte le ministère de l'Énergie et peut contacter les parquets concernés pour examiner l'anomalie avec eux et décider d'éventuelles mesures à prendre, comme l'ouverture d'une enquête.

Au moment de clôturer la session de la matinée, le Président note que les autorités de la concurrence semblent utiliser un grand nombre d'instruments. Même si elles ne peuvent pas supprimer la volatilité des prix des matières premières, elles ont recours à des mesures d'application, au contrôle des fusions, à la coopération internationale, à la promotion de la réforme de la réglementation, aux études de marché et au suivi du marché pour tenter à tout le moins d'améliorer la situation.

3. Séance plénière : les rapports des Présidents des sous-sessions

Les délégués se sont scindés en trois sessions pour discuter de l'expérience des autorités de la concurrence en matière d'application des lois et de promotion de la concurrence. À la reprise de la séance plénière, le Forum a entendu les rapports des Présidents de chacune de ces sous-sessions.

3.1 *Rapport de M. Joseph Wilson, Commission de la concurrence du Pakistan*

M. Wilson observe que deux questions ont été abordées : la promotion de la concurrence par les autorités de la concurrence et la puissance d'achat des supermarchés. Il relève qu'en Colombie, l'autorité doit donner son avis, non contraignant, sur l'ensemble des projets de réglementation et sur chaque acte législatif pour veiller à ce qu'aucun problème de concurrence ne se pose. Au Mexique, les recommandations formulées par l'autorité à l'intention d'autres organismes fédéraux sont contraignantes. Dans le cas de l'Afrique du Sud, on nous a indiqué que la déréglementation du secteur du commerce de détail en 2006 s'était accompagnée de comportements anticoncurrentiels, de sorte que la leçon qui en a été tirée est de ne pas déréglementer du jour au lendemain, mais de le faire avec prudence.

Les commentaires montrent par ailleurs que la distinction entre puissance d'achat et abus de position dominante peut être subtile. La Bulgarie constitue un cas intéressant. Dans ce pays, l'autorité estime souhaitable de disposer de compétences particulières dans ce domaine pour prendre des mesures concernant les supermarchés. En Australie, l'autorité contrôle les prix de détail, sans réagir de manière disproportionnée en cas de plaintes déposées par les petits commerçants. M. Wilson invite le délégué égyptien à faire part de l'expérience de son pays en matière de promotion de la concurrence.

3.1.1 *Le marché égyptien du lait cru*

Un délégué de l'Égypte relate que l'autorité a été invitée à enquêter sur le marché réglementé du lait cru, où la production en baisse a conduit à l'abandon d'un grand nombre d'exploitations agricoles, malgré l'existence d'un comité tripartite de contrôle des prix dans le secteur formel, représentant 25 % de la production de lait cru. L'autorité a conclu que l'entente entre les acheteurs était illégale en soi et a commandé une étude économétrique selon laquelle il était peu probable qu'une augmentation du prix du lait cru entraîne une augmentation du prix du lait en aval. Elle a proposé que les exploitations agricoles et les industries manufacturières adoptent une formule de prix, et le plus gros acheteur a accepté l'application d'un « rapport lait/alimentation ». D'autres grandes entreprises ont opté pour une intégration verticale. Les prix du lait cru ont augmenté et l'abandon des exploitations agricoles a pris fin.

M. Wilson invite la délégation de la Bulgarie à rendre compte des mesures qu'elle a prises pour contrer la puissance d'achat des supermarchés.

3.1.2 *La puissance d'achat des supermarchés en Bulgarie*

Un délégué de la Bulgarie indique que des fournisseurs ont déposé une plainte au motif que les chaînes de supermarchés exerçaient une forte pression sur eux et que leurs prix d'achat continuaient d'être trop bas. L'autorité a engagé une action pour abus de position dominante, avant d'y renoncer faute de preuves suffisantes. Elle a toutefois poursuivi son enquête et découvert que les supermarchés avaient conclu des accords d'échange d'informations et recouru à la clause du client le plus favorisé. Au moins trois chaînes avaient une puissance commerciale suffisante pour imposer une baisse des prix à leurs fournisseurs sans nécessairement la répercuter sur le public. L'affaire est en cours, donne lieu à un débat national et son issue est incertaine.

La délégation de l'Australie est alors invitée à parler de l'expérience de ce pays en matière de surveillance des prix sur le marché de l'épicerie.

3.1.3 *La surveillance des prix sur le marché australien des produits alimentaires*

Un délégué de l'Australie explique que deux chaînes de distribution de détail se partagent 80 % du marché et que les pouvoirs publics ont demandé à l'autorité de la concurrence de contrôler les prix de détail à titre temporaire. L'autorité a publié les résultats sur l'Internet de manière à ce que les consommateurs puissent facilement comparer les prix. Le site, d'abord populaire, a rapidement perdu de son intérêt auprès des consommateurs. Par la suite, une enquête plus approfondie a été menée en vue d'examiner les réglementations relatives aux supermarchés. Elle concluait que des éléments tels que les clauses restrictives et les lois d'urbanisme étaient d'importants facteurs de concurrence dans ce secteur, et que la puissance commerciale n'était pas nécessairement mauvaise si elle profitait aux consommateurs.

Le Président demande ensuite à M. Kusha Haraksingh, de la Commission de la concurrence de la CARICOM, de présenter le rapport de la sous-session suivante.

3.2 *Rapport de M. Kusha Haraksingh, la Commission de la concurrence de la CARICOM*

M. Haraksingh précise que son groupe s'est intéressé à 3 questions : les études de marché, les mesures d'application sur les marchés d'aval et l'importance des activités de sensibilisation concernant la réglementation des prix. Les études de marché sont un excellent instrument d'application du droit de la concurrence, lorsqu'il s'agit notamment des denrées alimentaires de base consommées par les populations rurales pauvres. Le Mexique, la Lituanie et le Kenya ont mené de telles études. Ils ont conclu que ces études mettaient également l'accent sur des problèmes tels que les restrictions imposées à l'échelon municipal ou national. Les études qui dépassent le cadre des frontières nationales pour s'intéresser aux marchés régionaux sont elles aussi importantes et l'intervenant invite la délégation de la CNUCED à faire part de son expérience.

3.2.1 *Les études sectorielles régionales en Amérique latine*

Un délégué de la CNUCED déclare que plus de 20 études sectorielles ont été menées en Amérique latine, portant sur la concurrence dans les chaînes de production et de commercialisation et recensant les obstacles à l'entrée dans les secteurs importants pour l'économie. Une de ces études portait sur la chaîne d'approvisionnement de céréales au Nicaragua, au sein de laquelle l'intégration était très faible en raison du grand nombre de petits producteurs. La CNUCED a recommandé la création d'associations de micro-producteurs pour faciliter les négociations sur les prix.

M. Haraksingh invite la délégation de la Lettonie à évoquer un cas de comportement anticoncurrentiel en aval sur le marché des œufs.

3.2.2 *Le marché letton des œufs*

Un délégué de la Lettonie explique que l'action de l'autorité de la concurrence a été motivée par une annonce publicitaire dans laquelle le plus gros producteur invitait ses concurrents à ne pas baisser le prix des œufs avant Pâques. L'autorité de la concurrence a découvert que les producteurs d'œufs se rencontraient régulièrement pour fixer les prix. Onze d'entre eux ont été sanctionnés. Une deuxième affaire a été ouverte lorsqu'elle a constaté que les œufs de l'un des producteurs étaient vendus dans les points de vente d'un autre producteur, et qu'ils échangeaient à cette occasion des informations commerciales confidentielles. Dans cette affaire aussi, l'autorité a obtenu gain de cause.

M. Haraksingh fait savoir que plusieurs délégués de ce groupe ont soulevé le problème des arguments avancés par les pouvoirs publics en faveur d'une réglementation publique des prix. L'autorité de la concurrence kenyane les a, pour sa part, convaincu de ne pas soutenir une proposition de contrôle des prix du maïs. Quant aux autorités lettones et lituaniennes, elles ont réussi à bloquer une proposition de

réglementation concernant les marges appliquées aux prix de détail. M. Haraksingh invite la délégation de Maurice à faire part au groupe de l'intervention de l'autorité nationale de la concurrence sur le marché du sucre.

3.2.3 *Le marché mauricien du sucre*

Un délégué de Maurice indique que la production de sucre est un secteur très important du pays, même s'il l'est beaucoup moins aujourd'hui que dans le passé. Le sucre est en grande partie exporté et le sucre vendu localement bénéficiait d'un prix subventionné jusqu'en 2010, avant d'être vendu au prix coûtant. Le syndicat du sucre mauricien, qui paye également les retraites des dockers ayant travaillé autrefois dans le secteur de l'exportation de sucre, était *de facto* un fournisseur en situation de monopole. Un homme d'affaires local a proposé d'importer du sucre à moindre prix mais le ministère de l'Agro-industrie et de la Sécurité Alimentaire a réagi en préconisant la création d'un monopole ; l'autorité a donc été chargée d'enquêter. Elle a estimé que rien ne justifiait la création d'un monopole, et qu'il y avait lieu, soit d'instaurer un traitement fiscal commun, indépendamment du vendeur, soit de charger l'État du paiement des retraites des dockers. Le ministre a convenu qu'il ne fallait pas faire obstacle à l'entrée de nouveaux concurrents sur le marché national et aux importations.

Le Président remercie M. Haraksingh et invite M. Francis Kariuki de l'autorité de la concurrence du Kenya à faire part des discussions menées dans son groupe.

3.3 *Rapport de M. Francis Kariuki, autorité kenyane de la concurrence*

M. Kariuki explique que son groupe s'est penché sur l'étude de cinq points : les restrictions commerciales, la surveillance des prix, les lois relatives à la fixation des prix, les activités de promotion et les mesures d'application. Il invite la Tunisie à décrire le fonds de compensation créé pour atténuer l'instabilité des prix, dont la mise en place s'est accompagnée d'importants coûts budgétaires et de mesures commerciales connexes.

3.3.1 *Le contrôle des prix en Tunisie*

Un délégué de la Tunisie indique que les produits céréaliers sont directement subventionnés par l'État et que les variations des prix internationaux sont absorbées. Les carburants et l'électricité sont traités de la même façon, et les entreprises publiques subventionnent les produits importés en totalité, comme le sucre, le café et le thé. Le coût budgétaire de toutes ces subventions a triplé entre 2006 et 2011. Les autres mesures en vigueur comprennent la réduction des droits d'importation sur les produits tels que les huiles végétales, les aliments pour animaux et l'orge, et la simplification des procédures d'importation. Des mesures ont également été prises pour libéraliser les marchés de l'orge et des huiles végétales, qui étaient des monopoles publics.

M. Kariuki demande alors à la délégation du Pérou d'expliquer le système de surveillance des prix « rouges, orange et verts » en vigueur dans ce pays.

3.3.2 *La surveillance des prix au Pérou*

Un délégué du Pérou indique que l'INDECOPI surveille tous les mois les prix de détail et de gros, en recueillant des informations auprès de l'Institut national de la statistique et en les corrigeant de l'inflation et des coefficients saisonniers. L'autorité examine ensuite dans quelle mesure les prix de produits jugés intéressants s'écartent des tendances antérieures, et elle les classe en prix « rouges » si l'écart dépasse 2 écarts-types pendant 3 mois, en prix « orange » si l'écart dépasse 2 écarts-types pendant un à deux mois, et en prix « verts » si les écarts sont minimes. Les produits faisant partie du groupe de prix rouges sont signalés à la Commission de la concurrence.

M. Kariuki invite la délégation du Pakistan à relater comment l'autorité nationale de la concurrence a réussi à convaincre la Cour suprême que les prix de certaines matières premières ne devraient pas être fixés.

3.3.3 *L'intervention contre la fixation des prix au Pakistan*

Un délégué du Pakistan explique que les médias ont rapporté l'existence en 2009 d'une « mafia sucrière » qui cartellisait le marché. Le prix fixé par l'État était de 36 roupies le kilo et les raffineries de sucre ont fait savoir qu'elles ne pouvaient pas fonctionner à ce prix. La Haute Cour a alors porté le prix à 40 roupies, ce qui a été contesté devant la Cour suprême, qui a demandé à l'autorité de la concurrence de procéder à une analyse des coûts. Celle-ci a expliqué que le marché devait être libre et que la fixation des prix faussait le marché. Elle a, quoi qu'il en soit, procédé à l'analyse demandée et, après avoir découvert plusieurs anomalies, s'est une nouvelle fois prononcée contre toute fixation des prix. En effet, un prix fixé à 40 roupies rendait le sucre inabordable. Elle a également découvert que l'État – qui a pouvoir juridique de fixer les prix – ne consultait que les associations professionnelles au moment de la fixation des prix, raison pour laquelle elle lui a recommandé de faire réaliser des études indépendantes. Les parties ont saisi le tribunal et demandé un sursis à l'exécution de la décision. En réaction, l'autorité de la concurrence a émis une ordonnance provisoire indiquant que les parties étaient coupables et requérant une sanction maximale. L'affaire est en instance.

4. **Séance plénière : les prochaines étapes**

Le Président remercie les Présidents des sous-sessions et invite M. John Davies, chef de la division de la concurrence de l'OCDE, à faire la synthèse des enseignements tirés et des conseils qui pourraient être donnés aux autorités de la concurrence sur cette base.

4.1 *Les propositions du Secrétariat de l'OCDE*

M. Davies annonce qu'il traitera essentiellement des prochaines étapes en s'appuyant sur les discussions menées pour illustrer les propositions faites. Il sera alors temps, avant la fin de la réunion, de lancer un débat général dans le cadre duquel tous les commentaires seront les bienvenus. Comme d'habitude, le Secrétariat rassemblera ensuite toutes les informations dans un ouvrage unique contenant l'ensemble des contributions des pays, ainsi que les exposés d'introduction et la note de référence du Secrétariat. Cela étant, compte tenu du caractère d'actualité de la question et de son intérêt politique et médiatique, le Secrétariat publiera également une brochure beaucoup plus succincte et percutante à l'intention des autorités de la concurrence, à laquelle celles-ci pourront faire référence si un responsable politique ou un journaliste leur demandent ce qu'elles pourraient ou devraient faire à propos des prix des matières premières. Les réponses sont multiples :

- Premièrement, un rappel factuel doit être fait de la situation mondiale, et pas seulement de celle d'un pays, et de la façon dont la volatilité est apparue, en s'attachant principalement aux causes réelles, sans rendre la spéculation responsable de l'instabilité des prix.
- Deuxièmement, il existe des problèmes de concurrence mondiale qui prennent la forme d'ententes d'exportation et d'interdictions d'exportation et qui peuvent exacerber l'instabilité des prix.
- Ensuite, il y a la question des subventions et des énormes coûts budgétaires que quelques États ont encourus, et continuent d'encourir, même si la Nouvelle-Zélande peut être citée en exemple de pays qui a réussi, dans le passé à surmonter ce problème. Concernant le contrôle des prix, l'autorité ne doit pas se montrer trop dogmatique en disant que l'on ne saurait y recourir, sachant

que cet outil pourrait constituer une mesure d'urgence temporaire appropriée pour les produits de base consommés par les ménages pauvres, même s'il gagnerait à être mieux conçu et circonscrit.

- Viennent ensuite les activités de sensibilisation, portant notamment sur la promotion de la déréglementation et de la réforme de la réglementation, dont les participants au forum ont sans doute davantage entendu parler lors de la réunion que d'affaires de concurrence proprement dites. Il faut préciser que ces activités doivent être menées au niveau local, et pas uniquement au niveau national.
- En ce qui concerne les affaires mentionnées durant la réunion, beaucoup portaient sur les ententes, sans que celles-ci aient été, semble-t-il, très étroitement liées à la crise. Les ententes évoquées ne semblent pas avoir été formées au moment de l'envolée des prix, mais elles existaient probablement déjà depuis un moment. Elles sont peut-être plus faciles à repérer lors des épisodes de flambée des prix du fait que leurs membres doivent alors se livrer à des renégociations plus fréquentes.
- Le rôle des études de marché s'est révélé plus important que prévu. Il n'est pas très aisé pour une autorité de la concurrence de répondre à une demande d'intervention en disant qu'il lui faut au préalable réaliser une étude de marché, mais cet outil permet de mettre en évidence tout ce qui pourrait susciter un problème sur le marché. Par exemple, le cas du Kenya a mis en évidence que se conjuguait dans ce pays non seulement des problèmes liés à la fixation des prix, mais aussi des problèmes induits par des réglementations préjudiciables à la concurrence et des problèmes d'infrastructures. Ainsi, réaliser une étude n'est pas juste un moyen pour les autorités de la concurrence de donner l'impression d'agir, mais leur est au contraire très utile, ce que la brochure de synthèse pourrait souligner.
- Enfin, des études *ex post* doivent être réalisées. La présentation de l'Égypte indiquait que l'autorité de la concurrence avait averti l'État de ce qui arriverait s'il tentait de contrôler le prix de l'acier, ce qui s'est confirmé lorsque l'État a décidé de persister malgré tout sur cette voie. Ce type de données d'expérience est très intéressant.

M. Davies propose que la brochure détaille certaines pratiques contre lesquelles les autorités de la concurrence devraient mettre en garde les États et certaines mesures qu'ils devraient prendre et selon quelles modalités. Cette brochure devrait par ailleurs décrire comment les autorités de la concurrence devraient agir vis-à-vis des affaires qui surviennent et aussi ce qu'elles devraient faire concernant les études de marché, en faisant valoir qu'il s'agit d'un outil très utile en cas de flambée des prix. Elle ne devrait traiter que des brusques variations des prix à la hausse, et non à la baisse étant entendu que, même si l'effondrement des prix des exportations peut causer d'importants problèmes, cet aspect n'est pas spécifiquement du ressort des autorités de la concurrence.

Nous espérons être en mesure de publier la brochure sous quelques mois.

4.2 Commentaires des participants

4.2.1 Le Président

Le Président déclare qu'à l'instar des études de marché, la surveillance des prix et la collecte d'informations, sans être de véritables mesures d'application, lui semblent très utiles et qu'elles peuvent aider l'autorité de la concurrence, lorsqu'elles ces activités sont menées *ex ante*, avant l'éclatement d'une crise, à préparer une réponse au moment où la crise est sur le point de se manifester. Il donne la parole à la délégation de l'Australie.

4.2.2 *Australie*

Un délégué de l'Australie souligne que les autorités de la concurrence devraient préciser que la concurrence ne fait pas nécessairement baisser les prix, mais que ceux-ci seront malgré tout inférieurs à ce qu'ils auraient été si elle ne s'exerçait pas. Sans cela, les gens diront que, dès lors que les prix augmentent, la concurrence ne fonctionne pas et que les autorités de la concurrence devraient faire quelque chose pour remédier à cet état de fait.

4.2.3 *Afrique du Sud*

Un délégué de l'Afrique du Sud fait observer que la situation varie selon les pays. Ainsi, en Afrique du Sud, la déréglementation a été mal gérée et une réglementation aurait été plus avantageuse qu'un marché réglementé par le secteur privé. Bien qu'il puisse être très utile de procéder à des enquêtes de marché et de donner aux autorités de la concurrence le pouvoir de recueillir des informations, il peut y avoir des distorsions sur différents marchés en raison d'événements survenant au sein ou en dehors du pays. Il convient donc de tenir compte de ces disparités.

4.2.4 *Namibie*

Un délégué de la Namibie explique qu'il cherche à mieux comprendre le lien entre concurrence et volatilité des prix des matières premières. Que les prix augmentent ou baissent – selon le cas –, ces fluctuations sont-elles dues à des paramètres fondamentaux ou à des distorsions ? L'absence de concurrence est-elle la cause de la volatilité des prix des matières premières, ou en est-elle un effet ?

4.2.5 *Pakistan*

Un délégué du Pakistan déclare qu'il est important de comprendre ce qu'est une augmentation déraisonnable des prix d'un point de vue juridique. Il n'existe guère de jurisprudence dans les différents pays du fait que les autorités de la concurrence sont chargées d'instruire des affaires d'abus de position dominante. Par ailleurs, le rapport des organisations internationales⁶ indique, à la page 18, que les politiques appliquées doivent être légitimes et que les parties prenantes concernées doivent largement y adhérer. Mais qu'est-ce qu'une politique légitime ? Et une large adhésion ne garantit pas forcément une moindre instabilité des prix. Le Pakistan a ainsi démantelé deux ententes au sein desquelles 82 entreprises se livraient concurrence, et malgré cela, des ententes ont subsisté. Les recommandations formulées ne sont donc sans doute pas valables pour tous.

4.2.6 *Japon*

Un délégué du Japon insiste sur le fait que les activités de promotion et la collecte d'informations sont utiles, mais que les mesures d'application restent la meilleure forme de promotion du droit de la concurrence.

4.2.7 *CUTS*

Le délégué de la CUTS indique qu'un aspect important de la concurrence sur les marchés de matières premières n'a pas été abordé, à savoir les opérations à terme. En Inde, une enquête est actuellement en

⁶ FAO, FIDA, FMI, OCDE, CNUCED, PAM, Banque mondiale, OMC, IFPRI et UN-HLTF (2011) « Price Volatility in Food and Agricultural Markets Policy Responses » [Volatilité des prix sur les marchés alimentaires et agricoles : mesures prises par les pouvoirs publics]. Consultable à l'adresse suivante : http://www.wto.org/english/news_e/news11_e/igo_10jun11_report_e.pdf

cours sur l'entente portant sur les commissions des opérateurs du marché. Dans la pratique, les autorités de la concurrence n'y peuvent pas grand-chose, ces questions restant une compétence exclusive de l'autorité de réglementation des opérations à terme.

4.2.8 *Le Président*

Avant de rendre la parole à M. John Davies, le Président fait remarquer que le Comité a déjà examiné les questions soulevées par la délégation du Pakistan lors de la table ronde de septembre 2011 consacrée aux « prix excessifs »⁷. Quant à l'intervention de l'Afrique du Sud, le Président ne souhaite pas que la brochure soit en quoi que ce soit prescriptive. Elle devrait mettre en évidence les échanges d'expérience sur les affaires, par exemple le fait que, dans tel ou tel cas, des mesures d'application vigoureuses ou des études de marché se sont avérées utiles. Le Comité a décidé il y a longtemps qu'il refusait toute négociation concernant les textes sur lesquels tous les pays doivent se mettre d'accord, au motif que cela serait trop long et contre-indiqué. Nous recenserons les diverses questions mettant en évidence l'expérience des différents pays, sans toutefois aller jusqu'à recommander une solution particulière parmi toutes celles qui existent. La brochure mettra en avant les affaires exposées, sans en tirer de conclusion. Il appartiendra en effet aux autorités de la concurrence de décider de quelle manière elles souhaiteront utiliser ces informations.

4.2.9 *Réponses du Secrétariat de l'OCDE*

M. Davies souligne que la brochure n'a pas pour objet de mettre en évidence de prescriptions particulières, mais plutôt d'étudier quelles sortes d'instruments les pouvoirs publics pourraient utiliser en situation d'urgence. Dans ce contexte, la mise en place de régimes de subvention et de contrôle des prix a été évoquée. Il était donc important d'associer à ce projet les autorités de la concurrence pour qu'elles puissent contribuer à mettre au point un dispositif qui fonctionnerait bien et qui n'engendrerait pas de distorsion. La brochure traitera essentiellement de ce qui fonctionne ou a pu fonctionner lors des épisodes de flambée et de volatilité des prix, et citera quelques exemples de dispositifs qui n'ont pas très bien fonctionné.

La Namibie soulève une question intéressante sur la nature véritable du lien entre concurrence et instabilité des prix. De l'avis de M. Davies, si les marchés fonctionnent bien, ils doivent se corriger d'eux-mêmes. Si tel n'est pas le cas, ou en cas de volatilité extrême, peut-être ne fonctionnent-ils pas bien, ce qui peut s'expliquer par l'inadéquation des politiques nationales ou internationales visant à supprimer les réactions de l'offre et de la demande.

Le Pakistan souhaite savoir ce que l'on entend par politiques légitimes et par large adhésion des parties prenantes à ces politiques ? Selon M. Davies, cela signifie qu'il faut se garder d'être trop rigoriste et de choisir des solutions technocratiques appréciées des économistes mais ne tenant pas compte des réalités auxquelles sont confrontées la sphère politique et l'opinion publique.

Au moment de lever la séance, M. Jenny note, en réponse à la CUTS, que la réglementation des marchés à terme n'entre sans doute pas dans le propos de la brochure proposée et, en réponse à la Namibie, que le lien théorique entre concurrence et volatilité n'est pas clair, même s'il existe bien un lien entre la volatilité et les pressions exercées sur les autorités de la concurrence pour qu'elles interviennent.

⁷ OCDE (2011), « Excessive pricing » [Prix excessifs]. Consultable à l'adresse suivante : www.oecd.org/competition/roundtables



BETTER POLICIES FOR BETTER LIVES

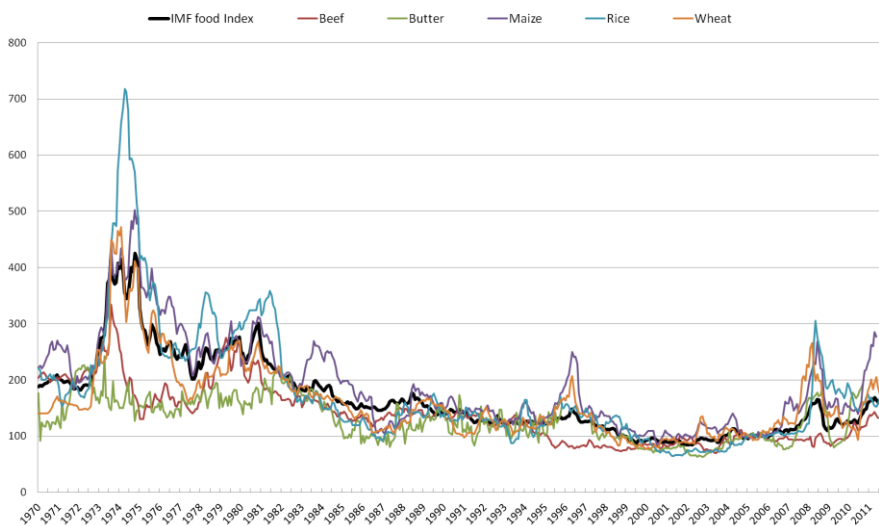
Competition and commodity price volatility

Carmel Cahill
OECD Trade and Agriculture

Global Forum on
Competition, February 16-17,
2012

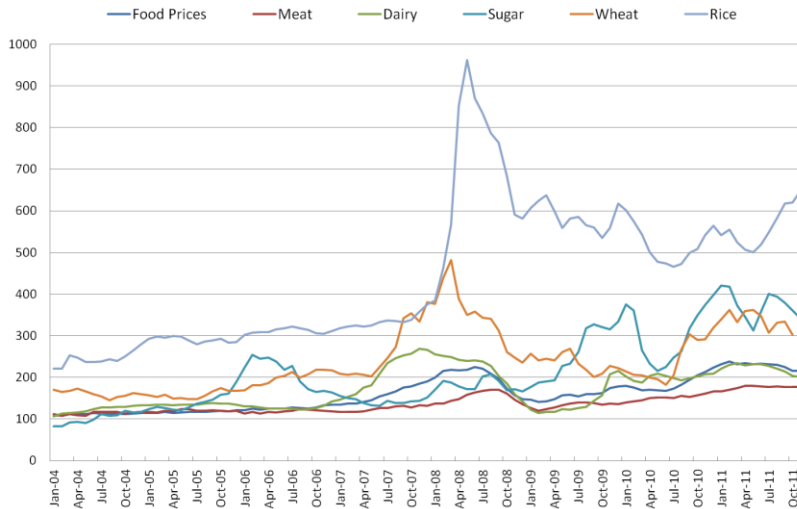
A long term view of volatility

Agricultural commodity prices in real terms (2005=100)



A shorter term view of volatility

Monthly commodity price indices (2002-04=100)



OECD Trade and Agriculture Directorate

Causes of food price volatility

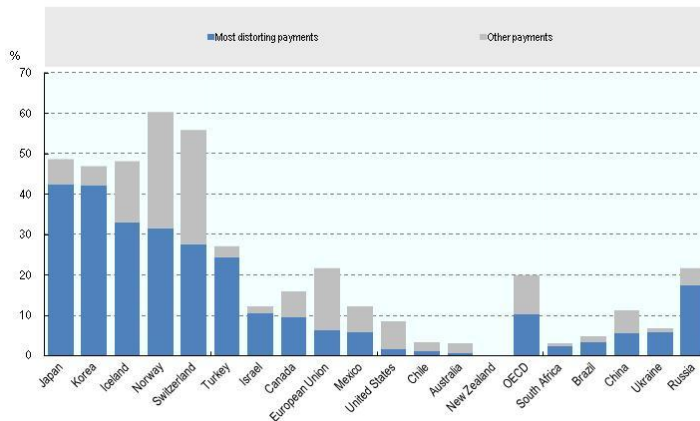
Long-term structural change	Short term market shocks	Policy factors
Increase in demand for food and animal feed from emerging and developing countries Historically low global stock-to-use ratios	Weather problems Drought Hoarding and panic buying by private agents	Trade policy measures •Export restrictions •Import measures Panic buying - SOEs and governments,
Effects of climate change Water scarcity Slowing productivity growth	Exchange rate fluctuations	Biofuel mandates and subsidies
Increase in use of agricultural feedstocks for bio-fuels	Speculation on commodity derivative markets	



OECD Trade and Agriculture Directorate

Market interference in agriculture still prevalent despite reforms

Producer support estimate 2010 as % of farm receipts



Most distorting: price- and output linked support and payments based on (unconstrained) input use



IO Mandate from G20

- G20 leaders at their summit meeting in November 2010 requested FAO, IFAD, IMF, OECD, UNCTAD, WFP, the World Bank and the WTO (to) work with key stakeholders “to develop options for G20 consideration on how to better mitigate and manage the risks associated with the price volatility of food and other agriculture commodities, without distorting market behaviour, ultimately to protect the most vulnerable”



The IO's proposal

A three-part approach to solving the problem:

- Increase long-term productivity, sustainability and resilience
- Policy options to reduce volatility
- Policy options to deal with the consequences



Policy options to reduce or mitigate volatility

- Improve short term market information with a view to:
 - Improving market efficiency through better transparency and more accurate, and timely data and projections
 - Providing a better basis for policy decisions
 - Providing a forum for policy dialogue and coordination
- Improve information and transparency in futures and OTC markets in agricultural commodities
- Remove subsidies and mandates on biofuels
- Strengthen discipline on all trade measures and on trade distorting domestic measures
 - Notification, consultation, stronger rules around export restrictions
 - Exemption of humanitarian purchases and shipments



Policy options to deal with the consequences of volatility

- Improve emergency reserve systems (not buffer stocks)
- Code of conduct for the free movement of humanitarian supplies
- Improve financing arrangements for humanitarian agencies
- Contingent financing for poorer importing countries
- Develop safety nets – targeted, capable of being stepped up
- Develop market based risk management options at household and country level (hedging, disaster risk financing, meteorological services etc.)



Next steps

- AMIS (Agricultural Market Information System) and Rapid Response Forum is being implemented
- Mexico has taken up the long term issues of productivity, sustainability and resilience
- Risk management, contingent financing being taken forward in other forums
- Same consortium of IO's are producing a new set of concrete policy recommendations under leadership of OECD, FAO and the World Bank



For more information



Trade and Agriculture Directorate

- Visit our website:
www.oecd.org/agriculture
- Contact us: **tad.contact@oecd.org**
- Follow us on Twitter: **[@OECDagriculture](https://twitter.com/OECDagriculture)**



Trade &
Investment

COMPETITION ISSUES IN AGRICULTURAL SUPPLY CHAINS

Scott Davenport

*Executive Director Strategic Policy & Chief Economist
New South Wales Department of Trade and Investment, Australia
Global Forum on Competition, 16 & 17 February 2012.*

Presentation Structure

1. Supply chains and the role of efficient price transmission.
- 2a. Reforming Regulation: Competition law and removing regulatory restrictions on competition.
- 2b. Reforming Regulation: Reform principles.
3. A better understanding of productivity 'drivers' will compliment pricing reform.

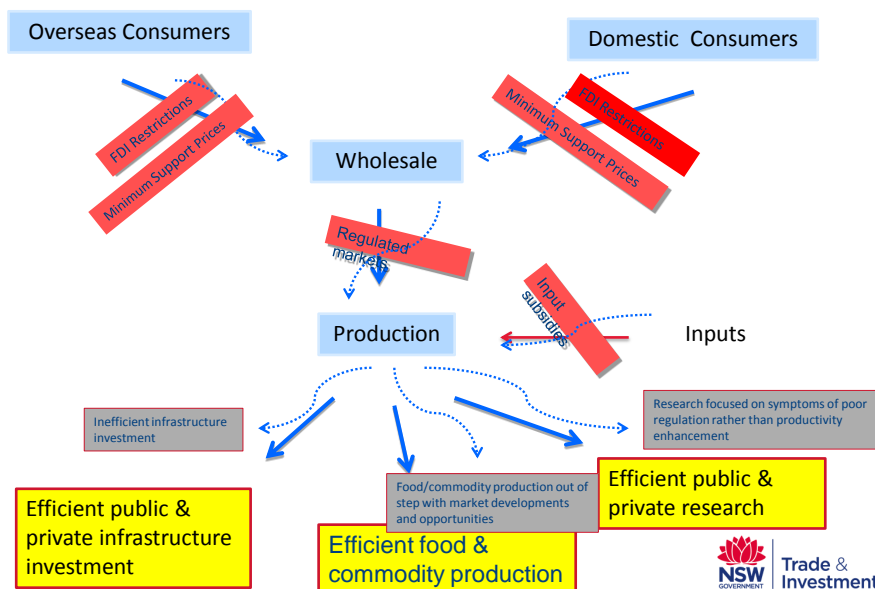


Trade &
Investment

1. Efficient supply chain price transmission drives productivity growth & employment.

- A key causal factor of commodity price volatility is agricultural supply chains and prices being poorly integrated with domestic and international markets due to excessive supply chain regulation.
- The result is:
 - under-developed and unsophisticated agricultural sectors, incapable of effectively responding to contemporary market demands and growth opportunities; and
 - inefficient public and private investment, limited sectoral adjustment, innovation and productivity.

Agricultural Supply Chains, Regulatory Restrictions on Competition and Price Transmission



2a. Reforming Regulation

Are we exploiting complementarities between competition law and regulatory reform?

- Competition Law: Regulating private business behaviour.
- Regulatory Reform: removing regulatory impediments to competition which advantage certain sectors in their 'bidding' for labour and capital resources.

some questions.....

- Are we as a group of competition practitioners fully aware of the complementarities between law and reform?
- Do we take into consideration that regulatory reform and the market outcomes so achieved, will often be more effective in promoting competition than competition law?
- Do we recognise that both need to be progressed in concert to achieve an orderly transition from outdated industry policy to the wider reliance on completion law?

2b. Reforming Regulation

'Role of government' principles are required, independent institutions and expertise

Accepted forms of market failure:

- Information deficiencies
- Anti competitive behaviour
- Externalities
- Public (and industry) goods
- Social equity and welfare

Key questions

- Are regulatory objectives clearly linked to accepted forms of market failure?
- Is the proposed intervention that which addresses the objectives whilst imposing the least restricting competition?
- Do the benefits of regulatory intervention exceed the costs?

Regulation: the 'good the 'bad' and the...

BAD restrictions on competition

Government 'running' the business

- Regulated commodity prices
- Input subsidies
- Regulated markets
- Regulated marketing
- Investment controls
- Ownership controls
- Export controls

GOOD restrictions on competition

Government 'shaping' the operating environment

- Education & training
- Information programs
- Competition law
- Regulating externalities
- Provision of public/industry goods (i.e. infrastructure)

Note: Progress with farm family welfare policy is important.

3. We Need to Better Understand Productivity ‘Drivers’

A better understanding of productivity ‘drivers’ and ‘enablers’ will compliment regulatory reform effort.

- ‘Drivers’ – price pressures & opportunities i.e. changes in Terms of Trade, pressure on profit margins.
- ‘Enablers’ – new technology, the ability to apply technology, RD&E.

Some observations...

- Technical ‘enabler’ solutions remain common and politically popular.
- Lack of appreciation of (or disinterest in) the dynamic capacity of pricing reform to drive and determine efficient levels of productive activity and investment.
- Enabler solutions will often simply load up the input side of the agricultural productivity equation resulting in declining sectoral productivity.
- Research and infrastructure investments focussed on the symptoms of poor regulation can act to insulate farmers and government from market reform pressures.
- ‘Agricultural Policies’ based on growth targets are an indicator of government rather than market based agricultural policies.

Conclusions

Against a backdrop of declining agricultural productivity, reforming regulatory impediments to competition in agricultural supply chains offers perhaps the greatest gains in addressing price volatility and international food security.

- The fundamental role prices play in 'directing' efficient agricultural production & associated public and private investment continues to be under-emphasised relative to technical solutions.

- As a result:

- we are not building capacity in understanding microeconomic reform principles and regulation review
- regulatory reform frameworks/institutions are not being developed
- competition efforts limited to competition law
- key transition issues, such as welfare policy, may not be receiving the attention they deserve
- public policy research institutions are not adequately considering the benefits and the opportunity costs of inefficient regulatory settings i.e. forgone sectoral productivity, growth and employment.

Competition Issues in Agriculture

With Examples from India

Interpretation of agriculture

- **National income accounts – primary, secondary, tertiary**
- **Excludes forestry & fishing**
- **But includes inputs (seeds, fertilizers, agro-chemicals, bio-technology), processing, storage, trade & distribution**
- **Private investments, FDI in agriculture**
- **WTO, DDA & competition policy**
- **Food security & supply side issues**

Cross-border measures

- Tariffs, TRQs, safeguards, SPS/TBT
- Export subsidies, export controls, export taxes
- State trading – China, Indonesia, India, Mexico, Pakistan. Especially food-grains and dairy
- Free cross-border encourages competition & efficiency, smoothens price volatility
- But incrementally distortions have increased
- Thin markets encourage volatility

Domestic output markets

- ECA of 1955, Essential Commodities (Special Provisions) Act of 1981
- Licensing of production, control & distribution
- MSPs, procurement & PDS
- APMC Acts that prevent direct selling
- Indirect taxes, environment & forest produce, motor vehicles
- Land markets, future markets
- Opening up retail trade to competition

Committee on Centre-State Relations

- Reduction of post-harvest losses by 5-7% for food-grains and 25-30% for fruits and vegetables.
- Static gains of 10% through harmonizing standards of agricultural products across States.
- Static efficiency gains of up to 20% because of dis-intermediation of distribution chains, resulting in higher prices for farmers and lower prices paid by consumers. The welfare gains are roughly distributed in a ratio of 40% for farmers (producers) and 60% for consumers.
- Savings in compliance costs by 5% consequent to fiscal unification. Savings of up to 20% if there is a transition to a complete and unified GST and revenue gains of 25%. The tax/GDP ratio will increase by 1%.

Committee on Centre-State Relations (cont)

- Reduction in transportation costs by 30%.
- Incremental growth in agriculture and allied activities by 2% because of static gains alone.
- Static increment to GDP growth by 1% because of removal of inter-State barriers alone. Increment by 2% if broader agricultural cum rural sector reforms are undertaken.
- Increase in export volume (not value) of agricultural products by 20%.
- Additional direct employment generation by 5 million a year. If one includes indirect employment, additional employment generation by 12 million a year.

Supply-side issue

- Investing in agriculture & rural sector
- Reducing dis-intermediation
- Injecting competition
- Producer price controls, MSPs
- Consumption subsidies, food aid, food for work, cash transfers
- Fiscal sustainability
- Do they lead to additional distortions?

Anti-competitive policies

- Cotton in Zambia, tobacco in Malawi, cocoa in Cote d'Ivoire, tea in Mauritius, sugar in Nepal, Pakistan and Zimbabwe, soybean in Bangladesh, food-grains in Laos and food-grains, onions and cotton in India
- Monopolies & cartels
- Dis-intermediation often temporarily increases abuse of dominance, unfair practices & price fixation

Input markets

- **Seeds, pesticides, herbicides, agro-chemicals and fertilizers, IPR issues**
- **Power and water**
- **Fertilizer Control Order of 1955 that controls pricing, distribution & imports**
- **National Seeds Policy of 2002**
- **Role of dealers**
- **Links in the distribution chain – for both output & inputs**

Financial flows in commodity markets

Torbjörn Iwarson, tel 076-001 57 90, torbjorn.iwarson@seb.se

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There is a difference between

1. Informed speculation
2. Cornering the market
3. Creating rents

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2

Accusations against speculation are not new – the Agrarian Movement, some quotes

from "The Chicago Board of Trade 1859-1905", Jonathan Lurie, Univ of Illinois Press, 1979

"We are profoundly impressed with the conviction that the gigantic gambling device known as short selling, in which one party agrees to sell what never did and never will exist, and the other agrees to buy what he knows is never to be delivered to him, has been a potent cause in producing the ruinous agricultural depression from which the country has suffered", from a print 1892

"By the combined action of certain persons... organised into... Boards of Trade, the prices of all kinds of farm products are so manipulated and depressed that they cannot be produced except at a loss to the farmer", the Hurricane Grange No. 359.

Butterworth Bill of 1890: a dealer pays \$1000 pa for the privilege to trade in futures and options, 5 cents / lb of cotton, 20 cents / bu of grain bought or sold.

Hatch Bill of 1892: \$2000 pa + 20 cents / bu of grain. (passed the House easily. Was sent back from Congress with amendments), failed to get 2/3 majority with a small margin in 1893.

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3

Why did it not pass?

CBOT: Produce gambling "bears about the same relation to legitimate commerce and speculation... that the froth and foam of the Niagara do to the almighty volume of water underneath. It is the bubble and fuss and fury, the froth and foam upon the surface that offends, not commerce itself", DP April 29, 1890.

"How in the world a farmer can be benefited by the passage of such a measure... is beyond us", Northwestern Miller, January 22, 1892

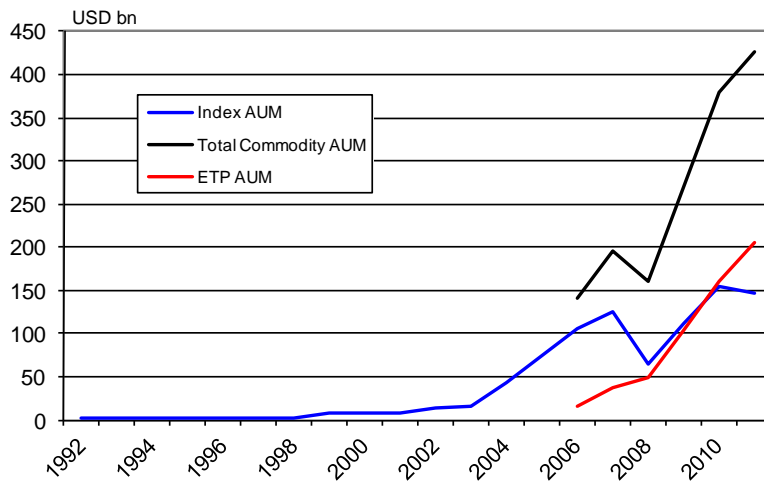
Farmers were quite active speculators, Prairie Farmer wrote on Dec 27, 1884: "What is wanted now, is for farmers to hold back all the grain they possibly can, and hold on to it".

The reason most cited for not interfering in the commodities markets was that "the ethical distinctions involved between legitimate and illegitimate speculation are not easily reducible to exact legal definition", Newman Smyth, Forum 19, 1895.

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Assets under management

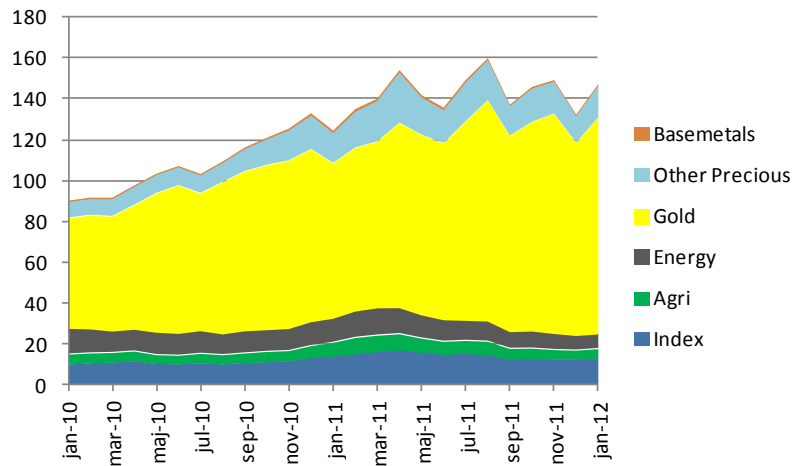


Source: SEB, Barclays

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AUM for the largest ETPs

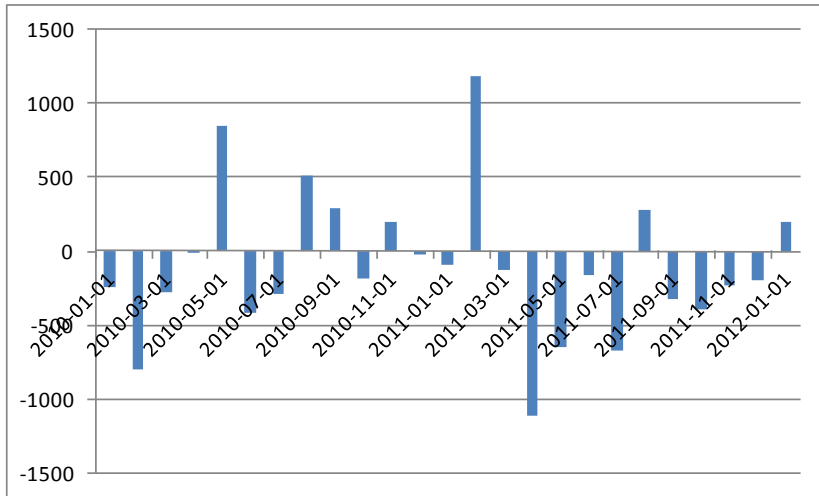


Source: SEB, Bloomberg

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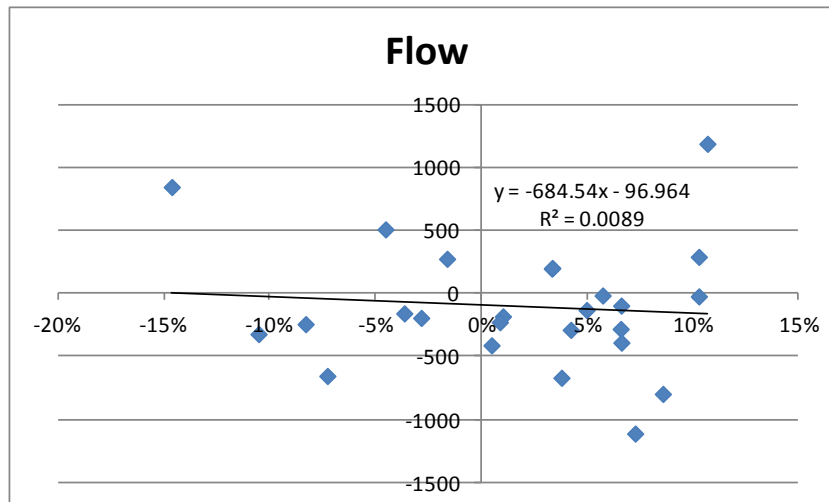
Flow Energy ETPs



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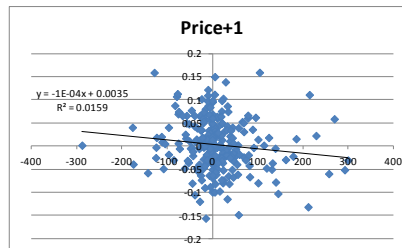
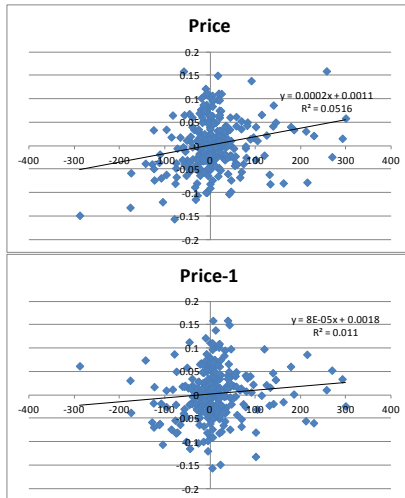
Energy ETPs and price change



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8

Powershares DB Agriculture, the largest Agri ETP in the world, weekly data from 2007



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9

Granger causality goes from price change in wheat to ETP flow. ETP flow statistically has the *opposite* price causation!

Flow actually causes price to go down!

	Koeff	St err	t-kvot	p-värde
Konstant	0.003483	0.003371	1.033036	0.30254
Flow	-9.9E-05	4.81E-05	-2.05797	0.040582

Price change causes flow

	Koeff	St err	t-kvot	p-värde
Konstant	8.370262	4.281558	1.954957	0.051651
Price-1	133.7397	78.5073	1.703531	0.089654

Weekly data from 2007

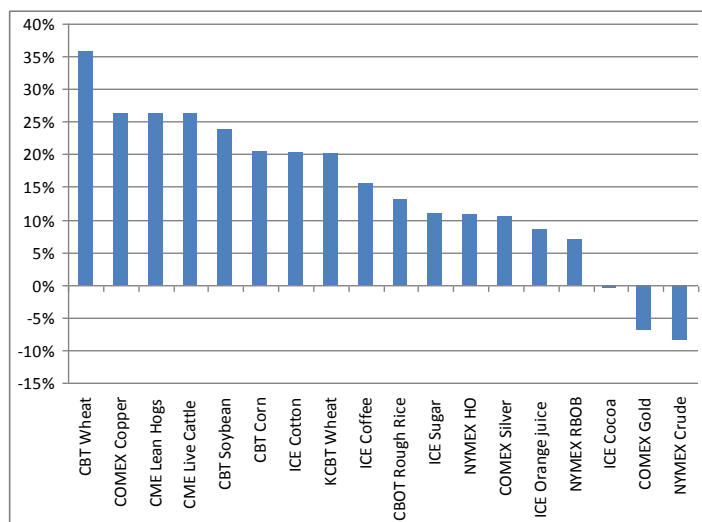
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What about non-commercials in CFTC data?

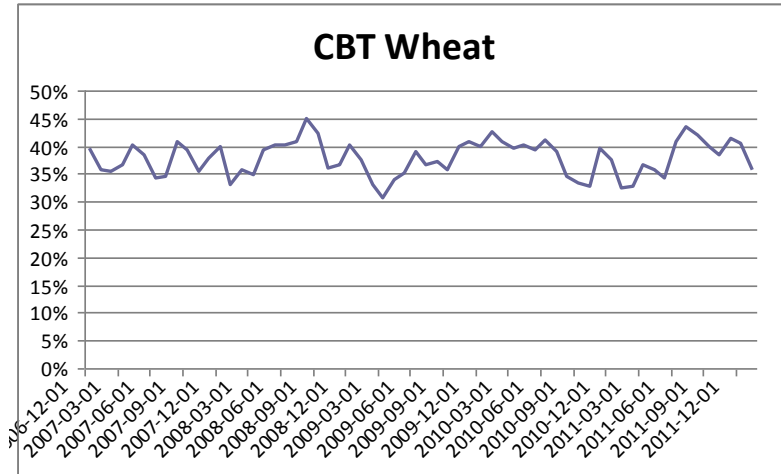
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Share of open interest held by "Swap dealers" in the latest COT report



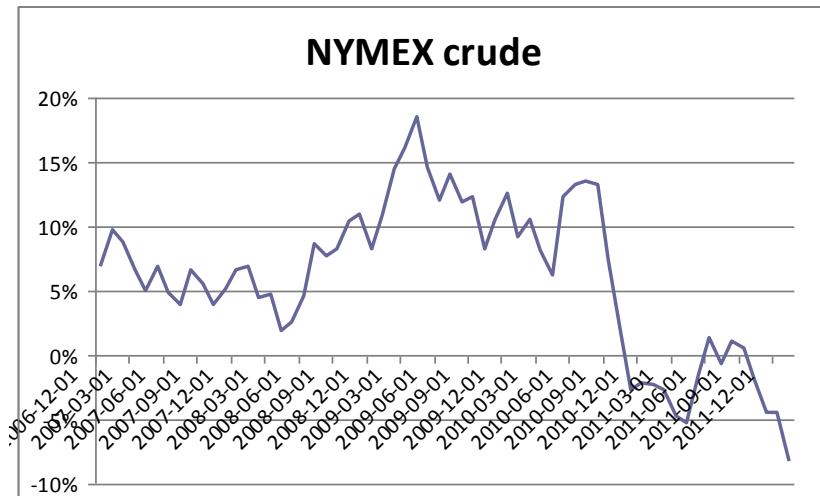
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Share held in CBT wheat



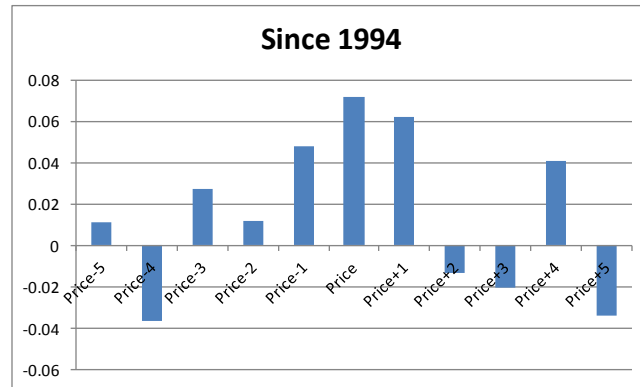
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Share held in crude oil



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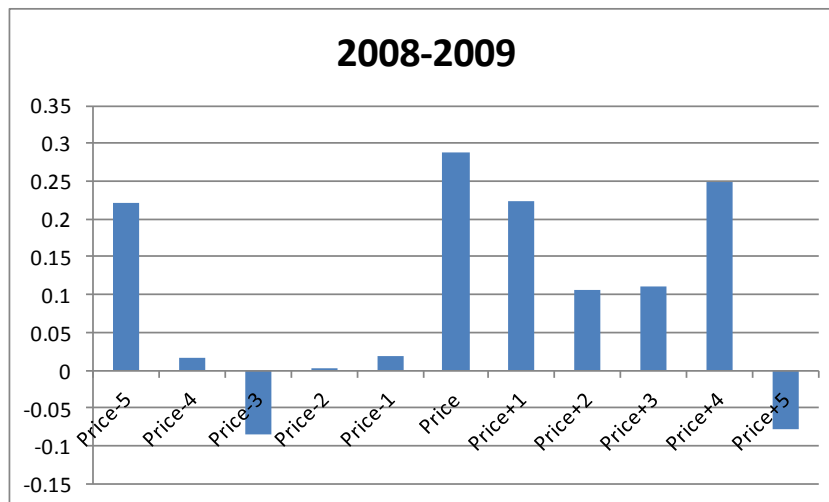
Correlations between price change and change in (# of) contracts held by non-commercials (weekly data) for corn



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Dito 2008-2009 (an unusual credit crunch as common factor affecting all things)

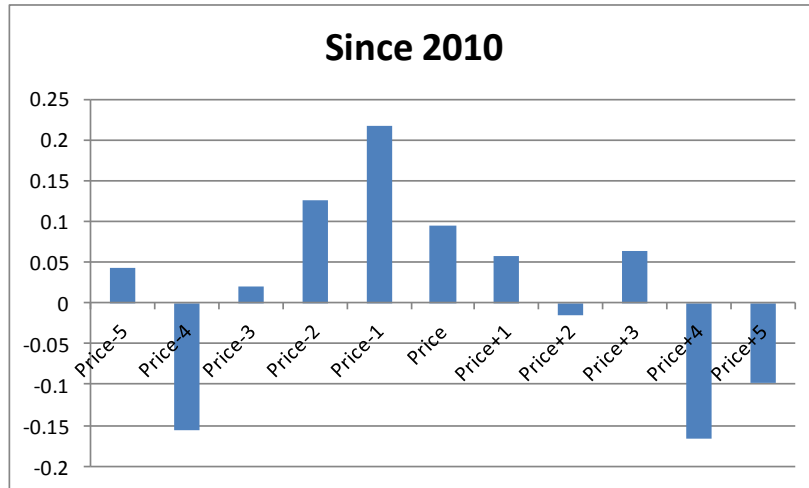


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Dito for corn since 2010

Price change causes change in speculative position



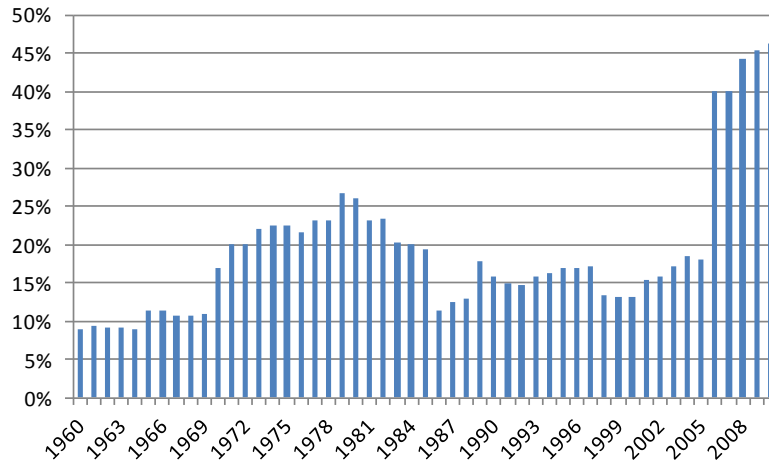
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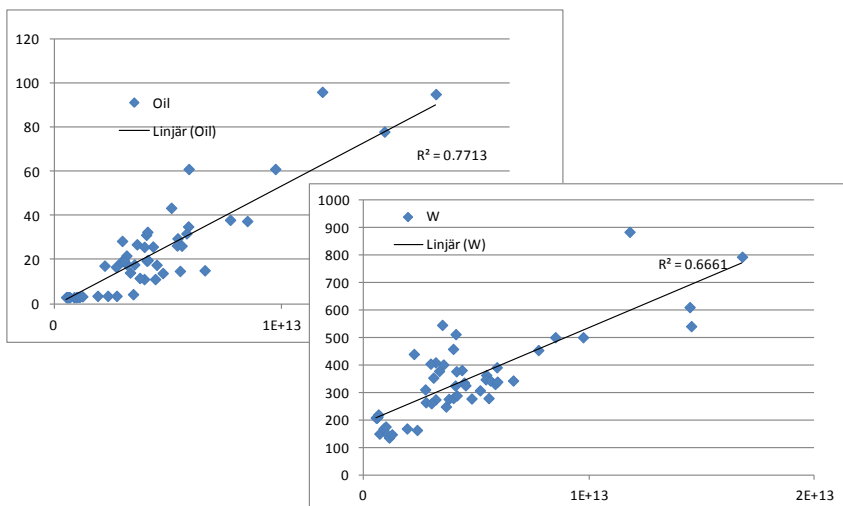
Is there some other common factor behind commodity waves?

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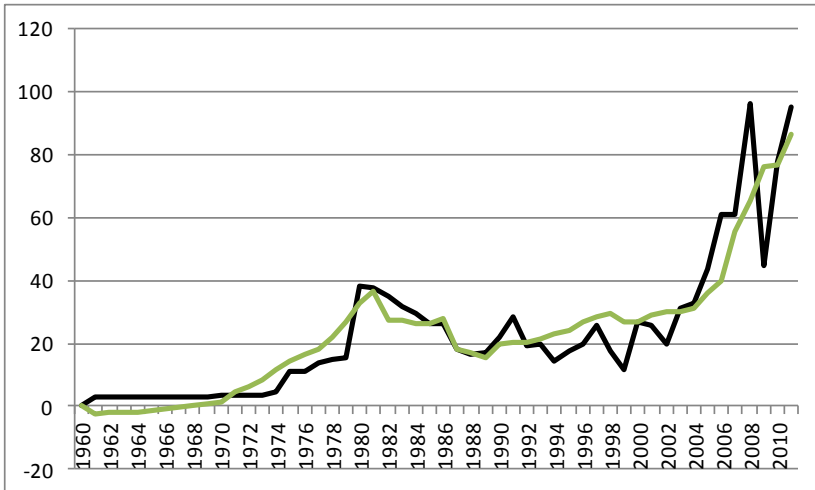
Share of global population with GDP per capita between 2000 and 13000 dollars



The sum of GDP for countries in the growth zone for GDP/capita as explanatory variable



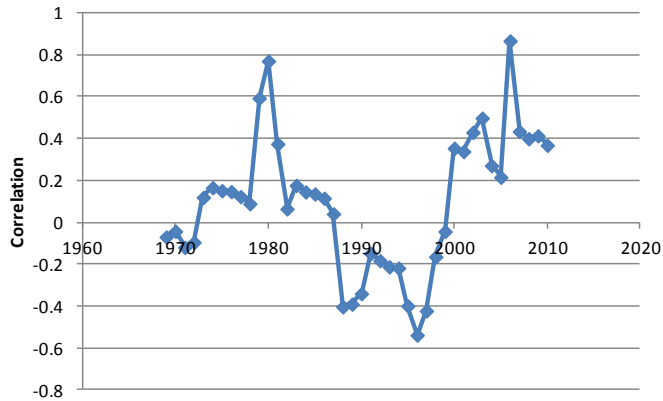
Crude oil (black) explained by the "Emerging market GDP indicator" and US CPI



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10 year rolling correlations between the "emerging market" indicator and the volatility of Chicago wheat prices



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22

Conclusion

The importance of financial flows is greatly exaggerated.

The fundamental and powerful demand force caused by the modernisation of half the world's population does not get the attention it should.

If you want to read more on this, there is for example:

Scott H. Irwin and Dwight R. Sanders, "*The Financialization of Commodity Futures Markets or: How I Learned to Stop Worrying and Love the Index Funds*", October 2010 (<http://ssrn.com/abstract=1699793>)

SEB

Price instability and competition law: the case of the potash cartel

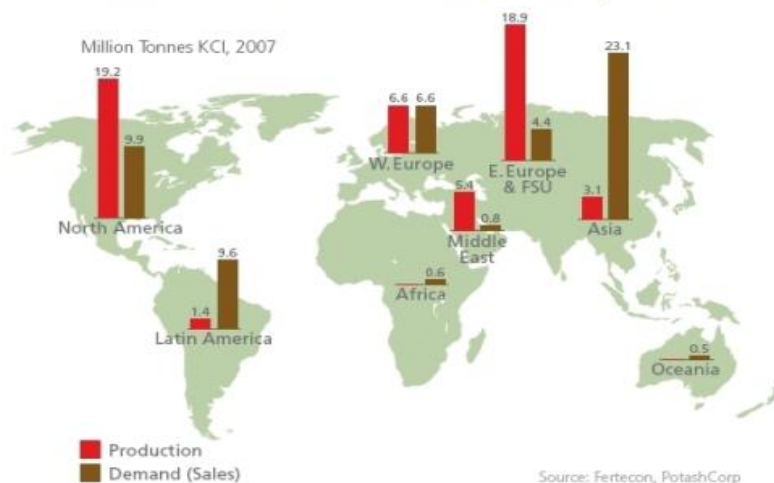
Frederic Jenny

Professor of economics, ESSEC Business School

OECD Global Forum on Trade and Competition 2012

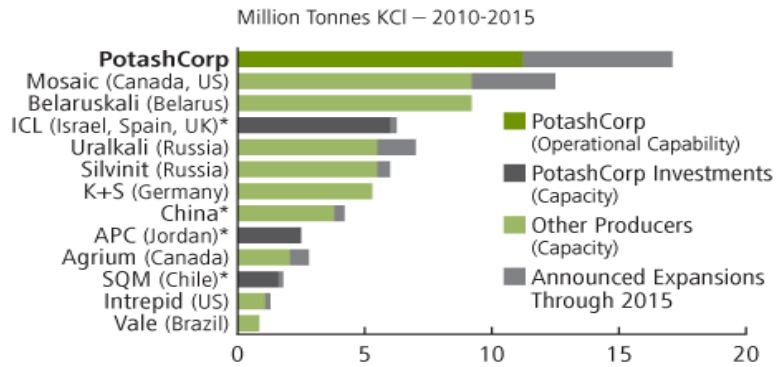
- 1) This presentation is based on F. Jenny « Export Cartels in Primary Products: the Potash Case in Perspective » in « Trade, Competition and the Pricing Commodities », F. Jenny and S. Evenett eds, CEPR, February 2012, available to download through the VoxEU.org website at <http://www.voxeu.org/index.php?q=node/7626>.

World Potash Production and Consumption



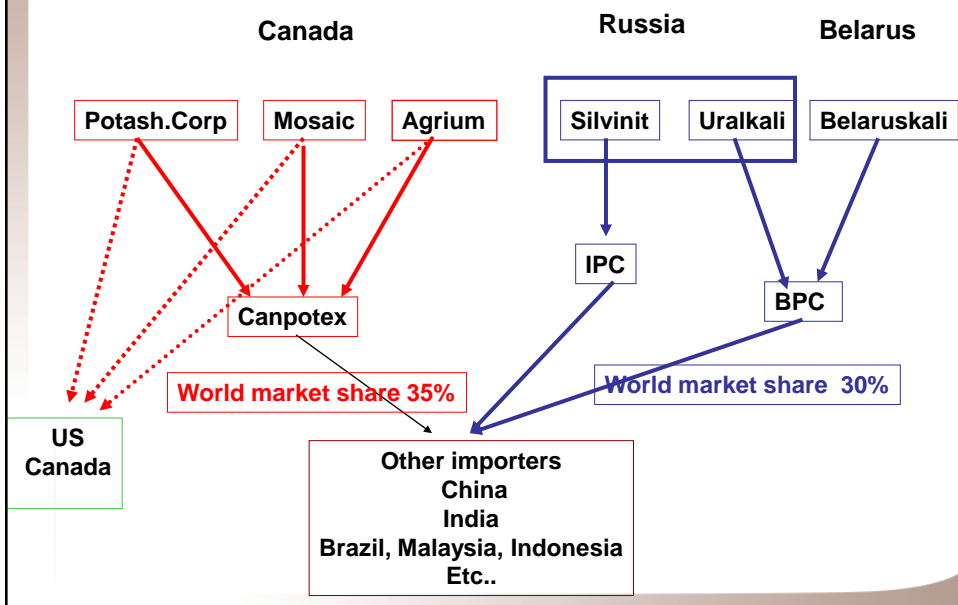
World Potash Producer Profile

PotashCorp growth potential is unmatched



* PotashCorp investments: ICL (14%), APC (28%), SQM (32%) and Sinofert (22%)
 Note: PotashCorp based on operational capability while competitor capacity is stated nameplate, which may exceed operational capability.
 Source: Fertecon, CRU, IFA, PotashCorp

The potash trade



Canpotex

“(PCS) uses its jointly owned subsidiary, Canpotex, to coordinate sales with Mosaic Co. and Agrium Inc. into export markets outside of North America and counts on market discipline among the three producers in determining volumes for North America (...)” (1).

1) Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc.—Risks and Opportunities, The Conference Board of Canada, October 1 2010, p15

East West Collusion

Less than 10 years ago, the Russian producers started to push up against capacity and realized it was in their interest to behave like oligopolists (1).

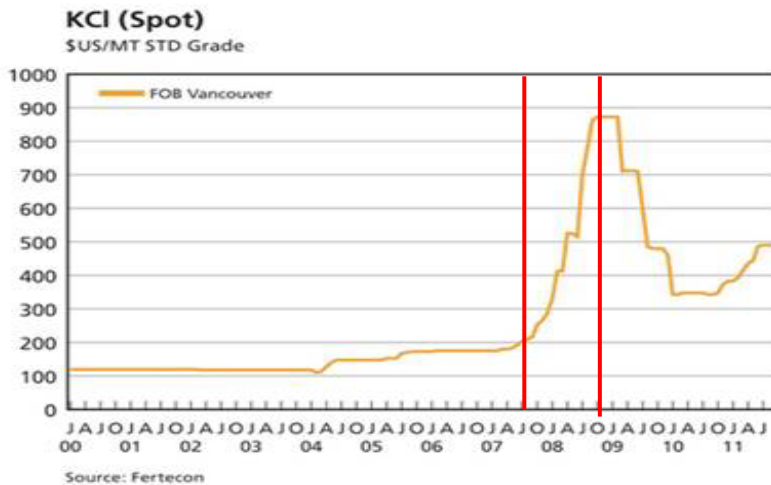
“Our strategy is that price is much more important than volumes,” Chief Financial Officer of OAO Uralkali, Russia’s biggest fertilizer maker, Victor Belyakov said in an interview yesterday in London. “It’s a strategy for most of the big players in the market. We usually cut some production to come up with a fair price.”

“Uralkali is following Potash Corp.’s strategy, and historically, Russian producers didn’t always do that,” he said. “If Russia and Canada have the same strategy, this is a much better business than it used to be.(2)”

1) Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc.—Risks and Opportunities, The Conference Board of Canada, October 1 2010

2) Bloomberg Business Week, Jan. 25 2012

World prices



In a period of **18 months** (January 2008 to October 2009) the **price** of potash **increased by more than 400%**.

The price of potash which historically had been for decades less than US\$ 200 per ton i multiplied by 250% between January 2008 and 2011

Production Curtailed to Match Demand



Global potash consumption dropped by about 9% in 2009 following a 16% decline in 2008. Global potash production plunged by 39%, shipments declined by 43% and the global trade volume dropped by 51% in 2009. Global potash production and trade volumes were at their lowest levels of the past 30 years.

Between 2008 and 2009 Canada's potash production declined by 56.3%. Potash.corp's production declined by 56%, Agrium's production declined by 50%

Cutting production to keep prices high

BusinessWeek

Bloomberg
Businessweek

Wednesday January 25, 2012

“Suppliers are seeking to prevent a drop in prices this year, concerned that demand has been “slow,”

Potash Corp., which **announced temporary cuts** at two mines in Canada last month, has since unveiled a four-week halt at its Allan mine and an extension of the shutdown at its Rocanville operation. Combined, Potash Corp.’s cuts total about 1 million tons, Credit Agricole’s Connelly said.

Mosaic, North America’s second-largest potash producer, said on Jan. 5 that it is **cutting production** by 250,000 tonnes over the first three months of this year, **trying to pressure prices higher along the Mississippi River supply route.**

OAO Uralkali, is **ready to cut production (by 10%) to prevent potash prices from falling** after Potash Corp. of Saskatchewan Inc. announced reductions this year.

The Conference Board of Canada
Insights You Can Count On



FINAL REPORT

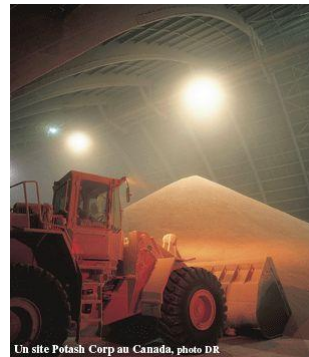
Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc.— Risks and Opportunities

Presented to:
Government of Saskatchewan

Prepared by:
The Conference Board of Canada

October 1, 2010

BHP attempts to take over Potash.Corp



Un site Potash Corp au Canada, photo DR

The Conference Board report

Scenario 1 : Base case

The base case forecast considers what would occur if a potential acquisition of PCS fails, or if an acquirer were to behave in a manner similar to that of the existing management at PCS.

The key assumption in this scenario is that the market discipline that potash producers have displayed in recent years will continue (....)

Scenario 2: Full production scenario

The key assumption in this scenario is that once a major producer like PCS breaks ranks with the other producers and maximizes production, all other market participants will follow suit.

Expected prices of potash

Price	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Competitive scenario	574	356	245	226	217					488
Canadian cartel Scenario	574	591	601	611	611					734

Predicted potash prices



Cost for India and China

if we assume that India will need an average of 6.5 million tons of potash per year between 2011 and 2020, the **overcharge it will pay each year** will be on average CAD\$ 1.183 billion (**US \$ 1.171 billion**), if it also **succeeds in getting an 18% discount**, and could reach CAD\$ \$ 1.825 billion toward 2015 when the pressure of demand will be greatest.

Thus, if the Indian government keeps on paying an annual subsidy of US\$ 1.5 billion to make potash fertilizers more affordable for Indian farmers, from 80% to 100% of this subsidy will in fact finance the monopolistic rent that potash producers will enjoy on their sales to India, thanks to the restrictive practices of the potash producers.

If we assume that **China** needs to import an average of 4 million tons of potash per year between 2011 and 2020, which is a conservative estimate based on the imports in 2008, the overcharge it will pay each year will be at a minimum **US \$ 500,000,000**, if it succeeds in getting a 30% discount from the cartel price (as it has recently), and could reach **\$ 1,144,000,000** annually.

Competition law responses: Canada

Competition Act

Art 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
(a) to fix, maintain, increase or control the price for the supply of the product (...)

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada(...)

In November 2010 the Canadian Bureau of Competition decided that it would not challenge the hostile bid for Potash.corp.

But that same month the Canadian government rejected the merger by using the Federal Investment Canada Act because it did not « provide net benefits to Canadians »

Competition law responses: United States

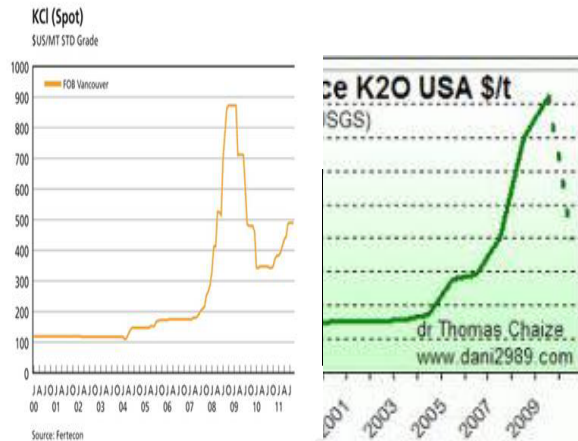
Two separate groups of plaintiffs, who were direct and indirect potash purchasers in the United States, filed nearly identical antitrust class actions alleging a global conspiracy to raise the price of potash at artificially high levels in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1

The court held that the complaint failed to provide any factual description of the way in which prices in China, Brazil, and India served as a “benchmark” for American prices and that it thus failed to permit **a plausible inference** that the defendants’ anticompetitive conduct in these foreign markets has **a direct, substantial, and reasonably foreseeable effect on potash prices in the United States.**

In November 2011 the seventh Circuit has granted rehearing en banc in this case

(1) United States Court of Appeals For the Seventh Circuit, No. 10-1712, SEPTEMBER 23, 2011, MINN-CHEM, INCORPORATED v.AGRIUM INCORPORATED.

World and US potash price



India's response

India is entirely dependent on potash imports and these imports are crucial to meeting the food needs of India's population. In this context, sanctioning the potash cartel by applying domestic competition law may create more problems than it solves both because the cartelists may be tempted to increase their export prices to India in order to recover any monetary fine imposed on them and because there is no easily available mechanism to ensure that sanctioning the cartel will deter the cartelists from fixing prices in India in the future.

One (limited) **possibility for India of responding to the cartel high prices for potash is to withdraw imports on a temporary basis**, and have farmers delay fertilizers application. This happened in 2009 (India did not buy potash in the first part of the year). India threatened to do it again in 2010, and it refrained from active buying in the fourth quarter of 2011.

But the potash producers are acutely aware of the fact that India cannot withhold its purchases of potash for very long without endangering its crops.

Competition law responses: China

In the spring of 2011, Mofcom cleared the the merger of Russian potash producers Uralkali and Silvinit subject to three behavioural conditions.

First, the merged entity must maintain its established sales process and procedures when supplying potassium chloride to customers in China.

Second the merged entity **must continue to meet the demands of China's customers** (including those in agricultural, general and 'special' industries) for potassium chloride - both in terms of product volume and product range.

Third, the **merged entity must continue to utilise traditional price negotiation procedures with Chinese customers and take account of the historical and current trading situation as well as the unique features of the Chinese market.**

As a commentator observed (): "By requiring the merged entity to maintain current levels of sales and supplies to customers in China, and to continue utilising existing price negotiation procedures, **Mofcom will have eased any concerns these customers may have had about the potential for price rises and increased disparity in their bargaining power with suppliers of potassium chloride.**

Conclusion

-1) Export cartels in primary agricultural products may allow SMEs to access international markets and increase competition

-2) But export cartels in primary agricultural products may also lead to price instability and monopolistic prices on the world markets for primary agricultural products.

-3) Export cartels can thus impose significant costs on importing countries.

-4) Because national competition laws in developed and developing countries usually exempt export cartels such practices are not curbed by the competition authorities of the exporting countries.

Conclusion

- 5) Total dependence on imports, lack of cooperation between competition authorities in cartel investigations, or restrictive conditions under which domestic competition laws apply to transactions abroad create significant obstacle in the importing countries limiting the possibilities to use of domestic competition laws to fight international or export cartels.

-- 6) Some scope for innovative use of competition law to fight (eg merger control in China).

- 7) A multilateral trade negotiation could limit the ability of countries to sponsor or tolerate the participation of their domestic firms in exploitative export cartels and / or provide for a mechanism to compensate countries victims of such cartels.

**A better multilateral framework on export cartels
and more cooperation between competition authorities
are needed**

Thank you very much

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COMPETITION AND COMMODITY PRICE VOLATILITY

Gustavo Lagos

Catholic University of Chile
Presented at the Global Forum on
Competition of the OECD,
Paris February 16, 2012.



Scope/Intro

- **Examine some of the causes and effects of volatility of the prices of copper, iron, aluminium, and gold, on competition and on the economies of producing countries that are dependent on the export of these commodities.**



Content

- **Aspects of price volatility**
- **Volatility for the four commodities**
- **Mineral commodity prices**
- **Mineral commodity prices and national economies**
- **Policies and practices for handling price volatility in developing countries.**



Causes & evidence of volatility

- **Two main causes**
 - **Market fundamentals: supply, demand.**
 1. Some key differences between commodities.
 - **Financial markets: speculation, hedging, commodity trade advisors, investment by pension funds**
 - Financial markets anticipate the trend of fundamentals, they act more rapidly than supply and demand.
 - Short time and long time effects.



Why is volatility a problem?

- Commodities with smaller volatility experience greater rate of growth
- Commodities traded in markets have $> V$ than those traded by producer prices or other methods.
- Affects terms of trade and currency value.
- Experiences on “managing” prices.
- Changes in terms of trade and profit margins are considered drivers of innovation and productivity



Measurement of volatility

$$Vol_t = \sqrt{\frac{1}{n-1} \sum_{i=1}^n (u_i - \bar{u})^2} \quad \text{where}$$

$$\bar{u} = \frac{1}{t} \sum_{i=1}^t u_i \quad \text{and}$$

$$u_i = \ln\left(\frac{P_t}{P_{t-1}}\right), \quad P_t \text{ is the price at time } t.$$



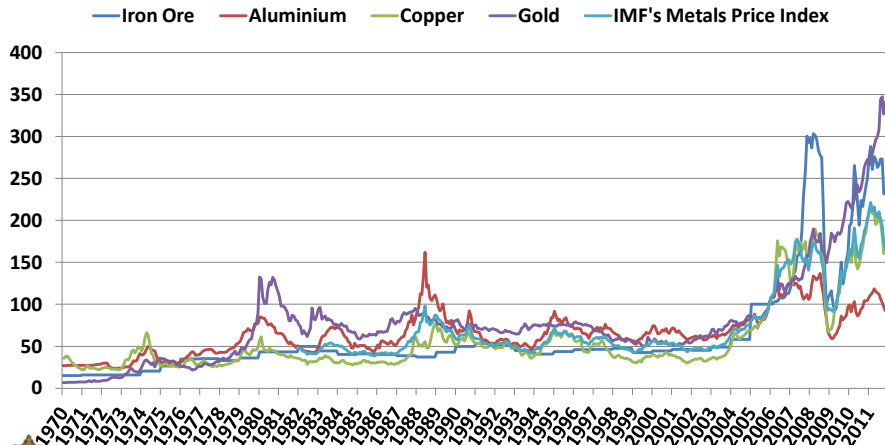
Measurement of volatility

	Volatility	Volatility	Volatility	Volatility
	Iron ore	Aluminium	Copper	Gold
1970-1974	11,2	16,2	28,4	21,8
1975-1979	15,1	26,3	32,6	27,1
1980-1984	13,6	27,9	14,4	39,7
1985-1989	7,2	32,7	17,0	15,3
1990-1994	11,8	19,1	14,1	5,6
1995-1999	7,4	16,0	22,0	7,3
2000-2004	7,2	11,4	23,0	8,5
2005-2009	50,4	27,0	33,7	9,1
2010-2011	32,6	11,8	16,0	0,9



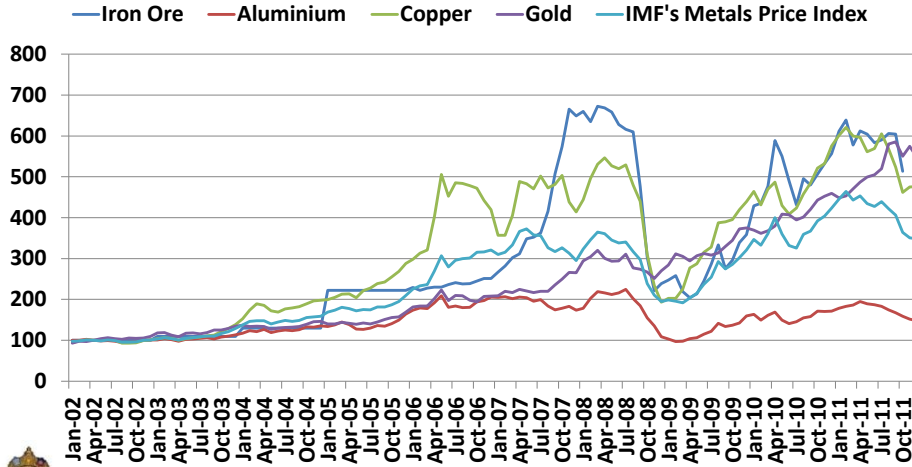
Mineral commodity prices

Metal commodity current prices
(2005-12=100)

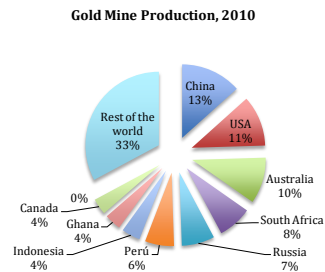
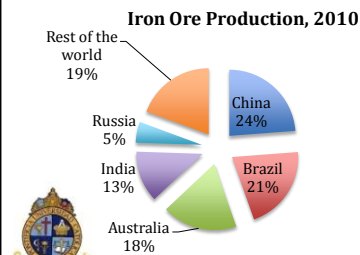
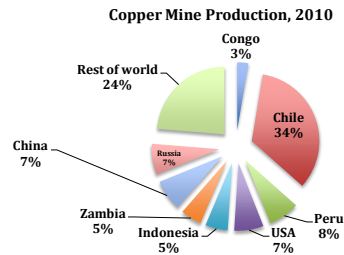
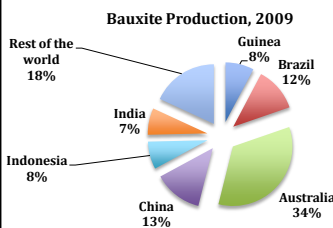


Mineral commodity prices

Metal commodity current prices
(2002-04=100)



Commodity prices and national economies



Mineral exports (excluding oil and natural gas) as % of total

- China, USA, India, Russia < 2%
- Indonesia 6%
- Brazil <15%
- Zambia, Peru, Chile > 50%
- Ghana 33%
- Guinea 80%



Policies and practices for handling price volatility

- Effect on trade balance
- Effect on currency value
- Dutch Effect
- Driving out the rest of the industries
- The case of Chile:
 - 1st SWF: 1986
 - 2nd SWF: 2006



Solutions

- Build Sovereign Wealth Funds, SWFs,
- Diversification of the economy
- Intervention of Central Banks to stabilize currency



Fondo de Estabilización Económico Social

Variación del Valor de Mercado (MM US\$)	2007	2008	2009	2010	2011			Desde el Inicio (1)		
					T1	T2	T3	Octubre	Noviembre	
Valor de Mercado Inicial	0,00	14.032,61	20.210,68	11.284,78	12.720,10	12.941,80	13.271,17	13.223,27	13.418,69	-
Aportes	13.100,00	5.000,00	0,00	1.362,33	0,00	0,00	0,00	0,00	0,00	19.462,33
Retiros	0,00	0,00	-9.277,71	-150,00	0,00	0,00	0,00	0,00	0,00	-9.427,71
Interés Devengado	326,15	623,95	404,27	227,63	62,58	61,78	56,18	22,40	17,12	1.802,07
Ganancias (pérdidas) de capital	606,81	556,08	-50,83	-3,51	159,37	267,91	-103,81	173,03	-170,03	1.435,00
Costos de Adm., Custodia y Otros (2)	-0,35	-1,96	-1,62	-1,13	-0,26	-0,32	-0,26	0,00	-0,06	-5,96
Valor de Mercado Final	14.032,61	20.210,68	11.284,78	12.720,10	12.941,80	13.271,17	13.223,27	13.418,69	13.265,73	13.265,73

(1) El FEES fue creado al refundir en un solo fondo los recursos adicionales de estabilización de los ingresos fiscales a los que se refiere el Decreto Ley N° 3.653, de 1981 y los del Fondo de Compensación para los Ingresos del Cobre, recibiendo su primer aporte el 6 de marzo de 2007.

(2) Incluye costos asociados a asesorías y otros.



Concluding remarks

- Financial markets may increase volatility of mineral commodities, but shorten price cycles, because they act faster than fundamental market forces.
- SWFs successful for oil producing countries, may provide macroeconomic stability in low price cycles – may also decrease overspending during high price cycle.
- Chile may be only emerging mineral economy (non oil producer) that has an SWF.

