

G&CO Cartels: Don't Make a Drama Out of a Crisis

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February 2009

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The Chairman of the Dutch Competition Authority has warned companies not to use the current economic crisis as an excuse to enter into illegal cartel agreements. Discussing the economic crisis in general is one thing but turning discussion into a coordinated industry response to the crisis is quite another.

We have witnessed "crisis cartels" before - from the 1973 oil shock to the response to the BSE crisis by beef farmers. Under the old EU regime it was possible to seek approval for the cartel by notifying the EU Commission. On rare occasions the EU Commission did grant an exemption: but only where it was shown that the crisis was caused by long term over-capacity requiring structural reform. Short or medium term market pain is not enough.

Under the new procedural rules and in the absence of an EU notification procedure, anyone brave enough to consider resorting to a crisis cartel would have to self-assess, i.e. make a determination of whether the EC Treaty Article 81.3 exemption criteria are met. This assessment would then be tested in any proceedings initiated before a national court or competition authority. If rejected, the reasons for the "cartel" could only be used as grounds for mitigation of any claim for damages or fine.

In times such as these, it is therefore government not industry that can take the lead - express interventions in the markets, state aid, rescue recovery or nationalisation. Thus the recent decision of the UK FSA to ban short selling would have become a major competition infringement had it been voluntarily implemented by the financial services industry.

What the Dutch Competition Authority may well be most concerned about is not the creation of new pan-European institutional cartels, but of smaller local level agreements to manage (*distort*) competition in these very difficult times. Sales people, worried not about bonuses but about their jobs, may feel that informal agreements with counterparts in other companies e.g. not to poach customers or to maintain price floors or maximum levels of discounts will help to bring back market discipline and confidence.

This is however a cartel, pure and simple and a hardcore restriction of competition to boot. This really would turn a crisis into a drama for all involved.

Footnotes:

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