The Role of Competition Policy in the Global Financial Crisis

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The following article summarises the recent statement of the BIAC Competition Committee submitted to the ongoing OECD discussions regarding competition policy and the financial crisis.

In the OECD Strategic Response to the Financial and Economic Crisis, it is stated that the “world is currently facing the most severe financial and economic crisis in decades” and further emphasised that “competition policy considerations should play an important role not only in financial sector bailouts and restructuring but also in the subsequent recovery.” 2

This article discusses the appropriate role of competition policy and the likely challenges that competition authorities will face going forward as a result of the global financial crisis. In assessing the appropriate role of competition policy in this context, governments should try to achieve an effective balance between appropriate regulatory oversight on the one hand and the continued reliance on normative competition principles on the other. In the latter part of this article, we offer specific suggestions, principally directed toward competition law and other regulatory agencies, that will help facilitate this balance in practice. In doing so, we focus on the relationship between competition authorities and other government regulators and make specific proposals as to how the agencies might effectively interact with each other in addressing critical issues that arise out of the global financial crisis. Finally, we note that the OECD, and in particular its Competition Committee, is well positioned to play a leading and constructive role in this area.

The need for balance between prudential/regulatory oversight and normative competition principles

Various views have been expressed as to the causes of the global financial crisis. Many commentators suggest that the crisis has some footing in a lack of proper regulatory oversight by financial sector authorities in various countries in relation to certain key areas (eg, inadequately regulated housing mortgage distribution markets and related security products, and failure to apply adequate risk management practices). 3 Notwithstanding the debate over the precise nature of the cause of the crisis, there is a broad consensus that the global financial crisis was not a result of a failure of effective competition policy. As such, there is no good reason to exclude competition and market considerations from decisions that will need to be made in this crisis concerning the restructuring of industries and economic sectors going forward. Accordingly, the challenge for governments is to find the right balance between financial sector regulation directed towards ensuring prudential and fiscal viability on the one hand and applicable norms of competition policy on the other.

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In this respect, it is important that we distinguish between regulatory failures and market failures. The global financial crisis was caused or contributed to by a series of regulatory failures both at national and international levels, as well as a series of risk management failures within the private sector. Our many years of experience and learning all suggest that faith in a market-based system should not be eroded as a result of this crisis. Competitive markets produce more wealth and efficiency, as well as economic stability and security, than any other system. Excessive economic controls by central governments have proved largely to be less efficient and less wealth maximizing. In short, competition policy should not be ignored or temporarily set aside; rather it must be utilized as a tool or necessary input within the overall economic and financial policy framework applicable to decisions made in the context of the financial crisis. Furthermore, as history has shown, competition policy can serve to act as a stabilizing force and provide legal certainty in uncertain economic times. 4 Accordingly, in formulating policy measures to address the economic crisis, governments should strive to the extent realistically possible to have competition norms be part of the decision-making process.

Nobel Prize winning economist Joseph Stiglitz explained that even Adam Smith, who is often regarded as a staunch proponent of free markets, recognized that some regulation is necessary:

“Adam Smith, the father of modern economics, is often cited as arguing for the ‘invisible hand’ and free markets: firms, in the pursuit of profits, are led, as if by an invisible hand, to do what is best for the world. But unlike his followers, Adam Smith was aware of some of the limitations of free markets, and research since then has further clarified why free markets, by themselves, often do not lead to what is best...”

Government plays an important role in banking and securities regulation, and a host of other areas: some regulation is required to make markets work...

The real debate today is about finding the right balance between the market and government...Both are needed.” 5

Indeed, in his Inaugural Address, President Obama stated:

“Nor is the question before us whether the market is a force for good or ill. Its power to generate wealth and expand freedom is unmatched, but the crisis has reminded us that without a watchful eye, the market can spin out of control...” 6

However, rather than see the pendulum swinging to excessive regulation and intrusion on an overly draconian basis, we suggest there should be a careful and well-thought out balancing of the principles applicable to crisis management and prudential regulation on the one hand, and the maintenance of normative competition, free market principles on the other. Debates about lessons to be learned from the financial crisis must not be about the “end of capitalism” or the “failure of the market economy.” In this regard, we can and should draw upon lessons from the past. For example, we certainly have much more learning at this stage regarding the importance of such competition norms and the dangers of protectionism than had been the case during the early part of the Great Depression.”

As a result, policy discussions concerning the appropriate scope of regulation need to be based on facts and not be driven by ideology or opportunism. For example, empirical evidence and analysis should continue to guide the policy action and the implementation of solutions. Markets should be kept open and transparent but subject to appropriate regulatory supervision. No matter how tempting it may be to protect and promote ‘national champions’ increased state intervention in the economy should be treated with care. The process of deregulation and increased reliance on competition policy should continue in relation to markets that are presently excessively regulated especially in newly industrialized nations. Finally, a certain degree of risk-taking is necessary in order to promote and foster innovation.

Specific suggestions concerning competition law enforcement policy going forward

Competition law agencies will have an increasingly important role to play in achieving a sensible balance between regulatory oversight and normative competitive principles on a going forward basis. We offer the...
following suggestions:

First, competition authorities should work in tandem, right from the outset, with sector specific regulators, especially in relation to critical issues in the financial services sector. Financial regulators should apply their expertise in regulating standards of prudence, while competition authorities should apply normative competition provisions and their wealth of experience in the review of business conduct, significant acquisitions and major restructurings. In order to achieve this, mechanisms need to be in place to allow for close coordination of their respective teams on the ground, right from the beginning of the matter. In essence, competition authorities should be included in the decision-making process concerning the overall framework resolution; in other words, competition law agencies should be invited to join the public sector discussions, and should accept the invitation to be at the table as early as possible.

In addition, practical experience suggests that effective coordination between two or more public sector bodies necessitates full information sharing among them. Such information sharing must be done in a manner that protects the confidential and competitively sensitive information that either or both statutory authorities need to respect; if necessary, waivers and other regulatory protection should be established to allow for this full sharing of such information. Experience in parallel merger reviews among domestic competition authorities from different nations has shown that the best way to avoid contradictory conclusions, which can produce uncertainty and delay, is to have teams on the ground (preferably experienced analysts and case officers) who could work together from the beginning of the process. This will significantly reduce the potential for conflicts and ought to give rise to the greatest likelihood of properly informed decision-making.

A second recommendation directed towards competition law enforcement agencies is that they need to have tools available to operate with sufficient speed and flexibility to complete even large and complicated reviews in an expeditious timeframe when the circumstances warrant, particularly in the area of mergers and restructurings. We note by way of example the new emergency rescue powers that European Commissioner Neelie Kroes has referred to recently as an important adjunct to her powers to decide mergers regulating financial institutions in a very short timeframe.6 We also note in this context that representatives of the United States Department of Justice are able to work expeditiously with competitive information of the United States Federal Reserve Bank and share requisite information on an expedited basis when necessary. In our view, these are both examples of the kind of timely and procedural flexibility that competition authorities need to have available in order to be able to contribute to the decision-making process in the context of a financial crisis. In essence, we suggest that competition authorities should have in place a framework for such situations so that they can play an effective role in what are often very limited timeframes. We therefore suggest that national competition authorities consider crafting not only substantive criteria (which may include failing firm principles) but also procedural criteria that will allow decision-making to be done in an expedited and orderly manner.

Third, we suggest that the OECD can play a leading and constructive role on a going forward basis having regard to its relevant experience and level of expertise. The Competition Committee of the OECD has a history of developing Recommendations and Best Practices in areas such as exchange of information between competition authorities, merger reviews and anticompetitive practices affecting international trade. We would suggest that the OECD Competition Committee could work towards establishing guidelines or best practices for cooperation between competition law authorities and financial sector regulators. This would ultimately establish a suggested framework for procedures allowing representatives of the two agencies to confer as early as possible and share all relevant financial and market related information, all under the umbrella of respecting all appropriate confidentiality protections. These procedures would ultimately assist in coordinating and expediting reviews and, as mentioned earlier, should also assist in avoiding potential conflicts.

We also suggest that the OECD Competition Committee could develop guidelines or best practices directed toward the substantive and procedural criteria applicable by the competition authorities in evaluating business practices during critical industry or economic crisis situations (eg, situations where a firm is failing or in danger of failing). By way of examples, these best practices could try to establish considerations relevant to determining likely insolvency without having to wait for actual insolvency; or the criteria and timelines that should be applicable to any “search” for a competitively preferable purchaser. Some of these criteria are already incorporated in national guidelines.7 The same would apply to procedural best practices directed toward trying to ensure that the competition authority is able to contribute, on an expedited basis, its input into the decision-making process.

Business remains committed to the application of competition norms in the context of the financial crisis and looks forward to continued engagement with governments and other relevant stakeholders on these issues.

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1. Founded in 1962 as an independent organisation, the Business and Industry Advisory Committee to the OECD (BIAC) is the officially recognised representative of the OECD business community. BIAC’s members are the major business organisations in the OECD member countries and a number of OECD observer countries, www.biac.org.

2. OECD Strategic Response to the Financial and Economic Crisis at pages 6 and 10 (paragraph 13). 2009 This OECD publication is issued under the responsibility of the Secretary-General of the OECD. It is available at www.oecd.org.


4. See D Gerard, Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not of the Problem, Global Competition Policy; December 2008 (source: www.globalcompetitionpolicy.org).


7. See paper by John Fingleton, OECD, UK Office of Fair Trading, entitled ‘Competition Policy in Troubled Times’, January 20, 2009 (source: http://www.oft.gov.uk/shared_oft/speeches/2009/ sp0109.pdf) where he states, inter alia: “The credit-crunch raises a more general risk that the emphasis on open, competitive markets and the benefits that they deliver is reduced or even lost as part of an overall regulatory response. The suspension of competition rules by the Roosevelt administration in 1933 is argued to have added to the duration of the Great Depression, and government intervention to restrict competition in ‘structurally depressed industries’ prolonged the Japanese recession in the 1990s. On top of the clear evidence that competition contributes positively to productivity growth and competitiveness, these episodes should serve as a warning against the attractive siren’s of reduced competition.”

8. For example, Neelie Kroes, the European Commissioner of Competition, has stated: “The College of Commissioners has granted new powers to ensure that rapid decisions are made to protect our future... Using these powers, I am able to decide favourably on emergency rescue measures of financial institutions within a very short timeframe, including over the weekend, to protect our future.”


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