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How can National Competition Authorities Mobilize in Times of Global Crisis?

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I. INTRODUCTION: LOOKING BACK AT THE SHIFT FROM A LOCAL MORTGAGE CRISIS TO A GLOBAL FINANCIAL CRISIS

The crisis that started with the U.S. mortgage market has spread to the worldwide banking sector. Over the last year, individual defaults have multiplied, even though the central banks massively injected liquidities into the money markets. As a result, confidence has receded, interbank lending has rarefied, and credit has started to crunch.

European governments have taken steps to restore trust. At first, their interventions consisted in *ad hoc* measures of rescue and restructuring—or in some cases of winding down—aimed at handling individual situations. Later, when it became apparent that the size and the intensity of the crisis were unprecedented, these measures evolved into more comprehensive schemes including guarantees, injections of capital, getting rid of toxic assets, and so on.

In such situations, there are basically two ways of going forward: either each Member State acts unilaterally, with a high risk of taking fragmented and conflicting measures that may either cancel one another or even make things worse; or Member States endeavor to coordinate their initiatives and come up with a consistent approach,

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beneficial to all. Europe was created out of a major crisis—Word War II—and it has often moved forward in times of crisis. We are now faced with a global market failure, although situations may obviously differ from one bank to another, from one segment of the market to another, and from one Member State to another. I am confident that, this time again, Member States will agree on a common strategy, just as they have begun doing in the last weeks.

The Euro Group and the EU Council and Commission have also started to play their part to ensure this result. The Commission has already accepted almost 25 national measures qualified as State aid, pursuant to discussions that permitted the Member States to design them in a way that was compatible with the common market. Twenty further draft measures are currently under assessment.¹

At the same time, we have heard a number of sirens calling for a relaxation or even a suspension of competition rules. But I said earlier that European and national leaders agreed to restore “trust,” not to restore “trusts”! On the contrary, these leaders have repeatedly insisted that antitrust and, more generally, competition concepts and instruments, are flexible enough to be accommodated in all weather.

Of course, as I said in Fordham last September, competition authorities are not wonder-doers. They are not empowered to do everything and they cannot do everything. Their mission and their means are limited. What they can—and must—do is make sure that firms compete on their merits and do their best to attract consumers with newer or better products and services at better prices. Why? Because competition fuels innovation,

¹See EU Commission MEMO/08/766 of December 4, 2008, *State aid: Overview of national rescue measures and guarantee schemes*.

productivity, cost-effectiveness, and ultimately growth; and because growth translates into jobs, wages, purchasing power, and, ultimately, consumer welfare.

Still, competition enforcement is well placed to contribute, in its field of competence, to forging viable solutions to the current international market failure. Let's not forget that our core business is to make markets work and to prevent or remedy a certain type of market failure, namely changes in structures or market behaviors that harm consumer welfare by substantially lessening competition or excluding efficient competitors from the marketplace.

I would like to look at how national competition authorities ("NCAs") can bring added value to the huge effort of solving the current crisis. I say "can" because a word of caution is warranted: visions never translate into results without hard work. And I shall try to answer the question from the following three angles: Where do we fit in the big puzzle? What can we do? What can we say?

II. WHERE NCAS STAND: LOOKING AHEAD AT THE COMPETITION ARCHITECTURE

Competition enforcers heavily rely on economics, but they also apply legal techniques: putting together the facts, assessing them, and drawing a conclusion from this assessment. Above, I briefly sketched the way European and national leaders handled the financial crisis.

Extracting a conclusion out of these raw facts, I would say that we do well not simply when we act together, but also when each of us has a part in the play—and ideally

the one for which he or she is best suited for. This is in line with economics, according to which we should make the best of our comparative advantages. It is also in line with the law, since the EU Treaty shares competences between the Union and its Member States and directs them to do what is best at each one's level. Finally, it is in line with our competition enforcement system, since the quest for the well-placed authority, if not the best-placed authority, is at the heart of the architecture set up by Regulation 1/2003 and Regulation 139/2004.

So competition enforcement is a shared competence. There are common rules as well as national rules. There is also a network of authorities. All of these must be mobilized to deal with the current financial crisis. Different authorities may be best placed to contribute to this common challenge, depending on what the problem at stake is (namely, which market(s), market player(s), and/or market situation(s) we are dealing with) and what the called-for solution is (namely, a State aid, a merger, or an antitrust approach). State aid control is a European tool. Merger review is a shared instrument. So is antitrust enforcement. But advocacy also features in our toolbox. I mention it last but it is certainly not the least of our options.

Before addressing competition enforcement and competition advocacy, I will very briefly mention State aid, because it is a stage on which NCAs are not actors but spectators. Being a spectator can be a good position, because it gives you a rare chance of meditating.

Eliminating internal barriers to trade and unilateral public subsidies is at the heart

of the European adventure, producing a single market. Historically, European firms have benefited from this opening of national borders and from this creation of a level-playing field, both of which have enabled firms to reach new markets and clients.

This cannot be a one way deal, for reasons both of strategy and necessity: Strategy, because we have to open our economies if we want others to open their own; and Necessity, because we need others for the commodities, mass products, and sometimes innovative techniques required to fuel our growth. Reciprocally, others depend on us insofar as they need our customer base to sell their goods, as well as our know-how to build their development. So this exchange should be fair, something that can only be achieved if it is not biased by competition and trade distortions.

This is why it is important to have a common State aid control aimed at making sure that national interest and community interest move hand-in-hand. But it is also very important to think about international disciplines, as provided, for instance, under World Trade Organization ("WTO") rules on subsidies (i.e. State aid granted by non-European countries), dumping, and other obstacles to trade. These instruments of global convergence have real teeth and should be fostered. European practice and case-law on unwarranted foreign subsidies are developing,² something the French Presidency expressly called for a few weeks ago.³

²Including in cases where third countries grant aid (loans, guarantees, recapitalization, and so forth) through private companies acting under their direction (*see, e.g.* Case T-383/03, Hynix Semiconductor / Council and Commission, pending before the European Court of First Instance).

³Luc Rousseau, Director General for Enterprises at the Ministry of Economy, Industry and Employment, keynote speech on *Globalization, Financial Crisis, Innovation and Climate Change: challenges for a modernized State aid policy*, State Aid Conference, Brussels, November 21, 2008.

III. WHAT CAN NCAS DO: LOOKING AHEAD AT COMPETITION ENFORCEMENT

The banking sector has undergone dramatic change since the beginning of the century. Markets have consolidated. Bigger groups have emerged. But a number of markets and market players remain national in scope. So it is foreseeable that, if banking mergers take place, a number of them will be treated under national rules. How can we best manage them? Let's look first at processes, and then at substance.

Starting with processes, I think we have to learn a lesson from the way the Commission handled recent State aid cases. In circumstances of widespread crisis, of possible systemic risk, there may be emergency situations. In such cases, we may have to act in a matter of days, if not hours. The merger review processes are swift—with a maximum of 25 working days for a “phase 1” and 65 working days for a “phase 2”, (if I take France, since the reform due to occur on 1st January 2009⁴ has shortened the phase 2 period). This is something I have advocated, because shifting from two competition agencies to a single one must translate into palpable efficiency gains for market players, especially time efficiencies. Even still, standard periods are by no means short enough to accommodate urgent cases.

Is that a real problem? Not to my mind. After all, urgency is business as usual in antitrust cases. Take the French example. Article L. 464-1 of the *Code of commerce* allows the *Conseil de la concurrence* (and tomorrow the *Autorité de la concurrence*) to take action in urgent antitrust cases, in which, on the one hand, the behavior at stake is

⁴Law N. 2008-776 of August 4, 2008 of Economic Modernization and Ordinance N. 2008-1161 of November 13, 2008 of Modernization of Competition Regulation

prima facie liable to contravene the rules prohibiting cartels and abuses of a dominant position, and, on the other hand, this behavior is such that it causes immediate and severe harm to the interests of the plaintiff, to the sector, or to the economy at large. In such cases, we may either grant the interim measures requested by the complainant or craft whichever relief measure we deem fit. Such a provision, which is also provided for by Regulation N. 1/2003⁵ as well as by a number of national legislations, can give rise to a significant practice. Around 15 requests are annually brought to the *Conseil*, which grants between three and six every year, mainly in unilateral conduct cases.

We might want to think more about urgency in merger cases. The parameters are at the same time both identical and opposite to the ones that govern antitrust interim relief. Identical insofar as we should seek to preserve a chance of future competition, by taking urgent measures that cannot wait the completion of a full assessment of merits. Opposite, insofar as this chance of future competition can only be preserved by allowing something to happen, rather than by preventing it from happening.

European and national rules—Article L. 430-4 of the *Code of commerce* in the case of France—allow us to do just that by giving merging parties a waiver from the standstill obligation imposed on them and by authorizing them to “effectively complete all or part of the merger (...) in the event of a duly substantiated special necessity.” In such a case, the operation can take place without waiting for our decision, but also, needless to say, without prejudice to its outcome. The law does not expressly state that this waiver can be conditional, but nothing in the text prevents us from conditioning a

⁵Regulation (EC) N. 1/2003 of the EU Council of December 16, 2002 relating to the implementation of competition rules provided by Article 81 and 82 EC

partial or full waiver on specific commitments, including *e.g.*, relevant safeguards and review mechanisms. As in antitrust, our guiding principle should be to adapt our *prima facie* analysis and solutions to the specifics of the merger under examination. We should, at any rate, be convinced that the measures that are given a go ahead are not liable to cause irremediable harm to competition.

However, this is only one of the instruments available in our toolbox. The financial crisis should lead us to search for all possible procedural efficiency gains. Here again, the Commission's recent State aid experience sheds light on what can be done. Notifying the merger is a red line that should not be trespassed: companies must in any case notify their projects so we can look at them. But the content of the notification can be adapted, provided companies cooperate. Here, I would like to send an important message to market players: we can help you, but you must help us to help you! If firms and lawyers come and frankly talk to us ahead of the merger; if they provide us immediately with trustworthy, relevant, and complete information, that will tremendously help in speeding up the process and in reaching suitable outcomes for all.

Turning now to substance, it is important to remind the sirens who call for cartelization and monopolization that where we stand in the future depends on what we do at present. We cannot say "no future," like rebellious adolescents. We must take care of the flood and at the same time prepare for after the flood, like Noah. The short-term need for market players, governments, and competition authorities to respond quickly to the financial crisis is our number one priority. But the long term impact of our initiatives

on consumers is also our number one priority! Today's solutions should not become tomorrow's problems. We are all aware that we would head that way if we allowed crisis cartels and oligopolies to further weaken already-weakened competition, and, ultimately, to abuse their market power by foreclosing efficient competitors from the marketplace and charging supra-competitive prices to consumers. Governments have commissioned us to regulate competition. We must stand for our mission.

We should also remind the grandchildren of those who called for cartels and monopolization, back in the 1930s, that modern competition concepts are fair, balanced, and efficient. Up to now, a vast majority of banking mergers have been cleared because they did not give rise to any significant competition concerns. A number of other operations have been authorized either because the potential for competitive harm was alleviated by commitments and remedies, or because the potential was balanced by efficiency gains. All of this is routine.

But competition enforcement not only addresses normal market conditions; it also anticipates exceptional circumstances. Today's dramatic evolution of market conditions may put a number of business models under pressure. Companies that had opted for riskier strategies are headed for trouble. But fundamentally sound companies may also be affected. There are laws designed specifically to put companies back on track—bankruptcy law for instance. But all laws in general, and competition law in particular, are framed for good times as well as for bad times.

Building on our fundamental objective of articulating short-term challenges and

long-term conditions of economic prosperity and welfare, I see at least three ways in which the current market circumstances may impact merger enforcement.

The first one is also the most obvious. We should be able to carry out a true and comprehensive competitive assessment of mergers. The crisis does not mean that competition authorities should simply rubber stamp cases on the grounds that market consolidation helps return the situation to normal market conditions. That is exactly what the new French merger control institutional framework⁶ is designed to avoid. The *Autorité de la concurrence* is called upon to assess all merger cases and take a decision based exclusively on competition grounds, pursuant to a phase 1 if the operation does not give rise to serious concerns or to a phase 2 if it requires an in-depth evaluation. Once it has handed out its final decision—and only once—the Ministry of Economy can evoke the case and make a decision based on grounds of general interest other than competition. The authority is thus always put in a position—and indeed required—to make a comprehensive competitive assessment before the minister can jump in and strike a balance between competition and other policies, if the case has strategic implications reaching beyond competition.

Second, our competitive assessment must take due account of the crisis. All cases are different, but they fall basically in two categories. On the one hand, there are mergers that cannot be justified on standard grounds of efficiency gains, but that can be accepted because, but for the merger, one of the parties will exit the market without being replaced by another efficient actor. This failing firm defense is available when a number of

⁶See footnote 4.

cumulative requirements are met. It must be proved, on the basis of cogent and convincing evidence, that: (1) the acquired company would rapidly disappear if it were not taken over; (2) there is no alternative and less anticompetitive purchase; and (3) absent the merger, the acquired company's assets would inevitably exit the market and result in greater damage for consumers. This defense has already been applied on a number of occasions at EU and national levels.

On the other hand, there are hopefully a number of cases in which the consequences of the financial crisis do not reach such extremes. Does this mean that we should not take them into consideration? For instance, two banking firms are believed to enjoy a strong market position. But they have opted for different business models. One has decided to build a competitive edge by investing massively in risky instruments. The other has stuck to traditional retail and investment banking. They desire to merge. Obviously, we have to look at all relevant market circumstances, from market shares to barriers to entry, from business models to prospective competition, etc. Even if neither of them is a failing firm, we have to make sure that the market position of each is indeed what we thought it was before the financial crisis unfolded in September 2008.

Third, these complex economic issues take time to assess. Granting an upfront waiver from the standstill obligation may be possible in duly justified cases, but we need to make certain that the provisional implementation of the merger will not irremediably damage competition. In any event, we cannot compromise on the need to make a fully-fledged assessment on the merits and to guarantee that the final decision will not produce

any risk of substantially lessening competition. This implies the need to: gather all the necessary evidence; fully look at it; and seriously discuss it with the concerned parties and, possibly, with third parties—all in order to take a well-informed and well-thought-out decision.

Remedies could prove decisive in the coming weeks. As indicated earlier, we may have to think not only about making commitments compulsory at the end of an expedited review (“phase 1”) or of an in-depth assessment (“phase 2”), but also about conditions imposed in conjunction with an authorization to implement a part or all of the merger pending the assessment on the merits. For instance, acknowledging the existence of a failing firm situation does not always imply that the company that acquires the assets should keep the entire business, whatever the cost to be paid. It can be necessary to accept a merger in order to ensure the survival of a failing firm. But if the market position resulting from the merger is liable to excessively weaken competition—if it amounts to monopolization—behavioral safeguards and review mechanisms could be devised.

However, the State aid experience is not necessarily transposable. Aid is reviewable. It can be refunded. This issue of reversibility arises in a very different way in merger cases. A number of behavioral remedies can be devised to prevent anticompetitive effects of vertical mergers leading to substantial market positions. But what about horizontal mergers? In these cases, behavioral remedies may be less suited than structural remedies. However, conditioning an approval with the requirement that the merger be reviewed in two years, or that specific parts of the assets or businesses

acquired by the notifying party be severed and sold once the market has stabilized would give rise to very difficult and perhaps insurmountable issues of predictability and feasibility.

IV. WHAT CAN NCAS SAY: LOOKING AHEAD AT COMPETITION

ADVOCACY

I will be much shorter on this last point, because the key message is that it is useless to be convinced if you do not convince others. The availability, relevance, and added-value of competition and competition enforcement must be communicated to private- and public-decision makers. This ongoing advocacy effort could focus on a select number of very straightforward messages:

1. Competition is a tailor-fit tool, not a rigid doctrine. In the same way as our key concepts, procedures, and instruments are adaptable to all markets, they are adaptable to all market conditions. But we must stand by the mission we have been entrusted with: making sure that free enterprise means freedom to offer the best deal to consumers, not freedom to abuse consumers.
2. Competition enforcers should be committed—and should make it known that they are ready—to play their part in fighting the current financial crisis, by handling the competition aspects of this international market failure. This is a priority. Means and human resources must be dedicated, even though the handling of urgent cases should not put our work on other cases at risk.
3. Our competitive assessments and conclusions should duly take into consideration

the relevant market conditions resulting from the crisis. We should not shy away from innovative solutions, but at the same time we should not compromise on our defense of long term competition, which is a fundamental tenet of innovation, productivity, efficiency, growth, and welfare.

4. We should make use of all available procedural tools to ensure swift, responsive, targeted, efficient, and predictable solutions. This task does not always stop with the decision: overseeing the honest and fast implementation of commitments and remedies, as well as evaluating their impact on competition on the marketplace, is an integral part of our job.

V. CONCLUSION: LOOKING AHEAD AT THE SHIFT FROM GLOBAL FINANCIAL CRISIS TO GLOBAL ECONOMIC HARDSHIP

To sum up, competition enforcers can be part of the solution to the crisis if, and only if, two conditions are met:

- They have a clear, principled, and consistent vision of their objective, which is to stand for the long-term market conditions necessary to foster growth and welfare, for the wider benefit of firms and consumers; and
- They opt for a responsive, flexible, and efficient approach to their means, by adapting their processes and tools to the short term market conditions created by the financial crisis.

If they do so, NCAs will manage to successfully handle competition issues that are best treated at their level. Let us hope that these issues will consist primarily of

mergers and not of too many cartels.

However, merely doing so is not going to be enough. It is equally important not to lose time, because the financial crisis has now spread to the real economy and evolved into an economic crisis. Needless to say, the scenarios to be tested in banking cases in the coming months will draw heavily on the present market conditions as well as on the specifics of these industries. Therefore, they will not necessarily be replicable in other sectors. But they will certainly provide food for thought.