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Antitrust in Distress: Causes and Consequences of the Financial Crisis

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This article examines the role of antitrust in the causes and consequences of the crisis. If market turmoil and financial upheaval can shatter the groundwork of competitive markets that antitrust seeks to protect, the shockwaves are sure to be felt in the intellectual foundations of competition policy. Section 2 considers whether antitrust contributed to the financial crisis and briefly describes the pre-crisis role of competition policy on both sides of the Atlantic with regard to the transformations that the banking sector underwent in recent decades. Section 3 analyses the crisis response on the antitrust front. Of particular importance are the two areas where the bailouts tend to collide with antitrust: mergers and, in the European context, State aid. Section 4 then looks at the challenges that economic crises have placed on antitrust enforcers. It is submitted that as the crisis deepens and recovery fails to take hold, the risks to antitrust are far more dangerous and less visible today. Although overall, antitrust enforcement does not seem to be seriously weakened in the US and at the EU level, there are troubling signs that as the current sovereign debt crisis deepens, at least some Member States may want to put a lid on antitrust. A global economic slowdown will tend to make it easier for those claiming a less aggressive antitrust policy is necessary to foster growth. Section 5 concludes that the financial crisis may increase the bias toward accepting ever-larger bank mergers. After all, if an orderly takeover is needed, to whom will central banks look to? The recent crisis showed who the usual suspects are.

1. INTRODUCTION

Taking a step back to the end of the twentieth century, we can recognize the harbingers of the financial crisis in episodes of localized financial meltdowns such as the Enron scandal (in particular regarding the unsupervised use of Structured Investment Vehicles to leverage capital and engage in risky transactions)[1] and the earlier Long Term Capital Management Fund debacle with the ensuing rescue by large Wall Street banks under the Federal Reserve's leadership.[2] In the recent financial crisis the telltale signs of greed, overconfidence in upward trends, the vulnerability of the financial sector to highly counterpart-dependent trades are also to be found. However, they were compounded by years of lax monetary policy, poor corporate governance (particularly visible in the fall of Lehman Brothers)[3] and also government failures in regulation. In short, hubris,

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[1] For an overall account, see Bethany McLean; Peter Elkind, *The Smartest Guys in the Room*, New York: Penguin, 2004.

[2] Excellently described in Roger Lowenstein, *When Genius Failed*, New York: Random House, 2000.

[3] For an account of the final days of Lehmann Brothers, see Andrew Ross Sorkin, *Too Big to Fail*, London: Allen Lane, 2009.

plain and simple, unchecked by appropriate institutional mechanisms, and government supervision and regulation, seems to have contributed to the (almost) perfect financial storm.

A general analysis of the causes of the 2007-2010 financial crisis is beyond the scope of this paper. What I propose to do is to evaluate the role of antitrust in the causes and consequences of the crisis. If market turmoil and financial upheaval can shatter the groundwork of competitive markets that antitrust seeks to protect, the shockwaves are sure to be felt in the intellectual foundations of competition policy. In section 2, I consider whether antitrust contributed to the financial crisis and briefly describe the pre-crisis role of competition policy on both sides of the Atlantic with regard to the transformations that the banking sector underwent in recent decades. Section 3 analyses the crisis response on the antitrust front. Of particular importance are the two areas where the bailouts tend to collide with antitrust: mergers and, in the European context, State aid. Section 4 then looks at the challenges that economic crises have placed on antitrust enforcers. Section 5 ends with some final remarks.

2. ANTITRUST AND THE CAUSES OF THE FINANCIAL CRISIS

The debate on the causes of the 2007-2010 financial crisis will no doubt continue for years to come.[4] What seems to be a fairly consensual point is that, as then Deputy Assistant Attorney General for Economics, Carl Shapiro stated:

> "[I]t seems clear to me that the crisis in the financial sector primarily reflects a failure of government *regulation*, not any underlying failure in the ability of well-regulated competitive markets to serve consumers and promote economic growth".[5]

If there are many culprits for the crisis, antitrust enforcement does not seem to be one of them.[6] As to the question of how to respond to the crisis, one obvious solution would have been to see it as another episode of the perpetual gale of creative

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[4] "The current global economic crisis had its roots in slack economic policy and huge strategic errors by the banks. Permitted by weak regulation and driven by biased incentives, the banks borrowed (and lent) far too much given their low capital bases, and were caught out when the housing price bubble began to burst, heralding large-scale defaults. The global reach of this behavior was compounded by the sale and purchase of opaque mortgage-backed securities and their derivatives between financial institutions." Bruce Lyons, "Competition Policy, Bailouts, and the Economic Crisis", 5 *Competition Policy International* 25 (2009), at 26.

[5] Carl Shapiro, "Competition Policy in Distressed Industries", *in* ABA Section of Antitrust Law, *Competition as Public Policy* Chicago: ABA Publishing, 2010, p. 17.

[6] See Howard A. Shelanski, "Enforcing Competition During an Economic Crisis", 77 *Antitrust L.J.* 229 (2010) at 230: "there is no evidence that antitrust law has ever so affected investment incentives that it caused or contributed to an economic crisis". According to Jenny, p. 451: "Is not the banking crisis evidence of a failure of competition on the banking sector? The answer to this second question is clearly no. The crisis arose and grew, on the one hand, because prudential regulation did not prevent some banks from taking excessive risks and, on the other hand, because the asset valuation method had magnifying effects which weakened the banking sector in a period of rapid decline in the value of financial assets, the result of which was to worse the systemic risk that the sector was facing." Frédéric Jenny, "The Economic and Financial Crisis, Regulation and Competition", 32 *World Competition* 449 (2009) at 451. However, others criticize lax antitrust enforcement in the U.S., particularly regarding mergers in the banking sector. See Darren Bush, "Too Big to Bail: The Role of Antitrust in Distressed Industries", 77 *Antitrust L.J.* 277 (2010).

destruction of the market system at work. The problem is that antitrust (or competition law and policy, as it is known in Europe) is currently primarily concerned with the efficient working of markets, which requires free entry and free exit from the market; however, banking does not fit well with free exit. Thus, a focus on efficiency in markets at large may conflict with central concerns regarding the banking sector.

It is simple enough to say that inefficient firms should leave the market and that markets punish managerial mistakes. However, when the firm at issue is a large bank it is to be expected that a special case will be argued on its behalf.[7] This is due to the contagion risks that plague the financial sector.[8] The specific regulatory question that arises is how to align incentives so that firms are deterred from incurring excessive risks (the moral hazard problem).

The way antitrust has been applied to financial firms has depended, to a significant extent, on the governing regulatory framework. Traditional analytical tools such as market definition have been adjusted to the specific characteristics of these sectors, as exemplified by the concept of "cluster markets", confirmed by the 1963 judgment of the US Supreme Court in *Philadelphia National Bank*.[9]

In the US jurisdiction over banking mergers is concurrently assigned to the Department of Justice[10] and federal regulatory authorities: the Federal Reserve Board and the Office of the Comptroller of the Currency.[11] It appears that in recent decades the Federal Reserve Board has been conscious of the need to take antitrust concerns seriously in its review, thus lowering the risk of conflict with the Department of Justice, and a workable cooperative approach has been followed by these agencies.[12] In such an institutional setting, a natural division of tasks would be for the Department of Justice to focus on purely competitive concerns and the regulators to address specific issues,

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7 See Jenny, "The Economic and Financial Crisis, Regulation and Competition", at 449: "Thus, unlike what happens in most goods and service markets, where a firm's failure represents an opportunity for its competitors, the failure of a firm in the banking and financial sector is liable to have systemic effects".

8 See Lyons, "Competition Policy, Bailouts, and the Economic Crisis", at 27-28: "It is an unfortunate truth that banking is different to other industries due to a unique combination of two essential characteristics that create the potential for systemic economic collapse: contagion within the banking sector and contagion from banks to the entire real economy."

9 *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963). On market definition in the banking sector, see Dean F. Amel; Timothy H. Hannan, "Defining Banking Markets According to Principles Recommended in the Merger Guidelines", 45 *Antitrust Bull.* 615 (2000); Dean F. Amel; Starr-McCluer, "Market Definition in Banking: Recent Evidence", 47 *Antitrust Bull.* 63 (2002); Andrew R. Biehl, "The Extent of the Market in Retail Banking Deposits", 47 *Antitrust Bull.* 91 (2002); Anthony W. Cyrnak; Timothy H. Hannan, "Is the Cluster Still Valid in Defining Banking Markets? Evidence from a New Data Source", 44 *Antitrust Bull.* 313 (1999); Erik A. Heitfield, "What do Interest Rate Data Say About the Geography of retail Banking Markets?", 44 *Antitrust Bull.* 333 (1999). For a European perspective of the issue, see Cento Veljanovski, "Banking Mergers: Transaction Costs and Market Definition", 21 *E.C.L.R.* 195 (2000).

10 The Federal Trade Commission has no jurisdiction over banking.

11 For an overview, see J. Robert Kramer, "Antitrust Review in Banking and Defense", 11 *Geo. Mason L. Rev.* 111 (2002).

12 *Ibid.* at 116-117.

such as financial stability.[13] On the all-important issue of remedies, that are likely to include divestments in horizontal merger cases, the system encompasses a regulatory approach, with the Federal Reserve Board assuming a major role, in exchange for an exemption from the normal litigation that arises in other areas of merger control.

On balance, merger policy towards banking has been quite lenient in the US in the last decades. As two commentators, Hanweck and Shull, put it:

> "Few mergers are denied on competitive grounds and, under current policy, there is little reason to believe that there will be any important barriers to future mergers among most of the largest banking organizations that now exist worldwide."[14]

And yet, this passive approach contrasts with their conclusion that:

> "However, there is little evidence that, as a result, consumers and small businesses have gained from greater efficiency and competition. There is some evidence that mergers, even though carefully scrutinized for anticompetitive structural effects in local markets, have had anticompetitive consequences; and that the bank consolidation movement is producing new structural configurations that tend to restrain competition".[15]

It could be argued that the cooperative institutional framework tends to lend more relevance to alleged efficiency gains, particularly when these reinforce regulatory concerns over financial stability. Even discounting this sectorial bias, the increasing role of efficiencies together with a higher threshold of tolerance to market concentration in the general antitrust approach of federal agencies and courts seems to account for the relative absence of competitive issues in bank mergers.[16] This is to be contrasted,

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[13] Maurice Stucke seems to argue in favor of the Department of Justice broadening its analytical focus to compensate for a possible policy failure on the part of the Federal Reserve Board. See Maurice E. Stucke, "Lessons from the Financial Crisis", 77 *Antitrust L.J.* 313 (2010), at 323: "Thus, competition authorities face the current dilemma. On the one hand, merger policy currently does not offer the tools to intelligibly make this risk assessment. On the other hand, to be effective competition advocates, the FTC and DOJ cannot ignore the system wide risks from a merger."

[14] Gerald A. Hanweck; Bernard Shull, "The Bank Merger Movement: Efficiency, Stability and Competitive Policy Concerns", 44 *Antitrust Bull.* 251 (1999).

[15] *Ibid.* at 252.

[16] Darren Bush partially blames antitrust enforcement for the financial crisis on account of this perceived bias. See Darren Bush, "Too Big to Bail: The Role of Antitrust in Distressed Industries", at 279-280: "The view of this article is that antitrust has contributed to the economic crisis in several ways: First and foremost, the use of mainstream economic theory in the most recent decades of antitrust enforcement has served to focus analysis of conduct potentially harmful to consumers on issues of efficiency and welfare effects. Moreover, within the analytical framework of contemporary antitrust, efficiencies are king. It is with a skeptical eye that courts and often times particular enforcement regimes view anticompetitive harms arising from consolidation. Conversely, efficiencies are often considered with less skepticism than should be the case. At the same time, any discussion of other motivations for antitrust enforcement, including concern about concentration of political power into the hands of a few large (multi-national) corporations, has been eliminated from antitrust discourse. While this legitimate concern has been expressed in political protests, antitrust law has largely ignored the notion that corporate political power may create significant economic effects that in turn may affect the structure and function of the market."

however, with the apparent lack of credible efficiency gains in most of the mega-merger deals of past decades.[17]

Overall, efficiency-gains and risk diversification arguments have dominated merger analysis by US agencies and too-big-to-fail concerns have been disregarded in two ways.[18] Firstly, no reasonable analytical framework has been developed to take increased systemic risk into account, particularly in the mega-merger deals of the 90s and early 2000s.[19] The business as usual approach has accepted increased concentration in banking as generally benign and a natural consequence of deregulation.[20] Secondly, the implicit subsidy in too-big-to-fail policy and the competitive advantage that larger banks derive from it has not been considered in the analysis of the competitive impact of reviewed transactions.[21] In fact, such gains from growing to become a too-big-to-fail bank may actually count as benefits as they lower their costs of equity capital.

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[17] According to Johan A. Lybeck, *A Global History of the Financial Crash of 2007-10*, Cambridge: Cambridge Univ. Press, 2011, at 325, scale economies are not a strong argument in favor of banking mega-mergers: "The optimal scale in banking is quite small; traditional banking is a labor-intensive activity. There would appear to be no or few economies of scale above total assets of $ 10 billion. At the end of 2009, Bank of America, JPMorgan Chase and Citigroup were probably 200 times larger than is needed to achieve efficient scale". Lybeck estimates that "[e]ven where economies of scale exist, they are unlikely to exceed 5 percent of total assets".

[18] As Maurice Stucke puts it "in focusing on the short-term static effects (such as whether the banks post-merger may raise rates for specific categories of borrowers), antitrust enforcers can fail to see or assess the long-term impact of major factors, such as the merger's impact on the efficiency, competitiveness, and stability of the overall financial system." See Stucke, "Lessons from the Financial Crisis", at 317.

[19] According to Darren Bush, "[i]nstead, the proper focus of antitrust should be upon whether or not consolidations and other transactions create serious economic or political consequences for consumers. The economic consequences arise not only from anticompetitive harms, but from efficiencies that fail to appear and which potentially lead to further consolidation in industries poised to cause ripple effects throughout the economy in times of distress. A permissive antitrust policy based upon the notion that efficiencies are everywhere while anticompetitive effects are speculative not only does disservice to consumers but runs afoul of the very purpose of the Clayton Act." See Bush, "Too Big to Bail: The Role of Antitrust in Distressed Industries", at 311. See also Lybeck, *A Global History of the Financial Crash of 2007-10*, at 321: "Not only were banks large to begin with, the crisis made the big banks even bigger, as a number of them swallowed weaker colleagues." Thus. Bank of America acquired Countrywide and Merril Lynch, going from total assets of 1.72 trillion USD in 2007 to 2.22 trillion in 2009. JP Morgan Chase takeover of Bear Sterns and Washington Mutual, increased total assets from 1.56 trillion USD in 2007 to 2.18 trillion in 2008.

[20] See Stucke, "Lessons from the Financial Crisis", at 323. "Thus, in creating a financial institution too-big-to-fail, a merger can adversely affect consumers and other market participants by reducing the requisite degree of diversity for the financial network to remain stable. Moreover, in being deemed too-big-to-fail, financial institutions can engage in risky behavior with the confidence of a government bailout, and thus enjoy a competitive advantage over smaller rivals that are permitted to fail."

[21] See Hanweck; Shull, "The Bank Merger Movement: Efficiency, Stability and Competitive Policy Concerns", 275-276. Bush, "Too Big to Bail: The Role of Antitrust in Distressed Industries", at 309: "The intertwining of large financial institutions and large insurance institutions made it impossible to allow proper market responses, including bankruptcy, to occur. Accordingly, by being 'too big to fail' and by bailout, many companies gain a competitive advantage over small state or regional banks by being propped up through crises, so that the cycle of consolidation and bailout continues without correction. The guarantee of a bailout could exacerbate the behavior that causes the crisis." Lybeck, *A Global History of the Financial Crash of 2007-10*, at 319 quotes a study by the Center for Economic and Policy Research (CEPR) that estimates the implicit subsidy provided to too-big-to-fail financial institutions in a staggering 34 trillion USD, thus creating costs for consumers and distorting competition vis-à-vis smaller banks.

In the current institutional setting, it is hard to conceive of antitrust analysis being made to incorporate such impacts. One of the issues that have been echoed by several commentators is whether the role of antitrust agencies should be broadened to include systemic risks and other regulatory concerns.[22]

Whereas the establishment of a nationwide banking system is relatively recent in the United States and stems from the deregulation movement that started in the seventies, Europe has a deliberate policy of market integration. Furthermore, integration has been enhanced by monetary integration among the Eurozone economies.

Under the EU merger control system, the European Commission has exclusive jurisdiction over mergers of "Community dimension".[23] However, Community dimension is subject to the so-called "two-thirds rule", that is to say, a merger will not be under the European Commission's jurisdiction where the firms involved make more than two-thirds of turnover within a single Member State. Thus, bank mergers in Europe have generally fallen under national purview, where "national champion" arguments may play a role in gaining approval of proposed transactions (or in rejecting hostile bids against politically friendly management).

Where the two-thirds rule is not met, cross-border mergers that have Community dimension will fall under the exclusive jurisdiction of the European Commission. It should be noted that EU rules allow Member States to protect legitimate interests even where a merger has Community dimension. These legitimate interests may include relevant public interests regarding banking, such as preventing systemic risk.[24] Nevertheless, what has happened is that Member States seek to protect their domestic banks on nationalist grounds, by challenging mergers under banking and insurance law.[25] It is ironic that too-big-to-fail may be addressed as a national interest and that it has not happened due to the narrow protectionist focus that tends to prevail at national level, and yet no similar provision exists for the European Commission to take into account when reviewing mergers with a European dimension.

That is to say, where mergers are subject to the European Commission approval, regulatory concerns may only be voiced by Member States. This stands in stark contrast with the achievement of the Eurozone and the European Central Bank role. Should the latter be broadened to encompass Eurozone-wide banking supervision, some

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22 Stucke, "Lessons from the Financial Crisis", at 323: "The issue, then, is to what extent is antitrust analysis inadequate when it ignores a merger's systemwide risks. The federal antitrust agencies cannot assume that the Council or their sister agencies will engage in this analysis adequately for the financial industry."

23 Under Article 1(2) of Regulation 139/2004, a concentration is considered to have Community dimension where the combined aggregate worldwide turnover of all the undertakings involved is more than €5,000 million and he aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million. This may then be trumped by the so-called two-thirds rule; where each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State, the concentration will not be considered as having a Community dimension. Article 1(3) provides lower turnover thresholds of €2,500 million and €100 million, respectively, where there are significant operations in three or more Member States, also subject to the two-thirds rule.

24 Article 21(4) of Regulation 139/2004.

25 See, e.g., European Commission decision of October 20, 1999, Case IV/M.1616, *BSCH/A. Champalimaud*.

mechanism will have to be devised to allow for some input from the European Central Bank on cross-border mergers.

3. ANTITRUST AND CRISIS RESPONSE

If history is relevant to today's crisis, what it is most likely to suggest is that abandonment of antitrust is clearly the wrong response to financial crisis. In many respects this is also the lesson taught by the political reaction to the Great Depression in the international trade arena; shielding domestic firms from competition, both from foreign and domestic competition, proved a recipe for disaster in the inter-war period.

Among these responses the inevitable parallel is with President Roosevelt's early New Deal initiatives. The National Industrial Recovery Act of 1933 pursued a return to cartels, now managed under the guidance of the federal government with dire economic consequences. The hardships of the recession were likely exacerbated by such efforts to undermine competition.[26] Even the long-established *per se* prohibition of horizontal price fixing was disregarded in *Appalachian Coals v. U.S.* (1933).

President Roosevelt subsequently abandoned this skepticism on the virtues of competition and there was a move to more rigorous antitrust enforcement, particularly following the appointment of Thurman Arnold as head of the Antitrust Division at the Justice Department.[27]

Dan Crane has expressed skepticism as to the existence of any historical lesson.[28] Although Crane considers that since the repeated response to situations of economic and war emergency has been to suspend antitrust enforcement, then riding out the storm may be the best approach. However, this has not been the dominant trend on both sides of the Atlantic. The first Assistant Attorney General nominated by President Obama has drawn two lessons from the New Deal experience:

> "The lessons learned from this historical example are twofold. First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive."[29]

In the US, in face of a perceived lax antitrust policy under President George W Bush, the Obama administration has put forward a new antitrust agenda, particularly in the

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[26] See Harold L. Cole; Lee. E. Ohanian, "New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis", 112 *J. Pol. Econ.* 779 (2004). According to these authors, in that period, cartels led to higher prices and higher unemployment. See also Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*, 2nd ed., New York: Fordham University Press, 1995.

[27] Spencer Weber Waller, *Thurman Arnold - A Biography*, New York: New York University Press, 2005.

[28] Daniel A. Crane, "Antitrust Enforcement During National Crises: An Unhappy History", 12 *Global Competition Policy* 2 (2008); Daniel A. Crane, "Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-2009 Financial Crisis?", 77 *Antitrust L.J.* 219 (2010).

[29] Christine A. Varney, "Vigorous Antitrust Enforcement in this Challenging Era", Remarks as prepared for the United States Chamber of Commerce, May 12, 2009, available at http://www.justice.gov/atr/public/speeches/245777.htm.

area of unilateral conduct (monopolization).[30] Some signs of a more activist enforcement policy have been particularly visible in some merger cases such as the AT&T/T-Mobile and NASDAQ OMX/NYSE Euronext deals as well as the ongoing *U.S. v. Apple and others* case (e-book publishing).[31] The Obama antitrust agenda has also focused on so-called pocketbook issues, establishing a link between active antitrust enforcement and providing indirect relief for consumers.[32]

Similar concerns have been voiced in the EU.[33] And yet, the Lisbon Treaty has clearly downplayed competition as a foundation of market integration, bowing to the pressure of France's president at the time, Nicholas Sarkozy. Whereas under the Treaty of Rome, one of the objectives set out in Art 3(g) EC was to establish "a system ensuring that competition in the internal market is not distorted", the Lisbon Treaty has confined this objective to a Protocol annexed to the Treaty on the Functioning of the European Union (Protocol No. 27).[34]

On the other hand, the financial nature of the crisis and the fact that massive bailouts have been necessary seems to have revived, at least nominally, state aid control. Early pressure was put to the Commission to essentially forego any State aid analysis.[35] It

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[30] *Ibid.* See also Spencer Weber Waller; Jennifer Woods, "Antitrust Transitions", 32 *World Competition* 189 (2009). Some commentators have disputed the claim of lax antitrust enforcement during the Bush administration. See William E. Kovacic, "Rating the Competition Agencies: What Constitutes Good Performance?", 16 *Geo. Mason L. Rev.* 903 (2009).

[31] On the AT&T/T-Mobile case, see Department of Justice Press Release 11/1673, December 12, 2011, *Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of its Proposed Acquisition of T-Mobile USA Inc.*, available at http://www.justice.gov/atr/public/press_releases/2011/278406.htm; regarding the NASDAQ OMX/NYSE Euronext case, see Department of Justice Press Release 11/622, May 16, 2011, *Nasdaq OMX Group Inc. and Intercontinental Exchange Inc. abandon their proposed acquisition of NYSE Euronext after Justice Department threatens lawsuit*, available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm; on the Apple e-book publishing case, see Department of Justice Press Release 12/457, April 11, 2012, *Justice Department Reaches Settlement WIth Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and two other Publishers to Restore Competition and Reduce e-Book Prices*, available at http://www.justice.gov/ atr/public/press_releases/2012/282133.htm and Department of Justice Press Release 13/772, July 10, 2013, *Justice Department Issues Statement on U.S. District Court Ruling that Apple Violated Antitrust Laws*, available at http://www.justice.gov/atr/public/press_releases/2013/299273.htm. The opinion of the U.S. District Court for the Southern District of New York in *U.S. v. Apple* was issued on July 10, 2013, and is available at http://www.justice.gov/atr/cases/f299200/299275.pdf.

[32] See Sharis A. Pozen, "Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers", Remarks as Prepared for the Brookings Institution, Washington, D.C., April 23, 2012, available at http://www.justice.gov/atr/public/speeches/282515.pdf.

[33] Philip Lowe, "Competition Policy and the Global Economic Crisis", 5 *Competition Policy International* 3 (2009), at 6: "competition policy should arguably focus on those sectors that either directly or indirectly affect household expenditure to the greatest extent in order to ease the burden on consumers, as well as on sectors that are the most important for productivity growth." See also Jenny, "The Economic and Financial Crisis, Regulation and Competition", at 461: "To the extent that competition authorities are independent institutions and that one of their objectives is to be perceived as fulfilling a useful function for society, it is also likely that in a period of economic crisis they will, more than in the past, choose to tailor their activities to markets which are particularly important for the economically and socially weakest groups."

[34] See Alan Riley, "The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law", 28 *E.C.L.R.* 703 (2007).

[35] As admitted by the then Director-General for Competition. See Lowe, "Competition Policy and the Global Economic Crisis", at 4 "At the outset of the crisis there was pressure on the Commission to set aside the competition rules on State aid, in order to allow EU Member States freedom to implement financial sector

should be noted that state aid control has little parallel in other jurisdictions, including the US, the exception being the WTO subsidies rules. EU rules on State aid perform a crucial function within the legal framework of the single market. Were Member States free to subsidize their domestic firms, this could trigger similar responses from other Member States, leading to a subsidies war. If this is undesirable in international trade and subject to the WTO Subsidies Agreement, it could have devastating effects to European economic integration. Thus, although grounded on the concept of "distortion of competition", State aid control is not to be confused with antitrust proper as the latter addresses market failures arising from the exercise of market power, not the distortions brought about by the use of public resources.

In this regard there has been a strong policy response by the Commission, and the clear and immediate danger of the crisis led to shorter delays and more flexible procedures. At least on the face of it, it seems that the Commission approach was flexing of the rules and maintaining adherence to principle. It should be noted that, according to the European Commission, between October 1, 2008 and October 1, 2011, it approved aid to the financial sector Europe-wide of €4.5 trillion or 36.7% of EU GDP.[36]

The competition framework for state aid introduced some measures that may help bring incentives more in line. The Recapitalization Communication's approach of distinguishing between fundamentally sound and distressed banks seems particularly useful. Yet, as the crisis broadens this distinction may become less clear. In any case, the Commission's framework is insufficient to eliminate the payoffs of too-big-to-fail. Further steps in market integration may follow, particularly in view of discussions of a banking union in June 2012.

4. CONSEQUENCES OF THE FINANCIAL CRISIS: ANTITRUST IN DISTRESS?

The question that these developments raise and that I would like to address now is: what are the consequences of the financial crisis regarding the level of antitrust enforcement in the US and in Europe.

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rescue measures as they saw fit." In exactly the same words, see Neelie Kroes, "Competition policy and the crisis - the Commission's approach to banking and beyond", 55 *Antitrust Bull.* 715 (2010), concluding, at 717, that the Commission's response was: "In other words, we wanted to stop a subsidy war."

[36] A full analysis of the Commission's State Aid framework would be beyond the scope of this paper. The subject has been amply commented. See Lorenzo Coppi; Jenny Haydock, "The Approach to State Aid in the Restructuring of the Financial Sector", 5 *Competition Policy International* 77 (2009); Damien Gerard, "Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not of the Problem", 12 *Global Competition Policy* 1 (2008); Kroes, "Competition policy and the crisis - the Commission's approach to banking and beyond"; Abel Moreira Mateus, "The Current Financial Crisis and State Aid in the European Union: Has It Been Timely and Appropriate?", 12 *Global Competition Policy* 1 (2008); Abel Moreira Mateus, "The Current Financial Crisis and State Aid in the EU", 5 *European Competition Journal* 1 (2009); Abel Moreira Mateus, "Banking Regulatory Reform: "Too Big to Fail" and What Still Needs to be Done", 7 *Competition Policy International* 22 (2011); Phedon Nicolaides; Ioana Eleonora Rusu, "The financial crisis and state aid", 55 *Antitrust Bull.* 759 (2010); Charalambos Savvides; Daniel Antoniou, "Ailing Financial Institutions: EC State Aid Policy Revisited", 32 *World Competition* 347 (2009); Ulrich Soltesz; Christian Von Kockritz, "From State Aid Control to the Regulation of the European Banking System - DG COMP and the Restructuring of Banks", 6 *European Competition Journal* 285 (2010); Ulrich Soltesz; Christian Von Kockritz, "The 'temporary framework' - the Commission's response to the crisis in the real economy", 31 *E.C.L.R.* 106 (2010).

It is clear that unlike the New Deal's initial response to the Great Depression, there is no tolerance for crisis cartels or other such output reducing restrictive practices. Given the very high costs that such restraints impose on other businesses and on consumers, the mere fact that tough policies on cartels on both sides of the Atlantic have been maintained clearly sends a strong message that there will be no safe harbors for cartelists. One should however be wary of the fact that the crisis has led to pressure to take the economic situation into account in imposing fines on defendants. The European Commission has responded with caution to such requests and seems to consider that such considerations will play an exceptional role in its fining policy.[37]

With regard to unilateral practices, the fact that this area of antitrust has been the subject of a heated debate, particularly following the Microsoft cases in the nineties, tends to obscure whether there is a slowdown due to a cautious approach adopted by antitrust authorities or whether there is a retrenchment due to the crisis and worries over political spillovers from prosecuting powerful firms. Only time will tell, although there are no signs that enforcement is significantly lower than in the past decade.

Another area where pressure has been felt is that of mergers, particularly regarding a possible relaxing of the requisites for the failing firm defense,[38] a more flexible approach to divestiture remedies[39] – where viable buyers may be quite scarce due to financial constraints – and arguments in favor of taking concerns about employment into account in the substantive analysis of mergers.[40] Given the high profile of the

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[37] Lowe, "Competition Policy and the Global Economic Crisis", at 22: "The Commission does have the option of reducing the cartel fine it would impose if the company in question is unable to pay. A reduction of this kind could only be granted if paying the fine would seriously endanger the economic viability of the company. While this situation might occur in the context of the crisis, the Commission would make an extremely careful assessment before granting any such reduction." One puzzling case is the Portuguese Competition Authority's Decision to take the economic crisis into consideration in determining fines on a bid-rigging cartel case, although the facts at issue took place at the latest two years before the beginning of the financial crisis and that cartelists were found to have made substantial profits, estimated at values well above the fines imposed in this case. On this case, the so-called Catering Services Cartel Case, see Miguel Moura e Silva, "Anti-cartel enforcement in Portugal: A short chronicle of an uphill struggle", 32 *E.C.L.R.* 37 (2011). In EU and Portuguese competition law there is a general principle that fines will take into account the ability to pay on behalf of the defendant. See the 2006 European Commission *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003*, Official Journal C 210, Sept. 1st, 2006, p. 2, at paragraph 35: "In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."

[38] Shelanski, "Enforcing Competition During an Economic Crisis", at 235-236.

[39] Jenny, "The Economic and Financial Crisis, Regulation and Competition", at 462-463. Shelanski, "Enforcing Competition During an Economic Crisis", at 237.

[40] Lowe, "Competition Policy and the Global Economic Crisis", at 19: "It is sometimes argued that in times of crisis, it would be appropriate for the Commission to be able to take into account other wider considerations, such as employment. However, experience has shown that a legal instrument such as the EC Merger Regulation is most effective when it is directed to one single objective. Employment concerns need to be addressed through other instruments. It is hard to see how it would be possible to agree on the wider objectives that should be taken into account in our assessment or, indeed, how it would be possible to agree on how these objectives should be implemented."

transactions that tend to raise concerns on both sides of the Atlantic, one would expect this to be the weak point of antitrust in the face of political pressure.

It is evident that at least procedurally antitrust agencies have had to act under very tight time constraints. We can find examples of such expedited merger approvals in the US and in Europe in the aftermath of the near-meltdown of the financial sector. Wells Fargo acquisition of Wachovia was approved by the Federal Reserve Board in only nine days.[41] And the European Commission authorized the BPN Paribas/Fortis merger two weeks before the normal deadline.[42]

Whereas procedural efficiency is certainly important for businesses, one cannot help but feel at least some disquiet over such quick-look approvals of deals, particularly when one considers that, even with possible redeeming features, they may just add to the too-big-to-fail problem. Perhaps this outcome was inevitable in the "fog-of-war" that surrounded attempts to contain the financial crisis, but it is also clear that more thought ought to be given to providing effective (and not just expedient) antitrust scrutiny. As things stand, we may very well conclude that, at least in the financial sector, regulatory objectives such as stability trump maintaining open and competitive markets.[43]

Professor Darren Bush has highlighted another troubling sign in other industries, such as airlines. He notes the contrasting attitude towards the United/US Airways merger in 2002, where the merger was blocked in the US, and the Delta/Northwest merger in 2008, approved by the Department of Justice.[44] One is hard-pressed to see why the fundamentals of antitrust analysis should change in a crisis.[45] Given the recent opposition to high-profile mergers by the Department of Justice under the Obama administration, it seems that this case may simply be an anomaly or else justified by a very specific factual context (or another example of lax antitrust enforcement, according to critics of the Bush administration).

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[41] Shelanski, "Enforcing Competition During an Economic Crisis", at 236.

[42] See Kroes, "Competition policy and the crisis – the Commission's approach to banking and beyond", at 725: "The robustness and flexibility of the EC Merger Regulation are evidenced by the Commission's ability and willingness to adopt its authorization decision two weeks before the normal deadline in the *BNP Paribas/Fortis* merger case13 in December 2008."

[43] See Albert A. Foer, "Preserving Competition After the Banking Meltdown", 12 *Global Competition Policy* 1 (2008), at 7: "In normal times, the failing company defense is given much scrutiny and a heavy dose of skepticism, but these are not normal times. When decisions have to be made over the weekend, antitrust scrutiny is going to take a back seat to the immediacy of a crisis."

[44] See Bush, "Too Big to Bail: The Role of Antitrust in Distressed Industries", at 300-301: "A possible example of the double standard of antitrust in economic difficulties appears in the airline industry. In particular, when comparing the proposed (and ultimately blocked) United/US Airways merger in 2002 and the 2008 Delta/Northwest merger, which DOJ approved, the limited evidence available could be read to suggest that Delta and Northwest might have benefited from a more lenient review in light of the particularly difficult economic situation of the airline industry during the review of the transaction."

[45] See Ken Heyer; Sheldon Simmel, "Merger Review of Firms in Financial Distress", 5 *Competition Policy International* 103 (2009), at 116: "Severe economic downturns may lead to more proposed mergers between financially distressed firms, but it does not imply that looser standards ought to be applied when evaluating them."

Overall, antitrust enforcement does not seem to be seriously weakened in the US and at the EU level. Yet there are troubling signs that as the current sovereign debt crisis deepens, at least some Member States may want to put a lid on antitrust. Furthermore, not all EU Member States have reacted to the crisis with strict adherence to antitrust principles.

At national level, even in cases where a competition case can be made against a merger, recent developments present a bleak picture. In the UK the 2008 takeover of HBOS by Lloyds TSB was considered by the Office of Fair Trading to lead to a substantial lessening of competition in the markets of personal current accounts and in banking services to small and medium sized enterprises, especially in Scotland. On October 31, the Secretary of State for Business, Enterprise and Regulatory Reform approved the merger on public interest grounds.[46] This is troubling since banking markets are still mainly of national dimension and merger activity in the banking sector has been essentially domestic, even following the financial crisis.[47]

In Portugal, crisis response involved the nationalization of the ailing bank BPN in November 2008. The nationalization was justified by the Government on the ground of a systemic risk – despite its relatively low market share – and effective control was handed to Portugal's largest and State-owned bank, CGD. The fact that this amounted to a horizontal merger does not seem to have troubled the Government and the Portuguese Competition Authority appears to have been sidelined. In fact, it was only called to approve a transaction regarding the BPN's privatization in late 2011.

At the time, the Portuguese Government presented a Bill, approved by Parliament, providing for financial intervention by the State in private banks while granting a temporary exemption from merger notification. In accordance with Law 63A/2008 the Government could overrule prohibition decisions on grounds of urgency, risk circumstances and the protection of the Portuguese financial sector stability.

Since national governments, unlike the European Commission, are elected and politically responsible before national parliaments, they are also more likely to heed to calls for a relaxation of antitrust enforcement. This creates tension with competition policy as the latter is legally grounded in the founding treaties that will prevail over national law. Furthermore, the European Commission safeguards the enforcement of treaty rules not just with regard to firms and competition rules, but also vis-à-vis Member States with respect to the legal framework of the single market.

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[46] Vickers, John Stuart, "Financial Crisis and Competition Policy: Some Economics", 12 *Global Competition Policy* 1 (2008). As Vickers highlights, the Secretary of State made a public statement on September 18, 2008 according to which he would clear the merger on public interest grounds. However, financial stability was only legally established as a relevant public interest ground for approval of a merger on October 24, 2008. The Competition Appeal Tribunal upheld the decision.

[47] Lowe, "Competition Policy and the Global Economic Crisis", at 16: "The picture under the EC merger control rules is quite different. In contrast with the wholesale government interventions providing financial support to the banking and insurance sectors, there has been relatively little merger activity directly related to banking rescue or restructuring (or other financial firms) that has been subject to review by the Commission. Some cases—such as the Lloyds/HBOS merger in the United Kingdom and the Commerzbank/Dresdner merger in Germany—have been dealt with by National Competition Authorities in the relevant EU Member States."

As the crisis deepens and recovery fails to take hold, the risks to antitrust are far more dangerous and less visible today. A global economic slowdown will tend to make it easier for those claiming a less aggressive antitrust policy is necessary to foster growth. As Vickers has put it, "It is a familiar pattern that when the going gets tough, some of the not-so-tough seek exemptions from competition law."[48] This is exactly the opposite of what should be pursued, for very much the same reasons that a return to protectionism would have led us to a crisis like the Great Depression.[49]

5. Concluding Remarks

I will now conclude with some remarks on the (trillion) dollar question: what can antitrust do to prevent further crises? Given the acknowledged origins of the crisis, it would seem that the main issue to address is whether merger policy should incorporate systemic risk into efficiency considerations. In other words, if too-big-to-fail is the problem, at least when "too-big" is caused by merger of previously independent banks, antitrust seems to be at hand to prevent such growth.[50] The problem is that, firstly, there seems to be no ground, under competitive analysis, to prohibit a merger merely on the ground that the resulting firm will be too-big-to-fail. Secondly, the reasons in favor of using antitrust to pursue a sectorial goal are, in essence, the result of admitting a regulatory failure. Solutions to the too-big-to-fail problem must therefore be found chiefly within the regulatory context.[51] After all, since competition authorities are viewed as more independent from any particular sector, they could be relied upon to impose measures that regulators, particularly those that tend to identify market stability with absence of competition, do not have the will to adopt.[52] The role that antitrust may play in this regard is thus a very limited one, confined as it is by a growing focus on efficiency gains as a defense for large horizontal mergers, on the one hand, and an institutional setting that defers to financial regulators. Proposals for the break-up of

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48 Vickers, "Financial Crisis and Competition Policy: Some Economics".

49 See Lowe, "Competition Policy and the Global Economic Crisis", at 5: "The link between effective competition and economic growth is particularly important in times of economic recession. As markets characterized by effective competition make companies innovate more, they drive economic growth through the improvement of total factor productivity. Total factor productivity growth can be several percentage points higher in sectors where the intensity of competition is higher. This can make the difference when markets cannot rely on large amounts of capital to stimulate growth."

50 This does not address organic growth, much as the Dodd-Frank legislation. See Lybeck, *A Global History of the Financial Crash of 2007-10*, at 319.

51 For a description of some proposals to address too-big-to-fail, see Lybeck, *A Global History of the Financial Crash of 2007-10*, at 332. Gary H. Stern; Ron J. Feldman, *Too Big To Fail - The Hazards of Bank Bailouts (With a New Preface)*, Washington, D.C.: Brookings Institution Press, 2009.

52 This seems to be the point of view of Elena Carletti; Giancarlo Spahnolo; Stefano Caiazza; Caterina Giannetti, "Banking Competition in Europe: Antitrust Authorities at Work in the Wake of the Financial Crisis", 33 World Competition 615 (2010), at 641: "Should competition authorities simply look at competition issues or should they also consider stability concerns? And if so, in what way? Despite having the task of promoting competition, it is not clear that having the competition authorities solely focusing on this task is the right approach. In addition, the consequences of competition policy on bank stability are anything but clear. For instance, when allowing a merger, should competition authorities take the costs of the creation of banks that are 'too big to fail' into account?" The authors do not attempt to answer these questions.

banks on grounds of bigness and systemic risk may only be justified by regulatory concerns and can hardly find justification in discredited deconcentration theories in vogue in the 60s.[53]

The financial crisis may increase the bias toward accepting ever-larger firms as the result of efficiency gains. Since the large banks were not allowed to go under and not only survived the crisis but actually grew larger, this may lead to thinking that it is bigness itself that accounts for survival – not the bailouts and taxpayers' money. In a next round of industry consolidation, the crisis may actually be used to legitimate purported efficiency gains in growth by acquisition, at least where there are no limits to such growth. Even in the United States, it seems a bold proposition to expect that the three groups that already exceed the 10% mark (Bank of America, JP Morgan Chase and Citigroup) will not be looked upon – in a future crisis – to further digest any of their smaller competitors or indeed to merge themselves.[54] After all, if an orderly takeover is needed, to whom will central banks look to? The recent crisis showed who the usual suspects are.

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[53] Lybeck, *A Global History of the Financial Crash of 2007-10*, at 367: "Even if both competition aspects and the lack of economies of scale indicate the need for a break-up of megabanks, as most recently proposed by John Kay, it cannot be done by individual countries, but only by worldwide agreements, which appear highly unlikely. It seems much better to achieve limitations on size by higher capital standards à la Switzerland (and perhaps in the UK?)."

[54] See Bush, "Too Big to Bail: The Role of Antitrust in Distressed Industries", at 278: "At least with respect to the latest crisis in the financial industry, it could be said that a crisis begets bailout which begets consolidation, which in turn makes it more likely that a future crisis will beget bailout."