Kluwer Competition Law Blog

The Financial Crisis – three lessons for antitrust

Damien Gerard (College of Europe, Belgium) · Monday, November 22nd, 2010

Over the past two years, while the world witnessed the devastating impact of the financial crisis, experts of all kinds have speculated about the root causes thereof and ways to address them so as to prevent the recurrence of a similar meltdown in the future. In the meantime, the role of competition authorities in the management of the crisis has been quite different from one jurisdiction to the other. In the EU, the European Commission has been heavily involved, notably as it ended up coordinating all national bailout plans and other *ad hoc* rescue measures by means of the EU State aid rules (for an early overview, see here and for the latest report from the front, here). Recurring questions remain, however, as to the precise relation between the crisis and "competition" – as the term is used rather loosely in this context. In a sequence of three short postings, I would like to address three issues related to the financial crisis by means of deliberately "big-picture-op-ed-style" comments and to venture three lessons for antitrust, with the view of eliciting reactions.

This is the first of such postings.

1. First: did antitrust, in general, and a "lack of enforcement", in particular, contribute to the financial crisis?

This question was debated within the OECD Competition Committee already in February 2009 (see the OECD report here) and is a recurrent one in the competition law community, almost as if we were secretly anxious to ensure that we, as antitrust specialists, are somewhat part of the story of the greatest failure of capitalism/regulation since – whenever. The question has puzzled me since the crisis blew up in September 2008 – why would antitrust have anything to do with the financial meltdown? Two years after, I still cannot figure out a clear connection between the two – can antitrust seriously be listed among those broken tools that would need to be fixed to prevent a similar crisis to happen again? On the contrary, at least in Europe, didn't the discipline of competition law rather contribute to "solving" the crisis?

Whether one considers the competition-stability trade-off argument and its possible systemic consequences in the financial industry or the "too big to fail" conundrum and its mind-boggling moral hazard effects, is the soundness of competition law enforcement really at stake? Certainly, those issues raise important questions about the market economy as a system but do they have anything to do with what antitrust policy or antitrust law is – or should be – about, namely the protection of the process of competition?

Certainly, market economy incentivizes risk taking and promotes profit-maximizing strategies – it does not accommodate well with stability, it is about "creative destruction" and may therefore lead to business failures, which can have dramatic consequences (or just be economically and politically inconceivable). Certainly, market economy also implies competition between economic actors and certainly antitrust aims to tackle the obstacles to competition in the form of abuses of market power, collective or unilateral, which stifle rivalry and hamper innovation. But certainly antitrust has no say as to whether greed is good or to what extent it is or ought to be legal (…). Likewise, antitrust certainly does not regulate product liability – it is not in charge of determining whether genetically modified financial products can be marketed freely or not.

Moreover, antitrust is, in theory, neutral as to the size of individual competitors, to the extent that competition remains effective. Antitrust also has its own set of analytical tools and its own internal logic when it comes to assessing concentration. Certainly those tools need to be geared to fit the relevant markets at issue in each case and antitrust rules do put emphasis on different variables depending on the affected market(s). Yet, in assessing concentrations, antitrust authorities do not review the balance sheet of merging parties to determine the actual value or strength of their assets; they do not seek – except in extreme circumstances – to determine the likelihood that those companies might go under at some point in the future and whether such an occurrence might cause a small, medium or large storm affecting consumers as individuals, locally or globally. Should it? Do these issues belong to realm of antitrust? Doubtful.

Don't get me wrong: antitrust should of course be concerned with the functioning of financial markets, the incentives of financial institutions, the drivers of competition among banks – in the aftermath of the financial crisis, competition authorities ought to have improved their knowledge of the financial sector and have a close look at future bank mergers and practices and their likely impact, including by (re-)establishing links with regulatory authorities. Likewise, antitrust ought to be concerned with oligopoly situations among, for example, rating agencies (remember Trichet's comments) and scrutinize their practices.

Rather, my view is anchored in a modest understanding of what antitrust is about, with the corollary that antitrust alone cannot address, let alone prevent, each and every market failures. Antitrust is only one form of economic regulation – it sets the default rules for the market economy, not less, but not more. It has great resources because it is formulated broadly and is often backed by effective remedies, but its scope is limited. And, indeed, antitrust (or rather "competition law") has been part of the story of the financial crisis in a much more positive way. To be continued.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Monday, November 22nd, 2010 at 1:42 am and is filed under Source: OECD“>Antitrust, Enforcement, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.