

Unclassified

DAF/COMP/GF/WD(2009)24



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

12-Feb-2009

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/GF/WD(2009)24
Unclassified

Global Forum on Competition

COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution from BIAC

-- Session I --

This contribution is submitted by BIAC under session I of the Global Forum on Competition to be held on 19 and 20 February 2009.

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JT03259602

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COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

--BIAC--

The Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Global Competition Forum for its meeting on Competition Policy, Industrial Policy and National Champions on February 19, 2009.

1. Strong Competition Policy Should be Maintained in Times of Economic Crisis

1. In times of economic crisis, governments may question whether competition policy can by itself provide adequate tools for assuring that robust commercial, financial, and industrial sectors are preserved. Indeed, a struggling economy might cause some to argue for laissez faire competition oversight and increased government support of industry in order to help businesses weather the storm of the current financial crisis. Although many different views may be taken as to the cause of the current economic crisis, there is no indication that competition policy enforcement is to blame. Therefore, it would be irrational to conclude that wholesale reform of competition policy can significantly contribute to economic recovery. In fact, there is significant risk that a departure from sound competition enforcement based on fundamental economic principles could significantly hamper recovery efforts. Moreover, governmental intervention into competitive markets could harm competition for years to come.

2. Arguably, a lack of appropriate regulatory oversight in the financial market sectors may have contributed to the current economic crisis in that the inadequacy of the risk management of many financial institutions was neither detected nor deterred. This is an area of concern and of legitimate inquiry with respect to financial markets and the imposition or enforcement of regulations regarding the banking and mortgage lending sectors¹. Even with respect to these sectors, however, failed competition policy does not appear to have been a contributory factor. In the United States, for example, there is no indication that lax merger control led to excess concentration in the banking sector, resulting in a lack of competitive vigour in that sector. In fact, bank mergers prior to and in the throes of the economic crisis were closely scrutinised to ensure that anticompetitive effects would not result. The U.S. Department of Justice has imposed conditions and required remedies to protect competition in several recent bank mergers². Moreover, there is no indication that any collusive behaviour occurred in the banking industry that went unchallenged by the Department of Justice³. This is evident in the Department of Justice's investigation of so-called "clubbing" arrangements by private equity funds⁴.

¹ See BIAC's companion paper, "The Relationship between Financial Sector Conditions and Competition Policy."

² See, e.g., NationsBank's acquisition of Barnett Banks, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Reaches Record Agreement with NationsBank \$4.1 Billion Divestiture Largest Ever in a Single State (Dec. 9, 1997), available at http://www.usdoj.gov/atr/public/press_releases/1997/1300.htm; Fifth Third Bancorp's merger with Old Kent Financial Corporation, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Fifth Third Bancorp and Old Kent Financial Corporation to Make Divestitures in Michigan (March 8, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/7638.htm; BB&T Corporation's merger with F&M National Corporation, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires BB&T Corporation and F&M National Corporation to Make Divestitures in Virginia and West Virginia (June 19, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/222009.htm; PNC Financial Services Group Inc.'s acquisition of National City Corporation, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Divestitures In Acquisition Of National City Corporation By The PNC Financial Services Group (Dec. 11, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm.

³ In fact, the Department of Justice has been quite active in this area. As Assistant Attorney General of the Antitrust Division from 2005 through 2008, Thomas Barnett "enjoyed a reputation for taking aggressive action against

3. The current economic crisis strongly suggests a need for targeted regulation of certain industries, but the benefits of deregulation are real and governments should be wary of swinging the pendulum back towards excessive intervention in industry. History demonstrates that free enterprise and deregulatory based policies foster innovation, spur competition, lower prices, and increase efficiency. The deregulation policies initiated in many countries in the fields of transportation, energy, telecommunications, and other industries were prompted by the view that as a result “consumers should benefit from more choices, improved products and services, and lower prices.”⁵ These policies had to be supported by the implementation of a strong competition policy, as shown by the recent developments of the telecommunications sector in Europe.

4. In contrast, total or partial nationalisation of industry can have negative consequences such as the subsidising of obsolete sectors and the propping-up of inefficient competitors, which impairs innovation and encourages inefficiency. There is little evidence that state control with indirect management through government officials has ever had much success in achieving these enterprise criteria. A legitimate distinction may be possible between such outright state intervention and providing or underwriting short-term debt capital to ensure that competitive businesses remain liquid in times of a credit crisis. In their anxiety to repair the consequences of the current economic crisis, however, governments must be extremely careful about overemphasising short-term considerations, which may lead to well-intended, but ultimately wrong decisions in an effort to protect employment, or other, sometimes ill-defined, public interest considerations.

5. Recognising that some level of state intervention is indispensable in the current crisis to prevent the world economy from grinding to a halt, we urge governments to keep real, long-term economic objectives in mind in their allocation of public help. This should be directed to the regeneration and sustainability of sectors that underpin the functioning of broad segments of the economy and that will contribute to sustainable development, to the upgrading of infrastructure, and to the setting up of innovation resources that will fully benefit the post-crisis era, rather than to artificially prop up uncompetitive businesses where the credit crisis is only hiding a long-term trend of decline.

6. Competition policy also should be extremely careful about overemphasising short-term considerations. As a U.S. Deputy Assistant Attorney General stated in 2002, “[m]isguided competition policy designed to maintain fragmented markets or protect small business retards growth and undermines

companies involved in price-fixing and other anti-competitive behavior.” Ryan Davis, Top DOJ Antitrust Enforcer to Resign, Law360, Nov. 7, 2008, available at <http://www.law360.com/articles/76063>. In 2008, the Department of Justice imposed more than US\$1billion in criminal fines compared to US\$338 in 2005. David E. Vann, Jr. & Ellen L. Frye, “Overview,” CARTEL REGULATION 3, 3 (2009). The Department of Justice has also continued its efforts to imprison cartel offenders. *Id.* at 4. “Since 1999, the Division has entered into plea agreements with over 30 foreign executives from nine countries.” *Id.*

⁴ In October 2006, the Department of Justice sent informal letters to Kohlberg Kravis Roberts & Company, Silver Lake Partners, the Carlyle Group, Clayton Dubilier & Rice, and Merrill Lynch & Co., requesting information about their business practices and participation in recent high-profile auctions. In these letters, the Department of Justice expressed heightened concerns that investment funds may be “conspiring” or “colluding” as part of a club to artificially reduce the purchase prices of the companies that are the targets of buyouts. See, Dennis K. Berman and Henny Sender, Private-Equity Firms Face Anticompetitive Probe; U.S.’s Informal Inquiries Have Gone to Major Players Such as KKR, Silver Lake, Wall St. J., Oct. 10, 2006, at A3.

⁵ Statement from Canadian Industry Minister Maxime Bernier on the CRTC Deregulation Decision of Local Telephone Service (Jul. 25, 2007), available at <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/02093.html>.

faith in free markets.”⁶ This comment was made in support of the affirmation that the sole objective of competition policy should be long-term consumer welfare. The same concept has progressively been recognised as the prime purpose of competition policy in many other jurisdictions such as the European Union. A good illustration of these tensions can be found in the sometimes ambivalent attitude of competition policy to intellectual property rights: from a short-term perspective, they can be considered as a barrier to entry, but from a long-term perspective they are an indispensable incentive to innovation⁷.

2. Industrial Policy and Competition Policy Should Operate the Same Core Objective of Maximising Consumer Welfare

7. Despite the inherent tension between an industrial policy that relies on subsidisation and a competition policy that supports the success of efficiency, both industrial policy and competition policy should share the same goal of maximising consumer welfare. Although different means might be used to achieve this goal, the policies can be compatible and sound competition policy need not be sacrificed in the name of industrial policy.

8. Industrial policy could be given many definitions, but generally refers to any government action, regulation, or law that promotes the ongoing operation of, or investment in, a particular industry, often by way of direct or indirect government financial support. The stated intention is that by supporting particular industries or firms, they are provided sufficient time to develop, or recover, which will eventually lead to an increase in economic welfare⁸. Time often will allow the protected firms or industries to reach sufficient size to achieve economies of scale without becoming susceptible to short-term market irregularities⁹. In this way, the companies are not required to survive based solely on their own resources, efficiency, ingenuity, or invention.

9. Competition policy intends to promote and to protect competition rather than to protect competitors. The European Commission has noted that the objective of Article 82 is “the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources This means that it is competition, and not competitors as such, that is to be protected.”¹⁰ Free and fair competition in the longer term leads to the survival and success of the most efficient actors, with the lowest prices and highest degree of product innovation. As noted by European Commissioner Neelie Kroes, “[t]o be concrete about it: citizens get better goods and services, and businesses have more opportunities to sell them.”¹¹ Similarly, dating back to the landmark case of *Brown Shoe* in the early 1960s, the U.S. has held that the legislative history of the Clayton Act “illuminates

⁶ Jonathan Galloway, *The Pursuit of National Champions, the Intersection of Competition Law and Industrial Policy*, 28 ECLR 2007, 172 (citing a November 7, 2002 speech at the American Bar Association Fall Forum, Washington DC).

⁷ See the controversy about the EC Commission’s comments about the operation of the Patents system in its Preliminary Report on its Pharmaceutical Sector Inquiry, DG Competition Staff Working Paper (Nov. 28, 2008), available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf.

⁸ Takako Ishihara, Assoc. Professor, Faculty of Economics and Information Science, Hyogo University, “Industrial Policy and Competition Policy,” at 8 (2002), available at <http://www.jftc.go.jp/eacpf/05/jicatext2/0826Ind.pdf>.

⁹ Id.

¹⁰ European Commission, Directorate-General for Competition, “DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses,” 17 (Dec. 2005).

¹¹ Neelie Kroes, European Commissioner for Competition Policy, “Competitiveness – the Common Goal of Competition and Industrial Policies,” Address at the Aspen Institute (Apr. 18, 2008), available at <http://www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/207&format=PDF&aged=1&language=EN&guiLanguage=en>.

congressional concern with the protection of competition, not competitors."¹² As noted by former U.S. Department of Justice Assistant Attorney General Thomas Barnett, "the distinction between harm to a rival and harm to competition has disseminated throughout our antitrust law – another triumph of the common law."¹³

10. As noted above, industrial policy and competition policy clearly have different means for achieving their goals. European Commissioner Neelie Kroes has asserted that the "great ideological divide" that apparently exists in Europe between competition policy and industrial policy, the economic libertarians and the Colbertist dirigistes, has no *raison d'être*¹⁴. This difference can raise significant tensions between the two policies. For example, such tensions were observed two decades ago in the preparation of the first Merger Regulation in 1989 and the De Havilland/Aerospatiale case in 1991 and seem to be recurrent: more recent examples include the debate over "efficiencies" in the preparation of the new Merger Regulation in 2004, the GE/Honeywell or ABN-Amro/Antonventa cases in 2001 and 2005, and the ongoing battles over Spanish energy companies¹⁵ and Portuguese banks¹⁶.

11. Merger control is not the only field where these tensions are visible. Antagonistic arguments of industrial policy and competition policy are exchanged each time there is difficulty over the implementation of state aid controls under Art. 87 of the EC Treaty. Another example is the dispute about the so-called "Volkswagen Law" which culminated in the European Court of Justice ruling of October 2007. The European Commission's stated posture favours competition policy over industrial policy, as shown by its restrictive position on the "legitimate interests" justifying intervention of Member States in community dimension concentrations under art. 21.4 ECMR, or its initiation of proceedings against "golden shares" under art. 226 of the EC Treaty. Current conditions provide no reason to believe that it will depart from this approach.

12. The international business community also appreciates these tensions. In industrialised economies there generally is little support for industrial policy as it existed in the post-war years: the public sector has shrunk and planning at a national level (such as the "indicative" planning conducted by the French Commissariat au Plan between 1946 and 2006) has virtually disappeared.

13. However, the international business community recognises that the market cannot do everything by itself. This is the case not only in times of crisis when governments are called to the rescue in response

¹² *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

¹³ Thomas O. Barnett, Assistant Attorney General, Antitrust Division, Department of Justice, "Competition Law and Policy Modernization: Lessons from the U.S. Common-Law Experience," Presentation to the Lisbon Conference on Competition Law and Economics, Lisbon, Portugal (Nov. 16, 2007), available at <http://www.usdoj.gov/atr/public/speeches/227755.htm>.

¹⁴ Neelie Kroes, European Commissioner for Competition Policy, "Industrial Policy and Competition Law & Policy," Speech at Fordham University School of Law (Sept. 14 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/499&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁵ In 2006, the Spanish government enacted an emergency law to prevent the takeover of Endesa, a national energy company, by the German company, E.ON. The European Court of Justice annulled the law as it was in violation of 21.4 of the Merger Regulation. Even though the Court upheld the Commission's position, E.ON's bid for Endesa has already been withdrawn. Press Release, European Comm'n, IP/06/1853 (Dec. 20, 2006).

¹⁶ In 1999, Portugal attempted to block a Spanish bank's, Banco Santander Central Hispano's (BSCH), bid for the Champalimaud Group of Portugal. The Commission notified the Portuguese government of its objections to the decision and the Portuguese government withdrew the improper measures. Press Release, European Comm'n IP/99/774 (Oct. 20. 1999); Press Release European Comm'n, IP/00/296 (Mar. 27, 2000).

to systemic failures, but also in “normal” times when business requires infrastructure and innovation requires education. These elements are widely regarded as being a primary responsibility of the State. Investment decisions taken or encouraged by governments in these fields, that can be looked at as a form of industrial policy, have heavy consequences on the countries' economies, and therefore must be planned carefully.

14. Governments, however, should not discard competition policy in favour of sweeping industrial programs, even in times of economic crisis. Instead, industrial policy should be utilised sparingly in order to overcome short-term disruptions, but always with an eye toward long-term objectives of ensuring long-term competition and maximising consumer welfare once the crisis conditions have eased.

3. Promotion of National Champions Can Distort Competition and Undermine Global Competitiveness

15. As put bluntly by the EC Competition Director General: national champions are “illegal, they’re immoral and they’re fat.”¹⁷ Former U.S. Federal Trade Commission Chairman Deborah Platt Majoras similarly thought that “the national champion concept is one whose time has come and gone.”¹⁸ As companies become increasingly global, promotion of national champions becomes not only unjustifiable, but increasingly futile as it becomes harder to define a “national champion.” Is “nationality” defined by the company’s place of incorporation, the nationality of the majority of its shareholders, the nationality of its board members, the location of its top management, the location of its key assets, or – an even less measurable concept – its company culture? As noted by Mrs. Kroes in 2006, the domestic share in large European companies’ business has in many cases fallen below 40%¹⁹. The concept of “national champions” that we discuss in this section is that of a company that is artificially propped up by its government. The economic reality of globalisation, which gives less substance to “economic patriotism,” makes policies in favour of national champions more and more difficult to justify.

16. Indeed the notion that governments should abandon the approach of promoting free and fair competition among independent firms and replace it with a policy promoting national champions would be detrimental to competition and to consumers. Inevitably such ideas gain momentum in times of international economic crisis. While the notion of “economic patriotism” may be popular in such circumstances, the resolution of this international crisis requires a well-coordinated international response. Countries that promote policies that isolate national industries and seek to gain a strategic national advantage thwart efforts at international teamwork. “What looks like necessary help to ailing industries at the domestic level may quickly translate into unfair competition from other countries’ perspective.”²⁰

17. Following the stock market crash of 1929, the U.S. adopted the Smoot-Hawley Tariff Act, designed to promote domestic businesses over foreign competitors.²¹ The Act quickly unleashed a backlash of global retaliation, pitting foreign countries against the U.S. and impeding coordinated efforts at recovery. This occurred at a time when a “global economy” was nearly non-existent. Thus, the lessons to

¹⁷ Philip Lowe, “What is wrong with National Champions?,” Speech to the Enforcing Competition Law Conference, London (June 23, 2006).

¹⁸ Deborah Platt Majoras, Chairman, U.S. Federal Trade Commission, “National Champions: I Don’t Even Think it Sounds Good,” Remarks before the International Competition Conference/EU Competition Day (Mar. 26, 2007).

¹⁹ Kroes, *supra* note 13.

²⁰ Patricia Wruuck, Industrial Policy Puts Global Cooperation at Risk, Yale Global Online (Nov. 14, 2008), available at <http://yaleglobal.yale.edu/display.article?id=11606>.

²¹ See U.S. Department of State discussion regarding the Smoot-Hawley Tariff Act, available at http://future.state.gov/when/timeline/1921_timeline/smoot_tariff.html.

be learned from this exercise are exponentially more important in the current and much more intensively integrated global environment. Tariffs, of course, are not the only means of domestic protectionism: national champions and subsidies are all variations on the same theme and are all likely to hinder cooperative efforts.

18. Markets that are characterised by competition amongst independent, non-nationalised firms promote consumer welfare more so than markets comprised of nationalised companies. History clearly proves this by showing that “enterprise” and deregulatory based policies foster innovation, spur competition, lower prices, and increase efficiency. Examples include the deregulation of telecommunications, trucking, transportation, and other industries.

19. National champions, however, are an attempt to give some form of preference, support, or protection to a national company. Such an approach may involve government intervention to provide subsidies to the national champion, altering merger policy so as to ensure that a domestic champion is not acquired by a foreign entity, or providing more favourable terms for the national company to gain business as compared to other firms (e.g., directed bids).

20. One theoretical rationale in favour of national champions relies on the capacity of the championed firm to generate economies of scale in order to thrive in markets which are global and driven by price. But, these premises are highly disputable and can come at a high cost to consumers in both domestic and foreign markets because the economies of scale are not necessarily the result of efficiency²². Arguably, an economy needs large companies as well as a rich fabric of SMEs because in certain areas of activity the cost of innovation can only be borne in the long-term by large companies. However, there is a substantial history demonstrating that start-ups are also indispensable to the eco-system of innovation. Such businesses, when they are successful, often become large independent firms (e.g., Microsoft, SAP, and Vodafone) or tend to merge into larger units after a period of time.

21. Despite the efficiencies of scope and scale often associated with large companies, those companies that are propped up by governments often are inefficient and lacking in invention and as a consequence lack competitiveness which in turn makes them ever more dependent on government support. It is only those large companies that achieve economies of scale through innovation and actual competition that can achieve international competitiveness, efficiencies, and provide incremental consumer welfare gains.

22. National champions distort competition because they deprive the market of opportunities for the best synergies. Companies that do not have to compete or who receive an influx of cash from outside sources do not strive to cut costs, to make better products, or to compete for customers. The net effect of championing a domestic company is to assure that more efficient and aggressive competitors are not allowed to compete on a level playing field. This can have significant detrimental effects on consumer welfare by denying consumers the benefits of innovation, expansion, and integrative efficiencies. As stated by former U.S. Federal Trade Commission Chairman Deborah Platt Majoras, “[i]n short, protect competition, and you protect consumers. Try to direct or manage competition, and you protect only specific competitors and their special interest; consumers, and thus the economy, lose.”²³

23. Additionally, governments that support national champions also pay a substantial cost for doing so. The McKinsey Global Institute’s twelve-year study to determine why some nations remain wealthy

²² See, e.g., Paul Geroski, Chairman, U.K. Competition Comm’n, “Competition Policy and National Champions” (Mar. 8, 2005), available at: http://www MMC.gov.uk/our_peop/members/chair_speeches/pdf/geroski_wifo_vienna_080305.pdf.

²³ Majoras, supra note 17.

and others remain poor despite years of international aid found that “economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can’t replace less efficient ones. Economic growth slows and nations remain poor.”²⁴

24. Given this outlook, there is no reason that smaller economies should take a different view toward promotion of national champions. Indeed, there is no reason why a small country that participates in the world trade would not abide by the same rules as larger countries. Luxemburg for instance has been subject to European competition law since the formation of the common market of which it was one of the founders. Indeed there may be fears that in the field of merger control, small and large countries receive asymmetric treatment, as claimed when the Commission prohibited Volvo’s acquisition of Scania in 2000²⁵. However, the remedy to this issue is probably to be found in challenging market segmentation and geographical market delineations rather than in establishing specific regulatory exceptions or different substantive standards for smaller countries. Also, there may be issues in certain small countries related to the transition from a state-controlled to a market economy based regime, but like issues related to development they are not specific to the size of the country, and they should be transitional by nature.

25. Developing countries often have a tendency toward significant state intervention until privately funded industrial investments are allowed to evolve. This often results in prolonged phases of protectionism and anti-competitiveness. However, some observers who have analysed the successful progress of the new economic giants of East Asia doubt that going through such phases is indispensable: “claims that those industrial policies that constrained rivalry were central to East Asian development and that such measures were effective have been discredited by empirical research.”²⁶

26. In any case, most would presumably agree that support should not be lent to economic dinosaurs that end up having no incentive to innovate or to make the necessary structural changes. The problem is that no country is prepared to admit its company is an economic dinosaur. As a result, there may be situations where because they independently do not have the management, products, assets, financing, etc. to compete in the global economy, companies – even would-be national champions – should be left to fail. Alternatively, governments should be open to allowing their companies to be acquired by international companies that can provide the required tools and synergies to compete effectively in the global economy.

27. The "crisis" exceptions recently observed in the U.S. and in European countries (e.g., the "public interest" intervention on the HBOS/Lloyds bank merger in the U.K., public aid to the French, German, and U.S. car industries) should not become recurrent accepted policy, but merely remain a short-term aberration.

4. Greater Emphasis on Certain Tools of Antitrust Policy May Serve to Enhance Industrial Reform and to Improve Outcomes

28. Despite the business community’s belief that wholesale reform or even serious amendment of competition policy is not necessary, now may be an appropriate time to consider aspects of competition

²⁴ Majoras, *supra* note 17 (citing William Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* (2004), at 103).

²⁵ Henrik Horn and Johan Stennek, “The Political Economy of EU Merger Control: Small vs. Large Member States” (Sept. 21, 2005) available at <http://www.econ-law.se/Papers/Horn-Stennek-revised.pdf>.

²⁶ Douglas Brook, “Industrial vs. Competition Policy”, Asian Development Bank Institute (May 2, 2007), available at <http://www.adbi.org/research-policy-brief/2007/05/02/2239.industrial.policy/industrial.vs.competition.policy/>.

policy that can be further advanced to ensure strong, robust, and efficient companies that are able to survive economic crises.

29. Competition agencies have long paid lip service to the concept of efficiencies and have incorporated efficiencies analysis into their theoretical merger guidance, but have rarely given them much weight in merger matters.²⁷ In the current environment, where the output of many businesses has declined sharply in a very short period of time, the benefit of integrative efficiencies is greater than ever. Merged companies that are able to take advantage of a reduction of costs – whether fixed or variable – are more likely to remain viable and competitive. Those companies that are deprived of such cost savings or are incapable of realising them may well be lost to bankruptcy or liquidation.

30. This suggests that agencies should seriously evaluate whether to give greater credit to efficiencies and more readily approve some mergers that present a risk of slight anticompetitive effects (by which we mean either transitory in nature or limited in magnitude or both) in order to permit more cost-efficient competitors to emerge. The alternative may be to deny such mergers and preserve competitors that are less able to withstand the kind of economic upheaval that we are witnessing at present.

31. Crucial to this discussion is the need to consider dynamic as well as static efficiencies in merger analysis. Static efficiencies, such as economies of scale in production, are one-time only events and therefore often times can be more easily quantified.²⁸ Dynamic efficiencies, however, are harder to quantify as they include efficiencies “that enable firms to improve their performance, whether in terms of cost, quality, service, or new product development, on a potentially continuing basis.”²⁹ There should be room for consideration of dynamic efficiencies in merger analysis beyond mere lip service, especially where dynamic efficiencies would outdistance any potential harm to consumers.³⁰ Despite the rhetoric, practical experience shows that agencies are eager to identify and to assert the mere possibility of harm to competition, yet extremely reluctant to acknowledge dynamic efficiencies that are highly likely to result from a merger. As evidence of this imbalance, consider how many agency decisions that find competitive harm also acknowledge the presence of efficiencies. This suggests that agencies view efficiencies, to some extent, as an afterthought used to justify a decision to clear a transaction, but not seriously considered once any potential for harm is identified.

32. The scope of efficiencies to be taken into account for the purposes of evaluating concentrations has been highly debated before the adoption of the new European Merger Regulation, described as “the most controversial topic in the history of the ECMR.”³¹ The controversy related to the fear that this could be used by large countries in defence of their national champions. Eventually, by deciding that efficiencies

²⁷ One exception in recent years has been the analysis conducted by the U.S. Department of Justice concerning efficiencies. See, e.g., Verizon Communications Inc.’s acquisition of MCI Inc., Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Divestitures In Verizon’s Acquisition Of MCI and SBC’S Acquisition of AT&T (Oct. 27, 2005), available at http://www.usdoj.gov/atr/public/press_releases/2005/212407.htm; and the merger between Delta Air Lines Inc. and Northwest Airlines Corporation, Press Release, U.S. Department of Justice Antitrust Division, Statement of The Department of Justice’s Antitrust Division on Its Decision to Close Its Investigation of The Merger of Delta Air Lines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/238849.htm.

²⁸ See OECD Policy Roundtables, “Dynamic Efficiencies in Merger Analysis” at 9 (2007), available at <http://www.oecd.org/dataoecd/53/22/40623561.pdf>.

²⁹ *Id.*

³⁰ See Steven C. Salop, “Efficiencies in Dynamic Merger Analysis,” Federal Trade Commission Hearings on Global and Innovation-Based Competition (Nov. 2, 1995), available at <http://www.ftc.gov/opp/global/saloptst.shtm>.

³¹ A. Lindsay, “The ECMR: Substantive Issues” (2nd ed.), 510.

must both be merger-specific and benefit consumers, the Commission has adopted a standard which preserves the ultimate goals of competition policy. Canada has a similarly flexible approach to efficiencies as a defence in merger cases, not requiring that they are passed on to consumers in the form of lower prices, provided they remain consistent with the purpose of the Competition Act "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy."³² The key, however, is not whether the standards are adopted in policy, but rather whether they are adopted in practice.

33. The concept of "international competitiveness" found in the French merger guidelines is more susceptible to use in favour of national champions. Indeed the view in some corners is that critical size is a form of efficiency that must be taken into account in appraising a merger: in 2004, Mr. Strauss-Kahn advocated "an evolution of competition law to facilitate the formation of European players having critical size on the market."³³ This concept of "international competitiveness" remains as one of the motives that can be invoked by the Minister of Finance to set aside a decision (based purely on competition grounds) taken by the new Competition Authority under the reform of August 2008.³⁴

34. However, competition policy criteria have clearly prevailed in the appraisal of mergers in the EC. The reasons for which a European Member State can intervene in a merger of community dimension and thereby impose decisions motivated by domestic public policy considerations have been progressively restricted. They relate essentially to "defensive" reasons of security; the other two accepted motives, plurality in the press and financial prudence are perhaps less relevant. But even in these limited areas the role of competition policy has not been entirely excluded.

35. As a separate issue, current economic conditions highlight that competition policy should further incorporate consideration of the failing firm issue in conducting merger analysis. Just as it would distort competition to subsidise inefficient competitors, it would equally distort competition to inhibit efforts by companies to become more efficient through various means, including by merger or, more likely, acquisition. Historically, a failing firm defence has only been considered – and then with tremendous scepticism – as a measure of absolute last resort. In order to invoke this defence in the U.S., for example, parties to a transaction must satisfy a very strict standard.³⁵ Former Federal Trade Commissioner Robert Pitofsky stated "that by requiring firms virtually to be in bankruptcy rather than clearly on the road to highly probable failure, United States law (unlike the law of many of our trading partners) is too restrictive."³⁶ The U.S. agencies have left the strict standard as is, but argue that "[w]hen faced with

³² Canadian Competition Act, sections 96 and 1.1.

³³ Table Ronde, "Un Projet Durable pour l'Europe de Demain" (Apr. 2004).

³⁴ Art. L.430-7-1 of the French Commercial Code.

³⁵ See U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," available at <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf> ("A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganise successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.")

³⁶ Robert Pitofsky, Chairman, Federal Trade Commission, "FTC Staff Report on Competition Policy: Six Months After," (Nov. 7, 1996), available at <http://www.ftc.gov/speeches/pitofsky/rpaba11.shtm>.

mergers involving firms in distressed industries or near-failing firms, antitrust should assess such transactions in terms of their likely competitive effects.”³⁷

36. There is some indication that these considerations have been at work to a greater extent since the outbreak of the economic crisis. In her remarks before the Economic and Monetary Affairs Committee of the European Parliament, European Commissioner Neelie Kroes noted that the Commission will continue to apply existing merger control rules and that “the Commission can and will take into account the evolving market conditions and, where applicable, the failing firm defence.”³⁸ Similarly, in discussing why the U.S. undertook certain initiatives and not others to stabilise the financial sector, the U.S. Treasury noted that the Treasury did not prohibit acquisitions because “when a failing bank is acquired by a healthy bank, the community of the failing bank is better off than if the bank had been allowed to fail. Branches and financial services in that community are usually preserved. Costs to the taxpayers via the FDIC deposit fund are also lower than had the bank been allowed to fail. Prudent mergers and acquisitions can strengthen our financial system and our communities, while protecting taxpayers.”³⁹ But, the U.S. government has not issued a blank check for every bank acquisition to go through without question as demonstrated by Department of Justice action in PNC Financial Services Group Inc.’s recent acquisition of National City Corporation, where the Department of Justice required the divestiture of 61 branch banking offices.⁴⁰

37. Government intervention should not be used as a means to impose or facilitate the creation of a cartel, particularly if that cartel would have any impact on international commerce. The durable harm caused by cartels is well-understood. Cartels are more likely to be formed in times of economic difficulty as companies search for ways to survive rather than face demise. Sharpening the tools to detect and especially to deter cartels will be an important role of competition agencies in helping to recover from the current crisis. As noted by Office of Fair Trading Chief Executive Officer, John Fingleton, “we may see greater temptation to cartelise markets with rising competition between existing suppliers for a shrinking demand . . . it is important that we [competition agencies] are vigilant to the potential rise of cartels in a recession.”⁴¹

38. At the same time, there may be much greater scope for firms to pool resources and coordinate efforts in ways that are pro-competitive and efficiency-enhancing through joint ventures, technology transfer, and similar cooperative ventures. We believe that such opportunities, at times, are not fully exploited due to uncertainty over the scope of competition laws. An emphasis on creating greater transparency with respect to joint venture guidance and enforcement principles could help to eliminate this uncertainty and lead to more efficient outcomes that benefit consumers. In particular, a greater use of safe

³⁷ Federal Trade Commission Staff, “Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace,” 3 (May 1996).

³⁸ Neelie Kroes, European Commissioner for Competition Policy, “Dealing with the Current Financial Crisis,” Speech before the Economic and Monetary Affairs Committee, European Parliament (Oct. 6, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/498&format=HTML&aged=0&language=EN&guiLanguage=en>.

³⁹ Press Release, U.S. Department of Treasury, Interim Assistant Secretary for Financial Stability Neel Kashkari Review of the Financial Market Crisis and the Troubled Assets Relief Program (Jan. 13, 2009), available at <http://www.ustreas.gov/press/releases/hp1349.htm>.

⁴⁰ Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Divestitures In Acquisition Of National City Corporation By The PNC Financial Services Group (Dec. 11, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm.

⁴¹ John Fingleton, Chief Executive Officer, Office of Fair Trading, “Competition Policy in Troubled Times” at 15 (Jan. 20, 2009), available at http://www.offt.gov.uk/shared_offt/speeches/2009/spe0109.pdf.

harbours in providing guidance to joint venturing companies and a more realistic approach by agencies to the thresholds at which they are likely to take action – as compared to the thresholds under which there may be a theoretical basis, in laboratory conditions, for taking enforcement action – would improve the potential for companies to conclude efficient joint ventures.

5. Conclusion

39. The primary concern of the international business community is that a "level playing field" is maintained. "Industrial policy" can often be an impediment to a level playing field, created to favour short-term objectives rather than long-run efficiency. BIAC recognises that industrial policy is, in some limited cases, an indispensable role of governments in attempting to promote industrial development or in responding to a systematic market failure as seen in the current economic crisis. Where industrial policy has the effect of a competitive retreat, creating anti-competitive domestic or international markets for any significant period of time, it clearly has gone too far. Deploying protectionist policies is not a means of long-term resolution of the current economic crisis, and competition policy cannot be set aside to wait for better times. Competition policy can adjust, however, to help further goals of industrial development and financial stability, in particular by enhancing consideration of efficiencies and failing firm issues in merger control. More than ever, there is a clear need for international coordination of measures based on internationally accepted ground rules that the OECD is uniquely placed to help formulate.