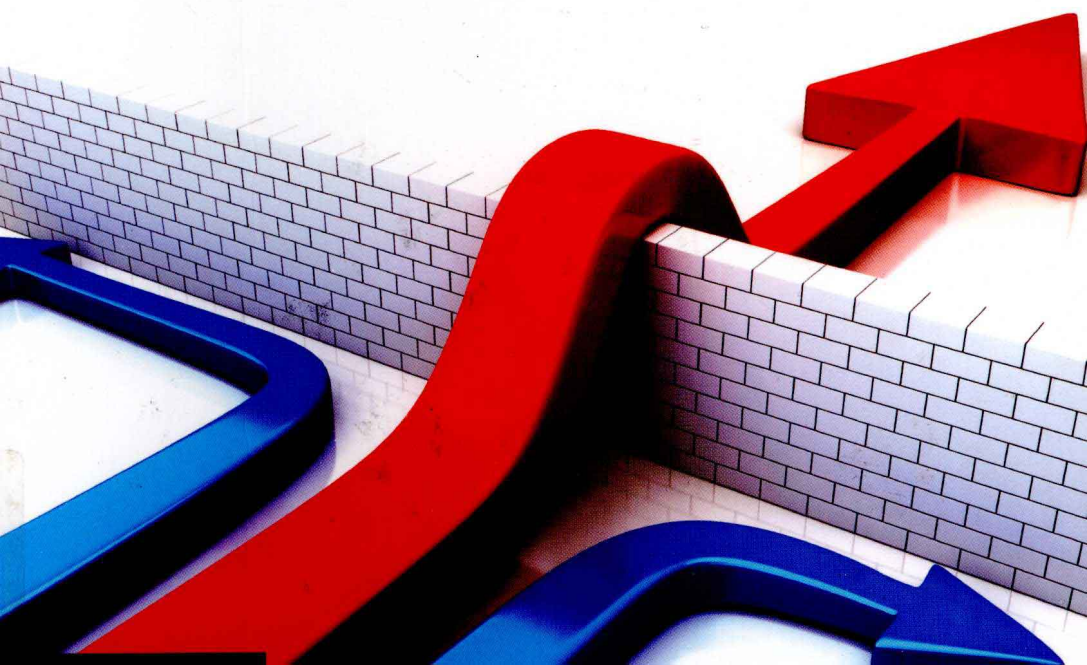


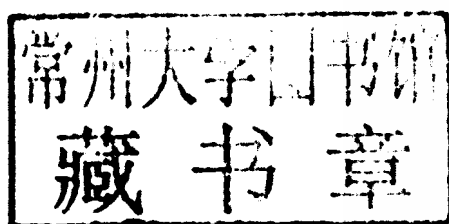
# **Antitrust Law amidst Financial Crises**

Ioannis Kokkoris and Rodrigo Olivares-Caminal



# ANTITRUST LAW AMIDST FINANCIAL CRISES

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failing-firm defences in merger control, attempts to justify cartels, and calls for more state aid to remedy crisis-related market failures. However, I believe we have the right rules in place to deal with the crisis. The Commission has been able to show flexibility on procedure in order to respond to crisis conditions, while at the same time standing firm on the principles.

The EC Merger Regulation is a good example of where recent reforms have stood us in good stead in terms of ensuring that merger control instruments are based on sound economic principles and are flexible enough to take account of evolving market conditions. And the Commission has maintained a strong focus on cartel enforcement during the downturn in view of the serious harm cartels cause to the whole economy. Indeed, as Neelie Kroes, the outgoing Commissioner for Competition, recently put it, no matter what the rate of economic growth, cartels are harmful to the consumer.

This book tackles many of the issues I have mentioned above and raises interesting questions about how flexible competition enforcement should be in view of the difficulties faced by companies in the global downturn.

In this unprecedented situation of economic difficulty, I am sure many of my colleagues in Directorate General Competition would agree with me that it is important to look at all sides of the debate; it is only through a lively exchange of views that we can determine the best set of policy tools to continue to respond effectively to the crisis and create the conditions for future sustainable growth. For this reason, I welcome Dr Kokkoris and Dr Olivares-Caminal's contribution to this discussion and I hope that they will agree with my belief that ultimately the way out of this crisis – for the financial sector and the wider economy – lies in making sure that markets remain competitive, with a robust enforcement of the competition rules but with an approach which is informed and realistic on what can be achieved.

## FOREWORD

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The financial crisis has had a considerable impact on competition policy and competition law enforcement.

First, questions were raised about the trust that one could put in free and competitive markets. It was recognized that for markets, such as the financial markets which have a systemic risk component, strict prudential regulation is a necessary complement of competition. Inadequate regulation or regulation which did not keep up with innovation in the financial markets was considered to be at the heart of the financial crisis. The political rhetoric of the 1990s against regulation was replaced by a more pragmatic approach to regulation.

Second, questions arose about whether and how competition law enforcement should be modified in a time of financial and economic crisis.

A consensus had emerged toward the end of the twentieth century that the enforcement of competition law should move toward an 'effects-based approach'. This approach requires that the competitive and efficiency effects of business practices or transactions be analysed in the context in which they are implemented to determine whether they should be prohibited.

This move away from an ideological or formalistic approach to competition law enforcement and towards a method of enforcement based on applied economic analysis put competition authorities in a much better position to face the challenges of the economic and financial crisis.

What changed drastically with the financial and economic crisis was the context of markets. All of a sudden, because credit was scarce, the competitive pressure from new entrants, from hostile takeovers or from small competitors became less constraining. Because the financing of international trade also experienced difficulties and because of the protectionist tendencies of a few governments, international trade decreased and so did the pressure of international competition. Because the real crisis, which was a consequence of the financial crisis,

was severe; some industries were faced with rapidly decreasing demand and very few opportunities to redeploy their resources in other sectors. Consolidations in some industries seemed to be the only possible solution to avoid bankruptcy. To try to alleviate the pain due to the rapidity of the collapse of the economy and a dramatic rise in unemployment, governments started intervening both to stimulate demand and to subsidize failing firms.

There were calls for competition authorities to modify their standards of competition law enforcement (and to move towards a more permissive attitude recognizing the need to meet sociopolitical goals such as keeping employment up or to avoid the failure of firms which may have been badly managed but were at risk of disappearing altogether). Other voices were heard saying that the goals and the standards of competition law enforcement should be kept intact, but that enforcement should take into consideration the new macroeconomic context of markets (including the existence of a systemic risk in the financial sector, the difficulty of reallocating resources in the real sector, the potential collapse of large segments of industries due to rapidly declining demand, the increase in state aids, and so on).

This book is the first comprehensive analysis of the responses of competition authorities to these challenges.

It explains how a number of new themes (or themes which had been forgotten because the economy had grown more or less smoothly for several decades) emerged in antitrust enforcement – for example, the conditions under which an efficiency defence could be accepted for mergers raising competition issues, the failing-firm defence for anti-competitive mergers, the benefits and costs of crisis cartels, and the conditions under which state aids could be accepted on a temporary basis. These themes became central concerns of competition authorities and this book thoroughly discusses the emergence of these new enforcement issues.

Also, as the book argues, by commenting on a vast number of decisions, competition law enforcement has, on the whole, been adapted intelligently and pragmatically to the challenges raised by a rapid and dramatic economic downturn without compromising the goals of competition law (the protection of consumer surplus) and without lowering the standards of competition law enforcement, unlike what happened after the 1929 economic crisis.

It is heartening to see that, as a result, competition law and competition policy are now seen as part of the solution to the economic crisis, rather than as part of the problem.

## PREFACE

The idea for this book can be traced back to the events that occurred during the weekend of 13–14 September 2008 when discussions were being held on both sides of the Atlantic to rescue troubled financial institutions. The outcome of these discussions was the emergency deal between Bank of America and Merrill Lynch, the filing for bankruptcy of Lehman Brothers and the announcement of the merger between Lloyds and HBOS.

As a result of a crisis threatening the stability of an economy, competition policy may be set aside due to special and exceptional circumstances. Therefore it is important to have a clear understanding of the rules (i.e. competition law) and the exceptions to those rules, especially in the presence of such exceptional circumstances. In addition, it is important for distressed entities and policy-makers to clearly understand the array of options that they have in advance since these can be used as part of their ‘crisis toolkit’. The aim of this book is to provide an analysis of such exceptions to competition law and policy, particularly in the context of a financial crisis.

The topics analysed herein include the failing-firm defence, efficiency defence, crisis cartels and state aids. During a crisis, concepts such as failing-firm defence and efficiency defence are essential in effective and pragmatic enforcement of merger legislation. In addition, the treatment of state aids as well as crisis cartels is also essential in ensuring the sustainability of undertakings and of whole industries.

The key issue that this book addresses is whether a crisis can justify the adoption of a more lenient approach to established legal standards as a result of the risks of the systemic crisis to the entire market. In summary, the book provides a comprehensive understanding of the rationale of competition law in the light of conflicting interests (promoting competition versus the collapse of a firm that might result in a systemic crisis). This book provides a valuable practical guide for policy-makers as well as practitioners in the field of competition policy.

The book has immensely benefited from the contribution of Phedon Nicolaides on the treatment of state aids. His insightful approach has been invaluable to the completeness of the arguments of this book.

We would also like to express our gratitude to Philip Lowe, Director General for Competition, European Commission, as well as Frederic Jenny, Chairman of the OECD Competition Committee, for writing the forewords to this book.

Finally, we are indebted to Cambridge University Press and specifically to Kim Hughes and Richard Woodham for their essential assistance in the process of publishing this book. Gratitude is also owed to Kiriakos E. Papadakis for providing us access to the data that he has collected over the years.

The views expressed herein are strictly personal and do not necessarily reflect any views of the affiliated institutions.

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