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Antitrust Legislation and Policy in a Global Economic Crisis—A Canadian Perspective

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I. INTRODUCTION

As the global economic crisis continues, governments and private parties worldwide have undertaken a number of measures to safeguard the stability of their ailing economies. For example, governments in the United States, Europe, and to a lesser degree, Canada, have delivered significant infusions of capital and facilitated major mergers in the financial sector (e.g., Wells Fargo/Wachovia, Bank of America/Merrill Lynch, JP Morgan/Bear Stearns) in a bid to help financial institutions withstand the crisis. In addition to such unilateral measures, given the increasing interdependence and integration of global financial markets and institutions, governments are considering the need for drastic restructuring of multilateral institutions and trading instruments.

When contemplating the implications of a global economic crisis, one is bound to ask what, if any, is the appropriate role of antitrust legislation and policy and what impact there will be on future antitrust enforcement. On the one hand, it could be argued that antitrust policy should be shunted aside—at least in the context of merger review—and not be allowed to prevent restructurings that are necessary for economic stability even though they may also allow the merging parties to acquire market power. Time is of the essence in responding to the financial crisis and timeliness of decision making has been a

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serious challenge for competition agencies in the past. On the other hand, it is possible to contemplate an even greater role for antitrust enforcement, particularly in areas such as cartels and abuse of dominance. Furthermore, given the global scope of the contemplated restructurings, it is quite plausible that the enforcement posture of one jurisdiction could lead to pressure to adopt the same stance in other jurisdictions, putting a severe strain on recent inter-agency cooperation.

To date, the approach of antitrust agencies has been anything but uniform. In Canada, the Competition Bureau has been silent on its views of the role of antitrust law and policy in the current crisis. This is in contrast to, for example, the European Commission, which has demanded a much more active role for itself (both in merger review and the review of State aid proposals). In the United States, the antitrust authorities have reviewed several significant mergers precipitated by the economic crisis but to date have taken a relatively non-interventionist approach. With the incoming Obama administration, which is expected to be much more activist in its antitrust enforcement, antitrust authorities in Washington may soon become much more involved in dealing with the crisis.

The Canadian Competition Bureau's relative silence may be attributed, in part, to the lower levels of government intervention that Canadian financial institutions and other industries have required to date. While the Canadian federal government has delivered a \$5 billion infusion to Canada's major domestic banks, plans to purchase \$75 billion in insured mortgages, and is expected to follow the United States with auto sector support,

there has yet to be a failure or major merger or acquisition of a major domestic financial institution. It also must be recognized that Canada has recently undergone a federal election, and indeed is still in a state of political flux, which has tempered government officials from opining upon politically sensitive matters.

Nonetheless, there are aspects of Canadian competition law that are clearly applicable in a period of economic dislocation. The Competition Bureau also has a track record of dealing with restructuring in the Canadian banking industry, which would be of obvious relevance to potential developments going forward.

In this article, we review some of the general considerations surrounding the role of antitrust law and policy in a global economic crisis and then discuss the Canadian situation in this global context.

II. ANTITRUST IN A TIME OF GLOBAL CRISIS

To some degree, the impact of the global economic crisis upon future antitrust policy and enforcement (particularly in the financial sector) is likely to depend upon the remedies used to restore viability and stability to the global financial sector.

If domestic remedies (i.e., mergers between industry participants and infusions of capital) are abandoned in favor of an internationally coordinated intervention, then it is conceivable that antitrust issues will be relegated to a second tier policy imperative in favor of the urgent need to restore stability to the world's financial institutions. Indeed, if a "Bretton Woods" like accord is required to restructure and perhaps regulate the global financial industry, it would not be surprising if this restructuring involved a diminished

role for antitrust considerations. Governments that are prepared to revert to deficit financing and large scale stimulus packages will also be willing to accept market concentration fallout for the sake of economic stability.

If, however, targeted domestic tactics continue to be the preferred remedy, then individual antitrust regimes may have at least a theoretical role in overseeing these remedies. However, as evidenced by the U.K. Office of Fair Trading's experience with the Lloyds/HBOS merger (where the government intervened to allow the merger despite the OFT's concerns), political pressures to move quickly and continue to keep large institutions afloat may not allow any meaningful role for antitrust review.

For antitrust authorities, the speed with which large institutions have decided to enter into large scale transactions may force them to intervene and address excessive concentration issues on an ex-post basis, e.g., via post-closing merger review. Antitrust scholars point to the post-World War II break-up of the aluminum monopoly held by Alcoa as an example of the kind of intervention that may be required at a later stage, once the "dust has settled." The creation of excessive concentration may also lead antitrust agencies to investigate more monopolization or "abuse of dominance" cases in the future. Indeed, the approach of getting through the crisis and dealing with negative consequences later is the model advocated by most economists and central banks when asked about post-crisis inflationary risks.

Even leaving aside mergers/acquisitions brokered by governments, strategic mergers between competitors are likely to increase parties' reliance on "failing firm" and

efficiencies arguments in antitrust merger review. Interestingly, some antitrust scholars have argued that if efficiencies are considered a factor in favor of a merger's approval, then the excessive debt loads which have resulted from certain mergers/acquisitions in the current environment should also be considered as a potentially negative factor in assessing the impact of the proposed merger.¹

One area that is still likely to keep antitrust authorities busy is cartel enforcement. Difficult economic times often lead to increased temptations for competitors to reach anticompetitive agreements to "share the pain." It thus would not be surprising to see an increase in cartel enforcement. Moreover, given the already significant levels of cooperation among antitrust authorities worldwide, as well as the global nature of commerce (and thus, it follows, conspiracies), increased cartel enforcement in one jurisdiction could lead to increased enforcement in other countries. Economic difficulties may, however, make it more difficult for antitrust authorities to obtain the types of dramatic fines that have become more common in recent years, which could lead antitrust agencies to look for other methods of deterrence, such as jail sentences or other sanctions for individuals.

III. THE CANADIAN PERSPECTIVE

If any major merger involving Canada's financial institutions was proposed as a way of coping with the financial crisis, the question of the appropriate interaction between antitrust policy and economic policy would be particularly controversial given the federal government's 1998 decision to impose a *de facto* moratorium on major bank

¹An Interview with Bert Foer, November 2008,
http://www.antitrustinstitute.org/archives/files/Multinational%20Monitor%20Foer%20Interview.11.4.08_110420081230.pdf.

mergers in Canada. This decision came after four of Canada's five leading banks proposed two separate mergers that would have seen their overall numbers reduced to three. The Competition Bureau reviewed the proposed mergers and issued letters to the parties indicating several areas of concern. However, it was quite clear that the Bureau's review was subordinate at all times to the ultimate decision-making authority of the Minister of Finance, who would have the final say on the mergers.² In the end, the Minister refused to approve the mergers and, until recently, there had been little political momentum to raise the issue anew, although there was also much speculation about the circumstances in which bank mergers might be approved.

In June 2008, a panel assembled by the federal government to conduct an independent review of Canada's competition policy and legislation recommended that the *de facto* prohibition on mergers be lifted.³ The reason cited was the need for Canada's banks to become more competitive in the global arena. On the other hand, some individuals (most notably Canada's former prime minister, Jean Chretien) have recently credited the relative strength and stability of Canada's financial institutions to the federal government's moratorium on major bank mergers.⁴ Supporters of the moratorium argue that this decision prevented Canadian institutions from playing a more significant international role and, consequently, becoming more intertwined with their international

²The Minister of Finance's authority to override competition issues is incorporated in the *Competition Act*, which specifically provides that a bank merger cannot be blocked if the Minister certifies that it is "in the public interest." *Competition Act*, R.S.C. 1985, c. C-34, s.94(b).

³Competition Policy Review Panel, *Compete to Win*, 52 (June 2008). A copy of the full report is available from: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00040e.html.

⁴S. Stewart, "Lucky or prescient? Chretien takes credit for stronger banks", *Globe and Mail* (October 8, 2008). Available from: http://www.reportonbusiness.com/servlet/story/RTGAM.20081008.wrbankschretien08/BNStory/Business/home?cid=al_gam_mostemail.

peers. This relative independence, it is argued, has decreased the exposure of Canadian financial institutions to the U.S. sub-prime mortgage meltdown. The current financial difficulties at Citibank are used as an illustration of the increased risk associated with a larger size.

In view of recent experience in other jurisdictions, it is certainly within the realm of possibility that two or more of Canada's leading banks will again float the possibility of a merger. As before, any proposed merger would be subject to review by the Competition Bureau (for the competitive impact of the transaction), the Office of the Superintendent of Financial Institutions (for the prudential impact of the transaction), as well as a "public interest review" by the Minister of Finance, with the ultimate decision regarding approval resting with the Minister. In a 2003 statement, the federal government set out five criteria that the Minister would consider in assessing the "public interest": (1) access to financial services by Canadian consumers; (2) continued access to sufficient choice by Canadian consumers; (3) impact of the merger upon international competitiveness and long-term growth prospects for the merging parties; (4) contribution of the merger to the "deepening and broadening" of Canadian capital markets; and (5) transition of employees displaced by the merger. While it may not fit squarely into any one of these criteria, one would presume that ensuring the stability of Canada's financial sector, or economy, would also qualify as part of the "public interest."

There are few other industries in Canada that are subject to an explicit "public interest" override of competition considerations.⁵ Moreover, the Competition Bureau

⁵The transportation industry is one other example. Any proposed transaction that is required to be notified under the merger provisions of the *Competition Act* and which involves a federal "transportation

prides itself on its independence and imperviousness to political pressure. But it is still legitimate to ask what would happen if a merger between two large manufacturers were proposed to save the North American/Canadian auto industry: Would the review be handled by the Competition Bureau in the usual fashion, or would the review be expedited or overridden by political concerns and pressures from other areas of government or, indeed, from other foreign governments or antitrust agencies? Similarly, could pressures from other antitrust agencies and governments to review and potentially challenge a merger of this kind increase the likelihood of Canadian antitrust intervention? When last faced with a similar, albeit lesser sectoral crisis, the Canadian Government was quick to suspend the application of the *Competition Act*.⁶

While there may not be a "public interest" override for most industries, Canadian competition law incorporates other forms of exceptions or defenses that may be relevant in difficult economic times. For example, section 92 of the *Competition Act* provides that it is appropriate to consider whether the target of a merger "has failed or is likely to fail" when assessing a transaction's effect on competition. In other words, if it is likely that the target of a merger will exit the market even in the absence of the merger (due to extreme financial difficulties), any reduction in competition as a result of the "failing firm's" acquisition is not attributed to the merger.

According to the Bureau's *Merger Enforcement Guidelines*, a firm will be considered to be "failing" for these purposes if: (1) it is insolvent or is likely to become

undertaking" must also be notified to the Minister of Transport. The Minister must then determine whether the proposed transaction negatively affects the "public interest" as it relates to national transportation.

⁶When faced with the imminent demise of one of Canada's major domestic airlines in 1999, a provision of the *Canada Transportation Act* was invoked to temporarily suspend application of the *Competition Act*.

insolvent; (2) it has initiated or is likely to initiate voluntary bankruptcy proceedings; or (3) it has been or is likely to be petitioned into bankruptcy or receivership. The Bureau will also typically require financial information from the firm (such as projected cash flows, credit information) to support its claims that it is failing or is likely to fail. In addition, before the failing firm argument is accepted, the Bureau will consider whether any preferable alternatives to the merger exist and are likely to result in a materially greater level of competition. In particular, the Bureau will consider whether there are any third parties whose purchase of the "failing firm" would be likely to result in a materially higher level of competition in a substantial part of the market. The Bureau must be satisfied that a thorough search for a competitively preferable purchaser has been conducted (referred to as a "shop" of the failing firm). If not, the Bureau will require an independent third party (such as investment dealer, trustee, or broker) to conduct the shop. The Bureau will also consider whether the retrenchment or restructuring of the failing firm (e.g., restructuring with focused or narrower operations) or liquidation would lead to a materially greater level of competition than if the proposed merger proceeds.

The "failing firm" criteria are quite onerous on their face. However, it remains to be seen whether, given the significant time pressures to clear such transactions, the Bureau would show greater flexibility in the current environment, particularly with respect to the "shop" requirement. There is some precedent for this. For example, the Competition Bureau decided in 1999 not to challenge the merger of Canada's two major domestic airline carriers (Air Canada and Canadian), notwithstanding that the merged

airline accounted for 90 percent of domestic passenger revenues. In what was a very short time for a review of that nature, the Bureau determined that there was no competitively preferable purchaser and that the acquisition as proposed (which included a set of significant undertakings for the acquirer) was preferable to the liquidation of Canadian.

In addition to the "failing firm" argument, Canadian competition law explicitly provides for an "efficiency defense," which allows anticompetitive mergers to be cleared if they are likely to generate gains in efficiency that "will be greater than, and will offset the effects of any prevention or lessening of competition." This defense has been relied upon very infrequently due to the debate surrounding the appropriate standards to be used in measuring and weighing the efficiencies arising from a transaction. The only case to have successfully invoked the efficiencies defense was litigated extensively and prompted the Competition Bureau to attempt to amend the statutory provision. The statutory defense still stands and the Competition Bureau appears to have moved away from suggesting that the provision should be significantly amended or deleted. However, there remains significant uncertainty as to how the provision is to be applied in practice.⁷ That said, the current economic climate and the inevitable consolidation in certain industries will likely lead parties increasingly to invoke and test the application of the efficiencies defense.

There are also several avenues in Canadian competition law whereby the Bureau can bring proceedings following an acquisition if necessary. These "safety valves" may provide the Bureau with the comfort it needs to allow a questionable merger to proceed,

⁷The Bureau released draft guidelines earlier this year but the general reaction is that these guidelines still do not provide sufficient clarification of this complex issue.

knowing that it could bring proceedings at a later stage if competition problems crystallize.

For example, section 97 of the *Competition Act* authorizes the Bureau to challenge a transaction up to three years following closing. Although this authority has almost never been exercised—and it is clearly the Bureau's preference to deal with potential problems up front—difficult economic times may persuade the Bureau to rely on this option as a matter of practical expediency rather than seek to prevent a merger from closing.

More generally, the Bureau also has the authority to bring applications against dominant parties for abuse of that dominant position. While the Competition Bureau has not brought a case to the Competition Tribunal in over six years, it has in the past commenced abuse of dominance proceedings in industries that have undergone significant restructuring. For instance, although Air Canada's acquisition of Canadian was allowed in 1999, the Bureau subsequently brought an abuse of dominance case against Air Canada in 2000 for predatory pricing on certain routes.

Finally, cartel enforcement is sure to remain a key enforcement priority for the Bureau as well. As such, parties in Canada will also have to resist trying to stabilize market conditions through coordinated conduct. Indeed, the Competition Bureau recently announced further guilty pleas in an alleged domestic retail gasoline cartel as well as a guilty plea and associated fines in its investigation of an international cartel involving sales of hydrogen peroxide. In these recent cases, the Bureau alleged that collective

action among competitors was undertaken to deal with economic pressures. As evidenced by some of these developments, the Bureau continues to benefit from cooperation from immunity applicants (who are the first to report anticompetitive activity to the Bureau) as well as cooperation with foreign antitrust enforcement agencies.

IV. CONCLUSION

The credit crunch and associated economic downturn have created new challenges for economic policy around the world. As governments struggle to fashion remedies to prime the global economic pump, they may also be tempted to ignore or downplay antitrust concerns in favor of mergers or restructurings that offer a "fast fix." Canadian competition law already contains elements that could smooth the way for more lenient application. However, one also expects that if today's resolutions truly raise significant antitrust issues (such as excessive concentration), then it will only be a matter of time before antitrust concerns (in one form or another) rise to the forefront again, albeit perhaps at odds with macroeconomic recovery imperatives.