ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 9 Issue 2 pp 91-118 July 2013

EU Competition Law in Times of Crisis: between present challenges and a largely unwritten future

*Arianna Andreangeli**

Since late 2007 and to this day, a broad ranging crisis has swept through a growing number of economic sectors. After an initial impasse the EU Commission and other European agencies have adopted an increasingly proactive stance in dealing with its effects, whether in the banking market or in other industries. But what has this meant for the current and foreseen directions of competition enforcement? This paper will address these questions by concentrating on three themes: first, it will consider which of its "traditional" antitrust tools the Commission has deployed to tackle the challenges of the crisis. Second, it will analyse the role of state aid law as a crisis busting tool and third, it will examine the question of whether EU merger control has been effective in dealing with the fallout from industrial restructuring, caused by the crisis. It will be concluded that despite remaining an important component of the Commission's agenda and especially of its response to the economic crisis, EU competition policy seems to have shifted away from many "established beliefs" and tools, thus opening further questions and creating numerous challenges for the years to come.

1. INTRODUCTION

Since late 2007, and to this day, a broad ranging crisis has swept through a growing number of economic sectors; starting from the banking and financial sector, the crisis has affected numerous manufacturing industries and has triggered sometimes "convulsive" reactions by the public authorities, the economic operators and many of the stakeholders. According to the EU Commission the effective application of the competition rules is an essential tool to rebuild a fragile economy. Despite an initial impasse, the Commission endeavoured to adopt measures designed to "cope" with the impact of the crisis on the single market and to pave the way out of this predicament in the financial and banking industry as well as in the wider "real" economy. But what has this all meant for the current approaches as well as the future directions of EU competition enforcement? Have the merger rules and the principles governing the supervision over state aids provided effective tools to tackle the challenges presented by the crisis, without threatening the integrity of the single market? And has the Commission lived up to its reputation of "tough cop" when it comes to upholding the Union interest in the field of competition policy?

* Lecturer in Competition Law, Edinburgh Law School, University of Edinburgh. An earlier version of this paper was presented at the conference "Scotland debates EU economic governance", organised by the Europa Institute of the University of Edinburgh on 31 May 2012. The author is very grateful to Prof David Howarth, to Dr Bob Lane and to Prof Barry Rodger for their feedback and comments. The usual disclaimer applies.

This paper will attempt to address some of these questions. It will touch upon three main themes: first of all, it will consider which of its "traditional" antitrust tools the Commission has deployed to tackle the challenges of the crisis. Second, the paper will examine the role of state aid rules in "busting" the adverse impact of the crisis. It will be argued that the same desire to uphold the integrity of the single market and to apply these principles coherently with the overarching design of a competitive and open economy pushed the Commission to exercise hitherto rarely invoked powers for the oversight of state intervention aimed at preventing threats to economic stability.

Thereafter, the paper will examine the approach to merger control adopted by the Commission to deal with the restructuring of key industrial areas in response to the credit squeeze: it will illustrate that, after an initial impasse, which de facto allowed Member States to adopt unilateral decisions concerning mergers and acquisitions in key sectors of their economy, the Commission was able to devise and implement a convincing strategy in this area. At the same time, it will be suggested that the consequences of these mergers are still likely to present a number of challenges for ex post control, thus calling for a careful vigilance over "financially significant" entities.

Finally, the paper will discuss some general issues concerning the current status of both competition law and of the Commission as competition watchdog. The paper will illustrate that the desire to maintain the integrity of the single market was especially apparent in the supervision of state aids and in the flexible, realistic application of the merger rules in specific cases, with a view to securing timely and principled clearance to key proposed concentrations. It will be argued that, although the Commission endeavoured to use existing tools flexibly and thereby maintain continuity with its long-standing policies and consistency with key principles, the concentration arising from the restructuring operations occurred in a number of sectors represents a challenge for future competitiveness.

The paper will conclude that competition policy remains an important component of the Commission's agenda and especially of its response to the economic crisis. However, the need to deal with its aftershocks not just in the financial and banking markets, but also in the "real economy" and the demands posed by the integrity of the single market have thrown in question a number of "established ideas" and tools that had hitherto been part of "traditional" EU approaches. While it is still unclear whether this shift is permanent, it is undeniable that the legacy of the economic crisis for the competitiveness and openness of the single market is both wide-ranging and liable to create further challenges for the years to come.

2. COMPETITION LAW RESPONSES TO TIMES OF CRISIS: LEAVING "OBSOLETE" TOOLS BEHIND?

2.1. The EU Commission and the financial and economic crisis: a short summary

The historical development of the financial crisis which unfolded from the US subprime mortgages' crack and swept through large swathes of the financial and banking sectors throughout not just the Americas but also here in Europe has already been addressed in numerous, exhaustive studies and it is not the purpose of this contribution to duplicate these efforts. However, it is suggested that roughly two phases of the crisis can be identified, which, in turn, have characterised the type of response adopted by the Commission. The "water-shed" moment can be identified with 2008, a year in which the Economic and Financial Ministers' Committee ECOFIN openly recognised the "systemic" nature of the crisis, thereby paving the way for greater and deeper involvement of the EU institutions.[1] In the first phase, i.e. the years 2007/2008, started by the run on the British bank Northern Rock and culminating with the crash of Lehmann Brothers, the Commission was regarded by many as being very much a "witness" of unilateral measures adopted by the Member States individually in order to tackle the dramatic unfolding of the crisis:[2] the Commission was either prepared to avoid interfering with the domestic authorities or was ready to examine and authorise mergers and other "packages" of national measures designed to deal with the consequences of the crisis on an "as and when" basis.[3]

This "wait and see" approach,[4] however, created the tangible risk of de facto allowing Member States, ostensibly for the sake of internal stability, to privilege "national champions" to the detriment of non-domestic players which may find themselves in similar difficulties,[5] thus eventually hampering the overall competitiveness of specific markets, especially given the risks arising from an increase of concentration.[6] It is undeniable that in 2007/2008 all authorities, whether at EU or at national level, were navigating unchartered waters in dealing with the crisis. Nonetheless, the lack of any precise guidelines as to how national "salvaging" operations should be conducted and overseen and the uncertainty as to the "aftermath" of the state-led restructuring prompted the EU institutions and especially the Commission, in its capacity as competition watchdog, to jump in the driver seat.[7]

2008 was a rather momentous year, since it saw the ECOFIN ministers setting out the guidelines concerning emergency state intervention by Member States in the banking

---

1 See e.g. Gerard, "Managing the financial crisis in Europe: why competition law is part of the solution, not of the problem", (2008) Global Competition Policy, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330326, pp. 2-4; also Mateus, "The current financial crisis and state aid in Europe", (2009) 5 *Eur. Comp. J*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1500532, pp. 1-2..

2 Gerard, cit. (fn. 1), pp. 7-8.

3 *Ibid.*

4 See OFT report, 31 October 2008, available at: http://www.oft.gov.uk/OFTwork/mergers/decisions/2008/LloydsTSB, para. 19; see also para. 4 ff.

5 See Commission Press release of 13 October 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1496&format=HTML&aged=0&language=EN&guiLanguage=en; see also OFT report, 31 October 2008, available at: http://www.oft.gov.uk/OFTwork/mergers/decisions/2008/LloydsTSB, and Conclusions of the Secretary of State for Business, Innovation and Skills, available at: http://www.bis.gov.uk/policies/business-law/competition/mergers/mergers-with-a-public-interest/maintaining-the-stability-of-the-uk-financial-system; for commentary see e.g. Gerard, cit. (fn. 1), pp. 5-7.

6 See Gerard, cit. (fn. 1), pp. 11-12.

7 For commentary see Mateus, cit. (fn. 1), pp. 4-5; see also Weitbrecht, "Mergers in an economic crisis", (2010) 31(7) ECLR 276 at 278; see also p. 284.

and financial sectors.[8] Perhaps more importantly, in 2008 there was a widespread recognition of the "systemic" nature of the crisis, namely of the circumstance that what started as a financial phenomenon, impacting on banks and other financial institutions, was now having ripple effects on the "real economy". This watershed moment led to the Commission taking a far more "structured" and active role in responding to the crisis.[9] The powers of state aid supervision were exercised flexibly and pragmatically, often in close cooperation with other Commissioners, and decisions were usually adopted rapidly to cope with the "timetable" of the financial markets.[10] Importantly, as will be explored in more detail below, the Commission relied on a hitherto infrequently used (if at all) clause, namely Article 107(3) TFEU, to authorise aid designed to cope with serious economic disturbances.[11]

Merger control rules were also applied in a more "creative" and flexible manner: the Competition Commissioner endeavoured to grant Phase I clearances rapidly, sometimes within 24 or 48 hours of official notification and to speed up the implementation of specific transactions by waiving the suspension effect following notification via a decision adopted according to Article 7 of the Merger Regulation.[12] At the heart of the Commission's renewed resolve was a desire to maintain the integrity of single market principles, an objective which was increasingly under threat and would have been even more so if the Member States had been allowed to continue "going it alone": for this reason, Commissioner Kroes not only ensured swift responses to notifications motivated by restructuring; she also declared that her Office would use existing legal and economic tools to their fullest extent.[13]

In light of the above, it is argued that the Commission's role, from this "second season" of the crisis and onward, became central in dealing with the crisis' demands, out of a concern for avoiding protectionist "torpedoes" on the part of individual Member States and, more generally, for maintaining the integrity of a competitive and open single market.[14] This change was not without problems: it was often suggested that the Commission seemed to become more closely involved not only in the strict supervision but also in the outright "micro-managing" of individual Member States'

8 See Conclusions of the ECOFIN Council held in Luxembourg on 7 October 2008 (Doc. No 13784/08); also Declaration on a concerted action plan of the Euro area countries, 10 October 2008, European Council of 15/16 October 2008, Presidency Conclusions, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103202.pdf.

9 See Commissioner Kroes's briefing to the ECOFIN Ministers on the financial crisis, 2 December 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/757&format=HTML&aged=1&language=EN&guiLanguage=en.

10 See e.g. Kapsis, "The impact of the recent financial crisis for EU competition policy in the banking sector", (2010) 9(3) Int'l J for Trade Law and Policy 256 at 263-265.

11 *Id.*, pp. 264-265; see also Zimmer and Blackschocz, "The role of competition in state aid control during the financial market crisis", (2011) 32(1) ECLR 9 at 10-11.

12 See e.g. Weitbrecht, cit. (fn. 7) at 282-283.

13 Kapsis, cit. (fn. 10), pp. 261-262; see also Zimmer et al., cit. (fn. 11), p. 14.

14 Inter alia, see Gerard, cit. (fn. 1), pp. 8-9.

budgets as a condition for, for example, approval of state aid packages.[15] This perceived change in its stance was criticised on the ground that so close supervision risked bypassing the democratic checks existing in individual Member States and thereby weakening the accountability of the institutions concerned vis-à-vis individual citizens.[16]

It can therefore be concluded that the financial crisis of 2007/2008 and its consequences for the real economy posed great challenges for competition policy as well as for the whole European project of a single, open and competitive market. Despite initially sitting on the sidelines, the Commission became and continues to be closely involved in dealing with these concerns, whether in order to limit the risk that unilateral state action could threaten the integrity of the common market or to reassert the efficacy of the EU's supra-national decision-making and implementation powers.[17] In doing so, it carefully selected the competition tools with which to structure its response: merger control and state aid supervision emerged as core instruments in this task, whereas other, more "traditional" tools for assisting restructuring, such as the application of Article 101(3) TFEU to "crisis cartels" were not on the agenda. The next section will attempt to analyse the question of whether "crisis cartels" may have become increasingly obsolete, in the face of the almost total condemnation of cartel behaviour and of other forms of collusion.

2.2. Applying Article 101(3) TFEU to restructuring deals: are crisis cartels just "museum material"?

The previous section sought to provide a short sketch of the "phases" (such as they can be identified) in which the financial and later "systemic" crisis unfolded and to highlight the main traits characterising the response of the Commission to the challenges posed by it. It was argued that, despite initially being "reactive" to the unfolding of these rather dramatic circumstances, the Commission soon adopted a far more involved, purposeful stance to addressing the consequences of the financial crisis by relying mainly on state aid supervision and merger control. This section will consider whether the application of the legal exception to forms of coordination designed to foster industrial restructuring may have become "relics" of the past.

The limited purvey of this contribution does not allow for any in-depth analysis of the issues arising from the practice of the Commission, mainly developed in the 1980s and 1990s, to "exempt" prima facie anti-competitive agreements destined to deal with the consequences of systemic overcapacity (namely over capacity owed to the consequences of demand downturn and not to, e.g., inefficiencies inherent to the conduct of individual undertakings) from the sanction of nullity provided by Article 101(2) TFEU.[18] As is well known, there have been cases in which rivals were allowed to jointly agree cuts of production if the dynamics of demand and supply cannot restore

15 Napolitano, "The two ways of global governance after the financial crisis", (2011) 9(2) Int'l J Const'l Law 310 at 314; see also 320-321.

16 See e.g. Kapsis, cit. (fn. 10), pp. 269-270.

17 For commentary, see Mateus, cit. (fn. 1), pp. 4-5; also Napolitano, cit. (fn. 15), pp. 319-320.

18 See, *inter alia*, Jones and Sufrin, *EC Competition Law: text, cases and materials*, 2nd Ed., 2008: OUP, p. 807.

"normal" market conditions.[19] Therefore, to ensure that any anti-competitive effect arising from the concerted output reduction would be counterbalanced by gains, in terms of longer term competition and efficiency increases and thereby conform to the Treaty requirements,[20] these arrangements could only be stipulated for a transient period and as a response to an objective industrial downturn.[21] Also, it must be shown that no lasting improvement can be forecast in the medium term in "normal" market conditions and that the cooperation does not unduly restrain the freedom of the parties beyond what is strictly necessary to shed the overcapacity.[22]

The legal exception clause was applied by the Commission sparingly, mainly to "exempt" from the sanction of nullity agreements designed to attain a concerted reduction in production in industries characterised by "structural oversupply" (as opposed to overproduction owed to inefficient behaviour of the undertakings concerned), so that greater efficiency and more "normal" competition patterns could be restored within a reasonably short period of time.[23]

In cases such as *Synthetic Fibres* and *Dutch Bricks*, the Commission was prepared to accept that a number of rivals could agree on a plan of production cuts, despite these arrangements constituting a very serious infringement of Article 101(1) TFEU by reason of their object, provided that strict requirements were met: first of all, the market had to be in a situation of ongoing crisis caused by factors beyond the control of the concerned undertakings and which could therefore only be resolved by concerted output reductions.[24] Second, the arrangement must be limited in its duration and geographic scope[25] and should not have been capable of totally curtailing any remaining competition.[26] In the Commission's view, these requirements were likely to be fulfilled if the arrangement preserved a certain degree of "uncertainty" as to the parties' future behaviour[27] and allowed them to determine autonomously key aspects of

---

19 *Ibid.*; see also pp. 237-238.

20 See e.g. Commission Decision 84/380/EEC, *Synthetic Fibres*, 4 July 1984, [1984] OJ L207/17, para. 25-27; see also e.g. joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Suiker Unie and others v Commission*, [1975] ECR I-1663, para. 173-175; Commission Notice, Guidelines on the applicability of Article 81 EC Treaty to horizontal cooperation agreements, [2001] OJ C2, para. 25; see also para. 18-19.

21 See e.g. Commission XII Report on Competition Policy, para. 38-41. For commentary, inter alia, WHISH, *Competition Law*, 6th Ed., 2007: OUP, p. 600.

22 Commission XII Report on Competition Policy, para. 38-39. See also Commission XXIII Report on Competition Policy, para. 85.

23 *Ibid.* See also Commission XXIII Report on Competition Policy, para. 82 and 89; Commission Notice, Guidelines on the applicability of Article 81 EC Treaty to horizontal cooperation agreements, [2001] OJ C2, para. 73-75, 84. For commentary, see *inter alia*, FIEBIG, "European crisis cartels and the triumph of industrial policy over competition in Europe", (1999) 25 *Brook. J Int'l L* 607 at 614-615.

24 See e.g. Commission decision 84/380/EEC of 4 July 1984—*Synthetic Fibres* (IV/30.810), [1984] OJ L207/17, para. 28-29; see also para. 31-35.

25 *Inter alia*, Commission decision 94/296/ECof 29 April 1994—*Stichting Baaksten* (IV/34.456), [1994] OJ L131/15, para. 32-34.

26 *Id.*, para. 39-40. See also, *mutatis mutandis*, Commission decision 87/3/EEC of 4 December 1986—*ENI/Montedison* (IV/31.055), [1987] OJ L5/13, especially paras. 7-8, 21-22, 33-35.

27 *Id.*, para. 34-35; see also Commission decision 84/380/EEC of 4 July 1984—*Synthetic Fibres* (IV/30.810), [1984] OJ L207/17, para. 31-32, 34-37.

their commercial policies.[28] Thus, although the application of Article 101(3) TFEU to mutually agreed output reductions was met with concern by some commentators, on the ground that it could have resulted in an excessively wide reading of the "efficiency gains" condition and in particular in incorporating "non-economic" elements in this analysis,[29] it has since been considered as an "acceptable" use of the legal exception.[30]

It may have been thought that, with the advent of the financial crisis, Article 101(3) TFEU could have provided a flexible and overall effective instrument to cope with the aftershocks of the "credit squeeze", especially when the latter started to adversely affect the "real economy". However, it is apparent that no decisions such as the one in *Dutch Bricks* were adopted. How can this apparent "gap" be explained? It is unquestionable that over the past 20 years a clear condemnation of cartel behaviour has been inspiring the enforcement activity of the Commission, as well as justifying the closer and more active involvement of the national competition agencies: this is especially visible in the multiplication of leniency programmes across the Union, a phenomenon which in turn has resulted in a far more incisive detection activity, in higher fines and even in criminal sanctions in some Member States. Furthermore, the more recent case law of the Court of Justice, concerning the application of Article 101(1) TFEU to similar "emergency" arrangements can be read as confirming a very "orthodox" view of the prohibition clause, as a result of which "serious infringements" will be condemned outright as restrictions 'by object',[31] with a very limited possibility of "redemption" under Article 101(3) TFEU.[32] Consequently, while "agreeing their way out of recession" may have seemed an attractive option, the current position shows that a "less controversial" way of dealing with industrial downturn would be for each rival to adopt unilaterally decisions as to its rationalisation.[33]

It is concluded that while Article 101(3) provides in principle a framework within which the positive effects of prima facie anti-competitive arrangements, including public policy objectives, can be assessed with a view to waiving the sanction of nullity of Article 101(2), it may not provide a suitable answer to the need to deal with the effects of the economic downturn in Europe.[34] The almost unanimous condemnation of cartel behaviour and consequently the more general distrust for any form of collusion having

---

[28] *Id.*, para. 51-52; see also Commission decision 94/296/ECof 29 April 1994—*Stichting Baaksten* (IV/34.456), [1994] OJ L131/15, para. 33, 35-36.

[29] See e.g. Fiebig, "European crisis cartels and the triumph of industrial policy over competition in Europe", (1999) 25 *Brook. J Int'l L* 607 at 619; see also pp. 636-637; also Hornsby, "Competition policy in the 80s: more policy less competition?", (1987) 12(2) *ELRev* 79.

[30] Case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, para. 85, 109-110; see also, *mutatis mutandis*, case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR 1, para. 5; for commentary, see e.g. Townley, *Article 81 EC and public policy*, 2009: Oxford, Hart Publishing, p. 255.

[31] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers*, [2008] ECR I-8637 (hereinafter referred to also as *Barry Brothers*), especially para. 33-37.

[32] For commentary, see *inter alia* Van der Vijver, "The Irish beef case", (2009) 30(4) *ECLR* 198; also Svetlicinii, "ECJ's ruling in beef industry case: competition law must be observed at all times", (2008) 12 *Eur. L. Reporter* 402; Andreangeli, "From mobile phones to cattle", (2011) 34 W Comp 215 at 223-224.

[33] See inter alia Andreangeli, cit. (fn. 32), pp. 221-222.

[34] Townley, cit. (fn 30), p. 302.

appreciably restrictive effects on competition support the view that allowing rivals to "agree their way out of a crisis" is no longer an appropriate competition policy tool to deal with the effects of the credit squeeze on the "real economy", and could therefore explain the preference of the Commission for other tools, such as state aid oversight and the application of the merger control rules. The next section will analyse the approach adopted by the Commission in these areas with a view to assessing the overall effectiveness of its role of "guardian of the single market" albeit in challenging times.

3. NEW CHALLENGES, NEW RESPONSES? ADAPTING THE EXISTING "TOOLBOX" TO THE DEMANDS OF THE FINANCIAL AND ECONOMIC CRISIS

3.1. State aids in times of crisis: "rescue and restructuring" banks and beyond

The previous section analysed briefly the question of whether Article 101 TFEU and especially the legal exception provided by its paragraph 3 can provide tools to tackle the consequences of the economic crisis and in that context questioned the continued suitability of "crisis cartels" as tools to deal with economically challenges times. This section will instead be concerned with addressing the questions arising from the application of state aid rules to the rescue and restructuring of undertakings in crisis, not just in the financial sector, but also in the "real economy". As is well known, the EU Treaty provides a framework for the overseeing the involvement of the Member States in the economy and more specifically for preventing the granting of public aid that may distort competition within the single market.[35]

According to Article 107(1) TFEU, any form of state assistance which may favour specific undertaking or the production of certain goods or services, thereby adversely affecting, actually or potentially, competition on the common market, is incompatible with the rules of the Treaty and therefore prohibited.[36] Article 108(3) imposes a duty on the notifying Member State to abstain from giving effect to the aid until such time as the procedure designed for its control has been completed.[37] This procedure is articulated in a "preliminary" examination, to be completed within two months, at the end of which the Commission may decide that either the assistance does not constitute "aid" within the meaning of the Treaty, or that it does not appear to be anti-competitive. In any other case, the Commission will initiate a formal procedure, entailing a full examination of the proposed measure, and assisted by *inter partes* procedural guarantees.[38]

As to the assessment of the aid, the case law indicates that the Commission enjoys a certain degree of discretion when approving aid under Article 107(2) and (3) TFEU.[39]

---

[35] See e.g. Hancher et al., *EC State Aids*, 2006; Iversen et al. (Eds), *Regulating competition in the EU*, 2008, see especially chapter IX.

[36] See *inter alia* Jessen, "State Aid", in Iversen et al., cit. (fn. 35), pp. 402-404.

[37] See inter alia, case 120/73, [1973] ECR 1471, para. 8; for commentary, Jessen, cit. (fn. 36), pp. 421-422.

[38] Inter alia, Jessen, cit. (fn. 36), pp. 409 ff.

[39] See inter alia, case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*, [2001] ECR I-8365, para. 30-31.

It will not take into account the "intention of the parties", i.e. whether the state, in granting the aid, pursued deliberately the goal of giving "targeted" financial assistance to the recipient[40] or whether the assistance pursued public policy goals.[41] What is, instead relevant is the extent to which any form of financial assistance is such that it favours the recipient by conferring to her advantages that she could not have obtained according to normal market conditions.[42] At the heart of this assessment is the "ordinary investor" concept, according to which financial support only constitutes aid if the terms under which it is granted by a public body would not be acceptable for a private entity operating within the free market.[43]

If these conditions are met, aid will be considered contrary to the Treaty if it is "selective", i.e. if it favours the recipient vis-à-vis other entities that are in a comparable position, thus conferring to the former a competitive advantage[44] by "mitigating the charges that are normally included in the budget of an undertaking" and putting it in a more favourable financial position than non-recipients.[45] By contrast, financial advantages stemming from the implementation of "general schemes" will not be regarded as aid that can distort competition, provided that they are "open to all economic agents" and operated in accordance with "proper objective criteria".[46] In this context, the manner in which the individual measures were construed and in particular the extent to which they result in specific undertakings or economic sectors being favoured will be especially important.[47]

As to whether aid is capable of distorting rivalry on the market or it threatens to do so, the Court of Justice held in *Commission v Italy* that this assessment must be conducted so as to prevent Member States from favouring certain undertakings or the supply of specific goods or services and thereby seeking to interfere with the "normal" functioning of competition within the common market.[48] Central is the question of whether the financial assistance could reduce the ability of rivals to the recipient to expand their position on the market or new rivals to attempt to enter the market.[49] For this purpose, the Commission will have to conduct a counterfactual analysis, by comparing the conditions of competition that characterised the relevant market before to those occurring after the aid was granted.[50]

---

40 See inter alia Commission Decision 92/11/EC, *Toyota*, [1992] OJ L6/36, Part IV.

41 Case C-241/94, *France v Commission*, [1996] ECR I-4551, para. 19-21.

42 See e.g. case C-126/01, *Gemo SA*, [2003] ECR I-13769, para. 28-33.

43 See inter alia case C-39/94, *SFEI V La Poste*, [1996] ECR I-3547, para. 62.

44 See e.g. case C-143/99, cit. (fn. 39), para. 35-36.

45 Case C-6/97, *Italy v Commission*, [1999] ECR I-2981, para. 15-16.

46 Jessen, cit. (fn. 36), p. 448; see e.g. Commission Notice on the application of the State aid rules to direct business taxation, [1998] OJ C384/3, para. 13-14.

47 See *inter alia*, case C-143/99, cit. (fn. 39), para. 41; also case C-88/03, *Portugal v Commission*, [2006] ECR I-7115, para. 54-56.

48 Case 173/73, [1974] ECR 709, para. 13.

49 See *inter alia* case C-169/08, *Presidenza del Consiglio dei Ministri v Regione Sardegna*, [2009] ECR I-10821, para. 61-63.

50 See *inter alia* case C-6/97, cit. (fn. 45), para. 21-23.

According to Article 107(2) TFEU, some forms of aid are compatible with the Treaty, such as certain forms of financial assistance targeted at social objectives. Under this provision the Commission enjoys very limited powers of appreciation, being able only to scrutinise the notified measures to ensure that they meet the criteria provided by the Treaty and are not disproportionate to the goals they seek to achieve or contrary to the general principles of EU law or other rules of the Treaty.[51] Article 107(3) provides a further basis for approval of notified aid aimed at supporting "development of certain regions or certain areas of the economy", at allowing the realisation of "projects of common European interest" and at preserving and promoting culture.[52] The Commission may also authorise aid that is necessary to prevent and limit the impact of a "serious disturbance" in the European economy. Unlike under Article 107(2) TFEU, however, the Commission enjoys wide discretion in examining the impact of the aid on competition and the extent to which any distortion, whether actual or threatened, is limited to what is indispensable to achieve the aim pursued by the notifying Member State.[53]

The role and scope of state aid control has evolved overtime, to respond to the changing economic conditions across the EU and to the challenges posed by globalisation and by the ensuing need, expressed in 2000 with the Lisbon strategy, to secure efficiency, openness and competitiveness of the European economy.[54] Member States were therefore resolved to reduce the scope of their intervention in the economy and to destine public resources to "more horizontal objectives of common interest" as well as the call for a stricter scrutiny of notified aid.[55] As a result, the Commission's approach to the scrutiny of aid tended to privilege financial assistance destined to support, inter alia, innovation as well as boosting the activity of small and medium sized enterprises.[56] The Commission also sought to identify more "virtuous" forms of aid by means of Notices and Guidelines and of Block Exemption Regulations.[57]

The implementation of the Lisbon Strategy had also a significant impact on the approach to aid destined to facilitating the "rescuing and restructuring of firms in difficulty".[58] Perceived as distortive by the Commission, on the ground that it could be used to "prop up" artificially inherently "inefficient" competitors, to the detriment of more "virtuous" market players, this form of financial assistance was strictly limited to

---

51 Article 108 TFEU; see Council Regulation (EC) No 659/1999 of 22 March 1999, [1999] OJ L83/1; also Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC)No 659/1999, [2004] L140/1. For commentary see e.g. Jessen, cit. (fn. 36), pp. 470-471.

52 *Id.*, p. 471.

53 *Ibid.*; see also Commission Guidelines on state aid for rescuing and restructuring firms in difficulty, [2004] OJ L244/2, para. 6-7.

54 *Id.*, para. 3.

55 *Ibid.*

56 See e.g. Community framework for state aid for research and development and innovation, [2006] OJ C323/1; also Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2004] L124/36; see also Guidelines on Rescue and Restructuring, para. 57 ff.

57 *Inter alia* Jessen, cit. (fn. 36), pp. 465-468.

58 See Guidelines, cit. (fn. 53), para. 2-3.

"exceptional" cases.[59] Thus, the 2004 Rescue and Restructuring Guidelines sought to achieve greater competitiveness in the EU economy and to respond to the need to limit the intervention of the Member States only to cases in which aid was truly "the only way out of a crisis" for undertakings which it can be demonstrated are capable of returning to long term viability within a reasonably short term.[60] The Commission had to be satisfied that State assistance was aimed at a "firm in difficulty", i.e. an undertaking that is unable to "stem losses which, without outside intervention (...) [would] almost certainly condemn it to going out of business in the short or medium term".[61] Whereas "rescue aid" is "by nature temporary and reversible" and limited to "keeping the firm afloat" for the time required to work out a restructuring strategy or a plan for liquidation,[62] "restructuring aid" is inherently of a "longer term nature" and is authorised only if it is accompanied by a "feasible, coherent and far-reaching plan" destined to bring the firm "back in business and to allow it to operate without support.[63]

To deserve approval rescue aid must consist of "liquidity support" such as loans or guarantees granted at an interest rate that would normally be charged to "sound" enterprises and be justified on the grounds of "serious social difficulties", as well as being unable to adversely affect competition in other Member States to a significant extent; it should also be repaid within six months of the first instalment being paid to the recipient and its amount should also be strictly limited to what is necessary "to keep the firm in business" for the required period.[64] In addition, the Member State concerned is obliged to provide, within the same six month period, the Commission with a "restructuring or a liquidation plan or proof that the loan has been reimbursed in full" or that the guarantees have been terminated by the same deadline.[65]

The approach to "restructuring aid" is, instead, more complex: according to the Guidelines, aid will only be authorised once in ten years and if the notification is accompanied by a restructuring plan detailing "appropriate" measures destined to bring the firm back to operating viably on the market within the shortest time possible.[66] In addition "compensatory measures", such as, inter alia, the divestiture of assets or reductions of capacity or of its market share must be adopted in order to ensure that any distortions of competition are kept to a minimum and that in particular "the positive effects outweigh the negative ones".[67] The aid recipient is also obliged to make a "significant own contribution" to the restructuring costs (50% at a minimum),[68]

[59] See e.g. Soltesz et al., "The "temporary framework"--the Commission's response to crisis in the real economy", (2010) *ECLR* 106 at 107-108; also Guidelines, cit. (fn. 53), para. 4.

[60] Inter alia, Stoltesz, cit. (fn. 59), pp. 107-108.

[61] Guidelines, cit. (fn. 53), para. 15.

[62] *Ibid.*; see also, inter alia, Stoltesz, cit. (fn. 59), pp. 108-109.

[63] Guidelines, cit. (fn. 53), para. 17.

[64] *Id.*, para. 25.

[65] *Ibid.*

[66] *Id.*, para. 35.

[67] *Id.*, para. 37.

[68] *Id.*, para. 44.

destined to minimise the distortion of competition arising from the competitive advantage gained by the recipient,[69] and to accept often pervasive limits to its business freedom, such as the obligation to divest key assets and to decrease its presence on the market.[70]

After initially adopting a "spectator" position vis-à-vis the developments of the financial crisis, the Commission sought to intervene more actively in managing its consequences. Following the US sub-prime mortgage crisis and leading up and including the fall of the investment bank Lehmann Brothers, the Commission allowed several Member States to take direct action to rescue banks and financial institutions, ranging from the grant of guarantees and loans for recapitalisation to the outright nationalisation of some of the most distressed institutions. Thus, for instance, in the *Northern Rock/Bank of England* case the Commission de facto avoided adopting a decision on the liquidity line granted by the UK central bank to the financial institution Northern Rock on the ground that this type of financial assistance did not constitute "aid" within the meaning of the Treaty.[71] The Commission took the view that since Northern Rock was still able to meet its liabilities at the time in which the line was granted and the latter had been provided at the Bank of England's own initiative, this measure did not trigger the application of Article 107 TFEU:[72] it was emphasised that, in any event, the grant of this short term credit facility had been backed by "high quality" guarantee and was accompanied by the obligation on the part of the recipient to pay "punitive interest rates".[73]

However, the initially "conservative approach", characterised by the application of the Rescue and Restructuring Guidelines, was replaced by a far more proactive attitude to dealing with the consequences of the crisis. The "turning point" was represented by the conclusions adopted by the ECOFIN ministers on 7 October 2008.[74] At that meeting it was agreed that state financial "interventions should be timely" and of limited duration; Member States should remain "watchful regarding the interests of taxpayers" as well as capable of determining a change in management; and shareholders of institutions in crisis should "bear the due consequences of the intervention".[75] Overall, it was recognised that the crisis had become "systemic", i.e. had become capable of not only leading to the downfall of "unstable" banks, but also to adversely affect "fundamentally sound" financial institutions.[76] At the same time, however, the Ministers expressed the view that any aid targeted at supporting failing banks should be inspired by "common EU principles" of openness and non-discrimination.[77] Thus on 13 October 2008 the

---

69 Inter alia, Stoltesz, cit. (fn. 59), pp. 107-108.

70 Id., p. 108; see especially Guidelines, cit. (fn,. 53), para. 45-46.

71 Commission communication of 5 December 2007, COM(2007) 6217.

72 Id., para. 30-33.

73 Ibid.; for commentary, see e.g. Gilliams, "Stress testing the regulator", (2011) 36(1) ELRev 3 at p. 5-6.

74 See http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103202.pdf.

75 Id., p. 2.

76 Ibid. See also, inter alia, Gerard, cit. (fn. 1), pp. 8-9; also Zimmer et al., cit. (fn. 11), pp. 9-10.

77 Id., pp. 2-3.

Commission issued a Communication concerning the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (hereinafter referred to as the Banking Communication).[78]

The framework proposed in the Banking Communication was expressly regarded as a derogation from the generally applicable Rescue and Restructuring Guidelines and the powers of assessment exercised by the Commission in this specific respect were based on Article 107(3)(b), i.e. on the provision conferring on the Commission the power to assess and approve aid destined to "remedy a serious disturbance in the economy of a Member State".[79] According to the Communication, this requirement had been fulfilled due to the nature of the crisis and in particular to the real and grave danger that the overall financial system of the EU Members could be jeopardised as a result of the credit squeeze.[80]

Several commentators emphasised that this legal basis entailed a rather wide power of appreciation in examining individual aid proposals and consequently had been relied upon by the Commission to depart from its general approach, enshrined in the 2004 R&R Guidelines, for the purpose of meeting the goals and expectations set at the 2008 ECOFIN Council Meeting.[81] As a result, it could adopt decisions in accordance with a more flexible set of criteria and "wave through" those forms of financial aid that aimed at attaining goals going "beyond competition", such as the "restoration of long term profitability" of a hitherto "troubled" bank,[82] thereby limiting the adverse consequences of the current financial disturbance.[83] At the same time, however, the Commission was profoundly conscious of the need to carefully "calibrate" the scope of its policy and therefore to limit clearance only to forms of financial intervention granted only in "genuinely exceptional circumstances", i.e. when the financial instability of one institution would threaten the "entire functioning of the financial markets".[84] The Commission was especially concerned with preventing individual member states from relying on the "serious financial disturbance" ground to "prop up" national champions.[85]

Before the downfall of Lehmann Brothers the Commission, reluctant to accept that the overall banking sector within a Member State could be threatened by the crisis engulfing a single institution,[86] had been slow to authorise under Article 107(3)(b) financial assistance targeted at a specific bank, preferring, instead, to apply the rather

78 [2008] OJ C270/8.

79 Id., para.4, 6-7.

80 Id., para. 8.

81 Id., para. 3; see also para. 10.

82 Zimmer et al., cit. (fn. 11), p. 114-115.

83 Banking Communication, cit. (fn. 71), para. 10; see also para. 13.

84 See id., para. 11.

85 Inter alia, Gilliams, cit. (fn. 73), p. 5-6.

86 See inter alia, Commission decision of 27 June 2007, BAWAG, COM(2007) 3038 final, especially para. 168-170.

restrictive standards laid down in the general R&R Guidelines.[87] However, the 2008 events showed that even the instability of one operator could provoke bank runs and, more generally, undermine the overall solidity of the banking sector within the notifying Member State.[88] For these reasons, the Commission sought to interpret many of the principles guiding its supervision of 'rescue and restructuring' aid more flexibly so that they could adapt better to the demands of the crisis.

This new approach was made manifest by the 2008 Banking Communication:[89] according to this new instrument any emergency measures of financial assistance could be authorised if the Commission was satisfied that they were capable of tackling effectively the consequences of the "credit squeeze" for the stability of the overall economy of a specific Member State.[90] "Aid schemes", accessible by all institutions "in crisis" that fulfilled certain objective and non-discriminatory criteria were preferable to "individual aid measures" which, given their ability to distort competition in favour of the recipients in a more glaring way, would be subject to closer scrutiny.[91] Both forms of assistance had to satisfy criteria of 'appropriateness' and of 'proportionality' and could only be allowed if they were of limited duration and strictly monitored.[92]

As to the eligibility for this type of aid, the Commission drew a distinction between "illiquid but otherwise financially sound" undertakings and those institutions who were "troubled" due to "endogenous" factors. In respect to the former, it was held that since their instability was owed to the impact of the present circumstances on their management, rather than to, e.g. "excessive risk taking", any distortion of competition likely to follow from the grant of aid would have been limited and the scope of the intervention itself would have been narrower.[93] By contrast, granting financial assistance to banks or financial institutions who were experiencing turmoil due to "poor management" or "reckless choices" in respect to assets would have required a far more careful examination, due to their greater intensity and, consequently to the greater likelihood that they would result in significant distortion of competition.[94] Furthermore, the notifying state would remain obliged to provide a "restructuring plan", whose approval is subject to the existence of appropriate compensatory measures and to the giving of a suitable and proportionate "own contribution".[95]

In order to be approved, notified aid should be "well-targeted", that is, capable of effectively address a serious economic disturbance; it should be "proportionate" to the objective being sought and "not going beyond what is required" to achieve this goal; and finally, it should be "designed in such a way as to minimize negative spill-over

---

87 Id., para. 171 ff.; for commentary, see Gilliams, cit. (fn. 73), pp. 7-8.

88 Gilliams, cit. (fn. 73), p. 8 ff.

89 Commission decision of 5 November 2008, COM(2008) 6498; see especially para. 54 ff.

90 Id., para. 11.

91 Id., para. 9-10.

92 Id., para. 12-13.

93 Id., para. 14.

94 Ibid.; for commentary, inter alia, Zimmer et al. (fn. 11), p. 15.

95 Id., para. 14-15; see e.g. Zimmer et al., cit. (fn. 11), pp. 11-12.

effects" on rivals, other economic areas or other Member States.[96] Access to financial assistance, in whatever form, approved under the 2008 Communication should be determined in light of objective and non-discriminatory criteria and be available to both institutions incorporated in the territory of the Member State concerned and institutions which have "significant activities" therein.[97] These guarantees should only cover certain types of liabilities, such as, inter alia, retail deposits, and "ensure an adequate private sector contribution from the beneficiaries and/or the sector" to its costs, in the form of "adequate remuneration"[98] to avoid "generating moral hazard" and thereby aggravate the crisis itself.[99]

Financial assistance should be limited to a minimum and be granted for a limited period of time, although, in derogation from the R&R guidelines, there is no fixed deadline of 6 months for repayment, and subjected to review at least every six months.[100] Finally, to avoid or at least minimize any distortion of competition resulting from the aid, the latter must entail the imposition of "appropriate mechanisms to minimise … the potential abuse of the preferential situations of beneficiaries" and also limiting the risk of moral hazard.[101] These "safeguards" can entail behavioural constraints, aimed especially at preventing aggressive expansion by the beneficiary, the introduction of limits as to the latter's market share or presence in the industry or as to its ability to engage in "advertising invoking the guaranteed status" or the "prohibition of conduct … irreconcilable with the purpose" of the assistance, such as, e.g., issuing new "stock options for management".[102]

The Banking Communication was followed by a number of Guidelines dealing with specific forms of aid to financial institutions, ranging from recapitalisation to the management of "impaired assets".[103] These documents are destined to supplement the discipline contained in the Banking Communication and, in that context, provide additional requirements for the purpose of obtaining the authorisation of notified aid: for instance, the 2009 Restructuring Communication makes clear that the notifying Member States must provide a "viability report" in order to demonstrate that, through the provision of the aid, the bank will be restored to long-term ability to conduct safely its business.[104]

[96] Banking Communication, cit. (fn. 71), para. 15.

[97] Id., para. 18; see also para. 35 and 37 for recapitalisation schemes.

[98] Id., para. 26, see also para. 38 for recapitalisation schemes.

[99] Id., para. 19-20.

[100] Id., para. 24.

[101] Id., para. 27; see also para. 39 for recapitalisation schemes.

[102] Id., para. 29.

[103] See Commission Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, [2008] OJ C10/2; also Commission communication on the treatment of impaired assets in the Community banking sector, [2009] OJ C72/1; for commentary, see inter alia Kapsis, "The impact of the recent financial crisis on EU competition policy for the banking sector", (2010) J Int's Trade L and Pol. 256 at 264-265.

[104] Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, [2009] OJ 195/4, see especially para. 55 ff.

The new "post-Lehmann" approach was made apparent in the *Roskilde* decision,[105] which was adopted shortly after the Banking Communication: the Commission approved the financial assistance on the ground of its being designed to avert the financial instability stemming from the winding down of the Roskilde Bank.[106] The aid was also of very limited duration and had been subjected to several conditions as to the applicable regime for the liquidation of the institution.[107] The importance of having clear, binding and detailed restructuring plans was also clear in the *Aegon* decision. The Commission took the view that the "viability report" should explain the weaknesses and the difficulties characterising the aid recipient,[108] illustrate the measures being proposed to address them and show how the recipient is going to return to long term viability, i.e. capable of meeting its liabilities and secure an "adequate" return on capital.[109]

The relatively more flexible and quicker, yet still scrupulous attitude to the assessment of aid to financial institution was especially apparent in the decision approving the United Kingdom's package of assistance measures designed to support its banking sector.[110] In 2008 the Chancellor of the Exchequer had waved through the merger between HBoS and Lloyds TSB on the basis of the "public interest", thus preventing the OFT, that had found that this takeover had given rise to a relevant merger situation, from referring it to the Competition Commission.[111]

In 2008 the Commission approved a guarantee and recapitalisation scheme, backed by the British Government on the ground that the critical state of the British banking industry had the potential of destabilising the whole British economy.[112] It took the view that the scheme was of limited scope, since it had been made available to all the "solvent" undertakings whose stability had been endangered by the decrease in liquidity within the system, and of short duration;[113] consequently, it was concluded that the assistance conformed to the criteria of "appropriateness", "necessity and proportionality" laid down in the 2008 Communication.[114] On that basis, the British Exchequer was allowed to support the new merged entity by granting it access to the Asset Protection Scheme: under the scheme the Government underwrote part of the

---

[105] Commission decision of 5 November 2008, COM(2008) 6498, see especially para. 54 ff.

[106] See id., para. 73-75.

[107] Id., para. 76.

[108] Commission decision of 17 August 2010, COM(2010) 5740, para. 98.

[109] Id., para. 97; see also para. 99.

[110] See Commission press release of 13 October 2008, available at: http://europa.eu/rapid/press-release_IP-08-1496_en.htm?locale=en; see also Conclusions of the Secretary of State for Business, Innovation and Skills, abvailable at: http://www.bis.gov.uk/files/file48745.pdf; for commentary, see e.g. Gerard, cit. (fn. 1), pp. 5-7.

[111] See OFT report of 31 October 2008, available at: http://oft.gov.uk/OFTwork/mergers/decisions/2008/LloydsTSB#.UP1r4LqPdBk.

[112] See Press release of 13 October 2008, IP/08/1486; decision N507/2008, C(2009) 6058, para. 36-37; see also para. 40-41.

[113] Id., para. 45 ff.

[114] Id., para. 68-70.

Lloyds Banking Group's losses caused by the takeover, with a view to issuing new shares.[115] The recipient on its part made a significant own contribution to the restructuring costs and also accepted to divest key assets at a later date.[116]

Eventually, the "impaired asset relief measure" was approved, together with a restructuring plan, in December 2009:[117] the Commission took the view that thanks to the assistance provided by the British Treasury, the recipient could have returned to long term viability as well as reacquired the confidence of the markets, by "shedding" the riskiest assets and upholding "good management" practices.[118] It was emphasised that, both to avoid moral hazard and limiting undue distortions of competition, the recipient would undertake to contribute significantly to the value of the aid and also to divest key elements of its most profitable businesses.[119]

Similar concerns also guided the Commission's decision in respect to the joint guarantee scheme granted by Luxembourg, Belgium and France in order to support the stability of Dexia, another financial institution active in the banking and insurance markets: Dexia was heavily exposed on the stock market and held risky assets which in turn, due to the impact of the financial crisis, could jeopardise its stability and thereby creating a serious systemic risk for the whole market.[120] In November 2008 the Commission approved the provision of the joint guarantee on the ground that the notified financial assistance would facilitate Dexia in accessing the finance required to reinforce its stability and thereby restore confidence of the market and of consumers in the recipient's viability;[121] it would also be limited in time and scope and remunerated on the basis of an interest rate determined in light of the ECB's recommendations, thus complying with requirements of necessity and proportionality.[122] Importantly, the aid to Dexia was approved very swiftly for an initial six-month period, subject to continuous supervision and, if the requirements in question continued to be complied with, to the submission of a restructuring plan securing the bank's return to long term viability.[123] Full approval of the guarantee was eventually obtained, subject to conditions, in March 2009.[124]

It is suggested that the framework made up of the 2008 Banking Communication and of its "supplementary" Notices are designed to allow the Commission to reconcile the integrity of the Common Market principles with the demands of managing the

115 See especially decision N428/2009, 14 December 2009; see also Press Release IP/09/1728.

116 See Press Release IP/09/1728 of 18 November 2009.

117 See Press release IP/09/1915; Commission decision N422/2009 and N621/2009, of 14 December 2009.

118 Commission decision N621/2009, para. 148 ff.

119 Id., para.153 ff.

120 See Press Release IP/08/1745. Commission Decision of 19 November 2008, case NN45/4008, COM(2008) 7388; see especially para. 36 to 44.

121 Id., para. 60-65.

122 Id., para. 68 ff.; see especially para. 71-72.

123 See inter alia Press Release IP/08/1745; also Decision, cit. (fn. 120), para. 77-78.

124 Commission Decision, case C9/09, of 19 March 2009, COM(2009) 1960, see especially para. 77-79.

aftershocks of the financial crisis in Europe.[125] Strict limits as to the duration of the assistance, the application of clear and non-discriminatory eligibility criteria and the obligation to make adequate "own contributions" to restructuring costs all concurred to limiting the scope of the competitive advantage that the recipients would otherwise enjoy and in particular to ensuring that no "national champions" would emerge.[126]

It is however clear that the Banking Communication carved a number of exceptions to the approach generally applicable to rescue and restructuring operations and enshrined in the 2004 Guidelines: first of all, the framework established in the 2008 document is applicable not just to "failing" institutions which may require "rescue aid", but also to banks which were "fundamentally sound but illiquid", due to factors beyond their control.[127] A second derogation concerns the nature of the aid which must be "temporary and reversible" will be authorised; by contrast, the 2008 Communication envisages that rescue aid aimed at banks through recapitalisation, which is by its own nature irreversible, will be amenable to authorisation.[128] And thirdly, the "once in ten years" limit is not applicable to aid to financial institutions.[129]

In respect to aid targeted at "fundamentally sound but illiquid" undertakings, it is further provided that these recipients, even when they benefit from aid aimed at their recapitalisation, are not obliged to provide the Commission with a "restructuring plan" or with a plan on the implementation of the notified measures; however they remain obliged to submit a plan detailing how they are proposing to meet their long-term financing needs.[130]

In addition, the circumstance that "compensatory measures" are imposed on all beneficiaries and for that purpose are "tailor-made to address the distortions identified on the markets" contribute to ensuring that a "level playing field" across the relevant market is maintained for the medium- and long-term.[131] The 2008 Banking Communication was accompanied by a number of administrative "adjustments" to the scrutiny and approval procedure and in particular by an express commitment of the Commission to examine notified measures as quickly as possible, and preferably within 24 hours of submission.[132]

It is concluded that the Commission succeeded in dealing with the consequences of the financial crisis while at the same time addressing the demands of having to maintain the integrity of the single market.[133] Guided by "smart pragmatism", the 2008 Banking

125 See e.g. Zimmer et al., cit. (fn 11), pp. 12-13.

126 Kapsis, cit. (fn. 10), p. 265.

127 Banking Communication, cit. (fn. 100), para. 13; for commentary see Gilliams, cit. (fn. 73), p. 11.

128 Gilliams, cit. (fn. 73), p. 12.

129 Id., p. 13.

130 Id., p. 16; for commentary see Kapsis, cit. (fn. 10), p. 265.

131 Id., p. 20.

132 See e.g. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1495&format=HTML&aged=0&language=EN&guiLanguage=en.

133 See e.g. Gilliams, cit. (fn. 73), p. 7-10; see also p. 24-25.

Communication deployed the existing state aid supervision standards in a more flexible, speedier and thus more responsive way. The circumstance that these decisions were hardly ever challenged can be read as demonstrating that this approach represented a "fair and balanced" deal for both banks and Member States. The next section will move on to deal with the effects of the "credit squeeze" on the real economy and will analyse the Commission's response to these challenges.[134]

3.2. The financial crisis and the "real economy": the "Temporary Framework" for "real" enterprises affected by the credit squeeze

The previous section provided a brief analysis of the approach adopted by the Commission in respect to state aid granted to banks and emphasised how, at the heart of these efforts, was a concern for reconciling the need to take swift action in order to tackle the adverse effects of the crisis with the integrity of the single market. However, the Banking Communication only dealt with the serious disturbances, whether actual or potential, arising from the instability of financial institutions; it did not, therefore, lay down any measures designed to tackle the "aftershocks" of the crisis for enterprises operating in the "real economy", i.e. those undertakings that ran non-financial activities and which required access to credit for the purpose of financing their commercial ventures.

Especially after the downfall of Lehmann Brothers it became clear that the financial crisis had become "systemic", in the sense of, inter alia, having spread to the "real economy".[135] To respond to these challenges, the Commission, once again, derogated from its "traditional" approach to state aid, enshrined in the R&R Guidelines, with a view to providing a temporary "lifeline" to those undertakings which, despite being fundamentally solid, are faced with serious challenges to their viability due to the scarce availability of credit. The Temporary Framework Notice, issued in January 2009 and originally in force only until the end of 2010, stated that financial assistance targeted at undertakings that find it difficult to access finance through the "normal channels" will be authorised under Article 107(3)(b) if it meets certain criteria relating to the type of assistance, the state of the recipient and the conditions at which the aid is granted.

It is clear from the Communication that the Commission was especially concerned with avoiding that the Temporary Framework could be used to circumvent the limits of the R&R Guidelines and in particular could be applied in a way that defeated the objectives and the key principles of the single market, especially by encouraging a "subsidy race" among Member States.[136] As a result, the Commission was particularly vigilant in assessing the measures proposed by the German government to support the stability and restore the long term viability of Opel in 2009[137] by rejecting any conditions that

[134] Commission Communication on the Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis, [2011] C6/5.

[135] Commission Communication on a Temporary Union Framework for State aid measures to support access to finance in the current financial and economic crisis, [2011] OJ C6/5, para. 1.1.

[136] See id., especially para. 1.2; for commentary, see Soltesz et al., cit. (fn. 59), pp. 108-109.

[137] See inter alia Commission decision on aid to Opel Europe, Memo/09/411, 23 September 2009.

were linked, for instance, to restrictions as to the location of the investment and to the retention of staff in specific areas of the single market.[138]

The Communication made clear that this type of aid could only be offered as part of a national scheme, regardless of where they had their seat and could not favour national over non-national goods or services[139] and would only be available to undertakings that are fundamentally financially "solid" and who have experienced difficulties in accessing credit after 1 July 2008 can benefit from this assistance.[140] In addition, aid under the Temporary Framework cannot be combined with financial assistance deemed to fall outside the scope of Article 107.[141] Member States are limited in the number options that they can choose from as regards the type of financial assistance that they can provide so that financial assistance remains "exceptional" and limited in its scope.[142] To benefit from this "more lenient" regime, aid must be granted in the form of either a loan for up to €500,000 over two years, or of a state guarantee for bank loans granted at a special interest rate.[143] State guarantees cannot exceed 80% of the value of the loan. "Preferential" rates are set at 15% if the recipient is a small/medium sized enterprise, or by the premium rate calculated by the Commission on the basis of the "safe harbour" clauses contained in the Communication.[144]

"Cheap state loans" are another key feature of the Temporary Framework: states can grant "public or private loans" at preferential rates, calculated solely on the basis of central bank overnight rates and thus, significantly lower than "normal commercial rates".[145] This form of support appears particularly attractive, since it does not seem to be subject to the same "wage bill" limit as other forms of assistance: however, the Commission will be willing to supervise closely these measures to ensure that they are "strictly necessary" to overcome temporary liquidity problems.[146]

In light of the above, it is argued that the 2008 Communications represented a "more lenient" regime vis-à-vis the one otherwise applicable in light of the R&R Guidelines, to respond to the immediate dangers of the financial crisis for the "real economy"[147] and at the same time to maintain the integrity of the single market principles, including those of genuine competition.[148] The Framework enshrines a clear preference for "general schemes", as opposed to individual aid which should fulfil objective and

[138] See Speech given to the European Parliament, Plenary Session of 14 September 2009, SPEECH/09/388.

[139] Communication, cit. (fn. 135), para. 2.3; see also Soltesz, cit. (fn. 59), p. 109.

[140] Communication, cit. (fn. 135), para. 1.2.

[141] Id., para. 2.6; see also Soltesz, cit. (fn. 59), p. 110.

[142] Id., p. 114.

[143] Communication, cit. (fn. 135), para. 2.2; also Soltezs, cit. (fn. 59), pp. 109-110.

[144] Communication, cit. (fn. 120) ??? , para. 2.3.

[145] Id., para. 2.4; see Soltesz, cit. (fn. 59), p. 113.

[146] Soltesz, cit. (fn. 59), p. 113; also, mutatis mutandis, Marsden and Kokkoris, "The role of competition and state aid policy in financial and monetary law", (2009) JIEL 875 at 888-889.

[147] Inter alia, Soltesz et al., cit. (fn. 59), pp. 109-110.

[148] Id., pp. 108-109.

transparent criteria.[149] Some flexibility is allowed, for instance in respect to the availability of "cheap loans".[150] Nonetheless, it was criticised for the lack of flexibility on important aspects of the assistance it allowed. For instance, the Communication does not contain any indication of the criteria applicable to determine if the former are "sound but in difficulty" due to the credit squeeze. Also, it is clear that unlike under the R&R Guidelines, Member States are tightly constrained when it comes to both the nature of the assistance that they can grant and the amount for which the latter can be supplied, especially if it takes the form of guarantees.[151] Also, there is no full legal certainty when it comes to granting these types of aid, especially because no formal "notification procedure" is provided.[152]

It can be concluded that the Temporary Framework represented an ambitious attempt to address the shockwaves that the credit squeeze has had (and continues to have, even though its period of applicability has now expired) for the real economy. However, it is equally clear that on its own the Temporary Framework could not give a unitary answer to the challenges posed by the banking crisis to undertakings acting in wider economy: continued vigilance, especially so as to maintain the integrity of the single market, was exercised via the application of general state aid principles.

3.3. Industrial restructuring in times of credit squeeze: the role of EU merger policy in the economic crisis

The previous sections briefly analysed the approach adopted by the EU Commission in the supervision of state aid measures destined to "cushion" the economy from the consequences of the financial crisis and emphasised the continuing need to counterbalance the demands of managing the crisis and especially of preventing the credit squeeze from damaging fundamentally "solid" companies active in "real" sectors of the economy with maintaining the integrity of the single market. Similar concerns have guided the Commission in its approach to merger policy. In a speech given in March 2011, Commissioner Almunia observed that although the recession had resulted in a drop in mergers and acquisitions overall, the restructuring of certain economic sectors (such as, among others, energy and air transport) had continued as the expression of "defensive strategies" adopted by companies affected by the downturn and operating within the same market.[153]

This trend toward the "consolidation" of potentially "ailing" businesses into stronger and bigger conglomerates is a well-known response to challenging times;[154] however, it is also liable to have negative consequences for competition, such as an increase in

[149] Id., p. 110.

[150] Communication, cit. (fn. 135), para. 2.4. and 2.6; for commentary, inter alia, Soltesz, cit. (fn. 59), p. 113.

[151] Soltesz, cit. (fn. 59), p. 111-112; see also pp. 114-115.

[152] Id., p. 114.

[153] "Merger Regulation in the EU after 20 years: EU merger control has come of age", speech given by Commissioner Neelie Kroes on 10 March 2011, SPEECH 11/166.

[154] See e.g. Lowe, "Competition policy and the economic crisis", (2009) 5(2) CPI, available at: http://ec.europa.eu/competition/speeches/text/cpi_5_2_2009_en.pdf, pp. 16 ff.

concentration and, as a consequence, greater ease of coordination, if not of tacit collusion, among competitors and the creation of artificial barriers to entry vis-à-vis potential competitors, who would be faced with powerful, often national incumbents.[155]

Just as with state aid, the initially "passive" role adopted by the Commission at the onset of the financial crisis left it de facto open to the Member States to act unilaterally, and to "orchestrate" mergers designed to salvage ailing companies:[156] but how can such action be justified if the merger in question clearly has a "Community dimension"? It should be emphasised that Article 21(4) of the Merger Regulation, which authorises Member States to adopt "appropriate measures to protect legitimate interests", so long as these measures remain compatible with the core principles of EU law and aim to address "non-competition concerns".[157] It was suggested that this provision could not be invoked to overcome the concerns for the integrity of competition raised by the Commission and, consequently to "by-pass" its decision to declare the merger incompatible with the common market solely for the purpose of, inter alia, maintaining the financial stability within one Member State.[158]

Against this background, it may be argued that the concentration involving Lloyds TSB and Halifax/Bank of Scotland presented on the one hand, the OFT and the British authorities with the realisation of the magnitude of the challenges of the nearly looming downfall of a major bank, with clear risks for the overall economy. And on the other hand, it prompted the Commission to reflect on how it should react to the risks for the unity and integrity of the internal market.[159] In the event the British authorities carved an additional "public policy exception" (i.e. the need to maintain financial stability) in their domestic law to justify the ministerial approval of the merger without it being necessary for the latter to be referred to the Competition Commission.[160]

This decision, despite being probably the only way forward to address the predicament in which HBoS was, posed important questions for the Commission's merger policy in tough times, when industrial consolidation had the potential of becoming more and more important as a "way out" of the crisis[161] but could also favour "protectionist

[155] See inter alia Geradin et al., "Industrial policy and European Merger Control: a reassessment", (2011), available at http://ssrn.co/abstract=1937586; see especially pp. 13-14 and 17-18; see also Marsden and Kokkoris, cit. (fn. 146), pp. 877-878.

[156] Geradin et al., cit. (fn. 1), pp. 17-18.

[157] See inter alia Pouncey and Bukovics, "Merger control, credit-crunch style", (2009) 30(2) ECLR 67 at 70.

[158] Id., p. 71.

[159] Id., p. 72-73.

[160] See OFT report, 31 October 2008, available at: http://www.oft.gov.uk/OFTwork/mergers/decisions/2008/LloydsTSB, and Conclusions of the Secretary of State for Business, Innovation and Skills, available at: http://www.bis.gov.uk/policies/business-law/competition/mergers/mergers-with-a-public-interest/maintaining-the-stability-of-the-uk-financial-system. For commentary see Marsden and Kokkoris, cit. (fn. 146), pp. 879-880.

[161] Id., p. 880; see also Gerard, cit. (fn. 1), p. 8-9.

pushes".[162] It became especially clear that the Commission had to adopt a far more involved attitude to merger review.[163] In 2009, the then Commissioner Neelie Kroes argued that the merger control framework and its established legal and economic concepts, such as the failing firm defence, was sufficiently flexible to provide principled and timely treatment for notified transactions, and at the same time respond to the challenges of financial instability.[164]

Although the limited scope of this paper does not allow a detailed discussion of this defence, it is reminded that, according to the Horizontal Merger Guidelines, the Commission can declare a prima facie anti-competitive merger compatible with the common market if one of the merging entities is a "failing firm". This requirement is meant to be fulfilled if "the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking"; in addition, it must be shown that there would not be any "less anti-competitive alternative purchase than the notified merger" and, finally, that without the concentration, "the assets of the failing firm would inevitably exit the market".[165] At the heart of the defence is the need to satisfy the Commission that the market structure would deteriorate to the same extent regardless of whether the merger itself was allowed to go ahead.[166]

Despite being couched in relatively flexible terms, the defence has been notoriously difficult to invoke: merging parties have succeeded only in limited cases in which, for instance, there was a clear risk of bankruptcy or when an "alternative purchaser" could not be identified due to the overall state of the industry.[167] It was added that since "a way of entering in a market is the acquisition/merger with an incumbent", allowing undertakings to rely on the failing firm defence to seek to establish themselves on a new market may actually result in an increase in competition in the long run, since it would permit new entrants to rely on the customer base and infrastructure of an existing, albeit ailing, company, thus reducing, to a degree the impact of fixed and other start-up costs.[168] This restrictive approach was however criticised on the ground that it may withhold approval from mergers that could limit the wider social and economic

[162] See e.g., mutatis mutandis, press release IP/08/1496 of 13 October 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1496&format=HTML&aged=0&language=EN&guiLanguage=en.

[163] See e.g. Geradin et al., cit. (fn. 1), p. 17.

[164] Speech given at the IBA 13th Competition conference, 11 September 2009, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/385&format=HTML&aged=0&language=EN&guiLanguage=en. See also Lowe, cit. (fn. 154), pp. 16-19

[165] Commission Horizontal Merger Guidelines, [2004] OJ C31/5, para. 90.

[166] Id., para. 89; see e.g. Commission Decision 94/449/EEC, IV/m. 308, [1994] OJ L186/38, para. 71-73; for commentary, see e.g. Marsden et al., cit. (fn. 146), pp. 878.

[167] Commission decision of 11 July 2001, COMP/M.2314, [2002] L132/45, see especially para. 144-145 and 147-148.

[168] Ibid.

aftershocks of industrial restructuring and could affect the decision of outsiders to attempt entry in the market.[169]

Against this background, it is not surprising that Philip Lowe, then at the helm of DG Competition, was not entirely convinced of the possibility of authorising mergers in the banking and financial markets on this ground.[170] He accepted in principle that concentrations involving "unsound" banks or financial services' providers could fulfil the conditions of the defence in certain cases. However, he argued that the lack of reliable information as to the existence of, inter alia, an "alternative purchaser" for the failing business would be especially problematic not only due to the "sensitive" nature of the evidence and the risks that any delays in testing the commitments could create for the financial markets, but also due to the effects that a "collapse" of the market could have on any remaining competitors.[171]

Another challenge for merger control is that posed by the need to provide a swift decision on proposed operations: while the merger control framework is famous for its tight time-limits, it soon became clear that, especially in respect to transactions involving banking and financial undertakings, time was of essence for the viability of the whole concentration. This issue became apparent, for instance, in the context of the takeover of Fortis, a Belgian bank whose stability had been thrown in question as a result of the financial crisis, on the part of BNP Paribas.[172] The Commission cleared the transaction, subject to the obligation for the merged entity to divest its credit card business, for the purpose of allowing the entry of a new rival on that market segment, two weeks before the deadline.[173] It was emphasised that the Commission had succeeded in delivering clearance of a key transaction for the viability of the Belgian financial market, within a tight time frame without "economising" in the scope and integrity of its appraisal.[174]

It can be concluded that, albeit within the procedural and substantial limits imposed to it by the existing merger acquis the Commission sought to respond to the challenges arising from the crisis in a relatively flexible and proactive way. Whereas initially it had left domestic authorities with significant leeway as to the way in which they should deal with mergers concerning "failing undertakings", especially after 2008 the Commission showed greater willingness to reconcile the integrity of the principles and approaches characterising merger assessment with the concrete demands of assessing and clearing M&A activity involving "problematic" firms.

---

[169] Kokkoris, "Failing firm defence in the European Union: a panacea for mergers?", (2006) 27(9) ECLR 494 at 507.

[170] Lowe, cit. (fn. 154),p. 18.

[171] Ibid.; see also Brouwer, "Horizontal mergers and efficiencies: theory and anti-trust practice", (2008) 26(1) *EJL & E* 11, pp. 13-14; also *inter alia*, *mutatis mutandis*, Pouncey and Bukovics, "Merger control, credict-crunch style", (2009) 30(2) ECLR 67 at 71.

[172] Commission decision of 3 December 2008, case M.5384, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m5384_20081203_20212_en.pdf.

[173] Press release of 3 December 2008, IP/08/1882.

[174] See e.g. Lowe, cit. (fn. 154), p. 18.

3.5. Commitments and remedies in the state aid and merger area: keeping an eye on the "winners"?

The above section considered some of the issues arising from the application of the rules governing, respectively, state aid and merger control to the granting of financial assistance and to M&A activities taking place as a result of the impact of the economic crisis. Another key tool for the effectiveness of the Commission's actions has been the practice of seeking ex-post commitments from the concerned undertakings as a condition for approval of Member States' assistance or of the merger, with a view of countenancing any adverse effects on competition: at the core of its approach was a concern for minimising, as far as possible, any distortions of competition caused by, respectively, the giving of aid or the approval of "emergency" mergers.[175]

In respect to state aid, the Commission aimed at ensuring that any undertaking that had received financial support would not be able to exploit the ensuing financial advantages to make access to the market more difficult for new entrants or to prevent existing rivals from expanding their market share. Thus, in the *Aegon* decision the Commission imposed on the recipient several structural and behavioural obligations, including a commitment to closing down significant areas of its business (especially those perceived as being the riskiest), to refraining from making further acquisitions until such time as it remained the beneficiary of the aid and to divest key assets.[176] Aegon was also subjected to a ban on "price leadership" and could not give information concerning its business to rating agencies to limit its expansion potential for the time in which it benefitted from state aid.[177]

Similar obligations were also imposed in the case of *SNS Reeal*.[178] The Commission imposed on SNS Reeal an obligation to maintain a minimum level of solvency, so as to secure its long term viability and avoid the risk of market foreclosure.[179] Individual institutions have often undertaken to divest key areas of their businesses, so that a "viable rival" would be allowed to emerge.[180] Thus, in the *Fortis Bank NV* decision the Commission took the view that the divestiture on the part of the bank of key assets, such as 30 to 40% of its retail branches, was sufficient to minimise any adverse effects on competition.[181] To avoid immediate increases in concentration the Commission

---

[175] Lowe, cit. (fn. 154), pp. 17-18.

[176] Commission decision of 17 August 2010, C(2010) 5740 final, especially para. 58-59 and 67-69.

[177] Id., para. 68, 70-73.

[178] See Press Releases IP/08/1951 of 11 December 2008 and IP/10/82 of 28 January 2010; Commission decision of 28 January 2010, C(2010)498 final.

[179] Commission decision, cit. (fn. 176), para. 78-81. See also, mutatis mutandis, the commitments imposed in respect to the aid given by the UK Government to the Lloyds Banking Group: press release IP/08/1496 of 13 October 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1496&format=HTML&aged=0&language=EN&guiLanguage=en; letter to the Member State, available at: http://ec.europa.eu/competition/state_aid/cases/228924/228924_928084_11_2.pdf, para. 12, 20 and 52.

[180] Id., para. 52.

[181] Commission decision of 3 December 2008, C(2008)8085, available at: http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-42-2008-NN-46-2008-NN-53A-2008-WLWL-EN-03.12.2008.pdf, para. 92-93.

sought a further commitment from a third party (i.e. BNP Paribas) not to purchase these assets in the short/medium term.[182]

A broadly similar approach to ex-post remedies was adopted also in the United Kingdom in the aftermath of the HBoS/Lloyds takeover. It may be reminded that, in its decision to refer the case to the Competition Commission, the OFT had taken the view that no "undertakings in lieu" could be considered but that it would have been more appropriate for the Commission itself to do so.[183] However, after the 'public interest' intervention of the Secretary of State, allowing for the takeover to go ahead,[184] the merged entity indicated that it would divest a substantial part of its retail business so as to limit the distortions of competition on this market segment and thereby allow a new or existing rival to emerge and counterbalance its own economic strength.[185] Following the submission of bids on the part of a number of potential competitors, the Co-Op was chosen as the "preferred bidder" for more than 600 Lloyds and HBoS branches, thus acquiring around 7% of the UK current account market[186] and creating the economic premises for the emergence of a "new challenger bank".[187]

The proactive and flexible use of remedies and commitments was also deployed to merger cases in the "real economy". In *Lufthansa/Austrian Airlines*,[188] for instance, the Commission cleared the notified transaction, which affected competition on key routes within continental Europe. It was recognised that the crisis affecting the aviation industry was likely to depress the incentive of airlines to enter the routes in question:[189] relieving "slot congestion" was therefore indispensable to maintain an open market not only in the short and medium term but would also in future, more florid times.[190]

It is concluded that the financial crisis and especially its aftershocks on the "real economy" have challenged many of the "established" principles and legal and economic approached guiding the Commission's approach to mergers and state aid, thus forcing it to adopt a more proactive stance to protect the openness, the rivalry and the overall integrity of the common market. However, the Commission's central role in

---

182 Id., para. 95-97.

183 See OFT report, 31 October 2008, available at: http://www.oft.gov.uk/OFTwork/mergers/decisions/2008/LloydsTSB, pp. 95-96.

184 See Conclusions of the Secretary of State for Business, Innovation and Skills, available at: http://www.bis.gov.uk/policies/business-law/competition/mergers/mergers-with-a-public-interest/maintaining-the-stability-of-the-uk-financial-system.

185 See report on 'the way forward for Scotland banking, building society and financial services' sector', Scottish Parliament's Committee on Economy, Energy and Tourism, para. 32-34; available at: http://archive.scottish.parliament.uk/s3/committees/eet/reports-10/eer10-03-vol01.htm.

186 See e.g. http://www.bbc.co.uk/news/business-17688731; see also http://www.bbc.co.uk/news/business-18898125.

187 See http://www.bbc.co.uk/news/business-18898125.

188 Commission decision of 28 August 2009, COMP/M.5440, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m5440_20090828_20600_en.pdf.

189 Id., para. 386.

190 Id., para. 388. See Commissioner Neelie Kroes, Press release of 28 August 2009, IP/09/1255. For commentary see e.g. Weitbrecht, cit. (fn. 7), at 279-280; also Lowe, cit. (fn. 154), p. 18.

the wider context of competition policy was challenged by the unfolding of the crisis. The next section will conclude by reflecting on the wider implications that dealing with these events have had on the Commission's actual role as well as on the overall framework for the enforcement of EU competition law.

4. BRUISED AND BATTERED? THE IMPLEMENTATION OF EU COMPETITION POLICY AND THE ECONOMIC CRISIS: TENTATIVE CONCLUSIONS

The forgoing sections sought to provide a snapshot of some of the responses given by the tools of EU competition law to the challenges posed by the 2007 financial crisis and by its aftershocks for the "real economy". It was illustrated how the EU Commission, after having been caught in some way "unawares" by the unfolding of the crisis, thus remaining passive, to some degree, to its demands, was soon able to "find its own voice". At the heart of this response was a deeply felt need to maintain the unity and integrity of the internal market, even in the face of very dangerous and disquieting times. From the Banking Guidelines to the Temporary Framework regulating state aids in, respectively, the banking and financial sector and in the wider context of the "real economy" to the adoption of more flexible, quicker approaches to the scrutiny of mergers, the Commission sought to use its own array of policy and legal tools to the full. At the same time it was ready to "ditch" old style instruments, such as the application of the legal exception to "crisis cartels". In light of these considerations, it may be argued that a picture which mixes continuity and change seems to have emerged: "established" tools have been deployed in a spirit of remarkable flexibility, substantive and procedural.

Thus, having regard to the banking sector, the Commission derogated from the rigorous approach enshrined in the R&R Guidelines to provide a relatively more generous "assessment of state assistance to banks and financial institutions and at the same time to uphold key principles of market openness, transparency and non-discrimination. Similarly, in the area of merger control, the Commission confirmed its commitment to a strong, scrupulous and, at the same time, "realistic" scrutiny, i.e. one inspired by principles of flexibility, expedition and ultimately aimed at protecting the integrity of the single market, especially vis-à-vis those Member States that may have been tempted to prop up "national champions".

Against this background, one could legitimately ask whether "all is well" in competition law and policy in times of crisis: and again, the answer should be inevitably more nuanced than just a straight positive or negative one. It is unquestionable that the initial phase of the crisis saw the Commission taking a back seat and, consequently, the Member States taking the lead in dealing with the "emergencies" occurring in their own jurisdictions. However, the risks that this passive role could have for the integrity of the common market and, perhaps more pragmatically, for the strength of its own leadership contributed to the Commission taking a proactive role in shaping the Member States' policies. It is undeniable that many of the challenges created by this systemic economic and financial crisis remain: Member States may have "trouble-shot" relatively effectively when it came to salvage banks, but this came at the price of far more concentrated markets, in which entry remains difficult and the implementation of divestiture and other remedies is far from complete. Other sectors, ranging from the automotive industry to aviation and other transport industries, also remain characterised by a more restricted pool of rivals and by the existence of several "alliances" and other loose cooperation arrangements.

Thus, it is concluded that competition law comes out of the crisis largely intact but also "bruised" by the effects of the crisis. It is accepted that some of the outcomes of the agenda deployed for its "management" may be reversed overtime--e.g. via a careful policy of divestiture of assets or a gradual repayment of governmental funds and guarantees. However, it is equally clear that other effects may be more difficult to "wipe out", such as the perceived difficulty for new entrants to challenge incumbents in key sectors, such as aviation. In many ways, the old adage "time heals all wounds" may help summing up what awaits EU competition policy in the post-crisis economic era. Nonetheless, it cannot be denied that time is something which, due to the irreversible consequences of the crisis itself and of the responses to it for rivalry and market openness, is now in relatively short supply. Thus, it may be preferable to think about the future as something which is largely unwritten and unpredictable still, as well as confined in a relatively small horizon.