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EU Competition Policy in the Financial Crisis: Extraordinary Measures

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Michael Reynolds, Sarah Macrory, and Michelle Chowdhury

Abstract

This Article reviews the framework of competition law in the European Union (”UN”), specifically in relation to state aid, mergers, and cartel enforcement. In each case it considers how the European Commission’s (”Commission”) response can and has adapted existing procedures to pressing circumstances while maintaining rigidity in the application of legal principles.

EU COMPETITION POLICY IN THE FINANCIAL CRISIS: EXTRAORDINARY MEASURES

Michael Reynolds, Sarah Macrory & Michelle Chowdhury[*]

INTRODUCTION

Some claim that competition law obstructs economic recovery. While doubts lingered over the contribution of competition to general economic policy in periods of economic prosperity,[1] the advent of the financial crisis may have added grist to the mill of competition law's critics. The criticism of European Commission ("Commission") interference by Axel Weber of Bundesbank, for example, was a very public reminder that the Commission's monitoring of state aid is not always welcomed by Member States.[2] In a period of economic decline, governments may now be more susceptible than usual to arguments that national prosperity should take priority over enforcement of European competition law. They may be tempted to succumb to political pressure to champion failing national businesses, ignore the abuse by dominant firms of weakened acquisition targets, and turn a blind eye to competitors clubbing together to protect themselves from falling demand.

There is precedent for such behavior: during the Great Depression, the U.S. National Industrial Recovery Act of 1933 encouraged competitors to group together to formulate binding

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1. Peter Freeman, Chairman of the U.K. Competition Commission, refers to this as the "end of the 'competition honeymoon.'" Peter Freeman, Chairman, U.K. Competition Comm'n, Speech at the 2009 International Competition Forum in Warsaw: Competition Advocacy in Time of Recession: The U.K. Competition Commission's Approach, (Apr. 15, 2009), http://www.competitionforum.uokik.gov.pl/download/freeman_warsaw_150409.pdf.

2. *See* James Wilson et al., *Bundesbank Chief Hits Out at Brussels*, FIN. TIMES (London), Apr. 21, 2009, http://www.ft.com/cms/s/0/8d8781c6-2ead-11de-b7d3-00144feabdc0.html.

industry codes of fair competition.[3] Those codes were exempt from antitrust scrutiny and in many cases contained anticompetitive provisions such as output restrictions and minimum resale prices.[4]

Criticism of antitrust measures may be attractive in periods of recession, not least because governments are now primary stakeholders in some of Europe's biggest, and most unstable, businesses. Yet, the failure to robustly enforce antitrust principles arguably prolonged the Great Depression. If exercise of market power involves reduction in output and thus employment, then it is crucial to ensure enforcement against anticompetitive conduct in a recession.[5] The preservation of competition within the current market structure of a given industry should be prioritized because the current crisis makes it more difficult for prospective new entrants to exert competitive pressure. Further, the recession may not necessarily hit inefficient firms the hardest. For example, the liquidity crisis may disproportionally affect those firms that happened to require refinancing from 2007 to 2009.[6] The Commission has thus characterized its recent achievements as "having avoided a dangerous subsidy race" and thus "the worst mistakes of the 1930s."[7] The Commission insists that "today's softness is tomorrow's nightmare"[8] and positions its policy as "part of the solution, not part of the problem."[9] Former Commissioner Neelie Kroes has stated that "for the Commission it is business as usual in cartels, mergers and antitrust."[10]

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3. *See* National Industrial Recovery Act of 1933, ch. 90, Title I, § 3, 48 Stat. 195, (formerly codified at 15 U.S.C. §§ 703–12 (1934)), *invalidated by* Schecter Poultry Co. v. United States, 295 U.S. 495 (1935).

4. *See id.* § 5; Andrea Gomes da Silva & Mark Sansom, *Antitrust Implications of the Financial Crisis: A U.K. and EU View*, ANTITRUST, Spring 2009, at 24–31.

5. *See* Philip Lowe, *Competition Policy and the Global Economic Crisis*, COMPETITION POL'Y INT'L, Autumn 2009, at 4.

6. *See* Freeman, *supra* note 1.

7. Neelie Kroes, Eur. Comm'r for Competition Pol'y, Speech at the EStALI Conference: EU State Aid Rules—Part of the Solution (Dec. 5, 2008) [hereinafter Kroes, EU State Aid Rules].

8. Neelie Kroes, Eur. Comm'r for Competition Policy, Address at the 36th Annual Conference for International Antitrust Law and Policy at Fordham University: Antitrust and State Aid Control—The Lessons Learned (Sept. 24, 2009).

9. Commission Press Release, MEMO/08/757 (Dec. 2, 2008).

10. Neelie Kroes, Eur. Comm'r for Competition Policy, Opening Remarks at the International Bar Association Conference, "Private and Public Enforcement of EU Competition Law—Five Years On": Many Achievements, More to Do (Mar. 12, 2009) [hereinafter Kroes, Many Achievements, More to Do]; *see also* Neelie Kroes, Eur.

Yet, extraordinary times may call for extraordinary measures and the Commission and Member States need to tread carefully as they attempt to simultaneously show flexibility in procedure and rigidity in principles. In relation to mergers, that may mean lowering the onerous burdens of review to ensure fast turnover of emergency transactions. In doing so, the Commission must be careful not to increase the risk of clearing or facilitating deals that ultimately lead to consumer harm and to protection of inefficient firms. In cartel cases there will be a tension between crippling financially vulnerable firms with enormous fines on the one hand and ensuring adequate deterrence to future cartelists on the other. In the arena of state aid, the challenge is "to support financial stability"[11] and to protect consumer deposits while ensuring that the market is not unfairly distorted by government aid.

The Commission has the unenviable job of balancing such interests. In the short term, it will be criticized if seemingly beneficial measures, be they government-brokered mergers or state aid, are blocked. In the long term, however, too much flexibility creates a dangerous precedent, especially in relation to fining policy against cartels, leaving firms and the general public with the impression that competition law has become redundant.

This Article reviews the framework of competition law in the European Union ("EU"), specifically in relation to state aid, mergers, and cartel enforcement. In each case it considers how the Commission's response can and has adapted existing procedures to pressing circumstances while maintaining rigidity in the application of legal principles.

I. *STATE AID*

By the Commission's own admission:

> The financial and economic crisis has propelled State aids to the top of the agenda of the Commission. The handling of the crisis situation is a basic test for the validity and the reasoning of the application of European State Aid rules. It

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Comm'r for Competition Policy, Address at the Atlantic Council: European Models for Economic Recovery (Mar. 26, 2009) ("The third [most important task for the Commission] is not going soft on competition enforcement—cartels, antitrust and so on—because it will help us out of recession.").

11. Lowe, *supra* note 5, at 7.

tests the basic rationale, our ability to communicate and our ability for reform.[12]

The article 87(1) of the Treaty Establishing the European Community ("EC Treaty") (now article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"))[13] prohibition on state aid and the Commission's self-professed objective of "less and better targeted State aid"[14] might appear at odds with the policy of fiscal stimuli adopted by governments across Europe in response to the exigencies of the global financial crisis.

In accordance with article 88 EC (now article 108 TFEU), the Commission is endowed with the responsibility of controlling state aid. Member States are obliged to inform the Commission of any plan to grant or alter state aid ("*ex ante* notification") and can only put such aid into effect once it has been authorized by the Commission ("standstill principle").[15] Any aid that is granted in the absence of Commission approval is automatically classified as "unlawful aid" and the Commission has the power to order its recovery.[16]

Yet, the seriousness and urgency of the financial crisis was such that Member States have not always waited for EU approval, expected to take months or even years. According to da Silva and Sansom: "At the EU level, there is no doubt that the Commission's hand was forced by the present crisis."[17] Neelie Kroes herself has spoken of the evolution in policy as a result of dealing with the U.K.'s granting of aid to the British bank

12. Herbert Ungerer, Deputy Dir. Gen. with Special Responsibility for State Aid, Directorate Gen. Competition, Eur. Comm'n, Keynote Address at the 7th Experts' Forum on New Developments in European State Aid Law: State Aids 2008/2009—Twelve Months of Crisis Management and Reforms 20 (May 14, 2009), *available at* http://ec.europa.eu/competition/speeches/text/sp2009_05_en.pdf.

13. Consolidated Version on the Functioning of the European Union art. 107(1), 2008 O.J. C 115/47, at 91 [hereinafter TFEU]; Consolidated Version of the Treaty Establishing European Community art. 87(1), 2006 O.J. C 321 E/37, at 76–77 [hereinafter EC Treaty].

14. Commission of the European Communities, State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009, COM (2005) 107 Final 5 (June 2005).

15. *See* Anne Fort, Adm'r, Eur. Comm'n, State Aid Control and Insolvency 4 (Oct. 8, 2003) (unpublished paper presented at the INSOL 23rd Annual Congress, *available at* http://www.insol-europe.org/events/23rd-annual-congress).

16. *Id.*

17. da Silva & Sansom, *supra* note 4, at 31.

Northern Rock and has acknowledged the need for the Commission "to be pragmatic, to be proportionate and to offer Member States flexibility in the exact design of their schemes."[18]

Thus, the Commission's policy and state-aid law itself has adapted to the current economic environment. The result of that evolution is, as the Commission's spring 2009 Special Edition of the State Aid Score Board[19] shows, the adoption of more than fifty state-aid decisions between October 2008 and March 2009, twelve comprehensive guarantee schemes, five major recapitalization schemes, five framework schemes comprising a combination of these measures, and a substantial number of ad-hoc measures concerning certain banks. Since October 2008, the Commission has approved a total of over €3.5 trillion in state aid measures to financial institutions.[20]

A. *Definition of State Aid*

What constitutes state aid is itself an evolving concept. The general—and arguably ignored—prohibition on state aid in the European Union, contained in article 87(1) EC Treaty (now article 107(1) TFEU), declares state aid incompatible with the Common Market if, insofar as it affects trade between Member States, it is "aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods."[21]

The Commission has historically adopted a broad interpretation of the notion of "state resources."[22] Aid can include "grants, loans at a low rate of interest, deferment of tax liabilities, schemes of aid financed by compulsory contributions by all traders including those who do not benefit and in general,

18. Commission Press Release, MEMO/08/757, *supra* note 9.

19. Commission of the European Communities, State Aid Scoreboard: Spring 2009 Update, Special Edition on State Aid Interventions in the Current Financial and Economic Crisis, COM (2009) 164, 14–21 (Apr. 2009), *available at* http://ec.europa.eu/competition/state_aid/studies_reports/2009_spring_en.pdf.

20. EC DIRECTORATE-GENERAL FOR ECON. AND FIN. AFFAIRS, EUR. ECON. NO. 7, ECONOMIC CRISIS IN EUROPE: CAUSES, CONSEQUENCES AND RESPONSES 62 (2009).

21. TFEU, *supra* note 13, art. 107(1), 2008 O.J. C 115, at 91; EC Treaty, *supra* note 13, art. 87(1), 2006 O.J. C 321 E, at 76–77.

22. *See, e.g.*, France v. Commission (*Kimberly Clark*), Case 241/94, [1996] E.C.R. I-3203, ¶ 19.

any gratuitous advantage such as a state guarantee of a firm's debt."[23] "State" includes not only central governments but also local authorities, regional development agencies, and other bodies whose funding comes largely or exclusively from the state.[24]

Crucially, aid must be selectively applied. General measures open to all comparable market players, such as guarantees for all retail bank deposits or open market operations and standing facilities entered into with or provided by central banks, are not selective and do not constitute state aid.[25] It is the effect, not the purpose of state aid that is decisive.[26]

To help identify state aid, the Commission has relied upon the principle of the "market economy investor," according to which a transaction involves state aid if it takes place in circumstances that would not be acceptable to a private investor operating under normal market conditions.[27]

The exceptional nature of the market situation in recent years and the intention, scope, and beneficiaries of state rescue packages might imply that virtually all state rescue measures amount to state aid.[28] That, not least implied by the Commission's application of the market-economy-investor test in cases such as *WestLB/Germany*. That decision emphasized—during a period in which banks were criticized for excessive risk taking—the prudence of the private investor "whose goal of

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23. *See* EURO. CONFERENCE OF POSTAL AND TELECOMMUNICATIONS ADMINS. (CEPT), REFARMING AND SECONDARY TRADING IN A CHANGING RADIOCOMMUNICATIONS WORLD 22 (2002); *see also* Commission Decision No. 25/08, slip op. ¶ 39 (Eur. Comm'n Apr. 30, 2008), *cited in* 2008 O.J. C 189/02 (*WestLB/Germany*), and Commission Decision No. 8/2008, slip op. ¶ 68 (Eur. Comm'n June 4, 2008) (*Sachsen LB/Germany*).

24. *See, e.g.*, EC DIRECTORATE-GENERAL FOR COMPETITION, VADEMECUM: COMMUNITY LAW ON STATE AID 6 (2008) [hereinafter VADEMECUM], *available at* http://ec.europa.eu/competition/state_aid/studies_reports/ vademecum_on_rules_09_2008_en.pdf; *see also* Italy v. Commission (*Textiles*), Case 173/73, [1974] E.C.R. 709.

25. *See* VEDMECUM, *supra* note 24, at 6.

26. *See Kimberly Clark*, [1996] E.C.R. 1-4551, ¶¶ 19, 20.

27. *See* BARRY J. RODGER & ANGUS MACCULLOCH, COMPETITION LAW AND POLICY IN THE EC AND U.K. 349 (4th ed. 2009).

28. *See* Damien Gerard, *EC Competition Law Enforcement at Grips with the Financial Crisis: Flexibility on The Means, Consistency in the Principles*, *in* CONCURRENCES, at 46, 48 (Inst. of Competition L., Issue No. 1, 2009).

profit maximization is tempered with caution about the level of risk acceptable for a given rate of return."[29]

Yet, the Commission held that no state aid was at stake in the case of emergency liquidity assistance provided by the Bank of England on its own initiative to Northern Rock.[30] Nor did the Commission consider that the liquidity facility provided by the Danish National Bank of up to kr750 million guaranteed by Det Private Beredskab constituted state aid within the meaning of article 87(1) EC Treaty (now article 107(1) TFEU).[31] In that way, the Commission has helped facilitate the administration of government rescue packages.

Perhaps mindful of market volatility, however, it has simultaneously confirmed its controversial approach in the France Telecom case, according to which the mere announcement on the part of public authorities to prevent the downgrading of a company's rating by rating agencies may, when coupled with subsequent intervention, constitute state aid.[32]

B. *Grounds for Approving State Aid in the Financial Crisis*

1. Historical Use of Article 87(3)(c) EC Treaty

Until relatively recently, the Commission's approval of state aid to failing banks has been based primarily upon article 87(3)(c) EC Treaty (now article 107(3)(c) TFEU), which permits "aid to facilitate the development of certain economic activities . . . where such aid does not adversely affect trading conditions to an extent contrary to the common interest."[33]

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29. *WestLB/Germany*, slip op. ¶ 32.

30. *See* Commission Decision No. 70/07, slip. op. ¶ 53 (Eur. Comm'n Dec. 5, 2007), *cited in* 2008 O.J. C 43/01 (*United Kingdom Rescue Aid to Northern Rock*).

31. *See* Commission Decision No. 36/08, slip. op. ¶ 65 (Eur. Comm'n July 31, 2008), *cited in* 2008 O.J. C 238/02 (*Denmark Roskilde Bank A/S*).

32. *See* Commission Decision No. 2006/621/EC, [2006] O.J. L 257/11, at 45–48, ¶¶ 206–24 (*France Télécom*).

33. TFEU, *supra* note 13, art. 107(3)(c), 2008 O.J. C 115, at 92; EC Treaty, *supra* note 13, art. 87(3)(c), 2006 O.J. C 321 E, at 77; s*ee* Commission Communication, 2008 O.J. C 270/2 (Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis), at 9 [hereinafter Banking Communication] (noting that state aid is normally assessed under article 107(3)(c) TFEU (article 87(3)(c) EC)).

The reliance upon the article 87(3)(c) EC Treaty exception was indicative of the Commission's initial perception that cases involving State aid to failing banks were not symptomatic of the "serious disturbance in the economy" required by article 87(3)(c) EC Treaty,[34] but were rather representative of "individual problems, . . . [requiring] tailor made remedies, which can be addressed under the rules for companies in difficulties."[35]

Those rules are embodied in the Commission's Communication on State Aid for Rescuing and Restructuring Firms in Difficulty ("Rescue and Restructuring Aid Guidelines"),[36] now supplemented by the Commission's Guidance on the Return of Viability and the Assessment of Restructuring Measures in the Financial Sector in the Current Crisis under State Aid Rules ("Restructuring Communication").[37] Rescue aid is available to keep failing firms afloat pending restructuring or liquidation.[38] It must be warranted on the grounds of serious "social" difficulty and constitutes reversible liquidity support for up to six months, which must be repaid.[39] Restructuring aid is aid granted with a view to giving undertakings long-term viability and must be limited to the minimum amount necessary to avoid undue distortions in competition.[40]

It was within the framework of rescue and restructuring aid that Germany notified the Commission of state aid for Sachsen LB and West LB, and that the U.K. provided a restructuring aid package for Northern Rock.

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34. EC Treaty, *supra* note 13, art. 87(3)(c), 2006 O.J. C 321 E, at 77.

35. *WestLB/Germany*, slip op., ¶ 42.

36. Commission Communication, 2004 O.J. C 244/2 (Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty) [hereinafter Rescue and Restructuring Guidelines].

37. Commission Communication 2009 O.J. C 195/04 (on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules) [hereinafter Restructuring Communication].

38. *See* Rescue and Restructuring Guidelines, *supra* note 36, 2004 O.J. C 244/2, at 4.

39. *See id.* at 4–5.

40. *See id.* at 6.

2. Use of Article 87(3)(b) EC Treaty as a Legal Basis for Aid Measures Addressing the Financial Crisis

On October 6, 2008, in an address before the Economic and Monetary Affairs Committee of the European Parliament, Neelie Kroes made known her intention "not [to] shy away if need be from applying the special provisions of Article 87(3)(b) [EC Treaty, now article 107(3)(b) TFEU] regarding aid granted to address a serious disturbance of the economy of a Member State."[41]

That acceptance of article 87(3)(b) EC Treaty as a legal basis for aid to even "fundamentally sound" undertakings represented a significant shift in policy.[42] Prior to the collapse of Lehman Brothers, the Commission had consistently refused to authorize measures reliant on the article 87(3)(b) EC Treaty exception to the prohibition on state aid, claiming the article "needs to be applied restrictively so that aid cannot be benefiting only one company or one sector but must tackle a disturbance in the entire economy of a Member State."[43]

The Commission's new-found reliance on that hitherto unused provision is an acknowledgment of the exceptional economic circumstances in which it is operating—the "serious disturbance in the economy of a Member State" to use the language of the article. It is via article 87(3)(b) EC Treaty that the Commission issued its approval of rescue packages such as the U.K.'s recapitalization of Lloyds TSB/HBOS and the Royal Bank of Scotland, the Dutch bail-out package for ING, and the Danish rescue scheme for Roskilde Bank.

While application of article 87(3)(b) EC Treaty gives scope for wider application of aid than that permitted by the existing Rescue and Restructuring Aid Guidelines, the Commission has taken pains to point out that "recourse to Article 87(3)(b) is possible not on [an] open-ended basis but only as long as the

41. Neelie Kroes, Eur. Comm'r for Competition Pol'y, Address Before the Monetary Affairs Committee, European Parliament: Dealing with the Current Financial Crisis 4 (Oct. 6, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/498 [hereinafter Kroes, Dealing with the Current Financial Crisis].

42. Banking Communication, *supra* note 33, 2008 O.J. C 270, at 8.

43. *WestLB/Germany*, slip op. ¶ 41.

crisis situation justifies its application."[44] The Commission's willingness to avail itself of the 87(3)(b) EC Treaty exception emphasizes the Commission's reliance on and novel use of the existing EC state aid framework, rather than an overt reinvention or a relaxation of state aid law.

C. *Commission Guidance*

1. The Banking Communication of October 25, 2008

The Banking Communication of October 25, 2008 ("Banking Communication")[45] was the first of four communications establishing the framework for the application of state aid rules on the basis of article 87(3)(b) EC Treaty. According to the then Deputy Director General Herbert Ungerer, the Banking Communication was designed to "prevent subsidy races between Member States that could undermine financial stability at the EU level,"[46] while enforcing "necessary discipline in assistance to banks."[47]

The Communication covers different types of aid, including guarantees of financial institutions' liabilities, the recapitalization of financial institutions (not permitted by the Rescue and Restructuring Guidelines), the controlled winding up of financial institutions, and the provision by central banks of short-term liquidity assistance (which the Commission notes is not state aid at all).[48]

It draws an important distinction between "illiquid but otherwise fundamentally sound financial institutions," who would benefit from a speedy approach and less scrutiny, and those whose problems are caused by their own "inefficiency or excessive risk-taking," who will also benefit from the speedier approach but will undergo the higher level of scrutiny required by the Rescue and Restructuring Guidelines.[49]

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44. Banking Communication, *supra* note 33, 2008 O.J. C 270, at 9.
45. *Id.*
46. Ungerer, *supra* note 12, at 7.
47. *Id.* at 6.
48. *See* FRESHFIELDS BRUCKHAUS DERINGER, LLP, BRIEFING: STATE AID TO FINANCIAL INSTITUTIONS 2 (2008), *available at* http://www.freshfields.com/publications/pdfs/2008/oct08/24336.pdf.
49. Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 9–10.

It signifies a more flexible approach on behalf of the Commission with respect to the application of article 87(3)(b) EC Treaty in the banking sector. It contains significant new elements: a new timetable for state aid approval, introducing a twenty-four-hour or weekend procedure.[50] For example, the Commission approved the U.K.'s rescue of Bradford & Bingley within twenty-four hours, albeit following detailed discussions prior to the submission for approval.[51] Likewise, Germany's Hypo Real Estate was bailed out with Commission approval within three days, after close cooperation between the Commission and German authorities;[52] a two-year time limit on state aid, with six monthly reviews to determine whether the aid remains necessary;[53] and the targeting of aid. Guarantees covering retail deposits (such as that offered by the Irish government)[54] are generally justifiable to prevent a run on the bank and wholesale lending and other guarantees are permissible in certain circumstances, particularly if they stimulate the resumption of interbank lending);[55] and proportionality guidelines for guarantees and recapitalization.[56]

The Banking Communication also attaches conditions to the Commission's authorization of financial recovery plans and individual rescue measures pursuant to article 87(3)(b) EC Treaty, such as the prohibition on advertising based on the recipient's state-supported status, or on expansion of business using state aid.[57]

The Communication requires general recovery plans to contain objective and non-discriminatory criteria.[58] As one scholar noted:

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50. *See id.* at 14.

51. *See* Commission Press Release, IP/08/1437 (Oct. 1, 2008), *available at* http://europa.eu/rapid/pressReleaseAction.do?reference=IP/08/1437.

52. *See* Commission Press Release, IP/08/1453 (Oct. 2, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1453 (noting that the Commission had received notification of German aid to Hypo Real Estate on Sept. 30, 2008, three days before the rescue package was approved).

53. *See* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 14.

54. *See* Credit Institutions (Financial Support) Scheme ¶ 10.1 (2008) (Ir.), *available at* http://www.finance.gov.ie/documents/publications/statutoryinstruments/2008si4112008.pdf.

55. *See* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 10.

56. *See id.* at 10

57. *See id.* at 11.

58. *See id.* at 10, 12.

> Guarantee and recapitalization plans must be open to all credit institutions with systemic relevance to the economy of the relevant Member State, regardless of their origin (i.e. including subsidiaries and regardless of whether their branches are headquartered abroad). Compliance with that criterion was the core of discussions between the Commission and Ireland during the review of the general guarantee scheme for banks in Ireland.[59]

The Communication insists that state guarantees be granted with adequate remuneration from individual financial institutions and/or the financial sector as a whole.[60] Indeed, the level of remuneration payable to the state was at the core of discussions between the Commission and the French government in relation to a capital-injection scheme for banks designed to stabilize financial markets and incentivize French banks to increase lending to the real economy.[61] Fees are to be "set according to the degree of risk and beneficiaries, respective credit profiles and needs."[62] Capital injections are to be "provided against properly valued and remunerated securities, ideally carrying corresponding rights."[63] Thus, in exchange for its bailout of the Royal Bank of Scotland, the U.K. government acquired a sixty-eight percent shareholding comprising of preferential shares yielding twelve percent interest.[64]

Guarantee and recapitalization schemes must be "tied to duly monitored behavioural constraints preventing aggressive commercial conduct" on the part of beneficiaries. GDP-related, market share or balance sheet growth caps might be implemented.[65] There have also been highly publicized cuts in bonuses. For example, the U.K. Bank Recapitalization Scheme

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59. Gerard, *supra* note 28, at 52; *see* Commission Decision No. 48/2008, slip op. (Eur. Comm'n Oct. 13, 2008), *cited in* 2008 O.J. C 312/1 (Ir.).

60. *See* Gerard, *supra* note 28, at 53; *see also* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 11.

61. *See* Commission Press Release, IP/08/1900 (Dec. 8, 2008).

62. *See* Gerard, *supra* note 28, at 53; *see also* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 11.

63. *See* Gerard, *supra* note 28, at 53; *see also* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 13.

64. *See, e.g.*, Jill Treanor, *Government Takes 68% Stake in Royal Bank of Scotland*, GUARDIAN (U.K.), Jan. 19, 2009, http://www.guardian.co.uk/business/2009/jan/19/rbs-second-bailout.

65. *See* Gerard, *supra* note 28, at 53; *see also* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 11.

requires that no cash bonuses be paid to directors for the current year's performance and provides for the appointment of new independent directors.[66] "The German scheme includes similar behavioural restraints with respect to executive remuneration and bonuses,"[67] while the French scheme "requires beneficiary banks to adopt measures concerning the remuneration of senior management and market operators (including traders) and limits severance packages for executives."[68]

During the weeks following the publication of the guidance, the Commission adopted several decisions, the content of which varies widely but all of which are governed by the application of article 87(3)(b) EC Treaty as laid down in the Banking Communication. Austria, Finland, France, Germany, Greece, Holland, Italy, Latvia, Portugal, Slovenia, Spain, and Sweden have benefited from remedial schemes and the Commission has adopted multiple measures designed for individual financial institutions: Roskilde Bank,[69] ING,[70] Fortis,[71] Dexia,[72] JSC Parex

66. *See, e.g.*, *Citizens Bank Parent Royal Bank of Scotland Rescued*, PHIL. BUS. JOURNAL, Oct. 13, 2008, http://www.bizjournals.com/philadelphia/stories/1008/10/13/daily6.html; *see also* Gerard, *supra* note 28, at 53 n.84.

67. Gerard, *supra* note 28, at 53 n.84; Commission Press Release, IP/09/711 (May 7, 2009).

68. Gerard, *supra* note 28, at 53 n.84; Commission Press Release, IP/08/1453 (Oct. 2, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1453.

69. Commission Decision No. 36/2008, slip op. (Eur. Comm'n Nov. 5, 2008), *cited in* 2009 O.J. C 12/1 (*Roskilde Bank/Denmark*).

70. Commission Decision No. 528/2008, slip op. (Eur. Comm'n Nov. 12, 2008), *cited in* 2009 O.J. C 328/7 (*ING/Netherlands*).

71. Commission Decision No. 574/2008, slip op. (Eur. Comm'n Dec. 3, 2008), *cited in* 2009 O.J. C 80/7 *(Fortis Bank/Belgium*).

72. Commission Decision No. 45/2008, slip op. (Eur. Comm'n Mar. 13, 2009), *cited in* 2009 O.J. C 181/42 (*Dexia/Luxembourg*).

Banka,[73] Aegon,[74] KBC,[75] Carnegie Bank,[76] BayernLB,[77] Nord LB,[78] and IKB.[79]

2. Recapitalization Communication of December 5, 2008

Supplemental to the Banking Communication, the Recapitalization Communication of December 5, 2008 ("Recapitalization Communication")[80] provides further guidance requested by industry. It was introduced in the context of saving distressed banks, such as Fortis and Dexia, from difficult market conditions and the risk of insolvency.[81]

Its broad principles are: to allow for the individual situation of each bank to be analyzed;[82] to ensure that there are incentives for state capital to be redeemed once market conditions have returned to normal;[83] and to provide behavioral safeguards to both limit distortions of competition and to protect taxpayers' money, without which "not only will state intervention not help, it will make the situation worse."[84]

Neelie Kroes couches its significance thus: "[W]e have moved beyond the need to shore up the banks. Now, financially sound banks may need state capital not to survive, but to provide

73. Commission Decision No. 68/2008, slip op. (Eur. Comm'n Nov. 24, 2008), *cited in* 2009 O.J. C 147/1 (*JSC Parex Banka/Latvia*).

74. Commission Decision No. 569/2008, slip op. (Eur. Comm'n Nov. 27, 2008), *cited in* 2009 O.J. C 9/1 (*Aegon/Netherlands*).

75. Commission Decision No. 602/2008, slip op. (Eur. Comm'n Dec. 18, 2008), *cited in* 2009 O.J. C 109/1 (*KBC Group/Belgium*).

76. Commission Decision No. 64/2008, slip op. (Eur. Comm'n Dec. 15, 2008), *cited in* 2009 O.J. C 29/1 (*Carnegie Bank/Sweden*).

77. Commission Decision No. 615/2008, slip op. (Eur. Comm'n Dec. 18, 2008), *cited in* 2009 O.J. C 80/4 (*BayernLB/Germany*).

78. Commission Decision No. 655/2008, slip op. (Eur. Comm'n Dec. 22, 2008), *cited in* 2009 O.J. C 63/16 (*Nord/LB/Germany*).

79. Commission Decision No. 213/2009, slip op. (Eur. Comm'n May 15, 2009), *cited in* 2009 O.J. C 258/1 (*IKB/Germany*).

80. Commission Communication to Member States 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, 2009 O.J. C 10/2.

81. *See* Neelie Kroes, Eur. Comm'r for Competition Pol'y, Remarks at Press Conference: The Role of State Aid in Tackling the Financial & Economic Crisis (Dec. 8, 2008), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/683 [hereinafter Role of State Aid].

82. *See* Kroes, EU State Aid Rules, *supra* note 7.

83. *See id.*

84. Kroes, Role of State Aid, *supra* note 81.

enough loans to companies in the rest of the economy. State recapitaliation can be an alternative to de-leveraging the balance sheets of the banks."[85] She places the Recapitalization Communication within the context of not merely necessary financial aid but the preservation of competition policy: "[W]henever State aid is used, it is really to serve financial stability and not to distort competition."[86]

Following the Recapitalization Communication, the Commission adopted the French recapitalization scheme[87] and approved the Austrian scheme,[88] among others.

3. Temporary Framework Adopted on December 17, 2008[89]

The new framework introduced "a number of temporary measures to allow Member States to address the exceptional difficulties of companies to obtain finance."[90] In particular, it allows Member States to grant, without notification of individual cases, subsidized loans, loan guarantees at a reduced premium, risk capital for small and medium enterprises and direct aids of up to €500,000, among other things.[91]

The framework was intended to facilitate the tackling of the current difficulties in the real economy, rather than just the financial sector. According to the Commission, its purpose was "to ensure sufficient bank lending to companies; secondly, it is to allow companies with liquidity problems due to the crisis to benefit from temporary relief through a limited grant; and thirdly it is to encourage companies to continue investing into a sustainable future, including the development of green products."[92]

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85. *Id.*

86. *Id.*

87. *See* Commission Press Release, IP/08/1900 (Dec. 8, 2008).

88. *See* Commission Press Release, IP/08/1933 (Dec. 10, 2008).

89. Commission Communication, Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis, 2009 O.J. C 83/01 [hereinafter Temporary Framework].

90. Commission Press Release, IP/08/1993 (Dec. 10, 2008).

91. *See id.*; *see also* Temporary Framework, *supra* note 89, 2009 O.J. C 83/01, at 7–11.

92. Commission Press Release, IP/08/1993 (Dec. 13, 2008); *see also* Temporary Framework, *supra* note 89, 2009 O.J. C 83, at 3.

The Temporary Framework does not apply to companies whose problems pre-date the current crisis. To that effect, a cut-off date was introduced in the Temporary Framework—the framework can only be applied to firms not in difficulty on July 1, 2008.[93] For firms already in difficulty by that date, the Rescue and Restructuring Guidelines remain the most adequate tool to restore long-term viability.

All measures are limited until the end of 2010 and subject to conditions. Based on Member States' reports, the Commission will evaluate whether the measures should be maintained beyond 2010, depending upon whether the crisis continues.[94]

Neelie Kroes was keen to emphasize the framework's continuity with previous state aid policy, saying the framework was intended to "complement the package already delivered by State aid reform in the last three years, to support growth through the recession period."[95]

4. Impaired Assets Communication of February 25, 2009

The Impaired Assets Communication of February 25, 2009[96] is part of the temporary framework and supplements the Banking and Recapitalization Communications.

Essentially, it aims to help Member States deal with "toxic assets" on banks' balance sheets. The type of asset scheme will be the choice of the Member State.[97] It gives Member States the option to purchase toxic assets and place them in a "bad bank," to guarantee bad assets on banks' balances sheets or nationalize banks and take control of their assets.[98]

The Impaired Assets Communication focuses on the rationale for asset relief as a measure to safeguard financial stability and underpin bank lending; the longer-term considerations of banking-sector viability and budgetary sustainability to be taken into account when considering asset

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93. *See* Temporary Framework, *supra* note 89, 2009 O.J. C 83/01, at 7.

94. *See id.* at 7.

95. Kroes, Role of State Aid, *supra* note 81.

96. Commission Communication on the treatment of impaired assets in the Community banking sector, 2009 O.J. C 72/01, at 1 [hereinafter Impaired Assets Communication].

97. *Id.* at 13.

98. *Id.* at 1.

relief measures; and the need for a common and co-ordinated Community approach to asset relief, notably to ensure a level playing field.[99]

Following the Communications, the Commission approved the recapitalization of Commerzbank[100] and WestLB,[101] and opened in-depth investigations on a number of other financial institutions.[102]

5. Simplification Package of April 16, 2009

The Simplification Package of April 29, 2009 ("Simplification Package")[103] was "the missing link in the implementation of the State Aid Action Plan"[104] announced in 2005. The package is composed of the Best Practices Code and the Notice on Simplified Procedure.[105] It represents the Commission's attempt to accelerate its approval of state aid packages and improve credibility, predictability, and transparency with respect to its state aid procedure.[106] The aim is to ensure that clearly compatible aid gets approved within one month when Member States provide a complete notification.[107]

The Best Practices Code details how state-aid procedures should be carried out in practice and applies to all cases not covered by the General Block Exemption Regulation or subject to the Notice on Simplified Procedure.[108] It includes arrangements regarding prenotification,[109] mutually agreed planning,[110] and the treatment of complaints.[111] The code

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99. *Id.* at 1

100. Commission Press Release, IP/09/711 (May 7, 2009).

101. *See* Commission Press Release, IP/09/741 (May 12, 2009).

102. *See, e.g.*, EC State Aid Register, http://ec.europa.eu/competition/state_aid/register/ii/by_date_2009_05.html (last visited Mar. 21, 2010) (listing EU decisions on state aid to Member States).

103. *See* Commission Notice, 2009 O.J. C 136/03 (On a Simplified Procedure for Treatment of Certain Types of State Aid) [hereinafter Notice on Simplified Procedure]; Commission Communication, 2009 O.J. C 136/04 (Code of Best Practice for the Conduct of State Aid Control Procedures) [hereinafter Code of Best Practice].

104. Ungerer, *supra* note 12.

105. *See* Notice on Simplified Procedure, *supra* note 103, 2009 O.J. C 136/03; Code of Best Practice, *supra* note 103, 2009 O.J. C 136/04.

106. *See* Notice on Simplified Procedure, *supra* note 103, 2009 O.J. C 136/03, at 3.

107. *See* Code of Best Practice, *supra* note 103, 2009 O.J. C 136/04, at 17.

108. *See* Commission Press Release, IP/09/659 (Apr. 29, 2009).

109. *See* Code of Best Practice, *supra* note 103.

110. *See id.* at 15–16.

includes a certain number of voluntary arrangements between the Commission and Member States to achieve more streamlined and predictable procedures at each step of a state-aid investigation.[112] With respect to prenotification, for example, the Commission will offer informal guidance, written guidance, and a preliminary assessment of the case if a Member State requests it.[113] Member States are also encouraged to respond more promptly to the requests made by the Commission; if a Member State fails to respond after one reminder, the notification will be automatically withdrawn.[114]

The Simplified Package aims at improving the Commission's treatment of straightforward cases, like those clearly in line with existing horizontal instruments or established Commission decision-making practice. The notice includes an illustrative list of aid measures, including certain aids for small- and medium-sized enterprises ("SMEs"), environmental aid, innovation aid and rescue and restructuring aid, which are in principle suitable for simplified treatment.[115] It is an enlargement of the category of measures that do not need to be notified in advance to the Commission. Such measures will be subject to ex post monitoring.[116]

Those procedures may help ameliorate any concerns of business and governments about the efficiency of the Commission's approval of State aid packages. The Commission does, however, view the success of the initiative as dependent upon the cooperation of Member States.[117]

6. Restructuring Communication of August 19, 2009

The Restructuring Communication of August 19, 2009 ("Restructuring Communication")[118] aims to make banks viable in the long term without further state support, to ensure that aided banks and their owners take responsibility for their past

111. *See id.* at 19–20.
112. *See id.* at 20.
113. *See id.* at 15.
114. *See id.* at 16.
115. *See* Notice on Simplified Procedure, *supra* note 103, 2009 O.J. C 136/03, at 5.
116. *See* Ungerer, *supra* note 12, at 16–17.
117. *See id.* at 14; *see also* Notice on Simplified Procedure, *supra* note 103, 2009 O.J. C 136/03, at 3.
118. Restructuring Communication, *supra* note 37, 2009 O.J. C 195/04.

behavior and help bear the cost of restructuring, and to limit distortions of competition in the EU single market.[119]

Banks that have received large amounts of aid and that have unsustainable business models are required to demonstrate strategies to achieve long-term viability under adverse economic conditions;[120] restructuring should put banks in a position to cover their costs and provide an appropriate return on equity without recourse to state funding.[121] To ensure the proposal is robust, banks will "stress test" their business, diagnosing its strengths and weaknesses.[122]

Restrictions and greater scrutiny apply to banks undertaking a restructuring program, with respect to the amount of aid, the payment of dividends and the reduction of capital and growth.[123] The communication envisages and aims to prevent scenarios of market distortion arising from state aid: aid may reinforce the market position of the aid recipient relative to that of its unaided competitors, help perpetuate failed business models, reduce the incentive to compete and create moral hazard by encouraging excessive risk-taking.[124] Banks will be prohibited from using state aid to acquire competing businesses except under exceptional circumstances, from making offers on terms that an unaided competitor cannot match, and from using state aid as a competitive advantage in marketing financial offers.[125]

The restructuring measures the guidance contemplates have led to forced divestments of assets and may radically reshape the banks subject to them and the financial landscape in which they operate.[126] On November 18, 2009, the Commission announced its approval of the Lloyds Banking Group restructuring plan, which includes the divestment of Lloyds Banking Group's core business of U.K. retail banking to remove distortions created by

119. *See* Commission Press Release, IP/09/1180 (July 23, 2009).

120. *See* Restructuring Communication, *supra* note 37, 2009 O.J. C 195/04, at 9.

121. *See id.* at 11.

122. *See id.* at 10.

123. *See id.* at 13; *see also*, Alison Berridge & Mark Friend, Editorial, *New European Guidelines on Bank Restructuring*, ALLEN & OVERY AREAS OF EXPERTISE ANTITRUST AND EU (July 27, 2009), http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=54063.

124. *See* Restructuring Communication, *supra* note 37, 2009 O.J. C 195/04, at 14.

125. *See id.* at 16.

126. *See e.g.*, Commission Press Release, IP/09/1728 (Nov. 18, 2009) (describing the restructuring plan for Lloyds Banking Group, including a divestment package).

aid granted in and since January 2009.[127] The Commission thus countered criticism that its recent endeavors have undermined the law and purpose of article 87 of the EC Treaty (now TFEU article 107).

In a change to past practice, however, the guidelines allow up to five years for the completion of restructuring, rather than the two or three years previously applied, offering more flexibility to banks and arguably allowing for natural market recovery.[128] Nor has the Commission specified the minimum level of contribution by a bank to its restructuring; in the past, large firms have been required to fund at least fifty percent of restructuring costs,[129] but the Commission has stated that it may accept lower levels in the current circumstances.[130] It has also indicated that it may approve aid packages to the same recipient, a suspension of its previous "one last time" rule.[131] This shift will be important in the context of ratings; agencies take into account what would happen in the event of failure—including the prospect of a bail-out—and confirmation that this option is still available may help secure better ratings for affected banks.

D. *Characterization of the Commission's Approach to State Aid*

Neelie Kroes claims she is "the first to concede that these exceptional times are making new demands on the state aid system."[132] The Commission has attempted to find a middle way between states clamoring for the power to rescue their most important financial institutions and legal purists decrying an apparent chasm between the existing state aid rules and the practice of the Commission.

To some extent it has succeeded. If nothing else, the Commission's abundance of guidelines has promoted some legal certainty and governmental restraint at a time when the world economy and government's attitude to state aid are in flux. Its guidance can help reassure the markets that the Commission is

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127. *See id.* at 2.

128. *See* Restructuring Communication, *supra* note 37, 2009 O.J. C 195/04, at 12.

129. *See* Rescue and Restructuring Guidelines, *supra* note 36, 2004 O.J. C 244/02, at 8.

130. *See* Commission Press Release, MEMO/09/350 (July 23, 2009), at 2.

131. *Id.*

132. Kroes, EU State Aid Rules, *supra* note 7, at 2.

promoting compliance with general EU single market principles. In that way, the evident evolution of state aid law and the Commission's ever-expanding policy and portfolio of decisions has helped preserve "the possibility and legitimacy of the Commission's involvement into the management of the crisis."[133] After all, the Commission's job, in part, has been to appease Member States anxious to offer substantial rescue packages to their failing institutions. The Commission has adopted an attitude of cooperation: "[W]e are a partner, not an obstacle. We are engaged in a pro-active process, to help Member States design their State aid schemes for banks in the best way."[134]

That may seem a far cry from the rhetoric of article 87(1) EC Treaty (now article 107(1) TFEU).[135] The premise of its intervention has been saving the system, rather than individual firms.[136] Moreover, the Commission has subjected the recipients of state guarantees and recapitalizations under the Banking Communication to limitations on their future commercial behavior.[137] They are constrained by bans on advertising based on their state-supported status, as well as by restrictions on pricing, bonuses for management, and expansion of the business through a market share cap and limitations on the size of their balance sheets.[138] For example, the bail-out recapitalization schemes involving Lloyds TSB/HBOS and the Royal Bank of Scotland required the recipients to restore lending to pre-credit-crunch levels and senior managers were obliged to forgo cash bonuses.[139]

Through the use of the article 87(3)(b) EC Treaty exception to the state aid prohibition[140] and the adoption of the Temporary Framework, which allows for approval of state aid measures

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133. Gerard, *supra* note 28, at 47.

134. Kroes, Role of State Aid, *supra* note 81, at 3.

135. TFEU, *supra* note 13, art. 107(1), 2008 O.J. C 115, at 91; EC Treaty, *supra* note 13, art. 87(1), 2006 O.J. C 321 E, at 76.

136. *See* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 8–9.

137. *See id.* at 11–12; *see also* da Silva & Sansom, *supra* note 4, at 29.

138. *See* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 11–12; *see also* da Silva & Sansom, *supra* note 4, at 29.

139. *See* Jon Menon, *RBS, HBOs, Lloyds Get 37 Billion-Pound U.K. Bailout*, BLOOMBERG, Oct. 13, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=aT9SRmp1jvxE&refer=home.

140. TFEU, *supra* note 13, art. 107(1), 2008 O.J. C 115, at 91.

within twenty-four hours,[141] the Commission has attempted to respond to criticism from those with a penchant for the protectionist measures of the Great Depression. In so doing, it is possible that "[t]he pragmatism and flexibility shown by the Commission in adjusting its approach to fit the circumstances may well have avoided a more serious undermining of State aid antitrust law through widespread non-compliance."[142] The Commission has also been firm with those refusing to follow state aid rules and decisions, as evidenced by the referral of Poland to the European Court of Justice ("ECJ") for their failure to recover illegal aid from Technologie Buczek.[143] Neelie Kroes commented in respect to that decision: "The Commission will continue to take a strong stance against Member States that do not recover State aid from companies who received unfair and illegal support."[144]

Yet some argue that the long-term effects of vast quantities of authorized state aid may prove more problematic than the robust rhetoric of the Commission would suggest. For example, where bail-outs are sector-wide, as they were in Ireland's guarantee of retail deposits,[145] and recipients of state aid are required to submit to market share caps as a result, it could affect the operation of competition in that market or lead to an increased risk of coordination between banks. According to da Silva and Sansom, "in-depth Commission scrutiny [of state aid] is merely postponed."[146] In short, such commentators argue, the Commission has rendered itself partly culpable for costly bailout packages, the effects of which remain to be seen and the scrutiny of which the Commission has seemed happy to defer: "the medicine may be more harmful than the illness."[147] It is perhaps difficult to see how the multitude of hastily authorized aid packages will avoid the pitfalls originally envisaged by the drafters of article 107(3)(b) TFEU. There is a risk in adopting a more flexible procedure that the new regime may not prove as robust

141. *See* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 14.

142. *See* da Silva & Sansom, *supra* note 4, at 32.

143. *See* Commission Press Release, IP/09/777 (May 14, 2009).

144. *Id.*

145. *See* Commission Decision No. 48/2008, slip op. (Eur. Comm'n Oct. 13, 2008), *cited in* 2008 O.J. C 312/01 [hereinafter Guarantee Scheme for Banks of Ireland].

146. da Silva & Sansom, *supra* note 4, at 29.

147. *Id.* at 30.

as the original.[148] Less time inevitably means less scrutiny and the mechanics of enforcing safeguards, such as behavioral restrictions, are yet to be fully defined.

The Commission's reliance on the article 87(3)(b) EC Treaty exception, however, is instructive. The Commission rightly views the current economic crisis as exceptional and profound. The language of article 87 EC Treaty itself makes provision for the approval of aid in such circumstances. Importantly, the Commission envisages its guidelines as temporary measures, placing deadlines on the applicability of its communications and the state-aid framework.[149] The degree to which the Commission enforces the Restructuring Guidelines—its insistence on a return to long-term viability for the recipients of state aid[150]— will be the decisive test of the Commission's framework. If successful, it will answer criticism that the new regime is an irreversible departure from the old and one which irrevocably damages competition law. It therefore remains to be seen whether the Commission can justifiably lay claim to the role of protector of the EU single market—the EU's "crown jewel"[151]—and quash the suggestion that "antitrust enforcement is a political luxury good consumed during times of relative peace and prosperity."[152]

II. *MERGERS*

A. *The European Response*

The initial stages of the crisis were characterized by divergent actions by the Member States struggling to support their own markets.[153] The need for a coordinated response was very real, and this was recognized early on by Neelie Kroes.[154] It

148. For further discussion on that point, see Paris Anestis & Sarah Jordan, *The Handling of State Aid During the Financial Crisis: an Efficient Response or Trouble for the Future?*, EUR. ANTITRUST REV. (2010).

149. *See* Banking Communication, *supra* note 33, 2008 O.J. C 270/2, at 8, 11, 12.

150. *See id.* at 12.

151. Neelie Kroes, Eur. Comm'r for Competition Pol'y, Speech at the "Sky Talks" Conference: Working Together to Clear up the Banking Mess (May 26, 2009).

152. Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, GLOBAL COMPETITION POL'Y, Dec. 2008, at 9.

153. *See* da Silva & Sansom, *supra* note 4, at 31.

154. "[C]ompetition authorities and central banks cannot afford to operate in their own little worlds—we must work together on issues like bank recapitalisations and

was acknowledged that, left to their own devices, the Member States would most likely implement policies that could jeopardize the single market.[155]

A coordinated response emerged in October 2008 with the Declaration on a Concerted European Action Plan of the Euro Area Countries,[156] which outlined the role of the Commission to maintain a level playing field between member States and avoid the export of financial problems from one Member State to another.[157]

Under Modernization Regulation 1/2003,[158] enforcement of articles 81 and 82 EC Treaty (now articles 101 and 102 TFEU) is shared between the Commission, the national competition authorities ("NCAs") of the Member States, and the national courts. However, the Commission has exclusive jurisdiction over mergers falling within the EC Merger Regulation ("ECMR"),[159] and the control of state aid.

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restructures." Neelie Kroes, Eur. Comm'r for Competition Pol'y, Speech at the Bundeskartellamt Conference on Dominant Companies—The Thin Line Between Regulation and Competition Law: The Interface Between Regulation and Competition Law, (Apr. 28, 2009), at 3.

155. "EU competition policy provides an objective, adaptable and comprehensive framework. It therefore helps us avoid the potential chaos resulting from each country doing their own thing, without regard for negative spillovers affecting others." Neelie Kroes, In Defence of Competition Policy: Opening remarks at Conference "Competition Policy, Growth and Consumer Purchasing Power"(Oct. 13, 2008), at 2.

156. "In the current exceptional circumstances, we stress the need for the Commission to continue to act quickly and apply flexibility in state aid decisions, continuing to uphold the principles of the single market and of the state aid regime." Declaration on a Concerted European Action Plan of the Euro Area Countries, ¶ 5, Summit of the Euro Area Countries, Oct. 12, 2008, http://ec.europa.eu/economy_finance/publications/publication13260_en.pdf.

157. "[A role of the Commission has been to] maintain a level playing field and to make sure that national measures would not simply export problems to other Member States. The crisis has actually demonstrated that this risk is very tangible, with money flowing to banks benefiting from guarantees and leaving other banks in trouble." Commission Press Release, MEMO/08/757 (Dec. 2, 2008) (providing full text of Neelie Kroes's remarks to EU Economics and Finance Ministers at a breakfast discussion on the financial crisis).

158. Council Regulation No. 1/2003, 2003 O.J. L 1/1 [hereinafter Modernization Regulation 1/2003].

159. *See* Commission Regulation No. 139/2004 on the control of concentrations between undertakings, 2004 O.J. L 24/1 (*EC Merger Regulation ("ECMR")*). The ECMR repealed and replaced Commission Regulation No. 4064/1989, 1989 O.J. L 395/1, corrected version in 1990 O.J. L 257/13, amended by 1997 O.J. L 180/1. *See* Commission Regulation No. 139/2004, art. 25, 2004 O.J. L 24/1.

Thus far the Commission has managed to be consistent with the established rules of competition law and procedure while allowing some flexibility in their application in light of the financial climate. It has echoed the sentiments of Peter Freeman, Chairman of the U.K. Competition Commission ("CC"), who insisted that "competition is just as important in difficult economic times as it is in the good times"[160] and has endeavored to act as a "stabilising force throughout this crisis."[161] According to Charlie McCreevy, the European Commissioner for Internal Market and Services,

> The crisis has required substantial state intervention in financial institutions in many Member States and in this regard I don't think anyone could argue that the Commission was anything other than vigorous and efficient in applying EU law, notably on competition and state aids, but doing so in a way that was flexible and rapid—which was essential to maintain confidence in the banking system and prevent the crystallization of systemic risks.[162]

B. *State of the Market*

The second half of 2008 saw a marked reduction in the number of mergers notified to the Commission—only 347 cases, as compared to the 402 in 2007.[163] The same trend continued in 2009, which ended with only 259 notifications to the Commission.[164]

At the end of 2008, the total volume of worldwide mergers and acquisitions reached US$3.28 billion (of which nineteen percent were financial deals), down twenty-nine percent from 2007.[165] The value of cancelled merger deals for the fourth quarter in 2008 was nearly the same as the value of deals actually

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160. *See* Freeman, *supra* note 1, at 1.

161. Kroes, Dealing with the Current Financial Crisis, *supra* note 41, at 4.

162. Charlie McCreevy, Eur. Comm'r for Internal Market and Services, Remarks at the 7th Annual Financial Services Conference: Financial Markets and Economic Recovery—Restoring Confidence and Responding to Public Concerns (Jan. 27, 2009).

163. *See* EUR. COMM'N, COMPETITIVE MERGER CASE STATISTICS FROM SEPTEMBER 21, 1990 TO FEBRUARY 28, 2010, http://ec.europa.eu/competition/mergers/statistics.pdf [hereinafter COMPETITIVE MERGER CASE STATISTICS].

164. *See id.*

165. *See* Lina Saigol, *Record Number of M&A Deals Cancelled in 2008*, FIN. TIMES, Dec. 22, 2008, http://www.ft.com/cms/s/0/d322de98-d056-11dd-ae00-000077b07658.html.

completed, with the rate of deals collapsing gathering pace from September 2008.[166] In total, 1309 transactions valued at US$911 billion were abandoned. In 2007 the figure was 870 transactions valued at US$1.6 billion.[167]

One headline-grabbing example was the planned US$6.5 billion takeover of U.S. chemicals manufacturer Huntsman by Hexion Speciality Chemicals (owned by buy-out firm Apollo Management), which was abandoned on December 15, 2008.[168] The chief executive of Huntsman said, "Selling a business is not easy, and in today's market it's darn near impossible."[169] In fact, Huntsman went on to sue, and settle with, Credit Suisse and Deutsche Bank—the banks that had agreed to finance the deal—claiming that the banks had conspired with Apollo and interfered with Huntsman's previous merger deal with Basell.[170]

BHP Billiton also abandoned its year-long pursuit of mining rival Rio Tinto in November 2008.[171] The deal, valued at about US$140 billion, would have been the biggest takeover seen in the mining sector, and the second largest corporate takeover ever.[172] Although the financing was reportedly in place, BHP Billiton's CEO said, that it would not be a good time to take on the level of debt that existed on Rio Tintos balance sheet.[173] Further, the Commission had conducted an initial market investigation into the transaction and had reportedly raised concerns over the iron ore business.[174] It was reported that BHP would have struggled to

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166. *See* Heidi N. Moore, *Postmortem: Nearly as Many Cancelled Mergers as New Ones*, WSJ BLOG: DEAL JOURNAL, Dec. 1, 2008, http://blogs.wsj.com/deals/2008/12/01/postmortem-nearly-as-many-cancelled-mergers-as-new-ones/tab/article.

167. *See* Saigol, *supra* note 165.

168. *See* Julie MacIntosh, *A Match Made in Recession*, FIN. TIMES (London), Dec. 16, 2008, at 14.

169. *See id.*

170. *See* Martin Arnold, *D[eutsche] Bank and Credit Suisse in Huntsman Settlement*, FIN. TIMES (London), June 24, 2009, at 19.

171. *See* Rebecca Bream & Peter Smith, *Credit Crunch Forces BHP to Drop Rio Bid*, FIN. TIMES (London), Nov. 26, 2008, at 1.

172. *See id.*; *see also Rio Tinto Rejects Takeover Bid from BHP Billiton to Create Mining Giant*, N.Y. TIMES, Nov. 8, 2007, http://www.nytimes.com/2007/11/08/business/worldbusiness/08iht-mine.8247508.html.

173. Press Release, BHP Billiton, Rio Tinto Offers No Longer in the Best Interests of BHP Billiton Shareholders (Nov. 25, 2008), http://www.bhpbillitone.com/bb/investorsMedia/news/2008/rioTintoOffersNoLongerInTheBestInterestsOfBhpBillitonShareholders.jsp.

174. *See id.*

complete any divestments of iron ore mines had they been required to by the Commission.[175]

Although there may be fewer mergers, the transactions that do go ahead are likely to throw up more challenging competition issues. But companies should not think that the Commission will subject them to less scrutiny in an attempt to boost transaction activity, as the Commission has confirmed: "[Y]ou will not see us offering special treatment to companies who view a merger as a quick-fix to their problems. . . . [W]e have no interest in allowing the creation of yet more companies that are 'too big to fail.'"[176]

The Commission has, however, shown some flexibility in procedure, if not in substance, clearing deals in record time. Although many of the headline-grabbing mergers born of the financial crisis have not fallen within the Commission's jurisdiction, it is likely that consolidation across all industries in the coming months and years will change that situation. It therefore remains to be seen how flexible the Commission will be.

C. *The EC Merger Regulation (ECMR)*

The merger control regime in the EU is contained within Regulation 139/2004 ("ECMR")[177] and Regulation 802/2004[178] ("Implementing Regulation"). Since the ECMR was introduced in 1989, 4317 cases have been notified.[179]

The purpose of the ECMR is to catch transactions that will lead to a long-term structural change in the European market. Transactions must only be notified if there is a "concentration" (i.e., a merger or the creation of a joint venture).[180] The concentration must involve acquisition of control.[181] "Control" is defined as the ability to exercise a decisive influence on a

175. *See id.*

176. Neelie Kroes, Eur. Comm'r for Competition Pol'y, Address at Deutsche Bank Conference: Time for Banks to Shoulder Their Responsibilities, (Mar. 14, 2009), at 5.

177. Commission Regulation No. 139/2004 (*ECMR*), 2004 O.J. L 24/1.

178. Commission Regulation No. 802/2004 (*Implementing Regulation*), 2004 O.J. L 133/1 (implementing Council Regulation No. 139/2004), amended by 2008 O.J. L 279/3.

179. *See* COMPETITIVE MERGER CASE STATISTICS, *supra* note 163.

180. *See ECMR*, arts. 3, 4, 2004 O.J. L 24/1, at 7–8.

181. *See id.* art. 3(1), at 7.

company,[182] i.e., the power to determine the business and commercial decisions of a company or the power to block/veto its strategic decisions.

Such a concentration only falls within the ECMR if it has a "Community" dimension.[183] The basic thresholds that determine whether a transaction has a "Community" dimension are: combined worldwide turnover of over €5 billion;[184] and Community-wide turnover of each of at least two undertakings of over €250 million.[185]

If those thresholds are satisfied, a notification must be made to the Commission prior to implementation of the transaction.[186] It will not be necessary to file in any other jurisdictions in the EU, because the idea is for the ECMR to allow for a "one-stop-shop" for notification.[187] The basic thresholds may not always ensure that the most appropriate authority reviews the transaction.[188] Therefore, mergers with a significant cross-border impact but subject to national controls can be transferred to the Commission;[189] cases whose impact is primarily national or local but which fall under the new ECMR can be reallocated to the NCAs.

Further, there are a set of supplemental thresholds that apply if the basic thresholds are not met. If any of these are *not* satisfied then the merger is notified to national competition authorities only: combined worldwide turnover of €2.5 billion;[190] or Community-wide turnover of each of at least two undertakings exceeds €100 million;[191] or combined turnover of all undertakings exceeds €100 million in each of three Member States;[192] or in each of those three Member States at least two

182. *See id.* art. 3(2), at 7.
183. *See id.* art. 1(1), at 6.
184. *See id.* art. 1(2), at 6.
185. *See id.*
186. *See id.* art. 4(1), at 8.
187. *See id.* pmbl. ¶ 8, at 2.
188. *See* Commission Notice, 2005 O.J. C 56/2, at 6, (on case referrals in respect of concentrations).
189. *See id.* art. 4, at 8–9.
190. *See ECMR*, art. 1(3)(a), at 6.
191. *See id.* art. 1(3)(d).
192. *See id.* art. 1(3)(b).

undertakings concerned each have turnover exceeding €25 million.[193]

Finally, even if either the basic or supplemental thresholds are satisfied the merger will not be notifiable to the Commission if the "two-thirds rule" is satisfied, that is if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[194]

The consolidations in the banking sector that have been making headlines since the crisis began have, for the most part, not satisfied those thresholds and have therefore been reviewed at a national level.[195]

D. *Commission Merger Decisions in the Financial Crisis*

Relatively few transactions arising out of the financial crisis have come within the Commission's jurisdiction, as the majority have not been cross-border but rather have been national in scope.[196] The Commission has, however, emphasized that the ECMR has sufficient flexibility to cope with the crisis.[197]

Moreover, the Commission recognizes that certain types of mergers are likely to be on the horizon, and has pledged not to unnecessarily stand in their way but rather to ensure that "cross-border acquisitions are not stopped for non-competition reasons during the phase of consolidation that the financial sector will likely enter in the coming years."[198]

These statements indicate that, in times of crisis, the Commission will apply the established rules flexibly and with an awareness of the financial situation. That has been tested in the

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193. *See id.* art. 1(3)(c), at 6.

194. *See* SLAUGHTER & MAY, THE EC MERGER REGULATION: AN OVERVIEW OF THE EU MERGER CONTROL RULES 5 (2006).

195. *See* Gerard, *supra* note 28, at 55.

196. *See id.*

197. "The Merger Regulation will be able to handle anything thrown at it in 2009. There may be difficult decisions, but we have the flexibility we need to take account of changing market circumstances." Kroes, Many Achievements, More to Do, *supra* note 10.

198. Neelie Kroes, Eur. Comm'r for Competition Pol'y, Speech at ECB-DNB Retail Payments Conference: Competition and Regulation in Retail Banking and Payment Markets, (May 25, 2009).

four cases relating directly to the financial crisis that have thus far been assessed by the Commission.

1. Santander/Alliance & Leicester[199]

The deal was announced on July 14, 2008,[200] notified to the Commission on August 8, 2008, and cleared on September 15, 2008.[201] It stated:

> The proposed transaction, organised in the form of a scheme of arrangement and exchange of shares, combined the sixth and the eighth largest banks in the UK. The main business areas in which the activities of the parties overlapped were retail banking, banking for corporate customers, factoring, payment cards, financial market services and insurance. However, in all these activities the market shares were below 15% and would face competition from several UK banks (such as Barclays, HBOS, HSBC, Lloyds, Nationwide and RBS/NatWest). In addition, Alliance & Leicester is present in cash handling and cash sales, markets in which Banco Santander is not active but which would create vertical relationships post-merger. However, given the market structure and the limited market shares of Alliance & Leicester, the Commission did not find that the transaction would have a significant impact on these markets and therefore concluded that the transaction did not give rise to competition concerns.[202]

2. BNP Paribas/Fortis[203]

The Commission cleared the acquisition of the Belgian and Luxembourg subsidiaries of Fortis (Fortis Bank Belgium, Fortis Banque Luxembourg, and Fortis Insurance Belgium) by BNP Paribas.[204] The deal was announced on October 6, 2008,[205]

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199. Commission Decision No. COMP/M.5293, slip op. (Eur. Comm'n Sept. 16, 2008), *cited in* 2009 O.J. C 26/3, at 8 (*Santander/Alliance & Leicester*).

200. *See Santander Agrees £1.2bn A&L Deal*, BBC, July 14, 2008, http://news.bbc.co.uk/2/hi/7504822.stm.

201. *See Santander/Alliance & Leicester*, slip op. ¶¶ 1, 2.

202. Commission Press Release, IP/08/1325 (Sept. 16, 2008).

203. Commission Decision, No. COMP/M.5384, slip op. (Eur. Comm'n Dec. 3, 2008) *cited in* 2009 O.J. C 7/05 (*BNP Paribas/Fortis*).

204. *See* Mary Loughran & John Gatti, *Merger Control: Main Developments Between 1 September and 31 December 2008*, COMPETITION POL'Y NEWSL. (Eur. Comm'n Competition Directorate-General, Luxembourg) (Jan. 2009), at 67.

notified to the Commission on October 29, 2008, and cleared by December 3, 2008.[206] The clearance was conditional on full divestment of BNP Paribas Personal Finance Belgium SA/NV.[207] The Commission's concerns centered on credit cards as a payment instrument as well as on the provision of consumer credit.[208] Neelie Kroes commented: "This decision is a perfect example of the Commission's ability to reconcile a rapid response to the credit crisis with the need to ensure that competition law plays its role in the defence of legitimate consumer interests."[209]

3. Santander/Bradford & Bingley Assets[210]

Upon the collapse and nationalization of U.K. mortgage lender Bradford & Bingley, its deposit book and associated assets were sold to the Santander Group.[211] The deal was announced on September 29, 2008,[212] notified to the Commission on November 12, 2008, and cleared on December 17, 2008.[213] After examining the operation, the European Commission cleared the acquisition. "Abbey acquired all retail savings account deposits held by Bradford & Bingley together with the agencies and other essential assets for the operation of the business. Some remaining assets of Bradford & Bingley, in particular the past mortgage lending activities, have been transferred to the state."[214]

The Commission's December 18, 2008 press release stated: "Since Bradford & Bingley did not provide a full range of retail banking services prior to the merger, the acquisition is unlikely

205. *See* Nelson D. Shwartz, *BNP Paribas to Buy Parts of Lender*, N.Y. TIMES, Oct. 6, 2008, http://www.nytimes.com/2008/10/07/business/worldbusiness/07bnp.html.

206. *See BNP Paribas/Fortis*, slip op. ¶¶ 1, 161.

207. *See* Loughran & Gatti, *supra* note 204, at 67.

208. *See id.*

209. Commission Press Release, IP/08/1882 (Dec. 3, 2008).

210. *See* Commission Decision, No. COMP/M.5363, slip op. (Eur. Comm'n Dec. 18, 2008) *cited in* 2009 O.J. C 7/04 (*Santander/Bradford & Bingley*).

211. *See* Commission Press Release, IP/08/2012 (Dec. 18, 2008).

212. *See* Poppy Trowbridge & Ben Livesey, *Bradford & Bingley is Seized; Santander Buys Branches*, BLOOMBERG.COM, Sept. 29. 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTBJa4IvamJc&refer=home.

213. *See Santander/Bradford & Bingley*, slip op. ¶¶ 1, 37.

214. Commission Press Release, IP/08/2012 (Dec. 18, 2008).

to have a significant impact on the overall position of Abbey in retail banking."[215]

In addition, the press release stated:

> However, since Bradford & Bingley was active in mortgage lending, the Commission considered in particular the mortgage market more specifically. The Commission based its analysis on the assumption that the transferred assets would be sufficient to recreate the pre-merger business of Bradford & Bingley if Abbey so wished. The savings accounts are directly transferred, whereas the customer relations and deposit base might allow Abbey to further build its book of mortgage business at a similar rate to that of Bradford & Bingley in the past. However, even on this assumption, the market shares of the merged entity on the UK mortgage market would remain below 20%, with a relatively small increment resulting from the merger. Moreover, Abbey will continue to face a number of competitors on this market. Therefore, the Commission concluded that the transaction would not raise competition concerns.[216]

4. Hypo Real Estate

On May 15, 2009, the Commission approved the acquisition of the German financial institution Hypo Real Estate AG ("HRE") by Germany's state-owned Financial Market Stabilization Fund ("SoFFin").[217] This was the first time in the financial crisis that a bank nationalization had been notified to the Commission under the ECMR.[218]

The transaction was notifiable because HRE and the Kreditanstalt fur Wiederaufbau ("KfW"), another state-controlled undertaking, would both be within the control of the Federal Ministry of Finance after the transaction.[219] SoFFin was created in October 2008 "with a view to acting as a vehicle for state interventions."[220] HRE is a German financial institution mainly active in commercial real estate financing, public sector

215. *See id.*
216. *Id.*
217. *See* Commission Press Release, IP/09/791 (May 15, 2009).
218. *See id.*
219. *See id.*
220. *See id.*

financing as well as capital markets and asset management.[221] Because HRE would not be operated as a separate commercial entity after the acquisition, and the turnover thresholds under the ECMR were met, the transaction fell within the Commission's jurisdiction.[222] The Commission "assessed the horizontal overlaps between HRE and KfW and concluded that there would be only a negligible impact on competition."[223]

The Commission's merger assessment is separate from the investigation into the state aid measures put in place to support HRE.

It is notable that all four of these transactions were cleared in roughly four weeks, which demonstrates the Commission's commitment to acting quickly on mergers arising out of the financial crisis. However, all four mergers were in the financial services sector. Given the role that such institutions play in the stability of the economy, the Commission needed to act fast. The real test of the Commission's flexibility will come when the wave of consolidation spreads beyond financial services, when the sense of emergency is not as acute.

E. *ECMR Exemptions for Emergency Transactions*

Even before the current crisis unraveled, legislators were aware of the need to accommodate the specific circumstances that accompany emergency transactions. The ECMR provides for three exemptions that might apply to investments in or acquisitions of distressed entities and it is likely that more companies will present these arguments to the Commission. These exemptions are an example of the in-built flexibility of the European system.

1. Acquisition with a View to Resale

Article 3(5)(a) of the ECMR exempts the acquisition of securities by credit institutions or other financial institutions or insurance companies in the ordinary course of business, where such securities are held on a temporary basis with a view to resale, provided that: the acquiring institution does not exercise voting

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221. *See id.*
222. *See id.*
223. *Id.*

rights in respect of those securities with a view to determining the competitive behavior of that undertaking; *or* the acquiring institution exercises voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities; *and* the disposal takes place within one year of the date of acquisition (subject to extension by the Commission on request where the acquiring institution can show that the disposal was not reasonably possible within the period set).[224]

2. Control by Insolvency Practitioner

A concentration does not arise where control is acquired by an "office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings."[225]

3. Holdco Maintaining Value of Investment

The ECMR also exempts the acquisition of securities by certain holding companies, provided that such companies exercise the voting rights held in the target company only in order to maintain the value of the investment and not to determine the strategic commercial behavior of the target.[226] It is likely that the three exemptions will have an increased relevance during the crisis.

F. *"Failing Firm" Defense*

The acquisition of companies on the brink of insolvency, so-called "failing firms," was already recognized as a special case in EU merger law.[227] While the intentions of the acquirer might be to absorb a competitor that has fallen on hard times in order to fast-track the expansion of operations, the incidental effect may be to save assets that would otherwise exit the market. In light of

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224. *See* Commission Regulation No. 139/2004 (*ECMR*), art. 3(5)(a), 2004 O.J. L 24/1, at 7.

225. *See id.* art. 3(5)(b).

226. *See id.* art. 3(5)(c).

227. *See* Commission Guidelines, 2004 O.J. C 31/03, at 14 (on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings).

the economic crisis, Neelie Kroes has indicated that the Commission will take into account the failing firm defense "where applicable."[228] However, Nadia Calvino, Deputy Director-General for DG Competition, has added that the Commission will remain "healthily sceptical" of attempts to rely on the defense.[229] Aside from clearing mergers on a quick timetable, this is where the Commission may show some flexibility.

1. Elements of the Defense

The Commission Guidelines on the Assessment of Horizontal Mergers ("Horizontal Guidelines") provide that:

> The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger.[230]

In other words, where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger, a merger may be permitted.[231] Parties wishing to claim the failing firm defense must prove three elements: First, *the target would be forced out of market*—it must be demonstrated that, in the absence of the merger, the target would leave the market because of financial difficulties if not acquired by another entity.[232] Second, *no alternative buyers*—the parties must show that there are no alternative buyers that would cause fewer anticompetitive concerns.[233] Third, *the absence of the merger*—it must be shown that the assets of the failing firm would inevitably exit the market. It is sufficient to show that a

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228. Kroes, Dealing with the Current Financial Crisis, *supra* note 41 ("[T]he Commission can and will take into account the evolving market conditions and, where applicable, the failing firm defence.").

229. *See* CLIFFORD CHANCE, OFT ACCEPTS FAILING FIRM DEFENCE IN HMV/ZAVVI (2009) (quoting Nadia Calvino, Remarks at the Law Business Research Conference: Competition Law under New Administrations—Convergence or Divergence? Views from Both Sides of the Atlantic (Apr. 27, 2009)).

230. *See* Commission Guidelines, *supra* note 227, 2004 O.J. C 31/03, at 14.

231. *See id.*, 2004 O.J. C 31/03, at 14.

232. *See* Commission Decision No. COMP/M.2314, slip op. ¶ 37 (July 11, 2001) (*BASF/Eurodiol/Pantochim*).

233. *See id.*

substantial part of the target's market share would have passed to the acquirer.[234] More broadly, the parties must demonstrate that the failing firm would inevitably exit the market.

2. The Defense in Practice

The Commission has admitted the failing firm defense in only four cases.[235] The *Kali-Salz/MdK/Treuhand* decision of December 1993[236] is particularly pertinent to the financial crisis. The Commission held that where the merger is not the cause of the deterioration of competitive structure of the market, the legal consequences of the creation or reinforcement of a dominant position will not apply to the merger.[237] However, it was noted that this situation would only apply in exceptional cases.[238] The Commission was satisfied that in the actual economic situation, the company would not be able to survive, not least because the ongoing funding provided by Treuhand was prohibited by the rules of state aid.[239]

The Commission's decision was appealed by the French potash distributors, SCPA and EMC, to the ECJ, where the approach of the Commission was upheld and broadened to allow for the approval of a concentration where "the competitive structure resulting from the concentration would deteriorate to a lesser extent if the concentration did not proceed."[240]

In *BASF/Eurodiol/Pantochim*, decided in July 2001, BASF argued that the conditions for a "failing company defence" were met in the proposed concentration.[241] The Commission applied the criteria set out in *Kali-Salz/MdK/Treuhand*,[242] and was satisfied that both Pantochim and Eurodiol would exit the market in the near future, as both companies had been placed under the

234. *See id.*

235. *See* Commission Decision No. COMP/M.5141 (Dec. 17, 2008) (*KLM/Martinair*); Commission Decision No. COMP/M.28210 (July 1, 2002) (*Deloitte & Touche/Andersen UK*); *BASF/Eurodiol/Pantochim*, slip op.; Commission Decision No. IV/M.308 (*Kali-Salz/MdK/Treuhand*).

236. *See generally Kali-Salz/MdK/Treuhand*, slip op.

237. *Id.* ¶ 11.

238. *Id.* ¶ 72.

239. *Id.* ¶ 76.

240. France v. Commission, Joined Cases C-68/94 & C-30/95, [1998] E.C.R. 1453, ¶ 115.

241. *BASF/Eurodiol/Pantochim*, slip op. ¶ 135.

242. *Id.* ¶¶ 145, 148, 150.

Belgian prebankruptcy regime, and it was confirmed to the Commission that if a buyer for the companies was not approved by a certain deadline, the companies would be declared bankrupt.[243] Further, following a search by the Commission and the administrators of the companies, the Commission was satisfied that no less anticompetitive purchaser could be found within the relevant timeframe.[244]

BASF argued that the remaining condition to be fulfilled, pursuant to the test that was good law at the time, that the acquiring undertaking would accrue all the market share of the target undertaking, was not a necessary prerequisite for the failing company defense, and that it would be sufficient if only part of the market share would accrue in the absence of the merger.[245] The Commission accepted BASF's argument and broadened the final condition to take into consideration whether the assets to be acquired would inevitably exit the market if not taken over by another undertaking.[246] The Commission was satisfied that if the takeover did not go ahead, the assets would exit the market;[247] further, it was held that following the merger BASF would not have an incentive to raise prices due to the economies of the case, which would result in more favorable conditions for the consumer.[248] The Commission held that "deterioration of the competitive structure through the merger in the specific circumstances is less significant than in the absence of the merger."[249]

In the case of the proposed acquisition by Deloitte & Touche U.K. entities of the Andersen network in July 2002, the failing company defense was not raised by the parties themselves.[250] However, while assessing potential concerns over collective dominance by the global accounting firms, the Commission held that a causal link between the proposed operation and the possible situation of collective dominance

243. *Id.* ¶ 156.
244. *Id.* ¶ 137(b).
245. *Id.* ¶ 149.
246. *Id.* ¶ 151.
247. *Id.*
248. *Id.* ¶ 162.
249. *Id.*
250. *See generally* Commission Decision No. COMP/M.28210 (July 1, 2002) (*Deloitte & Touche/Andersen (UK)*).

could be excluded, on the basis that the reduction from five to four global accounting networks was inevitable and that no other scenario could be established which would be less anticompetitive.[251]

The Commission viewed the proposed concentration in the general context of the disintegration of the Andersen network in light of the Enron collapse, and accepted the argument that Andersen could no longer be considered a top-tier audit competitor;[252] thus the reduction from five to four accounting networks was inevitable. As such, the Commission held that if the proposed transaction did not go ahead, only two possible scenarios would remain: either one of the other big four audit and accounting firms took over Andersen U.K., or no takeover occurred and the existing clients would be dispersed among the remaining big four firms.[253]

Most recently, in December 2008, the Commission cleared the KLM/Martinair transaction in light of the failing firm counterfactual.[254] The parties claimed that in the absence of KLM's acquisition of Maersk Holding B.V.'s fifty percent shareholding in Martinair, Martinair's long-haul passenger operations would likely be discontinued in the near future.[255] The business had been loss-making for a few years and Maersk Holding B.V. lacked any incentive to make the necessary investments as it no longer had any strategic interest in the aviation business.[256] KLM already jointly controlled Martinair and Martinair's competitive strength had been consistently decreasing; to regain its market position Martinair depended on KLM's agreement to a renewal of its long-haul passenger fleet.[257] The Commission agreed that the competitive constraint exerted by Martinair would be eroded in the foreseeable future and therefore that the merger-specific effects of the proposed acquisition were likely to be limited.[258]

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251. *Id.* ¶ 44.
252. *Id.* ¶ 45.
253. *Id.* ¶ 49.
254. Commission Decision No. IV/M.308, slip op. ¶ 412 (*Kali-Salz/MdK/Treuhand*).
255. *Id.* ¶ 163.
256. *Id.*
257. *Id.* ¶ 21.
258. *Id.* ¶ 175.

Those cases are the only cases in which the failing-firm defense has been allowed. The defense thus applies in exceptional circumstances only. The Commission's conditional clearance of the acquisition by VB Autobatterie GmbH of FIAMM S.p.A.'s ("FIAMM") automotive battery business in May 2007[259] exemplifies the hurdles to overcome for the failing-firm defense to apply. The transaction would have led to a reduction in the number of competitors in the market from three to two.[260] The Commission conducted an in-depth investigation into FIAMM's financial position and asset sale options, including the position of its creditors and any possible insolvency or liquidation procedures.[261] It was held that it was by no means inevitable that FIAMM's assets would exit the market, because smaller producers could purchase the machinery, production lines, and brands.[262] The key test was whether the merger causes a deterioration of the competitive structure in the market similar to the effect of the failure of the firm. In relation to each market, the Commission held that the structural harm caused by the merger would be more detrimental than the short-term effects of the failed firm (e.g., potential capacity gaps).[263] The failing firm defense was thus rejected. Ultimately the Commission decided that the notified transaction would impede competition but that divestment of certain manufacturing capabilities and brands would address these concerns, and therefore gave conditional clearance.[264]

3. Failing-Firm Defense: U.K. Perspective

The criteria for meeting the failing-firm defense in the U.K. are similar to the tests used by the Commission.[265] The OFT's

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259. Commission Decision Summary No. 2009/C241/06, 2007 O.J. C 241/12, at 13 (*VB*).

260. *Id.* at 13.

261. *Id.* at 14–15.

262. *Id.*

263. *Id.* at 13.

264. *Id.*

265. These criteria are codified in the Restatement of the OFT's position regarding acquisitions of 'failing firms,' issued in December 2008. The parties must present evidence that: (a) the target business would inevitably have exited the market in the near future absent the merger; (b) having demonstrably explored such options, there is no serious prospect of the target business being reorganized; and (c) there is no realistic and substantially less anti-competitive alternative. *See* Office of Fair Trading,

approach where Lloyds TSB Group plc ("Lloyds") sought to acquire sole control of HBOS plc ("HBOS") demonstrates that the OFT will not be easily convinced by the failing firm defense.[266] In that case, the OFT believed that the assets would not leave the market because the most appropriate counterfactual involved some form of short to medium-term support from the U.K. government.[267]

The OFT has cleared only five transactions on the failing-firm defense under the Enterprise Act of 2002 ("Enterprise Act"); most recently, it approved HMV plc's ("HMV") buyout of Zavvi.[268] HMV acquired fifteen former Zavvi music stores.[269] This deal was cleared despite numerous local overlaps in the companies' activities.[270] The OFT received compelling evidence that (1) without the merger the stores would inevitably have exited the entertainment retail market as a result of Zavvi's collapse (it went into administration at the end of 2008);[271] and (2) there was no less anticompetitive alternative to the merger in the overlap areas, including no other realistic entertainment retail purchaser for the stores.[272]

Although members of Zavvi's previous management acquired ex-Zavvi stores in other areas, there was clear evidence that the landlords of the stores to be acquired by HMV would not have reached agreement on acceptable tenancy terms with this new management group.[273] In light of this evidence, the OFT did not consider it necessary to undertake a detailed market analysis.

Restatement of OFT's position regarding acquisitions of 'failing firms,' OFT1047, at 4 (Dec. 2008) (U.K.); *see also* Competition Commission & Office of Fair Trading, Merger Assessment Guidelines, OFT1078, at 20–21 (Apr. 2009) (U.K.) (showing that similar criteria are included in merger assessment guidelines published by the OFT and the Competition Commission ("CC") on April 20, 2009).

266. Office of Fair Trading, Report to the Secretary of State for Business Enterprise and Regulatory Reform: Anticipated acquisition by Lloyds TSB plc of HBOS plc, at paras. 59–60 (Oct. 24, 2008) (U.K.).

267. *Id.* ¶ 85.

268. Press Release, Office of Fair Trading, *OFT Clears Acquisition of Zavvi Stores by HMV Under 'Failing Firm' Analysis,* No. 47/09, at 1 (Apr. 28, 2009) (U.K.).

269. *Id.* at 2.

270. *Id.* at 1.

271. *Id.*

272. *Id.*

273. *Id.*

In January 2009, defense was allowed on a transaction in the U.K. cheese sector.[274] The Competition Commission cleared the transaction, despite the fact that the number of large players in the market would be reduced from three to two, because this would happen whether the target was acquired or left the market.[275]

It is likely that more companies will attempt to use the failing-firm defense in an economic recession and, without any softening of the interpretation, it may be that more and more transactions satisfy the necessary criteria. The OFT will take account of prevailing economic and market conditions when assessing evidence put forward by merging parties, and has noted that these conditions will be particularly relevant to "an evaluation of evidence on the inevitability of a business exiting the market (because of, for example, cash flow difficulties or an inability to raise capital), and the realistic availability of alternative purchasers for an exiting business (as a result, for example, of difficulties in raising investment finance)."[276]

Firms should, however, be under no illusions that it will be easier than before to meet the conditions, because although the market is changing, its standards of review are not.[277] It might be expected, however, that the level of detail of the review may be less intense in failing firm cases, where time is often of the essence. In this regard the OFT has confirmed that "[i]f there is a very strong failing-firm defence, we will not consider it necessary to do a detailed analysis of the competitive overlaps which we might normally do. That should enable us to do more of these cases faster."[278] Peter Freeman has also recognized that increased flexibility may be needed in relation to divestments, although he also said, "But further than this we should not go."[279]

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274. Competition Commission, Long Clawson Dairy Limited/Millway merger inquiry, at para. 5 (Jan. 14, 2009) (U.K.).

275. *Id.* ¶¶ 7, 10.

276. Press Release, Office of Fair Trading, OFT publishes restatement of its approach to 'failing firms' in merger reviews, 146/08, at 1 (Dec. 18, 2008) (U.K.).

277. John Fingleton, Chief Executive, Office of Fair Trading, Speech at the Conference on Competition Law Under New Administrations—Convergence or Divergence? (Apr. 27, 2009) ("[T]he standards we set in merger analysis are not changing, the market facts are.").

278. *Id.*

279. Freeman, *supra* note 1, at 5.

G. *Procedure for Clearance*

1. Phase I and Phase II: Waiting Period

At the EU level, merger review takes place in two phases. Phase I concerns the Commission's initial investigation period and lasts twenty-five working days starting the day following receipt of notification.[280] An extension of ten working days may be granted where remedies (to address the Commission's concerns) are offered, or a referral request from a Member State (where the Member State requests the case to be referred from the Commission to the Member State's own competition authority) is received.[281] Phase I concludes with a Commission decision either clearing (with or without conditions) the proposed transaction or initiating "Phase II" proceedings on the basis of serious concerns that the proposed transaction will damage competition.[282] It is notable that in 2008, six percent of transactions received conditional clearance at Phase I,[283] which is a higher percentage than in the last few years,[284] perhaps indicating increased flexibility in avoiding Phase II.

Phase II concerns the Commission's in-depth investigation of serious doubts to competition raised during their Phase I investigation.[285] Phase II lasts for ninety working days from the Phase II initiation date. This ninety working day period may be extended. If remedies are offered later than fifty-five working days after the initiation of a phase II investigation then the investigation period can be extended by fifteen working days. Alternatively, the Commission (with the agreement of the parties), the notifying parties themselves or a combination of both can request an extension, the cumulative total of which cannot exceed twenty working days. In the case of the notifying parties this request must be made within the first fifteen working

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280. *See* JOHN PARISI, A SIMPLE GUIDE TO THE EC MERGER REGULATION 7 (2009), *available at* www.ftc.gov/bc/international/docs/ECMergerRegSimpleGuide.pdf.

281. *Id.*

282. *Id.* at 8.

283. *See* the statistics page for mergers on the website of the Commission for the European Communities, available at http://ec.europa.eu/competition/mergers/statistics.pdf (last visited Sept. 19, 2010).

284. *Id.*

285. *See* PARISI, *supra* note 280, at 8.

days of phase II. Phase II concludes with the publication of a decision by the Commission either clearing the concentration (with or without conditions) or blocking the transaction.[286]

2. Derogations

In the EU, a suspensory regime precludes concentration with a Community dimension before notification of the transaction or until the Commission declares it compatible with the common market by the Commission.[287] The Commission may, however, grant a derogation to the statutory waiting period upon request.[288] Grant of a derogation from this obligation enables the immediate (if partial) implementation of the transaction. One can imagine that, in the context of rescue mergers, the buyer would be keen to at least have the ability to monitor the target's risk portfolio and to take appropriate measures to preserve value of assets if necessary. The Commission has stated that such derogations will be granted "where there is urgency and where there are no 'a priori' competition concerns."[289]

In this respect, the Commission will take into account the effects of the derogation on the parties to the transaction or on third parties, and the threat to competition posed by the concentration.[290] The derogation may be subject to conditions and obligations "in order to ensure conditions of effective competition."[291] Application for the derogation can be made at any time, whether before the notification or after the transaction.[292]

Derogations from the suspensory regime were previously granted only in exceptional circumstances.[293] The Commission has shown a willingness to be flexible in light of the financial crisis, finding exceptional circumstances more frequently than

286. *See id.*

287. Council Regulation No. 4064/89, art 2(3), 1989 O.J. L 395/1, at 4, *corrected version in* 1990 O.J. L 257/13 [hereinafter Merger Regulation].

288. *Id.* art. 7(4), at 7.

289. Kroes, Dealing with the Current Financial Crisis, *supra* note 41.

290. *See* Merger Regulation, *supra* note 292, 1990 O.J. L 257/13.

291. *Id.* art. 5.

292. *Id.* art. 7.

293. *See, e.g.*, Commission Decision No. COMP/M.2621, 2005 O.J. L 138/18 Commission Decision No. IV/M.3209, 2003 O.J. C 212/9.

before.[294] Six such derogations were granted in 2008, including allowing the Santander/Bradford & Bingley transaction to close immediately.[295] It was also reported that BNP Paribas was overseeing the trading floor activities of Fortis Bank Belgium pending the Commission's approval of the transaction, and even injected cash into the target prior to clearance to keep it afloat.[296] A derogation was also granted in the *STX/Aker Yards*[297] case in March 2008, and five have been granted in 2009.[298]

3. Blocking Transactions

Of all cases notified to date, the Commission has prohibited a mere twenty mergers.[299] The most recent of these was the Ryanair/Aer Lingus[300] case, which the Comission prohibited on June 27, 2007. This relatively low figure reflects the Commission's relatively light touch and broadly noninterventionist approach to merger regulation. There is no indication yet of a reversal of this trend, but the Commission's flexible approach may be tested by the potential wave of consolidations that may result from a loosening of credit.

H. *U.K. Mergers*

1. Banking (Special Provisions) Act of 2008

The Banking (Special Provisions) Act of 2008 ("BSPA") allows the U.K. Treasury to nationalize a failing bank, or to direct its transfer to a third party.[301] The power is exercisable by order for two purposes: to maintain financial stability or to protect the public interest where financial assistance has already been

294. *See* COMPETITIVE MERGER CASE STATISTICS, *supra* note 163.

295. *See id.*

296. Commission Decision, No. COMP/M.5384, slip op. (Eur. Comm'n Dec. 3, 2008) *cited in* 2009 O.J. C 7/05 (*BNP Paribas/Fortis*).

297. Commission Decision No. COMP/M.4956, 2009 O.J. C 147/11 (*STX/Aker Yards*).

298. *See* COMPETITIVE MERGER CASE STATISTICS, *supra* note 299.

299. *See* Martin Bechtold & David Gabathuler, *European Union: The Ripple Effect*, INT'L FIN. L. REV., Oct. 1, 2008.

300. Commission Decision No. COMP/M.4439, 2008 O.J. C 47/05 (*Ryanair/Aer Lingus*).

301. Banking (Special Provisions) Act, 2008, c. 2 (Eng.).

provided to maintain financial stability.[302] An order may provide for the transfer of securities or assets and must make provision for compensation to the shareholders or, in the case of an asset transfer, to the bank itself.[303]

Section 12 affords the treasury a very broad power to make "supplementary, incidental or consequential provision [including the power to] disapply (to such extent as is specified) any specified statutory provision or rule of law."[304] As a result, the treasury can order transferring one bank to another and disapplying U.K. merger control legislation.[305] This power has been used most notably in the case of Bradford & Bingley, where article 40 of the order transferring assets to Santander expressly provides that "Part 3 of the Enterprise Act 2002 (mergers) (c) shall not apply to the first or second transfer save insofar as it gives effect to an obligation under Community law."[306] Arguably this provision was unnecessary since the merger fell within the ECMR in any case, but it was most likely designed to cover the risk that the deal might be repatriated to the U.K. Interestingly this provision was not used in the *HBOS/Lloyds* case.[307]

2. Case Study: *HBOS/Lloyds*

a. Public Interest Interventions

In September 2008, the British government brokered the acquisition of the failing HBOS plc ("HBOS") by Lloyds TSB Group plc ("Lloyds") for UK£12.2 billion, to create the country's largest bank and mortgage lender.[308] For the merger to proceed, the Secretary of State for Business Enterprise and Regulatory Reform ("Secretary of State") had to intervene.

302. *See id.*
303. *See id.*
304. *Id.* § 12.
305. *See id.*
306. The Bradford & Bingley plc Transfer of Securities and Propety etc. Order, 2008, S.I. 2008/256 (U.K.).
307. Decision by Lord Mandelson, the Secretary of State for Business (Oct. 31, 2008), *available at* http://www.berr.gov.uk/files/file48745.pdf [hereinafter HBOS/Lloyds].
308. *Id.*

The Enterprise Act contains the U.K. merger regime.[309] One of the goals of the updated regime was to remove politics from the merger process by making the OFT and CC independent authorities.[310] Notification of mergers in the United Kingdom is voluntary, but parties can be required to undo transactions that pose particular competition problems if this is deemed necessary after the transaction is implemented.[311] The OFT has a duty to refer mergers to the CC where it believes a relevant merger situation has resulted or may result in a substantial lessening of competition ("SLC") in any U.K. market.[312]

The Act provides for the Secretary of State to intervene in mergers that raise concerns relevant to the public interest, either under the grounds specified in the Act, or grounds the Secretary of State believes should be specified.[313] The Secretary of State issues an intervention notice, and the OFT must provide a report to the Secretary of State within such a time as he may specify.[314] The OFT's conclusions on the competitive effects of the merger are binding, but ultimately the Secretary of State has the discretion to refer the merger to the Competition Commission or to clear it on public interest grounds.[315]

Previously there were only two public interest grounds, media plurality and national security,[316] and they had been invoked only six times.[317] However, the Secretary of State has the power to add new public interest considerations by laying an Order before Parliament that is approved by resolution of each house within twenty-eight days.[318] The Secretary of State exercised this power in *HBOS/Lloyds* to introduce "[t]he interest of maintaining the stability of the UK financial system" as a new public interested consideration.[319] The Secretary of State

309. Enterprise Act, 2002, c. 40 (Eng.). First provisions came into force on April 1, 2003. The remaining substantive competition provisions came into force on June 20, 2003. *Id.*

310. *See id.*

311. *See id.*

312. *See id.* § 41.

313. *See id.* § 42.

314. *See id.*

315. *See id.*

316. *See id.*

317. *See id.*

318. *HBOS/Lloyds*, *supra* note 307.

319. *Id.*

highlighted the "systemic importance of HBOS plc to the UK banking system" which necessitated his intervention "given the serious threat to the stability of the UK financial system" when explaining his actions.[320]

It is worth noting that other European countries have also introduced such measures. In October 2008, the Irish Parliament passed emergency legislation enabling the Irish Minister for Finance to clear mergers on financial stability grounds despite any SLC.[321] In Italy, the government passed a decree in August 2008 precluding the Italian Competition Authority from blocking mergers between large companies deemed to be "in crisis" and from ending a monopoly situation brought about by such a merger within a period of three years.[322] The decree allowed the CAI consortium's merger of Alitalia and Air One,[323] although it has subsequently been declared potentially unconstitutional by an Italian regional court.[324]

b. The Secretary of State's Decision

In its report to the Secretary of State, the OFT concluded there was a "realistic prospect" that the merger would result in an SLC in relation to personal current accounts, banking services for small and medium-sized enterprises, and mortgages.[325] A detailed inquiry by the CC was therefore warranted, although it was "by no means a foregone conclusion" that the CC would find an SLC under the "balance of probabilities" standard that applies to CC investigations.[326]

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320. *Id.*

321. *See* Credit Institutions (Financial Support) Bill, 2008 (Act No. 45/2008 (Ir.).

322. Decree No. 134/08 was converted into law 166/08 and contained "urgent measures on the restructuring of major corporations in crisis." GE.S.A.C. S.P.A, 2008 FINANCIAL STATEMENTS AND REPORT 11 (2008), *available at* http://www.portal.gesac.it/portal/page/portal/internet/inGESAC/Profilo/Bilanci/Bil._ENG._2008web_0.pdf.

323. *See id.*

324. Finding by the Italian Administrative Court of First Instance (TAR Lazio) on May 20, 2009, in TAR LAZIO, Ordinanza n. 983/2009, solleva q.l.c. dell'art. 1, c. 10, del d.l. n. 134/2008 (decree to Alitalia) sulle regole della concentrazione tra Alitalia e Air One.

325. OFFICE OF FAIR TRADING [OFT], OFT REPORT TO THE SECRETARY OF STATE ON LLOYDS/HBOS MERGER (Oct. 31, 2008), http://www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/decisions/2008/LloydsTSB.

326. OFT, ANTICIPATED ACQUISITION BY LLOYDS TSB PLC OF HBOS PLC, REPORT TO THE SECRETARY OF STATE FOR BUSINESS ENTERPRISE AND REGULATORY REFORM 6 (2008),

Despite these findings, Lord Mandelson decided not to refer HBOS/Lloyds to the CC[327] pursuant to section 45 of the Enterprise Act 2002 on the basis that the benefits of the transaction for the stability of the U.K. financial system outweighed the potential for the merger to result in anticompetitive outcomes, despite the OFT's concerns. He stated, "On balance, [the Secretary of State] has concluded that ensuring the stability of the UK financial system justifies the anti-competitive outcome which the OFT has identified and that the public interest is best served by clearing the merger."[328] Lord Mandelson's decision was nine pages long, and relied heavily on submissions from the Bank of England, the Financial Services Authority, and the U.K. Treasury.[329]

c. Timetable

The following timeline traces events affecting the decision to approve the HBOS/Lloyds merger. On September 18, 2008, the Lloyds/HBOS deal was announced. The Secretary of State issued an intervention notice the same day.[330] On October 7, 2008, a Draft Financial Stability Order was laid before Parliament.[331] The next day, the U.K. unveiled a UK£500 billion bank rescue package.[332] On October 13, 2008, recapitalization measures for RBS, HBOS, and Lloyds were announced.[333] Later that week, on October 16, the draft order was debated in the House of Lords.[334] The draft order was subsequently debated in the House of Commons on October 20, 2008.[335] On October 23,

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available at http://www.oft.gov.uk/shared_oft/press_release_attachments/LLloydstsb.pdf.

327. *HBOS/Lloyds*, *supra* note 307.

328. *Id.*

329. *See id.*

330. *Id.*

331. The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008, No. 2645, 2008 (Eng.).

332. *See Euro Area Looks to UK for Bank Rescue Blueprint*, EURACTIV, Jan. 29, 2004, http://www.euractiv.com/en/financial-services/euro-area-looks-uk-bank-rescue-blueprint/article-176280.

333. *See UK Banks Receive £37bn Bail-out*, BBC NEWS, Oct. 13, 2008, http://news.bbc.co.uk/2/hi/business/7666570.stm.

334. 704 PARL. DEB., H.L. (5th ser.) (2008) 849 (U.K.).

335. House of Commons, Second Delegated Legislation Committee, Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (Oct. 20,

2008, the Financial Stability Order was passed, and it entered into force on October 24, 2008.[336] Also on October 24, the OFT submitted a report to the Secretary of State on the Lloyds/HBOS merger.[337] On October 31, 2008, the Secretary of State issued its decision not to refer.[338] On December 10, 2008, the Competition Appeal Tribunal ("CAT") dismissed the appeal by the Merger Action Group ("MAG").[339]

d. Criticism of the Clearance

The decisions to clear the HBOS/Lloyds transaction and to set aside the OFT's competition concerns were heavily criticized.[340] The government tried to reassure the public that the merged bank would still be subject to competition law, but few people found this statement comforting because ex post enforcement is significantly less effective than initial prevention of the merger.[341]

The decision was subsequently appealed in the CAT by the MAG, representing a group of account holders, bank employees, and business people, as a disproportionate and therefore unlawful use of the Secretary of State's discretion.[342] MAG further claimed that the Secretary of State's discretion had been fettered

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2008), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmgeneral/deleg2/081020/81020s01.htm.

336. The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008.

337. OFT, *supra* note 325.

338. *Id.*

339. *See* Competition Appeal Tribunal, Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform, http://www.catribunal.org.uk/237-3402/1107-4-10-08-Merger-Action-Group.html (last visited Mar. 12, 2010).

340. *See* BUSINESS AND TRANSPORTATION SECTION, THE LLOYDS-TSB AND HBOS MERGER: COMPETITION ISSUES, STANDARD NOTE, Dec. 15, 2008, H.C. SN/BT/4907, *available at* http://www.parliament.uk/commons/lib/research/briefings/snbt-04907.pdf; *see also* Louise Armitstead, *Lloyds Merger with HBOS Under Fire as Sir Victor Blank Departs*, TELEGRAPH, May 18, 2009, http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5340255/Lloyds-merger-with-HBOS-under-fire-as-Sir-Victor-Blank-departs.html; Jill Treanor, *Pressure Grows on Brown Over Lloyds Merger Deal*, GUARDIAN (London), Feb. 16, 2009, at 6.

341. Robert Peston, *Creation of Lloyds HBOS*, BBC NEWS, Sept. 17, 2008, http://www.bbc.co.uk/blogs/thereporters/robertpeston/2008/09/the_creation_of_lloyds_hbos.html.

342. Merger Action Group v. Sec'y of State For Bus., Enter. and Regulatory Reform, [2009] CAT 19, 1107/4/10/08 (sitting as a tribunal in Scotland) (judgment for expenses).

by announcements made by the Chancellor of the Exchequer and the Prime Minister prior to the decision.[343] The CAT heard the case on December 8 and 9, 2009 and on December 10 delivered its judgment dismissing the action as "wholly without merit."[344]

The MAG had, in particular, raised an issue with the counterfactual used to assess the merger's impact on competition.[345] The OFT submitted that the appropriate counterfactual would be a scenario in which the government would give some form of capital injection, guarantee, or other support in the short term, which would allow HBOS to continue exerting competitive pressure in the market.[346] This situation, the OFT argued, would be preferable in terms of competitive effect to the merger.[347]

The HBOS/Lloyds transaction could have been justified on the basis that one of the key problems with HBOS at the time was one of confidence and that there was a real risk of a bank run triggered by the worries of individual depositors and financiers that the others would pull out their money. If the takeover could convince the depositors and financiers that the HBOS balance sheet was not at risk, then the case for allowing the transaction would be compelling on that ground alone.

That would have been a sufficient solution only if the sole problem with HBOS was a lack of depositor confidence. Yet, the more fundamental problem was that the bank's underlying assets were unsound. This problem was not unique to HBOS. The problems were systemic, and were about insolvency (namely, bad loans) as much as they were about liquidity (i.e., depositors withdrawing their money).[348]

By the time the decision was made, the UK£200 billion package of systemic support for the U.K. banks was already in

343. Merger Action Group v. Sec'y of State for Bus., Enter. and Regulatory Reform [2008] CAT 36, 1107/4/10/08 (sitting as a tribunal in Scotland).

344. *Id.*

345. *Id.*

346. *See id.*; *see also* OFT, *supra* note 325, at 23–24 (explaining that with a short-term government rescue package, HBOS would "still be able to exert competitive pressure in the market").

347. *See* OFT, *supra* note 325, at 24 (reasoning that the effects of this measure would, over time, leave HBOS a "significant player" in the market).

348. *See* John Vickers, *The Financial Crisis and Competition Policy: Some Economics*, GCP, Dec. 2008, at 6.

place,[349] as were the recapitalization measures. The package provided for measures to boost bank capital, including government subscription of capital and government guarantees to issue new debt.[350] These measures were aimed at addressing the systemic problem rather than the woes of just one bank,[351] but they were arguably also sufficient to sustain HBOS. Some commentators have therefore argued that once this support was in place, the decision to clear the HBOS/Lloyds transaction was unnecessary and an economic mistake, risking an irreversible loss of competition in banking services in Great Britain, and especially in Scotland.[352]

The circumstances surrounding the clearance indicate that despite the provisions of the Enterprise Act of 2002, which purported to make the OFT and CC independent authorities,[353] competition policy in the United Kingdom is far from insulated from political pressure. That may be desirable in cases that have the potential to dictate the course of the economy. In such cases, the government itself should be more hesitant to overlook long-term competition concerns. That result will probably require further advocacy by the competition authorities.

3. Changes to Merger Analysis

Although the OFT has confirmed that the economic crisis will not affect the standard of review for mergers,[354] companies can expect a change in the analysis. John Fingleton, Chief Executive of the OFT, has highlighted that the old assumptions may no longer apply. At a recent conference, Fingleton made reference to an online merger the CC cleared in 2008 on the basis of two "bricks and mortar" competitors that would exert a competitive constraint on the merged entity.[355] Those two retailers subsequently left the market as a result of the crisis, demonstrating that historical performance in the market could

349. *See* Press Release, HM Treasury, Financial Support to the Banking Industry, 100/08 (Oct. 8, 2008), *available at* http://www.hm-treasury.gov.uk/press_100_08.htm.

350. *Id.*

351. *See id.*; *see also* Vickers, *supra* note 348, at 4–5.

352. *See* Vickers, *supra* note 348, at 9.

353. Enterprise Act, 2002, c. 40, ¶ 1.1 (Eng.).

354. *See* Craig Pouncey & Kriakos Fountoukakos, *Mergers in Times of Crisis: 'Business as Usual'?*, EUR. ANTITRUST REV. 2010, 22–23.

355. Fingleton, *supra* note 277.

be little indication of future market structure.[356] That is not an isolated instance. In September 2007 the OFT cleared a merger between two video game retailers on the basis of significant competitive pressure from traditional market players such as Woolworths, which subsequently went into administration.[357]

Fingleton indicated that the same could apply to assumptions about new entrants.[358] Companies would be rethinking business plans to expand into new markets given the current downturn and difficulties in obtaining credit.[359] Merging parties drawing attention to potential new entrants as a competitive constraint may therefore find their arguments are increasingly less convincing.[360] Fingleton also raised concerns that assumptions around the competitive constraints exerted by imports may require revision, as the fluctuating exchange rates may make historically competitive imports relatively less cost-effective.[361] The overall message was that the past may no longer be a good basis on which to predict the future.[362]

4. Remedies

The financial crisis will likely also affect the remedies the Commission offers or accepts to secure clearance of transactions. For example, it might be expected that some companies, if forced to quickly sell overlapping parts of the business, may suffer large losses or may not be able to procure a buyer at all. The selling party may, in particular, fear that competitors will attempt to frustrate the disposal process and ultimately the deal itself. The Commission may be more lenient, accepting alternatives to structural remedies. On the other hand, there may

356. *Id.*

357. *See id.*; *see also* OFFICE OF FAIR TRADING, OPINION, COMPLETED ACQUISITION BY GAME GROUP PLC OF GAMESTATION LIMITED, ¶ 50 (Sept. 3, 2007).

358. Fingleton, *supra* note 277.

359. *Id.*

360. J. Thomas Rosch, a Commissioner of the Federal Trade Commission, posits that this may lead enforcement agencies to take more aggressive action (e.g., blocking mergers). J. Thomas Rosch, Comm'r Fed. Trade Comm'n, Implications of the Financial Meltdown for the FTC, Remarks at the New York Bar Association Annual Dinner, (Jan. 29, 2009).

361. *Id.*

362. *See id.* ("In a time of considerable volatility, whether that's exchange rates or market demand, we can't rely on the past as such a good predictor of the future. That has made the analysis more complex.").

be an increased number of up-front buyer requirements, as the Commission tries to ensure that the transaction will not go ahead unless a buyer is found. But such requirements inevitably delay any clearance, which may be unacceptable in rescue merger situations.

III. *CARTELS*

A. *Incentives in Economic Downturn*

Article 81 of the EC Treaty (now article 101 TFEU) prohibits anticompetitive agreements between undertakings.[363] Anticompetitive conduct is a very broad term that includes price fixing, setting price increases, restricting supply or production capacity, and market or customer allocation.[364] It can also include exchanges of information.[365]

More than ever, firms are facing increasing pressure to maintain their margins and to retain customers in the current economic climate. This may lead to diverging incentives. There may be a temptation for competitors to agree not to sell below a certain price, or not to compete for customers in certain geographic regions, both of which are "hardcore" restrictions under article 81 EC Treaty.[366] On the other hand, countering this incentive to collude with competitors is a temptation to defect from any existing agreement in the hope of capturing market share, or even to blow the whistle on any existing cartel agreement to obtain immunity from fines.

Any firms considering the collusion option should pay attention to the Commission's recent statements on cartel enforcement. The Commission has emphasized that it will not turn a blind eye because of the financial crisis.[367] Neelie Kroes

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363. TFEU, *supra* note 13, art. 101, 2008 O.J. C 115, at 88–89; EC Treaty, *supra* note 13, art. 81, 2006 O.J. C 321 E, at 73–74.

364. *See* sources cited *supra* note 363.

365. *See* sources cited *supra* note 363.

366. EC Treaty, *supra* note 13, art. 81, 2006 O.J. C 321 E, at 73–74.

367. ALAN RILEY, CENTRE FOR EUROPEAN POLICY STUDIES, THE MODERNISATION OF EU ANTI-CARTEL ENFORCEMENT: WILL THE COMMISSION GRASP THE OPPORTUNITY? 22 (2010).

sees cartels as "infectious" misbehavior,[368] and is intent on rooting them out regardless of the financial crisis. She argued:

> This matters more than ever in 2009 as millions of families face problems with their budgets, and law-abiding businesses struggle to survive. None of these people need the cost and hassle of competition problems to make life worse for them. So we have no intention of doing anything except maintaining our enforcement AND finding ways to speed our economic recovery.[369]

There will be no "recession defense" for cartelists.

It will be interesting to see how the competition authorities approach the arguments that firms will put forward in light of the financial crisis. The justifications will likely fall into two categories: (1) anticompetitive behavior justified by the poor business climate; and (2) claimed inability to pay the typically huge cartel fines. Cartels are often uncovered years after they have been implemented,[370] so we might not see arguments of the first sort until any agreements entered into now, finally come to light in due course. Firms will more likely attempt to put forward the second type of argument, producing evidence that paying large fines under current market conditions would cripple chances of economic survival and lead to necessary lay-offs. The Commission has reassured consumers that it will not relent in punishing cartels,[371] but the Commission may increasingly find itself in the position of having to judge whether the best interests of the consumer are really served by record-breaking fines.

The crisis will undoubtedly create certain situations in which the normal rules appear not to apply. Governments may find themselves attempting to dictate prices to the market where there is a perceived benefit to the consumer. In November 2008, the Bank of England cut interest rates by one-and-a-half percent

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368. Kroes, Many Achievements, More to Do, *supra* note 10.

369. *Id.*

370. *See* Joel I. Klein, Assistant Attorney General, Remarks at the American Bar Association Antitrust Section Spring Meeting: The Antitrust Division's International Anti-Cartel Enforcement Program (Apr. 6, 2000) ("[T]he majority of the international cartels that we have prosecuted or that are currently under investigation are believed to have already existed continuously for 5–10 years or longer.").

371. *See* European Commission, Antitrust: Commission Action Against Cartels—Questions and Answers (2009) ("Since June 2005 an entire Directorate . . . has been involved exclusively in helping the Commission to detect and punish cartels.").

to three percent.[372] The majority of banks failed to pass these savings on to borrowers.[373] Amid mounting fears that the monetary expansion would not result in the desired boost in spending, Alistair Darling, the U.K.'s Chancellor of the Exchequer, demanded that the banks adjust their interest rates.[374] And when the interest rate was reduced to two percent in December 2008, the U.K. Prime Minister, Gordon Brown, insisted that banks pass on the cut to consumers.[375] Though the motives behind those pleas were understandable, they did not take account of losses to savers, nor of the relative ability of banks to attract deposits.

If the Commission remains true to its historical policy on cartels, the financial crisis will affect the Commissioner's pursuit of cartelists. The Commission may show some flexibility in the application of procedural rules, however, where there is no enforcement loss. Firms themselves may be increasingly interested in the alternatives to full fines, namely those contained in the immunity/leniency and settlement regimes. The rest of this Part considers the effect of the financial crisis on these procedural elements.

B. *Immunity/Leniency*

1. The 2006 Leniency Notice

The immunity and leniency regime in the EU is arguably the Commission's most effective tool in cartel detection. Not only does the regime encourage parties to blow the whistle on anticompetitive agreements, it also rewards the voluntary disclosure of information of probative value during the

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372. *See* Helen Power & James Charles, *Darling Summons Bank Chiefs Over Rate Cut Failure*, TIMES (London), Nov. 7, 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article5105630.ece ("Yesterday, the Bank of England slashed interest rates by 1.5 percent to 3 percent.").

373. *See Brown Will Press Banks to Pass on Full Rate Cut*, TIMES (London), Dec. 5, 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article5292173.ece.

374. *Id.* (quoting the Prime Minister as saying, "Remember the last time there was a cut, we spoke with [the banks] before it was passed on [to the customers].").

375. *Id.* ("The Bank of England yesterday cut the interest rate to 2 per cent.").

Commission's investigation.[376] Each year new records are set for the number of leniency applications received.[377]

The current system is set out in the 2006 Leniency Notice,[378] which came into effect on December 8, 2006 and replaced the 2002 Leniency Notice.[379] Companies are able to apply for 100 percent immunity from fines or, if this is not available, for a fixed range of percentage reduction in any fine.[380] The reduction bracket and final amount of any reduction will depend upon the timing of the application and the value of any cooperation.[381] The Commission will consider whether the leniency program applies after it has established a total fine pursuant to its Fining Guidelines.[382]

It is important to note that neither immunity nor a reduction of fines under the leniency program can protect an undertaking from private damages actions.[383] The Commission itself has been encouraging private enforcement,[384] and there may be an increase in the number of follow-up damages actions as corporate customers, in particular, explore every way to improve their own balance sheets.

For cash-strapped firms, immunity may be more attractive than waiting to see if another collaborator takes the plunge first. When one firm cooperates with the Commission and is granted immunity, leniency becomes the best case scenario for the remaining firms if there is sufficient evidence of their involvement.

2. Eligibility for Full Immunity

The application for immunity must be made before the Statement of Objections ("SO") has been issued and the

376. Commission Notice, 2006 O.J. C 298/11, at 17 (*Cartel Cases*).

377. *See* EUROPEAN COMMISSION, COMPETITION: COMMISSION LENIENCY NOTICE—FREQUENTLY ASKED QUESTIONS (2006).

378. *Cartel Cases*, 2006 O.J. C 298/11, at 17.

379. *Id.* at 22.

380. *See id.* at 17–18, 20.

381. *See id.* at 20, 21.

382. *See id.* at 20.

383. *See id.* at 22.

384. *See id.*

Commission has the discretion to disregard an application if it is submitted after this time.[385]

Under the 2006 Leniency Notice, the Commission will grant full immunity from any fine to the first company to fulfill two tests.[386] The first test relates to the provision of certain evidence by the applicant to the Commission.[387] The second test concerns the applicant's ongoing cooperation with the Commission.[388]

a. Sufficient Information for "Targeted Inspection"

The first test is satisfied once the company has submitted sufficient information to enable the Commission to carry out a "targeted inspection" in connection with the alleged cartel,[389] or to come to an infringement decision.[390] Naturally, the Commission must not already have been in possession of sufficient evidence to carry out such an inspection or to come to an infringement decision.[391]

The term "targeted inspection" is unknown in European competition law and is not defined in the 2006 Leniency Notice. The intent and meaning of the term therefore remains unclear. To seek to meet the "targeted inspection" threshold, an applicant must submit a corporate statement containing (to the extent that it would not jeopardize the inspections and as far as it is within the company's knowledge), *inter alia*, a detailed description and explanation of the cartel, including its activities, meetings, scope and duration.

b. The Cooperation Obligation

The second test requires the company to fulfill certain criteria to qualify for immunity (the cooperation obligation). The company must (1) cooperate fully and continuously with the Commission's investigation, including promptly providing all

385. *See id.* at 19.
386. *See id.* at 17–18.
387. *See id.*
388. *See id.*
389. *See id.* at 18. This assessment is made exclusively on the basis of the information submitted by the applicant, without taking into account whether such inspection is actually carried out or whether the raid is successful. *See id.*
390. *See id.*
391. *See id.*

evidence that comes into its possession, remaining at the Commission's disposal to answer questions, making employees and directors available for interviews, and not destroying, falsifying, or concealing relevant information;[392] (2) end its involvement in the suspected cartel;[393] (3) not destroy, falsify, or conceal evidence of the alleged cartel or disclose the contemplated application to third parties other than competition authorities in contemplation of the application;[394] and (4) have taken no steps to coerce others to participate in the cartel.[395]

3. Marker System

A company that wishes to apply for immunity may apply to the Commission for a marker to hold its place at the front of the queue while it prepares a formal application.[396] The Commission then has discretion on a case-by-case basis, to decide whether or not to grant a marker and for how long the marker will be valid.[397]

To apply for the marker, the applicant must submit to the Commission the names of the parties to the alleged cartel, the names of the products and territories, the estimated duration of the cartel and the nature of the alleged cartel conduct, and details of any actual or contemplated leniency applications to other competition authorities in relation to the alleged cartel.[398] The Leniency Notice, issued in 2006, requires a level of information at an early stage that is significantly higher than in other jurisdictions' marker systems.[399] The applicant must also justify its request for a marker.[400] For example, the acquirer of a business who discovers a cartel in the course of their due diligence or after the purchase of the business, and consequently notifies the Commission about the cartel. In view of both this

392. *Id.* at 18–19.
393. *Id.*
394. *Id.*
395. *Id.*
396. *See id.* at 19.
397. *See id.*
398. *See id.*
399. *See, e.g.*, Competition Bureau Canada, Cartels—Immunity Program, http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02928.html (last visited Mar. 21, 2010) (showing the Canadian anticompetition regime requires less initial information for an applicant to request a marker).
400. *Cartel Cases*, 2006 O.J. C 298/11, at 19.

information requirement and the Commission's discretion, the marker system is less attractive and more uncertain than elsewhere in the world.

4. Eligibility for Leniency

The program also offers a percentage reduction in the total fine to companies that choose to cooperate with the Commission during the course of its investigation.[401] Such companies must fulfill a two-part test. First, they must provide evidence which represents "significant added value" with respect to the evidence already in the Commission's possession.[402] Second, they must comply with the Cooperation Obligation, as detailed above.

Under the 2006 Leniency Notice, the percentage range of reduction available depends on the' timing of the application. The notice provides for the following fixed ranges of reduction: (1) the first company to provide significant added value receives a fine reduction of thirty to fifty percent, (2) the second company to provide significant added value receives a fine reduction of twenty to thirty percent, and (3) any subsequent cooperating companies receive a fine reduction of up to twenty percent.[403] The level of any fine or reduction under the leniency program is notified in the Commission's decision at the end of its administrative procedure.

C. *Settlement*

On June 30, 2008, the Commission formally introduced its new procedure for settling cartel cases, set out in two documents: Commission Regulation No. 662/2008, amending Regulation 773/2004[404] and the Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to article 7 and article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases.[405] On the same date, the Commission also published a "*Q & A*" document intended to provide

401. *See id.* at 22.
402. *Id.* at 20.
403. *See id.*
404. Commission Regulation No. 622/2008, 2008 O.J. L 171/3.
405. Commission Notice, 2008 O.J. C 167/01 (*Settlement Procedures Notice*).

responses to frequently asked questions about the settlement procedure.[406]

The overriding principles of the settlement procedure established by the Commission is that parties do not have an automatic right to settle their case and that the Commission will retain full discretion throughout the process.[407] Under this procedure, the parties, having seen the evidence in the Commission's file, they may choose to acknowledge their involvement in the cartel and their liability.[408] In return for this acknowledgment, the Commission can reduce the fines imposed on the parties by ten percent.[409] The Commission has been quick to point out that the settlement procedure will not enable companies to negotiate with the Commission as to the existence of an infringement of EU law or the basic level of the fine.[410] Commentators have been skeptical on this point, the general feeling being that a dialogue with the Commission on the level of fine must include some element of negotiation of the amount, otherwise firms would not be willing to settle for a mere ten percent reduction. In any case, firms may be attracted to the increased certainty on the eventual level of fine that such dialogue may bring.

Companies accused of cartel behavior will be very interested in any potential fine discounts in the current economic climate, particularly as a speedy resolution of any cartel investigation will ease shareholders' minds. Firms will also be keen to limit their financial uncertainty in any way that they can. However, that benefit may be offset by fears that the written acknowledgement of guilt that is required to proceed with settlement must surely strengthen the case for any follow-up damages actions lodged by customers. Such damages actions are being encouraged by the Commission,[411] and may become more popular as the financial crisis drives customers to explore every available source of funds.

On May 12, 2009, one of the participants in the cartel in animal feed phosphates reported that the Commission had

406. Commission Press Release, Memo/08/458, (June 30, 2008).

407. *Id.* at 1.

408. *See id.* at 2.

409. *See id.*

410. *See id.* at 1.

411. *See* Commission of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM 0165 Final (Apr. 2008).

invited the firms involved to engage in settlement discussions.[412] This follows the announcement by Infineon in February 2009 that the Commission had invited it to consider settlement in the DRAM investigation.[413]

Other firms subject to cartel investigations will keenly await the outcome of those settlement discussions. If a significant fine reduction is achieved (albeit an unofficial one) that will encourage other firms to settle, which is good for firms that want to limit the liability provision on their balance sheets, and also for the Commission, which will be eager to demonstrate that its newly introduced settlement procedure works. However, the Commission may face conflicting incentives. On the one hand, a speedy settlement would free up scarce resources and allow the Commission to maintain its energetic enforcement agenda during the financial crisis. On the other hand, the Commission will not want to be accused of letting the firms get off lightly and may therefore resist the temptation to settle with a low fine.

D. *Fines*

1. The 2006 Fining Guidelines

For all cases where an SO has been or is issued after September 1, 2006, the level of fines will be determined by reference to the 2006 Fining Guidelines.[414] Given the Commission's wide discretion in calculating fines and the lack of published decisions under the new guidelines, the final amount is difficult to predict.[415] There is no plea bargaining or formal provision for negotiating a fine in advance of a final decision.[416]

The maximum level of fines that the Commission can impose on an undertaking demonstrated to have participated in

412. *See* Michael Antalics et al., *Developments in International Cartel Enforcement and Leniency Agreements: 2008 to 2009*, ANTITRUST REV. AM. 2010 (2010), http://www.globalcompetitionreview.com/reviews/20/sections/71/chapters/786/international-leniency-agreements.

413. *See id.*; *see also* Abigail Rubenstein, *Law 360, Settlement Looms in DRAM Antitrust Battle*, LAW360, Feb. 26, 2010, http://www.law360.com/articles/152205.

414. Commission Guidelines, 2006 O.J. C 210/02, at 2 (on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02)) [hereinafter Fining Guidelines].

415. *Id.* at 2.

416. *Id.* at 3.

a cartel is ten percent of that undertaking's total turnover in the preceding business year.[417] Within this limit, the Commission has discretion regarding the level of the fine it imposes on an undertaking, although its discretion must be exercised in accordance with the Fining Guidelines.[418]

2. Calculation of the Fine

The Commission's methodology for setting fines is to determine the "basic amount" of the fine and then to adjust that basic amount upwards or downwards.[419] The basic amount is set by reference to the value of the undertaking's sales of goods or services to which the infringement relates in the relevant area within the European Economic Area ("EEA") in the last full business year of the infringement.[420] Depending upon the perceived gravity of the infringement, a proportion of up to thirty percent of the relevant sales value will be taken.[421] This number will then be multiplied by the number of years the cartel existed,[422] and then a further fifteen to twenty-five percent of sales by value may be added in order to deter undertakings from entering collusive agreements.[423] That last element may be considered an "entry fee" and will be applied to all cartelists, however brief their participation in the cartel.[424] Together, this gives the "basic amount."

The basic amount is then adjusted by reference to aggravating or mitigating circumstances. In particular, the basic amount may be increased for recidivism,[425] failure to cooperate, and if the undertaking was the leader or instigator of the

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417. *Id.* at 4.

418. *Id.* at 3.

419. *Id.* at 2.

420. *Id.* This is in contrast to the 1998 Fining Guidelines under which an infringement was classified as "minor[,] serious[, or] very serious[,]" with each classification having a corresponding likely level of fines (e.g., €20 million for very serious infringements) regardless of the size of the market concerned. Commission Guidelines, 1998 O.J. C 9 (on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (O.J. C 9, 14.1.1998, p. 3)).

421. Fining Guidelines, *supra* note 414, 2006 O.J. C 210/02, at 3.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at 4.

infringement. Fines may also be increased to deter firms with a particularly large turnover in the relevant market.[426] The level of the fine may then need to be adjusted to take account of the ten-percent-of-turnover maximum[427] and for reductions applied in view of immunity or leniency applications.[428] Mitigation circumstances include: (1) termination of the infringement as soon as the Commission intervenes; (2) the infringement committed negligently; (3) involvement in the infringement was limited; (4) effective cooperation with the Commission outside the scope of the Leniency Notice and beyond the obligation to do so; and (5) the anticompetitive conduct was authorized or encouraged by public authorities or legislation.[429]

3. Fining Practice

In 2008, the Commission issued seven cartel decisions and imposed fines of over €2 billion. That includes the massive fine of €1.3 billion imposed on participants in the Car Glass cartel in November 2008 for dividing geographic markets, allocating customers, and exchanging commercially sensitive information.[430] There was no immunity applicant in the *Car Glass* case, as the Commission launched its own investigation following initial information provided by Member States' NCAs through the European Competition Network ("ECN").[431] One of the companies, Saint-Gobain, was fined €900 million alone.[432]

The Commission has taken advantage of the provisions in the Fining Guidelines to significantly increase the fines in a number of cases due to the presence of aggravating circumstances.[433] In the Car Glass cartel, Saint Gobain's fine was increased by sixty percent because it was a repeat offender, and in the largest increase imposed by the Commission for repeat

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426. *Id.*
427. *Id.*
428. *Id.*
429. *Id.*
430. Commission Decision No. COMP/39.125, slip op. ¶ 731 (Eur. Comm'n Nov. 12, 2008) (*Car Glass*).
431. *Id.* ¶¶ 715–19.
432. *Id.* ¶ 731(a). This was the highest individual fine ever, until the Intel decision in May 2009.
433. *See generally id.*; Commission Decision No. COMP/38.695, slip op. (Eur. Comm'n June 11, 2008) (*Sodium Chlorate*); Commission Press Release, IP/08/1007 (June 25, 2008) *(Aluminium Flouride)*.

offenses, Arkema France's fine was increased by ninety percent for its involvement in three previous infringements prior to the Sodium Chlorate Paper Bleach cartel.[434]

In the Aluminum Fluoride cartel, the Commission applied, for the first time, point eighteen of the 2006 Fining Guidelines, which allows the Commission to use sales outside of the EEA to which the infringement related, and apply them to the sales within the EEA to give a value of sales figure that reflects the gravity and geographical spread of the infringement.[435] More recently the Commission fined E.ON and GDF Suez a total of €1.106 billion for operating a market sharing agreement in France and Germany.[436]

The Commission fined Intel €1.06 billion for using anti-competitive practices to exclude its only competitor (AMD) and thus reduce consumer choice in the worldwide market for it its "x86 central processing units," in breach of article 82 of the EC Treaty.[437] Although this was not a cartel case, it shows that the Commission is not shying away from extremely large fines. On the contrary, the Commission appears to be ramping up the pressure on firms engaging in anticompetitive behavior to protect consumers at a time when consumers will be concerned about how much they pay for their goods and services. As Neelie Kroes commented: "Given that Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for over five years, the size of the fine should come as no surprise."[438]

4. Financial Constraint Discount

When setting a fine, the Commission may, upon request, and only in "exceptional cases . . . take account of the

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434. *Car Glass*, slip op. ¶¶ 715–19.

435. *Aluminium Fluoride*, IP/08/1007.

436. *See* Neelie Kroes, Eur. Comm'r Competition Pol'y, Remarks at the Pharmaceutical Press Sector Inquiry Final Report Press Conference: E.ON and GDF Gas Market Sharing, GDF Commitments 2 (July 8, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/333.

437. *See* Neelie Kroes, Eur. Comm'n Competition Pol'y, Introductory Remarks at Press Conference: Commission Takes Antitrust Action Against Intel (May 13, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/241.

438. *Id.*

undertaking's inability to pay the fine in a specific social and economic context"[439]—for example, where the amount of the fine is far in excess of the assets held by the company.[440] It is important to note that the Commission is not obliged to take that into account[441] and that the mere finding of an adverse or loss-making financial situation is not sufficient to obtain a reduction, although evidence of the financial impairment of the party in question must be adduced.[442] The undertaking must provide objective evidence that the fine would "irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose their value."[443] This is known as the "financial constraints" or "bankruptcy" discount.[444]

The bad news for cartelists coming under scrutiny during the financial crisis is that the discount has been applied only rarely. In this respect the interpretation of the requirement that the "specific social context" warrants the reduction will be key.

In the i case, the Commission reduced the fine of one undertaking by sixty percent, taking into account, among other things, the fact of falling beef consumption due to the spread of mad cow disease.[445] In *Electrical and Mechanical Carbon Graphite Products,* the Commission did not accept one party's submission that a large fine would force that party to breach certain financial covenants in its financing agreements, because it would be too easy for parties in the future to ensure their financings were structured in such a way as to allow reliance on that defense.[446] Further, the Commission dismissed the argument that one company needed all of its financial resources to resist the

439. *See* Fining Guidelines, *supra* note 414, 2006 O.J. C 210/02, at 4.

440. *See* Romana Tabacchi SpA v. Commission, Case T-11/06, [2006] E.C.R. II-2941, ¶ 32.

441. Tokai Carbon Co. v. Commission, Joined Cases T-71, 74, 87, 91/03, [2005] E.C.R. II-10, ¶ 11.

442. *See* Commission Decision No. 2003/675/EC, 2003 O.J. L 255/33, at 99.

443. Fining Guidelines, *supra* note 414, 2006 O.J. C 210/2, at 4.

444. *See, e.g.*, Andreas Stephan, *The Bankruptcy Wildcard in Cartel Cases* 4-5 (Ctr. for Competition Pol'y, Working Paper No. 06-5, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912169.

445. Commission Decision No. 2003/600/EC, 2003 O.J. L 209/12 (*French Beef*), at 40, ¶ 185.

446. Commission Decision No. 2004/420/EC, 2003 O.J. L 125/45 (*Electrical and Mechanical Carbon Graphite Products*). Full version available online, Commission Decision, No. 2004/420/EC, slip op. ¶¶ 344–47 (Eur. Comm'n Dec. 3, 2003), http://ec.europa.eu/competition/antitrust/cases/decisions/38359/en.pdf.

worsened business climate on the basis that all companies were facing the same business climate and if the Commission reduced the fine for one party that would be discriminatory.[447] In *Speciality Graphite* the Commission held that it could not reduce the fine for parties in financial distress because to do so would be "tantamount to conferring an unjustified competitive advantage."[448] However, the Commission did grant the discount to one party because not only was it in financial distress, but also the Commission had imposed a large fine (€80.2 million) the year before.[449] A discount of thirty-three percent was therefore applied.[450]

It remains to be seen whether the Commission will be convinced by those claiming an inability to pay due to the financial crisis. Another option available, also used rarely in the past, is payment by installments. In *Amino Acids*, the Commission refused to allow a financial distress discount but did agree to allow the party to "propose acceptable periods for payment of the fine on the condition that it demonstrates its inability to pay."[451]

It is also possible to request that the fine not be recovered immediately, in which case the party must provide a bank guarantee.[452] One factor that may be considered is whether it is in the Commission's interest to recover the fine immediately—for example, if doing so will trigger liquidation of the company, in which case the Commission would have to enter its claim as an unsecured creditor.[453]

In exceptional circumstances only, it will be possible to apply for an exemption from the obligation to provide a bank guarantee.[454] It will be necessary to prove that it is objectively

447. *Id.* ¶ 340.

448. Commission Decision No. E-2/37.667/EEC, slip op. ¶ 555 (Eur. Comm'n Dec. 17, 2002) (*Speciality Graphite*).

449. *See id.* ¶¶ 557–58. It is worth noting that the company was not considered a recidivist. *See generally id.*

450. *Id.* ¶ 559.

451. Commission Decision No. 2001/418/EEC, 2001 O.J. L 152/24, at 438 (*Amino Acids*).

452. *See* Romana Tabacchi SpA v. Commission, Case T-11/06 R, [2006] E.C.R. II-2941, ¶ 2.

453. *Id.* ¶¶ 75, 127, 461.

454. *See* Allgemeine Eledtricitäts-Gesellschaft AEG-Telefunken AG v. Commission, Case 107/82 R, [1982] E.C.R. 1549.

impossible for the party to provide such a guarantee by providing letters of refusal from banks at which the party is a regular customer. It will also be necessary to prove that the guarantee could not be provided by another entity in the same group of companies. Combinations of these measures may be available, as demonstrated in *Romana Tabacchi SpA v. Commission*[455] where the Commission showed significant flexibility in allowing partial bank guarantees and staggered payments.

While the Commission is aware that firms will be interested in exploring the availability of such options in the present climate, it has been keen to confirm that financial constraint discounts "could only be granted if paying the fine would endanger the economic viability of the company and cause its assets to lose all their value. While this situation might occur in the context of the crisis, we would make an extremely careful assessment before granting any such reduction."[456]

CONCLUSION

The financial crisis presents the Commission with a formidable challenge: to react flexibly to the emergency situation without compromising on the standard of enforcement. It remains to be seen whether the €3.5 trillion of state aid or the record-breaking four-week merger clearances in the financial services sector represent an improvement in procedural efficiency, or short-term expediency for businesses at the expense of market competition. Many have perceived such rushed jobs as the U.K. HBOS/Lloyds merger as unnecessary and dangerous precedents. The fear is that *ex post* review can never be as effective as preventing a transaction in the first place because it can be extremely difficult to unscramble the proverbial egg.

The Commission has repeated at every opportunity that competition laws are not being sacrificed for short-term gains. In some respects, it has shown laudable rigidity in its application of established rules. The competition authorities have affirmed that flexibility will be granted in procedure (e.g., speedy review of state aid merger applications, derogations from the suspensory

455. *Romana Tabacchi SpA*, [2006] E.C.R. II-2491, ¶ 146.

456. Philip Lowe, Director General, DG Competition, Remarks on European Competition Day (May 14, 2009).

regime, financial constraints discounts, and merger remedies) and that flexibility built into the existing rules will be exploited (e.g., failing-firm defense, exemptions to the ECMR, public interest interventions, and the article 87(3)(b) EC (now article 107(3)(b) TFEU) exception to the prohibition on state aid.

Those exemptions, derogations and carve-outs, however, are supposedly reserved for extraordinary cases only. Future competition policy will be shaped by how broadly the Commission interprets the exceptions, and the extent to which it successfully applies—or fails to apply—its financial crisis procedures to a post-crisis world.