# EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles

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## Abstract

*The financial crisis is today's most challenging issue faced by political and economic leaders across Europe and the world. It has been commented at length in recent months, including with respect to the European Union's contribution to a solution thereto. Away from the polemics, this article takes a comprehensive look at the European Commission's enforcement of EC competition law, in particular State aid rules, in the framework of the financial crisis. It is divided into two parts corresponding to what the author views as the two main policy options pursued by the Commission, namely: (i) "flexibility on the means"; but (ii) "consistency in the principles". Those options appear to condition the possibility and legitimacy of the Commission's involvement in managing the crisis and have actually enabled the Commission to play a critical role so far, which, given the circumstances, has evolved into one of coordination between the 27 EU Member States' respective economic policies.*

*La crise financière constitue actuellement la préoccupation majeure des dirigeants politiques et économiques en Europe et dans le monde. Elle a fait l'objet de nombreux commentaires ces derniers mois, en ce compris à propos de la contribution de l'Union européenne à la définition d'une possible solution. A l'écart des polémiques, cet article offre une analyse systématique de l'application du droit communautaire de la concurrence - principalement en matière d'aides d'Etat - par la Commission européenne dans le cadre de la crise financière. Il comporte deux parties qui correspondent à ce que l'auteur identifie comme les deux options politiques majeures poursuivies par la Commission, à savoir: (i) de la flexibilité dans la mise en œuvre des règles de concurrence; mais (ii) de la cohérence dans les principes guidant l'interprétation de ces règles. Ces options ont conditionné tant la légitimité que la simple possibilité d'une implication de la Commission dans la gestion de la crise et ont en fait permis à la Commission de jouer un rôle clé jusqu'à présent et de s'affirmer, compte tenu des circonstances, en tant que coordinateur des politiques économiques poursuivies par les 27 Etats membres.*

* Kindly note that the present contribution reflects the decisional practice of the EU Commission up until December 31, 2008. References are made to Commission's press-releases when formal decisions are not yet publicly available.

**1.** Mid-September 2007, images of British people queuing to withdraw their savings from local branches of UK mortgage bank Northern Rock hit the screens of millions of bemused Europeans who were told that the "subprime crisis" had crossed the Atlantic. However, barely anyone outside the UK had ever heard about Northern Rock and the UK government seemed to take care of the problem. In the following months, the crisis spread to credit institutions with a particular risk profile, namely those that had relied on assets securitization to fuel their growth and/or had invested heavily in mortgage-backed securities. As a result, various EU Member States were prompted to address solvability issues on a case by case basis. As from March 2008, the situation further deteriorated. While the US authorities engineered the emergency sale of Bear Stearns to JPMorgan, the share price of various large European banks came under serious pressure and headlines started referring to a possible "credit crunch" as European central banks were compelled to inject massive liquidity into money markets.

**2.** Mid-September 2008, exactly one year after the "bank run" on Northern Rock, Lehman Brothers' filing for Chapter 11 bankruptcy protection in the US triggered a general crisis of confidence and an unprecedented freeze in inter-bank lending that immediately squeezed credit institutions in need of refinancing. At that point, even though the crisis virtually affected Europe as a whole, the absence of an institutionalized forum at EU level competent to deal with such issues meant that Member States remained in the frontline to devise urgent *ad hoc* rescue measures.[1] Quickly, though, the size and cross-border operation of credit institutions forced certain Member States to pull resources together in structuring recapitalization schemes.[2] A coordinated response finally emerged under the leadership of the "Eurogroup" (those EU countries sharing the Euro as their currency) in the form of common principles aimed to respond effectively to the crisis while ensuring the compatibility of national implementing measures with EU single market principles.[3] On October 15, 2008, the European Council endorsed the initiative of the Eurogroup, turned it into a "concerted action plan" and expressly confirmed its support – "*in the current exceptional circumstances*" – for "*the Commission's implementation [...] of the rules on competition policy, particularly State aids*".[4] In the same statement, the European Council called for European rules "*to be implemented in a way that meets the need for speedy and flexible action*".

1 In the past, Member States have attempted to palliate the lack of institutionalized framework at EU level by devising a *Memorandum of Understanding* (MoU) aimed to facilitate cooperation between Financial Supervisory Authorities, Central Banks and Finance Ministries of the Member States in time of financial crises. In particular, the MoU lays down so-called "*common principles for cross-border financial crisis management*" and establishes procedures for the sharing of information and assessments in order to facilitate the pursuance of each institution's respective policy functions (see Memorandum of Understanding on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European union on Cross-Border Financial Stability, June 1, 2008, ECFIN/CEFCPE(2008)REP/53106 REV REV).

2 See, in particular, the joint efforts of Belgium, the Netherlands, Luxembourg surrounding the rescue of Fortis and those of Belgium, Luxembourg and France with respect to Dexia.

3 See the "*Declaration on a concerted European action plan of the euro area countries*", October 10, 2008, available at www.ue2008.fr (last visited November 18, 2008). See also the Conclusions of the ECOFIN Council held in Luxembourg on October 7, 2008 (Doc. 13784/08). Generally, a coordinated response was necessary to ensure the credibility of the remedial measures adopted at national level, which is a key factor to restore confidence in the markets.

4 European Council of October 15 and 16, 2008, Presidency Conclusions (doc. 14368/08), §5.

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**3.** Even though it is difficult to draw any conclusive lessons at this stage, a survey of the European Commission's (the "Commission") decisional practice since September 2007 suggests that two policy options stand at the core of the enforcement of EC competition law in the framework of the financial crisis: (i) ensure *consistency in the principles* relied on to assess the competition issues arising in connection with the financial crisis, with the view to prevent distortions in the EU single market; and (ii) introduce sufficient *flexibility in the implementation* of those principles, in order to provide adequate legal certainty to market operators while preserving the possibility and legitimacy of the Commission's involvement into the management of the crisis. This is apparent primarily from the application of State aid rules to *ad hoc* rescue measures and general remedial plans devised by Member States, but the same options appear to guide the Commission's – to date still limited – merger control practice. This article illustrates how the above policy options have been implemented in those two enforcement areas. It also shares some thoughts as to the institutional constraints that (may) have shaped the Commission's policy and points to some of its (un-)intended consequences.

# I. Policy option 1: "Consistency in the principles"

**4.** As noted, in spite of the exceptional nature of the current situation, the Commission has so far endeavored to rely on established principles in dealing with those competition issues that have arisen in the framework of the financial crisis. In the enforcement of competition policy, consistency is therefore largely prevailing, so far, over calls for greater flexibility.[5] In turn, the Commission aims to demonstrate that – contrary to what some Member States like to pretend – the current legal framework is flexible enough to accommodate exceptional and country-specific circumstances.

## 1. State aids: From *ad hoc* rescue measures to general remedial plans

**5.** The enforcement of EC competition law since September 2007 has mirrored the development of the financial crisis. Up until September 2008, the Commission examined case-by-case rescue measures aimed to address liquidity difficulties of credit institutions exposed to the subprime crisis according to established rules on subsidies for firms in difficulty,[6] adopted pursuant to Article 87(3)(c) of the EC Treaty ("EC"). In doing so, the Commission expressly refused to consider those individual measures as remedies to "*a serious disturbance in the economy of the relevant Member State*" pursuant to Article 87(3)(b) EC, a rarely-used and more lenient provision.[7] Since October 2008, however, with the subprime crisis leading to a general freeze in inter-bank lending, the Commission acknowledged the systemic effects of such liquidity shortage and started applying Article 87(3)(b) EC to general remedial schemes put in place by Member States, as well as to certain *ad hoc* measures. Given the circumstances, and in order to promote legal certainty, it even issued detailed guidelines on the application of that criterion to the current global financial crisis.[8] This evolution in the enforcement of State aids rules was dictated by a change in market conditions and in the nature and scope of Member States' remedial measures. Still, it was based on and consistent with existing principles, even if designed for exceptional circumstances.

### 1.1. Phase I: September 2007 to September 2008

**6.** *The facts.* Over the September 2007-September 2008 period ("Phase I"), the Commission adopted six State aid decisions on the basis of Article 87(3)(c) EC, a provision allowing Member States to grant subsidies to firms in difficulty, under strict conditions. Those decisions have involved: (i) *Northern Rock*, an important UK mortgage bank relying heavily on mortgage securitization to meet its refinancing needs, which benefited successively from an emergency liquidity assistance from the Bank of England, a State guarantee for existing and new accounts, and then various liquidity facilities from the UK Treasury;[9] (ii) *WestLB AG*, a German commercial bank significantly exposed to the subprime crisis and threatened of a downgrading of its credit rating, which benefited from a €5 billion guarantee against losses in its structured securities portfolio from the state of North Rhine-Westphalia to prevent such downgrading;[10] (iii) *Landesbank Sachsen Girozentrale (Sachsen LB)*, a German commercial bank facing a significant liquidity shortage following the decline of the mark-to-market value of its investments in US mortgage backed securities, which benefited from a credit facility of €17.1 billion provided by a pool of state-owned banks and a €2.75 billion guarantee from the state of Saxony in the framework of its sale to Landesbank Baden-Württemberg;[11] (iv) *Roskilde Bank A/S*, a

5 This is quite remarkable considering the history of antitrust enforcement at times of crises, notably in the US (see D. Crane, "Antitrust Enforcement During National Crises: an Unhappy History", *Global Competition Review*, December 2008, www.globalcompetitionpolicy.org). Commissioner Kroes recently picked on that point to justify the need for a consistent enforcement of State aid rules and argued that, based on researches by UCLA scholars, the suspension of the antitrust laws in the framework of the New Deal had the effect of prolonging the Great Depression by an extra seven years (see N. Kroes, "*EU State aid rules – part of the solution*", speech delivered at the EStALI Conference, Luxembourg, December 5, 2008).

6 Communication from the Commission – Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, *O.J.*, 2004, C 244/2.

7 See, *e.g.*, Commission Decision of December 5, 5007 in Case NN 70/2007 (ex. CP 269/07) – *United Kingdom Rescue aid to Northern Rock*, §37.

8 Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, *O.J.*, 2008, C 270/2.

9 Commission Decision of December 5, 5007 in Case NN 70/2007 (ex. CP 269/07) – *United Kingdom Rescue aid to Northern Rock*, C(2007) 6127 final.

10 Commission Decision of April 30, 2008 in Case NN 25/2008 (ex. CP 15/08) – *WestLB riskshield, Germany*, C(2008)1628 final. WestLB proceeded to the restructuring of its structured securities portfolio by isolating the risks thereto related in a stand-alone SPV to be removed from its accounts.

11 Commission Decision of June 4, 2008 in Case C 9/2008 (ex. NN 8/2008, CP 244/2007) – *Sachsen LB, Germany*, C(2008)2269 final. The sale of Sachsen LB to Landesbank Baden-Württemberg involved a complex restructuring of Sachsen LB's structured investments portfolio. The guarantee provided by the state of Saxony covered losses on a structured investment portfolio with low mark-to-market value transferred in a stand-alone SPV to insulate Sachsen LB from any further losses upon maturity.

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Danish bank, which experienced a severe lowering of its financial strength rating due to its large exposure to the US subprime crisis and that of the Danish real estate market, benefited from unlimited emergency liquidity assistance from the Danish central bank backed by guarantees provided by the Danish banking association and the government;[12] (v) *Bradford & Bingley*, a UK-based financial institution providing specialist mortgages and savings products that was downgraded by the major credit rating agencies in September 2008, lost its banking license, was nationalized and then winded down by the UK authorities, including by means of a sale of its retail deposits and branches to Abbey National, part of the Santander group;[13] and (vi) *Hypo Real Estate Holding AG*, a large German bank holding facing a liquidity crisis due to its involvement in the national and international mortgage business and its short-term refinancing strategy, which benefited from a €35 billion guarantee from the German federal government and a pool of German financial institutions, against collateral in the form of securities and the shares of its subsidiaries.[14]

**7.** *Consistency in the assessment of the notion of State aid.* In all the above cases, the logical starting point of the Commission's assessment was Article 87(1) EC according to which "*all subsidies granted by Member States which distort or threaten to distort competition in the common market are* prohibited *unless they meet justification grounds as provided for under Article 87(2) and (3) EC*". As a corollary, the notion of State aid requires: (i) an intervention by the State or through State resources; (ii) that is liable to affect trade between Member States; (iii) confers a selective advantage on the recipient(s); and (iv) distorts or threatens to distort competition.[15] The Commission has historically adopted a broad interpretation of the notion of "State resources", which it maintained in the above cases.[16] In the assessment of the other criteria, the Commission relied systematically on the well-established principle of the *market economy investor*, according to which any public intervention to the benefit of economic operators constitutes State aid unless a private investor acting under normal market conditions could have granted the same or similar facilities under the same or similar circumstances.[17] The exceptional nature of the market situations faced already at that time by the relevant credit institutions and the scope of – let alone the motives for – the rescue measures adopted by the Member States *de facto* implies that virtually all those measures amounted to State aid, notably given the risks involved.[18] Interestingly, though, the Commission held that no State aid is at stake in case of emergency liquidity assistance provided: (i) by an independent central bank against high quality collateral and at its own initiative; or (ii) by a State-owed central bank against a guarantee provided by the private sector.[19] Likewise, in line with its past practice and despite the degraded market conditions, the Commission confirmed that a purchase price is considered to be the market price – and therefore that no State aid is involved – if the sale is organized via an open and unconditional tender and the assets go to the highest or only offeror.[20] The Commission also confirmed the controversial approach adopted in the *France Telecom* case, according to which a mere announcement on the part of public authorities aimed to preempt the downgrading of a company by rating agencies, is capable of constituting State aid.[21]

**8.** *Consistency with the Commission guidelines on State aid for rescuing and restructuring firms in difficulty.* As noted, in all decisions adopted over the Phase I period, the Commission has systematically refused to consider the compatibility of the relevant State measures with the common market pursuant to Article 87(3)(b) EC. Consistent with its *Crédit Lyonnais* practice,[22] the Commission takes the view, indeed, that such justification ground "*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*".[23] Thus, at the time, the Commission did not consider that the risk of bank failures in the UK or Germany, but also in Denmark, was such as to trigger a systemic crisis. Rather, it viewed those cases as "*based on individual problems*, [requiring] *tailor made remedies, which can be addressed under the rules for companies in difficulties*".[24] Those rules, issued pursuant to Article 87(3)(c) EC, are embodied in the Commission guidelines on State aid for rescuing and

12 Commission Decision of July 31, 2008 in Case NN 36/20085 – *Denmark/Roskilde Bank A/S*, C(2008)4138. However, the rescue plan envisaged in that decision did not succeed and Roskilde Bank was finally taken over and then winded down by the Danish central bank and the Danish banking association. In that framework, the Danish authorities gave a new guarantee to the Danish central bank covering any losses incurred in relation to that transaction. The liquidation plan was approved by the Commission on November 5, 2008, pursuant to Article 87(3)(b) EC as it was found that a default of Roskilde Bank could have caused a systemic crisis and, as a result, a serious disturbance in the Danish economy as a whole (see Commission press-release IP/08/1633, "*State aid: Commission approves Danish liquidation aid for Roskilde Bank*").

13 See Commission Decision of October 1, 2008 in Case NN 41/2008 – *UK/Rescue Aid to Bradford & Bingley*, C(2008)5673 final..

14 See Commission press-release IP/08/1453 of October 2, 2008, "*State aid: Commission approves German rescue aid package for Hypo Real Estate Holding AG*" (Case NN 44/2008, decision only publicly available in German so far).

15 For a restatement of those basic conditions, see, *e.g.*, Case C-345/02, *Pearle et al.* [2004] ECR I-7139, §33.

16 See, *e.g.*, *WestLB riskshield/Germany*, §29; *Sachsen LB*, §71.

17 See, *e.g.*, *WestLB riskshield/Germany*, §32, where the Commission recalls that "*the attitude of the hypothetical private investor is that of a prudent investor, from a position ex ante, whose goal of profit maximization is tempered with caution about the level of risk acceptable for a given rate of return*".

18 See, *e.g.*, *WestLB riskshield/Germany*, §33-35; *Roskilde Bank*, §§34-38; *Sachsen LB*, §§81-85.

19 See, respectively, *Northern Rock*, §§32-34 and *Roskilde Bank*, §§32-33.

20 See, *e.g.*, *Sachsen LB*, §76 and *Bradford & Bingley*, §38.

21 *WestLB riskshield/Germany*, §37, referring to Commission Decision of August 2, 2004 in Case C 13a/2003, *France Telecom* [2006] *O.J.* L 257/55, §194.

22 Commission Decision of May 20, 1998 in Case C(1998) 1454 – *Crédit Lyonnais group/France* [1998] *O.J.* L 221/28, as restated in, e.g., *Northern Rock*, §38.

23 See, *e.g.*, *WestLB riskshield/Germany*, §41; *Sachsen LB*, §94. See also Joined Cases T-132 and 143/96, *Freistaat Sachsen and Volkswagen AG/Commission* [1999] ECR II-3663, §167.

24 *Idem*, respectively §42 and §95 (where the Commission referred to "*company-specific events*").

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restructuring firms in difficulty (the "Guidelines"),[25] which condition the grant of an exemption to the general prohibition of State aid on a number of criteria. The Commission has endeavored to apply its guidelines consistently in the above cases, as follows:

**9.** *Company in difficulty*. Under the Guidelines, a firm is regarded as being in difficulty when it is unable to stem losses which, without outside intervention by the public authorities, will "*almost certainly condemn it to going out of business in the short or medium term*".[26] This is the case, *e.g.*, when the relevant company fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings, as *Northern Rock* did in September 2007, for example.[27] In line with the Commission's past practice, this is also the case when the total capital ratio of a bank threatens to fall below the minimum quota required by the banking regulator, resulting in a moratorium on the bank's activities,[28] or in case of severe refinancing problems caused by the downgrading of a bank's financial strength rating.[29]

**10.** *Rescue aid*. Rescue aid consists in temporary and reversible liquidity assistance aimed to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan.[30] Technically, it must be: (i) granted in the form of loans or guarantees for a maximum six months term bearing a market-based interest rate; (ii) warranted on the grounds of serious social difficulties and have no unduly adverse spillover effects on other Member States; (iii) accompanied by an undertaking to communicate a restructuring or liquidation plan within six months (or evidence that loans have been reimbursed and/or guarantees terminated); (iv) restricted to the amount needed to keep the firm in business during the relevant period, *i.e.*, proportionate; and (v) limited to a one-off operation.[31] The Guidelines introduce some flexibility with respect to rescue aid in the banking sector in the sense that aid can be granted in a form other than loans or loan guarantee to the extent that it does not consist in structural measures related to the bank's own funds (*i.e.*, recapitalization).[32] All other principles and procedural obligations remain applicable.

**11.** In the Phase I cases listed above, the Commission has followed the methodology and conditions set forth in the Guidelines, including those rules specific to the banking sector. As far as the form of the rescue aid is concerned, the Commission has assimilated a number of peculiar measures to loans or loan guarantees, such as: (i) a guarantee on deposits;[33] (ii) the acquisition of "toxic" commercial paper leaving the default risk with the original owner (assimilated to a credit line);[34] (iii) a guarantee covering the notes issued by a special investment vehicle ("SIV") and acquired by a bank so as to back the *mark-to-market* losses related to the SIV's structured investment portfolio on the bank's balance sheet (assimilated to a loan);[35] and (iv) an urgent working capital facility.[36] In contrast, it refused to consider as rescue aid facilities having the effect and character of a capital injection.[37] With respect to the duration requirement, the Commission has shown some flexibility for facilities that are indispensable to enable banks to comply with prudential requirements and thus serve the purpose of rescue aids for banks.[38] Above all, the Commission has ensured that any aid remains proportionate, *i.e.*, is limited to the actual needs of the relevant bank, does not enable it to behave aggressively on the market and is subject to effective oversight.[39]

**12.** *Restructuring aid*. Aid that is not temporary and reversible in nature such as capital injections and the likes (*e.g.*, recapitalization) – including any amount disbursed as rescue aid and not paid back within the initial six months period – is scrutinized under the conditions set forth in the Guidelines for restructuring aid. In a nutshell, the grant of restructuring aid is conditional on the implementation of a restructuring plan capable of restoring the long-term viability of the relevant operator within a reasonable timescale and on the basis of realistic assumptions.[40] It must entail compensatory measures, such as the divestment of assets or reductions in capacity, and the aid recipient is expected to make a significant contribution to the financing of the restructuring plan, of at least 50% in the case of large companies.[41] Finally, specific conditions are

25 Cited above, note 6.

26 *Idem*, §9.

27 *Northern Rock*, §41. See also *Sachsen LB*, §96.

28 In September 2008, for example, the license of *Bradford & Bingley* to accept deposits was withdrawn by the UK Financial Services Authority.

29 *WestLB*, §45; *Roskilde Bank*, §§43-50.

30 Guidelines, cited above, note 6, §15.

31 Idem, §§25(e) and 72-76 (the Commission will oppose rescue aid if the beneficiary has already received rescue or restructuring aid over the preceding 10 years period).

32 Idem, §25(a) footnote 3.

33 Northern Rock, §44.

34 Sachsen LB, §99.

35 WestLB, §47 and references to precedents provided at §52. The Commission found, in particular, that such measure was "*the least structural* […] *possible in order to settle the regulatory problem of WestLB in line with the banking legislation*" and noted that it fell short of an equity provision (§§48-49).

36 *Bradford & Bingley*, §§43-46.

37 Commission Art. 88(2) EC letter to Germany of February 27, 2008 in Case C 10/2008 (ex. CP233/07 and NN7/08) – *IKB, Germany* (§50). IKB is a German bank specialized in long-term financing to medium-sized companies, which accumulated a total subprime exposure of approximately €7.7 billion arising from direct investments in CDOs and liquidity facilities provided to a structured investment vehicle.

38 See, *e.g.*, in the Northern Rock case, the PIK Interest Agreement providing for interest payments on the other facilities to be deferred for five years (§46).

39 In the *Northern Rock* case, the liquidity facilities were structured so that the bank would receive only the cash needed for one week ahead and the use thereof was controlled by the Bank of England (§§49-51). The acquisition of "toxic" commercial papers in the *Sachsen LB* case was capped at an amount corresponding to the bank's needs and limited to securities that could not be placed on the market (§§100-103). The guarantee provided to *WestLB* on the notes issued by one of its special investment vehicle was also capped to the bank needs, did not lower *WestLB*'s level of refinancing costs compared to other banks and the capital freed could not be used for any expansionary activities (§54-56). In the *Roskilde Bank* case, the Commission emphasized that the loan provided by the Danish central bank entailed a higher level of interest than other credit facilities and was structured so that Roskilde Bank would receive only the cash needed for two weeks ahead, as approved by an independent auditor (§§59-63).

40 Guidelines, §§34-35.

41 Guidelines, §§38-45.

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typically attached to the aid, notably to prevent its use for aggressive, market-distorting activities not linked to the restructuring process. The notification of a restructuring plan has the immediate benefit of extending the duration of any preexisting rescue aid measure pending the Commission's examination of the restructuring plan, which can take months.[42]

**13.** So far, the Commission has adopted only one final decision involving restructuring aid, in relation to *Sachsen LB*.[43] In addition, it has opened in-depth investigations into restructuring aid packages for *Northern Rock*,[44] *WestLB*[45] and *IKB Deutsche Industriebank AG*.[46] In those cases, the Commission considered measures such as: (i) the outright sale of *Sachsen LB* combined with the prolongation of the guarantee provided by the state of Saxony; (ii) the nationalization of *Northern Rock* combined with an outstanding debt towards the Bank of England and a commitment of the UK Treasury to operate the bank above the minimum capital requirements; and (iii) the riskshield provided to *IKB*, which indirectly amounted to a capital injection. In the *Sachsen LB* decision, the Commission reached the conclusion that, after discounting for the prolongation of the guarantee provided by the state of Saxony, the contribution of the purchaser to the costs of restructuring *Sachsen*'s operations would amount to 51%.[47] The restructuring plan included the sale of certain assets, the closure of Sachsen's Irish subsidiary involved in structured financial investments, undisclosed divestitures and the abandonment of Sachsen's proprietary trading and international real estate businesses. Those measures related to activities accounting for more than 25% of the Sachsen's group 2008 profits and were thus found sufficient to compensate for the aid provided and limit its distorting effect.[48] In addition, the transaction involved the dismissal of Sachsen's management team, which was considered a "*valuable signal against moral hazard*".[49] Finally, it is worth underlining that, in relation to *IKB*, the Commission has admitted the parallel grant of restructuring aid to remedy the exposure to the subprime crisis - still under review - and of a temporary guarantee aiming to palliate refinancing difficulties due to the financial crisis.[50]

42 Guidelines, §26.

43 See above, note 11. The liquidation of *Roskilde Bank* was approved on November 5, 2008 pursuant to Article 87(3)(b) EC, the provision aimed to allow aids aimed to remedy a serious disturbance in the economy of a Member State (see Commission press-release IP/08/1633).

44 Commission Art. 88(2) EC letter to the UK of April 2, 2008 in Case C 14/2008 (ex NN 1/2008) – *United Kingdom/Restructuring aid to Northern Rock*, C(2008) 1210 final.

45 See Commission press-release IP/08/1435 of October 1, 2008: "*State aid: Commission opens in-depth investigation into restructuring of WestLB*".

46 Commission Art. 88(2) EC letter to Germany of February 27, 2008 in Case C 10/2008 (ex. CP233/07 and NN7/08) – *IKB, Germany*.

47 *Sachsen LB*, §§110-119.

48 *Sachsen LB*, §§120-125. In the *IKB* Art. 88(2) EC letter, the Commission viewed positively the abandonment of IKB's main loss making activities, which were also its most important sources of revenues (§53). The *Northern Rock* restructuring plan envisaged a drastic reduction of the bank's lending operations, notably by means of an ambitious retail mortgage redemption program, in order to halve the bank's balance sheet over five years. The plan also included the increase of retail deposits as a proportion of total funding and the closure of some overseas operations.

49 *Sachsen LB*, §126.

**14.** As acknowledged by EU Competition Commissioner Kroes, the cases dealt with over the Phase I "subprime" period, *i.e.*, prior to October 2008, have allowed her services to "*test and improve our ability to meet the urgent demands that face banks in these* [liquidity shortage] *situations*".[51] In a crisis where many public authorities appear constrained to proceed by trial and error under the pressure of time, the Commission has indeed been able to gain experience progressively and to acquire an intimate knowledge of the various rescue initiatives taken across the EU. This has most probably improved its reactivity when the crisis spread to the whole interbank system and Member States started adopting all sorts of urgent remedial measures. Beyond the precedents, the Commission has demonstrated over that period the resilience of its State aid policy, *i.e.*, its ability to combine the authorization of rescue measures with the protection of competition in the common market. The same approach has guided the Commission's action over the Phase II of the financial crisis.

## 1.2. Phase II: Since October 2008

**15.** In the aftermath of Lehman Brothers' Chapter 11 bankruptcy filing on September 15, 2008, the financial crisis intensified both in scale and in scope, leading to a global freeze of the market for interbank lending. Hence, financial institutions across Europe, including fundamentally sound ones, faced refinancing difficulties. The change in the nature of the crisis and the magnitude of the potential consequences thereof led the Commission to adapt its State aid enforcement policy. On October 6, 2008, in an address before the Economic and Monetary Affairs Committee of the European Parliament, Commissioner Kroes *made* known her intention "*not* [to] *shy away if need be from applying the special provisions of Article 87(3)(b) of the Treaty regarding aid granted to address a serious disturbance of the economy of a Member State*".[52] In effect, since that time, the Commission has exclusively relied on that exceptional provision, thus acknowledging the systemic nature of the crisis.

**16.** *The facts.* Ireland, Denmark and the UK were the first Member States to notify to the Commission general guarantee schemes and financial support measures for the banking sector as a whole. In three decisions adopted on October 10 and 13, 2008, published immediately, the Commission outlined the policy principles underlying the application of Article 87(3)(b) EC in the context of the financial crisis.[53]

50 See Commission press-release IP/08/2055 of December 23, 2008: "*State aid: Commission approves state support for IKB*". In that case, the Commission assessed the compatibility of the guarantee both with the Guidelines and the Banking Communication (see below note 54) and eventually authorized it pursuant to Article 87(3)(b) EC.

51 N. Kroes, "*Dealing with the current financial crisis*", Address before the Economic and Monetary Affairs Committee, European Parliament, Brussels, October 6, 2008 (SPEECH/08/498). See also N. Kroes, "*EU State aid rules – part of the solutions*", speech delivered at the EStALI Conference, Luxembourg, December 5, 2008 (SPEECH/08/679).

52 *Idem.*

53 See, respectively: Commission Decision of October 13, 2008 in Case NN 48/2008 – *Ireland/Guarantee scheme for banks in Ireland*, C(2008)6059; Commission Decision of October 10, 2008 in Case NN 51/2008 – *Denmark/Guarantee scheme for banks in Denmark*, C(2008)6034; and Commission Decision of October 13, 2008 in Case N 507/2008 – *UK/Financial support measures to the banking industry in the UK*, C(2008)6058, as modified (see Commission press-release IP/08/2057 of December 23, 2008: "State aid: Commission approves modifications to UK financial support measures to the banking industry").

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Those principles were consolidated in an official Communication issued on October 13, 2008 (the "Banking Communication"),[54] thus at the same time as the announcement of the coordinated EU response to the crisis. Subsequently, the Commission formally authorized twelve other general remedial schemes adopted respectively by Germany, Sweden, Portugal, France, the Netherlands, Spain, Italy, Finland, Greece, Austria, Slovenia and Latvia,[55] as well as eleven sets of measures aimed for individual financial institutions (Roskilde Bank, ING, Fortis, Dexia, JSC Parex Banka, Aegon, KBC, Carnegie Bank, BayernLB, NordLB and IKB).[56] The content of the remedial schemes varies remarkably from one country to the other, as apparent from the table enclosed as Annex I. Yet, they have all been designed – sometimes after (in)tense discussions with the Commission[57] – to fit the principles governing the application of Article 87(3)(b) EC, as laid down in the Banking Communication.

54 Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis [2008] *O.J.* C270/08.

55 See, respectively: Commission Decision of October 27, 2008 in Case N 512/2008 – Germany/*Rescue package for credit institutions in Germany*, C(2008) 6422, as modified on December 12, 2008 (see Commission press-release IP/08/1966: "*State aid: Commission approves modifications to German financial rescue scheme*"); Commission Decision of October 29, 2008 in Case N 533/2008 – *Sweden/Support measures for the banking industry in Sweden*, C(2008) 6538; Commission Decision of October 30, 2008 in Case N 524/2008 – *Nederland/Garantieregeling ten behoeve van banken in Nederland*, C(2008) 6616; Commission press-release IP/08/1609 of October 31, 2008: "*State aid: Commission authorizes French scheme for refinancing credit institutions*"; Commission press-release IP/08/1630 of November 4, 2008: "*State aid: Commission approves Spanish fund for acquisition of financial assets from financial institutions*"; Commission press-releaseIP/08/2049 of December 23, 2008: "*State aid: Commission approves Spanish guarantee scheme for credit institutions*"; Commission Decision of November 13, 2008 in Case N 567/2008 – *Finland/Guarantee scheme for banks' funding in Finland*, C(2008) 6986; Commission press-release IP/08/1706 of November 14, 2008: "*State aid: Commission authorizes Italian scheme for refinancing credit institutions*"; Commission press-release IP/08/2059 of December 23, 2008: "*State aid: Commission approves Italian recapitalization scheme for financial institutions*"; Commission Decision of November 19, 2008 in Case N 560/2008 – *Greece/Support Measures for the Credit Institutions in Greece*, C(2008) 7382; Commission press-release IP/08/1933 of December 10, 2008: "*State aid: Commission approves Austrian support scheme for financial institutions*"; Commission press-release IP/08/1964 of December 12, 2008: "*State aid: Commission approves Slovenian support scheme for credit institutions*"; Commission Decision of December 17, 2008 in Case NN 60/2008 – *Guarantee scheme for credit institutions in Portugal*, C(2008) 8686; Commission press-release IP/08/2054 of December 23, 2008: "*State aid: Commission approves Latvian support scheme for banks*".

56 See, respectively: Commission press-release IP/08/1633 of November 5, 2008: "*State aid: Commission approves Danish liquidation aid for Roskilde Bank*"; Commission Decision of November 12, 2008 in Case N 528/2008 – *The Netherlands/Aid to ING Groep NV*, C(2008) 6936 final cor.; Commission press-release IP/08/1745 of November 20, 2008: "*State aid: Commission approves joint aid from Belgium, France and Luxembourg to rescue Dexia*"; Commission press-release IP/08/1746 of November 20, 2008: "*State aid: Commission approves Belgian state guarantee for Fortis Bank*"; Commission press-release IP/08/1766 of November 25, 2008: "*State aid: Commission approves Latvian state support for JSC Parex Banka*"; Commission decision of November 27, 2008 in Case N 569/2008 – *The Netherlands/Aid to Aegon N.V.*, C(2008) 7734 final; Commission press-release IP/08/2033 of December 18, 2008: "*State aid: Commission approves recapitalization of Belgian KBC Group*"; Commission press-release IP/08/1977 of December 16, 2008: "*State aid: Commission approves Swedish rescue aid for Carnegie Bank*"; Commission press-release IP/08/2034 of December 18, 2008: "*State aid: Commission approves state support for BayernLB*"; Commission press-release IP/08/2056 of December 23, 2008: "*State aid: Commission approves German banking rescue aid for NordLB*"; Commission press-release IP/08/2055 of December 23, 2008: "*State aid: Commission approves state support for IKB*".

**17.** *Consistency in the assessment of the notion of State aid.* As for rescue measures considered over the Phase I period, described in Section I.1.1 above, the Commission has applied established principles to the assessment of the State aid nature of (part of) the general remedial schemes and individual measures adopted by Member States since October 2008. Those measures are most of the time clearly imputable to the Member States and involve financial burdens on the State, whether in form of an immediate transfer of State resources (*e.g.*, recapitalization) or a potential call on State funds in the future (*e.g.*, guarantees). Public interventions to the advantage of certain economic operators, such as banking institutions incorporated in a specific Member States and/or with "*significant and broad footprint in the domestic economy*", *i.e.*, of a systemic importance, also satisfy the selectivity criterion.[58] In contrast, general measures open to all comparable market players, such as guarantees for retail deposits or open market operations and standing facilities entered into with or provided by central banks (to the extent they are not backed by collateral benefiting from State guarantee),[59] are not selective and therefore do not constitute State aid (and, hence, do not need to be notified to and reviewed by the Commission).[60] Above all, given the circumstances and the magnitude of the sums involved, the Commission has consistently found that no market economy investor would have been willing (if able) to intervene on terms similar to those offered by Member States.[61] This is so even though State interventions must entail a proper remuneration to qualify for an exemption under Article 87(3)(b) EC (see below).

**18.** *Consistency in the assessment of the compatibility of the aids with the common market under Article 87(3)(b) EC.* The Commission's policy decision to resort to Article 87(3)(b) EC appears fully consistent with the reasoning developed in Phase I to precisely refuse the benefit thereof at that time, and thus with the *Crédit Lyonnais* precedent. Indeed, most of the schemes reviewed in Phase II are of a general nature and/or aim to tackle the risk of a systemic disturbance for Member States' financial stability and thus their entire economy.[62] The key element that appears to have triggered the application

57 See, *e.g.*, Commission press-release IP/08/1742 of November 19, 2008: "*State aid: Commission authorizes support package for Greek credit institutions*" ; Commission press-release IP/08/1933 of December 10, 2008: "*State aid: Commission approves Austrian support scheme for financial institutions*" and Commission press-release IP/08/2059 of December 23, 2008: "*State aid: Commission approves Italian recapitalization scheme for financial institutions*".

58 Ireland, §47.

59 See, *e.g.*, UK, §§40-41; Sweden, §§32-33.

60 As a result, the increase in the ceilings of State guarantees for retail deposits announced by various Member States did not raise State aid issues. Regarding central banks operations, see the Banking Communication, §51 and the UK decision, §§40-41.

61 See, *e.g.*, Denmark, §32; Ireland, §48; UK, §39; Germany, §43; Finland, §28; ING, §§36-51 (citing as relevant factors: "*the current distressed market conditions*", the "*public policy considerations*" that determined the investment; and "*the pricing of the securities*" above the share price on the day the transaction was settled) or Aegon, §§40-51.

62 The Commission has applied Article 87(3)(b) EC to individual measures affecting credit institutions based in relatively small Member States such as Denmark (Roskilde Bank), Belgium (Fortis and Dexia) and Latvia (JSC Parex Banka). In the case of Belgium, for example, the Commission found that a collapse of Dexia "*would have had a snowball effect on the Belgian banking sector and, consequently, on the entire Belgian economy*" (Commission press-release IP/08/1745 of November 20, 2008: "*State aid: Commission approves joint aid from Belgium, France and Luxembourg to rescue Dexia*").

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of Article 87(3)(b) EC is the possibility of "*even fundamentally sound financial institutions […] facing the prospect of going out of business*", which the Commission characterized as a "*clear international market-failure*",[63] combined with the recognition of the "[banking] *sector's pivotal role in providing financing to the rest of the economy*".[64] In contrast, financial institutions affected by losses stemming from poor asset-liability management or risky strategies remain, in theory, subject to the normal framework for rescue aid.[65] That being said, Article 87(3)(b) EC, which may entail the justification of State aid granted to "*remedy a serious disturbance in the economy of a Member State*", is a rarely-used provision.[66] As a result, the Commission has acknowledged that there is no established practice as to the conditions for compatibility of aid granted under that provision.[67] It therefore endeavored to resort to general principles guiding the assessment of the compatibility of aid under Article 87(3) EC as a whole. Those principles are elaborated upon in the Banking Communication. The filiation with the reasoning underlying the assessment of rescue aid during the Phase I period, as explained above, is evident,[68] even though Article 87(3)(b) EC offers additional flexibility as to the nature of acceptable aids (*e.g.*, structural interventions), the duration thereof (*i.e.*, going beyond six months) and, particularly, the absence of structural compensatory measures. The policy principles laid down in the Banking Communication revolve around two central EU single market criteria, namely non-discrimination and proportionality.

**19.** *Non-discrimination*. To be held compatible with the common market, general remedial schemes adopted in the framework of the financial crisis must contain objective and non-discriminatory eligibility criteria.[69] Guarantee and recapitalization plans, in particular, must be open to all credit institutions with systemic relevance to the economy, regardless of their origin, *i.e.*, all banks incorporated in a relevant Member State, including subsidiaries or branches of banks headquartered abroad, with "significant activities" in that Member State.[70] Compliance with that criterion was at the core of discussions between the Commission and Ireland during the review of the general guarantee scheme for banks in Ireland. The first version of the scheme notified on October 3, 2008, which limited eligibility to domestic banks, was amended on October 12 *in* order to comply with "*issues […] raised by the Commission relating to the maintenance of the integrity of the single market in financial services*" (sic).[71]

**20.** *Proportionality*. The principle of proportionality typically requires the measure(s) under scrutiny to be: (i) suitable for securing the objective pursued; (ii) limited to what is necessary in order to attain it; and (iii) the least disruptive solution possible, taking into account other laws, regulations and "measures" in place. Translated in the current context, it implies that State aids must be: (i) appropriate and adequately targeted to remedy the alleged serious disturbance in the economy of the Member State concerned; (ii) the least distortive possible of competition; and (iii) not redundant with existing arrangements or other means.[72]

**21.** As far as State guarantees are concerned, the appropriateness criterion is first of all appreciated in relation to the scope of the debt and liabilities covered. For the Commission, the drying-up of interbank lending may justify guaranteeing not only retail deposits but also certain types of wholesale deposits and even short- and medium-term debt instruments.[73] However, shareholders and investors are not permitted to benefit from such guarantees, which ought therefore to exclude, in principle, hybrid or subordinated debt considered as Tier 2 capital.[74] The duration of the guarantee scheme is also relevant and may extent to a period *up* to two years (absent compensation),[75] to the extent that the scheme is

63 See, *e.g.*, UK, §§44 and 47; Denmark, §40. Therefore, Article 87(3)(b) EC in principle covers remedial schemes limited to accommodate the liquidity difficulties of solvent companies (see, *e.g.*, Denmark, §43). See also UK, §§14 and 57; Germany, §7 (eligibility limited to those credit institutions with a Tier 1 ratio above a certain threshold); Sweden, §5 (eligibility limited to institutions with at least 6% Tier 1 capital and at least 9% combined Tier 1 and Tier 2); Finland refers to general solvency criteria set forth in the Finnish Act on Credit Institutions and requires the opinion of the Finnish Financial Supervisory Authority (Finland, §8). Note that the capital injection into ING, in spite of its AA rating, was prompted by stricter requirements imposed by capital markets (and rating agencies) in the form of core Tier 1 ratios in the range of 7-9%, compared to previous levels of 5-7% (ING, §10).

64 See, *e.g.*, Germany, §46; Sweden, §36; Portugal, §29 ("*As a consequence, there is a systemic crisis that affects not only the entire functioning of the financial market but of the economy as a whole*").

65 Banking Communication, §§14 and 33.

66 C. Quigley and A. M. Collins, in their leading treatise on EC State aid law (Hart, Oxford, 2003) refer to aid granted by several Member States in the mid-1970s to protect employment during recession and to the privatization of hundreds of Greek firms and public-sector banks as part of a national economic recovery plan in the early 1990s (p.86).

67 See, *e.g.*, Denmark, §41; UK, §45.

68 See, *e.g.*, the various references to the cases handled over the Phase I period in the *Banking Communication.*

69 *Banking Communication*, §16.

70 *Banking Communication*, §18 and *Recapitalization Communication*, §46. See, *e.g.*, Denmark, §6: an estimated 140 banks are eligible under the Danish scheme. In Spain, the guarantee scheme is open to all solvent registered credit institutions having a share of at least 1/1000 of the credit market (see Commission press-release IP/08/2049 of December 23, 2008: "*State aid: Commission approves Spanish guarantee scheme for credit institutions*") Note also that the issue of discrimination is particularly sensitive in those Member States, like Belgium, which have adopted a series of individual measures instead of devising a general remedial scheme.

71 See Commission press-release MEMO/08/615 of October 12, 2008: "*State aid: Commission welcomes revised Irish guarantee scheme*". The final Irish guarantee schemes covers six domestic credit institutions and "*such specific subsidiaries as may be approved by the Government following consultation with the Central Bank and the Financial Regulator*" (Ireland, §§5 and 16). In the UK, the relevant criterion is the eligibility to sign up for the Bank of England's Standing Facilities (UK, §4). In Germany, eligibility is conditional on the "best judgment" of the Federal Ministry of Finance, based on a series of benchmarks (§6).

72 *Banking Communication*, §§15 and 21.

73 *Banking Communication*, §21.

74 See, *e.g.*, Denmark, §8: the guarantee scheme excludes covered bonds and subordinated debt, which the Commission considered positively (§47). See also UK, §59; Germany, §63. The *Banking Communication* notes that if such debt is covered, specific restrictions may be necessary (§23). See, *e.g.*, Ireland, §§17 and 63-64. For a discussion on the coverage of covered bonds, see Sweden, §§24 and 42 and Finland, §§23 and 38.

75 Even though it is valid up to three years, the UK Guarantee Scheme was found justifiable because it covers only new debt issued over a has a six months period (§60). See also Germany, §65; Sweden, §44 (up to five years for covered (mortgage backed) bonds, exceptionally justified by the Swedish situation, the cap set on the overall amount covered and a six month review commitment – see also Finland, §§39-40). In the decision concerning the Portuguese guarantee scheme, the Commission stated that: "*the coverage of liabilities with a maturity up to two years is in principle sufficient to attain the objectives pursued but accepts that liabilities with a longer time-frame may be accepted if additional safeguards are put in place in order to prevent excessive distortion of competition*" (§37).

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re-notified to the Commission for review every six months.[76] In turn, the necessity criterion mainly requires guarantees to be: (i) granted against adequate remuneration from individual financial institutions and/or the financial sector as a whole,[77] fees being set according to the degree of risks and the beneficiaries' respective credit profiles and needs;[78] and (ii) tied to duly monitored behavioral constraints preventing aggressive commercial conduct, *e.g.*, by introducing GDP-related, market share or balance sheet growth ceilings.[79] Even though the scope and structure of guarantee schemes vary from one Member State to the other, the most commonly adopted one aims to cover, for 24 to 36 months, new short and medium term debts (*i.e.*, with a maturity between three months and three years) issued over a six months period starting on the date of the Commission's approval and remunerated according to European Central Bank's recommendations.[80]

**22.** With respect to *recapitalization schemes*, the Banking Communication provides that, to remain proportionate, capital injections must be:[81] (i) limited to the minimum necessary; (ii) provided against properly valued and remunerated securities,[82] ideally carrying corresponding rights;[83] and (iii) tied to duly monitored behavioral safeguards, primarily to prevent aggressive commercial practices,[84] with accompanying sanctions. The Commission considers that the irreversible nature of capital injections requires recapitalization schemes to be accompanied by particularly clear ex-ante behavioral safeguards that Member States must monitor and enforce in order to ensure their observance and avoid undue distortions of competition.[85] In addition, Member States are also bound to report every six months on the evolution of the scheme and the individual restructuring plans for the beneficiaries.

**23.** Generally, the Commission has been reluctant to allow Member States to buy financial assets from banks outright because of the valuation difficulties caused by the credit crisis and the perceived higher risk of providing undue advantages to banks. In the case of Spain, the Commission's reluctance was overcome by limiting such purchase to highly rated covered bonds and asset backed securities by means of an auction process.[86]

**24.** However, the main difficulty with recapitalization schemes has been the calculation of their proper remuneration rate.[87] At the request of Member States, the Commission has endeavored to give further guidance in that respect, in the form of a dedicated Communication (the "Recapitalization Communication").[88] The difficulty stems from the diversity in the possible objectives pursued by recapitalization schemes as they may aim to: (i) avoid the insolvency of individual credit institutions; (ii) strengthen banks' capital ratios in order to facilitate the recovery of inter-bank lending; and/or (iii) prevent credit supply restrictions to the "real economy". In turn, they may raise different competition and systemic concerns, either because they may result in undue competitive advantages and/or may frustrate the return to normal market functioning. A proper remuneration rate, combined with behavioral safeguards, is a critical tool to arbitrate among those various objectives and concerns. The Recapitalization Communication emphasizes two key elements to factor into

76 *Banking Communication*, §24. See, *e.g.*, Ireland, §§65-66; Denmark, §§17-18; the Netherlands, §§34-36 (the guarantee schemes can be extended, if necessary, upon review and authorization by the Commission).

77 In Denmark, the general remedial scheme is funded partly by the participating banks and partly by the Danish banking association, as well as by the State as far as the winding-up vehicle is concerned (§§10-11).

78 The Commission concedes that the payment of such remuneration may be deferred until beneficiaries are effectively in a position to do so. See, *e.g.*, Ireland, §§20-23 and 68-69, which provides for a claw-back clause to collect the remuneration over time "*in a manner consistent with the* [covered institutions] *long-term viability and sustainability*". Generally, fees are based on market benchmarks comprising various elements including a measure of institution-specific risk and a fixed mark-up designed to compensate the State (see, *e.g.*, UK, §§ 15-17 and 61). See also: Germany, §§22 and 66 (premium corresponding to an interest rate set 0.5% above each institution's credit default swap spread); the Netherlands, §§10 and 39. Sweden made an express reference to the October 20, 2008 "*Recommendations on government guarantees on bank debt*" of the European Central Bank (§§11 and 45-47). See also Finland, §§9-12 and 41-43; Portugal, §13; Slovenia and Spain.

79 *Banking Communication*, §§26-27. See, ***e.g.***, Ireland, §§24-28 and 71-72; Denmark, §§14-15 and 52-53; UK, §§20 and 62; Germany, §23 and 67; Sweden, §§13-14 and 4; Finland, §§14-15 (the Finnish Financial Supervisory Authority is responsible for monitoring the growth of balance sheet volume and reporting back to the government; additional constraints are to be included in the bylaws of banks participating in the guarantee scheme); the Netherlands, §§40-45; Portugal, §§18-19. Note that the benefit of a guarantee scheme can also be made conditional on other requirements, *e.g.*, related to management remuneration or bonus payments (see, *e.g.*, Latvia).

80 See Finland, Germany, Greece, Italy, the Netherlands, Sweden, UK.

81 *Banking Communication*, §§35-40.

82 On the proper remuneration rate of capital injections, see below.

83 See, *contra*, UK, §10. In the *ING* case, the securities acquired by the Dutch State do not carry voting rights but the State is entitled to two representatives at ING's Supervisory Board with veto rights on a list of important Board decisions (ING, §§16-19; idem in the *Aegon* case, see §22). Assets purchases or swaps by or with Member States also require a valuation that reflects their underlying risks (*Banking Communication*, §40 – see, e.g., Germany, §29). For a discussion on assets purchase, see Spain and for assets swaps, see Italy and Greece.

84 The UK Bank Recapitalization Scheme also imposes, *e.g.*, no cash bonuses to be paid to Directors for the current year's performance, the appointment of news independent directors, commitments to maintain the availability and active marketing of competitively priced lending to homeowners and to small business and to support schemes to help people struggling with mortgage payments to stay in their homes (UK, §12). The German scheme includes similar behavioral constraints (*e.g.*, with respect to executives' remuneration and bonuses) and conditions the distribution of dividends to shareholders to the sale of the Recapitalization Fund's shares to a third party or the repurchase thereof (§§14 and 57). The French capital-injection scheme also requires beneficiary banks to adopt measures concerning the remuneration of senior management and market operators (including traders) and limiting severance packages for executives (see Commission press-release IP/08/1900 of December 8, 2008: "*State aid: Commission authorizes French scheme to inject capital into certain banks*").

85 UK, §51. Note that competitors of *Fortis Bank* and *KBC* in Belgium and of *ABN AMRO* in the Netherlands have already complained that those banks introduced more aggressive offers after having benefited from capital injections by the Belgian, French, Dutch and/or Luxemburg authorities.

86 See Commission press-release IP/08/1630 of November 4, 2008 : "*State aid: Commission approves Spanish fund for acquisition of financial assets from financial institutions*".

87 Remuneration is no more an issue, however, when State capital injections are combined, on equal terms, with significant participations (30% or more) by private investors. In those circumstances, the Commission accepts the remuneration set in the deal as reflecting the market price. See the Recapitalization Communication, §21.

88 "*Communication from the Commission – The recapitalization of financial institutions in the current financial crisis : limitation of aid to the minimum necessary and safeguards against undue distortions of competition*", December 5, 2008, C(2008) 8259 final.

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the remuneration rate of capital injections: (i) closeness to market prices; and (ii) exit incentives, *i.e.*, incentives to redeem the State as soon as possible.[89] In turn, it introduces a distinction between fundamentally sound, well-performing banks, on the one hand, and distressed, less-performing banks, on the other hand, the lower risk profile of the former category justifying a lower remuneration rate than for credit institutions belonging to the latter.

**25.** In a nutshell, the remuneration rate for fundamentally sound banks is assessed according to a methodology devised by the Governing Council of the European Central Bank.[90] That methodology provides for a price corridor of 7 to 9.3% within which an "entry level" rate is set on the basis of different parameters:[91] (i) the type of capital chosen (the lower the subordination, the lower the required remuneration in the price corridor); (ii) appropriate benchmark risk-free interest rate; and (iii) the individual risk profile at national level of all eligible financial institutions (including both financially sound and distressed banks).[92] The "entry level" rate ought then to be adjusted upwards to incentivize exit when the market so allows. In that respect, pricing structures reflecting an increase in the remuneration rate over time or linking the payment of dividends to an obligatory remuneration of the State that increases over time, are viewed positively.[93] For reasons of administrative convenience, Member States may also resort to alternative pricing mechanisms leading to a total expected annualized return for all banks participating in the scheme "*sufficiently high to cater for the variety of banks and the incentive to exit*",[94] *i.e.*, so far, at least 10%.[95] In addition, capital injections in fundamentally sound banks must be tied to "*effective and enforceable national safeguards* [to] *ensure that the injected capital is used to sustain lending to the real economy*".[96] Likewise, they are linked to an obligation to report periodically on the long term viability of the beneficiary and the steps taken to limit distortions of competition.[97] Capital injections in ailing banks, on the other hand, should be set at a higher rate and combined either with a winding-up or a far-reaching restructuring plan, including management and corporate governance changes.[98]

**26.** In the early cases of the UK and German recapitalization schemes, the Commission accepted flat remuneration levels of 12 and 10%, respectively, while in the ING case, it considered that the return on the State's investment was likely to be in excess of 10%. Following the publication of the Recapitalization Communication, the Commission accepted lower remuneration rates, such as: (i) 8% on average for a capital-injection scheme set up by France and aimed to stabilize financial markets and incentivize French banks to increase lending to the real economy;[99] and (ii) 8.8% for the capital injection into KBC by the Belgian State. In turn, the UK and German schemes were modified to reflect the methodology set forth in the Recapitalization Communication.[100] As far as exit incentives are concerned, the modified German scheme provides for either a dividend ban or a 0.5% remuneration rate increase per year over 5 years. Alternatively, the capital injections into KBC, Aegon and SNS REAAL provide for a remuneration paid only if a dividend is distributed on ordinary shares, in the form of a coupon equal to the higher of: (i) a flat amount per security; or (ii) a premium on the dividend paid on the ordinary shares increasing over time.[101]

**27.** The benefit of a recapitalization plan, like the activation of a guarantee, must be followed by a restructuring plan within six months, to be separately examined by the Commission.[102] In the alternative, it may be followed by or combined with a *controlled winding-up*, possibly involving another contribution of public funds,[103] *e.g.*, to reimburse certain creditors of the liquidated bank, cover debts or guarantee against the default of certain assets. In the event of a winding-up, the Commission insists on the need to exclude shareholders from the benefit of any aid, to carry out the liquidation under strict time limits and to proceed to the sale of relevant assets by means of an open and non-discriminatory tender procedure with the aim of maximizing the sales price.[104] The best example of such winding-up process so far is that of *Roskilde Bank*,[105] following the failure of the rescue plan analyzed above (see Section I.1.1). Roskilde was taken over by a NewCo owned by the Danish central bank and the Danish banking association, which was to remain active as a

89 *Recapitalization Communication*, §19.

90 Recommendations of the ECB Governing Council on the pricing of recapitalizations, November 20, 2008 (available at http://www.ecb.int/pub/pdf/other/recommendations_on_pricing_for_recapitalisationsen.pdf, last visited December 22, 2008).

91 The ECB methodology uses average values of relevant parameters such as government bond yields, CDS spreads and equity risk premia to determine a corridor with a 7% lower bound representing the average required rate of return on preferred shares with features similar to those of subordinated debt and a 9.3% higher bound representing the average required rate of return on ordinary shares relating to Euro area banks (see *Recapitalization Communication*, §27).

92 *Recapitalization Communication*, §28. Member States may also include step-up or payback clauses in their pricing formula. Alternative pricing methodologies are also accepted provided they lead to higher remunerations rates than achieved by means of the ECB one.

93 *Recapitalization Communication*, §§31-32.

94 *Idem*, §46.

95 *Idem*, footnote 22, as confirmed by the modifications accepted to the German recapitalization scheme (see Commission press-release IP/08/1966 of December 12, 2008: "*State aid : Commission approves modifications to German financial rescue scheme*"). See also the commitment entered into by the Dutch authorities in the *Aegon* case to achieve an overall return on the securities of at least 10% (§31).

96 *Idem*, §39.

97 See, *e.g.*, Aegon, §58.

98 *Idem*, §§43-45.

99 Commission press-release IP/08/1900 of December 8, 2008: "*State aid: Commission authorizes French scheme to inject capital into certain banks*".

100 Commission press-release IP/08/1966 of December 12, 2008: "*State aid: Commission approves modifications to German financial rescue scheme*".; Commission press-release IP/08/2057 of December 23, 2008: "*State aid: Commission approves modifications to UK financial support measures to the banking industry*". See also the Italian scheme approved on December 23, 2008 (Commission press-release IP/08/2059: "*State aid: Commission approves Italian recapitalization scheme for financial institutions*".

101 See, *e.g.*, Aegon, §13.

102 *Banking Communication*, §§30-35. See, *e.g.*, Ireland, §73; UK, §69; Germany, §§18, 24, 58; Sweden, §49, Finland, §45; the Netherlands, §§46-47.

103 However, a private sector solution must first be considered before committing any additional state resources (see, *e.g.*, Denmark, §57).

104 *Banking Communication*, §§46-50.

105 See Commission press-release IP/08/1633 of November 5, 2008: "*State aid: Commission approves Danish liquidation aid for Roskilde Bank*".

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bank for the time necessary to complete the sale of the Roskilde's branches and the redemption of all its senior creditors (with the exception of hybrid and subordinated loans). The Commission was satisfied eventually that the sale of the branches had been achieved at the maximum possible market price and that the corresponding assets and liabilities were transferred to the buyers without any aid attached. The redemption of creditors was deemed necessary to preserve the financial stability of the Danish financial system and was approved pursuant to Article 87(3)(b) EC.

## 2. Merger control: Consistency at EU level vs. flexibility at national level

**28.** On the merger control front, the activity of the Commission in direct relation with the financial crisis has been relatively limited, as few cross-border rescue acquisitions have taken place within Europe so far.[106] Since most markets involved in banking and insurance mergers are still considered national in scope and few consolidated European players have emerged to date,[107] those transactions are not likely to raise major competition issues.[108] Commissioner Kroes has indicated her readiness to take into account "*where applicable, the failing firm defense*",[109] but no instance of reliance on that theory in relation to the financial crisis has been reported yet. Interestingly, in the framework of the nationalization of banks, in particular that of Fortis Bank Nederland and ABN AMRO Bank Nederland by the Dutch authorities, the Commission has insisted for the new owner, *i.e.*, the Dutch State, to comply with the merger control commitments entered into by Fortis group at the time of the ABN Amro acquisition. In particular, the Commission has emphasized that pending an agreement as to the implementation of those commitments by the Dutch State, no merger of the two banks could take place.[110] Like for State aid, the Commission therefore intends "*to continue applying existing* [merger control] *rules*" to cases brought in the framework of the crisis.[111]

**29.** At national level, however, a number of rescue acquisitions have taken place, some of which raising the possibility of anticompetitive effects. This has been particularly the case in the UK in relation to the acquisition of HBOS by Lloyds. The terms of that transaction were finalized on October 13, 2008 and provided for the intervention of the UK Bank Recapitalization Scheme. On October 24, 2008, the Office of Fair Trading ("OFT") reported to the UK Secretary of State for Business that the acquisition was likely to create a so-called "*relevant merger situation*" warranting further inquiry by the UK Competition Commission. In particular, it was likely to result in a substantial lessening of competition in markets such as personal current accounts, banking services to SMEs in Scotland and mortgages. In the meantime, the UK government introduced a bill providing for the "*stability of the UK financial system*" to be introduced as a policy exception, along with national security, to the referral of relevant merger situations to the Competition Commission under Section 58 of the Enterprise Act 2002.[112] The bill was turned into law and came into force on October 24, 2008. A few days later, on October 31, 2008, the Secretary of State relied on that new provision to justify its decision not to refer the merger between Lloyds and HBOS before the Competition Commission for further inquiry. In a nine page decision citing extensively submissions made by the Bank of England, the Financial Services Authority and the UK Treasury before the OFT, Lord Mandelson explained that the benefits of the transaction for the stability of the UK financial system outweighed the potential for the merger to result in anticompetitive outcomes, which was therefore deemed to be in the public interest.[113]

**30.** The least to say is that the introduction of the stability of the financial market as a new "specified consideration" under Section 58 for not referring a merger to the Competition Commission is a bold move by the UK authorities, reflecting a pragmatic approach to coping with the financial crisis. Merger control is a shared competence within the EU; the UK authorities were therefore entitled, in theory, to proceed as they did. Nonetheless, the decision of the Secretary of State was challenged before the Competition Appeal Tribunal ("CAT") by a group of account holders, bank employees and business people, called the "Merger Action Group",[114] as a disproportionate and therefore unlawful use of the Secretary of State's discretion. At the core of the dispute stood a conflict between the opinions of the OFT and the Financial Services Authority as to the counterfactual to the merger, namely the possibility for HBOS to be "rescued" by the UK government by means of, *e.g.*, a capital injection and/or a guarantee, and to remain an independent source of competitive pressure in the future. In turn, the plaintiffs claimed that the Financial Services Authority's statement before the OFT was filled with

[106] Only three cases are so far related to the financial crisis: Commission decision of September 16, 2008 in Case COMP/M.5293 – *Santander/Alliance & Leicester* (not yet published, see press-release IP/08/1325); Commission Decision of December 3, 2008 in Case COMP/M.5384 – *BNP Paribas/Fortis* (not yet published, see press-release IP/08/1882); Commission Decision of December 18, 2008 in Case COMP/M.5363 – *Santander/Bradford & Bingley Assets* (not yet published, see press-release IP/08/2012). See also Commission Decision of December 4, 2008 in Case COMP/M.5361 – *Bank of America/Merill Lynch*, C(2008) 8105.

[107] Markets for retail banking (incl. products for corporate customers) and insurance products, in particular, are still considered national in scope (for a recent account, see, *e.g.*, Commission decision of October 3, 2007 in Case COMP/M.4844 – *Fortis/ABN AMRO Assets*, §§80, 86 and 92).

[108] In the case of *BNP Paribas/Fortis*, for example, section 1.2 of the Form CO reports that "*BNP Paribas mainly operates in France and Italy, while Fortis Entities mainly operate in Belgium and Luxembourg*" (see http://ec.europa.eu/comm/competition/mergers/cases/additional_data/779467.pdf).

[109] N. Kroes, "*Dealing with the current financial crisis*", Address before the Economic and Monetary Affairs Committee, European Parliament, Brussels, October 6, 2008 (SPEECH/08/498, available at http://ec.europa.eu/comm/competition/speeches/index_2008.html).

[110] See Commission press-release MEMO/08/729 of November 21, 2008: "*Mergers: Commission closely monitoring Dutch State plans as regards Fortis Bank Nederland and ABN AMRO Bank Nederland*".

[111] N. Kroes, "*Dealing with the current financial crisis*", *op.cit.*, note 109 above.

[112] See "The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008", available at http://www.opsi.gov.uk/si/si2008/uksi_20082645_en_1#f00001 (last checked on December 1, 2008).

[113] Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the Enterprise Act 2002, October 31, 2008 (available at http://www.berr.gov.uk/files/file48745.pdf, last checked on December 1, 2008).

[114] See the submission available at http://www.mergeractiongroup.org.uk/ (last visited December 2, 2008).

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factual and legal errors and that the Secretary of State relied excessively on its findings whereas the OFT's report should have been given precedence. The action was dismissed by the CAT on December 10, 2008, after a two days hearing.[115] Generally, though, concerns remain as to the way the Secretary of State is likely to use the powers provided by the amended Section 58 in the future. From an EU single market perspective, the key element is the extent to which the new exception is applied consistently and remains truly exceptional, *e.g.*, by referring to "systemic standards" similar to those used by the Commission in assessing the compatibility of State aids with Article 87(3)(b) EC.

**31.** The consistency displayed so far by the Commission in the enforcement of the relevant EC competition law principles is part of a general aim to use those principles "*as a stabilizing force throughout this crisis*".[116] In the same way, Commissioner Kroes has repeatedly stated that the competition rules were part of the solution to the crisis, not part of the problem.[117] Indeed, from an institutional point of view, in the absence of a central EU Treasury competent to propose and implement solutions to solvency issues faced by European financial institutions, it is primarily through the review of national rescue measures pursuant to EC State aid rules that the Commission has been formally involved in the design and implementation of remedial measures to the financial crisis. In turn, from a substantive point of view, the application of State aid principles to national rescue measures allows the Commission to ensure that general EU law principles, such as non-discrimination and proportionality, are complied with. In other words, by means of the enforcement of EC competition law the Commission is able to ensure that the "European interest" is taken into account by Member States in dealing with the crisis. With money flowing from banks in trouble to those benefiting from State guarantees, the risk of national measures exporting problems to other Member States appears indeed very tangible.[118] In addition, by keeping track of all national rescue plans and individual remedial measures in the exercise of its State aid competence, the Commission is also able to advise on their compatibility with the concerted action plan agreed upon by the European Council on October 15, 2008, thus ensuring a *de facto* coordination among national measures in spite of a lack of express competence in the area of economic policy.

## II. Policy option 2: "Flexibility on the means"

**32.** The consistency in the principles underlying the enforcement of EC competition law to issues related to the financial crisis stands in contrast with the flexibility introduced at various levels in the implementation of those principles. Again, this is apparent primarily in the field of State aid but also in the merger control area. Such flexibility has been a key element in the Commission's strategy to use competition law enforcement as a stabilization factor. In particular, the Commission has endeavored to provide legal certainty to market operators by acting swiftly according to exceptional procedures,[119] thereby contributing to restore confidence in the market, on the one hand, while preserving the possibility and legitimacy of its own role in the management of the crisis, on the other hand.

### 1. State aid: Swift decisions to ensure legal certainty

**33.** *Notification obligation, duration of proceedings and legal certainty*. Pursuant to Article 88(3) EC, Member States have the duty to notify any plans to grant State aid to the Commission, prior to the implementation thereof. In addition, aid cannot be put into effect before the adoption of an authorization decision by the Commission.[120] A failure to notify an aid or the implementation thereof pending review may, under the current case-law of the EU Courts, have drastic consequences for the recipient(s). In a nutshell, if national authorities act in breach of the notification and/or standstill obligations provided for in Article 88(3) EC, the validity of measures giving rise to the aid is affected and national courts are bound to order the cessation of the aid, the recovery of any sums already paid and damages to compensate the possible harm suffered by third-parties.[121] Needless to say that, in particular in the context of the current crisis, such prospects are rather gloomy. However, they represent a concrete threat to the effectiveness of rescue operations, as apparent from the challenge brought by shareholders against the nationalization of Fortis Bank Belgium, followed by a sale to BNP Paribas, precisely on grounds of lack of notification and improper implementation of what they perceive as unlawful aid. Hence the critical need to ensure legal certainty for market operators.

**34.** Legal certainty is also conditioned on the rapidity of the Commission's authorization process. Under normal circumstances, though, the Commission is supposed to carry a

115 Judgment of December 10, 2008 in *Merger Action Group v. Secretary of State for Business*, [2008] CAT 36 (available at http://www.catribunal.org.uk/237-3402/1107-4-10-08-Merger-Action-Group.html).

116 N. Kroes, "*Dealing with the current financial crisis*", *op.cit.*, note 109 above.

117 See N. Kroes, "*Competition policy and the financial/banking crisis: taking action*", open letter available at http://ec.europa.eu/commission_barroso/kroes/financial_crisis_en.html, as repeated, *e.g.*, in Commission press-release IP/08/1453 of October 2, 2008, "*State aid: Commission approves German rescue aid package for Hypo Real Estate Holding AG*" and again on December 2, 2008 in a briefing with EU Economics and Finance Ministers (see MEMO/08/757).

118 See N. Kroes' briefing to EU Economics and Finance Minister on December 2, 2008 (MEMO/08/757).

119 The Commission appears to have also displayed some flexibility in opening formal proceedings into relative sketchy restructuring plans, thereby allowing rescue measures to remain in effect pursuant to §26 of the Guidelines. See, *e.g.*, Commission press-release IP/08/1435 of October 1, 2008: "*State aid: Commission opens in-depth investigation into restructuring of WestLB*".

120 Article 3 of Regulation 659/99 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] *O.J.* L83/1.

121 See, *e.g.*, Case 120/73, *Gebrüder Lorenz GmbH/Germany and Rhénanie-Palatinat*, [1973] ECR p. 1471, §8; Case C-354/90, *FNCE/France*, [1991] ECR I-5505, §12; Case C-39/94, *SFEI et al./La Poste et al.*, [1996] ECR I-3547, §44 ; Case C-199/06, *CELF et al./SIDE*, [2008] ECR I469, §55.

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"preliminary examination" of any notified aid within a two months period and then decide whether to authorize the aid or to initiate a formal investigation procedure.[122] In the case of rescue aid, the Commission already recognized the need for some flexibility and therefore endeavors to take a decision within one month, but only if the aid does not exceed €10 million.[123] As a result, it is not uncommon for State aid review procedures to last several months. Obviously, those time frames are not suited to deal with emergency rescue operations or the adoption of urgent multi-billion remedial plans. Had the Commission not been able or willing to take drastic measure to speed up the review process, it would have been quickly sidelined by Member States and the future of State aid law enforcement would have been significantly jeopardized. As further discussed below, the exceptional procedural framework set forth by the Commission, notably by means of a delegation of decisional power from the College of Commissioners to Commissioner Kroes, now allows for the approval of State aid linked to the financial crisis in a matter of days, if not hours. For example, the Commission was able to decide on the compatibility with State aid principles of the package of measures designed to ensure the orderly winding down of Bradford & Bingley, within 24 hours.[124] The effectiveness of the Commission's action in providing legal certainty is naturally conditional upon close cooperation on the part of Member States, *i.e.*, through the involvement of the Commission in the design of the State aid plans and the timely notification thereof.

**35.** *Delegation of powers to Commissioner Kroes.* Commission decisions, such as those taken in the area of EC competition law enforcement, must be adopted by the College of Commissioners acting collectively.[125] That authority can be delegated to one or more Commissioners, subject to strict restrictions and conditions.[126] In a move that is truly exceptional as far as the adoption of final decisions in the area of competition law enforcement is concerned, the Commission has, on October 1, 2008,[127] decided to empower Commissioner Kroes, in agreement with President Barroso and Commissioners Almunia (Economic and Monetary Affairs) and McCreevy (Internal Market), with responsibility to authorize so-called "emergency rescue measures". The empowerment is limited to positive decisions concerning measures in favor of financial institutions facing serious difficulties due to the "*current exceptional market situation*" and "*with a view to prevent harmful spill-overs on the financial system or the economy as a whole*".[128] It is valid for three months, *i.e.*, until December 31, 2008, and is conditioned upon: (i) the certification of the urgency of the measures to be adopted by a reasoned letter of the governor of the central bank of the Member State concerned;[129] and (ii) prior approval by the Commission's Legal Service, DG ECFIN and DG Markt.[130]

**36.** The empowerment is expressly designed to allow the Commission to take decisions "*if necessary within hours*" and "*at any moment in time in particular over the weekend, during the evening or at night and also on bank holidays*" in order to "*positively contribute to the resolution of the current crisis*".[131] It proceeds from the Commission's acknowledgment of the need to reconcile "*the legitimate interests of Member States to prevent [...] potentially harmful spill-over effects in the financial sector*", "*the need for effective State aid control*" and "*the need [for private undertaking participating in rescue operations, e.g., the acquirer of a financial institution in difficulty] to obtain as quickly as possible a degree of legal certainty [...] as to the State aid law implications of envisaged or adopted rescue measures*".[132] In the eight weeks following the empowerment, the Commission adopted more than 20 decisions, which is by all means remarkable. Meanwhile, the Commission has established an Economic Crisis Team to assist Member States in the design of their economic recovery plans.[133]

## 2. Merger control: Allowing risk management pending merger control review

**37.** In the field of merger control, the Commission has also announced its readiness to grant derogations to the standstill obligation enshrined in Article 7 of the European merger control regulation (ECMR) "*where there is urgency and where there are no 'a priori' competition concerns*".[134] In effect,

122 Article 4 of Regulation 659/99 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] *O.J.* L83/1.

123 Guidelines, §30. Note that, during the Phase I period, the Commission was able to adopt decisions within days or weeks of the notification, but often still weeks or months after having been communicated for the first time with background information concerning the envisaged rescue measures (see, *e.g.*, Case NN 70/2007 *Northern Rock*, decided on December 5, 2007 following a notification filed on November 26, 2007 but with background information already provided to the Commission on September 28 and October 14, 2007).

124 See "*State aid: Commission approves UK rescue aid package for Bradford & Bingley*", European Commission press-release IP/08/1437 (October 1, 2008).

125 See Articles 1 and 4 of the Commission's Rules of Procedure as modified on November 15, 2005 [2005] *O.J.* L 347/83.

126 *Idem*, Article 13.

127 Minutes of the 1845th meeting of the Commission, October 1, 2008, PV(2008) 1845 final, §10.4.

128 Communication from the President in agreement with Ms Kroes – Temporary empowerment, SEC(2008) 2575/2. Positive decisions include: (i) decisions finding that rescue measure does not constitute aid pursuant to Article 4(2) of Regulation 659/1999; (ii) decisions not to raise objections against a notified aid pursuant to Article 4(3) of Regulation 659/1999; and (iii) decisions not to raise objections against a non notified (so-called "unlawful") aid pursuant to Articles 13(1) and 4(3) of Regulation 659/1999.

129 See, *e.g.*, Sweden, §23; Germany, §35; Finland, §20, the Netherlands, §26; Portugal, §30.

130 Note that the empowerment decision originally provided for the sole prior approval of the Legal Service; it was then amended to include prior approval by DG ECFIN and DG MARKT.

131 Communication from the President in agreement with Ms Kroes – Temporary empowerment, SEC(2008) 2575/2. See, *e.g.*, the German aid scheme to the "real economy" approved on December 30, 2008, *i.e.*, "*within a matter of days and during the Christmas break*" (press-release IP/08/2063).

132 *Idem*.

133 See http://ec.europa.eu/competition/contacts/stateaid_mail.html. The primary contact point for State aids designed for the financial sector is DG COMP's Financial Services Directorate.

134 N. Kroes, "*Dealing with the current financial crisis*", *op.cit.*, note 109 above.

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such derogation enables the immediate implementation of (part of) transactions that are part of rescue operations, *i.e.*, pending their merger control clearance. Under the current circumstances, it is easy to imagine that acquirers would typically request at least the ability to monitor the nature and structure of their target's risks portfolio and to take appropriate measures to protect the value of certain assets. For example, BNP Paribas is reported to have been overseeing Fortis Bank Belgium' trading floor activities, pending approval of the transaction by the Commission, and to have already injected substantial amounts into Fortis Bank Belgium in order to keep the bank afloat. Generally, although the Commission has little possibility to reduce the duration of the examination of merger control notifications, it may display some flexibility with respect to the scope of the information to be provided by merging parties, thus in effect lightening the notification burden on the parties. The scope of any waiver is of course dependent on the existence of significant overlaps in the parties' activities.

**38.** The flexibility introduced in relation to the implementation of EC competition rules reflects the Commission's willingness to "*react with the adequate responsiveness to the current situation*" and to "*ensur*[e] *that measures designed for financial stability can be implemented with legal certainty*".[135] Member States have both praised the Commission's reactivity and encouraged continuous flexibility in its action.[136] Obviously, this has put some strains on the Commission's resources, constraining Commissioner Kroes' cabinet members and competent services to work virtually 24/7. The situation is unlikely to improve in the coming months given the need to ensure the follow up of the various national rescue plans and restructuring measures adopted by Member States. However, it is the price to pay for the Commission to remain involved in the management of the financial crisis and, as noted, to ensure that the "European interest" is taken into account by Member States in dealing with the crisis.

## Conclusion

**39.** The financial crisis, which is unprecedented in many respects, raises a myriad of issues, including in relation to the implementation of EC competition law. Few are truly novel but most carry a particular sensitivity given the circumstances. And this may be just a start. Spreading to the economy as a whole, the crisis is entering a Phase III that will involve economic stimulus packages likely to raise further issues under State aid law (and, possibly, under trade/WTO law),[137] while consolidations between/among banks and/or with other financial institutions may become a source of concerns under merger control rules. As is well known, times of crises are also fertile in collusive practices. So far, as noted, the crisis has not forced the Commission to bend the substance of the law: the enforcement of EC competition law has been largely consistent with established principles, which tends to demonstrate that those principles are sufficiently flexible in themselves to accommodate exceptional and country-specific circumstances or, in the words of Commissioner Kroes: "*sophisticated enough to cope with the differences and strong enough to cope with the difficulties*".[138] It is in relation to the implementation of those principles that the Commission has been the most flexible, and rightly so since such flexibility conditioned both the possibility and legitimacy of its involvement into the management of the crisis. ■

135 See, respectively, N. Kroes, "*Dealing with the current financial crisis*" (*op.cit.*, note 109 above) and Commission press-release IP/08/1453 of October 2, 2008 in "*State aid: Commission approves German rescue aid package for Hypo Real Estate Holding AG*".

136 See, *e.g.*, Conclusions of the Ecofin Council of October 7, 2008 (doc. 13930/08, Presse 284) and European Council of October 15 and 16, 2008, Presidency Conclusions (doc. 14368/08), §5.

137 See, in that respect, the Communication from the Commission – Temporary framework for State aid measures to support access to finance in the current financial and economic crisis, December 17, 2008. In that Communication, the Commission acknowledges the need for new temporary State aid as "*the full impact of the financial crisis on the real economy is now being felt*". The first aid scheme complying with that Communication was approved on December 30, 2008 (see Commission press-release IP/08/2063: "*State aid: Commission approves first real economy crisis measures*"). The Communication complements the European Economic Recovery Plan unveiled by the Commission on November 26, 2008.

138 N. Kroes, "*The role of State aid in tackling the financial & economic crisisState aid: Commission approves Latvian support scheme for banks*".

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## FINANCIAL CRISIS –
## REMEDIAL MEASURES AUTHORIZED PURSUANT TO ARTICLE 87(3)(B) EC*

| Member State | Guarantees | Recapitalization | Winding-up | Others |
|---|---|---|---|---|
| **AUSTRIA** | *N 557/2008*: the "Interbankmarktstärkungsgesetz" provides for the setting up of a Clearingbank aimed to collect funds with the view of guaranteeing up to €75 in new and existing wholesale debt. | *N 557/2008*: the "Finanzmarktstabilitätsgesetz" introduces various recapitalization measures such as State guarantees covering the value of certain assets, loans and recapitalizations for a total budget of €15 billion. | | |
| **BELGIUM** | *N 574/2008*: State guarantee of Fortis' short and medium term wholesale debt for a period of six months (renewable upon Commission's approval).<br>*NN 45/2008*: State guarantee of Dexia's newly issued short and medium term debt, valid until October 31, 2009. | *NN 42/2008, NN 46/2008 and NN 53/2008/A*: Capital injection in and liquidity assistance to Fortis between September 29 and October 5, 2008 (*i.e.*, prior to its sale to BNP Paribas), combined with the divestment of its Dutch operations.<br>*N 602/2008*: €3.5 billion capital injection in KBC Group by means of the issuance of special securities qualifying as core Tier 1 capital. | | |
| **DENMARK** | *NN 51/2008*: The Financial Stability Act 2008 provides for guarantee arrangements covering existing deposits to supplement the Danish Deposit Guarantee Scheme. It excludes covered bonds and subordinated debt. | *NN 64/2008*: €225 million emergency liquidity assistance from the Swedish central bank converted into an emergency loan from the National Debt Office, which led subsequently to the nationalization of Carnegie Bank. | *NN 51/2008*: The Financial Stability Act sets up a winding up company vehicle owned and capitalized by the State.<br>*NN 39/2008*: Liquidation of Roskilde Bank pursued by means of a takeover by the Danish central bank and the Danish banking association, which proceeded to the sale of branches and the redemption of all senior creditors of the bank (except for hybrid and subordinated loan capital). | |

* For an up-dated version as of 21 January 2009, see Chronique Aides d'Etat, J. Derenne, *Concurrences* N° 1-2009.

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## FINANCIAL CRISIS –
## REMEDIAL MEASURES AUTHORIZED PURSUANT TO ARTICLE 87(3)(B) EC

| Member State | Guarantees | Recapitalization | Winding-up | Others |
|---|---|---|---|---|
| **FINLAND** | *N 567/2008*: State guarantee of new short and medium term debt (issued over a six months period, to be prolonged if necessary until December 31, 2009), valid for up to 36 months (five years for covered bonds) and capped at €50 billion. | | | |
| **FRANCE** | *N 548/2008*: Setting up of a public company (the “SRAEC” for “refinancing company for the activities of credit institutions”) which will issue securities guaranteed by the State with a view to making loans up to €265 billion to credit institutions against collateral.<br><br>*NN 45/2008*: State guarantee of Dexia’s newly issued short and medium term debt, valid until October 31, 2009. | *N 618/2008*. Capital-injection scheme for “fundamentally sound” banks, capped at €21 billion, aimed to incentivize beneficiaries to continue financing the economy. The scheme provides for the purchase of newly issued subordinated debt securities classified as non-core Tier 1 capital, to be remunerated at an average 8% rate, by a State-owned investment vehicle.<br><br>*NN 42/2008, NN 46/2008 and NN 53/2008/A*: Capital injection in and liquidity assistance to Fortis between September 29 and October 5, 2008 (*i.e.*, prior to its sale to BNP Paribas), combined with the divestment of its Dutch operations. | | |
| **GERMANY** | *N 512/2008*: Financial Market Stabilization Act providing for a €400 billion state guarantee of new debt instruments (issued over a six months period, possibly prolonged until December 31, 2009) with a term of up to 36 months.<br><br>*N 655/2008*: Guarantees provided by the Länders of Lower Saxony and Saxony-Anhalt for short and medium term debt issued by a special purpose vehicle to cover the medium-term refinancing needs of NordLB.<br><br>*N 639/2008*: State guarantee of new short and medium term debt issued by IKB to cover its medium-term refinancing needs up to €5 billion. | *N 512/2008*: Financial Market Stabilization Act setting up an €80 billion stabilization fund for recapitalization and assets swap purposes (capped at €10 billion per individual institution), as modified (*N 625/2008*).<br><br>*N 615/2008*: €10 billion capital injection into BayernLB by the state of Bavaria combined with a risk shield of €4.8 billion to cover part of the bank’s assets-backed securities portfolio. | | *N 661/2008 and N 668/2008*: reduced-interest rate loans up to €50 million for mid-size enterprises and direct aids up to €500,000 for firms in need. |

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## Financial Crisis – Remedial Measures authorized pursuant to Article 87(3)(b) EC

| Member State | Guarantees | Recapitalization | Winding-up | Others |
| --- | --- | --- | --- | --- |
| **Greece** | *N 560/2008*: State guarantee of new short and medium term debt issued over a six months period starting November 19, 2008. | *N 560/2008*: Recapitalization scheme consisting in capital injections in exchange for preferential shares remunerated with a 10% interest. | | *N 560/2008*: Securities scheme enabling credit institutions to borrow government bonds against collateral (and a fee) to enhance their access to liquidity, in particular with the European Central Bank. |
| **Ireland** | *NN 48/2008*: The Credit Institutions Financial Support Act 2008 provides for guarantee arrangements covering retail and corporate deposits, interbank deposits, senior unsecured debt, asset covered securities and dated subordinated debt (lower tier 2), for a two-year period. | *NN 48/2008*: “Financial support”, including the exchange of assets, is foreseen under the Credit Institutions Financial Support Act 2008 | | *NN 48/2008*: Loans are foreseen under the Credit Institutions Financial Support Act 2008. |
| **Italy** | *N 520a/2008*: State guarantee: (i) of banks’ newly issued short and medium term debt; and (ii) in favor of third-parties lending high-grade assets to banks to get refinancing from the European Central Bank. | *N 520a/2008*: Six-month renewable swap between banks’ debt certificates and Treasury bills whose interest rate and maturity match perfectly (to ensure identical cash flow and straightforward pricing).<br>*N 648/2008*: €15 to 20 billion committed to subscribe subordinated debt instruments qualifying as core Tier 1 capital | | *N 520a/2008*: One-month €40 billion swap facility set up by the Italian central bank to allow a temporary exchange of governments bonds held by the central bank with financial instruments held by banks and rated at least BBB. |
| **Latvia** | *NN 68/2008*: State guarantee of JSC Parex Banka’s existing and newly issued debt.<br>*N 638/2008*: State guarantee of a broad range of liabilities with a maximum maturity of three years, valid until June 23, 2009 and capped at 10% of Latvia’s GDP | | | *NN 68/2008*: State loans to JSC Parex Banka with a maturity of three to five years. |

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## Financial Crisis – Remedial Measures authorized pursuant to Article 87(3)(b) EC

| Member State | Guarantees | Recapitalization | Winding -up | Others |
|---|---|---|---|---|
| **Luxembourg** | *NN 45/2008*: State guarantee of Dexia's newly issued short and medium term debt, valid until October 31, 2009. | *NN 42/2008, NN 46/2008 and NN 53/2008/A*: Capital injection in and liquidity assistance to Fortis between September 29 and October 5, 2008 (*i.e.*, prior to its sale to BNP Paribas), combined with the divestment of its Dutch operations. | | |
| **The Netherlands** | *N 524/2008*: State guarantee covering newly issued senior unsecured debt instruments (commercial paper, commercial deposits and medium term notes) with a term of up to three years, valid until June 30, 2009 and capped at €200 billion | *N 528/2008*: €10 billion capital injection into ING against special securities qualifying as core Tier 1 capital.<br>*N 569/2008*: €3 billion capital injection into Aegon (insurance group) by means of a loan to one of its main shareholders combined with a first right of pledge for the authorities.<br>*N 611/2008*: €750 million capital injection into SNS REAAL by means of the issuance of special securities qualifying as core Tier 1 capital. | | |
| **Portugal** | *NN 60/2008*: State guarantee of newly issued short and medium term debt, valid until December 31, 2009 and capped at €20 billion. | | | |
| **Slovenia** | *N 531/2008*: State guarantee of newly issued short and medium term non-subordinated debt (*i.e.*, with maturity between 90 days and five years), valid until June 11, 2009 and capped at €12 billion. | | | |
| **Spain** | *NN 54/B/2008*: State guarantee of newly issued short and medium term debt (*i.e.*, with maturity between 3 months and 3 years), valid until June 23, 2009 and capped at €100 billion (initially). | *NN 54/2008*: Reverse auctions with a government-sponsored fund entitled to purchase only AA(A) rated covered bonds or asset backed securities (i) outright or (ii) on a temporary basis via Repo agreements. | | |
| **Sweden** | *N 533/2008*: State guarantee of new short and medium term debt (issued over a six months period, to be prolonged if necessary until December 31, 2009), valid for up to 36 months and capped at €150 billion. | | | *N 533/2008*: Widening of the scope of accepted collateral by the Swedish Riskbank. |
| **UK** | *N 507/2008*: Wholesale Funding Guarantee Scheme – state guarantee of new short and medium term debt issuance (to be issued over a six month period), valid for up to 36 months. | *N 507/2008*: Bank Recapitalization Scheme – GBP 50 billion committed for the purchase of preference shares and the likes over a six month period, as modified (N 650/2008). | | *N 507/2008*: Short-term Liquidity Measures – setting up of a GBP 200 billion Special Liquidity Scheme and extension of collateral range accepted for sterling and US dollar money market operations. |

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