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Competition Policy and the Global Economic Crisis

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Competition Policy and the Economic Crisis

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The Commission stands firm on the importance of maintaining the competition rules and a policy of robust competition policy enforcement. I propose to discuss in this article first why we believe that competition policy is one of the tools we need to deploy to help maintain the integrity of the EU single market and to help our economies out of the crisis, and then to examine, concretely, how the crisis has affected and is affecting our approach to enforcing the EC State aid rules, as well as the EC antitrust and merger control rules.

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I. Introduction

The past year has been challenging for the economy and for business, but also for policy makers. Governments, central banks, and financial regulators are all working hard to stabilize the world financial system and to introduce the regulations and institutions necessary to try to ensure that the current crisis cannot recur. At the same time, policy-makers are working on policies to help minimize the impact of the crisis on the real economy.

Within the European Union, the European Commission, and, in particular, my directorate general, has the task of scrutinizing government aid to financial institutions and to the real economy, under the competition rules laid down in the EC Treaty.[1] More widely, the Commission, in the area of internal market and economic and financial policy, has also put in place measures[2] to help restore consumer and business confidence, restart lending, and stimulate investment in the EU economies, and is working on proposals for a new regulatory and supervisory framework for financial services.

At the outset of the crisis there was pressure on the Commission to set aside the competition rules on State aid, in order to allow EU Member States freedom to implement financial sector rescue measures as they saw fit. However, it was very quickly recognized that there was a need to enforce common rules so as to help maintain a level playing field in the EU and avoid large scale movements of funds between Member States by investors in search of the highest level of protection. Under the EU state aid rules mechanisms were put in place to minimize the distortions of competition that might result from the large-scale award of rescue aid, so as to avoid disrupting the European Single Market and to prepare for the return to normal market functioning.

As the crisis has spread into and deepened in the real economy, our mergers and antitrust policies have also come under pressure.

The Commission stands firm on the importance of maintaining the competition rules and a policy of robust competition policy enforcement. I propose to discuss in this article first why we believe that competition policy is one of the tools we need to deploy to help maintain the integrity of the EU single market and to help our economies out of the crisis, and then to examine, concretely, how the crisis has affected and is affecting our approach to enforcing the EC State aid rules, as well as the EC antitrust and merger control rules.

> THE COMMISSION STANDS FIRM ON THE IMPORTANCE OF MAINTAINING THE COMPETITION RULES AND A POLICY OF ROBUST COMPETITION POLICY ENFORCEMENT.

II. Competition Policy in General and the Crisis

The crisis has not undermined the economic principle that competition breeds competitiveness: it enables an efficient allocation of resources and stimulates technological development and innovation. This, in turn, leads to a wider choice of products and services, lower prices, better quality, and higher productivity. The benefits of pursuing a competition policy based on these principles are clear. For example, the opening up of telecommunications and air transport services to competition means that we now have lower prices and a wider choice of telecommunications and air transport services in Europe than previously. In 2008, the Commission's application of competition policy tools resulted in estimated consumer benefits of more than 11 billion EUROs.[3]

The benefits of competition are particularly relevant at times of economic crisis. By producing consumer savings through the breakup of cartels or by prohibiting anticompetitive mergers, competition policy stimulates demand and leads to concrete improvements in consumers' purchasing power. At the same time, competition not only leads to lower prices for consumers (and thereby lowers inflation) but it also reduces price levels in wholesale and intermediary markets. This, in turn, has a beneficial effect on the competitiveness of those undertakings that act as customers on these markets. For example, introducing more competition to telecommunications markets led to an average decrease of 45 percent of the price businesses paid for international calls between 1998 and 2003.[4]

The link between effective competition and economic growth is particularly important in times of economic recession. As markets characterized by effective competition make companies innovate more, they drive economic growth through the improvement of total factor productivity. Total factor productivity growth can be several percentage points higher in sectors where the intensity of competition is higher. This can make the difference when markets cannot rely on large amounts of capital to stimulate growth.

And at a time when people are concerned with growing unemployment, it is important to emphasize that there is absolutely no evidence to suggest that more competition leads to net employment losses.

Markets subject to external competitive pressures also grow faster. It is estimated that if trade between EU Member States was eliminated (for example, as a result of market-sharing agreements or State restrictions on external competition) average productivity would fall by 13 percent.[5] Sealing off markets from outside competition allows companies to raise prices and to restrict output which, in turn, further deepens recession.

And at a time when people are concerned with growing unemployment, it is important to emphasize that there is absolutely no evidence to suggest that more competition leads to net employment losses. For example, in the wake of opening the air transport sector to competition, direct airline employment in Europe rose by 6 percent between 1992 and 2001.[6]

It follows that alongside fiscal (and in some countries monetary) policy, competition policy should be an integral part of the toolbox on which governments rely for responses to the economic crisis. According to widely quoted research from the University of California, the relaxation of antitrust rules in the United States in the 1930s probably helped prolong the economic crisis by seven years. The relaxation of the antitrust rules—which included exempting certain industries from competition law—was partly to blame for the slowing down of the economy and for an unemployment rate of around 20 percent.[7]

This does not mean that competition policy (and competition enforcement agencies) do not face particular challenges arising from the crisis. However, a well-established competition regime should not require a lot of adjustment to cope with these challenges. And there should be no need to compromise on the principles of competition policy.

The types of adjustments that may be required are:

1. In order to be able to respond to urgent situations (e.g. the need to ensure that rescue measures for banks could go ahead quickly, in the interest of financial stability) processes may need to be streamlined and timelines adjusted to take account of the market situation so as to be able to respond accordingly.

2. In contributing to an effective response to the crisis, where we have discretionary powers, competition policy should arguably focus on those sectors that either directly or indirectly affect household expenditure to the greatest extent in order to ease the burden on consumers, as well as on sectors that are the most important for productivity growth. In the EU, network industries such as energy and telecommunications meet both criteria and therefore arguably should be the focus of attention. More generally, prioritization is increasingly important so as to ensure that enforcement action is targeted towards those infringements that have the greatest impact on consumers.

3. In an environment where confidence in markets may have decreased and where there is a greater chance of government intervention, competition advocacy will have a greater role to play in ensuring that State measures take on board competition principles and do not create disproportionate restrictions of competition, which will ultimately harm the economy and make things worse for consumers.

Finally, as the economic crisis puts pressure on State budgets and public sector expenditure may need to be cut back, authorities in charge of competition policy must also justify their resources to taxpayers. This requires them to constantly improve their efficiency and effectiveness and to demonstrate to society that they deliver real benefits.

III. State Aid to the Financial Sector

Early on in the crisis EU Member States decided it was necessary to inject large amounts of State aid into the financial sector. The European Commission became involved, because of our powers to scrutinize State aid under the EU competition rules.

The State aid provided to EU banks and insurance companies have had clear benefits. They have helped avoid the meltdown of the financial system and helped re-open markets, re-establish lending to the real economy, and put financial markets back on the path towards normal market functioning (that is to say, without state support). Financial stability and protecting and preserving competitive markets are complementary objectives. Competition policy is there to support financial stability and create the right conditions for stable financial markets in both the short- and the longer-term—which is why it is crucial to ensure that bail-outs in the banking and insurance sector respect fundamental competition principles.

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From the start, our objective in applying the State aid rules was to preserve the level playing field for European banks, by preserving competition between banks in different Member States and between banks throughout Europe which are competing on the same markets, taking into account their different risk profiles. We try to ensure that State aid measures do not undo all the benefits of the Single Market, and do not have the effect of delaying the return to normal competitive market functioning.

At the same time, it has been crucial to provide a clear and predictable framework for rapid approval of Member State rescue measures for individual banks and national schemes to support the banking sector. In the interests of speed and efficiency we have been flexible on process—but firm on the principles underpinning the state aid rules.

In order to assist Member states to take urgent and effective measures to preserve stability and to provide legal certainty, between October 2008 and July 2009 the Commission adopted four Communications indicating how we would apply the State aid rules to government measures to support the financial sector in the context of the current crisis. On October 13, 2008 the Commission adopted guidance indicating how we would apply State aid rules to state support schemes and individual assistance for financial institutions.[8]

Essentially the conditions it insisted on are:

- Non-discriminatory access to the schemes in order to protect the functioning of the Single Market by making sure that eligibility for a support scheme is not based on nationality;
- State commitments should be limited in time—and reviewed at least every six months—so that support can be provided as long as necessary but that it will be reviewed and adjusted or terminated as soon as improved market conditions permit;
- State support should be clearly defined and limited in scope to what is necessary to address the acute crisis in financial markets, while excluding unjustified benefits for shareholders of financial institutions at the taxpayer's expense;
- The private sector should contribute by way of an adequate remuneration for the introduction of general support schemes (such as a guarantee scheme) and it should also cover at least a significant part of the cost of assistance, so as to ensure that there are incentives to return state money;
- Beneficiaries should be subject to constraints on their behavior so as to prevent an abuse of state support by means of, for example, expansion and aggressive market strategies on the back of a state guarantee; and
- There should be an appropriate follow-up in the form of structural adjustment measures for the financial sector as a whole and/or restructuring by individual financial institutions that benefited from state intervention.

> BY THE END OF 2008 THE SOLUTIONS BEING DEVISED BY MEMBER STATES EVOLVED FROM LARGELY GUARANTEE-BASED SCHEMES TO OTHER MEASURES SUCH AS RECAPITALIZATIONS.

The principles set out in the *Banking Communication* are based on our pre-existing Guidelines on rescue and restructuring aid.[9] As a rule, rescue and restructuring aid is assessed under Article 87(3)(c), which allows the Commission to authorize "aid to facilitate the development of certain economic activities [..] where such aid does not adversely affect trading conditions to an extent contrary to the common interest." The Commission relies on this provision to authorize aid to correct disparities caused by market failures or to ensure economic and social cohesion—but makes such aid subject to strict conditions. However, the Commission has recognized that the severity of the crisis justifies the award of aid on the basis of Article 87(3)(b) of the EC Treaty, under which aid can be allowed in order to "remedy a serious disturbance to the economy of a Member State."

By the end of 2008 the solutions being devised by Member States evolved from largely guarantee-based schemes to other measures such as recapitalizations. On December 5, 2008, following detailed discussions with the European Central Bank and the Member States, the Commission adopted detailed guidance on how it would assess these bank recapitalization schemes,[10] complementing the October 13 guidelines.

The *Recapitalisation Communication* distinguishes between banks that are fundamentally sound and receive temporary support to enhance the stability of financial markets and restore lending to businesses and consumers, and distressed banks whose business model has brought about a risk of insolvency and which pose a greater risk of distortions to competition.

In particular, the *Recapitalisation Communication* establishes principles for pricing the injections of capital made by States into banks. For fundamentally sound banks, the price of capital injections should be linked to: the base rates set by central banks to which a risk premium is added to reflect the risk profile of the beneficiary bank; the type of capital used; and the nature of the safeguards against abuse of public funding that accompany the recapitalization measure. This pricing mechanism needs to carry sufficient incentives to keep the duration of state involvement to a minimum, for instance by having a rate of remuneration that increases over time.

BANKS IN DISTRESS WHICH ARE AT RISK OF INSOLVENCY SHOULD, IN PRINCIPLE, BE REQUIRED TO PAY MORE FOR STATE SUPPORT AND SHOULD BE SUBJECT TO STRICTER SAFEGUARDS.

Banks in distress which are at risk of insolvency should, in principle, be required to pay more for state support and should be subject to stricter safeguards. Injections of state capital into these banks are acceptable only on condition that they are followed by far-reaching restructuring to restore long-term viability, which may include changes to management and corporate governance.

By way of these first two Communications, the Commission introduced some necessary flexibility into our handling of national financial sector rescue schemes and individual financial institution rescue measures, without losing sight of key state aid principles. While giving Member States clear guidelines on what would or would not be acceptable, we aimed to achieve a degree of consistency in Member State responses across Europe.

Flexibility in process as well as in substance has also been very important. Support schemes such as guarantees or re-capitalization schemes have been cleared by the Commission very quickly as long as the schemes fulfill conditions, which guarantee that they are well-targeted and proportionate and contain safeguards against unnecessary negative effects on competition.

While it seems clear that the financial sector rescue packages adopted by Member States since October 2008 averted the risk of financial meltdown, by early 2009 it also seemed clear that further measures were needed to restore trust and to return the financial sector to normal functioning.

One reason why credit remained squeezed seemed to be uncertainty about the value and location of impaired assets held by banks. On February 25, 2009, after detailed discussions with the Member States, the Commission adopted a Communication on the treatment of impaired assets.[11] This Communication discusses the budgetary and regulatory implications of asset relief measures that could be adopted by Member States to remove impaired or toxic assets from the balance sheets of banks, and provides guidance on the application of the State aid rules to such measures.

The *Impaired Assets Communication* stipulates that:

- Member States must make asset relief measures conditional on full transparency and disclosure of impaired assets and must ensure that the costs of the impaired assets are shared among the Member States, shareholders, and creditors of the financial institutions.

- Member States should take a coordinated approach to identifying assets eligible for asset relief measures and to valuing assets. The primary task of carrying out asset valuation is performed at the national level, and validated by the appropriate supervisory authority. However, each individual case is checked by the Commission with the help of external experts.

- Finally, restructuring measures should follow, so as to ensure the return to viability of the banks in question, and the return to normal market conditions.

The measures in question could involve asset purchases (including "bad" bank scenarios), asset swaps, state guarantees, or hybrid systems—the choice is, of course, up to the Member States who are responsible for the methods and design of asset relief measures. The complexity of asset eligibility and valuation is illustrated by the fact that, to date, the Commission has given final approval for very few impaired asset measures, and is still investigating others.

THE COMPLEXITY OF ASSET ELIGIBILITY AND VALUATION IS ILLUSTRATED BY THE FACT THAT, TO DATE, THE COMMISSION HAS GIVEN FINAL APPROVAL FOR VERY FEW IMPAIRED ASSET MEASURES.

Finally, on July 23, 2009 the Commission published guidelines setting out its approach to assessing restructuring aid given by Member States to banks.[12] Essentially, those banks that have received large amounts of aid and that have unsustainable business models will have to restructure in order to return to long-term viability without relying on State support.

The *Restructuring Communication* stipulates that banks in need of restructuring have to demonstrate strategies to achieve long-term viability under adverse economic conditions; this involves rigorous stress testing of the businesses. In some cases, divestments will not be needed but in many cases they will be essential, either to ensure viability of core businesses or to reflect the negative competitive impact of aid on key market segments. However, the Commission also needs to be realistic about divestments, for example with respect to the likelihood of finding buyers and the time period for divestiture.

Additionally, banks that have received large amounts of aid and that have unsustainable business models should, along with their capital holders, contribute to the cost of restructuring as much as possible with their own resources. This creates appropriate incentives for future behavior. An appropriate price for State support ensures that the aid cannot be used to finance activities such as acquisitions which are not linked to the restructuring process. Similarly, aid should not be used to pay interest to holders of hybrid capital instruments when a bank receiving aid is making losses, unless this remuneration is essential to attract new capital.

Finally, the Commission needs to create conditions which foster the development of competitive markets after the crisis. Where restructuring is necessary, decisions need to be taken now, in order to chart the road map of the bank to viability without state support. This may be achievable over two to three years, but restructuring may even take up to five years. Banks which do not need fundamental restructuring, because their basic business models are sound, also need to plan their return to normal market operation without state support. Essentially, exit strategies from national support schemes for all banks now need to be developed providing the conditions for a sustainable recovery of private markets as a whole are met. This requires detailed discussions among the European Commission and the Member States, national central banks and regulators, the European Central Bank, and coordination across all policy areas.

In addition to these Communications, in the past year the Commission has taken around 70 decisions approving national schemes for aid to the financial sector.

Taken as a whole, the four Communications from the Commission provide guidance as to what we see as the key principles that Member States need to comply with, in order to: 1) reduce the risk that national measures to support the financial sector might fragment the Single Market; 2) minimize any distortions of competition that might result from the state intervention; and 3) avoid distorting the incentives of market players in the financial sector going forward.

In addition to these Communications, in the past year the Commission has taken around 70 decisions approving national schemes for aid to the financial sector—taking the form of guarantee schemes, bank recapitalization schemes, and asset relief schemes—as well as individual rescue aid measures and some restructuring aid decisions.[13]

An example of a complex, ongoing investigation is the ING "illiquid assets" case. On March 31, 2009, the Commission approved for 6 months the illiquid asset back-up facility provided by the Dutch State to the financial group ING. At the same time, the Commission initiated the formal investigation procedure laid down in Article 88 (2) of the EC Treaty to verify that the conditions laid down in the *Impaired Assets Communication* regarding valuation (including the valuation methodology) and burden sharing of the measure are met.

In January 2009, the Dutch State and ING agreed on a so-called illiquid assets back-up facility for a portfolio of U.S. $39 billion par value worth of securitized U.S. mortgage loans, mostly consisting of so-called Alt-A mortgages. Alt-A loans are the category of U.S. loans between prime and sub-prime, often granted on the basis of a simple declaration by the borrower about his income with no other proof required.

Under the transaction, the Dutch State will buy the right to receive the cash flows on 80 percent of this U.S. $39 billion portfolio by paying ING about U.S. $28 billion. That amount will be paid by the Dutch State in accordance with a pre-agreed payment scheduled.

Following an initial assessment of the measure, the Commission decided for reasons of financial stability, similar to those governing the assessment of rescue aid, not to raise objections for a period of six months. The Commission found that the measure complies with the conditions on eligibility of assets, asset management arrangement, transparency and disclosure, and a guarantee fee as stipulated in the *Impaired Assets Communication*. However, some conditions like valuation and burden sharing require further in-depth analysis, which is why the Commission opened an in-depth investigation.[14]

ING had already benefited from an emergency recapitalization of 10 billion Euros, which the Commission approved in November 2008.[15]

In essence these measures are all part of the process undertaken by Member States to restore stability to the banking sector and put it on the path back to normal market functioning, without State support. In parallel, a move toward regulatory reform of the financial sector is underway. The Commission has put forward a number of proposals to improve regulation and supervision of the financial sector.[16]

This regulatory program and the restructuring of banks are complementary routes to the same goal of the return to viability of individual banks and of the European banking sector as a whole. Banks must operate on the basis of sound business models in a regulatory framework in which they can compete on the merits with balanced incentives without state aid. They must be able to exit the market or restructure when they are no longer competitive, without triggering the systemic consequences that have characterized the current crisis.

IV. State Aid to the "Real" Economy

State aid issues are, of course, not confined to the financial sector. Before the end of 2008, the effects of the credit crisis were being felt in the "real" economy and Member States began to consider what measures they could take to tackle that crisis too.

As stated, relaxing or suspending the State aid rules for the duration of a financial and economic crisis has never been an option—the effect would be that some companies would have enjoyed State subsidies, giving them a competitive advantage over their competitors. A subsidy race between Member States would not only be financially unsustainable, it would also delay the necessary restructuring of the economy and thus deepen the recession and its long-term effects.

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Although public intervention has to be decided at national level, it needs to be implemented within a coordinated framework and on the basis of principles common to the whole of the EU.[17]

The Commission's policy has been to encourage a horizontal approach that benefits the whole economy, rather than specific industrial sectors. However, this does not mean that Member States do not have flexibility to target specific problems within their territory.

For the real economy, on December 17, 2008 the Commission adopted a Temporary State Aid Framework which provides additional possibilities for Member States to grant State aid until the end of 2010. Some technical adjustments to this framework, mainly on guarantees, were introduced on February 25, 2009.

The main objective of the Temporary Framework is to reduce the negative effects of the crisis in the real economy by facilitating companies' access to finance. Sufficient and affordable access to finance is clearly a pre-condition for investment, growth, and job creation by the private sector. In the short-term, the economic crisis has negative consequences on the viability of European companies. In the long-term, it could delay investments in sustainable growth and other Lisbon Strategy objectives.

The Temporary Framework has additional objectives: 1) to contribute to the immediate unblocking of bank lending and continuity in companies' access to finance; 2) to ensure that limited amounts of the necessary aid reach the recipients in the most rapid and effective way; and 3) to encourage companies to continue investing into a sustainable future, including the development of green products.

Although Member States can already grant State aid for a range of different objectives (environmental aid, rescue and restructuring aid, etc.), there was a need for additional measures targeted to the exceptional difficulties in obtaining finance.

The measures contained in the Temporary Framework are—like the crisis measures adopted in the banking sector—based on Article 87 (3) (b) of the Treaty. This is the reason why the new measures are limited in time, until the end of 2010.

On the basis of the Temporary Framework Member States may:

- Give 500,000 EUROs per undertaking to cover investments and/or working capital over a period of two years.
- Offer State guarantees for loans at a reduced premium. The guarantee may relate to both investment and working capital loans and it may cover up to 90 percent of the loan.
- Offer aid in the form of subsidized interest rate applicable to all type of loans. This reduced interest rate can be applied for interest payments until the end of 2012.
- Offer subsidized loans for the production of green products involving the early adaptation to or going beyond future Community product standards.

The Commission considers that environmental goals should remain a priority despite the crisis—and, for this reason, it sought to give support to companies investing in environmental projects.

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Furthermore, the Temporary Framework also allows for:

1. A temporary derogation from the Community guidelines on Risk Capital[18] guidelines in order to allow 2.5 million of risk capital injection in small- and medium- sized enterprises ("SMEs") per year (instead of 1.5 million EUROs) and a reduction of the minimum level of private participation (from 50 percent to 30 percent).
2. A simplification of the Communication on short-term export credit insurance.[19] This makes it easier for Member States to demonstrate that certain risks are temporarily non-marketable and can thus be covered by the State.

Member States do need to notify all the measures contained in the Temporary Framework—but special procedures have been put in place to ensure that the Commission is in a position to very quickly adopt decisions allowing State aid under the Temporary Framework. To date, over 65 aid scheme decisions have been adopted under the Temporary Framework.

To give some examples of decisions under the Temporary Framework:

On December 30, 2008 the European Commission approved two German measures to support the real economy, the first under the Temporary Framework. The first measure was intended to provide liquidity for companies affected by the credit squeeze, and allows interest rate reductions on loans to finance investments and working capital of up to 50 million EUROs to be granted to companies with a turnover of less than 500 million EUROs. The second measure is a framework scheme which allows federal, regional, and local bodies to provide aid of up to 500,000 EUROs to firms in need. It only applies to companies that were not in financial difficulties on July 1, 2008.[20]

On June 12, 2009 the European Commission authorized a Finnish guarantee scheme aimed at providing relief to companies encountering financing difficulties as a result of the credit squeeze. The scheme allows authorities to grant aid in the form of subsidized guarantees for investment and working capital loans concluded by December 31, 2010. The scheme meets the conditions laid down in the Temporary Framework because it is limited in time, respects the relevant thresholds, and applies only to companies that were not in difficulty on July 1, 2008.[21]

In adopting the Temporary Framework, the Commission sought to react in a pragmatic and responsible way to the evolving market circumstances, so as to enable Member States to react to market circumstances, but without compromising the State aid rules and the EU Single Market.

The Commission is also thinking ahead and preparing also for the review process. We are closely monitoring the aid schemes put in place by Member States under the Temporary Framework—a report on these measures should be provided to the Commission by Member States by October 31, 2009.

As with financial sector measures, the Commission's aim has been to be flexible on process—by facilitating national umbrella schemes—but firm on the underlying principles. It is important the Commission responds to market conditions while, at the same time, resisting pressures to allow Member States to adopt protectionist measures and provide long term support to ailing national companies, contrary to the principles of fair competition among EU companies. EU State aid policy provides a framework for ensuring that restructuring is based on a feasible, coherent, and far-reaching plan to restore long term viability of companies, which also helps safeguard employment.

V. Mergers and the Crisis

The picture under the EC merger control rules is quite different. In contrast with the wholesale government interventions providing financial support to the banking and insurance sectors, there has been relatively little merger activity directly related to banking rescue or restructuring (or other financial firms) that has been subject to review by the Commission. Some cases—such as the Lloyds/HBOS merger in the United Kingdom and the Commerzbank/Dresdner merger in Germany—have been dealt with by National Competition Authorities in the relevant EU Member States.

It is, however, likely that as the worst of the financial sector turbulence calms down, there will be further mergers in the banking sector. The same applies to other areas of the real economy where the effects of the economic downturn may result in some consolidation.

In assessing mergers that occur against the backdrop of the financial and economic crisis, the Commission's priority is to ensure that we maintain effective scrutiny under the competition test laid down in the EC Merger Regulation.[22] The purpose of the test is to ensure that consumer welfare is preserved. In the shorter term, this will be achieved by maintaining financial and economic stability; but, in the mid- to long-term, it will be achieved by preserving competitive market structures.

We believe that the EC Merger Regulation is an appropriate and sufficiently flexible tool for merger control enforcement in times of crisis as well as in normal times. There is no need for special procedures to be adopted for the review of mergers in time of crisis, nor is there a need to amend our substantive test for approving mergers. But, of course, the crisis has thrown up procedural and substantive challenges, some of which are directly linked to Member State intervention in the economy as a result of the crisis. I will deal with these in some detail.

In terms of procedure, one issue that arises is how to deal with nationalizations. The EC Treaty is neutral on the question of private or public ownership. Consequently, any nationalization measure has to be assessed under the competition rules in the same way as any other change of ownership. The first step would be to determine whether a nationalization measure is a merger within the meaning of our merger rules—which is something we assess very carefully, on a case-by-case basis. This is a particularly sensitive issue where a government takes control of two or more companies or banks which are competitors on the same markets.

CONSEQUENTLY, ANY NATIONALIZATION MEASURE HAS TO BE ASSESSED UNDER THE COMPETITION RULES IN THE SAME WAY AS ANY OTHER CHANGE OF OWNERSHIP.

Another issue that arises is whether the time limits for the approval process laid down under the EC Merger Regulation and its implementing provisions need to be adjusted in a crisis situation. Timing of the review process is always important to the merging parties and may be even more pressing in case of rescue mergers. However, in order to carry out an effective and thorough review of whether any particular merger is likely to give rise to competition concerns, it is important that the Commission has sufficient time. The rules, as they stand, give a certain degree of flexibility. For instance, the Commission can give the parties permission to derogate from the normal standstill obligation and implement a merger immediately, pending the outcome of the review.

In exceptional cases, we may also need to work faster than usual. In the BNP Paribas/ Fortis case, from December 2008, the Commission adopted its authorization decision two weeks before the normal deadline. The case, which concerned the acquisition of Fortis' Belgian and Luxembourg assets by BNP Paribas, was only cleared subject to conditions relating to the credit card market, so as to avoid narrowing consumer choice for credit cards.

Remedies is another area where we may need to show some flexibility on timing. Where we are considering proposing that a merger be cleared subject to, for instance, a commitment to divest a business, it may be necessary to take into account the difficulty in finding buyers given the current economic climate. This can addressed, depending on the circumstances, either by requiring upfront buyers, in order to guarantee the effectiveness of the proposed remedy, or by extending the divestment period. However, both of these possibilities are already covered by our revised Notice on Remedies, adopted in October 2008.[23]

The Remedies Notice reflects the Commission's experience of remedies in a large number of cases, a study on remedies in past cases that we carried out in 2005, as well as recent judgments by the European courts. It also takes into account amendments brought to the EC Merger Regulation in 2004, such as the possibility of extending the compulsory merger deadlines in order to discuss and assess remedies.

In terms of the Commission's substantive assessment the competition test under the EC Merger Regulation already allows the Commission to take into account rapidly evolving market conditions in its competition assessment.

In terms of the Commission's substantive assessment the competition test under the EC Merger Regulation already allows the Commission to take into account rapidly evolving market conditions in its competition assessment. Even in sectors suffering particularly from the current economic crisis, the Commission takes the view that it is important to ensure that markets remain competitive. In the European airline sector, for instance, the Commission takes great care that the interests of consumers in having a competitive choice of airline services in Europe are safeguarded, particularly in view of the current consolidation process.

In the Lufthansa/ SN Brussels Airlines case, on June 22, 2009 the Commission approved the acquisition by Lufthansa of SN Brussels Airlines. The Commission's decision is conditional upon the implementation of a set of remedies offered by Lufthansa to alleviate the Commission's competition concerns, in particular on a number of routes between Belgium and Germany and Belgium and Switzerland. Taking into account past experience with remedies in the airline sector, these commitments aim at generally enhancing the attractiveness of the route for new entrants. They provide for an efficient and timely slot allocation mechanism. Furthermore, any new entrant will obtain grandfathering rights over the relevant slots, once it has operated a route for a certain pre-determined period of time. This specifically targets the problem of slot congestion, which is an important entry barrier on the problematic routes. Ancillary remedies, such as interlining, special pro-rate or code-share agreements, and the participation in Frequent Flyer Programs are also foreseen.

> In the event of a rescue merger, the Commission's policy and practice provide for consideration of the so-called "failing firm defense."

In the event of a rescue merger, the Commission's policy and practice provide for consideration of the so-called "failing firm defense." However, the conditions set out in the Guidelines on horizontal mergers would need to be met.[24] These guidelines suggest that the Commission may decide that an otherwise problematic merger can nonetheless be allowed if one of the merging parties is a failing firm, as long as the deterioration of the competitive structure of the market that follows the merger cannot be said to be caused by the merger.

The Guidelines identify the following three criteria as being especially relevant to the Commission's assessment of a failing firm defense:

1. First, the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking.
2. Second, there is no less anticompetitive alternative purchase than the notified merger.
3. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.

In a period of financial crisis and market collapse, it may often be difficult to obtain reliable information to test the merger against these criteria, for example the criterion of an alternative purchaser. However, this does not absolve the Commission from carrying out as thorough an investigation of the arguments as possible.

Under the EC Merger Regulation[25] the EU Member States can also intervene in order to prohibit, on public policy grounds, a merger that the Commission might otherwise approve. But they do not have the right to clear mergers that the Commission would prohibit on competition grounds.

It is sometimes argued that in times of crisis, it would be appropriate for the Commission to be able to take into account other wider considerations, such as employment. However, experience has shown that a legal instrument such as the EC Merger Regulation is most effective when it is directed to one single objective. Employment concerns need to be addressed through other instruments. It is hard to see how it would be possible to agree on the wider objectives that should be taken into account in our assessment or, indeed, how it would be possible to agree on how these objectives should be implemented.

VI. Antitrust Policy and the Crisis

The current financial and economic crisis has not—at least to date—resulted in wholesale government intervention in company behavior, such as promoting or encouraging collective action or measures by companies to combat the effects of the crisis. Nor have companies brought to our attention many such initiatives of their own. However, we have come under some pressure from both governments and companies to suggest that we might relax our application of the EU antitrust rules, namely Articles 81 and 82 of the EC Treaty which respectively prohibit anticompetitive agreements between undertakings and abuses of dominance, in the event that such schemes might be thought necessary.

But in our view crisis conditions cannot justify collective or concerted action through so-called "crisis cartels" aiming to reduce capacity or production.

It is probably unavoidable that in times of recession many companies will suffer. There is a risk of reduced profits and overcapacity—but in our view crisis conditions cannot justify collective or concerted action through so-called "crisis cartels" aiming to reduce capacity or production.

In recent years the Commission has made cartels—arguably the most harmful type of competition infringement—a priority. We have implemented a comprehensive policy framework for cartels, including a very successful leniency program[26] and an effective fining policy.[27]

In the interest of maintaining competitive markets in the EU, which are fundamental to ensuring the economy finds its way out of the crisis, we believe it would be very unwise to relax our rules on cartels or indeed to pursue cartels any less vigorously. Of course, collective action can take other forms, some of which may be less harmful than cartels. However, any such cooperation between companies would have to satisfy the criteria laid down in Article 81(3)—that the companies concerned would have to show that the agreement contributed to improving production or distribution, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, but without imposing unnecessary restrictions or eliminating competition. The Commission would view any argument related to the economic crisis with considerable skepticism—and it would seem extremely unlikely that any agreement on prices or output could be justified. Nonetheless, the point is that under the rules certain types of cooperation are allowed, if they are truly necessary and proportionate.

In many ways, the focus of our enforcement policy in recent years is also suitable to meet the challenges posed by the current financial and economic crisis. The Commission has pursued a policy of targeting its antitrust enforcement efforts on those infringements that cause the most harm to consumers. It has consolidated an economics-centered, effects-based approach across the board—except with respect to naked cartels—and improved prioritization.

One tool we have used to this end is the sector inquiry; the Commission has carried out major inquiries in recent years into energy, financial services, and pharmaceuticals.[28] Our final report on competition in pharmaceuticals in Europe was published in July 2009. These inquiries were launched in sectors of the economy where there were indications that competition was not working as well as it might. They have helped us understand the sectors, identify where the obstacles to competition lie, and decide on the best course of action. For instance, in energy our sector inquiry resulted in both regulatory changes—the Third Energy Package[29]—and antitrust enforcement action. One lesson it has taught us is that competition enforcement action is not always the only solution to a competition problem—sometimes regulatory action is an option.

Decisions taken by the Commission following the energy sector inquiry have had a clear impact on improving competitor access to the market and potentially improving consumer choice. On March 18, 2009, the Commission opened the German gas market to competition by accepting commitments from RWE to divest its transmission network. The Commission had concerns that RWE may have abused its dominant position on its gas transmission network to restrict its competitors' access to the network. In order to alleviate these concerns, RWE offered to divest its entire Western German high-pressure gas transmission network.

In a separate case, the Commission imposed the first fines in the energy sector, amounting to 553 million EUROs on GDF Suez, as well as on the German E.ON Group for participating in a market-sharing agreement in the French and German gas markets. The Commission found that in 1975, when E.ON/Ruhrgas and GDF decided to jointly build the MEGAL pipeline across Germany to import Russian gas into Germany and France, they agreed not to sell gas transported over this pipeline in each other's home markets. They maintained the market-sharing agreement in place after European gas markets were liberalized thus denying French and German gas consumers the benefits of the 1998 liberalization, including more price competition and choice of suppliers.

The other focus of the Commission's enforcement action under the antitrust rules is against unilateral conduct such as abuses of dominance where we are again targeting our enforcement action against those infringements that cause the most harm to consumers. In December 2008 we adopted our Guidance on enforcement priorities in relation to exclusionary abuses of dominance,[30] but we have, in essence, been applying the principles underlying the Guidance for some time, notably in IT cases such as the Telefonica margin squeeze case, in Microsoft, and in the recent Intel decision. We are also focusing on the energy sector, with the E.On and RWE commitments decisions and other ongoing cases.

On May 13, 2009, the Commission adopted a prohibition decision in the Intel case finding that Intel infringed Article 82 of the EC Treaty. The decision orders Intel to cease its anticompetitive practices to the extent that they are ongoing and refrain from engaging in similar or equivalent practices, and imposes a fine of 1.06 billion EUROs. The Commission found that Intel engaged in two specific forms of illegal practice. First, Intel gave wholly or partially hidden rebates to computer manufacturers conditional upon (near) exclusivity for its x86 Central Processing Unit ("CPU"). Intel also made direct payments to a major retailer to stock only computers with its x86 CPUs. Second, Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products.

In the context of the financial and economic crisis, we have faced criticism over the level of our fines. In 2006 we adapted our fining policy to ensure that our fines would act as an effective deterrent and would better reflect the economic harm caused by cartels and other anticompetitive behavior. In the absence of criminal sanctions at EU level and taking into account the fact that there is little civil litigation, fines are the only instrument the Commission has to sanction and deter companies from engaging in the most serious violations of the antitrust rules.

While our antitrust fines may now be, on average, higher than in previous years, we do not believe that they are too high now—rather, previously they were too low to be a deterrent.

While our antitrust fines may now be, on average, higher than in previous years, we do not believe that they are too high now—rather, previously they were too low to be a deterrent. The Commission enforces EU competition rules across the largest integrated economic area in the world, and we target the most serious infringements, so the size of the Commission's fines also reflects the size and importance of the companies that we are investigating. Our fines are based on sound economic principles and are directly related to the economic harm likely to have occurred on the market, and to the duration of the infringement. And, at any event, the Commission is always bound by the threshold of 10 percent of the undertaking's worldwide turnover, which has remained unchanged since 1962. Most of our fines remain well below this legal maximum.

The Commission does have the option of reducing the cartel fine it would impose if the company in question is unable to pay. A reduction of this kind could only be granted if paying the fine would seriously endanger the economic viability of the company. While this situation might occur in the context of the crisis, the Commission would make an extremely careful assessment before granting any such reduction.

I BELIEVE THAT OUR FOCUS ON ELIMINATING CONSUMER HARM—RATHER THAN PROTECTING INEFFICIENT COMPETITORS—WILL STAND US IN GOOD STEAD IN THE CURRENT CRISIS.

I believe that our focus on eliminating consumer harm—rather than protecting inefficient competitors—will stand us in good stead in the current crisis. In times of economic recession, allowing consumers to make the best use of their buying power is essential. The recession cannot be an excuse for the burden of the downturn to be transferred, through cartels and abusive practices from companies which are doing badly, to consumers in general.

VII. Conclusions—Lessons from the Crisis

The best strategy to get out of the current crisis must include a robust and rigorous competition policy. However, the crisis naturally has and continues to have an effect on the way the Commission enforces competition policy. Governments and companies alike are faced with very real constraints as a result of the crisis, and the Commission has to make sure that it does not put procedural obstacles in the way of necessary and urgent rescue measures which aim to stabilize our economies. But, equally, we would be failing at our job, and failing the European consumers and the economy as a whole, if we did not ensure that these measures comply with competition principles. The route to recovery lies with competitive markets, not markets where inefficient and ailing companies are propped up by state support, illegal cartels, or abuses of market power, nor with markets where consumers pay to support structures which are not sustainable.

In order to ensure competitive markets, we also need competition-friendly regulation. We need to ensure that regulatory initiatives take account of competition principles, in the financial sector and in other sectors of the economy, as well as horizontal measures such as consumer protection initiatives that cut across many areas.

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1 Articles 87, 88, and 89 of the EC Treaty. The scrutiny of State aid is a task that falls to the Commission's Directorate General for Competition (DG Competition)—although formal decisions on State aid are in principle the responsibility of the full College of Commissioners. At the height of the crisis, the Commission delegated powers to Mrs. Kroes, the Commissioner in charge of competition, to adopt decisions authorizing rescue aid under an emergency procedure.

2 Commission Communication, *A European Economic Recovery Plan*, COM (2008) 800 final, (November 26, 2008).

3 Based on the methodology applied for calculating customer benefits as set out in DG Competition's Annual Management Plan 2009, *available at* http://ec.europa.eu/competition/publications/annual_management_plan/amp_2009_en.pdf.

4 Commission Communication, *European Electronic Communications Regulation and Markets 2003—Report on the Implementation of the EU Electronic Communications Regulatory Package*. COM(2003) 715 final.

5 Commission Communication, *European Competitiveness Report 2008*, COM(2008) 774 final.

6 Study by U.K. Civil Aviation Authority on *The Effect of Liberalisation on Aviation Employment* (2004), available at http://www.caa.co.uk/docs/33/cap749.pdf.

7 H. L. Cole & L. E. Ohanianm, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. Pol. Econ. 4, pp. 779-816, (2004).

8 Commission Communication, *The application of the State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, OJEC [2008] C 270/8 (the "Banking Communication").

9 Commission Communication, *Community guidelines on State aid for rescuing and restructuring firms in difficulty*, OJEC [2004] C 244/2; *Prolongation of Community guidelines on State aid for rescuing and restructuring firms in difficulty*, OJEC [2009] C 156/2.

10 Commission Communication, *The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition*, OJEC [2009] C 10/2 (the "Recapitalisation Communication").

11 Commission Communication, *Treatment of Impaired Assets in the Community Banking Sector*, OJEC [2009] C 72 (the "Impaired Assets Communication").

12 Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid OJEC [2009] C 195/9 (the "Restructuring Communication").

13 The European Commission publishes an overview of national measures adopted as a response to the financial/economic crisis, which is regularly updated http://ec.europa.eu/competition/sectors/financial_services/financial_crisis_news_en.html.

14 On September 15, the Commission announced that it was extending the temporary clearance of the measure because the investigation is not yet complete.

15 Case N 528/2008.

16 Charlie McCreevy, Towards an integrated approach to regulation across the EU, Speech/09/398, European Commissioner for Internal Market and Services (September 18, 2009).

17 Conclusions of the ECOFIN Council of 7 October 2008.

18 Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises OJEC [2006] C 194/2.

19 Communication of the Commission to Member States amending the communication pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance, OJEC[2005] C 325/22.

20 Case numbers N 661/2008 and N 668/2008 (the latter was amended on 5 June 2009 and 16 July 2009).

21 Case number N82b/2009.

22 Article 2 of the EC Merger Regulation (Council Regulation 139/2004 on the control of concentrations between undertakings, OJEC [2004] L 24/1) stipulates that "a concentration which would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

23 Commission Notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation 802/2004, OJEC [2008] C267/1.

24 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEC [2004] C 31/5, ¶¶.88-91.

25 Article 21 of the EC Merger Regulation.

26 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJEC [2006] C298/17.

27 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJEC [2006] C 210/2.

28 *See* http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html.

29 The Third Energy Package consists of two directives and three regulations adopted by the European Parliament and the Council on July 13, 2009; *see* http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm.

30 Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJEC [2009] C 45/7.