

COMMENTS

EUROPEAN COMMISSION AND ANTITRUST: CHANGING PATTERNS IN TIMES OF CRISIS

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Abstract.

The present short article focuses on competition law in times of crisis. It examines how the current breakdown of economy has modified antitrust policy at EU and national level. The main issues are (i) State aid policy; (ii) control over cartels and abuses of dominant position; (iii) control over mergers. It is contended that, in the field of State aids, the European Commission is playing an active role indeed. It has adopted soft-law provisions and it is applying EU rules in a more flexible manner. Nevertheless, the crisis did not release Member States from the respect of State aid rules. With regard to cartels and abuses of dominant position, during the earlier stages of the crisis, the Commission has, to a certain extent, mitigated sanctions, but there is no rescue for hard core violations. Finally, the financial crisis has involved a decrease in the number of mergers and acquisitions, so that antitrust Authorities did not really have to enact a particular policy in this regard. It is worth mentioning, though, that some national governments seem proactive in facilitating State-engineered transactions in order to rescue big firms.

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1. Introduction.

Even during the new great financial crisis, competition law provisions are still applicable to Member States and undertakings, although their implementation by the relevant authorities may change. With regard to the choices of the European Commission's Directorate General for Competition (hereinafter: "DG Comp"), three issues seem particularly relevant: (i) State aid policy; (ii) control over cartels and abuses of dominant position; (iii) control over mergers. This short article considers such issues in the light of the measures taken by the Commission and some national competition authorities.

2. State aid policy.

State aids are currently at stake in many relevant sectors, such as banking. The banking system has benefited from a benevolent approach by public authorities for systemic reasons: banks are so interconnected that the default of a large bank could affect the whole banking system. Besides, banks provide the liquidity necessary to the whole economic system¹. Thus, the Commission seems to carry out a significant effort in applying the existing provisions with a certain degree of flexibility, despite the fact that Art. 107(3) TFEU (formerly, 87(3) ECT) – the legal basis for granting exemptions from EC Treaty rules – requires a strict interpretation². Nevertheless, the Commission has frequently updated its approach, in order to adapt it to changing market scenarios.

At the very beginning of the crisis (September 2007), the Commission regarded the concerns raised by troubled banks as individual cases³. Thus, Brussels authorised several individual rescue packages⁴, relying on the provisions of Art. 107(3)(c) TFEU⁵.

¹ B. Lyons, *Competition Policy, Bailouts and the Economic Crisis*, in http://www.uea.ac.uk/polopoly_fs/1.112187!CCP09-4.pdf.

² See, in this regard, Court of first instance, Joined Cases T-132 and 143/96, *Freistaat Sachsen and Volkswagen AG v. Commission*, [1999] ECR II-3663.

³ D. Gerard, *Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not of the Problem*, in <http://papers.ssrn.com/sol3/papers.cfm?>

⁴ European Commission, Decision of 5 December 2007 in Case NN 70/2007 (ex. CP 269/07), *United Kingdom Rescue aid to Northern Rock*, 2007/C 6127 final; European Commission, Decision of 30th April 2008 in Case NN 25/2008 (ex. CP

However, in the aftermath of the bankruptcy of Lehman Brothers, the crisis turned out to be systemic. Since October 2008, national governments have increased their subsidies, in particular under the form of State guarantees and recapitalisation measures⁶.

Nevertheless, the Commission made several attempts to play a pivotal role. The Commission's underlying policy seems to have been the following: considering the crisis as a general problem, whose solution would require remedies going beyond "tailor-made" solutions. Hence, it granted several exemptions under Art. 107(3)(b) TFEU, i.e. the provision for aids aiming to address serious disturbances in the economy of a Member State – rarely used until the crisis⁷.

In order to allow the DG Comp to act promptly, the Commission entrusted the Commissioner responsible for competition with the power to grant authorisations in agreement with the President and the members responsible for services, internal market and economic and monetary affairs⁸.

15/08), *WestLB riskshield, Germany*, 2008/C 1628 final; European Commission, Decision of 4 June 2008 in Case 2008/C 9 (ex. NN 8/2008, CP 244/2007), *Sachsen LB, Germany*, 2008/C 226 final; European Commission, Decision of 31 July 2008 in Case NN 36/20085, *Denmark/Roskilde Bank A/S*, 2008/C 4138; European Commission, Decision of 1 October 2008 in Case NN 41/2008, *UK/Bradford & Bingley*, 2008/C 290; European Commission, Decision of 2 October 2008, in Case NN 44/2008, *Germany/Hypo Real Estate Holding AG*, 2008/C 293.

⁵ This provision empowers the Commission to declare aids granted to undertakings in economic difficulty compatible with the internal market: see European Commission, *Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty*, 1 October 2004, 2004/C 244.

⁶ For an overview on the financial crisis, see, among others, P. Della Posta (ed.), *Crisi finanziaria globale, Stato e Mercato* (2009). See also L.T. Orłowski, *Stages of the 2007-2008 global financial crisis: Is there a wandering asset-price bubble?*, 43 *Econ. E-J. Disc. P.* 122 (2008); R. Masera (ed.), *The Great Financial Crisis. Economics, Regulation and Risk* (2009).

⁷ D. Gerard and G. Schaeken Willemaers, *L'Union européenne au chevet de la crise financière: un état des lieux*, in <http://papers.ssrn.com/sol3/papers.cfm?abstract>.

⁸ European Commission, *Minutes of the 1845th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 1 October 2008 (morning)*, PV(2008) 1845 final, par. 10.4. See, D. Gerard, *EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles*, available at http://www.concurrences.com/article_revue_web.php3?id_article=23208&lang=fr.

The Commission also published a series of communications to explain the approach it would follow towards State aids. The soft-law approach has been followed by the Commission since the early Seventies, when the Council refused to approve Commission's proposals for hard-law regulations. In the following years, this technique proved to be effective, since it prevented the Commission from assessing State aids on a purely case-by-case basis, "structuring" its discretion while allowing flexibility⁹. Today, communications are still an unavoidable tool of Commission's State aid policy, even in crisis management: they provide Member States with legal certainty and leave room for Commission's discretion¹⁰.

Thus, in the so-called "Banking Communication", the Commission immediately acknowledged the need to adopt appropriate measures to safeguard the stability of the financial system. The latter has therefore become one of the main goals of State aid policy. The Commission recognised that it could be necessary for Member States to adopt appropriate measures to safeguard the stability of the financial system, including schemes of aids in case Member State's authorities responsible for financial stability declared to the Commission that there is a risk of a serious disturbance in the economy. However, the Commission announced that it would still interpret the serious disturbance in a restrictive manner¹¹.

Moreover, the Commission has also enabled its DGs to grant authorisations within a very short time, in order to respond

⁹ M. Cini, *From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime*, available at http://www.eui.eu/RSCAS/WP-Texts/00_35.pdf, 17. See also G. della Cananea, *Administration by Guidelines: the Policy Guidelines of the Commission in the Field of State Aids*, in I. Harden (ed.), *State aid. Community Law and Policy and its Implementation in Member States* (1993); F. Rawlinson, *The Role for Policy Frameworks, Codes and Guidelines in the Control of State Aid*, in I. Harden (ed.), *State Aid: Community Law and Policy* (1993).

¹⁰ The communications were also issued in order to compensate the lack of case law on the conditions of application of art. 107(3) (b) TFEU (D. Gerard and G. Schaecken Willemaers, *L'Union européenne au chevet de la crise financière* cit. at 7.

¹¹ European Commission, *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*, 25 October 2008, 2008/C 270/02.

to Member States' needs. Authorisations can now be granted within 24 hours and even over week-ends, if necessary¹².

One month later, the Commission has issued the so-called "Recapitalisation Communication", aiming to regulate the conditions for supporting the recapitalisation of troubled banks¹³. Further guidance on impaired assets was then provided in the so-called "Impaired Assets Communication"¹⁴.

In the above mentioned documents, the Commission has showed a growing degree of flexibility towards financial market intervention. Nevertheless, it has not given up its role as competition watchdog. First, it has taken into due account the general principles of non-discrimination and proportionality, in order to prevent aids granted by Member States from becoming unjustified privileges on the market¹⁵. Second, the Commission has stated clearly on many occasions that it will not stop to enforce competition law. In fact, even in times of crisis, relaxing State aid control or simply giving up any control whatsoever could be detrimental to European economy¹⁶.

Thus, State guarantees have been limited to retail and wholesale deposits and short and medium-term debts, so as to

¹² Banking Communication, par. 53. Consider also the creation of the so-called "Economic Crisis Team" within the frame of DG Comp. As an example of quick response, see the authorisation granted to the UK for the rescue package to Bradford & Bingley, formally notified on 30 September 2008 and approved on 1 October 2008 (European Commission, *State aid: Commission approves UK rescue aid package for Bradford & Bingley*, IP/08/1437) (on the topic, D. Gerard, *EC competition law enforcement at grips with the financial crisis*, above footnote 8, 48).

¹³ European Commission, *Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition*, 5 December 2008, 2009/C 10.

¹⁴ European Commission, *Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector*, 25 February 2009, 2009/C 72.

¹⁵ This non-discrimination criterion was at stake in the discussions concerning the general guarantee scheme for banks in Ireland (European Commission, Decision of 13 October 2008 in Case NN 48/2008, *Ireland/Guarantee scheme for banks in Ireland*, 2008/C 6059). See D. Gerard, *Managing the Financial Crisis in Europe*, above footnote 3, 12.

¹⁶ M. Campo, *The new State aid temporary framework*. *Competition Policy Newsletter*, in http://ec.europa.eu/competition/publications/cpn/2009_1_6.pdf. This is also why competition policy would not be part of the problem, but rather part of the solution (*idem*).

exclude hybrid and subordinated debts¹⁷. This should address the risk that depositors withdraw deposits, but would not offer any State guarantee to banks engaged in toxic activities. In addition, banks may not enact commercial policies based on the aids that were granted¹⁸. Besides, both guarantees and capital injections must be remunerated¹⁹.

In addition, aids must have a temporary nature. Under the Commission's Banking Communication, only measures not exceeding two years can be approved, provided that such measures are submitted for review every six months. True, Member States could exceed that length in case the entire functioning of financial markets be jeopardised. However, even the need for such schemes has to be reviewed and reassessed at least every six months²⁰.

The temporary nature of the measures adopted by Member States has also been underlined in the Recapitalisation Communication with regard to State's presence in banks' capital²¹. A few days later, the Commission has also adopted the so-called "Temporary framework". This document followed the adoption of the communication on the European economic recovery plan and does not concern only the banking sector, but regards more broadly of the economy. It gives details on a certain number of temporary openings to State aids²². It is worth noting, in particular, that the *de minimis* threshold has been raised up to EUR 500.000²³.

Moreover, the Commission has, to some extent, also addressed the concern of moral hazard. In fact, it has provided

¹⁷ Banking Communication, par. 23.

¹⁸ Banking Communication, par. 27.

¹⁹ Recapitalisation Communication, par. 3. This draw the attention of several institutions on what a proper remuneration would be, and it was defined in 8-10% (D. Gerard, *Financial Crisis Remedies in the European Union: Balancing Competition and Regulation in the Conditionality of Bailout Plans*, in N. Jentzsch and C. Wey (ed.), *The Future of Retail Banking in Europe: Competition and Regulatory Challenges* (2010).

²⁰ Banking Communication, par. 24.

²¹ Recapitalisation Communication, par. 20.

²² Communication from the Commission – *Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis*, 17 December 2008, 2009/C 16.

²³ Temporary Framework, par. 4.2.2.

some hints, in order to encourage behaviours that foster stability rather than risk-taking. In addition, the Commission has approved the dismissal of the management of some ailing banks, such as Fortis ²⁴, as well as the decision of the Greek authorities to limit the compensation of banks' executives, which cannot exceed the compensation received by the Chairman of the Greek Central Bank ²⁵. When adopting all these measures, the Commission addressed mainly the concern of market stability. In the Commission's view, it was necessary that capital injections did not go beyond what was strictly necessary, so that they could not allow aggressive commercial policies that would have been incompatible with the stabilisation goal ²⁶.

More recently, the Commission has slightly modified its approach. In July 2009, the so-called "Return to viability Communication" has stressed some conditions that restructuring plans must fulfil. In addition, Member States are required to present a diagnosis of the problems of the banks concerned, and the latter would also be required to disclose impaired assets ²⁷.

According to the "Return to viability Communication", special attention is paid on the overall design of the plan submitted, with particular regard to the flexibility of the program and to the likeliness of its implementation timing. In addition, the burden must be shared between the awarding Member State and the beneficiary banks. In any case, the fulfilment of this condition is assessed in light of the overall situation of the financial sector. If

²⁴ European Commission, Decision of 3 December 2008 in Case NN 42/2008, *Fortis*, 2009/C 80. See, in this regard, D. Gerard, *Financial Crisis Remedies in the European Union*, above footnote 19, 4 and 6.

²⁵ D. Gerard, *Managing the Financial Crisis in Europe*, cit. at 3.

²⁶ F. Marcos, *Una lección de política de la competencia en tiempos de crisis: el control de ayudas de Estado por la Comisión Europea*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1429792.

²⁷ European Commission, *Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules*, 23 July 2009, 2009/C 195, pars. 7 and following. Note that the temporary framework has been amended at the end of 2009: European Commission, *Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis*, 15 December 2009, 2009/C 303, 4.

burden sharing is not immediately possible, the issue can be addressed at a later stage of the implementation of the plan ²⁸.

Moreover, the Commission has accepted the possibility to provide additional aids during the restructuring period if justified by reasons of financial stability, although such aids should be limited to the minimum necessary to ensure the viability of the plan ²⁹.

Finally, awarding Member States have to adopt measures aiming at preventing distortions of competition by the beneficiary bank, in order to limit disadvantages to other banks. Thus, the Commission appears to be also balancing the concerns raised by moral hazard, in order to avoid that virtuous and solvent undertakings suffer from a disadvantage vis-à-vis undertakings that benefit from State aids ³⁰.

During the year 2010, the Commission has authorised several schemes pursuant to the communications mentioned above ³¹. However, the framework just described will only be valid until 31 December 2010.

Some observers argue that the above-mentioned rules on banks' restructuring aim at striking a balance between concerns for financial stability in the short-term and for the preservation of normal market functioning in the long term ³². Therefore, more than one year after the beginning of the acute phase of the financial crisis, with lesser risks to financial stability and signs of recovery, the Commission has started to examine the conditions to restore a normal market functioning and the competitive process

²⁸ *Idem*.

²⁹ *Idem*.

³⁰ F. Marcos, *Una lección de política de la competencia*, cit. at 26.

³¹ European Commission, Decision of 3 December 2008 in Case NN 42/2008, *Fortis*, 2009/C 80. In this regard see also D. Gerard, *Financial Crisis Remedies in the European Union*, cit. at 19.

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/179&format=HTML&aged=0&language=EN&guiLanguage=en#footnote-1>.

³² A. Bomhoff, A. Jarosz-Friis and N. Pesaresi, *Restructuring banks in crisis. An overview of applicable State aid rules*, available at http://ec.europa.eu/competition/publications/cpn/restructuring_guidelines.pdf.

³³. This, hopefully, could prevent today's solutions from becoming tomorrow's problems ³⁴.

As a matter of fact, the approach adopted by the Commission in the last two years has changed and is still changing, according to the needs of the particular phase of the financial crisis concerned. Nevertheless, the Commission seems more flexible than it used to be, while checking State recovery measures, so that flexibility definitely constitutes a "silver line" of its State aids policy.

From the point of view of regulatory techniques, the adoption of several communication should receive a warm welcome, since it provides legal certainty, which is one of the key elements of good policies.

3. Control over cartels and abuses of dominant position.

The breakdown of economy has had a deep impact on undertakings in terms of turnover and credit availability. Thus, under the financial crisis, undertakings could be tempted to modify their normal competition policy, in order to earn profits through cartels, concerted practices and abuses of dominant position. Hence, the tasks of competition authorities could be more difficult, and there would be no point in being more flexible on those issues. Quite the contrary, cartels and abuses could be detrimental to the consumers (unless the conditions of Art. 101(3) TFEU are fulfilled) and even delay economic recovery ³⁵.

Interestingly, during the crisis, the Commission has inflicted the most severe fine of every time to a single undertaking in a cartel case: in the so-called "Carglass Cartel", Saint-Gobain has been fined nearly EUR 1 billion ³⁶. Some months later, during 2009, the Commission has imposed severe fines also on E.ON and

³³ *Idem*.

³⁴ European Commission, Decision of 3 December 2008 in Case NN 42/2008, *Fortis*, 2009/C 80. See, in this regard, D. Gerard, *Financial Crisis Remedies in the European Union*, above footnote 19, 9.

³⁵ B. Lyons, *Competition Policy, Bailouts and the Economic Crisis*, cit. at 1, 22.

³⁶ European Commission, Decision of 12 November 2008 in Case COMP/39.9125, *Carglass* (see press-release IP/08/1685).

GDF for market sharing in the energy sector: EUR 553 million each³⁷.

It is true that hardcore cartels cannot be accepted, even in times of crisis. However, the question arises whether such a severe sanction is appropriate in the current financial situation. In fact, many undertakings stop to earn profits and face losses and default. However, sanctions have become softer in the last few months. For example, the producers that took part in the so-called “DRAMS Cartel” were only fined the total amount of approx. EUR 331 million for price cartel³⁸. Even a multinational firm like Samsung has been fined only EUR 115 million³⁹. Besides, it is worth noting that also the overall amount of fines imposed for cartel cases has decreased during the earlier stages of the crisis, while increasing again in 2010 with signs of recovery in the outlook, as outlined in the following chart.

³⁷ European Commission, Decision of 8 July 2009 Case COMP/39.401, *E.ON./GDF* (see press-release IP/09/1099).

³⁸ European Commission, Decision of 19 May 2010 in Case COMP/38.8851, *DRAMS* (see press-release IP/10/586).

³⁹ The decision was addressed to Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya. It is to be noted that, with the exception of Infineon, which is a German company, all the parties were non-European. See press-release IP/10/586, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586&format=HTML&aged=0&language=EN&guiLanguage=en>. Note, however, that the demonstrative capacity of the examples cited above should not be overestimated. In fact, Carglass and DRAMS cases were different and the fine inflicted to Saint-Gobain has been severe also because of its recidivism, while Samsung had a 18% reduction under the leniency notice and another 10% under the settlement notice.

Total amount of fines imposed by the Commission in cartel cases (2007 – 2010) ⁴⁰

Year	Fine imposed (not adjusted for Court judgments)
2007	3.338.427.700
2008	2.270.012.900
2009	1.623.384.400
2010	1.668.904.832

Thus, with regard to cartel cases, the Commission has mitigated its fines during the financial crisis, although it has shown clearly that the crisis will not be regarded as a justification against severe sanctions in case of “hardcore” cartels ⁴¹. The same applies to abuses of dominant position. In this respect, the Commission seems consistent with its ordinary policy.

During the financial crisis, undertakings could also claim for exemptions under Art. 101(3) TFEU (formerly Art. 81(3) EC). However, since this kind of pro-competitive agreements does not have to be preliminarily notified to the Commission, we have no evidence of decisions authorising their implementation.

At national level, some competition authorities seem to be mitigating fines and tailoring decisions. In this regard, from the very beginning of the economic slowing-down, the Italian competition authority (*Autorità garante della concorrenza e del mercato*, hereinafter “Agcm”), has been keen to accept commitments from undertakings, in order to obtain some pro-competitive effect from possible cartels ⁴². However,

⁴⁰ Source: European Commission statistics, available at internet site <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>. Last change: 20 July 2010. Please note that the figure of year 2007 takes into account the amendment of 23 June 2008 to the decision of 5 December 2007 in case Chloroprene rubber. The 2008 figure takes into account the amendment of 24 July 2009 to the decision of 11 March 2008 in case International removal services

⁴¹ See also, in this regard, the so-called “Bathroom fittings & fixtures” case, where 17 bathroom manufacturers have been fined the overall amount of EUR 622 million for price-fixing (European Commission, Decision of 23 June 2010 in Case COMP/39.902, *Bathroom fittings & fixtures*, see press-release IP/10/790).

⁴² See, already in 2007, Agcom, Decision of 20 December 2007, n. 17754 in Case I681, *Prezzi del carburante in rete*, 48 Official Bulletin (2007). Nevertheless, such a

notwithstanding the crisis, hardcore cartels do not receive any benefit ⁴³.

4. Merger control

Last but not least, merger control must be considered. Since the beginning of the crisis, the worldwide number of mergers has fallen, as indicated in the following chart.

Evolution of mergers in 2008 comparing to 2007 and in 2009 comparing to 2008 ⁴⁴

	2008		2009	
	Worldwide	EU	Worldwide	EU
Number of transactions	- 16,0%	- 18,0%	- 21 %	- 16,4%
Total value of transactions	- 35,0%	- 24,7%	- 43 %	- 58%
Average value of transactions	- 23,5%	- 8,1%	- 16,8%	- 8%

During the year 2008, in the EU only transactions above EUR 1 billion increased their average value (+31,4%), but their total number was 38,8% lower than in 2007 ⁴⁵. In 2009, however, also the average value of very big transactions decreased by 24% ⁴⁶.

“pro-commitment approach” has also been criticised: it is contended that the Agcm is exercising inappropriate regulatory powers (G. Colangelo, *I rischi della concorrenza patteggiata. Note a margine del caso ACI Global*, 4 *Il diritto industriale* 353-362 (2009).

⁴³ See, for instance, Agcm, Decision of 24 March 2010, n. 20931 in Case I700, *Prezzo del GPL per riscaldamento Regione Sardegna*, 12 *Official Bulletin* 8 (2010).

⁴⁴ Source: Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2008*, Addendum A.1, and *Relazione sull'attività svolta nell'anno 2009*, Addendum A.1, available at <http://www.agcm.it/>.

⁴⁵ See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2008*, Addendum A.1, available at <http://www.agcm.it/>, 336 and following.

⁴⁶ See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2009*, Addendum A.1, available at <http://www.agcm.it/>, 316 and following.

The first five transactions, both in 2008 and 2009, represented 19% of the total value of worldwide transactions, whilst the first 5 transactions in 2007 represented 9% of the total value of worldwide transactions. However, while in 2008 three of them took place in the U.S. and the other two were implemented in the EU ⁴⁷, in 2009 all the biggest transactions were implemented in the U.S ⁴⁸.

In such a scenario, Commission merger control has not played a very important role, since only a few cross-border acquisitions have taken place so far ⁴⁹.

With regard, more specifically, to financial markets, the Commission announced its readiness to grant acquirers of ailing banks derogations to the standstill obligation enshrined in Art. 7 of Regulation 139/2004 ⁵⁰, in case of urgency and “where there are no a priori competition law concerns” ⁵¹. This would allow the immediate implementation of transactions. However, Commissioner Kroes made it clear that DG Comp will not set aside the existing rules ⁵². The so-called “failing firm defence” should therefore apply as well, even though, apparently, no undertaking has relied on the failing firm theory yet ⁵³.

At national level, some Member States intervened in order to facilitate State-engineered transactions. In the United Kingdom, for instance, the proposed acquisition of HBOS by Lloyds would have created a so-called “relevant merger situation”, calling for further inquiry by the Office for Fair Trade. However, in order to avoid such a further enquiry, the Government passed a bill providing for the “stability of the UK financial system”, which

⁴⁷ See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2008*, Addendum A.1, available at <http://www.agcm.it/>, 337.

⁴⁸ See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2009*, Addendum A.1, available at <http://www.agcm.it/>, 317.

⁴⁹ D. Gerard, *EC competition law enforcement at grips with the financial crisis*, above footnote 8, 55.

⁵⁰ Regulation of the Council n. 139/2004 of 20 January 2004, 2004/L 24.

⁵¹ N. Kroes, *Dealing with the current financial crisis*, Addressed to the Economic and Monetary Affairs Committee, European Parliament, Brussels, 6 October 2008, 3.

⁵² *Idem*.

⁵³ D. Gerard, *Managing the Financial Crisis in Europe*, cit. at 3, 12.

justified an exception to the referral of relevant merger situations to the Competition Commission ⁵⁴.

A similar approach has also been adopted in Italy for the transaction between Alitalia and Air France. In this respect, the Parliament passed for the first time a bill that made the authorisation of the Agcm non compulsory ⁵⁵.

In sum, there is little room for a European merger policy, given that Member States are proactive in facilitating mergers deemed to help national markets.

5. Concluding remarks.

The conclusions of this analysis are the following. First, the crisis has clearly influenced the State aid policy of the Commission. This policy is more flexible than in the past, and this allows the Commission to seek to play a pivotal role in the management of the crisis.

With regard to control over cartels and abuses of dominant position, the Commission does not seem willing to adopt a relaxed approach. Quite the contrary, despite some rebates on the fines imposed, it is enforcing competition law in a vigorous manner.

Finally, in the field of merger control, the case law is pinpointing a proactive approach of national authorities. In fact, the latter enact industrial policies and intervene actively to drive mergers that could raise competition law concerns. However, while doing so, national authorities should also keep in mind the consequences of their behaviour in the long run. How far will the Commission tolerate behaviours that could affect internal market?

⁵⁴ D. Gerard, *Managing the Financial Crisis in Europe*, cit at 3, 11. See also <http://www.ffhsj.com/siteFiles/Publications/8E969877A544C1EDBBA13739199BAEE4.pdf>; http://us.ft.com/ftgateway/superpage.ft?news_id=fto111020081514551352.

⁵⁵ Art. 1(10) of decree law 28 August 2008, n. 134. Pursuant to art. 10 of the Law 10 October 1990, n. 287, the authorisation would have been compulsory. On the Alitalia case, see S. Spuntarelli, *Poteri pubblici e costituzione dell'economia nel "singolare" caso Alitalia*, 5 F. A. - T. A. R. 1444 ss. (2009).