The International Economic Crisis - Causes of the Crisis and Consequences in Terms of Competition Policy

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You can access some of my papers and references to academic / research activities in connection with my Jean Monnet Chair
The credit crisis and its general background 2007-2008 – September 2008 and the default of some major financial institutions in the USA (Lehman Brothers), Germany, Ireland and the UK and its quick spill over effect to other banking systems in Europe.

The problems experimented, ‘inter alia’ by Fortis Bank, ABN AMRO, Dexxia and BNP and the meeting of 11-12 October 2008 between the Heads of Governemnt of the Euro-Group, the President of the European Central Bank and the UK Prime Minister (Gordon Brown) – the agreement between the participants to provide guarantees for their national banking sector. The 13 th October 2008 meeting of competition law experts in order to attempt a consensus for the application of competition rules – the state aid rules viewed as a necessary complement to the national measures ensuring the financial viability of Member States banks.

An exceptional situation concerning the banking sector that has led to the establishment of a Commission Special Task Force for State Aid in the financial sector since the Autumn of 2008 – a new and exceptional context for state aid policy and control (“State Aids seem to be sexy today” – Competition Commissioneer, Neelie Kroes – Conference at the State Aids Action Day – November 21 st, 2008, Brussels)
Causes of the financial crisis (2007-2009) and subsequent economic crisis, involving in the EU a crisis of sovereign debt markets intertwined with the crisis of the banking sector, have been widely discussed and will not be extensively debated here.

However, it is of fundamental importance to properly identify the causes of the crisis in order to prevent the adoption of policies in a collision course with competition policy, on the basis of a supposed general market failure, or to prevent options to drastically relax competition, as it happened in the US in the 1930s.

Accordingly, in a very brief manner, we may mention FOUR types of causes for that crisis:
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1 - Overall Remarks - Cont.

• (A) – Opacity of the financial system and insufficient coverage by sector-specific regulation and supervision over what has been rather loosely designated as a ‘shadow financial system’, involving securitized assets, structured investment vehicles, private equity funds, or hedge funds and also gaps in the regulatory and supervisory scrutiny of too complex organizations of financial groups (comprehending banking and insurance) – on the whole, this led to financial institutions taking excessive risks.
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1 - Overall Remarks - Cont.

• (B) - Pro-cyclical effect of Basel II rules, which determined that banks had to maintain own funds in a certain correlation with the level of risk of its assets – once those assets had its value drastically reduced in the context of new economic tensions and also due to adopted asset valuation methods, that led to a downward, perverse, spiral, requiring higher capital ratios and leading to overall magnifying effects (pro-cyclical), weakening as a whole the banking sector.

• (C) – Dispersion of structures of financial supervision, leading to overall gaps. Dispersion between supranational and national levels (e.g., in EU, almost Federal harmonization of prudential rules but supervision of its application was essentially done at national level).
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1 - Overall Remarks - Cont.

• (C) – (cont) - Dispersion also related with institutional separation between (i) prudential micro-supervision (concerned with financial equilibrium of individual institutions), (ii) conduct of business or market behaviour supervision and (iii) macro-prudential supervision oriented towards systemic risk in global terms – FUNCTIONAL AND ORGANIZATIONAL DISPERSION of SUPERVISION STRUCTURES leading to coordination and information-sharing problems between different Supervisory Authorities that tend to be maximized, with perverse effects, at times of crisis.

• (D) – Causes of the financial crisis related with global macro-economic imbalances (not to be dealt with here).
Conversely, there seems to be no ideal solution in terms of institutional architecture of financial regulation and supervision.

In the recent crisis, no model seems to have respondend without major failures, nor (i) the model of the sole financial supervisor (e.g. UK – Financial Services Authority), nor (ii) very fragmented models of supervision (with a combination and some overlap of multiple Authorities, as in the US), nor (iii) the so called Twin Peaks Model based on a dual pillar of a prudential supervisory Authority and a behavioural supervisory Authority.
• No model of financial regulation and supervision ensures or guarantees in itself - in absolute terms - the emergence of crisis of the financial system.

• However, the legal, economic and institutional architecture of models of regulation and supervision is not irrelevant and may offer a significant contribution for attenuating financial crisis and for crisis resolution (whenever crisis ultimately occur).
In the wake of the crisis, regulatory reform should lead to a new architecture of models of regulation and supervision of the financial sector having at its core a leading and overarching goal of FINANCIAL STABILITY (with the emergence of a new autonomous function of supervision of MACRO-PRUDENTIAL Supervision).

More than discussing different institutional models it is necessary to properly identify and address the key goals of regulation and supervision of the financial sector.

Essentially, and comparing various national systems worldwide, these should comprehend FOUR KEY GOALS
• (1) Financial soundness and sustainability of financial institutions;
• (2) prevention and attenuation of systemic risks;
• (3) Safeguard of loyalty and commercial correctness and efficiency of markets;
• (4) Protection of clients of financial services and financial institutions

[(3) and (4) essentially interconnected, but (3) predominantly related with transparency and providing accurate information on financial products and (4) of behavioural duties of financial institutions]
In connection with objectives (1) and (2) the fundamental need of finding a proper framework to deal with the so called TOO BIG TO FAIL INSTITUTIONS (no common solutions between the US and the EU – need to combine ‘ex ante’ solutions of financial regulation with competition law and policy as regards merger control of financial institutions)
QUESTION I - Given the extent, structural nature and duration of the financial crisis, will the rapid and powerful expansion of competition law and policy in the two decades preceding the crisis be followed – as provocatively asked by MARIO MONTI – by a ‘Competition Night’, or, we might also ask, in a more benign fashion, by a ‘Competition Dawn’?

QUESTION II - Is it foreseeable that, after the apparent wider consensus on the benefits of competition law and policy of the latest two decades (for the economy in general and consumers), leading to an expansion of competition rules worldwide (as reflected by ICN – International Competition Network), e.g. in China (as we shall briefly comment in the end), we are going to experiment (i) an abrupt paradigm shift which will downplay competition policy? Or, at least (ii) limited changes of the evolutionary stage of competition policy within the two reference models of US antitrust policy and EU competition policy? (some limited answers attempted at the end)
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2 - Overall Remarks and Transversal Questions

• Regardless of the final repercussions of the financial and economic crisis on competition law and policy (issues raised QUESTION II, (i) and (ii) supra), we may currently refer to an apparent PARADOX in terms of competition law and policy.

• This PARADOX involves, at least in the EU, the coexistence between, on the one hand, (a) potential governmental pressures on autonomous competition authorities (considering here the predominatly administrative system of enforcement of competition rules in the EU, within the fundamental pillar of public enforcement of these rules) or the potential temptation to develop industrial policies in collision course with competition policy and, on the other hand, (b) a situation related with the financial sector (at the core of the crisis) characterized by an enhanced or decisive role of the Commission, acting as EU competition authority, in the field of control of state aids to financial institutions.
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2 - Overall Remarks and Transversal Questions

- In fact, the EU competition law scrutiny of state aids massively granted to financial institutions between the last quarter of 2008 (following the collapse of Lehman Brothers, as per the overall context identified at the beginning of this Presentation) and the end of 2009 has translated into the necessary building of a framework and supervision – within the regime of state aid control - of restructuring processes of financial institutions that were recipients of state aid (although 2008-2009 corresponds to the period of more massive state intervention, that has not stopped and the situation of EU banking sector, contrary to what happens in the US, remains fragile as illustrated, *inter alia*, by the very recent rescue by the French Government – Summer 2012 - of Crédit Immobilier de France).
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2 - Overall Remarks and Transversal Questions

• Against this background it is, therefore, curious, or, to some extent, paradoxical that in a period of hypothetical or supposed retreat of competition law and policy and of competition authorities, the EU Competition Authority (Commission) is playing a decisive role on the incoming evolutions and prospects of a key sector for the economy as the financial sector.

• In thesis, this may even imply risks or problems of a new type of overlap between the competition authority and Regulatory and Supervisory Authorities of the financial sector, somehow epitomised by statements of the former EU Competition Commissioner NEELIE KROES, referring a necessary intervention of the Commission, in its role of competition authority, in the area of financial stability and performing tasks that Regulatory and Supervisory Authorities of the financial sector failed to perform in a satisfactory manner.
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2 - Overall Remarks and Transversal Questions

• A second possible PARADOX involving competition law and policy in the context of economic crisis has to do with the fact that the dynamic and volatility of the evolution of the economy and of the financial sector in the more recent months and years has led to the emergence of some winning entities vis a vis other players that exited the market or were constrained to drastically reduce their activity.

• Accordingly, a restricted group of some market players (particularly in the financial sector) have presented exceptional results (record results in some cases over the latest 24 months) that are bound to indicate a significant reduction of competitive pressure and a correlated reinforcement of market power, which requires enhanced attention on the part of Competition Authorities and corresponding strategies to monitor this reinforced market power and its possible effects.
Therefore, while as regards a significant part of the financial sector it is still necessary to delineate exit strategies from an exceptional framework of massive state aid granted to financial institutions – through restructuring processes, to be duly followed and monitored by Competition Authorities in the EU (*maxime*, the Commission) – at the same time it may already be necessary, as regards some entities and operations in the financial sector (or in other sectors), an accrued monitoring of the exercise of reinforced market power (gained by some players at the detriment of others that were forced to exit the market or drastically reduce their activities).

This, to some extent, translates into contradictory forces at play over Competition Authorities, which require them to find the correct middle ground approaches to cope with those potentially contradictory pressures.
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2 - Overall Remarks and Transversal Questions

• On the basis of this second aforementioned paradox (arising from the interplay of competition law and policy and the economic crisis), I – to some extent – disagree with JOHN FINGLETON view (see – ‘Competition Policy in Troubled Times’ – OFT, 20 Jan. 2009), according to which the economic crisis may promote vigorous long-term growth in productivity, eliminating inefficient firms that would have survived in periods of expansion and thus strengthening the production base and promoting innovation in subsequent periods. While this vision of ‘creative destruction’ may be true in some cases, given the seriousness and persistence of the economic crisis, there are, conversely, serious immediate risks to competition arising from the significant reinforcement of market power of some players (since the players eliminated or gravely constrained in a situation of protracted crisis are not inevitably the least efficient) – requiring as such enhanced attention and adequate monitoring strategies.
3 - Antitrust enforcement in a time of crisis - global considerations

• Considering the core of antitrust (properly or strictly speaking), involving the prohibition of cooperation between undertakings restrictive of competition (maxime cartels) and abuses of dominance, it has been debated whether antitrust enforcement should be significantly relaxed (a debate e.g. illustrated by CARL SHAPIRO, Competition Policy in Distressed Industries, Remarks for the delivery to the ABA Antitrust Symposium on Competition as Public Policy, May, 13, 2009).

• Historical evidence involving US antitrust system is clearly oriented towards a negative answer – temporary relaxation of antitrust enforcement in the US between 1933-37 at the time of the great depression led to highly negative market results.

• Also, to a large extent, as we have observed in connection with the reinforcement of market power, in difficult economic conditions cartels and abuses may be more frequent and justify careful scrutiny
Competition Law and the Economic Crisis
4 - Sequence of Topics Covered

• Following the preceding transversal considerations, and focusing on competition law and policy at the level of the EU and its Member States, it is pertinent to review recent fundamental developments in the context of the economic crisis in THREE KEY AREAS.

• FIRSTLY, the new and exceptional context & framework for state aid policy and control in the financial sector – 2008-2012.
• Secondly, and in succint terms, merger control.
• Thirdly, also in extremely succint terms, antitrust scrutiny of anticompetitive practices (cooperation and abuse of dominance)
5 - State Aid and Public Intervention in Times of Crisis - the economic crisis and the limited response of the EU

- The international economic crisis and the limited and late response of the EU due to the imbalances of the EMU as originally conceived in the Maastricht Treaty.
- The particular responses from some Member States – PROJECT MERLIN in the UK (February 2011 – agreement between UK government on lending and remuneration practices – 4 biggest UK banks plus Santander commit to make available 190 billion pounds (215 bn Euros) of credit to business in 2011 – further comitments include lending to SMEs – is Public interventionism back? Is there a new path and a new form of industrial policy? – Apparent limited/scarce results in the case of PROJECT MERLIN
- [www.hm-treasury.gov.uk/d/bank_agreement_090211.pdf](http://www.hm-treasury.gov.uk/d/bank_agreement_090211.pdf)
A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - I - The Commission’s General Measures in this field

- Adoption of several general measures by the Commission – starting from the 2008 ‘Lehman moment’ of the crisis (initial context described supra) - that tried to tackle the particular issues concerning the financial sector of the Member States in the context of the credit crisis.
- The “Impaired Assets Communication” - Communication on the treatment of impaired assets in the Community banking sector – 26 March 2009 OJ C 72, p.1
6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - I - The Commission’s General Measures in this field - CONT

• The “Restructuring Communication” - 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 – 19 August 2009 OJ C 195, p. 9:

• Fundamental issues (inter alia) – the need for a vital distinction between banks that are fundamentally sound and banks that are not (solvency vs liquidity problems)– it should not be automatically assumed that restauration of long term viability will have to include restructuring for all banks.

• Adjustments in methodology – the Restructuring Communication provides for structural and behavioural conditions.
6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - I - The Commission’s General Measures in this field - CONT - 2

• A Global exit strategy to the temporary framework of state aids to the financial sector that was justified as an emergency response to a situation of unprecedented stress in the financial sector – the need to define a balanced road map [has the financial crisis ended? Sovereign debt crisis and the imbalances of the Eurozone and its possible effects on the stability of the banks of the Eurozone and other EU banks – Possible solutions of Debt restructuring (the case of Greece) that may involve partial recapitalization of banks].

• The Communication from the Commission on the application from 1 January 2011 of state aid rules to support measures in favour of banks in the context of the financial crisis – 7 December 2010 OJ C 329, p.7 – “the Prolongation Communication” (extending, on amended terms, the Restructuring Communication – the only one with a specified expiry date)

• The Communication of the Commission – Temporary Union framework for state aid measures to support access to finance in the current financial and economic crisis – 11 January 2011 OJ C 6, p.5
6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - I - The Commission’s General Measures in this field - CONT - 3

- Difficulties in devising a definitive exit strategy for the exceptional framework due to evolution of the crisis – protracted crisis of sovereign debt markets, possibly more serious than the ‘Lehman moment’ (2008) of the Banking Crisis (the need of a defining moment of overhaul of the EMU – a ‘shock Lehamn moment’ for the crisis of sovereign debt markets) – the Second Prolongation Communication - The Communication from the Commission on the application from 1 January 2012 of state aid rules to support measures in favour of banks in the context of the financial crisis – 6 December 2011 OJ C 356, p.7 – following the so called ‘banking package’ agreed by Heads of State and Government in 26 October 2011 (acknowledging the interconnection between tensions in sovereign debt markets and a new stage of banking sector crisis in the EU)

6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - I - The Commission’s General Measures in this field - CONT - 4

• On the whole, looking for a **systematic overall perspective** of the Commission’s **general measures** put in place to follow and scrutinize state aid policy and public intervention in the financial sector, we may differentiate **three distinct levels**
  • **A first level**, including a first wave of financial assistance to individual banks affected by the initial stages of the crisis and subsequent – albeit not so intense – cases of financial assistance to individual banks affected by the prolongation of the crisis (related with sovereign debt markets) – requiring implementation of restructuring plans.
  • **A second level**, comprehending wider or overall programs of recapitalization and financial assistance to the financial sectors of Member States receiving financial assistance (so called “Programme Countries” – Greece, Ireland and Portugal)
6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - I - The Commission’s General Measures in this field - CONT - 5

- **At this second level** - and I may refer here to the example of Portugal - the recapitalization of banks using public resources received from the program of financial assistance to the Member States carries with it a significant dependency on the State and massive public presence in the banks, involving important risks for competition in the banking sector, that should justify ad hoc carefully tailored measures to limit competition distortion.

- **A third level**, comprehending the particular situation of the Spanish Banking Sector, involving a comprehensive program of public intervention in banks with the Spanish government applying for **European funding to sustain the recapitalization process** (a loan of up to 100 billion Euros in the context of economic conditionality which Spain will be subject).
6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - Some landmark individual decisions

- Adoption of a large number of state aid decisions in **individual cases** concerning the financial sector. Considering that speed and urgency were of the essence many of these decisions were taken under **Article 108(3) TFEU** – preliminary procedure (usually providing that the Member had to submit a restructuring plan within 6 months/Follow-up decision adopted under the formal procedure of Article 108(2) TFEU

- Significant part of the decisions adopted in this period in the exceptional context at stake were not taken under the usual legal basis of Article 107(3) (c) TFEU, but under **Article 107(3) (b) TFEU** (“**serious disturbance in the economy of a Member State**”)

- Large amounts of state aid to financial institutions involved
6 - A new and exceptional context for state aid policy and control in the financial sector - 2008-2012 - Some landmark individual decisions - CONT 1

- The Commission decision on **ING** (concerning measures adopted by the government of the Netherlands) – Nº C 10/2009 of 18-11-2009 (see website of DGCOMP/State Aid/Cases).

- The Commission decision on **Northern Rock** – Nº C 14/2008 (see website of DGCOMP/State Aid/Cases).

- The Commission decision on **Landesbank Baden-Wuertemberg** – Nº C 17/2009 (see website of DGCOMP/State Aid/Cases).

- The Commission decision on **Banco Privado Português (BPP)** – Nº C 33/2009 (see website of DGCOMP/State Aid/Cases – determining the recovery of state aid to BPP deemed illegal by the Commission.
7 - The exceptional context for state aid policy and control in the financial sector - 2008-2012 - overall view

- Initial agility displayed by the Commission in handling the massive aid support to financial institutions in this exceptional period and trying to adopt the leadership of the process in the EU (preventing every Member State from acting for its account)

- Doubts about the Commission’s view that, in case Member States present complete restructuring plans, it can proceed according to the preliminary procedure of Article 108(3) TFEU

- The indispensable control ‘ex post’ of the fulfilment of the conditions under which state aids to financial institutions were authorised and the difficult and sensitive interplay that may involve between the Commission and Financial Regulators and Supervisory authorities charged with the financial supervision of these institutions (considering that even in the wake of the September 2010 reforms arising from the LAROSIÈRE Report financial supervision remains largely a task entrusted to National supervisory authorities and although envisaged reforms contemplate significant transfer of supervisory functions to EU level).
7 - The exceptional context for state aid policy and control in the financial sector - 2008-2012 - overall view -2

- **Reform** on the basis of conclusions of the Euro Area Summit of 29 June 2012, later endorsed by the European Council. In this statement, a further activation of Article 127 (6) TFEU was announced, **providing the ECB with operational functions in the area of micro-prudential supervision**, i.e. extending beyond its close involvement in systemic, or macro-prudential, supervision (on the basis of such Article 127(6)). In its conclusions, the Euro Area Summit acknowledged the vicious circle between sovereigns and banks: “**We affirm that it is imperative to break the vicious circle between banks and sovereigns. The Commission will present Proposals on the basis of Article 127(6) for a single supervisory mechanism shortly.** We ask the Council to consider these Proposals as a matter of urgency by the end of 2012. When an effective single supervisory mechanism is established, involving the ECB, for banks in the euro area the ESM could, following a regular decision, have the possibility to recapitalize banks directly.” The European Council welcomed this statement.
7 - The exceptional context for state aid policy and control in the financial sector - 2008-2012 - overall view -3

• But, Reform providing ECB with new supervisory powers – in effect started some weeks ago, in December 2012, albeit in a very incomplete manner - will take time and subject to considerable uncertainties and hurdles.

• Nevertheless, given the vicious circle between banking and sovereign debt crisis (now explicitly acknowledged) the EXIT ROAD from the exceptional – ‘temporary’ – framework of state aid for banks will largely depend on the building of the so called ‘Banking Union’ in connection with new structural measures to solve the sovereign debt crisis in the EuroZone – in short, key developments of competition policy now depending on further inputs on EU integration.
8 - Developments in the context of the economic crisis in the field of merger control - succinct reference

- (A) Economic crisis has potentially significant implications in the merger policy field, although the first apparent signs of relaxation of merger control particularly as regards transactions in the banking sector were not confirmed (e.g. cases mainly at national level in the EU in which public interest considerations related with stability of financial system were brough forward – ex -Lloyds TSB/HBOS merger in the UK - or rather lax reviews of certain horizontal mergers between financial institutions in the US – ex – JPMorgan Chase/Washington Mutual). On the contrary, I believe that systemic problems identified in the financial sector should lead to a more rigorous scrutiny of certain mergers in this field – but that has to do with a new interplay between competition authorities and financial regulators and supervisors to be focused in out final considerations.
8 - Developments in the context of the economic crisis in the field of merger control - succinct reference - cont

• (B) Failing firm defence in merger transactions which has been rarely invoked in the past is bound to be considered in more cases in the context of the crisis. The fundamental parameters and standards of proof of this failing firm defence should be finetuned (something that has been emphasized at the level of OECD), maintaining fundamentally the same legal test applied and resisting the temptation of creating special rules or criteria for financial distress arising during the crisis – conversely that does not imply necessarily the application of a somehow stricter test “especially in a downturn” (as suggested, e.g., by JOHN FINGLETON). What is ultimately important is to avoid any kind of overlap between the failing firm defence and the so called ‘flailing firm’ defence, where parties may attempt to justify the merger is pro-competitive because the acquired firm is financially weak
(C) Finally, conditions of the financial crisis will render more difficult in multiple cases the adoption of structural conditions envisaged to authorize mergers with anticompetitive effects (difficulties to find in a timely manner buyers to certain assets). The adoption of behavioural conditions should be considered as an alternative only in an extremely careful manner. Competition authorities should resist the temptation of excessively creative solutions or excessive ‘market engineering’ involving their lasting intervention and _ex post_ monitoring of merged entities, e.g. through combinations of behavioural remedies with structural conditions made possible through an appreciable extension of deadlines to divest assets, which carries with it considerable risks.
9 - Developments in the context of the economic crisis in the field of antitrust scrutiny of anticompetitive practices (cooperation and abuse of dominance) - succinct reference

- (A) Stronger incentives to price fixing and market sharing in conditions of crisis in which a significant reduction of demand occurs. Accordingly, there is a pressing need to reinforce the effectiveness of the antitrust scrutiny of cartels and dissimulated cartels (under other arrangements, e.g. joint ventures or others). Possibly, as suggested by Frédéric Jenny (President of the Competition Committee of the OECD), with the Competition Authorities not relying so much on clemency and developing, on a selective basis, more field investigations. At the same time, it is important to resist appeals from market operators and pressures these may exert in order to severely limit fining policy at a time of crisis. The deterrent effect of fines has to be preserved, while taking into consideration the financial situations of firms (a proper balance has to be casuistically found).
9 - Developments in the context of the economic crisis in the field of antitrust scrutiny of anticompetitive practices (cooperation and abuse of dominance) - succinct reference

• (B) Need of enhanced attention to situations of reinforcement of market power due to market exit of various operators and to exclusionary practices, that may target in particular innovative firms (more exposed to situations of financial distress since they tend to be smaller and less established in certain markets). Also, hypothetical need to apply in a more flexible manner, in order to maintain the flow of innovation, the requirements of access to essential infrastructures (delineated in a more restrictive manner in the beginning of the 2000s), given that economic resources tend to flow less freely in the difficult macro economic conditions of the crisis.

• (C) Importance of the ability of Competition Authorities to effectively scrutinise alleged ‘voluntary’ agreements between competitors stimulated by governments and other public entities. There is room for new forms of industrial policy but not of that kind.
9 - Developments in the context of the economic crisis in the field of antitrust scrutiny of anticompetitive practices (cooperation and abuse of dominance) - succinct reference

• (C) – Cont – In connection with the preceding aspect, there is a need to maintain at EU level a very strict view of ‘crisis cartels’ – rigorously scrutinized in exceptional terms and in individual cases under par 3 of article 101.º TFEU (and the very narrow margin the conditions established therein, or in corresponding rules of Member States competition laws, allow in these cases), never accepting those ‘crisis cartels’ on the basis of the general crisis or of a sector-specific crisis arising from the wider conditions of economic distress.
10 - Final Considerations

• We may close attempting to put forward - although dealing with a context still in flux - **FOUR final considerations**, bearing in mind our initial questions and issues identified throughout the Presentation:

• 1 – We believe the crisis (2007-2008 and ongoing under new diversified forms) should not lead to a fundamental paradigm shift in terms of competition policy (lato sensu). The crisis should not call into question essential premises of competition law systems (as evolving over the last decade, e.g. in the EU case, more reliant on economic aspects and ‘effects based’). It should not either justify a fundamental relaxation (a kind of ‘benign neglect’) of enforcement of competition rules. Conversely, considering the origin and causes of the crisis (discussed *supra*), it should lead to a **qualitative new interplay between competition law and a deeply reformed regulation of the financial sector**.
10 - Final Considerations - cont

• 1 – (cont) - examples of such new interplay abound – e.g., in the field of merger control, interplay between Competition Authorities and Financial Regulators in order to avoid the emergence of ‘too big to fail’ financial institutions not subject to the same competitive constraints as other market players.

• 2 – Development of new and more sophisticated forms of competition advocacy on the part of Competition Authorities (in connection with governments), avoiding the dual mantra of competition enforcement parameters absolutely untouched regardless of the crisis and of formal appeals against alleged overregulatory responses to the crisis. As part of such competition advocacy, and building on methodologies developed by the OECD (e.g., 2007 – OECD – Competition Assessment Toolkit), promote a finetuning of methodologies to identify and assess restraints of competition arising from certain public and regulatory policies.
10 - Final Considerations - cont

- Development by Competition Authorities of a ‘balanced flexibility’ approach – while preserving core goals of antitrust and key enforcement parameters (not fundamentally relaxed), adapt the enforcement process to the prevailing economic conditions (with a limited degree of flexibility that does not lead to long term harm). In this context, prioritisation is essential to select the areas more critical to preserve competition incentives in the particular conditions of a prolonged crisis. The prioritisation approach is well known in the UK (with the OFT adopting prioritisation principles) but may still be the object of a qualitative upgrade. In Portugal, the recent 2012 reform of the Competition Act led to the replacement of a preceding legality principle by an opportunity principle that at the same time allows the Competition Authority to define priorities for its activity and requires it to state and justify the guiding criteria of such prioritisation.
4 – Also, qualitative upgrade of methodologies used by Competition Authorities to evaluate the economic output (or social and economic output, considering the perspective of consumer welfare) of its antitrust enforcement – maxime (but not only) in the field of cartel work (price effect, volume effect and other negative effects that may to some extent be measured or estimated), allowing regular comparisons of those economic outputs with the budgets and resources allocated to Competition Authorities (thus resisting temptations of budget cuts or other financially driven restructuring of those Authorities like, e.g. ‘mergers’ of Competition Authorities with sector-specific Regulatory Authorities (as currently envisaged in Spain or in a process of preliminary evaluation in Portugal).
10.2 - Final Considerations - the case of China

• It is relevant in parallell with these final considerations to add a very short and also conclusive note on CHINA and the Far East.

• Curiously at the time of the outbreak of the international economic crisis – 2007 – China adopted its Competition Act (Antimonopoly Law – ‘AML’) after a very long process of drafting and discussion. And currently Hong Kong is on the verge of establishing its Competition Authority.
10.2 - Final Considerations - the case of China

- Accordingly this is also a confirmation that the international market crisis ultimately did not stop the momentum for expansion of competition law and policy worldwide.
- The AML of China is clearly focused on merger control. Since 2008 some noteworthy decisions have been adopted, in particular the prohibition decision Coca Cola-Huiyan of 2009, or very recent cases of approval with conditions, e.g., Western Digital/Hitachi (March 2012) or Wal-Mart-Niuhai H (August 2012).
- On anticompetitive practices the developments are less noteworthy, but, anyway, there are some relevant ones.
10.2 - Final Considerations - the case of China

• We refer, e.g., to complaints against leading internet companies like Baidu (abuse of dominant position) raising competition concerns similar to the ones raised in regard of Google in the US and the EU.

• Another front in which prospective developments are to be expected, albeit very slowly, is the curbing of so called administrative monopolies in China and government related restrictions to competition – IN A NUTSHELL – competition law and policy is following its course, also in China, although an uneven one, and that has not been stopped by any negative image of competition policy in the wake of the crisis!