

## 2nd Portuguese – Spanish Conference on Competition Law

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Madrid

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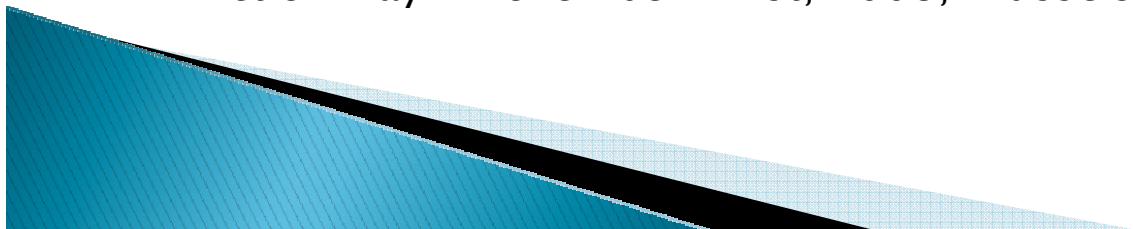
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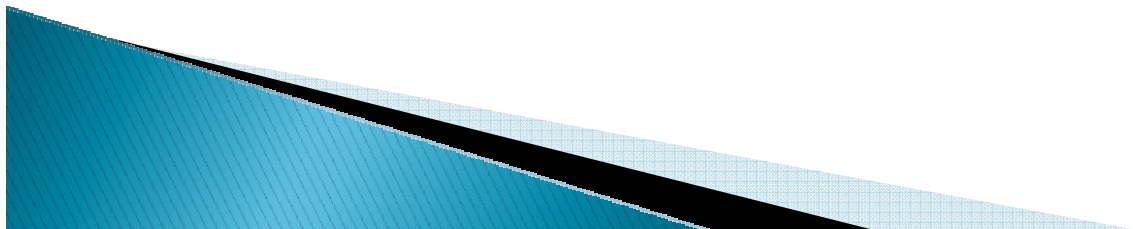
## Second SESSION – State Aid in Times of Crisis. State Aid in the Financial Sector 1 – Introductory Remarks

- ▶ 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 the banking system in Europe.
- ▶ The problems experienced, ‘inter alia’ by Fortis Bank, ABN AMRO, Dexsia and BNP and the meeting of 11–12 October 2008 between the Heads of Government of the Euro-Group, the President of the European Central Bank and the British Prime Minister (Gordon Brown) – the agreement between the participants to provide guarantees for their national banking sector. The 13<sup>th</sup> October 2008 meeting of competition law experts in order to attempt a consensus for the application of competition rules – the state 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 Commissioner, Neelie Kroes – Conference at the State Aids Action Day – November 21<sup>st</sup>, 2008, Brussels)



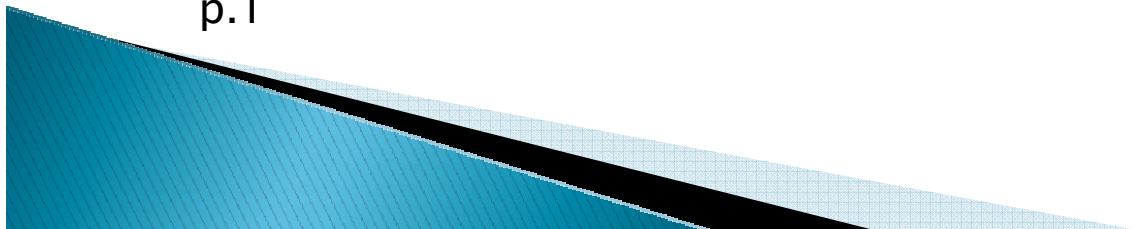
## State Aid in Times of Crisis – the economic crisis and the limited response of the EU

- ▶ the international economic crisis and the limited response of the EU due to the imbalances of the EMU as originally conceived in the Maastricht Treaty.
- ▶ The Communication from the Commission to the European Parliament, the Council and the European Central Bank – Enhancing Economic Policy Coordination for Stability, Growth and jobs – Tools for a Stronger EU Economic Governance (COM(2010) 367 final – Brussels 30.6.2010
- ▶ 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 commitments include lending to SMEs – is Public interventionism back? Is there a new path and a new form of industrial policy?
- ▶ [www.hm-treasury.gov.uk/d/bank\\_agreement\\_090211.pdf](http://www.hm-treasury.gov.uk/d/bank_agreement_090211.pdf)



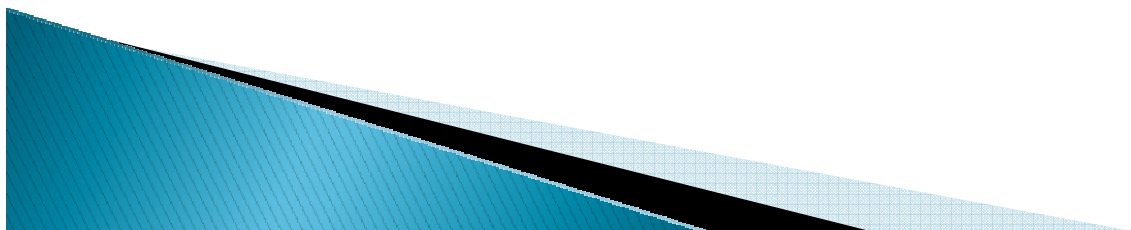
## A new and exceptional context for state aid policy and control in the financial sector – 2008–2011 – I – The Commission’s General Measures in this field

- ▶ Adoption of several general measures by the Commission that tried to tackle the particular issues concerning the financial sector of the Member States in the context of the credit crisis.
- ▶ The “***Banking Communication***” – Communication on 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 OJ C 270, p. 8.
- ▶ The “***Recapitalization Communication***” – Communication on the Recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition – 15 January 2009 OJ C 10, p. 2.
- ▶ The “***Temporary Framework Communication***” – Communication on the temporary Framework for state aid measures to support access to finance in the current financial and economic crisis – 22 January 2009 OJ C 16, p.1
- ▶ The “***Impaired Assets Communication***” – Communication on the treatment of impaired assets in the Community banking sector – 26 March 2009 OJ C 72, p.1



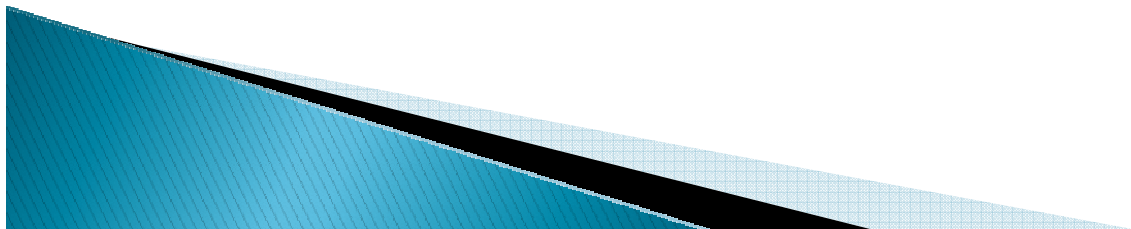
## A new and exceptional context for state aid policy and control in the financial sector – 2008–2011 – I – The Commission’s General Measures in this field – CONT

- ▶ 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.



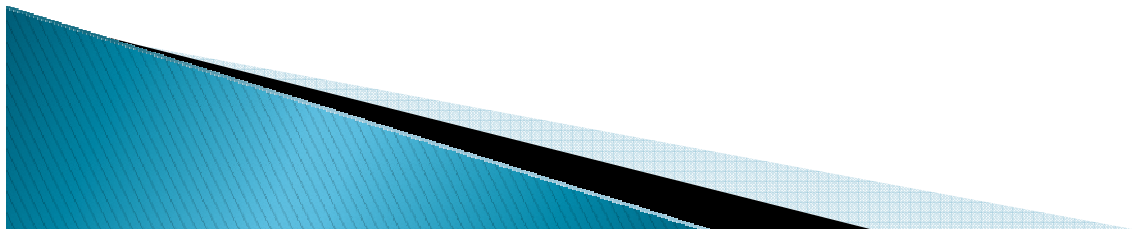
A new and exceptional context for state aid policy and control in the financial sector – 2008–2011 – I – The Commission's General Measures in this field – CONT – 2

- ▶ **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 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



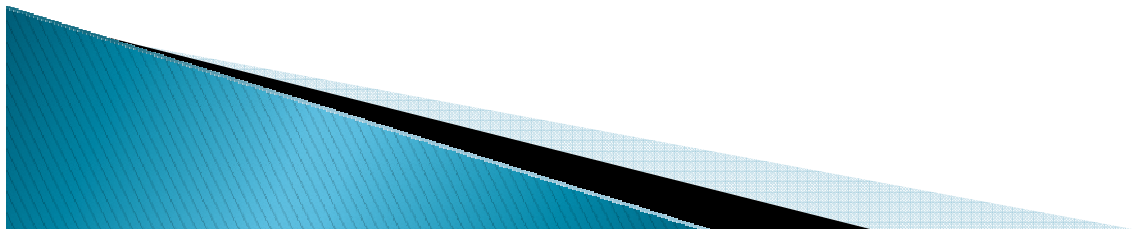
## A new and exceptional context for state aid policy and control in the financial sector – 2008–2011 – Some landmark individual decisions

- ▶ 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



## A new and exceptional context for state aid policy and control in the financial sector – 2008–2011 – Some landmark individual decisions – CONT 1

- ▶ The Commission decision on **ING** (concerning tow measures adopted by the government of the Netherlands) – N° C 10/2009 of 18–11–2009 (see website of DGCOMP/State Aid/Cases).
- ▶ The Commission decision on **Northern Rock** – N° C 14/2008 (see website of DGCOMP/State Aid/Cases).
- ▶ The Commission decision on **Landesbank Baden–Wuerttemberg** – N° C 17/2009 (see website of DGCOMP/State Aid/Cases).
- ▶ The Commission decision on **Banco Privado Português (BPP)** – N° C 33/2009 (see website of DGCOMP/State Aid/Cases – determining the recovery on state aid to BPP deemed illegal by the Commission).





## The exceptional context for state aid policy and control in the financial sector – 2008–2011 – 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 '*a posteriori*' 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.

