

Sarah Kim (I6061122)

Nefeli Filos (I6055143)

State aid and the financial crisis - An assessment under the State aid rules for the banking sector

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Schoenmaekers / Dr. Niels Philipsen**

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Introduction

The first signs of a global financial crisis became apparent in early 2007 when the US mortgage market began to collapse. The crisis soon reached Europe when the German banks Sachsen LB and LKB were the first to feel the severe consequences. Only a € 26 billion bailout provided by the German government could prevent those banks from collapsing. Further bailouts by national governments followed with Northern Rock¹ in Britain, Roskilde² in Denmark and the case of the German Landesbank West LB.³ But it was not until the collapse of Lehman Brothers that the EU's State aid policy began to adjust to the occurring exceptional circumstances.

When Lehmann Brothers filed for bankruptcy protection in September 2008, member states faced the danger of further collapses in their national economies. It became therefore necessary for the states to intervene - in a hitherto unknown dimension. As a first reaction to the crisis the central banks provided for liquidity on the financial markets which was yet not sufficient to prevent the first bank insolvencies. Due to the gravity of the crisis the member states were compelled to conduct new rescue measures for individual financial institutions. These measures were subject to the Commission's supervision on State aid in order to prevent excessive distortion of competition on the single market.⁴

State aid control is one of the main tasks of the EU. The rules on State aid are laid down in Articles 107-109 TFEU while the procedural rules are codified in Regulation 659/1999. Art 107(1) TFEU lists the cumulative conditions necessary for an action in order to qualify as State aid: "(...) any aid granted by a member state or through state resources (...) which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods (...)". State aid can be either illegal or incompatible. According to Art 108(3) TFEU aid is illegal if it has been granted by the member state without prior notification to the Commission. The "illegality" thus does not refer to what kind of aid has been granted but is linked only to the prior notification. In Art 107(2) and (3) TFEU several kinds of aids are listed that either qualify as being compatible with the internal market or that "may" qualify as

¹ British mortgage lender.

² Danish retail bank.

³ Doleys, *European Integration*, Vol. 34, No. 6, September 2012, p. 549 (554).

⁴ Arhold, *EuZW* 2008, p. 713.

such. Those aids that “may” be compatible are of importance for State aid in the financial sector, in particular the aids mentioned in Art 107(3)(b) and Art 107(3)(c) TFEU⁵:

Art 107

3. The following may be considered to be compatible with the internal market:

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest

The criteria set out in Art 107(3)(b) TFEU were used by the Commission during the crisis in order to determine the compatibility of aid. The Commission decided that Art 107(3)(b) TFEU does not apply to other sectors.⁶ It is entirely in the Commission’s discretion to decide whether an aid qualifies as being compatible under Art 107(2) and (3) TFEU. In order to make the exercise of this discretion more predictable the Commission issues guidelines and communications on a regular basis.⁷ The most important communications will be elaborated in the first section. The concrete application of the new rules will be demonstrated on selected case studies from Germany and Greece in the second section followed by an analysis in the third section and a final conclusion in section four.

⁵ CEPS Task force report, p. 28.

⁶ CEPS Task force report, p. 28.

⁷ Arhold, EuZW 2008, p. 713.

I. Rules under EU State aid for the banking sector

During the financial crisis the Commission focused mainly on the banking sector. Until then State aid rules had been applied to the financial sector only in a very limited number of cases as for example in *Crédit Lyonnais*⁸. But only three weeks after Lehman had collapsed, the danger of distortion on the single market was demonstrated when the Irish Dáil⁹ approved a € 400 billion guarantee scheme for banks that covered only major financial institutions owned by the country.¹⁰ In a very foreseeable response to this measure capital was withdrawn from foreign-owned banks and injected to the protected national banks.¹¹

The Eurogroup quickly reacted by holding a meeting in which it was decided that the State aid rules needed to be temporarily relaxed. States were allowed to cover bank debts with state guarantees for a period up to five years. Furthermore governments could hold equity stakes in certain situations.¹² The Commission immediately responded to this decision. It issued the first four communications for the financial sector very quickly and granted a multitude of national bank rescue plans as well as various individual aids while the real economy was dealt with rather reluctantly with only one temporary framework.¹³ As of April 14, 2013 the Commission has issued seven communications¹⁴ concerning the financial sector. This paper

⁸ Commission Decision of 26 July 1995 giving conditional approval to the aid granted by France to the bank *Crédit Lyonnais* 95/547/EC, OJ 1995 L 308 p. 92–119.

⁹ Dáil Éireann being the lower house of the Oireachtas (Irish parliament).

¹⁰ 17 October 2008 “Dáil approves two-year bank guarantee scheme”, available at <http://www.breakingnews.ie/ireland/dail-approves-two-year-bank-guarantee-scheme-382360.html>.

¹¹ Doleys, *European Integration*, p. 549 (554).

¹² Eurogroup meeting, 12 October 2008, pp.2-3.

¹³ Soltész/Köckritz, *EuZW* 2010, p. 167.

¹⁴ 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, 13 October 2008 (see [IP/08/1495](#)); Communication on 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 (see [IP/08/1901](#)); Communication on the Treatment of **Impaired Assets** in the Community Banking Sector, 25 February 2009 (see [IP/09/322](#)); Communication on the **Temporary framework** for State aid measures **to support access to finance in the current financial and economic crisis**, adopted on 17 December 2008 (see [IP/08/1993](#)), as amended on 25 February 2009; [Communication from the Commission](#) - 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 (see [IP/09/1180](#)); [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 (see [IP/10/1636](#)); [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 (see [IP/11/1488](#)).

will focus on the four core communications. The Commission's communications are soft law and thus technically not binding but of authoritative character.

Snyder gave a definition of soft law stating that it is "rules of conduct which, in principle, have no legally binding force but which nevertheless have practical effect".¹⁵ Whether the Commission's goals have been achieved will be elaborated in the last part of this paper.

1. The Banking Communication¹⁶

As a result of the global financial crisis and the European banking sector being affected severely, the Commission had to react quickly to set up a temporary framework.

Aside from the general State aid rules requiring measures to be necessary to achieve the legitimate purpose and to avoid distortion of competition, the Commission wanted to specify general principles for the banking sector, laid down in these Guidelines.

The Commission would normally assess State aid to undertakings in difficulties under Art 107(3)(c) TFEU and the so-called R&R Guidelines¹⁷, being of general application.

However, since the economic situation in several member states and its impact on the overall European financial market was serious, the Commission considered Art 107(3)(b) being the right legal basis for the adoption of measures to combat the crisis in the banking sector more specifically.

In order to prevent the distortion of competition between financial institutions or negative spillover effects on other member states through measures taken by member states, the Commission published this Banking Communication, in order to provide guidance on Treaty-compatible criteria relevant for general schemes as well as ad hoc interventions by member states.¹⁸

This first out of several Communications under the temporary framework entails general principles for guarantee schemes covering liabilities. Those general principles could be

¹⁵ Snyder, *The Construction of Europe*, p. 197.

¹⁶ Commission 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, ("Banking Communication") OJ 2008 C 270/8.

¹⁷ Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004 C 224/2.

¹⁸ *Ibid.* Point 5

applied *mutatis mutandis* to other crisis instruments¹⁹, being covered under other guidelines. The Banking Communication sets out objective and non-discriminatory eligibility criteria²⁰ for financial institutions and requires state support to be limited in time and scope.²¹ Furthermore, an adequate contribution from the private sector should be required²² as well as behavioural restrictions²³ for beneficiary financial institutions, for example restrictions on commercial conduct, as well as adjustment measures²⁴.

2. The Recapitalisation Communication²⁵

Recapitalisation schemes were recognized under the Banking Communication as being one of the measures²⁶ member states could take to maintain the stability and proper functioning of financial markets. However, a more detailed guidance was necessary in order to help the member states and beneficial financial institutions either to set up new recapitalization schemes or to adjust existing ones.²⁷

The objectives pursued through this Communication are to restore financial stability, to ensure lending to the real economy and to prevent insolvency.²⁸

The Commission will assess recapitalization schemes by taking into account possible competition concerns, such as member states giving their own banks an undue competitive advantage over banks in other member states²⁹, or an undue advantage to less-performing banks compared to sound banks³⁰ or putting banks, that have no recourse to public funding in a less competitive position, when seeking additional capital on the market³¹.

The guideline deals in detail with the elements of the different types of recapitalisation³², as

¹⁹ Other crisis instruments being for example recapitalization, asset relief and winding up.

²⁰ Section 18 of the Banking Communication, OJ 2008 C 270/8.

²¹ *Ibid.* Section 24.

²² *Ibid.* Section 25-26.

²³ *Ibid.* Section 2.

²⁴ *Ibid.* Section 28-29.

²⁵ Commission 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, (“Recapitalisation Communication”) OJ 2009 C 10/2.

²⁶ Section 34 ff. Banking Communication, OJ 2008 C 270/8.

²⁷ Section 3 of the Recapitalisation Communication OJ 2009 C 10/2.

²⁸ *Ibid.* Section 4.

²⁹ *Ibid.* Section 8.

³⁰ *Ibid.* Section 9.

³¹ *Ibid.* Section 10.

³² *Ibid.* Section 19-25.

well as the entry level price³³, the incentives for state capital redemption³⁴ and the prevention of undue distortions of competition by introducing safeguards³⁵.

The Communication also introduces a regular review procedure of the recapitalization schemes taking place every six months after their introduction.³⁶

3. The Impaired Assets Communication³⁷

a. Transparency and disclosure

When applying for an aid, banks should provide for full ex-ante transparency and disclosure on the assets that are supposed to be covered. The assessment should be carried out by independent experts and the results have to be confirmed by the respective supervisory authority. After the application has been submitted, the bank's balance sheet and activities should be subject to full review whereby the bank's capital adequacy and its prospects for a return to viability should be examined. The result of such viability review has to be notified to the Commission and will be taken into account when follow-up measures are determined.³⁸

b. Burden-sharing

It is stated in the Communication that as a general principle banks should bear their losses to a maximum extent by paying adequate remuneration to the state.³⁹ The amount of the remuneration can be oriented to the remuneration that recapitalization measures would have required.⁴⁰ If the evaluation of the assets and the identification of the losses lead to the conclusion that the respective bank is technically insolvent without any State aid measures, help from the state is required in order to keep the financial stability of the member state. If however putting a financial institution into administration or its orderly winding up does not seem advisable under this aspect, aid may be granted in the form of guarantee or asset

³³ *Ibid.* Section 26-30.

³⁴ Section 31-34 of the Recapitalisation Communication, OJ 2009 C 10/2.

³⁵ *Ibid.* Section 35-39.

³⁶ *Ibid.* Section 40.

³⁷ Communication on the treatment of Impaired Assets in the community banking sector ("Impaired Assets Communication"), OJ 2009 C 72/1.

³⁸ *Ibid.*, Section 5.1.

³⁹ *Ibid.*, Section 5.2., para 21.

⁴⁰ *Ibid.*, Annex IV of the Communication.

purchase. This way banks can keep their heads above water until they find a final resolution such as restructuring or orderly winding-up.⁴¹

c. Aligning incentives

The program on Impaired Asset relief is limited to 6 months in order to prevent banks from delaying necessary actions in the expectation for more advantageous relief programs.⁴² An enrolment into the program after six months is possible only in exceptional and unforeseeable circumstances under more strict conditions.⁴³ To ensure the effectiveness of the program the participation in particular of the most “damaged” banks may be made mandatory.⁴⁴ Where such obligation does not seem necessary other incentives should be established to encourage banks.

d. Eligibility of assets

Furthermore the Communication sets out the criteria for eligible assets. The Commission’s aim is to strike a balance between a straightway financial stability and an intermediated-term return to normal market-functioning.⁴⁵ The scope should not be limited to “toxic assets” (such as US mortgage-backed securities) only. It is stated in the Communication that due to the different kind of problems encountered in all the member states, a more flexible approach is necessary so that a broader range of assets is covered including both securitized and non-securitized assets.⁴⁶ Non eligible assets are *expressis verbis* those assets that have entered the balance sheet of a bank after the expiry of a specified effective date before the announcement of the program.⁴⁷

⁴¹ *Ibid*, Section 5.2, para 23.

⁴² *Ibid*, Section 5.3, para 26.

⁴³ *Ibid*, Section 5.3, para 29.

⁴⁴ *Ibid*, Section 5.3, para 27.

⁴⁵ *Ibid*, Section 5.4, para 32.

⁴⁶ *Ibid*, Section 5.4, para 32.

⁴⁷ *Ibid*, Section 5.4, para 36.

e. Valuation of assets eligible

The deliberate valuation of assets eligible for relief is important to prevent distortion of competition. Therefore asset valuations should be based on a common and general methodology.⁴⁸ In principle the actual market value of the assets should be assessed. The current market value attributed to impaired assets serves as a boundary value within the relief program. In section 5.5, para 39 it is stated that “any transfer of assets covered by a scheme at a valuation in excess of the market price will constitute State aid”.

Furthermore valuation should be carried out ex ante. When examining the credibility of a valuation it is crucial to refer to the information available at the time of execution.⁴⁹ In the case of very complex assets alternative approaches such as nationalization of a bank might be considered.⁵⁰

f. Management of assets

The Communication demands a clear separation between the beneficiary financial institution and “its assets, notably as to their management, staff and clientele” to prevent a collision of interests.⁵¹

4. The Restructuring Communication

The previously discussed Communications refer to the principles laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. The Restructuring Communication aims to show how the Commission will assess aid for the restructuring of banks during the financial crisis.⁵² Hereby the principles of the other Communications are complemented.⁵³ The Communication basically sets out the requirements for a bank’s restructuring plan. Those conditions were in line with the measures taken in Commerzbank, as

⁴⁸ *Ibid*, Section 5.5, para 37.

⁴⁹ Boudghene/Maes, *Journal of European Competition Law & Practice* 2012, p. 1 (p. 10).

⁵⁰ *Ibid*, Section 5.5, para 38.

⁵¹ *Ibid*, Section 5.6, para 46.

⁵² 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 (“Restructuring Communication”) OJ 2009 C195/4. Hereinafter called RC, Introduction para 5, para 7.

⁵³ RC, Introduction, para 4.

will be shown in the next section. The Commission demanded that banks have to bear a fair share of the restructuring costs on their own. Furthermore the Commission requested divesting of non-core activities. In several cases the Commission's demands under the Restructuring Communication were highly criticized for going far beyond the goal of preventing distortion.⁵⁴ ING even commenced proceedings against the Commission's decision of 18 November 2009 for being out of proportion and exceeding the requirements of restructuring.⁵⁵

⁵⁴ Doleys, *European Integration*, Vol 34, No. 6, September 2012, p. 549 (561).

⁵⁵ CEPS Task Force Report, p. 48 et seq.

I. Case Studies

The practical application of the Communications will be demonstrated by means of examples using cases from two member states that have “experienced” the debt crisis quite differently. The first case studies will focus on Germany. Although Germany was also hit hard by the crisis, it is still considered to be one of the richer EU countries and its economy recovered fast in comparison to that of other member states.

The second part of the case studies will deal with Greece, a member state that in contrast to Germany is still suffering from deep economic recession and is reliant on Eurozone bailouts.

The economic dichotomy between these two countries during the crisis offers an interesting starting point to gain insight on how the Communications were implemented at both ends of the spectrum.

1. Germany

a. WestLB

Before its division in 2012, WestLB was the third-largest Landesbank⁵⁶ in Germany⁵⁷. As one of the major German providers of financial services, at 2006 its total assets were € 285 billion, with a staff of 5.862. By 2011 its total assets had reduced to € 167.9 billion with a staff of 4.188.⁵⁸ Until 2005 WestLB was granted unlimited state guarantees which were ended due to the Commission’s objections. Subsequently the bank expanded its business to the risky field of investment banking which eventually caused the bank’s serious difficulties leading to its downfall.⁵⁹ The first huge losses began to incur in 2007 when misadventures with proprietary trading caused an estimated damage of € 600 million.⁶⁰ Further excessive losses followed in 2008 when the financial crisis affected the bank’s structured portfolio investments. Even before the collapse of Lehman Brothers, WestLB was already in need of

⁵⁶ Regional bank.

⁵⁷ **Europa Press Release 20 December 2011:** “State aid: Commission approves split-up of WestLB”, IP/11/1576, available at http://europa.eu/rapid/press-release_IP-11-1576_en.htm.

⁵⁸ http://www.westlb.de/cms/sitecontent/westlb/westlb_de/de/wlb/ir/finanzinformationen/bilanzpressekonferenz/articles/bpk12.standard.gid-N2FkNDZmMzU4OWFmYTIyMWM3N2Q2N2Q0YmU1NmI0OGU_.html.

⁵⁹ Lyons/Zhu, *I Ind Compet Trade* 2013, p.39 (52); Press release of the Commission IP/11/1576 of 20/12/2011.

⁶⁰ <http://www.ftd.de/unternehmen/finanzdienstleister/:Streit-um-Vorzugsaktien-WestLB-siegt-im-Prozess-gegen-Aktienh%E4ndler/419370.html>

rescue. The owners⁶¹ decided then in February 2008 to create a special-purpose-vehicle (“Phoenix”) to which impaired assets worth € 23 billion were transferred. The vehicle was financed through guarantees amounting to € 5 billion provided by the owners. The state of North-Rhine Westphalia contributed a capital injection of € 2 billion. This measure was considered to be State aid by the Commission but was approved in the course of a restructuring plan in May 2009. The approval was accompanied by strict conditions that required a reduction of the bank’s size including a reduction of its assets by 50 % and a further reduction of the volume in risky activities.⁶²

In December 2009 WestLB was the first German bank to make use of a so called “bad bank”, transferring impaired assets worth € 77 billion and the Phoenix portfolio of 2008 to it.⁶³ This measure was considered to be incompatible State aid by the Commission and led to another in-depth investigation.

In November 2010 Joaquín Almunia, Commission Vice President in charge of competition policy, stated that those assets had been transferred at prices that exceeded their real economic value. The result of the Commission’s investigation was that € 3.4 billion were in fact incompatible state aid leading to distortion of competition. Since WestLB was neither able to pay the amount back nor to compensate it through further measures as it was required by the Commission’s guidelines, its owners announced in January 2011 that the bank would be split up into three divisions⁶⁴ which was approved⁶⁵ by the Commission. Moreover it solved one of the main problems identified by the Commission which was the contradicting interests of the shareholders. Therefore a change of ownership was deemed necessary in order for the bank to return to viability. The Commission made the sale of the bank a condition for their approval of aid measures.⁶⁶

⁶¹ State of North Rhine-Westphalia, NRW Bank, Rheinischer Sparkassen- und Giroverband, Sparkassenverband Westfalen-Lippe.

⁶² Lyons/Zhu, *I Ind Compet Trade* 2013, p.39 (53).

⁶³ <http://www.boersennews.de/nachrichten/top-news/erste-bad-bank-in-deutschland/2757>.

⁶⁴ <http://www.nzz.ch/aktuell/wirtschaft/uebersicht/westlb-zerschlagung-landesbank-steuerzahler-1.11040948>

⁶⁵ Europa Press Release 20 December 2011: “State aid: Commission approves split-up of WestLB”, IP/11/1576, available at http://europa.eu/rapid/press-release_IP-11-1576_en.htm.

⁶⁶ Nicolaidis/Rusu, *The Antitrust Bulletin* 2010, p 759 (773).

b. Commerzbank

Commerzbank became the second largest bank in Germany with the acquisition of Dresdner Bank in December 2009. After the Commission had approved State aid of € 18 billion provided by the Special Fund for Financial Market Stabilization⁶⁷ in December 2008⁶⁸, Germany notified additional State aid that was approved in May 2009. Due to assets of Dresdner Bank that were performing badly, Commerzbank requested further capital injection which was again partly provided by the Fund. Additionally the state became an owner holding a 25% stake plus one share. The aid was approved on the term that Commerzbank would divest Eurohypo, its largest subsidiary in public finance and commercial real estate, by the end of 2014.⁶⁹ When the divestment turned out to be impossible because of its financing gap and great sovereign exposure, Commerzbank changed its restructuring plan and pursued the wind-up of Eurohypo instead. The Commission approved the plan on the conditions that Eurohypo would be divided into core assets and non-core assets (public finance and parts of commercial real estate) with the latter one to eventually exit the market. Furthermore the bank was not allowed to acquire any other businesses until March 2014. The fact that Eurohypo still operates (on a limited level) is compensated by the prolonged prohibition of new acquisitions.⁷⁰

The case of Commerzbank was a quasi-forerunner of the Restructuring Communication. The Communication had been issued shortly after the Commission's approval of the restructuring plan in May 2009. The strict requirements imposed on Commerzbank by the Commission lead to great uncertainty of market actors who were thus awaiting clarification on the conditions accompanying the approval of a restructuring plan.⁷¹ The Restructuring Communication then laid down the conditions banks had to meet in accordance with the terms that had been demanded of Commerzbank.

⁶⁷ SoFFin (Sonderfonds Finanzmarktstabilisierung).

⁶⁸ Europa Press Release 12 December 2012: "State aid: Commission approves modifications to German financial rescue scheme", IP/08/1966, available at http://europa.eu/rapid/press-release_IP-08-1966_en.htm.

⁶⁹ Europa Press Release 30 March 2012: "State aid: Commission approves amendment to Commerzbank restructuring plan", IP/09/711, available at http://europa.eu/rapid/press-release_IP-12-337_en.htm.

⁷⁰ Europa Press Release 30 March 2012: "State aid: Commission approves amendment to Commerzbank restructuring plan", IP/12/337, available at http://europa.eu/rapid/press-release_IP-12-337_en.htm.

⁷¹ Doleys, *European Integration*, p 549 (561).

c. SachsenLB

SachsenLB was the Landesbank of Saxony with a group balance sheet of € 67.8 billion. When its existence was jeopardized due to lack of liquidity, two measures were taken: First a number of German Landesbanken provided liquidity to SachsenLB by committing to buy the commercial papers in case those could not be sold regularly on the market. Only one week later SachsenLB was sold to LBBW⁷². In this context LBBW provided € 250 million emergency aid⁷³ and furthermore developed a restructuring plan. The free state of Saxony provided another € 2.75 billion in form of a guarantee to cover potential losses. In February 2008 the Commission opened in-depths investigations and assessed the compatibility of the measures on the basis of Art 107(3)(b) TFEU. The approval was accompanied by compensatory measures, namely divestment, the reduction of international activities and a contribution to the restructuring costs.⁷⁴ In order to comply with these requirements Sachsen LB sold some of its subsidiaries, withdrew from its business in various fields, especially in real estate and bore over 50% of the costs necessary for the measures.⁷⁵

On April 1st 2008 Sachsen LB was incorporated into LBBW and thereby liquidated.

⁷² Landesbank Baden-Württemberg.

⁷³ <http://www.lbbw.de/lbbwde/1000009518-s1048-de.html>.

⁷⁴ **Europa Press Release 4 June 2008:** „State aid: Commission approves restructuring of Sachsen LB“, IP/08/849, available at http://europa.eu/rapid/press-release_IP-08-849_en.htm.

⁷⁵ Nicolaidis/Rusu, *The Antitrust Bulletin* Vol. 55 No 4/Winter 2010; p. 759 (771).

2. Greece

When the global financial crisis hit the European Union, the Commission undertook several steps to develop Guidance in order to ensure the stability of the financial system and of the internal market, as well as to avoid a spill- over effect of some Member States' financial problems to others.⁷⁶

The case of Greece is however different to that of Germany, which is also the reason, why those two countries were chosen. Beyond the global financial crisis, Greece had to deal with its own sovereign debt crisis at the same time. A variety of measures had to be taken in order to safe and maintain the liquidity of the Greek State and Greek banks, measures which involved not only State Aid instruments but also more specific instruments, which had to be created in order to handle the situation in the Eurozone.⁷⁷

Due to the multiplicity of measures and the limited size of this paper, the focus will reside on State aid instruments, giving however a short general overview of the different kind of measures related to State Aid and instruments applicable in Greece, in order to subsequently examine the specific case of the Greek ATE Bank.

a. Overview of measures

Greece notified a first package of state aid measures to the Commission in November 2008, which the Commission approved.⁷⁸

The package of State aid measures in detail included (i) a Recapitalisation Scheme, (ii) a Guarantee Scheme, and (iii) a Government Bond Loan Scheme.⁷⁹

The budget for Recapitalisation amounted to a total of EUR 5 billion and an injection of Tier 1 capital into participating institutions in the form of preference shares that need to be remunerated at 10%. The aim of the Recapitalisation Scheme was to enhance solvency.

⁷⁶ Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004 C 224/2, pt. 5.

⁷⁷ Overview: European Commission- Financial Assistance in EU Member States, available at: http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm; overview of instruments and measures for Greece available at: http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm.

⁷⁸ Commission Decision of 19 November 2008 in State Aid Case N 560/2008 “Support Measures for The Credit Institutions in Greece”, OJ 2009 C 125/6.

⁷⁹ *Ibid.* The schemes were set out according to Greek Law 3723/2009.

Under the Guarantees Scheme, a total budget of EUR 15 billion was given to allow participating institutions to issue certain debt instruments with a maturity ranging from three months to three years with a State guarantee. The aim was to enhance liquidity, by allowing credit institutions to have better access to funding.

The Bond Loan Scheme consisted of total budget amount of EUR 8 billion, under which Greece issues government bonds and through that enables lending to participating institutions with the objective to enhance liquidity.

The notified measures were accompanied by various commitments from Greece. In particular, Greece agreed that the recapitalisation would need to be followed up by a restructuring plan after six months and it also agreed on several other behavioural restrictions, such as a state representative on the board of the participating bank, a dividend and a hybrid coupon ban and the obligation not to undertake aggressive market strategies.

During the assessment⁸⁰ of the package in light of the EU State aid rules and especially the Communications, the Commission found that the package ensures non-discriminatory access, since it is open to all credit institutions licensed in Greece. It is also limited in time and scope, with a period of maximum six months. Beneficiaries were further required to pay a market-oriented remuneration. Moreover, Greece had set out several behavioural safeguards to avoid an abusive use of the state support. Greece had committed to notify the Commission on restructuring or liquidation plans for financial institutions that have either failed under the guarantee or the securities scheme or benefited from the recapitalisation scheme.

The Commission thus concluded that the package was an adequate instrument to remedy a serious disturbance in the Greek economy and therefore compatible with Article 107(3)(b) TFEU.

However, the global financial crisis was not the only problem the Greek government had to face in 2008. The Greek sovereign debt crisis seriously affected the Greek banks, through the increase of credit spreads of Greek government bonds, which then gradually foreclosed the Greek government access to the international bond market, leading to a subsequent foreclosed access of the Greek banks.⁸¹

In order to respond to this problem, several additional measures had to be taken.

⁸⁰ Commission Decision of 19 November 2008 in State Aid Case N 560/2008 “Support Measures for The Credit Institutions in Greece”, OJ 2009 C 125/6.

⁸¹ State Aid Control in a Stability Programme Country: The Case of Greece, p. 48.

The Euro-zone countries agreed to provide EUR 80 billion in bilateral loans to Greece over a period of three years. The IMF agreed to provide EUR 30 billion under its Stand-By Arrangement for Greece.⁸² The fulfilment of a Programme plan⁸³ including provisions for fiscal, structural and financial sector reforms was the condition however to be able to get these loans. The implementation of this Programme plan is being monitored by a Task Force⁸⁴ the so-called Troika, constituting of staff from the European Central Bank, the International Monetary Fund and the European Union.

The various support measures under the different schemes, which the Commission had approved in Greece before the outburst of the sovereign debt crisis however seemed insufficient and had to be reinforced. The Commission subsequently approved amendments to the measures and prolonged them several times,⁸⁵ while, at the same time, other measures were put in place. One major amendment was the increase of ceiling of the state guarantee scheme⁸⁶ from a starting budget of 28 billion to an increased total budget of 98 billion eventually.

The First Economic Adjustment Programme,⁸⁷ foresaw no allocation of any additional liquidity for Greek banks, but instead the possibility to rely on a combination of State-guaranteed bonds, which could be used as collateral to obtain funding from the Eurosystem, more specifically the European Central Bank.

⁸² European Commission Press Release of 3 May 2010, “Euro area and IMF agreement on financial support programme for Greece”, available at: http://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-05-03-statement-commissioner-rehn-imf-on-greece_en.htm.

⁸³ The Economic Adjustment Programme for Greece, available at: http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/op61_en.htm, implemented by Greece through Article 1(3) of Law 3845/2010, Annex III (Memorandum on economic and financial policy) and Annex IV (Memorandum of Understanding on specific economic policy conditionality).

⁸⁴ Europa Press Release 13 September 2011 “Questions and Answers on the Task Force for Greece”, available at http://europa.eu/rapid/press-release_MEMO-11-599_en.htm, http://ec.europa.eu/commission_2010-2014/president/taskforce-greece/index_en.htm.

⁸⁵ Commission Decision of 18 September 2009 in State Aid Case N 504/2009 “Prolongation and amendment of the Support Measures for the Credit Institutions in Greece”, OJ 2009 C 264/5, Commission Decision of 25 January 2010 in State Aid Case N 690/2009 “Prolongation of the Support Measures for the Credit Institutions in Greece”, OJ 2010 C 57/6, Commission Decision of 12 May 2010 in State Aid Case N 163/2010 “Amendment to the Support Measures for the Credit Institutions in Greece”, OJ 2010 C 166/2, Commission Decision of 30 June 2010 in State Aid Case N 260/2010 “Extension and amendment to the Support Measures for the Credit Institutions in Greece”, OJ 2010 C 238/3, Commission Decision of 21 December 2010 in State Aid Case SA.31998 (2010/N), “Fourth extension of the Support Measures for the Credit Institutions in Greece”.

⁸⁶ Commission Decision of 12 May 2010 in State Aid N163/2010: “Amendment to the Support Measures for the Credit Institutions in Greece”, OJ 2010, C 166/2-3 (increase from €15 to 30 billion-total budget increased from 28 to 43 billion); Commission Decision of 30 June 2010 in State aid N260/2010: “Extension of Support Measures for the Credit Institutions in Greece”, OJ 2010, C 238/3 (increase from €30 to 55-total budget increased from 43 to 68 billion); Commission Decision SA 32767: “Amendment to the Greek Bank Guarantee Scheme”, OJ 2011, C 164/8 (€55-85 billion-total budget increased from 68- 98 billion).

⁸⁷ The Economic Adjustment Programme for Greece, May 2010, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf.

As the issuance of state guarantees for bonds is a financial contribution by the government through state resources granting an advantage to a specific sector, and has the potential to distort competition, it constitutes State aid, and had thus to be approved by the Commission.

The Commission found the guarantees compatible with the internal market under the standard rules incorporated in the Commission's Banking Communication.⁸⁸

The programme also set out the creation of the Hellenic Financial Stability Fund (HFSF),⁸⁹ which was prolonged three times.⁹⁰ The HFSF is a legal person governed by private law, and administratively and financially independent. It is funded by the government with resources from the programme. The HFSF is managed by a Board of Directors, where representatives of the Commission and the ECB also participate, without voting rights.⁹¹

The HFSF and the credit institutions will have to jointly set up detailed restructuring plans or amend applicable plans in line with the EU State aid rules. The HFSF will have the power to impose restructuring measures and to monitor the process.⁹²

Since the measures provided under the HFSF were constituting State aid, the Commission had to assess the HFSF under the rules on state aid.

The Commission approved the HFSF as a recapitalisation scheme⁹³ in light of the rules on support schemes for the financial sector during the crisis. The Commission concluded that the measure was compatible under Art 107(3)(b) TFEU to remedy a serious disturbance in the economy of a member state and that the scheme was appropriate, necessary and proportional to the objective of Art 107(3)(b).

⁸⁸ Banking Communication, OJ 2008/C 270/08.

⁸⁹ Established by Greek Law 3864/2010; original Commission approval decision of 3 September 2010 on State Aid Case N 328/2010, "Recapitalisation of Credit Institutions in Greece under the Financial Stability Fund", OJ 2010 C 316/7.

⁹⁰ See Commission decision of 14 December 2010 in State Aid case SA.31999 (2010/N), "Prolongation of the Recapitalisation of credit institutions in Greece under the Financial Stability Fund (FSF)", OJ 2011 C 62/16, Letter to the Member State available at: http://ec.europa.eu/eu_law/state_aids/comp-2011/sa33154-2011n.pdf; Commission decision of 27 June 2011 in State Aid case SA.33154 (2010/N), "Second prolongation of the Recapitalisation of credit institutions in Greece under the Financial Stability Fund (FSF)", OJ 2011 C 244/2, letter to the Member State available at: http://ec.europa.eu/eu_law/state_aids/comp-2011/sa34148-2011n.pdf; Commission decision of 6 February 2012 in State Aid Case SA 34148, OJ 2012 C101/2, letter to the Member State available at: http://ec.europa.eu/competition/state_aid/cases/243136/243136_1308675_55_2.pdf.

⁹¹ State aid control in a stability programme country: The Case of Greece, p. 47

⁹² *Ibid.* p. 48

⁹³ Commission Decision of 3 September 2010 on State aid Case N 328/2010, "Recapitalisation of Credit Institutions in Greece under the Financial Stability Fund (FSF)", OJ 2010, C 316/7. The FSF was prolonged until end of June 2011, see Commission Decision of 14 December 2010 under State aid case SA.31999 (2010/N), "Prolongation of the Recapitalisation of credit institutions in Greece under the Financial Stability Fund (FSF)", OJ 2011, C 62/16.

The First Adjustment Programme was followed up by the Second Programme⁹⁴, which provided for recapitalization of Greek banks up to EUR 50 billion in the form of EFSF bonds and new bank resolution schemes, transfer and obligations to third parties.

This section of the paper is however not meant to give a detailed overview but give an idea of the complexity of the problems and the length of the process. Overall, a large amount of money is flowing from one institution and programme to another in Greece. The question is, whether those measures are sufficient in order to stabilize the financial market and the Greek economy.

b. Case of Agricultural Bank of Greece (ATE)

After giving a short overview of the complex financial instruments and measures applied in Greece, a practical example will be helpful to illustrate the problem.

ATE Bank was the fifth largest bank in Greece with around two million customers. It had a market share of 16% in terms of branches and 8% in terms of total assets, with particularly strong market positions in the more rural parts of Greece. The Greek State was the bank's main shareholder.

The Commission in November 2008 had provisionally approved the first State capital injection of €675 million pending the submission of a restructuring plan.⁹⁵

In May 2011, the Commission approved restructuring aid in favour of ATE Bank.⁹⁶ The restructuring plan was assessed and found in line with the relevant Restructuring Communication⁹⁷. It was found apt to restore the bank's long-term viability without distorting competition, as well as ensuring it was sharing the burden of its restructuring through private contributions. The plan foresaw in detail, a recapitalization of the bank of up to EUR 1, 144.5 million as well as liquidity measures. ATE bank committed also to reduce its overall assets by 25% during the restructuring period.

⁹⁴ The Second Economic Adjustment Programme for Greece, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf.

⁹⁵ Europa Press Release: "State aid: Commission authorizes support package for Greek credit institutions" IP/08/1742, available at http://europa.eu/rapid/press-release_IP-08-1742_en.htm.

⁹⁶ Europa Press Release: "State aid: Commission approves restructuring plan of Agricultural Bank of Greece" IP/11/626, available at http://europa.eu/rapid/press-release_IP-11-626_en.htm.

⁹⁷ Restructuring Communication, OJ 2009 C 195/9.

The restructuring plan was also assessed in the context of the Programme by the IMF, the ECB and the EU and found compatible. The conclusions of the strategic review⁹⁸ were that ATE should be restructured on a stand-alone basis, with reduced lending to public entities and more enhanced corporate governance.

ATE received state capital of €675 million in 2009 under the support measures for credit institutions in Greece and also benefitted from the Greek state guarantee and bond loan schemes. In April 2011, the bank announced a share capital increase of €1,259.5 million.

However, the bank continued to face problems. In July 2012 ATE Bank was resolved, following a tender process, where certain assets and liabilities were transferred to Piraeus Bank and with the remaining assets and liabilities being put into a “bad-bank”. Since this transfer was effectuated through a tender process, in which Piraeus Bank had made the best offer, the Commission concluded that this transfer did not constitute State aid.

Three measures granted in favour of the ATE Bank did however contain State aid in the view of the Commission.

During its assessment, the Commission found that recapitalisation of € 290 million granted in 2011, the further aid of € 7,471 million to address the funding gap between assets and liabilities and the recapitalisation of € 570 million benefitting the transferred activities were constituting state aid. The aid was found to be in line with the EU State aid rules and limited to the minimum necessary.

The Commission thus approved in May 2013 the liquidation aid for the ATE Bank.⁹⁹

In the context of the financial crisis, this particular case however shows, that the financial institution as such could not be saved, albeit the rescue-measures taken. Considering the huge amount of money that flew into this bank, the question can be raised, whether the rules for State aid under the financial crisis are indeed helpful.

A further analysis of the overall “crisis framework” will be made in the following section of this paper

⁹⁸ See IMF, “Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding”, 8 December 2010, p.12- 14, available at <http://www.imf.org/external/np/loi/2010/grc/120810.pdf>.

⁹⁹ Europa Press Release: “State aid: Commission approves liquidation aid for Greek ATE Bank” IP/13/401, available at http://europa.eu/rapid/press-release_IP-13-401_en.htm.

III. Assessment

1. Financial stability

One of the main goals of the Commission when approaching the financial crisis was to safeguard financial stability in the Union. So far within the European Union 59 banks have been restructured of which 19 have been orderly liquidated. These banks represent around 25 % of the whole European financial sector.¹⁰⁰ It can be concluded from this number that the Commission has achieved quite a lot which was also confirmed by the International Monetary Fund¹⁰¹. In spite of these achievements the financial stability in the EU remains vulnerable.¹⁰² The sovereign debt crisis continues to be one of the greatest risks to financial stability as well as declining asset values. In fact Germany, which remained one of the few member states performing well even throughout the crisis, fears the severe economic impacts of the Euro crisis on its economic growth¹⁰³ while Greece struggles with its massive budget deficit. Thus at this interim state it can be noted that the Commission has made progress towards this goal yet there is no breath of relief.

2. Is the level playing field ensured?

A major challenge before and during the financial crisis was to ensure an even level playing field in the internal market¹⁰⁴. Throughout the past years, different policies and instruments have been used to tackle the problems arising from the financial crisis.

The question remains therefore, whether the ‘crisis framework’ regarding state aid in the financial sector helped to achieve such a homogenous level playing field.

A huge obstacle for the efficiency of the system has been on the one hand the awareness of the specific rules in each of the member states. Some member states had many years of

¹⁰⁰ Europa Press Release 8 March 2013: Speech of Joaquin Almunia “Banking crisis, financial stability and State aid: The experience so far”, available at: http://europa.eu/rapid/press-release_SPEECH-13-223_en.htm.

¹⁰¹ IMF Press Release No. 13/79 of March 15, 2013, “Assessment of Financial Stability in Europe: Much Achieved to Address the Crisis but Vulnerabilities Remain and Intensified Efforts Needed”, available at <http://www.imf.org/external/np/sec/pr/2013/pr1379.htm>.

¹⁰² Europa Press Release 8 March 2013: Speech of Joaquin Almunia “Banking crisis, financial stability and State aid: The experience so far”, available at: http://europa.eu/rapid/press-release_SPEECH-13-223_en.htm.

¹⁰³ <http://theconversation.com/the-euro-crisis-has-arrived-in-germany-but-is-a-recession-scenario-plausible-11695>.

¹⁰⁴ Banking Communication, OJ 2008 C 270.

experience, newer member states were facing the EU bureaucracy less often until then.¹⁰⁵ Additionally, banks in certain member states were better structured and others were more in need. The application of different instruments regarding state aid varied also from member state to member state. Most of the member states applied a national scheme to the banking sector as a whole, others had applied only individual support measures, others again used neither.¹⁰⁶

The coordination of the aid that was directly granted did not happen in a coordinated way¹⁰⁷ and the guarantees provided by the member states had significant differences.¹⁰⁸

The main aim of the Commission in setting State aid rules is to avoid the distortion of competition and trade in the internal market between the member states and to bring some order in the national support schemes, however, during the financial crisis, the main focus resided on the need to preserve the internal market as a policy priority.¹⁰⁹

The positive outcome eventually was that all financial players and economic actors benefited from the measures taken to stabilize the financial sector and support the economy.¹¹⁰

Overall, State aid was, in combination with the monetary policy and financial stability measures successful in preventing a collapse of the financial system.¹¹¹

Throughout the discussion points in this paper, and comparing Germany and Greece, the divergences of the system become visible. Germany had an overall smaller problem with its banking sector, since not all the banks were severely affected. Greece on the other hand had to deal with more substantial problems, since the overall financial sector was facing problems, a situation which was not able to be resolved through state resources solely.

This raises the question, whether an even playing field can ever be reached, since the economic system of each member state is different.

The reason for this uneven level playing field occurs eventually not only due to national politics and no proper knowledge of EU State aid rules, but in the end also mainly because of a bad management¹¹² the banks themselves had done in the first place.

¹⁰⁵ CEPS Task Force Report, Executive Summary p. ii.

¹⁰⁶ CEPS Task Force Report, p. 9-11.

¹⁰⁷ CEPS Task Force Report, p. 22.

¹⁰⁸ CEPS Task Force Report, p. 22.

¹⁰⁹ CEPS Task Force Report, p.12.

¹¹⁰ CEPS Task Force Report, p. 21.

¹¹¹ CEPS Task Force Report, p. 20.

¹¹² CEPS Task Force Report, p. 23.

This is a problem however, which cannot be tackled through State aid instruments. The only thing the Commission can do within the limits of State aid, is to ensure that through the legal framework, the guidelines and the close monitoring of its implementation, the conditions for granting State aid remain the same for every member state.

The coherence and the stability of the internal market can therefore not solely be achieved through State aid, but in conjunction with other policy areas.

3. Are the state aid rules not strict enough?

During the financial crisis the rules on State aid have surely been less strict. But such loosening of the rules was necessary in order for the financial sector as well as for the real market to function.¹¹³ The sectors were in need of more support, the member states granted more aid and the commission approved. But was the Commission too generous with approving State aids that are financed through tax money? It did not allow for unlimited aid but it certainly approved excessive amounts of aid. While between 2002 - 2007 the aid granted in the whole EU was an average 2% of GDP per year during the height of the crisis it was 13 % of the GDP. On the hand it can be argued that these amounts simply reflect the extraordinary dimension of the crisis.¹¹⁴ On the other hand there was certainly no lack of State aid. In the case of WestLB the rescue attempts ended in liquidation in spite of the huge amounts of aid granted which gives rise to the question whether more careful investigation and more reluctance by the Commission could have saved billions of taxmoney.

However it can be noted that the Commission has weakened its own principle of “one time last time” as stipulated in its guidelines. According to this principle State aid should be granted only once in ten years to each beneficiary unless “restructuring aid follows the granting of rescue aid as part of a single restructuring operation”.¹¹⁵ Looking at the cases discussed it seemed to become a rule to approve repeatedly granted State aid to the same undertaking which leads to the next issue that is being tackled: the matter of legal certainty.

¹¹³ Nicolaides/Rusu, *The Antitrust Bulletin*, Vol. 55, No. 4, Winter 2010, p. 759 (778).

¹¹⁴ Nicolaides/Rusu, *The Antitrust Bulletin*, Vol. 55, No. 4, Winter 2010, p. 759 (782).

¹¹⁵ R&R Guidelines, OJ 2004 C 244/02.

4. Do the measures under the state aid rules help maintain legal certainty?

Another crucial point when assessing the outcome and effect of the measures under the State aid rules for the banking sector is whether legal certainty has been achieved.

In the beginning of the crisis the Commission still applied the R&R Guidelines in cases like Sachsen LB, as discussed in this paper.¹¹⁶ This was then reconsidered, as the main framework was too strict and the procedures too slow to respond in a timely manner and since the financial crisis affected also financially sound banks, which could not be considered under the R&R Guidelines as being “in difficulties”.¹¹⁷

The Commission then started using Art. 107(3)(b) TFEU as a legal basis for support measures in the banking sector. This provision however can only be applied when the whole economy of a Member State is disturbed and should be interpreted narrowly.¹¹⁸

The exact relationship between the Communications and the R&R Guidelines is not entirely clear. Art. 107(3)(b) applies to healthy banks, facing unexpected difficulties, whereas the R&R Guidelines are mainly applied to structurally unsound companies having difficulties. The Communications however do not really deviate from the R&R Guidelines, and are said to be “complementary”.¹¹⁹

It must be borne in mind, that it is the Commission, who decides about the compatibility of measures with the internal market under Art. 107(2) or (3) TFEU¹²⁰ and has therefore the discretion to assess certain cases under different Guidelines, if it considers it to be more appropriate.

Since Art 107(2) and (3) TFEU do not have direct effect, national courts cannot decide on compatibility matters. This seems logical, since the Commission has the technical knowledge to assess the cases quicker and easier.

The Commission decisions are in any case subject to judicial review in the European Courts through Art 263 TFEU, but the Commission’s decisions are based on highly technical expertise and are the result of an intensive cooperation with the respective member state. The Court will thus not easily overturn those decisions.¹²¹

¹¹⁶ Drijber/Burmester, *Ondernemingsrecht* p. 577 (578) point 3.

¹¹⁷ Drijber/Burmester, *Ondernemingsrecht* p. 577 (578) point 3.

¹¹⁸ Joined Cases *Freistaat Sachsen und Volkswagen* C-57/00, C-61/00, para. 98.

¹¹⁹ Banking Communication, OJ 2008 C 270/8, point 10, 42, 49.

¹²⁰ CEPS Task Force Report, p. 28.

¹²¹ CEPS Task Force Report, p. 30.

Another important issue that should be considered is the temporality of the rules. The current rules for the banking sector are only a temporal derogation from the normal R&R State aid regime, since the main aim is to return to normal market conditions in longterm.¹²² The condition posed on the member states to review the measures every six months, leads also to a certain degree of certainty.¹²³ However, this temporal derogation is now being applied for years, without having a clear exit strategy yet.

Some say that more precise criteria are missing,¹²⁴ others consider the Commission Guidelines providing enough for legal certainty.¹²⁵ The Commission Communications, although being soft law do give guidance and the Commission is handling with difficult cases in a very timely manner due to its technical expertise. If a judicial review would actually take place, those guidelines would certainly be taken into account.

The discretion of the Commission on the one side, and the general interest on the other side however renders the need for legal certainty a crucial factor. Those measures for the banking sector are financed through State resources, meaning tax money. The public is therefore indirectly involved. The overall framework should hence be well monitored in order to avoid excessive spending of tax money.

5. Moral hazard

In a well-functioning market economy any inefficient undertaking normally exits the market. In principle it is thus damaging to the market if such firm or bank is rescued by the state. If any mismanaged bank was rescued it would create the problem of moral hazard: the bank does not bear responsibility for its own inefficiencies and such aids create negative incentives. Furthermore State aid to badly performing banks also constitutes a burden-sharing of the cost to the detriment of competitors functioning without aid as well as to other member states. Therefore State aid to failing banks constitutes a distortion of competition.¹²⁶ How is the aid granted to the banks then justified?

¹²² See for instance Banking Communication, OJ 2008 C 270/8, points. 12, 24, 28-29 and 35.

¹²³ Banking Communication, OJ 2008 C 270/8, section 24; Recapitalisation Communication, OJ 2009 C 10/2, point 40; Impaired Assets Communication OJ 2009, C 72/1, annex V; Restructuring Communication, OJ 2009, C 195/4, point 8.

¹²⁴ Nicolaidis/Rusu, *The Antitrust Bulletin*, Vol. 55, No. 4, Winter 2010, p. 759 (779).

¹²⁵ Doleys, *European Integration*, Vol. 34, No 6, 2012, p. 549 (563).

¹²⁶ Europa Press Release 4 June 2008: "State aid: Commission approves restructuring of Sachsen LB- frequently asked questions", available at http://europa.eu/rapid/press-release_MEMO-08-363_en.htm.

First it is justified with the systematic relevance of banks. They have to be distinguished from other firms because the effects of a failing bank on the economy are much more severe. If a bank is considered to be systemic important its fail can cause a negative spiral dragging down other banks on a global level as it could be seen with Lehmann in 2008.

The problem with moral hazard is neither easily justified nor desired. The failing of the big banks during the crisis was often the result of recklessness and greed. The public criticism why this behavior is “rewarded” by granting State aid is thus understandable and reasoned. But with regard to the systematic importance there hardly seems to be any alternative. The Commission tried to establish a kind of punishment by requiring the banks to share the financial burden. Even though such sanctions might not prevent reckless behavior entirely it is surely of some help.

IV. Conclusion

The Commission’s assessments of the cases have shown that they have the technical expertise and the capacities to deal with such complex state of facts in a short period of time. However the goals of the Commission, especially the financial stability, are difficult to achieve with the given rules. The four Communications provide only for a temporary framework and mitigation but the gravity of the financial crisis requires permanent and preventive rules providing for more control.

The Commission has the difficult task to ensure financial stability and prevent moral hazard but not to go beyond the original objective at the same time. The Commission has already designed some behavioral constraints as was seen in the case of Commerzbank under the Restructuring Communication. In the ING case excessive restructuring requirements even led the parties concerned to seek for partial annulment of the Commission’s decision. Then again banks are aware of their systematic role and are willing to abuse it to the detriment of society. Thus it can be acknowledged that the Commission’s actions are subject to proportionality – but it is not a tightrope walk. The financial sector finds itself in a self-inflicted situation caused by mismanagement and greed. Thus notwithstanding a few cases where the

Commission, according to critics, might have pursued “industrial policy in disguise”¹²⁷, the Commission has to counteract the “too big to fail” - attitude with more severe punishments.

With regards to the financial burden carried by the taxpayer, the EU should seek for a coherent and preventive solution that is not limited to the field of competition law. They recently established Tobin tax is an example of how to establish permanent instruments to control the banking sector. The failings of the banks were manmade and not inevitable and thus call for more stringent measures in the future in order to prevent the necessity of State aid in the first place. State aid should only be the last option yet banks seemed to see it as a convenient solution. This reckless attitude should be corrected by the EU with a clear and coherent framework.

¹²⁷ CEPS Task Force Report, p. 49.

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