

Jadwiga Urban-Kozłowska\*

## ‘Bailouts’ – Revision of the EU State Aid Policy

**Abstract:** *The current global financial crisis has both challenged and changed the European Commission’s interpretation of EU State aid law. In the first phase of the economic meltdown, the Commission systematically relied on the established EU State aid rules, notably the Guidelines on rescue and restructuring aid for firms in difficulty. As the crisis unfolded, the Commission recognised that those rules were insufficient and decided that tailor-made measures should be envisaged in order to fully address the problems faced by the banking sector. This article analyses the evolution in the Commission’s approach to State aid measures granted to ailing financial institutions. It is argued in conclusion that the revision of the State aid policy was a necessary step forward.*

### Introduction

When the financial crisis broke in the late summer of 2007, the perilous condition of the US mortgage market and the excessively risky strategies of individual banks were widely regarded as the root causes of the crisis.<sup>1</sup> Although it was clear that the problems faced by the US banking sector would have an impact on the functioning of financial institutions<sup>2</sup> in the European Union, the European policymakers at that time still perceived the crisis primarily as a liquidity problem of particular individual banks. During that initial phase, concerns over the solvency of financial institutions as a whole also

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\* **Jadwiga Urban-Kozłowska** – Ph.D. candidate at the Chair of European Law of the Jagiellonian University, attorney-at-law trainee at the Szczecin Bar Association.

<sup>1</sup> For more information about the causes of the financial crisis, see generally: W. Szymański, *Kryzys globalny. Pierwsze przybliżenie (Global crisis. A closer look)*, Warszawa 2009, p. 13–118; J.B. Taylor, *Zrozumieć kryzys finansowy. Przyczyny. Skutki. Interpretacje (Getting Off Track: How Government Actions and Interventions Caused, Prolonged, and Worsened the Financial Crisis)*, Warszawa 2010, p. 23–40.

<sup>2</sup> Hereinafter also ‘credit institutions’ and ‘banks’.

emerged, but a systemic collapse was deemed unlikely.<sup>3</sup> Moreover, a number of prominent experts shared the belief that the European economy, unlike the US economy, would be largely immune to the financial turbulence. As a result, until the late summer of 2008 the European Commission (hereinafter ‘Commission’), when examining the rescue measures granted to ailing financial institutions, systematically relied on the long-established EU rules for assessing State aid to firms in difficulty.

This perception of the situation changed dramatically with the bankruptcy of Lehman Brothers in September 2008. The financial crisis intensified markedly, both in scale and in scope. The pervasive uncertainty about the true value of banks’ assets and the vulnerability of credit institutions to the deteriorating economic market conditions led to a general erosion of confidence within the banking sector. The interbank lending market froze, making access to liquidity progressively more difficult for financial institutions. Furthermore, as the crisis unfolded it became clear that its adverse effects would not be restricted only to those financial institutions which, due to their structural solvency problems (inefficiencies, poor asset-liabilities management and/or risky investment strategy),<sup>4</sup> were considered to be the ‘authors’ of the then-current credit crunch. The striking feature of the re-assessed financial crisis was the fact that fundamentally sound banks also faced refinancing problems.<sup>5</sup> Due to the high degree of integration and interdependence of the European financial markets, as well as the waning confidence of retail clients in the banking sector, the risk of a systemic crisis emerged.

Awakened to the nature and the magnitude of the crisis, the Commission decided to adapt its State aid enforcement policy. The Commission acknowledged that the aid measures undertaken by the Member States for the benefit of ailing financial institutions might be considered compatible with the common market rules, as their objective was to ‘remedy a serious disturbance in

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<sup>3</sup> See also: Speech by L. Papademos, *The financial market turmoil, the European economy, and the role of the European Central Bank*, New York, 27 September 2007, [http://www.ecb.int/press/key/date/2007/html/sp070927\\_1.en.html](http://www.ecb.int/press/key/date/2007/html/sp070927_1.en.html)

<sup>4</sup> The less-performing financial institutions are often called ‘ailing’ or ‘distressed’. They are likely to be particularly affected by losses stemming from inefficiencies, poor asset-liability management or risky strategies. See: *Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current financial crisis* (hereinafter ‘Banking Communication’), OJ C 270, 25.10.2008, p. 8–14, point 14.

<sup>5</sup> A financial institution is considered to be fundamentally sound if the viability problems it may face are inherently exogenous and they result from the extreme situation in the financial market rather than from inefficiency or excessive risk-taking. See: Banking Communication, point 14. See also: R. Luja, *State Aid and the Financial Crisis: Overview of the Crisis Framework*, “European State Aid Law Quarterly” No. 2/2009, p. 146–147.

the economy of a Member State' under what is now Article 107(3)(b) TFEU,<sup>6</sup> which at that time was Article 87(3)(b) TEC.<sup>7</sup>

In order to preserve financial stability and provide legal certainty in the application of the, until then rarely-used Article 87(3)(b) TEC, the Commission adopted four official Communications between October 2008 and July 2009, indicating how State aid rules would be applied to national support measures for financial institutions in distress. This new legal framework comprised various kinds of aid measures, such as guarantees, recapitalisation, impaired asset relief, restructuring, and controlled winding-up.

The main focus of this article is to review the evolution of the Commission's approach to the State aid measures granted to assist the ailing financial institutions.<sup>8</sup> It begins with an analysis of the established State aid rules used at the beginning of the crisis, and moves on to examine the special legal framework adopted by the Commission during the second phase of the economic downturn. This overview will demonstrate the size, shape and complexity of the changes involved, and enables identification of their directions and effects. Furthermore, throughout the analysis of the relevant provisions, examples of their practical application are provided.

This article consists of two parts, corresponding to the two approaches pursued by the Commission so far during the current financial crisis. The first part takes a comprehensive look at the application of the established State aid rules to the support measures granted to ailing financial institutions during the first phase of the crisis. In order to provide an introduction to this subject, the scope and content of the Article 107 TFEU (ex-Article 87 TEC) is succinctly described. It should be highlighted that during the first phase the Commission allowed support measures only on the basis of Article 107(3)(c) TFEU (formerly Article 87(3)(c) TEC). The second part illustrates how the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter 'R&R Guidelines')<sup>9</sup> have been applied in cases of State aid measures granted to financial institutions. The criteria applicable to rescue aid and aid for restructuring of firms in difficulty is spelt out.

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<sup>6</sup> Due to the amendment introduced by the Treaty of Lisbon, the former Treaty establishing the European Community was transformed into the Treaty on the Functioning of the European Union (hereinafter 'TFEU').

<sup>7</sup> The Treaty establishing the European Community (hereinafter 'TEC').

<sup>8</sup> It is unfortunately beyond the scope of this article to comment on a set of rules adopted by the Commission in order to foster the undisturbed flow of credit to the real economy during the current financial crisis.

<sup>9</sup> *Community guidelines on State aid for rescuing and restructuring firms in difficulty*; OJ C 244, 01.10.2004, p. 2–17, (hereinafter 'R&R Guidelines').

The second part also provides a forum for discussion of the various measures encompassed by the special State aid framework for ailing financial institutions adopted by the Commission under Article 107(3)(b) TFEU (formerly Article 87(3)(b) TEC). These measures include: guarantees of liabilities, recapitalisation, asset relief, and restructuring of the beneficiary firm.<sup>10</sup> The second part is divided into four subchapters, with each subchapter presenting the conditions and safeguards concerning each of the above-mentioned types of government assistance.

The final section of the article contains a review and conclusions, ultimately arguing that the changes which were introduced by the Commission in respect of State measures granted to ailing financial institutions were a step in the right direction. The additional guidance issued by the Commission during the second phase of the global financial crisis provided an element of legal certainty in the application of the State aid rules. The special features of the financial market are outlined in the conclusions, and the arguments for and against the approach taken by the Commission during the current economic crisis are examined. Finally, some recommendations for the future application of State aid rules are proposed.

## **1. Phase I: The subprime crisis**

The first phase of the ongoing financial crisis, over the period from September 2007 to September 2008, was triggered by the subprime mortgage crisis in the United States and is referred to as the ‘subprime crisis’, which spread throughout the world as global securities backed by subprime mortgages suffered significant, and in some cases total, losses in value. During this time the European Commission systematically assessed all support measures granted to ailing credit institutions according to the established EU State aid rules. This means that all economic advantages granted to banking sector companies were first assessed by the Commission under Article 87(1) TEC (now Article 107(1) TFEU). If the aid was characterised as State aid, possible grounds for justification were then considered (subchapter one). In this respect, the R&R Guidelines, issued on the basis of Article 87(3) TEC (now Article 107(3) TFEU), played an important role (subchapter two).

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<sup>10</sup> The Commission also set out rules for controlled winding-ups of insolvent financial institutions. This controlled liquidation is also, however, outside the scope of this article, which is limited to discussion of those measures aimed at the restoration of the long-term viability of beneficiary banks.

## 1.1. Treaty provisions

As stated above, every alleged subsidy was first of all examined under Article 87(1) TEC (now Article 107(1) TFEU) in order to ascertain whether it constituted State aid. Provided that the four cumulative criteria<sup>11</sup> stipulated therein were fulfilled, the measure at issue would then be put to the compatibility test to verify whether it could be deemed consistent with the common market. This is because the general prohibition against granting State aid, embodied in Article 87(1) TEC (now Article 107(1) TFEU), is not absolute. It is in fact subject to two sets of exceptions. Article 87(2) TEC (now Article 107(2) TFEU) lists three grounds which automatically entitle the aid to be granted if it falls within the categories defined (the so-called ‘mandatory exemptions’).<sup>12</sup> Article 87(3) TEC (now Article 107(3) TFEU) provides, in turn, certain types of cases in which the grant of financial support may be justified if the Commission considers it appropriate (the so-called ‘discretionary exemptions’).<sup>13</sup>

Given the exceptional situation of the financial sector at that time, the scope of the emergency measures adopted by the Member States, as well as the high risks involved, it is not surprising that most of the measures assessed were characterised as State aid. To this end, the Commission relied systematically on the well-established ‘market economy investor’ test.<sup>14</sup>

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<sup>11</sup> According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.

<sup>12</sup> The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

<sup>13</sup> The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (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 the trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

<sup>14</sup> See: *WestLB riskshield* (Case ex CP 15/08) Commission Decision NN 25/2008 [2008] OJ C 189/03, par. 33–35; *Roskilde Bank A/S* Commission Decision NN 36/2008 [2008] OJ C 238/5, par. 34–38; *Sachsen LB* Case C 9/2008 (ex NN 8/2008, CP 244/2007) Commission Decision 2009/341/EC [2009] OJ L 104/34, par. 81–85. For more information on the principle of the market economy investor, see generally: Y. Simon, *The Application of the Market Economy Investor Principle in the German Landesbanken cases*, “European State Aid Law Quarterly” No 3/2007, p. 499.

As indicated above, there are several grounds for authorising State aid measures. However, it should be noted that during the first phase of financial crisis, Article 87(3)(c) TEC (now Article 107(3)(c) TFEU) was considered by the Commission as the only legal basis capable of providing a viable exemption from the general prohibition against granting State aid. In all its decisions adopted over subprime crisis period, the Commission refused to admit that subsidies provided to ailing financial institutions could be viewed as measures necessary to 'remedy a serious disturbance in the economy of a Member State', and as a consequence obtain a discretionary exemption under Article 87(3)(b) TEC (now Article 107(3)(b) TFEU).<sup>15</sup> Following the opinion expressed in the *Crédit Lyonnais* decision,<sup>16</sup> the Commission stated that Article 87(3)(b) TEC (now Article 107(3)(b) TFEU) 'needs to be applied restrictively so that aid cannot be benefiting only one company or one sector but must tackle a disturbance in the entire economy of a Member State'.<sup>17</sup> As regards the difficult situations faced by particular financial institutions, the Commission took the view that they resulted from individual problems encountered by these companies and that they could be addressed by tailor-made remedies under the rules for firms in difficulty.<sup>18</sup> In this respect, it is important to note that, in a limited number of previous cases, the Commission had permitted the invocation of Article 87(3)(b) TEC (now Article 107(3)(b) TFEU) as a viable ground for justification.<sup>19</sup> It can thus be argued that Commission did not fully recognise, at that time, the severity of the liquidity problems faced by the banking sector, problems which could lead not only to the insolvency

<sup>15</sup> In those cases the Commission expressly refused to consider the compatibility of the relevant State aid measures with the exemption provided in Article 87(3)(b) TEC (now Article 107(3)(b) TFEU), e.g. *Rescue aid to Northern Rock* (Case ex. CP 269/07) Commission Decision NN 70/2007 [2008] OJ C 43/1, par. 38; *WestLB riskshield*, op.cit., par. 42; *Sachsen LB*, op.cit., par. 95. In the two decisions taken in September 2008, the Commission presented a slightly different opinion and stated that since the relevant State aid measures were found compatible on the basis of Article 87(3)(c) TEC, it was not necessary to assess whether Article 87(3)(b) TEC could, in the given case, be applied, see: *Rescue aid to Bradford & Bingley* Commission Decision NN 41/2008 [2008] OJ C 290/2, par. 52; *Rescue aid for Hypo Real Estate* Commission Decision NN 44/2008 [2008] OJ C 293/1, par. 32.

<sup>16</sup> *Crédit Lyonnais group* Commission Decision 98/490/EC [1998] OJ L 221/28.

<sup>17</sup> See: *WestLB riskshield*, op.cit., par. 41.

<sup>18</sup> See: *WestLB riskshield*, op.cit., par. 42; *Sachsen LB*, op.cit., par. 95.

<sup>19</sup> See: Editorial Comments, *Weathering through the credit crisis. Is the Community equipped to deal with it?*, CML Rev Vol. 46/2009, p. 9. The Commission rejected the arguments of the Member States in favour of the application of Article 87(3)(b) to the banking sector in the following cases: *Crédit Lyonnais* Commission Decision 95/547/EC [1995] OJ L 308/92, par. 7.1; *Crédit Foncier de France* Commission Decision 2001/89/EC [2001] OJ L 34/36, par. 68–70; *BAWAG-PSK* (Case C 50/2006 (ex NN 68/2006, CP 102/2006)) Commission Decision 2008/263/EC [2008] OJ L 83/7, par. 164–165.

of some financial institutions, but more generally trigger an unprecedented global crisis.

## 1.2. Rescue and restructuring (R&R) guidelines

The notion of aid aimed at facilitating the development of certain economic activities embraces, *inter alia*, emergency State measures for financial institutions facing liquidity problems. With a view to providing more specific guidance on the application of Article 87(3)(c) TEC (now Article 107(3)(c) TFEU), the Commission issued special guidelines on what was termed ‘rescue and restructuring aid’ for firms in difficulty. Although each guideline (including the one in question) belongs to the realm of soft law,<sup>20</sup> and consequently is not binding in the legal sense, one should not underestimate the role played by these instruments in the context of EU law. The main advantage of these guidelines is that they give an insight into Commission’s way of thinking and articulate its understanding of the relevant provisions of EU law. In other words, the Commission makes some sort of commitment that it will comply with the principles, as well as the way of interpretation, stipulated in its Guidelines.<sup>21</sup> Hence the relevance of here taking a closer look at the substantive provisions of the R&R Guidelines.

While State aid measures are inherently selective in terms of recipients,<sup>22</sup> nonetheless rescue aid as well as aid for restructuring are especially destined for a particular category of firms, i.e. so-called ‘firms in difficulty’. Within the meaning of the R&R Guidelines, a firm is considered as being in difficulty when it is unable to stem losses which, without the outside intervention of public authorities, will ‘almost certainly condemn it to going out of business in the short or medium term’.<sup>23</sup> The wording of this notion is rather general and vague, bringing about as a result the necessity to conduct an economic evaluation of the prospects of a company in distress in order to ascertain whether the losses it is incurring may result in its bankruptcy.<sup>24</sup> Beneficiaries eligible for R&R aid are limited to undertakings operating on a particular mar-

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<sup>20</sup> For more information about soft law instruments in EU law: J. Klabbers, *Informal Instruments before the European Court of Justice*, “Common Market Law Review” Vol. 31/1994, p. 997.

<sup>21</sup> See: T-214/95 *Het Vlaamse Gewest (Flemish Region) v. Commission* [1998] ECR II-717, par. 79; T-187/99 *Agrana Zucker und Stärke AG v. Commission* [2001] ECR II-1587, par. 56; T-17/03 *Schmitz-Gotha Fahrzeugwerke GmbH v. Commission* [2006] ECR II-1139, par. 42; T-369/06 *Holland Malt BV v. Commission* [2009] ECR II-3313, par. 93.

<sup>22</sup> See: Article 107(1) TFEU.

<sup>23</sup> See: R&R Guidelines, point 9.

<sup>24</sup> M. Szydło, *Pomoc państwa na ratowanie i restrukturyzację przedsiębiorstw zagrożonych w prawie wspólnotowym (Rescue and Restructuring State Aid for firms in difficulty in European Community Law)*, “Przegląd Ustawodawstwa Gospodarczego” No. 2/2006, p. 3.

ket segment for at least three years. As a result, all newly created firms, as well as those which emerged from the liquidation of a previous firm or merely took over such firm's assets, are expressly excluded.<sup>25</sup> Some restrictions are also imposed on companies belonging to or being taken over by a larger business group.<sup>26</sup>

As indicated above, the firm in difficulty is characterised by two distinctive features: (i) the firm is incurring losses which cannot be stemmed using its own resources, including the funds it is able to obtain from its owner/shareholders or creditors;<sup>27</sup> and (ii) due to the total amount of losses incurred the failure of the firm is almost certain.<sup>28</sup> This will particularly be the case when the company concerned fulfils, under its applicable domestic law, the criterion for being the subject of collective insolvency proceedings.<sup>29</sup> A bank should also be qualified as being 'in difficulty' if its total capital ratio is so low that it may fall below the minimum levels required under the applicable national banking law.<sup>30</sup>

As regards the material scope of the R&R Guidelines, there are two kinds of aid that may be provided to firms in difficulty: (i) rescue aid; or (ii) aid for restructuring of the business company. The term 'rescue aid' is generally understood to mean temporary and reversible liquidity assistance designed to keep an ailing firm afloat for the time necessary to enable it to draw up a restructuring or liquidation plan.<sup>31</sup> Restructuring aid, on the other hand, is aimed at restoring a firm's long-term viability.<sup>32</sup> The restructuring of a business company should be viewed as a twofold process. In order to achieve the best results, capital injections and other forms of liquidity assistance (so-called financial restructuring) should be timed to coincide with the reorganisation and rationalisation of the firm's activities (so-called physical restructuring).<sup>33</sup> What is more, restructuring aid should not consist of financial support de-

<sup>25</sup> See: R&R Guidelines, point 12.

<sup>26</sup> See: R&R Guidelines, point 13. For more information on the scope and effects of restrictions on granting rescue and restructuring aid to companies, see: P. Nicolaidis, M. Kekelekis, *When do Firms in Trouble Escape from State Aid Rules?*, "European State Aid Law Quarterly" No. 1/2005, p. 19–20.

<sup>27</sup> To find out more about the exact meaning of the first condition see: *Bankgesellschaft Berlin AG* Commission Decision 2005/345/EC [2005] OJ L 116/1, par. 157–158.

<sup>28</sup> To find out more about the precise meaning of the second condition see: *Infineon Technologies* Commission Decision 2005/373/EC [2005] OJ L 120/5, par. 34–37.

<sup>29</sup> *Northern Rock*, op.cit., par.41; *Sachsen LB*, op.cit., par. 96.

<sup>30</sup> *Bradford & Bingley*, op.cit., par. 38.

<sup>31</sup> See: R&R Guidelines, point 15.

<sup>32</sup> See: R&R Guidelines, point 17.

<sup>33</sup> See: P. Anestis, S. Mavroghenis, S. Drakakakis, *Rescue and Restructuring Aid. A Brief Assessment of the Principal Provisions of the Guidelines*, "European State Aid Law Quarterly" No. 1/2004, p. 30.



signed to make good past losses unless it simultaneously tackles the reasons for those losses.<sup>34</sup> It is worth mentioning that both forms of aid are subject to strict conditions, as well as certain requirements that rely principally on economically sound foundations.<sup>35</sup>

Pursuant to point 25 of the R&R Guidelines, State aid for rescuing a firm in difficulty must, in order to be deemed compatible with the common market, satisfy five cumulative criteria. Analysis of these requirements in this article is accompanied by examples of their practical application in cases concerning the granting of State aid measures to ailing financial institutions during the subprime crisis.

First, the aid must consist of liquidity support in the form of loan guarantees or loans granted at a market-based interest rates for a maximum period of six months after the disbursement of the first instalment to the firm at issue. With regard to rescue aid in the banking sector, the R&R Guidelines provide for the possibility to broaden the scope of liquidity assistance in order to enable the relevant credit institutions to temporarily carry on their banking business in accordance with the prudential legislation in force. During the first phase of the financial crisis, a number of particular measures were qualified by the Commission as rescue aid, notably: (i) a guarantee on deposits;<sup>36</sup> (ii) a working capital facility;<sup>37</sup> (iii) the acquisition of ‘toxic’ commercial paper, providing that the associated risks were still incurred by the previous owner;<sup>38</sup> (iv) a default guarantee for the repayment of liquidity lines.<sup>39</sup> In the *Bradford & Bingley* decision, the Commission confirmed that a measure of a structural nature, which needed to be implemented immediately so as to halt a worsening of the financial situation of a company, might exceptionally be undertaken by a grant of rescue aid.<sup>40</sup> The Commission also showed some flexibility concerning the maximum duration of the rescue aid, by allowing the interest payment of a relevant grant facility to be deferred for five years.<sup>41</sup>

Second, the aid must be warranted on the grounds of serious social difficulties and have no unduly adverse spill-over effects on other Member States. The requirement that a measure be justified on the grounds of serious social

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<sup>34</sup> A comparison between rescue aid and aid for restructuring of a company is carried out in: M. Szydło, *op.cit.*, p. 6.

<sup>35</sup> For a more in-depth economic analysis of provisions of the R&R Guidelines, see: P. Nicolaidis, M. Kekelelis, *An Economic Analysis of EC Guidelines on State Aid for the Rescue and Restructuring of Companies in Difficulty*, “*Intereconomics*” No. 39/2004, p. 204–212.

<sup>36</sup> *Northern Rock*, *op.cit.*, par. 44.

<sup>37</sup> *Bradford & Bingley*, *op.cit.*, par. 43–45.

<sup>38</sup> *Sachsen LB*, *op.cit.*, par. 99.

<sup>39</sup> *Hypo Real Estate*, *op.cit.*, par. 27.

<sup>40</sup> *Bradford & Bingley*, *op.cit.*, par. 46.

<sup>41</sup> *Northern Rock*, *op.cit.*, par. 46.

difficulties is met, notably, when: (i) provision of the measure protects depositors of the bank in question and helps to maintain confidence in the relevant national financial system;<sup>42</sup> (ii) denial of granting the rescue aid would lead to the bankruptcy of the relevant bank and, as a consequence, would cause a series of employee redundancies.<sup>43</sup> In the Commission's view, the negative spill-over effects are eliminated when, for example: (i) the beneficiary bank receives only the cash needed for a week in advance, and consequently cannot behave aggressively on the market;<sup>44</sup> (ii) the main recipient of the aid is being wound up.<sup>45</sup>

Third, the Member State concerned must undertake to submit to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan, or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated.<sup>46</sup> In the case of non-notified aid, the six-month period should be counted from the day when the first implementation of a rescue aid measure takes place.

Fourthly, the amount of aid must be proportional, which means that it should be restricted to the minimum amount necessary to keep an ailing firm in business for the period during which the aid is authorised. This will be the case, for instance, when the amount of the rescue measure corresponds to that portion of the company's liquidity requirements that cannot be financed using its own resources, and the amount of aid is based on a liquidity forecast that is deemed plausible.<sup>47</sup> The exact amount of aid should be based on the liquidity needs of the relevant company, covering the costs of salaries and routine supplies. In order to facilitate the correct calculation of the permissible amount of aid, a special formula has been drawn up by the Commission in the form of an annex to the R&R Guidelines.

Lastly, the rescue aid should, as a matter of principle, constitute a one-off operation.<sup>48</sup> This requirement is known as the 'one time, last time' principle. This means that the repeated provision of rescue aid in order to keep an inefficient and unviable firm artificially alive in the market is not permitted.<sup>49</sup>

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<sup>42</sup> *Bradford & Bingley*, op.cit., par. 47.

<sup>43</sup> *Northern Rock*, op.cit., par.49; *WestLB riskshield*, op.cit., par. 33–35; *Roskilde Bank A/S*, op. cit., par. 56; *Sachsen LB*, op.cit., par. 103.

<sup>44</sup> *Northern Rock*, op.cit., par. 49.

<sup>45</sup> *Bradford & Bingley*, op.cit., par. 47.

<sup>46</sup> *Hypo Real Estate*, op.cit., par. 29.

<sup>47</sup> *Ibidem*, par. 30.

<sup>48</sup> See: *Aid scheme implemented by Portugal in favour of the pigfarming sector* Commission Decision 2001/86/EC [2001] OJ L 29/49, par. 43; *Hilados y Tejidos Puigneró SA* Commission decision 2003/876/EC [2003] OJ L 337/14, par. 138.

<sup>49</sup> See: *Thüringer Motorenwerke GmbH* Commission Decision 98/664/EC [1998] OJ L 316/20, par. VI (b).

Moreover, if less than ten years have elapsed since the last rescue aid was granted, no further rescue or restructuring aid is allowed unless there exists exceptional and unforeseeable circumstances for which the company receiving aid was not responsible.<sup>50</sup>

Following our review of the conditions accompanying aid to a firm in difficulty, the next issue is the criteria set forth in the R&R Guidelines for granting restructuring aid to a firm qualified as a firm in difficulty. First, the provision of the aid must be subject to the implementation of a restructuring plan capable of restoring the long-term viability of the relevant company within a reasonable timeframe and on the basis of realistic assumptions as to future operating conditions.<sup>51</sup> The restructuring plan must, *inter alia*, describe the circumstances that led to the company's difficulties and include a market survey. The future prospects of the relevant firm are appraised on the basis of at least three different scenarios, reflecting best-case, worst-case, and intermediate assumptions. The objective of the R&R Guidelines' provisions is to create, after completion of the restructuring plan, a firm that will not only be able to cover all its costs, including depreciation and financial charges, but will also generate enough capital to compete in the marketplace using its own resources.<sup>52</sup>

Second, appropriate compensatory measures must be envisaged in order to reduce, as far as possible, any adverse effects on competitors of the aid granted.<sup>53</sup> These measures may include, in particular, the divestment of assets, reductions in capacity or market presence, and the reduction of entry barriers on the relevant market.<sup>54</sup> The compensatory measures must, however, be in proportion to the distortive effects of the aid. Each grant of restructuring aid should be assessed on a case-by-case basis, taking into due account all the relevant information at the disposal of the Commission, including that supplied by interested outside parties.<sup>55</sup>

Third, the amount and intensity of the aid must be limited to the strict minimum required to enable the restructuring to be undertaken in light of the existing financial resources of the company, its shareholders, or the business group to which it belongs.<sup>56</sup> It is important to note that, when assessing the

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<sup>50</sup> See: R&R Guidelines, point 73. During the first phase of the global economic crisis the Commission systematically applied the 'one time, last time' principle to rescue measures granted to financial institutions. See e.g. *Northern Rock*, op.cit., par. 52; *WestLB riskshield*, op.cit., par. 57.

<sup>51</sup> See: R&R Guidelines, point 35.

<sup>52</sup> See: R&R Guidelines, point 37.

<sup>53</sup> For more information on compensatory measures, see: P.Nicolaides, M.Kekelekis, *When do Firms in Trouble...*, op.cit., p. 20–21.

<sup>54</sup> For more examples of compensatory measures, see: P. Anestis, S. Mavroghenis, S. Drakakakis, op.cit., p. 31.

<sup>55</sup> See: R&R Guidelines, point 40.

<sup>56</sup> See: R&R Guidelines, point 43.

relevant restructuring aid, the Commission takes into account any rescue aid granted beforehand. What is more, the R&R Guidelines impose an obligation on the beneficiary company to make a significant and real contribution to the restructuring plan from its own resources, including the sale of assets that are not essential to the firm's survival, or using external financing at market conditions. As far as 'significant contribution' is concerned, the R&R Guidelines set out thresholds, which can be reduced only in exceptional circumstances.<sup>57</sup> The Commission endeavors to ring-fence the dangers associated with possible competition distortions by verifying that the amount of the aid or the form in which it is granted is such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.<sup>58</sup>

Lastly, the beneficiary must undertake to adhere to the restructuring plan endorsed by the Commission, and the Member State granting the aid must commit itself to assure the submission of regular detailed reports to enable the Commission to verify whether the restructuring plan is being implemented properly.<sup>59</sup>

During the subprime period of the financial crisis, only one final decision concerning the restructuring aid was adopted by the Commission, being a decision of conditional approval in the case of Landesbank Sachsen Girozentrale (hereinafter 'Sachsen LB'). In its assessment of the restructuring aid, the Commission followed the above-mentioned criteria. First of all, the abandonment of the loss-generating activities and the refocusing of Sachsen LB on corporate clients and wealthy private clients was evaluated positively by the Commission. In addition, the restructuring plan was accompanied by a market study and based on sound financial projections, which convinced the Commission that the firm would restore its long-term viability.<sup>60</sup> The restructuring plan comprised the sale of certain assets, the closure of Sachsen LB's Irish subsidiary, undisclosed divestitures, and the termination of Sachsen LB's proprietary trading and international real estate activities. The Commission viewed these measures as sufficient to justify the aid granted.<sup>61</sup> Finally,

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<sup>57</sup> The Commission will normally require the following contributions: at least 25 per cent in the case of small enterprises, at least 40 per cent for medium-sized enterprises and at least 50 per cent for large firms. See: Guidelines, point 44. It should be noted that the Commission's previous practice shows that in certain circumstances the contribution of as little as 11 per cent may be regarded as significant. See: *KHK Verbindetechnik GmbH Brotterode* Commission Decision 2002/71/EC [2002] OJ L 31/80, par. 61–64.

<sup>58</sup> See: R&R Guidelines, point 45.

<sup>59</sup> See: R&R Guidelines, point 49.

<sup>60</sup> See: *Sachsen LB*, op.cit., par. 106–109.

<sup>61</sup> *Ibidem*, par. 120–125.

a change of the Sachsen LB management was considered a ‘valuable signal against moral hazard’.<sup>62</sup>

## 2. Phase II: ‘systemic crisis’

After the collapse of Lehman Brothers in September 2008, the global economy entered into a severe recession. The intensification of the crisis and the reluctance of banks to lend to each other made access to liquidity progressively more difficult.

In the light of the seriousness of the ongoing financial crisis and the special characteristics of the financial markets, the Commission acknowledged that the crisis had reached a dimension to qualify as ‘a serious disturbance of the economy of a Member State’ under Article 87(3)(b) TEC (now Article 107(3)(b) TFEU). With a view to providing legal certainty, the Commission adopted and proclaimed four Communications:

- 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 (hereinafter ‘Banking Communication’);<sup>63</sup>
- 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 (hereinafter ‘Recapitalisation Communication’);<sup>64</sup>
- Communication on the treatment of impaired assets in the Community banking sector (hereinafter ‘Impaired Assets Communication’);<sup>65</sup>
- Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules (hereinafter ‘Restructuring Communication’)<sup>66</sup>.

The first three communications set out the prerequisites for the compatibility with EU law of the main types of assistance granted by Member States to financial institutions, i.e. guarantees on liabilities, recapitalisation and asset relief measures. The fourth Communication details the special features that a restructuring plan (or a viability plan) should display in the context of the current global financial crisis. These measures will be discussed individually in the following subchapters.

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<sup>62</sup> *Ibidem*, par. 126.

<sup>63</sup> OJ C 270, 25.10.2008, p. 8–14.

<sup>64</sup> OJ C 10, 15.1.2009, p. 2–10.

<sup>65</sup> OJ C 72, 26.3.2009, p. 1–22.

<sup>66</sup> OJ C 195, 19.8.2009, p. 9–20.

## 2.1. Guarantees

The Banking Communication provides guidance on the underlying standards and safeguards in relation to one of the most important State measures, i.e. guarantees. As far as general guarantee schemes are concerned, the Commission underscores that their eligibility criteria should be objective and non-discriminatory.<sup>67</sup> In other words, guarantee measures must be available to all financial institutions incorporated in a given Member State, including subsidiaries and branches of foreign banks, on the condition that they have significant activities there.<sup>68</sup> In order to address the bottleneck limiting access to liquidity, the guarantee may protect not only retail deposits but also certain types of wholesale deposits and even short-term and medium-term debt instruments.<sup>69</sup> However, subordinated debt should, in principle, be excluded from coverage by the guarantee scheme.<sup>70</sup> According to the Banking Communication, a guarantee may be approved for up to two-year period, provided that a system of regular review (i.e. every six months) is safeguarded.<sup>71</sup> In some cases, however, longer coverage of debt has been allowed, subject to additional safeguards,<sup>72</sup> due to the exceptional circumstances of a relevant Member State<sup>73</sup>.

In order to minimise the amount of aid, the Banking Communication requires a significant contribution from the beneficiaries and/or the sector to the cost of the guarantee and the cost of State intervention in the event the guarantee should become activated.<sup>74</sup> It is worth emphasising that, unlike in the

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<sup>67</sup> See: Banking Communication, point 18. See also: *Guarantee scheme for banks in Denmark* Commission decision NN 51/2008 [2008] OJ C 273/2, par.6; *Rescue package for credit institutions in Germany* Commission decision N 512/2008 [2008] OJ C 293/2, par. 5–7.

<sup>68</sup> See: Commission press release MEMO/08/615, 12.10.2008, ‘State aid: Commission welcomes revised Irish guarantee scheme’. In the first version of the Irish guarantee scheme eligibility was limited to domestic financial institutions. In response to the Commission’s critical assessment of this criterion, the scheme was amended by Ireland on 12 October 2008 in order to comply with the principle of non-discrimination.

<sup>69</sup> See: Banking Communication, points 19–21.

<sup>70</sup> See: Banking Communication, point 23. See also: A. Arora, *The 2007–2009 Banking Crisis and the EU’s Regulatory Response*, “European Business Law Review” Vol. 21/2010, p.608–609.

<sup>71</sup> See: Banking Communication, point 24.

<sup>72</sup> *Financial Support Measures to the Banking Industry in the UK* Commission decision N 507/2008 [2008] OJ C 290/4, par.60; *Rescue package for credit institutions in Germany*, op.cit, par. 65; *Support scheme for banks’ funding in Poland* Commission decision N 208/2009 [2009] OJ C 250/1, par. 11.

<sup>73</sup> *Support measures for the banking industry in Sweden* Commission decision N 533/2008 [2008] OJ C 308/6, par. 44; *Guarantee scheme for banks’ funding in Finland* Commission decision N 567/2008 [2008] OJ C 309/7, par. 39–40.

<sup>74</sup> See: Banking Communication, point 25.

R&R Guidelines, no exact thresholds are set forth in the Communication.<sup>75</sup> This solution should be evaluated positively in the light of aggravating market conditions in the banking sector, as it makes the use of guarantee schemes more flexible. The Commission also points out that the fees charged for the provision of the guarantee schemes should be as close to the market price as possible. If the relevant beneficiary cannot afford to pay the totality of the calculated recompensation, the respective Member State may condition the provision of the guarantee upon the introduction of a claw-back mechanism or 'better fortunes' clauses.<sup>76</sup> Furthermore, the pricing mechanisms should take account of the degree of risk and the beneficiaries' respective credit profiles and needs.<sup>77</sup>

The Banking Communication lays particular emphasis on guarding against negative effects for non-beneficiary banks, since those who benefit from the government guarantee may be considered as less susceptible to the deteriorating market conditions and, consequently, attract more investors or retail customers. The Commission thus suggests that behavioural constraints must be envisaged so as to avoid the undue distortions of competition.<sup>78</sup>

The same standards and safeguards are applied when it comes to granting a guarantee to an individual financial institution. One remark is necessary, however. When a guarantee is called upon, the beneficiary bank has to undertake to submit a restructuring or liquidation plan, which will be then separately assessed by the Commission as to its compliance with the State aid rules.<sup>79</sup>

## 2.2. Recapitalisation of financial institutions

With respect to recapitalisation, the Banking Communication sets out a number of conditions. The overriding goal of providing public funds to strengthen the capital base of banks, either directly or through the injection of

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<sup>75</sup> See: R&R Guidelines, point 44.

<sup>76</sup> See: *Guarantee scheme for banks in Ireland* Commission decision NN 48/2008 [2008] OJ C 312/2, par. 23.

<sup>77</sup> For example, the remuneration for the guarantee under the German scheme should, in some cases, include a risk premium corresponding to the individual financial institution's credit default swap spread. See: *Rescue package for credit institutions in Germany*, op.cit, par. 22. Similarly: *Financial Support Measures to the Banking Industry in the UK*, op.cit., par. 15. An extensive list of the various factors that should be considered when setting the appropriate guarantee fee has been outlined in the Irish guarantee scheme, see: *Guarantee scheme for banks in Ireland*, op.cit., par. 22.

<sup>78</sup> See: Banking Communication, point 27. The German guarantee scheme prohibited marketing the State guarantee as a commercial advantage, see: *Rescue package for credit institutions in Germany*, op.cit, par. 23. Limitations on the size of the balance sheet of the beneficiary institutions has been proposed in the Finnish guarantee scheme, see: *Guarantee scheme for banks' funding in Finland*, op.cit., par. 14.

<sup>79</sup> See: Banking Communication, point 30. See also: *State aid to Banco Privado Português-BPP* Commission Decision NN 71/2008 [2009] OJ C 174/1, par. 14.

private capital, is to prevent 'negative systemic spillovers'.<sup>80</sup> As with guarantees, the recapitalisation schemes must: (i) contain objective and non-discriminatory criteria for eligibility;<sup>81</sup> and (ii) be limited to the minimum necessary.<sup>82</sup> In order to be deemed proportional, the relevant Member State should, in principle, receive shares of a value corresponding to the amount of public funds provided to the beneficiary of the recapitalisation. In addition, the Commission opts for the use of preferred shares or, alternatively, the introduction of claw-back mechanisms or better fortunes clauses. Due to the irreversible nature of the capital injections, the Commission points out the need to include appropriate *ex ante* behavioural safeguards and mechanisms to monitor their implementation.<sup>83</sup>

The main difficulties that have appeared in relation to recapitalisation schemes involve the lack of precise rules on calculation of the proper remuneration rate. In order to provide further guidance in this respect, the Commission decided to issue a new Communication, the so-called 'Recapitalisation Communication'. Pursuant to point 19 of the Recapitalisation Communication, there are two key elements that should be borne in mind when setting the remuneration rate of capital injections: (i) closeness to market prices; and (ii) exit incentives. What is more, the Commission introduced a distinction between fundamentally sound banks, on the one hand, and distressed, less-performing banks, on the other hand.<sup>84</sup> This distinction is of great importance, as the remuneration rate should reflect, *inter alia*, the current risk profile of each beneficiary.<sup>85</sup>

As regards the fundamentally sound banks, the Commission is willing to accept below-market remunerations in order to enhance the stability of the banking sector and ensure lending to the real economy.<sup>86</sup> Based on the Eurosystem recommendations, the price of capital injections should consist of a base rate, to which a risk premium is added.<sup>87</sup> The latter reflects, in particular, the type of capital used, the individual risk profile of the beneficiary bank, and the nature of safeguards against abuse of public funding linked to the recapitalisation measure. The Recapitalisation Communication pays particular attention to exit incentives, which should encourage the redemption of State

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<sup>80</sup> See: Banking Communication, point 34.

<sup>81</sup> See: Banking Communication, point 37.

<sup>82</sup> See: Banking Communication, point 38.

<sup>83</sup> *Financial Support Measures to the Banking Industry in the UK*. op.cit., par. 51.

<sup>84</sup> See: Recapitalisation Communication, point 12.

<sup>85</sup> See: Recapitalisation Communication, point 23.

<sup>86</sup> See: Recapitalisation Communication, point 24.

<sup>87</sup> Recommendations of the ECB Governing Council on the pricing of recapitalisations, 20.11.2008.



capital. The Commission suggests redemption clauses, a restrictive dividend policy, the use of increasing remuneration over time, or mechanisms that encourage the raising of private capital.<sup>88</sup> Furthermore, behavioural safeguards may be required so as to limit the potential adverse effects on competition.<sup>89</sup> The approval of capital injections to ailing financial institutions is conditional on two additional requirements: (i) a higher remuneration; and (ii) an obligation to draw up a thorough and far-reaching restructuring plan or carry out a winding-up of the beneficiary.<sup>90</sup>

The recapitalisation should be subject to regular review. The first report on the implementation of the measures undertaken must be communicated to the Commission within six months from the provision of the relevant capital injection. The Commission will assess, *inter alia*, the long-term viability of the recipient of the aid and the steps aimed at limiting the distortions of competition.<sup>91</sup>

### 2.3. Treatment of impaired assets

The announcement and implementation of rescue measures adopted by Member States beginning in October 2008 played an important role initially in avoiding a meltdown of the EU financial system. Unfortunately, by early 2009 the envisioned evolution in lending to the real market economy still lagged far below expectations. The perpetual uncertainty about the value and location of impaired assets seemed to be the key reason for the insufficient flow of credit. On 25 February 2009, after careful deliberation and numerous discussions with the Member States, the Commission adopted the Impaired Assets Communication.

The main objective of this Communication is to provide guidance on state intervention with respect to the removal of impaired or toxic assets from the balance sheets of banks. As regards the assets eligible for relief, it is for Member States to decide which categories of assets ('baskets') will be covered by their national asset relief schemes.<sup>92</sup> Although there is no common definition

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<sup>88</sup> See: *Anglo-Irish Bank* Commission decision N 9/2009 [2009] OJ C 177/1, par. 67–68; *Allied Irish Bank* Commission decision N 241/2009 [2009] OJ C 223/2, par. 79.

<sup>89</sup> For example, the Mortgage and Land Bank of Latvia pledged to: (i) abstain from entering into any new commercial lending activities; and (ii) keep limited business relations with its existing customers. See: *Recapitalization of "The Mortgage and Land Bank of Latvia"* Commission decision NN 60/2009 [2009] OJ C 323/5, par. 57. In some cases prohibitions against mass marketing of the measure is included. See: *Anglo-Irish Bank*, op.cit., par. 69.

<sup>90</sup> See: Recapitalisation Communication, points 43–45. But see: *Further recapitalisation of Hypo Real Estate* Commission decision N 161/2010 [2010] OJ C 190/7, par. 36–37.

<sup>91</sup> See: *State Aid to Aegon N.V.* Commission decision N 569/2008 [2009] OJ C 9/3, par. 58.

<sup>92</sup> More detailed guidance on the definition of those categories is provided in Annex III, which is attached to the Impaired Assets Communication.

of impaired assets, the Commission points out that this notion should encompass, in particular, assets that have either a much-reduced value or no value at all in comparison with their book values. Furthermore, the asset relief measure may take several forms, such as: asset purchase, asset insurance, asset swap, or hybrid systems.<sup>93</sup> It is relevant to note that all asset relief schemes should have an enrolment window not exceeding six months from the launch of the particular programme. The objective of this requirement is to limit speculation about the level of relief.

The Impaired Assets Communication formulates a number of principles that every asset relief measure must satisfy: (i) full *ex ante* transparency and disclosure of the impairments; (ii) correct valuation of assets; (iii) adequate burden-sharing of the costs between the State and the beneficiary. First of all, the full *ex ante* disclosure of risks on assets from which the potential beneficiary bank wishes to relieve itself is required.<sup>94</sup> What is more, the bank seeking to benefit from such relief is under an obligation to submit all available information in order to assess its capital adequacy and its prospects for future viability.<sup>95</sup> With reference to the valuation of assets, the current market value should, whenever possible, be considered a suitable benchmark. The Commission is, however, willing to accept the real economic value with a view to achieving the relief effect.<sup>96</sup> In addition, the valuation of covered assets should be certified by recognised independent experts and validated by the relevant supervisory authority.<sup>97</sup>

As Luja points out, the provision of asset relief ‘should not be a burden only to the state that steps in’.<sup>98</sup> In order to minimise moral hazard and avoid excessive aid, the Commission expects Member States to bear the losses associated with impaired assets to the maximum extent. If the upfront beneficiary contribution is deemed insufficient, it may be complemented by the inclusion of claw-back clauses or, in the case of insurance schemes, by a clause of ‘first loss’ and a clause of ‘residual loss sharing’.<sup>99</sup>

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<sup>93</sup> See: Impaired Assets Communication, point 11.

<sup>94</sup> See: *Germany German asset relief scheme* Commission decision N 314/2009 [2009] OJ C 199/3, par. 46.

<sup>95</sup> See: *Establishment of a National Asset Management Agency (NAMA)* Commission decision N 725/2009 [2010] OJ C 94/10, par. 130.

<sup>96</sup> When setting the correct valuation of assets eligible for relief, the Commission refers to a transfer value reflecting the underlying long-term economic value of the assets on the basis of underlying cash flows and broader time horizons. See: Impaired Assets Communication, point 40.

<sup>97</sup> See: *Restructuring of Royal Bank of Scotland and participation in the Asset Protection Scheme* Commission decision N 422/2009 and N 621/2009 [2010] OJ C 119/1, par. 150–151.

<sup>98</sup> R. Luja, *op.cit.*, p. 152.

<sup>99</sup> See: Impaired Assets Communication, point 24. See: *Germany German asset relief scheme*, *op.cit.*, par. 54.

If the beneficiary bank does not fulfil the above-mentioned conditions, the Commission may impose compensatory measures, such as: (i) downsizing or divestment of profitable business units and subsidiaries; or (ii) limitation of commercial expansion.<sup>100</sup> Finally, the Commission underlines the importance of assuring the long-term viability of the financial institutions granted aid. In order to achieve this goal, restructuring may be deemed necessary, especially in the case of a bank that has already benefited from other forms of State aid.<sup>101</sup>

## 2.4. Restructuring of ailing financial institutions

The final step towards the resolution of the current financial crisis involves the restructuring of those credit institutions which have received significant amounts of financial support from the respective Member States. On 22 June 2009 the Commission adopted the Restructuring Communication.<sup>102</sup> Together with the three previous Communications, these rules form a body of guidance for assessing various types of financial support measures granted to banks during the ongoing economic crisis.<sup>103</sup>

The Restructuring Communication sets out the rules that will be applied by the Commission when assessing the restructuring of financial institutions in the current crisis. It should be highlighted, however, that fundamentally sound banks are exempted from the obligation to devise a restructuring plan. In such cases, the submission of a viability plan will suffice.<sup>104</sup> The conditions and specific circumstances which trigger the necessity to submit a restructuring plan have been explained in the Banking Communication, the Recapitalisation Communication, and the Impaired Assets Communication.<sup>105</sup> As an example, a restructuring plan should be presented in the case of a distressed bank that has been recapitalised by a Member State, or when a bank which has already received State support applies for asset relief.

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<sup>100</sup> See: Impaired Assets Communication, point 57–59. See also: *Restructuring of Royal Bank of Scotland and participation in the Asset Protection Scheme*, op.cit., par. 106, 108–109.

<sup>101</sup> See: Impaired Assets Communication, points 53–56.

<sup>102</sup> The Restructuring Communication stipulated an expiration date of 31 December 2010. However, its application has been extended to restructuring aids notified by 31 December 2011. See: *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*; OJ C 329, 7.12.2010, p. 7–10, point 7.

<sup>103</sup> See: R. Monstad, K. Van de Castele, *State aid: main developments between 1 May and 31 August 2009*, “Competition Policy Newsletter” No. 3/2009, p. 61.

<sup>104</sup> The principles outlined in section 2 of the Restructuring Communication apply by analogy to beneficiary financial institutions that are under an obligation to demonstrate viability.

<sup>105</sup> For an illustration of situations when a beneficiary bank needs to devise and submit a restructuring plan, see: A. Bomhoff, A. Jarosz-Friis, N. Pesarei, *Restructuring banks in crisis – overview of applicable State aid rules*, “Competition Policy Newsletter” No. 3/2009, p. 5–6.

In order to be deemed compatible with the internal market under Article 107(3)(b) TFEU, the restructuring of a financial institution must comply with three principles. First, the restructuring plan has to lead, within a maximum of five years, to the restoration of long-term viability of the relevant financial institution without the recurrent need for government intervention.<sup>106</sup> ‘Long-term viability’ means that a bank is able to cover all its costs, including depreciation and financial charges, and generate an appropriate return on equity.<sup>107</sup> From the Commission’s point of view, the liquidity, solvency and profitability of the beneficiary bank are the main indicators of its viability.<sup>108</sup> The restructuring plan needs to be thorough, based on rigorous stress testing of the bank’s business model in order to demonstrate strategies to achieve viability also under adverse economic conditions.<sup>109</sup> Furthermore, the causes of the difficulties faced by the financial institution must be identified.<sup>110</sup> If a financial institution cannot be restored to viability, the restructuring plan should indicate how it can be orderly wound-up.

Second, State restructuring aid must be kept to the minimum and the beneficiary financial institutions should first use their own resources to finance their restructuring, for instance, by absorbing losses with available capital.<sup>111</sup> In other words, each financial institution must make an appropriate ‘own contribution’ to restructuring costs, to be provided by the former shareholders and capital holders of the aided bank within the framework of the restructuring process. This objective is achieved through: (i) fixing an appropriate price; (ii) temporary restrictions on payment of dividends and coupons on hybrid capital by banks operating at a loss; and (iii) various behavioural commitments.<sup>112</sup> The Restructuring Communication indicates that the restructuring aid must be limited to covering only those costs which are necessary in order to restore viability.<sup>113</sup> It should be emphasised that the requirement of burden-sharing plays an important role in ensuring that competition distortions are effectively limited (see below) and moral hazards adequately addressed.

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<sup>106</sup> See: Restructuring Communication, points 9 and 15.

<sup>107</sup> See: Restructuring Communication, point 13.

<sup>108</sup> See: *Restructuring of Kommunalkredit Austria AG* Commission decision SA.32745 (2011/NN) [2011] OJ C 239/2, par. 64.

<sup>109</sup> See: *Restructuring of Sparkasse KölnBonn* Commission decision C 32/2009 (ex NN 50/2009) [2011] OJ L 235/1, par. 83; *Restructuring of CajaSur* Commission decision N 392/2010 [2010] OJ C 357/13, par. 72.

<sup>110</sup> See: *Restructuring aid to Ethias SA* Commission decision N 256/2009 [2010] OJ C 252/5, par. 106–109.

<sup>111</sup> See: *Restructuring of Sparkasse KölnBonn*, op.cit., par. 88–91; *Restructuring of CajaSur*, op.cit., par. 80.

<sup>112</sup> See: *Restructuring of Kommunalkredit Austria AG*, op.cit., par. 87–89.

<sup>113</sup> See: Restructuring Communication, point 23.

Third, the restructuring plan should include effective and proportionate measures limiting distortions of competition and ensuring a competitive banking sector. The Restructuring Communication indicates that the Commission, when approving a restructuring plan, has to take into account in its assessment: (i) the amount of aid as well as the conditions and circumstances under which that aid was granted; and (ii) the size, scale and scope of activities that the aided bank will have on the market after the restructuring.<sup>114</sup> Moreover, the restructuring plan should contain sufficient measures to ensure that the State aid is not used to the detriment of competitors which did not receive similar public support. In other words, a level playing field needs to be maintained between banks which benefit from State aid and those operating without it. In order to minimise competition distortion, the beneficiary banks may be subject to: (i) structural measures, such as the obligation to divest itself of subsidiaries or branches and specific portfolios of customers or business units; and/or (ii) behavioural safeguards.<sup>115</sup> Such a plan must include steps to insure that a situation is not created whereby the State support weakens incentives for non-beneficiaries to compete, invest, and innovate, and that it does not create entry barriers.<sup>116</sup>

The restructuring plan must be followed by regular reports in order to allow the Commission to verify that it is being implemented properly.<sup>117</sup> In this respect, a Member State may appoint a monitoring trustee, who will provide semi-annual monitoring reports.<sup>118</sup>

## Conclusions

The financial crisis has been, for the last four years, the most challenging issue faced by political and economic leaders across Europe and the world. The volume and scope of aid approved by the Commission during that period has been unprecedented.<sup>119</sup> It should be recalled that until the beginning of October 2008 all State measures were assessed by the Commission under Article

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<sup>114</sup> See: Restructuring Communication, point 30. See also: *Restructuring of Kommunalkredit Austria AG*, op.cit., par. 93–100.

<sup>115</sup> See: *Restructuring of Sparkasse KölnBonn*, op.cit., par. 95–100; *Agricultural Bank of Greece* Commission decision SA.31154 (N 429/10) [2011] OJ C 317/5, par. 85–91.

<sup>116</sup> See: Restructuring Communication, point 28.

<sup>117</sup> See: Restructuring Communication, point 46.

<sup>118</sup> See: Restructuring Communication, point 30. See also: *Restructuring of Kommunalkredit Austria AG*, op.cit., par. 106.

<sup>119</sup> Until 2010 the total volume of State support granted to financial institutions in the context of the economic crisis amounted to EUR 4,588.90 billion, see: [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/ws7\\_1.xls](http://ec.europa.eu/competition/state_aid/studies_reports/ws7_1.xls)

87(3)(c) TEC (now Article 107(3)(c) TFEU). In the light of the deteriorating financial market conditions and the risk of a systemic crisis, the Commission adopted its State aid policy. In effect, since that time the Commission has relied exclusively on Article 107(3)(b) TFEU (formerly Article 87(3)(b) TEC) and the four Communications it issued and published.

It could be argued that exceptional circumstances call for exceptional responses. The analysis of the Commission's approach towards the assessment of State aid measures in favour of financial institutions raises, however, several questions. The fundamental issue is to determine the reasons and consequences of the Commission's change of justification grounds for State support granted to ailing financial institutions. Was this a much needed step forward, an indispensable adjustment or maybe a harmful U-turn from previous deliberative State aid law and policy? Will this change actually contribute to the rapid recovery of the banking sector, paving the way for a long-awaited return to normal market conditions?

First of all, it should be observed that the financial market differs from non-financial markets in a number of dimensions.<sup>120</sup> Commercial banks play an important role, as they provide capital to the wider economy. The high degree of integration and interdependence of European financial markets make them unique and unlike any other sector. What is more, the R&R Guidelines are based on the premise that the exit of inefficient firms is a normal part of the functioning of the market and, consequently, it cannot be the norm that a company which gets into financial difficulties is rescued by the State.<sup>121</sup> While in most goods and service markets the failure of an individual firm represents an opportunity for its competitors to increase their market share, the collapse of a major financial institution is liable to propagate and amplify shocks throughout the entire banking sector. The reason for such drastic repercussions of the potential bankruptcy of a financial institution results from the fact that commercial banks' business models are built on trust. When even a limited number of depositors lose confidence in their bank's stability, this may cause not only a run on this particular bank but is liable to trigger a widespread panic that could lead to a crisis of confidence in the entire financial system.<sup>122</sup>

Second, it should be observed that the four Communications adopted by the Commission between October 2008 and July 2009 provided additional

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<sup>120</sup> For an extended comparison of financial markets and non-financial markets, see: C. Savvides, D. Antoniou, *Ailing Financial Institutions: EC State Aid Policy Revisited*, "World Competition" No. 3/2009, p. 360–365.

<sup>121</sup> See: R&R Guidelines, point 4.

<sup>122</sup> See: J. Frédéric, *The Economic and Financial Crisis, Regulation and Competition*, "World Competition" No. 4/2009, p. 449.

flexibility as to the nature and duration of State aid measures. To illustrate, the provision of recapitalisation to financial institutions in distress could be approved for up to five years and enabled the enhancement of the soundness and stability of the banking sector, as banks were able to maintain higher capital adequacy ratios. Due to the introduction of asset relief measures, the beneficiary banks could be relieved of assets that had much-reduced values or none at all. This in turn contributed to the restoration of confidence within the banking sector. The adoption of the Communications gave the Commission the opportunity to explain how State aid rules would be applied to national support measures regarding ailing financial institutions. The determination of conditions and safeguards concerning State aid measures in favour of credit institutions provided legal certainty.<sup>123</sup> Moreover, it is worth underscoring that the new State aid framework did not come out of nowhere. All communications that were published by the Commission during the systemic phase of the current financial crisis were based on well-known principles of State aid policy.<sup>124</sup>

Third, it is relevant to note that in the absence of guidance from the Commission, there existed the possibility that Member States would make recourse to Article 108(2) TFEU (formerly Article 88(2) TEC) in order to approve certain State aid measures without the Commission's involvement. In this respect, Luja rightly points out that the Commission's central role in assessing State support measures is essential to the prevention of free rider policies.<sup>125</sup>

Fourth, account needs to be taken of the unprecedented scale of the liquidity problems faced by the financial institutions. One must not underestimate how far the financial market conditions had deteriorated in September 2008. In the light of the protracted global recession and the increasing number of crisis-hit financial institutions that followed, the restoration of stability in the banking sector was further away than ever before.

For the reasons described above, this author is of the opinion that the current financial crisis has reached a dimension to qualify as a serious disturbance of the economy of Member States under Article 107(3)(b) TFEU. But some questions remain: When was the right moment to have a recourse to this provision for the first time? Should the Commission have approved all State aid

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<sup>123</sup> From the Board, *The Credit Crisis and Its Aftermath*, "Legal Issues of Economic Integration", No. 4/2009, p. 282.

<sup>124</sup> According to the Banking Communication all measures should comply with the general principles underlying the State aid rules of the Treaty. In other words, the State support measures must be well-targeted, proportionate and non-discriminatory, but also designed in such a way as to minimise competition distortions. See: Banking Communication, point 15–16. But see: R.M. D'Sa, 'Instant' State Aid Law in a Financial Crisis – A U-Turn?, "European State Aid Law Quarterly" No. 2/2009, p. 142.

<sup>125</sup> R. Luja, *op.cit.*, p. 146–147.

measures under this provision from the very beginning of the financial turmoil? It is impossible to indicate a precise date when it should have been acknowledged that State support granted to ailing financial institutions should be considered as measures to 'remedy a serious disturbance in the economy of a Member State' under Article 107(3)(b) TFEU. The Commission's initial refusal to assess government assistance under this provision should be evaluated positively. It should be recalled that the R&R Guidelines apply to firms in all sectors, not only just financial institutions. Consequently, the Commission's reliance on this document was a standard procedure. What is strongly positive is that the Commission adapted its policy to the changing conditions in the financial market.

There are several advantages to the approach taken by the Commission with respect to State aid measures granted to financial institutions in distress. First of all, from the end of 2008 on the Commission has shown itself to be adaptive and flexible in dealing with the challenges posed by the ongoing economic crisis. Second, the Commission has been able to ensure, through the adoption of four Communications, that all State support measures would comply with the established principles of necessity, proportionality, and limitation of competition distortions.<sup>126</sup> Third, the coherent and predictable enforcement of State aid rules has played an important role in the response to the crisis. This co-ordination of actions has served as a useful tool to fend off protectionism and ensure a level playing field.<sup>127</sup> Fourth, the Commission has approved a large number of Member States' schemes at a record speed, which it deemed necessary in order to avoid the insolvency of financial institutions and meltdown of the banking system.<sup>128</sup> On the other hand, it can be argued that these 'fast track' approvals limited the time needed for appropriate scrutiny. Fifth, the significant use of the adopted special framework may indicate that it should be considered as the appropriate instrument to face the repercussions of the crisis on the banking sector.

Nevertheless, the Commission's policy is not without weaknesses. It could be argued that the Commission's insistence on structural compensatory measures in the midst of the financial crisis was not the best approach. A further

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<sup>126</sup> See: D. Gerard, *EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles*, "Concurrences" No. 1/2009, p. 58.

<sup>127</sup> See: Editorial comment, *From rescue to restructuring: The role of State aid control for the financial sector*, "Common Market Law Review" Vol. 47/2010, p. 316; *Economic Crisis in Europe: Causes, Consequences and Responses*; "European Economy" No. 7/2009, p. 6, [http://eu.europa.eu/economy\\_finance/publications/publication15887\\_en.pdf](http://eu.europa.eu/economy_finance/publications/publication15887_en.pdf)

<sup>128</sup> For more information on the actual speed of approving the State aid measures to ailing financial institutions, see: D. Gerard, *op.cit.*, p. 56–57; Editorial comments, *Weathering through the credit crisis...*, *op.cit.*, p. 8.



common criticism is the lack of specification of consequences in the case of breach of the contract by the beneficiary bank.<sup>129</sup> As regards the argument that the use of Article 107(3)(b) TFEU may have had the effect of rewarding inefficient and inept banks, this point of view is not without grounds.<sup>130</sup> Nevertheless, the provision of State support was necessary in order to protect the stability of financial sector, underpin lending to the real economy, and avoid harmful subsidy wars among the Member States.

With hindsight, the way the Commission has responded to the crisis should be adjudged overall as successful. It is possible however to make some recommendations for the future changes. Given the significant volume of approved State aid measures, a co-ordinated approach is necessary to ensure an orderly exit of crisis control policies.<sup>131</sup> It must be further assured that the special framework adopted is applied only for as long as the extraordinary circumstances are still in place. Moreover, the restructuring of the distressed financial institutions and the obligation to redeem the State aid as soon as market circumstances allow seem to be the two key elements of the path to the long-awaited return to normal market conditions.

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<sup>129</sup> See: C.A. Russo, *Bail Out Plans: Do They Really Envision State Exit and Bank Repayments? A View from a Competitive Assessment Perspective*, "European Business Law Review" No. 4/2010, p. 514.

<sup>130</sup> See: R.M. D'Sa, *op.cit.*, p. 143.

<sup>131</sup> See: *Economic Crisis in Europe: Causes, Consequences and Responses...*, *op.cit.*, p. 85. See: *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*; OJ C 329, 7.12.2010, p. 7–10, points 9–11.