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Title: **The Role of Competition Policy and Competition Enforcers in the EU Response to the Financial Crisis: Applying the State Aid Rules of the TFEU to Bank Bailouts in Order to Limit Distortions of Competition in the Financial Sector**

Author: **Jonathan M. DeVito***

Abstract:

Governments throughout the world responded to the financial crisis of 2008-2009 by granting massive bailouts to their largest and most interconnected banks. In most jurisdictions, financial stability took precedence over all other policy concerns, which meant that competition policy was relegated to the position of a distant spectator in the proceedings. This was not the case in the EU, however, where competition policy and competition enforcers played a lead role in shaping the European response to the crisis. This paper evaluates the EU's exercise of its State aid authority to prevent bailouts from distorting competition in the financial sector. In doing so, this paper explores (a) the importance of competition policy during a financial crisis, and (b) the ability of competition enforcers to coordinate with banking authorities in order to form an effective response. As lawmakers assess the outcomes of the crisis, and consider what might be done differently to prevent or respond to a future crisis, they should draw upon the most effective aspects of the EU model, and incorporate competition policy and competition officials in future crisis proceedings.

Author Contact: jmdevito@camden.rutgers.edu

I. Introduction

The systemic nature of the recent global financial crisis posed a significant challenge for the European Commission Directorate-General of Competition ("Commission"), the body responsible for enforcing the European Union's ("EU") competition laws.[1] Under Article 107 of the Treaty on the Functioning of the European Union ("TFEU"),[2] Member States of the EU ("Member States") are generally prohibited from granting government-funded subsidies ("State aid") to their businesses, because of the potential for such aid to distort competition in the EU Single Market ("Single Market").[3] However, beginning in autumn 2008, as the crisis spread throughout Europe and threatened the total collapse of its financial system, Member States pressured the Commission to suspend the competition rules prohibiting them from unilaterally rescuing their distressed banks.[4] Although the Commission recognized that State intervention was necessary in order to restore financial stability, it refused to abandon the competition principles underlying its control of State aid. Rather, the Commission vigorously upheld competition policy as an essential element of the solution to the crisis.

The central role of competition policy and competition enforcers, inherent in the EU response, is what distinguishes it from virtually all other responses of jurisdictions affected by the crisis. Outside of the EU, "few governments allowed their intervention to be disciplined in any way

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* 2010 Summer Research Fellow, American Antitrust Institute; J.D. Candidate May 2011, Rutgers School of Law—Camden; Managing Notes Editor, Rutgers Journal of Law & Public Policy.

[1] Simon Polito, *EU and UK Competition Laws and the Financial Crisis: The Price of Avoiding Systemic Failure*, 2009 FORDHAM COMP. L. INST. 120 (B. Hawk ed. 2010).

[2] Consolidated Version of the Treaty on the Functioning of the European Union art. 107, Dec. 13, 2007, 2010 O.J. (C 83) 45, 91 [hereinafter TFEU].

[3] TFEU, *supra* note 2, art. 107(1).

[4] Neelie Kroes, Eur. Comm'r for Competition Pol'y, *Competition policy and the crisis – the Commission's approach to banking and beyond.* COMPETITION POLICY NEWSLETTER 2010-1, *available at* http://ec.europa.eu/competition/publications/cpn/2010_1_1.pdf

by competition policy considerations."[5] Thus, to the extent it has been argued that government interventions have contributed to the emergence of a more concentrated financial industry--comprised of even bigger banks, with the ability to wield greater political power, and to operate under more favorable conditions than their smaller, less-aided competitors[6]-- it is crucial to identify the appropriate lessons to be learned from the various government responses, particularly as lawmakers consider how to prevent and/or respond to a future crisis.

The purpose of this paper is to evaluate the EU's exercise of its State aid authority in order to curtail the anticompetitive effects of bank bailouts during the financial crisis. In doing so, this paper explores: (a) the importance of competition policy during a financial crisis, and (b) the ability of competition enforcers to coordinate with banking authorities, in order to form a response that both addresses competition policy concerns and restores financial stability. Section II provides a brief overview of the EU State aid regime and the State aid reform movement, which greatly influenced the Commission's response to the crisis. Section III describes how the competition policies underlying the State aid rules remained applicable as the crisis took hold in Europe, and demonstrates how Commissioner Kroes successfully promoted competition policy as a vital part of the solution to the crisis. Section IV provides a detailed explanation of the four Communications released by the Commission, between October 2008 and June 2009, which governed its application of the State aid rules to bank bailouts during the crisis. Section V identifies two primary competition policy objectives pursued by the Commission during the crisis, and discusses the specific conditions

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[5] Philip Marsden & Ioannis Kokkoris, *The Role of Competition and State Aid Policy in Financial and Monetary Law*, 13 J. INT'L ECON. L. 875, 875 (2010).

[6] *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 180-181 (2010); *see also* European Parliament Resolution of 20 January 2011 on Competition Policy and the Financial Crisis, EUR. PARL. DOC. P7_TA (2011) 0023, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0023+0+DOC+XML+V0//EN (last visited March 1, 2011).

imposed on bailout beneficiaries, which were tailored to achieving those objectives. Section VI evaluates the Commission's response, and Section VII concludes.

II. EU State Aid Regime

a. General Rules & Principles

The scope of the EU State aid regime is defined by the terms of Articles 107 and 108 TFEU. Under Article 108 TFEU, the Commission is vested with the authority to control the implementation of State aid measures by Member States.[7] Member States are required to inform the Commission of any plan to grant or alter State aid measures, and may not implement any such plan without first receiving approval from the Commission.[8] Aid implemented without the Commission's approval is automatically "unlawful," and the Commission may order its recovery.[9]

As a general rule, Member States are prohibited by Article 107(1) TFEU from granting any government-funded subsidy[10] or "state aid" that distorts, or threatens to distort, competition and trade between Member States.[11] The EU's prohibition of State aid emanates from its fundamental goal of "maintain[ing] a level playing field for all firms in the EU single market, no matter in which

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[7] TFEU, *supra* note 2, art. 107 - 108, 2008 O.J. (C 115); *see* Polito, *supra* note 1, at 122.

[8] TFEU, *supra* note 2, art. 108(3); *see* Polito, *supra* note 1.

[9] TFEU, *supra* note 2, art. 108(3).

[10] "State aid has been interpreted broadly to include *inter alia* government loans, tax rebates, deposit guarantees, purchases of shares, and capital injections." SIR CHRISTOPHER BELLAMY & GRAHAM CHILD, EUROPEAN COMMUNITY LAW OF COMPETITION, 1505 (P.M. Roth & V. Rose eds., 6th ed. 2008). The concept of 'aid' is wide, going beyond mere subsidy, and comprises any form of intervention or assistance which has the same or similar effects to a subsidy." *Id.* at 1503. In order to determine whether a grant of public funds constitutes State aid, the Commission employs the *market economy investor principle* – which identifies State aid as existing where "the terms on which the funds are provided go beyond those that a private investor, operating under normal market economy conditions and having regard to the information available and foreseeable developments at that time, would find acceptable when providing funds to a comparable private undertaking." *Id.* at 1507.

[11] TFEU, *supra* note 2, art. 107(1).

member state they are established."[12] In particular, the bar on State aid targets "measures which provide unwarranted and selective advantages to some firms, thereby decreasing overall European competitiveness."[13] Such measures can "lead to a build-up of market power in the hands of some firms," and as a result, "customers may be faced with higher prices, lower quality goods, and less innovation."[14]

Although State aid is generally "incompatible" with the Single Market, it is not forbidden *per se*. The Commission may approve particular forms of aid that it determines to be "compatible" with the Single Market. The key compatibility provisions are found in Articles 107(3)(b) and 107(3)(c) TFEU. Under Article 107(3)(b), aid is compatible with the Single Market if it is granted to "remedy a serious disturbance in the economy of a member state."[15] Since the applicability of 107(3)(b) is limited to a serious economic disturbance, it was rarely used prior to October 2008.[16] Instead, the Commission consistently based its approval of aid to failing firms upon Article 107(3)(c), which "permits aid to facilitate the development of certain economic activities . . . where such aid does not adversely affect trading conditions to an extent contrary" to the goals of the Single Market.[17]

The Commission assesses the compatibility of aid to "firms in difficulty,"[18] under Article 107(3)(c) TFEU, pursuant to the framework set forth in the Rescue & Restructuring Guidelines of

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[12] Commission of the European Communities*, State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009,* COM (2005) 107 Final 5 (June 2005) [*hereinafter* Action Plan].

[13] *Id.*

[14] *Id.*

[15] TFEU, *supra* note 2, art. 107(3)(b).

[16] Prior to Oct. 2008, the Commission had only used art. 87(3)b EC Treaty (as in effect 2007)(*now* 107(3)(b) TFEU) three times in the last 50 years. Polito, *supra* note 1, at 122.

[17] TFEU, *supra* note 2, art. 107(3)(c).

[18] Under the R&R Guidelines, a firm is regarded as "being in 'in difficulty' where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/ shareholder or creditors, to stem losses which, without State intervention, will almost certainly condemn it to going out of business in the short or medium term." BELLAMY &

2004 ("R&R Guidelines). The R&R Guidelines require government rescue measures to be: (a) *necessary & proportionate*, i.e. well-targeted to achieve their objective, in terms of the form, scope, and duration of the aid;[19] (b) subject to conditions (e.g. compensatory measures and behavioral safeguards) designed to *prevent undue distortions of competition*; and, (c) in certain cases, subject to the implementation of a restructuring plan, capable of restoring the *long-term viability* of the aid recipient.[20] The R&R Guidelines draw an important distinction between "rescue aid" and "restructuring aid," and outline specific compatibility requirements for each. *Rescue aid* consists of temporary and reversible liquidity assistance available to keep an ailing firm afloat pending restructuring or liquidation.[21] Rescue aid must be limited to the amount necessary to keep the firm afloat during the relevant period; restricted to loans or guarantees of certain debts for a maximum six-month term, carrying a market-based interest rate; and confined to a one-time offering.[22] *Restructuring aid* is defined as aid which is permanent and irreversible, e.g. capital injections and any loan or guarantee lasting more than six months.[23] Grants of restructuring aid must be accompanied by the implementation of a restructuring plan, which is capable of restoring the firm's long-term viability within a reasonable time and on the basis of realistic assumptions.[24]

CHILD, *supra* note 10, at 1552, citing Commission Communication, Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, Oct. 1, 2004, 2004 O.J. (C 244) 2, at para. 9 [hereinafter R&R Guidelines].

[19] *See* R&R Guidelines, *supra* note 18.

[20] *See* Polito, *supra* note 1, at 126, citing R&R Guidelines *supra* note 18, at paras. 10-11, 25(c), 39-40.

[21] *See* BELLAMY & CHILD, *supra* note 10, at 1552-1553.

[22] *See id.*

[23] *See id.*

[24] *See id.*

During normal times, the rules of State aid procedure require the Commission to complete a "preliminary examination" of an aid proposal within two months of its notification.[25] The R&R Guidelines reduce the preliminary examination period to one month, but only under limited circumstances.[26] Once the Commission completes its preliminary examination, it may either authorize the aid or subject it to further review in a "formal investigation."[27] Final decisions in State aid matters must be adopted by the College of Commissioners ("College).[28] State aid cases brought under the standard procedural framework often span several months.[29]

b. State Aid Reform

In 2005, as part of a broad initiative, known as the "Lisbon Strategy," to enhance the competitiveness of the EU economy,[30] the Commission adopted the "State Aid Action Plan" ("Action Plan"),[31] which is meant to revamp the substance and procedure of State aid regulation.[32] The Action Plan calls for "less and better-targeted aid," and seeks to "simplify the State aid rules by reference to a coherent set of fundamental principles which can be consistently applied in different settings." These principles focus on identifying the positive impact of the aid and the level of distortion it will create. In general, the positive impact of the aid depends on: (i) how accurately the

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25 *See* Commission Regulation 659/99, art. 4, 1999 O.J. (L83)1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:083:0001:0009:EN:PDF.

26 Only in cases involving *rescue aid* in an amount less than € 10 million. *See* R&R Guidelines *supra* note 18, at § 30.

27 *See* Commission Regulation 659/99, art. 4, *supra* note 25.

28 *See* Decision 2005/960, of the European Commission of 15 November 2005 Amending its Rules of Procedure, arts. 1, 4, 2005 O.J. (L347) 83, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_347/l_34720051230en00830090.pdf.

29 *See* Damien Gerard, *EC Competition Law Enforcement at Grips with the Financial Crisis: Flexibility on the Means, Consistency in the Principles*, in Concurrences, at 46, 57 (INST. OF COMPETITION L., ISSUE NO. 1, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338000.

30 *See* BELLAMY & CHILD *supra* note 10, at 1499.

31 *See* Action Plan, *supra* note 12.

32 *See* Paris Anestis & Sarah Jordan, *The Handling of State Aid During the Financial Crisis: an Efficient Response or Trouble for the Future?* EUR. ANTITRUST REV. (2010).

accepted objective of common interest has been identified; (ii) whether an appropriate alternative to State aid is available; and (iii) whether the aid creates the needed incentives and is proportionate.[33] The level of distortion created by the aid depends on: (i) the procedure for selecting beneficiaries and the conditions attached to the aid; (ii) characteristics of the market and of the beneficiary; and (iii) the amount and type of the aid.[34] By streamlining its State aid policies, and focusing on the most distortive types of aid, the Action Plan is directed at "mak[ing] State aid control more predictable and user friendly, thereby minimizing legal uncertainty and the administrative burden both for the Commission and for Member States."[35]

III. EU Competition Policy & the Financial Crisis

The crisis in Europe began in September 2007 with the collapse of Northern Rock[36] in the United Kingdom ("UK") and several of Germany's Landesbanken[37] -- each sophisticated credit institutions that relied heavily on mortgage securitization and related derivatives to fuel the rapid growth of their balance sheets, without maintaining adequate capital reserves to protect their depositors.[38] These cases introduced the Commission to "the risky behaviors and stubborn defiance of the financial sector," and greatly influenced its adaptation of the State aid framework a year later.[39]

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33 *See* BELLAMY & CHILD *supra* note 10 at 1499.

34 *Id.*

35 *Id.*

36 *See* Commission Press Release, *State Aid: Commission Approves Rescue Aid Package for Northern Rock*, IP/07/1859 (Dec. 5, 2007); *see also Northern Rock: Lessons of the Fall – How a Financial Darling Fell From Grace and Why Regulators Didn't Catch It*, ECONOMIST (Oct. 18, 2007), *available at* http://www.economist.com/node/9988865.

37 *See* Commission Press Release, *State Aid: Commission Approves Restructuring of Sachsen LB*, IP/08/849 (June 4, 2008); *see also SachsenLB Has EU3 Billion in Subprime, Person Says (Update 4)*, BLOOMBERG (Aug. 21, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aosVPIhxcCCg&refer=home (last visited Feb. 7, 2011).

38 *See id.*

39 Kroes, *supra* note 4.

At this stage, however, the Commission did not perceive the Northern Rock and Landesbanken cases to be symptomatic of a serious economic disturbance – the prerequisite for applying the broad and rarely used exemption of Article 107(3)(b) TFEU. Rather, the Commission perceived them to be "individual problems, [requiring] tailor-made remedies, which could be addressed under the existing rules for firms in difficulty."[40] Thus, throughout 2007, the Commission approved bailouts of distressed banks under the R&R Guidelines and Article 107(3)(c) TFEU, while it expressly rejected all attempts to invoke the ostensibly broader exemption provided by Article 107(3)(b) TFEU .[41] The Commission's refusal to relax the State aid rules during the initial phase of the crisis incited sharp criticism from the finance ministers of several Member States, who felt that they were best situated to deal with the problems facing their nation's banks.[42]

Despite vocal opposition, the Commission, led by former Competition Commissioner Neelie Kroes, vigorously upheld competition policy as a vital element of the solution to the crisis. Kroes observed that "[i]n the midst of massive government intervention, we need to make sure that we do not – along the way – also lose the level playing field and the future dynamism that comes from competition."[43] The European economy relies on competition to provide the fundamental incentives for businesses to innovate and increase their efficiency, in order to deliver lower prices and higher quality to consumers.[44] Kroes warned that "[g]iving up on competition was the surest way to waste state aid funds and hurt consumers as they began to hurt from job losses, home

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[40] Michael Reynolds et al., *EU Competition Policy in the Financial Crisis: Extraordinary Measures*, 33 FORDHAM INT'L L.J. 1670 (2010).

[41] Polito, *supra* note 1, at 123.

[42] *See* Stephen Castle, *European Regulators Again Revise Bank Subsidy Rules*, N.Y. TIMES, Dec. 2, 2008, *available at* http://www.nytimes.com/2008/12/03/business/worldbusiness/03euro.html (quoting several European finance ministers' expressions of discontent regarding State aid control during the financial crisis).

[43] Kroes, *supra* note 4.

[44] *Id.*

foreclosures, and the general economic malaise" resulting from the crisis.[45] Moreover, Kroes emphasized that the advantages gained by beneficiaries of state aid could enable them to obtain market power, which would allow them to raise prices and restrict output.[46] Thus, unrestricted bailout measures would only cause additional harm to consumers, and further deepen the recession.[47] [48]

IV. The Commission's Response

News of Lehman Brothers' Chapter 11 Bankruptcy filing on September 15, 2008, triggered a rapid erosion of confidence in the stability of banks throughout Europe.[49] Lehman's collapse caused lending between banks to dry up almost instantaneously. The threat of insolvency, previously limited to individual, "unsound" banks -- whose troubles were a direct result of endogenous risk --

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Relaxed competition enforcement during times of deep recession can have serious, long-term negative effects. The suspension of the competition rules in the US under the National Industrial Recovery Act of 1933 is argued to have added years to the duration of the Great Depression, *See* Harold Cole & Lee Ohanian, *New Deal Policies and The Persistence Of The Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004). Similarly, government intervention to restrict competition in "structurally depressed industries" prolonged the Japanese recession in the 1990s. *See* Fumio Hayashi & Edward Prescott, *The 1990s in Japan: A Lost Decade*, 5 REVIEW OF ECONOMIC DYNAMICS 206 (2002). In a presentation before the Commission in June 2009, DG COMP Chief Economist, Damien Neven, highlighted lessons from the US and Japanese experiences that are relevant to the recent crisis. According to Neven, the US experience demonstrates that "[r]elaxing competition rules by transferring rents to firms depresses consumers' purchasing power," which in turn "delay[s] recovery and resumption of trend growth." Furthermore, Neven asserted that the Japanese experience is evidence that "artificially maintaining firms can have disastrous consequences." Specifically, he observed that Japan's "protracted 'L shaped' recession can be directly traced back to the existence of 'zombie' banks undertaking 'zombie' lending." Instead of shedding workers and losing market share, as would have occurred under normal competitive conditions, the "zombies' congested the market, reduced the profits for healthy firms, [and] discouraged their entry and investment." Damien Neven, *The Current Financial Crisis and EU Competition Policies*, Presentation to European Commission, Brussels, 24 (June 16, 2009).

[49]*See* Damien Gerard, *Financial Crisis Remedies in the European Union: Balancing Competition and Regulation in the Conditionality of Bailout Plans*, ECRI/CEPS No. 12, pg. 36 (2010), *available at*, http://aei.pitt.edu/14441/1/ECRI_RR_No_12_with_covers_final.pdf (last visited March 1, 2011)[*hereinafter Balancing Competition & Regulation*].

now extended to healthy banks, unable to access liquidity because of exogenous market instability.[50] With Europe's financial sector on the brink of collapse, the Commission recognized that the existing State aid framework was not equipped to handle the unique challenges of the systemic crisis, and the wave of urgent and complex bailout requests that was sure to follow.[51] On October 6, 2008, speaking before the EU's Economic and Financial Affairs Council ("ECOFIN"), Commissioner Kroes announced that the Commission would turn to Article 107(3)(b), regarding aid granted in response to a serious economic disturbance, as the new legal basis for approving bank bailouts in response to the crisis.[52] [53]

a. The Communications

In order to assist Member States in developing emergency measures to restore financial stability, and to provide legal certainty in the process, the Commission issued four "Communications," between October 2008 and July 2009, which established the legal and procedural framework for evaluating financial sector bailouts under Article 107(3)(b) TFEU.[54] The

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[50] *See* Gerard, *At Grips with the Financial Crisis*, *supra* note 29, at 46, 48.

[51] European Commission, *State Aid Scoreboard: Spring 2010 Update*, COM (2010) 255, *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0255:FIN:EN:PDF.

[52] European Commission, *State Aid Scoreboard: Autumn 2010 Update*, COM (2010) 701, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0701:FIN:EN:PDF.

[53] The Commission's transition to Article 107(3)(b) occurred within the context of a rapid series of crisis-related activities among several EU institutions. On October 7, 2008, the EU's Economic and Financial Affairs Council ("ECOFIN") concluded that all necessary measures, including government guarantees and recapitalizations, should be taken "to enhance the soundness and stability of the banking system in order to restore confidence and the proper functioning of the financial sector." *See* Banking Communication, *infra* note 55. Furthermore, the ECOFIN Council emphasized that rescue measures must be decided within a coordinated framework and on the basis of the EU's competition principles. *See id.* Consistent with the ECOFIN Council's resolutions, the Eurogroup, on October 12, 2008, committed to: (1) "coordinate in providing [support measures], as significant differences in national implementation could have a counter-productive effect, creating distortions in banking markets, and to (2) ensure that support measures would be "designed in order to avoid any distortion in the level playing field and possible abuse at the expense of the non-beneficiaries of these arrangements." *See* CEPS Task Force Report, *infra* note 64. On October 15 and 16, 2008, the European Council endorsed the ECOFIN resolutions and the Eurogroup's decisions, and applied them to the EU as a whole. *See* Gerard, *At Grips with the Financial Crisis*, *supra* note 29, at n. 4.

[54] *See* CEPS Task Force Report, *infra* note 64, at 8.

Banking Communication[55] set forth criteria for the compatibility of government guarantees, recapitalizations, and other forms of liquidity support, and adopted new, expedited procedures for the handling of emergency cases. The Recapitalization Communication[56] provided additional guidance on the remuneration requirements for capital injections. The Impaired Assets Communication[57] addressed the removal of "toxic assets" from banks' balance sheets, and the Restructuring Communication[58] outlined updated requirements for plans to restructure and restore long-term viability.

1. Legal Framework

Based on existing State aid principles,[59] the Communications required government bailouts of financial institutions, whether in the form of national plans[60] or *ad hoc* measures,[61] to be: (i) *necessary & proportionate*, i.e. well-targeted to remedy the alleged economic disturbance; (ii) subject to conditions designed to *limit distortions of competition* in the financial sector; and (iii) in certain cases,

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[55] Communication from the Commission--*The Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis* (EC) 25 Oct. 2008, 2008 O.J. (C 270) 8 [hereinafter Banking Communication], *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:270:0008:0014:EN:PDF

[56] Communication from the Commission--*The Recapitalisation of Financial Institutions in the Current Financial Crisis: Limitation of Aid to the Minimum Necessary and Safeguards Against Undue Distortion of Competition* (EC) 15 Jan. 2009, 2009 O.J. (C 10) 2 [hereinafter Recapitalization Communication], *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:010:0002:0010:EN:PDF

[57] Communication from the Commission--*The Treatment of Impaired Assets in the Community Banking Sector* (EC) 26 Mar. 2009, 2009 O.J. (C 72) 1 [hereinafter Impaired Assets Communication], *available at* http://ec.europa.eu/competition/state_aid/legislation/impaired_assets.pdf

[58] Commission Communication--*The Return to Viability and the Assessment of Restructuring Measures in the Financial Sector in the Current Crisis Under the State Aid Rules* (EC) 19 Aug. 2009, 2009 O.J. (C 195) 9 [hereinafter Restructuring Communication], *available at* http://ec.europa.eu/competition/state_aid/legislation/restructuring_paper_en.pdf

[59] *See* R&R Guidelines, *supra* note 18.

[60] National plans or "schemes" were programs established by the Member State, available to support all financial institutions operating within its borders, no matter their country of origin.

[61] Ad hoc measures were granted by Member States to rescue and support individual financial institutions, and were sometimes supplemental to national schemes.

subject to restructuring in order to *restore long-term viability* to the recipient bank.[62] Together, the Communications outlined criteria for the compatibility of bailouts in the form of guarantees, capital injections, and impaired asset relief measures.

Government guarantees of bank liabilities were the most widespread response during the "liquidity crisis," when it was necessary to encourage lending between banks.[63] A "guarantee" is a promise by the government to pay out on a bank's liability if the bank itself is unable to pay.[64] In order to satisfy the proportionality requirement, guarantee schemes were limited in terms of the types of debt instruments eligible for the guarantee, and the duration for which the guarantee could be offered.[65] Eligibility was limited to retail deposits, certain types of wholesale deposits, and certain short and medium-term debt instruments.[66] Guarantees could not last longer than two years, subject to review by the Commission every six months following their implementation.[67] In addition, guarantees carried strict remuneration requirements and behavioral restrictions, which were designed to limit the unfair competitive advantages that guarantees create; namely, depositors pulling their money out of competing banks in order to seek a higher level of government protection.[68] [69]

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62 *See* Banking Communication, *supra* note 55, 2008 O.J. (C 270), at 10.

63 *See* State Aid Score Board Fall 2010, *supra* note 52.

64 Centre for European Policy Studies, *Bank State Aid in the Financial Crisis: Fragmentation or Level Playing Field*, (Feb. 5, 2010)[hereinafter CEPS Task Force Report], http://www.ceps.eu/ceps/download/3859.

65 *See* Gerard, *At Grips With the Financial Crisis, supra* note 29.

66 *See* Banking Communication, *supra* note 55, at para. 21.

67 *See id.* at para. 24.

68 *See id.* at paras. 19, 27.

69 *See* Centre for European Policy Studies, *Tying and Other Potentially Unfair Commercial Practices in the Retail Financial Service Sector*, [Final Report submitted to EC DG Internal Market] ETD/2008/IM/H3/78, 98 n. 199 (Nov. 24, 2010), [hereinafter CEPS Unfair Practices] *available at*, http://ec.europa.eu/internal_market/consultations/docs/2010/tying/report_en.pdf (identifying potential changes in competition for customers in the retail banking market as a result of the crisis).

Recapitalization was an important method used by Member States to stabilize the market in the contexts of the liquidity crisis and the "credit squeeze," when it was necessary to facilitate the flow of credit to the real economy.[70] In a recapitalization or "capital injection," the government strengthens a bank's capital base by injecting funds into it in exchange for direct equity, preferred shares, or subordinated debt.[71] The Commission emphasized that, because capital injections directly and irreversibly alter the financial structure of their recipients, they are potentially more distortive of competition than other forms of aid, and therefore must be subject to additional considerations.[72] The need for capital injections to receive special treatment under the new framework was underscored by the diversity of possible objectives for which they were pursued. Capital injections were used to: (1) rescue individual distressed banks; (2) strengthen banks' capital ratios in order to facilitate lending between banks and to the real economy: or (3) to pursue a combination of those objectives. For each use, capital injections raise different competition and systemic concerns.[73] The Commission resolved this dilemma by drawing a crucial distinction between the recapitalization of "sound" versus "unsound" banks,[74] and delineating the types and levels of conditions appropriate for each. Generally, the dichotomy drawn between sound and unsound banks meant the greater the risk profile of the recapitalized bank, the heavier the conditions imposed.[75] All capital injections

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[70] *See* State Aid Scoreboard: Fall 2010, *supra* note 52.

[71] CEPS Task Force Report, *supra* note 64, at 8.

[72] *See* Gerard, *At Grips With the Financial Crisis*, *supra* note 29, at para. 24.

[73] *See id.* (observing that capital injections may generate unfair competitive advantages and/or frustrate the return of normal market conditions).

[74] *See* Banking Communication, *supra* note 55, at para. 14 (defining an "unsound bank" as one whose illiquidity problems have been caused by endogenous factors, such as inefficiency, poor asset-liability management or excessive risk-taking, and a "sound bank" as one whose "viability problems are inherently exogenous," i.e. caused by the instability of the financial market).

[75] *See* Polito, *supra* note 1, at 136.

were subject to specific remuneration requirements[76] and strict behavioral restraints. In addition, unsound recapitalized banks were required to undergo restructuring (discussed in greater detail below).

Despite the success of State guarantees and recapitalizations in averting financial contagion, the remaining presence of "toxic assets" on banks' balance sheets undermined further economic recovery.[77] In response, the Commission released its Impaired Assets Communication, which provided guidance on the government purchase of toxic assets through the establishment of a "bad bank," as well as insurance solutions, additional guarantees, and the nationalization of banks.[78] The Commission required that each measure to remove toxic assets be "appropriately targeted and accompanied by behavioral safeguards that align the incentives of banks with the objectives of public policy," i.e. to eliminate moral hazard.[79] Eligibility for toxic asset relief was conditioned on the recipient's full *ex ante* transparency; disclosure of impairments on assets to be covered; and a full review of its activities and balance sheet.[80] Banks that received toxic asset relief were subject to behavioral restraints, in addition to any other conditions that may have applied, e.g. mandatory restructuring.

The Commission required fundamentally unsound banks that received government support to undergo restructuring. In order to gain approval from the Commission, restructuring plans needed to: (i) provide for the bank's own contribution to the cost of its rescue; (ii) include procompetitive measures to limit distortions of competition, and (iii) demonstrate strategies to

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[76] *See* Gerard, *Balancing Competition & Regulation*, *supra* note 49, citing Recommendations of the ECB Governing Council on the pricing of recapitalizations, *available at,* http://www.ecb.int/pub/pdf/other/recommendations_on_pricing_for_recapitalisationsen.pdf.

[77] *See* State Aid Scoreboard: Spring 2010, *supra* note 52, at 4.

[78] *See* Impaired Assets Communication, *supra* note 57; *see also* Reynolds et al., *supra* note 40, at 1685.

[79] *See* Impaired Assets Communication, *supra* note 57, at para. 9; for discussion of moral hazard *see infra* Sec. V(b).

[80] *See* Impaired Assets Communication, *supra* note 57, at §5.1.

restore the bank's long-term viability.[81] First, banks were required to appropriately contribute to the cost of their rescue and restructuring.[82] This ensured that banks would take responsibility for their failure, and lessen the burden placed on taxpayers. Second, banks had to undertake procompetitive measures designed to mitigate the unfair competitive advantages generated by government support.[83] Compensatory measures included the reduction or divestment of certain assets.[84] Lastly, the Commission required banks to demonstrate how they would restore long-term viability, and survive adverse market conditions, without relying on a bailout in the future.[85] In order to develop well-targeted structural remedies, banks underwent "stress tests" to identify their specific strengths and weaknesses.[86] The stress tests also helped to ensure that restructuring plans were based on realistic assumptions, and could be carried out within a reasonable time frame.[87]

2. Procedural Framework

As the crisis intensified, it became critical for the Commission to provide market operators with legal certainty, in order to restore confidence in the financial system.[88] Legal certainty depended largely upon the Commission's ability to act quickly, on an emergency basis.[89] During the initial stages of the crisis, many critics of the Commission argued that its protracted review of emergency bailout proposals undermined the effectiveness of rescue operations.[90] Thus, on October

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[81] *See* Restructuring Communication, *supra* note 58.

[82] *See* Restructuring Communication, *supra* note 58 at 7.

[83] *See* Restructuring Communication¸ *supra* note 58, at 10.

[84] *See id.*

[85] *See* Restructuring Communication, *supra* note 58.

[86] Reynolds et al., *supra* note 40, at 1687, citing Restructuring Communication, *supra* note 3, at 10.

[87] *See* Restructuring Communication¸ *supra* note 58, at 3, para. 7.

[88] *See* Gerard, *At Grips with the Financial Crisis*, *supra* note 29, at para. 32.

[89] *See id.* at para. 34.

[90] *See supra* note 42 and accompanying text.

1, 2008, the College authorized Commissioner Kroes to -- in agreement with Commission President Barroso, Finance Commissioner Almunia, and Internal Market Commissioner McCreevey -- approve emergency bailouts in the financial sector during the crisis.[91] By lifting the requirement that State aid decisions pass through the College, this expedited procedure enabled the Commission to make decisions, if necessary, within hours, overnight, or over the weekend.[92]

V. Conditions Imposed on Bailout Recipients

The Communications demonstrate that the Commission was primarily driven by two policy objectives in applying the State aid rules to bailouts during the crisis: (1) to prevent distortions of competition between banks, and (2) to eliminate moral hazard in the financial sector. The Commission sought to achieve both of these objectives by imposing on beneficiary banks a combination of eligibility conditions, remuneration requirements, behavioral restraints, and structural conditions – each designed to maintain a level playing field and promote long-term stability in the EU financial sector.

a. Preventing Distortions of Competition

The Commission strived to prevent or limit the distortive effects of aid that amounted to: (i) protectionist schemes, benefiting national heroes; (ii) disproportionate support, allowing banks to artificially retain or increase market share; or (iii) any competitive advantage for a beneficiary over a less-aided competitor.[93] The Commission addressed the problems of protectionism and excessive aid by requiring that bailouts adhere to the well-established State aid principles of nondiscrimination

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[91] *See* Gerard, *At Grips with the Financial Crisis*, *supra* note 29, at para. 35, citing Minutes of the 1845th meeting of the Commission, October 1, 2008, PV(2008) 1845 final, §10.4.

[92] *See* Gerard, *At Grips with the Financial Crisis*, *supra* note 29, at para. 36.

[93] Gerard, *Balancing Competition & Regulation*, *supra* note 49.

and proportionality.[94] In addition, the Commission implemented a series behavioral restraints and structural requirements, specifically designed to counteract the unique anticompetitive effects created by bailouts during the crisis.

1. Behavioral Restraints

The Commission "systematically conditioned its approval of bailout plans on a series of behavioral restraints that it has applied in a relatively homogeneous manner across the EU."[95] The behavioral restraints barred aid recipients from using government funds, or the status of having received them, to either retain business, or draw customers away from less-aided competitors. They prohibited bailout beneficiaries from pursuing a range of aggressive commercial strategies, ranging from bailout-based advertising, to price leadership and market expansion.[96]

The most pervasive behavioral condition imposed on bailout beneficiaries was a prohibition of advertisements claiming the advantages of government support.[97] Stemming from the Commission's concern over "bank runs" during the early stages of the crisis, the ad-ban prevented banks from encouraging depositors to pull their money out of their existing banks, only to seek higher levels of government protection.[98] The prohibition of bailout-based advertising was enhanced by a corresponding ban on commercial practices aimed at attracting business from less-aided competitors.

[94] *See id.*

[95] *See id.*

[96] It is important to note the extraordinary nature of the restrictions imposed on bailout recipients by the Commission during the crisis. Under normal market conditions, these types of restraints would be anticompetitive, i.e. obstacles to price competition and consumer choice. Thus, it is ironic to see a competition agency enforce such restraints, although they are justified by the exceptional circumstances created by the crisis.

[97] The ad ban was pervasive because it attached to aid in the form of a guarantee, the most widely used bailout instrument, and it applied to both sound and unsound aid recipients.

[98] *See* Gerard, *Balancing Competition & Regulation*, *supra* note 49, citing Banking Communication, supra note 55, at para. 26; *see also*, *supra* note 73 and accompanying text.

The Commission imposed price leadership bans on a number of recapitalized banks for certain retail and small & medium-sized enterprise ("SME") banking products and services.[99] For example, Fortis Bank agreed not to offer interest rates for internet accounts higher than other main retail banks in Belgium, unless its market share were to drop below 25%.[100] Similarly, Dexia committed not to offer interest rates for retail deposits exceeding the three best rates offered by the ten largest retail banks in Luxemburg, France, and Belgium.[101] In addition, the Commission prevented Commerzbank from taking deposits under more favorable price conditions than its top three competitors in markets where it has a market share above 5%.[102] Notably, in an appeal pending before the European Court of Justice, ING has challenged several of the conditions attached to its recapitalization, including a ban on price leadership, which it claims to be excessive.[103]

Many national schemes approved by the Commission in the weeks following its adoption of the crisis framework prohibited banks from exceeding a certain balance sheet growth rate.[104] The Commission later abandoned that practice, "acknowledging that it could form an obstacle for fundamentally sound banks to sustain lending to the real economy and, generally, to compete for customers and increase output levels."[105] However, the Commission continued to place restrictions on growth, particularly in cases where capital injections accompanied fire-sales or mergers. For example, upon its acquisition of Dresdner Bank, Commerzbank was restricted from acquiring any

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99 *See, e.g.* CEPS Task Force Repost, *supra* note 64, at 16-17; *see also* discussion, *supra* note 96.

100 *See* Commission Decision on Fortis NN 42/2008, 2009 O.J. (C 80) 7.

101 Gerard, *Balancing Competition & Regulation*, *supra* note 49, at 42, citing Commission Decision on Dexia NN 50/2008, 2010 O.J. (L274) 54.

102 Commission Press Release, *State Aid: Commission Approves Recapitalization of Commerzbank*, IP/09/711(May 7, 2009).

103 Appeal Against Specific Elements of EC Decision, ING, http://www.ing.com/group/showdoc.jsp?docid=432710_EN (last visited Feb. 28, 2011).

104 Ana Petrovish & Ralf Tutsch, *National Rescue Measures in Response to the Current Financial Crisis,* (EUR. CENT. BANK, LEGAL WORKING PAPER SERIES, No. 8, 2009).

105 Gerard, *Balancing Competition & Regulation*, *supra* note 49, citing Recapitalization Communication, *supra* note 56 at n.18

other competing bank for a period of three years.[106] Likewise, in its acquisition of Fortis Bank, BNP Paribas agreed not to acquire the assets of Fortis Belgium (purchased by the Netherlands) for a period of four years.[107]

2. Structural Requirements

In order to prevent inefficient banks from crowding the market, to the detriment of healthy competitors, the Commission required unsound banks to undergo restructuring as a condition of receiving government support.[108] The Commission determined the type of restructuring appropriate for each bank on a case-by-case basis, considering facts specific to the bank in question as well as the markets in which it operates.[109] Restructuring typically involved the reduction or divestment of a portion of the bank's activities or assets.[110] According to the Restructuring Communication, reductions and divestments were necessary in order to level the playing field between the rescued bank and its competitors, and, in some cases, to enable the entry or expansion of healthy competitors.[111]

The case of Lloyds Banking Group ("LBG") in the UK is perhaps the best example of the detailed restructuring requirements imposed on an aid beneficiary by the Commission.[112] In January 2009, Lloyd's TSB received a £17 billion capital injection from the UK to facilitate its takeover/rescue of HBOS, which was on the verge of collapse.[113] The acquisition of HBOS enabled

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106 Commission Press Release, *supra* note 102.

107 Gerard, *Balancing Competition & Regulation*, *supra* note 49.

108 *See* Restructuring Communication, *supra* note 58, at para. 28.

109 *See id.* at para. 7.

110 *See id.* at n.6.

111 *See id.* at para. 28.

112 *See* Marsden & Kokkoris, *supra* note 5, at 889.

113 *Id.*

Lloyds to significantly increase its market share, and to eliminate a competitor in the already concentrated UK banking sector.[114] In order to mitigate the distortive effects of the aid, and to ensure that LBG emerged as a stable, profitable bank, the Commission required LBG to divest or wind down "non-core businesses and activities in the corporate, wholesale, personal and small business segments."[115] In addition to undertaking a program to achieve a £181 billion reduction in a specified pool of assets by the end of 2014, LBG plans to dispose of a retail banking business, including its branches, staff, customers, customer accounts, and support infrastructure.[116] The divested entity will "provide an appropriate means of increasing competition in the concentrated UK retail banking market," because it will "constitute a sufficiently attractive target for some competitors wishing to enter [that] market."[117]

b. Eliminating Moral Hazard

As current Competition Commissioner Almunia proudly declared in June 2010, the EU is "the only jurisdiction in the world that has explicitly tackled the moral hazard issue."[118] Moral hazard exists wherever one party "makes the decision about how much risk to take, while someone else bears the cost if things go badly."[119] Bailouts create moral hazard by insulating banks from their losses, which are instead transferred to the taxpayer.[120] The Commission viewed moral hazard not

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114 *Id.*

115 *Id.* at 890.

116 *Id.*

117 *Id.*

118 Joaquín Almunia, *State Aid Rules Can Help Europe Exit Crisis*, Speech at European State Aid Law Institute, Brussels, (June 10, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/301&format=HTML&aged=0&language=EN&guiLanguage=en (last visited Feb. 28, 2011).

119 PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 63 (2009); *see also* Organization for Economic Co-Operation and Development ("OECD"), *Competition and the Financial Crisis*, 5 (Feb. 17, 2009)(discussion paper), http://www.oecd.org/dataoecd/52/24/42538399.pdf (last visited Feb. 16, 2011).

120 Georges Siotis, Economist, DG COMP, *EU Competition Policy in Times of Financial Crisis*, 5 ECRI/CEPS (2010).

only as a distortive effect of bailouts, but as a problem that could "trigger the next crisis down the line."[121] The Commission addressed moral hazard by subjecting aid beneficiaries to strict eligibility criteria, behavioral restraints, and structural requirements—targeting the incentives of both the shareholders and managers of unsound banks.[122]

1. Eligibility & Remuneration Requirements

The Commission sought to ensure that unhealthy banks share the burden of the consequences of the crisis, and that they properly contribute to the cost of their rehabilitation. It accomplished these objectives by attaching strict eligibility and remuneration requirements to guarantees and capital injections.

The Commission limited the type of debt instruments eligible for guarantees to retail and wholesale deposits, and short and medium-term debts.[123] Hybrid and subordinated debts, considered as Tier 2 capital, were excluded from eligibility, because shareholders and investors were not permitted to unduly benefit from the guarantee.[124] The Commission also required that guarantees be subject to proper remuneration.[125] Remuneration consisted of service fees based on the recipient bank's risk-profile, and fixed premiums calculated according to a methodology devised by the European Central Bank ("ECB").[126]

The Commission was particularly concerned with setting appropriate remuneration requirements for capital injections. In order to ensure that the remuneration rates were appropriate, giving due consideration to important financial policy goals, the Commission drew a crucial

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121 *See id.*

122 Gerard, *Balancing Competition & Regulation*, *supra* note 44.

123 *See* Banking Communication, *supra* note 55, at para. 21.

124 Gerard, *At Grips With the Financial Crisis*, *supra* note 29, at 52, para. 21.

125 Gerard, *Balancing Competition & Regulation*, *supra* note 49, at 39.

126 *See* Recommendations of the Governing Council of the European Central Bank on Government Guarantees for Bank Debt (Oct. 20, 2008), *available at* http://www.ecb.int/pub/pdf/other/recommendations_on_guaranteesen.pdf.

distinction between capital provided to sound banks versus unsound banks. It adopted a formula established by ECB, which required unsound banks to pay higher rates than sound banks.[127] In general, banks that received capital injections were required to reimburse the state at an interest rate of 8-12%.[128]

2. Behavioral Restraints

In order to ensure that banks are guided by the right incentives, and favor stability over excessive risk-taking, the Commission called for a number of behavioral restraints to be placed on the management and shareholders of failing banks. Within the new framework, the Commission endorsed the UK's nationalization of the Royal Bank of Scotland,[129] Germany's review of risk management and corporate governance practices in the case of Commerzbank,[130] and France's limitation of management compensation and severance packages.[131] In addition, the Commission restricted recapitalized banks' distribution of dividends, repurchasing of shares, and autonomy in making key decisions.[132]

3. Structural Requirements

The Commission required that unsound banks undergo restructuring in order to internalize their risk and reorient their business models toward achieving long-term viability. Restructuring entailed *inter alia* reduced activities and divestments, which (in addition to the Lloyd's divestments mentioned above) included: SachsenLB's and WestLB's termination of proprietary trading

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127 *See* Recommendations of the Governing Council of the European Central Bank on the Pricing of Recapitalisations (Nov. 20, 2008), *see also* Recapitalization Communication, *supra* note 56, at para. 16.

128 Gerard, *Balancing Competition & Regulation*, *supra* note 49, at 39.

129 Reynolds, et al., *supra* note 40, at 1681.

130 *See* Commission Decision on Commerzbank N 625/2008.

131 *See* Commission Decision N 618/2008.

132 *See* Commission Decision N 512/2008; *see also* Commission Decision N 51/2008.

activities;[133] Commerzbank's reduction of investment banking activities and divestment of certain entities by 2014;[134] and ING's divestment of several insurance brands, plus a complete separation of insurance and banking by the end of 2013.[135]

VI. Post-Crisis Observations

Governments throughout the world responded to the financial crisis by granting massive bailouts to their largest and most interconnected banks. In most government responses, financial stability took precedence over all other policy concerns, meaning that competition policy was "relegated to a distant spectator in the proceedings."[136] In this respect, the EU response contrasted sharply with that of other jurisdictions. In the EU, competition policy and competition enforcers not only participated in the proceedings, but played a lead role in shaping the response and laying the groundwork for sustainable recovery.

From the onset of the crisis, the Commission, led by former Commissioner Kroes, stood at the frontlines of the EU response. Drawing upon evidence from past crises, Kroes highlighted the importance of competition policy and competition enforcement in preventing bailouts from causing worse outcomes and prolonged economic malaise. Kroes effectively promoted competition policy as a vital element of the solution to the crisis, and the Commission as an essential partner with Member States – assisting their development of aid measures compatible with the competition-based goals of the Single Market. The steps taken by the Commission throughout 2008 and 2009 demonstrate that the formation of partnerships between competition authorities and other

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133 *See* Commission Decision on Sachsen LB C 9/2008; *see also* Commission Decision on West LB NN 25/2008.

134 *See* Commission Decision on Commerzbank N 625/2008.

135 *See* CEPS Task Force Report, *supra* note 64, at 16.

136 Marsden & Kokkoris, *supra* note 5, at 875.

regulatory bodies, across borders and across disciplines, is both achievable and prudent. By developing relationships with central banks, and coordinating with other EU institutions, the Commission was able to establish a new State aid framework, capable of responding to the urgent and complex demands of Member States and financial markets, while adhering to the competition principles underlying the State aid provisions of the TFEU.

Moving forward, Commissioner Almunia has concentrated the Commission's efforts on restoring long-term viability to the European financial sector. Under Almunia's leadership, the Commission has continued its efforts to curb moral hazard, and has begun implementing strategies for the orderly withdrawal of government support. Almunia has emphasized the Commission's treatment of moral hazard as being one of the most crucial steps toward preserving long-term stability in the EU financial system. With over 40 European bank restructurings pending,[137] it remains critical for the Commission to ensure that unhealthy banks reorient their business strategies, in order to provide effective customer service without relying on the possibility of a bailout in the future. Lastly, under Almunia's leadership, the Commission has actively encouraged sound banks to withdraw from State support programs, further promoting the return of the financial system to normal market conditions.

Although it is clear that competition policy was integral to the EU response, no data yet exists to demonstrate precisely how effective the Commission was at preserving competition between banks in the Single Market.[138] In the absence of such evidence, the Commission has been subject to a variety of criticisms; some arguing that its decisions regarding individual banks were too strict, and others arguing that its decisions in general were too lenient.

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[137] *See* Almunia, *supra* note 118, at 3.

[138] *See* European Parliament Resolution of 20 January 2011 on Competition Policy and the Financial Crisis, EUR. PARL. DOC. P7_TA (2011) 0023.

In its October 2010 report on banking aid during the crisis, the Centre for European Policy Studies ("CEPS") argues that the Commission measured competition at a national level, rather than at the European level, which, CEPS contends, led to disparate results, particularly between banks that received aid as part of a national scheme versus those that were supported through individual, *ad hoc* measures.[139] CEPS reaches this conclusion by comparing the French national scheme to a number of the Commission's decisions regarding Germany's troubled Landesbanken. According to CEPS, the Commission approved the French national scheme quickly, without placing any additional demands on individual banks.[140] CEPS argues that the Commission's treatment of the French scheme is inconsistent with its "13 individual bank cases in Germany, some of which are still under in-depth investigation, and much deeper restructuring demands."[141] In addition, CEPS argues that the Commission's allegedly "fragmented" approach to measuring competition has led to claims that its decisions have been "arbitrary" and "inflexible."[142] In support of this claim, CEPS points to ING's appeal to the European Court of Justice ("ECJ"), objecting to the price leadership restrictions and the proportionality of the restructuring measures imposed by the Commission. [143]

In contrast, Drs. Phillip Marsden and Ioannis Kokkoris contend that the EU "rubber-stamped" almost all Member State interventions in support of their domestic banks.[144] According to Marsden and Kokkoris, a review of the Commission's decisions during the crisis reveals that it largely approved Member States' bailout proposals "unconditionally."[145] "As the new rules are very

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[139] CEPS Task Force Report, *supra* note 64, at 19-20.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id*; *see also* ING press release regarding ECJ appeal, *supra* note 103.

[144] *See* Mardsen & Kokkoris, *supra* note 5, at 875.

[145] *Id* at 876.

lenient," Marsden and Kokkoris state, the "few cases where the Commission has raised concerns relate to measures that were so complex" that the EU had to subject them to formal investigations.[146] Although they ultimately support the opposite view, Marsden and Kokkoris note that the extent to which the Commission "bent with the wind" may discourage other jurisdictions from looking favorably upon the EU model.[147]

These are soft criticisms when viewed in light of the exceptional demands placed on the Commission by the crisis; namely, the difficult balancing of competition and financial policy objectives in approving emergency bailout measures. Nevertheless, the disparate results of national schemes versus *ad hoc* measures may be justified under the crisis framework. The Communications provided *ex ante* guidance to Member States, enabling them to prepackage their bailout proposals with the conditions necessary to limit distortions of competition. Member States had every incentive to comply, because doing so meant that their proposals would gain speedier approval. Moreover, as the CEPS report later acknowledges, national measures "raised much less of a competition policy problem, as they provided support for the whole banking sector" of a Member State. National measures were adopted in large part to address the systemic difficulties faced by both sound and unsound banks. In contrast, individual measures were used to remedy the more pervasive deficiencies of unsound banks. Therefore, such *ad hoc* decisions required greater scrutiny by the Commission, and often resulted in heavier restraints and restructuring requirements. Lastly, in addition to conditions discussed in Section V of this paper, the ING appeal itself runs counter to the proposition that the Commission simply "bent with the wind" during the crisis.[148]

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146 *Id.*

147 *Id.*

148 *Id.*

Although some have made recommendations as to how the EU crisis response model might be improved in the future, the Commission is widely regarded as having successfully risen to the extraordinary challenges presented by the crisis. Indeed, as Frederic Jenny, Chairman of the OECD Competition Committee, observes, "[EU] competition law enforcement has, on the whole, been adapted intelligently and pragmatically to the challenges raised by a rapid and dramatic economic downturn without compromising the goals of competition law . . . and without lowering the standards of competition law enforcement, unlike what happened after the 1929 economic crisis."[149]

VII. Conclusion

Through the exercise of its State aid authority under the TFEU, the Commission played a lead role in shaping the EU response to the financial crisis. Under the leadership of Commissioners Kroes and Almunia, the Commission worked in tandem with other EU institutions (e.g. ECOFIN and the ECB) and Member State finance ministries, to facilitate the orderly and transparent release of aid, with the least anticompetitive outcomes. The Commission placed meaningful limits on bailout measures in order to prevent healthy, less-aided banks from becoming unduly disadvantaged. In addition, the Commission explicitly dealt with the issue of moral hazard, ensuring that bailouts do not create conditions that may trigger yet another crisis. However, unlike the EU, where competition enforcers "sat at the head of the table" during the crisis, competition enforcers in other jurisdictions were absent from the table when crisis policy decisions were made. Therefore, as lawmakers assess the outcomes of the crisis and consider what might be done differently in the future, they should draw upon the most effective aspects of the EU model, and, ultimately, incorporate competition policy and competition enforcers in future crisis proceedings.

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[149] Frederic Jenny, Preface to Ioannis Kokkoris & Rodrigo Olivares-Caminal, Antitrust Law Amidst Financial Crises, at xiii (2010).