STATE AID IN THE FINANCIAL CRISIS

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Abstract

The financial crisis heavily affected many sectors of the EU economy, it was no different with the banking sector. Many Member States proclaimed to introduce measures in order to help their financial institutions. However, the EU realised that such help can only be effective if it had been conducted at EU level. As a response to that, the EU has created the Common European Framework for state aid.

Firstly, this article focuses on the inception of the financial crisis and reasons behind it, then identifies the relation between the American and European financial sector. Subsequently, the article provides a summary of the EU efforts taken to deal with the crisis. It explores four communications (Banking, Recapitalisation, Impaired Assets and Restructuring Communications) which have been issued by the Commission, to demonstrate the steps which have been taken by the EU institutions to cope with state aid during the crisis. Finally, an example from the Netherlands is described. An overview of the ING judgment is depicted in order to reveal how the newly created framework works in practice as well as to reflect whether the case will set a landmark for the prospective cases.

INTRODUCTION

> '…As the physical and technical barriers inside the Community are removed, the Commission will see to it that a rigorous policy is pursued in regard to state aids so that public resources are not used to confer artificial advantage to some firms over others...'[1]

Under Chapter 1, section 2 of Title VII of the Treaty on the Functioning of the European Union (TFEU) the rules on state aid are codified. The articles 107 – 109 cover substantive and procedural elements that have in principle been the same ever since the Treaty of Rome.[2] Its genius drafters foresaw the possible future necessity to adapt these provisions; flexibility in their application might be necessary in case of a serious disturbance in a Member States' economy.

On September 15, 2008 the world economy was introduced to a type of disturbance that would be considered serious enough to break up the until then rigid state aid regime. The

[1] Commission of the EC, *Completing the Internal Market,* COM(85) 310 Final, 14 June 1985, para 158

[2] Treaty of Rome, 25 March 1957, Article: 92-94

United States' fourth biggest investor bank, Lehman Brothers Holdings Inc., filed for Chapter 11 Bankruptcy protection. With an astonishing 613 billion US dollar in debt, the failure of this institution and the threat of a simultaneous default of the American International Group (AIG), the world's largest insurance company, caused the sixth largest point drop in the history of the Dow Jones index[3] [4] [5].With nowadays' information technology, financial markets are no longer limited to their national borders thus a bankruptcy of this size created a tremendous spill over effect across the globe. The internationally connected market share integrated further than a mere buying and selling of shares and also includes a whole range of complex derived products. One of the most popular derivatives to change hands in the years prior to 2008 was the Collateralized Debt Obligation (CDO).[6] Since CDOs were rated as highly trustworthy by rating agencies, they were also considered safe enough a product to be purchased by European banks and pension funds which are interested in purchasing low-risk securities. When Lehman Brothers defaulted, mainly because of a large group of customers being unable to pay instalments on their subprime mortgage and thus CDOs, it became evident that the value of collateral did not suffice to cover the CDOs.

European financial institutions and their governments shivered when they realized their exposure to this foreign event and were quickly forced to take action. Only three days after the Lehman collapse, the British Lloyds TSB bought out its national mortgage competitor Halifax Bank of Scotland after its shareholders doubted the quality of the mortgage portfolio and started dumping their shares.[7]At the same time, the Dutch-Belgian bank and insurance company Fortis was also severely exposed to Lehman Brothers and AIG assets. The value of its stock price decreased over the course of two weeks to a level that the Dutch government was forced to buy the national part of the organization in order to prevent it from defaulting.[8] The list of examples continues and covers mergers, bail outs and takeovers by private institutions and/or governments that are in principle in conflict with rules

[3]Mamudi, 'Lehman Brothers Holdings is closing its doors with more than $600 billion of debt, the biggest bankruptcy in U.S. history', *MarketWatch*, 15 September 2008

[4] AIG possessed large amounts of credit default swaps set out against the default of Lehman Brothers, these derivatives are designed to pay the holder in case the person they are set out to would default. Since Lehman Brothers defaulted, AIG was forced to pay out an amount reaching far beyond its financial capability.

[5]504,48 points, *Down Jones Industrial Average*, it was at sixth place at that time: it has now already shifted to the fifteenth place

[6]A CDO represents a basket of different types of loans, mainly (subprime) mortgages, stacked together and sold as one unit. The selling back and forth of these derivatives generates revenue and subsequent profit. After a CDO had been purchased it was combined with others or re-stacked and sold again, creating more profit. Since this latter process was so lucrative, a culture of predatory lending quickly arose creating a bubble of debt which by definition was impossible to recover.

[7] ANP, 'Akkoord over overname hypotheekbank HBOS', *NRC*, 18 September 2008

[8] Nelson D. Schwartz, 'Dutch government nationalizes Fortis' operations in the Netherlands', *The New York Times,* 3 October 2008

on competition and state aid law within the European Union. The EU's institutions responded to the crisis as well and quickly came with a number of temporary measures. Three weeks after the Lehman crash, the Eurogroup ministers and the ECOFIN council recognized that the effects of the catastrophe would be common to many Member states and required a coordinated EU response.[9] In the conclusions of this meeting it set out a strategy to restore confidence on the financial markets, stabilize the value of the common currency and to ensure domestic policies would foster sustainable growth. As a response to the same meeting, the Commission quickly came up with a set of guidelines to Member States on measures for banks in crisis mentioning the proportionality and non-discriminatory aspects of protection, an interesting element of this guidance demonstrating the severity of the market's situation was Commissioner Kroes' intention to provide approval for rescue schemes within 24 hours.[10]

On 1 October, the Commission proposed a revision of rules on bank capital requirements which it considered 'a sensible and proportionate response to the financial turmoil'.[11] Leverage criteria would have to be sharpened and national supervisory authorities were to be given more cross-border overview. It realized that these hindsight measures would not suffice for those institutions already severely beaten by the recent events. This resulted in the above mentioned guidance and a later published communication altering the application of State aid rules for financial institutions.[12] In contrast to general principles of competition law, temporary measures were now even allowed to favour the institution in crisis 'to the detriment of others operating within that Member State or in other Member States'.[13] It was the first in a series of Communications altering the field of State Aid law for financial institutions whose existence was threatened.

In early 2010, the dust created by the Lehman crash had only just started to settle when a second financial disaster began to unravel. A common aspect this time was the burden that was generated by resolving the first crisis. The already imbalanced balance sheet of several European countries with a relatively high level of debt now forced some Member States to cut back spending tremendously within a relatively short period of time.[14] In Ireland, the situation was different; known as the Celtic Tiger, the Irish economy had a booming

[9] Council of the EU, 'Council Conclusions on a coordinated EU response to the economic slowdown', 7 October 2008
[10]Press Release of the European Commission, IP /08/1495, 13 October 2008
[11] Press Release of the European Commission, IP/08/1433, 1 October 2008
[12]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', OJ C 270, 25 October 2008, p 8
[13]Ibid., para. 2
[14] L. Becker *et al*, 'Europa übt das Sparen', *Frankfurther Allgemeine Zeitung*, 27 May 2010

growth rate, low inflation and a budget surplus in the decade prior to 2008.[15] The generated welfare created a fast growing bubble on the housing market that burst almost simultaneously with the government nationalizing the Anglo Irish Bank, on the brink of bankruptcy, Ireland requested for €85 billion of financial support by the EU and IMF in mid-November 2010.[16] The Irish were the first, but without doubt not the last to become victim of the still on-going Euro crisis.[17] Whereas Greece, Italy, Spain and Portugal have dominated the headlines ever since, the fear on the financial markets for a spill-over effect to Northern Europe is still present and becomes evident through fluctuating country bond rates.

This paper analysis the legislative weapons provided for by the EU Institutions and its Member States to combat the crisis and to bring back the stability of the financial system and sustainable growth of the economy and provides a practical example to show how these measures were put into action.

THE EUROPEAN FRAMEWORK

On a European Union level there are two major institutions that have the legislative power to make changes in this field. In the TFEU the Council on a proposal from the Commission, may make regulations on the applications of the state aid rules.[18] A *de facto* legislative initiative lays also with the Council since the two work strongly together and Commission proposals are often a result of Council meeting conclusions.[19] The former also has the general obligation to oversee the application of Union law, thereby not only having a legislative initiative but also being a watch dog in the field of state aid law. [20] This chapter provides an overview of the most important legislative documents produced by these two institutions.

The Banking Communication

The Commission's first response to the financial crisis was not of an arbitrary nature as one might expect of a supervisory authority. On the contrary, it lends a helping hand by

[15] A. E. Murphy, *The 'Celtic Tiger' – An Analysis of Ireland's Economic Growth Performance,* Robert Schuman Centre for Advanced Studies, April 2000
[16] Press Release of the Department of the Taoiseach, 'Government Statement – Announcement of joint EU – IMF Programme for Ireland', 28 November 2010
[17] Euro crisis is used interchangeably with 'foreign sovereign debt crisis' throughout this report
[18]Article 109 TFEU
[19]See *The Commission's communications*
[20]Article 17(1) Treaty on European Union

providing a framework for Member States to give aid to financial institutions in trouble. In close coherence with the ECOFIN and EUROGROUP meetings a few days earlier, the conditions for state support schemes and individual aid to be allowed were set out as a check-list for Member States. Swift action was of the essence and the aim was to approve schemes that complied with this guidance within 24 hours.[21] In this Communication, also known as the Banking Communication, the Commission recognizes a general erosion of confidence and a dried up interbank lending market.[22] [23] It considers these elements, *inter alia*, to cause such a disturbance of a Member States' economy that it gives room to invoke Article 87(3)(b) EC, now Article 107(3)(b). It is made clear that this does not result in a revolutionary unexhausted list of measures and that these measures are only of temporary nature and based on the *Guidelines on State aid for rescuing and restructuring firms in difficulty* (R&R).[24] The R&R guidelines stem from the state aid section of competition law and are called into life when applying the facultative exemptions of Article 107(2) and 107(3) TFEU.[25] Prior to the crisis, these guidelines were the main document containing the conditions for aid to be exempted, it is of universal application not only focussing on the financial sector but containing provisions applicable to all companies receiving aid. The Banking Communication tries to fill the gaps for the financial sector where the R&R is more of a universal application. The blueprint of the former thus shows many similarities with the latter. The approval of rescue and restructuring aid are in both documents covered by the same set of criteria; demanding a restructuring or liquidation plan for the aid to be approved.[26] The philosophy behind this is that the Commission wants to prevent simple capital injections to otherwise uncompetitive firms which, according to the earlier mentioned, should simply go bankrupt. There are also areas of conflict; the R&R describes the exit of inefficient firms as a normal part of the operation of the market thereby focussing on 'one' firm and not taking into account the domino effect this particular exit might cause.[27] The situation in the financial sector requires a different approach; the strong interconnection of participants on financial markets could lead to institutions that under normal conditions would be competitive, now being vulnerably

[21] Press Release of the European Commission, IP /08/1495, 13 October 2008
[22] 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', OJ C 270, 25 October 2008, p 8
[23] *Ibid.*, para. 1
[24] *Ibid.*, para. 6-12
[25] Communication from the Commission, 'Community guidelines on State aid for rescuing and restructuring firms in difficulty', OJ C 244, 1 October 2004, para. 19
[26] *Ibid.*, para. 14 – 17
[27] *Ibid.*, para. 4

exposed to such an extent that their existence is threatened.[28] Even though the communication recognizes the latter, the Commission does not completely abandon the above mentioned R&R principle considering an inefficient firm's failure as a normal market event. When narrowing down the application of guarantee schemes to individual cases it explicitly states to distinguish between 'otherwise fundamentally sound financial institutions' and the ones 'suffering from structural solvency problems'.[29] The real threat coming from this warning remains questionable, in order to fall within the scope of the Communication the subjected institution should be of such a size that its failure would threaten the system.[30] Thus, the mere fact that the institution conducted in a structurally high risk business model would be a ground to refuse or restrain aid and risk to destroy all that the Communication tries to protect? Furthermore, what is the threshold to decide on which business model is structurally high risk? There is more to say about the size of the subjected institutions in conjunction with the legal basis chosen by the Commission. A financial institution's failure would cause serious harm to a Member State's economy, yet the Commission does not have the power to influence a Member State's economy in itself. If one would elaborate on this reasoning and look at the wording and structuring of the very fundamental prohibition clause in 107 TFEU, it becomes evident that its initial purpose is the protection of competition against aid granted by Member States and not the continuation of a failed and inefficient financial system. If the Commission has the power to strongly influence an institution's restructuring by virtue that the latter has to be in coherence with the Commission's ideology in order to consider the aid given compatible with the internal market, whereas this institution is in itself so big that its bankruptcy strongly jeopardizes the financial system, the Commission *de facto* influences the financial system itself through the application of its state aid approval power. This thin line between competition and economic policy has been recognized by scholars that, in addition, also criticize the short time frame in which these measures are approved.[31] The swift reaction may be necessary given the volatility of financial markets to rumour; it also marginalizes the window in which measures can be thoroughly investigated and often put a lot of consequential decision power in the hand of only a few. In order to not lead to abuse, described by the Commission as 'undue distortion of competition', it inserted an article on

[28] E. Adler *et al.*, 'State Aid to Banks in the Financial Crisis: The Past and the Future', 1 *Journal of European Competition Law and Practice* 1(2010), 68
[29]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', OJ C 270, 25 October 2008, p 8, para33
[30]*Ibid.*, para11
[31]D. Zimmer and M. Blaschczok, 'The Role of Competition in European State Aid Control During the Financial Market Crisis', 32 *Journal of Competition Law and Practice* 1,(2011), 9

possible safeguards.[32] This unexhausted list contains examples of restrictions on commercial conduct and behavioural constraints. It provides for Member States' discretion in determining even stricter conditions and the possibility to withdraw its support in case of non-compliance. The Banking Communication also covers aspects that, from a substantive point of view, might raise questions such as whether they belong in this specific document. The Commission allows, in order to limit the possibility of bank runs, for state guarantees protecting retail deposits.[33] Could not it be argued that the deposits in fact are owned by retail clients, thus consumers, that do not fall within the scope of state aid regulation?[34] Another dualistic and questionable reasoning can be found in the paragraph proceeding the latter. In order for a general scheme to be in coherence with the guidance, it should apply the principle of non-discrimination on the grounds of nationality.[35] Could not it be argued that when a scheme is of a general nature it does not meet the selectivity requirements and thus does not qualify as aid at all?

The Recapitalisation Communication

Before engaging in a complete word by word analysis of the Banking Communication, it is best to stick to the general picture of setting out the different aid measures allowed under this document. After elaborating on the conditions for guarantee schemes to be approved, a chapter on recapitalisation is inserted. Many of the previous conditions in relation to general guarantee schemes apply, *mutatis mutandis,* to recapitalisation.[36] A part from reconfirming the applicability of the latter conditions, the Commission sees great importance in recognizing additional 'considerations'.[37] These can be categorized in an elaboration on the proportionality principle and safeguarding market rate remuneration. The absolute minimum of aid should preferably be determined in accordance with financial supervisory authorities.[38] The choice for the specific aid instrument should also be based on the criteria that reflects the

[32]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', OJ C 270, 25 October 2008, p 8, para27
[33]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', OJ C 270, 25 October 2008, p 8, para 19
[34]Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979, para 21: '…the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...'
[35]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', OJ C 270, 25 October 2008, p 8, para 18
[36]*Ibid.*, para. 34
[37]*Ibid.*, para. 36
[38]*Ibid.*, para. 37

least necessary support and the conditions related to pricing and remuneration should be market-oriented.[39] It soon became evident that these general provision were simply too general of nature to serve as practical guidelines for the highly varying and difficult types of recapitalisation leading to an additional communication, The Recapitalisation Communication[40] [41]. As described above, the crisis caused the evaporation of trust amongst financial institutions. It should be noted that when the Commission described the market for interbank lending as being dried up, it referred to a type of market that is cut off from consumers and the 'real' economy. Interbank lending, in a nutshell, serves to refinance outstanding obligations which in turn could represent obligations such as car or student loans to consumers in the real economy. Thus, the standstill of the interbank lending market eventually influences financial institution's capability to provide credit to consumers. It is this latter domino effect that gave rise to a new ground for providing state aid to financial institutions. In the conclusions of the 2 December 2008 ECOFIN Council, the Council stated to await a new communication by the Commission based on *inter alia* the following principles: 'ensuring that measures are consistent with the shared objective of banks effectively financing the real economy'.[42] Furthermore, the Council found a way of distinguishing between otherwise solid institutions but now requesting for aid and the ones currently suffering extra losses as a result of structural solvency problems. The former category did no longer have to submit a restructuring plan to the Commission.

The Impaired Assets Communication

The next area in which the Commission has been active in the context of the financial crisis is the field of impaired assets. As the financial crisis has also affected lending capabilities of the banks, some of the Member States following the USA example have decided to assist banks with some form of relief for damaged bank assets to bring back the confidence and stability to the financial market *inter alia* by disclosure of foreseeable losses. The Commission has recognized that concrete asset valuations are crucial, and moreover to deal with the problem caused by impaired assets a common approach was needed.

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[39] *Ibid.*, para. 39
[40] Press Release of the European Commission, IP /08/1901, 8December 2008
[41] 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 distortions of competition', OJ C 10, 15January 2009, p 2
[42] Press Release, 2911th Council Meeting ECOFIN, 16231/1/08 (Presse342), 2December 2008

Furthermore, such approach allows for more efficient and more immediate actions in the whole European Union, which are essential in the time of financial crisis. As a result, after the consultation with the European Central Bank (ECB), the Commission decided to issue a Communication on the treatment of impaired assets in the Community banking sector.[43] In general the Communication provides rules and guidelines with regards to design, and implementation of asset relief measures.[44] Contaminated US mortgages, as mentioned in the introduction, would be a classical example of impaired assets on a bank's balance sheet. The Impaired Assets Communication, next to two previous Commission Communications, is another step to provide stability on the financial market. The main goal of the Communication is clearly confirmed in the words of Competition Commissioner[45]who stated that '*We (the Commission - authors) have already taken important steps towards financial stability through bank rescues and recapitalisation. Now, we need transparency, disclosure and correct valuation of impaired assets in order to clean the balance sheets of banks and address the root cause of lack of confidence. But we also require that the banks contribute adequately to the costs….'* Thereby effectively referring back to the principles written down in the R&R guidelines as described above. *..They may have to be restructured in exchange for the State aid they receive. The Commission can play a key role through coordinated and rapid action, and thus contribute to restart lending'.*[46]

The Commission recognizes that impaired assets are one of the factors which harass financial stability since they are at the very heart of the problem. These assets form the 'bad' products on the bank's shelve leading to an increasing number of denied bank credits as a result of an undermined confidence in the banking sector. Therefore, one of the few ways to bring back the confidence to the market is located in the asset relief measure programmes.[47] The Impaired Assets Communication, like its two relatives, details the principles which must be followed in a particular situation. The Communication is based on the following principles:

(i) transparency and disclosure of impairments before government intervention;

(ii) burden sharing between the State, shareholders, and creditor;

(iii) aligning incentives for beneficiaries with public policy objectives,

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[43]Hereinafter called Impaired Assets Communication
[44] Communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector (2009/C 72/01); Paragraphs 1-4
[45]Neelie Kroes
[46]Press release of the European Commission, IP /09/322, 25 February 2009
[47]Communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector (2009/C 72/01) Paragraphs 6-7

(iv) principles for designing asset relief measures in terms of eligibility, valuation and management of impaired assets; and

(v) the relationship between asset relief other government support measures and the restructuring of banks.[48]

Subsequently, the Commission addresses the issue of a longer-term perspective.[49] It underlines that the asset relief measures must be designed in a way that brings the profits in the longer-term perspective rather than create a burden for the Member States. Therefore, the measures created by the Member States should be '*appropriately targeted and accompanied by behavioural safeguards*'[50], and moreover they should be designed in a way that they do not create burden for the budget of the Member States (e.g. by rising public debt levels).[51]

Afterwards, the Commission emphasizes that there is a need for common community approach and provides that such approach should be guided by the following objectives: a) confidence of the market must be increased and it may be done by effective reaction of Member States; b) negative spill overs should be limited; c) protection of a single market must be maintained; d) compliance with any legal State-aid requirements is crucial. Following these objectives will reduce the need for state aid rules, unsurprisingly these objectives show many similarities with the codified principles in the previously discussed communications.[52]

The way in which these objectives are to be respected differs, the Impaired Assets Communication provides the guidelines for the treatment of impaired assets: asset relief measures such as asset purchase, swap, guarantee or hybrid models. It outlines various methods to deal with impaired assets e.g. asset purchase or asset insurance schemes.[53] The Commission underlines that any relief measures for impaired assets must comply with the principles of necessity, proportionality and limit the distortion of competition as much as possible.[54] Firstly, the Impaired Assets Communication provides the instructions that any asset relief measure must be clearly identified to make sure that state resources are not wasted. Thus, full transparency and disclosure of impairments assets must be examined by independent experts, and then confirmed by supervisory authority in accordance with section 5.5. of the Communication, this has to be done prior to government intervention.

[48] *Ibid.*, para. 4
[49] *Ibid.*, section 3
[50] *Ibid.*,para. 9
[51] *Ibid.*, para. 10
[52] *Ibid.*,section 4
[53] *Ibid.*,section 5
[54] *Ibid.*, para. 16

Consequently, the Communication requires that when an individual bank makes an application for aid, the review of its activities must be carried out with the indication of future viability plans. Then, such review must be reported to the Commission.[55]

Secondly, this Communication describes the adequate way of burden-sharing between the Member States, shareholders and creditors.[56] This section provides that '*banks ought to bear losses (...) to the maximum extent'*.[57] Thus, to provide such approach after transparency and disclosure, correct valuation of assets prior to government intervention is needed. After such procedure, if the bank would be found as insolvent without the aid, then help from the State is required in order to avoid wounding-up. Otherwise, it would lead to the complications which could affect financial stability of the Member State and as a consequence even the whole European Union. If it is not possible to provide appropriate burden-sharing scheme as described, then the bank should provide special risk coverage and bear the losses as the first one.[58]

Thirdly, the Communication provides guidelines on the incentives to participate in asset relief programmes.[59] The impaired asset relief measures programme is only limited to six months from the date when the government starts the program. The time is limited to avoid the situation that certain banks wait to take actions with the expectations for better relief programme in the future. The Communications provide that governments may create mandatory participations in the programmes where the banks are required to disclosure their impaired assets or the voluntary form. Participation after six months is also possible, however only in *exceptional and unforeseeable circumstances.*[60] The definition of an 'unforeseeable circumstance'[61] and 'exceptional circumstance'[62] is provided in the Communication.

Fourthly, the eligibility of assets is described.[63] The Commission recognizes that the balance between financial stability and the return to normal functioning of the market must be preserved. Therefore, a common approach to recognize applicable assets is needed. The

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[55] Communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector (2009/C 72/01) Section 5.1
[56] *Ibid.*, section 5.2.
[57] *Ibid.*, para. 21
[58] *Ibid.*, para. 24
[59] *Ibid.*, section 5.3.
[60] *Ibid.*, para. 29
[61] These are circumstances described by the Commission that could not be anticipated by the company's management when making its decision not to join the asset relief programme during the enrolment window and that is not a result of negligence or error on the part of the company's management or decisions of the group to which it belongs.
[62] These circumstances are these which are beyond the current crisis.
[63] Communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector (2009/C 72/01) Section 5.4.

Communication provides the guidelines on the recognition of impaired assets. The definition of such assets is very wide. However, only assets which were on the balance-sheets of the banks prior to launch of the relief programme are eligible. Subsequently, the Communication provides that for the Member States which their banking sector is affected by other factors, an additional approach can also be created. However, the Commission recognizes that the wider definition of impaired assets requires more careful approach in order to protect competition and prevent situations in which banks engage in risky behaviour after the Communication had been adopted and then use it as some sort of exit-strategy.

Fifthly, the Impaired Assets Communication provides the methodologies for the valuation of assets eligible for relief and pricing, which are crucial to prevent undue distortion of competition.[64] The aim of the valuation is to assess the real economic value of the assets, in some of the cases these may be above market value. In a case where valuation is complex, even the nationalisation of a bank becomes possible in order to provide a proper valuation of assets. Valuation of the assets should be based on their current market value and transfer with a higher price than a market value will be deemed as a State aid. Successively, value of impaired assets under relief programme *should be higher than current market price in order to provide relief effect.*[65] Therefore, the aid is more likely to be found compatible if the transfer price is close to the real economic value of the assets. All the valuation methods of assets shall be in accordance with the Annex IV of the Impaired Assets Communication. Moreover, the valuation and valuation methodology must be approved by the Commission which can consult experts e.g. from ECB.

Finally, the Communication provides that the Member States can decide the most appropriate model for relieving banks from assets.[66] Accompanied with the objectives of State aid in order to provide equal treatment and prevent undue distortion of competition. Following aforementioned guidelines of the Impaired Assets Communication provides common principles for asset relief measures in order to increase the chances for stabilisation of the financial market. Moreover, this Communication also tries to endorse normal market conditions and to ensure that the competition is not distorted. However, the Commission recognizes that banks themselves must also '*take appropriate measures (...) to avoid*

[64]Communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector (2009/C 72/01) Section 5.5.
[65]The valuation shall be guided by the principles from Annex IV of the Communication.
[66] Communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector (2009/C 72/01) Section 5.6

recurrence of similar problems'.[67] The beneficiary bank must comply with the appropriate restructuring measures which will be assessed on the base of the State aid obtained through recapitalisation, guarantees or asset relief. The beneficiary bank has only three months from the date when it joined the scheme to submit its viability review or restructuring plan. If the State aid has been previously received by a bank for more than 2% of their capital then *'in-depth'* restructuring shall be implemented.[68]

The Restructuring Communication

In July 2009, the Commission has issued subsequent Communication which confirms the need for the stability on the financial market.[69] This Communication together with previously discussed communications aim to adapt the concept of compatible State aid to help to recover from the financial crisis. It distinguishes from the latter two in as much that these were concentrated on two specific problems, impaired assets and recapitalisation. The current Communication sets out guidelines that are to be used in combination with the previous ones. The Restructuring Communication discusses the possibility to return to viability and the assessment of restructuring measures in the financial crisis. It provides the guidelines to evaluate aid given during the financial crisis, and examine restructuring of *'structurally unsound'* banks. As a result, this Communication does not alter the principles described in the previous Communications, instead it complements them with the aim to show the Commission's assessment of the restructuring aid. However, this Communication was of a temporary nature and is only limited to the restructuring aid notified to the Commission before 31 December 2010.[70] The main goal is to use the supplied rescue aid to recover full financial stability and credit flows between Member States' banks. This Communication requires in the situation where the aid was given to the financial institutions Member States are obliged to provide viability plan to the Commission for fundamentally sound banks, or restructuring plan for banks in difficulties as a confirmation that a long-term viability without

[67]*Ibid.*, para. 48
[68]*Ibid.*, para. 55
[69]Communication from the Commission on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules. (2009/C 195/04) Hereinafter called Restructuring Communication
[70]Commission Communication on the return to viability and the assessment of restructuring measures (2009/C 195/04) Paragraph 49

State support is restored.[71] The condition of the bank's long-term viability should be based on the burden-sharing scheme and accompanied with the measures to limit the distortion of competition.

Subsequently, the Restructuring Communication provides the guidelines for restoring an institutions strategy to long-term viability.[72] This section however applies only in the situation where Member state is obliged to notify a restructuring plan. It lists essential information which must be included within a restructuring plan or a viability review to allow the Commission to assess what are the chances to restore long-term viability. The plan should also state the causes of the bank's difficulties, and should consist of many details about the situation of a financial institution e.g. risk management, corporate governance, off-balance sheet commitments. Consequently, this Communication describes how to achieve long-term viability. Such bank should be able to cover all its costs and provide return on equity. The bank should also be able to compete in the market under normal conditions. And what is more important, the plan should include analysis under 'stress' scenario. Such stress test should consider different scenarios, even global recession. This test ought to be based on parameters approved at the European Union level. The Communication also provides the indicative model of restructuring plan.[73] The Communication's long-term viability test requires that the aid received by the bank must either be *redeemed over time, or remunerated* in accordance with the market conditions.[74] Consequently, the restructuring period shall be defined as short as possible. However, taking into account current financial crisis the Commission allows the possibility that the return to viability may take longer than under normal circumstances.[75] Finally, the Restructuring Communication provides that viability may also be achieved by the sale of a bank. Nevertheless, certain requirements must be met. The purchaser must prove that viability will be actually restored, as well as distortion of competition is limited. In addition to that *a transparent, objective, unconditional and non-discriminatory sale* must be undertaken.[76] In the situation where the long-term viability cannot be returned relevant bank can be orderly winded-up or auctioned off. Another method provided in the Restructuring Communication is purchase of the *good* assets by a healthy bank or creation of an

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[71]*Ibid.*, para. 4
[72]*Ibid.*, section 2
[73] The model is enclosed in Annex of the Restructuring Communication.
[74]Commission Communication on the return to viability and the assessment of restructuring measures (2009/C 195/04) Paragraph 14
[75] *Ibid.*, para. 15
[76] Commission Communication on the return to viability and the assessment of restructuring measures (2009/C 195/04) para. 18

autonomous good bank from the good assets, but only if the new bank will not distort competition.[77]

Afterwards, the Restructuring Communication provides the rules on the burden-sharing issue.[78] This Communication states that the aid applicable to banks in difficulties should be limited only to the minimum, what is needed to restore the viability. The adequate burden-sharing costs scheme is crucial, in its result all parties shall be responsible for covering the costs e.g. shareholders must also contribute to the restructuring costs with their own resources. Therefore, not only particular State will bear the costs. The idea is that the significant costs will be covered by the banks themselves as a liability for their actions in the past. This Communication also *inter alia* prohibits that the new investments cannot be financed by the State Aid.[79]

Consequently, the Communication describes the measures which must be taken in consideration in order to limit distortions of competitions in the Single Market.[80]As mentioned earlier the State can support the financial stability of banks but what is also important is the fact that the State can affect and create distortions in many ways. For instance competing banks which accumulate excessive risk or are based on questionable business models will lose the market share for more efficient competitors. The State rescue can aid to protract the past distortions or doubtful business models by artificially supporting the market power of beneficiaries and as a result it creates the moral hazard as well as undermines the incentives for non-beneficiaries to compete.[81] The measures should be customized to limit the distortion of competition as well as obeyed to a rule and principles. In order to minimize the distortions of competition the measures will depend on the following criteria: the conditions, amount, and circumstances of the given aid. The most significant factor in this measure is the amount of the aid followed by the degree of burden sharing and a level of pricing. Absolute and relation terms are the main measures used by the Commission for the assessment. The beneficiary's own contribution and burden sharing applied over the restructuring period are considered a positive factor. As a general rule, it is considered that the higher the burden sharing and contribution the less negative consequences and the measures are reduced. Subsequently, the measures also depend on the markets on which bank will operate. The size of the market and the importance of the bank on the market are the main factors taken into

[77]*Ibid.*, para. 21
[78]*Ibid.*, section 3
[79] In principle but see: Case T-17/03 Schmitz-Gotha 2006) ECR II-1139
[80] Commission Communication on the return to viability and the assessment of restructuring measures (2009/C 195/04) Section 4
[81]*Ibid.*, para. 28-29

consideration by the Commission. The second part which is investigated is the market characteristics. Where in some regions the divestments may cause negative impact on the desired outcome, in other areas the divestments are highly required in order to enable entry for new competitors or further expansion current rivals. One of the most applicable limitations of distortions of competitions is adequate remuneration of State treatment.[82] The structural measures may enforce the banks benefiting from State aid to for example divest some subsidiaries, branches or business units. In some geographical areas the banks' expansions can also be limited by the Commission to limit moral hazard. The Commission can also extend the timeframe for the selling phase of subsidiaries or business activities etc. especially if the task is relatively difficult to achieve.[83] The State aid also must not be used to fund anti-competitive behaviour to competitors which are not supported by the State. Moreover, in most cases the banks must not use the aid for the acquisition of competing businesses. The claw-back mechanism may also be implemented by the Commission if the imposition of divestiture is not appropriate.[84] Subsequently, the Communication requires the banks which have received aid to provide the credits on commercial terms to avoid the undue distortion of competition. Thus, the aid cannot be used to support bank's competitiveness. The aforesaid restrictions shall last for at least three years.[85]

Finally, the Restructuring Communication provides framework for monitoring measures to be in place to ensure that restructuring plan has been implemented in accordance with the Communication.[86] The monitoring measure is based on the report which must be delivered to the Commission within six months from the date of the approval of the restructuring plan. On the base of this notification the commission assesses the probability to restore the viability. In case of serious doubts the Commission can start formal investigation procedure. However, if the plan does not rise the objections then the Commission may declare that the aid is compatible with article 107(3)(b) TFEU (ex 87(3)(b) EC).

FINANCIAL CRISIS AID IN THE NETHERLANDS

The Dutch citizen

[82] Commission Communication on the return to viability and the assessment of restructuring measures (2009/C 195/04) Paragraphs 30-4
[83]*Ibid.*, para. 35-38
[84]*Ibid.*, para. 39-42
[85]*Ibid.*, para. 43-45
[86]*Ibid.*, section 5

Dutch citizens already became personally involved in the financial crisis at its very beginning in 2008. More than €1,6 billion of savings belonging to 120.000 Dutch account holders at an Icelandic bank (Icesave) became inaccessible as the latter collapsed[87]. The Icelandic economy was, just as the previously mentioned Irish economy, showing stable growth, low inflation and low unemployment.[88] Its government however, started a process of financial deregulation allowing the country's banks to become global financial intermediaries whereas they had acted only marginally abroad prior to the deregulation.[89] In addition, the leverage requirement for banks which serves as a safety margin, had been decreased to such an extent that the financial sector's assets amounted to ten times the country's GDP. As the international financial markets took the hit of the Lehman collapse, Iceland's highly exposed and vulnerable financial sector forced the government to nationalize its three largest banks in order to save its domestic assets.[90] In the day foregoing the default of Icesave, the Dutch government had increased the coverage level of its deposit guarantee scheme from a maximum of €38,000 to €100,000 with the intention to restore confidence and proper functioning of the financial sector.[91] The initiative can be traced back to a meeting of the ECOFIN Council in which it was agreed to increase the guarantee of deposits to a minimum of €50,000 having immediate effect, and a further increase to €100,000 one year later.[92] Some Member States, including the Netherlands, immediately applied the higher threshold. There was already an international framework in place to guarantee deposits in case of a bank's default setting a minimum of 20,000 ECU and, although Iceland is not a member of the EU, it is a member of the EEA which in turn ratified this directive, the remaining €80,000 would have to be paid by the Dutch government.[93]

The Icesave case was the first real case to test the capabilities of the regulatory framework, procedural issues that arose during the implementation were quickly tackled in the new version of the directive.[94] The amendment covered obligations to check coherence between the different national schemes[95], the involvement of the European Banking

[87] Financiële redactie, 'Nederlandse spaarders Icesave kunnen niet bij geld', *NRC*, 8 October 2008
[88] Central Bank of Iceland, *Annual Report 2008*, p. 7-9
[89] K. Cappell, 'The stunning collapse of Iceland', *Bloomberg Business Week*, 9 October 2008
[90] Europe, 'Iceland on the brink of bankruptcy', *Bloomberg Business Week*, 8 October 2008
[91] Staatscourant nr. 211, 15 October 2008
[92] Press Release, 2894th Council Meeting ECOFIN, 13784/08 (Presse 279), 7 October 2008
[93] Directive 94/19/EC [1994] L 135, Article 7(1)
[94] Directive 2009/14/EC [2009] L 68/3
[95] *Ibid*., Article 1(2)

Committee[96], the codification of the above mentioned increase of the minimum guarantee[97] and a decrease in the maximum allowed pay-out delay to 20 days.[98]

The above mentioned case is not an example of state aid per se. The fact that the Dutch government increased the coverage level could only be seen as best practices, furthermore, individual consumers do not constitute an undertaking hence do not come within the scope of EU competition law. [99] Yet, it is important to mention these developments in order to give a complete overview of the way, and especially the time frame, in which measures were taken.

The ING case

One day after the Lehman collapse the second largest savings bank in the world, ING, tried to reassure its shareholders of its solid financial standing.[100] By issuing a press release stating that the institution's exposure to Lehman Brothers was limited to a mere 100 million, ING hoped to calm down its customers and prevent a drop in the value of its shares.[101] The globally operating ING is part of the ING Group, a firmly rooted organization not only providing banking like services but also insurance and retirement services. Its origin can be traced back to one of the first insurance services provided for by the Dutch government in 1845, ever since which it has merged with and taken over many competitors on an international level leading to a worldwide turnover of €76,59 billion in 2007.[102] At the time, ING's financial products were being exchanged in Amsterdam, Brussels, New York, Paris, Frankfurt and Zürich. These stock exchanges were the scene for a dramatic event having a tremendous influence on the company's later strategic development and business model.

On Friday 17 October 2008 its stock price dropped tremendously after Morgen Stanley had issued a report in which it expected ING to lower its dividends, furthermore, there was a wide spread rumour that the bank was going to require capital investment by the Dutch government in order to survive another day. [103] [104] When on top of that, later on the same day

[96] *Ibid.*, Article 1(4)
[97] *Ibid.*, Article 1(3)(a)
[98] *Ibid.*, Pre-amble para 10
[99] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979, para 21: '…the concept of an undertaking encompasses every entity engaged in an economic activity, regardlessof the legal status of the entity and the way in which it is financed...'
[100] Forbes 2007: 9th largest company in the world, 2nd largest savings bank after Mitsubishi Bank
[101] Press release, 'ING expects limited impact from lehman brothers exposure', 16 september 2008
[102] Annual report ING Group N.V. 2007
[103] Morgen Stanley Research Europe, 'Insurance, Fat Tail Friday' J. Hocking ea October 17 2008
[104] Elsevier, 'Na dramatische week eindigd AEX in plus' 17 Oktober 2008, R. van der Kloor / L. van Kemenade

the institution published a new statement[105] in which it readjusted its financial prospects downwards to a €500 million loss in the third quarter (opposed to 1,9 billion profit in the second quarter) its stock price completely collapsed. Leading advisory bodies, such as Goldman Sachs[106], advised their clients to sell their ING assets. By the time the financial markets closed down, ING shares had decreased in value by 27%[107]. Over the course of the weekend, one of the rumours causing the stock price collapse became reality. The Dutch Minister of Finance, Wouter Bos, announced a direct capital investment of €10 billion making the privatized company partly state owned again. In his letter to parliament, the Minister described ING as a company which was fundamentally solid but became a victim of extreme turmoil on the financial markets.[108] He supported his statement by recognizing that the institution meets all the required solvency ratios and that this injection merely serves as 'an extra sweater for a cold winter'. The €10 billion capital was injected as Tier-1 Capital, and the Dutch government refrained from actively participating in management. The latter did not prevent the government from adding conditions to the bail-out; a part from specific conditions on repayment and emphasizing the responsibility towards Dutch tax payers, the Minister's letter ends with an open-ended paragraph recognizing the final word of the European Commission in this state aid case.

In practice, the Commission's final word in the ING case has not always been respected. The initial decision by the EC was to accept the bail-out under the conditions set by Minister Bos.[109] This approval is, as described in the analysis of the Banking Communication above, of a temporary nature and a final approval is only given once a proper restructuring plan is submitted. For now, the situation seemed prosperous for ING since Competition Commissioner Neelie Kroes considered the aid to be compatible with the recently adopted Banking Communication and specifically the 'appropriate own contribution, limited temporal scope, necessity and avoidance of undue distortions competition'. Compatibility with the latter criteria is based on a number of restrictive conditions that can be found back in the text of the Commission's temporary decision.[110] These conditions cover mainly restrictions to the growth rate of ING and a prohibition to indulge in the expansion of business activities that

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[105] Press release, 'ING's capital position in line with targets despite market turmoil in third quarter', 17 october 2008
[106] Goldman Sachs additionaly decreased the long term (12 month) prospect value of ING shares from 19 to 14
[107] NRC, 'ING in rode cijfers door crisis, koers stort verder in', 17 October 2008, Financiele Redactie
[108] Brief aan Tweede Kamer, 'Brief inzake participatie kernkapitaal ING' FM/2008/2586M, Minister van Financiën W. Bos
[109] IP/08/1699, 13 November 2008, 'State aid: Commission approves Dutch emergency recapitalisation of ING'
[110] European Commission, State aid N528/2008 – The Netherlands aid to ING Group N.V., C(2008) 6936, 12 November 2008

ING would not have pursued in the absence of perceiving the aid. The Dutch authorities are to make sure these restrictions are respected. Furthermore, there was an obligation to both ING and the government to hand in a report demonstrating how ING planned to return to long-term viability and how it intended to minimize the distortion of competition. This later report would form the basis for the Commission to give its final judgment and thus final restrictions on competition as a consequence from receiving aid. However before the six-month deadline for handing-in a restructuring plan was reached, the Dutch government was forced to intervene once again in ING's bookkeeping. On 26 January 2009, the Dutch government announced a guarantee scheme representing 80% of one of ING's overseas portfolios.[111] The scheme in fact covered a €27,7 billion pool of contaminated US mortgages that had been piled together as CDOs which, in the aftermath of the sub-prime mortgage crisis, were very low in demand on the trading floor. This so-called 'Illiquid assets backup facility' served to back up the difference in market value as a result of low demand and the factual economic value.[112] Five days later, the Commission gave its temporarily approval once again.[113] Interestingly, Commissioner Kroes already seemed less convinced of the appropriateness of this measure as she stated that 'some' of its provisions are in line with EC rules while emphasizing the fact that further investigation is required and especially the remuneration by the state. The applicable Communication to aid given in such a form is the 'Impaired Assets Communication' dealing with assets that have been at the heart of the financial crisis. At first glance, nothing out of the ordinary seems to appear in this case however there has been a growing scepticism on the real practical benefit that is generated by the back-up facility. Somehave argued that the backing up of a difference in market and real value meant a *de facto* €5 billion in new state aid.[114] The facility worked not only a guarantee in case the bank would incur any losses, the profits that were gained were also meant to be distributed on a 80% - 20% basis, on top of that a 'management fee' was paid to ING and a 'guarantee fee' was paid[115] to the state, the question still remains: does this constitute illegal aid in the eyes of the EC? There were now two issues lying at the Commissioner's desk (1) ING's €10 billion capital investment and the more recent (2) Illiquid Back-up Facility.

On 26 October 2009 Minister Bos and ING send their restructuring plan to Brussels,

[111]Press Release Minister of Finance, 'Staat verleent backup faciliteit aan ING', 26 January 2009
[112]Press Release ING, 'ING update on results and measures to reduce risk and costs, 26 January 2009
[113]Press Release European Commission, 'State aid: Commission temporarily authorizes illiquid asset facility for ING', 31 March 2009, IP/09/514
[114]N. Hume, 'The ING blueprint', Financial Times, 26 January 2009
[115]Minsiter of Finance Wouter Bos, Letter to parliament, 31 371, Nr. 353, 27 September 2010

in a letter[116] to the Dutch parliament the Minister confirmed to have reached consensus with Commissioner Kroes on the additional remuneration to the state resulting from the new facility, the restructuring of ING and the conditions for repaying the capital injection pre-maturely. The final changes that were made by the Commission in the official state aid decision to the latter two elements proved too much to ING and the Dutch government.[117] They appealed against the decision by bringing suit in two separate casesdisagreeing on the following elements[118]:

Repaying the capital injection pre-maturely

It is rather evident that the €10 billion capital injection constitutes an artificial advantage and is the classic definition of state aid. However, when ING's investments after the state intervention became more profitable and the institution agreed with the Dutch government to pre-maturely pay off their outstanding debt, the Commission disagreed on the terms. According to the EC, by this action the state waived its right to obtain revenues as it supposes that ING saves between €1,79 and €2,2 billion[119], *de facto* state aid, by paying pre-maturely as opposed to the original agreement.[120] The Dutch state claims the readjustment of payment terms of already existing aid cannot constitute new aid, and even if the Court would accept this, the Commission has made miscalculations in that regard. Yet, these miscalculations do not change the substance and cannot lead to annulment of the decision. In its plea, the government continues with the fact that state aid only consists of the artificial advantage between market rate and the more beneficial terms provided by the government. Given the fact that the Commission considers the entire amount as aid, the Dutch argue that this already compensates for the new paying conditions.[121] Secondly, it is argued that even when there would be some form of aid, the EC was obliged to start a new formal procedure rather than to single out this research and annex it to an already pending case.[122] Third, even when the Commission would be allowed to re-examine these new terms as a possible new aid they have

[116] Minister of Finance Wouter Bos, 26 Oktober 2009, Staatssteun traject Europese Commissie t.a.v. ING Groep, FIN/2009/0268 U
[117]Press Release European Commission, 'State aid: Commission approves ING restructuring plan and illiquid asset back-up facility', 18 November 2009, IP/09/1729
[118]Cases T-29/10 and T-33/10
[119]State Aid Decision C-10/09, '*implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan'* L274/139 19 October 2010, recital 34
[120]*Ibid*., recital 98
[121]Case T-29/10 and T-33/10*Kingdom of the Netherlands and ING Groep NV v Commission*[2012], para 75
[122]*Ibid.*, para 77

to take into consideration the private investor principle by which ING and the state claim to have acted.[123] This latter element is at the very core of the judgment, other arguments that are raised mainly serve procedural and substantive elements that are nevertheless important, still, the centre of gravity in the annulment decision is the role of the private investor test in order to determine the artificial advantage. Under the original agreement, ING could either re-purchase the stock at €15 (issued at €10) prior to November 2011 or wait until after that date and pay the issue price + accrued interest. The fact that ING could 'opt' for either the one or the other proved that the Dutch government did not waive a 'right', furthermore, if the state had not adopted the new terms it was very unlikely that ING would have paid €15 per share given its share's market value at that time.[124]
The Court largely agrees with the applicants in that the option to pre-maturely pay back does not constitute a right to the Dutch state of receiving the 50% reimbursement.[125] It elaborates on the factual incorrect approach taken by the Commission to simply recognize the no longer available option as a loss[126], and the Commission's inability to perform a private market investor test whereas it had correctly done so in the assessment of the initial €10 billion capital injection.[127] The arguments given by the EC to demonstrate ING's obligation to pay the 50% reimbursement were described as none-convincing[128], and were contradicted by the *more persuasive arguments* brought forward by the plaintiffs claiming ING would not have made use of this option as long as its share price did not come close to €15.[129] A clear cut victory for both ING as the Dutch government, although the two filed suit separately they shared the above mentioned objection in their pleas.

The restructuring

As described in the analysis of the Commission's Communications above, an institution receiving aid should be restructured. The severance of the restructuring process depends on the degree with which the institution's strategic behaviour has caused the situation resulting in government interference. In the case of the ING-Group, the organization was forced to sell of its insurance branch and be left with only banking activities in order to create a solid bank

[123]*Ibid.,* para 79
[124]*Ibid.,*para 80
[125]*Ibid.,* para115
[126]*Ibid.,* para112
[127]*Ibid.,* para110
[128]*Ibid.,* para127
[129]*Ibid.,* para128

focussed predominantly on the European market.[130] A cost reduction of 616 billion, 45% of its balance sheet, is targeted of which the majority is to be earned by divesting all of its insurance branches[131] and selling off of non-core business activities such as the Formula 1 team.[132] In order to extra compensate the impact on the Dutch competition, there is also an obligation to sell one of its subsidiary mortgage banks, Westland Utrecht.[133] It also makes changes to the limitation of balance sheet growth rate which was already mentioned in the preliminary approval. None of these severe obligations and restrictions seem to seriously bother ING as they are willing to accept them. Out of the list of restructuring elements, all but one are accepted: a ban on price leadership.[134]

Unlike the previous point of conflict, this one is only contested by ING. The Court decided to first deal with the issues that both applicants had in common before elaborating on ING's question. Given that fact, the answer provided to the first question in principle decreased the supposed aid by the Commission with €2 billion thereby altering the foundation on which the Commission's contested restriction was based. The latter was argued by the EC as it tried to establish that there was no link between the quantity of the aid given and the subsequent restriction it would impose on the recipient.[135] The Court disagreed and mentioned that it was evident from the Commission's decision that it had based its sanctions on all the individual elements taken together hence the accumulated sum of all aid that was received.[136] A clear cut victory for ING as its restriction on price leadership becomes void.

Some[137] have argued that the outcome of the combined cases can be considered a landmark judgment since the court sets two new case law principles: (1) a proportionality link between the aid received and the imposed restructuring requirements and (2) the importance of the private investor test in the arrangement of early repayment agreements. Given that mid-crisis the effectively committed aid had reached 13% of the EU's GDP, there is still a lot to repay and room for many re-negotiations on early payments. Although the landmark seems to be set, it should be noted that the Commission still has the option to appeal and alter the case's outcome.[138]

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[130]State Aid Decision C-10/09, '*implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan'* L274/139 19 October 2010, recital 50
[131]*Ibid*., recital 54
[132]*Ibid*., recital 51
[133]*Ibid*., recital 55
[134]*Ibid*.,Annex II (c)
[135]Case T-29/10 and T-33/10*Kingdom of the Netherlands and ING Groep NV v Commission*[2012], para 157
[136]*Ibid*., para158
[137]Clifford Chance, 'ING's landmark victory brightens the outlook for State aid recipients', March 2012
[138]A. Sutton, 'Bank State Aid in the Financial Crisis, Fragmentation or Level Playing Field?', Centre for European Policy Studies Brussels, October 2010, p. I