The Past, Present and Future of the Rescue and Restructuring Guidelines for Undertakings in Difficulty

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Anna Grigorian

Dominika Hainová-

Blagovesta Barbova

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1. Introduction

On 5 November 2013, the Commission published the new draft guidelines for rescue and restructuring aid for undertakings in difficulties, which is supposed to improve the current 2004 guidelines. As the 2014 guidelines will be published later this year, around September or October according to Dr. V. Verouden, the Deputy Chief Economist of the European Commission (DG competition), it seems that it is a good time to write an overview of what has happened in the past two decades in the area of rescue and restructuring aid in the EU.

This paper will mainly focus on the changes of the past decade and the changes that are introduced in the upcoming 2014 guidelines. Beginning with discussing the purpose of rescue and restructuring aid in the EU, the placement of R&R in the general idea of state aid and a brief overview of the development of the Rescue and restructuring guidelines. This is followed by an introduction to the 2004 guidelines and how these have adopted some main changes for Rescue and restructuring aid. The issues that have arisen throughout the years with respect to the 2004 guidelines are discussed thereafter, accompanied with proposals made for the upcoming 2014 guidelines. Then the 2014 guidelines are introduced comprising the main changes made by the Commission. Hereafter, the 2013 draft guidelines are discussed, with the support of the comments published for the consultation that may or may not be taken into consideration by the Commission in the finalised 2014 guidelines.

Lastly, a brief comparison is made between the way the US apply their idea of rescue and restructuring aid for undertakings in difficulty, especially after the worldwide crisis that hit all countries, consequently all undertakings, and how this differs or compares to the rescue and restructuring guidelines in the EU.

The conclusion will briefly sum up the most important observations made in this paper, focusing particularly on how the proposals for the 2014 guidelines are reflected in the draft guidelines.

2. Purpose of the rescue and restructuring Guidelines

2.1 R&R + state aid history

Article 107(1) of the TFEU contains the prohibition of any aid that distorts or threatens to distort competition in the internal market. Different types of state aid are often used as a mechanism to enable firms in difficulties to survive.[1] Controlling state aid is tremendously important and necessary, because it aims to limit the distortions of competition that arise as a result of subsidies from a state. It has been confirmed in case law that the purpose of Article 107 TFEU is to protect competition within the Common Market while at the same time preserving the level playing field between the companies competing at this market.[2] The general rule is still the prohibition of state aid as contained in the Treaty, and the derogations from this rule are limited.

However, it is recognized that in some instances state aid can help to achieve objectives of common interests and correct market failures that arise when markets do not function in an economically efficient way. The granting of a state aid by a Member State in such an instance can improve this efficiency and promote further development of the firm and indirectly of the region. If granted under these circumstances, state aid will be considered as compatible with the Treaty.[3]

Already in the 1970s the issue of rescue and restructuring aid emerged. The *First Report on Competition Policy* in 1971 pointed at the existence of many different aid schemes in various Member States, which aimed at correcting structural deficiencies of enterprises. The Commission expressed the opinion that this kind of intervention in form of aid is not generally forbidden, however the imposition of this aid should not be regarded as a general rule but rather as an exception. R&R aid can be granted, if this is done as a part of well-defined reorganization programme, and if the effects on competition and intra-Community trade of such aid can be assessed with sufficient precision.[4]

This was followed by the *8th Report on Competition Policy* in 1978, in which the Commission laid down a number of conditions under which R&R aid would be regarded as

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[1] Farantouris 2009, p.1
[2] *Banco Exterior de España SA v Ayuntamiento de Valencia*, recital 12; Italy v Commission of the European Communities (173/73) [1974] E.C.R. 709; [1974] 2 C.M.L.R. 593 ECJ recital 26.
[3] Farantouris 2009, p.2
[4] Anesti, Mavroghenis & Drakakaki 2004, p.27

compatible with the internal market. On the basis of the vast amount of cases on the issue of R&R aid, the Commission issued its first detailed guidelines in 1994, in which it advised Member States on how to design and notify this kind of aid schemes that can be authorized by the Commission. The 1994 guidelines were amended in 1997, with the intention to give specific rules on the issue to the agricultural sector. These were further updated in 1999. [5]

In 2005, the Commission issued the *State Aid Action Plan*, from which it was clear that the Commission is shifting its current, rather substantive, approach to a more economic or efficiency-oriented approach. The pre-2005 approach featured many situations in which the Commission took circumstances of each particular case into account when taking decisions on whether to authorize an aid, it didn't pay much attention to whether trade will be distorted by the State aid measure or what the effects on competition will be.[6] The decisive criterion for compatibility with the Internal Market according to the new economic approach is the promotion of economic efficiency, which is in turn defined by means of a total welfare standard.[7] The new approach offers a much more rigorous analysis of market failures which should be tackled by the R&R aid. This sounds rather promising, because it should offer more precise and clear evaluation of these distortions of trade and it should serve to help the Commission when deciding on exemptions.[8]

2.2. What does Rescue and Restructuring aid entail?

It is indisputable, that R&R aid for firms in difficulty belongs to the category of the most potentially distortive kinds of State aid. This only adds up to its overall controversial nature caused by the fact that the aid is given to firms on a selective basis and this is in fact incompatible with the TFEU. Such selective aid changes the market position and the competitiveness of the participants on the market which leads to the distortion of competition. This aid may even shift the costs of the inefficient enterprises to the healthy competitors, and ultimately to the consumers.[9]

5 Ibid
6 Heimler 2009, p.3
7 Zimmer & Blaschczok 2011, p.2
8 Heimler 2009, p.9-10
9 Zimmer & Blaschczok 2011, p. 1-2

Looking at the Community legislation, one can see that granting R&R aid is subject to strict eligibility conditions.[10] The only general exceptions with regard to the R&R aid is granted under the de minimis doctrine, under which only R&R aid of certain amount will trigger the application of the Union rules.[11] It is necessary to balance costs and benefits, because in some cases the benefits produced by such R&R aid may outweigh the costs generated by the distortion of trade, e.g. when the social or regional policy considerations in question are more pressing and R&R aid would address them with only minor distortion of competition.[12] The Commission is generally of the opinion that if a firm is unprofitable, its exit from the market is an inevitable consequence that Member States should not interfere with. The reason is that R&R aid supporting unprofitable firms causes the worst competition distortions, because more efficient competitors are adversely discriminated against.[13] However, sometimes allowing an inefficient firm to remain active in the market can be allowed, especially in situations when it can be expected that the firm will be able to rise from ashes, rebuild itself, become profitable again and eventually repay the aid. [14] Also, the R&R aid may be allowed if the firm concerned is a big firm that many small local suppliers depend on, and if letting such a firm go bankrupt and extinct would deprive many people of employment. The reason for allowing R&R aid in such cases is that is helps so maintain the balance between the national/regional interests and the single market.[15]

When deciding whether a firm can be awarded R&R aid, the important notion is the notion of a firm in difficulty. There is no Union definition of this concept contained in the primary legislation. Although this concept is difficult to define due to the differences in national law, in basic terms it means that the firm must be unable to handle losses and would eventually go bankrupt. This scenario is very likely to happen when more than half of the firm's capital is disappeared or when a firm falls under the criteria of the domestic insolvency proceedings. [16]

Besides this notion, there is a number of factors that have an implications on the award of this type of aid, such as the amount of financial support offered by different Member States to different sectors, how liberal the national markets are and other worldwide economic circumstances, such as financial crisis. This is why the form and the amount of the aid must

[10] Farantouris 2009, p.9
[11] Farantouris 2009, p.2
[12] Heimler 2009, p.11
[13] Zimmer & Blaschczok 2011, p.2
[14] Anesti, Mavroghenis & Drakakaki 2004, p.27
[15] Heimler 2009, p.12
[16] Kokkoris & Lianos 2010, p. 542

be assessed precisely and cautiously. A trend arose in recent years towards R&R aids by Member States, and this is also thanks to the economic recession.[17]

Due to the fact that both rescue and restructuring aid concern firms in difficulties, and due to the fact that they often constitute two parts of a single operation, they are covered by the same principles.[18]

Rescue aid is temporary in nature and constitutes a reversible assistance. It is defined as an 'ephemeral assistance in the form of loans and guarantees granted to an ailing firm while its future is being assessed'. Its aim is to support the firms that found themselves in a particularly serious deterioration of its financial situation during the period in which the firm is conducting its restructuring. The firm must undertake these structural measures promptly. During this type of support, the potential reasons for the firm's financial deterioration should be assessed and examined, and a plan must be developed – a plan which addresses ways how to remedy these difficulties. [19]

Restructuring aid is in place to address structural measures which are not so urgent as to trigger the granting of rescue aid. Restructuring aid is meant to be received by firms with long-term viability. It is undisputable that all forms of state aid are quite controversial, and this is not different with regards to the restructuring aid. The risk that this type of aid runs is that competition can be distorted to the point that a lot of burden is shifted from the company receiving the aid to other market participants who are surviving without help of an aid.[20] This is the reason why the following condition is in place – it can only be granted if such aid does not go against the common interests of the Community and if the benefits that the aid generate outweigh the costs that it brings.[21] Restructuring aid comprises of 2 processes – first comes the financial restructuring (in form of e.g. capital injections or debt reduction), that in most of the times must accompany the actual physical restructuring. The physical restructuring is necessary because the first step to restoring long-term viability is abandoning activities that would be loss-making even after restructuring. It is important to note that the range of restructuring operations is not limited to financial aid. The firm asking for a grant of restructuring aid needs to submit a detailed and viable restructuring programme to the Commission – so-called restructuring/liquidation plan – restoring the firm's long-term

[17] Farantouris 2009, p.9
[18] Farantouris 2009, p.3
[19] Hancher, Ottervanger & Slot 2012, p. 927
[20] Farantouris 2009, p.5
[21] *British Airways v Commission of the European Communities* [1998] E.C.R. II-2405 at [235]

viability within a reasonable time. Once this plan has been drafted and is being implemented, any aid granted after this action will be considered as restructuring aid. Non-implementation of the plan will be considered by the Commission as a misuse of aid.

2.3. R&R Guidelines – an overview of the past two decades

Over a period of time, the Commission established guidelines and continued updating and reforming them, in order to force Member States to comply with the state aid provisions contained in the TFEU. Legally speaking, these guidelines are not binding. They are non-obligatory acts, which thoroughly explain the law on state aid, and the criteria under which R&R aid may be granted in derogation from Article 107 TFEU, which generally prohibits state aid. Because these guidelines are issued by the Commission, they reflect the Commission's approach and the future intentions and plans can be implied from them. The guidelines on the R&R aid for firms in difficulty are especially important, due to their controversial nature that, as previously mentioned, also led to a number of controversial Court decisions.[22]

The first set of guidelines were the 1994 guidelines but, as it was believed that a set of specific rules should be added for the agricultural sector, another guideline was published in 1997, mainly adding these specific rules.[23] In the 1999 guidelines all sectors of the economy, including banks and non-financial institutions were added.[24] These guidelines are considered to be a very successful piece of legislation, because they established with certainty the circumstances in which rescue aid is acceptable. However, the guideline also had a number of flaws, which will be discussed in the next chapter.

The 2004 guidelines are known for offering more legal certainty than any of its predecessors. One of its most important contributions is that they clearly give the conditions that rescue aid must fulfil – namely the reversibility, temporary nature and short-term economic support. The most significant criticism is that the guidelines were unable to deal with many issues that emerged during the financial crisis and it was necessary to come up with a more permanent solution. However, despite this realization, the revision of the

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[22] Farantouris 2009, p.1
[23] Ibid
[24] C9/2008--Sachsen LB case

guidelines was postponed several times and one of the reasons was the financial crisis itself.[25] During the period, the Commission was considering different R&R rules and for the time being it adopted the Temporary Framework, which was meant to help firms who were in difficulties on the 1st of July 2008. Under the guidelines, these firms would have to apply for R&R aid.[26] In the end, the Commission decided to draft 2014 guidelines which are only applicable to non-financial firms in difficulty.[27]

The 2014 guidelines are supposed to bring about a number of changes and provide many useful clarifications and concepts. The main changes include the new concept of temporary restructuring support for small and medium-sized enterprises (hereafter referred to as SMEs), the practice of burden sharing has now also been specified more and has been broadened. Moreover, criteria for compatibility with the internal market have been introduced together with a list of scenarios to provide an illustration on when the criteria are complied with, and the concept of “undertaking in difficulty” has been adjusted with the aim of removing the uncertainty it brought with it.

All these issues, and more, will be dealt with in the next chapters dedicated to the 2004 and 2014 guidelines.[28]

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[25] Schutte 2012, p.813
[26]Schutte 2012, p.814
[27] White & Case 2013, p.1
[28] White & Case2 013, p.1-3

3. The changes made in the 2004 Guidelines

The Commission has been making serious efforts to modernize the rules that apply to control State aid. The 2004 guidelines on rescue and restructuring have been an important element of the streamlining and modernizing process. The Guidelines aim to clarify the rules and resolve the issues that have been identified, to reach the goal of effective State aid control. [29]

The 2004 guidelines on rescue and restructuring aid furthermore aim to tighten the rules applying to aid given to undertakings, making it more difficult for the member states to grant aid. A mentioned, this is because of the highly distortive effect of this type of aid. The Commission therefore, understandably, does not want States rescuing undertakings which get into difficulties, to become the norm. And therefore aims to prevent this from happening. [30] Another reason for the Commission to tighten the guidelines is the issues it has encountered with Member States which have found loopholes and ambiguities in the 1999 guidelines. [31]

The 2004 guidelines make a division between rescue and restructuring aid, each having their own objective. Rescue aid has as its primary objective to "make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan." The general principle is that rescue aid makes it possible temporarily to support a company confronted with an important deterioration of its financial situation reflected by an acute liquidity crisis or technical insolvency"[32] Paragraph 15 of the 2004 guidelines goes on to explain that within a time-period, not exceeding six months, temporary support is offered, in order to give the undertaking time to analyse the circumstances that have contributed to cause the difficulties and to develop a fitting plan to resolve the situation.

With regards to restructuring aid, the main objective is to restore the profitability of the firm. For this reason, the Commission will approve aid only if it can be shown by the State that there is a high probability that the aid will make sure the undertaking becomes profitable again. [33]

Even though the 2004 guidelines are an update of the 1999 guidelines, a significant amount of changes have been made to the guidelines to achieve their objectives and aims. The main

[29] Van de Casteele & Valle 2004, p. 15
[30] Nicolaides 2008, p.478
[31] Nicolaides 2008, p. 479
[32] 2004 guidelines, paragraph 15
[33] Heimler 2009, p.12

changes with respect to the 1999 guidelines are the following: First of all, the 2004 guidelines have extended the scope of the application for a "group of companies". Secondly, the length of the time-period given for rescue aid has been adjusted to a mere six months, after which the undertakings need to pay the amount back. This used to be a time-period of 12 months in the 1999 guidelines. Moreover, it must be communicated to the Commission within six months after the implementation of the aid measure, when there is a case of non-notified aid, liquidation or restructuring plan or any evidence that the rescue loan is fully reimbursed and/or that they have terminated the guarantee. [34]

Another great innovation is the fact that the Commission has simplified and quickened the assessment process of rescue aid. In addition to this, they also added "the one-time, last-time" principle to apply to the rescue aid.[35] This principle makes sure an undertaking will only receive aid once in a period of ten years. It has been established to avoid situations where the State repeatedly grants aid to an undertaking, through a combination of rescue and restructuring aid.[36] Supporting this change, a maximum amount of rescue aid has been established which is found in the annex of the 2004 guidelines. This maximum amount is determined on the basis of a specific formula.

With regards to the restructuring plan the SMEs have to submit, it is stated in paragraph 59, that it is not required to be endorsed by the Commission, however it should fulfil all the conditions and be communicated to the Commission after being approved by the Member State. The Guidelines in general have a different approach between large enterprises and small and medium enterprises, compared to the 1999 guidelines.[37]

Furthermore, according to the 2004 guidelines the compensatory measures must, as a general principle, be taken to ensure a minimal distortion of competition. The measures can be made in various forms, such as reduction in capacity or market presence, divestment of assets or reducing entry barriers on the relevant markets.[38] Moreover, the current guidelines do not refer to "negligible" market share, however they do state that the measures should take place in the relevant markets for the beneficiary undertaking, where they should have or obtain a significant market position after restructuring.[39] However, it should be noted that SMEs are exempted from this rule and consequently do not have to offer any compensatory

[34] Rydelski 2006, p. 226
[35] Ioannis Kokkoris, Ioannis Lianos 2009, p. 554
[36] Valle & Van de Casteele, p. 61
[37] Ibid
[38] 2004 guidelines, paragraph 39
[39] Nicolaides 2008, p. 482

measures, because it is believed that these do not distort competition under normal circumstances in such a way that it will contradict the common interest.[40] And Lastly, the own contributions that have to be provided by the undertaking that receives the aid have been adjusted, as the 1999 guidelines did not address how substantial the own contribution of the beneficiary undertaking should be.[41] The own contributions have now been specified to certain minimum percentages for every category of enterprises: 25%, 40% and 50% for small enterprises, medium-sized enterprises and large enterprises, respectively.[42]

There have also been other issues with the concept of "firm in difficulty", which have not been addressed in the 2004 guidelines. However, the main reason for this was the fact that it is difficult to create a concrete definition that will apply to the Community, as in this Community different national insolvency laws and procedures exist.[43]

Overall, the rules in the 2004 guidelines have been tightened and are stricter in some aspects, such as the own contribution of beneficiary undertakings and limits on the amount of rescue aid which, as previously mentioned, are now subject to the "one-time, last-time" principle. On the other hand, it can be observed that the rules on SMEs are more relaxed, making it easier for States to grant them aid. However, the questions arise whether these changes have been sufficient and whether issues have arisen from the 2004 guidelines. And if so, what kind of issues and which changes should then be implemented for the 2014 guidelines.

[40] Nicolaides 2008, p. 501; 2004 Guidelines, paragraph 51
[41] European Commission 2004
[42] Valle & Van de Casteele, p.61
[43] Nicolaides 2008, p.480

4. Issues of the 2004 guidelines shown in practice and propositions for improvement

The following chapter concerns the issues that have arisen after the 2004 guidelines and for which academics and practitioners have made their propositions on improvements to be taken into consideration for the 2014 guidelines.

4.1. Objectives of R&R should be clarified

As paragraph 4 of the 2004 guidelines states; R&R aid has given rise to the most controversial State aid cases and therefore is one of the most distortive types of State aid. The Member States should therefore justify more thoroughly their use of aid. A clearer public policy objective will help not only to give more clarity, but, it is believed by academics, that it will then also help as a guide when limiting the amount of aid to what is warranted by the particular objective that it pursues. The public policy objective as defined by Nicolaides (2013) is to avoid the lost output of workers who do not find a job after a long period of time. However, in several cases it has occurred that the Member States spent much more than the value that is lost. For this reason, it was proposed to consider introducing a maximum amount of aid that is permissible, reflecting the value of economic output in each Member State.[44]

4.2. Private investor test – public creditor principle

The concept of the public creditor has in some academics' eyes created a loophole in the state aid control system as it can lead to the failure or even unwillingness to demand the amount of money back that is owed to the State by the public authorities. This is the reason why the private investor test is applied. This raises an issue though, because the test namely refers to investments by a new investor, which means that the aid is considered to be a stand-alone investment and that the profitability is calculated with respect to this investment.[45]

The *Alitalia case* is an example for the fact that a calculation is needed when the Government owns the undertaking. The current test is not appropriate because the injection of new capital can ensure that the old capital increases its value, which in turn ensures a higher return for the owner. This result cannot be achieved by an outside investor who injects new

[44] Ferruz & Nicolaides 2013, p.6
[45] Heimler 2009, p. 14

capital under the same conditions in the same undertaking. [46] And therefore the calculation is not appropriate in certain situations.

The Alitalia case concerns two main issues; the compensatory measures that should be taken and the private investor test. The former will be discussed later on in this paper.

In the *Alitalia* case the Italian government decided to invest around 1.5 billion EUR through a State owned holding company named IRI, in 1997. The aim of this investment was to restore the financial viability of the company for the period of 1997-2000. The Commission stated in its decision of 1997, that this action did not fulfil the private investor test and therefore concluded that there was a case of a State aid measure.[47] Italy did not agree and challenged the Commission decision in court with success. In 2001, however, the Commission came back with more convincing proof that it did not meet the private investor test, which the Court of First Instance confirmed in 2008, after the Commission decision had been challenged again by Italy. [48]

The issue concerning the test is that the Commission had not conducted any market analysis to see specifically whether a private investor would or would not act in the exact way. Moreover, in 2005 the Alitalia company received an injection of 1.2 billion EUR which met the private investor test, simply because a group of private banks participated in the investment. Again, there was a lack of proper analysis by the Commission to check the internal rate of return of the capital investment.[49].

When the Commission applies the private investor test, it does looks at objective benchmarks of performance such as the average return of the investment compared to similar categories of assets or market rates of the interest. However, these do not suffice because the moment the public authority is in the position to demand its money back, it is so to say "engaging in bilateral negotiations with the debtor". The outcome of these negotiations depends on what the prevailing (national) legal rules are, what the particular contractual obligations are, considering the negotiation skills of each and lastly the assessment of the financial prospects of the beneficiary/debtor. The latter two can be regarded as very subjective factors, for which

[46] Von Weiszacker Christian (2002)
[47] Commission decision 1997, p. 44
[48] *Westdeutsche Landesbank Girozentrale v Commission* [1999]
[49] Heimler 2009, p. 14

there is no specific market benchmark. [50]

In practice, however, one can see that the courts do not resort to such difficult criteria and assess the application of the public creditor by attempting to determine whether it has acted promptly and whether it has pursued all possible options. The *Spain v Commission* and the *Lenzing v Commission* cases are great examples of these issues. [51]

In *Spain v Commission*, The Commission had decided that the Spanish authorities had not acted as a private creditor for the following reasons; the undertaking had not been obliged to pay taxes and social securities over a period of 3 years. Moreover, their debt had been written-off for two thirds and the repayment of the remaining amount could be done over a ten-year period. However, when the undertaking had failed to pay after the agreement, the public authorities started to seize its property, which it had tried to do earlier as well. The situation eventually lead to the suspension of the agreement. The ECJ believed the Spanish authorities had tried all legally available options, which included the seizing of property and closure of the company. The ECJ therefore, contrary to the Commission, found that the measures taken sufficed to show that the authorities had acted as a private creditor. Consequently, it annulled the Commission decision. [52]

However, again as in the Alitalia case, arguments can be made that the ECJ in this case did not conduct a proper analysis to conclude whether it had acted as a public creditor. It did not examine issues such as the strength of the first attempts to seize the property, or as to why the negotiations on the agreement took three years. Nor were any of the provisions of the agreement taken into consideration. It shows how there is a "floor" set up which is defined by the legally available option. Nevertheless, it leaves a great amount of discretion to the public authorities as to how the repayment will be handled, as well as the non-fulfilment of it and other such issues. [53]

In the *Lenzing v Commission* case, the Spanish authorities had a law which fixed the statutory rate of interest, which was lower than the market rate, on the outstanding debt. This in itself was not enough to indicate State aid, as even creditors at times opt for a lower rate as to minimise the potential losses. However, as the national law gave them discretion on matters such as the amount of repayments and the length of the period for repayment, the

[50] Nicolaides 2008, p. 490
[51] Nicolaides 2008, p. 491
[52] Case C-276/02, *Spain v. Commission*, 2004 ECR I-8091
[53] Nicolaides 2008, p. 494

Court of First Instance concluded that the discretion that is given is sufficient to turn actions that are dictated by the law into a form of state aid. This happened, according to the CFI, when the authorities had allowed for the undertaking not to pay social security contributions for several years. For these reasons, the CFI concluded that Commission decision should be annulled, in which no state aid had been found. [54]

The proposition therefore would be to establish a more appropriate calculation and a proper analysis of the situation to achieve the most efficient and appropriate decisions.

With regards to rescue aid:

4.3. Timing problems

Rescue aid is mostly granted before they receive an approval from the European Commission for the simple fact that a rescue situation is mostly imminent and is rarely planned beforehand. The situation at hand and/or the financial difficulties of an undertaking are in such cases less foreseeable, to ensure, like in other cases of aid, prepare thoroughly for an investment project by preparing a plan and document incentive effects, before going to the Commission.[55]

It is therefore proposed to have an *approved aid scheme* for the Member States, so that this situation can be handled in a simpler and quicker way to ensure immediate support to the undertakings in difficulties. The 2014 guidelines should recognize the need for these schemes and lay down conditions for them. Aid schemes for larger companies should be limited. Then for any further rescue aid, an application should be notified to the Commission, which then would be approved in a quick manner according to the standard process. Thus, it would include two stages of approved schemes followed by individually notified rescue aid, which would not be regarded as violation of the "one-time, last-time" principle. [56]

Another issue, with regards to time-periods, is the six months that are given for rescue aid, which have a strict deadline. However, practice shows that it is very difficult for an undertaking to make a thorough analysis of its difficulties and at the same time develop a coherent restructuring plan in the limited time-period that is given to them. Other requirements for the restructuring plan do not help with this issue, such as the requirement of having an independent expert to elaborate the plan. Therefore it is proposed by many, to

[54] Case *Lenzing* [2004]
[55] Rydelski 2006, p.227
[56] Schutte 2012, p. 816

elongate the time-period as to ensure sufficient time to analyse and prepare a proper coherent restructuring plan.[57]

With regards to restructuring aid:

4.4. Definition of firm in difficulty

The definition of a "Firm in Difficulty" is a very important element from the Rescue and Restructuring guidelines. This concept determines whether an undertaking is eligible for restructuring aid, but also whether it is precluded from obtaining any other form of State aid, as other frameworks and guidelines clearly state that a firm in difficulty cannot be a beneficiary of State aid.[58] As the concept is not clear, it is highly needed to clarify the definition. And it is proposed to clarify the fact that a firm should not be considered to be in difficulties in the case where it has enough funds of its own to overcome these difficulties, by making investments with the previously proposed State aid approved schemes.[59]

4.5. Coherent restructuring plan

Even though having a coherent restructuring plan is a just requirement, and it is understandable that a company needs to realise and define in which parts of its business it needs substantial restructuring, the issue is that this restructuring plan can never be realized word for word. Which is the problem, as the plan as a whole must be approved by the Commission and any deviation from the plan is regarded as a misuse of the restructuring aid.[60] Making these deviations dependent on the prior approval of the Commission results to an unforeseeable and heavy-handed process, which is not desirable. In reality, the plan will have to be subject to adaptations and amendments along the way. The ECJ states that "any important deviation" must be approved by the Commission, however it is not noted what exactly an important deviation constitutes. [61]

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[57] Ibid

[58] Ioannis Kokkoris, Ioannis Lianos 2009, p. 540

[59] Schütte 2012, p. 816-817

[60] *Olympic airways* case; Ioannis Kokkoris, Ioannis Lianos 2009, p. 540,

[61] Schütte 2012, p. 817; Case *Olympiak Aeroporia Ypiresies AE v Commission,* [2007], para.91

4.6. Own Contribution -Limited Amount of Aid

There are several issues with this part of the Guidelines. First of all, the definition of "own contribution" is not clear enough. The Commission does not take into account several contributions that, by some, seem to be included in this definition. The Commission does not include debt waivers by suppliers of banks, nor does it include employees' contributions which may include the renouncing to holiday pay. The reasoning of the Commission is that those contributions do not provide for any extra cash or capital to the company.[62] However, not everyone agrees with this notion. It is argued that contributions made by third parties which are closely linked to the firm with a business link, are free of state aid and are even helpful with taking care of the restructuring expenses by providing cash.[63] Therefore, it is argued that these contributions should be treated as "own contributions" instead of aid free contributions.

Furthermore, it is also argued that suppliers and employees should be included to the own contribution, as their belief in the viability of the undertaking is shown by the agreement to contribute to the undertaking in difficulty. Moreover, in the case of employees, it should be noted that these various forms of contributions that are possible, actually do provide for more capital for the undertaking. Therefore it is proposed to set aside this difference that is made. [64]

4.7. Compensatory measures

According to the 2004 guidelines, the Commission must keep in mind the objective of restoring the long-term viability of the undertaking in difficulty and should also impose the compensatory measures in the markets where the undertaking holds a significant market position after the restructuring aid. The term "significant market position." is new and raises the question what shall be understood under this term. [65]

Compensatory measures are moreover included in the Guidelines with the purpose of limiting the negative impact of the aid on the competition, by reducing the presence of the undertaking that is receiving the aid in the relevant markets. This is to make sure that the aid

[62] Rydelski 2006, p. 206
[63] Commission Decision; Vanyera State Aid paragraph.40.
[64] Schütte 2012, p. 818
[65] Nicolaides 2008, p. 485

is not contrary to the common interest.[66] The restructuring plan, therefore, requires either closing or selling some of the profitable parts of the business, as these are considered to be "real" sacrifices. The issue here is that, as the restructuring plan has to be assessed by the Commission with the compensatory measures included, it can be destructive for the plan as these measures can lead to a business that is too small to be viable in the end. The question therefore arises, whether it is sensible to make undertakings to close down profitable parts of their businesses.[67] Is this not counter-productive?

Others also question whether this measure should be regarded as compensatory measure at all. The reason for selling is to avoid distortion of competition, however when selling a part of a business it will convey an advantage for the purchaser of that part of the business. The undertaking in difficulties will have to sell its part for a lower price than the true market price, consequently distorting competition. It therefore is argued to be a profit for other undertakings which are their competitors, but it will not significantly reduce the distortion of competition that is caused by the aid, nor will it eliminate those distortions.[68]

The main issue with compensatory measures is visible in the Alitalia case as well. The Commission namely imposed conditions on Alitalia to make sure the aid is compatible. Several conditions were not contradictory to the 2004 guidelines, which were not yet issued at the time and were appropriate measures in line with competition law, as they enhanced competition and reduced barriers. Some of these conditions include the requirement set on Italy to not give Alitalia any priority over other Community companies and the imposition to appoint a market coordinator which will act independently for the air transport and who does not have a link with Alitalia, ensuring its independence. However, there were also conditions set that limited the freedom of Alitalia itself, to compete in the air transport market. Conditions such as hindering any independent price reduction, placing a ceiling to the number of seats allowed to offer and not allowing any other European carriers to have partial ownership, are examples of this. These requirements in actuality blocked the possibilities to restructure Alitalia instead of helping them. The competitors were being helped, not the company itself, which was supposed to be the aim of the aid for restructuring purposes and went beyond what is regarded to be appropriate remedies in order to avoid distortion of competition, as set in the 2004 guidelines.

[66] 2004 guidelines, paragraph 38
[67] Example: the divestitures imposed by Commission Decision, Alstom, 01 2005 L 150/24, para. 198.
[68] Schütte 2012, p. 818

The proposition for this issue, therefore, is to make use of behavioural compensatory measures instead of structural remedies. Examples of behavioural compensatory measures would be limiting the negative effect of competition by restricting the ways the State Aid will be used, however not over-doing it in order to maintain a balance with the efficiency of the firm in difficulty which will have to be restructured. A restriction that would impact the efficiency of the undertaking would be an imposition of production limitations. however, situations may differ and therefore it is encouraged to look at the market structure before imposing specific forms of compensatory measures.

Moreover, the term of "significant market" should be clarified and defined whether no compensatory measures are ought to be imposed if there is no significant market position in the relevant markets. [69]

As to the issue of viability the 2004 guidelines state that: "[t]he restructuring plan, the duration of which must be as short as possible, must restore the long term viability of the firm within a reasonable timescale".[70] Consequently, it is still not clear what the reasonable period of time is in which the undertaking shall have to attain viability and it is proposed to clarify this in the following guidelines. [71]

After analysing and considering some of the main issues, it is clear that certain concepts included in the current guidelines are in need of some clarification. Furthermore, the analysis and the calculations of the Commission should be specified and be more case-appropriate. Some great propositions have been made, and it is now only the question whether the Commission will take these into consideration for the upcoming 2014 guidelines, of which the draft will be discussed hereafter.

[69] Nicolaides 2008, p. 487
[70] 2004 guidelines, paragraph 35
[71] Nicolaides 2008, p. 488-489; also now adjusted in paragraph 49 in the 2013 Draft guidelines

5. The 2014 Guidelines

The Commission Communication on State Aid Modernisation defines the goal of the new R&R aid guidelines as increased control over “that very distortive type of aid in order to ensure that the market process of exit is interrupted by State intervention only when truly justified”.[72] This goal found its reflection in the main changes in the Draft guidelines, namely:

5.1.Temporary restructuring support

The Draft guidelines introduce a new type of aid - “temporary restructuring support”, in the form of loans or guarantees. It resembles in some aspects the rescue aid and in other aspects, the restructuring aid. However, it is targeted solely at SMEs and significantly simplifies the grant of aid for their restructuring for a period longer than the six-month period for rescue aid. There are two possibilities for the duration – either 12 months, or 18 months. The main advantage is the requirement for a simplified restructuring plan instead of the full one which is obligatory for the restructuring aid.

5.2.Better targeting of aid

A drawback of the Current R&R guidelines is that they do not ensure that aid is granted solely in cases with real public interest involved. Therefore, the Draft guidelines introduce more stringent tests to check if aid really serves the public interest. The first test consists in proving that by saving the company social hardship or market failure are avoided. The Draft guidelines give a non-exhaustive list of situations in which aid would be justified, for example: (i) the unemployment rate in a specific region is higher than the EU or national average, persistent and accompanied by difficulty in creating new employment in that region; (ii) the beneficiary has an important systemic role in a particular region or sector or provides important services that are hard to replicate (*e.g.*, a national infrastructure provider); (iii) failure or adverse incentives of credit markets could push an otherwise viable company into

[72] Ferruz & Nicolaides 2013, p. 5

bankruptcy; or (iv) the failure of the beneficiary would lead to an irremediable loss of important technological knowledge. Important to note is that a less strict list applies to SMEs.

Aid will also only be in the public interest if it can alter the situation that would prevail without the aid. Consequently, in cases of restructuring aid, Member States are expected to present a comparison with a realistic alternative scenario without State aid /the so called "counterfactual analysis", e.g. asset disposals, private capital raising. If these high evidentiary requirements are adopted, many companies will not be eligible for receiving restructuring aid.

5.3.Burden sharing

In order to reduce the amount of aid as much as possible, the existing guidelines require restructuring undertakings to cover some of the restructuring costs from their own budget. However, the costs often would be distributed unevenly among investors and taxpayers.

To achieve a better distribution and deriving from its experience with banks during the crisis, the Commission invented the concept of "burden sharing". This concept takes into account not only the amount of own contribution, but also who is making that contribution. In the future, adequate burden sharing may entail greater contributions from the beneficiary's shareholders and creditors. The Commission proposes two alternative ways to reach this goal. Option 1 is very general and stipulates that the contributions by shareholders and creditors should be reasonable in light of the expected losses in case of insolvency. This means that the contributions should be at least as high as the amount of the aid.[73] Option 2 is more comprehensive, requiring first that all past losses be borne by shareholders and, only if this is not enough, contributions by subordinated creditors be demanded. The Commission will not, however, require a contribution of senior debt holders (in particular, holders of bonds). Here the contributions should be at least 50% of the restructuring costs.[74] Both are stricter than the Current R&R guidelines which differentiate between minimum own contributions for small (25%), medium (40%) and large (50%) beneficiaries.

5.4.New measures limiting distortion of competition

The compensatory measures of the 2004 guidelines have been replaced by a very detailed list

[73] 2013 Draft guidelines, paragraphs 64-65
[74] 2013 Draft guidelines, paragraphs 66-67

of measures that aim to strengthen the competition in the market. The list includes structural measures, behavioural measures and market opening measures that are aimed at promoting competitive and open markets.[75] But most importantly a set of assessment criteria are added for the Commission to enable them to assess the extent the measure can be to limit distortion of competition. First criteria are, the amount and the nature, and the circumstances under which the aid was granted. Secondly, it must check the characteristics of the market and the size and the relative importance of the undertaking receiving aid. And lastly, after applying the burden-sharing measures, to what extent the moral hazard concerns remain. [76]

5.5.Definition of "undertaking in difficulty"

A qualification as "undertakings in difficulty" is a precondition for receiving R&R aid. At the same time, being qualified as "undertaking in difficulty" leads to a prohibition from receiving other types of aid without a consideration of their viability prospects within the R&R guidelines. Therefore, a single definition should be set out in the R&R guidelines and apply to all State aid regulations and guidelines. The current definition of "undertaking in difficulty" namely, combines the so-called "hard" (objective) criteria and "soft" (subjective) criteria. The Draft guidelines make a transition from soft to hard criteria, in order to foster legal certainty and to make it easier for granting authorities and potential aid beneficiaries to determine whether an undertaking is in difficulty. Thus the soft criteria shall apply only by exception, whereas new hard criteria are introduced: the recipient's credit rating, debt-to-equity ratio and interest coverage ratio.

Under the current and the new regime, a company will be perceived to be "in difficulty" if, without state aid, it will go out of business in the short or medium term. The Current Guidelines state two possibilities for this. Firstly, if the loss of more than half of its capital, with more than a quarter being lost over the preceding 12 months. Secondly, if the company is eligible under its domestic law to be subject to collective insolvency proceedings. The Draft guidelines add that for a limited liability company, the first situation will happen when the deduction of accumulated losses from reserves leads to a negative result that exceeds half of the company's subscribed share capital.

However, the Draft guidelines include two further situations in which a company will be considered to be in difficulty, namely: if the company's credit rating by at least one

[75] 2013 Draft guidelines, paragraphs 79 –90
[76] 2013 Draft guidelines, paragraphs 90- 98

registered credit rating agency is equivalent to CCC+ or below and in case the company's book debt-to-equity ratio is greater than 7.5 and/or its EBIT or EBITDA interest coverage ratio has been below 1.0 for the past two years. An undertaking that does not fall under any of those situations will be qualified as a company "in difficulty" only in exceptional cases. This change significantly raises the bar for being granted aid under the Draft guidelines.

Indeed, it is evident from the Draft guidelines that the Commission has significantly *fine-tuned* its approach to the assessment of state aid and has set *stricter* rules for its grant. For instance, the key condition for eligibility to receive rescue aid, restructuring aid and temporary restructuring support is *tightened* in the proposed R&R guidelines – if a company does not fulfil the list of requirements for an "undertaking in difficulty", it will be considered as such only in exceptional cases.[77]

A perceived weak point of the current R&R regime is that aid is not always targeted at cases with real public interest involved. In the Draft guidelines, an attempt is made to *solve* this problem in 2 ways. Firstly, by setting stricter conditions for the grant of aid, which is reflected in the revised definition of undertaking in difficulty. And secondly, by introducing seven criteria for compatibility of the aid with the internal market, one of which requires the aid granting authority to justify the aid by demonstrating that the failure of the beneficiary would bring about social hardship or severe market failure. [78] Also with regard to the new concept of burden sharing, both proposed options considerably *tighten* the rules regarding the contribution to be made by shareholders. Consequently, the adoption of the Draft R&R guidelines is meant to significantly *change* the EU rules applicable to state aid for undertakings in difficulty outside the financial services, coal and steel sectors. The Commission will be accorded more power in deciding whether, and on what conditions, EU Member States can grant this type of aid.[79]

However, there might be some downsides to it, which is why an invitation for consultation lasting from 05.11.2013 to 31.12.2013 was launched. Institutions, public authorities (Member States, regions, cities and municipalities), citizens, companies and organisations were welcome to contribute to the consultation by submitting comments on the Draft guidelines**.** As a result, the Directorate-General for Competition of the Commission

[77] Sullivan & Cromwell LLP 2013
[78] Sullivan & Cromwell LLP 2013
[79] Sullivan & Cromwell LLP 2013

received 20 replies by Member States, 11 replies by registered organisations and 12 replies by non-registered organisations.[80]

One of the MS with the most reservations was Germany. It expressed its concerns about the new hard criteria in the definition of an undertaking in difficulty, the higher requirements for compatibility assessment, especially from the viewpoint of SMEs, and the short time-period for the temporary restructuring aid. In sum, the most contentious issues were the revised definition of "undertaking in difficulty", the period of time for temporary restructuring aid, the new concept of burden sharing, and the new tests for compatibility of the aid with the internal market.

Hereinafter follows a comprehensive description, in numerical order of provisions, of the most important issues raised during the consultation.[81]

Paragraph 13 – duration of temporary restructuring support

§13 stipulates that the duration of the temporary restructuring aid would be 12 or 18 months. However, some Member States, one of which Germany, believe this period is too short to achieve the goals enshrined in this new type of aid and insist on a longer period of time, for instance 30 months.

Paragraph 21 – definition of "undertaking in difficulty"

The current definition of "undertaking in difficulty" combines the so-called "hard" (objective) criteria and "soft" (subjective) criteria. The Draft guidelines make a transition from soft to hard criteria, in order to foster legal certainty and to make it easier for granting authorities and potential aid beneficiaries to determine whether an undertaking is in difficulty. Thus the soft criteria shall apply only by exception, whereas new hard criteria are introduced. [82]

However, this transition and the new criteria itself provoked a lot of criticism among Member States and organizations. On one hand, some fear that the strict use of hard criteria only will prevent viable undertakings from receiving aid and might have a negative impact on the access to financial resources for SMEs. Finland for instance believes that this will result in a very rigid framework for R&R aid. Therefore, it proposed to increase the flexibility of

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[80] European Commission 2013

[81] All arguments derived from the consultations can be found at: http://ec.europa.eu/competition/consultations/2013_state_aid_rescue_restructuring/index_en.html

[82] Explanatory note

hard criteria and to allow soft criteria in exceptional cases after prior notification and approval by the Commission. On the other hand, some countries such as the UK perceive the definition of "undertaking in difficulty" as too broad. In this respect, Finland suggested to exclude micro-companies from the definition due to the fact that aid for them has limited effect on competition but have the biggest potential for growth locally. In addition, concerns were raised that the definition does not reflect properly the economic reality, as it contains alternative criteria, whereas a single indicator does not suffice to determine if an undertaking is ailing. The combined use of several indicators is considered more appropriate.[83]

The following observations are made, when examining the different criteria in §21.

A. §21(a) and (b) may be problematic when taken as individual criteria because micro-enterprises with small share capital may easily fulfil their requirements. Moreover the loss of share capital may be a temporary occurrence and should not result in the qualification of the company as one in difficulty. §21 (a) & (b) are also criticized for being impracticable as they are impossible to apply in some countries. For example, Irish legislation allows incorporation of a company with a nominal subscribed capital of 2 EUR. Of course, this is not indicative of the solvency of the undertaking.

Moreover, §21 (a) & (b) do not state a time period in which they should be satisfied. There is a real danger that Member States will interpret and apply the aforementioned criteria differently towards companies in a similar situation. For the sake of legal uncertainty, Finland and Comper Partnership (Poland) propose to set a time limit of two years as it is in §21 (e)(2). Germany is even less content with those two provisions and prefers to keep them in their current version, with the requirement of loss of more than ¼ of capital over the previous 12 months.

B. §21(c) was pointed out during the consultation as the only appropriate criteria for assessing if a company is in difficulty, when it comes to RDI activities of SMEs operating less than five years or tax aid. Thus the proposal was made to apply it exclusively in those cases.[84]

[83] Remark by Business Europe, Belgium
[84] Remark by Finland

C. §21(d) is one of the most problematic provisions in the Draft guidelines. Its wording causes dispute as to its optional or mandatory nature - it is unclear if it only applies when a rating is existent or if in any case a rating has to be provided. If the second scenario is correct, then this will lead to immense difficulties in countries with less developed financial institution infrastructure. For instance, Ireland and the European Association of Public Banks (Belgium) reminded that many companies (even large ones) are not rated by a registered credit rating agency and very few SMEs are so rated. If the lack of rating would lead to qualification as undertaking in difficulty, this would also mean the company would not be eligible for financing for economically sound companies and will force many sound companies to provide for rating. Hence, the rating by registered credit rating agency should not be made obligatory if the company does not have one at the moment. Both Ireland and Croatia think it is reasonable to apply **§21(d)** solely to large companies. Croatia proposes different variants: to remove the provision, to exempt SMEs or at least micro and small companies from its scope or to authorize commercial banks to do credit assessment. Germany prefers another category for the rating - CCC instead of CCC+.

D. §21(e) has its strengths and weaknesses as well. §21(e)(1) is very controversial. It is said to be useless in countries like Ireland with companies with a nominal subscribed capital of 2 EUR. The book debt to equity ratio also depends on many factors: business sector, risk-involvement, market competition and the season. Most of all, it is not a significant indication for the performance of a company.[85]

§21(e)(2) concerns the interest coverage ratio which is also not indicative of the performance of a company. BusinessEurope (Belgium) gives example with difficulty in servicing a loan for a period of 2 years – it does not necessarily mean the undertaking needs R&R aid. §21(e)(2) includes the EBITDA interest coverage ratio which is better than using EBIT as it is related more to the cash flow indicators. It would also allow for uniform application of the definition in all Member States because the depreciations taken into account in EBIT may vary from one MS to another. However, using EBIDTA will be inconsistent with the definition in the new project for de minimis Regulation, as Comper Partnership (Poland) pointed out. Moreover, the verification of EBIT and EBITDA requires to issue a financial report which will be an additional burden for small entrepreneurs in countries with no

[85] Remark by Germany

mandatory financial reporting. The European Association of Public Banks (Belgium) states this would be a violation of main principles in the EU Small Business Act.

Finland believes that the cumulative application of §21(e)(1) and (2) would present a more adequate picture of the financial situation of a company, especially if the time span for *both* indicators would be 2 years. This would mitigate the effect of temporary changes in the financial situation of a company. UK also supports the combined use of §21 (e) (1) & (2) and only if it is cumulative with either §21 (a) or (b). Denmark dislikes the too general wording of the aforementioned provisions and calls for a case-by-case approach, so does BusinessEurope (Belgium).

Germany proposes the abolition of the entire §21 (e) as its statistics show that if the provision is to be retained, 35% of German SMEs will be considered as undertakings in difficulty, in East Germany and Berlin the numbers would reach even 60 to 70%. UK also fears the effect of §21 (e) on SMEs as many of them would fall under §21 (e) (1) without being in difficulty, nevertheless they would be denied financing for sound undertakings.

Possible solution to this problem would be to exempt SMEs or at least micro and small entrepreneurs from the scope of §21(e), as Croatia and Ireland suggested. Another possibility would be to differentiate the indicators for SMEs from those for large companies, since an equity ratio of "greater than 7.5" is not appropriate for SMEs.

Paragraph 23 – safe harbour for SMEs

§23(b) provides for a 3-year-safe harbour period for new SMEs in which they will not be considered to be in difficulty for the purpose of other EU regulations. However, this might prove to be contrary to EU policy towards SMEs due to the short period of the safe harbour. It means that a company which has not become profitable for the first 3 years could not be financed under the General Block Exemption Regulation, for instance, as Finland pointed out.

Paragraph 45 and 46 – demonstration of social hardship

With regard to the new tests for compatibility with the internal market and in particular the demonstration of social hardship by Member States of §45(a), Germany disapproves of the increased requirements. It demanded the inclusion of regions with lower unemployment rate in the list or the complete abolition of §45 (a) due to the fact that the unemployment rate in a certain region does not depend on a single company. Germany also disapproves of the requirement for proving social hardship in cases of aid to SMEs set out in §46.

Paragraph 64-67 – burden sharing

As to burden sharing, Germany prefers Option 1 which it perceives as more flexible, with one important remark: for SMEs Germany would like to keep the current burden sharing which is lower (25-40%). Similarly, Croatia suggests that SMEs would contribute to 25% of the restructuring costs. By contrast, Denmark and Finland prefer Option 2 for burden sharing. Finland, however, wants to exclude from its scope companies active in the agricultural sector. The rationale behind it is the fact that farmers usually have invested their whole wealth in the farm and cannot attract investors very easily. Therefore, the draft should include the exceptions for the agricultural sector in Chapter 5 of the current Guidelines.

6. Comparative Analysis: US v EU

For the purpose of having a basic understanding of the different approaches to help undertakings in difficulties a short comparative analysis between the United States and the European Union is provided in this chapter.

Worldwide corporate debt problems emerged as a consequence of the global economic crisis. Governments tried to help many deteriorating companies by giving them rescue aid, which led to direct fiscal costs and the increase risk of moral hazard. Many recovery strategies drafted by the ailing corporations in and outside the US included as one of their aims the resolution of corporate debt. The link between the recovery of financial system and the corporate debt has been acknowledged by governments of different states, which tried to help in resolving the problem of corporate debt.[86] The level up to which these governments got involved differed from country to country, depending on the scope and type of the debt in a given country and the nature of the corporations involved. Because this governmental involvement can be in any case regarded as a public intervention, it triggered a wave of questions about the benefits and costs of such intervention.[87]

Restructuring of the corporate debt in the US aims at restoring operation and financial viability of the corporation. When the corporate debt problems are only small-scale, there is not much of a rationale for government to get involved. This is different when the debt

[86] Grigorian & Raei 2013, p.1
[87] Grigorian & Raei 2013, p.3

problems are widespread, because they can have massive consequences and in this instance the government involvement requires an appropriate method for solving the problems. When it is accepted that the involvement of government is necessary, this involvement needs to be precisely defined and the benefits must be balanced against the costs.[88] There are different ways of involvement in the process for the government; these include: providing legal basis such as insolvency law; offering mediation services and trying to resolve the issue out of the court, especially in cases where the debtors or creditors have excessive negotiating power and a presence of an independent third party is necessary; granting direct financial assistance, e.g. when there is a risk of enormous negative effects on the overall economy; and helping the companies with the actual restructuring. Drafting the strategy that aims at restructuring of the corporate debt is a case-by-case complex procedure in which regard needs to be paid to various factors, depending on the country in which the strategy is to be implemented.[89]

An example of how the debt restructuring took place in the US is offered in the automotive industry, where the aid granted in this case included a bailout of large firms. In November 2008, General Motors, Ford and Chrysler asked the US government for financial aid in order to avoid bankruptcy.[90] Congress initially refused, basing their refusal on the back that these Big-3 brought this fate on themselves. This was followed by an examination by the Congress of the potential effects of the aid, if granted, on the companies. President Bush ultimately agreed to the bailout, which actually took place 5 years later. More than two-third of the aid has been already recovered, and the aid proved to be beneficial as it created many jobs.[91]

Moreover, in 2009 the US Treasury undertook the task to create the so-called Automotive Industry Financial Program, whose goal was to ensure that the automotive industry in the US would not be significantly disrupted, because this would eventually endanger the stability of the financial market and the economy in the US in general.[92] The reason why the automotive companies were granted the aid is that they were 'too big to fail'– in number, they accounted for roughly 50% sales in the US and provided an employment for enormous amount of people. If these were left to go bankrupt, it would ruin the automotive industry and the economy in the country. These companies were given an aid by means of the

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[88] Ibid
[89]Grigorian & Raei 2013, p.4
[90] Stoll, Dolan, McCracken & Mitchell 2008, p.1
[91] U.S. department of the treasury, 2014
[92] Reuters 2009

Troubled Assets Relief Program (TARP), but up to this day it is not certain whether the 'investments' by the US government in these companies will be divested.[93]

Besides the apparent structural differences between the US and the EU, there are also similarities and other differences. The main difference is that the US does not seem to have main guidelines such as the R&R guidelines from the Commission in the EU. The objective and aim of restructuring of the corporate debt in the US is nevertheless very similar to the R&R in the EU as both aim at restoring the viability of an ailing undertaking. The US system refers to the fact that small-scale corporate debts do not justify the government to interfere, which can be compared to the concept of "undertaking in difficulties" of the R&R guidelines. The guidelines namely state a set of criteria to which the undertakings must comply to be able to fall under this concept, which essentially also means that the difficulties the undertaking faces are of such magnitude that it will be unable to save itself without the help of the State. It therefore, cannot be a small-scale debt.

The reasoning as to why the government should interfere in the automotive industry is explained as the prevention of having unwanted consequence that will affect the financial stability of the market and the economy of the US. One of these being the danger of massive unemployment caused if this industry would at one point fail. Here some differences and similarities can be found with respect to the R&R guidelines. First of all, the US has chosen a specific industry, which is similar to some aspects of the guidelines where certain industries are not included for several reasons. However the R&R guidelines differ, as they evidently cover many more industries. The reason of establishing the different documents also differs, as the US tried to prevent the negative impact on the economy by the lack of aid, the EU on the other hand established the R&R guidelines in order to prevent States to help their undertakings too easily and prevent them to disrupt the competition and the internal market. However, there is one similarity, which is that in both systems one of the reasons the aid is allowed is to prevent massive unemployment as a consequence of the ailing undertakings closing down.

Upon agreement of the involvement of the US government, the involvement is said to be precisely defined and that the benefits must be balanced against the costs. This is the same for the R&R guidelines, where the benefits must also be balanced against the costs. One may not outweigh the other.

[93] Grigorian & Raei 2013, p.13

As to the form of aid, in the US both financial aid and restructuring aid are provided however there is also a measure that is not mentioned in the R&R guidelines, which is the mediation services that are offered to resolve issues. The EU has financial aid (rescue aid) as well as restructuring aid for which it is said in paragraph 58 of the draft guidelines that the Member States are free to choose the form as long as it is appropriate to the issue it is supposed to address.

All in all, it can be concluded that there is not much difference when a closer look is given. It can be said that the main difference is that the EU has a more comprehensive guideline which sets out much more specific principles. Whether the US should take note from us is a question to which no concrete answer can be given, as the structural difference plays a great role.

6. Conclusion

The clear overview given of the R&R guidelines of the past decade shows how the guideline has evolved and is becoming more comprehensive and is constantly adjusted to clarify the concepts, which had remained unclear in the previous guideline. Interestingly, the economic crisis and changes in the economy are reflected in the changes over the years. It can be concluded that the Commission has surely taken some propositions into consideration to further develop the guidelines but has also made their own adjustments.

One of the main changes, which was also proposed during the 2004 guidelines, was the clarification of "undertakings in difficulties". This should have been clarified a long time ago, however the comments of member states and organisations on the changes in the 2013 draft guidelines is a clear example as to why it might have taken such a long time to adjust. It is a very difficult concept to define and has to take many circumstances into account. According to Dr. V. Verouden[94] the draft will be adopted with some adjustments in either September or October, and with respect to this concept it will follow the advice of many comments recently made and make the extra requirements in §21 cumulative, and will also include both soft and hard criteria.

The draft guidelines have also given much more attention to the SMEs, including the newly integrated temporary restructuring support. Moreover, the reasonable period of time to

[94] Deputy Chief Economist, European Commission, DG Competition

attain viability has been clarified in paragraph 49. As well as the public policy objectives, as there are stricter conditions that have to be met to ensure there is a real public interest involved. Another change that is very welcomed to see is the change in compensatory measures, which are now replaced by a set of limited measures. These also comprise a set of criteria for the assessment of the Commission, to ensure the measures taken are appropriate.

The comparison with the US gave insight as to how different systems essentially have the same aims and even though not everything is similar, the approaches can be compared. It might also be concluded that the EU has a more comprehensive guideline as the structure of the EU demands it to have such a guideline in place in order to prevent the distortion of competition by States that want to benefit their own undertakings and economy.

The 2013 draft guidelines have introduced new changes and received quite a bit of criticism but with the information of Dr. V. Verouden about the changes in the 2014 guidelines, we remain positive and curious for the adoption of the 2014 guidelines later this year.

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