Competition Policy in the Framework and Application of State Aid in the Banking Sector

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The Crisis Communications provided for an extensive framework under which the Commission analyzed state aid to banks in the context of the financial crisis. All State aid decisions were built on three pillars: viability, burden sharing and competition. In order to minimize distortions of competition, the Commission imposed significant structural and behavioral measures. The reasoning of the Commission's decisions in the Dutch banking sector shows that the rationale behind several measures was to sanction risk taking and mismanagement, and to restructure the banking sector as a whole. Furthermore, the imposition of behavioral measures, in particular price leadership prohibitions designed to minimize distortions of competition, paradoxically appear to have further distorted competition in the Dutch banking sector. All in all, the overall lack of a sophisticated economic assessment of the measures imposed by the Commission raises serious doubts regarding the suitability and proportionality of the unprecedented State aid decisions during the financial crisis.

Keywords: Crisis Communications; competition law; competition policy; State aid; SRM; BRRD; banking sector; financial crisis

I. Introduction

During the financial crisis, national governments across Europe provided significant financial support to banks that were considered too big, too interconnected or too important to be allowed to fail.[1] The main objective of the bailouts was to prevent significant contagion effects in the event of the failure of one or more systematically important banks,[2] as the consequences of a disorderly failure would greatly outweigh the costs of avoiding the failure.[3] Whilst financial stability was considered the overarching objective, the Commission also sought to ensure that distortions of competition resulting from the State aid were kept to a minimum.[4]

In the absence of a dedicated crisis management mechanism at EU-level, state aid control was the only EU-level coordination tool for bank rescue and restruc-

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1 Since the beginning of the financial crisis, the EU Member States have provided €671 billion in capital and repayable loans and €1,288 billion in guarantees to financial institutions in distress. Between 2007 and 2014, The European Commission's DG Competition has taken over 450 State aid decisions, determining the restructuring or orderly resolution of 112 European Banks. G Adamczyk and B Windisch, 'State aid to European banks: returning to viability' (2015) 1 *Competition State Aid Brief*, available via <http://ec.europa.eu/competition/publications/csb/csb2015_001_en.pdf> accessed 7 April 2015.

2 European Commission, Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 216, 30.7.2013), 1.

3 Financial Stability Board, 'Reducing the moral hazard posed by systematically important financial institutions' (FSB Recommendation, 20 October 2010); B Bernanke, 'Causes of the Recent Financial and Economic Crisis' (Testimony before the Financial Crisis Inquiry Commission, Washington, D.C., 2 September 2010); E Adler, J Kavanagh, A Ugryumov, 'State Aid to Banks in the Financial Crisis: the Past and the Future' (2010) 1(1) Journal of European Competition Law & Practice 66.

4 *European Commission, Communication* (n 2), 1 [2].

turing.[5] The need for coordinated action beyond the approval of the State aid was recognized at an early stage.[6] Therefore, on 7 October 2008 the ECOFIN Council agreed that while public intervention was to be decided on at national level, decisions would have to fall within a coordinated framework and on the basis of a number of EU common principles.[7] Considering the lack of a designated crisis management mechanism at EU-level, state aid control became the central coordination tool for bank rescue and restructuring.[8]

In order to facilitate and clarify the application of the State aid rules in favor of bank rescue and restructuring, the Commission adopted a set of exceptional State aid rules for the financial sector, namely the Crisis Communications.[9] The Crisis Communications provided the conditions under which State aid can be granted and under which aid is found to be compatible with the internal market in light of State aid principles set out in the Treaties.[10] In order to ensure that distortions of competition were kept to a minimum, the Commission imposed structural measures, such as divestures and behavioral measures, often taking the form of price leadership prohibitions, under which banks were prohibited from undercutting their competitors.[11] As a result, the State aid measures have had a significant impact on competition in the financial sector.

The EU has recently adopted several legislative reforms that have brought about increased centralization of the resolution framework for bank failures. In particular, the Single Resolution Mechanism (SRM) has established a Single Resolution Board, responsible for the resolution of failing financial institutions in the Eurozone,[12] while the proposed Bank Recovery and Resolution Directive (BRRD) provides for harmonized tools necessary for orderly bank resolutions are available in all EU Member States.[13] The State aid framework will, however, remain relevant under the new resolution mechanisms as the State aid rules will continue to apply where there is recourse to public funds.[14] Although the resolution mechanisms are construed with the objective that resolution costs would first have to be borne by shareholders and creditors, recourse to public funds remains necessary where

5 See for instance, J Almunia, 'Competition policy for the post-crisis era' (Speech/12/249, Lewis Bernstein memorial lecture, Washington D.C., 30 March 2012).

6 According to Joaquín Almunia, former Commissioner for Competition: "It was clear that these responses needed to be harmonised at European level, otherwise the tensions between the different national banking systems would quickly compromise the integrity of the Single Market. And because this is one the pillars of the EU, the very survival of the European project was at stake." J Almunia, 'Banks in distress and Europe's competition regime: On the road to the Banking Union' (Speech/13/750, Peterson Institute for International Economics, Washington D.C., 25 September 2013).

7 The ECOFIN Council committed "to take all necessary measures to enhance the soundness and stability of the banking system in order to restore confidence and the proper functioning of the financial sector." See also 2008 Banking Communication, paragraph 3, Council of the European Union, 'Immediate responses to financial turmoil' (Ecofin Council Conclusions 13930/08 (284), Luxembourg, 7 October 2008).

8 This is stressed as well by *J Almunia* (n 6).

9 European Commission, Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('2008 Banking Communication') (OJ C 270, 25.10.2008), 8; now replaced by Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 216, 30.7.2013), 1, ('2013 Banking Communication'); Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('Recapitalisation Communication') (OJ C 10, 15.1.2009), 2; Communication from the Commission on the treatment of impaired assets in the Community financial sector ('Impaired Assets Communication') (OJ C 72, 26.3.2009), 1; Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ('Restructuring Communication') (OJ C 195, 19.8.2009), 9; Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2010 Prolongation Communication') (OJ C 329, 7.12.2010), 7 and Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2011 Prolongation Communication') (OJ C 356, 6.12.2011), 7.

10 2013 Banking Communication [2].

11 J Almunia, 'Restructuring the banking sector in the EU: A State aid perspective' (Speech/12/481, Conference on State Aid in the Banking Market, Frankfurt am Main, 21 June 2012).

12 The Single Resolution Board will have broad powers to analyze and define the resolution plan. Regulation 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L225, 30.07.2014), 1.

13 The Bank Recovery and Resolution Directive (BRRD) ensures that harmonized tools necessary for orderly bank resolutions for the whole European Union. The BRRD includes rules on early interventions, bailing-ins and the creation of bridge banks. While the BRRD harmonizes the resolution rules, it does not establish a central resolution authority, and will continue to rely on a network of national authorities and resolution funds to resolve banks. Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014), 190.

14 The State aid rules will be applicable by analogy where there is recourse to a public fund, such as the Single Bank Resolution Fund. See *inter alia* Recital 30, 57, 75; Articles 3(29); 18(4)(9); 19 of the SRM Regulation; and *inter alia* Recital 41, 47, 55, 57, 69; Articles 2(28)(53); 32(4); 34(3); 37(10); 38(2); 39(2) BRRD.

burden-sharing alone cannot ensure viability, where the resolution fund is insufficiently capitalized, or where burden sharing would risk contagion in the wider banking sector.[15] Furthermore, the Commission's State aid framework has had a significant influence on the structuring of the SRM and BRRD, and the experiences with the Commission's State aid practice to likely to have an important impact on subsequent practice under the new resolution mechanisms.

This article will analyze the role of competition policy in the Crisis Communications and the effects of the application of State aid policy on competition in the Dutch banking sector.[16] An increased understanding of the framework and the effects of State aid policy in the banking sector, particularly focusing on structural and behavioral restrictions, will contribute to better resolution decisions in the future. The conclusions in this article will therefore in particular be relevant for future applications of the State aid rules in the banking sector, and future practice under the SRM and BRRD.

The article is divided into two sections. Part I will provide a systematic and comprehensive framework of the role of competition policy in the Crisis Communications. The first part will predominantly use a black letter methodology in order to provide a systemized and coherent framework of the provisions on competition contained in the various Crisis Communications.

Part II will provide a critical analysis of the role of competition policy in the application of State aid rules in the Dutch banking sector. To this end, the decisions on State aid in favor of ABN AMRO, ING, AEGON and SNS REAAL, and the Netherlands Competition Authority will be critically analyzed. The second part uses an empirical legal approach, offering a critical analysis of the relevant decisions in the Dutch banking sector. A law and economics methodology will be used where relevant, in particular where determining the effects of the State aid decisions in the Dutch banking sector.

II. Competition Policy in the Crisis Communications (Part I)

1. Legal Framework

The financial crisis forced Member States to grant State aid to banks at an unprecedented scale. Without a dedicated resolution mechanism at EU-Level to ensure a consistent approach to bank rescue, crisis management and resolution tools remained a task of the individual Member States. The financial support of governments to financial institutions, however, triggered the State aid provisions. By means of the State aid provisions, the Commission was able to closely monitor the interventions of governments across the EU. Pursuant Article 107 TFEU:

> *"Save as otherwise provided in the Treaties, any aid granted by a Member State through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

Under Article 107(3)(b) TFEU, State aid may nevertheless be declared compatible with the internal market if it is necessary "to remedy a serious disturbance in the economy of a Member State." Perhaps unaware of the severity of the Crisis to come, the Commission initially rejected submissions that the aid was necessary to remedy a serious disturbance in the economy of a Member State.[17] Instead, the Commission considered that the problems were the re-

15 The total target size of the Single Bank Resolution Fund will equal a mere 1% of the covered deposits of all banks in Member States participating in the Banking Union. In absolute terms the SRF would reach around 55 EUR billion. Meanwhile, Eurozone banks hold an aggregate balance sheet total of over 30,000 EUR billion, over three times the Eurozone GDP. During the period of October 2008 – October 2011, the Commission approved €4.5 trillion in state aid measures to financial institutions, of which €1.6 trillion was used. See European Commission, 'Proposal for a Single Resolution Mechanism for the Banking Union – frequently asked questions' (MEMO/13/675, Brussels, 10 July 2013); ECB, 'Aggregated balance sheet of the euro area MFIs' (Monthly Bulletin, 28 May 2014) Available via <http://sdw.ecb.europa.eu/reports.do?node=100000137> accessed on 7 April 2015; IMF, 'European Union: Publication of Financial Sector Assessment Program Documentation - Technical Note on Progress with Bank Restructuring and Resolution in Europe' (IMF country Report No. 13/67, March 2013); European Commission, 'State aid: Crisis-related aid aside, Scoreboard shows continued trend towards less and better targeted aid' (IP/12/1444, Brussels, 21 December 2012).

16 Competition policy can be defined as policy allowing the development of a regulatory framework within which authorities can maintain or encourage competition. Derived from M Cini and L McGowan, *Competition Policy in the European Union*, (Second edition; Palgrave, 2009), 2-3.

17 Commission Decision in Case C-9/2008 Sachsen LB (OJ L104, 24.04.2009), 34; Commission Decision in Case C-10/2008 IKB (OJ L 278, 23.10.2009), 32; Commission Decision in Case NN 70/07, Northern Rock (OJ C 43, 16.2.2008), 1).

sult of idiosyncratic flaws in the business models, and thus applied the standard approach under Article 107(3)(c) the Rescue and Restructuring Guidelines.[18]

The Commission soon changed its position in October 2008, when it adopted the 2008 Banking Communication, in which the Commission recognized that given the scale of the crisis, the high degree of integration and interdependence of European financial markets, and the drastic repercussions of the potential failure of a systemically relevant financial institution further exacerbating the crisis, Member States might consider it necessary to adopt appropriate measures to safeguard the stability of the financial system.[19] To this end, the Commission has adopted six communications (the 'Crisis Communications') that provide guidance on the criteria for the compatibility of State aid with the internal market pursuant to Article 107(3)(b) TFEU for the financial sector during the financial crisis.[20]

The Crisis Communications provide a framework for coordinated action in support of the financial sector in order to ensure financial stability, while minimizing distortions of competition between banks and across Member States in the internal market.[21] To this end, the Communications provide the conditions under which State aid can be granted and be found to be compatible with the internal market in light of State aid principles set out in the Treaties.[22] The Crisis Communications are for a large part derived from the Rescue and Restructuring Guidelines, but sets out more detailed provisions reflecting the systemic risks addressed.[23]

The European Court of Justice has held that Article 107(3)(b) TFEU should be applied restrictively, so that the economic disturbance should affect the entire Member State and not just be of a regional dimension.[24] The Commission revisited the appropriateness of Article 107(3)(b) TFEU as the legal basis of its state aid decisions in the financial market in the 2013 Banking Communication. In that Communication the Commission concluded that given the "circumstances of persisting stress in financial markets and given the risk of wider negative spill-over effects, the requirements for the application of Article 107(3)(b) continue to be fulfilled. The application of that derogation remains, however, possible only as long as the crisis situation persists, creating genuinely exceptional circumstances where financial stability at large is at risk."[25]

The 2013 Banking Communication furthermore sought to ensure a smooth transition to the new resolution regimes.[26] The Communication converges State aid policy with the new resolution mechanisms by placing a stronger emphasis on burden sharing for banks in receipt of State aid. The 2013 Banking Communication raised the minimum requirements for burden-sharing on an EU level, and requires bail-ins before public support can be granted, ensuring the level playing field which State aid control aims to protect.[27] As some Member States had begun to introduce stricter burden sharing requirements, going beyond the minimum requirements under the State aid rules, the revised Banking Communication ensured that regulatory competition between Member States was kept to a minimum.[28]

The necessity of remedying competitive distortions resulting from the state aid is one of the main objectives outlined in the Crisis Communications. However, the Communications only sporadically discuss the application of measures imposed to minimize such negative externalities. The following section seeks to consolidate the provisions under which conditions the Commission is able to impose restric-

18 For a further discussion of the development of state aid control in the financial crisis see C Ahlborn and D Piccinin, 'The Application of the Principles of Restructuring Aid to Banks during the Financial Crisis' (2010) 1 European State Aid Law Quarterly 47, 50 or C Ahlborn and D Piccinin, 'The Great Recession and other mishaps: the Commission's policy of restructuring aid in a time of crisis' in Erika Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar, 2011), 138.

19 2008 Banking Communication, [4].

20 *Supra* n 9; N.B. Unlike regulations or directives, the Crisis Communications did not go through any legislative process.

21 2013 Banking Communication, [2]

22 2013 Banking Communication, [2]

23 S Gebski, 'Competition First? Application of State Aid Rules in the Banking Sector' (2009) 6(1) Competition Law Review 89.

24 Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG* v *Commission* [1999] ECR II-3663, [167]; confirmed on appeal in Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and others* v *Commission* [2003] ECR I-10023, [98].

25 2013 Banking Communication, [6].

26 2013 Banking Communication, [13].

27 2013 Banking Communication, [18].

28 "Such differences in the approach to burden-sharing between Member States have led to divergent funding costs between banks depending on the perceived likelihood of a bail-in as a function of a Member State's fiscal strength. They pose a threat to the integrity of the single market and risk undermining the level playing field which State aid controls aims to protect." see *ibid.*

tions on beneficiary banks in order to remedy competitive distortions.[29]

2. Overarching Objective

The overarching objective for the Commission has been to maintain financial stability, whilst ensuring that State aid and distortions of competition between banks and across Member States are kept to a minimum.[30] As will be shown in further detail below, there is a balancing act between financial stability on the one hand, and competition concerns on the other.

In order to obtain approval from the European Commission, the banks must submit a restructuring plan to be approved by the Commission.[31] The overarching objective of State aid is reflected in the way restructuring plans are assessed. All aid measures are built on three pillars: Viability, Burden Sharing and Competition. While this pillar structure is set out most clearly in the Restructuring Communication, the framework also applies to recapitalization and impaired assets measures.[32]

The first requirement is that aid should lead to the restoration of viability of the firm in the longer term without State aid.[33] A restructuring plan must demonstrate how the bank will restore long-term viability without State aid as soon as possible. In the event the bank cannot be restored to viability, the bank must be "wound up in an orderly fashion", in other words, liquidated.[34]

The second pillar of burden sharing requires that aid should be limited to the minimum necessary, and that the capital holders and the aid beneficiary should provide an appropriate contribution to the restructuring costs from their own resources. Burden sharing (commonly referred to as bail-ins) ensures that rescued banks bear adequate responsibility for the consequences of their past behavior and creates appropriate incentives for future behavior.[35]

Thirdly, State aid inevitably distorts competition in the financial markets. While financial stability remains the overriding objective of State aid to the financial sector, safeguarding systemic stability in the short-term should not result in longer-term damage to the level playing field and competitive markets.[36] Competition as third pillar therefore requires that State aid measures must aim at preparing the beneficiary for return to long-term viability without State support, whilst ensuring a minimum distortion of competition.[37] However, while a conceptual division between issues of viability, burden sharing and competition may be clarifying, all pillars are in fact interrelated and cannot be evaluated separately from each other.

3. Competition Concerns

The first Crisis Communications distinguished between three types of distortions of competition: ensuring fair competition between banks, ensuring fair competition between Member States and ensuring a return to normal market functioning. A conceptual divide between ensuring fair competition between banks and ensuring a return to normal market functioning is difficult to make. The latest of the Commissions Communications, the 2013 Banking Communication, thus only distinguishes between two types of distortions of competition: competition between banks and across Member States.[38]

First, state aid may distort competition between banks, as grants an undue advantage to distressed or less-performing banks compared to banks that are fundamentally sound and better performing. This will distort competition on the market, distort incen-

29 Thus, the article will not go into detail on the notions of state resources, selectivity, economic advantage and effect on trade. For the application of these notions, see S Gebski, 'Competition First? Application of State Aid Rules in the Banking Sector' (2009) 6(1) Competition Law Review 89.

30 2013 Banking Communication, [7]; Restructuring Communication, [2].

31 The Commission approved of all rescue packages unconditionally and without amendments. However, it is generally assumed that the modalities were already the subject of consultation between the Commission and Member States before their notification and that the Commission exercised a restrictive influence. D Zimmer and M Blaschczok, 'The Role of Competition in European State Aid Control During the Financial Markets Crisis' (2011) 32(1) European Community Law Review 9, 13.

32 Impaired Assets Communication, [52].

33 Restructuring Communication, [5].

34 Restructuring Communication, [9].

35 Burden sharing thus contributes to the attainment of the objectives under the third pillar, as it reduces moral hazard and distortions of competition. Restructuring Communication, [22]; see also Impaired Assets, [21 and following].

36 Restructuring Communication, [29]; Impaired Assets Communication, [8].

37 See for instance Impaired Assets Communication, [48].

38 2013 Banking Communications, [2].

tives, increase moral hazard and weaken the overall competitiveness of European banks.[39] Moral hazard may reduce incentives to compete, as competitors will anticipate that irrespective of their success, they will not be able to drive competitors out of the market.[40] By reducing the rewards for success, and decreasing the costs of failure, State aid reduces incentives to compete.[41] Additionally, public intervention could risk crowding out market-based operations, having the effect of putting banks that do not have recourse to public funding, but seek capital on the market, in a significantly less competitive position.[42]

Second, national interventions tend to promote focus on the national markets. State aid to banks in one Member State should thus not give those banks an undue competitive advantage over banks in other Member States, [43] and the risk of a subsidy race between Member States, financial protectionism and a fragmentation of the internal market should be avoided.[44] Cheap access to capital in the absence of an appropriate risk-based justification may have a substantial impact on the competitive position in the wider single European market.[45] Aid measures are therefore assessed with a view to ensuring effective competition and preventing market power or entry barriers.[46] State aid policy thus allows the EU to minimize regulatory competition between Member States and to coordinate the internal market where deemed necessary.[47]

Any State aid has cumulative competitive effects on both distortions between banks and across Member States. [48] A balance must therefore be struck between these competition concerns and the objective of restoring financial stability. On the one hand, banks must have sufficiently favorable terms of access to capital in order to make the aid as effective as possible, and to ensure return to viability. On the other hand, the conditions tied to any measure should ensure a level playing field.

4. Limiting Distortions of Competition

The Communications provide that the Commission can impose measures in order to limit the distortion of competition. While the nature and form of such measures depends on the circumstances, the Communications seek to ensure common policy and principles. Measures can be categorized under structural or behavioral constraints. The specific design of the measures attached to State aid decisions are based on a proportionality assessment, taking into account: the amount, conditions and circumstances under which of the aid is granted, the market on which the beneficiary bank operates and its market position, the general soundness and the risk profile of the bank, and the nature and origin of the problems.[49] As was mentioned above, these rules continue to apply under the current SRM and BRRD where there is recourse to public funds.[50]

The measures vary depending on the amount of aid as well as the degree of burden sharing and the level of pricing.[51] The amount of State aid is assessed both in absolute terms and relative to the bank's assets. The Commission stresses that it will consider the total amount of aid granted, including any kind

39 Recapitalisation Communication, [9]; Restructuring Communication, [29]; Impaired Assets Communication, [9].

40 Moral hazard is furthermore detrimental to financial stability, as the anticipation that aid will be available should the need arise again at a later state may create perverse incentives to engage in excessive risk taking behavior, as banks will be able to reap the benefits of potential gains, yet will be shielded from the downside risks by means of State aid.

41 Restructuring Communication, [29]; Impaired Assets Communication, paragraph 9; C Ahlborn and D Piccinin, 'The Application of the Principles of Restructuring Aid to Banks during the Financial Crisis' (2010) 1 European State Aid Law Quarterly 47, 54.

42 Recapitalisation Communication, [10].

43 Recapitalisation Communication, [8].

44 Impaired Assets Communication, [16].

45 Recapitalisation Communication, [8].

46 Restructuring Communication, [29].

47 The adoption of the SSM, SRM and BRRD can be considered a continuation of the desire to limit distortions of competition. For instance, Article 1 of the SSM Regulation provides that the ECB was conferred with supervisory powers "with a view to preventing regulatory arbitrage."

48 Recapitalisation Communication, [11].

49 Restructuring Communication, [30]; Recapitalisation Communication, [38]; Impaired Assets Communication, [59].

50 The State aid rules will be applicable by analogy where there is recourse to a rescue fund, such as the Single Bank Resolution Fund. See *inter alia* Recital 30, 57, 75; Articles 3(29); 18(4)(9); 19 of the SRM Regulation; and *inter alia* Recital 41, 47, 55, 57, 69; Articles 2(28)(53); 32(4); 34(3); 37(10); 38(2); 39(2) BRRD.

51 Restructuring Communication, [31]; Impaired Assets Communication, paragraph 31; Previous research has shown inconsistency in the Commission policy in this regard, see F C Laprévote, 'Selected Issues Raised by Bank Restructuring Plans under EU State Aid Rules' (2012) 1 European State Aid Law Quarterly 93.

of rescue aid.[52] The beneficiary's own contribution and burden sharing will also be considered. Where the extent of burden sharing and own contribution is higher, the negative consequences resulting from moral hazard are less, thus reducing the need for further measures in the future.[53] Measures may furthermore depend on the risk profile of the bank, the nature and origin of the problems of the beneficiary bank and the soundness of the bank's business model and investment strategy.[54]

With regards to the market analysis, the Commission will analyze the likely effects of the aid on the market in which the beneficiary bank operates.[55] First of all, the size and the relative importance of the bank on its market or markets will be examined. The design of the measures will be tailored to the market characteristics, in particular concentration levels, capacity constraints, the level of profitability, barriers to entry and expansion. The examination of the market position will concern the post-restructuring situation. Therefore, if the bank is required to divest some of its operations, those markets will not be considered.[56] In case the bank has limited remaining market presence after restructuring, additional constraints are less likely to be needed. On the basis of the above assessment, two types of measures may be imposed: structural, and behavioral measures.

Structural measures require the beneficiary bank to divest or downsize subsidiaries or branches, portfolios of customers or business units or other such measures.[57] In order to increase competition in the internal market, such measures should favor entry of competitors and cross-border activity. The Commission is generally more likely to consider divestments necessary in markets with high entry barriers, in order to enable entry or expansion of competitors.[58] The Commission may also limit on the bank's expansion in some business or geographical areas. The beneficiary bank could thereby be prevented from growing in markets where it already has a strong position.

Behavioral standards seek to align the incentives of banks with those of public policy.[59] In particular, State aid must not be used to the detriment of competitors that do not enjoy similar public support.[60] Beneficiaries should therefore not use State aid for the acquisition of competing businesses.[61] State aid also cannot be used to offer terms that cannot be matched by competitors which are not in receipt of State aid. Although, in cases where such limitations could result in a reduction of effective competition, Member States could propose other more suitable measures.[62] Beneficiaries are often also prohibited from mass marketing State aid, as an advantage in competitive terms, and restrictions on dividend policy and caps on executive remuneration should be considered.[63]

III. Competition Policy in the Dutch Banking Sector (Part II)

1. Introduction

The Dutch banking sector is to a large extent dominated by three large banks: Rabobank, ING and ABN AMRO. During the financial crisis, two of the three largest banks, namely ABN AMRO and ING, as well as two smaller players: AEGON and SNS REAAL received aid from the Dutch state, whilst Rabobank remained self-reliant. This section will provide an analysis of the Commission Decisions in these four cases, as well as the investigation by the Netherlands Competition Authority (currently renamed to Authority Consumers and Markets), in the Dutch mortgage market. This section will focus in particular on the measures imposed in order to limit distortions of competition and the application of the State aid rules as a competition policy tool in the Dutch banking sector.

The analysis will thus not go into detail whether the aid measures granted by the Dutch Government constituted State aid under the Treaties. In all decisions, it was rather clear from the outset that the mea-

52 Restructuring Communication, [31]; Impaired Assets Communication, [31].

53 Restructuring Communication, [31].

54 Impaired Assets Communication, [17, 52].

55 Restructuring Communication, [32].

56 Restructuring Communication, [32].

57 Restructuring Communication, [35]; Impaired Assets Communication, [57].

58 Restructuring Communication, [35]; Impaired Assets Communication, [57].

59 Impaired Assets Communication, [9].

60 Restructuring Communication, [39].

61 Restructuring Communication, [39]; Impaired Assets Communication, [30].

62 Restructuring Communication, [44].

63 Impaired Assets Communication, [31].

sures did. The analysis will focus instead on the conditions the Commission imposed in order for the aid to be compatible with the internal market. The approach is therefore to analyze the decisions from a competition policy perspective.

2. ABN AMRO

In the spring of 2007, before the advent of the crisis, ABN AMRO Holding was in the process of being acquired by a consortium, of which the Dutch activities were to be purchased by the Fortis Group.[64] In October 2008, the difficulties in the Fortis Group necessitated the Dutch state to acquire the Dutch subsidiary of Fortis Group, Fortis Bank Nederland (FBN) and thereby indirectly acquire ABN AMRO.[65] Through a series of measures, including EUR 71.7 billion in funding and liquidity aid, [66] FBN and ABN AMRO came into the hands of the Dutch state, thereby cutting all the links between FBN and the liquidity-constrained Fortis Group.[67]

When the Fortis Group acquired ABN AMRO in 2007, the plan was to merge FBN with ABN AMRO. In the Merger proceedings, the Commission had concluded that a merger between ABN AMRO and FBN would lead to concentration problems in the Dutch banking market.[68] To remedy those concentration problems Fortis Group committed to sell several units.[69] FBN and ABN AMRO officially merged to form ABN AMRO Group on 1 July 2010.[70]

The Commission assessed under Article 107(3)(b) TFEU and the Crisis Communications whether the aid amounting to EUR 28 billion was well targeted and designed to avoid undue distortions of competition.[71] The measures were deemed well targeted, as FBN and ABN AMRO would have collapsed without the coordinated effort.[72] However, given the amount and scope of the aid and the consequent distortions of competition, the State aid could therefore only be declared compatible under conditions relating to viability, burden-sharing and limiting distortions of competition.

With regard to viability, the Commission concluded that the business model of FBN and ABN AMRO did not rely on excessive risk taking or unsustainable lending practices, but that they were left vulnerable as a consequence of the separation from their respective parent groups.[73] As FBN and ABN AMRO had already divested a number of businesses in the merger process,[74] and because there were no divisions with structural profitability problems, the Commission did not require further divestments to improve the viability of the company.

Burden sharing measures may be necessary to ensure that the rescued bank bears adequate reasonability for the consequences of their past behavior so as to create appropriate incentives for future behavior for themselves and others.[75] However, the Commission concluded that as ABN AMRO's problems were to a large extent linked to the former parent company Fortis Group, the Commission did not require further burden-sharing measures.[76]

With regards to measures to limit distortions of competition, the case presented some atypical features.[77] The difficulties resulted from excessive risk taken by the parent company, and FBN and ABN AMRO had not relied on excessive risk taking or unsustainable lending practices. The aid to FBN and ABN AMRO was therefore significantly less distortive than the aid approved in favor of financial institutions that had accumulated excessive risks.[78] The

64 The Consortium consisted of Royal Bank of Scotland, Banco Santander and Fortis Group. The arrangements of which were set out in the Consortium Shareholder Agreement (CSA). Commission Decision of 5 April 2011 on the Measures No C11/2009 (ex NN 53b/2008, NN 2/2010 and N 19/2010) implemented by the Dutch State for ABN AMRO Group NV, Brussels, C(2011)2114 final (Hereafter: ABN AMRO Decision).

65 ABN AMRO Decision, [1], It furthermore replaced the Belgian subsidiary of Fortis SA/NV as oblige in loans to FBN and granted FBN a short-term liquidity facility and agreed to indemnify Fortis SA/NV for costs and obligations which stemmed from the CSA.

66 ABN AMRO Decision, [280].

67 ABN AMRO Decision, [286].

68 ABN AMRO Decision, [43]; Commission Decision of 3 October 2007 in Case No M/4833 Fortis/ABN AMRO Assets, Brussels, SG-Greffe (2007) D/205893.

69 Including IFN, its factoring division, the commercial banking activities of New HBU, its global trust and corporate management division, Intertrust, and PFS, which provides fund services to the alternative asset management industry, see ABN AMRO Decision, [45, 73, 74].

70 ABN AMRO Decision, [44, 47, 68]. The Dutch transferred the management of its stake in ABN AMRO Z to the new ABN AMRO Bank.

71 ABN AMRO Decision, [285].

72 ABN AMRO Decision, [78, 286].

73 ABN AMRO Decision, [305].

74 Namely: New HBU and IFN in the Merger process as well as Intertrust and PFS. ABN AMRO Decision, [90, 72-74.

75 Restructuring Communication, [22]; ABN AMRO Decision, [316]

76 ABN AMRO Decision, [316]

77 ABN AMRO Decision, [317].

78 ABN AMRO Decision, [319-320].

Commission therefore decided that further structural measures were not necessary.

The Commission, however, did impose certain behavioral restrictions. Most significantly, the merged ABN AMRO Group could not be the price leader for standardized savings and mortgage products for three years.[79] This restriction ensured ABN AMRO group could not use State aid to grow at the expense of the competitors, which would weaken the incentives for non-beneficiaries to compete, invest and innovate and could undermine incentives for cross-border activities by discouraging entry in the Dutch market.[80] The Commission also imposed an acquisition ban and several other behavioral restrictions.[81]

The ABN AMRO decision illustrates that the Commission imposes structural measures, in particular divestments, as a punishment for risk-taking.[82] According to the Commission, structural divestments may be necessary to limit distortions of competition where the aid is in favor of a financial institution that accumulated excessive risks. From a viability perspective, structural measures, such as the divestment of risky business units, are understandable. It is, however, unconvincing that structural measures should be required under the heading of limiting distortions of competition, as measures such as forced divestments, reduction in business fields or limits to expansion have doubtful effects in terms of promoting competition.[83]

Moreover, even where structural measures could remedy distortions of competition, State aid may be equally distortive for banks that engaged in excessive risk taking and for those that did not. From the perspective of remedying distortions of competition, it thus remains unconvincing that structural measures, such as divestments would only be necessary where the bank engaged in excessive risk taking. Additionally, structural measures constitute a significant intervention both in entrepreneurial freedom and the structure of the market, while less intrusive interventions are available.[84] The imposition of such far reaching measures as a sanction for excessive risk taking therefore raises doubts concerning the suitable and proportionate of such measures, as will be seen in further detail below.[85]

3. ING

As of the end of 2008, ING Group consisted of more than 70 individual businesses operating in about 50 countries, with a balance sheet totaling EUR 1,332 billion, of which more than 75% was attributable to ING's banking activities.[86] Over the course of 2008

79 ABN AMRO Decision, [321, article 3 sub 1 and 4].

80 ABN AMRO Decision, [321],

81 ABN AMRO was prohibited from acquiring control of more than [0-7]% of any undertaking for three years (ABN AMRO Decision paragraph 321 article 5); the ABN AMRO Group was also prohibited from advertising the fact that it received State support (article 6); required to offer consumers of Private Banking NL the option to end their private banking relationship with them and to transfer their investment portfolios to another bank (article 7); prohibited from paying dividends (article 8); ordered to pay the Netherlands an adjusted interest rate (article 9) and required to report to the Commission its projections and actual figures for three years (article 4).

82 ABN AMRO Decision, [155, 305].

83 D Zimmer and M Blaschczok, 'The Role of Competition in European State Aid Control During the Financial Market Crisis' (2011) 32(1) European Competition Law Review 9, 12-14; C Ahlborn and D Piccinin, 'The Great Recession and other mishaps: the Commission's policy of restructuring aid in a time of crisis' in E Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar 2011); B Lyons, 'An Economic Assessment of European Commission Merger Control: 1958–2007' in X Vives (ed.), *'Competition Policy in the EU'* (Oxford University Press 2009); S Davies and B Lyons, *'Mergers and Merger Remedies in the EU: Assessing the consequences for competition'* (Edward Elgar 2007); In the context of Lloyds see Independent Commission on Banking, 'Interim report: Consultation on reform options' (April 2011, London), 9.

84 e.g. higher payments or temporary behavioral restraints.

85 *D Zimmer, M Blaschczok*, (n 83), 11; See to this effect the speech by N Kroes, 'Banks must reform and restructure' (Speech/09/306 at OECD Forum, Paris, 23 June 2009); See also S Bishop, 'The European Commission's Policy Towards State Aid: A Role for Rigorous Competitive Analysis' (1997) 18(2) European Competition Law Review 84; A Sutton, K Lannoo and C Napoli, 'Bank State Aid in the Financial Crisis: Fragmentation or Level Playing Field?' (Centre for European Policy Studies, 2010), 40; I Hasan and M Marinč, 'Should Competition Policy in Banking be Amended During the Crisis? Lessons from the EU' (2013) European Journal of Law and Economics 1, 25.

86 Commission Decision of 18 November 2009 on the State Aid No C 10/2009 (ex N 138/2009) implemented by the Netherlands for ING's Illiquid Assets Back-Up Facility and Restructuring Plan, Brussels, C(2009)9000 final corr. (Hereafter: ING 2009 Restructuring Decision) [12]; Commission Decision of 29 August 2012 on State Aid SA.28855 (ex N373/2009, ex C10/2009, ex N528/2008), The Netherlands, Amendment to the restructuring plan of ING, Brussels, C(2013) 7442 final (Hereafter: ING 2012 Restructuring Decision), [12];N.B. The 2009 Restructuring Decision was replaced with the 2012 Restructuring Decision after the Netherlands and ING brought an action for annulment to the General Court, which was partially honoured based on a lack of reasoning concerning the analysis of a small part of the aid granted in Joined Cases T-29/10 and T-33/10 *Netherlands and ING v Commission* [2012] ECR I-0000. The 2012 Restructuring Decision largely confirmed the assessment of the Commission in its 2009 Restructuring Decision. The catalogue of commitments of the 2012 Restructuring Decision was later replaced by the Amendment Decision Commission Decision of 16 November 2012 on State Aid SA.33305 (2012/C) and SA.29832 (2012/C) implemented by the Netherlands for ING, Brussels, C(2012) 8238 final (Hereafter: ING 2012 Amendment Decision).

and 2009 ING received EUR 17 billion in aid in the form of an emergency recapitalization measure, an impaired assets for a portfolio of US Alt-A residential mortgage backed securities and a Credit Guarantee scheme on medium-term liabilities.[87]

The Commission concluded that ING was a systematically relevant bank due to its significant lending activities in multiple regional markets, cross-border presence and integration and cooperation with other banks, ING's collapse would therefore have entailed serious consequences for the Dutch financial sector and the real economy.[88] The aid was thus to be assessed under Article 107(3)(b) of the Treaty.[89] In terms of the absolute and relative amount of State aid, ING received a significant amount, an in-depth restructuring was therefore necessary to ensure viability, burden-sharing and limiting distortions of competition.[90]

Regarding the return to viability and burden sharing, the Commission concluded that the restructuring plan was apt to restore ING's long-term viability,[91] and that the restructuring provided for an appropriate own contribution to the restructuring costs.[92]

In order to address the "very large competition distortions" ING had to undergo a significant number of structural measures.[93] On the whole, ING was required to reduce its balance sheet by 45% before the end of 2013 compared to its balance sheet of 30 September 2008.[94] The balance sheet reduction primarily had to be achieved through the divestiture of several businesses, including the Insurance and Asset Management divisions as well as retail banking in the Netherlands and banking activities outside Europe.[95] Westland Utrecht Bank (WUB) was one of ING's businesses in the Dutch retail market that had to be divested, aiming to add competition in to a "highly concentrated" retail banking market.[96] The divesture of WUB was deemed appropriate, as WUB constituted a viable business that could compete in the Dutch retail banking market in the future.[97]

The Commission also imposed a number of behavioral measures. Most significantly, a general price leadership ban was imposed under which ING could not offer more favorable prices than its three best-priced competitors. The Commission considered that commitment was appropriate as it targeted all markets where the bank had a market share of at least 5%.[98] Additionally, an acquisition ban was imposed, preventing ING from acquiring businesses.[99] Amongst others, ING was also prevented from marketing the aid as an advantage, and payments of dividends were restricted.[100]

By imposing a great number of divestments, the Commission aimed at encouraging competition by reducing ING's market share, and thereby its market power. The Commission speaks rather openly about the need to add competition to a highly concentrated market, yet a sophisticated economic assessment is lacking.[101] In fact, it is questionable whether the divesture of non-core assets, such as ING's international operations, could have had any noticeable impact on the distortion of competition.[102] Questions arise as well whether the divestment of profitable

87 ING 2012 Restructuring Decision, [10]; The EUR 10 billion emergency recapitalization measure was granted just two weeks after the nationalization of ABN AMRO.

88 ING 2012 Restructuring Decision, [168-169].

89 *ibid.*

90 ING 2012 Restructuring Decision, [198-199].

91 ING would undergo a large amount of divestments, which would improve its capital structure, initiate a de-risking program and adopt a prudent business strategy. ING 2012 Restructuring Decision, [175-185]; ING 2012 Amendment Decision, Annex I(d).

92 Including adequate remuneration of its capital injection and guarantees, a prohibition on payment of dividends and coupons and a share offering which would result in a significant dilution of existing shareholder rights. ING 2012 Restructuring Decision, [186-196], Annex I.

93 ING 2012 Restructuring Decision, [200].

94 ING 2012 Restructuring Decision, [74, 101, 200].

95 ING 2012 Restructuring Decision, [200]; ING 2012 Amendment Decision, Annex I.

96 ING 2012 Restructuring Decision, [201-202].

97 ING 2012 Restructuring Decision, [201-202].

98 ING 2012 Restructuring Decision, [206, 207]; ING 2012 Amendment Decision, Annex I(d).

99 ING 2012 Restructuring Decision, [205]; ING 2012 Amendment Decision, Annex I(c).

100 ING 2012 Restructuring Decision, [208]; ING 2012 Amendment Decision, Annex I.

101 ING 2012 Restructuring Decision, [201-202].

102 *Supra* n 102; D Zimmer and M Blaschczok, 'The Role of Competition in European State Aid Control During the Financial Market Crisis' (2011) 32(1) European Competition Law Review 9, 12-14; B Lyons, 'An Economic Assessment of European Commission Merger Control: 1958–2007' in X Vives (ed.), *'Competition Policy in the EU'* (2009, Oxford University Press); S Davies and B Lyons, *'Mergers and Merger Remedies in the EU: Assessing the consequences for competition'* (2007, Edward Elgar).

subsidiaries was truly necessary for the return to viability. In fact, significant divestments could have the effect of worsening a bank's viability, as the sale of productive assets reduces solvability.[103] Rather than aiming at remedying distortions of competition, many of the structural measures thus appear to have been imposed as to restructure the market and to sanction excessive risk taking and mismanagement.

While the Commission considered the measures to limit distortions of competition proportionate to the aid received,[104] the measures, of which most significantly the 45% balance sheet reduction in combination with price leadership and acquisition prohibitions, are significant by any standard.[105] Although State aid policy will inevitably shape the market, and while crisis responses may result in accidental over-enforcement, the Commission took its State aid policy competence to unprecedented lengths.[106] The imposition of the abovementioned far-reaching measures, in absence of a sophisticated economic assessment, thus raises doubts concerning the suitability and proportionality of the measures imposed.

The adoption of such far-reaching measures is arguably even more problematic due to the lack of a democratically legitimized regulatory framework limiting the Commission's discretion. As a result of the Commission's broad discretion, the grounds for judicial review are limited 'to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers'.[107] While Article 107(3)(b) admittedly grants the Commission a broad mandate to engage in competition policy,[108] the accumulation of lacking democratic legitimacy and limited possibilities for judicial review raises concerns in the light of the principle of the rule of law.[109]

4. AEGON

AEGON is a bank and insurer based in the Netherlands, employing approximately 30 thousand people and serving around 40 million customers worldwide.[110] Just over three weeks after ABN AMRO's and ING's rescue, the AEGON required recapitalization for three main reasons: firstly, the spread business of the US-based Institutional Management Division which made AEGON dependent on its AA rating; secondly, losses resulting from the un-hedged variable annuities products and thirdly, a level and quality of capital which proved to be insufficient in the crisis environment.[111]

103 L Coppi and J Heydock, 'The Approach to State Aid in the Restructuring of the Financial Sector' (2009) 5 Competition Policy International 77.

104 ING 2012 Restructuring Decision, [209].

105 N.B. It has been suggested that the stringent conditions may have been driven by the desire of Neelie Kroes, at the time Commissioner for Competition, not to be seen as acting partially in favour of a Dutch institution. F Murphey, 'The Financial Crisis in Ireland and the Use of the State Aid Rules by the EU Commission: Observations' (2013) 2 European State Aid Law Quarterly 260, 285.

106 A Sutton, K Lannoo and C Napoli, 'Bank State Aid in the Financial Crisis: Fragmentation or Level Playing Field?' (Centre for European Policy Studies, 2010), 40; I Hasan and M Marinč, 'Should Competition Policy in Banking be Amended During the Crisis? Lessons from the EU' (2013) European Journal of Law and Economics 1, 25.

107 See for instance Case T-29/10 and T-33, *Kingdom of the Netherlands and ING Groep NV* v *Commission*, ECLI:EU:T:2012:98, [102]; Case C-290/07 P Commission v Scott [2010] ECR I-07763; See also Case C-142/87 Belgium v Commission [1990] ECR I-959, [56]; Case C-39/94 SFEI and Others [1996] ECR I-3547, [36]; Case T-152/99 *Hijos de Andrés Molina, SA (HAMSA)* v *Commission* [2002] ECR II-03049, [48]; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, [163]; T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, [32] and Case T-137/02 *Pollmeier Malchow* v *Commission* [2004] ECR II-03541, [52]; Case T-319/11 *ABN Amro Group NV* v *Commission* [2014] ECLI:EU:T:2014:186, [27-28].

108 Furthermore, this broad mandate was largely confirmed in the Council of the European Union, 'Immediate responses to financial turmoil' (Ecofin Council Conclusions 13930/08 (284), Luxembourg, 7 October 2008).

109 According to established case law, 'The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order.' Case C-50/00 P *UPA* [2002] ECR I-6677, [38-39]; See also Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-06351, [316]; For further on the rule of law see, for instance, L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) *Jean Monnet Working Paper* 04/09, 57; D Kochenov, 'The EU Rule of Law: Cutting Paths Through Confusion' (2009) 2(1) Erasmus Law Review 5.

110 Commission Decision of 27 November 2008 on the measure N 569/2008 on State Aid to AEGON implemented by the State of the Netherlands, Brussels, C(2008) 7734 final (hereafter: AEGON Rescue Decision), [1]; Commission Decision of 17 August 2010 on the Measure N 372/2009, The Netherlands, Restructuring Aid to AEGON, Brussels, C(2010)5740 final, [6] (hereafter: AEGON Restructuring Decision).

111 AEGON Rescue Decision, [8-10]; AEGON Restructuring Decision, [14].

In order to maintain appropriate capital levels, the Netherlands purchased newly issued Non-Voting Convertible Capital Securities worth EUR 3 billion from AEGON.[112] In the Rescue Decision, the Commission found that the EUR 3 billion capital injections granted by the Dutch State constituted State aid.[113] As the Dutch economy was experiencing a serious disturbance, the compatibility of the aid with the internal market was assessed on the basis of Article 107(3)(b) TFEU, making reference to the Recapitalization and Restructuring Communications.[114]

In the Rescue Decision, the Commission temporarily approved the recapitalization measure, as the emergency rescue measures were *prima facie* capable of restoring confidence to the conditions laid down in the Crisis Communications.[115] The Commission made its final assessment two years later in the Restructuring Decision, in which it carried out an in-depth assessment of the adequacy of the restructuring plan submitted by the Dutch government. The plan included detailed commitments to structural and behavioral measures which aimed at addressing the sources of difficulties of AEGON in the past, ensuring an adequate level of burden-sharing and limiting distortions of competition resulting from the State's intervention.[116]

The Commission first concluded that the submitted plan adequately addressed the reasons for the difficulties in the past and considered the plan apt to restore AEGON's long-term viability.[117] Burden sharing was ensured by the contribution of capital and hybrid instrument holders of AEGON to the costs of the restructuring.[118]

With regards to measures to address distortions of competition, the Commission noted that AEGON was required to pay very high compensation to the Dutch government.[119] Nevertheless, in order to limit distortions of competition and decrease moral hazard, AEGON was subjected to several behavioral conditions. AEGON had been one of the price leaders on the Dutch mortgage and savings market in the period after the capital injection by the State and had increased its market share in mortgages throughout 2009. The Commission therefore considered that past pricing practice of AEGON amounts to aggressive commercial behavior, and thus imposed a price leadership prohibition to avoid distortions of competition on the Dutch mortgage and savings markets.[120] AEGON was furthermore prohibited from acquiring stakes of 20% or more in business entities prior to the full repayment of the State.[121]

In addition, AEGON was required to sell its pension portfolio in the Netherlands and to sell its bulk purchase annuity business in the UK, exiting this segment of the UK market.[122] AEGON was furthermore required to reduce its USA balance sheet by USD 25 billion,[123] and to sell its reinsurance activities operations in the US, Europe, Asia and Latin America.[124] Finally, AEGON had already withdrawn from its subsidiary in Taiwan and sold its funeral business in the Netherlands.[125]

All in all, the restructuring of AEGON thus included several far-reaching structural and behavioral measures, including a large number of divestments and balance sheet reductions, and a price leadership prohibition and an acquisition ban. As indicated above, it is questionable whether the structural measures, in particular concerning the sale of global activities could have had any significant effects in terms of limiting distortions of competition.[126] Furthermore, as will be discussed in further detail below, AEGON's policy of offering low prices was essentially beneficial to competition and consumer welfare, the imposition of the price leadership prohibition, while ABN AMRO and ING were under similar restrictions, was therefore liable to result in unintended detrimen-

112 AEGON Rescue Decision, [36; 41]; AEGON Restructuring Decision, [11, 82].

113 AEGON Rescue Decision, [51].

114 AEGON Rescue Decision, [56]; AEGON Restructuring Decision, [91, 92].

115 AEGON Rescue Decision, [34, 71]; The Rescue Decision provided that the Netherlands should submit a plan within six months in providing how "AEGON will secure long term viability and how distortions of competition are limited to the strict minimum."

116 AEGON Rescue Decision, [41].

117 AEGON Restructuring Decision, [97-105].

118 AEGON Restructuring Decision, [106-114], Furthermore, early repayment was only possible at a high cost.

119 AEGON Restructuring Decision, [114].

120 AEGON Restructuring Decision, [116].

121 AEGON Restructuring Decision, [119].

122 AEGON Restructuring Decision, [118].

123 Representing a reduction of around 19% of its total USA balance sheet as compared to 2007 and around 6% of the 2009 total balance sheet, AEGON Restructuring Decision, [121].

124 AEGON Restructuring Decision, [122].

125 Both measures representing a total balance sheet reduction of EUR 5 billion, AEGON Restructuring Decision, [123].

126 *Supra* n 102.

tal effects to competition in the Dutch banking sector.

5. SNS REAAL

SNS REAAL is a bank and insurer, created in 1997 by a merger between SNS Bank and REAAL Insurance.[127] SNS REAAL is the fourth largest bank in the Netherlands, and has been categorized as a domestic systemically important financial institution by the Dutch Central Bank (DNB) and the Ministry of Finance.[128] Following its merger, SNS REAAL made a number of high-profile acquisitions, including SNS REAAL Property Finance, the root of its problems.[129]

In December 2008, two months following the recapitalization measures of ABN AMRO, ING and AEGON, SNS REAAL was recapitalized with EUR 750 million by the Dutch state in the form of core Tier 1 securities. The Commission declared the recapitalization measure compatible with the internal market after the Dutch State submitted a viability plan, which explained that SNS REAAL would run-off its property finance division.[130]

However, The losses of the property finance division continued to drag on the financial performance of SNS REAAL and the external auditor of SNS REAAL, KMPG, and DNB concluded that SNS REAAL was in need of urgent recapitalization.[131] On 1 February 2013, the Dutch State nationalized SNS REAAL, to expropriate securities and capital components of SNS REAAL and SNS Bank.[132] And implemented recapitalization measures and a bridge loan constituting 3.3 billion EUR in State aid.[133]

On 19 December 2013, the State aid was declared compatible with the internal market for reasons of financial stability on the basis of Article 107(3)(b) TFEU.[134] The Commission concluded that the plan notified by the Dutch authorities would enable SNS REAAL to become viable in the long term, whilst ensuring sufficient burden-sharing, and without unduly distorting competition in the EU internal market. On this basis, the Commission concluded that the aid measures granted by the Dutch state to SNS REAAL were in line with its rules on state aid for the restructuring of banks during the crisis.[135]

SNS REAAL was required to spin off its problematic property finance portfolio into a separate bad bank, which would gradually wind down the portfolio. SNS REAAL was furthermore required to simplify its structure by divesting the insurance subsidiary. SNS REAAL would thus shift its focus on its retail division, which had proved to be robust since the start of the financial crisis.[136]

Similar to the other Decisions, SNS REAAL was required to divest substantial activities with questionable impact on distortions of competition.[137] Furthermore, the divestment of core assets, while seemingly attractive at first glance from a competition policy perspective, could in fact threaten the financial stability. As multiple divestments were applied to several banks across Europe simultaneously, this could have resulted in several 'fire sales', uncertainty about the prices could threaten the stability of the fragile financial system.[138]

127 Commission Decision of 22 February 2013 on the measure State aid SA.35382 (2013/N), The Netherlands, Rescue SNS REAAL, Brussels, C(2013) 1053 final, [5] (hereafter: SNS REAAL Rescue Decision).

128 SNS REAAL Rescue Decision, [6, 8].

129 'Bouwfonds Property Finance' prior to the acquisition, SNS REAAL Rescue Decision, [9].

130 SNS REAAL Rescue Decision, [15-21].

131 SNS REAAL Rescue Decision, [22-24].

132 SNS REAAL Rescue Decision, [27].

133 SNS REAAL Rescue Decision, [29-31].

134 SNS REAAL Rescue Decision, [76]; Commission Decision of 19 December 2013 on the measure State aid SA.36598 (2013/N), The Netherlands, Restructuring Plan SNS REAAL, Brussels, C(2013) 9592 final, paragraph 63, chapter 5 (hereafter: SNS REAAL Restructuring Decision).

135 SNS REAAL Restructuring Decision, chapter 5.

136 *Ibid.*

137 C Ahlborn and D Piccinin, 'The Great Recession and other mishaps: the Commission's policy of restructuring aid in a time of crisis' in E Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar 2011), 154; D Zimmer and M Blaschczok, 'The Role of Competition in European State Aid Control During the Financial Markets Crisis' (2011) 32(1) European Community Law Review 9, 13; B Lyons, 'An Economic Assessment of European Commission Merger Control: 1958–2007' in X Vives (ed.), 'Competition Policy in the EU' (Oxford University Press 2009); S Davies and B Lyons, *'Mergers and Merger Remedies in the EU: Assessing the consequences for competition'* (Edward Elgar 2007).

138 C Ahlborn and D Piccinin, 'The Great Recession and other mishaps: the Commission's policy of restructuring aid in a time of crisis' in E Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar 2011), 155; This approach was abandoned by the former Commissioner for Competition Joaquín Almunia in 2010, see L Hancher, T Ottenvanger, P J Slot, 'EU State Aids' (4th Edition, Sweet and Maxwell, 2012), 638.

As in the case of ING, the Commission required the divestment SNS REAAL's insurance division. While the Commission argued that the sale of the insurance division would simplify the structure of the undertaking, and thereby its viability, a sophisticated economic assessment of such kind was lacking. Considering SNS REAAL's insurance division was making a positive contribution to the banks performance, the divestment of the insurance divisions may arguably not have had a significant contribution to the return to viability.[139] While ING's insurance division did receive a substantial amount of State aid,[140] the division accounted for about 50% of ING's pre-crisis earnings.[141] Furthermore, there are no European rules requiring banks to separate their insurance from banking activities,[142] nor did the High-level Expert Group on Structural Bank Reforms, chaired by Erkki Liikanen, recommend such a rule.[143]

The divestments of the insurance divisions of ING and SNS REAAL instead appear to have been adopted primarily as a punishment for risk-taking and mismanagement. While risk-taking behavior should indeed be discouraged, it is questionable whether divestments are a suitable and proportionate manner of doing so. State aid thus appears to have been effectively used as an *ex post* financial regulation policy to amend *ex ante* regulatory failure, which had allowed banks to engage in excessive risk taking while holding insufficient capital buffers.[144] This was confirmed by Neelie Kroes, former Commissioner for Competition, who spoke of how officials were 'in a sense doing the work that banking regulators should be doing' and warned that 'this must be the last time banks are allowed to create this kind of mess.'[145] Considering that the Commission is not entrusted with financial regulation and only has limited expertise in this field, the Commission should have focused its attention on ensuring viability and remedying distortions of competition, rather than sanctioning risk-taking and mismanagement.

6. Netherlands Competition Authority Investigation

In December 2010, the International Monetary Fund (IMF) expressed concerns over the strong increase in concentration levels in the Dutch financial sector since the start of the financial crisis, amongst the highest in Europe. The IMF concluded that competitive pressure in the Dutch markets was limited, partly because State aid conditions imposed by the Commission are limiting financial institutions in their competitive behavior.[146]

Five months later, the Dutch Consumers Association protested against high interest rates charged by the Rabobank.[147] The Consumer Association was highly unsatisfied that consumers first had to bail out banks as tax payers and were subsequently subjected to very high mortgage interest. The Netherlands Competition Authority, and the Bureau for Economic Policy Analysis (CPB) both concluded that mortgage interest rates in the Netherlands were around one percent higher in comparison with surrounding countries.[148] Meanwhile, there were no indications that the financing costs of debt capital were

139 SNS REAAL Rescue Decision, [14].

140 I.e. 4.7 EUR billion, ING 2012 Restructuring Decision, [162].

141 ING 2012 Restructuring Decision, [74].

142 Commercial banking, investment banking and insurance underwriting were separated in the United States under the Glass-Steagall Act of 1933, which was repealed in 1999 by the Gramm-Leach-Bliley Act. See E Harshman, F Yeager and T Yeager, 'The Door is Open, but Banks are Slow to Enter Insurance and Investment Arenas' (2005) The Regional Economist 5.

143 E Likkanen et al, 'High-level Expert Group on Reforming the Structure of the EU Banking Sector' (Final Report, Brussels, 2 October 2012). Commissioner Michel Barnier established the High-level Expert Group on structural bank reforms in February 2012. Its task was to assess whether additional reforms directly targeted at the structure of individual banks would further reduce the probability and impact of failure, ensure the continuation of vital economic functions upon failure and better protect vulnerable retail clients.

144 For more on the pre-crisis regulatory failure see OECD, 'Competition Issues in the Financial Sector, Key Findings' (OECD, Paris, 2011); See also X Vives, 'Competition Policy in Banking' (2011) 27(3) Oxford Review of Economic Policy 479.

145 N Kroes, 'Banks must reform and restructure' (Speech/09/306 at OECD Forum, Paris, 23 June 2009)..

146 IMF, 'The Netherlands: Financial Sector Assessment, Preliminary Conclusions by the Staff of the International Monetary Fund' (14 December 2010).

147 Consumentenbond "Rabobank verlaagt hypotheekrente niet" 7 April 2011, at <http://www.consumentenbond.nl/actueel/nieuws/nieuwsoverzicht-2011/rabobank-verlaagt-hypotheekrente-niet/> accessed on 7 April 2015; Zembla "Uw hypotheek als melkkoe" 14 September 2012, at <http://zembla.incontxt.nl/seizoenen/2012/afleveringen/14-09-2012> accessed on 7 April 2015.

148 Nederlandse Mededingingsautoriteit, 'Quick Scan Hypotheekrente, een onderzoek naar de marges op hypotheken' (November 2010); CPB Notitie, 'De Nederlandse woningmarkt: hypotheekrente, huizenprijzen en consumptive', 14 February 2013, at <http://www.cpb.nl/publicatie/de-nederlandse-woningmarkt-hypotheekrente-huizenprijzen-en-consumptie> accessed on 7 April 2015.

higher in the Netherlands compared to surrounding countries.[149]

The changes in the market structure, the effects of the financial crisis and the high level of mortgage interest rates prompted the Netherlands Competition Authority, the NMa (subsequently renamed to Authority Consumers and Markets), to open an investigation on competition in the Dutch mortgage market.[150] In their study, the NMa found that the sudden increase in mortgage interest margins during the financial crisis coincided with a significant increase in concentration.[151] After the outbreak of the financial crisis, several mortgage providers stopped selling new mortgages, such as GMAC and DSB, several other mortgage providers became less active, such as Argenta. Furthermore, the merger between ABN AMRO and FBN, two relatively large mortgage providers, caused a significant increase in concentration. The NMa concluded that it was reasonable that these factors resulted in an, at least temporary, reduction of competition due to which margins increased.

The increased margin increase could have also related to lower competitive pressure from potential entrants to the market. During the financial crisis, banks experienced difficulties financing mortgages, resulting in higher barriers to entry. The largest banks therefore felt less competitive pressure from potential entrants compared to before the crisis. This is confirmed by the fact that during the financial crisis, no new mortgage providers have entered the Dutch mortgage market.[152]

The NMa researched the possibility of price agreements in several ways. Considering the structure and transparency of the mortgage market, there was a risk that mortgage providers are reducing mutual competitive pressure by coordinated behavior. An analysis of factual market behavior, however, led to the conclusion that there are no indications for a presumption of price fixing.[153]

The NMa also researched the effects of the price leadership prohibition on the interest rates on the mortgage market. Due to the pricing restrictions in force, 80% of the market was exercising less competitive pressure on the Rabobank, the only large bank in the Netherlands that did not receive state aid during the crisis, while the measures were in force. A number of mortgage providers thus indicated that price restrictions were distorting competition on the markets, in particular because competitive pressure on Rabobank had decreased as a result of the pricing restrictions.[154] Furthermore, econometric research showed that state aid measures had a statistically significant impact, resulting in increases in the mortgage interest margin, as the supported banks showed less aggressive pricing behavior during the price leadership prohibitions, resulting in higher prices on the market.[155]

However, the NMa nonetheless concluded that the price leadership prohibitions imposed by the Commission on ABN AMRO, ING and AEGON could not be a leading cause of the interest margin increase, as the price leadership prohibitions were imposed only after the margins had already started to increase.[156] It concluded that while the margin could have developed differently in absence of the price leadership prohibitions, the state aid conditions could not explain the margin increases. This conclusion is, however, inherently flawed.

First, in the period between the temporary authorizations in 2008,[157] and the definite imposition of the price leadership prohibitions, numerous meetings, discussions, consultations and negotiations took place between the Dutch government, the Commission, the Dutch Central Bank and the banks concerned, in which *inter alia* the need for price leadership prohibitions were discussed.[158] In the Parliamentary Inquiry commissioned by the Dutch government on the Financial System, Neelie Kroes, former Commissioner for Competition explained that the financial markets could have reasonably presumed that price restrictive measures would be imposed:

149 CPB Notitie, 'De Nederlandse woningmarkt: hypotheekrente, huizenprijzen en consumptive', 14 February 2013, at <http://www.cpb.nl/publicatie/de-nederlandse-woningmarkt-hypotheekrente-huizenprijzen-en-consumptie> accessed on 7 April 2015.

150 Nederlandse Mededingingsautoriteit, 'Sectorstudie Hypotheekmarkt: Een onderzoek naar de concurrentieomstandigheden op de Nederlandse Hypotheekmarkt' (May 2011), 3, 6.

151 *Ibid*, 64.

152 *Ibid*, 64.

153 *Ibid*, 64.

154 *Ibid*, .39.

155 *Ibid*, 25, 40.

156 *Ibid*, 40.

157 See ING 2009 Restructuring Decision, [1]; AEGON Rescue Decision, [1]; ABN AMRO Decision, [3 and following].

158 Joined Cases T-29/10, T-33/10 *Netherlands and ING v Commission* [2012] ECR I-0000, [14]; ING 2009 Restructuring Decision, [7]; AEGON Rescue Decision, [1]; ABN AMRO Decision, [3 and following].

"If you would ask me if one could reasonably presume that the Dutch measures in respect of the aid would not be a free lunch, then the answer is yes, that could have been presumed."[159]

A further confirmation is given by the fact that healthy banks that did not receive state aid engaged in active lobbying for the imposition of price leadership prohibitions upon banks in favor of state aid:

"Healthy players also came to visit me for coffee. They said: Go ahead, but ensure that those that are kept above the water with tax money now, will not compete on the market where we have to compete on our own strength."[160]

Additionally, the first Banking Communication was already adopted in October 2008, and specifically required any guarantee scheme to provide safeguards in order to limit distortions of competition, including "restrictions on commercial conduct, such as advertising invoking the guaranteed status of the beneficiary bank, pricing or on business expansion."[161] Over the course of 2009, five more Crisis Communications were adopted, which all confirmed the need to remedy distortions of competition by *inter alia* imposing pricing restrictions. In this regard, Neelie Kroes explained:

"The Communications were not the product of one day of work. It was a process that was handled in particularly close consultation with the various stakeholders. Already before the date of publication of the Banking Communication, we were in the process of consultations to determine the final outcome. The Banking Communication therefore did not come as a surprise on the moment of publication."[162]

Lastly, price restriction measures could have been anticipated based on previous State aid decisions. Price restriction measures had already imposed upon Fortis Bank in December 2008,[163] and on Commerzbank in May 2009.[164]

The imposition of price leadership bans upon banks in receipt of state aid therefore could not have come as a surprise. The need for pricing restrictions was raised in numerous meetings, in the Crisis Communications and had become apparent from previous Commission policy. The healthy banks in the Netherlands therefore could have reasonably anticipated that price restriction measures were likely to be imposed. Therefore, during the spring of 2009, as the Commission's practice consolidated, the Crisis Communications were adopted and state aid policy became crystalized, the Dutch banking sector must have been able to anticipate with reasonable certainty that price restrictions would be inevitable.

The NMa should have therefore followed its econometric analysis, in which it concluded that the state aid measures resulted in mortgage interest margin increases. The fact that the price leadership prohibitions were imposed only after the margins had already started to increase does not alter this fact, as the banks could have foreseen with reasonably certainty that price restrictions were inevitable. Therefore, by imposing price leadership prohibitions in order to minimize distortions of competition, the Commission paradoxically distorted competition on the Dutch banking sector, resulting in higher interest rates on the mortgage market.

IV. Conclusion

During the crisis, the Commission became the central crisis management and resolution authority for failing banks in the EU. The Crisis Communications provide for an extensive framework under which the Commission analyzed state aid to banks in the context of the financial crisis. While the SRM and BRRD will soon replace the resolution framework under the Crisis Communications, the State aid framework will remain relevant under the new resolution mechanisms as the State aid rules continues to apply where there is recourse to public funds.

159 Tweede Kamer der Staten-Generaal, 'Parlementaire Enquête Financieel Stelsel' (Vergaderjaar 2011-2012, 31 980, nr.61) Verslag openbaar verhoor met mevrouw Kroes, 7 December 2011, 1459.

160 *Ibid*, 1451-2.

161 European Commission, Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('2008 Banking Communication') (OJ C 270, 25.10.2008) 8.

162 Tweede Kamer der Staten-Generaal, 'Parlementaire Enquête Financieel Stelsel' (Vergaderjaar 2011-2012, 31 980, nr.61) Verslag openbaar verhoor met mevrouw Kroes, 7 December 2011, 1457.

163 Commission Decision of 3 December 2008 in Cases NN 42/2008, NN 46/2008 and NN53/A/2008 Restructuring aid to Fortis Bank and Fortis Bank Luxemburg, Brussels, C(2008) 8085.

164 Commission Decision of 7 May 2009 in Case N 244/2009, Germany, Commerzbank, Brussels, C(2009) 3708 final.

The resolution framework is built on three pillars: viability, burden sharing and competition. While the return to financial stability was the Commissions primary objective, remedying distortions of competition played a key role in the application of state aid rules in favor of banks. Finding the right balance between the three pillars is an inherently difficult task; on the one hand, banks must have sufficiently favorable terms of access to capital in order to make the aid as effective as possible, thereby ensuring a return to viability, on the other hand, the conditions tied to any measure should ensure a level playing field.

In order to strike the right balance, the Commission imposed structural and behavioral measures limiting the distortion of competition. While the Crisis Communications sought to ensure common policy and principles, the Communications did not provide detailed information with regards to how, when and the degree to which structural and behavior constraints must be applied. The Commission therefore had a broad discretion to engage in competition policy while applying the rules on State aid.

The analysis of the Commission Decisions in the Dutch banking sector demonstrates that the Commission was able to engage in far reaching competition policy by means of imposing significant structural and behavioral remedies. The decisions concerning ABN AMRO, ING, AEGON and SNS REAAL illustrate that the restructuring decisions provided the Commission with a unique opportunity to reshape the market structure by imposing a vast range or tailor made structural and behavioral measures.

The decisions show that the Commission often imposed structural measures in order to remedy pre-crisis regulatory failure by financial regulators. The reasoning adopted by the Commission in its decisions suggests that the Commission required significant divestments as a sanction for risk-taking and mismanagement. While risk-taking and mismanagement should indeed be discouraged, it is questionable whether the imposition of far reaching structural measures was a suitable and proportionate manner of doing so. Questions arise as well whether certain compulsory divestments, in particular international activities or non-core activities, were able to limit distortions of competition. It therefore appears that State aid has been effectively used as an *ex post* regulation policy to amend *ex ante* regulatory failure. Considering that the Commission is not entrusted with financial regulation and only has limited expertise in this field, the Commission should have focused its attention on ensuring viability and remedying distortions of competition, rather than sanctioning risk-taking and mismanagement

Furthermore, the imposition of behavioral measures, in particular price leadership prohibitions, paradoxically appear to have resulted in the opposite effect as intended. Econometric research by the Netherlands Competition Authority showed that the price leadership prohibitions imposed by the Commission had a detrimental impact on competition in the Dutch mortgage market, resulting in higher interest rates on the mortgage market. Nevertheless, the Authority concluded that the price leadership prohibitions imposed by the Commission could not have been the cause of a margin increase in the Dutch mortgage market, as the margin increases began before the measures were imposed. This argument is however intrinsically flawed. The analysis of the time period between the temporary approval of the State aid measures and the imposition of the measures shows that the banks could have reasonably anticipated that price leadership prohibitions were to be imposed by the Commission. In the short term, the measures intended to minimize distortions of competition thus in fact further distorted competition in the Dutch banking sector.

All in all, while numerous structural and behavioral measures were adopted with the purpose of limiting distortions of competition, the reasoning behind the imposition of the far-reaching structural and behavioral measures illustrates the rationales of such measures were often to sanction risk taking and mismanagement, and to restructure the banking sector as a whole. In addition, many Commission's decisions lacked a sophisticated economic assessment and it often remained unclear why various measures were selected. In the context of the Dutch banking sector, the imposition of certain behavioral measures in fact appear to have had the opposite effect as intended. The imposition of the far-reaching structural and behavioral measures, in absence of a sophisticated economic assessment, therefore raises doubts concerning the suitability and proportionality unprecedented State aid decisions during the financial crisis.