

# How much flexibility do we need?

## Commission crisis management revisited

The year 2008 saw interesting developments in several areas of State aid law, ranging from sectorial aid (e.g. the airline industry and airport infrastructure and utilities) to the rules applicable to specific forms of aid (e.g. taxation, SGEIs, privatisations) and also the principles of State aid prohibition (e.g. the limitation of the *telos* of the standstill obligation and an ensuing limit to recovery). Still, the ongoing financial crisis has recently overshadowed all of these developments. The scale of the crisis, in both territorial terms and economic figures, is unprecedented in the Community's history and has thus significantly changed the environment and parameters for State aid control by the Commission. The Commission is still coming to terms with this changed environment. Likewise, State aid practitioners in national administrations, the industry and academia (irrespective of whether they are lawyers or economists), are just beginning to acquire a fuller understanding of the phenomenon. The last editorial for this journal by *Koenig* already cleared away a little of this fog. The present editorial will clarify a few more aspects. However, much more reflection is needed before we can be sure to what degree of procedural and substantive derogation from the general State aid regime effective crisis handling really commands. After all, allowing too much derogation might be just as detrimental as too little flexibility for adaptation.

2008 was supposed to be a quiet year, when the Commission would focus on the enactment of the last or next-to-last reform measures as laid out in the State Aid Action Plan and cosily inch towards the evaluation phase of the reform in 2009. We have seen several such measures handed down from the Commission during the first half of 2008, most prominently the new General BER. But there have also been less spectacular ones like the SME-Fisheries BER or the communications on institutionalised PPPs, guarantees or environmental aid. It was only in mid-2008 that the true scale of the economic effects of the banking crisis started to unfold, and then the reform drive of the Commission was noticeably held up, albeit not brought fully to a stop. This is probably why in some of the envisaged areas for reform so far we have seen either draft documents only (e.g. in relation to procedure and national enforcement) or nothing at all (e.g. for direct taxation). Instead, the Commission was busy as from mid-2008 with handling and tackling the banking crisis. It did so mainly by providing for speedy authorisations on the basis of Art 87 (3) (b) EC and by reinforcing assistance to Member States on both the general scale (cf. the three successive communications on initial aid measures, recapitalization and access to credit) and the individual scale (cf. the newly established Economic Crisis Team). By February 2009, the Commission counted around sixty-one national procedures on either aid to financial institutions or on measures to mitigate the effects on the real economy (cf. also MEMO/09/67 for most decisions mentioned below).

While the State Aid Action Plan had still promised to deliver 'less and better targeted State aid', in 2008 the Commission was caught in the midst of a rapidly deteriorating economy where massive state interventions for ailing sectors and individual undertakings looked inevitable. It had no prepared strategy and was unable to draw upon previous experience to determine just what kind and degree of aid grants would be acceptable in such a situation. Although the handling of crisis cases took up a great deal of the Commission's resources, it was still quick to come up with general guidelines. Furthermore, handling the crisis was not – and is not – just about exercising the right degree of State aid control. More fundamentally, the crisis posed a challenge to the overall justification of State aid prohibition as well as, albeit to a lesser degree, to certain other parts of competition law (e.g. merger control). Commissioner *Kroes* was thus busy on many occasions during these past few months trying to convince Member States and

stakeholders that DG Competition would act to be “part of the solution, not part of the problem”. Emphatically and successfully, she argued that undiminished competition control and policy-making was essential to ensure a coordinated EU response to the crisis. Here, a tabloid might have penned a headline like “Kroes saves our State aid bacon”. In a scientific journal however, we may content ourselves, as was rightly done here (cf. the editorial by *Koenig* for ESTAL 4/2008) and earlier elsewhere, by simply noting that the Commission is generally to be applauded for its performance in the crisis so far.

That being said, however, there is also some potential for collateral damage from the Commission’s crisis management. Even when taking into account that it is likely that informal consultations took place prior to notification in the cases concerned, the unprecedented speed with which some of the authorisation decisions were rendered (often within a couple of days and, as in the case of *Bradford&Bingley*, even overnight) may raise some suspicion as to the quality of the examination. For many of these decisions, a closer look dispels all such doubts, as their reasoning is thorough and balanced (e.g. in *Fortis I*, *ING* or *Roskilde I* and *II*). Even so, in the operative part of a few other decisions, we observe significant accumulations of empty formulas or quasi-circular reasoning (e.g., simply to illustrate this point, *Bradford&Bingley*, para. 49: “The measures must ... be restricted to the amount needed ... the Commission notes that the working capital measure is restricted to the minimum necessary”). Effective numbers and hard data on the scale and effects of the measure do not figure in the compatibility argument there (cf., apart from *Bradford&Bingley*, e.g. also *Hypo Real Estate* or *Carnegie*).

Furthermore, even the more extensively reasoned decisions show no sign of application of a More Economic Approach (like an economics-based assessment of competitive effects, of a market definition or of an application of the balancing test, the latter developed precisely for cases of market failure). The More Economic Approach was not just one of the Commission’s favourites among the novelties introduced by the State Aid Action Plan; it is actually the single main tool for ensuring that aid is well-targeted. The same absence of a More Economic Approach is to be observed in the three abovementioned Communications, which (despite some general references to the concept of market failure in the communication on access to finance) do not contain any close economic reasoning either. Surprisingly, therefore, economists either have or get no significant say in current crisis policies for State aid. If, however, the primary answers to an economic crisis do not come from economists, how do lawyers know they are on the right track when handling crisis aid measures? It is to be hoped that Commissioner *Brittan* was not right when he implicitly hinted some years ago that the Commission’s occupation with economic analysis might indeed be a luxury hobby that could only be pursued while no actual threats to market integration were present (cf. SPEECH/91/85).

Partial deficiencies in the reasoning of decisions, or in the extent of assessment of competitive effects and the non-application of the More Economic Approach for letter-b crisis-measures are not just dogmatic lapses. In view of the generally high sums involved, cursory assessments or incoherent assessment standards yield potentially significant competitive effects. At the same time, the brevity of the official part of the procedures between notification and authorisation poses a problem of transparency to competitors and hampers their manoeuvring space for counter-action. Extensive informal pre-notification talks only aggravate this transparency problem. However, after some ultra-quick, panicky-looking decisions early on, the average time between notification and clearance seems now to have settled at about one month (e.g. *Dexia*, *Fortis II*, *KBC* or *Roskilde II*).

But even when competitors are again given more time to react, they still face another procedural problem specific to the Commission's crisis handling: Out of the sixty-one crisis cases dealt with by the Commission in mid-February 2009, the formal investigation procedure was opened in just four cases, while forty-eight authorisations were waived through without opening the formal procedure. Furthermore, all cases where a formal procedure was opened (*Sachsen LB*, *West LB*; *Northern Rock*, *IKB*) had already been notified around the turn of 2007 or in the early months of 2008; this means that once the crisis had really kicked in at mid-2008, no further formal investigations were opened. Under such circumstances, competitors have no right to be heard in the procedure and are unable to initiate an immediate court review of the measure in substance, but only of the formal question whether serious difficulties of assessment should have prompted the Commission to enter into the next stage of the procedure. The combined effects of meagre reasoning and procedural lack of transparency are therefore particularly problematic for the safeguarding of undistorted competition and effective legal protection.

Regarding the banking sector, these concerns perhaps do not really bite. We may assume that European financial institutions are highly networked across borders and thus have a pretty good idea of each other's state of affairs. Other sectors, however, are less transparent, so that certain collateral effects of rapid-reaction crisis management by the Commission might indeed prove to be harmful to competition. As with banks, the crux in other sectors also lies in distinguishing essentially healthy undertakings in need of a temporary crisis bailout from undertakings that are already ailing or in fact failing to get back on track under the excuse of crisis aid, in determining the right data to make that distinction and in setting the appropriate aid cap. As the banking crisis hits the real economy, more and more crisis decisions are rendered for sectors other than banking. Thus far, the Commission has basically only checked real crisis State aid schemes against the conditions of the Communication on access to credit, and those decisions are accordingly brief (e.g. *Federal framework scheme* or *KfW-run special programme for 2009*). It therefore remains to be seen (e.g. in the case *Rescue Aid to Austrian Airlines*, recently decided but not yet publicly available) how individual rescue measures will be handled and whether the Commission will be able to keep any negative collateral effects down to a minimum.

When in turbulent times a balance must be struck between the need for quick action and uncertainty on how best to proceed, then distinctions should be made between adaptations of substantive and of procedural rules for State aid. As regards substantive rules, quick adaptations of the regime without reliable economic input are generally undesirable, but may exceptionally be tolerated, given that subsequent corrections can be made when expertise or some application experience is available. By contrast, procedural and assessment standards cannot be relaxed and subsequently tightened quite as flexibly. Here the protection of individual rights and the principle of non-discrimination outweigh a general interest in more Commission discretion for handling cases. In terms of procedural and assessment standards, the Commission should thus strive to make no difference between handling crisis measures and handling regular State aid cases. All in all, a generally cautious approach with as few adaptations from the general regime as possible seems warranted for both substantive and procedural rules. Apart from avoiding uncertainties as to the effects of such adaptations, this caution will also facilitate a return to post-crisis standards of State aid control. The Commission should, after all, not just seek to save the bacon, but also ensure a good long-term digestibility of its crisis diet for competition and competitors in the internal market.

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