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State Aid and the Financial Crisis in the EU

LLM Paper

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Chapter I: Introduction.

The financial crisis has been heralded as the most destructive economic disaster since the Great Depression of the late 1930s. While this is a very bold statement, it has good reasons to live up to that claim. From the moment of its outbreak, the crisis has led to an incalculable amount of loss across the entire globe. Shortly afterwards it became clear that its effects could not be contained within one specific market and due to the unprecedented momentum it displayed, most policymakers realized that they were not dealing with a normal market fluctuation. Naturally, this implies that the situation also unfolded upon European soil and a certain reaction to halt the crisis became indispensable. In Europe a political consensus emerged and a Union wide solution was considered vital to counter the approaching calamity since this would ensure a level playing field across the European Union and prevent Member States from engaging in a detrimental subsidy race. Therefore State aid within a regulated framework was chosen as the appropriate method to stabilize the situation. As a result the European Commission, as the competent European institution to set out the EU's competition policy, gained quite an important role to play. In the beginning, the Commission did not particularly deviate from its conventional State aid policy and tackled each situation individually. However this deemed to be ineffective and a new set of tools that could be applied on a larger scale were necessary to avoid the inevitable collapse. For that reason, the Commission adopted a crisis-framework consisting of initially five essential crisis communications (the Banking Communication, the Recapitalization Communication, The Impaired Assets Communication, the Restructuring Communication and a Communication on the Temporary Framework for State aid measures) of which some were later on prolonged and/or amended.

The purpose of this paper is to take a closer look at these crisis communications and to investigate their validity and their modus operandi. It should be noted that not all of these Communications will be reviewed and instead the focus of this paper will be drawn to the two most influential and innovative of the five: the Banking Communication and the Temporary Framework. The reasoning behind this choice consists of a threefold nature:

- First and foremost, both Communications are built around article 107 (3) (b) TFEU, a previously unexplored State aid justification ground set out to *"remedy a serious disturbance in the economy of a Member State".* Given that this ground is uncharted terrain for Member States and the Commission alike, further analysis on how the article is applied and utilized through these two Communication is a central element of this paper. The Restructuring Communication and Recapitalization Communication are unsuited for this task as they are a continuation and remodeling of the existing pre-crisis State aid policy.
- In addition, the second main reason for restricting the examination to the Banking Communication and the Temporary Framework lies in the fact that the vast majority of all aid provided, originated from the measures contained with these two Communications. By contrast, the Impaired Assets Communication for example was hardly applied over the duration of the crisis.
- Third and last main motivator for limiting the scope of this paper to the Banking Communication and the Temporary Framework is linked to the recent emergence of two judgements by the Court of Justice of the European Union that together with the opinions of the Advocate General provide for a better insight on many aspects of both Communications. Considering that these Communications have been unprecedented

due to the specific circumstances at play and added with the fact that their basis has been unfamiliar terrain so far, it is unlikely that every aspect of both Communications would be impeccable. Therefore, a fully detailed case study of both judgements and the Advocate General's preceding opinion is not an extravagant luxury as these Communications will serve as a benchmark for any future crisis-frameworks, should a similar situation occur. Appropriately that study will be one of the more extensive addressed subjects of this paper.

While both case studies and their insights will reflect a crucial part of this paper, it is not the only objective pursued. Prior to the case study, this work contains an essential breakdown of the legal framework where the Communications operate. Article 107 of the Treaty on the Functioning of the European Union is the basis of every State aid policy pursued and the crisis communications are naturally no exception to this rule. A correct analysis of the legal foundation is a very important exercise and it will provide an understanding of the background these Communications are placed within. Subsequently it will also provide a better perception on why the Commission has chosen to shift its policy from article 107 (3) (c) TFEU to article 107 (3) (b) TFEU as the primary justification ground for crisis related State aid.

State aid is in itself a double edged sword that should never be underestimated. While State aid is a very effective tool to quickly address a certain market failure, the measure remains a distortion of competition capable of being harmful to the economy, should it be carelessly applied. Taking this aspect into consideration, the mechanism of State aid always required a high level of control and caution in its application. Crisis situations are by definition exceptional, meaning that the conventional methods are inefficient to provide a proper solution. The same reasoning applies to the aid given during these exceptional circumstances since they are usually applied in a less restrictive way than during a normal market situation. However one could argue if that would always be the right approach? Is State aid always, the best and optimal solution to counter an exceptional crisis situation? Should there not be some sort of alternative that could be applied in a similar situation? This paper will take that different perspective into account and present a catalog of feasible alternatives as a means to provide an answer on the burning question whether any less intrusive substitute to State aid could have been applied during the financial crisis.

Chapter II: The Legal Framework.

In order to gain a better understanding of the communications governing the application of State aid, both during the financial crisis that plagued the European Union and its lingering effects afterwards, it becomes essential to analyze the framework that supports these communications.

European Law is a complex set of rules that consist of three main sources: primary law, secondary law and supplementary legislation.[1] The State aid control provisions are no exception to this rule given that they are a combination of article 107-109 TFEU, multiple Commission regulations, policy documents, various communications of the Commission and some highly interesting case law given by the European Court of Justice.

In light of the objective of this paper, it is unnecessary to assess and review every aspect of these provisions. As initially mentioned, the focus is instead directed at two of the most active players introduced by the Commission: the special exemption of the State aid prohibition

[1] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=URISERV%3Al14534.

mentioned in article 107 (3) (b) TFEU and the interpretation of this article by the Commission in the Temporary Union Framework for State aid measures to support access to finance in the current financial and economic crisis and secondly the Commission's communication on the application of State aid rules to support measures in favor of banks in the context of the financial crisis (the Banking Communication).

2.1 Article 107 (1) TFEU.

When launching the ambitious project that we know today as the European Single Market, the Union had to decide on how they would set out their future State aid policy. Being faced with 2 possible solutions, the European Community (now European Union) quickly came to the decision that the benefits of a minimal regulated State aid policy, such as for example the positive incentive for the economy by allowing Member States to effortlessly give companies support to develop new technology or products, do not outweigh the strains it could possibly place on the internal market[2]. While there are undoubtedly some positive economic benefits to State aid, in the end an effective and strict control is needed for the internal market to flourish[3].

As a result, the EC treaty declared in article 87 (1) EC that the general principle of State aid is incompatible with the very functioning of the internal market. The strategy was to build upon a far-reaching prohibition with minimal exceptions[4] and this approach is still maintained until today. Article 107 (1) TFEU, continues the same way of thinking by stating that in general any aid is prohibited when it follows *all* of the following criteria[5]:

A) The aid must be directly given by the State or through their State resources;
B) The aid must give a certain advantage to the beneficiary;
C) The aid must be of a selective nature: it must favor a specific undertaking or economic sector;
D) The aid must have an effect on trade between Member States
E) The aid must be able to distort competition in the internal market.

Naturally, a State aid policy purely based upon a restriction cannot ensure a stable and equitable economy as State aid might in some situations be necessary to address market failures or to ensure the competitiveness or viability of a certain sector. This line of thought was immediately confirmed by the EU Commission in its Report on Competition Policy of 1972:

"Intervention by the States represents a necessary instrument of structural policy when the operation of the market by itself does not make it possible (or at least within acceptable time-

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[2] P. NICOLAIDES, M. KEKELEKIS and P. BUYSKES, *State Aid Policy in the European Community: A Guide for Practitioners*, The Hague, London, Boston, Kluwer Law International, 2008, 9.
[3] C. BUELENS, G. GARNIER, R. MEIKLEJOHN and M. JOHNSON, "The economic analysis of State aid: some open questions", *European Economy. Economic papers* September 2007, European Commission, Brussel, 2 and 29, http://ec.europa.eu/economy_finance/publications/pages/publication9549_en.pdf.c
[4] A. SANTA MARIA , *Competition and State Aid: an analysis of the EC practice* in *International Competition Law Series*, The Hague, London, Boston, Kluwer Law International, 2007, 15.
[5] A. SANTA MARIA, *Competition and State Aid: an analysis of the EC practice* in *International Competition Law Series*, The Hague, *London, Boston,* Kluwer Law International, 2007, 16-17; P. NICOLAIDES, M. KEKELEKIS and P. BUYSKES, *State Aid Policy in the European Community: A Guide for Practitioners*, The Hague, London, Boston, Kluwer Law International, 2008, 10-11.

limits) to attain certain objectives of development justified for the sake of a better quantitative or qualitative growth or when it leads to intolerable social tension" [6]

Subsequently the Court of Justice of the European Union confirmed that view by stating that:

"*The prohibition in Article 92(1) EC is neither absolute nor unconditional since article 92(3) EC and article 93(2) EC give the Commission a wide discretion and the Council extensive power to admit aids in derogation from the general prohibition in article 92 EC* "[7]

Since these declarations, a substantial and diverse number of State aid has been found to be compatible with the internal market despite the restrictive wording of article 107 (1) TFEU[8]. Exceptions to the rule have become commonplace and the foundation of these derogations are contained within the article itself (in the second and third paragraph), with a disparity between the two based upon the nature of the exception.

2.2 Article 107 (2) TFEU.

Article 107 (2) TFEU contains a brief list of exceptions that, according to the wording of the article, *shall* be deemed as compatible with the internal market. These three categories can be summarized as follows[9]:

A) Aid having a social character;
B) Aid to reconstruct the damage caused by natural disasters or exceptional occurrences;
C) Aid granted to the economy the Federal Republic of Germany to compensate for the economic disadvantage it suffered during the division of Germany.

At a first glance, the article's wording of *shall* appears to give the impression that the EU Commission has to automatically approve any form of State aid as long as its reasoning lies within one of the mentioned categories. While this is theoretically correct, in practice it is not that simple. Member States will not receive any "free pass" by simply referring to this provision. They will still be bound by their duty to notify the EU Commission according to article 108 TFEU and this implies that the Commission still has a role to play albeit a different one.

When a Member State is planning to give a form of aid based upon article 107 (2) TFEU, then the Member State will have to provide adequate proof that classifies the aid in question under one of the three categories mentioned in the article[10]. The sole task of the Commission would be to review this claim and to decide whether the conditions of that category truly apply or not. That is the limit of its investigation and interference in the process. The articles mentioning of *Shall* needs to be interpreted in a way that denies the Commission of any discretionary power

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[6] Commission of the European Communities, First Report on Competition Policy, 112-113, N° 132, http://aei.pitt.edu/31201/1/Comp_1971-(1st).pdf.
[7] European Court of Justice 22 March 1977, ECCI:EU:C:1977:52, 609, § 8, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0078&from=EN.
[8] A. SANTA MARIA , *Competition and State Aid: an analysis of the EC practice* in *International Competition Law Series*, The Hague, London, Boston, *Kluwer Law International*, 2007, 68-87.
[9] C. BAUDENBACHER, *A brief guide to European State Aid Law* in *European Business Law and Practice Series*, The Hague, London, Boston, Kluwer Law International, 1997, 27-32.
[10] T. BRUYNINCKX, *Materieel EU-Staatsteunrecht* in *Bibliotheek Handelsrecht - Mededinging, Marktpraktijken en Intellectuele rechten*, Larcier, 2015, 119, N° 198.

to assess or review the notified aid[11]. The Commission cannot determine if the benefits of the given State aid could outweigh the possible distortion of the market, given that its role is restricted, in the situation of a Member State applying to provide aid under article 107 (2) TFEU.

2.3 Article 107 (3) TFEU and the balancing test of the Commission.

The same reasoning does not apply to the exceptions mentioned in article 107 (3) TFEU. Article 107 (3) TFEU states that the following forms of aid *may* be deemed compatible with the internal market, making it evident from the wording of the text that the Commission will retain its full discretionary power[12]. This means that when a Member State reports a form of aid (under the requirements of article 108 TFEU) with the request to determine it compatible on the basis of an exception mentioned in article 107 (3) TFEU, the Commission will not only have to assess whether the aid can be defined within the parameters of those exceptions but also if it would be desirable to allow a distortion of the market[13].

The Commission will have to weigh certain interests by performing a balancing test. This raises the question: how does the Commission preform this balancing test and what kind of elements do they put on the scales? The roots of this concept can be traced back to the Commission's larger attempt to revitalize State aid within the area of EU competition law by means of the State Aid Action Plan of 2005[14]. This plan contained four major objectives that would ensure the modernization of State aid control[15]:

a) Less and a more restrictive targeted State aid;
b) A refined economic approach;
c) More effective procedures and enforcement, greater predictability and transparency;
d) A better allocation of responsibilities between the Commission and the Member States.

Out of these four objectives, the refined economic approach was deemed as the most adequate method to (swiftly) achieve the goal of introducing new and efficient tools for the Commission to assess State aid cases[16].

This image grew stronger over time and lead to the introduction of the balancing test as it is formulated within the policy paper *"common principles for an economic assessment of the*

[11] T. BRUYNINCKX, *Materieel EU-Staatsteunrecht*, in *Bibliotheek Handelsrecht - Mededinging, Marktpraktijken en Intellectuele rechten*, Larcier, 2015, 118, N° 196.
[12] T. BRUYNINCKX, *Materieel EU-Staatsteunrecht* in *Bibliotheek Handelsrecht - Mededinging, Marktpraktijken en Intellectuele rechten,* Larcier, 2015, 126, N° 216.
[13] T. BRUYNINCKX, *Materieel EU-Staatsteunrecht* in *Bibliotheek Handelsrecht - Mededinging, Marktpraktijken en Intellectuele rechten, Larcier*, 2015, 127, N° 218.
[14] L. COPPI, "The role of economics in State aid analysis and the balancing test" in E. SZYSZCZAK (ed.), *Research Handbook on European State Aid Law*, Cheltenham, Edward Elgar Publishing, 2011, 64-65*;* Commission of the European Communities, State Aid Action Plan: less and better targeted aid, a roadmap for state aid reform 2005-2009, Brussels, 2005, http://ec.europa.eu/competition/state_aid/reform/saap_en.pdf.
[15] L. COPPI, "The role of economics in State aid analysis and the balancing test" in E. SZYSZCZAK (ed.), *Research Handbook on European State Aid Law*, Cheltenham, Edward Elgar Publishing, 2011, 68.
[16] N. KROES, *The refined economic approach in State aid law: a policy perspective*, speech at the College of Europe Conference, Brussels, 2006, 3, *europa.eu/rapid/press-release_SPEECH-06-518_en.pd*; L. COPPI, "The role of economics in State aid analysis and the balancing test" in E. SZYSZCZAK, *Research Handbook on European State Aid Law*, Cheltenham, Edward Elgar Publishing, *2012*, 68.

compatibility of State aid under Article 87.3 EC" of 2009[17]. In this paper the Commission shed some light on how they would approach their State aid policy from that moment on. Their method of choice was the aforementioned balancing test that consists of a three step approach[18]:

a) Is the aid directed at a well-defined object of common interest?
b) Does the aid provide for an objective of common interest? Is the aid aimed at a certain market failure or does it have any other ambition? (as a policy instrument or as an incentive effect). And if that would be the case, would the aid be proportional in order to counter that goal?
c) Do the potential negative effects of that aid outweigh the positive effects when that goal is achieved?

While the balancing test is undoubtedly a pleasant development that provides clarity on how the Commission will conducts its State aid control, it does not go without its fair share of criticism. The primary weaknesses of the test are the lack of legal certainty and its inherent complexity[19]. These observations undeniably have some truth to them, however it is clear from the General Courts case law that the Court holds a positive view of the current balancing test. A recent example can be found in the case of *Hamr-Sport Vs The Commission*[20], that reaffirms the Courts approval of the Commissions assessment system and the considerable discretion it enjoys while doing so, making it still highly relevant until today.

Having set out how the Commission will review aid under article 107 (3) TFEU, the next step is to analyze the categories that are subject to this review. The article contains five justification clause with two of them being the spotlight of this paper.

a) Aid to promote the economic development of area's with a low standard of living or serious underemployment;
b) Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
c) Aid to facilitate the development of a certain economic activities or of certain economic areas;
d) Aid to promote culture and heritage conservation;
e) Any other categories of aid that are specified by the Commission.

Article 107 (3) (b) TFEU is a combination of two different justification grounds[21]. The first ground refers to projects of a common European interest although the article itself fails to specify what can be addressed as such a project. Over the course of several years, the

[17] European Commission, Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC, 2009, 1-25, http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf.
[18] European Commission, Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC, 2009, 3, N° 9, http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf .
[19] P. NICOLAIDES, "Economic Analysis of State Aid: An Assessment of the Balancing Test and its Application in the Draft Framework on State Aid to Research, Development and Innovation", *EStAL* August 2006, 6-8, http://www.eipa.nl/UserFiles/File/state_aid/Economic_Test_of_State_Aid_24Aug06.pdf.
[20] European Court of Justice 12 May 2016, ECCI:EU:T:2016:292, http://curia.europa.eu/juris/document/document.jsf?text=&docid=178121&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=146975.
[21] C. BAUDENBACHER, *A brief guide to European State Aid Law* in *European Business Law and Practice Series*, The Hague, London, Boston, Kluwer Law International, 1997, 34-36.

Commission adopted a case by case review that constantly (re)shaped the concept[22]. In 2014 that came to an end as the Commission released a communication to provide guidelines for the assessment of State aid given to an important project of Common European interest and along with it a clear answer on what qualifies under such a project[23]:

"*The project must contribute in a concrete, clear and identifiable manner to one or more Union objectives and has a significant impact on the on (I) the competitiveness of the Union, (II) sustainable growth, (III) addressing social challenges or (IV) value creation across the union".*

The second justification ground states that aid can be given as a counter-measure for a serious disturbance of the economy of a Member State. According to the Court's early case-law, this disturbance must affect the Member State altogether and not solely a specific region or district[24]. In addition, the situation must be exceptional and serious compared to the state within the entire Union. Requests based upon company specific events, where the bankruptcy of a prominent company could lead to a "serious disturbance of the economy", are currently unsuccessful[25] and this indicates that the justification ground was interpreted, by the Court and the Commission, in quite a restrictive manner.

Article 107 (3) (c) TFEU allows for compatible aid if the aid is granted for the purpose of the development of certain economic activities or certain economic areas. The ground is aimed at the economic development of certain districts or sectors, however there has been a recent development of the Commission to base itself upon 107 (3) (c) TFEU to approve aid measures for the development of certain economic activities without any link to a specific sector[26]. To invoke this ground, trade between Member State has to remain unaffected in order to avoid damage to the Common Interest. This means essentially two things: first a proportionality test

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[22] Commission Decision (13 March 1996), 96/369/EG, *OJ L 146*, 20.06.1996 P. 0042 – 0048, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996D0369; Commission Decision (6 June 2001), 2001/780/EG, *OJ L 292, 9.11.2001, 58–63*, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001D0780*;* Commission Decision (23 October 2007), 2008/708/EG, *OJ L 236, 3.9.2008, 10–44, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008D0708.*

[23] European Commission, Criteria for the analysis and capability with the internal market of State aid to promote the execution of important projects of common European interests, 2014, C 188/02, *OJ C 188*, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014XC0620(01).

[24] European Court of Justice 15 December 1999, ECCI:EU:T:1999:326, § 167, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d5043ff9e007174f34854abec8583d9b63.e34KaxiLc3qMb40Rch0SaxyKchb0?text=&docid=44921&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=625748 ; European Court of Justice 30 September 2003, ECLI:EU:C:2003:509, § 106, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48646&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=636807.

[25] Commission Decision (30 November 2009), 2009/341/EC, 2009, *OJ L 341*, (95), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009D0341; Commission Decision (30 April 2008), NN 25/2008, 2008, http://ec.europa.eu/competition/state_aid/cases/225266/225266_843256_6_1.pdf.

[26] European Commission, Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification, 2009, C 188/02, *OJ C* 188, *6-10*, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0811(02); European Commission, Criteria for the analysis of the compatibility of State aid for training subject to individual notification, 2009, C 188/01, *OJ C* 188, 1-5, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0811(01); European Commission, *Framework for State aid for research and development and innovation*, 2014, C 198/01, *OJ C* 198, § 5, § 14, § 36, § 40, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0627(01); European Commission, Guidelines on State aid for environmental protection and energy 2014-2020, 2014, C 200/01, *OJ C* 200, § 2, § 10, § 18, § 27, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628(01).

will be used to ensure that aid will not exceed the amount that is necessary to achieve that goal[27]. Secondly when making an assessment, the potential consequences for competitors have to be taken into account[28]. For example a limited loss of customers cannot lead to a disturbance of trade between Member States that would damage the Common Interest[29] and the same applies when there is no real impact on the activities of competitors[30].

On a first impression it would appear that 107 (3) (b) and 107 (3) (c) have a different objective in mind as they are applied on a completely different level. By looking at the wording of the text, 107 (3) b plays-out at a national level while 107 (3) (c) only applies at a sectoral level. And yet it appear that these justification grounds are more and more merging with each other. An ideal example of this evolution can be found within the Commission's interpretation of the Rescue and Restructuring aid guidelines for failing firms. According to the Commission, these guidelines "*are of a general application while containing some specific criteria for the financial sector"*[31]. At the time, these guidelines were a tool used to assess a possible application of article 107 (3) (c) TFEU only, however the Commission's statement provided these guidelines a more expansive field of application so that these criteria can also be used to assess a possible application of 107 (3) (b) TFEU. A possible explanation on why Commission switched focus could lie at the fact that the exception was rather underdeveloped as a result of it being rarely invoked[32].

2.4 Temporary (Union) Framework for State aid measures to support access to finance in the current financial and economic crisis.

In 2009, the Commission issued a communication with the intent of temporary allowing additional State aid measures to soften the blow of the sudden financial crisis. This action was a follow-up and a confirmation of the Commission's resolve not to abandon the State aid monitoring system during more turbulent times[33]. Since its introduction, Member States have not hesitated to rely on the aid schemes supported by this Framework and in retrospect, there is no doubt that this initiative has played a significant role in the stabilization of the financial

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[27] European Court of Justice 15 June 2005, ECCI:EU:T:2005:221, § 66 and § 267, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59354&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1197209.

[28] Commission Decision on State aid which Spain has implemented and is planning to implement for the restructuring of Babcock Wilcox España SA (Text with EEA relevance)(3 July 2001), 2002/200/EG, 2001, *OJ L 67*, § 106, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002D0200.

[29] Commission Decision on State aid – Germany – Additional Financing for the Conversion of Kassel –Calden airport (25 July 2012), SA 34089 (N/2011), § 68-73, http://ec.europa.eu/competition/state_aid/cases/243040/243040_1368104_106_2.pdf.

[30] Commission Decision on State aid – Lithunia - Construction of Infrastructure for the Passenger and Cargo Ferries Terminal in Klaipeda (22 February 2012), SA.30742 (N/2010), § 81-82, http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf .

[31] European Commission, The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, 2008, *OJ C* 270, § 6, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC1025(01); A. LISTA, *EU Competition Law and the Financial Services Sector*, Informa Law from Routledge, Oxon, 2013, 115, § 1.

[32] M. SCHMAUCH, *EU Law on State Aid to Airlines: Law, Economics and Policy*, Berlin, Lexxion Verslagsgesellschaft , 2012, 165.

[33] European Commission, Communication from the Commission tot the European Council, *A European Economic Recovery Plan*, 2008, Brussels, COM (2008) 800, 12, http://ec.europa.eu/economy_finance/publications/pages/publication13504_en.pdf.

market[34]. Extraordinary policy measures such as the Framework proved to be vital to ensure stability and to avoid a subsidy race initiated by the Member States that would only further deteriorate the situation[35].

The Temporary Framework was centered on two main ambitions. First was the urgent need to address the predicament of obtaining finance for companies during the crisis and second, it was necessary to ensure a continuing investment in EU projects[36]. The optimal way to reach those ambitions was to present Member States with a temporary instrument that would result in rapid and immediate results[37]. This instrument of choice was none other than an exceptional State aid scheme linked to the extraordinary circumstances of the crisis.

Considering the Framework's origin and purpose, the Commission deemed it essential that these measures remain limited in time. In that regard, article 107 (3) (b) TFEU (at the time article 87 (3) (b) EC-Treaty) was chosen as the befitting legal basis for the Framework[38]. Additionally, the initial Framework was intended to come at an end at the 31st of December 2010 and despite its effectiveness, the uncertainty about the recently recovered financial markets called for an extension of one year[39] (with some amendments in place as the situation was no longer as severe) before it was finally terminated.

By adopting article 107 (3) (b) TFEU as its foundation, the Commission considered the financial crisis of 2008 as a "*serious disturbance to the economy"* with effects that span over the entire European Economy[40]. To remedy these effects, the Framework provided for three new categories of aid (aid in the form of guarantees, aid in the form of subsidized interest rates and aid solely for the production of green products), while enhancing the already existing forms (mainly risk capital investments and short-term export-credit insurance)[41]. And yet contrary to expectation, these forms of aid were not unlimited. Conditions and restrictions, ranging from specific to general ones, were put into place even if this was not strictly required by the article itself. The very fact that the Commission places conditions on the applicability of a State aid policy based upon 107 (3) (b) TFEU is a highly interesting phenomenon. In turn, this raises a few questions on how these two interact and if it would be possible for the article to be directly

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[34] European Commission, Commission Staff Working Paper: the effects of temporary State aid rules adopted in the context of the financial and economic crisis, 2011, 105, http://ec.europa.eu/competition/publications/reports/working_paper_en.pdf.

[35] M. CAMPO, "The new State aid temporary framework", *Compet.policy newsl.* 2009, 21, http://ec.europa.eu/competition/publications/cpn/2009_1_6.pdf.

[36] European Commission, Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis, 2008, 2, http://ec.europa.eu/competition/state_aid/legislation/temp_framework_en.pdf .

[37] M. CAMPO, "The new State aid temporary framework", *Compet.policy newsl*. 2009, 22, http://ec.europa.eu/competition/publications/cpn/2009_1_6.pdf.

[38] M. CAMPO, "The new State aid temporary framework", *Compet.policy newsl.* 2009, 22, http://ec.europa.eu/competition/publications/cpn/2009_1_6.pdf.; European Commission, *Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis*, 2008, 6, http://ec.europa.eu/competition/state_aid/legislation/temp_framework_en.pdf.

[39] European Commisson, EU Commission, Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis, 2011, *OJ C* 5-15, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011XC0111(01); M. CAMPO, "Prolongation of the State aid temporary framework", *Compet.policy newsl.* 2011, 42, http://ec.europa.eu/competition/publications/cpn/2011_1_8_en.pdf.

[40] European Commission, Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis, 2008, 6, http://ec.europa.eu/competition/state_aid/legislation/temp_framework_en.pdf.

[41] M. CAMPO, "Prolongation of the State aid temporary framework", *Compet.policy newsl.* 2011, 43,

invoked next to the (temporary) scope of the Framework with the aim of avoiding the restrictions and conditions. A further and more in depth analysis on these questions will be addressed in chapter III.

2.5 The Banking Communication.

Within the broader context of the crisis framework, the Banking Communication of 2008 was the Commission's very first course of action. The Communication enabled swift and flexible State interventions, while maintaining the protection of European competition, in exceptional times of crisis. Prevention of subsidy races between the Member States was the primary driving factor behind these actions and the Banking Communication fitted that idea perfectly as it provided for a specific and uniform approach to State aid in the financial sector. More in particular the Communication was specifically aimed at providing aid in the form of recapitalization schemes, banking guarantees, asset relief and liquidity support[42]. As the first of many Communications to come, the Banking Communication settled out the initial approach of the Commission regarding the allocation of the necessary aid. Six cumulative conditions had to be met before a State aid request could generally be accepted:[43]

- The aid in question has to be granted on a non-discriminatory basis. Access to aid can never be based upon nationality;
- The access to the aid can only be temporary;
- The aid itself has to be clearly defined and the amount has to be limited to what is necessary to tackle the dire situation of the financial markets;
- When possible, a system of burden-sharing with the applicant should be in place;
- Abuse of requests must be prevented by imposing behavioral restrictions on the applicants (for example, the applicant cannot pursue an aggressive expansion while it is receiving any aid);
- Continuity should be ensured by providing for additional measures for the entire financial sector as well as for the individual financial institutions who benefitted from the aid.

These general principles were reapplied and further refined in the follow-up Communications issued by the Commission (the Recapitalization Communication, the Impaired Asset Communication, the Restructuring Communication and the Temporary Framework for State Aid Measures).

At that crucial moment in time, the Banking Communication showed its true worth as it introduced two major innovations on the field of State aid policymaking:

[42] European Commission, Communication of the Commission, The application of State aid rules to measures taken in relation of financial institutions in the context of the current global financial crisis, 2008, Brussels, *OJEU* 270/02, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1025(01)&from=EN ; European Commission, Commission Staff Working Paper: the effects of temporary State aid rules adopted in the context of the financial and economic crisis, 2011, 10, http://ec.europa.eu/competition/publications/reports/working_paper_en.pdf.

[43] European Commission, Commission Staff Working Paper: the effects of temporary State aid rules adopted in the context of the financial and economic crisis, 2011, 25-26, http://ec.europa.eu/competition/publications/reports/working_paper_en.pdf.

First it paved the way for a more flexible utilization of article 107 (3) (b) TFEU as a reinvented ground for State aid measures in the financial sector[44]. This allowed the Commission to apply aid on a two track system, according to the specific needs of the situation. Aid could be applied to individual financial institutions under article 107 (3) (c) TFEU, as was the common practice before the Communication's introduction, and from its introduction aid could also be given in a more flexible and tolerant way to a group of undertakings or to a whole sector on the basis of article 107 (3) (b) TFEU. Preferring a fresh approach on article 107 (3) (b) TFEU to confront the effects of the financial crisis, is further proof that from that day forward the Commission deemed the crisis as capable of affecting not only the stability of individual banks but also the banking system as a whole, creating a risk for the economies of all European Member States.

Secondly, the Communication emphases the importance of urgency by establishing new opportunities to gain a faster approval of State aid support. It became possible to receive a follow up on a State aid request within 24 hours, fill in request during the weekends or even to receive a form of preliminary aid while the request was still under review[45]. All of these new elements introduced by the Communication illustrate that the Commission spared no efforts or manpower to keep the situation contained.

Even with these innovations in place, some Member States put forward complaints about the Communication stating that one of its general principles was aimed at differentiating aid to financially solid banks, who came into difficulty due to the collapse of inter-bank lending, and banks who actively and consciously participated in a risky behavior due to poor management[46] and yet the Communication itself provided for no tangible actions or consequences to support this principle. That complaint was spot-on and the distinction was properly put into action in the subsequent Recapitalization Communication[47]. Both categories of banks will still benefit from the swift methods to apply for aid under the Banking Communication, however banks whose issues primary arose from its own inefficiency and mismanagement, will be subjugated to a stricter and rigorous examination[48].

Apart from some minor complaints, the Banking Communication received a warm reception by the Member States from the moment of its introduction as it stabilized the financial markets and prevented any further outbreak. Nevertheless over the course of the crisis, the Commission

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[44] M. REYNOLDS, S. MACRORY and M. Chowdhury, "EU Competition Policy in the Financial Crisis: Extraordinary measures", *Fordham Int'l L.J.* 2011, 1680, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2218&context=ilj.; J.J. PIERNAS LÓPEZ, *The Concept of State Aid under EU law: from internal market to competition and beyond,* Oxford, Oxford University Press, 2015, 224.

[45] M. REYNOLDS, S. MACRORY and M. CHOWDHURY, "EU Competition Policy in the Financial Crisis: Extraordinary measures", *Fordham Int'l L.J.* 2011, 1680, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2218&context=ilj.; J.J. PIERNAS LÓPEZ, *The Concept of State Aid under EU law: from internal market to competition and beyond,* Oxford, Oxford University Press, 2015, 224.

[46] European Commission, Communication of the Commission, The application of State aid rules to measures taken in relation of financial institutions in the context of the current global financial crisis, 2008, Brussels, *OJEU* 270/02, (14), http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52008XC1025(01)&from=EN.

[47] European Commission, Commission Staff Working Paper: the effects of temporary State aid rules adopted in the context of the financial and economic crisis, 2011, 26-27, http://ec.europa.eu/competition/publications/reports/working_paper_en.pdf.

[48] J.J. PIERNAS LÓPEZ, *The Concept of State Aid under EU law: from internal market to competition and beyond,* Oxford, Oxford University Press, 2015, 224.

realized that certain elements of the Communication could be streamlined in favor of quality and efficiency. From 2008 to 2013, the Commission constantly refined the Communication by providing amendments, updates and clarifications for the parameters it employs during its assessment of crisis-related aid to banks[49]. This practice continued until the Communication arrived at its latest incarnation in 2013[50] that completely replaced the original Communication of 2008.

The focus of the revisioned version lies upon the improvement of the restructuring process and maintaining a level playing field between the banks. The situation has greatly changed since the first Communication, making it the appropriate moment in time to adapt the crisis rules for banks. Given that the ultimate goal is the return of the normal functioning of the market[51], the overly flexible and lenient approach to crisis-aid for banks had to be toned down. While the system remains in place, the revisioned Communication instead makes it more difficult for banks to demonstrate that they are still in need of aid. Not only will these banks have to to provide a restructuring and capital-raising plan before their request even comes into consideration, a strengthened system of burden-sharing ensures that public funding will not abused.

To conclude, the Commission has quite successfully deflected the most dangerous impacts of the financial crisis by softening their approach for (crisis) aid to banks early on. Later, when the markets started to become more stabilized, they started to revert back to their original (stricter) stance, one step at a time. The Commission's quick intervention and strategy is worthy of praise as it shows the Commissions capability in upholding European Competition law while still being able to find a way to deal with an unforeseen and severe crisis.

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[49] European Commission, Communication of the Commission, The recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, 2009, Brussels, *OJ C* 10/03, 2-10, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0115(01); European Commission, Communication of the Commission, The treatment of impaired assets in the Community banking sector, 2009, Brussels, *OJ C 72/01*, 1-22, *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009XC0326(01)*; European Commission, Communication of the Commission, The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, 2009, Brussels, *OJ C* 195/04, 9-20, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0819(03); European Commission, Communication of the Commission, The application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, 2010, Brussels, *OJ C* 329/07, 7-10, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010XC1207(04); European Commission, Communication of the Commission, The application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, 2011, Brussels, *OJ C* 356/02, 7-10, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011XC1206(02).

[50] European Commission, Communication of the Commission, The application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, 2013, Brussels, *OJ C* 216/01, 1-15, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730(01).

[51] P. LOWE, "State Aid Policy in the context of the financial crisis", *Compet.policy newsl.* 2009, 3 http://ec.europa.eu/competition/publications/cpn/2009_2_1.pdf.

Chapter III: The European Financial Crisis in a nutshell.

Europe's most dreadful crisis since WOII did not happen overnight. A common misconception currently still exists on how this crisis came into being and according to most journalistic sources, the cause can be traced back to the method of securitization that allowed banks to indulge in advantageous but risky loans. In truth, the crisis roots cannot be boiled down to a single cause as it is the result of a series of events and a multitude of factors. The process of securitization was not the main cause, however it did function as an impressive catalyst that amplified the process[52].

Over the last two decades, banks all over the world have turned away from their traditional policy in favor of pursuing new opportunities. The banking sector wanted to reinvent themselves and focus on more lucrative activities aside from the strict deposit and lending schemes. With the aim of expanding their operations, the banking industry started to offer a wide range of diverse products and services generating more revenue in return. At that time, an increasingly popular method was to sell a pool of financial assets as one securitized product. This method allowed them to take certain assets of their books in order to free up more capital, which in turn allowed the banks to be more complacent with their lending criteria[53].

This behavior resulted into what is referred to as the first phase of the financial crisis or the US Subprime Mortgage Crisis[54]. With low mortgages interest rates, low short-term interest rates and relaxed standards for loans becoming a common practice, property ownership rose along with their market value. Seeing this trend, investors enthusiastically signed into all sorts of mortgage-backed securities as they were unaware of the lurking danger. When the housing prices eventually reached their peak, most lenders became unable to pay back their loan. In turn, the value of the mortgage backed securities rapidly plummeted and its investors (mainly other banks) started to face serious liquidity problems. Unfortunately European banks were neither safe from this development as the same problems started to appear with two German banks: Sachsen LB and IKB and the Irish bank: Northern Rock who heavily invested in US mortgage-backed securities. In the end, bankruptcy of these banks could only be avoided by keeping them afloat through restructuring aid[55].

In September 2008, the situation took a turn for the worst as Leman Brothers, the fourth largest American investment bank, filed for bankruptcy. The very fact that a large investment bank

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[52] European Parliament, *Understanding Securitization: background, benefits, risks* 2015, 4 and 11-16, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/569017/EPRS_IDA(2015)569017_EN.pdf.
[53] B. GUP, *The Financial and Economic Crises: An International Perspective*, Cheltenham, Edward Elgar Publishing Limited, 2010, 83.
[54] F. S. MISHKIN, *Over the Cliff: From the Subprime to the Global Financial Crisis* in *Nber Working Paper Series*, Cambridge, 2010, 2-4, https://www0.gsb.columbia.edu/faculty/fmishkin/papers/nberwp.w16609.pdf.
[55] Commission Decision on State aid measure C 10/08 (ex NN 7/08) implemented by Germany for the restructuring of IKB Deutsche Industriebank AG (notified under document C(2008) 6022) (Text with EEA relevance) (21 October 2008), 2009/775/EC , *OJ L* 278, 32-50, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009D0775; Commission Decision on State aid C 9/08 (ex NN 8/08, CP 244/07) implemented by Germany for Sachsen LB (notified under document number C(2008) 2269) (Text with EEA relevance) (4 June 2008), 2009/341/EC, *OJ L* 104, 34-50, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009D0341; Commission Decision on State aid C 14/08 (ex NN 1/08) implemented by the United Kingdom for Northern Rock (notified under document C(2009) 8102) (Text with EEA relevance**)** (28 October 2009), 2010/262/EC, *OJ L* 112, 38-60, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010D0262.

such as Leman Brothers could go bankrupt was the start of the second phase of the crisis[56]. It became evident that there is no bank that would be "too big to fall" and in response a panic broke out that lead to the freezing of interbank lending and depositors fearing the general entrustment of their savings. It became even harder for banks to find a solution on their own due to a fundamental problem for finding liquidity on the market. The Commission, sensing that the situation could no longer be solved with any individual measure as the crisis had become "*one of the severest financial and economic crisis in almost a century, with the European economy not being spared"*[57], quickly issued several rescue operations and managed to avert a devastating financial meltdown. At that moment in time, the situation was more or less contained, however further measures were needed to return the financial markets to its normal operations.

Chapter IV: Analysis of the State aid measures taken during the crisis.

4.1 Article 107 (3) (b) TFEU and the Temporary Framework: a troublesome relationship?

When the first visible signs of the crisis started to reach the European markets, the Commission quickly introduced and adopted a vast array of measures to counter a possible doomsday scenario. Of the various measures introduced, it can be said that the Temporary Framework is by far one of the most distinguishable as it promotes the application of a rather unknown and unexplored State aid exemption. Prior to the events of the crisis, the article was hardly ever invoked[58], resulting in an underdevelopment of any Commission practice on this specific ground. Due to the (potential) impact of the crisis on the EU's economy however, the Commission changed its approach and gave it a significantly more important role from that moment on.

The emergence of the Framework perfectly illustrates the new approach to rely upon article 107 (3) (b) TFEU and while nothing can be said against the Commission's attempts to provide for new tools and mechanisms in difficult times, some questions can be raised on how the Commission applies the article through the Framework. The Commission goes beyond a pure application of the initial treaty article as it put certain conditions and thresholds in place[59], that have to be fulfilled before any aid can be considered feasible on the basis of article 107 (3) (b) TFEU. These same thresholds do not exist within the article themselves, making the Commission's policy (as soft law) actually far stricter in application.

With this take on the article, the Commission invites two main concerns to the table. First, it is unclear what the boundaries are of the temporary measures taken under the article's aim of remedying *"a serious disturbance in the economy of a Member State"*. Was it within the power of the Commission to take these measures in the first place? Secondly, there exists doubt on whether Member States still retain the possibility to directly invoke article 107 (3) (b) TFEU

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[56] F. S. MISHKIN, *Over the Cliff: From the Subprime to the Global Financial Crisis*, 2 in *Nber Working Paper Series*, Cambridge 2010, 4-9, https://www0.gsb.columbia.edu/faculty/fmishkin/papers/nberwp.w16609.pdf.

[57] Report from the Commission, State aid Scoreboard, Special edition on state aid interventions in the current financial and economic crisis, Brussels, Spring 2009, COM(2009) 164, 3, http://ec.europa.eu/competition/state_aid/studies_reports/archive/2009_spring_en.pdf .

[58] M. SCHMAUCH, *EU Law on State Aid to Airlines: Law, Economics and Policy, Berlin*, Lexxion Verlagsgesellschaft, 2012, 165.

[59] European Commission, *Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis*, 2008, 7-12, http://ec.europa.eu/competition/state_aid/legislation/temp_framework_en.pdf .

next to the existence of the Framework as some situations might not come into consideration due to the Framework's thresholds.

The relevance of these concerns cannot be underestimated as during that short timeframe, a tremendous amount of aid has been reviewed on the basis of the Framework[60] and even with the termination of the Framework today, it remains a relevant benchmark for gaining insight in future applications of the article in similar situations.

While most of the notified aid under the Framework ended up in favor of the Member States requesting the aid, a selected few were deemed as incompatible with the requirements of the Framework. The notification for aid in favor of *Oltchim*[61], unfortunately never came before the Court due to Romania retracting its request while clarifying that it had not yet taken any steps in providing the Framework guarantee. The Commission confirmed this statement and closed its investigation[62].

On the 8th of March 2016, clarity curtailing the legality of the Framework and its relation to article 107 (3) (b) TFEU finally arrived in the form of the ELGA case, where the Court confirmed the Commission's Decision to recover unlawful aid given by Greece to the Greek Agriculture Insurance Organization (ELGA).

4.1.1 *Greece Vs The Commission (ELGA)*[63].

A) Background of the decision.

In 2008, the Greek agricultural sector found itself in an alarming situation due to unforeseen crop losses. These losses were the result of abnormal weather conditions and many farmers were driven to the brink of bankruptcy. The government, convinced of the seriousness of the situation, opted to restore the viability of the sector by creating an exceptional compensatory aid scheme. The scheme in question would be executed by the Greek Agriculture Insurance Organization (from now on ELGA) as the scheme fits perfectly within the aim of the organization (insurance against damage caused by natural disasters). Its budget was made up from earlier contributions made by the Greek farmers, however this sum proved to be insufficient and the remaining funds had to be financed by means of a loan in favor of ELGA and guaranteed by the State.

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[60] Commission Decision (19 January 2009), N13/2009, 2009, http://ec.europa.eu/competition/state_aid/cases/229162/229162_914377_32_2.pdf; Commission Decision (1 April 2009), N156/2009, 2009, http://ec.europa.eu/competition/state_aid/cases/230338/230338_941435_30_2.pdf ; Commission Decision (5 May 2009), N248/2009, http://ec.europa.eu/competition/state_aid/cases/231080/231080_959709_29_2.pdf; Commission Decision (24 April 2009), N203/2009, 2009, http://ec.europa.eu/competition/state_aid/cases/230794/230794_966506_36_2.pdf; Commission Decision (29 May 2009), N268/2009, 2009, http://ec.europa.eu/competition/state_aid/cases/231182/231182_961362_31_2.pdf; Commission Decision (26 March 2009), N47d/2009, 2009, http://ec.europa.eu/competition/state_aid/cases/229767/229767_956616_25_1.pdf.

[61] Commission Decision (19 November 2009), C36/2009, 2009, (91)-(96), http://ec.europa.eu/competition/state_aid/cases/233973/233973_1027060_11_1.pdf.

[62] Commission Decision (30 September 2010), C36/2009, 2010, http://ec.europa.eu/competition/state_aid/cases/233973/233973_1148745_146_1.pdf.

[63] European Court of Justice 8 March 2016, ECLI:EU:C:2016:145, http://curia.europa.eu/juris/document/document.jsf?text=&docid=174840&doclang=EN.

The Greek government informed the Commission of the measures it had taken to remedy *" a serious disturbance"* that could potentially threaten the downfall of Greek economy and in return the Commission opted to carefully investigate this scheme in further detail. For the Commission, this aid scheme undoubtedly represented State aid. Still, the measures were not completely incompatible with the internal market and the Commission approved a portion of the aid while the excess required to be recovered through any means necessary. The Greek government disapproved the decision and contested it by means of an action for annulment before the General Court. The General Court did not share the view of the Greek government and rejected its claims, leading to its appeal before the Court of Justice.

B) Arguments of the parties involved.

B.1 First Ground of appeal: The concept of State aid and distortion of facts.

The claims brought forward by the Greek government can be summarized as follows:

- The General Court erred in it judgement by deciding that the compulsory insurance payments paid in 2008 and 2009 by the producers of agricultural products could be viewed as State resources under the definition of article 107 (1) TFEU. These contributions should be viewed as "private resources" that fall outside of the scope of the State aid prohibition.
- The fact that Greek national legislation obligates the Greek authorities to collect the compulsory insurance contributions on behalf of ELGA, does not immediately result in these contributions being State resources. The method of collection is irrelevant to review the condition in question. The State is merely an intermediary that assists ELGA in the collection of the contributions, by no means does the State gain any insight or control on how these funds will be used.
- The General Court neglected its duty to respond on the remarks made by the Greek authorities to deduct the amount of State aid that had to be recovered with compulsory insurance contributions paid by the agricultural producers.
- The payment of compensatory aid to remedy the situation only had a very limited effect on EU competition, almost no effect at all. The advantage these measures pursue outweigh the small and insignificant effect on fair competition.

In response, the Commission flat-out rejected these claims without any further remarks.

B.2 Second ground of appeal: exceptional circumstances.

The Greek authorities brought forth that General Court failed to take into account the exceptional situation the Greek economy endured in 2009. According to the Greek authorities, the General Court should have interpreted article 107 TFEU differently as it failed to ascertain if the adopted measures could truly affect trade between Member States and threaten to distort competition. Given the nature of the circumstances, these measures never provided the Greek agricultural producers an economic advantage over the producers of the European Union as they were necessary to ensure that survivability of the Greek producers.

The Commission contests the admissibility of this claim.

B.3 Third ground of appeal: misinterpretation and misapplication of article 107(3) (b) TFEU.

Under its last ground for appeal, the Greek authorities contested the General Court's decision not to investigate an error of the Commission as it refused to apply article 107 (3) (b) TFEU directly to the exceptional situation of the Greek economy. In its view, the General Court did not take into account the fact that the Commission used the article in an incorrect way by solely referring to the conditions set out by the Temporary Framework for State Aid Measures. The situation of the Greek economy differs vastly from the Framework's field of application, making it an inappropriate tool to assess the situation at hand.

The Commission rejected this claim and responded that the Greek authorities never referred to any exceptional circumstance of the crisis in Greece at the time of the investigation and that these allegations were not brought before the General Court. As a result, the Greek authorities cannot claim that the unproven exceptional circumstance could lead to a different judgement of the General Court regarding the utilization of article 107 (3) (b) TFEU.

C) Reasoning of the Court of Justice and opinion of the Advocate General.

C.1 First Ground of appeal: The concept of State aid and distortion of facts.

Regarding the first ground for appeal, the Court of Justice immediately reaffirmed that the General Court has the sole and exclusive competence on investigating the factual details of cases relating to State aid. Only when there exists an overly apparent mistake in the assessment of these facts, can this become a question of law before the Court. The case at hand however, does not contain such an apparent mistake and the Greek authorities were unable to provide any further evidence in support of their claim. Therefore the Court rejects the Greek authorities appeal relating to the distortion of facts by the General Court as inadmissible.

Having set out that the Court will maintain the General Court's take on the facts, the Court reviewed whether or not the Commission and the General Court were correct by designating the compulsory insurance payments as State funds. According to the General Court's investigation, this classification was the correct one as the national legislation ensured that the insurance payments were collected by the State's tax authorities, brought into the State budget and were payed to ELGA from the budget of the Ministry of Agriculture. These findings alone are enough to classify the aid, that stems from the insurance payments, as State resources. Furthermore the aid given by ELGA provided the Greek agricultural producers an advantage that no other producer could acquire under normal market conditions making it an unlawful action under article 107 (1) TFEU. The Court of Justice confirmed that the General Court was not mistaken in its investigation and was entitled to allow the Commission to refuse the neutralization of the insurance contributions.

C.2 Second ground of appeal: exceptional circumstances.

When confronted with the Greek authorities second ground for appeal, the Court concluded that same argument was never invoked before the General Court, making it "*new in character".* Based upon that fact alone, the second ground for appeal must be rejected as inadmissible due to the fact that the Court can never review different elements then the General Court. The allegation raised by the Greek authorities of invoke this argument, but being ignored by the General Court, is unfounded as they brought it up in an unclear manner. The General Court is

not required to provide an explanation on each and every argument as long as the applicant and defendant are able to understand its reasoning.

It is clear from the General Court's judgement, that its reasoning allowed both parties to understand how it came to its conclusion and that the General Court implicitly did not deem the situation of the Greek economy as an exceptional situation that is allowed to deviate from the State aid competition policy.

C.3 Third ground of appeal: misinterpretation and misapplication of article 107(3) (b) TFEU.

Concerning the admissibility of the third ground for appeal, Advocate General Sharpston commented that she contests the Commissions stance on that point. Even if the evidence presented by the Greek authorities is once more "*new in character"*, the aim of this specific appeal is not to achieve a completely new examination of the facts but to review whether or not the General Court committed an error by not applying article 107 (3) (b) TFEU directly and independently from the Temporary Framework[64]. The Court follows the recommendation made by the Advocate General and states that the situation is indeed different than the one under the second appeal, which allows the Greek authorities to present this claim before the Court.

How article 107 (3) (b) should be applied in a certain context is a matter for the Commission, one on which they have a wide margin of discretion according to the Court. The Advocate General reminds the Court that the Commission is tasked with making complex appraisals of both an economic and social nature within a broad Community context, a task solely suited for the Commission. As such, the Court cannot fully substitute itself in the Commission place and has to limit itself to the finding of a manifest error or a misuse of powers by the Commission, when reviewing this appeal[65]. The Court takes this warning to heart and confirmed that the Commission did not made a mistake by refusing to directly apply article 107 (3) (b) TFEU to the Greek situation. In general, the Commission, Member States, companies, are equally bound by the guidelines issued in specific areas of State aid, as long as these guidelines do not contradict with the rules mentioned in the TFEU and the general principles of law. Guidelines such as the Temporary Framework, cannot contain a different assessment method then the one mentioned in article 107 (3) TFEU nor can they dissolve the Commission of its duty to investigate the exceptional situation that could potentially lead to a direct application of the article and they can never prevent the requesting party from receiving an adequate reasoning on why the request was denied.

The Temporary Framework was created to take into account the consequences of the economic crisis in all Member States and by utilizing the Framework, the Commission correctly applied article 107 (3) (b) TFEU at the case at hand. Next to the utilization of the Framework, a direct application of the article is indeed possible as long as specific and exceptional circumstances require the Commission to do so. However, the evidence brought forward by the Greek authorities is not of such an exceptional and specific nature, making an assessment exclusively based upon the Framework adequate enough. The Court decided that the third ground for appeal was admissible but unfounded.

[64] Opinion of Advocate General SHARPSTON 15 October 2015, ECLI:EU:C:2015:699, (30)-(32), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CC0431&from=EN.
[65] Opinion of Advocate General SHARPSTON 15 October 2015, ECLI:EU:C:2015:699, (38), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CC0431&from=EN.

D) Reflections on the judgement of the Court[66].

On a closer inspection, quite a few things can be learned from the ELGA judgement and while the case provides for some much needed answers on two different fronts, it also opens the door for some further questions and inquiries.

With respect to the relationship between the Commission State aid policy guidelines and its source article 107 (3) TFEU, the Court has now clarified that as a general rule, it is not possible to deviate from these policy guidelines. However when a specific sector is faced with exceptional circumstances, who are inherent different from the ones foreseen in the policy guidelines, then the Commission is required to additionally take the source article into account. It appears that the Court wants to prevent the Commission from concealing itself behind its State aid policy guidelines when there are dire circumstances at play that require a complete and in depth investigation, but the Court fails to give any indication on what these exceptional circumstances could be. The Court is quite unclear on what the Commission should rely on to determine such an exceptional circumstance. Should this be a situation specific to one Member State or is it allowed to have effects in multiple Member States? If the situation of the financial crisis, which has been heralded as one of the most dreadful disasters ever to impact the European economy on its own does not meet this criterion, then what does the Court qualify as an exceptional circumstance? The lack of any clear answer will presumably result in a form of self-enforcement of this exception by the Commission that can go two ways. The Commission could possible end up doing the complete opposite of what the Court envisaged in its judgment by referring to the source article merely pro forma, with the in depth investigation still focused upon the policy guidelines. Or the Commission could end up approaching the concept in a completely different and maybe incorrect way then what the Court initially intended. Either way, the result will be that Member States will become more than willing to contest this self-enforcing approach by the Commission leading to an increasing amount of disputes before the Court.

Alternatively, in the long run this case might just be the right wake-up call for the Commission to abandon (or at least limit) their minimalistic approach when reviewing State aid measures. The Commission is notoriously known to review the majority of the aid request in a form of a "*box-ticking exercise"* of various conditions and thresholds within its policy guidelines in favor of efficiency[67]. The ELGA judgement might just be the necessary trigger for the Commission to enhance their assessment to a higher level but the end result will depend on the future actions of the Commission.

Regarding the previously unexplored article 107 (3) (b) TFEU itself, the ELGA judgement presents some insight on how it should be specifically interpreted. The Court acknowledges that Member States are able to invoke the article next to the Framework if there exists a specific and dire disturbance in the economy of that Member State. However when the Member States would like to invoke that provision, it has to provide proof that the disturbance "*distinguishes*

[66] A. SANCHEZ-GRAELLS, "CJEU rules on Greek Support to the Agricultural Sector under the 2008 and 2009 State Aid Frameworks: A Blow to the Commission's Waiver of Discretion?", *How to Crack a Nut, a blog on EU economic Law* 10 March 2016, http://www.howtocrackanut.com/blog/2016/3/10/vd9y0d5qc27toyps2xl7kiln1fz6i8.

[67] A. SANCHEZ-GRAELLS, "Digging itself out of the hole? A critical assessment of the European Commission's attempt to revitalize State aid enforcement after the crisis", *JAE* 2016, 13-14.

a given sector of the economy of a Member State"[68] as Greece did for its agricultural sector. This interpretation undeniably contradicts the literal interpretation of the article that contains not a single reference to a specific sector of the economy but is aimed at a serious disturbance on the whole economy of a Member State. By doing so, the Court has narrowed down the scope applicable to article 107 (3) (b) TFEU.

In conclusion, while the Court sets out new possibilities for Member State to apply article 107 (3) (b) TFEU next (or in some cases in replacement) of the policy guidelines, a certain amount of caution should be advised. Quite a lot of vagueness still exists surrounding the concept of an exceptional circumstance that has or can result into a serious disturbance (of a sector) within Member State's economy. This is a vagueness that can only be resolved with a further clarification by the Court, depending on the future actions of Commission in a similar situation.

4.2 The Banking Communication and the European Court of Justice: an unexpected plot twist?

Immediately after its introduction, the Banking Communication proved to be a vital supporting actor for Member States to deflect the detrimental effects of the financial crisis. In total, a stunning amount of 188 aid request under the Banking Communication alone made it before the Commission for review, demonstrating its popularity amongst the Member States and their willingness to make full usage of it to assist the financial institutions. Out of all these notifications, only 14 made the cut after a further investigation of the Commission, giving further testimony that the Commission adopted quite a lenient and flexible approach to remedy the situation. In 2013, when the Communication's latest form took the stage, the dust began to settle and the most perilous effects of the crisis had already passed. This required the Commission to readdress their policy and gradually return to a more restricted application of crisis-aid. Financial institutions were no longer able to easily gain funding under the tolerant conditions of the (original) Communication and that fact became visible in the decreasing amount of notifications to the Commission.

Doubts began to form concerning the Commissions "post" crisis-aid policy. The brunt of the crisis may have passed, its lingering effects however were still visible as the banks were only starting to recuperate. Was the Commission not too rash and overconfident that the market already could return to a normal pre-crisis functioning? Opinions differed on the very fact of whether or not the financial crisis had reached its end in 2013[69] and these doubts became more visible over time. Financial institutions and their supportive backers (government, investors,…), began searching for alternatives and methods to bypass the Banking Communication in order to keep the support of crisis-aid steady and flowing. Such a situation unfolded in Slovenia where a national legislation was drafted with the objective of transposing

[68] European Court of Justice 8 March 2016, ECLI:EU:C:2016:145, (70), http://curia.europa.eu/juris/document/document.jsf?text=&docid=174840&doclang=EN.

[69] http://www.cnbc.com/2013/11/27/the-global-financial-crisis-is-over-nomura.html.; https://hbr.org/2013/11/what-weve-learned-from-the-financial-crisis.; http://www.economist.com/blogs/buttonwood/2013/09/debt-crisis?fsrc=scn/tw/te/bl/fiveyearson.; https://www.theguardian.com/business/2013/mar/25/mervyn-king-crisis-not-over.; http://humansarefree.com/2013/10/the-financial-crisis-is-not-over-worst.html.; http://blog.euromonitor.com/2014/11/the-recovery-from-the-global-financial-crisis-of-2008-missing-in-action.html.

the Banking Communication into its national legislation. According to the Slovenian Investor Community, the new legislation that imposes a requirement of "burden-sharing" is unconstitutional and contrary to not only article 17 of the Charter of Fundamental Rights of the European Union but to the provisions of Directives 2012/30/EU and 2001/24/EC as well. This objection came before the Slovenian Constitutional Court, however the Court believed it did not have the jurisdiction to provide an answer to the validity and interpretation of the Banking Communication, as the national legislation is a strict transposition of it and asked for a preliminary ruling to the European Court of Justice.

4.2.1 *Tadej Kotnik and others Vs Državni zbor Republike Slovenije*[70].

A) Background of the preliminary ruling.

Due to the events of the financial crisis, five major Slovenian banks underwent a capital shortfall at the end of 2013. These shortfalls were of an unrecoverable nature on their own. In response, the Bank of Slovenia (Slovenia's central bank) came to their aid and provided for exceptional measures that would recapitalize Nova Ljubljanska banka and Nova Kreditna banka Maribor, rescue Abanka Vipa and write off the equity capital and subordinated debt for Probanka and Factor banka. The measures taken for both Probanka and Factor banka were heavily contested as investors could not agree that they had to literally share the burden by erasing the subordinated rights of these investors. This would mean that in the case of bankruptcy, they no longer held a reserved position before other creditors.

The investors that held these subordinated right had no claims against the very fact that these two banks were in need of aid not that these banks put forward a request for State aid under the national legislation that transposed the Banking Communication. They contested the validity of the prerequisite of burden-sharing (the write off) under the Communication before any aid can possibly be given. Not only is that requirement unconstitutional, it is a violation to the right of property protected in article 17 of the Charter and the provisions of Directive 2001/24/EC on the reorganization and winding up of credit institutions and Directive 2012/30/EU on the coordination of safeguards for public limited liability companies and the maintenance and alteration of their capital. The Slovenian Constitution Court was not convinced it had the proper jurisdiction to make an interpretation regarding the validity of EU law. Therefore on the 6th of November, the Constitutional Court asked seven preliminary questions to the European Court of Justice, which delivered a judgment on the 19th of July 2016 by Grand Chamber.

B) The questions referred to by the Slovenian Constitutional Court.

Seven inquiries were made to the European Court Justice, which can be summarized as follows:

1) Must the Banking Communication be interpreted as a binding instrument upon Member States, who are planning to grant State aid to a financial institution as a means to remedy a serious disturbance in the economy?
2) Are the prerequisites that require the equity capital to be written off along with the subordinated debt and/or convert these rights into equity before any aid can be given

[70] European Court of Justice 19 July 2016, ECLI:EU:C:2016:570, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d6e2615ee0b4164a7ca2a3dc99d2b08213.e34KaxiLc3eQc40LaxqMbN4PahyLe0?text=&docid=181842&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=903196.

under the Banking Communication, compatible with articles 107 to 109 TFEU? Or does the Commission exceed their competence by imposing these requirements?

3) Are these prerequisites that impose the equity capital to be written off along with the subordinated debt and/or convert these rights into equity before any aid can be given under the Banking Communication while that same Communication does not foresee any kind of compensation, compatible with the principle of the protection of legitimate expectations under EU law, considering that these rights existed before the Banking Communication came into being?
4) Are these prerequisites that impose the equity capital to be written off along with the subordinated debt and/or convert these rights into equity before any aid can be given under the Banking Communication, compatible with the right of property protected in article 17 of the Charter, since these rights are dissolved without any prior insolvency procedure?
5) Are these prerequisites that impose the equity capital to be written off along with the subordinated debt and/or convert these rights into equity before any aid can be given under the Banking Communication, compatible with article 29, 34, 35, 40, 41, 42 of Directive 2012/30/EU on the protection of investors in public limited liability companies, given that these measures reduce or increase the share capital of the company due to a decision of an administrative body (instead of a decision of the general meeting of shareholders)?
6) Can the prerequisites that impose the equity capital to be written off along with the subordinated debt and/or convert these rights into equity before any aid can be given under the Banking Communication, be limited the necessary amount of what is needed to counter the capital-shortfall? Can they be applied in a proportionate manner or do they always have to be fully applied?
7) Can the prerequisites that impose the equity capital to be written off along with the subordinated debt and/or convert these rights into equity before any aid can be given under the Banking Communication, be interpreted as reorganizational measures under Directive 2001/24/EC on the reorganization and winding up of credit institutions?

C) Admissibility of the case.

Both the Slovenian government and the Commission contested the admissibility of the second, third, fourth and fifth preliminary question. In response the Court put forward that the questions at hand pursues the objective of ascertaining whether or not a form of burden sharing can be asked as a requirement before aid will be given under the Banking Communication. The legality of such a prerequisite is of such an importance that it cannot be denied an investigation by the Court.

D) Answers provided by the Court and the opinion of the Advocate General.

D.1 Is the Banking Communication a binding instrument upon the Member States?

The Court reaffirms the traditional stance that the Commission is the sole institution that is able to review the compatibility of aid measures with the internal market. While doing so, the Commission has a wide margin of discretion that takes into account various economic and social elements. Most commonly, the Commission adopts guidelines that set out the method on how they preform that review. The Commission itself is also bound by these guidelines and in principle cannot deviate from them. However it has become clear from the judgement in *C-*

431/14: Greece V Commission (the ELGA case) that next to these guidelines, the Commission also has to take article 107 (3) (b) TFEU directly into account when specific exceptional circumstances compel it to do so. Additionally the Commission also has the duty to provide adequate reasoning should it refuse to do so. In the case at hand, the Banking Communication is a form of guidelines that the Commission employs to determine aid for financial institutions and thus the reasoning set out by the ELGA case applies.

As acknowledged in the ELGA judgement, Member States are allowed to put forward evidence of an exceptional situation that would require the Commission to authorize aid not on the basis of the benchmarks established in the Banking Communication but on article 107 (3) (b) TFEU it is derived from. Given that Member States have the option to deviate from conditions raised in the Banking Communication when applying for State aid, the answer to the first question must be that the Banking Communication is not a binding instrument upon the Member States.

The answer provided by the Court is fully in line with the recommendation given by Advocate General Wahl, who reminds the Court that the Commission has no legislative power in the area of State aid as this remains reserved for the Council[71]. Should the Commission impose a binding set of rules upon Member States in order to remedy a serious disturbance in the economy, then these rules would automatically become null and void[72]. The goal of these communications and guidelines issued by the Commission is to provide insight in the method of assessment and to ensure equal treatment and legal certainty while doing so, making them a form of soft law only[73]. Even if the conditions mentioned in these soft law publications are not met, Member States should still have the possibility to request aid, as long as article 107 (3) (b) can be applied to the situation at hand[74].

D.2 Does the Commission exceed its competence?

At its core, the aim of the Banking Communication is to remedy a serious disturbance in the economy of a Member State based upon the justification ground of article 107 (3) (b) TFEU. The usage of this article and the Communication that is derived from it, can be rationalized upon the underlying idea that the banking sector is highly interconnected. Should one bank fall, others will soon follow and this has an effect on other sectors of the economy which will eventually lead to a grave disorder in the economies of multiple Member States. By employing article 107 (3) (b) TFEU, the Commission gains a certain discretion to decide upon the route it will take to be one step ahead of that scenario. In that way the Commission is also entitled to

[71] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (36), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

[72] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (37), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

[73] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (38), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

[74] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (40), (44), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

refuse any aid request that deviates from that route if the aid in question is not essential to attain that objective.

The conditions raised in the Banking Communication and the conditions of burden-sharing in particular were put in place to ensure the aid would be limited to what is necessary so that any redundant distortion of competition is prevented. In essence, these measures are designed to prevent banks from resorting to State aid without first taking all available options to counter the situation by their own means. Otherwise, banks would possibly neglect some difficult restructural decisions that could prevent the reliance upon State aid and the distortion of competition along with it. Additionally these measures are also put into place to prevent the risk of a "moral hazard" where the banks are more than willing to participate in various risk-taking ventures, as the negative repercussions of those risks will be carried by the Community through State aid.

Based upon the foregoing and the fact that the Commission did not intrude upon the exclusive competence of the Council by adopting the Banking Communication, the Court decided that the answer to the second question should be that the Commission did not exceed its competence by making the condition of burden-sharing a prerequisite to the conferral of State aid to banks.

Again the Court takes a stand that is generally in line with the opinion of the Advocate General. In difference though, Advocate General Wahl specified that the condition of burden-sharing cannot be asked as a "*conditione sine qua non"* for any aid under article 107 (3) (b) TFEU, given that it is not mentioned in the article itself[75]. However it is not unreasonable for the Commission to require this condition to counter the exceptional situation that transpired in the banking sector of various Member States, as long as it is limited to the amount that is necessary to address that specific situation[76]. The Court itself does not clarify anything relating to the specific usage of the condition of burden-sharing, which could possibly lead to different forms of interpretation and speculation on some parts in the future.

D.3 Is the condition of burden-sharing compatible with the protection of legitimate expectations?

Regarding the protection of legitimate expectations, the Court observed that this kind of protection only applies to situations where an institution, body or agency of the European Union provides precise assurances that ensure well-founded expectations. The investors that are subject to the condition of burden-sharing, have not received any guarantee or assurance by the Commission that would protect from any measures taken to support banks during the financial crisis. Parallel with the Advocate General, the Court does not consider the fact that these investors were not subject to a condition of burden-sharing in the previous Banking Communication nor in any other publication, a potential infringement of any legitimate expectation. Neither can any breach of the principle be assigned to the assumed shortcoming of the Commission in providing a transitional period that would allow Member States to adapt to

[75] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (48), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

[76] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (49), (57), (61-63), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

the new prerequisites of burden-sharing. As the Advocate General pointed out, there might be situations where a transitional period might be unnecessary, impossible or even counter-productive[77]. In that way, the objective of the Banking Communication (the swift stabilization of the financial markets while keeping the volume of the aid to the necessary minimum) must be seen as an overriding public interest that excludes the need for any prior transitional period.

D.4 Is the condition of burden-sharing compatible with the right to property?

In its analysis on the compatibility of the fourth question, the Court inspects the consequences of burden-sharing to both shareholders and subordinated creditors. For the shareholders, the Court came to the conclusion that there could be no possible infringement of their right to property since the effects would remain the same if the bank never received aid and went into a state of insolvency. It also follows from the general rules applicable to their status as shareholder that the situation at hand falls under the risk of their investment. The subordinated creditors, who in the event of insolvency would receive payment before the shareholder, have likewise no ground to claim an infringement to their right to property as the Banking Communication only requires their contribution after the losses are consumed by the remaining equity and if there were no other ways to overcome the impending situation. Would that scenario eventually come into effect, then the creditors would never receive less than what their rights would have been worth if there was no State aid in the first place. In the end the Court's decision follows the recommendation of the Advocate General, however there is a slight deviation from it as the Advocate General upholds that only the national courts would be able to make the adequate factual, economic and legal assessment that is required to investigate a potential infringement to the right of property[78]. The Court itself did not follow-up on that suggestion.

D.5 Is the condition of burden-sharing compatible with Directive 2012/30/EU?

With its fifth question, the Slovenian Constitutional Court wants to receive clarification of whether a reduction in the capital of a public limited liability (in the case at hand due to the result of burden-sharing) must always be proceeded by a decision of the general meeting of shareholder or whether it also can be the result of a decision by an administrative body? The Court of Justice responds by emphasizing that the validity of the Banking Communication cannot be called into question by allowing burden-sharing to take place, without a prior agreement of the general meeting of shareholders, in exceptional situations. After a careful analysis of the Directive, the Court came to the conclusion that its protection only extends to a normal functioning of the financial markets, while by comparison the measures of burden-sharing will only be applied in the exceptional situations the Banking Communication is meant to counter or prevent. With that reasoning in mind, the Court deems the conditions of burden-sharing compatible with the protection granted within Directive 2012/30/EU.

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[77] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (69), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

[78] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (78-79), (85), (91-92), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

The Advocate General furthermore pointed out that Directive 2012/30/EU is not a tool meant to harmonize every protectionary right of shareholders and in exceptional circumstances it should become possible to deviate from the Directive's protection[79]

D.6 Do the measures of burden-sharing always have to be applied in full or can they be applied partially in a proportionate manner?

Under the sixth question, the Slovenian Constitutional Court ask the Court of Justice to expand on the possibility of partially applying the burden-sharing under the Banking Communication. In response, the Court acknowledged that a partial execution of burden-sharing is possible in the event that a full application of these measures would lead to financial instability or any disproportionate result. It follows from the Banking Communication's aim that all aid should be limited to the amount that is strictly necessary to counter the capital shortfall a bank is currently facing.

D.7 Do the measures of burden-sharing qualify as reorganizational measures under Directive 2001/24/EC?

The purpose of Directive 2001/24/EC on the reorganization and winding up of credit institutions is to sets forth a system of mutual recognition of reorganisatory measures and wind-up proceedings for banks, amongst the Member States. This means that the effects of reorganization measures taken within one Member State, must be respected and have exactly the same effects and outcome in other Member States. Both the Court and the Advocate General are of the opinion that in order for measures to be perceived as reorganization measures, three essential conditions need to be fulfilled:

a) The measures must be geared toward the stabilization of the bank's financial situation (preserving or restoring it);
b) The measures have to be taken by an administrative or judicial body;
c) The measures must be able to potentially affect the rights of third parties.

After careful consideration, the Court concluded that burden-sharing qualifies as a reorganization measure that falls under the scope of Directive 2001/24/EC.

In addition the Constitutional Court had doubts whether or not the conditions of burden-sharing could be qualified as a reorganisatory measure, given that an amendment of the concept took place through article 117 of Directive 2014/59/EU on the establishment of a framework for the recovery and resolution of credit institutions an investment, that specifically include measures who are compatible to burden-sharing. This would mean that only those specific measures could fall under the concept of reorganisatory measures, excluding the ones adopted in the Banking Communication. The Court dismissed these doubts by reminding the Constitutional Court that Directive cannot be interpreted as a tool meant to harmonize all reorganisatory measures for financial institutions as it merely established a system of mutual recognition.

[79] Opinion of Advocate General WAHL, 18 February 2016, ECLI:EU:C:2016:102, (99-101), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c715da36d431402ca2d58fde8935e1f6.e34KaxiLc3qMb40Rch0SaxyLax10?text=&docid=174451&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=610173.

E) Reflections upon the answers provided by the Court[80].

While the answer to the first question might appear to be quite unexpected, in truth its practical effects and consequences are rather limited. Starting with the ELGA case, the Court had already showed its willingness to allow deviation from the Commission's guidelines and publications. It is interesting to note that the same willingness remains in the Kotnik case. Unfortunately, the reasoning of the Court is still plagued by the same "loopholes" as the Court did not take the opportunity to refine the concept introduced in the ELGA judgement. The reason behind it would probably be linked to the short timeframe between the judgment and the preliminary ruling, however given the minor disputes regarding the Commission's crisis-framework, it still feels like a missed opportunity. Along the line of the ELGA judgement, the Court remains of the opinion that in principle the Commission can demand a certain conformity of its guidelines for the application of crisis-aid and that deviation from this policy framework is only possible when there are exceptional circumstances at play. Member States themselves will have to provide the proof of these exceptional circumstances and I feel that the Court underestimates the difficulty of this burden of proof. Currently Member States do not have an inkling how they should present such proof as neither in the ELGA judgement, nor in the first answer provided in Kotnik, does the Court provide any insight on what can be qualified to be an exceptional circumstance that requires the Commission to assess the situation directly to the Treaty articles. The results will be the same as the ones mentioned earlier[81] or perhaps Member States will start to comply with the policy framework in any event as it is the only secure method to gain approval for State aid. In the end, this behavior would be contrary to what, I presume, the Court would like to establish with its ruling in ELGA and Kotnik.

On the question whether the concept of burden-sharing can consistently be required as a prerequisite for State aid (the second question), I believe that the Advocate General provides for a better and more carefully devised answer. The Advocate General goes out of his way to specify that burden-sharing cannot be required by the Commission as a general rule. No, the condition of burden-sharing is only allowed in so far they are used to offset capital in the specific situation governed by the Banking Communication (where State aid would be required to counter a serious disturbance in the economy of a Member State due to financial instability). The Court itself does not make this clarification and while one can argue that the Court already took this into account subconsciously, by neglecting to explicitly mention whether the general concept of burden-sharing can be utilized outside of the Communication's scope or not, the Court leaves the door open for further speculation and contested views on that point. Unless this would be the Court's true agenda, however in my opinion I do not believe that the Court had the intention of allowing burden-sharing as a general condition for all State aid notifications.

Regarding the application of burden-sharing, the Slovenian Constitutional Court was unsure whether the measures in itself always require to be applied in full or if it would be possible to apply them partially and use State aid to acquire the remaining capital. On that particular question, I fear that the Court is rather cryptic in its wording. After rereading paragraph 101, it appears that a full write off is not necessary if it would cause financial instability or should the outcome have any disproportionate results. On top of these exceptions, who are enshrined in

[80] P. NICOLAIDES," Burden-Sharing and State Aid to Banks", *State Aid Hub* 13 September 2016, http://www.stateaidhub.eu/blogs/stateaiduncovered/post/7165.
[81] Supra 17.

the Communication themselves, the Court also considers that there is no need for a full application if a partial write off would be enough to recapitalize the bank in question. In the way that I understand this particular paragraph, this essentially means two things.

First, if you apply an *a contrario* reasoning upon this particular paragraph then it appears that a full application of burden-sharing would in fact be necessary unless this would cause financial instability, a disproportionate result or if a partial application would be sufficient to counter the capital short-fall. If this would be the Court's true answer to the sixth question then that is surely not that well reflected in the conclusion of paragraph 102. In addition, it is quite unsure when the Court is of the opinion that financial stability is at stake. Would that be in any event due to the interconnection of the banking system or does it only apply for the bigger, more powerful banks? By failing to clarify that exception, the Commission can speculate upon that point and use it to its advantage.

Secondly, it appears that the proposed idea of applying burden-sharing partially in conjunction with State aid appears to be rejected. The Court allows a partial application but only when that would be enough to cover for the capital shortfall on its own and in that event, State aid would be no longer required. Personally I think this answer was to be expected given the Communication's aim and logically it would otherwise invite any misusages that would result in an unnecessary application for State aid.

A final development reflected in the answers provided in Kotnik, would be that the Court accepts that the Commission can shift its view on the requirements to counter the effects of the financial crisis. Under the third and fourth question, the Constitutional Court was in doubt whether the general principle of legitimate expectations would not be into jeopardy as the Commission never imposed a condition of burden-sharing in any earlier forms of the Banking Communication. It is true that the Commission adopts a far more restrictive approach along with the Banking Communication of 2013, that would make it harder for banks to acquire the necessary aid to keep them afloat. In the context of the financial crisis, unforeseen events happen in the blink of an eye and it would not be unreasonable to argue that the earlier versions of the Communication would give banks some legitimate expectation on the requirements to receive State aid support. By dismissing that doubt, the Court expressed that the Commission is surely allowed to change its stance given that it cannot be expected of the Commission to at all time maintain the same course of action during a reshaping economic situation. In short, the Commission's return to a more restrictive approach during the latter ends of the crisis is not something the Court frowns upon, on the contrary the Commission is the most suitable actor to decide when alterations needs to be made. While according to some this might be deemed logical, it is still interesting to see the Court making an explicit confirmation.

To conclude I personally feel that, apart from the previous remarks, the answers to the preliminary ruling are a welcome addition to problems surrounding the crisis-framework. It might not be the right answer that the investor community was hoping for, they make sense in the way that State aid is not something that should easily be given. State aid will result in a distortion of competition and if additional measures such as burden-sharing can reduce or prevent this distortion, then it should be possible for the Commission to impose those measures.

Chapter V: Alternative remark: Was State aid the right choice to counter the financial crisis?

"There's no such thing as a free lunch" is a popular and common saying, utilized all across the globe. That same maxim can also be applied to the situation of State aid as there are repercussions to its usages. State aid flows from the taxpayers contributions and if aid is given to companies then naturally there remains less funds for other investments. Therefore State aid should not be handled lightly and during the Commission's first major attempt at reforming the concept, this concern was specifically disclosed[82]. Given that intervention is to be carefully considered, then a few emerging questions would be whether or not State aid was the most efficient method to counter the crisis or were there any alternatives? When and how would it be justifiable to grant State aid and did the Commission take the right decision by softening the application of State aid during the crisis?

The reason behind the emergence of those set of questions is due to a different take on the consequences of State aid. According to some authors, the closure of company or a financial institution is not always such a bad option as one might think. In some situations, it might even be beneficial to the market as a bad apple is removed from play, which in turn creates opportunities for better competitors to enter that market[83]. Furthermore, it has to be kept in mind that an improper usage of State aid will have the opposite effect. Reckless intervention will unnecessary distort competition and the justification of correcting a certain market failure will be hard to maintain since it will create a new kind of market failure on its own. In the end, Member States will start noticing that their own companies are in an unfavorable position due to another Member State's decision to grant aid and that will lead to a snowball effect where the outcome will not be beneficial to the economy.

Keeping that perilous scenario in mind, what are some of the possible alternatives to the classical system of State aid?[84]

- Taxation. Taxation is an interesting substitute to leverage companies into following a certain behavior that would otherwise require State funding instead. For example, a Member State wishes to reduce pollution of its rivers and other waterways. An overly simple method to achieve that goal is to provide State aid to companies so that they will build a filtration system and lower their pollution. On the other hand, a far more efficient manner to reach that same objective would be to enforce a taxation on pollution that would indirectly push companies to install a filtration system or to find other means to reach that goal. Member States are able to enforce such a form of taxation as long as it can be justified under EU internal market rules and the taxation is proportionate to achieve the higher goal it is meant to protect (in this example environmental protection can be invoked as long as the taxation is applied in an indistinctly applicable manner). However, Member States have to be careful not to cross the fine line that deviates taxation from State aid. When taxation is utilized to provide an unfair advantage to one

[82] Commission of the European Communities, State Aid Action Plan: less and better targeted aid, a roadmap for state aid reform 2005-2009, Brussels, 2005, (8), http://ec.europa.eu/competition/state_aid/reform/saap_en.pdf.
[83] J.F., COLLINET, "State Aid in the Banking Sector: A Viable Solution to the "Too big To Fail" Problem?", *GAR* 2014, 150, http://www.icc.qmul.ac.uk/docs/gar2014/146223.pdf .
[84] C. BUELENS, G. GARNIER, R. MEIKLEJOHN and M. JOHNSON, "The economic analysis of State aid: some open questions", *European Economy. Economic papers* September 2007, European Commission, Brussel, 12-15, http://ec.europa.eu/economy_finance/publications/pages/publication9549_en.pdf.

specific company or undertaking then due to its selective nature it is essentially a form of State aid. Examples such as the outcome of *Belgium Vs The Commission* on the Maribel bis and Maribel ter schemes[85], the further investigations into Luxembourg's taxation treatment of GDF Suez[86] or the recent acceptance of Belgium's alternative tax regime system for diamond traders and processors[87], perfectly illustrate the Commission's vigilance on that particular point.

- Regulation. Identical to the method of taxation, regulation can be applied to achieve a similar ambition on the condition that this regulation can be justified to achieve a higher objective under EU internal market rules and that the regulation is applied in a proportionate way to reach that objective (there were no less restrictive alternatives available).

- Decreasing the amount or intensity of aid. While not an alternative in the true sense of the word, it should be noted that a minimalistic approach to State aid can be a viable option. If State aid is required to remedy a certain situation, then at the very least it should be better targeted and reduced to the amount that is strictly necessary. While this idea sounds rather logical for the reason that it follows from the basis methodology that State aid should be used proportionally to limit any distortive effects, economists preach caution not to overgeneralize that thought. From the moment that the Commission expressed its intent to modernize State aid, the Commission started to pay more attention to a better targeted State aid in its policy guidelines. However, economists reminded that a higher aid intensity or amount is not always linked to a greater distortion of competition[88]. Depending on the situation it could even be beneficial instead which is why caution should be taken not to overly minimalize the intensity of aid.

  A prime example of such and "alternative" would be the *de minimis* notice for State aid. Under the Notice, minor capital injections of maximum 200 000 euro for a company or undertaking over a period of three years will not fall under the scope of the State aid regulations. Theoretically, the measures remain a form of State aid (as the general conditions do apply), however due to it its insignificant and negligible amount it is not able to threaten of distort competition is a considerable way. Not only will aid be applied more efficiently without the entire notification process, the market failure is addressed

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[85] European Court of Justice 3 July 2001, ECLI:EU:C:2001:370, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d547db9fe891a4482d8ababee7f8444a0c.e34KaxiLc3qMb40Rch0SaxyLaxb0?text=&docid=46485&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1005809.

[86] Commission Decision - Luxembourg - Possible State aid in favor of GDF Suez (19 September 2016), SA.44888 (NN/2016), http://ec.europa.eu/competition/state_aid/cases/266094/266094_1854598_79_8.pdf ; http://europa.eu/rapid/press-release_IP-16-3085_en.htm.

[87] Commission Decision - Belgium - Alternative income tax regime for the wholesale diamond sector (29 July 2016), SA.42007 (2015/N), http://ec.europa.eu/competition/state_aid/cases/258758/258758_1780644_143_2.pdf.; P. NICOLAIDES, "Belgium's Alternative Tax Regime for the Diamond Sector", *State Aid Hub* 25 October 2016, http://stateaidhub.eu/blogs/stateaiduncovered/post/7336.

[88] R. NITSCHE and P. HEIDHUES, "Study on methods to analyse the impact of State aid on competition", *European Economy. Economic papers* February 2006, European Commission, Brussels, 108- 113, http://ec.europa.eu/economy_finance/publications/pages/publication804_en.pdf.

with a limited or at least a significant lower distortion than under a regular State aid application.

- Conditioning the application of State aid. While again this is not an authentic alternative since it is still closely linked to the mechanism of State aid, it is nonetheless a very effective technique to limit State aid applications. Conditioning of aid can be executed in multiple ways and the Commission has been quite inventive over the years. The most common way to establish conditioning is to create guidelines that specifically defines what kind of companies can apply for aid and for which specific purpose. Alternatively, the Commission can opt to put prerequisites into place that would require compliance before any aid could possibly be applied or make a combination of both systems. A good example of the latter would be the Banking Communication of 2013 that incorporates the condition of burden-sharing as a prerequisite for financial institutions to receive crisis-aid due to a serious disturbance in the economy. Regarding the legitimacy of such measures, it appears that the Court is in favor of these requirements for the reason that the Commission is the most suited institution to set out the essential State aid policy and it enjoys a wide margin of discretion while doing so.

- Merger. Instead of blind reliance upon State aid, a merger orientated approach aimed at restructuring failing undertakings might be a reasonable substitute. Mergers can be applied to correct market failures in various situations such as for example to efficiently allocate rare resources, to create a competitor that is able to compete with a monopoly holder or one of the other many imaginative possibilities. Theoretically mergers would be able to achieve a similar result albeit with less distortion of competition or even with a slight enhancement instead as unhealthy companies are weeded out and a restructured version put into place. However, can that theory survive outside of its theoretical model and have any usage in practice? According to a study on crisis relief measures for the automobile sector, it surely is possible[89]. In two of their investigations, State aid was actually the lesser of the two options[90] which emphases the utility of this alternative.

During the financial crisis, the Commission spurred Member States on to remedy its devastating effects under a relaxed State aid framework. Swiftness and efficiency were the Commission's main motivators and State aid was chosen as the preferred tool to stabilize the situation. In retrospect this was probably the most reasonable choice the Commission could make. The method of taxation and regulation are both unfit in the events of a crisis situation due to the fact that it would be unreasonable to increase the burdens companies should carry when they are yearning for an escape from their predicament. In addition, it would be unwise to leave the solution to the Member States themselves as the lack of a unified Union wide-action would only backfire in the long run. A simplified application for crisis-mergers could have been a possible alternative, however the Commission did not pursue this method and handled any potential merger during the crisis under the normal merger control regime. Was that the correct

[89] L. GRIGOLON and N. LEHEYDA, *State aid in times of crisis: is it always good aid? An analysis of the European automobile market case*, Kuleuven, 2012, 2-5, 19, 23, 24-25, https://feb.kuleuven.be/public/n07082/GrigolonLeheydaStateAid.pdf.

[90] L. GRIGOLON and N. LEHEYDA, *State aid in times of crisis: is it always good aid? An analysis of the European automobile market case*, Kuleuven, 2012, 26-28, https://feb.kuleuven.be/public/n07082/GrigolonLeheydaStateAid.pdf.

decision or should the Commission have invested into a merger crisis framework next to the existing one for State aid? That question is hard to answer due to the fact that there exists quite some insecurity surrounding the possible outcome of such a scheme. Mergers have so far never been utilized to counter any crisis on such a scale and there does not exists any overwhelming evidence or research on that point that could prove that crisis policy based upon a relaxed merger control framework would be a more suited alternative with far less adverse effects in the long run. Perhaps this might be true in a distinctive area or category, as is illustrated with the example of the automobile sector, it is very difficult to argue that the same would be true in every situation. In light of the severity of the situation and the need for immediate action, I think that the Commission made the right decision to reshape and apply a crisis policy based upon State aid instead of plunging into the unknown.

Taking into account the interconnectedness of the financial system and the economic risk a shut-down of the system would bring, State aid was a necessary evil to avoid a catastrophic collapse that would otherwise result into a large-scale recession[91]. The same conclusion can also be applied to the second phase of the crisis. Various State aid measures were already into effect and it would be more sensible to reform those measures by means of conditioning in order for them to gradually fade out of existence. In hindsight, the Commission's reliance upon State aid to tackle this specific and peculiar crisis is not something to frown upon as no other alternative would be able to stabilize the system in such a short notice.

Chapter VI: Conclusion.

By adopting an exceptional State aid policy, the Commission was able to prevent an irreversible scarring of the European economy. Through the swift adoption of various crisis Communications, it avoided making any crucial mistakes that would otherwise reduce the effectiveness of the policy pursued. Both communications are emergency measures based upon the reinvented justification ground of article 107 (3) (b) TFEU and they proved to be a far better alternative than the preexisting rescue and restructuring measures created from article 107 (3) (c) TFEU. This "new" approach not only allowed the Commission to provide aid more efficiently due to its relaxed form of application, the majority of measures were also restricted in time which enables the Commission to adjust its policy to the needs of the economy.

Some questions did arise about this "new" approach and the various measures that were introduced through these Communications. Starting with the ELGA judgement it was unclear how these Communications relate to the source articles within the treaty: is co-existence possible? The short answer is no, the Court boldly introduced this as a general rule and yet deviations to the rule are possible in the event of exceptional sectoral circumstances who are different from the scope of the Communication. Thus the possibility surely exist that in some situations the Commission has to expand its investigation, the only question that remains is when does this situation happen? Unfortunately the Court is very vague on that notion, making it impossible to predict what qualifies as an exceptional circumstance. Furthermore, the Court places the burden of proof with the Member States and for them it feels that they have been given an impossible assignment. Without any additional support on how to qualify this concept, it will be extremely difficult for this theory to have any practical application. The ELGA ruling

[91] 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*, Cheltenham, Edward Elgar Publishing, 2011, 143.

further provides insight on how the "new" approach should be interpreted and this interpretation is different from the literal wording of the article. The Court narrowed down the scope of article 107 (3) (b) TFEU and requires detailed evidence of a specific sector influencing serious disturbance in the economy of the Member State. Once again the vagueness of the Court is regrettable and it remains uncertain how significant this sector must be to inflict a serious disturbance. The Kotnik case provided the Court of the ideal opportunity to clarify the established theory in ELGA however the Court failed to do so. This is presumably caused by the short timeframe between the two judgements, still it is quite disappointing to witness the Court copying the theory with the same ambiguity and I fear that this oversight might be detrimental for future applications of any crisis communication.

In Kotnik, the Court takes a positive stance on the measures of the 2013 Banking Communication and while I agree with the reasoning, I prefer the carefully constructed answer of the Advocate General instead. Burden-sharing as a prerequisite for aid should remain limited to the situations that fall under the scope of the Communication and it should never be able to become an universal condition for State aid. I think that the Court agrees with the Advocate General but fails to present the required clarity to expel any future doubts on the subject. Both the concept and method of burden-sharing are in line with the spirit of the crisis communication and while they might not be the most popular measure, I feel that should be nonetheless encouraged.

On the question about effective alternatives for State aid during crisis situations, it should be noted that for the measure of State aid itself, a multitude of substitutes undoubtedly exist. Whether they could form a relevant substitution to counter an exceptional crisis situation is in my opinion rather unlikely. None of the alternatives would be able to efficiently neutralize the treat in such a short notice. State aid appears to be the only tool available that is flexible enough to relieve the immense economic and political tension witnessed during the early moments of the crisis, while still allowing the Commission some freedom to shift towards a more restrictive approach once the situation becomes stable. In that way, a crisis policy based around State aid turned out to be very effective and the instrument itself should not be shunned for any future applications. On the contrary, the events unfolded during the financial crisis and its aftermath might create the right amount of awareness and incentive to fully modernize this lesser explored branch of EU competition law.

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