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Compensating Competitors or Restoring Competition? EU Regulation of State Aid for Banks During the Financial Crisis

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Abstract We contrast the theory underpinning state aid for failing banks with that for failing firms in the non-financial sector. We argue that there is little justification for measures to 'compensate' rivals when the bank has been saved for reasons of systemic stability. The Commission's approach to bank restructuring aid takes insufficient notice of this. Furthermore, the use of punitive divestitures is not the best way of addressing moral hazard. Worse, such divestitures can impede competition by creating weak rivals. We provide four detailed case studies to illustrate the problems. We conclude that the Commission provided a useful constraint in the midst of a crisis of unprecedented scale and complexity, but its approach could have been improved by more systematic attention to effective competition relative to the appropriate counterfactual.

Keywords state aid · competition · banks · European Commission

JEL classification F15 (integration) · G21 (banks) · L49 (antitrust policy—other)

1 Introduction

Forty European banks required specific and urgent rescue during the global financial crisis of 2007–10 and most others received huge amounts of assistance through general schemes.[1] Thirty-nine percent of EU GDP was committed to supporting banks from October 2008 to

[1] Fortis Bank, Fortis Bank Luxembourg and Fortis Bank Netherlands are counted as a single bank, as are Kaupthing Bank Finland and Kaupthing Bank Luxembourg. A further 18 banks notified specific aid during 2011, including an additional five Spanish cajas and the first two Greek banks. However, this trend must be treated with caution as the Commission effectively treated all banks that require additional state aid after the second half of 2010 as fundamentally distressed banks, instead of discriminating between distressed and fundamentally sound banks as it had done at the beginning of the crisis. This article does not include the Euro sovereign debt crisis which was adversely affecting an increasing number of banks at the time of writing in May 2012. It is likely that more European banks will need rescuing if there is further sovereign default.

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October 2010. [2] This provided a very sharp reversal of a trend that had seen the total state aid bill fall from 1 % in 1992 down to 0.5 % in 2007.[3] Under Treaty provisions, the European Commission provided supranational regulation of Member States in their specific bank rescues and more general support schemes involving state subsidies to banking. It imposed constraints on the amount of aid each bank could receive. It also required 'compensation' in the form of punitive asset sales and price restraints on individual banks in receipt of specific aid.

In this article, we address the following questions. How well did the European Commission deal with the particular circumstances of bank bailouts? Was it right to intervene in national aid decisions? Did its interventions result in markets that were more or less competitive than would have emerged otherwise? Was it more intent on compensating rivals or on restoring competition? Could its decisions have been better designed to benefit consumers? Our focus is on specific aid granted to individual banks, the Commission's unusual choice of 'compensatory measures' in relation to banks, and the impact of restructuring aid and 'compensation' on bank competition.

Both the specific rescues and dozens of general schemes were reviewed by the Commission for compliance with Article 107 TFEU. This put enormous pressure on the Commission's resources, especially as the urgency of rescue and restructuring (R&R) aid cases made them particularly difficult to deal with. Following the wording of Article 107, state aid for most sectors, including finance, falls under the competence of DG Competition. This reinforces the view that it is appropriate to evaluate the success of the Commission's interventions in national state aid decisions in the context of its role as protector of competitive markets, in addition to any achievements in stabilising (or not further destabilising) financial markets. Although the Commission was a stabilising influence in the heat of the crisis, we find that it did not take the specific externalities created by a financial crisis sufficiently into account when designing its 'compensation' packages for state aid. We also question its policy of using divestitures as a punishment to prevent future moral hazard.

In section 2, we contrast the justification for both allowing and controlling restructuring aid to banks as compared to other firms. In section 3, we compare the Commission's published guidelines behind rescue and restructuring aid in general with the guidance for such aid to banks during the financial crisis. Section 4 analyses the Commission's practice, in particular through four case studies of how individual banks got into difficulty, received aid from a Member State, and were required by the Commission to restructure or change their behaviour. Section 5 brings together the problems highlighted by the case studies.

2 Justification for EC regulation of rescue and restructuring aid

2.1 General principles

The prime motivation for Article 107 was to facilitate trade between Member States (and later, more ambitiously, in a single European market) by maintaining a level playing field on which firms in different parts of Europe can compete fairly.[4] State aid causes cross-border

[2] This figure refers to the maximum amount of aid approved by the European Commission including schemes and ad hoc interventions. The subsidy element was less than a tenth of this. See section 4.1.

[3] European Commission (2010) 'State Aid Scoreboard', Autumn update, COM(2010) 701.

[4] Article 107(1) of the Treaty on the Functioning of the European Union prohibits any aid that threatens to distort competition insofar as it could also affect trade between Member States. Article 107(2) provides very limited automatic exemptions for aid to individuals and for damage due to natural disasters. Article 107(3) sets out some further circumstances where aid may possibly be justified.

externalities when there is actual or potential cross-border trade. In particular, it may commercially disadvantage firms located in other states. For example, in the context of a declining market, R&R aid may be used by one state to keep its less efficient local firm going until a more efficient firm located in another state is forced to exit. Regulation of such aid can ensure a more efficient industry (e.g. survival of only the most efficient firms). Furthermore, regulation of state aid can limit self-defeating subsidy races in which governments each seek to protect their home firms with 'retaliatory' subsidies.[5]

Control of state aid can also provide a helpful counterweight for member states to limit the effect of heavy lobbying by firms for aid. The prospect of bailout encourages reckless behaviour (moral hazard) by limiting the downside risk to firms. It also encourages firms to divert resources away from more productive uses in order to seek subsidies. Even without cross-border externalities, a national government may then be happy to commit to state aid control by a supranational body as a way of encouraging firms to develop strategies aimed at improving competitiveness as opposed to rent seeking. National commitment problems may be magnified in federal states (e.g. the Länder may pursue local interests within Germany), so the commitment value of the European Commission may be enhanced. Nevertheless, it is not obvious that commitment value is an appropriate role for the European Commission unless the moral hazard would have substantial cross-border externalities.

R&R aid is normally granted under Article 107(3c), which may allow 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'. During the crisis, Article 107(3b) was also invoked to allow aid: 'to remedy a serious disturbance in the economy of a Member State'.[6] Lowe (2009) identified the Commission's 'initial objectives' for state aid policy during the crisis as 'to preserve financial stability, deal with the risk of insolvencies and restore lending'. In doing so, he emphasised three principles that were to ensure: 'fair competition between Member States;… fair competition between banks;… [and] a return to normal market functioning' (p.3). In other words, the aim was to preserve the single market, to protect competitors when rivals receive aid, and to move towards eliminating state support. Note that there is no direct mention of the consumers of bank services.

A difficulty for the Commission is that, short of a complete prohibition on restructuring aid, how can it limit the incentives to lobby for and to grant aid, and how can it determine how much aid to allow? This question has been particularly difficult for the Commission to answer in the context of bank bailouts, which amounted to R&R aid on a previously inconceivable scale. More fundamentally, the whole basis for aid to banks is different to that for real sector firms. This is because the whole banking system is vulnerable to collapse if a systemically important bank fails—a version of the too-big-to-fail argument. An implication is that the Commission might be right to change the basis for any conditions attached to sanctioning R&R aid, but such a change must be consistent with both the contagion externality of a bank collapse and the wider objectives of the policy.

2.2 Non-financial firms

Exit is an essential part of the competitive process. If a firm invests unwisely, or provides a product that is costly to produce and not attractive to customers at the price, then it will lose

[5] As Collie (1998, 2002) points out, this may benefit consumers through lower prices, though it must be balanced by losses to tax payers.

[6] This provision was extended at the end of 2010 on the grounds that the 'serious disturbance' was continuing.

customers and, eventually, exit. This confers a positive externality on rivals by freeing both resources and customers. The prospect of exit provides incentives both for weak firms to strive to improve and for strong rivals to attract potential customers with a better offer. This is not explicitly recognised in EC (2004). By EC (2009c), however, there is an explicit recognition that bailouts weaken 'incentives for non-beneficiaries to compete, invest and innovate' [#28].

When a government finances a failing firm on non-commercial terms, it weakens those incentives to compete and so can be expected to create a distortion to competition. This distortion arises even when there is no aid actually given. If firms expect a government agency to step in to support a failing firm, then a weak firm will be tempted to invest less wisely and to try less hard to improve. A strong firm will also have less incentive to compete. The customers of both firms will thus lose out even when the taxpayer is not actually providing a subsidy.

In its Guidelines on how to implement Article 107 in relation to R&R aid, the Commission observes that this: 'is among the most distortive types of State aid. Hence, the general principle of the prohibition of State aid as laid down in the Treaty should remain the rule and the derogation from that rule should be limited' (EC, 1994, #4). Relative to other forms of state aid, the Commission looks unfavourably on R&R aid, especially at the restructuring stage. A key manifestation of its displeasure is the requirement for 'compensatory measures', for example, in the form of forced asset sales. We return to this in section 2, but for now we simply note that it is unsubsidised competitors who are to be 'compensated'.

The European Commission makes a distinction between 'rescue' and 'restructuring' aid. Rescue aid is temporary. It provides breathing space for a firm in crisis to achieve agreement on a way forward with its creditors. It must be repaid in full within six months or else a restructuring plan is required. Restructuring aid is to subsidise a recapitalisation and reorganisation of businesses, including the sale or closure of certain activities. If the Commission approves the restructuring plan, the aid need not be repaid in full on market investor principles as long as there is adequate 'burden sharing' with owners and junior creditors. The focus of this paper is in restructuring aid because of its long-term consequences.

2.3 Why banks are different

There are two reasons why bank failures are different from non-financial firm failures (Lyons 2009). First, the standard positive externality of exit on rivals can turn negative, in which case bank failure is contagious. Banks borrow short and lend long, so depositors must have confidence in the bank's business. If they fear that a bank might fail, they withdraw deposits, which leads to a self-fulfilling liquidity crisis even when the bank is objectively solvent. Panic in one bank can then shake confidence in another. This is why most countries even pre-crisis provided systemic State aid in the form of a guarantee for retail depositors.

If such a liquidity problem was the only issue, this could easily be dealt with by temporary support. A far more damaging negative externality arises when a systemically important bank becomes insolvent. A modern bank is so highly leveraged that bad investments (e.g. loans against property when borrowers are unable or unwilling to repay as prices fall; or investment in derivatives backed by such failing assets) quickly reveal a funding gap in its balance sheet. If wholesale funds are not readily available to fill that gap, assets must be sold quickly. This depresses asset prices and so also the value of similar assets held by other banks who may similarly then need to sell in a negative spiral. Banks also trade with each other and if one bank is unable to pay, counterparty banks would see the value of their own assets fall, requiring them to rebuild their balance sheet by withholding lending, selling assets or borrowing wholesale funds at a crisis premium. Given the global nature of investment and capital flows, the collapse of a bank in one country can have negative international externalities, as Lehman so dramatically demonstrated in October 2008.

The second distinctive feature of banks is that they provide an essential input into all other productive activities—finance. If credit is disrupted, for example by banks trying to rebuild their balance sheets, this has an immediate and cumulative impact on the real economy. The cost of a financial crisis is not so much the direct cost of bank bailouts to the taxpayer, but the permanent loss of output in the subsequent recession and period of slow growth. The consequent loss of corporate tax revenue has a negative impact on national treasuries and sovereign debt.

Given the negative externalities conferred by a) failing individual banks on the whole banking market, and b) a failing banking system on economic growth, it is little wonder that national governments race to bail out their banks in a crisis even though this will itself cause problems for sovereign debt. Aid totalling €4,589b was approved for banks by EU Member States over just 2 years (October 2008 to October 2010). Although three-quarters of this took the form of guarantees which were mostly not called in, it is still a massive amount compared with, say, aid for manufacturing of around €40b p.a. over the last decade.

The concern with a bank collapse is therefore very different to non-banks. State aid has a *positive* externality so the international policy concern is that there may be too little provision. For example, there may be too little support for banks which are systemically important beyond national borders, too little support for foreign owned banks operating in a national market, or too little cooperation in saving multinational banks. Alongside this positive externality of intervention, there may also be more traditional negative externalities; for example, excessive deposit guarantees to attract internationally mobile funds away from rivals. Furthermore, once the banking system has been stabilised, any further subsidies can create similar competitive distortions to those outlined for real sector firms. This suggests a subtle role for the Commission in minimising the negative externalities of aid while recognising also the positive spillovers. One important implication is that rivals benefit from the stability created by bailouts, so it is no longer obvious that rivals need 'compensating'.

3 The Commission's guidance for regulation of restructuring aid

We begin with a brief summary of some general measures adopted by the Commission designed so that it did not have to investigate every bank that received any support. We then turn to our main focus, which is differences in the guidance for intervention in specific aid for 'real' versus 'financial' firms.

3.1 General measures for banking

The speed with which the banking crisis took hold and the volume of aid granted by Member States could have overwhelmed the Commission. In order to limit its caseload and provide guidance to Member States, the Commission issued four Communications between October 2008 and July 2009 on the design and implementation of state aid in favour of banks.[7] EC

[7] These are the: Banking Communication (European Commission 2008); Recapitalisation Communication (European Commission 2009a); Impaired Assets Communication (European Commission 2009b); Restructuring Communication (European Commission 2009c). There was also a parallel communication providing a temporary Community framework for State aid measures to support access to finance for non-banks (European Commission 2009d).

(2008) also legitimised a second line of justification for R&R aid for banks by invoking Article 107(3b), which may allow aid 'to remedy a serious disturbance in the economy of a Member State'. The guidance relates to two types of aid: general schemes to aid all banks; and ad hoc (i.e. specific) interventions in support of a particular bank.

General schemes are designed for fundamentally sound banks whose viability problems are inherently exogenous and due to extreme financial market conditions, not due to individual inefficiency or excessive risk-taking. These schemes are similar to a block exemption and must meet certain conditions in order to be approved, including time limits, non-discrimination against foreign subsidiaries and the avoidance of undue distortive effects on neighbouring markets. Appropriate remuneration charges must restrict the aid element to a minimum and structural adjustment measures for the financial sector as whole will eventually be required to reduce the likelihood of a future crisis. Once the rules of a Member State's support scheme are approved by the Commission (under Article 107(3b)), individual banks receiving aid only under the approved scheme receive no scrutiny and are not subject to any compensatory or punitive measures.[8]

This article focuses on those banks that got into difficulty due to their own inefficiency, poor asset-liability management or risky strategies, and for which the general schemes provided insufficient support. Aid for such banks requires separate notification and a detailed restructuring plan to be assessed by the Commission on similar, but not identical, terms to the general R&R guidelines.

3.2 Comparison of pre-crisis R&R Guidelines (2004) and Financial Sector Restructuring Communication (2009)

The pre-crisis R&R Guidelines contain the underlying 'balancing' principle that restructuring aid can only be justified if any distortions it creates (e.g. negative effect on competitors) are offset by other benefits (e.g. employment, competition). Furthermore, there must be 'adequate compensatory measures *in favour of competitors*' (EC 2004; R#31, emphasis added).[9] The aid and consequent restructuring plan are to be judged against three criteria. First, the plan must convince the Commission that the firm will be restored to long-term viability. The firm should not have to return for further aid in the future—the 'one time, last time' principle that has too often been honoured only in the breach. Second, the aid and plan should avoid 'undue distortions of competition'. Third, the aid should be the minimum necessary and include a 'substantial own contribution'.

The motivation for the second criterion is that aid 'can shift an unfair share of the burden of structural adjustment and the attendant social and economic problems onto other producers who are managing without aid' [R#31]. The Commission therefore demands 'compensatory measures' such as '…divestment of assets, reductions in capacity or market presence and reduction of entry barriers…[taking] account of the market structure and the conditions of competition…' [R#39]. These must be additional to 'closure of loss-making activities … [which are anyway] necessary to restore viability' [R#40]. This concept of compensation for competitors rests awkwardly with the aims of a competition authority. While it may appear that saving a failing firm enhances the competitive structure of an industry, it reduces the incentives to compete in the first place (see section 2.2). From this perspective, it is no longer obvious that, for example, capacity reduction or divestment to competitors will leave consumers better off than if there was a prohibition on restructuring

[8] See Neven and de la Mano (2009).

[9] We use R#x to refer to paragraph x of EC (2004).

aid. There is no requirement for the Commission to develop a counterfactual against which to judge either aid or compensation.

The third criterion demands a substantial owner contribution alongside the support provided by the state. For example, the Guidelines say that for large firms the own contribution should be at least 50 % of the total [R#44]. This demonstrates the owners' belief that the aid will result in long term viability as well as limiting the advantage over competitors. Furthermore, the 'own contribution' encourages firms to ask only for the minimum necessary—they should be willing to sell profitable assets or contribute more of their own capital or raise market funding to lend credibility to their claim. Put another way, the own contribution element is to reduce an *adverse selection* problem in asking for aid.

The Financial Sector Restructuring Communication was adopted to tailor the general R&R guidelines to the specifics of bank bailouts. It makes some important modifications to each of the above three criteria. First, it makes the restoration of viability the 'first and foremost' requirement [F #5].[10] This is consistent with the negative exit externality on rivals (see section 2.3 above) and the importance of limiting contagion to the real economy. It similarly fits with the changing basis for aid under Article 107(3)—from (c) 'development of certain activities' to (b) 'remedy of a serious disturbance to the economy'.[11] As in the earlier Guidelines, there is no requirement for the Commission to identify a counterfactual by which to judge the necessity for aid in the first place.[12] The other changes are more subtle.

Second, there is a change in justification for compensatory measures. There continues to be an element of compensating rivals but in a crucial way it goes further by introducing behavioural 'remedies'. In order to avoid aid being used to the detriment of non-beneficiaries, subsidised banks must not set prices that undercut rivals (e.g. offering high savings rates). It looks odd for a competition authority to facilitate collusive or at least price-following behaviour in this way. Recall why so much aid to banks was justified. In contrast to the usual case for R&R aid, bank bailouts convey a *positive* externality on rivals if exit would have caused or worsened a systemic crisis. If, then, the aid was already benefitting rivals, why should they need compensation?[13] This is particularly important given the danger of zombie banks which absorb savings and withdraw lending as they rebuild their own capital, to the detriment of lending to the non-financial sector and causing a major recession. As Beck et al. (2010) point out, there was insufficient lending capacity in the banking system at the time, which is in stark contrast to non-bank R&R cases which typically arise in the context of excess capacity in an industry.

Needless to say, the Commission makes all the right noises about wanting to minimise distortions to competition. It says it compares alternatives to identify 'more market oriented, less costly or less distortive options' [F #9]. Where a merger option 'would result prima facie in a significant impediment to effective competition, it should not be allowed unless the distortions to competition are addressed by appropriate remedies' [F #19]. There must be no acquisition of competing businesses for at least 3 years. Effective and proportionate measures should be 'tailor-made to address the distortions' [F #30]. The extent of compensatory measures should depend on the amount of aid and the characteristics of market (e.g. market share, behavioural remedies, facilitated entry). Divestiture and measures that reduce activity

[10] We use F#x to refer to paragraph x of EC (2009c). See Bomhoff et al. (2009) for an insider view of the Communication.

[11] This had been established in the Banking Communication (EC 2008).

[12] An explicit counterfactual is recommended in Lyons et al. (2008).

[13] Although, the negative externality of exit may be felt by banks that are not necessarily rivals in a particular market, the systemic benefits matter more than bilateral effects.

should favour entry and avoid retrenchment behind national borders. In our case studies, we illustrate how the practice often falls short of these aspirations.

Third, there was a new purpose allocated to the 'own contribution' element, including the revised terminology of 'burden sharing'. The adverse selection argument is replaced by an emphasis on *moral hazard*. The expectation of bailout has always been high for banks because they are very aware of their systemic importance. The moral hazard for real sector firms in most countries is much smaller. The justification for the own contribution element in EC (2009c) is therefore changed to make it a *punishment for reckless past behaviour*. Unlike in the R&R Guidelines, there is no guidance on the expected size of own contribution. The Commission hopes that by raising the expectation of punishment, this will provide an incentive for sustainable bank strategies in the future. This explains why it singles out banks in trouble due to a faulty business model for mandatory restructuring (Neven and de la Mano 2009). However, it does not explain why this is the most efficient way to reduce future moral hazard.

It is worth reflecting more generally on the economic purpose of punishment. Four purposes can be identified: retribution; incapacitation; communication of social norms; and deterrence. Pure retribution or vengeance have little economic role as they are backward looking and do not directly affect economic behaviour, even though they may serve a social purpose in assuaging public anger with bankers. 'Incapacitation' in the form of firing executives responsible for poor strategy is only shutting the stable door after the horse has bolted. Legal philosophers suggest there is a further role for punishment as a method of communicating acceptable social norms.[14] Punishment signals society's displeasure to the offender in the hope that he or she will repent and change their future behaviour. Similarly, others observing the punishment will have a stronger moral obligation against reckless behaviour if they see it being punished. In the case of bankers post-crisis, we note that there has been little in the way of repentance, and punitive bank and bonus taxes do not seem to have changed the corporate culture of banks.

This leaves deterrence as the primary economic aim of punishment. The fear of future punishment is supposed to deter individual banks from 'reoffending', and more generally to deter other banks from getting into financial difficulty, because they should not see bailout as an attractive option. This economic deterrence motive for punishment should therefore be the benchmark for judging the Commission's 'burden sharing' argument for reducing future moral hazard. Burden sharing in the event of a bailout should also be compared with the tools of prudential regulation (e.g. minimum Tier 1 capital ratios, bonus schemes that do not encourage excessive risk) as a means of addressing moral hazard.

Insight into the Commission's own view of burden sharing is provided by a recent speech by the Vice President of the European Commission responsible for Competition Policy. His speech is directed at German Landesbanken because of where it was given, but it is clearly intended to apply to all subsidised banks:

> "Who should share the burden of rescuing and restructuring subsidised Landesbanken? I believe that *institutional shareholders should be held responsible for their mistakes or their reckless risk-taking*. I can see no reason why the burden of restructuring Landesbanken should be transferred wholly onto taxpayers; there must be a rational and fair way to share the burden with shareholders. Sharing the burden would also *affirm a sense of justice*. We cannot accept a system that rewards recklessness and

[14] For an introduction to the philosophy of legal punishment, see Duff (2008).

punishes prudence. We cannot accept a system that privatises profits and socialises losses. Sharing the burden would *address the moral-hazard issue*, because we all agree that we need to send clear signals and build incentives for more prudent behaviour in the future" (Almunia 2011, *emphasis* added). This seems to draw on a wide range of the theories of punishment.

4 The Commission's practice of regulating R&R aid to banks

The purpose of this section is to examine how the Commission has applied the principles discussed above to banks requiring restructuring aid. We begin with a brief quantification of the volume of aid, before turning to our four case studies. We focus on specific (ad hoc) aid because this is more likely to be market-distorting than are general measures available to all banks.

4.1 Extent of aid to the financial sector during the crisis

According to the Commission's State Aid Scoreboard, the Commission took more than 200 decisions for the financial sector based on Article 107(3b) in the period between 1 October 2008 and 1 October 2010.[15] These decisions authorised, amended or prolonged 41 schemes (20 guarantee schemes, 14 recapitalisation schemes and 7 impaired assets measures) and addressed with individual decisions the situation of forty financial institutions. These financial crisis measures were taken in 22 Member States. Table 1 shows the total value of these measures that were approved in principle, and Table 2 shows the actual take-up of aid.

Table 1 shows that the equivalent of 30 % EU GDP was at risk in supporting the financial system, and a further 9 % EU GDP was made available to rescue or restructure individual banks (i.e. ad hoc aid). Table 2 shows that only 21 % of the support that was available under general schemes, and 34 % of the aid available through ad hoc measures, was actually taken up. To the extent that banks paid what was considered a 'market rate' for this support, it does not constitute a subsidy.[16] The last column of Table 2 shows that the subsidy element was 25 % of the aid used in general schemes and 43 % in ad hoc schemes. This reduces the actual subsidy to around 3 % EU GDP, split roughly equally between general and ad hoc schemes. Of

[15] Autumn 2010 update: COM(2010) 701, 01.12.2010.

[16] In the case of a state guarantee, according to the Banking Communication, this price should be as close to the market price as possible and be based on the risk profile of the banks. In the case of recapitalisation, the Commission considers the Eurosystem recommendations of 20 Nov 2008 as an adequate method to determine the price of recapitalisation for fundamentally sound banks. This method involves the calculation of a price corridor on the basis of different components which should also reflect the specific features of individual institutions and of member states. The commission accepts a minimum remuneration based on the above methodology for fundamentally sound banks. The remuneration is then differentiated at the level of an individual bank on the basis of its risk profile and other relevant parameters. In the case of asset relief measures, as stated in the Impaired Assets Communication, assets should be valued on the basis of their current market value, whenever possible as a first stage. Then any transfer of assets covered by a scheme at a valuation in excess of the market price will constitute State aid. As a second stage, the Commission considers a transfer value reflecting the underlying long-term economic value of the assets as an acceptable benchmark indicating the compatibility of the aid amount as the minimum necessary. Adequate remuneration is then required to be secured by the state. If the transfer value of the assets exceeds the real economic value, the aid element contained in the measures is considered correspondingly larger. Furthermore, it must be accompanied by far-reaching restructuring.

Table 1 Value of measures approved by the Commission (1 October 2008 to 1 October 2010)

	Amount of aid approved by the Commission	% of EU-27 GDP (2009)
Schemes approved, of which	€3479b	30
Guarantee schemes	€3026b	26.0
Recapitalisation schemes	€349b	3.0
Asset relief schemes	€62b	0.5
Liquidity facilities	€42b	0.4
Ad hoc measures in favour of individual financial institutions, of which	€1110b	9
Guarantee measures	€459b	3.9
Recapitalisation measures	€197b	1.5
Asset relief measures	€340b	2.8
Liquidity facilities	€114b	0.8
Total	€4589b	39

Source: DG Competition

course, the crisis was spread unevenly across Member States, with some countries (e.g. Ireland) providing proportionately much more aid than others.

Since the Commission identifies the actual amount of aid as one of the factors determining the extent of restructuring required for distressed banks, the valuation and pricing of the aid measures is crucial for the restructuring assessment. However, this can be a difficult exercise due to the extreme market conditions. For example, the value of a recapitalisation requires the risk premium for the distressed bank to be determined. Information before the crisis may underestimate the risk profile of a bank but information during the crisis may overestimate it. With regard to the valuation of impaired assets, the difficulties lie in both the determination of current market value and real economic value of the assets in the absence of a liquid market. The future shape of a restructured bank can hang on such

Table 2 Actual use of aid approved by the Commission (2009)

	Actual use 2009	Subsidy element 2009
Schemes approved, of which	€727b	€181b
guarantee schemes	€613b	€77b
recapitalisation schemes	€95b	€95b
asset relief schemes	€1b	€1b
liquidity facilities	€18b	€9b
Ad hoc measures in favour of individual financial institutions, of which	€379b	€171b
guarantee measures	€214b	€51b
recapitalisation measures	€46b	€44b
asset relief measures	€108b	€74b
liquidity facilities	€11b	€2b
Total 2009	€1107b	€352b
Total 2008	€1236b	€237b

Source: DG Competition

technicalities and the Commission's ability to measure the aid under huge pressure of time and economic crisis.

4.2 Case studies of ad hoc aid to individual banks

We proceed by examining four case studies of banks in financial distress. The individual crisis that precipitated each rescue arose at different times during the period, across different countries and with different ownership structures. The forms of intervention included guarantees, recapitalisation, impaired asset underwriting, nationalisation, facilitated merger, and forced divestiture. We chose the cases to reflect the breadth of experience, but we do not claim that the sample is selected scientifically to be representative, as opposed to illustrative, of Commission interventions. The selected banks include a specialised mortgage bank (Northern Rock), a publicly owned bank (WestLB), a cross-border banking group (Fortis Bank), and a crisis merger of two banks with substantial retail market overlaps (Lloyds-HBOS). Table 3 summarises the background to the four cases.

We ask four questions in each case. What caused the bank to get into difficulty? What aid was granted by the Member State? What 'own contribution' and 'compensatory measures' were agreed with the Commission? Was the Commission's intervention beneficial to competition and consumers? It is not possible to be precise in answering the last question because formally the Member State must present a set of measures to the Commission for its approval. However, the responsible state agency will talk to the Commission and anticipate its response before presenting those measures as part of the restructuring plan. Depending on domestic politics, it may then claim all the measures as its own good ideas, or that it had been forced into them by Brussels. It is therefore not possible to identify the precise role of the Commission. In the case studies, we adopt the convention of presenting all 'own contributions' and 'compensation' as having been extracted by the Commission. In doing so, we acknowledge that some countries might have imposed at least some of these measures even without the Commission's discipline.

4.2.1 Northern Rock[17]

Northern Rock (NR) was the fifth largest UK mortgage bank and had been growing rapidly. Its balance-sheet was £113.5b (end-June 2007) with a staff of 6000 persons and it had 77 branches throughout the UK. It was also present in Ireland, Denmark and Guernsey. Its core activity was residential mortgage lending which represented more than 90 % of outstanding loans to customers. NR's lending had grown rapidly over the previous 8 years since it had demutualised, and the bank roughly trebled its share of the UK mortgage market over that period. In the first half of 2007, it achieved gross lending of £19.3b and net lending of £10.7b, giving it a 9.7 % market share of UK gross mortgage lending and 18.9 % of net mortgage lending. In 1998, retail deposits had constituted its main source of funding, but this expansion was dependent on its ability to raise money in wholesale markets at a lower rate of interest than its lending rate. It had to keep raising wholesale funds (securitised notes and covered bonds) both to repay its short term borrowing and to fund its lending. When wholesale funding dried up due to turbulence in the global financial markets in mid 2007, NR could no longer meet its funding needs. NR had been providing mortgages in excess of the value of the property, and when house price growth faltered this also led to an increase in

[17] See the decision text of the European Commission State aid case no. C14/2008 for detailed information on the case.

Table 3 Comparison of the four cases

Bank	Member State	Balance sheet size as at 31.12.2006	Business model and ownership	Time of the financial distress	Types of State interventions
Northern Rock	UK	£101b (approx. €150bn at the time)	Specialised mortgage bank	Since September 2007	State guarantee, liquidity facility, nationalisation, recapitalisation
WestLB	Germany	€285.3b	Universal bank, public owned bank	Since February 2008	State guarantee, asset relief
Fortis Bank	Belgium, Luxembourg, Netherlands	€675b	Universal bank	Since September 2008	Recapitalisation, liquidity facility, other measures to facilitate the sale to BNP Paribas
Lloyds TSB-HBOS	UK	HBOS: £591b Lloyds TSB: £344b	HBOS: universal bank specialised in mortgage and savings; Lloyds TSB: universal bank	HBOS: Since Sep 2008 Lloyds Banking Group (as a result of the acquisition): since Jan 2009	Recapitalisation, state guarantee

defaults on NR's outstanding loans. On 14 September, it requested Bank of England support as lender of last resort. As the news became public, there was a classic run on the bank, with queues of depositors outside branches wanting to withdraw their entire savings. NR was the first European casualty of the financial crisis.

In September 2007, the UK authorities stepped in to stop the immediate panic.

- To the extent that they were not covered by the UK deposit guarantee scheme, a full guarantee was provided on all existing retail deposits[18] (max £20b with remuneration charges);
- This guarantee was accompanied by a liquidity facility provided by Bank of England (£25b with commitment charges);
- The guarantee was extended from existing retail deposits to new retail deposits and several types of unsubordinated wholesale deposits (£10b with monthly charges).

In Feb 2008, after unsuccessful attempts to find a private sector buyer, NR was taken into public ownership.

The Commission decided that the purchase of the shares from the existing shareholders did not constitute state aid to the bank or the former shareholders since the shareholders were compensated on the basis of the value of the company. After nationalisation, the UK authorities submitted an initial restructuring plan. However, as the financial crisis deepened in autumn 2008 with the fall of Lehman Brothers and deterioration in the housing market, the plan had to be amended. NR impairment charges were well above the average for other banks. A final plan was submitted in June 2009. The plan proposed to split NR into a 'good bank' (BankCo) which would be privatised in due course, and a 'bad bank' or asset management company (AssetCo) which would hold the remaining, underperforming assets. The plan required additional aid measures:

[18] The Financial Service Compensation Scheme, is a UK national scheme funded by the banks which, at the time, compensated at least 90 % of a maximum £35,000 for retail deposit holders in case of the failure of a financial institution.

- For BankCo: continuation of the guarantees on retail and wholesale deposits (£21.6b with remuneration charges), a recapitalisation (£1.4b in the form of ordinary shares) and a contingent liquidity facility (£1.5b with monthly commitment charges).
- For AssetCo: a guarantee on the wholesale deposits that remained with it (£8.3b with monthly charges), the liquidity facility granted to NR (increased to £23b and with lower commitment fees), recapitalisation (£1.6b in the form of debt-equity swap) and a working capital facility (£2.5b with commitment charges).

The Commission required compensatory measures that imposed absolute limits on lending, borrowing and balance sheet size:

- New lending by BankCo capped to £4b in 2009, £9b in 2010 and £8b in 2011;
- In the event that BankCo remains in Temporary Public Ownership (TPO) after 2011, a lending cap of £8b until end-2013 or exit from TPO;
- BankCo retail deposit balances across the United Kingdom, Ireland and Guernsey capped at £20b until end-2011;
- In the event that BankCo remains in TPO in 2012 and 2013, the retail deposit cap must be £23b for 2012 and £26b for 2013 or exit from TPO.

There were also measures to limit the ability of NR to compete aggressively in the UK market, including precedent-setting price controls:

- BankCo, must not rank within the top three Moneyfacts mortgage categories for 2- 3-, or 5-year fixed or variable mortgages (excluding mortgages with a loan-to-value ratio greater than 80 % and products for first time buyers) until end-2011 or exit from TPO;
- Existing subordinated debt must remain in AssetCo and no principal or coupons can be paid on subordinated debt instruments (unless contractually obliged to do so);
- No engagement in acquisitions of shares in other firms or promotion of the Government guarantee arrangements or ownership;
- No new economic activities by AssetCo, apart from the activities necessary to provide operational support to BankCo, until the operational separation between BankCo and AssetCo is completed.

Finally, there were measures to ensure the exit of public ownership and state intervention including:

- Commitment to exit majority State ownership;
- Commitment to release the specific retail deposit guarantee by public notice;
- Wholesale guarantee arrangements related to BankCo must be lifted by end-2010.

NR was not a systemically important bank in the sense that even if it had collapsed, it would probably not have brought down other banks. It first got into difficulty a year before the Lehman collapse and before the Commission's declaration of a 'serious disturbance in the economy'. Its distress arose from a fragile funding model and risky loan portfolio. Its crisis was precipitated by market conditions and it did not immediately trigger problems elsewhere in the banking system. It is known that there were several private offers to buy Northern Rock, but these were rejected by shareholders and the Commission does not say why these offers were unacceptable.[19] The Commission has no apparent decision criteria by which to judge whether a private bid offer should be acceptable or not, so the cost of a

[19] For example, were the shareholders holding out for a better offer or did potential buyers require an even bigger State subsidy to take on NR?

private bid offer could not be assessed against the cost of state aid measures. More generally, there was no attempt to construct a counterfactual.

The Commission concluded that the new bank, BankCo, would be viable on the basis of stress tests on its revised business and the replacement of senior management. It also concluded that the aid was limited to the minimum necessary. Given that the bank was nationalised and it was already under new management and narrowly focused on the mortgage market, there is apparently little in the way of pure punishment in the remedies. The same cannot be said of the compensatory measures. These included the withdrawal of a bank-specific State guarantee and timely exit from public ownership, both of which are entirely appropriate. However, 'compensation' also included lending and retail deposit caps, and direct restrictions of price competition.[20] In the context of a massive credit squeeze, this is punishing consumers as much as compensating rivals.[21]

In December 2011, the Commission approved NR's acquisition by Virgin Money for £747m (plus some future conditional payments) based on the simplified procedure and without any conditions. Virgin Money is a relatively recent entrant into banking services and does not provide a full service range, so there were no negative competition issues in relation to the merger which potentially creates a long-term competitor.[22] However, as our discussion of the Lloyds case will show, it is unlikely that a bank on this scale will provide effective competition for some years.

4.2.2 WestLB[23]

WestLB is a European commercial bank based in North Rhine-Westphalia (NRW), Germany's largest federal state. With total assets of €285 billion and 5,862 staff (both at 31 December 2006), it is a major German financial services provider. It is the central institution for the savings banks of NRW and Brandenburg, and as an internationally operating commercial bank it acts as their link to global financial markets. In partnership with the savings banks, WestLB offers the services of a universal bank, providing lending, structured finance, capital market and private equity products, asset management, transaction services and real estate finance. Until July 2005, along with other German public banks, it profited from unlimited State guarantees. These were abolished following pressure from the Commission.[24] In the following years, West LB expanded into risky business activities such as proprietary trading and investment management of structured portfolios.

In spring 2007, WestLB was hit by high losses from one of its proprietary trading desks. Turbulence in financial markets also affected its structured portfolio investments, which included exposure to U.S. subprime real estate loans. It was unable to refinance the

[20] NR's market share in the UK mortgage market decreased in 2008 and 2009.

[21] According to the BBC (http://news.bbc.co.uk/1/hi/business/8205443.stm), the Building Societies Association (i.e. rival mortgage lenders organised as mutuals) had lobbied the Commission for formal limits on new lending to prevent NR having an 'unfair advantage', but the report makes no mention of price controls. The importance of lobbying by rivals is confirmed in section 5.3 of Didziokaite and Gort (2010).

[22] As part of the sale conditions, the UK Treasury required NR's 74 branch network to be retained and eventually expanded. There should also be no further compulsory redundancies. These commitments at least incentivise a minimum scale of activity. Virgin Money had only a handful of 'money stores'.

[23] See the decision text of the European Commission State aid cases no.C43/2008, N531/2009 and N555/2009 on which this section is based. See also Carletti and Vives (2009) for an analysis of state aid to Landesbanken in the 1990s and early 2000s. They also review an important earlier bank state aid case on Credit Lyonnais, which had got into difficulty due to bad lending (including property and film-production studios).

[24] Certain public mission activities were also floated off as NRW Bank.

structured portfolio by selling notes on the market and the mark-to-market loss pushed capital ratios towards the regulated minimum level. In February 2008, the public owners[25] announced the transfer of the crisis-ridden assets from WestLB to a special purpose vehicle (Phoenix Light) and provided a risk shield in the form of a guarantee of €5b on the asset portfolio, with a commission of less than 1 % p.a.. The Commission opened an in-depth investigation on 1 Oct 2008 and approved a modified aid and restructuring plan on 12 May 2009.

The following compensatory measures were required to limit the absolute size of WestLB and reduce its participation in risky activities. It was required to:

- reduce its assets by 50 % by 31 March 2011;
- reduce its risk-weighted-assets by a similar amount (i.e. from €104b to €52b);
- focus on three core business areas: transaction banking; medium-sized companies, and savings banks partnerships; and corporate banking, capital markets and specialised financing.

To achieve this, the bank was required to divest almost all subsidiaries (19) and streamline its domestic and foreign branch network.[26] Pending the divestitures, risk reduction had to be achieved by:

- Structural separation of capital market activities, corporate banking, capital market and specialised financing;
- Restrictions on business volume in these activities;
- Stopping proprietary trading activities;
- Client-related trading to be restricted to locations in Dusseldorf, New York, Hong Kong and London.

Furthermore, Germany committed to initiate the change of the bank's ownership structure through a public tender procedure before the end of 2011.[27] According to the Commission, the change of ownership was vital for the bank to abandon its risky business model and to return to viability.

A year later, WestLB was still engaged in proprietary trading.[28] Nor did the May 2009 plan restore viability. In September 2009, Germany notified the Commission of its intention to grant additional aid through the assumption of risk in relation to impaired assets. This covered:

- bonds issued by the special purposes vehicle Phoenix Light, which was holding structured securities (€23b);
- collateralised debt obligations (€2.9b);
- a portfolio of structured securities (€6.4b) with remuneration charges.

The owners of WestLB also agreed with the German government's Financial Market Stabilisation Fund (SoFFin) to a restructuring to include a 'bad bank' which would take over and wind up WestLB's portfolio of toxic and non-strategic assets. Since the bad bank was expected to make losses, SoFFin provided:

[25] State of North Rhine-Westphalia, NRW Bank, two regional savings banks associations and two municipal associations.
[26] It had to: close 5 of its 11 locations in Germany (by 2010) limiting the locations to Dusseldorf, Berlin, Frankfurt, Hamburg, Munich and Stuttgart; and reduce its locations outside Germany from over 30 to 7 (by 2010), limiting the locations to London, New York, Hong Kong, Moscow, Sydney, Istanbul and Sao Paulo.
[27] See point 39 and 68 in the decision text.
[28] See State Aid N249/10–Germany, published 22.06.2010.

- equity (€3b) in the form of silent participation convertible into ordinary shares;
- a guarantee (€1b) to cover further potential losses by WestLB's owners.

In December 2009, Germany submitted a revised restructuring plan which took into account the additional State aid since the Commission's decision of 12 May 2009. This proposed:

- Transfer of the Phoenix portfolio (€24b) to the 'bad bank' along with the original risk shield (€5b);
- Spinning off the remaining portfolio (€61b).

At least five more affiliate companies than in the earlier plan were also to be sold. The Commission found that these measures did not obviously fall under the general authorisation for asset relief measures (EC, 2009b) and another formal investigation was opened. The final decision was not available at the time of writing, but the Commission has required yet another restructuring plan to be submitted by 15th February 2011. According to Commissioner Almunia (2011): "The plan will have to account for all the aid received and explain how the bank intends to achieve long-term viability".

Once again, the Commission provided no consistent counterfactual as to what would have happened if WestLB had been allowed to fail. Its first decision was assessed under Article 107(3c) because this was before it declared there was a serious disturbance to the economy. However, its later investigations were under Article 107(3b), implicitly acknowledging it was a systemically important bank. Even without the final decision, we know that WestLB has kept coming back for more aid. The first restructuring plan obviously did not meet the requirement of a return to viability and 'one time, last time' aid.

A major problem has been due to the complexities of public ownership in the German federal system. The Landesbanken are controlled by regional governments and savings banks. This makes it difficult for the German federal authority to intervene directly. It appears also to have led to a lack of transparency in declaring the full extent of the problems and then in implementing restructuring plans. The lack of full disclosure of impaired assets may have been encouraged by the hope that fewer structural measures would be required in compensation.

In order to achieve the targeted balance sheet reduction proposed in the plan of May 2009, it was expected that "WestLB would fully dispose a number of assets grouped in an exit portfolio".[29] Regarding the exit portfolio it was planned from the very beginning to spin-off both structured securities and non-strategic assets of approximately €85 billion (the so-called 'PEG' portfolio, of which the Phoenix portfolio is part) to a so-called 'bad bank'. The structure of the bad bank was not agreed among the owners until December 2009, and this delay played an important role in necessitating the additional aid in September 2009. Moreover, in the plan of May 2009 Germany committed to initiate the change of the bank's ownership structure through a public tender procedure before the end of 2011. However its implementation has proved elusive. As early as spring 2007, the shareholders (i.e. savings banks) in WestLB engaged in merger talks with Landesbank Baden-Württemberg (LBBW), but this failed because of opposition of the State of NRW which wanted to protect Düsseldorf as a financial centre. Other merger proposals have similarly been thwarted. This is not to say that such mergers would necessarily be desirable, but it does illustrate a problem of aid control in federal Member States.[30]

[29] See the decision text of the Commission 22 December 2009, P3.
[30] See also the paper by Haken in this volume.

Ultimately, the long and painful negotiations over rescue and restructuring have proved futile. In December 2011, after 5 years of crisis and bailouts, the Commission agreed a wind-down plan to be completed by mid-June 2012. WestLB's business providing services to small local savings banks has been absorbed by rival Landesbank Helaba, but this involves only 400 staff. Attempts to sell other of its businesses have failed and it appears (in May 2012) that they will nearly all have to be wound down. More effective state aid control may have saved German taxpayers many billions of Euros.

4.2.3 Fortis Bank[31]

Fortis was created by a series of mergers in the 1990s between Belgian and Dutch banks and insurers. It was active in retail banking (including private banking), financial services to business and to institutional customers, asset management and financial services connected with financial markets. Fortis Bank was the leading retail bank in the Belgian market and had substantial operations in the Netherlands.[32] Fortis Bank Luxembourg and Fortis Bank Netherlands (FBN) were both subsidiaries of Fortis Bank. As of end-2006, Fortis Bank had total assets €675b and employed 19,948 staff. In September 2008, it held [20–30]% of the deposit accounts of Belgian and [10–20]% of the deposits which Belgian non-financial undertakings have in banks established in Belgium.[33]

Fortis Bank's problems arose from a combination of factors. Firstly, in October 2007 it was involved in the acquisition of ABN AMRO as part of a consortium including Santander and RBS.[34] Fortis Bank undertook to pay €24b towards this acquisition. This required a huge financing plan which later proved difficult to implement. Secondly, the subprime crisis and the resulting general loss of confidence, made it extremely difficult to raise the funds required for the acquisition. Thirdly, its investments in structured credit (€42b) were undermined by successive depreciations of asset impairments. Further losses on the structured credit portfolio amounted to €10b (according to the 2008 annual report of Fortis Bank). This does not include a further huge loss from ABN AMRO activities as these activities were sold to the Dutch State in October 2008.[35]

Attempts to restore solvency caused dissatisfaction among shareholders and undermined market confidence. Fortis Group's shares dropped precipitously and there were fears of a

[31] See the decision text of European Commission State aid cases no.N574/2008, NN42-46-53A/2008,N255/2009 and N274/2009 for detailed information on the case.

[32] Fortis Bank was a subsidiary of SA Fortis Brussels, itself controlled by Fortis SA/NV and Fortis NV ('the Fortis Group'), whose securities are listed inter alia on Euronext Brussels and Euronext Amsterdam.

[33] The square brackets are ranges which the Commission uses in public documents to protect business confidentiality.

[34] The figures are from the background information of Fortis Bank in the decision text of the case of Fortis Bank Netherlands (case no. NN2/2010). RBS acquired the ABN AMRO business units of Global Business and Markets, Global Transaction Services and the international network; Santander acquired the business units of Latin America and Antoveneta (Italy) and Fortis Bank acquired business units Netherlands and Private Banking. At the time of acquisition agreement, business units acquired by Fortis Bank were harboured into Fortis Bank Netherlands (FBN). On 3 Oct 2008, the Dutch State acquired FBN (including the ANB AMRO business units) from Fortis Bank.

[35] According to the annual report of ABN AMRO for the year 2009, ABN AMRO recorded a loss for the period of €4.4b. The loss for the period comprises a loss of €4.3b attributable to the RBS acquired businesses, a loss of €117m attributable to the Dutch State acquired businesses and a loss of € 214m attributable to Central Items (mainly reflecting the impact of ongoing ramp down activities). For the Dutch acquired business, the loss was mainly attributable to lower net interest income (€2.1b in the first 9 months of 2009 compared with €2.4b in the first 9 months of 2008) and an increase of loan loss provisions (€838 m in 2009 compared with €383m in 2008). Pisani-Ferry and Sapir (2010) point to exposure to Lehman Brothers and sub-prime debt.

bank run. On Friday 26 September, the Fortis directors concluded that the group could no longer raise sufficient funds on the market and that if no action was taken there would be a liquidity deficit of €30b by the following Monday. Over the weekend, Fortis Group established contacts with various investors who might be interested in bidding for Fortis Bank as a whole or in purchasing some of the activities. ING made an offer of €1.5 per share. BNP made an offer of €2 per share, but requested additional guarantees from the Belgian Government. The latter took the view that, in the light of the closing share price on Friday of €5.2 per share, those offers were too low and ultimately no formal offer was made. On the following Monday, the Belgian, Dutch and Luxembourg authorities issued a joint public statement announcing their commitment to invest €11.2 billion in Fortis Bank:

- The Belgian Government subscribed to a capital increase for Fortis Bank amounting to €4.7b, thus acquiring a 49.93 % share in Fortis Bank's capital;
- The Belgian National Bank made emergency liquidity assistance available to Fortis Bank;
- The Luxembourg Government subscribed to a €2.5b 3-year convertible bond issued by Fortis Bank Luxembourg. The bond must be converted at maturity, at which point it would give the Luxembourg Government 49.9 % of the borrower's capital;
- The Dutch Government subscribed to a capital increase for Fortis Bank Netherland (€4b) giving it a 49 % share of this bank.

These investments were not sufficient to reassure the markets or creditors. Withdrawals by institutional customers and companies increased substantially and €36b in deposits was withdrawn that week alone. Fortis found it impossible to borrow on the interbank market, except overnight, and had to rely massively on liquidity assistance provided by the Belgian National Bank. Further state aid was provided in the first week of October 2008.

- The Dutch Government acquired Fortis Bank Netherland for €12.8b.
- Belgium purchased the 50.1 % of Fortis Bank not in its possession for €4.7b.
- The Belgian authorities found a merger partner, and announced that it was selling 75 % of its share in Fortis Bank to BNP Paribas for €8.25b (to be paid in BNP Paribas shares).
- Luxembourg announced the sale of 16 % of Fortis Bank Luxembourg to BNP Paribas for €0.8b, thus increasing BNP Paribas's share of Fortis Bank Luxembourg to 67 % (since by acquiring Fortis Bank, BNP Paribas would obtain a 50 % share in Fortis Bank Luxembourg).
- A 'bad bank' was set up to take over Fortis Bank's impaired assets from the structured credit portfolio for €10b (nominal value of €42b). Belgium was to own 24 %, BNP Paribas 10 % and the holding company, Fortis Group, the remaining 66 %. The creation of a 'bad bank' vehicle reflected BNP Paribas's refusal to bear the risk associated with those products on its balance sheet.

However, the market was not certain that the announced sale of 75 % of Fortis Bank to BNP Paribas would proceed, and this did not remedy Fortis Bank's difficulty in accessing the interbank market. BNP Paribas had to lend it very significant amounts and on 18 November 2008, Belgium introduces a state guarantee mechanism (up to €150b) for Fortis Bank, with ECB-recommended remuneration charges. The Commission agreed that this guarantee was compatible with the common market, subject to behavioural constraints and balance sheet growth restrictions as a safeguard against 'distortions to competition'. The Commission further decided (3 December 2008) that the above measures in relation to Belgium and Luxembourg were the minimum aid necessary and that they would not unduly distort competition. It expected that once Fortis Bank formed part of BNP Paribas, it would be able to return to viability and no compensatory measures were required. It opened a separate investigation into Dutch support for Fortis Bank Netherlands.[36]

The Belgian plan was thrown into chaos when, on 12 December 2008, the Court of Appeal of Brussels suspended the transfer of Fortis Bank from the Belgium State to BNP Paribas and requested a consultation with the shareholders of the residual Fortis Group. This resulted in changes to the terms of the transaction in favour of Fortis Group. The Belgian authorities responded with further aid measures in favour of Fortis Bank/BNP Paribas, to compensate for both the concessions granted to Fortis Group shareholders and the higher than anticipated loss in value Fortis Bank had suffered since the original agreement was signed.

The additional measures that would benefit Fortis Group included (the figures in the brackets indicate the element of aid assessed by the Commission):

- increased participation by the Belgian State in RPI (the 'bad bank') from 24 % to 43.5 % capital (saving Fortis Group a loss of €332m)
- guarantee granted on the 90 % of RPI's senior tranche initially underwritten by Fortis Bank (saving Fortis Group €0.8–2.2b)
- loan guarantee on €1 billion granted by Fortis Group to Fortis Bank (aid element of €5.5m);
- guarantee on the interest payment by Fortis Group regarding its obligations to Fortis Bank up to €2.35b (aid element €37m);
- option granted to Fortis Group with regard to capital gain on BNP Paribas shares (estimated aid of €503m).

The additional measures that would benefit Fortis Bank/BNP Paribas include:

- purchase of additional impaired assets by RPI from Fortis Bank (additional aid of €500–700m)
- mezzanine (second loss) guarantee accorded by the State on the structured credit portfolio retained by Fortis Bank (aid element of €250–750m).

Finally the following additional measure by Luxembourg would benefit Fortis Bank Luxembourg:

- increase of capital by €100m by the Luxembourg government (aid up to €100m).

Once again, the Commission considered the sale to BNP Paribas was the best option for Fortis Bank and concluded that the aid was the minimum necessary. It would not distort competition, no compensation was necessary and, surprisingly, there was no revised judgement on burden sharing—Fortis Group shareholders simply ended up with more money ultimately coming from the state.

The Commission's state aid decision does not consider the competitive impact of the merger in any detail. Instead, the merger was assessed separately in a merger inquiry.[37] The Commission's merger decision required the divestiture of BNP Paribas's credit card business in Belgium (PFB) subject to which the Commission found that the merger would not impede competition. However, there were still two additional commitments by BNP Paribas in the

[36] See European Commission State aid cases no. C11/2009, N19/2010 and NN2/2010. The final decision text was not available at the time of writing. The Commission opened an in-depth investigation having expressed doubts about whether a loan facility accompanying nationalisation by the Dutch authorities was either the minimum necessary or at an appropriate interest rate.

[37] Case No. M5384 (decided 3rd December 2008).

aid decision text a few months later (May 2009). These were to the effect that they should not to compete too aggressively or, as the Commission puts it, that the following measures were 'sufficient to restrict potential distortions of competition':

- Not to acquire other credit institutions in Belgium and Luxembourg, valid for 4 years and
- To restrict interest rates on internet-account customers if its market share reaches [20–27.5 %][38]

In the state aid decision text of December 2008, the Commission noted that the market presence of Fortis Bank was reduced by selling its Dutch operations, but the acquisition still gave BNP Paribas the largest retail deposit base in Europe. In its quarterly results, BNP Paribas reported net profit of €1.3b in the 3 months to the end of September 2009 (the first to include Fortis's contribution)—up 45 % on the same quarter in 2008—of which €277m was contributed by the core of Fortis Bank.

As noted earlier, the final state aid decision on Fortis Bank Nederland (FBN) was still not available at the time of writing. In October 2007, the merger of the Dutch activities of Fortis and ABN AMRO had been allowed subject to the divestiture of certain assets in commercial banking and factoring.[39] Agreement to sell these assets to Deutsche Bank was reached in October 2008, a couple of weeks after FBN had been nationalised. Meanwhile, in addition to the nationalisation support package already mentioned, FBN received further recapitalisation of €2.5b in July 2009 and another €6.9b in November 2009 explicitly to support the ABN AMRO merger and reorganisation costs. In January 2010, yet another €4.4b was provided to support a capital shortfall for FBN associated the sale of these businesses. The sale to Deutsche Bank was eventually completed only in April 2010.

In a press release prior to the publication of a public version of its state aid decision, the Commission decided that the aid for FBN was not due to excessive risk taking or unsustainable business models, but due to recapitalisation associated with the ABN AMRO merger and subsequent reorganisation.[40] It still proceeded to impose conditions that limit competition: 'In order to ensure that the state funding is used solely to consolidate the viability of the merged entity and not, for instance, for financing an aggressive growth of the group at the expense of competing banks, the Commission has subordinated its approval of the aid package to a set of conditions. The conditions include a ban on acquisitions and a *requirement to achieve certain margin profit levels in the private banking sector*, where the bank has a strong position, to avoid that it uses the aid to undercut competitors' [*emphasis* added].

4.2.4 Lloyds TSB/HBOS

LloydsTSB was a universal bank with a reputation for prudent management (at least until the fateful merger decision that led it to become this case study). Even in 2008, it made a profit of £0.845b on assets of £436b. HBOS had been created by a merger of the Bank of Scotland and Halifax, which had been the UK's biggest building society before demutualising. Their business model became more aggressive including very large loans to certain favoured

[38] This was considered to be a growing market. A complaint had been received by the Commission on 4 Nov 2008 against the state aid granted by the time to Fortis Bank on the grounds that it allowed Fortis Bank to offer higher interest rates on deposits and on-line savings accounts. Presumably, this complaint was by a competitor.

[39] See case M4844, 3rd October 2007.

[40] See EC press release IP/11/406, dated 5th April 2011.

businessmen. Much went into commercial property development. A reckless lending policy resulted in a £7.4b loss on £690b assets.

At the height of the immediate post-Lehman crisis (September 2008), HBOS was in severe funding difficulty and a rescue merger was announced. This was apparently initiated by a private conversation between the then Chancellor of the Exchequer, Gordon Brown, and LloydsTSB chairman Sir Victor Blank. The merger was completed in January 2009 despite objections from the OFT (2008) as the agency responsible for first phase merger decisions. The OFT was quite reasonably concerned that, for example, in the personal current account market, the merger would combine shares of 19 % and 14 %, and in the Scottish market for SME business it would combine shares of around 10 % and 35 % (to create a balanced duopoly with the equally crippled RBS).[41] The government response, with the support of the Bank of England, Treasury and Financial Services Agency, was to change the law so the merger could take place without a second phase merger investigation. This was the first case of such an intervention since the reforming Enterprise Act of 2002 was meant to take mergers out of political decision making.[42]

It soon became clear that HBOS assets were more toxic than Lloyds had expected and it required state aid:

- £17b recapitalisation by the State (43.5 % equity) in January 2009
- £260b of toxic assets temporarily insured
- £6b in rights issue ('Seaview' project) taken up by the State

In return, Lloyds offered

- £181b non-core asset reduction plan presented as 'burden sharing'

– Five business disposals and ten reductions in business size
– Plus the previous £33b sale of two Australian businesses

- £1.5b synergies were promised
- Extension of Lloyds prudent business philosophy throughout the merged entity

– Replacement of HBOS senior managers

The Commission opened a full investigation and the final restructuring plan (December 2009) also required:

- Further £71b core asset reduction as 'compensatory measures'

– Sale of 632 branches plus the IF internet/tele banking (= 4.6 % market share in personal current accounts)
– The buyer's combined share must be <14 %
– 19 % of Lloyds mortgage share to be sold[43]

- No further acquisitions would be allowed before end-2012

[41] Vickers (2008) argues that stability might have been achieved in a less anticompetitive way.
[42] The Act does allow for such a political decision on the grounds of public interest though this was intended to be interpreted narrowly, with national security as the only stated example plus a public interest provision to maintain media plurality (Whish 2001, p.898). A new public interest "to ensure the stability of the UK financial system" had to be created in a formal Order to be passed urgently by both Houses of Parliament. Note that national security and media plurality are appropriately long-term considerations for a merger, whereas this merger's contribution to financial stability could only have been short-term at best.
[43] This appears to be around 5 % market share.

Lloyds refer to the divestiture plan as Project Verde and it has to be completed by end November 2013. The Commission decided that the own contribution "adequately addresses the issue of moral hazard and prevents the creation of perverse incentives".

The Commission recognised that the merger was only possible due to State aid, yet it still allowed it to proceed with relatively minor remedies. This goes against the Restructuring Communication (EC 2009c) which advocates applying the same standards as in the EC Merger Regulation.[44] The Commission required only a 4.6 % market share to be put up for divestiture, which would take PCA market share down to 25 % and gross mortgage lending to 19 %.[45] The requirement for the buyer's combined market share to be less than 14 % limits potential buyers to new entrants or those with an existing market share of <9.4 %. It is traditionally hard to grow market share in retail banking. Market shares matter because of low switching on current accounts and cross-selling of other activities. As can be seen from Table 4, this merger leaves Lloyds with a powerful position in a newly concentrated market.[46] Furthermore, the divestment is of the weaker assets in the merger (including the TSB brand) which are being carve-out of an existing business. Merger remedies research shows this to be much less effective in maintaining competition than would be the sale of a previously stand-alone business.[47] It is clear that Lloyds saw the merger as 'once-in-a-lifetime opportunity' because this merger would almost certainly not have been allowed at any other time.

As part of its response to the financial crisis, the UK government set up an Independent Commission on Banking headed by Sir John Vickers which reported its final recommendations in September 2011. ICB (2011, chs.7–8) provides strong evidence that smaller challengers to the Big Four banks fight to overcome switching costs by providing both higher deposit rates and lower borrowing rates. Challengers starting from at least a 6 % share of personal current accounts (PCAs) were much more effective at increasing their share than were those with 5 % or less. The ICB further observes that most UK banks now have a loan to deposit ratio (LDR) in the range 100–130 %. A higher LDR implies excessive reliance on wholesale markets to bridge the funding gap and this leaves a bank with high funding costs and highly vulnerable to a credit crunch in which wholesale funds dry up. Such a bank would have to reduce its balance sheet and it would not be an effective competitor.

Applying these findings to the Lloyds divestiture (project Verde), the ICB states that Verde would have £64b assets and £32b liabilities (i.e. LBR=200 %). Although Lloyds claims it would reduce this before sale, this safeguard necessary for effective competition was not required by the Commission. Furthermore, a 4.6 % PCA share results in a bank of sub-optimal scale, and judged by the difficulties of previous entrants unlikely to be an effective competitor (even with an adequate LBR). The ICB recommends a larger divestiture including at least 6 % of PCAs would

[44] See points 18 and 19: "A transparent, objective, unconditional and non-discriminatory competitive sale process should generally be ensured to offer equal opportunities to all potential bidders. Furthermore, without prejudice to the merger control system that may be applicable, and while recognising that the sale of an aided ailing bank to a competitor can both contribute to restoring long-term viability and result in increased consolidation of the financial sector, where this would result prima facie in a significant impediment of effective competition, *it should not be allowed unless the distortions of competition are addressed by appropriate remedies accompanying the aid.*"[emphasis added]

[45] The post-divestiture market share for SME banking will be 21 %.

[46] The Commission explicitly acknowledges that the merger eliminates a 'challenger' and draws on the financial regulator's opinion: 'The FSA has observed that smaller banks like HBOS tend to behave like challengers, in the sense that they try to increase their market shares by decreasing price. Conversely, the four biggest banks (Barclays, Royal Bank of Scotland, Lloyds TSB and HSBC) tend to behave like harvesters, in the sense that they focus on extracting value from their existing clients' [see footnote 47 of the Lloyds decision letter, N428/2009].

[47] See FTC (1999), EC (2005) and Davies and Lyons (2007).

Table 4 Market shares (%) of banks in the UK: 2009/10 (pre-Lloyds divestitures)

	Personal current accounts	Gross mortgage lending	Unsecured personal loans	Savings acccounts	Credit cards
Lloyds	30	24	25	21	29
RBS	16	13	9	10	19
HSBC	14	11	7	8	13
Barclays	13	10	13	10	23
Santander	12	18	10	12	6
Nationwide	7	8	4	9	5
Big 5	85	76	64	61	90
Lloyds/#2	1.88	1.33	1.92	1.75	1.26

[*Source*: OFT 2010]

The last row is the ratio of the Lloyds market share to that of the second largest in the market. The absence of a 'close rival', as defined by market share, is frequently used by the Commission as a measure of potential competitive harm in merger cases. See Davies et al. (2011) for econometric evidence

both make Verde a credible competitor and help address Lloyds's dominance in this market. Despite its 40 % ownership stake, the UK government has stated that it cannot change the conditions agreed with the EC and so cannot compel Lloyds to change its divestiture plans.

At the time of writing (May 2012), Lloyds had three possible ways of selling Verde. The Cooperative Bank was interested in buying and it would create a bank with 7–8 % of PCAs. However, the UK financial regulator was concerned about its ability to absorb such a large acquisition given its leadership and governance systems. It is interesting to note that the Cooperative Bank was Lloyds's choice as preferred bidder—it has superficially attractive market share characteristics but would in practice be a weak competitor. A second possibility was to sell to an investment vehicle (NBNK). It is unclear what that would imply for competition unless it wishes to purchase another small bank or banks to combine with Verde. Finally, Lloyds's reserve position was to float it as a separate entity through an initial public offering, which is highly unlikely to create a serious competitor. It remains very uncertain whether a strong new competitor will emerge.

5 Lessons from the case studies

Similar standards of 'compensation' have been required irrespective of the systemic importance of a rescued bank. A competition authority is not the right body to judge systemic importance but it can take advice from central banks and financial regulators. The Commission appears to have been too ready to consider every bank as being of systemic importance under Article 107(b). For example, it may have been that Fortis and Lloyds were systemic but NR and WestLB probably were not.[48] Instead, the presumption has been that it is appropriate for the bank to survive.[49] The establishment of a counterfactual should have

[48] The Basel Committee on Banking Regulation is currently working on a list of systemically important banks (see Financial Times 29/03/11, http://www.ft.com/cms/s/0/2069bd4a-5a41-11e0-86d3-00144feab49a.html#axzz1LHLB567z). Although no such list was available to the Commission at the critical time in 2007–10, it could have sought advice more systematically.

[49] This follows from EC (2008) which give a first priority to viability, but it does not mean that these guidelines are always appropriate. See White (2009) and ICB (2011) for discussions of the too-big-to-fail argument.

been an essential first step in the appraisal of aid. Banks which are not systemic could have been treated the same as any other real sector firm receiving R&R aid. Banks which are systemic need to be treated differently, in particular in relation to 'compensation'. In practice, this simple dichotomy may be difficult to identify, and there will be shades of grey, so the counterfactual may have to be nuanced.

Excessively high amounts of aid have been allowed in some cases. Even accepting the desirability of saving a particular bank, there is no serious attempt to judge the required amount of aid. Of course, differentiating between banks in terms of their risk profile and performance under abnormal and uncertain market conditions is very hard to achieve given the massive caseload and global drama of the financial crisis, but it is important to try. There are two types of error. First, there may be too much aid granted. Indirect evidence for this is when the aid element is increased without penalty after the agreed plan (e.g. extra aid to enable Fortis Group shareholders to receive a better deal after a court challenge). Minority ownership interests or the complexities of a federal state can also hold up the aid and review process in order to extract better terms.

There is no evidence of too little aid having been allowed, such that it might undermine the viability of an efficient bank. Our case studies show how state aid has been combined with nationalisation (NR), slow extended wind-down (WestLB), merger (Lloyds/HBOS) and combinations of these (Fortis) to try to achieve viability. This has not always been achieved, but that is because of the inefficiency of the bank. It has not been for lack of state aid and there has been no abrupt bankruptcy in Europe (compare Lehman in the USA). Instead, as illustrated by WestLB, the inefficient bank is allowed to come back for more aid. This undermines the principle of 'one time, last time' and so also the incentive to take difficult actions so as not to get into future financial difficulty (moral hazard). The need for further subsidies could be because of a major change in external circumstances (possibly Northern Rock), but our case studies suggest other factors were often more important. Lack of transparency in the degree of distress may arise from a desire to minimise the restructuring required by the Commission (WestLB). In a merger, it can also arise out of the problem of conducting due diligence on an emergency timescale, combined with the incentive for the selling firm to present its difficulty as a liquidity problem and not one of solvency (Lloyds/HBOS).

A significant failure by the Commission is that compensation is offered to rivals and is seen most evidently in behavioural restraints to suppress competition. We highlight three problems with the Commission's decisions on compensation. First, it has been applied without a clear pattern. For example, Northern Rock cannot sell mortgages in the top three 'best buys', Fortis must limit its interest rates for internet customers though only if its market share reaches around 25 %, and FBN must achieve certain margins in private banking; also, quantitative lending limits were imposed on Northern Rock. On the other hand, there were no such constraints for WestLB or Lloyds.

Second, and far more importantly, whereas there may possibly be some justification in limiting price competition by a subsidised firm that would have exited a traditional market, the underlying justification for bailing out the systemically important banks was different—it was to prevent a negative externality on the whole banking system. This perspective should have fundamentally changed the Commission's attitude to compensation in the form of anticompetitive behavioural restraints which strike at the heart of the competitive process. If rivals benefit from the preservation of the financial system, they do not need a further benefit at the expense of consumers.

Third, the Commission should have been far more concerned about the competitive effects of market concentration as a result of subsidised mergers (particularly Lloyds). Given the OFT's advice that there was a realistic prospect that Lloyds/HBOS would substantially lessen competition, and the ICB's confirmation of its anticompetitive effects, it may not be too strong to say that the Commission colluded with the UK government to facilitate an anticompetitive merger with an incomplete remedy. At the very least, it should have required a competitively effective divestiture. Instead, the Commission adopted a blinkered approach, excluding viable competition concerns remaining after the unorthodox UK merger approval, and considered only 'burden sharing' (i.e. punishment) in its state aid approval.

Asset reductions were imposed for two reasons. Some were required for viability—i.e. to exit particularly risky businesses in which the bank had no track record of sustained success. While this seems sensible, it remains questionable that the Commission should be acting as a management consultant or even has the competence to do so. Even if it does, implementation can be delayed for various reasons including local politics (WestLB).

Asset reductions were also imposed for punishment with a view to deterring future moral hazard. It remains unclear how effective this requirement (e.g. Lloyds's divestments of non-core businesses) will be for deterring future banks from getting into difficulties, especially given the ease with which such assets can be acquired in the future. Furthermore, if the buyer of the assets reduces the amount of activity associated with them, then the punishment will have had collateral damage by reducing lending in the economy exactly when it was most needed. Given that there were no 'up front' buyers for most of these asset reductions, it is not possible to judge the impact, but once again the merger remedies research suggests forced divestitures are unlikely to be competitively successful without very clear safeguards.[50] Neither the Northern Rock sale to Virgin nor the Lloyds divestiture look set to establish strong competitors in the near future.

One of the justifications for the involvement of the European Commission might have been to facilitate coordination between national governments in bailing out banks operating across several Member States. However, in the Fortis case there appears to have been no problem in the international coordination of state aid between Belgium, the Netherlands and Luxembourg. The Commission accepted a break-up along broadly Member State lines, though with substantial involvement of a French bank acquiring the Belgian assets.

A standard condition in our case studies has been to require abstention from mergers for at least 2 years. This is usually presented as a compensation argument (i.e. so recapitalised banks cannot go out and acquire assets that an unaided bank could not afford). However, 2 years is not a long period when measured in terms of the evolution of market structure.

Finally, our cases show that merger scrutiny should not be cut short and separated from state aid appraisal. The BNP Paribus acquisition of Fortis Bank appears to have been responsibly cautious and does not seem to have led to further difficulties. It was also a merger that was separately investigated by the Commission, which required structural remedies for relatively modest market power concerns. In contrast, Lloyds could not believe its luck in being able to acquire HBOS without a thorough merger investigation, and it rushed into an acquisition that enhanced its market power. It did not take a lot longer to discover just how toxic HBOS was. We conclude that mergers should not be excused a full and rigorous review process even in the heat of a crisis.

6 Conclusion

The European Commission has achieved much in dealing with a huge caseload of bank rescues. It has almost certainly resulted in more systematic and less distortionary rescue and

[50] See FTC (1999), European Commission (2005) and Davies and Lyons (2007).

restructuring aid than would have been the case in its absence. Furthermore, in the heat of the crisis, it was probably necessary to be formulaic in implementing its duty to review state aid. Importantly, even if minimally, the Commission has not required any measures that have resulted in a bank collapsing for lack of state aid so it appears to have been successful in terms of stability (though we cannot say if its effect was neutral or positive on that count).[51] Nevertheless, we have found a number of inconsistencies in linking the economic justification for the aid and the conditions required by the Commission for its approval.

Our case studies provide evidence for our concerns, although is difficult to attribute the measures proposed by national authorities as distinct from those imposed by the Commission. In particular, the Member States should anticipate the commitments required by the Commission and address them before submitting a restructuring plan. Thus, we cannot determine the relative contributions of the Member States and the Commission in terms of limiting the distortion of competition induced by state aid. Nevertheless, it is almost certain that the extent of aid has been limited by Article 107, but we also find evidence that aid in excess of the minimum has been allowed. Shareholders were able to use the courts to extract more aid for themselves. The 'one time, last time' stipulation lost credibility not only because of rapidly changing circumstances as the crisis evolved, but also for other more political reasons.

Our main focus has been on the conditions the Commission has imposed that affect competition in banking. We have assessed its principles (as embodied in its guidelines) and its practice in relation to specific bank bailouts during the financial crisis (as in our case studies). While acknowledging the enormous stresses and constraints in the context of a huge financial crisis, we find inconsistencies that could have been avoided. Behavioural measures on pricing were imposed with little clear pattern. More importantly, 'no price cutting' requirements undermine the competitive process and encourage rivals to set higher prices. Merger control was addressed inconsistently and divestitures were allowed as carve-ups of assets, often without up-front buyers. Experience from merger control suggests that such divestitures are not as successful as divestitures of ongoing businesses to carefully identified buyers. This applies a fortiori when divestitures were required as a punishment and unrelated to potential competitive success (e.g. with insufficient scale for a successful stand-alone business).

An underlying concern is that there was no attempt at a bank-specific counterfactual. The collapse of a systemic bank would have negative externalities on its rivals, and there is no justification for measures that further benefit rivals by suppressing competition (e.g. requiring high prices or low volumes of activity). In contrast, if the bank is not systemic, the justification for support would have to be very different and the bank should be allowed to fail unless there is some other identifiable benefit. Only in the latter case is there some logic in ensuring that prudent rivals do not suffer a competitive disadvantage.

While the Commission has available very considerable expertise in judging competition issues, it does not have the specific skills to decide a suitable punishment strategy that will discourage future moral hazard. In fact, it is not at all clear that punitive divestitures will have any impact at all on the degree of recklessness of bankers. Better corporate governance, unbiased bonuses and other individual incentive schemes, limited cross-subsidisation of risky activities, suitable liability for junior and senior debt holders, sufficient capital ratios, effective resolution schemes and generally improved prudential regulation each have a place

[51] Banks complain that it has imposed conditions that have not been applied to banks receiving aid from outside the EU. CEPS (2010) presents the views of a task force of leading European and US banks, including two discussed in our case studies (BNP Paribas/Fortis and Lloyds/HBOS).

in controlling moral hazard. It would be better to focus rescue and restructuring aid control for banks exclusively on restoring balanced competition.

Finally, there may be very little time for the Commission to absorb these lessons from the 2007–10 financial crisis. At the time of writing, there is a very substantial probability that the Euro sovereign debt crisis will result in many more banks requiring rescue. It is to be hoped that the Commission will pay more careful attention to the implications for competition when it sets 'compensatory measures' as part of the regulation of bank restructurings.

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