

Responses of European competition policy to the challenges of the global economic crisis

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European competition policy has been one of the common policies since the beginning of European integration. The European level economic policy coordination and the customs union have required a uniform framework for competition policy covering the whole Community.

Nowadays the economic integration of Europe is suffering from its biggest crisis ever, which also affects companies based and/or operating in Europe. This brings about new challenges for common competition policy as it has to assure, on one hand, a legal framework to maintain fair competition. The importance of cooperation between competition authorities, for example in the field of restrictive agreements, has been recognised by the European Commission. The Commission, on the other hand, has to deal with an increasing number of merger cases because, after the decline of the number of cases in 2008 and 2009, concentrations have started to intensify again. This is due to the recovery of companies in 2010 and the relaunch of lending activity. Also, competition policy has to stimulate markets as it is also a way to put the European economy on a growing path.

Much more emphasis should be put on state aid because it does not only spur economic growth but it could have negative effects as well. This type of excessive spending is problematic in the sense of competition policy and it could eventually even worsen the long term economic perspectives of Europe.

The crisis in Europe escalated three years ago. I summarise the legal development and guidelines relating to competition policy after 2008. I examine the block exemption schemes and the extended state aid activities. These are developments that may contribute to the recovery from the crisis. It is essentially important to shape competition policy so that it effectively guards companies' adaptation process to the new economic circumstances, and stimulates their economic activity.

Keywords: competition policy, economic crisis, European Commission, legal development

1. Introduction

Nowadays economic crisis has escalated in the European Union in 2008. The crisis, that has in the meantime become the most serious in the history of the European integration, is being derived from the weakness of the banking sector and regulation (Cejnar, 2011). Clemenz and Janssen (2011) emphasize that the crisis has had negative effects not only in the banking sector, but in the real economy as well. As the crisis is being prolonged responses to the effects of it from supranational and national levels become diversified. Sometimes these laws and enforced legislation raise the question of compatibility with the relevant EU law, in the most cases with these of competition regulations (mostly State aid).

Cejnar (2011) highlights the importance of the international organizations, like the United Nations. In 2010 the United Nations Conference on Trade and Development (UNCTAD) issued a guidance

relating to the competition policy for the time of economic crises. This highlights the importance of the competition authorities overcoming the economic crisis. It states:

“In addition to increased coordination, the paper proposes that effective enforcement of competition policy and merger control requires that national laws are enforced with consistent rigor throughout the economic cycle and not relaxed in response to a recession. Furthermore, the paper draws attention to the increased importance of the role of competition advocacy during periods of economic troubles, stating that the effective enforcement of competition policy requires that competition advocacy is broadened to wider policy areas without compromising on the independence of competition authorities” (UNCTAD, 2010, 2nd paragraph of the executive summary).

From the first shocks of the crisis considerable time has passed. The European Union has issued numerous binding and guiding provisions relating to the – beside others – competition policy. The policy making and enforcing power of the European Commission and national competition authorities is overwhelming. The goal of this paper is to summarize changes in the legislation approach relating to the EU competition policy.

The structure of the paper is as follows. Firstly, we will give a short overview about the competition policy system of the European Union. Dealing with a short overview of the antitrust regulation, mergers, and State aid policy is essential to highlight the importance of the reforms made during the crisis. In the next chapter, we will discuss the development of the legislation relating to the mentioned competition policy fields. The role of the European Commission could be presumed as pivotal in determination of the way the competition policy in the European Union progresses. Lastly, the summary will give an overall picture of changes in the European competition policy was made mostly between mid-2008 and 2010.

2. Overview of the common competition policy of the European Union

Establishing the European Economic Community (EEC, 1957), European policy makers set up competition policy into the limited number of common policies. This was made in accordance with the desire of common economic policy and coordination throughout the EEC. Only a competition policy that is unique and binding in all of the member states could result in equal economic conditions.

In the Treaty of Rome the fields of the competition policy were being divided due to the object of the regulations. Articles 85-91 set clear conditions for enterprises that would like to operate in the common market (EEC, 1957). According to these, creating cartels and antitrust were forbidden, while eliminating of dumping was possible to be asked from the Commission (EEC, 1957, Article 91 (1)). Moving along, objects of articles 92-94 are member states – setting up the fundamentals of a common State aid policy for the EEC MSs. The most important feature of these articles is the prohibition of State aid where interstate trade clause is applicable (EEC, 1957, Article 92 (1)). The portioning (regulations for enterprises and states) reflects the importance of competition issues not only for private companies but states as well. It should also be highlighted that for these competition regulations it was a crucial need avoiding market distortion and creating a common economic area, according to the initial liberalization of movement of capital.

These major ways of regulation were being transferred to the later amendments of the Treaty establishing the European Economic Community. No great change in the initial concept was made; however, the structure and objectives were being refined. While the Treaty (now the provisions of the

Treaty on the Functioning of the European Union, Articles 101-109) lays down the core of the competition regulation, by the normal decision making process accepted secondary law supplement primary ones. Interpretation of the European Court should be noted as well as a “source” of law.

On the highest EU level, the commissioner- and Directorate General for Competition is responsible for the common competition policy.

3. Competition policy and the crisis – effects and consequences

After a short overview about the basic provisions of the legal background of the EU competition policy, we are going on dealing with the effects of the economic crisis on the competition policy of the European Union. According to the classical approach of economic prosperity cycles, economic developments occur on a wavering manner. These waves – now downturn – could restructure economies and shape a new institutional order. Hereafter we examine this phenomenon screened on the EU competition policy.

3.1. Psychology of the crisis regarding to the competition policy

Nobody challenges that competition policy has crucial role regulating markets’ working in a market economy. This role appreciates during economic crisis since economic actors’ likelihood for deflection is much higher than it is in normal circumstances. For this sake cutting regulations back is not an optimal way of spurring the economy. Niminet (2009, p. 68) says in reference to the Great Depression of 1929-33 that “*weakening competition laws as a tool to combat economic difficulties may have the opposite effect and works to prolong the crisis.*”

In the economic crisis the biggest challenge for the European Union competition policy was/is to ensure and enforce common rules on the field of common policy mentioned, while “*the problem ... was that there was a diverse range of urgent (and ad hoc) national approaches to the crisis*” (Cejnar, 2011, p. 207). The author also reflects that the EU was concerned to avoid bid in the volume of national subsidies, to prevent the common market from distortions, to maintain legal certainty, not to be discriminatory in crisis management, etc. Therefore the EC competition policy can be regarded from two aspects: it should eliminate anti-competitive elements from the enterprises’ competition practice, on one hand, and, on the other hand, to help MSs with appropriate/exceptional measures overcoming economic crisis, challenges in economic life.

Since the EU is a supranational organization, instead of enterprises MSs play important role in crisis management. However, this doesn’t mean exclusivity of the former entity (or, in a broader sense: the exclusivity of governmental [including the EU institutions as well] command) overcoming the crisis, but without stricter regulation the recession couldn’t be fought. As Cejnar (2011) thinks, more regulation and corporate governance is needed for success. The open question is if these “measures” help winning back confidence on the market and in the free market economy.

3.2. Changes in competition policy regulation since mid-2008

In this subchapter we will examine the development of competition policy branches (antitrust regulation, mergers and State aid). Decision makers await from these measures to spur the European economy, to initiate economic growth, to achieve and later maintain budgetary stability, to handle unemployment and calm down social pressure. These – macroeconomic – fields of intervention are mostly related to state activity, therefore we will firstly deal with State aid regulation. Hereinafter the

emphasize will be put on the other fields of competition policy for the purpose getting a complete picture about the changes in the EC competition policy.

3.2.1 State aid regulations

Due to the Article 107 of the Treaty of Functioning of the European Union, “... any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market” (TFEU, 2010). This means generally that granting State aid is prohibited in all of the Member States avoiding distortion of the internal market. By the way, this provision is dated back to the Treaty establishing the European Economic Community.

In 2005 a reform was initiated with the clear aim of setting the State aid activity in service of Lisbon strategy (Pelle, 2010). This new concept targeted innovation lead investment, regionalism, improvement of human capital, etc. A new (i.e. broader) group exemption scheme was created as well supporting the achievement of above mentioned goals. The group exemption scheme (800/2008/EC regulation¹) put great emphasize on creating a new, innovation led economy, with special focus on SMEs. Thanks to the deepening crisis, the development of the State aid regulation was being diverted from the shortly reviewed orbit. A new way of Commission work was initiated: this was crisis management.

State aid regulation has the biggest effect on crisis management. This is due to the fact that state intervention doesn't affect only real economy rescue but the rescue of the financial sector as well (EC, 2011a; Nicolaidis and Rusu, 2010). However, this latter was more important due to the loaning activity and the relating (absence of) confidence. This dual approach was being recognized by the MSs and the European decision making institutions. This situation presumed increased State aid activity and since the European Commission is the guardian of the Treaty provisions, it had to respond swiftly on the new circumstances. The State aid/GDP ratio, as it is illustrated on Figure 1, reached high level in some Member States in 2009.

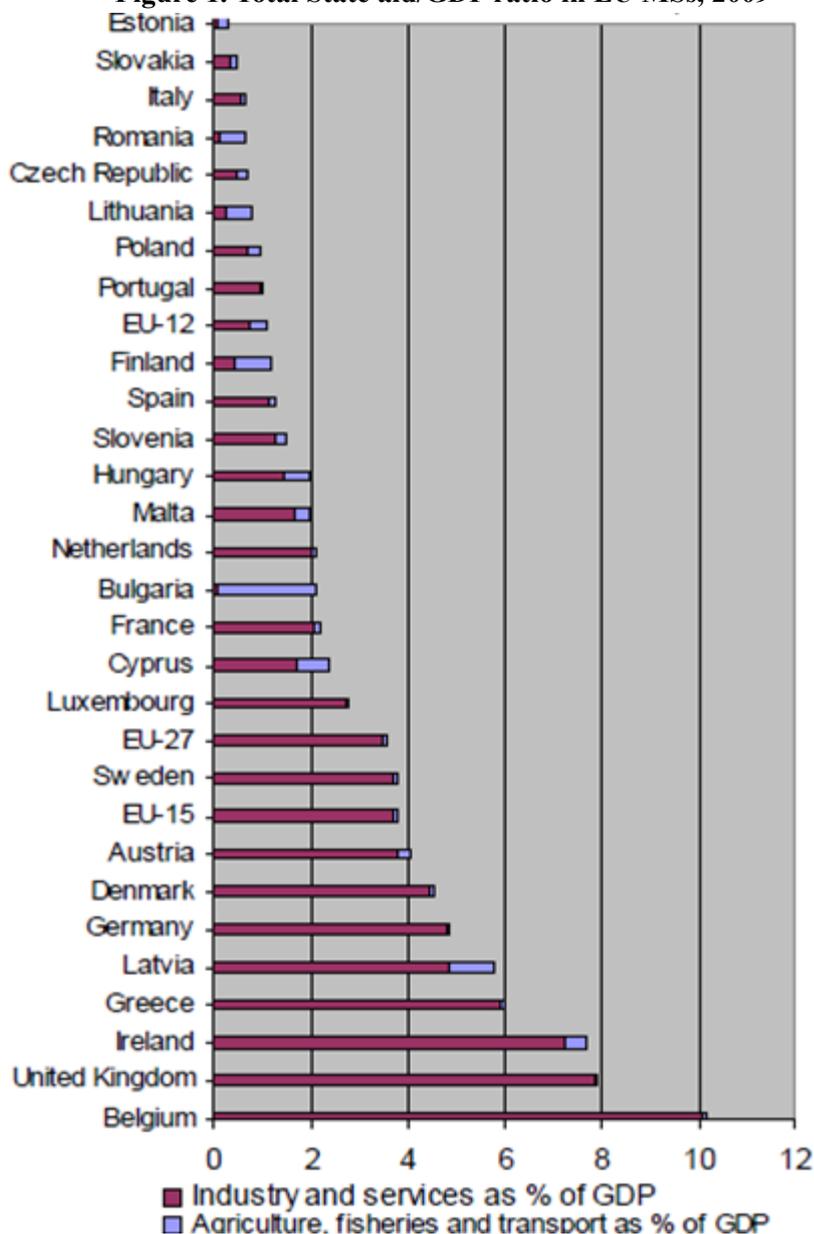
The European Commission issued from the autumn of 2008 approximately a dozen of communications, temporary frameworks and working documents and amendments handling the situation the crisis have brought (EC 2011a). The issues, that are correlated to the European Economic Recovery Plan, could be considered as reactions on emerging State aid novelties. It is worth to note that these “allowances” do not grant total freedom for MSs to spur national economies with financial assets. “They [MSs] have also been required to submit realistic restructuring plans and compensate competitors to the extent possible for distortions caused by aid” (Nicolaidis and Rusu, 2010, p. 763). The authors highlight the importance of the following documents adopted by the EC combating the financial crisis (Nicolaidis and Rusu, 2010, pp. 762-763):

- “application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis
- Recapitalisation of Financial Institutions in the Current Financial Crisis: Limitation of Aid to the Minimum Necessary and Safeguards against Undue Distortions of Competition
- Treatment of Impaired Assets in the Community Banking Sector

¹ See full text: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:214:0003:01:EN:HTML>

- Return to Viability and the Assessment of Restructuring Measures in the Financial Sector in the Current Crisis Under the State Aid Rules (Restructuring Communication for Financial Institutions), and
- A Temporary Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis.”

Figure 1. Total State aid/GDP ratio in EU MSs, 2009



Source: EC (2010a, p. 8)

According to the European Commission’s report, in a two years long period after the 1st of October 2008, it made more than 200 decisions in State aid issues in the financial service sector (EC, 2010a). The Commission approved intervention measures that amounts € 4 588.90. This was 39% of the GDP of EU-27 for 2009 (EC, 2010a).² Table 1 details this amount according to aid instruments.

² For the period from 1st of October 2008 to 1st of October 2010.

Table 1: Commission-approved State aid measures by aid instruments in 2009, € billion

Aid instrument	Amount	% of EU-27 GDP
Guarantees	3485.25	30
Recapitalisation	546.08	4.5
Impaired assets	401.79	3.3
Liquidity instruments	155.77	1.3

Source: EC (2010a)

It should be noted that the European Commission highlighted in its working document that “Member States relied principally on guarantee measures which had a stabilising effect for the financial sector without weighing heavily on the public finances as opposed to more interventionist instruments such as recapitalisations or the cleaning of impaired assets. In addition, nearly 70% of approved aid relates to just 5 Member States (the United Kingdom, Ireland, Denmark, Germany and France)” (EC, 2010a, p. 47). This reflects the relative importance of aid instruments and the biggest actors of rescue measures. However, Italy as one of the biggest European economy, is not among them.

A more detailed picture can be seen examining Table 2. Table 2 represents Table 1 on a more detailed way. It is divided into the two major components of the total State aid (schemes and ad hoc interventions) and shows the actually used, and aid element amount of State aid. According to the EC working document, the 2009 actually used aid³ was € 1106.54 billion (GDP ratio 9.3%), while MSs’ aid element⁴ 351.68 € billion (EC, 2010a).

Table 2: Summary table on maximum Commission-approved volumes, nominal amount and aid element, in € billion

	Approved volume 2008-2010	Actual use 2009	Aid element 2009	Total crisis aid granted, % of GDP
Schemes	3478.96	727.38	180.91	1.53%
guarantees	3026.28	612.59	77.33	0.6%
recap. measures	348.64	95.15	95.15	0.8%
asset relief interv.	62.17	1.4	1.4	0.01%
liquidity meas. other than guarantee schemes	41.87	18.23	8.6	0.05%
Ad hoc interventions in favour of individual financial institutions	1109.94	379.16	170.76	1.44%
guarantees	458.97	214.3	50.81	0.4%
recap. measures	197.44	46.36	44.49	0.3%
asset relief interv.	339.63	108.38	73.87	0.6%
liquidity meas. other than guarantees	113.9	11.11	1.5	0.01%
Total	4588.90	1106.54	351.68	2.9%

Source: EC (2010a, p. 48-49)

³ Actually used amount (or nominal amount) expresses the actual volume of aid which was implemented by the MSs.

⁴ Aid element (or gross grant equivalent) shows monetary advantage granted to individual banks.

Temporary framework for State aid

One of the preceding documents relating to the State aid that is issued by the European Commission handling the economic crisis was adopted on the 17th of December 2008. The document is named “Communication from the Commission – Temporary framework for State aid measures to support access to finance in the current financial and economic crisis”⁵ and mirrors the standpoint of the European Commission about the “new role” of State aid. The main changes are, inter alia, higher upper limit of State aid, risk capital, loans and credit guarantees (Nicolaidis and Rusu 2010). According to the Communication of the Commission, State aid regulation should be interpreted more submissively in relation to the following aspects of State aid (EC, 2009a):

- compatible limited amount of State aid
- aid in the form of guarantees
- aid in the form of subsidized interest rate
- aid for production of green products
- risk capital measures.

Two months later the EC placed an amendment⁶ to the Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (discussed above). One of the most important changes the amendment contained set a “limit” of intervention for MSs. The second point of the amendment draws as follows: “Therefore Member States have to show that the State aid measures notified to the Commission under this framework are **necessary, appropriate and proportionate** to remedy a serious disturbance in the economy of a Member State and that all the conditions are fully respected” (EC, 2009b, p. 1, bold mine).

Financial sector rescue

Immediately after the escalation of the financial and economic crisis in the European Union, the Council of the European Union, in formation of ECOFIN, issued his views about the crisis management in the financial sector (on the 7th of October 2008.). The Conclusion emphasizes that “the priority is to restore confidence and proper functioning of the financial sector” (ECOFIN, 2008, p. 1). Due to the ECOFIN, other important steps are to support financial institutions, to ensure liquidity, to achieve full transparency, to protect the interests of depositors, to put the Stability and Growth Pact in service of the stabilisation, etc. (ECOFIN, 2008). The ECOFIN agreed on common principles as well. These are as follows:

- interventions should be timely and temporary
- interventions should respect the interests of taxpayers
- consequences of the intervention should be born by existing shareholders
- MS governments should carry about a change of management
- the remuneration of the management could be checked by the MS governments
- competitors’ interests must be protected
- paying attention on negative spillover effects of the interventions (ECOFIN, 2008; Mateus, 2009).

Demonstrating the above mentioned rescue operations, Table 3 shows the 2009 expenditures on guarantees granted for liabilities of financial sector. The approved volume for 2008-2010 with its amount of 3485.25 billion € is grandiose.

⁵ See full text: http://ec.europa.eu/competition/state_aid/legislation/temporary.html

⁶ See full text: http://ec.europa.eu/competition/state_aid/legislation/atf_en.pdf

Table 3: Guarantees granted for liabilities of financial institutions in 2009, € billion

	Approved volumes (01.08.2008- 31.7.2010)	Actual use in 2009	Aid element for 2009	% of aid element in relation to EU- 27 GDP for 2009
Schemes	3026.28	612.59	77.33	0.6%
<i>Ad hoc</i> interventions	458.97	214.3	50.81	0.4%
Total	3485.25	826.89	128.14	1%

Source: EC (2010a, p. 52)

On the 25th of October 2008 the European Commission issued his point of view about the rescue of the financial institutions. The document, that is in accordance with the 7th of October 2008 ECOFIN Council Conclusions, is named “Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis”⁷ and contains the main guidelines the EC considers applicable to overcome the economic crisis in the financial sector. As the document says,

*“The ECOFIN Council on 7 October 2008 adopted Conclusions committing to take all necessary measures to **enhance the soundness and stability of the banking system in order to restore confidence and the proper functioning of the financial sector.** The recapitalisation of vulnerable systemically relevant financial institutions was recognized as one means, among others, of appropriately **protecting the depositors’ interests** and the stability of the system. It was further agreed that public intervention has to be decided on at **national level** but within a **coordinated framework** and on the basis of a number of EU common principles. On the same occasion the Commission offered to shortly issue guidance as to the broad framework within which the State aid compatibility of recapitalisation and guarantee schemes, and cases of application of such schemes, could be rapidly assessed” (EC, 2008a, p. 1, bold mine).*

Recapitalisation of financial institutions

The Commission posted a new Communication that affects the banking sector as well. The “Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis; limitations of aid to the minimum necessary and safeguards against undue distortions of competition”⁸ was aimed to supplement the ECOFIN Conclusions (that of 7th of October 2008) and Eurogroup statement on crisis management. As it can be read in the introduction of the Communication, [the Banking Communication] “recognizes that recapitalisation schemes are one of the key measures that Member States can take to preserve the stability and proper functioning of financial markets” (EC, 2008b, p. 2.). The Communication accepted the statement of the mentioned forums taking from them that

*“Governments commit themselves to **provide capital** when needed in appropriate volume while favouring by all available means the **raising of private capital.** Financial institutions should be obliged to accept **additional restrictions**, notably to preclude possible abuse of such arrangements at the expense of non beneficiaries, [and] legitimate **interest of competitors must be protected**, in particular through the State aid rules” (EC, 2008b, p. 2, bold mine).*

⁷ See full text:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:270:0008:0014:EN:PDF>

⁸ See full text:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:010:0002:0010:EN:PDF>

The Communication sets common objectives that should be followed. It concerns restoring financial stability, beside others for the purpose of ensuring lending operations to real economy. It marks as common objective treating insolvency as systematic risk. The guideline, stressing the depth of the crisis, mentions the collapse of Lehmann Brothers as well (EC, 2008b). However, the goals listed are strictly correlated to each other and cannot be achieved separately.

Similarly, the European Commission in his working document for State aid informs us about the aggregated amount of State aid spent for recapitalization. This is represented in Table 4. As we can compare the amount for recapitalization and financial sector rescue, we can state that the latter counts far more bigger amount than the previous expenditure.

Table 4: Recapitalisation measures for 2009, in € billion

	Approved volumes (01.08.2008- 31.7.2010)	Actual use in 2009	Aid element for 2009	% of aid element in relation to EU- 27 GDP for 2009
Schemes	348.64	95.15	95.15	0.8%
<i>Ad hoc</i> interventions	197.44	46.36	44.49	0.3%
Total	546.08	141.51	139.64	1.1%

Source: EC (2010a, p. 53)

It should be noted that the Communication lists three types of possible distortions of competition that could occur by recapitalisation. Member State bank recapitalization may not result in distortion of competition by giving undue competitive advantage to his own banks. National assistances ensured to banks may lead to “subsidy race among Member States” (EC, 2008b, p. 3), therefore it could result in a disadvantageous situation for other MSs financial institutions. This point is characterized by “ensuring fair competition between Member States” (EC, 2008b, p. 3). On the other hand, there is no differentiation between the banks of MSs, therefore it could give an undue advantage for banks with worst results (“ensuring fair competition between banks” (EC, 2008b, p. 3). And thirdly, it is avoidable for the banks to be rescued only by public sources, but they have to look for sources from the markets as well. This principle is known as “ensuring a return to normal market functioning” (EC, 2008b, p. 3). The European Commission would have particular role in the assessment of the risk, and eligibility and criteria.

Question of impaired bank assets

The European Commission communicated in the spring of 2009 its views about the treatment of impaired assets that emerge in the banking sector.⁹ The European Union and Member States recognized at the beginning of the crisis that without support (i.e. State aid and interventions) the banking system was not sustainable in the Community. For these purpose they introduced the above mentioned rescue measures. However, an other supporting scheme was communicated by the EC, and it was relating to the impaired bank assets. It, as the fourth paragraph of the introduction says, “... focuses on issues to be addressed by Member States in considering, designing and implementing asset relief measures. At a general level, those issues include the rationale for asset relief as a measure to safeguard financial stability and underpin bank lending, the longer-term considerations of banking-sector viability and budgetary sustainability to be taken into account when considering asset relief measures and the need for a common and co-ordinated Community approach to asset relief, notably to

⁹ See full text on

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:072:0001:0022:EN:PDF>

ensure a level playing field” (EC, 2009c, p. 1). The communication details how the European Commission imagine to handle the question of asset relief. It lists “issues such as (i) transparency and disclosure requirements; (ii) burden sharing between the State, shareholders and creditors; (iii) aligning incentives for beneficiaries with public policy objectives; (iv) principles for designing asset relief measures in terms of eligibility, valuation and management of impaired assets; and (v) the relationship between asset relief, other government support measures and the restructuring of banks” (EC, 2009c, p. 1).

Summarizing, Farantouris (2010) proposes that in the future State aid-related amendments should run along three principles. Firstly, he argues that closer co-operation should be form between MSs. He underlines the importance of control in rescue measures. This would improve efficiency of the State aid and intervention. Thirdly, deep competition analysis should initiate aiding activity. This would cover abuse of dominant position issues and merger regulation as well.

Antitrust regulations

In the time of crisis every fields of competition policy is affected but the measure of it is variable. As we have seen in the previous subsection crisis-related State aid regulations are highly sophisticated. In this section we will examine the most important changes in relation to the antitrust regulation.

First of all, to understand the essential feature of crisis antitrust behaviour we have to the take a look on the background and on the logic of it. Antitrust activity (i.e. cartels and abuse of power in dominant position) could be increased during the time of crisis since markets where the affected firms are professing could become narrowed. These markets could be characterized as any other markets of an economy in crisis. However, exposure of sectors is variable due to their characteristics. As Kokkoris (2010, p. 727) says: “Crisis cartels are likely to appear in industries where production facilities are durable and specialized and consumer demand falls due to adverse market conditions.” Anyway, antitrust attitude in these circumstances may come to the front, therefore effective antitrust regulation is needed to prevent the free competition from distortions sketched in.

The Commission issued the “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”¹⁰ on the 3rd of December 2008. This guidance made no expressed reference on the crisis, but its statements are authoritative in a lot of aspects. It, firstly, “... sets out the main principles of an effects-based approach determining enforcement priorities in relation to Article 82 EC ...” (EC, 2009d, p. 6). Secondly, it gives a framework for specific forms of abuse. These handle affairs relating to exclusive dealing, tying and bundling, predation, refusal to supply and margin squeeze (EC, 2009e). However, 2009 and 2010 annual report made no expressive statement on crisis affected antitrust regulation development. In these years establishing of new block exemption in antitrust regulations were being initiated (both vertical and horizontal agreements) (EC, 2010b), and accepted (the vertical block exemption regulation (BER) on the 20th of April 2010, while for the horizontal agreements on the 14th of December 2010). In relation to the BER for vertical agreements the Commission states that “the basic principle of the revised rules remains that companies with limited market power are free to decide how their products are distributed, provided their agreements do not contain price-fixing or other hardcore restrictions. However, the rules were revised in order to take into account both the buyers' and sellers' potential market power so that all parties to the agreement must have a market share under 30% for a block exemption” (EC, 2011b, pp. 14-15). There are several changes in the case of horizontal

¹⁰ See full text:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF>

agreements, since “the new rules on horizontal cooperation agreements are much more detailed, user-friendly and clearer than the previous ones” (EC, 2011b, p. 15).

Merger control

According to the Commission’s 2008 annual report on competition policy, on the field of merger control a guidance was being accepted (EC, 2009d). The guidance, named Notice and Remedies (22nd of October 2008) was supplemented with the amended Implementation Regulation. As it was underlined in the cases of antitrust, neither at the merger control regulations are expressed reference to the current crisis. However, the reform could be seen as a forward-looking development of the merger control. It could be made out from the summary of the reform. It draws as follows:

“The reform imposes more stringent information requirements on merging parties, requiring the notifying parties to systematise the information to be provided. It also clarifies and tightens up the requirements for the sufficient scope of divestitures and for the suitability of purchasers, and explains the application of “up-front buyer” provisions and “fix-it-first” solutions” (EC, 2009d, p. 9).

There is another explanation of the Commission. The Commission brings merger control to Member States’ attention to “distinguish interventions with a protectionist motivation from a genuine pursuit of legitimate public interests” (EC 2010b, p. 30.). For this purpose Article 21 of the EC Merger Regulation is authoritative. The (4) paragraph of Article 21 states that “notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law” (EC, 2004).

4. Conclusions

The crisis that has escalated in Europe in the mid-2008 has caused amendments in economic policy concepts in the European Union. Due to this, it was a need for the modernisation of the common competition policy, to adapt it to the challenges the economic crisis meant.

In these circumstances State aid rules played central role. It seemed that, however, Member State interventions overcame common State aid rules guided by the primary law. Therefore the European Commission initiated its supplementing work relating to State aid activity with the clear purpose of keeping in check rescue measures. This was manifesting especially in its communications and guidance. Among the State aid measures special role was dedicated to the rescue of financial sector. This finding is valid since modern (real) economies do not exist without strong financial background. Rescue measures took place in the form recapitalizations or impaired assets rescue as well.

It is an open question how the European Commission will reduce crisis management measures after the crisis. A positive sign from the Institution is the emphasized importance of reduction and avoidance of market distortion and discriminatory measures. Giving up again national sovereignty on the field of State aid would be a lesson for MSs that they had already done one time – in accordance with the Treaty provisions.

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