

the European Lawyer



The voice of the profession Issue 84 January 2009

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First aid for the financial crisis

Member states across the EU are bailing out domestic banks and other financial institutions as the global economic crisis bites. CHRISTOPH WÜNSCHMANN and FALK SCHÖNING look at how the downturn could change the European Commission's assessment procedure of state aid

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This is a demanding time for the European Commission. The financial crisis requires urgent action both by the EU as a whole and by its member states to avert severe damage to the entire banking sector. However, the European treaties do not provide for EU-wide legislation in these circumstances.

The EU – unlike the member states – cannot bail out financial markets by spending taxpayers' money. At the same time, the Commission needs to supervise and scrutinise national bank bail-out schemes so that member states do not give an unfair advantage to national banks at the expense of competitors from other countries operating in the same market. What seems to some an undue formality in a time of severe crisis is in fact a necessary requirement to preserve the functionality of the EU state aid system as an important pillar of the European common market.

Swift response

The Commission has proved that EU state aid rules do not impede a swift response to the current challenge. By putting in place a fast-track procedure for state aid that complies with a Communication issued on 13 October, and by aiming to approve such measures within 24 hours, the Commission is trying not to jeopardise national bail-out plans.



To keep state aid to a minimum, a significant contribution from the beneficiary or the sector is required

The Commission specifies in the Communication that in view of the seriousness of the situation, member states may rely on article 87(3)(b) of the EC Treaty – which allows 'aid to remedy a serious disturbance in the economy of a member state' – when bailing out financial institutions. The Communication is inspired by previous guidelines adopted for rescue and restructuring packages, although it has a broader scope and applies more flexible criteria. Member states may adopt general measures aimed at remedying the problems of the whole financial sector, as opposed to limiting themselves to individual aid for certain institutions, which was the focus of the

previous rescue and restructuring guidelines.

However, emergency state aid is subject to several conditions. In the view of competition commissioner Neelie Kroes, it is crucial that there is no discrimination based on nationality, that all measures are proportionate, and that rescue aid is accompanied or at least followed by restructuring or liquidation plans. In particular, guarantee and recapitalisation schemes are only eligible for state aid under article 87(3)(b)EC if they meet the same criteria as those previously applied by the Commission in the enforcement of EU state aid rules.

Besides the fact that state aid must be granted in

a non-discriminatory manner, the question of proportionality is the Communication's linchpin. As regards the scope of these plans, the Commission considers it necessary that member states review their rescue measure scheme regularly (at least every six months), and report the results to Brussels. Moreover, state aid is limited to what is strictly necessary to achieve its legitimate purpose.

Close scrutiny

In this light, the Commission focuses on guarantees protecting retail deposits and measures that foster interbank lending by guaranteeing certain types of wholesale deposits and short- and medium-term debt instruments. However, an extension of a guarantee scheme to other types of debt would require close scrutiny.

To keep state aid to a minimum, a significant contribution from the beneficiary or the sector is required – for example, in the form of fees paid for the provision of the guarantee or clauses allowing member states to receive compensation for the guarantee at a later date. Finally, the rescue measure must be accompanied in due course by general adjustment measures for the sector as a whole or by individual restructuring plans for individual beneficiaries.

In general, the Commission is right to continue to apply state aid

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>databases

such cases, simply browsing through the database would result in a copy of the webpage in question being transferred onto the browser's computer and, typically, that copy would be retained.

Preventing abuse

The ECJ said that extraction is not limited to acts of copying by technical means. And it does not matter what the purpose of the transfer is (for example, whether to create another database or not) or if the items transferred are arranged differently. The ECJ made it clear that although a database right could give broad

protection, competition law still prevented abuse of that right.

In interpreting broadly the protection given by the database right, the ECJ followed its reasoning in 2004 in the British Horseracing Board (BHB) case. The right was introduced to protect investment – whether human, technical or financial – in producing a database. Therefore, acts prejudicing that investment will generally infringe, and extraction covers any unauthorised appropriation of all or part of the database's contents.

The ECJ's decision in *BHB* was disappointing for

database owners, because it said there was only a database right if there was substantial investment in creating the database itself (rather than the contents). However, the decision did (as does the *Directmedia* decision) result in the database right, when it does subsist, giving broad protection. In the *BHB* case, the ECJ held that the right protected against the taking of a substantial part of the contents of a database not only by direct access but also by taking indirectly from publicly accessible material – such as in newspapers and websites.

This latest ECJ judgment is a positive development

for database owners and means that investment in Europe in information systems and databases should be better protected. However, database owners should make sure that terms and conditions for accessing a database are clearly drafted.

Users of databases need to take care when accessing a database that they are not infringing the owner's rights. But there is likely still to be disagreement over which acts do infringe. ■

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>banking aid

The current crisis will result in a completely revised framework for the financial industry

rules to bank bail-out schemes. Without the framework of competition law, member states might have harmed the European economy even more by only trying to rescue their respective national champions at the expense of competitors. However, given the value of the rescue packages and the time pressure in assessing state aid programmes, it is doubtful whether the substantive EU state aid rules will be fully respected in practice.

Superficial scrutiny

It is clear that in 24 hours the Commission can only give superficial scrutiny to bail-out plans, considering that regular state aid cases of a comparable size would take the Commission many months, if not longer. Therefore, it cannot be ruled out that some beneficiaries will not meet the criteria set by the Commission – a fact that might harm certain competitors more than the financial crisis as a whole.



However, the current crisis will not just change the current assessment procedure of state aid, but will also result in a completely revised

framework for the financial industry in the future. The Commission will tighten the regulation of rating agencies, and may also look to utilise the situation to try to improve supervision structures at European level.

With the globalisation of financial markets on the one hand and national supervision on the other, it is likely that a discussion will be launched about setting up 'colleges' of several national supervisors, or eventually even the creation of a European agency. ■

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