



Catriona Hatton

## STATE AID BAILOUTS

# Rules on rescue

## European Commission issues guidance on state aid to banks

Following a flurry of rescue measures put in place by European Union (EU) member states to support the banking sector, on 13 October the European Commission (EC) issued a communication to clarify the types of measures which it considers will be compatible with state aid rules. The communication focuses on guarantee schemes, recapitalisation schemes and complementary forms of liquidity support.

The Commission specifies that in view of the seriousness of the situation, member states may ground the provision of state aid to financial institutions on Article 87(3) (b) of the EC Treaty. This provision allows 'aid to remedy a serious disturbance in the economy of a member state'. The Commission has put in place a fast track procedure for state aids which comply with the guidance set out in the communication. It aims to approve such measures within 24 hours.

The Commission communication is inspired by previous guidelines adopted for rescue and restructuring aids (the R&R guidelines). However, the communication has a broader scope and applies more flexible criteria. It acknowledges that 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 R&R guidelines.

As regards duration, in contrast to the R&R guidelines, the Commission is prepared to authorise certain rescue measures, including some guarantee schemes, for up to two years (as opposed to 6 months under the R&R guidelines).

However, state aid schemes adopted by member states in application of the communication must meet the same criteria as those previously applied by the Commission in enforcement of EC state aid rules. In particular, guarantee and recapitalisation schemes must be temporary and, as such, subject to regular review by the relevant member state authorities.

They must also be proportionate — in other words, limited in time and scope to what is strictly necessary to achieve the legitimate purpose. For example, the Commission considers that guarantee schemes for retail deposits, certain types of wholesales deposits and even short and medium term debt instruments may be necessary. However, it says that extension of a guarantee scheme to other types of debt would require close scrutiny. Further, guarantee schemes must ensure a significant contribution from the beneficiary and/or the sector (for example, through an association of private banks). This contribution may be in the form of fees paid for the provision of the guarantee, or claw-back fortunes clauses allowing the member state to receive compensation for the guarantee at a later date.

In the case of recapitalisation schemes, the Commission considers that

the member state should receive shares in the institution whose value corresponds to the contribution to recapitalisation, or should provide for claw-back provisions.

There is also a requirement that guarantee and recapitalisation schemes be non-discriminatory. For example, guarantee schemes must be available to all institutions incorporated in the member state concerned with significant activities in that jurisdiction.

Finally, guarantee and recapitalisation schemes must be followed by restructuring plans, either in the form of general adjustment measures for the sector as a whole, or individual restructuring plans where, for example, a bank has drawn on the guarantee or has benefited from recapitalisation. These individual restructuring plans will be investigated by the Commission to ensure compliance with state aids rules. The Commission specifies that restruc-

**THE COMMISSION MAKES IT CLEAR IT WILL HAVE A CONTINUING ROLE IN STATE AID SCHEMES AND WILL EXPECT MEMBER STATES TO IMPLEMENT FURTHER MEASURES TO PUT THE SECTOR ON A SOUNDER FOOTING**

turing plans for institutions that are in difficulty because of their particular business model or practice will undergo increased scrutiny.

The communication confirms the Commission's intention to continue to apply EC state aid rules during the economic crisis. However, it also indicates the Commission is prepared to take a flexible approach, while setting some parameters to avoid discrimination and undue distortions of competition. Further, the Commission makes it clear that it will have a continuing role in overseeing state aid schemes and that it will expect member states to implement further measures to put the sector on a sounder footing.

In addition, individual institutions which have to draw on the general state guarantee or which receive an injection of capital from the state — or are otherwise supported by state aids — will need to undergo restructuring. The Commission can be expected to closely scrutinise such restructuring plans, which member states will need Commission approval on — particularly where the Commission considers that the individual institution required rescue because of the way they conducted their business rather than as a result of the current difficulties with access to liquidity. ■

Catriona Hatton is a partner at Hogan & Hartson's Brussels office and Michel Debrux is a partner at the Paris office. Jean-Michel Coumes is counsel in both Brussels and Paris, and Christoph Wunschmann is counsel at Hogan & Hartson Berlin.