Developments during this period were still heavily influenced by the economic and financial crisis.

1. Policy developments

The Commission adopted the following five communications:

1.1. Communication on bank restructuring

On 22 June 2009 the Commission adopted a Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules. This is the fifth communication the Commission has adopted in response to the financial crisis. In this document, the Commission provides guidance as to how it assesses any restructuring aid Member States give to banks. The Commission lays down three fundamental principles, namely: (i) aided banks must be made viable in the long term without further state support; (ii) their owners must carry their fair share of the burden of restructuring costs; and (iii) measures must be taken to limit distortions of competition in the Single Market. The Commission explains how it intends to apply these principles in helping the European banking sector to become viable once again. The guidelines are in force until 31 December 2010. After this date, the normal rules on rescue and restructuring will apply, as laid down in Article 107.3(c) of the TFEU (ex Article 87.3 (c) of the EC Treaty).

The Commission Communication on bank restructuring complements but does not change the previous guidance on State aid rules which the Commission has adopted since the beginning of the financial crisis. The previous guidelines set out, in particular, the conditions under which banks are required to submit a restructuring plan. The new Communication, on the other hand, outlines how the Commission will use competition rules to support financial stability. The Commission’s view is that making banks viable again is the best way to ensure their stability and their sustained ability to lend to the real economy.

1.2. Communication on funding public service broadcasters

On 2 July 2009, the Commission adopted a new Communication on the application of State aid rules to public service broadcasting. The Communication provides a clear framework for the development of public broadcasting services and enhances legal certainty for investment by public and private media alike. It replaces and updates the Commission’s 2001 Broadcasting Communication. This update forms part of the Commissions’ State Aid Action Plan and was necessary in view of the extensive case practice developed since the 2001 Communication and to take account of significant technological changes as well as legal developments since the Altmark judgment.

The main changes include an increased focus on accountability and effective control at national level, including a transparent evaluation of the overall impact of publicly funded new media services. More specifically, these changes involve:

(i) the ex ante control of significant new services launched by public service broadcasters (balancing the market impact of such new services with their public value);

(ii) clarifications concerning the inclusion of pay services in the public service remit;

(iii) more effective control of overcompensation and supervision of the public service mission at national level; and

(iv) greater financial flexibility for public service broadcasters.

The Communication is designed to ensure high quality public broadcasting services on a variety of platforms, ranging from the internet to screens in public places.

The views expressed are purely those of the writers. The content of this article does not necessarily reflect the official position of the European Commission.

1.3. A more Economics-based approach: three guidance papers

On 3 June 2009, as a part of its efforts to clarify and simplify state aid rules, the Commission adopted two guidance papers setting out criteria for the in-depth assessment of large amounts of training aid (7) and of aid to disadvantaged and disabled workers (8). The guidance applies to measures affecting the recruitment of workers who are considered to be disadvantaged or disabled, as defined in the General Block Exemption Regulation (9).

The guidance papers on training aid and employment aid set out the criteria to be followed by the Commission when assessing the compatibility of such aid measures in cases where they have to be individually notified. The papers provide guidance on the kind of information the Commission requires and the assessment methodology it intends to follow. The criteria are based on the principles of the Commission’s State Aid Action Plan, in particular the balancing test that weighs the positive effects brought about by the aid against the negative impact a potential distortion of competition might entail. On this basis, the Commission will carry out an overall evaluation of the aid to determine whether, as a whole, the aid measure can be approved.

On 24 June, the Commission adopted a further guidance paper setting out criteria for the in-depth assessment of regional aid to large investment projects. The Regional Aid Guidelines 2007-13 state that large investment projects above certain thresholds need to be individually notified to the Commission because they may carry a greater risk of distorting competition. The Commission opens a formal investigation procedure for projects where the aid beneficiary has a market share of more than 25% or where the production capacity created by the project exceeds 5% of the market (while the growth rate of the product market concerned is below the EEA GDP growth rate). Regional aid to such large investments entails a higher risk of distorting competition. The Commission has now provided further guidance on how it will carry out this in-depth assessment.

2. Cases adopted (10)

2.1. Decisions taken under Article 106 TFEU (ex Article 86(2) EC): Services of General economic interest

On 18 June 2009, the Commission authorised an Irish scheme of levies and tax relief in the health insurance sector (11). The scheme aims to promote intergenerational solidarity by decreasing the risk differentials between old and young customers. The Commission concluded that the measure was in line with the EU Framework for state aid in the form of public service compensation and as such was compatible with Article 106(2) of the TFEU (ex Article 86(2) of the EC Treaty). In particular, after the Irish Authorities agreed to amend the scheme, the Commission was satisfied that none of the insurers would be overcompensated for the discharge of the public service. The scheme is a temporary replacement for, and very similar to, the previous Risk Equalisation Scheme, which was annulled by the Irish Supreme Court for domestic law reasons.

In line with the jurisprudence of the European Court of Justice, notably the Altmark ruling (12), the Commission concluded that the measure constitutes state aid. However, such aid can be compatible with the Single Market provided it satisfies the conditions laid down in the EU Framework on state aid in the form of public service compensation (13). In particular, the public service must be clearly defined and entrusted by the public authorities, and the public support may not overcompensate the service providers.

2.2. Decisions adopted on the basis of Article 107(3)(b) TFEU (ex Article 87(3)(b) EC)

2.2.1. Banking cases

(a) Aid Schemes

Under EU state aid rules, the European Commission approved a German scheme designed to further stabilise the financial markets by providing financial institutions with the possibility of asset relief. This scheme is in addition to the German rescue package authorised by the Commission in October 2008 (14). The mechanism is in line with the Commission’s Guidance Communication on the treatment of impaired assets. In particular, the mechanism provides

(10) This is only a small selection of the cases adopted in the period under review.

ex-ante transparency and disclosure of impairments, valuation of the assets based on their real economic value, a burden sharing of the costs and adequate remuneration. Moreover, the enrolment period for asset relief is limited to six months.

Also under EU state aid rules, the European Commission approved a Portuguese bank recapitalisation scheme (\textsuperscript{(2)}) intended to bolster financing of the real economy. The scheme is in line with the Commission's guidance on support measures for credit institutions during the financial crisis.

In addition, the Commission approved prolonging a number of schemes in Sweden (\textsuperscript{(18)}), Denmark (\textsuperscript{17}), Italy (\textsuperscript{18}), France (\textsuperscript{19}) and the Netherlands (\textsuperscript{20}).

(b) Ad Hoc Aid

**Commerzbank (N 625/2008)**

Commerzbank has sustained major losses, in particular deriving from the Dresdner Bank ABS portfolio. Moreover, given the current crisis, financial markets need more capital, The German Government therefore agreed to provide Commerzbank with €18 billion of new capital.

The purpose of this aid is to ensure financial stability under a German financial crisis scheme, approved by the Commission on 12 December 2008 (\textsuperscript{21}). This scheme allows recapitalisation for fundamentally sound banks if the remuneration and exit incentives are appropriate, as laid down in the scheme, in accordance with the Commission's Recapitalisation Communication. However, given the amount of aid involved, Germany presented the Commission with a business plan setting out measures to restore the viability of the bank.

The main element of Commerzbank's plan is a focus on its core businesses, namely retail and corporate banking including in Central and Eastern Europe, which has generated stable returns in the past. In contrast, volatile investment banking will be reduced over time and the bank will divest itself of Eurohypo’s commercial real estate activities. Commerzbank has also reviewed its practices regarding risk management and corporate governance.

The plan includes a number of measures aimed at keeping the aid to the necessary minimum. For example, Commerzbank will divest itself of certain activities and will sell off subsidiaries including Eurohypo, an important European player in the real estate and public finance business. These measures address the Commission's concerns about possible distortions of competition by this large grant of aid also include the suspension of dividend and interest payments to holders of hybrid capital. In addition, to allay further competition concerns, the bank will for three years be banned from taking over financial institutions or other businesses which might compete with it. Furthermore, the bank will not be allowed to do business (including deposit taking) under more favourable price conditions than its top three competitors in markets/products where it has more than a 5% market share.

Although the current crisis means rising credit risk for Commerzbank, the Commission’s assessment found that the plan is likely to restore the bank's long-term viability, as demonstrated in a number of simulations including stress test scenarios. Also, Commerzbank has demonstrated that its funding situation has been stable throughout the crisis and it still has significant liquidity buffers.

The large-scale divestments (amounting to roughly 45% of Commerzbank’s current balance sheet total) and the planned suspension of payments of dividends and interests will limit the aid to the minimum necessary and will ensure that the bank itself makes a significant effort to return to viability.

Finally, the Commission also considers the plan sufficient to mitigate potential distortions of competition. In particular the Commission notes that the ban on acquisitions and the price leadership prohibition are adequate to prevent state aid from being misused to promote organic and non-organic growth at the expense of competitors which have not received state aid.

**WestLB (C 43/2008)**

Under EU state aid rules, and following an in-depth investigation that began in October 2008 (\textsuperscript{22}), the European Commission approved the €5 billion risk shield and accompanying measures for German bank WestLB. The risk shield was authorised by the Commission as temporary rescue aid on 30 April 2008 to protect the bank against the volatility of its €23 billion structured investment portfolio.

On 8 August 2008, Germany notified a restructuring plan for WestLB and requested an extension of the risk shield. On 1 October 2008, the Commission launched a formal investigation to determine

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\textsuperscript{(2)} N 556/2008.
\textsuperscript{(18)} N 436/2009 — Prolongation of Swedish recapitalisation scheme.
\textsuperscript{(17)} N 415/2009 — Prolongation of the recapitalisation and guarantee scheme in Denmark.
\textsuperscript{(19)} N 328/2009 — Prolongation of Italian bank guarantee scheme.
\textsuperscript{(20)} N 251/2009 — Extension of French scheme for refinancing credit institutions.
\textsuperscript{(21)} N 379/2009 — Prolongation of the Dutch Guarantee Scheme.
\textsuperscript{(22)} N 625/2008.

\textsuperscript{22} see IP/08/1435.
whether the measures would enable WestLB to return to long-term viability without undue distortions of competition. Germany's latest amendments to the viability plan show that much of WestLB's business is being redirected into less risky activities. Under the plan, WestLB will completely stop certain risky business activities such as proprietary trading, thereby reducing its assets by 50%. In future, the bank may maintain its activities in three core business areas:

- ‘transaction banking’ (i.e. handling payments)
- loans to medium-sized companies and its savings banks partnership (‘Verbund Mittelstand’)
- corporate banking (e.g. loans to large companies), capital market activities (including financial instruments trading) and structured finance (e.g. financing of large projects).

Finally, Germany undertook to change the bank’s ownership structure through a public tender procedure before the end of 2011.

The Commission was also satisfied that the state aid is limited to the necessary minimum and that potential distortions of competition will be minimised by, for example, substantially reducing WestLB’s geographical presence and selling most of its shareholdings.

However, the Commission will confirm its decision only if the statutory bodies of all WestLB’s owners approve the restructuring plan.

LBBW (C 17/2009)

The European Commission granted temporary clearance to a recapitalisation scheme and an asset relief measure offered to Landesbank Baden-Württemberg (LBBW) by the German State of Baden-Württemberg. The asset relief is to be achieved via a guarantee structure, not through a sale of assets. The guarantee protects LBBW against potential credit losses resulting from two separate portfolios of securitised assets. LBBW will retain the risk of default up to a certain amount (first loss piece), while the State of Baden-Württemberg will bear potential losses exceeding this amount (second loss piece). The guarantee is provided for a term of five years and can be terminated at the request of LBBW.

In addition, LBBW will receive a capital injection of € 5 billion from its owners. The capital injection became necessary to cope with the higher expectations of market participants and rating agencies regarding capital ratios. The bank will pay an overall remuneration of 10% for the capital it receives. It is therefore in line with the requirements of the Recapitalisation Communication.

The Commission examined the asset relief measure, which is rather complex. As a preliminary result, and for reasons of financial stability similar to those governing the assessment of rescue aid, the Commission decided not to raise objections for a period of six months. However, as some of the conditions required by the Impaired Asset Communication need further in-depth analysis, in particular regarding valuation, the Commission has decided to launch an in-depth investigation of this aspect and of corresponding elements such as burden sharing.

Kaupthing (N 344/2009)

On 10 June 2009, Luxembourg informed the Commission that a € 320 million loan had been set up for restructuring Kaupthing Bank Luxembourg SA. Since the primary purpose of the loan was to compensate depositors with the Belgian branch of Kaupthing Bank Luxembourg SA, the Belgian State decided to contribute € 160 million to this loan. Under the restructuring plan, deposits with the Belgian branch of Kaupthing Luxembourg were sold to Crédit Agricole Belgique/Keytrade Bank. The Luxembourg based private bank part is to be taken over by the UK investment fund Blackfish Capital. All these activities were sold to the highest bidder in a transparent tender procedure. The bank’s other assets will be wound up in a hive off vehicle and the revenue used to compensate creditors and repay the state aid.

The Commission concluded that the proposed measure was appropriate for the purpose of restructuring the bank’s activities, which will enable depositors to access their money again. The aid is proportionate because it will not result in compensation being unduly paid to the bank’s former shareholders. In addition, the scaling down of the bank’s activities and the break up of its assets following an open, transparent sale procedure will ensure that the aid does not give rise to distortions of competition.

IKB (N 400/2009)

IKB is a medium-sized private German bank with a business focus on medium-sized companies. IKB was the first bank in Germany to receive aid, in 2007 (23), to offset the damage caused by bad investments in structured securities. Restructuring aid to IKB was approved by the Commission on 21 October 2008 (24), and liquidity support was approved on 22 December 2008 (25).

The measure approved was notified on 6 July 2009 and concerns guarantees for liabilities up to a volume of €7 billion, granted by SoFFin — a fund ad-
ministering the German support scheme for financial institutions. This additional support was allowed only in order to counter a threat to financial stability stemming from IKB’s potential illiquidity.

The Commission finds that this aid meets the general criteria as set out in the Banking communication and the additional, more stringent requirements concerning additional aid in cases where restructuring aid has already been given. As IKB had previously received restructuring aid, it was particularly important to ensure that this additional support is limited to the necessary minimum. The Commission analysed in detail IKB’s funding needs for the next six months and verified that the aid amount is strictly limited to the required volume, ensuring that the bank has sufficient liquidity buffers to comply with regulatory requirements without being forced to restrain its lending. Additionally, IKB is prohibited from any proprietary trading as a means to inflate profits using taxpayers’ money.

Although funding constraints have eased in general, IKB is nevertheless facing a significant funding gap. The Commission therefore has doubts regarding IKB’s financial capacity to implement the original restructuring plan. Consequently, the Commission authorised this aid only after Germany had undertaken to notify a revised restructuring plan.

2.2.2. Real economy cases adopted under the temporary framework

On 17 December 2008, the Commission adopted a temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (26). Through this framework the Member States are provided with additional tools to tackle the effects of the credit squeeze in the real economy. These temporary measures are based on Article 107(3)(b) TFEU, which allows the Commission to declare aid to be compatible with the common market ‘to remedy a serious disturbance in the economy of a Member State’.


The Commission authorised further schemes in Estonia, the Czech Republic, Greece, Slovenia, Finland and Malta. The measures enable aid of up to € 500 000 to be granted in 2009 and 2010 to businesses in difficulty or facing funding problems because of the economic crisis and the credit crunch.

Furthermore, the Commission approved two amendments to the German scheme. One amend-

ums are set at a level that provides an incentive for exporters to use private insurers as soon as sufficient cover is available on the private market.

2.3. Decisions adopted on the basis of Article 107(3)(c) TFEU (ex Article 87(3)(c) EC)

The Commission has continued being particularly active in areas such as restructuring and rescue aid, environmental protection and the recovery of unlawful aid (Article 108 TFEU).

2.3.1. Rescue and restructuring

Rescue aid Quelle (N 382/2009)

On 30 June 2009 the Commission approved a € 50 million rescue aid loan to German retailer Quelle. The Commission concluded that the aid complies with the conditions of the EU Guidelines on rescuing and restructuring firms in difficulty since the aid is granted in the form of a repayable loan which is limited to the minimum necessary to ensure the rescue of the company and also limited in time. In line with the Guidelines, Germany also undertook to notify to the Commission, not later than 6 months after the rescue aid is authorised, a restructuring plan, a liquidation plan or proof that the rescue loan has been repaid in full.

Restructuring aid for Gdansk shipyard (C 18/2005)

On 22 July 2009, following an in-depth investigation that began in June 2005, the Commission authorised various support measures worth € 251 million, spread over several years and extending into the future, to assist the Gdansk Shipyard in Poland. Privatised in 2007, the yard recently presented a restructuring plan that will, to a large extent, be financed from private resources raised by the yard and its owner. The Commission concluded that the plan will ensure the viability of the yard and that the distortions of competition, caused by years of subsidised operation, will be adequately reduced by production capacity closures.

The Commission decision authorises state aid granted to Gdansk Shipyard since 2004 when Poland entered the EU (€ 94 million) as well as a further € 35 million of aid still planned to finance the yard’s restructuring. In addition, the decision authorises production guarantees from the Polish Export Credit Insurance Corporation of a nominal value of € 122 million (€ 80 million already received and € 42 million planned in 2009-2012). However, the decision does not cover the further € 36 million of state aid the yard received between 2002 and 2004, before Poland joined the EU.

2.3.2. Environmental Aid Guidelines(28)

Austrian feed-in tariffs (N 446/2008)

On 22 July 2009, the Commission authorised subsidised feed-in tariffs in Austria for producers of green electricity (i.e. electricity produced from environmentally-friendly sources). The measures are designed to accelerate and increase the development of electricity production from renewable energy sources without granting over-compensation for extra costs incurred. They are therefore in line with the requirements of the Environmental Aid Guidelines.

The feed-in tariffs are electricity prices above the market price paid to the producers of green electricity to compensate for their extra costs. The Commission concluded that the measure is in line with the requirements of the EU Environmental Aid Guidelines. In particular, Austria has undertaken to avoid any over-compensation with regard to the extra costs for buying green electricity.

At the same time, the Commission launched an in-depth investigation to establish whether certain provisions of the new Austrian Green Electricity Act, which may favour large energy consumers, infringe the state aid rules. According to the new Act, energy-intensive industries may be exempted from their obligation to purchase green electricity and to contribute to the funding of green electricity in Austria. As a result, enterprises not qualifying for the exemption may be burdened with extra costs for purchasing additional amounts of green electricity.

2.3.3. R&D&I (29)

Carmat (N 5/2009)

On 18 June 2009, the Commission decided not to raise any objections to the € 33 million of financial support granted by France to Carmat’s R&D programme. The lead company, Carmat S.A.S., backed up by four industrial partners and a large number of SMEs acting as subcontractors, will have the task of designing and developing an artificial heart that is fully implantable, together with the associated electrical supply and telediagnostic systems. The Carmat R&D programme will extend over five years and involve a total of about € 74 million of eligible expenditure. State aid of € 33 million will primarily benefit Carmat S.A.S., the company leading the project (€ 31 million, of which € 14.5 million is in the form of refundable advances).

(27) C 244 of 1.10.2004, p. 2-17.


After scrutiny, the Commission concluded that the programme was compatible with the framework for state aid for research and development and innovation. In particular, it remedies a market failure, and it will have a positive impact, especially in the public health sector, without significantly altering competition conditions.

2.3.4. Regional aid

Ford España (N 473/2008)

On 18 June 2009, under EU state aid rules, the Commission authorised €51.9 million of aid which the Spanish authorities intend to grant to Ford España, part of the Ford Motor Company, for radically transforming their existing plant at Almussafes, in the Valencia region. The Commission’s assessment found the measure to be compatible with the requirements of the regional aid guidelines.

Normally the aid would be granted under an existing aid scheme. However, due to the large amount involved, the aid to Ford had to be notified to the Commission for individual assessment and clearance. The Commission found that Ford’s market share would remain significantly below the 25% threshold in each of the car segments concerned (superminis, small family cars and compact multi-purpose vehicles), both before and after the planned investment. The Commission also verified that the capacity increase generated by the project remains below 5% of the apparent consumption of the product concerned in the European Economic Area (EEA).

2.3.5. Fiscal measure

Groepsrentebox (C 4/2007)

On 8 July 2009, the Commission endorsed a Dutch ‘Groepsrentebox’ tax break scheme. The Commission concluded that the Dutch plan to apply reduced taxation on revenue from intra-group loans under a scheme known as ‘Groepsrentebox’ does not constitute state aid. The Commission therefore closed a formal investigation it had begun in 2007, to verify whether the measure would not confer a selective advantage on certain companies. In the light of the comments submitted and the changes made by the Dutch authorities, the Commission concluded that the ‘interest box’ measure does not constitute state aid as it will apply equally to all companies receiving interest from related companies. The measure is not limited to certain sectors, certain types of companies, or certain parts of the Dutch territory.

Following the abolition of the minimum capital requirement for the creation of a limited liability company, there will be no legal or economic obstacle to the creation of a group. There are no restrictions regarding the turnover of the company, its size, the number of employees, whether or not it is part of a multinational group, or the nature of the operations that the beneficiaries would be authorised to perform.

3. Decisions under Article 108 TFEU (ex Article 88 EC)

The Commission brought several cases before the Court of Justice for failure to recover, in the cases of Technologie Buczek (Poland), New Interline S.p.A. (Italy), Bank Burgenland (Austria) and Magefesa (Spain).

The Commission also decided to refer Italy to the Court of Justice for failure to implement a 2004 ruling (case C-99/02) confirming a Commission decision of 1999 finding that Italy had granted illegal and incompatible aid and ordering its recovery. The illegal aid in question took the form of exemptions from social security contributions in cases where companies could not prove that new jobs had been created or prove that the workers hired had special difficulties entering or re-entering the employment market. Although more than five years have elapsed since this judgement, Italy has still recovered only a small part of the overall aid amount estimated at about 281 million euros. The Commission therefore now requests the ECJ to impose fines on Italy under Article 260 of the TFEU (ex Article 228 EC).