The return to long-term viability

Primary goal of banking restructuring

- Banking Restructuring Communication 2009
- Restoration of long-term viability paramount to burden sharing and compensatory measures
- DG COMP in the financial crisis: viability watchdog for banks

DG COMP's assessment in practice

- Before Lehman Brothers (no "*serious disturbance in the economy*") ⮚ Spring 2009 ⮚ Sovereign debt crisis
- Relevant factors:
  - Profitability
  - Liquidity
  - Solvency
- Application to individual business activities and consequences (remuneration, claw-back and winding-up)

Burden-sharing

Banking Restructuring Communication 2009

- Own contributions by beneficiary and investors: Limitation of aid to minimum distorting competition to extent absolutely necessary
- Threshold: “Adequacy” of burden sharing

Assessment in case practice

- Significantly changed approach in context of financial crisis (50% criterion)
- Contribution by beneficiary to own restructuring: Best endeavours to raise funds (fresh capital, divestments, reducing capital needs)
- Contribution by owners:
  - Private owners (dilution of share by State shares issued at discounted market value; dividend ban)
  - Public owners (from privatisations to additional equity contributions)
  - Hybrid investors (e.g. coupon payment ban; hybrid debt conversion into equity)

Compensatory measures

Background

- Commission does not want to simply “wave through” a massive State aid package, but also can not block measures
- Feasible compromise: tries to water down distortive effects through extensive obligations (comparable to merger control)
- Commission possesses considerable negotiating power
- Puts considerable administrative burden on the Commission (has to supervise and regulate a bank’s market conduct for a long time)
- A new role for DG COMP: not only controlling i.e. approving or prohibiting State aid, but actively shaping the economic landscape

Compensatory measures

Structural remedies

- Reduction of balance sheet by at least 40% (compensatory measure or measure to restore viability?)
- Divestments, closure of branches, discontinuation of certain business activities and production areas
- Measures have a very strong impact on future corporate strategy of the bank
- Can conflict with the objective of the aid measure (lending to the real economy, in particular to SMEs)
- High number of M&A transactions in a difficult market environment (*WestImmo, Commerzbank, KBC*)

Behavioural commitments

- Non-price leadership commitment
  - Relatively easy to apply in retail banking
  - More difficult in wholesale banking (antitrust issues)
- Acquisition ban
  - To avoid that banks go on “shopping tour” financed by the State
  - Creates administrative burden
- Requirement to achieve certain margin profit levels (difficult to monitor)
- Market opening measures (access to cashpoint network, “customer mobility package”)

Procedure I – General and monitoring decisions

General

- Commission's obligation to issue formal decision if failure to comply with commitment
- Minor deviation: Decision granting explicit exception
- Deviation from material condition: Opening of formal examination on "misuse of aid"

Monitoring and re-opening of proceedings

- Role of monitoring trustee
- Commission's standards for extension requests regarding restructuring plan
- Monitoring decision allowing modification or extension: "Sui generis" decision (e.g. KBC, ING) as opposed to increase of aid (new aid and new Commission investigation)

Procedure II – Non-implementation of commitments

Legal consequences?

- “Misuse of aid“ (Article 16 in conjunction with Article 1 g), Article 4 (4) of Regulation No 659/1999) with possibility of a negative decision
- Rarely applied in practice
- Certain degree of „seriousness of the infringement“ as a precondition?
- Does effect of the approval decision even lapse “automatically” in case of a failure to comply?

Thank you!

[BRU 4227305]

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