



Department of Law

EU State Aid Rules and the Lender of Last Resort: Challenges to the Notion of State Aid in the Wake of the Financial Crisis

Kira Krissinel

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

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INTRODUCTION

When the sub-prime crisis, which originated in the US, began to have repercussions in Europe, banks started to experience a liquidity squeeze no longer being able to borrow in the inter-bank lending market at good rates. This liquidity squeeze had serious consequences in the financial services market, leading to the failure of several major banks, which were over-leveraged and heavily exposed to the American sub-prime mortgage derivative products.

In order to deal with the consequences of the financial crisis and to restore financial stability, Member States of the EU have adopted various measures, including state guarantees in respect of the entire banking sector and/or individual financial institutions, as well as rescue and restructuring measures to allow them to bring failing institutions back to viability. An unprecedented amount of state aid has been notified and granted to the financial services sector since the onset of the financial crisis in September 2007. The Commission estimates that the overall level of state aid nearly quintupled in 2008 compared to 2007 almost exclusively as a result of crisis aid to the financial sector.¹

Different types of measures have been adopted in support of financial institutions all around the EU. These measures include general measures in the form of guarantee schemes², recapitalisation schemes³ and comprehensive schemes, which include any combination of guarantees, recapitalisation aid and other forms of equity intervention⁴. Later on, some Member States adopted asset relief schemes⁵ and schemes designed to grant banks access to more liquidity.⁶ In addition, various support measures were granted to individual institutions which were gravely affected by the crisis and needed to be rescued and subsequently restructured.⁷ These measures are unprecedented in their amount and scope⁸ and constitute a rapid evolution in Community state aid policy and enforcement.

¹ State Aid Scoreboard, Commission Report on State aid granted by Member States, Autumn 2009 Update COM(2009) 661 ('Autumn 2009 State Aid Scoreboard'), p.3

² These were adopted by Denmark, Ireland, Portugal, Sweden, the Netherlands, Italy, Finland, Slovenia, Latvia, Spain, Greece and the UK

³ Adopted by France, Italy, Denmark, Sweden, Slovakia, Slovenia, Finland, Poland and Spain

⁴ Adopted by UK, Germany, Greece, Austria, Hungary, Poland and Lithuania

⁵ For example, Austria, Germany, Hungary and Ireland

⁶ Like the ones set up by Greece, Spain, Hungary and Slovenia

⁷ The decisions in respect of all support measures are available on the website of the European Commission:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/411&format=HTML&aged=0&language=EN&guiLanguage=en>

⁸ Crisis measures that were reported by the Member States in 2008 amounted to EUR 212.2 billion, with thirteen Member States implementing crisis-related state aid in favour of the financial sector. By the end of October 2009, all 15 Member States that joined the EU prior to 2004, as well as Hungary, Latvia and Slovenia have had their crisis measures approved by the Commission (see Autumn 2009 State Aid Scoreboard, p.4). By 31 March 2010, the amount of overall aid approved by the Commission in relation to financial institutions had raised to €4 131.1 bn, out of which €950.1 bn were approved in 78 decisions in favour of some 40 individual institutions (see Spring 2010 State Aid Scoreboard, COM(2010)255 final/2, p.5)

One type of support measure that was used to aid troubled banks merits particular attention, as it was organised not by the central government directly, but through the Member States' national central banks ('NCB') and is known as emergency liquidity assistance ('ELA'). At first, the Commission dealt with ELA as it would with any other type of state aid, under what I refer to as the 'no crisis' framework. However, in October 2008, the Commission started to develop a new legal framework, designed especially to deal with the effects of the financial crisis (what I will call the 'in crisis' framework). The Commission's policy in regard to NCB intervention was restated and made more explicit in the first of the Commission Communications establishing the new, or 'in crisis', framework. There it was stated that general measures adopted by the central banks (such as open market operations and standing facilities) were generally not caught by the state aid rules and thus no prior notification of them to the Commission was required.⁹ ELA in respect of individual institutions, on the other hand, would only be considered to fall outside the scope of state aid rules' application if certain conditions were satisfied.¹⁰ When considering these particular conditions and the Commission's overall policy on the application of state aid rules in respect to ELA, an overlap with the theory on the lender of last resort ('LOLR') becomes obvious. Indeed, it seems that the Commission's policy is to a large extent informed by the principles behind classical LOLR theory.

It is submitted here that, boiled down to the core, Commission policy seeks to distinguish between two scenarios: first, when the NCB is acting in its capacity as a LOLR in the performance of its public duties as the guardian of monetary policy and financial stability, and second, when the NCB steps outside of its LOLR function. State aid rules would then apply only in relation to the latter, and not the former, type of NCB interventions. However, as will be shown, such a distinction is far from clear-cut and is subject to much confusion exists as to the exact nature of, and the requirements for, a central bank's LOLR function. Nevertheless, I submit that it is necessary to understand the premises of LOLR theory in order to be able to evaluate the Commission's approach to applying state aid rules to ELA, both under the 'no crisis' and the 'in crisis' frameworks.

This paper will attempt to elucidate the connection between LOLR theory and the current state aid regime as it applies to NCB intervention in the form of ELA and consider whether the two are compatible. Part I provides a brief overview of both the 'no crisis' and the 'in crisis' legal frameworks.

⁹ 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, 25.10.2008 (2008/C 270/02) ('Banking Communication'), para.51; for practical application of this rule, see *UK Banking Industry* (N507/2008) where the Commission decided that the general liquidity scheme put in place by the Bank of England to provide eligible counterparties with short-term liquidity were within the Bank's remit as a monetary authority and so fell outside the state aid rules. The same conclusion was reached in respect of the initial grant of specific liquidity assistance by the Bank of England to Northern Rock in September 2007, with the Commission qualifying such liquidity assistance as ELA (NN70/2007).

¹⁰ Banking Communication, para.51

Part II then ventures into the realm of LOLR theory, tracing back its origins and development recalling in particular its inceptions in late 19th Century and the subsequent academic debate as to the particular requirements for LOLR support. A parallel is then drawn between LOLR theory and state aid rules as they apply to ELA. Part III considers state aid rules and their application in the banking sector, specifically in relation to ELA, in more detail. An attempt to outline and analyse some of the problems with the approach to ELA under EU state aid rules is made. Part IV concludes, by making several suggestions on how the present regime could be clarified so as to avoid confusion in the area and promote legal certainty for central banks and governments.

PART I - OVERVIEW OF THE LEGAL FRAMEWORKS

Whereas Art 107(1) TFEU (ex Article 87(1) EC) contains a general prohibition on “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition”, Art 87(2) EC contains a list of aid that is to be considered as compatible with the common market and Art 87(3) enumerates aid which may so be considered, provided the Commission finds this to be the case. The Commission has the exclusive competence to make such an evaluation as to the compatibility of state aid measures with the Treaty and to this end, Member States must notify the Commission of any proposed measures prior to their implementation (Art 88(3) EC), unless such aid is covered by the *de minimis*¹¹ or one of the block exemption Regulations.

THE ‘NO CRISIS’ LEGAL FRAMEWORK

The first phase of rescue measures in favour of individual banks which were gravely affected by the credit crunch due to their exposure to US sub-prime mortgage lending through collateralised debt obligations (‘CDOs’) was dealt with by the Commission on the basis of the existing framework under Art 107(3)(c) TFEU and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty¹² (‘R&R Guidelines’). The new¹³ R&R Guidelines reflect a shift in policy towards a closer scrutiny of the distortions created by rescue and restructuring aid following the general trend of “less

¹¹ Regulation No 1998/2006 of 15.12.2006, OJ L 379, 28.12.06, p.6

¹² Community Guidelines on State aid for rescuing and restructuring firms in difficulty [2004] OJ C 244, 1.10.2004, p.2 (‘R&R Guidelines’);

¹³ The R&R Guidelines currently in force are the revised version of the Guidelines that were adopted in 1999 (OJ C 288, p.2), which were in turn a revised version of the original Guidelines adopted in 1994 (OJ C 368, p.12) and amended in 1997 (OJ C 283, p.2) to include some specific rules for agriculture.

and better targeted state aid” as called upon by the European Council¹⁴. In general terms, the Guidelines reinforce the “one time, last time” principle and preserve the transitional character of rescue aid, which is designed to provide a firm in difficulty with an opportunity to work out a restructuring plan so as to return the firm to viability and not to keep it afloat with state resources indefinitely. The Guidelines also require the beneficiary of restructuring aid to make a substantial contribution, which is real and free of aid, so as to ensure that restructuring is limited to the minimum necessary to restore the firm’s viability and to limit distortion of competition. These Guidelines apply to rescue and restructuring measures in respect of firms in difficulty, i.e. where the firm in question “is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.”¹⁵ The Guidelines identify Art 87(3)(c) of the EC Treaty as “the only basis on which aid for firms in difficulty can be deemed compatible”¹⁶. Art 87(3)(c) provides that “aid to facilitate the development of certain economic activities [...], where such aid does not adversely affect trading conditions to an extent contrary to the common interest” may be considered to be compatible with the common market. Thus, state aid may be considered compatible with the common market where the aid is necessary to correct disparities caused by market failures or to ensure economic and social cohesion¹⁷.

Several of these measures were approved under the old framework on the basis of Art 107(3)(c) TFEU, including rescue aids granted by Denmark to Roskilde Bank¹⁸, by Germany to Hypo Real Estate Holding¹⁹ and the UK’s rescue package to Bradford & Bingley²⁰.

To illustrate the application of this legal framework to ELA granted by national central banks, two case studies are presented here: UK rescue aid to Northern Rock, the first ELA-related case that was considered during the financial crisis 2007-2009, and Denmark’s rescue aid to Roskilde Bank. Although both of these cases deal with a variety of rescue measures, the case studies are presented only in relation to emergency liquidity assistance.

¹⁴ Conclusions of the European Council in Lisbon, March 14-23, 2000. See XXXII Report on Competition Policy, p.6; see also Thibaut Kleiner, “Reforming state aid policy to best contribute to the Lisbon Strategy for growth and jobs” (2005) 2 *Competition Policy Newsletter* 29

¹⁵ R&R Guidelines, paras. 9-10

¹⁶ R&R Guidelines, at para. 19

¹⁷ R&R Guidelines, at para. 19

¹⁸ N 366/2008 *Rescue aid to Roskilde Bank*, decision not to raise objections (IP/08/1222) dated 31 July 2008. Note, however, that rescue aid to Roskilde Bank was never implemented. Instead, the Danish authorities have submitted a plan to liquidate the bank, which was approved by the Commission: NN 39/2008 *Liquidation aid to Roskilde Bank*, decision not to raise objections (IP/08/1633) dated 5 November 2008

¹⁹ NN 44/2008 *Rescue aid to Hypo Real Estate Holding*, decision not to raise objections (IP/08/1453) dated 2 October 2008

²⁰ NN 41/2008 *Rescue aid to Bradford and Bingley*, decision not to raise objections (IP/08/1437) dated 1 October 2008

CASE STUDY 1: NORTHERN ROCK²¹

As the credit crisis spread across the pond to the UK, many of its banks found themselves exposed to the quickly-depreciating CDOs. The British mortgage lender Northern Rock was one of the institutions most heavily invested in the American subprime mortgage market and soon found itself in financial trouble. Northern Rock requested support from the Bank of England as it was unable to meet its funding needs on the private markets and was at risk of going into administration, with the Bank of England having previously made clear that it will not grant ELA until it was confirmed that no private investor solution would be possible.²² However, in order to grant the requested liquidity assistance to Northern Rock, the Bank of England had to deviate from the framework for its operations in the sterling money markets as it is set out in the ‘Red Book’ and obtain authorisation from the Chancellor of the Exchequer under the provisions set out in para.14 of the Memorandum of Understanding.²³ Having obtained the necessary authorisation from the Chancellor of the Exchequer²⁴, the Bank of England granted ELA to Northern Rock on 14 September²⁵ in the form of a Loan Agreement and a Repo Facility, on the following conditions²⁶: both facilities were (i) uncommitted and repayable on demand, (ii) required the provision of high quality collateral or securities, to which (iii) margins ("haircuts") were applied to protect the Bank against the risk of falls in the price of collateral, which was assessed daily, and (iv) the rate of interest was fixed above the Bank of England’s official rate and above the rate of its standing facility with the financial markets, which made it above the reference rate for the UK (and in other words, a “penal interest rate”).

In its decision, the Commission considered these conditions and the fact that these measures were taken at the Bank of England’s own initiative when Northern Rock was still solvent, to conclude that these measures did not constitute State aid within the meaning of Article 107(1) TFEU.²⁷

²¹ NN 70/2007 (ex CP 269/07) – *United Kingdom Rescue aid to Northern Rock*, 05.XII.2007 C(2007) 6127 final

²² *Ibid.*, paras.5-7

²³ *Ibid.*, para.8; the Memorandum of Understanding between the Treasury, the Bank of England and the FSA sets out in para.14 the exception on financial crisis management: “In exceptional circumstances, there may be a need for an operation which goes beyond the Bank’s published framework for operations in the money market. Such a support operation [...] would normally only be undertaken in the case of a genuine threat to the stability of the financial system to avoid a serious disturbance in the UK economy. If the Bank or the FSA identified a situation where such a support operation might become necessary, they would immediately inform the other authorities and invoke the co-ordination framework outlined in paragraph 16 below. Ultimate responsibility for authorisation of support operations in exceptional circumstances rests with the Chancellor. Thereafter they would keep the Treasury informed about the developing situation, as far as circumstances allowed.”

²⁴ NN 70/2007 *Northern Rock*, para.8

²⁵ *Ibid.*, para.9

²⁶ *Ibid.*, paras.11-14

²⁷ *Ibid.*, paras.32-34

However, Northern Rock's woes did not stop there and were actually exacerbated by a bank run when the details of this support measures were leaked to the press one day before they were actually implemented and publicly announced. In order to stop the bank run and avoid contagion effects spreading in the market and causing a wider banking crisis, the Treasury took further measures, including a guarantee backed by State resources for all existing accounts in Northern Rock on 20 September²⁸, which was later extended on 9 October together with a modification of the ELA facility with the Bank of England.²⁹ Thus, at the request of the Treasury, the Bank of England made additional funding facilities available, with the Treasury undertaking to indemnify the latter for any liabilities that may arise.³⁰ The Commission considered that these measures constituted state aid since they fulfilled all the conditions laid down in Article 107(1) TFEU , and in particular, because no market economy investor would have granted them.³¹

When considering compatibility under Art.107(3)(b) TFEU , the Commission noted that according to its long-standing case law (in particular relying on *Crédit Lyonnais*), this provision cannot be invoked in relation to one single market operator, since it was “designed to remedy serious economic disruption” and applied only to “the acute problems facing all operators in the industry” as opposed to a single operator like *Crédit Lyonnais* or Northern Rock.³² Moreover, it did not consider UK's fears of a systemic crisis arising justified, as it deemed the information provided by the UK authorities insufficient to arrive at such a conclusion.³³

In its assessment of compatibility under Art.107(3)(c) TFEU , the Commission concluded that Northern Rock qualified as a ‘firm in difficulty’³⁴, that the aid fulfilled all five conditions for compatible rescue aid as these are stipulated in point 25 of the R&R Guidelines³⁵ and was therefore aid compatible with the common market.³⁶

CASE STUDY 2: ROSKILDE BANK³⁷

An emergency liquidity facility was at stake also in the Roskilde Bank case. It was provided by the Danish National Bank in the form of a loan for an unlimited amount and could be cancelled by the

²⁸ *Ibid.*, para.9

²⁹ *Ibid.*, para.10

³⁰ *Ibid.*, paras.17-19

³¹ *Ibid.*, para.35

³² *Ibid.*, para.38

³³ *Ibid.*, para.38

³⁴ *Ibid.*, para.41

³⁵ *Ibid.*, paras.42-52

³⁶ *Ibid.*, para.53

³⁷ State aid NN 36/2008 – *Denmark Roskilde Bank*, 31.07.2008 C(2008)4138 published in OJ C 238/5 on 17.09.2008

central bank at any time.³⁸ The floating interest rate was set at 6.6% which was fixed at 200 basis points over the Danish National Bank's ordinary interest rate for loans and was also above the reference rate for rescue aid in Denmark.³⁹ However, as Roskilde Bank would not have been able to provide sufficient collateral for the liquidity facility, it was instead secured by two guarantees: one, which guarantees any potential losses for up to DKK 750 million by Det Private Beredskab, a voluntary-membership association created by the Danish Bankers Association, and the other, which covers any further losses not covered by the first guarantee, is provided by the State.⁴⁰

In its assessment of the guarantee provided by Det Private Beredskab, the Commission considered that no State resources were involved in the financing of the guarantee provided by Det Private Beredskab for the following reasons⁴¹: (i) participation in Det Private Beredskab was voluntary and of a private nature; (ii) the members of the highest authority of Det Private Beredskab are private, and the private bank members in the decision-making body could exercise a power of veto; (iii) the members of Det Private Beredskab have a lower exposure under the guarantee compared to their potential obligations under the Deposit Guarantee Fund. Therefore, the Commission concluded that it did not constitute State aid within the meaning of Article 107(1) TFEU .

In its assessment of the part of the liquidity facility which was guaranteed by the private sector, the Commission considered the following in relation to the requirement of 'state resources': firstly, it observed that the Danish State is the sole shareholder of the Danish National Bank and secondly, since the Danish National Bank has to be considered as a public authority or a public body, the imputability to the State of the use of State resources need not be shown separately. Moreover, the measure was taken in a coordinated action with the State. Therefore, it concluded that State resources were involved in the provision of liquidity by the Danish National Bank.⁴² The 'selectivity' criterion was also considered as fulfilled, since the measure was of an *ad hoc* measure in favour of one beneficiary, which the Danish National Bank granted by deviating from its set-up framework, and over which it had considerable discretion when deciding whether to grant it and at what conditions.⁴³ In view of the special characteristics of the banking sector, the Commission concluded that this ELA measure was susceptible to distort competition and affect trade between Member States.⁴⁴ Nevertheless, it decided that the part of the measure that was guaranteed by Det Private Beredskab did not constitute aid within

³⁸ *Ibid.*, paras.14-15

³⁹ *Ibid.*, para.18

⁴⁰ *Ibid.*, paras.19-24

⁴¹ *Ibid.*, paras.25-31

⁴² *Ibid.*, para.32

⁴³ *Ibid.*, para.32

⁴⁴ *Ibid.*, para.32

the meaning of Article 107(1) TFEU , because it did not involve the grant of an advantage from state resources. The reasoning behind was the following: (i) the interest rate charged for this liquidity facility was 2% higher than the lending rate of the Danish National Bank; (ii) the guarantee provided by Det Private Beredskab was of a private nature, and (iii) it provided a highly secure coverage for the Danish National Bank's exposure to the beneficiary's credit risk in respect of the liquidity facility, since Det Private Beredskab would pay the Danish National Bank under the guarantee should Roskilde Bank fail to comply with its repayment obligations, regardless of whether any liquidation proceedings are initiated against it. Therefore, no advantage was considered to be involved, with both the Danish National Bank and the State acting as a prudent market economy lender would do under the circumstances.⁴⁵

In its assessment of the part of the ELA facility that was guaranteed by the government, the Commission concluded that since this guarantee (i) was granted without a fee or any collateral, (ii) for an unlimited amount, (iii) conferred a selective advantage provided from State resources and (iv) had the potential to distort competition and affect trade between Member States, it constitute state aid within the meaning of Art.107(3)(b) TFEU .⁴⁶ However, given that Roskilde Bank was a firm in difficulty, that the measure was designed to ensure that the loan could only be used by the bank to conduct its present day-to-day activities and not to invest in new activities or behave aggressively in commercial markets, and, moreover, that that there were sufficient guarantees in place to ensure that the aid amount was limited to the minimum necessary, the Commission concluded that the measure constituted rescue aid compatible with the common market under Art.107(3)(c) TFEU .⁴⁷

THE 'IN CRISIS' FRAMEWORK

In early autumn of 2008 it became apparent that the framework in place until then became inadequate to deal with the effects of the spreading crisis, especially after the failure of Lehman Brothers in the US with significant consequences for European banks. Therefore, the European Commission introduced a new and temporary framework with the adoption of the Banking Communication in October 2008, speeding up the procedure for the assessment of compatibility of proposed national measures and introducing Article 107(3)(b) TFEU as a legal basis available to the Member States in the current market turbulence.

⁴⁵ *Ibid.*, para.32

⁴⁶ *Ibid.*, paras.35-38

⁴⁷ *Ibid.*, paras.42-65

The Banking Communication and the new legal framework

In the Banking Communication, the Commission recognised that given the level of seriousness of the financial crisis and its impact on the financial markets and the overall economy of Member States, Article 87(3)(b) is available as a legal basis for aid measures undertaken to address this systemic crisis⁴⁸. The Commission warned, however, that this legal basis is not to be used as a matter of principle in crisis situations in other individual sectors “in the absence of a comparable risk that they have an immediate impact on the economy of a Member State as a whole”⁴⁹. According to the European Court of Justice (‘ECJ’), in order to invoke this provision, “the disturbance in question must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory”⁵⁰. Indeed, there is only one precedent for the successful use of Art 107(3)(b) TFEU in the case concerning economic reforms and a stabilisation programme introduced by the Greek government in the 1980’s⁵¹.

Apart from this new legal basis, the Banking Communication also introduced a distinction between financial institutions characterised by “endogenous problems” (i.e. those banks whose inefficiency or excessive risk-taking are the root cause of their woes, exacerbated or brought to light by the financial crisis) and financial institutions with “exogenous problems” (i.e. illiquid but otherwise fundamentally sound banks institutions which are in difficulty solely because of the financial crisis). The Communication is concerned predominantly with guarantee schemes (until then the most common measure resorted to by Member States, as will be discussed below), as well as recapitalisation measures, controlled winding-up of financial institutions and other forms of liquidity assistance. The general conditions which must be fulfilled for aid to be considered as compatible with EU rules on state aid are the following: (i) non-discriminatory access to support measures (i.e. eligibility should not be based on nationality); state support must be limited in (ii) time and (iii) scope to what is necessary to address the acute crisis; there must be (iv) an appropriate contribution by the private sector, including an adequate remuneration, and (v) sufficient behavioural rules must be in place to prevent the beneficiary of aid

⁴⁸ Banking Communication, para. 9

⁴⁹ Banking Communication, OJ C 270, 5.10.2008, pp.8-14, at para. 11

⁵⁰ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II-3663, para. 167; see also Commission Decision 98/490/EC in Case C 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1, Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 et seq. and Commission Decision 2008/263/EC in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166.

⁵¹ Commission decision 8/167/EEC of 7.10.1987 concerning Law 1386/1983 by which the Greek government granted aid to the Greek industry.

from abusing State support. Moreover, structural adjustments should be made, as appropriate, including restructurings of firms receiving state aid, and measures granted should be regularly reviewed.

The Recapitalisation Communication

As the crisis continued to rampage through financial markets and the inter-bank lending markets dried up, severe repercussions began to be felt elsewhere: banks, no longer secure about their own assets and unable to borrow, stopped lending to commercial and retail clients. The Commission responded to this need by issuing a Recapitalisation Communication⁵² on 5 December 2008, in which a set of standards and safeguards was identified to allow Member States to recapitalise banks in order to ensure that adequate levels of lending to the economy ensued. The Communication places a particular emphasis on two principles to ensure the avoidance of undue distortion of competition: (i) remuneration close to market prices; and (ii) temporary character of recapitalisation, with incentives for State capital redemption favouring an early return to normal functioning of the market.⁵³ The Recapitalisation Communication goes hand in hand with the Banking Communication, making *inter alia* the same distinction between endogenously and exogenously troubled banks.

Impaired Assets Communication

As the market value of portfolio investments held by banks kept decreasing and the effects of the “toxic” or impaired assets associated with the US sub-prime mortgage and derivative products thereof continued to be felt, there arose a need for a way to dispose of such toxic assets to unburden the troubled banks from the uncertainty as to the location and the size of losses potentially stemming from impaired assets. The Commission responded by adopting the Impaired Assets Communication⁵⁴ on 25 February 2009. This Communication provides a set of principles according to which impaired assets relief measures will be assessed, including principles relating to disclosure of impaired assets prior to government intervention, their identification, valuation, as well as adequate burden-sharing of related costs between the shareholders, creditors and the State and adequate remuneration for the State.

⁵² Communication from the Commission on the recapitalization of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.01.2009, pp.2-10 (‘Recapitalisation Communication’)

⁵³ For a summary of the main points see Report from the Commission: State Aid Scoreboard – Spring 2009 Update, COM (2009) 164, 08.04.2009, p.202

⁵⁴ Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.03.2009, p.1 (‘Impaired Assets Communication’)

Restructuring Communication

On 23 July 2009 the Commission issued the Restructuring Communication⁵⁵, in which it explains its approach to assessing restructuring aid given by Member States to the banks during the financial crisis notified to it before 31 December 2010. Under these guidelines, the Member States are required to submit a ‘viability plan’ for fundamentally sound banks, or a more in-depth ‘restructuring plan’ for banks in difficulties, in order to confirm or re-establish individual banks’ long-term viability without reliance on State support.⁵⁶ The Commission will then assess the restructuring based on three fundamental principles: (i) aided banks must be returned to viability in the long term without further state support, (ii) with the beneficiaries making an own contribution to the restructuring costs (“burden sharing”), (iii) whilst limiting distortions of competition and ensuring a competitive banking sector in the Single Market. Thus, this Communication continues in line with the previous three Communications in maintaining the distinction between “fundamentally sound” and “structurally unsound” banks and the goal of striving to maintain financial stability without harming the level-playing field in the single market.⁵⁷

The measures that were assessed under the new framework include rescue aid in the form of a capital injection into SNS Reaal/New⁵⁸ by the Dutch authorities, the joint rescue and restructuring scheme for Fortis⁵⁹ designed by Belgium, Luxembourg and the Netherlands, the capital injection into Ethias⁶⁰ by the Belgian authorities, Latvian support measures for Parex Banka⁶¹ and the Swedish emergency rescue measures in favour of Carnegie Sweden.⁶² The following case study on rescue aid to the Swedish Carnegie Bank provides an illustration of how the Commission applies this new ‘in crisis’ legal framework to ELA.

CASE STUDY 3: CARNEGIE BANK⁶³

⁵⁵ Communication from the Commission "The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules" Official Journal C195, 19.8.2009, p. 9 ('Restructuring Communication')

⁵⁶ *Ibid.*, para.4

⁵⁷ *Ibid.*, para.29

⁵⁸ N 611/2008 *SNS Reaal/New capital injection by Dutch authorities*, (IP/08/1951) of 10 December 2008

⁵⁹ N 574/2008 *Measures in favour of Fortis*, (IP/08/1746) of 19 November 2008

⁶⁰ NN57/2008 *Capital injection for Ethias group*, decision not to raise objections (IP/09/254) of 12 February 2009

⁶¹ NN 68/2008 *Support measures for JSC Parex Banka*, (IP/08/1766) of 24 November 2008

⁶² NN 64/2008 *Emergency rescue measures regarding Carnegie Investment Bank*, (IP/08/1977) of 15 December 2008

⁶³ NN 64/2008 – *Sweden Rescue aid to Carnegie Bank*, 15.12.2008 C(2008) 8660

Sweden's Carnegie Bank found itself in increasing financial difficulties, not being able to finance itself on the interbank market and, following the publication of its third quarter report of 2008 which revealed some unfavourable investments with an exceptionally large credit exposure, and, finding itself being investigated by Sweden's Financial Services Authority and at risk of losing its banking license, it turned to Sweden's central bank, the Riksbank, for emergency liquidity assistance.⁶⁴ This ELA was granted to Carnegie in the form of a loan, with an interest rate 150 basis points above Riksbank's repo rate, and against collateral, which consisted of shares in Carnegie Bank's subsidiaries and in Carnegie Bank itself.⁶⁵

Recalling the criteria it has set out in its Banking Communication,⁶⁶ the Commission considered that these were not satisfied in the present case. In particular, given that the ELA was secured by collateral that consisted mainly of shares in the beneficiary and its subsidiaries, the value of which was subject to market fluctuations and which would not have normally been accepted as security by a central bank, this collateral was not deemed as adequate under the conditions set out in the Banking Communication.⁶⁷ Therefore the measure constituted an advantage and was, moreover, selective in nature as it applied only to Carnegie Bank, and, given the intense exchanges in banking and financial services and the beneficiary's presence on the four Nordic markets, was liable to distort competition and affect trade between Member States.⁶⁸ Riksbank's resources were also deemed to be 'State resources' imputable to the State for the purposes of state aid rules, since the central bank was established by the Swedish constitution, with its operations governed by a special law and its board of governors appointed by Parliament. The ELA measure was therefore considered to constitute State aid within the meaning of Article 107(1) TFEU.⁶⁹

In regard to compatibility, the Commission agreed to apply Article 107(3)(b) TFEU since the failure of Carnegie Bank would have entailed a serious disturbance in Sweden's economy, given the fact that the beneficiary had important international operations and the default on its payments may have had detrimental effects on Swedish economy in which, because of its relatively small size, the counterparties do not tend to distinguish between individual banks and the lack of confidence in respect to one of them, Carnegie, would have extended to the others.⁷⁰ The Commission therefore set out to apply the compatibility in line with the Banking Communication and decided that the aid was: (a)

⁶⁴ *Ibid.*, paras.8-9

⁶⁵ *Ibid.*, paras.10 and 26

⁶⁶ See the Banking Communication; NN 70/2007 *Northern Rock*.

⁶⁷ NN 64/2008 *Carnegie Bank*, para.26

⁶⁸ *Ibid.*, para.27

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, paras.32-34

appropriate, in being well-targeted to address the cause of the beneficiary's problem, namely its inability to refinance itself on the interbank market, and through its immediate delivery was well fitted to the purpose of eliminating the threat to the stability of the Swedish economy that the failure of Carnegie Bank would have entailed;⁷¹ (b) necessary, since it was taken in the form of a loan of a reversible character and with an interest rate of 150 basis points above the Riksbank's repo rate to adequately reflect the lender's risk and to limit the beneficiary's reliance on the ELA to the minimum necessary;⁷² and (c) proportional, since the aid was accompanied with a series of behavioural commitments by the beneficiary and Sweden's commitment to provide a restructuring or liquidation plan by a set date, thus limiting the time the rescue aid would be provided, all of which was designed to limit the risk of undue distortion of competition.⁷³ In light of this, the Commission concluded that the aid was compatible with the common market pursuant to Article 87(3)(b) of the Treaty.⁷⁴

PART II - THE THEORY ON THE LENDER OF LAST RESORT

(1) The Central Bank's Role as a Lender of Last Resort and its Justifications

A national central bank fulfils a variety of functions, including acting as a bank both to the government and to the other banks (public and private). Typically its tasks would also include issuing banknotes, keeping and investing the country's official foreign exchange and gold reserves, controlling foreign exchange transactions, conducting monetary and credit policy and engaging in prudential supervision of the activities of credit institutions⁷⁵, though this latter function can also be performed by another institution (such as the independent Financial Services Authority in the UK). However, it is its crisis management function, namely the provision of ELA to individual banks or the market as a whole which is particularly relevant for the present discussion. This is what is termed its "lender of last resort" ('LOLR') function. According to classical LOLR theory (as born in the 19th Century out of the works by Henry Thornton⁷⁶ and Walter Bagehot⁷⁷), the banks that are unable to finance themselves on the

⁷¹ *Ibid.*, paras.37-38

⁷² *Ibid.*, paras.39-42

⁷³ *Ibid.*, paras.43-46

⁷⁴ *Ibid.*, para.47

⁷⁵ See e.g. Mary Papaschinopoulou, *The Legal Articulation of Central Bank Independence: An Interdisciplinary and Comparative Analysis*, Schriftenreihe des Europa-Kollegs Hamburg zur Integrationsforschung, Band 34 (2002, Nomos Verlagsgesellschaft Baden-Baden/Ant. N. Sakkoulas Publishers Athens), p.53, n.64; see also national legislation outlining the functions of the Member States' respective central banks, e.g. Art.3(2) of the Polish Act on the National Bank of Poland of 29 August 1997, Art.2 of the Act on the National Bank of Slovakia 1992, Art.2 of Act No. 6/1993 Coll. of 17 December 1992 on the Czech National Bank; Art.11 of the Bank of Slovenia Act, Official Gazette of RS, No. 58/02; Art.2 of the National Bank of Romania Act (Law No. 312 / 28.06.2004)

⁷⁶ Henry Thornton, *An Enquiry into the Nature and Effects of the Paper Credit of Great Britan* (1802, Hatchart, London)

interbank market can turn to the central bank for a loan, to which a high interest rates is applied and which is secured by the bank's good assets (collateral). Such a LOLR facility is unique to the banking sector and is justified by a number of factors present solely in connection with the specific nature of banking activity, which make the banking sector particularly vulnerable to systemic risk.

Banks are special

What makes banks particularly vulnerable to systemic failure is their unique balance sheet structure - banks tend to take short-term deposits (reflected on the liabilities side of their balance sheet) which is the main source of their liquidity, and make long-term loans (the traditional assets of banking activity). Thus, the bank's liquidity is largely tied up in illiquid long-term loans. Given also the expectation of depositors to be able to withdraw any or all of their money at any given time, there is an inherent mismatch of maturities between the bank's assets (long-term loans) and liabilities (short-term deposits to be made available at the depositors' request).

Such a balance sheet structure "creates an inherent potential instability in the banking system" whereby rumours about individual bank's financial condition could spread and, if the distressed institution is large or prominent, the panic could spread to other banks"⁷⁸. This contagion effect may result from the following factors⁷⁹: (i) by their deposit contracts, banks offer liquidity that finances illiquid assets of uncertain value; (ii) virtually no secondary market for bank loans exists; and (iii) information asymmetries make it difficult for potential purchasers in this secondary market to evaluate customer-specific information that is pertinent to the value of the contract; moreover, (iv) banks are much more interconnected than firms in other industries. These factors combined can throw even solvent banks into insolvency. This is so because, on the assumption that only some of the depositors will want to withdraw their money at any one particular point in time, the banks hold only a fraction of the funds deposited in liquid assets. Hence, if depositors "run" with a substantial number of them wanting to withdraw their money at the same time, the bank would have to suspend payments or sell assets, often at lower "fire sale" prices⁸⁰, as panic drives down the value of assets that are by nature not easily marketable⁸¹. Although such systemic failure is a rare occurrence, the potential effects of a

⁷⁷ Walter Bagehot, *Lombard Street: A Description of the Money Market* (originally published in 1873 by Henry H.S. King & Co., London; revised edition with a foreword by Peter Bernstein, 1999, Wiley, New York)

⁷⁸ Edward W. Kelley, "Are Banks Still Special?", Remarks at the Seminar on Banking Soundness and Monetary Policy in a World of Global Capital Markets, sponsored by the International Monetary Fund, Washington, DC, 29 January 1997

⁷⁹ Charles A.E. Goodhart, *Financial regulation: why, how, and where now?* (1998, Routledge), p.11

⁸⁰ George J. Benston, 'Consumer Protection as Justification for Regulating Financial-Services Firms and Products' (2000) 17:3 *Journal of Financial Services Research* 277-301, at p.280

⁸¹ Goodhart (1998), op cit n.79, pp.8-9

“chain reaction that may have a self reinforcing effect”⁸² could be “debilitating for the economy as a whole”⁸³. This is so because the illiquidity and indeed the insolvency of an individual bank may have implications for the financial system as a whole by threatening the liquidity of other banks through contagion risk, given the potential direct exposures to the failing bank via the interbank market or the payments system, or the withdrawal of lines of credit from the failing bank⁸⁴ in today’s increasingly interlinked financial markets.⁸⁵ Indeed, as was noted by Allen and Gale, panic could cause even normally viable commercial banks to become insolvent, due to their interconnected nature.⁸⁶

Interbank market

The interbank market allows banks with surplus liquidity (i.e. banks that received more payments than anticipated on any given day) to lend to banks with liquidity shortage (i.e. those banks that received less payments than was anticipated on that day)⁸⁷, usually by way of secured or unsecured short-term loans at a high rate of interest (several basis points above base rate, depending on the estimated risk exposure). Thus, the interbank market is an important tool in managing such temporary imbalances in liquidity supply and demand. Without it, banks would need to keep larger reserves of cash to insure themselves against unanticipated liquidity shortages (as a sort of buffer). Instead, with an interbank market able to meet short-term liquidity needs, these buffer resources could be more usefully employed by being invested or lent long-term.

When the interbank markets are functioning normally, a temporarily illiquid bank can borrow from the other banks with liquidity surplus at a rate suitable for its credit ranking and thus reflecting the

⁸² Howard Davies (1999), ‘Financial Regulation: Why Bother?’, Society of Business Economists lecture, January 1999, London, FSA, *mimeo*

⁸³ Kelley (1997), op cit n.78

⁸⁴ See e.g. Glenn Hoggarth and Farouk Soussa, “Crisis management, lender of last resort and the changing nature of the banking industry” in Brealey, Clark, Goodhart et al (eds.), *Financial Stability and Central Banks – a global perspective* (2001, Routledge, London), pp.166-186 at p.166

⁸⁵ The problem of a bank being “too big to fail” or, as it is more recently referred to, “too interlinked to fail” or “too connected to fail” forms a significant justification for politicians to bail it out. See e.g. the statement of Alan Blinder, the former vice chairman of the Federal Reserve, when he argued that “everyone knows that there are institutions that are so large and interlinked with others that it is out of the question to let them fail.” (Rob Blackwell, “‘Too Big to Fail’ Deniers Have a Tough Audience,” *American Banker*, June 4, 2001). The rationale for the “too big to fail” doctrine has been presented by Goodhart and Huang, who argue that the threat to financial stability is often related to the size of the failed bank: Charles A.E. Goodhart and Haizhou Huang, “A Model of the Lender of Last Resort” (1999) *IMF Working Paper* 99/39. For a contrasting view on the TBTF issue see Gary H. Stern and Ron J. Feldman, *Too Big to Fail: The Hazards of Bank Bailouts* (2004, Brookings Institution Press) where the two senior officers of the Federal Reserve argue that the government should not provide bailouts even to large banks.

⁸⁶ Franklin Allen and Douglas M. Gale, “Optimal Financial Crises” (1998) 53 *Journal of Finance* 1245-1284; Franklin Allen and Douglas M. Gale, “Financial Contagion” (2000) 108 *Journal of Political Economy* 1-33

⁸⁷ See e.g. G. Selgin, “In Defence of Bank Suspension” (1993) 7 *Journal of Financial Services Research* 347-64

counterparty credit risk (the risk that the borrowing bank will not be able to repay the loan at the designated time, due to, for example, its insolvency). This means that a bank that is unable to obtain a loan at the interbank market is perceived to be an unsuitable borrower by the market: its credit rating is too low, it is unable to make high interest rate payments, it has no good collateral to secure the loan and the market may be anticipating its impending insolvency.⁸⁸ However, under certain circumstances even solvent banks may be unable to borrow on the interbank market. This may be due to information asymmetries, whereby the interbank market is only able to access incomplete information about the institution, which raises doubts as to its solvency, when in fact the bank is sound.⁸⁹ Moreover, the interbank market may become cautious in times of crisis⁹⁰, with individual banks losing confidence in the market and each other. As such, banks could refuse to lend their surplus liquidity if they cannot be confident that they will themselves be able to borrow later to address their own liquidity shortage⁹¹. This was, for example, the case in September 2007 when the British Northern Rock experienced a bank run following a media announcement of its liquidity problems⁹² and in September 2008 after Lehman Brothers filed for bankruptcy in the United States, raising doubts with its creditors worldwide as to the possibility of recouping the money owed to them (in addition to the usual counterparty credit risk here, there was widespread legal uncertainty as to the exact level of exposure that foreign banks had with Lehman Brothers' assets and the legal uncertainty associated with the priority of claims in insolvency proceedings). Thus, it has been argued⁹³, central bank intervention may be justified under such circumstances to address interbank market failure, since illiquid banks, unable to borrow on the interbank market, can turn to the national central bank as a lender of last resort.

(2) Academic Debate on LOLR and current practice

We have seen that central bank intervention is justified where market failures impede an efficient allocation of surplus liquidity on the market and that, given the particular nature of banking activities

⁸⁸ See e.g. Charles Goodhart, "Myths about the Lender of Last Resort" in Charles Goodhart and Gerhard Illig (eds.), *Financial Crises, Contagion and the Lender of Last Resort: A Reader* (2002, OUP), p.231

⁸⁹ See e.g. Freixas, Giannini, Hoggarth and Soussa, "Lender of Last Resort: a review of the literature" (1999) Financial Stability Review, November 1999, 151-167, at p.153; note also the efforts within the EU to remove the legal uncertainties related to the title to the collateral held by the bank seeking to borrow – the introduction of repurchasing agreements aims to manage the risk associated with collateral and the Settlement Finality Directive was introduced to reduce legal uncertainty as to title and to harmonise transaction laws across the EU.

⁹⁰ M. Flannery, "Financial Crises, Payment System Problems and Discount Window Lending" (1996) 28 *Journal of Money, Credit and Banking* 804-824

⁹¹ Freixas, Parigi and Rochet, "Systemic Risk, Interbank Relations and Liquidity Provision by the Central Bank" (1998) Mimeo, IDEI

⁹² The Chancellor's "Statement on emergency liquidity assistance" to HM Treasury on 25 November 2009

⁹³ See e.g. Freixas, Giannini, Hoggarth and Soussa (1999), op cit n.89, at p.154

and the unique balance-sheet structure of a bank, illiquidity can often lead to insolvency, which is undesirable due to the potential contagion effects that the failure of a bank can produce. Bagehot originally suggested that in a liquidity crisis, a central bank should lend freely to illiquid but solvent banks, at “a very high rate of interest” and against good collateral, with the object of “stay[ing] the alarm”.⁹⁴ Moreover, he was of the opinion that such a policy should be made known to the market in advance and as soon as possible after the onset of the panic, so as to provide confidence and “stay the panic”.

Since the publication of Bagehot’s famous *Lombard Street* in 1873, the theory of the lender of last resort has received a lot of attention from academics and practitioners alike. Currently, the conditions for LOLR vary slightly from jurisdiction to jurisdiction⁹⁵, but in general these include the following: (i) ELA support is only to be made available to illiquid but solvent institutions; (ii) against good collateral with sufficient ‘haircuts’ (or margins) applied to safeguard the central bank against counterparty credit risk; (iii) at a high or “penalty” rate; (iv) where the systemic stability of the financial system is threatened; and (v) where the decision is at the discretion of the central bank, to avoid any expectation to receiving ELA support so as to avoid moral hazard.⁹⁶ These general conditions, though modelled on Bagehot’s original rules, go beyond the classical LOLR theory in adding additional requirements and going counter to the suggestions made by Thornton and Bagehot. These have been a matter of hot debate in academic literature, the main tenets of which will be briefly addressed in turn.

(i) The question of solvency

Emergency liquidity assistance should only be made available to illiquid but otherwise solvent banks. It has been argued that if an institution is clearly insolvent, it is up to the government to decide whether or not it considers it necessary to provide it with risk capital for rescue or to orderly liquidate it. The central bank’s role would be to advise the government on the systemic consequences that the failure of the institution would produce,⁹⁷ but the central bank itself no longer has the mandate to act as a lender of last resort, since this facility can only be made available to illiquid but otherwise solvent institutions. This is a question of legitimacy, as once an institution is insolvent, the decision as to its

⁹⁴ Bagehot (1873), p.197

⁹⁵ For a thorough comparative analysis, see Ross S. Delston and Andrew Campbell, “Emergency Liquidity Financing by Central Banks: Systemic Protection or Bank Bailout?”, IMF Legal Department and IMF Institute Seminar on Current Developments in Monetary and Financial Law, 7-17 May 2002

⁹⁶ See e.g. for the approach taken by the Bank of England, guidance by former Governor of the Bank of England, Sir Edward George, ‘The Pursuit of Financial Stability’ (1994) *Bank of England Quarterly Bulletin* at pages 60-66; see also an example of a legislative provision for ELA support: Art.33(2) of the Bulgarian Law on the Bulgarian National Bank

⁹⁷ See e.g. Freixas, Giannini, Hoggarth and Soussa (1999), op cit n.89, at p.159

rescue or liquidation entails considerations of public policy and will be based on other political and social criteria going beyond the question of systemic stability and thus it should up to the government to make the call.

However, in practice it is generally difficult to distinguish between illiquidity and insolvency in times of crisis. Goodhart even refers to the assertion that this is possible as the first myth about the lender of last resort.⁹⁸ Indeed, according to Goodhart, whenever a central bank is approached by an individual commercial bank for ELA, the “CB must/should suspect that the failure of the bank to adjust its liquidity on the open market means that there is at least a whiff of suspicion of insolvency”⁹⁹ since an individual bank will only go to the CB seeking ELA when it cannot meet its liquidity needs on the wholesale markets, which “almost by definition [...] must be because it is running out of good security for collateralized loans and other (bank) lenders will not lend to it on an unsecured basis in the quantities required (at acceptable rates)”, which in turn must “almost by definition [...] be because there is some question about its ultimate solvency.”¹⁰⁰ However, as was already noted above, there may be instances where the interbank market fails due to information asymmetries and a solvent bank is not able to borrow. Moreover, as a study conducted by Berger *et al* revealed, the market is not always accurate in assessing the financial health of banks.¹⁰¹ Still, this means that the question as to the solvency of an individual financial institution which seeks LOLR support from the central bank is a difficult one.

An example of this difficulty is presented by the mere definition of insolvency. In most legal jurisdictions, insolvency is defined by the inability of a firm to meet its liabilities as these fall due¹⁰² (legal definition), whereas the economic definition of insolvency entails an evaluation of the firm’s overall balance sheet, namely, a firm is deemed to be insolvent when the total value of its assets is less than the amount of its total liabilities. In the context of banks, the distinction between these two definitions is particularly acute. Given the particular balance sheet structure of the bank, with its short-term liabilities (deposits) and long-term assets (loans) only a fraction of which is held in liquid form, the bank may be economically solvent (has more assets than liabilities), but is unable to meet its obligations as these fall due, since it cannot easily convert its long-term illiquid assets into cash. Moreover, when forced to do so, given that generally there is no good secondary market for bank loans, it has to sell them at an undervalue, leading to great losses and possibly ultimately resulting in

⁹⁸ Goodhart (2002), op cit n.88, at p.229

⁹⁹ *Ibid.*, p.232

¹⁰⁰ *Ibid.*, p.231

¹⁰¹ A. Berger, S. Davies and M. Flannery, “Comparing Market and Regulatory Assessments of Bank Performance: Who Knows What When?”, *Federal Reserve Board Working Paper*, March 1998

¹⁰² See e.g. Section 123 of the UK Insolvency Act 1986

insolvency. Thus, the distinction between the bank's illiquidity and its insolvency is a very fine line, which is not easy to draw, especially when only limited information is available to the central bank and the time-scale required for making a decision is very short.¹⁰³ There is also some evidence that in many industrial countries, authorities have often advanced support even when confronted with a genuine insolvency problem.¹⁰⁴

(ii) The question of good collateral with 'haircuts'

A similar difficulty presents itself in the questions of "adequate" or "good" collateral. Bagehot suggested that LOLR support should only be extended to banks with good collateral and that institutions without good collateral should be allowed to fail (under the assumption that they are insolvent). As was noted above, banks seeking LOLR support are deemed to not be fit to borrow at the interbank market, due possibly to the fact that they do not have collateral deemed adequate by other bank lenders. In such a situation, in times of crisis, Bagehot suggested that the central bank should relax its quality standards on collateral and accept other types of collateral that it would not accept in normal times. Such a policy is justifiable on the assumption that the bank is solvent, in that it has illiquid assets for which there is no secondary market (which is why it cannot use them as security in the interbank market) and, after borrowing temporarily from the central bank against such assets, the bank will be able to use them as planned (long-term investment) upon their return to the bank when it discharges its obligations with the central bank.

One conceptual difficulty with such a policy is that the availability of good collateral is a sign of the bank's solvency, so extending the range of collateral deemed 'acceptable' could signal the bank's impending insolvency (in that it has no assets that would be accepted as collateral by the central bank in normal times). Moreover, this could lead to the central bank incurring losses by giving ELA to banks who can only offer lower quality collateral as security. Asset prices can fluctuate substantially during the period for which ELA is granted, and the market value of the collateral could in the meantime decrease. Moreover, in times of crisis there is a substantial risk that the bank becomes insolvent after ELA has been extended and before it is able to repay the central bank. In such instances, the value of the collateral may depreciate substantially, given especially the personalised nature of the bank's assets

¹⁰³ Charles A.E. Goodhart, *The Central Bank and the Financial System* (1995, MIT Press, Cambridge, MA); Rosa Maria Lastra, "Lender of Last Resort" (1999) 48(2) *International and Comparative Law Quarterly* 340-361; Goodhart and Huang (1999), op cit n.85

¹⁰⁴ A. Prati and G. Schinasi, "Financial Stability in European Economic and Monetary Union" (1999) *mimeo*; and C. Giannini, "Enemy of None but a Common Friend of All? An International Perspective on the Lender of Last Resort Function" (1999) *Princeton Essays in International Finance*, No.214

– loans extended by a commercial bank are usually tailored to the individual customers and their value is tied to the information that the bank has about its customers. When a bank leaves the market, this information is lost and the value of its assets depreciates.

In light of this, it is questionable whether the policy of relaxing the standards of acceptable collateral is a sound practice, since it is likely to expose the central bank to excessive risks if the collateral turns out to be inadequate if the borrowing bank fails or if the collateral itself turns out to be ‘toxic’ (e.g. collateral debt obligations widely traded until the market failure of 2007, though of course Bagehot could never have had such innovative financial instruments in mind when he called for the relaxation of quality standards on collateral to be deemed acceptable by the central bank).¹⁰⁵ For example, Laurens suggests that acceptable collateral should be debt instruments issued or guaranteed by financially sound entities, that it should not be issued by the counterparty to the central bank or where the creditworthiness of the issuer is dependent on that of the counterparty, and moreover, that it should not fall due for repayment before the maturity date of the monetary operation they collateralise.¹⁰⁶ Such precautions should ensure that the collateral is sound even if the counterparty bank goes insolvent, but at the same time the types of collateral that fall within this category is severely restricted, so it becomes unlikely that quality of acceptable collateral becomes too relaxed.

Moreover, the collateral used to secure the ELA should also be accompanied by ‘haircuts’ or margins to insulate the central bank from counterparty credit and collateral valuation risk. These haircuts are to be determined on a case-by-case basis, depending on, *inter alia*, the counterparty’s credit ranking, the quality of the collateral offered and the amount of ELA requested.

(iii) The question of penalty rates

According to both Thornton and Bagehot, LOLR support should only be extended against a very high interest rate. Some commentators take this to mean that LOLR should always be at a ‘penalty’ rate, meaning at a rate higher than that available on the market.¹⁰⁷ However, more recently it has been suggested that though the rate should indeed be higher than in the market prior to the panic, it need not

¹⁰⁵ On the issue of the consequences of financial innovation, see e.g. Gai *et al*, “Financial innovation, macroeconomic stability and systemic crises” (2008) *Bank of England Working Paper* No.340; and more generally Franklin Allen and Douglas Gale, *Financial Innovation and Risk Sharing* (1994, MIT Press, Cambridge, MA)

¹⁰⁶ B. Laurens, “The Use of Standing Facilities in Indirect Monetary Management: Country Practices and Operational Features” (1997), IMF Operational Paper, April 1997

¹⁰⁷ T.M. Humphrey and R.E. Keleher, “The Lender of Last Resort: A Historical Perspective” (1984) 4(1) *Cato Journal* 275-317

necessarily be above the contemporaneous market rate.¹⁰⁸ Indeed, a number of commentators have pointed out the central bank's unique position to change the priority of claims on the banks' assets in crisis periods, which enables them to lend at a rate lower than demanded on the interbank market, which imposes high penalty rates on the banks' risky assets.¹⁰⁹ This means that if the banks cannot afford to borrow on the interbank market (due to for example the uncertainties associated with the bank's assets, which drives their value down and the interest rate for interbank loans up), they should be able to obtain a cheaper loan from the central bank so as not to compromise their stability. The literature reflects numerous examples where emergency lending to individual solvent institutions has been made without applying a premium over the current notional market rate¹¹⁰. Such a divergence from Bagehot rules has been justified for several reasons. Firstly, lending at a high/penalty interest rate may aggravate the bank's crisis situation¹¹¹, eventually leading to the undesirable result – the bank's insolvency. Secondly, lending at a penalty rate may send a signal to the market that precipitates an untimely run on the bank, unless ELA is provided covertly.¹¹² Finally, it may give the managers incentives to pursue a higher risk/reward strategy to get themselves out of trouble (the so-called 'gamble for resurrection').¹¹³

However, the original Bagehot rule was concerned with the repercussions that lending at (or below) the market rate may have. First of all, ELA by the central bank is meant to be a measure of truly *last resort*. If, however, the interest rate for ELA is set at the same level as that available on the interbank market, then the distinction between the two types of borrowing becomes less defined. Secondly, a moral hazard risk arises, in that the banks are no longer incentivised to act more prudently, since even if they cannot obtain funding on the interbank market, they can still go to the central bank that would lend at the same interest rate as the market. Finally, even insolvent banks, by posing as illiquid ones, could obtain funding this way, since it is difficult to distinguish between the two and since the central bank is no better informed than the market (unless it also performs a supervisory function and has recently performed a review of that particular bank's financial position).¹¹⁴ Indeed, according to

¹⁰⁸ See e.g. Goodhart (2002), op cit n.88, p.228

¹⁰⁹ Xavier Freixas, Bruno M. Parigi and Jean-Charles Rochet, "The Lender of Last Resort: A 21st Century Approach" (2004) 2(6) *Journal of the European Economic Association* 1085–1115; M. Goodfriend and J.M. Lacker, "Limited Commitment and Central Bank Lending" (1999) *Federal Reserve Bank of Richmond Working Paper*, 99-2

¹¹⁰ Charles A.E. Goodhart and D. Schoenmaker, "Should the Functions of Monetary Policy and Bank Supervision be Separated?" (1995) 39 *Oxford Economic Papers* 75-89; A. Prati and G. Schinasi, "Financial Stability in European Economic and Monetary Union" (1999) *mimeo*

¹¹¹ A. Crockett, "The Theory and Practice of Financial Stability" (1996) 144(4) *De Economist* 531-68; G. Garcia and E. Plautz, *The Federal Reserve: Lender of Last Resort* (1988, Ballinger, Cambridge, MA)

¹¹² Hoggarth and Soussa (2001), op cit. n.89 at p.175

¹¹³ *Ibid.*

¹¹⁴ See Berger *et al* (1998), op cit. n.101

Bagehot, higher than interbank market rates for LOLR support are needed to prevent banks from relying on central bank liquidity assistance unless this is absolutely necessary, since such rates “will operate as a heavy find on unreasonable timidity, and will prevent the greatest number of applications by persons who do not require it” so that “no one may borrow out of idle precaution without paying well for it” and “then the banking reserve may be protected as far as possible”.¹¹⁵

(iv) The question of systemic stability

The central bank should only intervene when the systemic stability of the entire financial system would be threatened by the failure of the institution(s) in question. However, the definitions of ‘systemic stability’, ‘systemic risk’ or indeed ‘financial stability’ are still the subject of much debate in academic literature. As was remarked by Alan Greenspan, “it would be useful to central banks to be able to measure systemic risk accurately, but its very definition is still somewhat unsettled. It is generally agreed that systemic risk represents a propensity for some sort of significant financial system disruption.”¹¹⁶ This is a widely accepted view, however, it offers little guidance to central banks when faced with a potentially “significant financial system disruption”, in the absence of a more exact definition.

Schinasi attempted to define ‘financial stability’ as “the joint stability of the key financial institutions operating within financial markets and the stability of those markets” and more generally “the absence of the kind of volatility that could have severe real economic consequences”¹¹⁷. Moreover, the financial system is perceived to be as ‘stable’ when there is confidence¹¹⁸ and when it “is in such condition that it can comfortably if not smoothly absorb financial and real economic surprises and shocks [systemic risks]”.¹¹⁹

One possible definition of ‘systemic risk’ was offered by the Group of Ten, who considered it to be “the risk that an event will trigger a loss of economic value or confidence in (...) a substantial portion of the financial system that is serious enough to quite probably have significant adverse effects on the

¹¹⁵ Bagehot (1873), p.197

¹¹⁶ Remarks at a Conference on Risk Measurement and Systemic Risk’ Board of Governors of the Federal Reserve System (New York, 1995) at p.7

¹¹⁷ G. Schinasi, “Responsibility of central banks for stability in financial markets”, *IMF Working Paper* WP/03/121, p.4.

¹¹⁸ See e.g. Sir Andrew Large, “Financial Stability: Maintaining Confidence in a Complex World” (2003) *Financial Stability Review*, Bank of England, December issue, pp. 170–74; Michael Foot, “What Is ‘Financial Stability’ and How Do We Get It?” The Roy Bridge Memorial Lecture, FSA, 3 April 2003

¹¹⁹ Garry J. Schinasi, *Safeguarding financial stability: theory and practice* (2006, IMF, Washington D.C), p.82; see also Douglas W. Arner, *Financial stability, economic growth and the role of law* (2007, CUP), p. 72.

real economy”¹²⁰. The effect of such a systemic risk would cause disruptions in credit flows, collapses in asset prices and disruptions of the payment system, leading to and causing the failure of illiquid but solvent (financial and non-financial) firms.¹²¹

However, in most cases ‘systemic stability’ seems to be defined by reference to, or “as an absence of instability”¹²², which is more easily observed (and hence can be more exactly defined). According to Ferguson, instability is usually characterised by the sharp divergence of an important set of financial asset prices from the fundamentals, significant distortions in market functioning and the availability of credit, resulting in significant deviations in aggregate spending from the economy’s ability to produce.¹²³ Thus, ‘instability’ becomes evident once a certain set of symptoms can be observed on the markets. However, such a definition implies that the assessment of stability or instability is necessarily *ex post*, whereas the central bank needs to be able to take a decision *ex ante*, when there is a “threat to systemic stability” so as to be able to prevent the markets from becoming unstable. Thus, the central bank needs some kind of guidance as to when a crisis situation exhibits a “threat to systemic stability”. Some commentators suggest that where more than 20% of the deposits in a banking system are affected the crisis should be considered systemic.¹²⁴ However, as pointed out by Schinasi, given the “multifaceted nature of financial stability” and the various factors at play, developments leading up to financial instability are impossible to summarise in a single quantitative indicator and are thus inherently difficult to forecast.¹²⁵ This means that when approached by a bank in distress, the central bank needs to be able to exercise discretion and to reach a decision with the (limited) information available to it.

(v) The question of discretion of the central bank

¹²⁰ Group of Ten, Consolidation in the Financial Sector, pp. 126-127; see also Douglas W. Arner, “The global credit crisis of 2008: causes and consequences” (2009) 43(1) *The International Lawyer*, at p. 96; for a more thorough discussion of the concept see S. Oosterloo and J. de Haan, “A Survey of International Frameworks for Financial Stability” (2003) *Occasional Studies* Vol 1/Nr 4, De Nederlandsche Bank, Amsterdam

¹²¹ B. Lyons, “Competition policy, bailouts and the economic crisis”, CCP Working Paper 09-4, p. 5; Arner (2009), op cit n.120 “The global credit crisis of 2008: causes and consequences” (2009) 43(1) *The International Lawyer*, p. 96.

¹²² See e.g. Crockett (1996), op cit n.111; John Chant, “Financial Stability As a Policy Goal,” in John Chant, Alexandra Lai, Mark Illing, and Fred Daniel, *Essays on Financial Stability*, Bank of Canada Technical Report No. 95 (Ottawa: Bank of Canada), September 2003, pp. 3–4; Roger Ferguson, “Should Financial Stability Be An Explicit Central Bank Objective?” in Piero Ugolini, Andrea Schaechter, Mark Richard Stone (eds.), *Challenges to Central Banking from Globalized Financial Systems* (2003, IMF, Washington D.C.).

¹²³ Ferguson (2003), op cit n.122

¹²⁴ See, for example, C. Dziobek and C. Pazarbasioglu, “Lessons from Systemic Restructuring: A Survey of 24 Countries” (1997) *IMF Working Paper* WP/97/161

¹²⁵ Garry J. Schinasi, “Defining Financial Stability” (2004) *IMF Working Paper* WP/04/187, p.11

According to LOLR theory, the central bank in exercising its LOLR function needs to be able to exercise discretion when considering whether or not to grant ELA to a bank in distress. This question of discretion seems to have developed in parallel with the evolution of the notion of central bank independence, presumed in part already by Bagehot, but recognised explicitly only fairly recently, following a century-long debate between economists, policy-makers and lawyers. Central bank independence is nowadays a commonly accepted principle of financial regulation and central bank governance, especially in the European Union.

Legal independence of national central banks in the EU

The Maastricht Treaty of 1992 recognised monetary stability as a substantial task of the Community¹²⁶ (now European Union¹²⁷) and the primary objective of the European System of Central Banks ('ESCB').¹²⁸ For the creation of a common market and single monetary union, Maastricht Treaty required the Member States to take substantive steps so as to ensure independence of their national central banks.¹²⁹ At the time of its drafting, only two Member States guaranteed legal independence of their national central banks: Spain and Germany.¹³⁰ In the 1990's, however, all of the Member States had adopted new, or amended their existing, laws so as to conform with their obligations under the Treaties.¹³¹ The new Member States that acceded after the entry into force of the Maastricht Treaty have also introduced new laws to guarantee independence of their respective central banks.¹³²

¹²⁶ See Art.2, together with Art.2 and Art.105 of the EC Treaty (as amended at Maastricht)

¹²⁷ Upon the entry into force of the Lisbon Treaty, the Community is now to be referred to as "European Union".

¹²⁸ See Art.105(1) EC Treaty: "The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 4" and Art.105(5) EC Treaty: "The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system". See also Art.2 of the Protocol on the Statute of the ESCB and ECB, with identical wording.

¹²⁹ Article 109 EC Treaty: "Each Member State shall ensure, at the latest at the date of the establishment of the ESCB, that its national legislation including the statutes of its national central bank is compatible with this Treaty and the Statute of the ESCB".

¹³⁰ According to Art.1 of the Spanish Law of 21 June 1980 on the Governing Bodies of the Banco de España, the central bank "pursues its activities with autonomy from the administration within the limits established by the present law". The Deutsche Bundesbank Act of 26 August 1957 at para.12 § 2 provides that "[i]n exercising the powers conferred on it by this Act, the Deutsche Bundesbank shall be independent of instructions from the Federal Government". For an analysis of the evolution of central bank independence in Europe and beyond, see Papaschinopoulou (2002), op cit n.75, esp. at pp.32 et seq.

¹³¹ Belgium: Law No.1061/12-96/97 of 22 February 1998; Denmark: The National bank of Denmark Act (Act No.116) of 7 April 1936 (as amended); Germany: The Sixth Act amending the Deutsche Bundesbank Act dated 22 December 1997; Greece: Law No.2548 dated 12 December 1997; Spain: Law 66/1997 of 30 December 1997, Law 12/1998 of 28 April 1998 amending Law of 1 June 1994; France: Law No.98-357 of 12 May 1998 amending the Statute of the Banque de France;

De jure and de facto independence

Thus, at least in the European Union, central bank independence is legally guaranteed. However, there is a distinction between *de jure* and *de facto* independence, or the actual ability of the bank to act independently.¹³³ As has been pointed out by Forder, “a central bank may be independent by statute, and it is nevertheless accepted – on all sides – that the government will have its wishes implemented”.¹³⁴ It is therefore of paramount importance that central banks are in practice able fulfil their functions and exercise their discretion independently of their respective governments. Their ability to do so may depend on a range of different factors, including the structure and composition of their governance boards, the legal and political culture of the State and the range of legal mechanisms available to review the actions of the government and/or directors and governors of the central bank.¹³⁵ A further issue to consider here is the question of *de facto* financial independence of the central bank. For example, it was found that in practice, many central banks are unlikely to be in a position to independently take on the credit risk associated with ELA loans in times of crisis when it is possible that the value of the collateral used to secure the loan falls below the value of the loan.¹³⁶ Therefore the central banks would usually require a government guarantee to cover this exposure to risks associated

Ireland: Central Bank Act 1998; Italy: Law No.433 of 17 December 1997 and Legislative Decree No.43 dated 10 March 1998 as well as Presidential Decree of 24 April 1998; Luxembourg: Law of 22 April 1998 amending the laws relating to the Institut Monétaire Luxembourgeois and the monetary status of Luxembourg; The Netherlands: Central Bank Act (Bankwet) 1998; Austria: Federal Law dated 24 April 1998 amending the National Bank Act 1994; Portugal: Law No.5/97 of 31 January 1998; Finland: Act No.214/1998 on the Bank of Finland issued on 27 March 1998; Sweden: The Sveriges Riksbank Act (1988:1385) as amended up to and including 1 January 1994; United Kingdom: Bank of England Act 1998

¹³² Poland: The Act on the National Bank of Poland of 29 August 1997; Slovakia: Act of the National Council of the Slovak Republic No. 566/1992 Coll. dated 18 November 1992 on the National Bank of Slovakia; Czech Republic: Art.98 in Chapter Six of the Constitution of the Czech Republic and Act No. 6/1993 Coll. of 17 December 1992 on the Czech National Bank; Slovenia: Bank of Slovenia Act, Official Gazette of RS, No. 58/02 amending Bank of Slovenia Act of 1991, Official Gazette of RS, No. 1/91-I; Estonia: Eesti Pank Act, passed 18 May 1993 (RT I 1993, 28, 498); Latvia: Law on the Bank of Latvia adopted on 19 May 1992 with amendments passed by the Saeima of the Republic of Latvia on June 15 2006 (in effect as of July 11, 2006); Lithuania: Law on the Bank of Lithuania adopted in 2001; Romania: The National Bank of Romania Act adopted by Law No. 312 / 28.06.2004 on the Statute of the National Bank of Romania; Bulgaria: Law on the Bulgarian National Bank adopted by the 38th National Assembly on 5 June 1997 (as amended).

¹³³ Papaschinopoulou (2002), op cit n.75, p.61

¹³⁴ J.Forder, “On the Assessment and Implementation of Institutional Remedies” (1996) 48 *Oxford Economic Papers* at p.43

¹³⁵ For reasons of space, it is impossible to review the practices in various countries in detail here, but this analysis will form part of future research. On this issue, see the Ortiz Report from the Central Bank Governance Group, “Issues in the Governance of Central Banks”, Bank for International Settlements, May 2009; Tonny Lybek and JoAnne Morris, “Central Bank Governance: A Survey of Boards and Management” (2004) *IMF Working Paper* WP/04/226; Ignacio Mas, “Central Bank Independence – A Critical View” (1994) *The World Bank Policy Research Working Paper* 1356; on wider issues of governance and incentives, see e.g. Edward J. Kane, “Incentive Conflict in Central-Bank Responses to Sectoral Turmoil in Financial Hub Countries” (2007) National Bureau of Economic Research Working Paper 13593

¹³⁶ See discussion on p.19

with collateral value and counterparty creditworthiness.¹³⁷ Such a government guarantee would, however, go counter to one of the Commission's conditions for a finding that a central bank's support measure to a particular institution falls outside the scope of state aid rules.¹³⁸

(3) LOLR Theory as reflected in EU State Aid Policy on NCB Interventions

EC state aid rules on emergency liquidity assistance by central banks are modelled, whether explicitly or implicitly, on the main tenets of LOLR theory. This becomes apparent not only through the general language and principles adopted in the Commission's Communications giving guidance to the Member States in modelling their support packages to the banking sector (1), but also when considering the express conditions used by the Commission to determine whether or not ELA falls outside the scope of application of state aid rules (2).

LOLR Theory is trickling down into Commission's state aid policy language

Both the 'Banking Communication' and the 'Recapitalisation Communication'¹³⁹ make the distinction between exogenously and endogenously-distressed banks. The former are defined as "fundamentally sound" whose "viability problems are inherently exogenous and have to do with the present extreme situation in the financial market rather than with inefficiency or excessive risk-taking", whereas the latter are characterised as being "likely to be particularly affected by losses stemming for instance from inefficiencies, poor asset-liability management or risky strategies."¹⁴⁰ Such a distinction is reminiscent of the formal illiquid/insolvent distinction, which lies at the heart of LOLR theory, with illiquid banks suffering from exogenous shocks in the market and insolvent banks being endogenously affected and thus not meriting LOLR support.

Conditions for application of state aid rules are modelled on LOLR Theory

¹³⁷ Charles A.E. Goodhart and Dirk Schoenmaker, "Institutional Separation between Supervisory and Monetary Agencies", (1993) *LSE Financial Markets Group Special Paper* No.52; Goodhart (1999), op cit n.88

¹³⁸ Banking Communication, para.51, the condition that "the measure is taken at the central bank's own initiative, and in particular is not backed by any counterguarantee of the State". See e.g. the *Northern Rock* decision, where subsequent funding assistance provided by the Bank of England at the request of the Treasury was qualified as state aid, and the *Roskilde* decision (NN36/2008), where a central bank loan was found to be state aid because it was partly underwritten by the state.

¹³⁹ Recapitalisation Communication, pp.2-10

¹⁴⁰ Banking Communication, para.14

The conditions of ‘Banking Communication’ according to which CB liquidity support may be found to fall outside the scope of state aid rules mirrors Bagehot rules and the more recent LOLR theory, in providing that (1) the borrowing bank is solvent, (2) the liquidity is provided in exchange for good collateral with adequate ‘haircuts’ and (3) against a penalty interest rate, and that (4) the decision to support the bank is taken by the central bank independently of the government.¹⁴¹ Such a policy is justified by having regard to the particular role of a national central bank as a lender of last resort, namely the provision of emergency liquidity assistance to banks that are otherwise unable to finance themselves on the interbank lending market. In other words, according to the Commission, as long as the central bank is acting in its LOLR capacity, state aid rules do not apply, as such intervention on behalf of the central bank has to do with the monetary policy and the systemic stability of the financial market of the State concerned. However, this also means that where the central bank steps outside of its LOLR function, its support has to be reviewed as to its conformity with state aid rules of the Union. It is therefore imperative to be able to determine when the central bank is acting in its LOLR capacity, since this would in turn determine whether or not EU rules on state aid are to be applied and whether a notification to the Commission, pursuant to Art.108(3) TFEU (ex Art.88(3) EC) is necessary. If it is found that the central bank oversteps its LOLR function in providing liquidity support, such a measure may still be considered compatible with the common market if it satisfies the conditions of the R&R Guidelines.¹⁴² However, the determination of whether or not liquidity support is advanced in the course of the NCB’s function as a LOLR is not straightforward and requires a further in-depth analysis of the central bank’s LOLR role and the theory behind it.

Conclusion on LOLR Theory

In this Part it was submitted that EU rules on state aid in relation to the banking sector, and more specifically to ELA provided by the NCBs, is modelled on, or informed by, the theory on the lender of last resort. The conditions applied by the Commission in order to determine whether or not such assistance falls within the scope of application of rules on state aid are inspired by the original Bagehot rules and subsequent academic debate on LOLR theory. However, it was also shown that LOLR literature is itself not unanimous on the five main principles for central bank intervention as a lender of last resort. This adds to the complexity in determining whether or not a particular intervention by the central bank is an LOLR support measure and thus whether or not state aid rules should be applied.

¹⁴¹ *Ibid.*, para.51

¹⁴² *Ibid.*, para.52

PART III – STATE AID RULES AND THEIR APPLICATION TO NCB INTERVENTIONS

EU State aid control is necessary to maintain a level playing field for all undertakings active in the Single European Market, no matter in which Member State they are established¹⁴³, but is the current State aid control well adopted to deal with all the sectors of a Member State's economy, or in other words, does it apply equally to all, including the banking, sectors, or is a deviation from the regime justified in particular circumstances?

In early case-law an attempt was made to qualify the banking sector as 'special' in light of its importance to the economy and the special characteristics it exhibits by comparison with the other sectors, as was discussed above.¹⁴⁴ In an attempt to exempt the banking sector from the state aid rules, the Member States claimed that banks were performing a service of general economic interest. However, such an argument was quickly dismissed by the ECJ, which in *Züchner* held that since the banks were not per se "entrusted with services of general economic interest", they were not as such exempt from competition rules.¹⁴⁵ Nevertheless, the Commission later admitted in *Banesto* that even though state aid rules must apply to the banking sector, the special characteristics present therein may justify financial intervention by the State, particularly when it is considered necessary to avoid a systemic crisis, to restore public confidence in the stability of the banking sector or to protect the proper functioning of the payment system.¹⁴⁶ Following the case, the Commission issued guidelines that it would henceforth use in its assessment of state aid in the banking sector.¹⁴⁷ The group of experts that in 1995 was charged by the Commission with the task of reflecting upon the applicability of state aid rules to banks¹⁴⁸ came to the conclusion that the normal state aid rules could – and even should – be applied to the banking sector, taking into consideration the 'special characteristics' and the 'sensitivity' of this sector.¹⁴⁹ Thus, the application of state aid rules to the banking sector should ensure that banks do not act in an imprudent manner, which could lead to distortions of competition in the market, merely because they are publicly owned and/or considered 'too big to fail'.¹⁵⁰ However, are the state aid rules

¹⁴³ State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final-SEC(2005) 795, 7 June 2005, para.7

¹⁴⁴ For a discussion of the special characteristics of banking, see p.14

¹⁴⁵ Case 172/80, *Züchner v Bayerische Vereinsbank* [1981] ECR I-2021, p.1354

¹⁴⁶ 1994 Competition Report, para.378

¹⁴⁷ See the 1994 Competition Report, para.378

¹⁴⁸ Michael Schütte, "The Rescue and Restructuring of banks: State Guarantees for Loans and Banks" in Claus-Dieter Ehlermann and Michelle Everson, *European Competition Law Annual 1999: Selected Issues in the Field of State Aid* (2001, Hart Publishing), p.376

¹⁴⁹ 1995 Commission Report, para.198 and Chapter IV, 2.6

¹⁵⁰ Schütte (2001), op cit n.148, p.377

really well adapted to the banking sector, and in particular, to cases of NCB interventions? The rules on state aid and the criteria for their application to NCB support will now be analysed in more detail.

Article 107(1) TFEU provides: “Save as otherwise provided in this Treaty, 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 common market.” The aim of this Article, according to EU case law, is to prevent trade between Member States from being affected by benefits granted by public authorities which in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain products.¹⁵¹ Therefore, Article 107(1) TFEU has to be interpreted so as to further the purpose of the provision, also engrained in Article 3(1)(g) EC¹⁵² and is therefore to be interpreted broadly.¹⁵³ Indeed, it has been consistently held that the concept of an ‘aid’ is wide, going beyond a subsidy, and comprises any form of intervention or assistance which has the same or similar effects to a subsidy.¹⁵⁴ Aid is therefore to be defined in relation to its effects¹⁵⁵ and not by reference to their causes or their aims. In other words, there is no ‘rule of reason’ or concept of ‘objective justification’ in the interpretation of Article 87(1).¹⁵⁶ This means that the purpose of ELA, namely the temporary provision of liquidity to individual banks or the market as a whole to prevent a systemic crisis from spreading through the banking sector to the real economy, is of no relevance in the determination of whether or not ELA constitutes state aid. It can, however, be invoked at the justification stage under Article 107(3) TFEU .

¹⁵¹ Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, para.12; Case 173/73 *Commission v Italy* [1974] ECR 709, para.13; Case T-613/97 *UFEX v Commission* [2006] ECR II-1531, para.64; see also Peter Roth and Vivien Rose (eds.), *Bellamy & Child European Community Law of Competition* (2008, 6th edn., OUP, Oxford), p.1500 §15.007

¹⁵² Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, para.58; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, para.12; Case 173/73 *Commission v Italy* [1974] ECR 709, paras.26-28; Case T-613/97 *UFEX v Commission* [2006] ECR II-1531, para.64; Case T-442/03 *SIC v Commission* [2008] ECR II-nyr, para.77; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para.56

¹⁵³ Martin Heidenhain (ed.), *European State Aid Law* (2010, Verlag C.H. Beck, München), p.16 §3 para.11

¹⁵⁴ Case 30/59 *Steenkolenmijnen v High Authority* [1961] ECR I, p.19, in relation to Article 4(c) ECSC; See also Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, para.13; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para.38; Case C-237/04 *Enirisorse v Sotacarbo* [2006] ECR I-2843, para.42

¹⁵⁵ Case 173/73 *Italy v Commission* [1974] ECR 709, para.13; see also Case C-56/93 *Belgium v Commission* [1996] ECR I-723, para.79; Case C-75/97 *Belgium v Commission* (‘*Maribel*’) [1999] ECR I-3671, para.2; and Case C-172/03 *Heiser* [2005] ECR I-1627, para.46; Case 310/85 *Deufil v Commission* [1987] ECR 901, para.8; Case C-241/94 *France v Commission* (‘*Kimberly Clark*’) [1996] ECR I-4551, paras.20 et seq.; Case T-613/97 *UFEX v Commission* [2006] ECR II-1531, para.66; Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, para.52, in which the CFI stated that the relevance of the causes or aims of State measures fall to be considered only in the context of Art 87(3) (not raised on appeal in Case C-83/98P *France v Ladbroke Racing and Commission* [2000] ECR I-3271); Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission* [1999] ECR II-139, para.81; Case C-480/98 *Spain v Commission* (‘*Magefesa*’) [2000] ECR I-8717. Note that there is no such thing as a measure having equivalent effect to a State aid – per AG Mancini in Case 290/83 *Commission v France* [1985] ECR 439, at 440-442, a view endorsed by the ECJ at para.18.

¹⁵⁶ Kelyn Bacon, *European Community Law of State Aid* (2009, OUP), p.25 §2.03

It has been well acknowledged in the case law of the Courts of the European Union that State aid ‘is a legal concept which must be interpreted on the basis of objective factors.’¹⁵⁷ The role of EU Courts is to carry out a comprehensive review as to whether a measure constitutes State aid within the meaning of Article 107(1) TFEU, “having regard both to the specific features of the case before them and to the technical or complex nature of the Commission’s assessment”¹⁵⁸. For this reason, the Commission deemed to have no discretion in the application of Article 107(1) TFEU¹⁵⁹ - in stark contrast to the application of Article 107(3) TFEU.¹⁶⁰

Examples of State aid include, *inter alia*, capital investments and injections,¹⁶¹ loans at a rate of interest below normal commercial rates¹⁶², or on preferential interest terms (so-called ‘soft loans’)¹⁶³ or without sufficient security,¹⁶⁴ or interest free loans,¹⁶⁵ interest rate subsidies¹⁶⁶. Moreover, a mere loan announcement was found by the Commission to constitute State aid, even though the loan was never actually implemented.¹⁶⁷ Therefore, at first glance, it seems that ELA would fall under the definition of State aid. However, first impressions can be deceptive and in order to be able to answer the question of whether or not ELA falls within the scope of application of Article 107(1) TFEU, a more in-depth analysis of the criteria for a finding of State aid is necessary. According to the EU Courts’ interpretation of Article 87(1), in order for this Article to apply, the measure must satisfy the following cumulative¹⁶⁸ criteria: (a) there must be aid in the sense of a benefit or advantage;¹⁶⁹ (b) which is

¹⁵⁷ T-152/99 *Hamsa v Commission* [2002] ECR II-3049, para.159; Case C-83/98P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para.25; Case T-296/97 *Alitalia v Commission* (‘*Alitalia I*’) [2000] ECR II-3871, para.95; Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, para.52; see also Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para.83; Case T-98/00 *Linde v Commission* [2002] ECR II-3961, para.40; Case T-152/99 *Hijos de Andrés Molina v Commission* [2002] ECR II-3049, para.159

¹⁵⁸ Case C-83/98P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para.25; Case T-296/97 *Alitalia v Commission* (‘*Alitalia I*’) [2000] ECR II-3871, para.95

¹⁵⁹ Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, para.52

¹⁶⁰ Heidenhain (2010), op cit n.153, pp.15-16 §3 para.10

¹⁶¹ Case 323/82 *Intermills v Commission* [1984] ECR 3809; Case 318/82 *Netherlands and Leeuwarder Papierfabriek v Commission* [1985] ECR 809; Case C-142/87 *Belgium v Commission* [1990] ECR I-959; Case C-303/88 *Italy v Commission* [1991] ECR I-1433; Case C-305/89 *Italy v Commission* (‘*Alfa Romeo*’) [1991] ECR I-1603.

¹⁶² Cases 62 and 72/87 *Exécutif Régional Wallon v Commission* [1988] ECR 1573, para.4

¹⁶³ Case 57/86 *Greece v Commission* [1988] ECR 2855; Case 63/87 *Greece v Commission* [1988] ECR 2875; Case 102/87 *France v Commission* [1988] ECR 4067; Cases C-15/98 and C-105/99 *Italian Republic and Sardegna Lines v Commission* [2002] ECR I-8855.

¹⁶⁴ Case C-457/00 *Belgium v Commission* (‘*Verlipack*’) [2003] ECR I-6931

¹⁶⁵ Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717

¹⁶⁶ Case 57/86 *Greece v Commission* [1988] ECR 2855; Case T-55/99 *CETM v Commission* [2000] ECR II-3207; Case C-114/00 *Spain v Commission* [2002] ECR I-7657

¹⁶⁷ Decision 2006/621/EC *France Télécom* [2006] OJ L257/11 (note also the appeal from this decision in Cases T-425 and 444/04 *France and France Télécom v Commission*)

¹⁶⁸ European Competition Policy 1996, p.31

¹⁶⁹ AG Jacobs in Case C-256/97 *DMT* [1999] ECR I-3913, para.29

granted by the State¹⁷⁰ and through State resources;¹⁷¹ (c) which favours certain undertakings or the production of certain goods ('selectivity');¹⁷² and (d) which is liable to distort competition and affect trade between Member States.¹⁷³ The requirement of selectivity, is met in the type of cases examined here, since emergency liquidity assistance to individual undertakings is by definition selective. The other three criteria will be examined in more detail below, starting with the last, which appears more straightforward in the context of NCB interventions in the banking sector. A more detailed analysis of the first two criteria, and selected problems with their application to the banking sector, follows below.

DISTORTION OF COMPETITION AND EFFECT ON TRADE

A measure falls within the ambit of Article 107(1) TFEU only if it distorts or threatens to distort competition and adversely affects trade between Member States. Although these are two separate criteria, the practice of the Court of Justice has been to join the two together in its assessment, since competition is distorted and trade between Member States is adversely affected where a State aid strengthens the position of an undertaking in relation to its competitors in the intra-Community trade.¹⁷⁴ More recently, the CFI considered the two requirements "as a general rule inextricably linked."¹⁷⁵

In its assessment of these criteria, the Commission is not obligated to make separate findings concerning the relevant markets and the position the beneficiary undertaking enjoys within this market and to what degree the granting of the preferential treatment would or might distort competition on the affected markets.¹⁷⁶ Nor is it obligated to prove the actual effects that a measure will produce on trade between Member States or that there will in fact be an adverse effect on competition.¹⁷⁷ It "merely needs to establish that the aid in question is of such a kind as to affect trade between Member States

¹⁷⁰ In other words, it is imputable to the State: see e.g. Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para.55; Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397, para.51; Case C-345/02 *Pearle* [2004] ECR I-7139, para.35; Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435, para.179; Case T-351/02 *Deutsche Bahn v Commission* [2006] ECR II-1047, para.101

¹⁷¹ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para.58; Case C-345/02 *Pearle* [2004] ECR I-7139, para.35

¹⁷² Case C-200/97 *Ecotrade* [1998] ECR I-7907, para.40; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para.41; Cases T-127, 129 and 148/99 *Disputación Foral de Álava v Commission* [2002] ECR II-1275, para.144; Case C-172/03 *Heiser* [2005] ECR I-1627, para.40

¹⁷³ Case C-372/97 *Italy v Commission* [2004] ECR I-3679, para.44; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, para.55

¹⁷⁴ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para.11

¹⁷⁵ Case T-288/97 *Friuli Venezia Giulia v Commission* [2001] ECR II-1169, para.41; Case T-298/97 *Alzetta Mauro v Commission* [2000] ECR II-2319, para.81; Case T-369/06 *Holland Malt v Commission* [2009] ECR II-nyr, paras.34 et seq.; Case T-211/05 *Italy v Commission* [2009] ECR II-nyr, para.117 et seq.

¹⁷⁶ Case T-298/97 *Alzetta Mauro v Commission* [2000] ECR II-2319, para.95

¹⁷⁷ Case T-288/97 *Friuli Venezia Giulia v Commission* [2001] ECR II-1169, paras.47 et seq., 49; Case T-298/97 *Alzetta Mauro v Commission* [2000] ECR II-2319, paras.77 et seq.

and threatens to distort competition.”¹⁷⁸ According to Heidenhain, Courts of the Union “in effect infer from the preferential treatment of an undertaking that its competitiveness will be strengthened, and again from there that an adverse effect on intra-Community trade will result.”¹⁷⁹ The Courts have established certain principles, to which Heidenhain refers to as “irrefutable presumptions” or “per se rules”¹⁸⁰, according to which it will be presumed that intra-Community trade is impacted and competition is at least at the risk of being distorted whenever an aid granted by a Member State to an undertaking, which is active in a market characterised by intense competition, strengthens the position of this undertaking in relation to its competitors in the Common market.¹⁸¹

Thus, the conditions are presumed to be met when the beneficiary undertaking is carrying on a cross-border activity, or is active in a sector which is characterised by a substantial level of trade between Member States¹⁸² by, for example, containing a large number of multinational undertakings,¹⁸³ and which is characterised by intense competition, especially if it has been liberalised at the EU-wide level, which is all true of the financial services sector.¹⁸⁴ Thus, in relation to aid granted in the banking sector, especially to a multinational institution, which is quite likely in the case of banks operating in the EU, it can usually be presumed that the aid will distort or will at least risk distorting competition¹⁸⁵ and is likely to have an effect on intra-Community trade.

GRANTED BY THE STATE OR THROUGH STATE RESOURCES

There was much debate about the interpretation of this strand of Article 107(1) TFEU, with proponents of the narrow view claiming that financing through public resources is a constitutive element of the definition of State aid¹⁸⁶ and that a certain burden on the public finances in the form either of expenditure or of reduced revenue was necessary for a finding of State aid.¹⁸⁷ Proponents of

¹⁷⁸ Case T-298/97 *Alzetta Mauro v Commission* [2000] ECR II-2319, para.95; see also Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, para.54; Case T-288/97 *Friuli Venezia Giulia v Commission* [2001] ECR II-1169, para.47 et seq.; Case T-298/97 *Alzetta Mauro v Commission* [2000] ECR II-2319, para.76 et seq.

¹⁷⁹ Heidenhain, op cit n.153, pp.55-56, §4-80

¹⁸⁰ *Ibid.*, p.52, §4-73

¹⁸¹ Case C-278/92 *Spain v Commission* [1994] ECR I-4103, para.40; 57/86, *Greece v Commission* [1988] ECR 2855, para.15 et seq.; Cases 62 and 72/87 *Exécutif Régional Wallon v Commission* [1988] ECR 1573, para.17

¹⁸² Case 173/73 *Commission v Italy* [1974] ECR 709, para.19; Case C-256/97 *DMT* [1999] ECR I-3913, para.29; Case C-114/00 *Spain v Commission* [2002] ECR I-7657, para.65

¹⁸³ Case C-53/00 *Ferring v ACOSS* [2001] ECR I-9067, para.21

¹⁸⁴ Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paras 142, 145

¹⁸⁵ Case T-214/95 *Vlaamse Gewest v Commission* [1998] ECR II-717, para.46; Case T-217/02 *Ter Lembeek v Commission* [2006] ECR II-4483, para.178

¹⁸⁶ See Case C-379/98 *PreussenElektra* [2001] ECR I-2099, opinion of AG Jacobs, para.116

¹⁸⁷ AG Capotorti at p.52 in Case 82/77 *Openbaar Ministerie of the Kingdom of the Netherlands v van Tiggele* [1978] ECR 25; at para.25 of the judgment the ECJ agrees with the Advocate General; for the support of the narrow view, see also Case

the wider view considered that any measure which confers economic advantages on specific undertakings, and which is the result of conduct attributable to the State, should constitute State aid regardless of whether it involves any actual financial burden for the State.¹⁸⁸ [The primary consideration is therefore the effect of the aid, rather than the financial burden on the institution which grants the aid.”¹⁸⁹] The position was finally clarified by the Court of Justice in *PreussenElektra*, where it held that: “[t]he distinction made in that provision between aid granted “by a Member State” and aid granted “through State resources” does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State.”¹⁹⁰ Thus, for an advantage to be categorised as aid, it must be (i) granted directly or indirectly through State resources, and (ii) be imputable to the State¹⁹¹ with these conditions being cumulative, rather than alternative.¹⁹²

DEFINITION OF ‘STATE’

According to long-standing case law, the concept of a ‘State’ within Article 107(1) TFEU is not limited to the federal or central authorities of a Member State, but includes regional and local bodies, whatever their status.¹⁹³ Therefore, State aid may emanate from any body within the public sector.¹⁹⁴ It seems, therefore, at first glance, that a national central bank would fall within this definition of the “State”. However, there is no ‘one size fits all’ approach when it comes to central banks, as each of them is embedded in the legal, economic, political and social structure of a given State. Indeed, a 2009 BIS Report on the Issues in the Governance of Central Banks found that most central banks exist

C-72-73/91 *Sloman Neptun* [1993] ECR I-887, para.19; Case C-C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paras.16-18; Cases C-52-54/97 *Epifanio Viscido* [1998] ECR I-2620, esp paras.14-15

¹⁸⁸ cf Case C-379/98 *PreussenElektra* [2001] ECR I-2099, opinion of AG Jacobs, para.115; Case 290/83 *Commission v France* (‘Poor Farmers’) [1985] ECR 439, at para.14; Cases 213-215/81 *Norddeutsches Vieh- und Fleischkontor* [1982] ECR 3583; Case C-72-73/91 *Sloman Neptun* [1993] ECR I-887, Opinion of AG Darmon at paras.12-46 and in particular paras.40-41; Case C-C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, Opinion of AG Darmon at paras.18-27. However, the ECJ refused to follow AG Darmon’s opinion in both of these cases.

¹⁸⁹ Kelyn Bacon, *European Community Law of State Aid* (2009, OUP), p.70 §2.91

¹⁹⁰ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para.58

¹⁹¹ Peter Roth and Vivien Rose (eds.), Bellamy & Child *European Community Law of Competition* (2008, 6th edn., OUP, Oxford), pp.1512-1513 §15.017

¹⁹² Bacon (2009), op cit n.189, p.73 §2.94; See also Case C-126/91 *GEMO* [2003] ECR I-13769, para.24; Peter Roth and Vivien Rose (eds.), Bellamy & Child *European Community Law of Competition* (2008, 6th edn., OUP, Oxford), pp.1512-1513 §15.017

¹⁹³ Case 248/84 *Germany v Commission* [1987] ECR 4013, para.17; Cases T-127, 129 and 148/99 *Disputación Foral de Álava v Comisión* [2002] ECR II-1275, para.142; Cases T-346-348/99 *Disputación Foral de Álava v Comisión* [2002] ECR II-4259, para.62; Case C-88/03 *Portugal v Commission* (‘Azores’) [2006] ECR I-7115, para.55

¹⁹⁴ See Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para.56; see also Bacon (2009), op cit n.189, p.26 §2.04

predominantly within their own country's legal framework, which differs in its form and type from the legal framework of another country, which in turn affects arrangements for central banks.¹⁹⁵ It was stated that whereas a number of recently created NCBs are part of the state and owned by it, some older central banks were originally created as privately owned institutions and continue to have features related to that status.¹⁹⁶ Out of 47 countries considered in the report, 77% of central banks were fully owned by state or the public sector, 11% were majority or half owned by state or the public sector and 4% were majority owned by private sector (interestingly, 9% were classified as "other").¹⁹⁷

In the European Union, though the majority of NCBs are State-owned, there are still some central banks that are at least partially private-owned, with most central banks exhibiting features of a hybrid institutional nature not like any public or private company or public authority.¹⁹⁸ For example, the Belgian central bank is a limited company (*société anonyme*), 50% of share capital of which is owned by the State.¹⁹⁹ The Greek law provides that the share capital of the Bank of Greece, similarly a *société anonyme*,²⁰⁰ cannot be held by the State or public enterprises to the amount exceeding 35%.²⁰¹ The Oesterreichische Nationalbank is also a stock corporation whose shares were until 2006 split 50/50 between the public and the private sectors.²⁰² In 2006, 20% more shares were brought within the government's control,²⁰³ until the Bank was fully nationalised in 2010.²⁰⁴ These examples show that, despite the common sense logic which would seem to dictate that a national central bank forms part of the State and disposes of State resources, by, *inter alia*, holding the State's reserves and being able to print the State's money, this may not be the necessary conclusion of the Commission applying EU state aid rules and its own guidelines. Therefore, for the sake of argument, a more examination must take place on a case-by-case basis to determine whether a particular NCB can be assimilated to a Member State or whether its resources can be classified as "State resources".

DEFINITION OF 'STATE RESOURCES'

¹⁹⁵ Central Bank Governance Group, Report on the Issues in the Governance of Central Banks (May 2009, Bank for International Settlements), p.59

¹⁹⁶ *Ibid.*, p.63

¹⁹⁷ Survey conducted by the BIS for the BIS Report (2009) op cit n.195

¹⁹⁸ Infact, the NCBs of 20 Member States could qualify this way, though some of them are expressly referred to as a 'public limited company' or a 'public authority' and contain features of both.

¹⁹⁹ http://www.nbb.be/pub/01_00_00_00_00/01_00_00_00_00.htm?l=en

²⁰⁰ Article 1 of the Statute of the Bank of Greece (9th edition, 2000)

²⁰¹ Article 8 of the Statute of the Bank of Greece (9th edition, 2000)

²⁰² 1984 Nationalbank Act – NBG (Federal Act on the Oesterreichische Nationalbank), Article 2(1) on legal status, Articles 8 and 9 on capital and shareholders; http://www.oenb.at/en/ueber_die_oenb/about_the_oenb.jsp ;

²⁰³ <http://www.boerse-express.com/pages/846668>

²⁰⁴ <http://diepresse.com/home/wirtschaft/economist/kordiconomy/573056/index.do>

The notion of ‘State resources’ covers all public funds, whatever their source and whatever their destination,²⁰⁵ including the funds and assets of central, regional or local government.²⁰⁶ Moreover, the broad notion of ‘State resources’ includes not only the resources of the Member State and of the State’s public authorities, but also the resources of public undertakings. The difference in the analysis lies in the fact that whilst aid granted directly by a public authority is considered directly attributable to the State, such a measure, if adopted by a public undertaking, can only be considered ‘state aid’ if it is also found to be imputable to the State. Moreover, under certain circumstances, funds of a private undertaking may be deemed to be ‘State resources’ if a sufficiently strong element of State control is present and thus aid need not necessarily need to be financed directly by the State to be classified as ‘State aid’.²⁰⁷ A national central bank can potentially fall into one of these three categories: (1) public authority, (2) public undertaking, and (3) private undertaking under State control.

(1) NCB as a public authority

The notion of a ‘public authority’ includes “the State and regional, local and all other territorial authorities”²⁰⁸. Seventeen Member States have granted their NCBs the status of a ‘public authority’, ‘public body’ or ‘public institution’ with exclusive note-issuing powers,²⁰⁹ or conferred upon it administrative powers of a public authority²¹⁰. With these NCBs it could usually be presumed that their resources constitute ‘state resources’ for the purposes of Art.107(1) TFEU, since they also tend to be wholly State-owned and, according to the Commission in its *Roskilde Bank rescue aid* decision²¹¹, where the State is the sole shareholder of an NCB and this NCB is to be regarded as a public authority, the imputability to the State and the use of State resources need not be shown separately.

(2) NCB as a public undertaking

²⁰⁵ Case 173/73 *Commission v Italy* [1974] ECR 709, per AG Warner, at p.727

²⁰⁶ See e.g. Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435.

²⁰⁷ Conor Quigley, *European State Aid Law and Policy* (2009, 2nd edn., Hart Publishing, Oxford-Portland Oregon), p.16

²⁰⁸ Article 2(a) of the Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318/17) (‘Transparency Directive’)

²⁰⁹ These include Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Germany, Ireland, Latvia, Luxembourg, The Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom – see the table in Annex II and for more detail on the national provisions, the table in Annex I.

²¹⁰ As in the case of Ireland and the Netherlands

²¹¹ State aid NN 36/2008 – Denmark Roskilde Bank A/S Brussels, 31.07.2008 C(2008)4138 published in OJ C 238/5 on 17.09.2008, para.32

A ‘public undertaking’ is defined as “any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.”²¹² According to the Transparency Directive, such a dominant influence is to be “presumed when these [public] authorities, directly or indirectly in relation to an undertaking: (i) hold the major part of the undertaking’s subscribed capital; or (ii) control the majority of the votes attaching to shares issued by the undertakings; or (iii) can appoint more than half of the members of the undertaking’s administrative, managerial or supervisory body.”²¹³

There are 8 NCBs that are qualified as a ‘public limited company’²¹⁴ in the legislation establishing and/or governing them. Applying the indicators set out in Art.2(b) of the Transparency Directive to determine whether or not the State exercises a “dominant influence” over these NCBs, the following picture emerges.

(i) *Capital ownership*

Out of these 8 NCBs only the central banks of Belgium, Greece and Italy are not fully state-owned (during the financial crisis, the central bank of Austria was also only partly owned by the State, which held 70% of the shares, until the Nationalbank was fully nationalised in May 2010). Thus, a dominant influence on behalf of the State may already be presumed in relation to the NCBs of Austria, Cyprus, Hungary, Ireland and The Netherlands.

(ii) *Control of the majority of votes attached to the shares*

In none of these three remaining NCBs does the respective State control the majority of shares. Whereas in Belgium, the State owns a 50% stake in the central bank²¹⁵, in Greece the State or public enterprises are prohibited by law from holding more than 35% of the central bank’s capital²¹⁶. The shares in the Bank of Italy are held by private corporations (mainly Italian banks and financial institutions).²¹⁷ The Belgian Organic Act does not include any provision about how votes should be allocated to the shares and thus, it may be assumed, that such allocations are equal. Therefore, the State with its 50% may not control the majority of the votes. Article 1 of the Statute on the National Bank of Greece states that one vote is attached to every 25 shares owned. No provision is made for a differentiated allocation of votes to shares and it must therefore be assumed that it is equal and that therefore the State cannot control the majority of votes. In the case of Banca d’Italia, the majority of its shareholders are banks and insurance companies and apart from the Italian National Social Security

²¹² Article 2(b) of the Transparency Directive 2006/111/EC (OJ L 318/17)

²¹³ Article 2(b) of the Transparency Directive 2006/111/EC (OJ L 318/17)

²¹⁴ Austria, Belgium, Cyprus, Greece, Hungary, Ireland, Italy, The Netherlands

²¹⁵ Article 4 of the Organic Act of the National Bank of Belgium dated 22 February 1998

²¹⁶ Article 8 Statute of the Bank of Greece (9th edition, 2000)

²¹⁷ <http://www.bancaditalia.it/bancaditalia/funzgov/gov/partecipanti/Shareholders.pdf>

Institute's holding of 15,000 shares with 34 out of 539 votes, no direct or indirect links to the Italian government or the public sector is evident. A detailed inquiry into the shareholding structure of each of the shareholders of the Banca d'Italia to determine the exact direct or indirect influence that the State or the public sector may have on the votes at the shareholders' meetings is beyond the scope of the present paper, but in the absence of any obvious evidence to the contrary, for present purposes it may be assumed that the State does not control the majority of the votes.²¹⁸

(iii) *Control of the majority of the members of the undertaking's administrative, managerial or supervisory body*

Out of these 8 NCBs that carry the status of a public limited company, the State appoints the majority of the governing (administrative, managerial or supervisory) bodies in all but Greece, Italy and The Netherlands, though dominant influence in the latter may already be presumed by virtue of the State's outright ownership.²¹⁹

Based on this simple (and not fully-developed) analysis, only the banks of Greece and Italy seem at first sight to not qualify as "public undertakings" within the meaning of Article 2(b) of the Transparency Directive. The resources of the other 6 may be imputable to their respective Member States.

However, though a dominant influence by the State or the public authorities may be presumed in the case of these NCBs by virtue of their shareholding and corporate governance structures, according to EU case law, the grant of ELA by these NCBs should not necessarily be imputed to the State. The ECJ stated in *Stardust Marine* that "[e]ven if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. [...] Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures [...], to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures."²²⁰ This means that despite the presumption of a dominant influence, the decisions of these central banks in the field of monetary policy cannot be imputed to the State, if the

²¹⁸ For a detailed analysis of the share-voting system in Italy in general, including of companies that are shareholders of the Banca d'Italia, see B. Espen Eckbo, Giulia Paone and Runa Urheim, "Efficiency of Share-Voting Systems: Report on Italy", (July 2009) *Tuck School of Business Working Paper* No. 2009-64, available at <http://ssrn.com/abstract=1431733>

²¹⁹ See above at p.36

²²⁰ Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397, paras.52, 55

central bank in question adopted the measure independently, without instructions or influence by the State.

This is so because all the NCBs of the Member States of the EU must, by virtue of their membership in the European System of Central Banks ('ESCB'), be independent of the government in relation to monetary policy. Indeed, the legislative instruments that govern all these 6 NCBs, in relation to which dominant influence may be presumed, include a provision guaranteeing legal independence of the central bank in question, often expressed in addition/or as "freedom from instructions" from the government or public authorities. However, despite this general principle of independence in the field of monetary policy, the State does sometimes get involved in the central bank's conduct of its LOLR function (which is usually considered as one of the tools available to the central bank for the implementation of its monetary policy, since it enables it to control the money supply and liquidity in the market). For example, state involvement was one of the deciding factors for a finding of state aid in *Roskilde Bank*,²²¹ where part of the ELA facility was underwritten by a state guarantee, and in *Northern Rock*²²², where the second ELA package was provided at the request of the Treasury. It is conceivable that the central banks in question in these cases would not have provided these ELA facilities had the State not intervened with a request and/or a guarantee.

Considering the six NCBs in question here, it is notable that the Organic Act of the National Bank of Belgium dated 22 February 1998 contains, in Article 22, a provision which gives the Minister of Finance the right to supervise the Bank and oppose any measure contrary to the law or the interests of the State, except in relation to ESCB tasks (formulation and implementation of monetary policy being one of them). Potentially, therefore, the Minister could intervene if he considered LOLR support to a particular bank to be contrary to the State's interests (e.g. if the State is pursuing a tough anti-bail-out policy in the interests of preserving the market from moral hazard). Whether this is likely, or indeed ever happens, is a matter for discussion that is beyond the scope of this paper and will depend on the individual circumstances of each case.

(3) *NCB as a private undertaking under State control*

²²¹ NN 36/2008 – *Roskilde Bank*

²²² NN 70/2007 – *Northern Rock*

Resources of entities other than public authorities or public undertakings, such as a State bank²²³, in other words, the resources of private undertakings, may also be considered to be ‘State resources’ if their allocation can be decisively influenced by public authorities. For example, in *Van der Kooy*, the ECJ attributed the allocation of Gasunie’s resources to the State only to the extent it was subject to State control, which was found since, *inter alia*, the State directly/indirectly held 50% of its shares the other 50% being privately owned, and appointed half of the members of its supervisory board.²²⁴ In holding that this constituted State aid, the ECJ took account of the fact that the Minister for Economic Affairs was empowered to approve the tariff, with the result that he could block any tariff which did not suit him. Accordingly, the company did not in fact enjoy full autonomy in the fixing of tariffs but acted under the control of the public authorities and took their requirements into account.²²⁵ In this regard, it is likely that NCBs are not in fact unaware of the government’s position as regards the exercise of their LOLR function and take this into consideration when making a decision. In fact, certain NCBs are not empowered to grant ELA to an amount

When assessing the nature of the resources that these NCBs may use when performing their LOLR functions, several factors must be considered. These may include: (a) the way in which the undertaking was established;²²⁶ (b) the legal status of the undertaking (subject to public law or ordinary company law);²²⁷ (c) the integration of the undertaking into the structures of the public administration;²²⁸ (d) the degree of supervision and management of the body by the public authorities, including of the extent of the shareholding (if any) of the State, the extent to which the governing board of the undertaking is appointed by the State,²²⁹ and any control over the budget of the undertaking;²³⁰ (e) the nature of the undertaking’s activities and the exercise of those activities on the market in normal conditions of competition with private operators,²³¹ and the extent to which the undertaking performs regulatory functions;²³² (f) the extent to which the contested decision was subject to the approval of, or

²²³ Case 57/86 *Greece v Commission* [1988] ECR 2855; Commission decision of 8.9.1999, OJ 2000 L 206/6, para.37; Commission decision of 3.5.2000, OJ L 272/29, para.20; Commission decision of 21.4.1999, OJ 2001 L 30/45 at 47

²²⁴ Cases 67, 8 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, para.36; See also Case C-305/89 *Italy v Commission* (‘Alfa Romeo’) [1991] ECR I-1603, paras.14-16; Case C-482/99 *France v Commission* (‘Stardust Marine’) [2002] ECR I-4397, para.56

²²⁵ Cases 67, 8 and 70/85 *Van der Kooy* [1988] ECR 219, para.36

²²⁶ See e.g. Decision 2006/513/EC *Berlin-Brandenburg DTT* [2006] OJ L200/14, para.53

²²⁷ Case C-482/99 *Stardust Marine* [2002] ECR I-4397, para.56

²²⁸ *Ibid.*

²²⁹ Cases 67, 8 and 70/85 *Van der Kooy* [1988] ECR 219, para.36 where the Court found that the undertaking Gasunie acted under the control of the public authorities since, *inter alia*, the State directly/indirectly held 50% of its shares and appointed half of the members of its supervisory board. See also Case C-305/89 *Italy v Commission* (‘Alfa Romeo’) [1991] ECR I-1603, paras.14-16; Case C-482/99 *Stardust Marine* [2002] ECR I-4397, para.56

²³⁰ Decision 2006/513/EC *Berlin-Brandenburg DTT* [2006] OJ L200/14, para.53

²³¹ Case C-482/99 *Stardust Marine* [2002] ECR I-4397, para.56

²³² Commission Decision 2006/513/EC *Berlin-Brandenburg DTT* [2006] OJ L200/14, para.53

requirements imposed by, the public authorities;²³³ (g) the way in which the measure is presented by the public authorities.²³⁴

Moreover, according to the judgment in *Stardust Marine*, resources can be ‘State resources’ even if they do not come from the State budget, provided that the State has control over them. Indeed, the resources over which the State has control need not even be permanent assets of the public sector.²³⁵ For example in *Air France*, the CFI held that funds deposited by private individuals with the Caisse des Dépôts et Consignations, a public body established by statute, constituted State resources even though the sums deposited could be withdrawn by individual depositors, since the Caisse was able to use and invest the available balance at its own risk in the same way as if that investment had been financed from taxation or compulsory contributions. This could be directly compared to the situation and role of the NCB: part of its funds is derived from the deposits that commercial banks are required (in most cases) to keep with the central bank. These deposits can be used by NCB in its day-to-day operations, but can also be accessed and withdrawn by the commercial banks on demand. Based on the reasoning in *Air France*, therefore, even this part of the central bank’s resources derived from private rather than public sources, may be considered ‘State resources’ as long as they are under State control and thus available to the public authorities.²³⁶

Conclusion on the ‘State resources’ criterion

The above analysis sought to follow the rules of the EU state aid regime by adapting the facts pertaining to national central banks to the framework that was established by the Commission and the Courts. What it shows is that such an analysis is very confusing and is not easy to follow and less so to apply in practice. This is so because the central banks’ entire being is not easy to classify: they are not always public institutions and even when they are (not), they contain elements of public and private (in the case of older central banks) entities. Moreover, they are charged with tasks of a public nature, and yet on a day-to-day basis engage in various activities that would also be carried out by a commercial bank (borrowing, lending, buying and selling). In other words, their classification cannot be ‘neat’ and the current framework is ill-adapted to take all the relevant factors into consideration. In the case

²³³ Case C-482/99 *Stardust Marine* [2002] ECR I-4397, para.55; Cases 67, 8 and 70/85 *Van der Kooy* [1988] ECR 219, para.36; Case C-305/89 *Italy v Commission* (‘Alfa Romeo’) [1991] ECR I-1603, paras.14-16

²³⁴ Case 290/83 *Commission v France* (‘Poor Farmers’) [1985] ECR 439, at para.15

²³⁵ See e.g. Case C-83/98P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paras.45-50

²³⁶ Case 173/73 *Commission v Italy* [1974] ECR 709, para.16; Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para.50; Case C-482/99 *Stardust Marine* [2002] ECR I-4397, para.37; Cases C-328/99 and C-399/00 *Italy v Commission* [2003] ECR I-4035, para.33; Case C-278/00 *Greece v Commission* [2004] ECR I-3997, para.52

studies dealt with in this paper, the Commission's reasoning in qualifying central bank resources as state resources was very brief (or at least what was made public, did not include all the conceivable considerations, with the Commission seemingly satisfied to operate on the basis of a few presumptions – see e.g. the fact that the Danish National Bank “had” to be considered as a public authority or a public body and was wholly-owned by the State, immediately qualified its resources as ‘state resources’²³⁷). Riksbank's establishment under the Swedish constitution and a special law governing it, which provided for its governing board to be appointed by Parliament, also qualified its resources as ‘State resources’ imputable to the State without further detail on its funding or ownership structure.²³⁸ Obviously these factors show the control that the State exercised over Riksbank. However, according to the decision in *Stardust Marine*, it is not sufficient that financial assistance measures are adopted by public undertakings under State control of the State - it is necessary to further examine whether the public authorities were actually involved in the adoption of the measures.²³⁹ For similar reasons, the brief treatment of the fact that authorisation by the Chancellor of Exchequer was required before the Bank of England could provide ELA to Northern Rock on 14 September 2007 and that this wasn't considered to raise the presumption of ‘State resources’²⁴⁰ and the lack of this reasoning in the decision raises some eyebrows. It seems that the resources of a national central bank are *ab initio* presumed to be those of the State, since they are usually created to serve a public function and are, in most cases, directly or indirectly controlled by the State through their ownership and corporate governance structures. However, as the above analysis and the detail in Annex I show, this cannot be said to be true of all of Europe's national central banks. Therefore, a revision of this criterion specifically for national central banks is required, as the state aid rules normally applied differ from the rules that seem to be applied to central banks in light of their special status and position in the national economy of a Member State.

ADVANTAGE

Assuming that the resources of the NCB are considered to be ‘State resources’ and its actions are attributable to the State, it is now necessary to consider whether through the provision of ELA, a benefit or an advantage was conferred. There are diverging views as to whether or not ELA constitutes

²³⁷ NN 36/2008 – *Roskilde Bank*, para.32

²³⁸ NN 64/2008 – *Carnegie Bank*, para.27

²³⁹ Case C-482/99 *Stardust Marine* [2002] ECR I-4397, para.55

²⁴⁰ Case 290/83 *Commission v France* [1985] ECR 439, para.15; Cases 67, 8 and 70/85 *Van der Kooy* [1988] ECR 219, para.36; Case C-482/99 *Stardust Marine* [2002] ECR I-4397, paras.37 et seq.

an advantage for the purposes of Article 107(1) TFEU . On the one hand, a loan is an economic advantage, on the other, if this loan is advanced at market rates, there is no specific benefit.²⁴¹ According to Stasch, since the issue in this respect is essentially whether a measure alleviates a burden that an undertaking would normally carry,²⁴² the deciding question with LOLR interventions in the form of loans is thus whether the loans are extended as against adequate and fair consideration.²⁴³ It must therefore be assessed whether penalty interest rates and good collateral represent adequate and fair consideration for the loan in question. This approach seems consistent with the Commission's approach in its *Carnegie Bank* and *Rescue aid to Hypo Real Estate* decisions, in both of which state aid was assessed by reference to the interest rate imposed on the ELA facility and the quality of collateral with which the facility was secured, holding in both cases that since the collateral advanced was not adequate in that it would not normally be accepted by central banks to secure ELA funding, the measures constituted state aid.²⁴⁴ However, such an approach is not consistent with the 'extended conception' of LOLR theory, which is sometimes adopted in practice. According to this 'extended conception', the requirements of both the interest rates and the collateral could be relaxed (the latter of which was incidentally also proposed by Bagehot himself). Some NCBs in the EU even contain express provisions that would allow them to do just that.²⁴⁵ Thus, a split standard is evolving: the 'normal' (i.e. containing elements of the extended conception of LOLR) and the 'Community-sanctioned' (or 'State-aid consistent') NCB operations.

A more traditional analysis would entail the examination of the economic nature of an advantage and the application of the private market investor ('PMEI') test, according to which, if the State or a public undertaking is deemed to be acting as a purely commercial actor, akin to a private investor, attaching the same terms and conditions to the economic advantage it is conferring on the beneficiary undertaking as any private investor would have done under the same or comparable market conditions, then such an economic advantage does not constitute aid.²⁴⁶ In the words of Advocate General Slynn in

²⁴¹ Katharina Stasch, *Lender of Last Resort: Bankenkrisen und Krisenmanagement in der Europäischen Union* (2009, Nomos Verlagsgesellschaft, Baden-Baden), pp.193-194

²⁴² Established case law: Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 3, para.43 et seq.; Case C-39/96, *SFEI* [1996] ECR I-3547, para.60; Case C-351/99, *Pan Renove Industrial* [2002] ECR I-8031; Case C-200/97, *Ecotrade* [1998] ECR I-7907, para.34; Case 75/97, *Maribel a/b* [1999] ECR I-3671, para.23.

²⁴³ Stasch (2009), op cit n.241, pp.193-195

²⁴⁴ State aid NN 64/2008 – Sweden Rescue aid to Carnegie Bank, Brussels, 15.12.2008 C(2008) 8660, para.26; State aid NN 44/2008 – Germany Rescue aid for Hypo Real Estate Brussels, 02.X.2008 C(2008)5735, see esp. paras. 9 and 23

²⁴⁵ See e.g. in Annex I the details for Romania – loans may be unsecured; Malta – security could be considered appropriate by the Board; also possible in the case of Bulgaria and Hungary, subject to approval of the Governing Council and Financial Services Authority respectively.

²⁴⁶ See AG Jacobs in Case C-278/92 *Spain v Commission* [1994] ECR I-4103, para.28, where he states that 'state aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social,

the *Van der Kooy* case,²⁴⁷ “[i]t is of the essence of a State aid that it is non-commercial in the sense that the State steps in where the market would not. The State may have its reasons for doing so but they are not commercial in the ordinary sense of the word.” Thus, what matters for this strand of the test is that (i) the State is acting commercially as a private or ‘economically rational’²⁴⁸ investor; (ii) under normal or comparable market conditions.²⁴⁹ However, in application to ELA and more generally to the LOLR function of a central bank, both of these notions raise several problems of interpretation and may even be irreconcilable with practice.

(i) NCB acting commercially as a private investor

The question here is whether the advantage in question is one which would or could have been obtained from a commercial actor, acting with a view to obtaining a normal return within a reasonable period of time.²⁵⁰ The practical difficulty with this analysis is that the ultimate reason why the central bank is intervening in providing liquidity to an illiquid bank or even the market as a whole, is that such liquidity can no longer be obtained on the interbank market²⁵¹. In such circumstances, the central bank’s motivation in providing this liquidity is not so much the commercial expectation of a return, but the need to liquidise the markets, boost confidence in the banking sector and to prevent the collapse of

political or philanthropic nature’. For an example, see Case T-98/00 *Linde v Commission* [2002] ECR II-3961; Case C-256/97 *DMT* [1999] ECR I-3913, paras.22-30 and opinion of AG Jacobs at para.31: test of whether the undertaking receives a benefit which it would not have received ‘in the normal course of events on the private market’; see also Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, opinion of AG Jacobs at para.60; Case C-303/88 *Italy v Commission* (‘*ENI-Lanerossi*’) [1991] ECR I-1433, paras.20-24; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para.70; Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, para.116; Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, para.38; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, para.41; Case T-25/07 *Iride SpA v Commission* [2009] ECR II-nyr, para.46; Case 234/84 *Belgium v Commission* [1986] ECR 2263, paras.9-18; Case C-301/87 *France v Commission* (‘*Boussac*’) [1990] ECR I-307, paras.38-39; Case C-142/87 *Belgium v Commission* (‘*Tubemeuse*’) [1990] ECR I-959, paras.22-29; Case C-305/89 *Italy v Commission* (‘*Alfa Romeo*’) [1991] ECR I-1603, paras.17-24; Case 234/84 *Belgium v Commission* [1986] ECR 2263, paras.14-15; Case 40/85 *Belgium v Commission* (‘*Boch No.2*’) [1986] ECR 2321, para.13; Case C-305/89 *Italy v Commission* (‘*Alfa Romeo*’) [1991] ECR I-1603, paras.19-23; Case 261/89 *Italy v Commission* [1991] ECR I-4437, paras.8-14; Case C-42/93 *Spain v Commission* (‘*Merco*’) [1994] ECR I-4125, paras.13-19; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para.134 (subscription by the State to virtually all the securities issued by an undertaking in a grave financial situation for a restructuring that was clearly incapable of improving the heavily indebted undertaking’s situation constituted aid); Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paras.51-53, 88-90. See generally Slocock, “The Market Economy Investor Principle” (2002) 2 *EC Competition Policy Newsletter* 23. For the application of the principle to financial services, see *Crédit Lyonnais*, OJ 1998 L221/28; *GAN*, OJ 1998 L78/1; also Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435.

²⁴⁷ Cases 67,68 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, p.251

²⁴⁸ Case T-98/00 *Linde v Commission* [2002] ECR II-3961, paras.45 and 49

²⁴⁹ Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, para.60; Case C-256/97 *DMT* [1999] ECR I-3913, para.22; Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para.78

²⁵⁰ Bacon (2009), op cit n.156, p.42 §2.34; Case C-301/87 *France v Commission* (‘*Boussac*’) [1990] ECR I-307, para.39; Case T-296/97 *Alitalia v Commission* (‘*Alitalia I*’) [2000] ECR II-3871, paras.84, 96-99.

²⁵¹ On interbank lending and market failure, see above at pp.15-16

individual illiquid institutions and the spread of systemic risk through contagion effect. Thus, the central bank is acting more in its role of a regulator rather than a simple market participant. According to Bacon, these regulatory functions have to be taken into account in determining whether there is an advantage within the meaning of Article 107(1) TFEU,²⁵² as this mixed role (regulatory and market participant) may indicate that the decision to provide ELA was not motivated purely by objective economic considerations, but was also influenced by political concerns.²⁵³

Therefore, a critique may be advanced in relation to the application to the NCB of the private market economy investor test. First, the NCB cannot be compared to a PMEI since it is “in a unique position on the market”²⁵⁴ for last-resort loans. Moreover, its resources could be said to be unlimited (it holds a monopoly on issuing money, controls monetary policy and sometimes, its losses could be underwritten by the State²⁵⁵). According to the judgment in the *Chronopost* case, if the State’s actions cannot be compared with those of a private undertaking, because the State undertaking enjoys a monopoly²⁵⁶, or because for any other reason there are not private undertakings active in the market, then the Commission must try to develop other standards of comparison.²⁵⁷ However, in the cases dealing with central bank interventions in the form of ELA, no such “other standard of comparison” is apparent to date, with the Commission still comparing the conduct of the NCB with that of a PMEI.²⁵⁸

Second, the NCB is not comparable to a PMEI, because at least in relation to its LOLR function, it exercises its duties as a public authority, taking considerations other than commercial ones into account (such as, notably, the stability of the financial system), which is incompatible with the PMEI test. As

²⁵² Bacon (2009), op cit n.156, p.30 §2.11

²⁵³ Case C-200/97 *Ecotrade* [1998] ECR I-7907 para.39 and opinion of AG Fennelly at para.28

²⁵⁴ Peter Roth and Vivien Rose (eds.), Bellamy & Child European Community Law of Competition (2008, 6th edn., OUP, Oxford), pp.1509-1510 §15.014

²⁵⁵ See e.g. Art.9 of the Law on the Bulgarian National Bank (as amended; Darjaven Vestnik, issue 10 of 2005), which states: “In case of shortfall in assets on the Bank’s balance sheet, the Minister of Finance shall replenish the statutory fund of the Bank to the amount necessary to cover the deficit, when the resources of the Reserve Fund and on the Bank’s Special Reserve Account under Art.36(1) have been exhausted”. Note however the provisions to the contrary in the laws governing NCBs of other Member States, according to which the NCB and the government are not liable for each other’s liabilities, as is in the case of Estonia (<http://www.bankofestonia.info/pub/en/yldine/pank/eestipank/index.html?ok=1>) and Lithuania (in Art.4(1) of the Law on the Bank of Lithuania of 1 December 1994). See also Willem Buiter, “Can Central Banks Go Broke?” (2008) *CEPR Discussion Paper* No. 6827, May 2008, available at www.cepr.org/pubs/dps/DP6827.asp; Romano Subiotto, “State Aids and the Banking Sector” in Claus-Dieter Ehlermann and Michelle Everson, *European Competition Law Annual 1999: Selected Issues in the Field of State Aid* (2001, Hart Publishing), p.409; Cf. the reference to “immeasurable financial resources” of the State in Commission Notice, EFIM [1003] OJ C349/2, 3 (in the context of State guarantees to the Landesbanken)

²⁵⁶ Cases C-83/01P *Chronopost v UFEX* [2003] ECR I-6993, paras.38 et seq. (on appeal from Case T-613/97 *UFEX v Commission* [2000] ECR II-4055). The ECJ remitted the matter to the CFI which then annulled the Commission’s original rejection of the complaint: Case T-613/97, [2006] ECR II-1531; Case C-341/06 *Chronopost v Ufex* [2008] ECR I-4777, paras.148 et seq.

²⁵⁷ Commission decision of 25.7.2001, *Reebok* OJ 202 L25/41, paras.29 et seq. (regarding the lease of real estate in the port of Rotterdam to establish a distribution centre).

²⁵⁸ See e.g. NN 36/2008 – *Roskilde Bank*, para.32

was previously held by the Court of Justice, when considering whether a PMEI would have chosen to make an investment rather than allow the liquidation of an undertaking, only the obligations that the State would have to assume as the investor may be taken into account, without considering the social and other costs which would have been incurred by it as a public authority (i.e. the cost of redundancies and payment of unemployment benefits). In the case of the NCB, however, these ‘extraneous’ costs and considerations that it might have to incur if it does not grant ELA to the requesting bank, are almost exclusively the factors that motivate its decision. This would include, but are not limited to, the consideration of the effects and the repercussions that the failure of the bank would have on the economy as a whole and the costs which would then accrue in the form of ELA requests by other banks, government-coordinated bailouts, and the support that would be required to minimise the costs of contractions in the real economy. Even if the majority of these costs are more likely to be borne by the State than the NCB itself, the NCB may suffer ‘reputation costs’ for its failure to prevent a bank failure/crisis and, given that the majority of NCB appointments are political (in that the decision-making boards and the chairperson/governor/president of the NCB are in the majority of cases appointed by the State) such reputation costs are unlikely to be incurred lightly.

Third, the PMEI test has been developed mainly with equity investments in mind, that tend to be medium – to – long-term investments with an expectation of a “reasonable return within a reasonable time”. ELA, on the other hand, is a debt investment and is (and should) only be provided on a short-term basis. The expectations of profit are therefore rather different and, under normal circumstances, cannot be adequately compared. It is true that recently in cases involving state aid in the form of a loan, the Commission started referring to its standard as the “private market economy lender”²⁵⁹, though it is unclear if this is just a change in the name or if any substantive differences exist between this and the usual PMEI test. In terms of the “investment’s” long-term prospects, it could be argued that NCB’s motivation in providing ELA is to allow the beneficiary bank to sort out its finances and thus improve its stability, for the maintenance of which the beneficiary will be responsible itself in the long run (i.e. where it cannot recover, it can be liquidated in an orderly fashion so as to contain systemic risk, otherwise it can return back to viability by selling some of its assets, for which it would not have been able to obtain a normal market price if it were forced, without ELA, to sell them at “fire prices”). Thus, though the ultimate goal for NCB intervention is to enable the beneficiary to be returned to viability in the long run, the NCB’s actual “investment” with the beneficiary is short-term and thus its expectations of returns cannot be compared to that of a PMEI, since the lender expects a high return within a

²⁵⁹ See e.g. NN 36/2008 – *Roskilde Bank*, para.32

relatively short time based on the agreed interest rate, whereas an equity investor would expect relatively small, sometimes sporadically allocated, return based on the residual interest of its equity holding.

(ii) ELA provided under normal market conditions

In considering the question of whether or not ELA was provided “under normal market conditions”, it is necessary to consider if “under similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount” and on such terms,²⁶⁰ and if not, on what terms it might have done so.²⁶¹ However, as was noted above, in the case of NCBs, there exists no such private investor of a comparable size with comparable resources. Moreover, even a lender of comparable size with comparable resources would have existed on the interbank market, the fact that the NCB was approached by the requesting bank which accepts the ELA at a higher rate of interest than what is offered on the interbank market, already indicates that no lender on the interbank market was willing to lend to it, under any terms, either because they consider (perhaps falsely²⁶²) that the requesting bank is insolvent, or because they are hoarding their cash due to lack of confidence in the market.

In this context, it is necessary to consider the market conditions which prevail at the time that ELA was granted. Such conditions could not be described as “normal”. Conditions on the loan market could be characterised as “normal” when both counterparties (the lender and the borrower) are able to accurately assess each other’s financial situations so as to enter into a beneficially mutual transactions on terms acceptable to both parties and in the most efficient way possible. Certainly then, where due to market failure, vast information asymmetries arise and the lenders are no longer able to accurately assess the risk that a particular transaction would entail and, as a result, a borrower that would be considered suitable in a comparable situation absent the market failure, is unable to obtain the loan on the same conditions, this signifies that the conditions prevailing at that time are no longer “normal”. If they were, the bank would not be requesting ELA, since it would have been able to obtain the funding it sought on the interbank market “under normal conditions”, and therefore one would invariably reach

²⁶⁰ Case C-305/89 *Italy v Commission* (‘Alfa Romeo’) [1991] ECR I-1603, para.19; Case T-234/95 *DSG v Commission* [2000] ECR II-2603, para.119; Case T-296/97 *Alitalia v Commission* (‘Alitalia I’) [2000] ECR II-3871, para.96; Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435, para.245

²⁶¹ Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, para.51; Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435, para.245

²⁶² See discussion on market failure above at pp.15-16

the conclusion that no advantage is present.²⁶³ Such a conclusion would, however, be erroneous, since the mere fact of being granted ELA is already an advantage in itself, for without it the bank faces a real risk of failure. Therefore, the inquiry into, and the comparison with, “normal market conditions” is useless in the present context.

If one were instead to apply the “similar market conditions” criterion, one would nevertheless encounter conceptual difficulties. For example, this test would require one to vest the hypothetical private market economy lender not just with attributes of comparable size and resources as the NCB, but also with access to the same information as is available to the LOLR at the time.²⁶⁴ Therefore, at least hypothetically, if the only reason why the borrower is unable to finance itself on the interbank market is because market failure introduced false information about its financial situation, the reality of which is known to the NCB, which acts accordingly, then this knowledge must also be attributed to the hypothetical lender. In reality, however, most NCBs do not possess more accurate information than the market, unless they are also charged with the task of supervising financial institutions²⁶⁵ and if such a review was recently carried out. If not, empirical evidence suggests that the market actually possesses more accurate information about its participants than does the NCB.²⁶⁶ In most cases, therefore, the hypothetical private market economy lender would have to be vested with even less information about the borrower than what the real private economy market participant would actually have. This would seem to lead to inadequate results, not least for the qualification of “normal market conditions” and, ultimately, the “advantage granted”, since with even less accurate information about the borrower than what is available to the real market, the hypothetical lender would be more likely to err in its assessment of the risks involved in the transaction, which would lead to gross inconsistencies in the application of this test.

Conclusion on Advantage

The arguments advanced here highlight the problems that arise in the application of the “private market economy investor/lender” principle and the criterion of “normal market conditions”. Neither of these tests seems to be adequate to assess the particular characteristics of LOLR support. And even if

²⁶³ Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, para.60; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, para.41; Case T-25/07 *Iride SpA v Commission* [2009] ECR II-nyr, para.46

²⁶⁴ Case C-482/99 *France v Commission* (‘*Stardust Marine*’) [2002] ECR I-4397, para.70; Case C-457/00 *Belgium v Commission* (‘*Verlipack*’) [2003] ECR I-6931, para.47

²⁶⁵ This task is expressly attributed to NCBs of 11 Member States: Bulgaria, Cyprus, the Czech Republic, Greece, Ireland, Luxembourg, The Netherlands, Portugal, Romania, Slovakia and Slovenia (see Annex I and Annex II).

²⁶⁶²⁶⁶ Berger *et al* (1998), op cit n.101

one would dispense with the details of this test and concentrate solely on the definition of “advantage”, one cannot help but disagree with the Commission’s reasoning that as long as the conditions imposed are equal to, or go beyond, what is required on the interbank market (i.e. adequate collateral is demanded and penalty interest rates are imposed) or by reference to NCB repo rate, no advantage would be involved. It is therefore submitted that the mere grant of ELA, no matter how onerous the terms, is already an advantage in itself, since without it the bank faces a real risk of failure, and thus, its position with ELA is improved relative to the position it would be without it.

CONCLUDING REMARKS

As can be seen from the above, the new ‘in crisis’ framework was designed to better tackle the problems that arose out of the financial crisis. It enabled the Member States and the Commission to act more swiftly in developing appropriate and effective measures to minimise the effects of the crisis on the economies of the Member States whilst at the same time ensuring that competition in the banking sector is not unduly distorted. These developments were timely and welcome (although one could only wish that such a framework was already available when the financial crisis started, but even without it, the Commission seems to have justified most of the measures notified to it on the basis of their compatibility with Article 107(3)(c) TFEU).

The position advanced in this paper was that the ‘in crisis’ framework, in so far as it applies to ELA, mirrors classical LOLR requirements of solvency, adequate collateral, penalty interest rates and a decision adopted at the NCB’s discretion. However, as was noted above²⁶⁷, current NCB practice often departs from these classical Bagehot rules. This means that situations may arise where the NCB believes that it is performing its LOLR function which is not subject to EU state aid control, whereas the Commission would not necessarily share this opinion. This type of ELA would then be classified as “state aid”, even if the NCB is by statute authorised to act this way in accordance with its statutorily (and sometimes constitutionally) guaranteed independence and does so without any instructions from the government.

Certain inconsistencies or difficulties in the analysis of ELA under the ‘no crisis’ framework (i.e. following the traditional state aid analysis) were also exemplified in the sections on the ‘state

²⁶⁷ See discussion of the LOLR theory at pp.16 et seq., and in relation to “advantage” in the definition of “state aid” at pp.41 et seq.

resources' and 'advantage' criteria. The conclusion that may be drawn from this are that the 'no crisis' framework is ill-adapted to assess ELA. However, though the 'in crisis' framework is already an improvement, it is not without its faults.

The 'in crisis' framework could only be used once the Commission was satisfied that the crisis at issue was serious enough (in other words systemic) to justify the use of Article 107(3)(b) TFEU as a legal basis, to allow for the adoption of measures "to remedy a serious disturbance in the economy of a Member State" (in other words, to restore financial stability). However, one could argue that at least in relation ELA, this legal basis ought to have been available sooner, since it is the NCBs who are entrusted with the task of maintaining stability of the financial system. It should therefore be up to them to determine whether or not financial stability is threatened by the troubles experienced by a particular institution (or several institutions). Given the absence of a universally accepted definition of the concepts "financial stability" and "systemic stability", which even the central bankers acknowledge to be "slightly vague and difficult to define"²⁶⁸, it should fall within the individual NCB's competence to determine what this means for their financial markets. However, NCB's "gut feeling" about the meaning of financial stability for their financial markets may not be consistent with the Commission's idea of threat to the financial stability, since it has so far shown itself to be rather conservative in defining this notion. For example, the Commission did not consider Crédit Lyonnais to be systemically relevant, even though at the time, it was the biggest European bank in terms of assets,²⁶⁹ so it refused to apply Article 107(3)(b) TFEU, because the systemic crisis had not yet occurred.

The Commission considers that a crisis can only be classified as "systemic" where all the banks, or a large part of the sector, are facing difficulties. Only this type of "systemic crisis" would, according to the Commission, justify state intervention, whereas in a situation where only a few banks have isolated problems, no systemic risk could be conceived.²⁷⁰ However, it has recently become apparent that the collapse of even one financial institution, that is "too connected to fail", such as was the case of Lehman Brothers, could lead to a systemic crisis.²⁷¹ Similarly, if one is to recall the basic principles of the theory on bank runs, it becomes apparent that the failure of any one bank may, potentially, lead to failure of others. History shows that the failure of several small firms, as in the post-BCCI "small banks" (or, as they're also commonly known as, "fringe banks") crisis in the UK, could be just as

²⁶⁸ Lars Heikensten, Speech at the Risk Management Conference, Swedish Riksbank, Stockholm, 16 November 2004, available at www.riskbank.com

²⁶⁹ Schütte (2001), op cit n.148, p.376

²⁷⁰ See Competition Report (1994)

²⁷¹ Howard Davies and David Green, *Banking on the Future: The Fall and Rise of Central Banking* (2010, Princeton University Press), p.58

threatening to systemic stability as a failure of a TBTF bank.²⁷² Thus, the Commission's reasoning in *Crédit Lyonnais* was criticised, since "if Article 87(3)(b) can be applied in the case of a systemic crisis in the banking sector, it should equally apply in cases where crises would arise in the absence of immediate state intervention. There is no reason to wait until the crisis has effectively occurred".²⁷³ Indeed, waiting until the tell-tale signs of systemic crisis appear could have disastrous results. Instead, intervention should be allowed to prevent systemic crisis from occurring.

In light of the foregoing, it is submitted that maybe the time has come to develop a specially tailored set of rules to the LOLR function of the NCBs, when they are concerned with systemic risk and contagion effects. Current state aid rules can be, and have been, adapted reasonably well to situations where the State itself bails a bank out (through the provision of loans or State guarantees or outright transfer of ownership to the State). However, the situation is different when it is the central bank that is performing its statutory duty in safeguarding monetary and financial stability independently of government instructions, using its own resources and needing to do so quickly and without unnecessary delay and sometimes to such an amount that would cause a public outrage if it came directly from the governments' coffers. Given the sensitivity of the financial markets to information about the provision of ELA to some banks, it is often desirable that this information is not disclosed and remains confidential between the beneficiary and the central bank and the speed with which ELA requests should be dealt with in an 'in crisis' situation make the requirement of prior notification of state aid impractical. In light of these considerations, it is submitted here, the Council should consider exercising its right under Article 107(3)(e) TFEU in regulating this particular situation with a set of *sui generis* rules. When the central bank is exercising its discretion within the limits of the authority allowed to it both under national and EU rules, which *inter alia* guarantee its independence in the field of monetary policy operations, it should be free to choose any policy and tools available to it. This may include lowering the interest rates or the quality of collateral it deems acceptable to a particular situation, if it considers that such measures are warranted by the particular circumstances of the case. Similarly, where instead of collateral the beneficiary's liability towards the central bank is secured by means of a State guarantee, this should be of no relevance to the 'business' decision that the central bank takes – all that the NCB must be concerned with is that its measures serve to stabilise the market and contain systemic risk and that it does not take on an unjustifiable credit risk (against which it is insulated by means of a State guarantee). In this scenario, it is the State guarantee which should be assessed under the normal state aid rules and as to its compatibility with the common market, not the

²⁷² Davies and Green (2010), op cit n.271, p.58

²⁷³ Schütte (2001), op cit n.148, p.379

ELA facility (which would already constitute an ‘advantage’ under the traditional state aid analysis). Moreover, the central bank should not be concerned with the effect that its decision will have on the classification of this measure as state aid and thus the potential risk that the recovery of this aid be ordered at a later stage. Admittedly, the normal state aid rules should apply in circumstances where the central bank was ordered to provide ELA to a bank that it would not have supported but for governmental instructions. Furthermore, the distinction between the set of rules governing ‘in crisis’ and ‘no-crisis’ situations do not make sense from the central bank’s LOLR perspective, as the failure of one bank alone could cause a systemic crisis and the NCB should not be required to wait until this happens for measures to be taken against such an event, just so that it can be certain that the measure will not be caught by Article 107(1) TFEU .

ANNEX II

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
<i>Austria – Member Since 1995 - Oesterreichische Nationalbank</i>				
Stock corporation (NBG ²⁷⁴ Art.2(1) on legal status and Arts.8 and 9 on capital and shareholders) wholly owned by the State since its full nationalisation in May 2010 ²⁷⁵	Price stability (NBG Art.2(2)); financial stability (NBG 44(b)); payment system (NBG Art.50)	General Council: President, Vice President and 12 other members: 6 appointed by the Austrian federal government; and 6 elected by the General Meeting (NBG Arts.22 and 23) Governing Board: Governor, Vice Governor and 2 other members – all appointed by the Federal President of Austria on a proposal of the government (NBG Art.33)	Freedom from instructions (NBG Art.2(5) Art.34)	
<i>Belgium – Founding Member - Nationale Bank van België/Banque nationale de Belgique</i>				
Public institution with public limited liability company (société anonyme) status, 50% of share capital owned by the State (OANBoB ²⁷⁶ Art.4). Special legal status and special organs and operating rules which distinguish it from other public limited liability companies. ²⁷⁷	Objectives of the ESCB (OANBoB Arts.2 and 5) – <i>implied monetary stability</i> Financial stability (OANBoB Art. 12)	Board or Directors: (administration, management and policy-setting - OANBoB Art.19(2)) Governor (appointed by the King), 5-7 Directors, incl. Vice-Governor (appointed by the King, on the proposal of the Council of Regency - OANBoB Art.23(1)) (OANBoB Art.19) Council of Regency: Governor, the directors and 10 regents, elected by the General Meeting – 5 on the proposal of the most representative labour and other organizations, and 5 on the proposal of the Minister of Finance (OANBoB Art.23(3))	Minister of Finance has the right to supervise the Bank and oppose any measure contrary to the law or the interests of the State, <i>except</i> in relation to ESCB tasks (OANBoB Art.22) Independence (same degree as that determined by Art.108 EC) in all financial stability related decision-making ((OANBoB Art. 12).	
<i>Bulgaria – Member Since 2007 - Българската народна банка (Bulgarian National Bank)</i>				
“independent issuing institution of the State” ²⁷⁸	Price stability (LBNB ²⁷⁹ Art.2); efficient payments system, supervision of banks to ensure stability of the banking system and protect depositors.	Governing Council: (management – LBNB Art.10) consists the Governor (elected by the National Assembly – LBNB Art.12(1)), the three Deputy Governors (elected by the National Assembly on the proposal of the Governor – LBNB Art.12(2)), and three other members (appointed by the President of the Republic – LBNB Art.12(3)).	Independence and freedom from instructions (LBNB Art.44); BUT: Minister of Finance replenishes the Bank’s statutory fund to cover the deficit, if the Bank’s reserve resources under Art.36(1) have been exhausted (LBNB Art.9) -> <i>financial independence?</i>	LOLR by Banking Dept under the terms of LBNB Governing Council regulations in case of systemic risk & threat to fin. stability (LBNB Art.20(2))
<i>Cyprus – Member since 2004 - Κεντρική Τράπεζα της Κύπρου (Central Bank of Cyprus)</i>				

²⁷⁴ 1984 Nationalbank Act – NBG (Federal Act on the Oesterreichische Nationalbank), Article 2(1) on legal status, Articles 8 and 9 on capital and shareholders; http://www.oenb.at/en/ueber_die_oenb/about_the_oenb.jsp ;

²⁷⁵ <http://diepresse.com/home/wirtschaft/economist/kordiconomy/573056/index.do>; until 2006 the Nationalbank was owned 50/50 by government/private shareholders; from 2006: 70/30 government/shareholders (<http://www.boerse-express.com/pages/846668>)

²⁷⁶ Organic Act of the National Bank of Belgium dated 22 February 1998

²⁷⁷ http://www.nbb.be/pub/01_00_00_00_00/01_02_00_00_00/01_02_01_00_00.htm?l=en

²⁷⁸ <http://www.bnb.bg/AboutUs/index.htm>

²⁷⁹ Law on the Bulgarian National Bank (as amended; Darjaven Vestnik, issue 10 of 2005)

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
Corporate body (CBCL ²⁸⁰ Art.3) not subject to Company Law (CBCL Art.68(1)), wholly owned by the State (CBCL Art.56(1))	Price stability (CBCL Art.5(1)); bank supervision; payment and settlement systems; and financial stability	Board of Directors: Governor, the Deputy Governor and five directors, all appointed by the Council of Ministers (CBCL Art.13(1))	Freedom from instructions (CBCL Art.7); financial independence (CBCL Art.58(1))	
<i>Czech Republic – Member since 2004 - Česká národní banka (Czech National Bank)</i>				
Legal entity under public law , with powers of an administrative and supervisory authority (ACNB ²⁸¹ Art.1); profits revert to the government (Art.47(2))	Price stability; financial stability; payments systems (ACNB Art.2); and supervision (ACNB Arts.2 (2)(d) and 44);	Bank Board: Governor, two Vice-Governors and 4 other members, all of whom are appointed by the President of the Republic (ACNB Art.6(1))	Freedom from instructions (ACNB Art.9(1)); Minister of Finance may attend Board meetings in an advisory capacity and submit motions for discussion (Art.11(1))	Exceptional short-term credit for up to 3 months against adequate collateral (Art.29(2))
<i>Denmark – Member since 1973 - Danmarks Nationalbank</i>				
Special status as a self-governing institution under government supervision ²⁸² , whose profits revert to the state treasury. ²⁸³	Safe and secure currency system; payment system; extension of credit (DNbA Art.1)	Board of Directors: 25 members, 8 with a seat at the Rigsdag, 2 appointed by the Minister of Trade, Industry and Shipping and 15 elected by the entire Board of Directors (DNbA ²⁸⁴ Art.2) Committee of Directors: 2 Directors appointed by the Minister of Trade, 5 elected by the Board from among its members. Minister of Trade approves the election of a Chairman and Deputy Chairman (DNbA Art.5) Board of Governors (daily management): 3 members - 1 nominated by the King, 2 appointed by the Board on Committee's recommendation (DNbA Art.6)	Minister of Trade, supervises the Bank, presides at Board of Directors meetings, where no decisions of particularly far-reaching character can be taken when he is not present, unless he was informed in advance (DNbA, Art.7); he also appoints 2 Chartered Accountants to audit the Bank's annual accounts (By-laws ²⁸⁵ § 37)	
<i>Estonia – Member since 2004 - Eesti Pank (Bank of Estonia)</i>				
Legal person (EPA ²⁸⁶ Art.1(2)) and an independent constitutional institution ²⁸⁷	Price stability (EPA Art.2(1))	Supervisory Board: Chairman (appointed by the Riigikogu on the proposal of the President of the Republic – Art.7) and 7 members (appointed by the Riigikogu on the proposal of the Chairman – Art.8) Executive Board: Governor (appointed by President of the Republic on the proposal of the Supervisory – Art.10) and Deputy Governors (EPA Art.13(1)).	Independence and autonomy from the government and other executive state agencies (EPA Art.3(1)); the Bank and the government are not liable for each other's financial liabilities ²⁸⁸	
<i>Finland – Member since 1995 - Suomen Pankki - Finlands Bank</i>				

²⁸⁰ Central Bank of Cyprus Laws of 2002-2007 (http://www.centralbank.gov.cy/media/pdf/LFLWE_CBCLAW0508.pdf)

²⁸¹ Act No. 6/1993 Coll. on the Czech National Bank

²⁸² Under the Danmarks Nationalbank Act 1936 ('DNbA') the Bank was restructured from a limited liability company to an independent institution (http://www.nationalbanken.dk/dnuk/hist.nsf/side/Danmarks_Nationalbank_Act)

²⁸³ <http://www.nationalbanken.dk/DNUK/AboutUs.nsf/side/Accounts!OpenDocument>

²⁸⁴ National Bank of Denmark Act

²⁸⁵ By-laws of the National Bank of Denmark

²⁸⁶ Eesti Pank Act, Passed 18 May 1993 (RT I 1993, 28, 498)

²⁸⁷ <http://www.bankofestonia.info/pub/en/yldine/pank/eestipank/index.html?ok=1>

²⁸⁸ <http://www.bankofestonia.info/pub/en/yldine/pank/eestipank/index.html?ok=1>

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
Independent institution governed by public law (ABF ²⁸⁹ Sec.1) owned by the State	Price stability (ABF Sec.2)	Board: Governor (appointed by the President), up to 5 other members (appointed by the Supervisory Council), 9 members elected by Parliament (Sec.10)).	Freedom from instructions (ABF Sec.4)	
France – Founding Member - Banque de France (Bank of France)				
An institution whose capital belongs to the State (SBoF ²⁹⁰ Art. L142-1) since its nationalisation in 1945 ²⁹¹	Price stability (SBoF Article L141-1); payments system (SBoF Article L141-4)	General Council: Governor and 2 Deputy Governors (appointed by Cabinet Decree – Art. L.142-3); 2 members appointed by the President of the National Assembly; 2 members appointed by the President of the Senate, 2 members appointed by a Cabinet Decree on proposal by the minister of economy, and an elected representative of the Bank's employees (Art. L142-3)	Freedom from instructions (Article L141-1) Independence (Article L142-3)	
Germany – Founding Member – Deutsche Bundesbank				
Federal institution governed by public law, owned by the State (GDB ²⁹² Art.2); with special status of a supreme federal authority (GDB Art.29)	Price stability (GDB Art.3); payment and clearing systems (GDB Art.3)	Executive Board: President, the Vice-President and 4 other members, all appointed by the President of Germany on the nomination of the Federal Government for the President, Vice-President and 1 member, and of the Bundesrat in agreement with the Federal Government for the other 3 members (GDB Art.7)	Independence and freedom from instructions (GDB Ar.12)	
Greece – Member since 1981 – Η Τράπεζα της Ελλάδος (Bank of Greece)				
Corporation (Société Anonyme) (SBoG ²⁹³ Art.1); State or public enterprises cannot hold capital to the amount exceeding 35% (SBoG Art.8)	Price stability (SBoG Art.4); payment system (SBoG Art.2(e)); prudential supervision, financial stability (SBoG Art.55A)	Monetary Policy Council: Governor and 2 Deputy Governors and 3 members (all appointed by the President on a proposal of the Council of Ministers– SboG Arts.29(3) and 35A) General Council: (general management): Monetary Policy Council + 6 Councillors, elected by the Shareholders (SBoG Art.21)	Freedom from instructions (SBoG Art.5A)	
Hungary – Member since 2004 - Magyar Nemzeti Bank				
Company limited by shares (AMNB ²⁹⁴ CH.IV Art.46(1), all of which are owned by the State (AMNB Ch.IV Art.46(4))	Price stability (AMNB Ch.I Art.3(1)); implied financial stability (AMNB Ch. I Art.4(7));	Monetary Council: Governor and Deputy Governors, appointed by the President on PM's and Governor's proposal respectively (AMNB Ch.IV Art.50(3) and Art.51(1)); up to 4 members, appointed by the President. Supervisory Board: Chairman and other members (elected by Parliament), a Minister representative and a consultant commissioned by the Minister (AMNB Ch.IV Art.52A(4)).	Independence and freedom from instructions (AMNB Ch.I Art.1(2)); Independence in monetary policy setting and implementation (AMNB Ch.II Art.6)	ELA subject to FSA's actions (AMNB Ch.II Art.14)

²⁸⁹ Act on the Bank of Finland NO. 214/1998

²⁹⁰ Statute of the Bank of France

²⁹¹ <http://www.banque-france.fr/gb/instit/histoire/histor3.htm>

²⁹² Bundesbank Act (Gesetz über die Deutsche Bundesbank)

²⁹³ Statute of the Bank of Greece (9th edition, 2000)

²⁹⁴ Act LVIII of 2001 on the Magyar Nemzeti Bank

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
<i>Ireland – Member since 1973 - Central Bank and Financial Services Authority of Ireland</i>				
Body corporate (ICBA ²⁹⁵ Art.5(2)) owned by the State (ICBA Art. 9) with a semi-autonomous entity for financial regulation.	Safeguarding the integrity of the currency (ICBA Art.6(1))	Board of Directors (management – ICBA Art.53)): Governor (appointed by the President on the advice of the Government – ICBA Art.19(1)), 3 banking Directors and other Directors as determined and appointed by the Minister of Finance (ICBA Art.23(1)).	<i>Independence in the field of monetary policy implied by virtue of its membership of the ESCB</i>	
<i>Italy – Founding Member - Banca d'Italia (Bank of Italy)</i>				
Institution incorporated under public law (SBI ²⁹⁶ Art.1) whose shares are held by private corporations (mainly banks) ²⁹⁷	Monetary and financial stability ²⁹⁸	Board of Directors: (administration, management supervision and internal control of the Bank – SBI Art.18) Governor (by the President of the Republic on a proposal from the President of the Council of Ministers) and 13 directors elected by shareholders (SBI Art.15)	Autonomy, independence and freedom from instructions (SBI Art.1)	
<i>Latvia – Member since 2004 - Latvijas Banka (Bank of Latvia)</i>				
State institution (LBoL ²⁹⁹ Art.1)	Price stability (LBoL Art.3); payments system (LBoL Art.9(1))	Council: (administration - (LBoL Art.21(1)): Governor (appointed by the Saeima of the Republic of Latvia – LBoL Art.22(1)), the Deputy Governor and 6 other members of the Council (appointed by the Saeima upon the recommendation of the Governor of the Bank of Latvia – LBoL Art.22(2))	Freedom from instructions (LBoL Art.13(1)); independence in decision-making (LBoL Art.13(2)) BUT: Bank is supervised by the Saeima (Art.43(1))	
<i>Lithuania – Member since 2004 - Lietuvos bankas (Bank of Lithuania)</i>				
Legal person (LBoLit ³⁰⁰ Art.2(1)) belongs to the State of Lithuania (Art.1(1)), capital is accumulated from the funds of the State of Lithuania (Art.20(2))	Price stability (LBoLit Art.7(1))	Bank Board: Chairperson (appointed by the Seimas on the recommendation of the President of the Republic – LBoLit Art.10(3)), 2 Deputy Chairpersons, and 2 Members of the Board (appointed by the President of the Republic of Lithuania on the recommendation of the Chairperson – LboLit Art.10(4)).	Independence and freedom from instructions (Art.3), freedom to choose and implement monetary policy (Art.25); Bank and the State are not liable for each others' obligations (Art.1(4))	
<i>Luxembourg – Founding Member - Banque centrale du Luxembourg</i>				
Public institution , (OLBCdL ³⁰¹ Art.3(1)) whose only shareholder is the State (OLBCdL Art.4(1))	Execution ESCB tasks; supervision of liquidity; payment system (OLBCdL Art.2)	Council: composed of Directors (ex officio members) and 6 members appointed by the Government (OLBCdL Art.7(1)) Executive Board: Director-General and 2 Directors, appointed by the Grand Duke on a proposal by the Government (Art.12)	Freedom from instructions (OLBCdL Art.5(2)); financial autonomy (OLBCdL Art.3(1))	
<i>Malta – Member since 2004 – Central Bank of Malta</i>				
Body corporate	Price stability	Board of Directors: (policy and general	Freedom from	Exceptional grant

²⁹⁵ Irish Central Bank Act 1942

²⁹⁶ Statute of the Bank of Italy (2006)

²⁹⁷ <http://www.bancaditalia.it/bancaditalia/funzgov/gov/partecipanti/Shareholders.pdf>

²⁹⁸ <http://www.bancaditalia.it/bancaditalia/funzgov/funzioni>

²⁹⁹ Law "On the Bank of Latvia" of 19 May 1992 (English translation accessible at <http://www.bank.lv/eng/main/all/lvbank/llb/>)

³⁰⁰ Law on the Bank of Lithuania of 1 December 1994 (As last amended on 10 December 2009 – No XI-557) (English translation accessible at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=364109&p_query=&p_tr2=)

³⁰¹ Organic Law of the Banque Centrale du Luxembourg (Consolidated Version of 2009)

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
with a distinct legal personality (CBMA ³⁰² Art.3(2)) owned by the government (CBMA Art.19(1))	(CBMA Art.4); Financial stability (CBMA Art.5(c))	administration): Governor and Deputy Governor (appointed by the President of Malta, acting on the advice of the Prime Minister - CBMA Art.8(1)) and the 3 other directors appointed by the Prime Minister (CBMA Arts.7 and 9)	instructions (CBMA Art.5(2))	of loans against security considered appropriate by the Board, to safeguard financial stability (CBMA Art.17(1)(g))
<i>The Netherlands – Founding Member - De Nederlandsche Bank</i>				
Public limited company ³⁰³ and “independent public body” ³⁰⁴ that was nationalised in 1948 ³⁰⁵	Price stability (NBA ³⁰⁶ Sec.2(1) and AABoN ³⁰⁷ Art.3(1)); other functions defined in NBA Sec.3, including prudential supervision of financial institutions.	Governing Board (management – AABoN Art.6): President and 3-5 Executive Directors appointed by Royal Decree (NBA Sec.12) Supervisory Board (supervision, management and adoption of annual accounts – NBA Sec.13): 9-12 members (1 is appointed by the Government), Chairman and the other members appointed by the shareholders (NBA Sec.13; AABoN Art.11) Bank Council : 11-13 members, incl. the member of the Supervisory Board appointed by the Government, a member appointed by the Supervisory Board from among its own members; 9-11 members appointed by the Bank Council (NBA Sec.15 and AABoN Art.17)	Independence in the field of monetary policy implied by virtue of its membership of the ESCB (reference to ESCB Statute in the preface to the Bank Act 1998)	
<i>Poland – Member since 2004 - Narodowy Bank Polski (National Bank of Poland)</i>				
Institution with exclusive right to issue money (Polish Constitution Art.227), whose funds consist of registered equity and reserve fund, derived from public resources (ANBP ³⁰⁸ Arts.60-69)	Price stability (ANBP Art.3(1)); financial stability (ANBP Art.3(2)(6)(a))	Monetary Policy Council : President (appointed and dismissed by the Sejm, at the request of the President of the Republic of Poland -ANBP Art.9), 9 members appointed in equal numbers by the President of the Republic of Poland, the Sejm and the Senate (ANBP Art.13) Management Board : President of the NBP and 6-8 eight Board members, incl. two Vice Presidents appointed and dismissed by the President of the Republic of Poland, at the request of the President of the NBP (ANBP Art.17)	<i>Independence implied from the Polish Constitution Art.227 and through membership of the ESCB</i>	Regulating banks’ liquidity and provision of refinancing facilities (ANBP Art.3(2)(5)); in the form of loans against pledge of securities (Art.42)
<i>Portugal – Member since 1986 - Banco de Portugal</i>				
Legal person governed by public law , with administrative and financial autonomy able to own property (OLBdP ³⁰⁹ Art.1);	<i>Implied price stability</i> : ESCB objectives tasks (OLBdP Art.3(2)); Financial stability (OLBdP Art.12(c));	Board of Directors : Governor, one or two Vice-governors, and 3-5 Directors (OLBdP Art.33), all appointed by means of a resolution of the Cabinet, upon proposal of the Finance Minister (OLBdP Art.27(1)) Board of Auditors : 3 members	Independence and freedom from instructions of the Governor and the other members of the Board of Directors (OLBdP Art.27(2));	LOLR function with a view to preserving financial stability (OLBdP Art.12(c))

³⁰² Central Bank of Malta Act, ACT XXXI of 1967, as amended

³⁰³ <http://www.dnb.nl/en/about-dnb/index.jsp>

³⁰⁴ <http://www.dnb.nl/en/about-dnb/organisation/legal-and-organisational-form/index.jsp>

³⁰⁵ <http://www.dnb.nl/en/news-and-publications/news-and-archive/speeches-2002/auto38626.jsp>

³⁰⁶ (Netherlands) Bank Act 1998

³⁰⁷ Articles of Association of the Bank of the Netherlands

³⁰⁸ The Act on the National Bank of Poland of 29 August 1997 (Consolidated text)

³⁰⁹ Organic Law of the Banco de Portugal, Art 1

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
was nationalised in 1974	payment systems (OLBdP Art.14); supervision (OLBdP Art.17)	appointed by the Finance Minister (OLBdP Art.41) Advisory Board: Governor, Vice-governors, former Governors, 4 members appointed by the Cabinet, upon proposal of the Finance Minister (OLBdP Art.47(2)); Chairman of the Portuguese Association of Banks; Chairman of the Public Credit Management Institute; representative of each of the Autonomous Regions of the Azores and Madeira, Chairman of the Advisory Board of the Bank (Art.47)	Administrative and financial autonomy (OLBdP Art.1); Bank cannot guarantee State or public body commitments (OLBdP Art.18(2)).	
Romania – Member since 2007 - Banca Națională a României (National Bank of Romania)				
Independent public institution with legal personality (LSNBR ³¹⁰ Art.1) that is fully state-owned (LSNBR Art.38(1))	Price stability (LSNBR Art.2(1)); regulation and supervision, payment systems and financial stability (LSNBR Arts.2(2)(b), 25(1) and 22(1))	Bank Board (management): Governor, Senior Deputy Governor and 2 Deputy Governors who are nominated by the Parliament (LSNBR Art.32); members are appointed by the Parliament on the recommendation of the competent standing committees of the two Chambers of Parliament (LSNBR Art.33(3))	Independent public institution (LSNBR Art.1); Freedom from instructions (LSNBR Art.3(1))	Exceptional case-by-case grant of loans (unsecured or secured with assets other than those provided by Art.19 (LSNBR Art.26)
Slovakia – Member since 2004 - Národná banka Slovenska				
Legal person (ANBS ³¹¹ Art.1(2)) and an independent institution, whose profits revert to the government (ANBS Art.38(2))	Price stability (ANBS Art.2(1)); financial stability (ANBS Art.2 (3)) and supervision (ANBS Art.2(3)(a))	Bank Board (supreme governing body , which determines monetary policy): Governor, 2 Vice-Governors (appointed by the President of the Slovak Republic upon the recommendation of the Government and with approval of the National Council of the Slovak Republic -(ANBS Art.7(2)), and 8 other members (appointed by the Government upon the recommendation of the Governor – Art.7(3)) of which at most 3 do not have to be employees of the National Bank of Slovakia (ANBS Art.6 and 7)	Independent central bank (ANBS Art.1(1)); Freedom from instructions (ANBS Art.12(1)) but the Governor must inform the Government of the conclusions form meetings of the Bank Board and its adopted decisions (ANBS Art.12(2)).	Exceptional short-term ELA loan, secured by sufficient collateral, with preferential repayment rights to the NBS (ANBS Art.24)
Slovenia – Member since 2004 - Banka Slovenije				
Autonomous institution under public law; wholly owned by the State (BSA ³¹² Art.1)	Price and financial stability (BSA Art.4); regulation and supervision (Arts.12(9) and 23)	Governor and Vice-governors: nominated by the President and appointed by the National Assembly (BSA Arts.35 and 36) Governing Board: appointed by the National Assembly on nomination by the President (BSA Art.37)	Independence and freedom from instructions (BSA Art.2); financial and administrative autonomy (Art.1(1)).	Liquidity management (BSA Art.11(3))
Spain – Member since 1986 - Banco de España				
Nationalised since 1962 ³¹³ ; institution under public law with own legal	Price stability (LABdE Art.7(2)); payments system (Art. 7(3)d);	Governing Council: Governor (appointed by the King on President's proposal - LABdE Art.24(1)), Deputy Governor (appointed by the government	Autonomy and freedom from instruction (LABdE Preamble and Art.1)	

³¹⁰ Law No. 312 / 28.06.2004 on the Statute of the National Bank of Romania

³¹¹ Act on the National Bank of Slovakia available at http://www.nbs.sk/_img/Documents/LEGA/a5661992.pdf

³¹² Banka Slovenije Act (Official consolidated version ZBS-1-UPB1)

³¹³ <http://www.bde.es/webbde/en/secciones/sobreelbanco/historia/historia.html#1998>

NCB Legal Status and Ownership Structure	Statutory policy objectives and functions	Corporate Governance Structure	Provisions for NCB Independence	Provisions for LOLR
personality and full public and private legal capacity, subject to private law except when exercising the administrative authority conferred on it by this and other laws (LABdE ³¹⁴ Art.1)	Financial stability (LABdE Art.7(5)(b)).	on Governor's proposal - LABdE Art.24(2)), 6 Council members (appointed by the government on Finance Minister – Art.24(3)), Director-General of the Treasury and Financial Policy, and Vice-president of the National Securities Market Commission (LABdE Art.20) Executive Commission: Governor and Deputy Governor, 2 Council members (appointed by the Governing Council, on Governor's proposal, from the Council's elected members – Art.24(4)), and the Directors-General of the Bank with no voting powers (LABdE Art.22)		
Sweden – Member since 1995 - Sveriges Riksbank				
Public authority under the Riksdag (the Swedish Parliament) (SRA ³¹⁵ Ch.1 Art.1; Ch.9 Art.13)	Price stability; payments system (SRA Art.2)	General Council: 11 members elected by the Riksdag (SRA Ch.1 Art.3 and Ch.9 Art.13) who cannot hold political positions (SRA Ch.2) Executive Council: (manages the Riksbank) appointed by the General Council (SRA Ch.9 Art.13), who cannot hold political positions (SRA Ch.3)	Freedom from instructions (SRA Ch.3 Art.2); No public authority may determine how the Riksbank shall decide in matters of monetary policy (Ch.9 Art.13)	LOLR: credits or guarantees on special terms in exceptional circumstances (SRA Ch.6 Art.8)
United Kingdom – Member since 1973 – Bank of England				
Independent public organisation wholly owned by the Government since its nationalisation by the BoE Act 1946	Monetary Stability (BoEA ³¹⁶ Art.11; MoU ³¹⁷ §2); Financial Stability (introduced by the Banking Act 2009; MoU §2)	Court of Directors (management and monetary policy): Governor, 2 Deputy Governors and directors appointed by Her Majesty (BoE Act 1998, Art.1) Monetary Policy Committee (monetary policy formulation): Governor and Deputy Governors, 2 members appointed by the Governor after consultation with the Chancellor of the Exchequer, and 4 members appointed by the Chancellor of the Exchequer. (BoE Act 1998, Art.13) Financial Stability Committee (since 2009): Governor and Deputy Governors of the Bank, 4 directors of the Bank appointed by the chair of the court of directors and a Treasury representative without voting rights.	Freedom from instructions in relation to monetary policy (BoE Act 1998, Art.10); Treasury has no operational responsibility for the activities of the Bank and shall not be involved, but the Bank must alert it in some circumstances (MoU §5); Financial Crisis Management: for operations beyond the Bank's published framework, ultimate responsibility rests with the Chancellor (MoU §14)	Liquidity maintenance (MoU §17(ii)); in exceptional circumstances other operations in accordance with MoU §§13-14 (MoU §2(iv)); Special Resolution Regime except temporary public ownership (BA 2009 SRR CoP ³¹⁸ §4.3)

³¹⁴ LAW OF AUTONOMY OF THE BANCO DE ESPAÑA Law 13/1994, of 1 June 1994

³¹⁵ The Sveriges Riksbank Act (Lag (1988:1385) om Sveriges riksbank) as from 1 June 2010

³¹⁶ Bank of England Act 1998

³¹⁷ Memorandum of Understanding between HM Treasury, the Bank of England and the Financial Services Authority

³¹⁸ Banking Act 2009 Special Resolution Regime Code of Practice

ANNEX I

Member State	Legal Status				Ownership Structure			Statutory objectives and Tasks				Corporate Governance Structure			Provisions on Independence			Specific Provisions on LOLR	
	Public Authority	Public limited company	Governed by public law	Other	Fully State-owned	Majority State-owned	Other	Price stability	Financial stability	Payments system	Regulation and/or supervision	Majority of Board appointed by Govt	Chief appointed by Govt	Other	Independence	Freedom from instructions	Contrary provisions	Secured loans	Unsecured loans
Austria		•			•	• ⁱ		•	•	•		•	•			•			
Belgium		•		•			•	i	•			•	•		•		•		
Bulgaria	•			•	•			•	•	•	•	•	•		•	•	•	•	
Cyprus		•		•	•			•	•	•	•	•	•		• ⁱⁱ	•			
Czech Republic	•		•	•	i			•	•	•	•	•	•			•	•	•	
Denmark	•			•	•			•	i	•				•	• ⁱⁱⁱ		•		
Estonia	•			•	i			•	i			•	•		•				
Finland	•		•	•	•			•				•	•		•	•			
France				•	•			•		•		•	•		•	•			
Germany	•		•	•	•			•		•		•	•		•	•			
Greece		•					•	•	•	•	•		•	•		•			
Hungary		•			•			•	i			•	•		•	•		• ^{iv}	
Ireland	•	•			•			i			•	•	•		i				
Italy		•	•				•	•	•					•	•	•			
Latvia	•			•	•			•		•		•	•		•	•	•		
Lithuania				•	•			•				•	•		•	•			
Luxembourg	•			•	•			i	i	•	•	•	•			•			
Malta				•	•			•	•			•	•			•		•	
The Netherlands	•	•			•			•			•		•	•	i				
Poland	•				•			•	•			•	•		i			i	
Portugal			•	•	•			i	•	•	•	•	•		•	•		•	
Romania	•			•	•			•	•	•	•	•	•		•	•		•	•
Slovakia	i			•	i			•	•		•	•	•		•	•		•	
Slovenia	•		•	•	•			•	•		•	•	•		•	•			
Spain	•		•	•	•			•	•			•	•		•	•			
Sweden	•			•	•			•		•				•	i	•		•	
United Kingdom	•			•	•			•	• ^v			•	•		i	•	•	• ^{vi}	

KEY:

- Provision present in the legislation governing the NCB (whether an Act, a Statute, an Organic Law or a provision of the Constitution).

i No express provision is found in the legislation, but it is implied either in other provisions or through a fact such as the membership of the ESCB.

Notes to the table:

ⁱ State had a 70% stake during the financial crisis; Bank was nationalised in May 2010

ⁱⁱ Reference is made to financial independence necessary for the achievement of the objectives of the Bank

ⁱⁱⁱ Historically independent of political organizations from the introduction of the Denmark's Nationalbank Act in 1936

^{iv} “[U]nder the circumstances that jeopardise the stability of the financial system, an emergency loan may be advanced subject to performance of actions by the Hungarian Financial Supervisory Authority or performance of actions by the credit institution, at the proposal of the Supervisory Authority” (Act on the MNB Ch.II Art.14)

^v Introduced by the Banking Act 2009

^{vi} Restrictions on the Bank's ability to do this apply – see MOU