Project: Towards more stability, competitiveness and predictability in the financial sector – the relevance of EU/EEA State aid rules and their correct application

I. Relevance

This project aims to provide a better understanding of how State aid rules should be applied in the financial sector to safeguard its efficiency, competitiveness and equal terms and conditions for all market operators. In particular, it focuses on analysing the most relevant legal instruments as well as scrutinising the potential and existing loopholes in the State aid control system. The project aims at clarifying the uncertainties relating to State aid law in the financial sector and thereby give public authorities and economic operators a better foundation to decide on State involvement in the sector.

The project is of significant relevance and benefit to the society because of its clearly practical profile. Importantly**,** the project applied for here includes **a Post.doc.-project that would be financed by Finansmarkedsfondet** and **a self-funded PhD Project.** Even though **we only apply for funding of certain parts of this project**, we have chosen to **present both individual projects** in order to provide a comprehensive description of the project and its relevance to the financial markets. The two individual projects described below address some of the most pressing questions raised by applying State aid law to the financial sector. The role of the Market Economy Investor Principle (MEIP) is of great importance to the question of how the state can involve itself in the financial sector without violating EU/EEA State aid law. The civil law consequences of granting unlawful and incompatible aid are of special importance to the companies active in this sector. Any uncertainties concerning their position require an immediate answer.

II. Aspects relating to the project

2.1 Background and status of knowledge

2.1.1 State aid law and policy in EU/EEA

State aid law is a part of EU/EEA Competition law. Yet, the rules on granting aid are directed at the Member States, not at undertakings. At its simplest, aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. Notably, the notion of aid is wider than the notion of subsidy; aid embraces both "positive benefits" such as subsidies and "negative benefits", i.e. interventions that mitigate the charges which are normally included in the budget of an undertaking and that have the same effect as subsidies.[1]

Granting aid is an important policy instrument. Member States grant aid to achieve different policy goals. In particular, aid aims at correcting market failures. For example, risk capital measures address a financing gap affecting small and medium enterprises, small or innovative mid-caps.

Yet, under certain circumstances, such advantages may considerably distort competition and the financial "level playing field" for all market participants. In spite of the importance of State aid law, however, it was not until the eighties that the European Commission shifted its priorities in the field of competition policy and focused on potential competition distortions by the states granting aid.[2] Since then, the legal framework on granting aid gradually evolved and expanded. State aid law has significantly contributed to opening markets for more competition, i.e. liberalisation, provided greater transparency and predictability that benefit investors and increased efficiency maximisation.

[1] Case 30/59 *De Gezamenlijke Steenkolenmijnen v High Authority* [1961] ECR 543.

[2] See para 128 of the II Report on Competition Policy of 1972 where the Commission emphasised its task of ensuring "that the Member States do not grant [public] undertakings aids incompatible with the common market-aids which may be difficult to detect, masked as they are by the special relations between the Member States and the undertakings".

Currently, the Commission is completing its second comprehensive and ambitious State aid reform. State Aid Modernisation (SAM), launched in May 2012, has three main, closely linked objectives: 1) to foster growth in a strengthened, dynamic and competitive internal market, 2) to focus enforcement on cases with the biggest impact on the internal market, 3) streamlined rules and faster decisions.[3] The relevance of State aid law to the economies of the Member States steadily increases.

2.2.2 State aid in the financial sector

State aid control in the financial sector became effective in the 1990s when a number of Directives abolished restrictions on capital movement.[4] Until the financial sector became subject to liberalisation, privatisation, demonopolisation and increasing harmonisation at the European level, the Commission was interested in banks only as transmitters of aid.[5] Introducing more competition into the banking sector forced public banks to compete with private on equal terms and conditions. As a result, some public banks, especially French and Italian, required rescue and restructuring aid to cope with solvency requirements.

Despite this background, the importance of State aid rules to the financial sector was fully recognised when the current financial and real economy crisis hit Europe in 2008. Following the failure of Lehman Brothers on 15 September 2008, the inter-bank market collapsed. The necessity of granting huge amounts of aid to banks that were "too big to fail" was widely debated not only in Brussels where the Commission officials attempted to restore confidence in the financial sector by the use of State aid regulations, but all over EU/EEA. The aim of avoiding a systemic crisis was at the top of the agenda of the EU/EEA and its Members. According to the Commission's data in the period between 1 October 2008 and 1 October 2011 the Commission approved aid to the financial sector for an overall amount of € 4.5 trillion (36.7% of EU GDP).[6]

The current statistics on the number of Commission Decisions on the "financial crisis aid" do not indicate that the Commission's role in providing an immediate response to the turmoil in the financial sector may soon diminish. Yet, while adjusting this response, so as it provides the best possible results under the current conditions, one must start asking about the future of the banking sector. The question is how competition rules and, in particular, State aid rules can contribute to rebuilding the financial sector for the future and make it more robust. Indeed, there is no novelty in pointing out that a healthy financial services sector is of critical importance to European citizens and the capital markets. Financial markets are the heart of the real economy and their proper functioning provides businesses and consumers with access to financial products. In other words, the better and more competitively they function, the better the economy will perform.

This project aims at providing a better understanding of how one should apply State aid law in the financial sector to safeguard its efficiency, competitiveness and a "level playing field".

3 Description of the planned individual projects

The project applied for here includes two individual projects. Firstly, a Post.doc.-project dealing with the scrutiny of the applicability and application of the so-called Market Economy Investor Principle (MEIP) in the financial sector, and explaining how the state may act as an entrepreneur in the financial markets and compete with private market operators without distorting competition by

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[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of the EU – State Aid Modernisation (SAM), COM/2012/209final. See also http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

[4] The Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, pp. 5–18, was the first to start the process of liberalisation of the financial markets.

[5] Arhold, Christoph, Financial sector [in:] Hancher, Leigh, Tom Ottervanger and Jan Piet Slot, EU State Aids, London 2012, pp. 302-320, at pp. 594-595.

[6] http://ec.europa.eu/competition/recovery/financial_sector.html

misusing its unique position and exclusive prerogatives. Secondly, a PhD Project analysing challenges related to State aid in form of guarantees. As mentioned above, **the PhD Project will be funded by the applicant**, and it is **only the Post.doc.-project that we seek to be funded by Finansmarkedsfondet**. Yet, for the sake of completeness and demonstrating the value of the project, both individual projects are presented in this project description.

The Post.doc.-project will scrutinise the use of the MEIP before the collapse of Lehman Brothers, its latter applicability and application under market conditions strongly influenced by the 2008 financial crisis and, it will attempt to establish the role of the MEIP in rebuilding the financial sector. The latest State aid Banking Communication of 2013,[7] which replaced the 2008 Banking Communication[8] and supplemented the remaining crisis rules, strengthened burden-sharing requirements. In practice, banks with a capital shortfall will have to obtain shareholders and subordinated debt-holders' contribution before resorting to public recapitalisations or asset protection measures. This is a significant change in the State aid policy towards banks affected by the crisis, which may possibly be described as a transition from bail-out to bail-in era in the banking sector. The increased use of the MEIP that relies on the state behaving as a private market operator seems to be the next step in the direction of rebuilding and strengthening the sector concerned.

The PhD Project will examine aid in the form of guarantees. In this respect, issues such as the civil law consequences of recovering unlawful and incompatible aid require more attention and research. This is because of the precarious situation of the financial institutions that act as lenders in a specific triangular relation that is created by providing a state guarantee. This relation includes the state acting as grantor, the beneficiary undertaking and the lending institution. If the loan qualifies as unlawful and incompatible aid, there is no doubt that it must be repaid. The recovery of aid is undertaken under national rules. Yet, should the guarantee be cancelled as well? If so, in spite of not being a party to the agreement between the state and the borrower, the lending institution may be forced to face the negative consequences of qualifying the loan as unlawful and incompatible aid.

Both individual projects concern the EU/EEA rules on State aid. Both will rely on the EU legal method. Both projects will clarify the identified legal uncertainties by analysing the primary and secondary EU law, including Commission decision-making practice, and the relevant case law. This analysis will not only improve the application of the existing rules on State aid in the financial sector, but also allow for making policy suggestions on their amendments, so as State aid law may to a larger extent secure an efficient and competitive financial sector.

3.1. Project I (Post.doc.-project): The use of the MEIP in the financial sector

3.1.1 The notion of Market Economy Investor Principle (MEIP)

The MEIP is a well-established yardstick both for determining whether a given state measure amounts to aid within the meaning of EU/EEA law and for quantifying the amount of aid if the intervention qualifies as aid. The intervention amounts to aid if it confers an economic advantage upon a recipient undertaking, which it would not have obtained under normal market conditions.

As regards the use of the MEIP to quantify the amount of aid, one may give the example of a state guarantee. Aid will amount to the difference between the premium that the undertaking concerned would have paid if it sought to obtain a corresponding guarantee in the market and what it actually paid, provided its financial situation did not exclude obtaining private capital at any rate.

[7] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("Banking Communication"), OJ C 216, 30.7.2013, pp. 1–15.
[8] Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ("2008 Banking Communication"), OJ C 270, 25.10.2008, p. 8.

Keeping in mind that EU State aid rules preclude the Member States from granting aid incompatible with the internal market, compliance with the MEIP is often viewed as a "derogation" that allows for escaping the scope of Articles 107(1) TFEU and 61(1) EEA. Nevertheless, such a "Member State's perspective" is far too narrow. The MEIP is first and foremost a tool designed to address the dilemma of the dual nature of state, which acts both as a public authority and an entrepreneur.

The correct interpretation and application of the MEIP safeguards that both dimensions of the state are properly balanced. In particular, the MEIP does not discriminate public investors against private market operators. The state is and should be allowed to act as entrepreneur, but it must do so on equal footing. It may not use its public authority prerogatives while competing with private entrepreneurs. This is why its interventions are subject to the MEIP. Importantly, as demonstrated in Cyndecka's PhD thesis, the proper use of the MEIP addresses the state's dual nature, but it does not amount to compelling the state to behave as an idealised, hypothetical model of an investor.

Moreover, as indicated by the recent case law and the Commission practice, the MEIP is one of the most expanding and developing legal instruments in State aid law. Its scope of applicability and application increases while its refinement safeguards the proper assessment of not only typical and clear-cut cases of state intervention, but also those more complex or atypical of the private sector. For example, in *EDF* of 2009, the General Court (GC) ruled on the applicability of the MEIP to a corporate tax waiver.[9] In *ING* of 2012[10], the GC ruled on the applicability of the MEIP to an amendment to the repayment terms of recapitalisation of ING that indisputably amounted to aid, which was granted in relation to the financial crisis.

Admittedly, the application of the MEIP may be difficult. It requires engaging in complex economic analyses assessing whether the state behaved as a rational and profit-oriented market operator would have behaved in similar circumstances under normal market conditions. Yet, the MEIP is the best or the least imperfect legal tool in addressing the challenges of the changing markets, including the financial markets. The expansion and refinement of the MEIP justifies the need for more research on how it should be applied in such an important sector as the financial sector.

3.1.2 Some observations on the use of the MEIP in the financial sector before the financial crisis

The discussion on the MEIP requires pointing out that while the term of the MEIP refers to the notion as such, terms like the private guarantor or the private creditor test refer to the subtypes of the MEIP. They have been distinguished to indicate what type of transaction the state entered. This allows for adjusting the application of the MEIP by taking into account all the circumstances and factors that are relevant to a given case. Indeed, the aims and business strategy of a lender or creditor are different from the objectives that are pursued by an investor. While the latter attempts to maximise its profit, a private creditor intends to recover the sum due or reduce the losses it currently bears. A private lender will focus on the risk attached to the loan, which is usually reflected in the rate charged and the security sought to cover the loan.

Amongst the examples proving the relevance of the MEIP in the financial sector pre 2008 are the unlimited state guarantees in favour of public credit institutions. Such guarantees were unlimited in both scope and duration. Amongst the best known are the Austrian *Ausfallhaftung* and the German *Anstaltslast* and *Gewährträgerhaftung*.

[9] Case T-156/04 *Electricité de France v Commission (EDF)* [2009] ECR II-4503. The Court of Justice (ECJ) confirmed this interpretation of State aid rules in Case C-124/10 P *Commission v Électricité de France (EDF)* [2012] ECR n.y.r.

[10] Joined cases T-29/10, T-33/10 *Netherlands and ING v Commission (ING)* [2012] ECR n.y.r. The ECJ was of the same opinion. On 8.3.2014, it dismissed the appeal in Case C-224/12 P *Commission v Netherlands*, OJ C 258, 25.8.2012, pp. 8-9.

Unlimited state guarantees provided a very effective protection for creditors and business partners of the secured institutions whose creditworthiness was significantly improved. Thus, their creditors could demand a lower risk premium, offer better conditions when granting capital, or require less security. Therefore, public financial institutions enjoyed a significant competitive advantage over their privately owned competitors. Indeed, no private operator would have and could have granted such an unlimited guarantee; only the state has at its disposal "effectively infinite financial resources".[11] The Commission classified the unlimited guarantees as incompatible, but existing aid.

The problem of unlimited state guarantees has recently returned on the agenda of the EU Courts and has raised much controversy. In a case concerning the privatisation of Bank Burgenland of 2012,[12] the question was whether one could take into account the costs (risks) stemming from an unlimited guarantee when applying the MEIP. The GC explicitly rejected any relevance of such guarantees to the MEIP. Nevertheless, this approach reopened the discussion on any comparability of unlimited state guarantees to the structures of liabilities in the private sector.

3.1.3. The applicability and application of the MEIP to the measures adopted in relation to the financial crisis

During the financial crisis there was a debate on whether the MEIP even was applicable to state measures, since it only applies under "normal market conditions". Yet, the Commission applied it in cases such as aid granted by Germany to HSH Nordbank in the form of a guarantee comprising a EUR 10 billion second-loss tranche ("the risk shield") and a EUR 3 billion capital injection.[13] The MEIP was applied to cases of impaired assets, disinvestments, privatisations and nationalisations.

Indeed, under the 2008 financial crisis conditions, it is significantly more difficult to prove that the state could have met the MEIP. Such "business-hostile" conditions mean more uncertainty, lower expected revenues, and higher risks. Thus, an investor must rather take into account the worst-case scenario than the mid one. Yet, as the Commission rightly concluded, the 2008 financial crisis does not as such exclude the applicability of the MEIP, but it is of high relevance in determining whether the state could have acted as a private market operator. The Commission decisions confirmed that, under certain circumstances, the MEIP not only applies, but also can be met. Even though such cases required particularly complex technical assessments, their analysis will provide more insight in implementing State aid rules with the aim of restoring the financial sector.

3.1.4 Post-2008 financial crisis challenges in the financial sector and the role of the MEIP

The rapid development and refinement of the MEIP raises the question of its role in rebuilding and strengthening the financial sector. The above-mentioned *ING* case posed a novel question of the applicability of the MEIP to an amendment to the repayment terms of recapitalisation of ING, which was undertaken due to the financial crisis.

Another interesting question may be posed in light of Basel III, the international regulatory framework for banks. Basel III is a comprehensive set of reform measures, developed by the Basel Committee on Banking Supervision, to strengthen the regulation, supervision and risk management of the banking sector. Norwegian banks had to take certain measures to adapt to the capital requirements regulation Basel III.[14] Several studies and reports have discussed those measures and

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[11] Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding aid which Italy has decided to grant to EFIM, C38/92, OJ C 349, 29.12.1993, pp. 2-7, at p. 3.

[12] Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission (BB)* [2012] ECR n.y.r. and Case T-282/08 *Grazer Wechselseitige Versicherung v Commission* [2012] ECR n.y.r.

[13] Commission Decision of 20.9.2011 on State aid granted by Germany to HSH Nordbank AG SA.29338 (C 29/09 (ex N 264/09)) (notified under document C(2011) 6483), OJ L 225, pp. 1-48.

[14] For more information on the implementation of Basel III in Norway, see Finanstilsynet's website http://www.finanstilsynet.no/no/Verdipapiromradet/Verdipapirforetak/Tema/Basel-III--CRD-IV/

their impact. They have also examined how banks look at the current competition in the banking sector, between themselves and from foreign competitors in light of the new regulations. Yet, no study on how the MEIP may contribute to improving efficiency and competitiveness of the banking sector has been carried out.

The MEIP may become an interesting issue in relation to the requirements on Tier 1 and Tier 2 capital. Those may need to be addressed under the *BP Chemicals* jurisprudence.[15] *BP Chemicals* addressed the question of whether the mere fact of having benefitted from aid in the past excludes the applicability of the MEIP in the future. This case concerned a series of three capital injections made by the same public undertaking to one of its subsidiaries. According to the Commission, the first two interventions constituted compatible aid, whereas the third met the MEIP.[16] This decision was challenged and the applicant argued that the links between those three injections were disregarded. The third one could not be assessed in isolation and all three measures should in fact be treated as parts of one single process for restructuring of the aid beneficiary.[17]

According to the Court, however, "the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as "aid" does not automatically mean that a further capital injection cannot be classed as an investment which satisfies the private market economy investor test … [in a case] which concerns three capital injections made by the same investor over a period of two years, the first two of which brought no return, the Commission must determine whether the third injection could reasonably be severed from the first two and classed, for the purposes of the private investor test, as an independent investment. The Court considers the following considerations to be relevant in making such a determination: the chronology of the capital injections in question, their purpose, and the subsidiary's situation at the time when each decision to make an injection was made."[18]

In light of Basel III, one must establish whether the recapitalisation by the state that is necessary to comply with Basel III requirements can be separated from the financial crisis aid.

3.2 Project II (PhD Project): State aid in the form of guarantees and the consequences of the triangular relation between the state, the beneficiary and the lending institution

State guarantees are one of the most common state measures that may amount to aid. In most cases, they are associated with a loan or other financial obligation to be contracted by a borrower with a lender. State guarantees are a specific form of state intervention in the market. Unlike such state measures as capital injections, loans, sales agreements or tax waivers, which involve a grantor and a beneficiary, state guarantees create a specific, triangular relation between the state acting as guarantor, a recipient undertaking that receives a loan and a lending financial institution. They may be granted as individual guarantees or within guarantee schemes. Depending on their legal basis, the type of transaction covered, their duration, etc., one may identify: i) general guarantees and those linked to a specific transaction; ii) limited guarantees and those that are unlimited in both scope and duration such as *Ausfallhaftung*, *Anstaltslast* or *Gewährträgerhaftung*; iii) guarantees provided directly and counter guarantees provided to a first level guarantor.

As the Commission clarified in its Guarantee Notice of 2008, the benefit of a state guarantee is that the state carries the risk associated with the guarantee. The state should thus receive an appropriate premium. If it forgoes all or part of the premium, the borrower may receive aid regardless of whether the guarantee was called upon or not. This is because the guarantee leads to a drain on state

[15] Case T-11/95 *BP Chemicals* [1998] ECR II-3235.
[16] Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding aid which Italy has decided to grant to EniChem SpA, OJ C 330, 26.11.1995, p. 7.
[17] Case T-11/95 *BP Chemicals* [1998] ECR II-3235, see para 94 et seq.
[18] Case T-11/95 *BP Chemicals* [1998] ECR II-3235, paras 170-171.

resources and benefits the borrower who may receive a loan on more favourable terms than those which it could have obtained without the guarantee. In some cases, the borrower would not, without the guarantee, obtain a loan on the market on any terms due to its poor credit ratings.

Under certain circumstances, however, also the lender may be in receipt of aid. This may be the case if a guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution. In the latter case, the lender may receive aid in so far as the security of the loans increased. Importantly, a guarantee that benefits the lender may amount to operating aid that is generally prohibited under State aid rules as it may seriously distort competition. Only under certain circumstances, the Commission may approve such support for running costs, on-going expenditure and working capital.

The above-mentioned triangular relation between the state acting as guarantor, a recipient undertaking that receives a loan and a lending financial institution may put the lender in a precarious situation if the loan turns out to be unlawful and incompatible aid. Such aid must be recovered with interest. Thus, even though the lender is not a party to the agreement between the state and the beneficiary undertaking, it may face its potential negative consequences.

Such consequences must be assessed under national rules that govern recovery of aid. In this respect, the situation of the lender is linked to the beneficiary. If the borrower does not pay a premium for the given state guarantee or pays a premium that is below the market rate, it obtains an advantage that may amount to aid. It amount may be calculated by comparing the market price for the state guarantee and the price the borrower actually paid. Yet, the situation becomes more complex if the state guarantee was the *sine qua non* condition for obtaining a loan because of the borrower's poor credit rating. In this case, as demonstrated on a few occasions, the entire amount of this loan may be qualified as unlawful and incompatible aid that must be repaid. Apparently, the guarantee should be cancelled.[19]

Yet, the requirement of repayment of the entire loan and cancelling the guarantee, which had been deemed to be unlawful and incompatible aid, is criticised in legal literature and this criticism seems to be justified.[20] In this respect, one must recall that the aim of negative decisions with recovery is to deprive the beneficiary of unlawful and incompatible aid, which strengthened its position in the market. The recovery of aid aims thus to restore the situation existing prior to granting aid. Consequently, the Commission denies that recovery decisions are penal in nature. Nonetheless, the requirement of the repayment of the entire loan and cancelling the guarantee contradicts the objective of aid recovery. This is because the one that bears the costs of such requirement without infringing State aid rules itself is the lender who is not a party to the agreement between the guarantor and the borrower. The state, that granted aid, in contrast, is enriched by the recovery.[21] A related question in Norwegian contract law would be if a guarantee which constitutes incompatible aid leads to a revision of the loan agreement under section 36 of the Norwegian contract act.

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[19] See Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paras 30-31; Joined cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267.

[20] See Lever, Jeremy, QC, The Currently Anomalous Treatment of State Guarantees that Give Rise to State aid [in:] Biondi, Andrea; Eeckhout, Piet; Slynn, James (eds.), The EC State Aid Regime: The Need for Reform, New York 2004, pp. 303-321; and Friend, Mark, State Guarantees as State Aid: Some Practical Difficulties, [in:] Biondi, Andrea, Eeckhout, Piet, Slynn, James (eds.), The Law of State Aid in the European Union, New York 2004, pp. 231-244. See also Long, William R.M., Illegal State Aid and its Effects on State guarantees, 11-12 EBLR 1998, pp. 389-393, where the author considered the negative consequences of granting incompatible aid from the perspective of the banking industry.

[21] See Lever, Jeremy, QC, The Currently Anomalous Treatment of State Guarantees that Give Rise to State aid [in:] Biondi, Andrea; Eeckhout, Piet; Slynn, James (eds.), The EC State Aid Regime: The Need for Reform, New York 2004, pp. 303-321; see likewise, Friend, Mark, State Guarantees as State Aid: Some Practical Difficulties, [in:] Biondi, Andrea, Eeckhout, Piet, Slynn, James (eds.), The Law of State Aid in the European Union, New York 2004, pp. 231-244, p. 232.

From an academic perspective, state guarantees as forms of aid may thus raise interesting questions about civil law consequences of the recovery decisions. From the perspective of the financial sector, however, such questions amount to serious risks. Thus, the position of the lending institution in the specific triangle relation requires a comprehensive analysis. In particular, this concerns recovery of aid that is governed by national rules. Those may vary in the Member States while the EU/EEA State aid law requires an efficient enforcement in national law. This may raise questions and uncertainties. It is thus of great importance to identify such difficulties and make well-reasoned solutions to deal with them to increase legal certainty for all operators in the financial sector.

In addition to national civil law challenges related to who is the beneficiary of aid and the repayment of aid, these situations may raise problems in relation to bankruptcy law. One such question is whether repayment of aid can be reversed under Norwegian bankruptcy law if the beneficiary ends up in bankruptcy.

Since the implementation of the system for supervision of State aid is a matter for the Commission/ESA and the national courts,[22] this project directly concerns the Norwegian legislation. It is for the Norwegian courts to identify the beneficiary(s) of aid and to draw all the necessary conclusions of granting unlawful aid in accordance with the Norwegian law. In this respect, one of the pressing questions is whether State aid law requires the national court to cancel such a guarantee. According to Article 14(3) of Protocol 3 to the Surveillance and Court Agreement, "recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the … [ESA's] decision granted the incompatible support".[23] The recovery of aid is crucial to the proper functioning of the system of State aid control. After all, its objective is to restore the competitive situation which existed before the aid was granted. The role of national courts is thus difficult to overestimate in this respect.

III The project plan, project management, organisation and cooperation

The leader of the project will be Ronny Gjendemsjø. Gjendemsjø is joint leader (together with Christian Franklin) of the Research Group for Competition and Market law at the Faculty of Law. The research project applied for here and the persons affiliated to the project will be part of this Research Group. Gjendemsjø and Franklin have led the Research Group since 2012. Gjendemsjø is also one of three members of the General Management of Bergen Center for Competition Law and Economics (BECCLE) since 2013. This gives Gjendemsjø experience and expertise in leading and organising research events and projects. As part of his role Gjendemsjø is also supervising three PhD students at the Faculty of Law. Gjendemsjø is also project leader on a project funded by Det Alminnelige Prisreguleringsfondet, regarding competition implications of price signaling, a project that is linked to the financial markets as well. One of the topics of that project, the effects of price signaling in the banking sector, provides Gjendemsjø with experience in working on financial sector related topics.

The Post.doc and PhD positions will be integrated in the Research Group allowing the researchers to be part of a highly qualified environment while carrying out their projects. Furthermore, the Research Group covers fields of law that are considered as one of the Law Faculty's priority areas, namely Competition and Market law. The Faculty's aim is to develop a leading research center in Nordic and European Competition and Market Law. The project applied for here will contribute to the development of this strategic commitment by the Faculty. As one should emphasise, neither the University of Oslo, nor the University of Tromsø succeeded in building such expertise in

[22] Case C-368/04 *Transalpine Ölleitung in Österreich and Others* [2006] ECR I‑9957, para 36.

[23] This rule corresponds to Article 14(3) of Council Regulation No. 659/1999 of 22.3.1999 laying down detailed rules for the application of Article 93 (now Art. 108 TFEU) of the EC Treaty, OJ L 83/1, 27.03.1999, p.1.

Competition and Market Law. In this respect, the establishment of BECCLE, a joint initiative of UiB, Norwegian School of Economics and Norwegian Competition Authority, which functions as meeting place for economists and lawyers interested in competition policy questions, proves the engagement of the Faculty in developing the unique expertise in Competition law.

As demonstrated on www.beccle.no, BECCLE is already well developed when it comes to hosting and organising workshops and seminars, and making these available online through streaming. BECCLE's associates are also encouraged to participate in the public debate and to write pieces for the media. This will safeguard the proper communication of results.

Importantly, the following key experts in the relevant fields of EU/EEA law have agreed to participate in the planned workshops. These are: Ass. Prof. Sune Troels Poulsen, Faculty of Law, University of Copenhagen and Andersen Partners Law firm, who specialises in Competition law, merger control, Public procurement law and EU State aid law; Ass. Prof. Pernille Wegener Jessen, Department of Law, Aarhus University, who specialises in EU State aid law, Competition law, EU and WTO law; Ass. Prof. Grith Skovgaard Ølykke, Department of Economics, Copenhagen Business School, who specialises in EU State aid and Competition law, Public procurement law and the relations between the state and the market; dr. Andreas Bartosch, Lutz Abel Law firm, Brussels, who is a renowned expert in EU Competition law, especially State aid law, European and German monopolies law as well as general EU law; and Gjermund Mathisen, PhD, Director of Competition and State Aid Unit at EFTA Surveillance Authority, (ESA).

These international experts are potential members of a reference group that will substantially contribute to the high quality of research. The involvement of ESA is particularly relevant because ESA enforces EU/EEA State aid law in Norway while the involvement of such relevant stakeholders as representatives of Finanstilsynet, the Ministry of Finance, and the Norwegian banking sector will safeguard and strengthen the practical profile of the project. The reference groups will be established at the first workshop in 2016 In this regard, one will also consider the participation of the international experts in the midway evaluation of the planned PhD Project.

IV Key perspective and compliance with strategic documents

4.1 Compliance with strategic documents

In December 2010, the Faculty Board adopted the Strategy 2011-2015 that declared "Competition and market law, with special development of competence in EU- and EEA-related law" to be one of the three prioritised areas. State aid law is a part of EU/EEA Competition law. One of the main goals of the Strategy 2010-2015 is supporting EU/EEA Competition law, so as it may "become a powerhouse in the development of a national, interdisciplinary competence centre, in collaboration with central partners in the region".[24] This project will significantly contribute to attaining these goals by developing expertise in the field of law whose relevance to the society increases.

4.2 Relevance and benefit to the society

The project is of significant relevance and benefit to the society because of its clearly practical profile. It addresses some of the most pressing questions raised by applying State aid law in the financial sector. First, both individual projects concern current challenges in the financial sector directly affecting the economies of the EU/EEA Member States. While the question of the role of the MEIP in rebuilding the financial sector after the 2008 financial crisis is of high relevance in both shorter and longer perspective, the civil law consequences of granted aid recovery in the form of a guarantee require a more immediate answer. Moreover, as aid recovery is governed by national rules, this question must be discussed in every national system of rules, including Norway. The

[24] http://www.uib.no/en/jur/22213/strategy-2011-2015

discussion on the MEIP is of equal relevance to every EU/EEA Member State. Therefore, it will contribute to developing the research on State aid law issues on the European level.

Second, the project has a large potential to raise awareness of the existence, mechanisms and indispensability of the State aid rules in both the society and amongst financial institutions. The latter are potential aid beneficiaries and competitors of the potential aid beneficiaries. In light of their weak position before the Commission/ESA and the Courts, when compared to the position of the state, they must be aware of the potential positive and negative consequences of receiving aid.

4.3 Environmental impact

The project in itself has no particular direct environmental implications.

4.4 Ethical perspectives

Both individual projects pose questions that have serious ethical implications. This is because answering the questions of how the state can or should involve itself in the financial sector has a large impact on its efficiency and fairness. The project aims to clarify how the state should behave to achieve more stability, competitiveness and predictability in the financial sector, one of the key sectors of every economy. Moreover, this project will strictly follow all ethical standards.

V Dissemination and communication of results

For a **detailed description of dissemination and communication** of results please see the **application form**. The main forms of dissemination will be the publishing of a book based on the self-financed PhD Project and three articles in renowned international journals as regards the results of the Post.doc.-project. In addition, there will be organised four workshops that will be made available online with the assistance of the Dragefjellet Centre of Learning and Communication.[25] The workshops will host both international and national legal experts and national stakeholders such as representatives of Finanstilsynet, the Ministry of Finance and banks. The participants of the project will also produce minimum four contributions (per year) with the aim of publishing them in the media as an important means of dissemination and communication of results to the public.

[25] http://www.uib.no/en/jur/87348/faculty-law-has-new-learning-and-communication-centre