

Assessment of Restructuring Plans of Banks in the New World Post Lehman

Dr Wolfgang Deselaers

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Linklaters

Overview

1. When is a restructuring plan required?
2. New world post Lehman, but old standard?
3. Test under Article 87(3)(b) EC – systemic crisis
4. Restructuring plan: key issues
 - Compensatory measures
 - Restriction to the minimum/proportionality
5. First test case: Fortis
6. Conclusions

1. When is a restructuring plan (RP) required in the new world?

- Ad hoc rescue aid approved for 6 months, and longer if RP is submitted
- Aid under approved scheme which may require RP, e.g. FMStG
 - Recapitalisation if bank unsound
 - Risk positions > EUR 5bn if bank unsound
- Distinction sound/unsound inappropriate (too complex, grey cases → legal certainty)

2. New world post Lehman, but old standard?

- Old world: Art. 87(3)(c) EC + 2004 R&R Guidelines
→ Very strict standard (e.g. CL, BG Berlin, IKB)
 - New world post-Lehman: Art. 87(3)(b) EC
 - Banking Communication: “Assessment according to the general principles in R&R Guidelines”, taking into account “past case law and the particular features of a systemic crisis”
 - Key difference: Overriding Community interest in rescue of systemic bank
- Softer standard in new world

3. Three-step test under Article 87(3)(b)

- Aid is appropriate to prevent systemic crisis
 - Even small banks may be systemic (e.g. Roskilde, 8th largest bank in DK)
 - Restoration of long-term viability
- Aid is necessary (limited to the minimum)
- Aid is proportionate (compensatory measures)

4. RP – key issues: compensatory measures – criteria (1)

- R&R: Only measures not needed to restore viability (“real sacrifice”), e.g. closure/sale of profitable outlets/businesses
 - Criterion less relevant in new world (liquidity crisis)
- Only measures which do not endanger viability, e.g. BGB
 - Berliner Bank to be divested,
 - but not Berliner Hyp

Compensatory measures – criteria (2)

- Market position, e.g. BGB
 - CRE Financing only 3% → no compensation
 - Retail banking Berlin 43% → drastic compensation
- Also non-EU businesses may qualify (e.g. Crédit Lyonnais)
- More compensation if bank unsound
- Divestitures only if reasonably possible during financial crisis (IKB)

RP - key issues: restriction to the minimum

- Capital injection needed to meet core capital requirements, in particular tier 1 ratio
 - BGB: no more than 6%
 - IKB 9.6% “indispensable”
 - New world > 10%
- R&R: 50% of restructuring costs
 - new world requires only “substantial” private participation

5. First restructuring aid approved under Art. 87(3)(b) EC – Fortis

– Long-term viability

Problem	Measure
ABN-Amro deal	Resale of Dutch part of ABN-Amro (FBN)
Subprime	Special vehicle toxic assets
No liquidity	Capital injection Belgian Government / sale to BNP

- Restriction to the minimum/proportionality
 - Sale of profitable FBN sufficient compensation
 - In Belgium: no price leader for 2 years

6. Conclusions

- New world post Lehman requires new standard
- R&R Guidelines and old cases only very limited guidance
- Decisive three-step test under Art. 87(3)(b) (e.g. more flexibility re compensation/private contribution)
- Shorter review periods even more important during financial crisis