

Burden Sharing Principle in Rescue and Restructuring - No Pain, No Gain

Obradović Mazal, Tamara; Butorac Malnar, Vlatka

Source / Izvornik: **Economic and Social Development (Book of Proceedings) : 18th International Scientific Conference on Economic and Social Development "Building Resilient Society", 2016, 705 - 715**

Conference paper / Rad u zborniku

Publication status / Verzija rada: **Published version / Objavljena verzija rada (izdavačev PDF)**

Permanent link / Trajna poveznica: <https://um.nsk.hr/um:nbn:hr:118:924274>

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Download date / Datum preuzimanja: **2025-01-04**

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Economic and Social Development

18th International Scientific Conference on Economic and Social Development –
“Building Resilient Society”



Editors:

Damir Mihanovic, Anica Hunjet, Zeljka Primorac

Book of Proceedings

ISSN 1849-7535



9 771849 753006 >

Zagreb, 9-10 December 2016

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Title ■ Economic and Social Development (Book of Proceedings), 18th International Scientific Conference on Economic and Social Development – “Building Resilient Society”

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Publishing Editor ■ Domagoj Cingula

Publisher ■ Design ■ Print ■ Varazdin Development and Entrepreneurship Agency, Varazdin, Croatia
University North, Koprivnica, Croatia
Faculty of Management University of Warsaw, Warsaw, Poland

Printing ■ Online Edition

ISSN 1849-7535

The Book is open access and double-blind peer reviewed.

Our Books are indexed and abstracted by ProQuest, EconBIZ, CPCI (WoS) and EconLit databases and available for download in a PDF format from the Economic and Social Development Conference website: <http://www.esd-conference.com>

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CONTENTS

Karim Sabri ■ A COMPARISON OF PRODUCTIVITIES OF THE NORTH AFRICAN RAILWAYS NETWORKS BASED ON THE INDEX OF MALMQUIST.....	1
Andrzej Skibinski, Monika Sipa, Malgorzata Okreglicka ■ THE LABOUR MARKET IN THE FACE OF DEMOGRAPHIC AGEING IN THE SELECTED COUNTRIES OF CENTRAL AND EASTERN EUROPE.....	10
Armand Krasniqi ■ CHARACTERISTICS OF THE FINANCIAL MARKET FUNCTIONING WITHOUT A LEGAL BASIS - THE CASE OF KOSOVO.....	21
Daria Benz, Elena Silova ■ CONTRADICTIONS BETWEEN THE SUBJECTS OF THE CONTRACTUAL RELATIONS IN THE REGIONAL AGRARIAN SECTOR.....	28
Barbara Doric, Dinko Primorac, Goran Kozina ■ THE NECESSITY OF ONLINE AND OFFLINE SALES INTEGRATION.....	39
Luciano Fanti, Domenico Buccella ■ BARGAINING AGENDA IN PUBLIC AND PRIVATE MONOPOLY.....	51
Jan Janac ■ LIBERALIZATION OF MOTOR THIRD PARTY LIABILITY INSURANCE AND ITS IMPACT ON THE INSURANCE MARKET OF SERBIA.....	63
Karim Sabri ■ MULTIPLE CRITERIA PERFORMANCE ANALYSIS: THE COMPARISON OF TELECOMMUNICATIONS SECTORS IN NORTH AFRICA.....	71
Aleksandra Grobelna, Katarzyna Skrzyszewska ■ DETERMINANTS OF A CAREER PATH CHOICE BY GENERATION Y: THE MARITIME UNIVERSITY STUDENTS' PERSPECTIVE.....	82
Lahyani Khalid, Tayeb Biad, Moulay Sadik Maliki ■ INFORMAL ECONOMY AND THE FEAST OF SACRIFICE: INFORMAL JOBS SPECIFIC TO THE SACRIFICE RITUAL OF EID ELKEBIR IN CASABLANCA.....	92

Monika Davidekova, Michal Gregus ■ CASE STUDY OF THE USE OF MEANS OF INFORMATION AND COMMUNICATION TECHNOLOGY FOR EXECUTION OF DAILY BUSINESS OPERATIONS BY ENTREPRENEURS IN SLOVAK REPUBLIC.....	98
Monika Rostarova, Katarina Rentkova ■ INVESTMENT CRITERIA OF THE SUCCESSFUL START-UP ACCELERATORS.....	109
Muhammet Deveci, Nihan Cetin Demirel ■ A HYBRID GENETIC ALGORITHM FOR AIRLINE CREW PAIRING OPTIMIZATION.....	118
Ornella Jadreskic, Ljerka Cerovic, Alemka Segota ■ GAME THEORY AND ITS APPLICATION IN ANALYSIS OF RELATIONSHIP BETWEEN EDUCATIONAL SYSTEM AND LABOUR MARKET.....	125
Sime Vucetic ■ ONLINE PROMOTION OF SMALL HOTELS OF THE ADRIATIC REGION IN CROATIA.....	131
Sonila Xhafa, Albana Kosovrasti ■ ENVIRONMENTALISM IN ALBANIA: LEGAL AND INSTITUTIONAL MANAGEMENT OF ENVIRONMENTAL PROBLEMS.....	142
Ali Naci Karabulut, Zeki Atil Bulut ■ EXTENDING OUR UNDERSTANDING OF CONSUMERS' eWOM BEHAVIOR: GENDER AND GENERATION DIFFERENCES.....	154
Marija Ham, Ana Pap, Karla Bilandzic ■ PERCIEVED BARRIERS FOR BUYING ORGANIC FOOD PRODUCTS.....	162
Ana Andrade, Rosa Martins, Joao Duarte, Madalena Cunha, Helena Moreira ■ EMOTIONAL INTELLIGENCE OF THE ELDERLY: THE RELEVANCE OF THE SENIOR UNIVERSITIES.....	175
Asli Ozpolat, Ferda Nakipoglu Ozsoy ■ THE RELATIONSHIP BETWEEN FINANCIAL DEVELOPMENT AND HUMAN DEVELOPMENT IN OECD COUNTIRES: A PANEL CAUSALITY TEST.....	181

Bacila Mihai-Florin, Pop Ciprian-Marcel, Ciornea Raluca ■ UNDERSTANDING STUDENTS' EXPECTATIONS OF HIGHER EDUCATION AS A VALUABLE ROUTE FOR MAINTAINING UNIVERSITIES' ROLE OF PILLAR FOR ECONOMIC DEVELOPMENT: A LONGITUDINAL RESEARCH IN ROMANIA.....	191
Filiz Cayiragasi, Gulsum Gunbala Guven, Asli Ozpolat ■ THE EFFECT OF CORPORATE SOCIAL RESPONSIBILITY ON FIRM PROFITABILITY: A PERSPECTIVE OF ECONOMICS, BUSINESS AND LAW.....	206
Bartlomiej Krzeczewski ■ THE PROBLEM OF LIQUIDITY MANAGEMENT IN HOSPITAL AND ITS IMPACT ON PROFITABILITY.....	215
Branislav Bojanic, Boris Miletic, Zivko Kondic ■ COST OPTIMISATION OF SPARE PARTS INVENTORY IN TECHNICAL SYSTEMS MAINTENANCE PROCESSES.....	224
Mihaela Braut Filipovic, Morana Derencinovic Ruk, Nikolina Grkovic ■ ALTERNATIVE INVESTMENT FUNDS AND THEIR ROLE IN PORTFOLIO COMPANIES – STATE OF ART IN CROATIAN LAW AND PRACTICE.....	234
Can Kose, Ulvi Cenap Topcu ■ INNOVATION MEASUREMENT REVISITED: COMPARISON OF THREE MAIN MEASURES.....	245
Volkan Yuncu, Celil Koparal ■ A THEORETICAL REVIEW OF A TERMINOLOGICAL CONFUSION: CHARACTER, IDENTITY, IMAGE OR REPUTATION?.....	254
Libena Cernohorska, Vojtech Kula ■ DOES A RELATIONSHIP EXIST BETWEEN THE DEVELOPMENT OF THE BANKING SECTOR AND THE ECONOMIC GROWTH OF EUROZONE?.....	262
Conceicao Martins, Sofia Campos, Joao Duarte, Rosa Martins, Daniel Silva, Claudia Chaves ■ HEALTH LITERACY AMONG DIALYSIS PATIENTS.....	270
Cristina Stroe, Silvia Florina Cojanu, Andreea Cambir ■ THE GUARANTEED MINIMUM INCOME IMPACT ON POVERTY REDUCTION IN ROMANIA AND SOME SCENARIOS REGARDING THE EMPLOYMENT ACTIVATION PRESENTED INTO THE LAW.....	276
Damir Ribic, Iva Ribic ■ SOCIAL ENTREPRENEURSHIP.....	287

Danijela Vrbljanac, Ivana Kunda ■ CONSUMER PROTECTION ISSUES IN CROWDFUNDING.....	299
Dinko Primorac, Sandra Sokcevic, Helena Slogar ■ EXPORT COMPETITIVENESS OF THE CROATIAN ECONOMY.....	310
Dorota Bednarska-Olejniczak ■ INNOVATIVENESS IN THE POLISH FINANCE SERVICES SECTOR.....	323
Eleonora Matouskova ■ UNEMPLOYMENT AS FACTOR OF INTERNATIONAL MIGRATION.....	332
Anita Freimann, Josipa Mijoc, Sanja Stefanac ■ THE IMPACT OF SOCIO-DEMOGRAPHIC CHARACTERISTICS ON LIFE SATISFACTION AND HAPPINESS.....	338
Chanyapat Sangsuwon, Ammara Ittipongse ■ THE LACK OF AWARENESS OF USING SKIN WHITENING COSMETICS: IN CASE OF WOMEN IN BANGKOK, THAILAND.....	349
Gordana Dukic, Darko Dukic, Neven Bertovic ■ THE IMPACT OF INFORMATION AND COMMUNICATION TECHNOLOGIES ON PUBLIC ADMINISTRATION MANAGERS AND THEIR WORK.....	353
Hassan Kian ■ SEVEN LAWS OF THE MACRO-ECONOMIC MOVEMENT.....	363
Ines Milohnic, Ivana Licul, Jelena Andjelic ■ THE IMPORTANCE OF EVENT IMPACTS IN THE TOURIST DESTINATION.....	373
Iwona Gorzen-Mitka, Andrzej Skibinski, Anna Lemanska-Majdzik ■ ASSESSMENT OF ACTIVITY OF UNITS ENGAGED IN AN BUSINESS ACTIVITY IN EUROPEAN UNION BY MULTI-OBJECTIVE EVALUATION METHOD.....	383
Hrvoje Katunar, Jana Katunar, Branka Crnkovic Stumpf ■ INTER-SECTORAL ANALYSIS OF FINANCIAL BEHAVIOR OF MEDIUM SIZED ENTERPRISES IN CROATIA.....	392

Jaroslaw Olejniczak ■ FISCAL TRANSFERS TO LOCAL GOVERNMENT UNITS IN POLAND.....	402
Jaruwan Chutrtong ■ ACTIVITY BEYOND CLASSROOM ENHANCE UNDERSTANDING OF SCIENCE.....	412
Magdalena Jasiniak ■ THE IMPACT OF THE METHOD OF FINANCING MERGERS AND ACQUISITIONS ON THE EFFICIENCY OF THE PROCESS.....	417
Katarina Rentkova ■ DEVELOPMENT OF REGIONS AND MUNICIPALITIES OF THE SLOVAK REPUBLIC BY APPLICATION OF EUROPEAN COHESION POLICY	426
Jakub Keller ■ ARE BROKERAGE RECOMMENDATION RELIABLE? THE EXAMPLE OF M&A TRANSACTIONS ON POLISH STOCK EXCHANGE MARKET	436
Cezary Klimkowski ■ THE COMMON AGRICULTURAL POLICY AND FARMERS' INCOME CONVERGENCE IN THE EUROPEAN UNION.....	447
Veljko Kondic, Sandra Cvetko, Marko Horvat ■ VIEW ON COST ASPECTS OF QUALITY OF TECHNICAL SYSTEMS.....	457
Kunyanuth Kularbphetong, Satian Janpla, Udomlux Ampant ■ THE RECOMMENDER SYSTEM FOR SELECTING USED CARS.....	463
Zivko Kondic, Boris Miletic, Branislav Bojanic ■ COST OF (POOR) QUALITY.....	469
Kunyanuth Kularbphetong, Praewphan Danchaiyaphuma, Udomlux Ampant ■ DEVELOPING OF E-LEARNING SYSTEM FOR THAI CUISINE.....	480
Liga Leitane, Inara Brante, Larisa Bule ■ THE COMPANY'S FINANCIAL SITUATION IN THE PREVENTION OF RISK FACTORS RAIDERISM.....	487
Laura Juznik Rotar ■ TOWARDS EVIDENCE-BASED POLICY MAKING IN EVALUATING THE EUROPEAN COHESION POLICY PROGRAMME.....	492

Lik-Jing Ung, Rayenda Brahmana, Chin-Hong Puah, Chee Wooi Hooy ■ DIVESTITURE, CORPORATE PERFORMANCE AND OWNERSHIP EXPROPRIATION: EVIDENCE ON MALAYSIA PUBLIC-LISTED COMPANIES.....	507
Maria Bohdalova, Michal Gregus ■ DO EU STOCK MARKETS BEHAVE LIKE GLOBAL STOCK MARKET?.....	523
Lik-Jing Ung, Rayenda Brahmana, Chin-Hong Puah ■ DOES CORPORATE RETRENCHMENT GAIN VALUE? A STUDY FROM MALAYSIA.....	533
Jerzy Rembeza, Grzegorz Przekota, Maria Klonowska-Matynia, Kamila Radlinska ■ RELATIONS OF UNEMPLOYMENT ON THE METROPOLITAN AND SUBURBAN LABOUR MARKETS IN GERMANY, POLAND AND SPAIN.....	555
Marina Malkina ■ ASSESSMENT OF INTER-REGIONAL CONVERGENCE IN THE SOCIAL WELFARE BASED ON THE A. SEN FUNCTION: RUSSIAN CASE STUDY.....	563
Michal Gregus, Sona Davidekova ■ CASE STUDY OF THE PERCEIVED ADVERSE EFFECTS OF THE USE OF MOBILE INFORMATION AND COMMUNICATION TECHNOLOGY MEANS IN BUSINESS PRACTICE IN SLOVAK REPUBLIC.....	573
Karlygash Mukhtarova, Saule Kupeshova, Marta Abdykalykova, Ernur Mukhtar ■ THE ROLE OF GOVERNMENT IN THE DEVELOPMENT OF INNOVATIVE ACTIVITY IN THE REPUBLIC OF KAZAKHSTAN.....	583
Natasa Vrh ■ PAY-OFF TO PARTICIPATION IN GLOBAL VALUE CHAINS: HOW MUCH ARE NEW EU MEMBER STATES LAGGING BEHIND THE REST OF EU COUNTRIES IN TERMS OF DOMESTIC VALUE ADDED IN EXPORTS?.....	592
Onur Dogan, Zeki Atil Bulut ■ TURKISH FACEBOOK USERS: EXPLORING DIFFERENCES AND DETERMINING USEFUL ASSOCIATION RULES.....	602
Osman Murat Telatar ■ THE EFFECTS OF FOREIGN PORTFOLIO INVESTMENTS ON TURKISH ECONOMIC GROWTH: A NONLINEAR APPROACH.....	612
Aleksandar Ostojic, Helena Slogar, Kresimir Jerin ■ ENVIRONMENT FOR SME SECTOR IN CROATIA WITH EMPHASIS ON INNOVATION.....	619

Rosa Martins, Rosario Silva, Ana Andrade, Conceicao Martins, Sofia Campos ■ PROFESSIONAL SATISFACTION OF PORTUGUESE SPECIALIZED REHABILITATION NURSES.....	629
Polona Sprajc, Iztok Podbregar ■ MULTICULTURAL ISSUES IN THE WORKPLACE.....	636
Radoslaw Pastusiak ■ EXCESSIVE OPTIMISM IN COMPANY’S VALUATIONS.....	644
Raushan Dulambaeva, Rustem Orazalin, Oleg Bordousov, Aigul Tazabekova ■ ASSESSING THE COMPETITIVENESS OF KAZAKH ECONOMY: DOES INDUSTRIAL-INNOVATIVE STRATEGY IMPROVE THE COMPETITIVENESS?.....	653
Rizwan Mushtaq, Catherine Bruneau ■ MICROFINANCE, FINANCIAL INCLUSION AND ICT: IMPLICATIONS FOR POVERTY AND INEQUALITY.....	663
Sipa Monika, Skibinski Andrzej, Okreglicka Malgorzata ■ BARRIERS FOR COOPERATION BETWEEN SMALL ENTERPRISES AND THEIR ENVIRONMENT. THE CONTEXT OF INNOVATIVENESS POLISH SMALL ENTERPRISES.....	687
Tamara Floricic ■ COMPREHENSION OF INNOVATIVE SOLUTIONS IN HOSPITALITY INDUSTRY.....	695
Tamara Obradovic Mazal, Vlatka Butorac Malnar ■ BURDEN SHARING PRINCIPLE IN RESCUE AND RESTRUCTURING – NO PAIN, NO GAIN -.....	705
Taras Hrendash ■ CLUSTER IDENTIFICATION IN SPATIAL NETWORKS OF INNOVATORS.....	716
Ticijan Perusko ■ ACCOUNTING INFORMATION FOR IMPROVEMENT OF THE PROCESS OF SUPPLY COST PLANNING IN LIFE INSURANCE.....	727
Tsotne Zhghenti ■ FORMAL AND INFORMAL MONETARY INSTITUTIONS IN TRANSITION – THE CASE OF GEORGIA.....	736

Magdalena Tusinska ■ FINDING PRO-GROWTH INCOME INEQUALITY: MISSION IMPOSSIBLE?.....	742
Ulvi Cenap Topcu ■ COMMODITY SHINES IDENTITY: AN ANALYSIS OF CONSPICUOUS CONSUMPTION IN RELATION TO SELF-IMAGE CONGRUENCE AND MATERIALISM.....	750
Vakhtang Chkareuli ■ IMPACT OF ECONOMIC FREEDOM ON REAL GDP GROWTH - EMPIRICAL STUDY (CASE OF GEORGIA).....	757
Veronika Linhartova, Eva Zidova ■ CORRUPTION AS AN OBSTACLE TO ECONOMIC GROWTH OF NATIONAL ECONOMIES.....	772
Walaa W. Diab, Baher Atlam, Nadia El Nimer ■ A CRITICAL LITERATURE SURVEY OF THE MACROECONOMIC EFFECTS OF FISCAL POLICY IN LIGHT OF RECENT EMPIRICAL EVIDENCE.....	781
Zeljko Mirjanic ■ ROLE OF SOCIAL PARTNERS IN PROTECTING AN EMPLOYED WHISTLEBLOWER AS AN ELEMENT OF SOCIAL DEVELOPMENT.....	791

BURDEN SHARING PRINCIPLE IN RESCUE AND RESTRUCTURING – NO PAIN, NO GAIN -

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Following the adoption of the new Commission's Guidelines on rescue and restructuring, the authors look closer into the principle of burden sharing to contextualize the impact of implementation of the Guidelines in practice, given the case law at hand. The stringent rules of rescue and restructuring of firms in difficulties provide the opportunity and chance to give them economic, production and employment rise where assessed viable and necessary. Yet, although welcoming the introduction of the burden sharing as a largely positive principle, the authors feel there is a space to (re)consider the proportionality of burden sharing principle, its limits as well as the effect. The rightful expectation of the State is to “cash in” the original investments by taking over debt-to-equity principle, thus being represented through ownership and accumulating all the owner’s rights as per national company’s law and other binding legislation, dependant on the Member state in question. The authors question the extent at which the State, firstly, enters the firms by assuming equity and, secondly, exercises its owner’s right with(out) the political context.

Keywords: *Burden sharing, firm in difficulty, restructuring aid, state aid*

1. INTRODUCTION

The Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulties was introduced in July 2014¹ (hereinafter: the R&R Guidelines) as part of the overall State aid modernization process². State aid represents a public expenditure; thus the R&R Guidelines aim at ensuring that its spending is effective and presents an investment for future, based on a *return on investment* principle. The novelties introduced embrace better targeting of aid, the burden sharing principle, temporary restructuring aid for SMEs as well as further elaborated principles of own contribution, all leading to tax payers having a fair share of the rescue and restructuring process. Since its adoption in 2014, the R&R Guidelines received limited attention by legal scholars.

Some authors focused on R&R economic aspects and balancing test,³ whilst others explored its economic significance through the lens of the discretionary character of rescue and restructuring.⁴

¹ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014, p.1

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid modernisation (SAM), COM(2012) 209 final.

³ Frank Maier-Rigaud, Christopher Milde, 'The Rescue and Restructuring Aid Guidelines of the European Commission: An Economic Point of View' (2015) 38 World Competition, Issue 2, pp. 189–213

M. A. Bolsa Ferruz, P. Nicolaidis, An Economic Assessment of State Aid for Restructuring Firms in Difficulty: Theoretical Considerations, Empirical Analysis and Proposals for Reform, World Competition 37, no. 2 (2014)

⁴ Ramona Ianus and Massimo Francesco Orzan, Aid subject to a discretionary assessment under Article 107(3) TFEU in Hoffman, Micheau, State Aid Law of the European Union, Oxford University Press, 2016

Yet there is an important issue that has not caught sufficient attention- the principle of burden sharing. In essence, the burden sharing represents a contribution to restructuring costs by firm’s denouncement of its future profit in favour of the State. The principle of burden sharing has been introduced in 2014 R&R Guidelines following its successful application across the financial sector.⁵ Amongst the instruments used⁶, the Commission applied a burden sharing principle in order “*to curtail as much as possible moral hazard in the future.*”⁷ The Commission highlighted that the restructuring process has been overall effective when looking at all of the measures implemented during the application of the temporary State aid to financial sector.⁸ The Commission did not single out the burden sharing principle as the main factor of restructurings’ effectiveness, which is understandable considering that an overall effect of a restructuring process is dependent upon all individual factors combined. However, the fact remains that following this success, the 2014 R&R Guidelines introduced, *inter alia*, the principle of burden sharing as a benchmark criterion for awarding R&R aid to firms in difficulty across sectors.

The authors explore this policy choice by evaluating the probability of achieving equal success in other sectors. One may argue that due to the fact that burden-sharing principle entails additional commitments to already heavily committed firms in difficulty, its application should not be the norm. In other words, that it is justifiable only in times of crisis as a one-off measure suited to particular characteristics of the financial sector, its importance to the overall economy and the states’ vulnerability as aid grantor. The authors contend that this newly introduced principle actually ensures the right balance between legitimate interests of the state and interests of state aid beneficiaries and is likely to bring about crucial benefits to the restructuring process outside the financial / banking sector as well. Applied burden sharing principle may in fact keep the recipient firms in more discipline implementing the “wish lists” under their restructuring plans, having the State waiting for its rightful “cut” in the gain at the end of the process. In addition, the authors advance the opinion that the attainment of the *return on investment* principle rests primarily on the burden sharing principle. Its application is likely to incite an evolution of the traditional understanding of state aid concept: it may transform the role of the

⁵ In response to the financial crisis that hit in the mid-2008, Member States allocated state aid to rescue banking sector at 10% GDP overall. To restore the financial market and ease the overall effects of the crisis, the Commission adopted several temporary instruments enabling Competition policy to become a legitimate tool at the disposal of national governments, central banks and European Central Bank in their fight against the crisis.

⁶ 10.07.2013 - 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")

(This Communication replaces the 2008 Banking Communication and supplements the remaining crisis rules.)

01.12.2011: Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, Official Journal C 356, 6.12.2011, p. 7

01.06.2011 - DG Competition Staff Working Document - The application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2011

01.12.2010: Communication from the Commission on the application, after 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis Official Journal C329, 7.12.2010, p.7

18.05.2010 – DG Competition staff working document – The application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010 (30 April 2010)

23.07.2009 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

25.02.2009 Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector, Official Journal C 72, 26.03.2009, pages 1-22

05.12.2008 - Commission Communication Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition. Adopted on 5 December 2008, Official Journal C 10, 15.1.2009, p. 2-10

⁷ 05.10.2011: DG Competition staff working document – The effects of temporary State aid rules adopted in the context of the financial and economic crisis, SEC(2011) 1126 final

⁸ *ibid*

state from a benefactor trying to “attain particular economic and social objectives”⁹ to an investor likely to have direct returns of its investment and thus its introduction should be welcomed. Yet, the role of the State may have its negative side; the authors thus question the qualitative exercise of investor’s rights enabling the State to go beyond the reasonable owner’s/equity/shareholder’s right but also set forth the question of the State’s withdrawal from the firm.

In order to present their arguments in a clear and coherent manner, the authors first analyse the notion of burden sharing as applied to the financial sector and identify its content in the 2014 R&R Guidelines (Section 2). The application of the burden sharing principle following the 2014 R&R Guidelines is analysed and evaluated through a case study of Polzela d.d. Given the fact that the restructuring plans following the 2014 R&R Guidelines have not been fully implemented yet, the authors will limit themselves to identifying open questions and potential perils that may emerge in its ex post implementation. (Section 3). Concluding remarks are offered last (Section 5).

2. 2014 GUIDELINES ON RESCUE AND RESTRUCTURING – THE BURDEN SHARING PRINCIPLE – *back to business*

2.1. Burden sharing principle in the banking sector

The quick reaction by the Commission in response to the financial crises came in the form of a Banking communication¹⁰ outlining the principles by which the State aid should be awarded. The Commission also sought to ensure that the aid awarded by the State was clear and limited in its scope, i.e. restricted only to what was needed to overcome the acute financial crises without providing a misused and unjustifiable benefit for bank shareholders/owners. The Restructuring Communication of 22 July 2009¹¹ provided a framework for the use of State aid in course of bank restructuring process in time of crisis. These rules, together with the three previous Communications on banking, recapitalisation and impaired assets¹², offered guidelines how to assess different support measures to banks during the financial crisis. The Restructuring Communication outlined conditions to be fulfilled in order for assistance to be compatible with State aid rules so as to ensure the return to viability without further State aid.¹³ Participation in own restructuring process by beneficiaries of State aid was necessary to restore the balance between the crisis, short-term financial difficulties and the principles of Internal market financial services.¹⁴ Thus, the burden sharing principle required from banks to contribute to the

⁹ Bellamy&Child, European Union Law of Competition, 7th ed., Rose V, Bailey D.(eds.), Oxford University Press, 2015, p. 1275, para 17.010.

¹⁰ Communication from the Commission on The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8)

¹¹ Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, Official Journal C 195, 19.8.2009, pp. 9-20

¹² Communication from the Commission — *ibid* 7

Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition, Official Journal C 10, 15.1.2009, pp. 2-10.

Communication from the Commission on the treatment of impaired assets in the Community banking sector, Official Journal C 72, 26.3.2009, pp. 1-22.

¹³ *Ibid*. The overall goal of the Restructuring Communication was to ensure the return to viability of banks, limit the restructuring aid to needed minimum and ensure that banks participate in cost of restructuring through their own resources and limit the distortion of market competition by imposing on state aid beneficiaries’ measures of divestments, behavioural measures and / or temporary restrictions of acquisitions via publicly allocated resources.

¹⁴ Former Vice President of the Commission and Commissioner for Competition Joaquin Almunia addressing State aid law and banks, addressed his opinion on the subject to have believed „...that... institutional shareholders

restructuring costs. The goal was to ensure that a restructured bank pays for the aid received once it returned to viability. The sharing of the burden or, better said, paying back what they received in the time of crisis, consisted of restrictions of payment of dividends, coupons on hybrid capital by loss-making banks or, where not immediately possible, claw-back clauses foreseen in the restructuring plan(s). Where banks were not providing restructuring plans, they needed to present their viability plans that did not contain the burden sharing principles.¹⁵ As explained by Bomhoff, Jarosz-Friis and Pesaresi, proper burden sharing is meant to solve the problem of moral hazard, by “requiring the firm, its shareholders and hybrid capital holders...to pay as much as possible for the State intervention. This can take the form of a high price for recapitalisations, the level of first loss and remuneration paid for impaired assets reliefs or, more lasting, bans or limitations on coupon payments on hybrid capital.”¹⁶

To illustrate the necessity of burden sharing principle, let us look at the Commission’s decision on *Italian Banca Tercas*¹⁷ where the Commission concluded that the aid provided to Banca Tercas by mandatory depositary scheme was not compatible with state aid rules. The Commission concluded that no restructuring plan was provided and that the burden sharing was not respected along with the limitations to distortion of market competition.¹⁸ The Commission found that the burden to be shared on the part of the Bank and its capital holders have not sufficiently contributed to the perspective restructuring plan of the Bank for aid received to be accountable for. Contrary to this example, amongst many decisions taken during the financial crisis¹⁹, the Commission e.g. took the decision not to raise objections to *Belgian KBC*²⁰ amendments to restructuring plan that included the introduction of an incentive structure to asset relief measure (the State Protection Measure) to encourage KBC, subject to strict conditions, to reduce the exposure of the Belgian State to the assets covered by the portfolio. On burden sharing principle, the Commission established that “...*despite the possible fee reduction, KBC still pays remuneration for the SPM (i.e. the Cash Range) that substantially exceeds the minimum required by the Commission for an asset relief, by around EUR [...]*”

should be held responsible for their mistakes or their reckless risk taking. “Speech/11/62, “Landesbanken and the EU competition rules”, 9th Handelsblatt annual conference Strategies for Savings Banks and Landesbanken, Berlin, 2 February 2011, pp. 5 et seq.

¹⁵ Where banks received a limited amount of aid whereas they were in fact basically sound, they were not required to provide other than the information on their viability and have their business plan reviewed/evaluated to demonstrate their capital adequacy and risk profile.

¹⁶ Andrea Bomhoff, Anna Jarosz-Friis, Nicola Pesaresi, Restructuring banks in crisis — overview of applicable State aid rules, Competition Policy Newsletter – found at: http://ec.europa.eu/competition/publications/cpn/2009_3_1.pdf

¹⁷ Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) (notified under document C(2015) 9526), Official Journal L 203, 28.7.2016, p. 1–34

¹⁸ Ibid – point 188, p. 27. Amongst all the findings, the Commission concluded the following: “*The only form of aid similar to a grant in the 2013 Banking Communication is aid for recapitalisation. However, recapitalisation requires a number of compatibility criteria to be fulfilled: there must be: (i) a capital raising plan, outlining all possibilities available for the bank in question to raise capital from private sources, (ii) a restructuring plan that will lead to the restoration of the viability of the financial institution, (iii) a sufficient contribution on the part of the beneficiary itself, with holders of capital and subordinated debt instruments contributing as much as possible (burden-sharing), and (iv) measures sufficient to limit the distortion of competition. While a capital raising plan may have been implemented by Tercas's[...], the Commission has not been provided with evidence that the compatibility requirements described here have been met.*”

¹⁹ Overview of decisions and on-going in-depth investigations of Financial Institutions in Difficulty, Memo by the European Commission, Brussels 01.01.2016. – found at http://ec.europa.eu/competition/recovery/banking_case_list_public.pdf

²⁰ Decisions in the context of the monitoring of the implementation of decisions regarding restructuring and liquidation aid for financial institutions Text with EEA relevance OJ C 135, 9.5.2012, p. 5–5

billion. The own contribution by KBC in that regard remains considerable.”²¹ Based on all the findings as well as the limited period of extension of the measures, the Commission has established that KBC would be able to complete the divestment of the businesses by determined date and that the divestments of Kredyt Bank and KBC Banka are compatible with the Internal market.²²

In 2013, the Commission has adapted its temporary state aid rules²³ for assessing public support to financial institutions during the crisis. The Commission's experience with the rescue and restructuring of financial institutions during the financial and economic crisis has shown that specific rules applicable to the financial sector can be beneficial in view of the specific characteristics of financial institutions and financial markets.²⁴ If the requirement imposed on banks to return to their viability withholding a part of the profit on account of being saved by public money worked for the financial sector, why not apply the same for the non-financial? Until 2014, public money was allocated to restructure firms in difficulty for the sake of regional significance, social hardship and redundancies as well as sectoral significance without expecting gain in return. The only “punishment” for receiving good money for bad decisions was to contribute by having the firm close down a part of its production line, limit its market or close some of its subsidiaries. Why would not a State go further and have its good money put in a firm and possibly gain profit from future viability?

2.2. Firms in difficulty – sharing the burden of the past to benefit in future

Firms that find themselves in difficulty have different options at hand; they can either explore “market” options to overcome their difficulties by negotiating with their creditors, downsizing their operations or go through a bankruptcy proceeding. They could as well turn to State for resources in form of rescue and restructuring aid. By resorting to these types of aid, the firms in difficulties are essentially given another »go« at trying to sustain their difficulties, overcome them and continue operating at the level playing field – with a price to pay. They have to abide to stringent rules of 2014 R&R to mitigate the risk of competition being distorted by giving them unlawful market advantage over their competitors.²⁵

²¹ Letter to the Member State, State aid no. SA.29833 (MC11/2009) – Belgium KBC – Accelerated phasing-out of the State Protection Measure and amendments to the KBC's restructuring plan, Brussels, 20.12.2012 C(2012) 9888 final

²² Between October 2008 and end 2010, the Commission adopted 26 decision on financial institutions restructuring thus approving the restructuring plans and making them binding upon the beneficiaries. Four banks ended up in a formal liquidation process, the remaining continued with the restructuring process and another 25 banks submitted their restructuring plans during 2011. Commission's data show that its decisions covered 60 institutions; by September 2013, the Commission adopted decisions approving a restructuring plan for 44 banks, 23 approving winding down plans and one negative decision requiring the recovery of the aid granted. (15.10.2013 European Commission Memo, State aid: Commission adapts crisis rules for banks - frequently asked questions)

²³ 10.07.2013 - 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. The novelties strengthened the burden sharing principle by requiring the banks to develop a sound plan for their restructuring or orderly winding down before they can receive recapitalisations or asset protection measures. In addition, when and if they were facing capital shortfalls, bank owners and junior creditors were required to contribute before additional state aid was awarded as a form of public funding.

²⁴ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014, point 17

²⁵ Just by looking at the latest State Aid Scoreboard 2015, the Member states provided information on expenditure allocated via state aid instruments by end 2014. The total expenditure amounts to 101.2 billion EUR i.e. 0.72% of GDP on state aid. This figure includes aid provided for the financial sector, railways and services of general economic interest. Looking at state aid allocated under rescue and restructuring, on the level of the EU 28, the R&R expenditure is €651.1 mil. Thus, the financial effect plays a significant role in setting of the rescue and restructuring correctly.

As in previous version(s) of the Guidelines²⁶, the 2014 R&R Guidelines foresee rescue aid and restructuring aid²⁷ with the difference of a temporary restructuring support (for SME and smaller State-owned enterprises) introduced in 2014. When it comes to restructuring aid, it needs to be limited to the necessary and argued minimum to secure the implementation of the restructuring plan and its overall desired effect. If the State is awarding aid in form of debt write off, capital or grants to the firm in difficulty, such a move may bring it into a more favourable position in the market and distort the position of its competitors. Thus, the restructuring plan must include a number of measures to mitigate that risk and make the firm adopt painful decisions in order to proceed further.²⁸ Therefore, all the restructuring plans must, amongst others, contain own contribution to restructuring and as of 2014 R&R Guidelines, the burden sharing principle.

Own contribution may take different forms but what represents a common denominator is that is normally as high as 50% of the total restructuring cost and its source is either own (re)sources free of State aid. It is expected that the beneficiary of restructuring aid participates in the overall costs by its own finances, debt-to equity conversion or e.g. raising fresh equity. What is necessary is that the own contribution results nor from future profits neither from State aid to be received but to be the result of present activities, significant and real.

On the other hand, burden sharing assumes that the beneficiary has accounted for all the losses and is ready to, once the restructuring plan has been implemented fully and the firm has regained its viability, pay back the State aid from the future profit. This way a balance is established between the State giving aid and the firm receiving it; both are in the process together and both have a vested interest to see the process succeed. One may identify the State as the investor, the aid as an investment and burden sharing as return on the investment. The State acts as an investor by awarding aid into a “promising” beneficiary, expecting some of the investment made to be returned in form of gain for the State.²⁹ From the point of view of the investor, the State has an interest to oversee the restructuring process via the corporate bodies under the company law to make sure its investment is protected by sound management decision thus, its return on investment secured.

Let us look at a concrete recent example of how a listed company that found itself in difficulty responded to challenge by applying the R&R Guidelines. Slovenia notified restructuring aid to

²⁶ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12).

Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 283, 19.9.1997, p. 2).

Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

Commission Communication concerning the prolongation of the Community Guidelines on State aid for rescuing and Restructuring Firms in Difficulty (OJ C 156, 9.7.2009, p. 3).(6)

Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing andrestructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3).

²⁷ Rescue aid is an urgent and temporary measure that helps the firm keep up whilst the liquidation or the restructuring plan is being prepared. It is limited in its duration to financially and temporarily assist the firm to look at its difficulties, their source and come about them appropriately. Restructuring aid has a different character; it assists the firm in difficulty through an elaborated, time-limited but longer plan to overcome its difficulties and return to viability. Temporary restructuring support is liquidity assistance, providing financial support to the (SME) firm in difficulty whilst working out on conditions to bring it back to viability.

²⁸ For details on content of a restructuring plans, see Annex II of the Guidelines

²⁹ “...any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for.”Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014, point 67

Polzela d.d.³⁰ whereas the notification was made preceded by the granting of a rescue aid which the Commission has previously approved on 23 June 2014³¹. In 2014, the Court imposed a compulsory settlements procedure whereby a Financial restructuring plan³² was a key element as it had set out the agreed terms of restructuring. The compulsory settlement resulted in Slovenian state holding 30.42% of Polzela d.d. The Restructuring plan encompassed several measures: 1) Conversion of claims into share capital, 2) Rescheduling of financial claims of banks and claims by the State for taxes and contributions, 3) The write-off of 50% of operating liabilities, 4) Disposal of non-operating assets, 5) A state loan of €800.000,00 by Ministry of Economic Development and Technology per 7 years and 6) A state guarantee of € 500.00,00 by Ministry of Finance. The Commission examined all measures against the content and requirements of the R&R Guidelines; it has also examined the Restructuring plan against the eligibility, objectives of common interest, social hardship or market failure, return to the long-term viability of Polzela d.d., the need for State intervention, the incentive effects, proportionality of the aid, own contribution to the restructuring from Polzela d.d.’s own resources, the application of the principle of burden sharing and negative effects of the aid and the overall balance. Polzela d.d. had to share the burden of its restructuring; as a result of the conversion, reprogramming and partial write-off of their claims under the compulsory settlement, the existing creditors have incurred losses on their financial exposure towards Polzela as they will not recover a substantial part of their original receivables. Following the conversion, the Republic of Slovenia acquired 30.42 % of the Company and thus would have a share in any future gains in value of Polzela. The Commission considered that the restructuring aid ensured an adequate level of burden sharing by the shareholders and creditors of Polzela, is in compliance with the R&R Guidelines. To make sure the competition was not distorted, Polzela d.d. had to ensure that appropriate measures have also been undertaken whilst the restructuring aid is used. Hence, Polzela d.d. agreed to undertake certain behavioural as well as structural measures.³³ Having examined the facts provided by Slovenia, the Commission has decided not to raise objections to the restructuring aid to Polzela d.d. on the grounds that it was compatible with the Internal market pursuant to Article 107(3) of the TFEU. The result of the restructuring plan and the overall success yet remains to be seen: the restructuring process and the implementation of the restructuring plan lasts until end 2017. By then, Polzela d.d. is obliged to provide semi-annual reports on the progress made in terms of realising the amounts designated as own contribution and annual reports on the overall implementation.

³⁰ Commission Decision of 12 May 2016 on the State aid SA. SA.40419 – Restructuring aid for Polzela d.d., OJ C 258, 15.07.2016. Polzela, operating in textile sector, manufacturing and distributing socks and stockings, in years prior to the Commission’s decision, experienced severe financial difficulties whereby the losses reported amounted to €1.7 million in 2014, €3.0 million in 2013, €1.7 million in 2012 and €4.6 million in 2011. The problems mainly resulted from liquidity issues and overall indebtedness.

³¹ Commission Decision of 23 June 2014 on the State aid SA.38631 – Rescue aid for Polzela d.d., OJ C 280, 28.06.2014.

³² The Plan was examined by an independent reviewer and it was concluded that Polzela d.d. was insolvent yet that there is more than 50% probability that the implementation of the Plan would enable the restructuring to take place bringing Polzela d.d. again to the liquidity and solvency in the determined period of time.

³³ Polzela d.d. agreed to withdraw selected products as well as sale by from the (relevant) market (lowpriced pantyhose and knee socks segment thus leading Polzela d.d. to a weakened competitive position and decreased market presence. Commission considered this measure against the manufacturing market of panty hose and stockings on which Polzela d.d. remained present and active and concluded that the measure in question would sufficiently prevent Polzela d.d. from gaining unfair competitive advantage by restructuring aid. In view of the point 98. of the 2014 R&R, the Commission looked at the applicability less stringent rules as regards the measures if the firm in difficulty was operating in an assisted area which was the case of Polzela d.d. under Article 107(3)(a). In terms of behavioural measures, Polzela d.d. made commitment not to publicise State support as a competitive advantage whilst marketing its products neither to acquire shares in any other undertaking during the period of restructuring

Introducing burden sharing in the restructuring process insofar appears to be a positive move by the Commission; it no longer supports giving away public money for free, without the firm itself being penalized for past decision. The firm now receives the necessary aid but needs to financially limit the expectations of its shareholders in terms of profit which is reasonable: to be injected with public money to keep the business afloat on one hand and, on the other, to experience the boost and collect the dividend is far from a rewarding position. Additionally, the potentially positive prospect of the firm to which the State has contributed must give way for the State to rightfully participates in the “success” by participating in the profit share on account of providing aid.

4. THE OPEN ISSUES: TWO CARDS FOR THE FIRM BUT... NO LIMIT HOLD’EM FOR THE STATE?

Couple of issues emerge instantly for future closer analysis; the circumstance of the “whens and ifs” of the State’s entry to the firm are rather clear. Nonetheless, the circumstances of its “how much” are not clear enough. Notably, when comparing burden sharing to own contribution, the formula of own contribution is laid down in the R&R where, simplified, own contribution should amount to 50% of the restructuring costs. However, when looking at how the burden sharing is formulated (in the attempt to calculate it), we are met with the requirement, *inter alia*, that the State should have a “reasonable share of future gains”.³⁴ What represents a reasonable share from the viewpoint of the State remains unanswered. We could easily foresee a situation where, for this or that reason, the State may actually wish to gain more than what it is actually financially entitled to. For that reason firms may be (un)intentionally driven to give away more equity / shares on account of the State standing by ready to provide aid. In those terms the 2014 R&R Guidelines, fail to provide any instrument ensuring the proportionality of burden sharing. On top of that, there is a question of the State (eventually) getting out of the firm, i.e. there is no limitation of the State’s life span of presence in such firms. We could compare the restructuring aid to firms in difficulty with the venture capital funds (VCF) that finance collapsed firms by injecting cash to improve their liquidity and in return acquire proportionate equity. VCFs business model, without elaborating further, is to invest, acquire equity and, with the lapse of agreed time, sell their share at the market price to another investor. VCF do not look out for firms for a long-time equity hold and long term investment. Neither should the State. However, the State does have asset management strategy when restructuring aid is concerned and its equity acquired on the ground of burden sharing is of unlimited duration. There is a limited body of case law to date to be checked against these issues. Hence, before 2020, when the Commission plans to revisit the R&R, the practice should be examined and these issues taken into consideration in the new framework to be adopted.

Another issue that needs the attention is of a different character, less numeric and far more political in its essence. Once the restructuring process has been completed and the restructuring and business plan fully and, hopefully successfully, implemented what remains to be seen and with a critical mind – is the question of the investor principle of State. The rightful expectation of the State is to “cash in” the original investments by taking over debt-to-equity principle, thus being represented through ownership and accumulating all the owner’s rights as per national company’s law and other binding legislation, dependant on the Member state in question.

What should at no case be an issue is for the State to execute its owner’s rights by resorting to a political or better say, politicised decision making when either a personnel or substantive business decisions are to be made. In case of later, the State may actually decide not to interfere

³⁴ point 67., 2014 R&R Guidelines

with what is rightfully a Management Board competence. Nonetheless, coming to the first point – what if the State decides to interfere with the Management Board?

The State had already interfered with the firm but also with the market, awarding R&R aid; as the Commission defined in para 6 of the R&R Guidelines, “rescue and restructuring aid may significantly slow economic growth in the sectors concerned.” Thus, on top of the “interference” that had already occurred, what the firm should not need additionally is for the State to interfere on the personal / decision making level to “overprotect” its ownership rights. In its Notice on the notion of State aid³⁵, the Commission explains the discretionary powers in applying the (aid) measure; the Commission here does not target the issue of what and to what extent the State executes its owner’s right in restructured firms – it is, however, useful mentioning that the Commission takes note of discretionary powers to exercise “a right” whereby the criteria are vague, general and/or imprecise. The worry of discretion applied whilst granting the aid is justifiable; should we not worry whether the potential discretion of influence of State in future management operations and daily business activities cross the boundaries? Influence of the State in managing assets where the State is already a major(ity) equity or shareholder in post-communist / post-socialist block of countries is already perceived as a political pray that comes natural after every election cycle. It is likely not to be perceived as such amongst the “older” Member States rather than the new. This is not an issue that seeks its legal codification within the Guidelines nor the authors suggest to do so. This is rather a simpler case of political culture (not) to reach after more than what is already rightfully at hand in exercising the State’s ownership rights.

5. CONCLUSION

In the case of success of the overall restructuring process or the failure of it; burden sharing is one of the elements that jointly either lead to a successful completion of the restructuring process or it is ended in failure. The motivating factor behind both the management of the firm as well as the State to closely look at how the process is developing, is the burden that two parties shared. Burden sharing shall not contribute to the success/failure of the process as an isolated contributor but it shall definitely be a guarding point of the State to make sure its “investment” is protected. Applied in the decision-making process of restructuring the firms in difficulty, burden sharing may indeed serve as a “punishment” for past decisions taken by the management but also as a disciplinary measure for future; the firms shall take an even better caution in what is their daily but also strategic management decisions. Using the opportunity to have another “go” at the market under strict conditions, by using State resources cannot go without paying dues but also allowing the State to have its return on the investment. The proportional burden sharing against the State’s financial contribution needs to be secured. Yet, burden sharing is to be looked beyond the mathematical/investment formulas of digits but is to be also observed from a point of temptation that is lurking in the shadows of State’s equity. Exercising its owner’s right may be tempting for the State not just by expectations of gain but by the chance of exercising its right wider than expected. Disciplining the firm follows stringent rules yet disciplining the State may prove to be a challenge to look after in future.

***ACKNOWLEDGEMENT:** This paper has been supported in part by the Croatian Science Foundation project no. 9366 “Legal Aspects of Corporate Acquisitions and Knowledge Driven Companies’ Restructuring” and in part by the University of Rijeka project no. 13.08.1.2.01 “Protection of beneficiary on the Croatian and European financial services market”.*

³⁵ Commission Notice on the notion of State aid referred to in Article 107(1) of the TFEU, Official Journal C 262/01 2016, 19.07.2016, p. 28

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