# The Legal Framework for the provision of Emergency Liquidity Assistance within the ESCB

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## A. Introduction

The quantity of Emergency Liquidity Assistance (ELA) provided by the national central banks of the European System of Central Banks (ESCB) since the onset of the financial crisis has been nothing less than extraordinary. It is estimated that in July 2012 around 40 billion Euro of ELA was provided to domestic credit institutions by the Central Bank of Ireland, while 100 billion Euro was provided by the Bank of Greece.[1] Indeed, during the summer of 2012, the total ELA granted to individual credit institutions by euro-area NCBs was equivalent to almost one-seventh of the overall amount of liquidity provided at the same time by the Eurosystem as part of its monetary policy operations.[2]

In order to better understand the purpose of and criteria for the provision of ELA, this article will examine the legal aspects of the Lender of Last Resort function of central banks, as implemented within the ESCB through the provision of ELA. The provision of ELA occurs "in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent credit institutions" by the national central banks of the ESCB.[3]

This article will briefly introduce the theory behind the central banks' role as Lender of Last Resort and the doctrine of the European Central Bank (ECB) on the provision of ELA. It will then discuss the possible legal bases for the provision of ELA within the ESCB under the EU treaty framework and according to the national laws of the Member States. Thereafter, the article will examine issues relating to the treatment of ELA under EU financial services legislation; in particular with regard to disclosure and transparency requirements and exchange of information between supervisors and central banks. It will also consider the treatment of ELA under the Commission's State aid rules and under selected State aid decisions.

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1 *Atkins/Watkins*, Disparities widen as ECB shifts focus, Financial Times of 20/8/2012; *Doyle/Mullen*, Irish Banks Shut Out of Market as Sovereign Returns: Euro Credit, Bloomberg.com of 24/8/2012. Following an accounting reclassification in April 2012 in order to harmonise the disclosure of ELA provided by Eurosystem central banks, the financial statements of the national central banks (NCBs) report figures on ELA under the category "other claims on euro area credit institutions denominated in euro". See ECB, Consolidated financial statement of the Eurosystem as at 20 April 2012, Press release of 24/4/2012. Note however, that this category does not exclusively contain data on ELA, and can thus provide only an estimate. For the month of September 2012, 40.57 billion Euro and 100.64 billion Euro were reported in this category in the financial statements of the Central Bank of Ireland and the Bank of Greece respectively, while 9.9 billion Euro was reported for the Central Bank of Cyprus. Putting these figures into context, the International Monetary Fund noted that ELA provided by the Central Bank of Cyprus reached 60 % of GDP in late 2012 – and was largely concentrated in one bank. See IMF, Cyprus: Request for arrangement under the extended fund facility, IMF Country Report No 13/125, May 2013, para. 7.

2 *Cœuré*, The history of central banks and the European banking union, Speech at the Symposium: Central Banking: Where Are We Headed?, Frankfurt am Main on 7/2/2013.

3 ECB, Opinion CON/2008/58, para. 4.1.

In conclusion, the article will examine the implications of the conferral of specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions within the framework of the Single Supervisory Mechanism and as part of the "European Banking Union", and the consequent opportunities to enhance the legal framework for the provision of ELA.

## I. The Lender of Last Resort Function of central banks: An Overview of Policy Developments

The Lender of Last Resort (LOLR) function of central banks has become an integral part of the financial sector safety net, alongside prudential supervision and regulation, deposit protection schemes and resolution regimes for credit institutions in distress.[4] Successful and timely LOLR operations have been credited with preventing and mitigating banking panics and financial crises in European countries over the past 150 years.[5]

The concept of a central bank serving as a LOLR dates back as far as the late 18th century, in relation to the Bank of England. The term has been credited to *Baring*, who stated that in times of panic, the Bank of England "are not an intermediate body, or power; there is no resource on their refusal, for they are the *dernier resort*."[6] However, it was *Thornton*[7] in 1802 and, in particular *Bagehot*[8] in 1873 who developed the classical theory of the LOLR function of central banks.[9]

4 *Campbell/Lastra*, Revisiting the Lender of Last Resort – The Role of the Bank of England, in: MacNeil/O'Brien (eds.), The Future of Financial Regulation, 2010, p. 161; International Association of Deposit Insurers, General Guidance to promote effective Interrelationships among Financial Safety Net Participants, Research and Guidance Committee International Association of Deposit Insurers 2006, p. 5; *Freixas/Giannini/Hoggarth/Soussa*, Lender of Last Resort: a review of the literature, Financial Stability Review 1999, p. 153.

5 *Bordo* has cited Britain, France, Germany, Sweden (and Canada) as examples. See *Bordo*, The Lender of Last Resort: Alternative Views and Historical Experience, Federal Reserve Bank of Richmond Economic Review 1990, pp. 24 and 27; *Bordo*, Financial Crises, Banking Crises, Stock Market Crashes and the Money Supply: Some International Evidence, 1870-1933, in: Capie/Wood (eds.), Financial Crises and the World Banking System, 1986, p. 230. See also: *Minsky*, Debt deflation processes in today's institutional environment, Banca Nazionale Del Lavoro Review 1982, p. 375; *Minsky*, Money and the Lender of Last Resort, Challenge 1985, p. 12.

6 *Baring*, Observations on the Establishment of the Bank of England (1797), in: *Capie/Wood*, The Lender of Last Resort, 2007, p. 8. See *Humphrey/Keleher*, The lender of last resort: a historical perspective, Cato Journal 1984, pp. 275, 282.

7 *Thornton*, An Enquiry into the Nature and Effect of the Paper Credit of Great Britain, first published 1802, 1939.

8 *Bagehot*, Lombard Street: A Description of the Money Market, 3rd ed. 1873.

9 *Humphrey*, Lender of Last Resort: What It Is, Whence It Came, and Why the Fed Isn't It, Cato Journal 2010, p. 334.

*Thornton* identified the necessity of the Bank of England's LOLR function and noted four important criteria in that context.[10] First, the Bank must act in the "general interest", and not in the interest of an individual institution. Second, in order to prevent moral hazard, the Bank of England is not obliged to "relieve every distress which the rashness of country banks may bring upon them: the bank, by doing this, might encourage their improvidence." Third, the relief should not be "prompt and liberal", but rather "should be extended sparingly and on relatively unfavourable terms."[11] Finally, *Thornton* rejected the idea that "every distressed person whose affairs are large" should receive support; it could also be beneficial to the economy that inefficient institutions fail.

*Thornton* argued that the duty of the Bank of England to act as LOLR stems from its unique role as the ultimate source of liquidity in the market, as custodian of the central gold reserve and as a result of its public responsibilities to assist the entire financial system during times of crisis.[12]

Seventy years later, *Bagehot* elaborated on and refined this theory further. Like *Thornton*, he emphasised that the responsibility of the Bank of England as LOLR is to the market as a whole and not to individual institutions.[13] *Bagehot* also added the following important principles:[14]

– An assurance of support to the market in times of crisis should be made by the central bank in advance;[15]

– Loans should only be granted at a penalty rate of interest;[16]

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10 *Humphrey/Keleher*, (fn. 6), p. 287. See the following extract from *Thornton*, (fn. 7), p. 188: "It is by no means intended to imply, that it would become the Bank of England to relieve every distress which the rashness of country banks may bring upon them: the bank, by doing this, might encourage their improvidence. There seems to be a medium at which a public bank should aim in granting aid to inferior establishments, and which it must often find very difficult to be observed. The relief should neither be so prompt and liberal as to exempt those who misconduct their business from all the natural consequences of their fault, nor so scanty and slow as deeply to involve the general interests. These interests, nevertheless, are sure to be pleaded by every distressed person whose affairs are large, however indifferent or even ruinous may be their state."

11 *Humphrey/Keleher*, (fn. 6), p. 287.

12 Ibid., pp. 282-284.

13 *Humphrey*, The Classical Concept of the Lender of Last Resort, Federal Reserve Bank of Richmond Economic Review 1975, p. 9.

14 See *Bordo*, The Lender of Last Resort, (fn. 5), p. 20; *Freixas et al*, (fn. 4), p. 151; *Humphrey/Keleher*, (fn. 6), pp. 300-305.

15 *Bagehot*, (fn. 8), p. 173. Interestingly, *Wood*, Bagehot's Lender of Last Resort: A Hollow Hallowed Tradition, Independent Review 2003, p. 344, has pointed out that the Bank of England never made such a public assurance before the end of World War I, and the improvement in financial stability during that early period should be attributed to other factors.

16 *Bagehot*, (fn. 8), p. 197.

– Loans should be advanced to all market participants, provided they can supply collateral which, under normal circumstances, would be considered good collateral;[17]

– Loans should not be advanced to "unsound" or insolvent banks;[18]

– The presence of a LOLR should not replace sound and prudent banking practices.[19]

As the concept of a LOLR developed over time, later theorists argued that in applying *Bagehot's* theory, the LOLR should only intervene at the macroeconomic level by providing liquidity through open market operations.[20] The proponents of this theory suggest that "central bank lending, in the sense of advancing funds to particular institutions, is not essential to the policy."[21]

By contrast, other theorists have emphasised the importance of interventions by the central bank at a microeconomic level to individual financial institutions in difficulty. This intervention would be justified by the need to prevent the effects of the failure of a systemically important institution from spreading to the rest of the banking system.[22] Moreover, *Goodhart* and other proponents of this approach have argued that the central bank should not only be able to lend to illiquid institutions, but also to insolvent institutions. This would be necessary, first, because it may be almost impossible for the central bank to distinguish between illiquidity and insolvency in times of crisis[23] and second, because of the high risk of contagion if the institution were to be allowed to fail.[24]

On the other hand, those who support the free banking theory have argued that there is no need for a public LOLR at all: if certain legal restrictions on the banking system

17 Ibid., pp. 51 and 197.

18 Ibid., p. 198.

19 *Humphrey/Keleher*, (fn. 6), p. 304.

20 *Goodfriend/King*, Financial Deregulation, Monetary Policy and Central Banking, Federal Reserve Bank of Richmond Economic Review 1988, p. 17; see also *Humphrey*, (fn. 13), p. 8; *Bordo*, The Lender of Last Resort, (fn. 5), p. 27; *Freixas et al*, (fn. 4), p. 157; *Freixas*, The Lender of Last Resort in Today's Financial Environment, Els Opuscles del CREI 1999, p. 10; *Humphrey/Keleher*, (fn. 6), p. 304.

21 *Bordo*, The Lender of Last Resort, (fn. 5), p. 27.

22 Ibid. In fact, according to *Goodhart*, Myths about the Lender of Last Resort, International Finance 1999, p. 344, only central bank lending to individual institutions should be described as LOLR, as it is impossible to distinguish between LOLR and non-LOLR open market operations.

23 Ibid., p. 343.

24 *Bordo*, The Lender of Last Resort, (fn. 5).

were removed, for example the prohibition on free currency issue by commercial banks, those banks would no longer be dependent on the central bank as LOLR.[25]

Alternatively, it has been argued that the existence of a LOLR generates the moral hazard which results in the need for such support to be extended to imprudent institutions.[26]

Other aspects of *Thornton* and *Bagehot's* classical theory have also been developed and reconsidered over time, such as the concept of "constructive ambiguity" which seeks to address the risk of moral hazard.[27] This concept prescribes that the LOLR should avoid any pre-commitment to act, and should retain full discretion whether and under what conditions it provides assistance.[28] Without any guarantee that they will be rescued, individual financial institutions will be pressurised to act prudently.[29] However, this may contradict *Bagehot's* requirement that the central bank provide an assurance of support to the market in advance, in order to assuage panic and calm the financial markets[30] and could thus be potentially "destructive."[31]

The main justifications for a LOLR are the maintenance of financial stability and the prevention of financial crises: the LOLR should prevent or mitigate bank runs,

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25 Ibid., p. 21 et seq. See *Manna*, Emergency Liquidity Assistance at work: both words and deeds matter, Studi e Note di Economia 2009, Anno XIV, p. 158. For an interesting explanation see *Slivinski*, Interview with George Selgin, Region Focus 2009, p. 40: "Freedom to issue notes is important too. When banks can't issue their own notes, well, they need a lender of last resort to supply them with notes. If we told companies that manufacture shoes that henceforth they could only make shoes for left feet, lo and behold there would be a need for an 'emergency' source of shoes for right feet, which could be created by establishing a new government agency for the purpose."

26 *Schoenmaker*, Banking Supervision and Lender of Last Resort in EMU, in: Andenas/Gormely/Hadjiemmanuil/Harden (eds.), European Economic and Monetary Union: the Institutional Framework, 1997, p. 430.

27 *Freixas et al*, (fn. 4), p. 160.

28 Ibid. See also *Hu*, Emergency Liquidity Support Facilities, IMF Working Paper 79 (2000), pp. 10-13; *Corrigan*, Reforming the US Financial System: An International Perspective, Federal Reserve Bank of New York Quarterly Review 1990, p. 14. In this context it has been suggested that LOLR operations should be exercised covertly by central banks, to prevent other market participants from assuming a precedent. *Freixas et al*, (fn. 4), p. 160.

29 Ibid.

30 *Freixas/Parigi/Rochet*, The Lender of Last Resort: A 21st Century Approach, Journal of the European Economic Association 2004, p. 1111.

31 *Campbell/Lastra*, (fn. 4), p. 166 accept the benefits of the LOLR's *discretion* whether to grant assistance, but maintain that "[a]mbiguity and uncertainty as to the *procedures* and *loci of power* are not constructive." See also *Niskanen*, Lender of Last Resort and the Moral Hazard Problem, Bank of Finland Discussion Papers 17 (2002), p. 29; *Aglietta*, A Lender of Last Resort for Europe, in: Goodhart (ed.), Which Lender of Last Resort for Europe?, 2000, pp. 55-57.

the failure of the interbank market and systemic risk caused by the collapse of a financial institution.[32] The unique characteristics and functions of credit institutions and of financial markets mean that financial stability is vital for the functioning of the real economy.[33] In the exercise of its function, the LOLR should also seek to prevent the collapse of asset prices.[34] Moreover, the "ultimate purpose" of the LOLR role is to prevent credit crises from becoming monetary crises and thus promote monetary stability.[35]

To summarise: the exercise of the LOLR function can be understood to mean the provision of liquidity to the market as a whole (at a macroeconomic level) in the form of open market operations or to individual financial institutions (at a microeconomic level) in a crisis situation.[36] This article will focus on the latter and will refer to the provision of liquidity to individual financial institutions as Emergency Liquidity Assistance (ELA).

## II. ELA provided by central banks of the ESCB: The Doctrine of the ECB

According to the ECB, ELA provided within the ESCB is a function of the national central banks (NCBs).[37] Therefore it can be understood that NCBs are empowered perform this function under Art. 14.4 of the ESCB Statute[38] and the legal basis for the provision of ELA is governed by national law, in the statutes of the NCBs.

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32 *Freixas et al*, (fn. 4), pp. 152-156. Note however, that *Humphrey/Keleher*, (fn. 6), p. 305, point out that these functions are "ancillary to the [LOLR's] main task of maintaining the aggregate quantity of money unchanged in the face of a panic." See also *Stasch*, Lender of Last Resort: Bankenkrisen und Krisenmanagement in der Europäischen Union, 2009, p. 105; *Andenas/Hadjiemmanuil*, Banking Supervision, the Internal Market and European Monetary Union, in: Andenas/Gormely/Hadjiemmanuil/Harden (eds.), European Economic and Monetary Union: the Institutional Framework, 1997, p. 391.

33 *Stasch*, (fn. 32), p. 64 et seq.

34 *Humphrey/Keleher*, (fn. 6), p. 278.

35 Ibid., p. 277.

36 *Kohtamäki*, Die Reform der Bankenaufsicht in der Europäischen Union, 2011, p. 29; *Radtke*, Liquiditätshilfen im Eurosystem: Zentralbanken als Lender of Last Resort, 2010, p. 27.

37 ECB, Annual Report 1999, p. 98: "The main guiding principle is that the competent NCB takes the decision concerning the provision of ELA to an institution operating in its jurisdiction. This would take place under the responsibility and at the cost of the NCB in question."

38 Protocol (No 4) on the Statute of the European System of Central Banks and the European Central Bank, OJ C 83 of 30/3/2010, p. 230. See *Tupits*, Legal Framework for the Eurosystem National Central Bank, 2010, p. 177; *Stasch*, (fn. 32), p. 173. This can be understood from the wording of the ECB doctrine on the matter, which corresponds to Art. 14.4 ESCB Statute: "National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed *on the responsibility and liability of national central banks* and shall not be regarded as being part of the functions of the ESCB."

The ECB has developed a doctrine on the criteria for the provision of ELA to be applied by NCBs in the Eurosystem.[39] In 1999, shortly after the beginning of the third stage of the Economic and Monetary Union (EMU), the ECB, in its Annual Report, emphasised the necessity for coordination mechanisms within the Eurosystem with regard to ELA, in order to maintain an appropriate single monetary policy stance.[40]

The ECB defined ELA as "the support given by central banks in exceptional circumstances and on a case-by-case basis to temporarily illiquid institutions and markets."[41] However, the ECB also emphasised that due to the risk of moral hazard, ELA should not be considered "a primary means of supporting financial stability"[42] and that other elements of the financial sector safety net should take precedence in the management of financial crises.

In recent years, the ECB reaffirmed these points and developed the doctrine further.[43] It explained that "the provision of ELA may be justified to prevent or mitigate potential systemic effects on financial institutions, including repercussions for market infrastructure such as the disruption of payment and settlement systems."[44] However, the provision of ELA must respect the prohibition on monetary financing laid down in the Treaties[45] and, in particular must not be granted to insolvent credit or financial institutions.[46] It referred specifically to ELA granted to "credit institution[s] which cannot obtain liquidity through either the market or participation in monetary policy operations,"[47] but emphasised that the provision of ELA is at the discretion of the NCB and that a credit institution cannot assume automatic access to this liquidity. Moreover, the same degree of independence must be granted to the NCB as regards the provision of ELA as with respect to the performance of its ESCB-related tasks.[48] The ECB also identified additional criteria where collateral for ELA is provided in the form of a State guarantee.[49]

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39 The Eurosystem constitutes the ECB and the national central banks of those Member States whose currency is the euro. See Art. 282(1) TFEU and Art. 1 ESCB Statute.

40 ECB, Annual Report 1999, p. 98; ECB, Monthly Bulletin May 2008, p. 123.

41 ECB, Annual Report 1999, p. 98.

42 Ibid.

43 See ECB, Financial Stability Review, December 2006, p. 171 et seq.; ECB, Monthly Bulletin February 2007, p. 80 et seq.; ECB, Opinions CON/2008/42, para. 4.10; CON/2008/46, para. 3.1; CON/2008/58, para. 4.1.

44 ECB, Monthly Bulletin February 2007, p. 80 et seq.

45 Ibid.

46 ECB, Convergence Report, May 2012, p. 29.

47 ECB, Monthly Bulletin February 2007, p. 80 et seq.

48 ECB, Opinions CON/2008/42 para. 4.11; CON/2008/46 para. 3.3; CON/2008/58 para. 4.3.

49 Ibid. See also ECB, Opinions CON/2008/54 paras. 3.1 to 3.3; CON/2009/49 para. 3.2; CON/2010/95 para. 3.3; CON/2012/4 para. 5.

Given that the provision of ELA is considered a national competence, an important issue to clarify is how the doctrine of the ECB can be enforced. Article 14.4 ESCB Statute explicitly provides that NCBs may perform other functions "unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB." Therefore the Governing Council effectively has a veto, by which it can control the exercise of this function by NCBs.[50] In addition, the ECB must be consulted on any draft legislative provision in its fields of competence by all EU Member States with the exception of the UK,[51] and may submit opinions on these laws.[52] Although opinions of the ECB are not legally binding, they can contribute to the "compatibility and consistency of national legislation and Community legislation with the ESCB's legal framework and ECB policies."[53] Not only do Member States benefit from the expertise of the ECB,[54] such opinions, which are in most cases published on the ECB's website,[55] are of considerable persuasive value[56] and can thus influence the Member States to ensure its laws are compatible with the Treaty framework and with the doctrine of the ECB.

For NCBs of Member States with a derogation, the ECB can exercise a level of control through its Convergence Reports.[57] These reports examine the progress made by those Member States in fulfilling their obligations regarding the achievement of economic and monetary union, including *inter alia* the compatibility of the national legal frameworks, and more specifically the statutes of the NCB, with the Treaties and with the ESCB Statute.

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50 This applies to all NCBs of the ESCB, with the exception of the Bank of England. See Art. 42.1 ESCB Statute and Art. 1 of Protocol (No 16) on certain provisions relating to Denmark, OJ C 83 of 30/3/2010, p. 287 (Denmark Protocol) *a contrario* and Art. 7 of Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, OJ C 83 of 30/3/2010, p. 284 (UK Protocol). See *Psaroudakis*, State Aids, Central Banks and the Financial Crisis, ECFR 2012, p. 216; *Stasch*, (fn. 32), p. 121. Note however, that *Stasch*, (fn. 32), p. 176 argues that the ESCB cannot enforce its rules for ELA when such actions are undertaken by the NCBs acting under Art. 14.4 ESCB Statute.

51 See Art. 4 and 7 of the UK Protocol.

52 Art. 127(4) and 282(5) TFEU and Art. 4 ESCB Statute. Council Decision of 29/6/1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, OJ L 189 of 3/7/1998, p. 42.

53 *Lambrinoc*, The Legal Duty to Consult the European Central Bank: National and EU Consultations, ECB Legal Working Paper Series 9 (2009), p. 5.

54 CJEU, case C-11/00, *Commission v ECB* (OLAF), ECR 2003, I-7147, para. 110.

55 *Lambrinoc*, (fn. 53), pp. 5 and 38; *Smits*, in: von der Groeben/Schwarze (eds.), EUV/EGV, 6th ed. 2003, Art. 105 EG, para. 65.

56 *Griller/Dutzler*, in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der EU, 40. EL 2009, Art. 105 EGV, para. 58.

57 Art. 140 TFEU. Art. 139(1) TFEU: "Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as 'Member States with a derogation'."

# B. The legal basis for the provision of ELA within the ESCB

## I. The competence of central banks of the ESCB to provide ELA

### 1. EU legal framework

Notwithstanding the doctrine of the ECB, it is necessary to examine other possible legal bases for the provision of ELA within the Eurosystem.[58] It is interesting to note that the drafters of the Treaties and ESCB Statute did not include any explicit reference to a LOLR or to the provision of ELA, possibly in order to create constructive ambiguity as to the existence of a LOLR.[59] In any event, this allows for a number of possible interpretations, which will be considered below.

When considering this matter, it is necessary to recall that the primary objective of the Eurosystem is to maintain price stability.[60] The basic tasks to be carried out through the Eurosystem, explicitly set out in Art. 129(1) TFEU and Art. 3.1 ESCB Statute, are to define and implement monetary policy, to conduct foreign-exchange operations, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems. While other "non-basic" tasks of the Eurosystem are also foreseen, these are not as clearly enumerated.[61]

The Eurosystem is ultimately governed by the decision-making bodies of the ECB; thus decision-making is centralised to the Governing Council and Executive Board,[62]

58 For Member States with a derogation, the UK and Denmark, Art. 127(1) to (3) and (5) TFEU and Art. 3 ESCB Statute do not apply by virtue of Art. 139(1)(c) TFEU, Art. 42.1 ESCB Statute, Art. 4 and 7 UK Protocol and Art. 1 Denmark Protocol. Thus for these Member States, the provision of ELA remains a national task governed by national law. The same is valid for macroeconomic LOLR operations: see Art. 42.2 ESCB Statute and Art. 3 UK Protocol. Therefore, in the following section, the term Eurosystem will be used in place of the term ESCB.

59 *Lastra*, The Governance Structure for Financial Regulation and Supervision in Europe, Columbia Journal of European Law (2003), p. 57; *Lastra*, The Role of the European Central Bank with regard to Financial Stability and Lender of Last Resort Operations, Europe, in: Goodhart (ed.), Which Lender of Last Resort for Europe?, Central Banking Publications 2000, has also argued that such ambiguity could in fact be a result of "calculated obfuscation for political purposes"; *Stasch*, (fn. 32), p. 113.

60 Art. 127(1) TFEU, Art. 3.1 ESCB Statute. The Governing Council has defined price stability as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below, but close to, 2 % over the medium term. See, ECB, Monthly Bulletin May 2008, 10th Anniversary Edition, p. 35.

61 *Lastra*, The Governance Structure, (fn. 59), p. 56; *de Lhoneux*, Decentralisation and Specialisation in the Eurosystem, Bulletin BCL 1 (2009), p. 152.

62 Art. 129(1) TFEU and Art. 8 and 9.3 ESCB Statute. See, *Scheller*, The European Central Bank: History, Role and Functions, in: ECB 2006, p. 42; *Priego/Conlledo*, The Role of the Decentralisation Principle in the Legal Construction of the European System of Central Banks, in: ECB, Legal Aspects of the Eurosystem of Central Banks: Liber Amicorum Paolo Zamboni Garavelli, 2005, p. 190. *Lastra*, The Division of Responsibilities between the European Central Bank and the National Central Banks within the European System of Central Banks, Columbia Journal of European Law 2000, p. 172.

while the implementation of Eurosystem tasks may be carried out either by the ECB or through the NCBs.[63] NCBs are considered an integral part of the Eurosystem and are obliged to act in accordance with the guidelines and instructions of the ECB.[64] Indeed, "[t]he first function of any NCB is to carry out the basic Eurosystem tasks."[65] However, as mentioned above, Art. 14.4 ESCB Statute provides that NCBs are also permitted to perform functions other than those specified in the ESCB Statute unless the Governing Council has found that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of the NCB and shall not be regarded as being part of the functions of the Eurosystem.[66]

## 2. The provision of ELA as a basic Eurosystem task

The first possibility is that the provision of ELA falls under one of the basic Eurosystem tasks.[67] Of these basic tasks, the definition and implementation of monetary policy and the promotion of the smooth operation of payment systems could provide a legal basis for ELA operations by the Eurosystem.

The definition and implementation of monetary policy is the most important means of achieving the Eurosystem's primary objective of maintaining price stability.[68] The formulation of monetary policy is carried out by the Governing Council, while implementation is carried out by the Executive Board,[69] which may have recourse to the NCBs to carry out monetary policy operations in a "decentralised" manner.[70] In practice, "the ECB coordinates the operations, while the transactions are carried out

63 Art. 9.2 ESCB Statute.

64 Art. 14.3 ESCB Statute.

65 *De Lhoneux*, (fn. 61), p. 160.

66 Ibid.; *Lastra*, (fn. 62), p. 168 provides a succinct explanation: "It is important to bear in mind that the NCBs act in a dual capacity. On the one hand they are operational arms of the ESCB when carrying out operations which form part of the tasks of the ESCB. On the other hand, they are national agencies when performing non-ESCB functions."

67 For example, *Aglietta*, (fn. 31), p. 60 argues that, given the implications of the LOLR function for monetary policy, it would be highly inappropriate to decentralise the LOLR function to NCBs acting on their own responsibility and the ultimate decision should always lie with the Governing Council.

68 Art. 127(1) TFEU and ESCB Statute; Art. 3(1)(c) TFEU. The Union has exclusive competence for monetary policy for the Member States whose currency is the euro.

69 Art. 12.1 first and second subparagraphs ESCB Statute.

70 Art. 12.1 third subparagraph ESCB Statute. See, *Priego/Conlledo*, (fn. 62). Note *Zilioli/Selmayr*, The Law of the European Central Bank, 2001, p. 118 consider that the term "indirect implementation" is more accurate than "decentralisation."

by the NCBs."[71] The instruments at the disposal of the Eurosystem include open market operations,[72] standing facilities[73] and minimum reserve requirements.[74] The principles, instruments, procedures and criteria for the implementation of monetary policy which must be complied with by NCBs are further set out in the Eurosystem's "General Documentation."[75] These instruments enable the Eurosystem to steer short-term money market rates by managing the liquidity situation in the money market:[76] certain instruments provide liquidity to the market, while others absorb liquidity.[77] Eurosystem monetary policy operations may only be conducted with eligible counterparties[78] and must be based on adequate collateral.

Thus it would appear that the instruments available to the Eurosystem in order to define and implement monetary policy would enable the Eurosystem to act as LOLR at a macro-level, by providing liquidity to the market as a whole or at a micro-level, by conducting credit operations with individual credit institutions. However, some commentators have argued that Art. 127(2) first indent cannot provide a suitable legal basis for the Eurosystem to act as LOLR because of the different aims of monetary policy and LOLR operations respectively: monetary policy seeks to ensure price stability, while LOLR operations seek to ensure financial stability.[79] Although the non-basic Eurosystem task of contributing to financial stability could be complementary to the objective of price stability, conflicts between the two may

71 ECB, The monetary policy of the ECB, 2011, p. 96.

72 Art. 18 ESCB Statute. These take the form of main refinancing operations, (MTOs), longer-term refinancing operations (LTROs) fine-tuning operations (FTOs) and structural operations. For a detailed description of how the Eurosystem implements monetary policy, see, ECB, (fn. 71), pp. 93-116; Guideline of the ECB of 20/9/2011 on monetary policy instruments and procedures of the Eurosystem (ECB/2011/14), OJ L 331 of 14/12/2011, p. 1 (General Documentation).

73 Art. 18 ESCB Statute. These take the form of marginal lending and deposit facilities. See *Weenink*, in: von der Groeben/Schwarze, (fn. 55), Art. 18 ESZB Statut, paras. 20-21.

74 Art. 19 ESCB Statute.

75 See the General Documentation, (fn. 72).

76 *Scheller*, (fn. 62), p. 86.

77 MTOs, LTROs and structural operations are liquidity providing; FTOs and outright transactions and can be either liquidity-providing or liquidity-absorbing; and the issuance of ECB debt certificates is liquidity-absorbing. See, General Documentation, (fn. 72), Annex I, Chapter 3.

78 Eligible counterparties are institutions subject to the Eurosystem's minimum reserve system, i.e. credit institutions and branches of credit institutions resident in Member States whose currency is the euro, which are financially sound and are subject to at least one form of harmonised Union/EEA supervision by national authorities. See, General Documentation, (fn. 72), Annex I, Chapter 2 and Art. 2 of Regulation (EC) No 1745/2003 of the ECB of 12/9/2003 on the application of minimum reserves (ECB/2003/9), OJ L 250 of 2/10/2003, p. 10.

79 *Stasch*, (fn. 32), pp. 139-141; *Radtke*, (fn. 36), p. 53 et seq.

come forward.[80] Moreover, monetary policy operations usually provide all credit institutions with liquidity, while ELA operations provide only individual institutions with liquidity.[81]

Other commentators have nevertheless suggested that by satisfying the temporary liquidity needs of credit institutions by means of the marginal lending facility[82] and by relaxing the rules on the eligibility of collateral for monetary policy operations,[83] the Eurosystem has exercised a role as LOLR at a macro-level, by providing liquidity to the market as a whole during the crisis.[84] It is interesting to note that the marginal lending facility is considered a standard instrument of monetary policy and that the ECB itself considers its other actions in response to the crisis as "non-standard monetary policy measures."[85] It is thus questionable whether it is at all possible to make either an economic or a legal distinction between LOLR open market operations and non-LOLR open market operations.[86] It would therefore be

80 *Kask*, Central Bank's Tools for Tackling Financial Instability: Feasibility to Implement Emergency Lending Facility in Estonia in 14th Scientific Conference on Economic Policy, Reports-papers of the XIV scientific and educational conference, 2006, p. 40. See also: *Prati/Schinasi*, Financial Stability in European Economic and Monetary Union, Princeton Studies in International Finance 86 (1999), p. 18 et seq.; *Stasch*, (fn. 32), p. 140 et seq.; *Bini Smaghi*, Who takes care of financial stability in Europe, in: Goodhart (ed.), Which Lender of Last Resort for Europe?, 2000, p. 238. See, by contrast, *Aglietta*, (fn. 31), p. 48.

81 *Stasch*, (fn. 32), pp. 139-141.

82 Ibid., p. 165 argues that the marginal lending facility and the FTOs would be the only facilities through which LOLR operations could be undertaken. See also *Cea*, The Regulatory Powers of the Federal Reserve and of the European Central Bank in the Wake of the Financial Crisis of 2007-2009, Creighton Int'l & Comp. L.J. 54 (2011), p. 74; *Prati/Schinasi*, (fn. 80), p. 34.

83 See, *inter alia* Regulation (EC) No 1053/2008 of the European Central Bank of 23/10/2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/11), OJ L 282 of 25/10/2008, p. 17; Guideline of the European Central Bank of 21/11/2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/18), OJ L 314 of 25/11/2008, p. 14; Decision of the ECB of 14/12/2011 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral (ECB/2011/25), OJ L 341 of 22/12/2011, p. 65, replaced by Guideline of the ECB of 2/8/2012 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (ECB/2012/18), OJ L 218 of 15/8/2012, p. 20.

84 *Cea*, (fn. 82), p. 74; *Prati/Schinasi*, (fn. 80), p. 34; *Stasch*, (fn. 32), pp. 139 and 172; *Radtke*, (fn. 36), p. 55 et seq. Other operations of the ECB, including the increased volume and maturity of refinancing through the Special Term Refinancing Operation (STRO), LTROs, and the Supplementary Longer-Term Refinancing Operation (SLTRO) and increased access to liquidity in US dollar and Swiss Francs have also been identified as measures taken by the ECB, acting as LOLR. See Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Die Finanzkriese meistern – Wachstumskräfte stärken, Annual Report 2008/09; ECB, The ECB's response to the financial crisis, Monthly Bulletin October 2010, p. 59.

85 Ibid.

86 See, *Goodhart*, (fn. 22), p. 344. *Goodfriend/King*, (fn. 20), p. 17 also consider "the lender of last resort policy and the routine provision of an elastic currency are functionally equivalent" and both are monetary policy. This approach is also supported by *Lastra*, The Role of the European

submitted that Art. 127(2) first indent could indeed provide a suitable legal basis for the Eurosystem to act as LOLR at macro-level, by providing liquidity to the market as a whole. However, the same cannot be said for the provision of ELA to individual institutions, which is more clearly distinct from monetary policy operations.[87]

The basic task of promoting the smooth operation of payment systems is a less controversial, but more specific and restrictive legal basis for the provision of ELA by the Eurosystem.[88] The Statute provides that the ECB and NCBs may provide facilities and that the ECB may make regulations, to ensure efficient and sound clearing and payment systems.[89] Moreover, properly functioning payment systems are an important transmission mechanism for monetary policy.[90] For these reasons and by virtue of its regulatory powers in this area, it has been accepted that the ECB can act as LOLR "in the case of an explicit payment gridlock."[91]

## 3. The provision of ELA as a non-basic Eurosystem task: financial stability

As the basic tasks of the Eurosystem can only provide a limited legal basis for the provision of ELA, it may be necessary to consider whether one of the non-basic tasks set out in the Treaty could empower the Eurosystem to act. In this context, Art. 127(5) TFEU is of relevance. This Article provides that the Eurosystem shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. More concretely, the ECB must be consulted on any proposed Union act or draft national legislative provision falling within its field of competence.[92] Moreover, the ECB may offer advice to and be consulted on the scope and implementation of Union legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.[93] In addition, specific tasks concerning policies relating to the prudential supervision of credit institutions

Central Bank, (fn. 59), p. 202; and *Smits*, The European Central Bank – Institutional Aspects, 1997, p. 269. *Schoenemaker*, (fn. 26), p. 436 suggests that: "Both 'monetary' and 'financial' stability concerns must be considered when such liquidity support is granted." See also *Mayes*, The Lender of Last Resort in the Safety Net, in: Mayes/Pringle/Taylor (eds.), Towards a New Framework for Financial Stability, 2009, pp. 356-358; *Andenas/Hadjiemannuil*, (fn. 32), p. 392; *Humphrey/Keleher*, (fn. 6), p. 305. For measures taken in the UK, see *Campbell/Lastra*, (fn. 4), p. 163.

87 *Stasch*, (fn. 32), p. 140.

88 Ibid., p. 142; *Lastra*, (fn. 62), p. 174; *Radtke*, (fn. 36), p. 58; *Weenink*, (fn. 73), Art. 18 ESZB Statut, para. 24.

89 Art. 22 ESCB Statute.

90 *Griller/Dutzler*, (fn. 56), Art. 105 EGV, para. 47.

91 *Lastra*, (fn. 62), p. 174.

92 Art. 127(4) TFEU and Art. 4 ESCB Statute.

93 Art. 25.1 ESCB Statute.

and other financial institutions may be conferred upon the ECB by means of a Council regulation.[94]

Based on these provisions, it has been suggested that the role of the Eurosystem with regard to prudential supervision and financial stability is merely "consultative and co-ordinating."[95] However, this restrictive interpretation of the Eurosystem's task must be rejected; such an interpretation is contrary to the wording of Art. 127(5) TFEU and would fail to ensure the *effet utile* of the provision.[96] Therefore, on this basis it can been argued that in order to contribute to the stability of the financial system, the Eurosystem is empowered to provide ELA[97] and may use the operations set out under Art. 18.1 ESCB Statute for this purpose.[98] The wording of Art. 18.1 ESCB Statute explicitly provides that open market and credit operations may be carried out "[i]n order to achieve the objectives of the ESCB, and to carry out its tasks" – thus including the task of ensuring the stability of the financial system.[99] In particular, it has been suggested that ELA could be provided by the Eurosystem

94 Art. 127(6) TFEU and Art. 25.2 ESCB Statute. So far, this has occurred in one case, where specific tasks were conferred on the ECB concerning the functioning of the European Systemic Risk Board (ESRB), established in 2010. The ESRB is responsible for the macro-prudential oversight of the financial system within the Union. The ECB ensures a Secretariat, and thereby provide analytical, statistical, logistical and administrative support to the ESRB. See Council Regulation (EU) No 1096/2010 of 17/11/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L 331 of 15/12/2010, p. 162. Note also the Commission's proposal for a Single Supervisory Mechanism, discussed below in section E.

95 *Andenas/Hadjiemannuil*, (fn. 32), p. 401. See also *Arda*, Objectives and Tasks of the European System of Central Banks and the European Central Bank: A Commentary on Art. 105 TEC, in: Campbell/Herzog/Zagel, Smit and Herzog on the Law of the European Union, 2005, p. 18.

96 *Smits*, (fn. 86), pp. 339-343; *Stasch*, (fn. 32), pp. 126-135; *Radtke*, (fn. 36), pp. 52 and 57-58. In relation to the principle of effectiveness (*effet utile*) see CJEU, joined cases 281, 283, 284, 285 and 287/85, *Germany v Commission*, ECR 1987, I-3203, para. 28: "In that connection it must be emphasized that where an article of the EEC Treaty – in this case Article 118 – confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task."

97 *Stasch*, (fn. 32), p. 132; *Tupits*, (fn. 38), p. 178 et seq.; *Smits*, (fn. 86), p. 269. Other arguments have also been put forward. For example, *Lastra*, (fn. 62), p. 175 has argued that although responsibility for ELA is understood to remain at the national level because it has not been elevated to an exclusive Union competence by the Treaties, one could nevertheless be envisage that it would become a Eurosystem competence based on the principle of subsidiarity under Art. 5(3) TEU. See however, criticism of this application of the principle of subsidiarity in *Stasch*, (fn. 32), pp. 115 and 153; and the discussion on the role of subsidiarity in *Zilioli/Selmayr*, (fn. 70), pp. 60-61 and 70-71.

98 *Andenas/Hadjiemannuil*, (fn. 32), p. 405; *Stasch*, (fn. 32), p. 132.

99 Ibid. and *Radtke*, (fn. 36), p. 66 do not, however, consider Art. 20 ESCB Statute to allow the Governing Council to employ other operational methods of monetary control, as the wording suggests that this Article cannot be applied to all Eurosystem tasks. See by contrast *Lastra*, The Role of the European Central Bank, (fn. 59), p. 205. See also *Aglietta*, (fn. 31), p. 61.

under a "creative and generous interpretation"[100] of the second indent of Art. 18.1 ESCB Statute,[101] which provides that the ECB and NCBs may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. These transactions could be carried out by either the ECB or the NCBs. NCBs would provide ELA as a task "delegated by the Governing Council and subject to its approval" in accordance with Art. 9.2, 12.1 and 14.3 ESCB Statute.[102]

The suitability of Art. 18.1 second indent as a legal basis for individual ELA transactions has, however, not gone without criticism. It has been questioned whether the requirement that lending is based on adequate collateral would cause difficulties: if the credit institution or other market participant could offer adequate collateral, surely it would not require ELA in the first place – therefore, only national instruments would be flexible enough to conduct ELA operations with illiquid institutions.[103] However, this argument overlooks three considerations: (i) the general principles and conditions for credit operations are set by the ECB in accordance with Art. 18.2 ESCB Statute, thus providing a certain level of flexibility;[104] (ii) in most cases, national law requires ELA operations to be granted against some form of collateral – indeed, in several Member States, the term adequate collateral is used;[105] and (iii) during the recent crisis, collateral for ELA transactions was provided in the form of a State guarantee.[106]

Where ELA is provided by the Eurosystem, losses resulting from such an operation could nevertheless fall to the individual NCB, as NCBs "enjoy financial autonomy and generally perform Eurosystem tasks at their own cost and risk."[107] The Governing

100 *Lastra*, (fn. 62), p. 176.

101 See also *Smits*, (fn. 86), p. 269.

102 *Tupits*, (fn. 38), p. 178 et seq.; *Stasch*, (fn. 32), pp. 162 and 172.

103 *Radtke*, (fn. 36), pp. 64-66; *Andenas/Hadjiemannuil*, (fn. 32), p. 406.

104 See *de Tomasi*, The Eurosystem's Credit Operations and Legal Protection of Collateral under Community Law, in: ECB, Legal Aspects of the Eurosystem of Central Banks: Liber Amicorum Paolo Zamboni Garavelli, 2005, p. 356; *Bruni/de Boissieu*, Lending of Last Resort and Systemic Stability in the Eurozone, in: Goodhart (ed.), Which Lender of Last Resort for Europe?, 2000, p. 182; *Prati/Schinasi*, Financial Stability in European Economic and Monetary Union' Europe, in: Goodhart (ed.), Which Lender of Last Resort for Europe?, 2000, p. 102. For example during the recent crisis, the ECB relaxed the rules on the eligibility of collateral for monetary policy operations. See fn. 83 above.

105 See, section B.I.5. The requirement for *adequate* collateral to be provided is found in the statutes of eight NCBs in Croatia, the Czech Republic, Estonia, Finland, Greece, Latvia, Luxembourg, the Netherlands, and Slovenia.

106 See, section D. below.

107 *Scheller*, (fn. 62), p. 114; *Radtke*, (fn. 36), pp. 78 to 80; *Krauskopf/Steven*, The Institutional Framework of the European System of Central Banks: Legal issues in the practice of the first ten years of its existence, CMLR 46 (2009), p. 1173.

Council may, in exceptional circumstances, decide to indemnify NCBs for specific losses arising from monetary policy operations undertaken for the ESCB.[108]

In conclusion Art. 127(5) TFEU, in connection with Art. 18.1 second indent ESCB Statute provides a possible legal basis for the provision of ELA as a task of the Eurosystem.

## 4. The provision of ELA as a national task

At present, the possible legal bases discussed above remain purely theoretical: the ECB, in its doctrine, does not consider the provision of ELA to be a Eurosystem task, but rather a task of the NCBs in accordance with Art. 14.4 ESCB Statute, falling within the NCBs' financial stability mandate.[109] According to the ECB, the primary responsibility for safeguarding financial stability remains at national level[110] and this responsibility for financial stability should be formally included under the NCBs' statute.[111] As a consequence, the legal basis for the provision of ELA is found under the respective NCB Statutes and the costs of the provision of ELA are borne by the individual NCB and ultimately by the Member State.[112]

108 Art. 32.4 second subparagraph. See, *Prati/Schinasi*, (fn. 80), pp. 43-44. See also, for example, ECB, Eurosystem Monetary Policy Operations in 2008, Press Release of 5/3/2009: "The Governing Council decided that any shortfall, if it were to materialise, should eventually be shared in full by the Eurosystem NCBs in accordance with Art. 32.4 of the Statute of the ESCB, in proportion to the prevailing ECB capital key shares of these NCBs in 2008." *Stasch*, (fn. 32), p. 170 suggests that in practice, even where the individual NCB is not indemnified, the costs are borne by the Eurosystem as a whole, as the individual NCB will contribute less monetary income to the Eurosystem under Art. 32.1 ESCB Statute. However, this is not the case: monetary income is calculated in accordance with Art. 32.2 ESCB Statute without taking into account any costs or losses suffered by the NCB. Only three exceptions to this are explicitly set out in Art. 32.4 TFEU. See, *Scheller*, in: von der Groeben/Schwarze, (fn. 55), Art. 32 ESZB Statut, paras. 27-31; *Radtke*, (fn. 36), p. 71.

109 ECB, Opinion CON/2008/39 para. 2.2. See, also ECB, Opinions CON/2001/10, para. 7; CON/2006/15, para. 2.2; CON/2006/39, para. 4.2; CON/2007/31, para. 3.1; CON/2008/32, para. 3.3. See also *Psaroudakis*, (fn. 50), p. 215.

110 See, for example: ECB, Monthly Bulletin May 2008, 10th Anniversary Edition, p. 118. See also *de Lhoneux*, (fn. 61), p. 161.

111 ECB, Opinions CON/2006/15, para. 2.2; CON/2006/39, para. 4.2; CON/2007/31, para. 3.1; CON/2008/32, para. 3.3; CON/2008/39, para. 2.2.

112 *Stasch*, (fn. 32), p. 169. The eventual allocation of NCB profits to the State budget may be provided for in the Statute of the NCB or may be decided on by the NCBs decision-making body. See, ECB, Convergence Report, May 2012, p. 27. See for example: § 27(2) Gesetz über die Deutsche Bundesbank; Art. L. 142-6 of the Statute of the Banque de France; Art. 39 of the Statute of the Banca d'Italia; Art. 47(2) of the Act on the Czech National Bank (No. 6/1993 Coll.). *Aglietta*, (fn. 31), p. 56 suggests that if the costs are borne by the individual NCB and Member States this may be a disincentive for national supervisors to conceal the insolvency of a firm. See however fn. 108 above, which shows that, in practice, it may be the case that NCBs will be obliged to bear the costs of the ELA operation, irrespective of whether it is performed as a national or Eurosystem task, thus rendering arguments as to the incentives of national supervisors moot.

It is nevertheless important to consider in more detail the level of control that could be exercised by the ECB over the provision of ELA by NCBs. Article 14.4 ESCB Statute provides that NCBs may perform functions such as the provision of ELA "unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB." While it is uncontroversial that NCBs are under an obligation to inform the Governing Council in advance of any provision of ELA, in order to enable the Eurosystem to neutralise excess liquidity in the market by means of open market operations,[113] there are two possibilities in relation to the extent of the Governing Council's influence over an individual ELA operation.

The first possibility is that the Governing Council takes a very pro-active role: it may prohibit, require modifications or provide *ex ante* approval for these measures, in order to ensure that these do not interfere with monetary policy and other Eurosystem tasks.[114] This would allow the Governing Council to exercise its veto-right in an effective and timely manner, and thus ensure ELA does not negatively impact on either price stability or the stability of the financial system. Indeed, some commentators have gone so far as to argue that prior authorisation from the ECB is vital before a NCB provides ELA.[115] While the internal Eurosystem arrangements for the provision of ELA have not been made public,[116] it is interesting to note that in relation to the Commission's decision on State aid granted to Dexia SA, the Belgian authorities submitted that the ELA provided by the National Bank of Belgium "was approved by the Governing Council" up to an undisclosed maximum amount.[117] Similarly, in its decision on ELA requested by the Central Bank of Cyprus on 21 March 2013, the Governing Council "decided to maintain the current level of ELA until 25 March 2013."[118]

The second possibility is that notwithstanding the likely *de facto* involvement of the Governing Council in the NCBs decision to provide ELA, there is no *de jure* power for either the Governing Council or Executive Board to control the actions of the

113 It has been argued that this obligation to provide this information stems from the principle of sincere cooperation under Art. 4(3) TEU. Moreover, it is likely that the Eurosystem agreement on emergency liquidity assistance – ECB, Annual Report 1999, p. 98 – provides an obligation to this effect. See *Radtke*, (fn. 36), pp. 59-61; *Stasch*, (fn. 32), pp. 116-117 and 171-172; *Smits*, (fn. 86), p. 270.

114 *Stasch*, (fn. 32), pp. 116-117 and 170-172; *Smits*, (fn. 86), p. 270.

115 *Lastra*, (fn. 62), p. 178; European Shadow Financial Regulatory Committee, EMU, the ECB and Financial Supervision, Statement No. 2 of 19/10/1998, http://www.esfrc.eu/sitebuildercontent/sitebuilderfiles/statement2.pdf (6/9/2013).

116 Eurosystem agreement on emergency liquidity assistance – ECB, Annual Report 1999, p. 98. Discussed further in section B.II.1. below and in particular in fn. 170.

117 Commission Decision 2010/606/EU, *Dexia SA* (C 9/09), OJ L 274 of 19/10/2010, p. 54, para. 106.

118 ECB, Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus, Press Release of 21/3/2013.

NCB *ex ante*, for example, by means of guidelines or instructions to the NCBs: these legal acts may only be adopted in relation to the exercise of ESCB related tasks.[119] However, it is submitted that the wording of Art. 14.4 ESCB Statute would not preclude the Governing Council from taking a negative decision on the provision of ELA in advance of it being provided by the NCB. Furthermore, while the Governing Council would not be able to impose modifications by means of a legal act, the NCB may attempt to avoid a negative decision of the Governing Council by ensuring its planned ELA operation is acceptable to that decision-making body.

In this context, an interesting argument has been raised by *Psaroudakis* who considers that because of the control exercised by the Governing Council by virtue of its veto power under Art. 14.4 ESCB Statute, the provision of ELA should indeed be considered a Eurosystem task.[120] It would however be submitted that such an interpretation is contrary to the explicit wording of Art. 14.4 ESCB Statute, which provides that such functions "shall not be regarded as part of the functions of the ESCB."

A difficulty might arise where a particular NCB is determined to provide ELA, irrespective of a negative decision of the Governing Council. Given the immediate and dramatic consequences of the provision of ELA, particularly where large quantities are involved, the powers of the ECB are limited to *ex post* measures: the Governing Council can draw attention to the NCB's actions through its analysis of compliance with the prohibition on monetary financing in its Annual Report,[121] or ultimately, could launch an infringement procedure against the NCB in question, in accordance with Art. 271(d) TFEU and Art. 36.5 ESCB Statute.

## 5. The national legal frameworks

The legal basis for the provision of ELA – as practised today by the central banks of the ESCB – is thus found under national law.[122] When reviewing the models in euro-area and non-euro area EU Member States, a number of main approaches towards the regulation of ELA can be identified. These approaches include: (i) an explicit competence found in the statute of the NCB (or in a legal act of the NCB); (ii) an implicit empowerment, based on the financial stability mandate of the NCB under its statute; (iii) silence; or (iv) an allocation of this competence under a memorandum of understanding.

119 Art. 12.1 ESCB Statute. See *Radtke*, (fn. 36), pp. 86-89.

120 *Psaroudakis*, (fn. 50), p. 217.

121 ECB, Annual Report 2012, p. 103.

122 For an analyses of national provisions on ELA, see *inter alia*: *Delston/Campbell*, Emergency Liquidity Financing by Central Banks: Systemic Protection or Bank Bailout?, in: IMF, Current Developments in Monetary and Financial Law, Vol. 3/2005, p. 419; *Delston/Campbell*, Appendix II, Emergency Liquidity Financing Provisions from 19 Countries, in: IMF, Current Developments in Monetary and Financial Law, Vol. 3/2005, p. 957; *Manna*, (fn. 25); *Tupits*, (fn. 38), pp. 172-175.

An explicit competence to provide ELA can be found in the statutes of the Banque centrale du Luxembourg,[123] the Central Bank of Malta,[124] the Banco de Portugal[125] and the National Bank of Slovakia.[126] In Member States outside the Eurozone, the Bulgarian National Bank,[127] the Czech National Bank,[128] the Hungarian National Bank,[129] the National Bank of Poland,[130] the National Bank of Romania[131] and the Sveriges Riksbank[132] also have an express mandate to provide ELA. A competence to provide ELA is also set out in a legal act of the Bank of Lithuania.[133] Moreover, in the Republic of Croatia, which joined the EU on 1 July 2013,[134] the statute of the Croatian National Bank also foresees an explicit power for the NCB to provide ELA, both before and after joining the euro.[135] While these formal national provisions differ in both the level of detail and the content, a number of similarities can be identified. First, in almost all cases such loans may only be provided in exceptional circumstances[136] and/or where there is a threat to financial stability.[137] Second, loans may only be granted against some form of collateral.[138] Third, loans may be

123 Art. 27-2 of the Organic Law of the Banque Centrale du Luxembourg; ECB, Opinion CON/2008/42, paras. 4.9-4.11.

124 Art. 17(1)(g) of the Central Bank of Malta Act (Cap. 204).

125 Art. 12 of the Organic Law of the Banco de Portugal, approved by Law No. 5/98 of 31/1/1998.

126 Art. 24(1) of the National Bank of Slovakia Act (No. 566/1992 Coll.); ECB, Opinion CON/2009/49.

127 Art. 20(2), 33(1) and (2) of the Law on the Bulgarian National Bank.

128 Art. 29(2) of the Act on the Czech National Bank (No. 6/1993 Coll.).

129 Art. 12(4) of Act CCVIII of 2011 on the Magyar Nemzeti Bank.

130 Art. 42 of the Act on the National Bank of Poland of 29/8/1997, Dziennik Ustaw (the Journal of Laws) of 1997 no 140, item 938.

131 Art. 26 of Law No. 312/28.06.2004 on the Statute of the National Bank of Romania.

132 Art. 8 of Chapter 6 of the Sveriges Riksbank Act (Lagen (1988:1385) om Sveriges riksbank – as from 1/7/2011). See also: Sveriges Riksbank, The Riksbank's role as lender of last resort, Sveriges Riksbank Financial Stability Review 2003, p. 57.

133 The mandate of the Bank of Lithuania to provide ELA is not found in the Law on the Bank of Lithuania (1/12/1994 No I-678), but rather in Resolution No 54 of the Board of the Bank of Lithuania of 22/6/1995 on Regulations on Granting of Loans to Commercial Banks.

134 Art. 3(3) Treaty concerning the accession of the Republic of Croatia to the European Union, OJ L 112 of 24/4/2012, p. 10.

135 Art. 11(2) and 93(2) of the Act on the Croatian National Bank (of 9/7/2008).

136 Croatia, the Czech Republic, Lithuania, Luxembourg, Malta, Romania, Slovakia and Sweden.

137 Bulgaria, Hungary, Malta, Portugal and Romania. This is not specified as clearly in the Act on the National Bank of Poland, (fn. 130).

138 Bulgaria, Croatia, the Czech Republic, Lithuania – see Art. 7 of Resolution No 54, (fn. 133) –, Luxembourg, Malta, Poland and Slovakia. The Organic Law of the Banco de Portugal, (fn. 125), provides that loans must be "duly secured by collateral" (Art. 24(1)(c)) and the Bank specifically may not "grant overdraft facilities or credit collateralized under forms, which run counter to the provisions of this Organic Law" (Art. 25(b)).

granted to illiquid, but (implicitly) not to insolvent institutions.[139] Finally, in most cases ELA may only be granted by the NCB to credit institutions, and not to other types of financial institutions or companies.[140]

However, in several Member States, the mandate of the NCB to provide ELA is not formally set out. This power can nevertheless be deduced from the NCBs competence to grant loans outside their Eurosystem tasks coupled with their financial stability mandate. This is the case for the National Bank of Belgium,[141] the Central Bank of Cyprus,[142] the Banco de España,[143] the Bank of Estonia,[144] the Bank of Finland,[145] the Bank of Greece,[146] the Central Bank of Ireland[147] and the Bank of Slovenia.[148]

A small number of NCBs, such as the Austrian National Bank,[149] the Deutsche Bundesbank,[150] the Banque de France,[151] the Banca d'Italia,[152] and de Nederlandsche

139 Bulgaria, Croatia, the Czech Republic, Lithuania, Poland, Slovakia and Sweden.

140 Bulgaria, Croatia, the Czech Republic, Hungary, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. While it is clear that the Sveriges Riskbank may provide ELA "to banking institutions and Swedish companies" – see Sveriges Riksbank Act, (fn. 132), p. 62 –, it can also be implied from Art. 24(1)(c) of the Organic Law of the Banco de Portugal that ELA loans may be granted "to credit institutions and financial companies."

141 Art. 12 and 13 of the Law of 22/2/1998 establishing the Organic Statute of the National Bank of Belgium; ECB, Opinion CON/2008/46, para 3.3.

142 Art. 6(2)(e) and 46(3) of the Central Bank of Cyprus Laws of 2002-2007. *Tupits*, (fn. 38), p. 175, considers this this to be an explicit empowerment to conduct ELA operations.

143 Art. 7(5)(b) and 7(7) of the Law of Autonomy of the Banco de España (Law 13/1994, of 1 June (Official State Gazette of 2 June).

144 § 2(2) subpara. 3 and § 14 of the Eesti Pank Act.

145 Sections 3, 5 and 7 of the Act on the Bank of Finland (No. 214/1998).

146 Art. 55(10), 55A, fourth subpara. and 56(8) of the Statute of the Bank of Greece.

147 Sections 5B(d) and 6A(2)(a) of the Central Bank Act 1942 (as amended).

148 Art. 4(3) and 12(1) subpara. 14 of the Banka Slovenije Act (Official Gazette of the Republic of Slovenia, No. 72/06). Clarifications on Slovenian law were provided by *Vesna Tišler*.

149 Art. 4(1) of the Federal act on the Oesterreichische Nationalbank, Nationalbankgesetz 1984 – NBG, BGBl. No. 50/1984 as amended by BGBl. Part I No. 50/2011, unofficial consolidated version. Note however, that there is no clear financial stability mandate – but see Art. 44b of the Federal act on the Oesterreichische Nationalbank.

150 § 19(1) Gesetz über die Deutsche Bundesbank. See also *Radtke*, (fn. 36), pp. 146, 161, who suggests that § 14(1), which sets out the Deutsche Bundesbank's monopoly on the issue of banknotes, is the legal basis for the provision of ELA in Germany. Note also the existence of the Liquiditäts-Konsortialbank GmbH, established and partly funded by the Deutsche Bundesbank (30 %) and by private, public and cooperative banks (70 %). This can be considered a "lender of penultimate resort." See *Radtke*, (fn. 36), pp. 30-32; *Stasch*, (fn. 32), p. 54.

151 Art. L.141-9 of the Statute of the Banque de France.

Bank[153] do not even have an explicit financial stability mandate under their respective statutes. However, they are empowered to conduct (credit) operations other than those required to fulfil their Eurosystem tasks and are thus able to provide ELA on that basis. This is also the case for two NCBs outside the Eurosystem: Danmarks Nationalbank[154] and the Bank of Latvia.[155]

In the United Kingdom, prior to December 2012, while there was no express legal basis in the Bank of England's statute for the provision of ELA,[156] the Memorandum of Understanding (MOU) between HM Treasury, the Bank of England and the Financial Services Authority (FSA)[157] provided that the contribution of the Bank to the maintenance of the stability of the financial system as a whole involved: "undertaking, in exceptional circumstances, official financial operations […] in order to limit the risk of problems in or affecting particular institutions spreading to other parts of the financial system."[158]

Following the adoption of the Financial Services Act in December 2012,[159] this MOU has been updated and has gained a legal basis in national legislation.[160] According to Section 65 of the Act, the Treasury, the Bank of England and the Prudential Regulation Authority must prepare and maintain a MOU on crisis management. Point 5 of the new MOU[161] describes the responsibilities of the Bank of England in a financial crisis, including: "the provision, when authorised by the Treasury, of Emergency Liquidity Assistance (ELA – defined as support operations

152 Art. 35 of the Statute of the Banca d'Italia; ECB, Opinion CON/2008/58, para. 4.1. See however Art. 5(1) of the Consolidated Law on Banking which confers a financial stability mandate on the Banca d'Italia when exercising supervisory powers. Clarifications on Italian law were provided by *Rachele Picchi*.

153 Section 8(1) of the Bank Act 1998 Articles of Association of De Nederlandsche Bank nv. Note that there is no express reference to financial stability in the Bank Act 1998. See however, sections 4(1) and (2) of the Bank Act 1998.

154 § 15 of the National Bank of Denmark Act.

155 Art. 36 of the Law on the Bank of Latvia.

156 *Delston/Campbell*, Emergency Liquidity Financing, (fn. 122), p. 424 et seq.

157 Memorandum of Understanding between HM Treasury, the Bank of England and the Financial Services Authority, agreed in October 1997 and updated in March 2006, http://www.bankofengland.co.uk/about/Documents/legislation/mou.pdf (6/9/2013).

158 Ibid., point 2(iv).

159 Section 65, Financial Services Act 2012.

160 *Delston/Campbell*, Emergency Liquidity Financing, (fn. 122), p. 425, who criticised the lack of formal statutory powers for the Bank of England to provide ELA, would no doubt welcome this development.

161 Memorandum of Understanding on Financial Crisis Management, http://www.bankofengland.co.uk/about/Documents/mous/moufincrisis.pdf (6/9/2013).

outside the Bank's published frameworks) to firms that are at risk but are judged to be solvent". Moreover, Section 61 of the Act itself provides that the Treasury may give a direction to the Bank of England relating to "the provision by the Bank to one or more financial institutions of financial assistance other than ordinary market assistance offered by the Bank on its usual terms."

In conclusion, the competence of NCBs to provide ELA under national law differs greatly between Member States. Eleven NCBs have an explicit competence to provide ELA under their respective statutes, while one is empowered to provide ELA under a legal act of the NCB. Eight NCBs have an implicit empowerment, based on their financial stability mandate, while in seven Member States the NCB statute is silent on both the provision of ELA and the NCBs role in ensuring financial stability. In one Member State the competence to provide ELA is referred to in a memorandum of understanding.

## II. EU law limitations to the provision of ELA by the central banks of the ESCB

Although the task of providing ELA is performed by NCBs under national law, this does not give the NCBs *carte blanche* to provide ELA in any circumstances and under any conditions that they see fit: a number of restrictions on the exercise of this function derive from the Treaties and the ESCB Statute. Indeed, Member States are obliged to ensure that national legislation, including the statutes of its NCBs, are compatible with the Treaties and the ESCB Statute.[162] Furthermore, the provision of ELA by NCBs under their national legal frameworks may not interfere with the objectives and tasks of the ESCB.[163] It is also worth noting that the principle of sincere cooperation laid down under Art. 4(3) TEU applies to the NCBs.[164]

### 1. Price stability and central bank independence (Art. 127(1) and 130 TFEU)

First, the provision of ELA by a NCB must not interfere with the primary objective of the Eurosystem to maintain price stability in accordance with Art. 127(1) TFEU, nor should ELA be used as an instrument of monetary policy, as this is an exclusive Union task, to be defined and implemented by the Eurosystem.[165]

162 Art. 14.1 ESCB Statute.

163 Art. 14.4 ESCB Statute.

164 *Zilioli/Selmayr*, (fn. 70), p. 80 et seq. refer to this as the principle of "system integrity."

165 Art. 3 TFEU. The Governing Council has provided a quantitative definition of price stability as "as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below, but close to, 2 % over the medium term." See ECB, Monthly Bulletin May 2008, 10th Anniversary Edition, p. 35.

The provision of ELA by an NCB to an individual institution could, in theory, interfere with the objective of maintaining price stability in a two ways. First, it could lead to excess liquidity in the market, where the amount of ELA is large and it is granted over a long period of time, as this could increase the monetary base.[166] Second, the provision of ELA could create a risk of moral hazard, which would in turn have a negative impact of the stability of the financial system, and eventually have an effect on price stability.[167]

One way of mitigating the risk of an impact on price stability would be adequate cooperation and coordination between the ECB and Eurosystem NCBs.[168] Thus, for the purpose of coordination, the ECB and NCBs entered into the Eurosystem agreement on emergency liquidity assistance in April 1999, which set out specific procedures for information-sharing when ELA is granted by a Eurosystem NCB.[169] However, the contents of this agreement have not yet been made public.[170] The agreement has the aim of ensuring that the impact of ELA intervention by an NCB "can be managed in a way consistent with maintaining an appropriate single monetary policy stance."[171] Moreover, in March 2003 an EU-wide Memorandum of

166 *Tupits*, (fn. 38), p. 176; *Smits*, European Supervisors in the Credit Crisis: Issues of Competence and Competition, in: Giovanoli/Devos (eds.), International Monetary and Financial Law: The Global Crisis, 2010, p. 308. *Walter*, Separability of ECB objectives and tasks: Price stability vs. lender of last resort, in: Deutsche Bank Research, EP Committee on Economic and Monetary Affairs, Monetary Dialogue with the ECB, Briefing Paper of 11/3/2007. See also *Stasch*, (fn. 32), p. 140 et seq. The term "monetary base" or "base money" is referred to by the ECB as the currency (banknotes and coins) in circulation, plus the minimum reserves credit institutions hold with the Eurosystem and any excess reserves held in the Eurosystem's deposit facility. See ECB, Monthly Bulletin August 2012, p. 87. See also *Collins*, Letters show extent of pressure put on Lenihan for bailout, Irish Times of 1/9/2012: "In particular, the letter referred to the provision of emergency liquidity assistance by the Irish Central Bank and said the governing council would assess whether there was a need to impose specific conditions to protect the integrity of monetary policy." Moreover, *Bini Smaghi*, (fn. 80), p. 238 has pointed out that even if an ELA intervention is sterilised, re-distributive effects across market participants can occur.

167 *Walter*, (fn. 166). *Tupits*, (fn. 38), pp. 176 and 188 also suggests that because the effects of the provision of ELA could be comparable to those that of monetary financing of government deficits this could "pose grave risks for internal price stability, and thus for the development of interest rates on the money capital markets," for the same reason that a lack of fiscal discipline will have a negative impact on price stability.

168 See for example, the European Shadow Financial Regulatory Committee, (fn. 115).

169 ECB, Monthly Bulletin May 2008, 10th Anniversary Edition, p. 123 et seq.

170 *Stasch*, (fn. 32), p.173 suggests that this is part of a strategy of constructive ambiguity. Note however a recent newspaper report suggesting that the Governing Council is planning to publish the agreement: *Plickert*, EZB veröffentlicht Regeln für umstrittene Notfallkredite, Frankfurter Allgemeine Zeitung of 29/7/2013.

171 Ibid.

Understanding on cooperation between supervisory authorities and central banks in financial crisis situations was also adopted.[172]

The ECB in its doctrine has emphasised that the decision on the provision of ELA by NCBs must be compatible with the Treaty provisions on independence.[173] In particular, Art. 130 TFEU[174] lays down a general prohibition on seeking or taking instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. This is part of the broader independence regime of the ESCB laid down in the Treaties, comprising institutional, personal, financial and functional independence and "constitut[ing] international best practice for central bank legislation."[175] This prohibition on seeking and taking instructions does not prevent the exchange of information and views between NCBs, the government and other authorities provided that there is no interference with the decisions of the NCBs.[176]

It is worth noting that Art. 130 TFEU only applies to the ECB and NCBs when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the ESCB Statute. Because the provision of ELA in accordance with Art. 14.4 ESCB Statute may not be considered an ESCB task, the obligation on the NCB to act in complete independence must instead be considered part of the doctrine of the ECB. This would be enforceable under Art. 14.4 ESCB Statute, by virtue of the veto right of the Governing Council.[177] In addition, it has been argued that, by analogy, the provisions on independence should be applied to the provision of ELA,[178] in order to give full effect to Art. 130 TFEU, which "seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to

172 Ibid. Note that this MOU has been complemented by the Memorandum of Understanding on co-operation between the Banking Supervisors, Central Banks and Finance Ministries of the European Union in Financial Crisis situations of 14/5/2005. These MOUs are not publicly available. Note however the Ecofin Press Release of 14/5/2005, http://www.eu2005.lu/fr/actualites/documents_travail/2005/05/14ecofin_mou/MoU-ecofin.pdf (6/9/2013). The 2005 MOU was extended and updated in 2008 by the Memorandum of Understanding on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European Union on cross-border financial stability of 1/6/2008, http://www.ecb.int/pub/pdf/other/mou-financialstability2008en.pdf (6/9/2013).

173 ECB, Opinions CON/2008/42, para. 4.11; CON/2008/46, para. 3.3; CON/2008/58, para. 4.3; CON/2009/49, para. 3.2.

174 Repeated in Art. 7 ESCB Statute.

175 *Sparve*, Central Bank Independence under European Union and other International Standards, in: ECB, Legal Aspects of the Eurosystem of Central Banks: Liber Amicorum Paolo Zamboni Garavelli, 2005, p. 273. See also *Smits*, The European Central Bank's Independence and its Relations with Economic Policy Matters, Fordham International Law Journal 2008, p. 1614.

176 Ibid., p. 277.

177 See by contrast, *Stasch*, (fn. 32), p. 183.

178 *Radtke*, (fn. 36), pp. 136-141.

pursue the objectives attributed to its tasks."[179] Where the government of a Member State could instruct an NCB to provide ELA, it could thus indirectly influence the Eurosystem's monetary policy: the Eurosystem would be forced to neutralise the effects of ELA on the monetary base in order to maintain price stability.[180]

The ECB has also stated that ensuring the full independence of the NCB in deciding whether to provide ELA will establish appropriate conditions for the possible acceptance of a State guarantee as collateral for ELA.[181]

## 2. Prohibition on monetary financing (Art. 123 TFEU)

The provision of ELA must furthermore be compatible with the prohibition on monetary financing, which is laid down in Art. 123(1) TFEU and Art. 21.1 ESCB Statute, and is further specified by the provisions of Council Regulation (EC) No 3603/93.[182]

Article 123(1) TFEU sets out a prohibition on the provision of overdraft facilities or any other type of credit facility with the ECB or with NCBs in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States. Council Regulation (EC) No 3603/93 clarifies that the term "other type of credit facility" encompasses not only "any claim against the public sector"[183] or "any transaction with the public sector resulting or likely to result in a claim against that sector"[184] but also "any financing of the public sector's obligations vis-à-vis third parties."[185]

Thus financing may not be provided by the NCB to insolvent institutions, as the main responsibility for the possible provision of financial support should be borne by the State.[186] This approach is also advocated by the Basel Committee on Banking Supervision "as the provision of solvency support puts taxpayers' money clearly at risk."[187] Thus the decision to provide solvency support "should always be taken and

179 CEUJ, case C-11/00, *Commission v ECB (OLAF)*, ECR 2003, I-7147, para. 134.

180 *Radtke*, (fn. 36), p. 139.

181 ECB, Opinion CON/2008/42, para. 4.11.

182 Council Regulation (EC) No 3603/93 of 13/12/1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, OJ L 332 of 31/12/1993, p. 1.

183 Art. 1(b)(i) Council Regulation (EC) No 3603/93.

184 Art. 1(b)(iii) Council Regulation (EC) No 3603/93.

185 Art. 1(b)(ii) Council Regulation (EC) No 3603/93.

186 ECB, Monthly Bulletin May 2008, 10th Anniversary Edition, p. 124; ECB, Convergence Report May 2012, p. 29. See also *Schoenmaker*, (fn. 26), p. 434; *Campbell/Lastra*, (fn. 4), p. 167 et seq.

187 Basel Committee on Banking Supervision, Supervisory Guidance on Dealing with Weak Banks, Report of the Task Force on Dealing with Weak Banks, March 2002, http://www.bis.org/publ/bcbs88.pdf (6/9/2013), p. 35.

funded by the government and the legislative body, and not the central bank."[188] In this context it is interesting to note the Governing Council decision on ELA requested by the Central Bank of Cyprus on 21 March 2013. While it was decided to maintain the level of ELA until 25 March 2013, it made the provision of further ELA conditional on an EU/IMF programme being put in place in order to "ensure the solvency of the concerned banks."[189]

However, it is interesting at this point to recall *Goodhart's* argument that "[t]he first myth is that it is possible to distinguish between illiquidity and insolvency."[190] Indeed in a crisis situation, where decisions on the provision of ELA need to be taken quickly, and where not all information may be available to the NCB it may be almost impossible to determine whether an institution is merely illiquid or is, in fact, insolvent.[191]

Where the provision of ELA is supported by collateral in the form of a State guarantee, this will not necessarily conflict with the prohibition on monetary financing provided that appropriate legal safeguards to ensure compliance are in place.[192] In particular the recipient of ELA should remain solvent.[193] The ECB, in its opinions, has specified the following criteria under which a NCB may engage in lending to a credit institution on the basis of collateral in the form of a State guarantee:

– the NCB needs to independently exercise full discretion regarding the decision whether to extend ELA;
– it should be ensured that the credit provided by the NCB is as short term as possible;
– there must be systemic stability aspects at stake;

188 Ibid., p. 1.

189 ECB, Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus, Press Release of 21/3/2013.

190 *Goodhart*, (fn. 22), p. 343.

191 *Weenink/Schulze Steinen*, State aid in the financial services sector, Journal of International Banking Law and Regulation 2008, p. 520; *Lastra*, Central Bank Independence and Financial Stability, Banco de España Estabilidad Financiera 2010, p. 51. See also *Radtke*, (fn. 36), p.116 who suggests that the difficulties in determining the solvency of the recipient *ex ante*, and enforcing a CJEU judgment against the insolvent recipient *ex post*, renders the prohibition on monetary financing a "*zahnloser Tiger*" (toothless tiger).

192 ECB, Opinion CON/2008/46, para. 4.1; *Radtke*, (fn. 36), p. 108.

193 Ibid.

– there must be no doubts as to the legal validity and enforceability of the State guarantee under applicable national law; and

– there must be no doubts as to the economic adequacy of the State guarantee, which should cover both principal and interest on the loans, thus fully preserving the financial independence of the NCB.[194]

### 3. "Open market economy" principle (Art. 127(1) third sentence TFEU)

Article 127(1) third sentence provides that the ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources. Thus, the monetary policy operations of the Eurosystem and, more specifically, the provision of ELA by NCBs must comply with this principle.[195]

The competition rules laid down in the Treaties, in particular Art. 101 to 106 TFEU, do not apply to the ECB and NCBs in the exercise of their ESCB tasks, as these can be considered public tasks exercised by a public authority.[196] The Court of Justice of the European Union (CJEU) has held that activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition.[197] It is also unlikely that the exercise of NCBs of tasks other than ESCB tasks would be subject to competition rules, where these are public powers granted to the NCB under national legislation.[198] However, the provision of ELA by a NCB may interact with the Treaty provisions on State aid under Art. 107 to 109 TFEU. This matter will be discussed in section D. below.

194 ECB, Opinion CON/2008/58. See also ECB, Opinions CON/2008/46, para. 4.3; CON/2008/48, para. 3.9; CON/2009/49, para. 3.2.

195 *Radtke*, (fn. 36), p. 43.

196 *Fernandez Martin*, The competition rules of the E.C. treaty and the European system of central banks, European Competition Law Review 2001, p. 51; *Tridimas*, Community Agencies, Competition Law and ESCB Initiatives, Yearbook of European Law 2009, p. 266 et seq.

197 CJEU, case C-138/11, *Compass-Datenbank*, ECR 2012, para. 36; CJEU, case C-107/84, *Commission v Germany*, ECR 1985, I-2655, paras. 14-15; CJEU, case C-364/92, *Eurocontrol*, ECR 1994, I-43, para. 30; CJEU, case C-49/07, *MOTOE*, ECR 2008, I-4863, para. 24.

198 *Fernandez Martin*, (fn. 196), p. 57.

## C. ELA and EU Financial Services Legislation

Provisions of secondary EU legislation may also have a significant effect on the provision of ELA: they may facilitate an effective and efficient ELA operation by a NCB, but may also interfere with it and potentially jeopardise the success of the operation. This section will examine a number of pieces of legislation which interact with ELA.

### I. Settlement Finality and Financial Collateral

Two examples of legislation which can now be considered to facilitate the provision of ELA are the Settlement Finality Directive[199] and the Financial Collateral Directive.[200]

Following amendment to the Settlement Finality Directive in 2009,[201] Art. 9(1) now provides that the rights of NCBs or the ECB to collateral security provided to them shall not be affected by insolvency proceedings, not only against a counterparty to NCBs or ECB, but also against any third party which provided the collateral security.[202] This is particularly relevant where ELA is granted to an institution against collateral provided by, for example, a private investor. This ensures "the harmonised insulation of collateral security provided to central banks by any third party including, but not limited to, affiliates of the participants in a central bank operated system or central bank counterparties."[203]

In addition, following the amendment of the Financial Collateral Directive in 2009,[204] Art. 1(4)(a) has extended the scope of the Directive from cash and

199 Directive 98/26/EC of the European Parliament and of the Council of 19/5/1998 on settlement finality in payment and securities settlement systems, OJ L 166 of 11/6/1998, p. 45. See *Tupits*, (fn. 38), p. 173; *de Tomasi*, (fn. 104), p. 365 et seq.

200 Directive 2002/47/EC of the European Parliament and of the Council of 6/6/2002 on financial collateral arrangements, OJ L 168 of 27/6/2002, p. 43.

201 Directive 2009/44/EC of the European Parliament and of the Council of 6/5/2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, OJ L 146 of 10/6/2009, p. 37.

202 This was suggested by ECB Opinion on a proposal for a directive amending Directive 98/26/EC and Directive 2002/47/EC (CON/2008/37), OJ C 216 of 23/8/2008, p. 1, para. 2.

203 ECB, Opinion CON/2008/37, para. 2.3.

204 Directive 2009/44/EC.

financial instruments to also cover credit claims,[205] thus "facilitating the use of credit claims as collateral by NCBs" and benefitting credit institutions which have large amounts of credit claims on their balance sheets.[206] This serves to make the legal position of NCBs more secure and facilitates "an informal and efficient operational handling of that kind of asset."[207] Moreover, Art. 3(1) provides that, when credit claims are provided as financial collateral, Member States shall not require that the creation, validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claim provided as collateral. This is important in order to ensure an effective ELA operation, as the necessity to register or notify a credit claim used as collateral for the provision of ELA could otherwise impact on the ability of the NCB to conduct a covert ELA operation.

It is also worth noting the contribution of Directive 2001/24/EC[208] to legal certainty regarding the enforceability of collateral where a credit institution enters into winding-up proceedings.

## II. Disclosure Requirements

Transparency is considered a vital part of a fully functioning financial market and is considered important for both market confidence and investor protection.[209] Several pieces of EU financial services legislation seek to ensure transparency, and ultimately fairness and investor confidence in the financial markets by obliging market participants to disclose certain relevant information to the public. Transparency is not only

205 Art. 2(1)(o) of Directive 2002/47/EC provides: "'credit claims' means pecuniary claims arising out of an agreement whereby a credit institution, as defined in Art. 4(1) of Directive 2006/48/EC, including the institutions listed in Art. 2 of that Directive, grants credit in the form of a loan." This was originally proposed by the ECB before Directive 2002/47/EC came into force. See ECB Opinion on a Directive of the European Parliament and of the Council on financial collateral arrangements (CON/2001/13), OJ C 196 of 12/7/2001, p. 10, para. 10. See *de Tomasi*, (fn. 104), p. 370.

206 ECB, Opinion CON/2008/37, para. 9.1.

207 Ibid.

208 Directive 2001/24/EC of the European Parliament and of the Council of 4/4/2001 on the reorganisation and winding up of credit institutions, OJ L 125 of 5/5/2001, p. 15. *See de Tomasi*, (fn. 104), p. 366.

209 See for example recital 2 of Directive 2003/6/EC of the European Parliament and of the Council of 28/1/2003 on insider dealing and market manipulation (market abuse), OJ L 96 of 12/4/2003, p. 16.

relevant in relation to a properly functioning financial market, but also for the credibility and accountability of public authorities, including the ECB and NCBs, and for the effectiveness of monetary and financial policies.[210]

However, as can be seen in the *Northern Rock* case, discussed below, disclosure obligations can interfere with the effectiveness of ELA and cause significant difficulties in executing an ELA operation. Ideally, there should be a possibility for the NCB to keep an ELA operation confidential "in order to contribute to the stability of the financial system as a whole and maintain public confidence in a period of crisis."[211] There are a number of justifications for this. First, there is considerable stigma attached to the receipt of ELA; while the recipient should be merely illiquid, other market participants, potential investors and depositors may question the recipient's solvency and long-term viability and may be reluctant to conduct further business with it. As a result, the recipient's liquidity problems may quickly turn into a solvency problem.[212] Second, disclosure of the provision of ELA to an individual institution, could lead to a wider loss of confidence in the financial system. The contagion effect could result in liquidity or even solvency problems for otherwise unaffected institutions.[213] Third the NCB may wish to keep the terms of the ELA operation covert, as a form of constructive ambiguity, in order to mitigate the risk of moral hazard where other institutions might face similar difficulties.[214]

This is not to suggest that information that an ELA operation has taken place should never be disclosed to the public. Rather the NCB or the recipient should have the possibility to notify the public *ex post*, in a measured and controlled manner, in order to prevent panic.[215]

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210 More specifically, an argument in favour of the transparency of ELA operations would be *Bagehot's* criterion to provide an assurance of support to the market in times of crisis in advance, in order to assuage a panic before it even begins. This view is supported by the Sveriges Riksbank, (fn. 132), pp. 58-59 and 72-73. See also *Walsh*, The Benefits of Enhanced Transparency for the Effectiveness of Monetary and Financial Policies, Seminar on Selected Experiences in Implementing the Code of Good Practices on transparency in Monetary and Financial Policies, Monetary and Financial Systems Department, International Monetary Fund, Washington, DC on 7/2/2005, http://people.ucsc.edu/~walshc/MyPapers/IMF_2_7_2005_remarks.pdf (6/9/2013); *Capraru*, Financial Stability and Central Bank Transparency in Europe, Scientific Annals of the Alexandru Ioan Cuza University of Iasi 57 (2010), p. 96; *Bruni/de Boissieu*, (fn. 104), p. 184.

211 ECB Opinion on a proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2004/109/EC (CON/2010/6), OJ C 19 of 26/1/2010, p. 1, para. 2.2.

212 See for example House of Commons Treasury Committee, The run on the Rock, Fifth Report of Session 2007-08, Vol. I, p. 148; *Cea*, (fn. 82), p. 72; *Mayes*, (fn. 86), p. 355; *Lastra*, Legal Foundations of International Monetary Stability, 2006, p. 316.

213 *Freixas et al*, (fn. 4), p. 160.

214 Ibid.; *Stasch*, (fn. 32), p. 99.

215 House of Commons Treasury Committee, (fn. 212), p. 148. See also *Bruni/de Boissieu*, (fn. 104), p. 184.

Thus the ECB in its opinion has called for an explicit exception to the disclosure obligations for central banks' monetary policy operations and ELA in all relevant EU legislation. In order to ensure the smooth functioning of the financial system, this should be a plain and unambiguous exception, "as an assessment of the need for disclosure on a case by case basis could create a deadlock in a situation where swift action is required."[216]

## 1. The Market Abuse Directive and proposed Market Abuse Regulation

Directive 2003/6/EC[217] seeks to combat market abuse, in particular insider dealing and market manipulation.[218] For this purpose, Directive 2003/6/EC requires the issuers of financial instruments to publicly disclose all inside information that concerns them.[219] Credit and other financial institutions are often issuers of financial instruments for the purposes of the Directive.[220]

Inside information is defined by Directive 2003/6/EC as information of a precise nature relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[221] Information that the issuer of financial instruments has obtained ELA would undoubtedly fall within this definition and would be considered "information a reasonable investor would be likely to use as part of the basis of his investment decisions."[222]

Article 6(2) of Directive 2003/6/EC provides for an exception to the broad disclosure requirement. An issuer may, under his own responsibility, delay the public disclosure of inside information, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of such information.[223]

However, this exception has proved insufficient for the purposes of ensuring a covert ELA operation. Shortly before the provision of ELA by the Bank of England

216 ECB, Opinion CON/2010/6, para. 2.2.

217 See *Tupits*, (fn. 38), pp. 179-181.

218 Recital 12 of Directive 2003/6/EC.

219 Art. 6(1) of Directive 2003/6/EC.

220 Art. 1(3) of Directive 2003/6/EC defines a broad range of instruments as "financial instruments."

221 Art. 1(1) of Directive 2003/6/EC.

222 Art. 1(2) of Commission Directive 2003/124/EC of 22/12/2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, OJ L 339 of 24/12/2003, p. 70.

223 Art. 3(1) of Commission Directive 2003/124/EC provides further details of what are considered legitimate interests.

to Northern Rock in 2007, the Board of Northern Rock, the Bank of England, and the Financial Services Authority (FSA) were given legal advice that a covert ELA operation would not be possible under Directive 2003/6/EC.[224] This was, in part, due to the difficulties in ensuring the confidentiality of the information and uncertainty as to whether the delay in disclosure would mislead the public.[225] The report of the House of Commons Treasury Committee found that, due to the stigma of such an operation, the inability of the UK authorities to provide a covert ELA operation contributed significantly to the run on the deposits of Northern Rock between 14 and 17 September 2007 and its subsequent difficulties.[226]

As a result, this issue has been addressed by Art. 12 of the Commission's proposal for a Regulation on insider dealing and market manipulation,[227] which was published on 20 October 2011, and will replace Directive 2006/3/EC when it is adopted. Article 12(5) of the proposal provides that a competent authority may permit the delay by an issuer of a financial instrument of the public disclosure of inside information, provided (i) that the information is of systemic importance; (ii) it is in the public interest to delay its publication; and (iii) the confidentiality of that information can be ensured.

The ECB has welcomed this development, but called for several enhancements.[228] In particular, the ECB recommended that the competent authority should be entitled "not only to permit but also to decide on its own initiative to delay the disclosure of inside information of systemic importance."[229] In addition, the ECB recommended

224 House of Commons Treasury Committee, (fn. 212), p. 137.

225 Ibid., p. 138.

226 Ibid., p. 148. See also *Lastra*, Northern Rock, UK bank insolvency and cross-border bank insolvency, Journal of Banking Regulation 9 (2008), p. 173. While the European Commission subsequently disputed the interpretation of Directive 2006/3/EC and argued that Art. 6(2) would indeed have permitted Northern Rock to delay disclosure, the House of Commons Treasury Committee, (fn. 212), p. 215 accepted that there were legal impediments to delayed disclosure and recommended the UK Government to work with the European Commission, the ECB and NCBs to examine whether there is a need to amend the Directive 2006/3/EC in order "to ensure that covert support operations by a central bank are permitted in specified circumstances." See also Commission, Impact Assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on insider dealing market manipulation (market abuse) and the proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM (2011) 651 final, pp. 128, 179.

227 COM (2011) 651 final.

228 ECB, Opinion on (i) a proposal for a directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council; (ii) a proposal for a regulation on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories; (iii) a proposal for a directive on criminal sanctions for insider dealing and market manipulation; and (iv) a proposal for a regulation on insider dealing and market manipulation (market abuse) (CON/2012/21), OJ C 161 of 7/6/2012, p. 3, paras. 16.1-16.3.

229 Ibid., amendment 14.

that, in view of possible financial stability concerns, the assessment of the systemic importance of issuers should be made in cooperation with the relevant central bank, the supervisory authority and the national macro-prudential authority and that the proposal should be amended to that effect.[230]

While the ECB's recommendation regarding the consultation of and cooperation with the central bank and other authorities has been incorporated into the provisional agreement between the Council and European Parliament on the proposal,[231] there has been no move to give the competent authority the power to decide whether to delay disclosure. Indeed, the wording of the provisional agreement emphasises that the decision to delay disclosure is made by the relevant issuer "under its own responsibility." It is likely that this approach has a political motive, due to the reluctance of Member States to make their competent authorities vulnerable to litigation taken by market participants negatively affected by delayed disclosure. However, this means that the issuer – or rather, the management body of the issuer – will make the decision to delay disclosure in its own interest, and not necessarily in the interests of the stability of the financial system.

Nevertheless, the lessons learned from the Northern Rock crisis have been applied by the Commission, and the Commission's proposal will go a long way to ensure that, in future, EU legislation will not stand in the way of an effective covert ELA operation.

## 2. The Prospectus Directive

The purpose of the Prospectus Directive[232] is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market,[233] thus ensuring investor protection and market efficiency.[234] Any entity which offers securities to the public, including credit institutions, is obliged to publish a prospectus in advance.[235]

Article 5(1) of the Prospectus Directive provides that this prospectus must contain all information which is necessary to enable investors to make an informed assessment

230 Ibid., para. 16.3. See also amendments 14, 15 and 17.

231 Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), Validation of the provisional agreement with the European Parliament, Brussels of 8/7/2013.

232 Directive 2003/71/EC of the European Parliament and of the Council of 4/11/2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345 of 31/12/2003, p. 64; *Tupits*, (fn. 38), p. 181 et seq.

233 Art. 1(1) of Directive 2003/71/EC.

234 Recital 10 of Directive 2003/71/EC.

235 Art. 3(1) of Directive 2003/71/EC.

of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. Thus, information that the issuer was in receipt of ELA would have to be disclosed in the prospectus.

However, Art. 8(2) provides that the competent authority may authorise the omission from the prospectus of certain information in a number of circumstances including, *inter alia*, if it considers that disclosure of such information would be contrary to the public interest.[236] Thus the Prospectus Directive already contains an important exception which would facilitate a covert ELA operation by the NCB. The ECB has recommended further clarification that there would be no requirement for the prospectus to contain information about central bank lending or other liquidity facilities (including ELA) provided to a credit institution by a NCB.[237] However, this amendment did not find its way into the Prospectus Directive.[238]

## 3. The Transparency Directive

The Transparency Directive[239] establishes requirements in relation to the disclosure of periodic and on-going information about issuers whose securities are already admitted to trading on a regulated market.[240] Articles 4(1) and 5(1) of the Transparency Directive oblige the issuer to publish annual and half-yearly financial reports while Art. 6(1) of the Transparency Directive provides that an issuer must publish interim management reports twice a year. These reports must provide an explanation of material events and transactions that have taken place during the relevant period and their impact on the financial position of the issuer, in addition to a general description of the financial position and performance of the issuer.

No exemption equivalent to those under Directive 2003/6/EC or under the Prospectus Directive is available to issuers from these reporting requirements.[241]

236 Art. 8(2)(a) of Directive 2003/71/EC.

237 ECB, Opinion CON/2010/6, amendment 1.

238 Directive 2010/73/EU of the European Parliament and of the Council of 24/11/2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, OJ L 327 of 11/12/2010, p. 1.

239 Directive 2004/109/EC of the European Parliament and of the Council of 15/12/2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390 of 31/12/2004, p. 38. See *Tupits*, (fn. 38), p. 182 et seq.

240 Art. 1(1) of Directive 2004/109/EC.

241 See *Tupits*, (fn. 38), p. 182 et seq. Note however, Art. 8 of Directive 2004/109/EC. The exemptions under Art. 8 are, however, unrelated to the legitimate interests of the issuer or the systemic

However, it could be argued that, due to their periodic nature, the impact the half-yearly and annual reports may not be as significant on the ability of the NCB to conduct a covert ELA operation as immediate disclosure requirements.

Following the publication of the Commission's proposal for a directive amending the Transparency Directive,[242] the ECB recommended that the obligation under Art. 6 to publish interim management statements should continue to apply to financial institutions,[243] but should be brought into line with Art. 12 of the Commission's proposal for a Regulation on insider dealing and market manipulation.[244] However, was not taken on board by the Council's General Approach[245] or the outcome of the European Parliament's first reading.[246]

It is also interesting to note that Art. 11(1) of the Transparency Directive already provides an exemption from certain other notification requirements relating to shares and voting rights attaching to shares where these are provided to a NCB as collateral for monetary policy operations.[247] The ECB called for clarifications to

importance of the information. The ECB recommended the inclusion of explicit exemptions, but these suggestions did not find their way into the Transparency Directive. See ECB, Opinion CON/2010/6, amendments 2 and 3.

242 See Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, COM (2011) 683 final; ECB, Opinion on a proposal for a directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC (CON/2012/10), OJ C 93 of 30/3/2012, p. 2.

243 The Commission's proposal, intends, *inter alia*, to abolish the requirement for issuers to publish interim management statements under Art. 6(1) of the Transparency Directive in order to reduce the administrative burden on listed companies and thus make regulated markets more attractive for small and medium-sized issuers. See recital 4.

244 Ibid., amendment 5.

245 Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC – General Approach, Brussels of 25/5/2012.

246 Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC – Outcome of the European Parliament's first reading, Brussels of 21/06/2013.

247 Art. 11(1) of Directive 2004/109/EC provides that the notification requirements under Art. 9 and 10(c) do not apply: "to shares provided to or by the members of the ESCB in carrying out their functions as monetary authorities, including shares provided to or by members of the ESCB under a pledge or repurchase or similar agreement for liquidity granted for monetary policy purposes or within a payment system."

Art. 11(1), so that shares provided "in the context of other central bank lending or liquidity facilities (including the provision of emergency liquidity assistance)"[248] would be covered by this exception. However, the ECB's proposed amendment did not find its way into the amending directive.[249] However, it would be submitted that the material impact of this particular notification requirement is limited, as it only proscribes notification to the issuer of the shares, and not to the public.

## III. Exchange of Information with Supervisory Authorities

As discussed in section B.II. above, exchange of information between supervisory authorities, NCBs and governments is vital in order to provide an effective and efficient response to difficulties with a credit institution and to strengthen the stability of the financial system,[250] particularly in light of the integration of EU financial markets.

### 1. EU Banking Legislation

Directive 2013/36/EU and Regulation (EU) No 575/2013 lay down rules on access to the activity of credit institutions and the prudential supervision and prudential requirements of credit institutions and investment firms.[251] The Directive and Regulation are referred to as the "CRD IV" and "CRR" respectively. The CRD IV and CRR replace Directives 2006/48/EC and 2006/49/EC and will apply from 1 January 2014.[252]

248 ECB, Opinion CON/2010/6, amendment 4.

249 Directive 2010/73/EU.

250 See for example *Lastra*, (fn. 226), p. 174 who points out that the lack of effective and timely communication between the tripartite authorities in the UK (the Bank of England, HM Treasury and the FSA) contributed to the difficulties in addressing the problems with Northern Rock. See by contrast House of Commons Treasury Committee, (fn. 212), para. 275. This is a particularly important point where the NCB providing ELA is not also the prudential supervisor, as the NCB should be sufficiently informed to take decisions about ELA and thus needs adequate and timely access to supervisory information. See *Mayes*, (fn. 86), p. 361; *Schoenmaker*, What Kind of Financial Stability for Europe?, in: Goodhart (ed.), Which Lender of Last Resort for Europe?, 2000, p. 241; *Aglietta*, (fn. 31), p. 52 et seq.

251 Directive 2013/36/EU of the European Parliament and of the Council of 26/6/2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176 of 27/6/2013, p. 338; Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26/6/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176 of 27/6/2013, p. 1.

252 Directive 2006/48/EC of the European Parliament and of the Council of 14/6/2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177 of 30/6/2006, p. 1; Directive 2006/49/EC of the European Parliament and of the Council of 14/6/2006 on the

In general the competent authorities, i.e. public authorities or bodies officially recognised by national law, which are empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned,[253] are bound by the obligation of professional secrecy.[254] However, this obligation does not prevent the competent authority from transmitting information to *inter alia* central banks of the ESCB "in their capacity as monetary authorities when the information is relevant for the exercise of their respective statutory tasks […]."[255] Moreover, the obligation does not prevent the central banks of the ESCB from communicating to the competent authorities the information the latter may need for their tasks.[256] Furthermore, in an emergency situation,[257] Member States are obliged to allow the competent authorities to communicate, without delay, information to the ESCB central banks where that information is relevant for the exercise of their statutory tasks, including the conduct of monetary policy and related liquidity provision, the oversight of payments, clearing and securities settlement systems, and the safeguarding stability of the financial system.[258] In addition, the CRD IV provides that institutions must take necessary operational steps in advance to ensure that liquidity recovery plans can be implemented immediately. For credit institutions, such operational steps include holding collateral immediately available for central bank funding.[259]

capital adequacy of investment firms and credit institutions, OJ L 177 of 30/6/2006, p. 201. The ECB, in its opinion, made a number of drafting proposals in order to further improve the exchange of information between supervisory authorities and ESCB central banks. See ECB Opinion on a proposal for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and a proposal for a Regulation on prudential requirements for credit institutions and investment firms (CON/2012/5), OJ C 105 of 11/4/2012, p. 1, para. 11 and amendments 3, 7, 12, 15 and 16.

253 Art. 4(1)(40) of Regulation (EU) No 575/2013.

254 Art. 53(1) of Directive 2013/36/EU.

255 Art. 58(1)(a) of Directive 2013/36/EU.

256 Art. 58(2) of Directive 2013/36/EU.

257 Emergency situations are defined under Art. 114(1) of Directive 2013/36/EU as: "including a situation as described in Article 18 of Regulation (EU) No 1093/2010 or a situation of adverse developments in markets, arises, which potentially jeopardises the market liquidity and the stability of the financial system in any of the Member States".

258 Art. 58(4) Directive 2013/36/EU. See also Art. 114.

259 Art. 86(11) of Directive 2013/36/EU. This requirement was newly introduced by Directive 2013/36/EU. Another provision which may be of relevance is Art. 112(1)(c) of Directive 2013/36/EU, which provides that the consolidating supervisor must carry out the task of planning and coordination of supervisory activities in cooperation with the competent authorities involved, and if necessary with central banks, in preparation for and during emergency situations.

## 2. Legislation on the European System of Financial Supervision (ESFS)

In 2010, three new European Supervisory Authorities – EBA,[260] ESMA[261] and EIOPA[262] – were established in order to address the shortcomings in financial supervision exposed during the financial crisis, in particular in the areas of cooperation, coordination and consistent application of Union law.[263] The European Systemic Risk Board, which is responsible for the macro-prudential oversight of the financial system within the Union, was established in parallel.[264] These authorities form part of the European System of Financial Supervision (ESFS), which comprises "an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level."[265]

The regulations establishing the European Supervisory Authorities provide *inter alia* for exchange of information between the members of the ESFS,[266] and a facilitating and coordinating role for the respective Authority in relation to the

260 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24/11/2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331 of 15/12/2010, p. 12.

261 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24/11/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331 of 15/12/2010, p. 84.

262 Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24/11/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331 of 15/12/2010, p. 48.

263 The tasks and powers of the authorities are set out in Art. 8 of each of the Regulations. See also *Wymeersch*, The reforms of the European Financial Supervisory System: An Overview, ECFR 2010, p. 240.

264 Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24/11/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331 of 15/12/2010, p. 1. There is a close relationship between the ECB and the European Systemic Risk Board (ESRB). The President of the ECB chairs the ESRB for the first five years under Art. 5(1) of Regulation (EU) No 1092/2010 and the President and Vice-President of the ECB are Members of the General Board. Moreover the ECB ensures the Secretariat of the ESRB in accordance with Regulation (EU) No 1096/2010. See *Vletter-van Dort*, Some Challenges Facing European Central Banks as Supervising Authority, ECFR 2012, pp. 131, 149. However, this will not be of relevance for the provision of ELA to individual financial institutions. For example, Art. 15(3) of Regulation (EU) No 1092/2010 provides that "the ESRB may request information from the ESAs, as a rule in summary or aggregate form such that individual financial institutions cannot be identified."

265 Recital 9 of Regulation (EU) No 1093/2010. See also Art. 2(2), which provides that the ESFS shall comprise the ESRB, EBA, EIOPA, ESMA, the Joint Committee of European Supervisory Authorities and the competent or supervisory authorities in the Member States.

266 See for example Art. 2(4), 8(1)(d), 36(1) and 70(3) of Regulation (EU) No 1093/2010.

exchange of information,[267] and in emergency situations.[268] However, there is a notable absence of provisions on cooperation or exchange of information with the ESCB.[269] This was highlighted by the ECB in its opinion, which pointed out that "central bank access to supervisory information on financial institutions may be relevant to the conduct of macro-prudential monitoring, the oversight of payment, clearing and settlement systems and the safeguarding of financial stability in general," referring in particular to the role of central banks as suppliers of liquidity to the financial system.[270] Notwithstanding these shortcomings, it is worth noting that this situation is likely to change with the establishment of the Single Supervisory Mechanism, in particular as the ECB will become a member of the ESFS.[271]

## IV. The proposed Bank Resolution Directive

The proposed Directive for the recovery and resolution of credit institutions and investment firms[272] seeks to address the lack of adequate tools at Union level to effectively deal with unsound or failing credit institutions, investment firms and other financial institutions by laying down certain rules and procedures for their recovery and resolution.

Whether or not the receipt of ELA by an institution must be taken into account by the competent or resolution authorities will depend on whether it falls under the definition of "extraordinary public financial support". The proposed Directive defines this term as "State aid within the meaning of Art. 107(1) TFEU, that is provided in order to preserve or restore the viability, liquidity or solvency of an

267 See for example Art. 8(2)(h), 29(1)(b), 31(2)(a) and 35 of Regulation (EU) No 1093/2010.

268 See for example Art. 18 of Regulation (EU) No 1093/2010.

269 *Vletter-van Dort*, (fn. 264), p. 153 also notes difficulties due to the lack of close links between the European Supervisory Authorities and the ESRB and ECB: "the crisis has taught that monetary policy cannot be completely separated from micro and macro supervision." Note however that Art. 40 of Regulation (EU) No 1093/2010 provides that a non-voting representative of the ECB sits on the Board of Supervisors of EBA, and a non-voting representative of the NCB may be invited, where the NCB is not also the competent authority.

270 ECB, Opinion on three proposals for regulations of the European Parliament and of the Council establishing a European Banking Authority, a European Insurance and Occupational Pensions Authority and a European Securities and Markets Authority (CON/2010/5), OJ C 13 of 20/1/2010, p. 1, paras. 4-6 and amendments 2-7.

271 Art. 2(2)(f) of the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1093/2010, Council Final Compromise Text, Brussels on 23/3/2013.

272 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM (2012) 280 final. See also the Council General Approach, Brussels of 28/6/2013.

institution."[273] Thus, the treatment of ELA is closely intertwined with whether it is considered State aid under the Commission's State aid framework: ELA will not be considered State aid under certain conditions set out in the 2008 and 2013 Banking Communications, discussed below.[274]

If an institution requires "extraordinary public financial support", this will be a factor which the competent authority or resolution authority will take into account when determining that the institution is "failing or likely to fail" and thus should be subject to a resolution action.[275] However, the proposed Directive makes clear that the need for ELA from a NCB should not in itself be a condition that significantly demonstrates that an institution is "failing or likely to fail" – ELA may be necessary in order to preserve financial stability, in particular in case of a systemic liquidity shortage.[276] In those circumstances, and by derogation from the conditions laid down in the Banking Communications,[277] an institution will not be considered "failing or likely to fail", if it is in receipt of "extraordinary public financial support" in the form of a State guarantee to back liquidity facilities provided by central banks according to the central banks' "standard conditions."[278] These guarantee measures must be confined to solvent financial institutions, may not be part of a larger aid package, shall be conditional to approval under State aid rules, and shall be used for a maximum duration of three months.[279]

273 Art. 2(26) of the proposed Directive.

274 See section D.I. below and, in particular, Commission, 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 of 25/12/2008, p. 8 (2008 Banking Communication), para. 51.

275 Art. 27 of the proposed Directive. Other provisions provide that neither recovery nor resolution plans should assume access to "extraordinary public financial support" (Art. 5(3), 9(2), 9(4)(i) and 11(3)(e) of the proposed Directive). Recovery plans may, however, include an analysis of how and when an institution may apply for the use of central bank facilities in stressed conditions and against available collateral (Art. 5(3) of the proposed Directive). The resolution authority should not take access to "extraordinary public financial support" into account when assessing the extent to which institutions or groups are resolvable (Art. 13(1) of the proposed Directive). Nor should this be taken into account when making a valuation of the assets and liabilities of the institution (Art. 30(2) and 66(3)(c) of the proposed Directive).

276 Recital 24 of the proposed Directive.

277 See in particular the fourth condition under para. 51 of the 2008 Banking Communication, (fn. 274), which provides that the Commission may consider that ELA does not to constitute State aid when "the measure is taken at the central bank's own initiative, and in particular is not backed by any counter-guarantee of the State."

278 Art. 27(2)(d) of the proposed Directive. The standard conditions referred to are that "the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, and the central bank charges a penal interest rate to the beneficiary."

279 Ibid.

# D. Treatment of ELA operations under State aid assessments

## I. The Commission's State aid framework during the crisis

Article 107(1) TFEU sets out the general rule that any State aid granted by a Member State or through State resources is incompatible with the internal market. Aid granted by a Member State may nevertheless be compatible if it falls under one of the exceptions listed in Art. 107(2) or (3) TFEU.

Prior to October 2008, when examining the compatibility of State aid with the internal market, the Commission applied the exception set out under Art. 107(3)(c) TFEU, including in cases where aid was granted to entities in the financial sector.[280] This provision justifies *inter alia* to "aid to facilitate the development of certain economic activities," and is applied "where the aid is necessary to correct disparities caused by market failures."[281] The Rescue and Restructuring Guideline clarifies how these rules are applied.[282]

However, by October 2008, the financial crisis had deteriorated considerably and the Commission began to apply the exception under Art. 107(3)(b) TFEU. This provision sets out that aid "to remedy a serious disturbance in the economy of a Member State" may be compatible with the internal market. The provision had previously found very limited application:[283] the jurisprudence suggested that it could only be applied restrictively and must tackle a disturbance in the entire economy of the Member State.[284] Some of the first measures considered to fall under Art. 107(3)(b)

280 *Psaroudakis*, (fn. 50), p. 195; Flynn, State aid compliance in the financial sector: a post-crisis framework, ECB seminar: Regulation of financial services in the EU: surveillance – resilience – transparency, Frankfurt on 20/10/2011, http://www.ecb.int/events/conferences/shared/pdf/reg_fs/session2_topic2_flynn.pdf?4bc854ffb8dd744c3c1c7dfab3bfcf13 (6/9/2013).

281 Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244 of 1/10/2004, p. 2 (Rescue and Restructuring Guideline), para. 19. Only a limited distinction is made between the financial sector and other sectors in the application of these provisions: see para. 25.

282 Rescue and Restructuring Guideline, (fn. 281).

283 Commission Decision 88/167/EEC, Law 1386/1983 – *Aid granted to Greek industry*, OJ L 76 of 22/3/1988, p. 18.

284 EGC, joined cases T-132/96 and T-143/96, *Freistaat Sachsen and Volkswagen*, ECR 1999, II-3663, para. 167; Commission Decision 98/490/EC, case C 47/1996, *Crédit Lyonnais*, OJ L 221 of 8/8/1998, p. 28, point 10.1. Indeed, in its State aid decisions taken in the earlier part of the current financial crisis relating to Northern Rock, WestLB and SachsenLB, the Commission found that there was not sufficient evidence to suggest that aid granted to these credit institutions was necessary in order to remedy a serious disturbance to the economy. See Commission Decision of 5/12/2007, *Northern Rock* (State aid NN 70/2007), OJ C 43 of 16/2/2008, p. 1, para. 38; Commission Decision of 17/7/2008, *WestLB* (State aid NN 25/2008), OJ C 189 of 26/7/2008, p. 1, para. 42; Commission Decision 2009/341/EC, *Sachsen LB* (case C 9/2008), OJ L 104 of 24/4/2009, p. 34, para. 95; Commission, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, Staff Working Paper October 2011, p. 22.

TFEU were the guarantee schemes put in place by the Danish,[285] Irish,[286] and UK[287] governments, as sufficient evidence was provided of a systemic risk, not only to the banking sector, but also to the economy as a whole.[288]

The use of Art. 107(3)(b) TFEU allowed the Commission to loosen the criteria for the compatibility of aid, but not to fundamentally alter them, in order to reflect the specificities of the financial sector and to act in a flexible, but coordinated and consistent manner.[289]

The Commission's Banking Communication, published on 13 October 2008, provided guidance on the application of State aid rules – and Art. 107(3)(b) TFEU – to measures taken in relation to financial institutions in the context of the current global financial crisis.[290] It set out the criteria under which aid, including guarantee, recapitalisation, asset relief and liquidity assistance schemes and controlled winding-up would be considered compatible with the internal market.[291] These criteria cover a number of essential elements: access to aid should be non-discriminatory and limited in time; State support should be clearly defined and limited in scope; an appropriate contribution should be provided by the beneficiary; sufficient behavioural rules should be respected by beneficiaries; and an appropriate follow-up should be included.[292] Further guidance was provided by the Commission's Recapitalisation Communication,[293] Impaired Asset Communication[294] and Restructuring Commu-

285 Commission Decision of 10/10/2008, *Guarantee scheme for banks in Denmark* (State Aid NN51/2008), OJ C 273 of 28/10/2008, p. 2, para. 40.

286 Commission Decision of 13/10/2008, *Guarantee scheme for banks in Ireland* (State aid NN48/2008), OJ C 312 of 2008, p. 1, para. 57.

287 Commission decision of 13/10/2008, *Financial Support Measures to the Banking Industry in the UK* (State Aid N 507/2008), OJ C 290 of 13/11/2008, p. 1, para. 44.

288 *Psaroudakis*, (fn. 50), p.196; *Flynn*, (fn. 280).

289 *Psaroudakis*, (fn. 50), p. 196; *Flynn*, (fn. 280); *Smits*, (fn. 166), p. 312 et seq.; *Ojo*, The Changing Role of Central Banks and the Role of Competition in Financial Regulation during (and in the Aftermath of) the Financial Crisis, European Law Journal 2011, pp. 513, 516; Commission, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, Staff Working Paper October 2011, pp. 23 and 31.

290 2008 Banking Communication, (fn. 274).

291 Commission, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, Staff Working Paper October 2011, p. 25 et seq.

292 Ibid.

293 Commission, The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10 of 15/1/2009, p. 2 (Recapitalisation Communication).

294 Commission, The treatment of impaired assets in the Community banking sector, OJ C 72 of 26/3/2009, p. 1 (Impaired Assets Communication).

nication,[295] published between December 2008 and July 2009. The Commission made clear that all four Communications would remain in place until market conditions permit permanent rules for State aid for rescue and restructuring of banks, based on Art. 107(3)(c) TFEU.[296] On 10 July 2013 the Commission published a new Banking Communication to replace the 2008 Banking Communication and supplement the other Communications, applicable from 1 August 2013.[297]

In addition to the general guidance on the application of State aid rules in the financial crisis, both the 2008 and 2013 Banking Communications specifically dealt with the treatment of ELA. First, both Communications state that the Commission may consider that the provision of assistance by NCBs to a financial institution does *not* to constitute State aid when:

– the financial institution is solvent at the moment of the liquidity provision and the latter is not part of a larger aid package,
– the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value,
– the central bank charges a penal interest rate to the beneficiary,
– the measure is taken at the central bank's own initiative, and in particular is not backed by any counter-guarantee of the State.[298]

295 Commission, The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195 of 19/8/2009, p. 9 (Restructuring Communication).

296 Commission, The application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 329 of 2010, p. 7 (First Prolongation Communication); Commission, The application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356 of 6/12/2011, p. 7 (Second Prolongation Communication).

297 Commission, The application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216 of 30/7/2013, p. 1 (2013 Banking Communication).

298 2008 Banking Communication, (fn. 274), para. 51; 2013 Banking Communication, (fn. 297), para. 62. This followed from the assessment by the Commission in its *Northern Rock* decision, where it found that the provision of ELA by the Bank of England did not constitute State aid. Note, however, that at the request of HM Treasury, additional funding facilities were made available on 9/10/2007 by the Bank of England to Northern Rock against an undertaking to indemnify the Bank of England against liabilities that might arise from its role in the facilities. According to the Commission, this measure constituted State aid, but was compatible with the internal market in accordance with Art. 107(3)(c). See the Commission's *Northern Rock* decision, (fn. 284), paras. 17-19, 35 and 47.

ELA provided by an NCB which does not fulfil the above criteria would be considered State aid. It would therefore be subject to the notification and authorisation procedure for new State aids, and may not be granted until the Commission has taken a decision authorising it.[299]

It will be interesting to observe how the changes introduced by the 2013 Banking Communication will affect the Commission's approach towards ELA which is considered State aid. Under the 2008 Banking Communication, the Commission stated it would examine whether the State aid could be found compatible with the internal market, according to the principles of the Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty.[300] The 2008 Banking Communication stated that the Commission could, in principle approve a scheme for the provision of liquidity assistance for a period longer than six months and up to two years, provided that a regular review of such a scheme is ensured every six months. This could be further extended, upon Commission approval, in the event that the crisis in the financial markets so required.[301]

The 2013 Banking Communication no longer makes reference to examining compatibility with the Rescue and Restructuring Guidelines, nor does it refer to the possibility of approving such a scheme for a period longer than six months. These changes reflect the Commission's approach to the "phasing-in" of institutional and regulatory changes aimed at strengthening the resilience of the financial sector, improving the prevention, the management and the resolution of banking crises and – in the long term – returning to normality. While it is possible that, where necessary, ELA operations may nevertheless be examined for compatibility with the stricter criteria set out under Art. 107(3)(c) TFEU and the Rescue and Restructuring Guidelines, the Commission will be likely to take a more restrictive approach towards the authorisation of State aid, particularly regarding the provision of ELA over an extended period of time.

## II. State aid cases involving ELA

### 1. ELA provided by the Bank of England

The Commission found that ELA provided by the Bank of England to Northern Rock[302] and Royal Bank of Scotland (RBS)[303] at the earlier stages of the credit

299 Art. 108(3) TFEU and Art. 3 of Council Regulation (EC) No 659/1999 of 22/3/1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, OJ L 83 of 27/3/1999, p. 1.

300 Rescue and Restructuring Guideline, (fn. 281).

301 2008 Banking Communication, (fn. 274), para. 52.

302 Commission's *Northern Rock* decision, (fn. 284), para. 34.

303 Commission Decision of 22/4/2010, *Royal Bank of Scotland* (cases N 422/2009 and N 621/2009), OJ C 119 of 7/5/2010, p. 1, para. 124.

institutions' difficulties were "part of the normal monetary operation of a central bank and [did] not constitute State aid:"[304] these measures were conducted on the Bank of England's own initiative,[305] were unconnected to the larger aid package provided subsequently by the State and the collateral provided by the credit institution was not counter-guaranteed by the State.

However, once HM Treasury had intervened with a larger aid package, including State guarantees,[306] capital injections,[307] and measures to address impaired assets,[308] ELA provided by the NCB was considered State aid and was examined for compatibility with the internal market in accordance with the Rescue and Restructuring Guidelines. In both cases, the Commission found that the ELA fulfilled the criteria laid down in point 25 of the Guidelines and were thus compatible with the internal market. In particular:

– the ELA was provided in the form of loans granted by the Bank of England at an interest rate at least comparable to those observed for loans to healthy firms, and the loans would be reimbursed within 6 months;[309]

– the ELA was warranted on the grounds of serious social difficulties and, due to the fact that the credit institutions would only be granted the minimum cash necessary, the ELA would not have unduly adverse spill over effects on other Member States;[310]

In the case of Northern Rock, the authorities had undertaken to submit a restructuring or liquidation plan within six months, while for RBS, the Commission noted that the ELA had already been reimbursed in full;[311]

– the ELA was restricted to the amount needed to keep the firm in business for the period during which the aid was authorised: Northern Rock only received the cash needed for the week ahead, while RBS received the minimum necessary for the bank to be able to fulfil its lending operations;[312] and

304 Ibid.

305 Commission's *Northern Rock* decision, (fn. 284), para. 33.

306 Ibid., paras. 15-16 and 27-28; Commission's *Royal Bank of Scotland* decision, (fn. 303), para. 50.

307 Ibid., para. 31 et seqq.

308 Ibid., para. 42 et seqq.

309 Commission's *Northern Rock* decision, (fn. 284), paras. 44, 47 and 48; Commission's *Royal Bank of Scotland* decision, (fn. 303), para. 182.

310 Commission's *Northern Rock* decision, (fn. 284), para. 49; Commission's *Royal Bank of Scotland* decision, (fn. 303), para. 182.

311 Commission's *Northern Rock* decision, (fn. 284), para. 50; Commission's *Royal Bank of Scotland* decision, (fn. 303), para. 183.

312 Commission's *Northern Rock* decision, (fn. 284), para. 51; Commission's *Royal Bank of Scotland* decision, (fn. 303), para. 182.

– the provision of ELA complied with the 'one time, last time' principle.[313]

In the above two cases, a systematic approach by the Commission to the application of the Rescue and Restructuring Guidelines can be identified.

## 2. ELA provided by the National Bank of Belgium

The Commission considered the ELA operation provided by the National Bank of Belgium in cooperation with the Banque de France to Dexia in October 2009 and covered by a guarantee of the Belgian State to be State aid.[314] The Commission considered that the capital increase, State guarantee and ELA measures taken in support of Dexia were: (i) appropriate to address the major liquidity crisis faced by Dexia – the Commission considered it was appropriate to supplement guarantee and recapitalisation plans with other forms of liquidity support;[315] (ii) the aid was limited to what was necessary for the continuation of Dexia's activities – for example the penalising interest rate on the ELA operation meant that that source of liquidity was called on only where needed;[316] and (iii) the aid was proportionate – for example, the penalising rate meant that the measure was an expensive source of liquidity which was unlikely to give Dexia an undue advantage for its operations.[317] Thus the Commission found the measures to be compatible with Art. 107(3)(b) TFEU and authorised the measures for six months.[318]

Following the expiration of this period, the Commission examined the submitted restructuring plan for Dexia, which included the extension of the ELA operation.[319] The Belgian State argued that the ELA operation should not be considered State aid, as the operations came under the normal tasks of NCBs and, in particular, their role to contribute to the stability of the financial system as LOLR.[320] It argued that the National Bank of Belgium and the Banque de France at all times took autonomous and discretionary decisions on granting ELA and the grant of ELA was a temporary measure.[321] In addition, the Belgian State stressed that the ELA provided to Dexia was approved by the Governing Council of the ECB: thus, classifying ELA as State

313 Commission's *Northern Rock* decision, (fn. 284), para. 52; Commission's *Royal Bank of Scotland* decision, (fn. 303), para. 184.

314 Commission Decision of 19/11/2008, *Dexia SA* (State aid NN 49/2008, NN 50/2008, NN 45/2008), para. 30.

315 Ibid., para. 61.

316 Ibid., para. 67.

317 Ibid., para. 73.

318 Ibid., para. 76.

319 Commission Decision 2010/606/EU, *Dexia SA* (C 9/09), OJ L 274 of 19/10/2010, p. 54.

320 Ibid., para. 105.

321 Ibid.

aid would make it incompatible with the prohibition of monetary financing.[322] It argued that it would be legally impossible to attribute to a Member State the actions laid down by a NCB when performing its tasks, provided that the NCB respects the conditions laid down for the performance of this task by the ECB.[323] According to the Belgian State, the mere fact that any ELA provided by the National Bank of Belgium automatically benefits from the guarantee also make no difference to this conclusion. It was argued that due to the structure of the National Bank of Belgium the guarantee was consequently an integral part of the NCBs Statute and its purpose was to allow the NCB to perform its task of LOLR.[324]

These arguments were rejected by the Commission, who reasserted the application of paras. 51 and 52 of the 2008 Banking Communication.[325] The Commission stated that since the National Bank of Belgium is a Belgian State body, its resources are public resources. Moreover the counter-guarantee has the effect that any loss will be borne directly by the Belgian State.[326] Thus it was concluded that the ELA operations did constitute State aid and were examined for compatibility with the internal market as part of the restructuring plan. The Commission concluded that, subject to a number of conditions, the aid nevertheless was compatible with the internal market.[327]

Similarly, ELA operations by the National Bank of Belgium in favour of Fortis were considered State aid, as they were backed by a counter-guarantee of the Belgian State.[328] Due to *inter alia* the fact that the ELA was kept to the minimum required, it was nevertheless considered to be compatible with the internal market.[329]

## III. Does the provision of ELA constitute State aid in certain circumstances?

### 1. There has been an intervention by the State or through State resources

First, it must be examined whether ELA provided by a NCB as a national task in accordance with Art. 14.4 ESCB Statute can be considered aid granted "by a

322 Ibid., para. 106.

323 Ibid.

324 Ibid., para. 107.

325 Ibid., para. 133.

326 Ibid., para. 135.

327 Ibid., para. 146.

328 Commission Decision of 3/12/2008, *Fortis* (State aid NN 42/2008, NN 46/2008, NN 53/A/2008), OJ C 80 of 2009, p. 7, para. 46.

329 Ibid., para. 87.

Member State or through State resources" within the meaning of Art. 107(1) TFEU. In examining this, the CJEU in its jurisprudence applies two "separate and cumulative conditions:"[330] first, the aid must be imputable to the State and second, the aid must be granted directly or indirectly through State resources.[331]

It is clear that intervention directly by the State – and by definition, this includes public authorities[332] – is imputable to the State. The legal status of a NCB as a public authority may be explicitly set out in its Statute.[333] Even where this is not the case, aid granted by a public or private body established or appointed by the State may also fall under Art. 107(1) TFEU.[334] If the NCB is considered to be a public undertaking,[335] the CJEU will not automatically presume that its actions can be imputed to the State, but will infer this by examining a set of indicators, such as its integration into the structures of the public administration, the nature of its activities or the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law).[336]

The fact that NCBs are established by national legislation and fulfil tasks in accordance with that legislation would be an important indicator in determining

330 EGC, case T-351/02, *Deutsche Bahn AG v Commission*, ECR 2006, II-1047, para. 103.

331 CJEU, case C-482/99, *Stardust Marine*, ECR 2002, I-4397, para. 24; CJEU, case C-279/08 P, *Commission v Netherlands*, ECR 2011, I-7671, para. 103. Note however: neither the CJEU's jurisprudence nor the literature have always made a clear distinction between the two. See *Soltész*, Der Tatbestand der Beihilfe, in: von Montag/Jürgen (eds.), MüKo Kartellrecht, Bd. 3: Beihilfenrecht und Vergaberecht, 2011, para. 239.

332 *Quigley*, European State Aid Law and Policy, 2009, p. 13; *Bacon*, State Aids and General Measures, Yearbook of European Law 17 (1997), pp. 270, 280; *Mederer/Triantafyllou*, in: von der Groeben/Schwarze, (fn. 55), Art. 87 EG, paras. 23-29. This includes all parts of the State: not only national central authorities, but also intra-state entities (decentralised federated, regional or other), whatever their status or description. EGC, joined cases T-92/00 and T-103/00, *Ramondín*, ECR 2002, II-1385, para. 57. *Stasch*, (fn. 32), p. 189 argues that a NCB should be considered an intra-state entity within the meaning of the CJEU's case law. See also the definitions of public authority and public undertaking in Art. 2(a) and (b) of Commission Directive 2006/111/EC of 16/11/2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318 of 17/11/2006, p. 17. Note also the explicit exception for central banks under Art. 5(1)(b) thereof.

333 See for example, Art. 3(1) Organic Law of the Banque Centrale du Luxembourg; §2(1) Gesetz über die Deutsche Bundesbank. *Radtke*, (fn. 36), p. 122.

334 CJEU, case C-345/02, *Pearle BV and Others v Hoofdbedrijfschap Ambachten*, ECR 2004, I-7139, para. 34; CJEU, joined cases 67, 68 and 70/85, *van der Kooy v Commission*, ECR 1988, I-219, para. 35; *Craig/de Búrca*, EU Law: Text, Cases and Materials, 2007, p. 1090 et seq.

335 Neither *Psaroudakis*, (fn. 50), p. 213; nor *Stasch*, (fn. 32), p. 187 think that a NCB should be considered a public undertaking instead of a public authority. However, *Psaroudakis* acknowledges that some NCBs are organised as public companies.

336 CJEU, case C-482/99, *Stardust Marine*, ECR 2002, I-4397, paras. 52-56.

imputability to the State.[337] Moreover, the tasks assigned to central banks, including the definition and implementation of monetary policy and the maintenance of financial stability are undoubtedly public tasks.[338] The only reason the State delegates these duties to the NCB is to avoid conflicts of interest between economic policy and monetary and financial stability.[339]

The imputability of actions of an NCB to the State applies irrespective of the independence of that NCB from government influence:[340] the CJEU has held that "a Member State incurs liability whatever the agency of the State whose action or inaction caused the failure to fulfil its obligations, even in the case of a constitutionally independent institution."[341]

It is clear that the Commission, in its State aid decisions has always considered that NCB interventions are granted "by a State or through State resources."[342] Moreover, in *Greece v Commission*, the CJEU held that interest rebates on exports were introduced "by the Hellenic Republic through the Bank of Greece which, for that purpose, acted under direct State control," and were thus measures charged to State resources.[343]

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337 See section B.I.5. above. CJEU, case C-305/89, *Alfa Romeo*, ECR 1991, I-1603, para. 14; CJEU, case C-303/88, *ENI/Lanerossi*, ECR 1991, I-1433. In EGC, case T-358/94, *Air France v Commission*, ECR 1996, II-2109, para. 58, it was sufficient that the undertaking was established by a statute and its tasks were governed by statutory and regulatory rules, and that the Director General was appointed by the President of France and its other Governors by the government. This shows considerable parallels to NCBs. See *Stasch*, (fn. 32), p. 187. Although this case was decided before the "indicator test" was introduced by CJEU, case C-482/99, *Stardust Marine*, ECR 2002, I-4397, it is nevertheless submitted that this will be of considerable relevance. See *Koenig/Kühling/Ritter*, EG-Beihilfenrecht, 2005, p. 121. Note also that this was considered by Opinion of AG *Slynn* with regard to the Bank of Greece in CJEU, case 57/86, *Greece v Commission*, ECR 1988, 2855, 2867.

338 *Psaroudakis*, (fn. 50), p. 213. For example, monetary sovereignty is a right held by a State under international law, which can be delegated by several Member States to a common central bank. *Gianviti*, Current Legal Aspects of Monetary Sovereignty, in: IMF, Current Developments in Monetary and Financial Law, Vol. 4, 2005, p. 3; *Proctor*, Mann on the Legal Aspect of Money, 2005, p. 500.

339 *Stasch*, (fn. 32), p. 187.

340 *Psaroudakis*, (fn. 50); *Stasch*, (fn. 32), p. 189.

341 EGC, case T-358/94, *Air France v Commission*, ECR 1996, II-2109, para. 60. CJEU, case 77/69, *Commission v Belgium*, ECR 1970, 237, para. 15. Commission Decision 2008/708/EC, *Aid for the introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia* (State aid C 34/06), OJ L 236 of 3/9/2008, p. 10, para. 67. *Soltész*, (fn. 331), para. 261.

342 *Stasch*, (fn. 32), p. 184. Commission Decision 2000/600/EC, *Banco di Sicilia and Sicilcassa* (C(1999) 3865), OJ L 256 of 10/10/2000, p. 21, para. 40; see also section D.II. above.

343 CJEU, case 57/86, *Greece v Commission*, ECR 1988, 2855, para. 13; see also Opinion of AG *Darmon* to CJEU, joined cases C-72/91 and C-73/91, *Sloman Neptun*, ECR 1993, I-887, para. 20. See *Weenink/Schulze Steinen*, (fn. 191), p. 515; *Psaroudakis*, (fn. 50), p. 212.

The second condition – that the NCB is providing aid "through State resources" – is also likely to be fulfilled.[344] Any intervention must entail "a burden on the public finances in the form either of expenditure or of reduced income."[345] NCB resources can be considered State resources, if it can be shown that the resources "constantly remain under public control."[346] Considering that the capital of the NCBs is often owned by their respective Member States,[347] and profits are distributed to the State budget,[348] the provision of ELA would constitute a burden on public finances in the form of reduced income.[349]

Though the provision of ELA cannot be considered to be a measure of monetary policy, it is interesting to note that the CJEU has held that the "monetary objective" of a measure "does not entitle [Member States] to take unilateral measures prohibited by the Treaty."[350] Thus monetary policy cannot be invoked to prevent the application of the Treaty rules on State aid.[351] Neither should measures to ensure the stability of the financial system preclude the application of State aid rules.[352]

344 *Radtke*, (fn. 36), p. 122 et seq.

345 Opinion of AG *Capotorti* to CJEU, case 82/77, *van Tiggele*, ECR 1978, 25, para. 8; CJEU, joined cases C-72/91 and C-73/91, *Sloman Neptun*, ECR 1993, I-887, para. 21. See *Plender*, Definition of State aid, in: Biondi/Eeckhout/Flynn (eds.), The Law of State Aid in the European Union, 2004, pp. 3, 18-19; *Soltész*, (fn. 331), para. 268.

346 CJEU, case C-482/99, *Stardust Marine*, ECR 2002, I-4397, para. 37; CJEU, case C-83/98 P, *Ladbroke Racing*, ECR 2000, I-3271, para. 50.

347 *Stasch*, (fn. 32), p. 187; *Smits*, (fn. 86), p. 112. For example, in CJEU, joined cases 67, 68 and 70/85, *van der Kooy*, ECR 1988, 219 the CJEU held that it was relevant that the Netherlands directly or indirectly held 50 % of the shares in the undertaking in question. *Soltész*, (fn. 331), para. 284. See also *Heidenhain*, in: Heidenhain (ed.), European State Aid Law, 2010, § 4 The Concept of State Aid, para. 38.

348 See above in fn. 112. In CJEU, case C-482/99, *Stardust Marine*, ECR 2002, I-4397, para. 37, the CJEU held that it was not relevant whether or not the means are *permanently* held by the Treasury.

349 CJEU, joined cases C-182/03 and C-217/03, *Belgium and Forum v Commission*, ECR 2006, I-5479, para. 129. *Plender*, (fn. 345), p. 18. Despite the fact that ELA would be secured by a penalty interest rate, given the high risks associated with this intervention, it is submitted that this is nevertheless a burden on the public finances.

350 CJEU, case 57/86, *Greece v Commission*, ECR 1988, 2855, para. 9; CJEU, case 127/87, *Commission v Greece*, ECR 1988, 3333, para. 7. See *Psaroudakis*, (fn. 50), p. 215. In its case law on this matter, the CJEU has used the terms "monetary objective", "monetary measure" and "monetary powers". It would appear that these terms can be understood to be synonymous with the term "monetary policy". Note in particular it was argued by the Italian State in CJEU, case 95/81, *Commission v Italy*, ECR 1982, 2187, 2191 that the measures of the Italian State in question formed part of monetary policy, in particular because they had "no aim other than that of avoiding speculative transactions against the national currency and the disequilibrium of the balance of payments."

351 *Quigley*, (fn. 332), p. 12. *Usher*, The Law of Money and Financial Services in the EC, 2000, p. 9. See also CJEU, joined cases 6 and 11-69, *Commission v France*, ECR 1969, 523.

352 *Smits*, (fn. 166), p. 312.

It can be concluded that ELA provided by a NCB as a national task under Art. 14.4 ESCB Statute is aid granted "by a State or through State resources" and must be notified in advance to the Commission.

However, an argument against the application of the Commission's procedural powers under Art. 108 TFEU could be found in Art. 271(d) TFEU and Art. 35.6 ESCB Statute. These Articles provide that the CJEU has jurisdiction in disputes concerning the fulfilment by NCBs of obligations under the Treaties and ESCB Statute. In this connection the powers of the ECB in respect of NCBs are be the same as those conferred upon the Commission in respect of Member States by Art. 258 TFEU.[353] Thus, notwithstanding the role of the Commission, it is exclusively[354] for the ECB to ensure that NCBs honour the obligations laid down by the Treaties and ESCB Statute.[355] Many commentators suggest that the ECB has jurisdiction not only regarding obligations internal to the ESCB, but regarding compliance of the NCB with Treaty obligations in general.[356] This stems from the rationale for Art. 271(d) TFEU, which is to avoid making the Member State liable for actions of its independent NCB[357] and to ensure that provisions on independence – in particular Art. 130 TFEU – cannot be undermined by the powers of the Commission under Art. 258 TFEU.[358]

It is, however, submitted that the above arguments cannot conclusively exclude a role for the Commission with regard to State aid, and that the powers of the ECB under Art. 271(d) TFEU are limited to ensuring the fulfilment of ESCB-related obligations by the NCBs.[359]

353 Art. 271(d) TFEU refers to the Governing Council, while Art. 35.6 ESCB Statute refers to the ECB. *Karpenstein*, in: Grabitz/Hilf/Nettesheim, (fn. 56), Art. 237 EGV, para. 28.

354 Ibid.; *Gaitanides*, in: von der Groeben/Schwarze, (fn. 55), Art. 237 EG, para. 18; *Krück*, in: von der Groeben/Thiesing/Ehlermann (eds.), Kommentar zum EU-/EG-Vertrag, 1997, Art. 180 EGV, para. 26 et seq.

355 See also Council Regulation (EC) No 3603/93, recital 9.

356 *Ehricke*, in: Streinz (ed.), EUV/AEUV, 2012, Art. 271 AEUV, para. 20; *Gaiser*, Gerichtliche Kontrolle im Europäischen System der Zentralbanken, EuR 2002, p. 523; *Koenig*, Institutionelle Überlegungen zum Aufgabenzuwachs beim Europäischen Gerichtshof in der Währungsunion, EuZW 1993, p. 666.

357 *Goetze*, Die Tätigkeiten der nationalen Zentralbanken in der Wirtschafts- und Währungsunion, 1999, p. 175; *Potacs*, Nationale Zentralbanken in der Wirtschafts- und Währungsunion, EuR 2003, p. 38.

358 *Karpenstein*, (fn. 353), Art. 237 EGV, para. 28; *Gaitanides*, (fn. 354), Art. 237 EG, para. 18.

359 See for example *Smits*, (fn. 86), p. 109; *Gaitanides*, (fn. 354), Art. 237 EG, para. 22; *Karpenstein*, (fn. 353), Art. 237 EGV, para. 30: "Art. 35.6 der ESZB-Satzung gibt allerdings zu erkennen, daß die Zentralbanken von der EZB nicht wegen jedwedem Vertragsverstoß (z.B. einer Diskriminierung), sondern nur wegen Gemeinschaftsrechtsverstößen verklagt werden können, die unmittelbar oder mittelbar aus der ESZB-Satzung oder den Vertragsvorschriften über die ESZB fließen."

First, while Art. 271(d) TFEU might preclude the Commission from launching an infringement procedure against a Member State in accordance with Art. 258 TFEU,[360] it does not explicitly prevent the Commission from conducting the procedure set out under Art. 108 TFEU for State aids and referring the matter directly to the CJEU under Art. 108(2) second subparagraph. Moreover, the ECB has discretion to act where there has been a breach of the Treaties.[361] It seems illogical that the ECB alone would have the discretion whether or not to undertake action in the area of State aid, as the Commission not only has the expertise, but also the Treaty-based procedural powers in this area.

Second, the national task of providing ELA can only be assigned to the NCB by the Member State: the influence exercised by the ESCB is limited to a veto-right in accordance with Art. 14.4 ESCB Statute.[362] Thus NCBs can be considered "national agencies when performing non-ESCB functions"[363] and their actions can thus be imputed to the State. It would seem unreasonable that the Commission would be precluded from taking action against a Member State for a breach of Union law committed by the national authority responsible for the supervision of credit institutions – or even insurance undertakings[364] – on the basis that the national authority is also the NCB.[365]

360 See fn. 354 above.

361 CJEU, case 247/87, *Star Fruit*, ECR 1989, 291, para. 11-12 and CJEU, case C-87/89, *Sonito v Commission*, ECR 1990, I-1981, para. 6-7. These cases referred to the discretionary power of the Commission, precluding the right of individuals to require it to adopt a particular position. Contrast *Gaitanides*, (fn. 354), Art. 237 EG, para. 21, which suggests that the ECB is under an obligation to bring an action.

362 *Goetze*, (fn. 357), p. 175 has pointed out that a more convincing rationale for Art. 271(d) TFEU is that, with regard to the ESCB, the boundaries of State sovereignty over its NCB have been broken through. Thus it is submitted that State sovereignty remains intact with regard to national tasks carried out by NCBs.

363 *Lastra*, (fn. 62), p. 168.

364 This would be particularly strange, as Art. 127(6) TFEU explicitly provides that the ECB may *not* be assigned specific tasks relating to the prudential supervision of insurance undertakings. The NCBs of Belgium, the Czech Republic, Ireland, Lithuania, the Netherlands and Slovakia are also responsible for the supervision of insurance and reinsurance undertakings. See Art. 4(2) of Regulation (EU) No 1094/2010 and EIOPA, List of Members and Observers of the EIOPA Board of Supervisors, https://eiopa.europa.eu/about-eiopa/organisation/management/board-of-supervisors/index.html (6/9/2013). See also Art. 13(10) of Directive 2009/138/EC of the European Parliament and of the Council of 25/11/2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335 of 17/12/2009, p. 1.

365 See Art. 17 of Regulation (EU) No 1093/2010 in relation to the powers of the EBA and Art. 17 of Regulation (EU) No 1094/2010 in relation to the powers of EIOPA.

Finally, the Treaty provisions on independence only apply to the exercise of ESCB-related tasks. While the doctrine and opinions of the ECB can persuade – or even compel – the Member State to guarantee an equal level of independence to the NCB for the provision of ELA, that independence finds its legal basis in national law.[366] As we have seen above, even in the case of constitutionally guaranteed independence, actions of organs of State, public authorities or undertakings can nevertheless be imputable to the State.

The question now arises: what if ELA is provided by a NCB as a Eurosystem task in accordance with Art. 127(5) TFEU and Art. 18.1 second indent ESCB Statute? Can this also be considered State aid subject to the notification procedure?

If Member States are implementing Union provisions in accordance with their obligations stemming from the Treaties, the measures are not imputable to the Member State.[367] This would certainly be the case where ELA is provided as a Eurosystem task. The NCB would provide ELA as a task delegated to it by a guideline adopted by the Governing Council. NCBs are bound comply with guidelines by virtue of Art. 14.3 ESCB Statute.

Moreover, Art. 107 TFEU cannot be applied to the ECB or NCBs in the exercise of their ESCB tasks.[368] The jurisprudence of CJEU has indicated that measures adopted by Union institutions do not constitute State aid and thus cannot be subject to Art. 107 TFEU.[369] The ESCB is nevertheless bound to comply with the principle of an open market economy with free competition, and it is possible that the Treaty provisions on State aid may be applied by analogy.[370] However the principle of institutional balance[371] and the Treaty provisions on independence – in particular

366 See section B.II.1. above. It is possible that a different conclusion could be reached where the Treaty provisions on independence are applied to the provision of ELA by analogy, as suggested by *Radtke*, (fn. 36), pp. 136-141.

367 EGC, case T-351/02, *Deutsche Bahn*, ECR 2006, II-1047, para. 102; CJEU, case C-460/07, *Puffer*, ECR 2009, I-3251, para. 70; CJEU, joined cases 213 to 215/81, *Norddeutsches Vieh- und Fleischkontor*, ECR 1982, 3583. *Soltész*, (fn. 331), para. 265.

368 *Psaroudakis*, (fn. 50), p. 217; *Stasch*, (fn. 32), p. 262; *Tridimas*, (fn. 196), p. 266. See by contrast *Radtke*, (fn. 36), p. 142; *Smits*, (fn. 86), p. 271.

369 CJEU, case C-341/95, *Bettati*, ECR 1998, I-4355, para. 74. See also *Quigley*, (fn. 332), p. 25.

370 *Tridimas*, (fn. 196), p. 267; *Stasch*, (fn. 32), pp. 262 and 284, who refers to CJEU, case 240/83, *ADBHU*, ECR 1985, 531, para. 17.

371 *Tridimas*, (fn. 196), p. 267. See by contrast *Stasch*, (fn. 32), p. 307. *Jacqué*, The Principle of Institutional Balance, CMLR 41 (2004) p. 383.

the prohibition on seeking and taking instructions under Art. 130 TFEU[372] – would preclude *ex ante* administrative control of actions of the ECB or ESCB by the Commission.[373]

There may be *ex post* judicial control of the measure by the CJEU in accordance with Art. 263(1) TFEU and Art. 35.1 ESCB Statute.[374] However, the jurisprudence of the CJEU suggests that it will give Union institutions "a wide measure of discretion, the exercise of which is subject to a limited judicial review."[375] The CJEU will most likely restrict itself to verifying that the action taken is not vitiated by a manifest error or a misuse of powers and that the ECB did not clearly exceed the bounds of its discretion.[376] This would take account of the complex assessments undertaken by the ECB based on technical information which is liable to change rapidly.[377]

## 2. The intervention confers an economic advantage to the recipient

The CJEU has interpreted the term "economic advantage" in a broad manner.[378] Measures which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions will constitute State aid.[379] However, one could question whether ELA provided by the NCB in the form of a loan granted against collateral and at a penalty interest rate would really be considered an economic advantage. In this context, the CJEU's *market economy investor test* is relevant: it must be shown that a private investor, in possession of the same information on the entity's financial situation as that available to the

372 *Tridimas*, (fn. 196), p. 267; *Stasch*, (fn. 32), p. 308. The provisions on independence also apply to the Eurosystem's financial stability mandate. See *Krauskopf/Steven*, (fn. 107), p. 1175. While CJEU, case C-11/00, OLAF, ECR 2003, I-7147, para. 145 held, *inter alia*, that the application to the ECB of Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) would not undermine the ECBs independence, it is submitted that this could not be applied by analogy to State aid control by the Commission. It would be submitted that such interference with the decision by the ECB to undertake specific ELA transactions would indeed be "such as to undermine its ability to perform independently the specific tasks conferred on it by the EC Treaty." (para. 137). See also *Zilioli/Selmayr*, Recent developments in the law of the European Central Bank, Yearbook of European Law 25 (2006), p. 20.

373 *Psaroudakis*, (fn. 50), p. 217; *Stasch*, (fn. 32), p. 308; *Tridimas*, (fn. 196), p. 268. See by contrast *Radtke*, (fn. 36), p. 142. It is also worth noting that the only addressees foreseen by Art. 108 TFEU are the Member States. *Stasch* suggests that a theoretical means of applying an *ex ante* examination of State aid would be Art. 17(1) TEU.

374 *Psaroudakis*, (fn. 50), p. 218; *Stasch*, (fn. 32), p. 309.

375 CJEU, case C-120/97, *Upjohn*, ECR 1999, I-223, para. 34.

376 Ibid.; CJEU, case C-127/95, *Norbrook*, ECR 1998, I-1531, para. 90. *Tridimas*, (fn. 196), p. 274; *Stasch*, (fn. 32), p. 303; *Smits*, (fn. 86), p. 110.

377 Ibid.

378 *Craig/de Búrca*, (fn. 334), p. 1087.

379 CJEU, case C-280/00, *Altmark Trans*, ECR 2003, I-7747, para. 84.

public authority (in this case the NCB), would have granted the loans on the same terms as those agreed to by the public authority.[380] In particular, the CJEU has held that where a loan is granted at an interest rate which is lower than market rate, the difference in interest payable is State aid.[381] The Commission has also suggested that the quality of security provided for the loan will be taken into account.[382]

Even where full consideration for the transaction is provided, State aid may nevertheless be present "if the benefit granted could not have been obtained on the open market."[383] In those circumstances, the entire loan, and not just the difference in interest payable will be considered State aid.[384] This may be of particular relevance for the provision of ELA: if a private investor had been willing to enter into a similar credit agreement with the financial institution, there would have been no need for the NCB to act as LOLR and provide ELA in the first place.[385]

## 3. Selectivity

If measures confer an advantage to the beneficiary on a selective basis, they will be considered State aid.[386] It is indisputable that ELA provided to individual financial institutions will selectively provide an advantage to that institution.[387] However, it is also notable that the Commission, in its 2008 Banking Communication has clarified that general measures available to the market as a whole on equal terms are "often outside the scope of the State aid rules and do not need to be notified to the Commission."[388] Therefore activities of NCBs related to monetary policy, for example open market operations and standing facilities, do not fall under State aid rules.[389]

380 CJEU, case C-457/00, *Belgium v Commission*, ECR 2003, I-6931, para. 47.

381 *Heidenhain*, (fn. 347), para. 2. EGC, case T-16/96, *Cityflyer Express*, ECR 1998, II-757, para. 56.

382 *Koenig et al*, (fn. 337), pp. 104-106. Commission, Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307 of 13/11/1993, p. 3, paras. 39-42.

383 *Quigley*, (fn. 332), p. 106. See also *Plender*, (fn. 345), p. 10. Both authors refer *inter alia* to, Opinion of AG *Slynn* to CJEU, case 84/82, *Germany v Commission*, ECR 1984, 1451, 1501, who stated that State aid could include "the provision of capital under normal market conditions but on a scale not normally available in the capital market." See also CJEU, case 234/84, *Belgium v Commission*, ECR 1986, 2263, para. 14; CJEU, case C-301/87, *France v Commission*, ECR 1990, I-307, para. 40. See also *Heidenhain*, (fn. 347), para. 2.

384 Ibid.

385 *Stasch*, (fn. 32), p. 197.

386 Commission, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, Staff Working Paper October 2011, p. 22; *Quigley*, (fn. 332), p. 41. See EGC, case T-222/04, *Italy v Commission*, ECR 2009, II-1877, para. 60.

387 *Weenink/Schulze Steinen*, (fn. 191), p. 516; *Quigley*, (fn. 332), p. 42.

388 2008 Banking Communication, (fn. 274), para. 51.

389 See also: *Weenink/Schulze Steinen*, (fn. 191), p. 516.

### 4. Competition may be, or has been distorted and the intervention is likely to affect trade between Member States

The CJEU has held that "[w]hen State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, the latter must be regarded as affected by that aid."[390] Even a relatively small amount of aid is liable to affect competition and trade between Member States where there is strong competition in the sector.[391] This is particularly the case in the financial sector, due to the liberalisation of capital movements and the integration of the financial markets.[392] Thus, for the purposes of Art. 107(1) TFEU, the provision of ELA by a NCB to a financial institution may distort competition and affect trade between Member States.

## IV. The consequences of the obligation to notify ELA to the Commission

As mentioned above, where ELA is considered State aid, it is subject to the notification and authorisation procedure for new State aids.[393] The consequences of this are that the Commission may prohibit the provision of ELA by the NCB or attach conditions thereto.[394] In the event that ELA is not notified, this is considered "unlawful aid" and a suspension or provisional recovery injunction may be granted.[395] Where a negative decision is taken by the Commission in the case of unlawful aid, the aid must be recovered from the beneficiary, including interest at a rate fixed by the Commission.[396]

The first issue to note is a practical one. The planned ELA operation could be delayed if the NCB is required to wait for a positive response from the Commission, thus jeopardising the effectiveness of the measure in times of crisis. This argument can be countered by reference to the Commission's commitment in its 2008 Banking Communication "to ensure the swift adoption of decisions upon complete notification, if necessary within 24 hours and over a weekend."[397] Moreover any parallel

390 CJEU, case 730/79, *Philip Morris v Commission*, ECR 1980, 2671, para. 11. *Quigley*, (fn. 332), p. 53.

391 CJEU, case C-351/98, *Spain v Commission*, ECR 2002, I-8031, para. 63.

392 CJEU, case C-66/02, *Italy v Commission*, ECR 2005, I-10901, para. 119; CJEU, case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA*, ECR 2006, I-289. See *Weenink/Schulze Steinen*, (fn. 191), p. 516; *Stasch*, (fn. 32), p. 180; *Quigley*, (fn. 332), p. 57.

393 Art. 108(3) TFEU and Council Regulation (EC) No 659/1999 of 22/3/1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, OJ L 83 of 27/3/1999, p. 1.

394 This would be part of the formal investigation procedure. Art. 108(2) TFEU and Art. 7 of Council Regulation (EC) No 659/1999.

395 Art. 1(f) and 11 of Council Regulation (EC) No 659/1999.

396 Art. 14 of Council Regulation (EC) No 659/1999.

397 2008 Banking Communication, (fn. 274), para. 53. Note however, that this reference to a "swift decision" of the Commission has been removed in the 2013 Banking Communication.

measures by the Member State, such as a State guarantee, will nevertheless have to be assessed in advance by the Commission.

Second, the Commission's objective to ensure undistorted competition will collide head-on with the national (and Eurosystem) task of ensuring the stability of the financial system. In addition, there will be a conflict between two treaty-based goals of the EU: the establishment of an internal market through the removal of distortions of competition between the Member States; and the establishment of a monetary union with the primary objective of price stability.[398] Where the Commission has the final word on the authorisation, prohibition or modification of an ELA operation, the goal of ensuring undistorted competition prevails over other national and Union objectives.[399]

Third, the involvement of the Commission in the decision by a NCB or the Eurosystem whether or not to provide ELA could interfere with the independence of the Eurosystem. As discussed earlier,[400] any influence on the decision whether to provide ELA will indirectly affect the Eurosystem's monetary policy: the Eurosystem would be forced to neutralise the effects of the ELA or the effects of the collapse of an individual institution.[401]

Thus, it is submitted that the provision of ELA should not be subject to the notification and authorisation procedures for State aid. This would be legally possible where the decision on the provision of ELA is taken by the Eurosystem, and not by the individual NCB. Moreover, where this decision is centralised to the ECB, any risk of national protectionist tendencies can be avoided.[402] This does not mean that the goal of ensuring undistorted competition will be disregarded: the Eurosystem remains under an obligation to comply with the principle of an open market economy with free competition. In addition, the Commission will have the opportunity to assess any State guarantee that may be used as collateral for ELA

398 *Radtke*, (fn. 36), p. 143. Art. 3(3) and (4) TEU. See also *Zilioli/Selmayr*, (fn. 372), p. 28.

399 Under normal circumstances competition and stability can co-exist, and indeed competition can strengthen stability. OECD, Competition and Financial Markets: Key Findings, 2009. However, it would be suggested that in extreme circumstances, financial stability is a stronger and much more urgent priority. See *Marsden/Kokkoris*, The Role of Competition and State aid policy in Financial and Monetary Law, Journal of International Economic Law 2010, p. 884.

400 Section B.II.1. See also *Psaroudakis*, (fn. 50), p. 218.

401 It would be submitted that CJEU, case C-11/00, *OLAF*, ECR 2003, I-7147, para. 134 supports this conclusion: the provisions on independence are far-reaching, as Art. 130 TFEU "seeks, in essence, to shield the ECB from all political pressure."

402 For example, it has been pointed out by *Zilioli/Selmayr*, (fn. 372), p. 7: "the ECB should be seen, in view of its striking organisational features, as a legal person akin to EC and Euratom as it has, in its fields of competence, legal personality and is therefore particularly supranational and independent from national politics."

transactions. In any event, cooperation and information-sharing with the Commission should form an essential part of the decision-making procedure.[403]

## E. The European Banking Union

On 26 June 2012, the President of the European Council, *van Rompuy*, in close cooperation with the Presidents of the Commission, the Eurogroup and the ECB, presented a report setting out a "vision for the future of the EMU."[404] The report proposed to move towards a stronger EMU architecture, based on integrated frameworks for the financial sector, for budgetary matters and for economic policy, "buttressed by strengthened democratic legitimacy and accountability."[405] The integrated framework for the financial sector would consist of integrated European banking supervision, a European deposit insurance scheme and a European resolution fund.[406] The European Stability Mechanism (ESM) would act as a fiscal backstop to the European deposit insurance and resolution authorities.[407] The aim of these measures is to "to break the vicious circle between banks and sovereigns."[408]

In order to establish integrated European banking supervision, it was proposed that in accordance Art. 127(6) TFEU, specific tasks would be conferred upon the ECB concerning policies relating to the prudential supervision of credit institutions and

403 *Stasch*, (fn. 32), p. 313. This would stem from the principle of sincere cooperation under Art. 4(3) TEU. See *Zilioli/Selmayr*, (fn. 372), p. 40.

404 Press Release of the European Council, Towards a Genuine Economic and Monetary Union: Report by President of the European Council Herman Van Rompuy, Brussels on 26/6/2012. On the basis of this Report, the European Council invited the President of the European Council to develop a specific and time-bound road map for the achievement of a genuine EMU: See European Council, Conclusions 28/29 June 2012, Brussels on 29/6/2012; President of the European Council, Towards a Genuine Economic and Monetary Union: Interim Report, Brussels on 12/10/2012; and President of the European Council, Towards a Genuine Economic and Monetary Union: Final Report, Brussels on 5/12/2012. See also: Euro Area Summit Statement, Brussels on 29/6/2012 and the Eurogroup Statement on the follow-up of the 29 June Euro Summit of 9/7/2012.

405 Ibid.

406 Ibid.

407 Press Release of the European Council, Towards a Genuine Economic and Monetary Union: Report by President of the European Council Herman Van Rompuy, Brussels on 26/6/2012.

408 Euro Area Summit Statement, Brussels on 29/6/2012; *Cœuré*, Why the euro needs a banking union, Speech at the Conference on Bank funding – markets, instruments and implications for corporate lending and the real economy, Frankfurt am Main on 8/10/2012.

other financial institutions by means of a Council Regulation. The Commission presented its proposal for this Regulation on 12 September 2012,[409] accompanied by a Commission Communication, setting out a roadmap towards a banking union.[410] The Commission's proposal sought to confer key supervisory tasks on the ECB necessary for the supervision of credit institutions within the euro area, with the option for non-euro area Member States to enter into "close cooperation" with the ECB to allow it to exercise its supervisory tasks in non-euro area Member States.[411] The ECB will carry out these tasks within a "Single Supervisory Mechanism" (SSM), composed of the ECB and national competent authorities (NCAs) following the ECB's instructions.[412] For this purpose, the ECB would be given supervisory and investigatory powers,[413] including powers to grant and withdraw authorisation;[414] to impose sanctions;[415] to request information[416] and to conduct general investigations[417] and on-site inspections.[418]

In order to avoid conflicts of interest with its monetary policy function, the ECB must carry out the supervisory tasks conferred on it by the Commission's proposal separately from its task relating to monetary policy.[419] Moreover, in carrying out these tasks it may only pursue the objectives of "promoting the safety and soundness of credit institutions and the stability of the financial system, with due regard for the unity and integrity of the internal market."[420] For that purpose an internal

409 Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM (2012) 511 final; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM (2012) 512 final.

410 Commission, A Roadmap towards a Banking Union, Communication, COM (2012) 510 final.

411 Explanatory Memorandum to the Commission's proposal, p. 3; Art. 6 of the Commission's proposal.

412 Art. 5 of the Commission's proposal. At present, ten Eurosystem NCBs are also the competent authorities for the supervision of credit institutions. In the remaining seven Eurozone Member States, a national authority separate from the NCB is responsible for the supervision of credit institutions. See ECB, Recent Developments in Supervisory Structures in the EU Member States (2007-10), October 2010.

413 Art. 4 of the Commission's proposal.

414 See Art. 4(1)(a) and 13 of the Commission's proposal.

415 Art. 15 of the Commission's proposal.

416 Art. 9 of the Commission's proposal.

417 Art. 10 of the Commission's proposal.

418 Art. 11 of the Commission's proposal.

419 Art. 18(2) of the Commission's proposal.

420 Art. 1 and 18(1) of the Commission's proposal.

'Supervisory Board' will be established, to which the Governing Council will delegate supervisory tasks.[421]

The negotiations in the Council made modifications to the Commission's proposal. One of the most important of these was the introduction of a distinction between "less significant" credit institutions – which will remain under the supervision of the NCAs – and other ("significant") credit institutions – which will be directly supervised by the ECB.[422] The classification of a credit institution as "less significant" or "significant" will be based on a number of criteria which were set out in the Council's Final Compromise Text, and which will be further implemented by the ECB in its legal acts.[423] Note however, the ECB may at any time, on its own initiative after consulting with NCAs or upon request by a NCA, decide to exercise directly itself all the relevant powers for one or more less significant credit institutions.[424] Indeed, it is emphasised that the ECB "remains exclusively competent" to carry out the tasks listed in the proposed Regulation in relation to all credit institutions, with the assistance of the NCAs.[425]

Even before the third stage of EMU, commentators criticised the organisation of supervisory responsibilities at national level as being unsustainable in a monetary union, particularly in light of the growing integration of EU financial markets.[426] Indeed, some already called for centralised supervision in the euro area.[427] However, it was rightly predicted that: "only a major financial crisis can really push European policy authorities to redesign the map of responsibilities in the field of prudential regulation and supervision and to relinquish at least part of their national powers."[428]

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421 Art. 19 of the Commission's proposal.

422 Art. 6(4) of the proposed Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, Brussels on 1/7/2013 (Council's Final Compromise Text).

423 Art. 6(4) and 6(7) of the Council's Final Compromise Text.

424 Art. 6(5)(b) of the Council's Final Compromise Text.

425 Art. 4(1) of the Council's Final Compromise Text.

426 *Andenas/Hadjiemannuil*, (fn. 32), p. 386; *Bini Smaghi*, (fn. 80), p. 235.

427 *Bruni/de Boissieu*, (fn. 104), pp. 191 and 194. See also the European Shadow Financial Regulatory Committee, (fn. 115), although its suggestion equates more to the ESRB than to centralised micro-prudential supervision. See also *Padoa-Schioppa*, The Euro and its Central Bank: Getting United after the Union, 2004, pp. 113-115.

428 *Bini Smaghi*, (fn. 80), p. 250. See also: *Padoa-Schioppa*, EMU and banking supervision, Lecture at the London School of Economics, Financial Markets Group, February 1999, http://www.ecb.int/press/key/date/1999/html/sp990224.en.html (6/9/2013): "The simplified procedure [the drafters of the Treaty] established could be interpreted as a 'last resort clause', which might become necessary if the interaction between the Eurosystem and national supervisory authorities turned out not to work effectively."

The proposed Regulation is expected to be adopted by the Council in September or October 2013, once consultation of the European Parliament has been completed.[429] When it is adopted, the conferral of key supervisory tasks on the ECB will serve to address the supervisory failures during the financial crisis[430] and the issues caused by the high level of integration in the European financial sector, in particular due to the highly complex and interconnected markets and institutions.[431]

Many commentators have pointed out that monetary policy and the operation of payment systems cannot – and should not – be completely separated from micro- and macro-prudential supervision.[432] In particular, in order to undertake effective and efficient operations as LOLR – either in the form of open market or ELA operations – these functions should not be separated.[433] At the very least, the overlap in the information required for both micro- and macro-prudential supervision on the one hand, and for effective LOLR operations on the other, speaks for a high level of coordination between supervisors and central banks.[434]

Thus it would be submitted that in parallel to the conferral of supervisory tasks on the ECB, the task of providing ELA to individual institutions should also shift from

429 The vote in the European Parliament's plenary is scheduled for 10/9/2013. See also *Asmussen*, Building Banking Union, Speech at the Atlantic Council, London on 9/7/2013.

430 Explanatory Memorandum to the Commission's proposal, p. 1. See also, for example *Regling/Watson*, A Preliminary Report on The Sources of Ireland's Banking Crisis of 31/5/2010, pp. 37-41; *Honohan*, The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008: A Report to the Minister for Finance by the Governor of the Central Bank of 31/5/2010, pp. 59-60, 75.

431 Explanatory Memorandum to the Commission's proposal, p. 3 and recital 3.

432 This is a hotly debated topic. *Aglietta*, (fn. 31), p. 48; *Vletter-van Dort*, (fn. 264), p. 153; *Padoa-Schioppa*, (fn. 427), p. 113 tend to favour the combination of these tasks while *Andenas/Hadjiemannuil*, (fn. 32), pp. 390 and 393, are less convinced by arguments that monetary and prudential functions should not be separated. The main disadvantage of combining the two is that banking supervision may interfere with the conduct of monetary policy – the central bank may be tempted to create liquidity in order to prevent the collapse of a financial institution which would cause financial instability: but in doing so, jeopardise price stability. Moreover, there is a higher reputational risk for the central bank, if it also acts as supervisor. See *Bini Smaghi*, (fn. 80), p. 245. Hence Art. 18(2) of the Commission's proposal requires the internal separation of these two functions within the ECB.

433 *Bini Smaghi*, (fn. 80), p. 245; Boot, Supervisory arrangements, LOLR and crisis management in a single European banking market, Sveriges Riksbank Economic Review 2006, p. 28. *Andenas/Hadjiemannuil*, (fn. 32), p. 392. Note however that *Andenas/Hadjiemannuil* do not support a direct regulatory and supervisory role for the ECB.

434 *Radtke*, (fn. 36), p. 70; *Padoa-Schioppa*, (fn. 428).

the national to supranational level.[435] First, when the proposed Council Regulation is adopted, the ECB will have the supervisory and information-gathering powers necessary to conduct ELA operations with individual institutions in a coordinated, effective and efficient manner.[436] The Commission's proposal provides the ECB with direct access to any supervisory information it requires from either the NCA or the credit institution itself. Second, given this centralisation of supervisory powers, the ECB would be best placed to assess the systemic risk of the institution in difficulty and the cross-border impact of ELA operations on financial stability.[437] For this purpose, it should cooperate closely with the ESRB and with national macro-prudential authorities to address issues at the macro-prudential level.[438] Third, the ECB would be better able to assess and control the impact of ELA operations on monetary policy and could thus more effectively pursue its primary objective of maintaining price stability.[439] This would require the development of appropriate internal mechanisms to allow the necessary exchange of information, but to prevent any conflict of interest.[440] Fourth, the ECB would be best placed to determine the cost-sharing arrangements for losses arising from ELA operations conducted in

435 The centralisation of the provision of ELA is also supported by *Radtke*, (fn. 36), p.76 and *Smits*, Europe's Post-Crisis Supervisory Arrangements – a Critique, Revista de Concorrência e Regulação 2010, p. 162. See also IMF Staff Discussion Note, A Banking Union for the Euro Area, February 2013, para. 32 which stated that centralising all LOLR functions at the ECB would eliminate bank-sovereign linkages present in the current ELA scheme. The note acknowledged that this would require changes to the ECB's collateral policy and suggested that ELA should be sourced through both the ECB (for banks brought under its purview) as well as NCBs (for banks that remain under national supervision).

436 See *Prati/Schinasi*, (fn. 104), pp. 111, 116 and 117 who consider that access to supervisory information is vital and that delays can be caused where the crisis management structure relies heavily on information sharing and coordinated responses. *Lastra*, The Role of the European Central Bank, (fn. 59), suggests by contrast that centralisation of LOLR neither implies nor requires centralisation of supervision, though it does require enhanced cooperation and harmonisation. See also *Schoenmaker*, (fn. 250), p. 220. Note that the ECB becomes a member of the ESFS and a non-voting member of the Board of Supervisors of the EBA and thus gains the benefit of the coordination and information exchange structures thereof. See proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1093/2010, Council Final Compromise Text, Brussels on 23/3/2013.

437 *Aglietta*, (fn. 31), pp. 52, 60 argues that "The quality of the diagnosis about the presence of systemic risk in a peculiar situation is crucial to strike the best compromise between the cost of letting the crisis burn out, on the one hand, and the cost of moral hazard on the other hand." See also *Schoenmaker*, (fn. 250), p. 221; *Bini Smaghi*, (fn. 80), p. 243; *Boot*, (fn. 433), p. 27.

438 See for example *Aglietta*, (fn. 31), p. 62; *Prati/Schinasi*, (fn. 104), p. 110. See Art. 3 and 5 Council's Final Compromise Text.

439 *Aglietta*, (fn. 31), p. 60: "Decentralising the LOLR function to national central banks, acting on their own responsibility and an ad hoc basis, is utterly inappropriate in view of the close implications of LOLR function for monetary policy." See by contrast, *Schoenmaker*, (fn. 250), p. 220.

440 Art. 18(2) of the Commission's proposal may need to be further clarified.

cross-border situations, thus helping to "break the vicious circle between banks and sovereigns."[441] Finally, where the decision whether or not to provide ELA is taken by the ECB – a European institution – the decision will not be based on national interests. Centralised decision-making will prevent protectionist national responses and their negative effects on competition.[442] Moreover, the provision of ELA can become more "competition neutral" where the terms and conditions under which it is granted can be more fully harmonised.[443]

This change will not require any legislative reform at Union level, once the proposed Council Regulation is adopted, but rather a change in the doctrine of the ECB through the rejection of its "auto-limitation."[444] As discussed above, the Eurosystem already has the task and the instruments to conduct ELA operations under Art. 127(5) TFEU and Art. 18.1 second indent ESCB Statute. In order to implement these, the Governing Council may adopt guidelines to regulate the modalities for the provision of ELA *ex ante*,[445] and the Executive Board may give instructions to the NCBs to conduct specific ELA operations on an *ad hoc* basis.[446] ELA operations would thus be undertaken by the NCBs, acting only in accordance with the guidelines and instructions of the ECB.[447] Any ELA operation by a NCB which is not based on a guideline or instruction could be prohibited by the Governing Council in accordance Art. 14.4 ESCB Statute.

It will also be interesting to consider the future role of the ESM with regard to financial crises and how this could interact with the role of the Eurosystem as provider of ELA. At present, Art. 15 of the ESM Treaty[448] empowers the ESM to grant financial assistance to an ESM Member (a euro area Member State) for the specific purpose of recapitalising its financial institutions. It has been proposed that following the establishment of the SSM, the ESM will also have the possibility to

441 See Art. 32.4, second subparagraph. See also fn. 108; and IMF Staff Discussion Note, (fn. 435).

442 See also *Bini Smaghi*, (fn. 80), p. 243 et seq.; *Boot*, (fn. 433), p. 22. *Prati/Schinasi*, (fn. 104), p. 117 point out that decentralisation of LOLR responsibilities could create an uneven playing field. Moreover, this also addresses the concern, that the national supervisors would be given the false incentive to provide ELA in inappropriate situations unless their national financial systems would bear the related costs. See *Bini Smaghi*, (fn. 80), p. 243.

443 Compare ibid.; *Radtke*, (fn. 36), p. 75.

444 See *Smits*, (fn. 435), p. 162. *Smits*, Memorandum by Professor René Smits, University of Amsterdam, in: House of Lords European Union Committee, The Future of EU Financial Regulation and Supervision, Fourteenth Report of Session 2008-2009, Vol. II. *Smits* refers to the current doctrine as an "auto-limitation" and a "self-imposed restrictive reading of its competences" which the ECB should relinquish in order to consider itself a LOLR for the euro area.

445 *Stasch*, (fn. 32), p. 162 and Art. 12.1 ESCB Statute.

446 Ibid. Alternatively, ELA operations could be conducted by the Executive Board: *Stasch*, (fn. 32), p. 161.

447 Ibid., p. 162.

448 Treaty establishing the European Stability Mechanism, signed on 2/2/2012.

recapitalise financial institutions directly.[449] These powers would undoubtedly complement the role of the Eurosystem as LOLR, in particular with regard to financial institutions with solvency problems.[450] However, the ESM's competence to recapitalise financial institutions will not obviate the need for the Eurosystem to provide ELA to illiquid institutions. The unique role of the LOLR in preventing and mitigating panics, the failure of the interbank market and systemic risk caused by the collapse of a financial institution requires the rapid response and expertise of a central bank with supervisory powers.

## F. Conclusion

At present, the provision of ELA in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent credit institutions is a national task exercised by NCBs under the responsibility and at the cost of that NCB in accordance with Art. 14.4 ESCB Statute. While the doctrine of the ECB and the veto-right of the Governing Council have an impact on the exercise of this task, the legal basis is found in national legislation, and the decision whether to grant ELA remains with the individual NCB.

It has been shown that a legal basis for the Eurosystem to act as LOLR at a macro-level, by lending to the market as a whole, could stem from its basic task to define and implement the monetary policy of the Union under Art. 127(2) first indent, or from its task to contribute to the stability of the financial system under Art. 127(5) TFEU.[451] The promotion of the smooth operation of payment systems in accordance with Art. 127(2) fourth indent TFEU certainly provides the Eurosystem with the mandate to act as LOLR. Furthermore, Art. 127(5) TFEU and Art. 18.1 second indent ESCB Statute provides the Eurosystem with both the mandate and tools to conduct ELA operations with illiquid credit institutions and other market participants.

When providing ELA, NCBs must comply with primary Union law, and in particular, any operation should not interfere with the Eurosystem's primary objective of maintaining price stability, with the independence of ESCB central banks, with the

449 See the Euro Area Summit Statement, Brussels on 29/6/2012; Eurogroup Statement on the follow-up of the 29 June Euro Summit of 9/7/2012; Eurogroup, ESM direct bank recapitalisation instrument: Main features of the operational framework and way forward, Luxembourg on 20/6/2013.

450 Such financial institutions would not be eligible to receive ELA, as this would conflict with the prohibition on monetary financing.

451 In accordance with Art. 18.1 first indent ESCB Statute.

prohibition on monetary financing, or with the obligation to act in accordance with the principle of an open market economy with free competition. EU financial services legislation can also affect the provision of ELA, either by facilitating or endangering effective and efficient ELA operations. Further progress is necessary with regard to disclosure obligations, in order to ensure the controlled release of information and thereby prevent panics and "old-fashioned bank runs."[452] Moreover, there is a need to further enhance EU-level provisions on coordination and information-sharing between national supervisors, the NCBs and the ECB, within the framework of the new European Supervisory Authorities – though the establishment of the SSM will provide a considerable improvement to this.

The EU State aid regime also has a significant impact on the provision of ELA. In certain circumstances – where ELA is provided as part of a larger aid package or is backed by a State guarantee – it will be subject to the notification and authorisation procedure for new State aids. This requires reconsideration of the respective roles of the Eurosystem and of the Commission and the importance of competition policy versus price and financial stability in times of crisis.

Once adopted, the proposal for a Single Supervisory Mechanism will lead to dramatic changes in the structure of prudential supervision in the EU. In the wake of the financial crisis, regulation and supervision in the EU financial services sector is going through unprecedented reforms: one need only look to the legislation on the European System of Financial Supervision, the recently adopted CRD IV and CRR and to on-going Commission work-streams in the areas of shadow banking,[453] structural reforms in the banking sector[454] and the establishment of the Single Resolution Mechanism.[455]

This also provides an excellent opportunity to enhance the framework for the provision of ELA within the ESCB. In future, the decision to provide ELA should be taken by the Eurosystem, drawing *inter alia* upon the micro-prudential expertise acquired by the ECB as part of its supervisory role. Centralised decision-making is

452 *Lastra*, (fn. 226), p. 166.

453 Commission, Green Paper on Shadow Banking, COM (2012) 102 final.

454 High-level Expert Group on reforming the structure of the EU banking sector, Final Report of 2/10/2012, http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf (6/9/2013), this is also known as the Liikanen Expert Group, as it is chaired by *Erkki Liikanen*.

455 Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM (2013) 520 final.

vital to ensure coherent and coordinated ELA operations and the development of harmonised terms and conditions for its provision. This centralisation must occur irrespective of whether the EU can find the political will and strength of European ideals to move forward towards "a federation of nation states."[456] Rather, it is a reform indispensable for the proper functioning of the internal market in financial services, and for the economic and monetary union.

456 *Barroso*, State of the Union 2012 Address, Plenary session of the European Parliament, Strasbourg of 12/9/2012, Speech 12/596.