

State Aid in the Banking Sector - Litigation Themes, and the Future of the State Aid Enforcement

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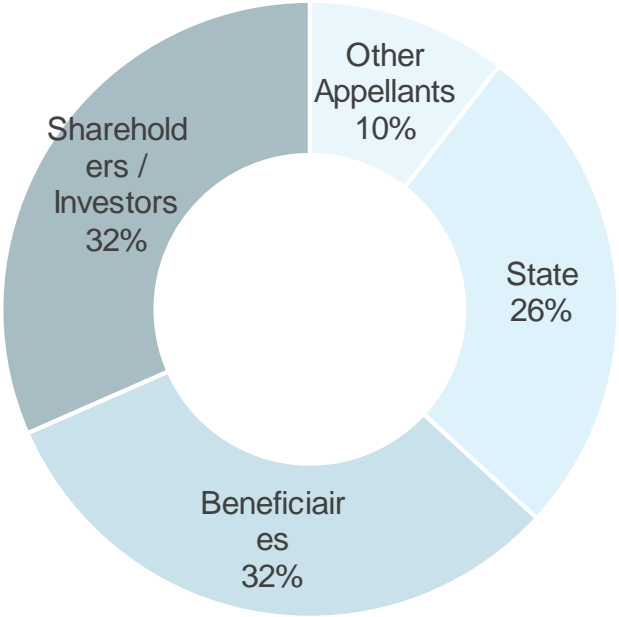


Litigation Stats Over 16 Judgments (2008-2021)

Outcome of the Litigation



Appellant to the EC Decision



Banking State Aid Litigation before the European Courts - Focus on the Past 5 Years

Imputability	Procedural Standing	Market Economy Investor	Bail-in Requirement	Selectivity
<ul style="list-style-type: none"> • A deposit guarantee scheme can be considered to not be imputable to a state. "... the absence of a link of a capital nature between the entity concerned and the State is clearly relevant..." (C-425/19 P, <i>Tercas</i>, para. 73) • Conditions for resolution remain effective. A State aid "classification would still be possible but would depend on the features of the deposit guarantee scheme and of the particular measure." (<i>Supra</i>, para. 78) 	<ul style="list-style-type: none"> • A direct link to the EC decision needed for concern. Effect on the bond value attributed "to the decision by the Portuguese authorities to put BES into resolution" (T-812/14 RENV, <i>BPC</i>, paras. 63-65) • A decision for the benefit of the appellant can be admissible. Action was found admissible "as it seeks to challenge the commitments and/or the restructuring plan which the Commission accepted". (T-386/14 RENV, <i>FIH</i>, para. 54) 	<ul style="list-style-type: none"> • New state aid might require reassessment of state aid previously granted. "...the Commission was fully entitled, when applying the private operator principle, not to take into account risks related to State aid granted" previously. (Case C-579/16 P, <i>FIH</i>, para. 62). 	<ul style="list-style-type: none"> • Unless instability clause applies, bail-in before state aid. Generally bail-in precedes state aid, but "an exception to the requirements of, inter alia, point 44 of that communication may be made where the implementation of measures for converting debt or writing down its principal 'would endanger financial stability or lead to disproportionate results.'" (C-526/14, <i>Kotnik</i>, paras. 99-101) 	<ul style="list-style-type: none"> • Comparison group consists of other shareholders of a bank. "... the extension of the guarantee scheme [...] to shares in cooperatives [...] has the effect of conferring an economic advantage on those cooperatives in relation to other economic operators which are [...], in a factual and legal situation comparable ..." (C-76/15, <i>Vervloet</i>, para. 101)

The Future of the Commission's State Aid Enforcement – Time for a Change?

Definition of "serious disturbance"	Success in addressing financial instability	Regulatory overlaps	Up-to-date?
<ul style="list-style-type: none">• Choice of legal basis. Is TFEU 107 (3)(B) the correct legal basis?• Clean trigger. No clear threshold for what constitutes a serious disturbance or reasoning unclear.• Branching interpretation. Recent airline COVID bailouts have lost focus on systemic risks.	<ul style="list-style-type: none">• Size. There has been litigation on how to calculate the aid amount. Errors lead to excessive or insufficient commitment.• Timing. While the EC process is relatively quick, litigation on unclear rules may cause uncertainty.	<ul style="list-style-type: none">• BRRD & State Aid. Differences in the field BRRD & State Aid rules can lead to (i) regulatory underenforcement; (ii) overenforcement, as well as (iii) inconsistent results (e.g. on systemic nature or bail-in).• Differences in the objectives. Impact on financial stability versus competition.	<ul style="list-style-type: none">• Different crisis, same tools. The financial crisis originated from the financial sector, while COVID is a macroeconomic demand and supply shock.

Conclusions

- The Banking Communication hasn't been updated since the introduction of BRRD.
- Multiple "cooks in the kitchen" with the ECB (+ the national central banks), SRB, and the Commission.
- BRRD and state aid enforcement should not lead to different outcomes.



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