Preface

On 26 January 2018, Randolf van Lambalgen was awarded a PhD by the Erasmus University Rotterdam for his thesis 'State aid to banks – an analysis of the Commission's decisional practice'. His supervisors were professor Hélène Vletter-van Dort and professor Kleis Broekhuizen.

Van Lambalgen has written an inspiring dissertation about State aid to banks. As the subtitle of the dissertation indicates, Van Lambalgen has focused on the decisional practice of the Commission. This is not without reason: the European Commission plays a central role in State aid cases. Indeed, every State aid measure has to be authorised by the Commission before it can be implemented by the Member State. In the case of State aid to banks, the authorisation by the Commission is usually conditional upon the submission of a restructuring plan. This restructuring plan has to include restructuring measures (such as divestments, pricing restrictions and an acquisition ban). These restructuring measures are "tailor-made" and thus different per case. Indeed, banks are different and State aid measures are different; consequently, the restructuring measures are also different in each case. This explains why in certain cases far-reaching restructuring measures are imposed, whilst in other cases a much more lenient approach is taken. However, as Van Lambalgen correctly argues, a tailor-made approach should not result in an arbitrary approach.

As Van Lambalgen sets out in chapter 6, it is not easy to establish whether the differences in restructuring measures are justified by the differences between the various bank State aid cases. In that regard, Van Lambalgen observes that there is a lack of clarity as to whether the bank State aid decisions of the Commission are in line with the principle of equal treatment. This observation has led to the following research question: How to assess whether a bank State aid decision complies with the principle of equal treatment?

In his dissertation, Van Lambalgen provides an answer to this question. He does so by introducing the 'relevant characteristics-approach'. This is a novel approach and it constitutes the most innovative aspect of his dissertation. In essence, the 'relevant-characteristics approach' entails that the Commission should consistently take into account the "relevant characteristics" (i.e. the characteristics that are relevant to the Commission's assessment). In order to find these relevant characteristics, Van Lambalgen has analysed the hundreds of bank State aid decisions that were taken since the start of the financial crisis

in 2007. The resulting list of relevant characteristics has led to a framework of analysis. Analysing a bank State aid case through the application of this framework of analysis ensures a consistent approach which takes all relevant aspects into account. The framework can be used by every actor in a bank State aid case, such as governments that consider granting State aid to banks, beneficiary banks, or the Commission itself. The 'relevant characteristics-approach' enables them to assess the consistency of the Commission's decisional practice.

It is with great pleasure that we introduce this dissertation in the Series of the Institute for Corporate Law of the University of Groningen and the Erasmus University Rotterdam (*Serie vanwege het Instituut voor Ondernemingsrecht van de Rijksuniversiteit Groningen en de Erasmus Universiteit Rotterdam*).

M.J. Kroeze
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Chapter 1. Introduction

1.1 Background and illustration of the subject-matter

"The Dutch lobby in Brussels should have been better."[1]
"The restructuring measures imposed on ING are punishments."[2]
"ING accuses the Commission that it has treated the banks unequally."[3]

These newspaper headlines all relate to the decision of the European Commission regarding the State aid that was granted by the Dutch state to the Dutch bank ING. During the financial crisis, ING (like many other banks and financial institutions) experienced financial difficulties, and it had to be 'rescued' by the Dutch state. The Dutch state undertook several measures to help ING survive the crisis. These measures constituted *State aid*.

In principle, EU law prohibits State aid, because State aid may give rise to competition concerns. Distortions of competition can occur in three ways. Firstly, State aid may give the beneficiary banks an unfair competitive advantage over other banks which did not get State aid. Secondly, State aid may lead to subsidy races between member states. If one member state is granting excessive aid to its banks, then other member states may follow and also give excessive aid to their banks. Thirdly, if a Member State recapitalises banks which do otherwise not have access to capital (and would subsequently have to leave the market), then State aid can frustrate the normal market functioning. Besides these competition concerns, there is also the concern of moral hazard. If banks know or expect that they will be rescued, then they are more inclined to take (excessive) risks. They enjoy the upside, but do not bear the downside risk of their actions. Thus, moral hazard may lead to excessive risk-taking.

So it comes as no surprise that State aid is prohibited in EU law. This prohibition is laid down in Article 107, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU). However, there are a few exceptions to this

1. "Nederland zou in Europa wat meer handjes moeten schudden", NRC Handelsblad, 26 May 2012.
2. "Halvering ING is strafmaatregel", NRC Handelsblad, 25 January 2010.
3. "ING verwijt Kroes banken ongelijk te behandelen", Het Financieele Dagblad, 9 January 2010.

prohibition (Article 107, paragraphs 2 and 3, TFEU). For instance, State aid may be justified when it is intended to remedy market failure. In the case of State aid to the banks, the aid was deemed necessary to prevent a meltdown of the financial system. Therefore, a balance must be struck between preserving competition on the one hand and preserving financial stability on the other hand. This is the task of the European Commission, who is the only competent authority to judge the aid measures. The Commission has sought to achieve this balance by approving the aid measures (to preserve financial stability), and by imposing restructuring measures on the beneficiary banks at the same time (to compensate for the competition distortions).[4] Those restructuring measures can be very severe, and are sometimes perceived (by the banks) as punishment.[5]

In the case of ING, the Commission approved the aid measures, but it imposed certain conditions on ING: ING had to divest 45% of its assets (i.e. its insurance branch, its subsidiary ING Direct USA, and other entities). Furthermore, ING was prohibited from acting as price leader. And finally, ING had to adhere to an acquisition ban for 3 years.

It is clear that those restructuring measures are very severe. ING has conducted legal proceedings against the European Commission arguing that it was not treated fairly. Other banks have also been granted State aid, but they were not imposed such strict conditions. Also in the literature, it is argued that ING was treated harshly, especially when compared to other banks. This raises the question of *equal treatment*.[6]

At this point, an important clarification should be made. The ING-case just serves as an illustration of a more general issue: can it be established whether the Commission has applied the principle of equal treatment in its State aid control policy. Since the ING-case is a well-known example in the Netherlands, it was a logical choice to illustrate my point using the ING-case. However, I could have easily used another bank. ING was not the only bank that felt treated unjustly. Some other banks also faced restructuring measures that they felt were too severe.

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4. In one of its decisions (ING, 16 November 2012, para. 170), the Commission underlined that "when it approves a measure, it does so on the basis of any accompanying commitments which form an integral part of the measure in question".
5. Also in the literature, the term 'punish(ment)' has been used. For instance, Soltész & Von Köckritz (2010, p. 302) remark that the Commission "punishes banks which received 'too much' or 'too cheap' aid".
6. In its 2009 Annual Report (p. 7), ING argued the following: "We accepted these far-reaching terms on the assumption that the EC would treat all state-supported financial institutions equally and safeguard the level playing field in the EU internal market. However, following the announcements of restructuring agreements the EC has entered into with other state-supported financial institutions, we have strong concerns that the level playing field in the EU internal market is at risk."

Thus, on a more general level, the following observation can be made: some banks appear to have 'escaped' easily, while ING and other banks faced severe restructuring measures. This raises the question of *equal treatment*. Similar concerns were raised in a task force report of the Centre for European Policy Studies:

> *"It should thus come as no surprise that some states felt unjustly treated, leading to criticism of arbitrariness and inflexibility in the decisions."*[7]

In the literature, the following observation was made:

> "Thus a tension surfaced over time between, on the one hand, the need for a case-by-case assessment of the viability of credit institutions and of *the requirement of equal treatment*. Put otherwise, the principle of proportionality sometimes required derogations to (or a *differentiated* implementation of) stated principles but the *lack of clarity as to the circumstances* justifying these derogations raised *concerns of discrimination*."[8]

This observation touches upon a crucial problem: there is a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment. In my opinion, this lack of clarity is problematic, as will be discussed in the following section.

1.2 Description of the problem

The previous section illustrated that there is some doubt whether the principle of equal treatment is respected by the Commission in its bank State aid decisions. This doubt is caused by a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment.

This lack of clarity is due to the fact that it cannot easily be established whether a bank State aid decision complies with the principle of equal treatment. This principle essentially requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[9] It goes without saying that bank State aid cases are not identical; the outcomes of the State aid procedure are therefore also not identical. In fact, State aid cases are often not comparable. This is because the Commission follows a "tailor-made approach": the Commission

7. Sutton, Lannoo & Napoli 2010, p. 20.
8. Gerard 2013, p. 18.
9. Case T-319/11, para. 110.

takes into account the specific circumstances of each case.[10] Taking into account all the specific circumstances of the cases inevitably means that there will be many aspects on which State aid cases can differ from each other. This, in turn, means that it cannot easily be established whether a bank State aid decision is in line with the principle of equal treatment. This is what results in a lack of clarity.

Because of the lack of clarity, banks that are confronted with severe restructuring measures may easily have the feeling that the imposition of those restructuring measures is unfair, (especially) when compared with other banks that were confronted with less severe restructuring measures. Those less severe restructuring measures are due to differences between the bank State aid cases, but if it is not clear which differences are relevant, then this lack of clarity may easily lead to a feeling of unfair or unequal treatment.

The lack of clarity may thus lead to doubts whether the principle of equal treatment is respected by the Commission in its bank State aid decisions. Since the principle of equal treatment is a general principle of European Union law, the Commission is bound to respect the principle of equal treatment. Doubts about the application of the principle of equal treatment may undermine the public support for the Commission's State aid control policy. The lack of clarity is therefore problematic for the Commission.

The lack of clarity is also problematic for the banks and Member States. In the first place, this lack of clarity may lead to uncertainty for Member States that are about to grant State aid to banks. Because of the "tailor-made approach" of the Commission and the resulting lack of clarity, Member States and beneficiary banks do not always know what to expect from the Commission in terms of the required restructuring measures. Furthermore, the restructuring measures that the Commission demands may be hard to challenge because of this lack of clarity. Beneficiary banks and Member States may have the feeling that they are unfairly treated in comparison with other bank State aid cases, but because of the lack of clarity, they are not able to assess if this feeling is correct. This is problematic, because if they are not able to assess if the restructuring measures (that the Commission demands from them) are in line with the principle of equal treatment, then they cannot successfully argue (during the negotiations with the Commission) that these measures should be less severe. In addition, they cannot make a well-considered decision whether to challenge the Commission decision before the Court of Justice.

10. For instance, in the 2013 Banking Communication (point 9), the Commission stresses that in its assessment of banks' restructuring plans, it will take account of the specificities of each institution and Member State.

The main problem that this PhD-study aims to tackle, can thus be formulated as follows:

> ***There is a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment. This lack of clarity may result in a feeling of being treated unfairly in comparison with other banks that have received State aid.***

1.3 The aim of the study

1.3.1 Research question

The aim of this PhD-study is to address the central problem that was identified in the previous section. How to clarify the applicability and application of the principle of equal treatment to bank State aid cases? The purpose of this PhD-study is to find a way in which it can be assessed whether a bank State aid decision complies with the principle of equal treatment. The corresponding central research question is thus as follows:

> ***How to assess whether a bank State aid decision complies with the principle of equal treatment?***

1.3.2 Relevance of the research

It has to be stressed that the main purpose of this PhD-study is not to reach any conclusions on whether or not the Commission has respected the principle of equal treatment in the past. In section 1.1, it was mentioned that there were some suspicions that the Commission had violated the principle of equal treatment. Although it might be tempting to find out whether these suspicions were correct, that is not the ultimate aim of this PhD-study. The aim of this PhD-study is not backward-looking; rather, it is forward-looking. It is about providing a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This framework can be put to use by the Commission, the Member States as well as by beneficiary banks.

Relevance to Member States and banks
First and foremost, this PhD-study is relevant for the Member States that consider granting State aid and for the beneficiary banks. Every Member State that grants State aid and every bank that receives State aid, is ultimately confronted with a decision of the Commission. If a Member State or a beneficiary bank has the feeling that it was unjustly treated by the Commission in comparison with

the way other banks were treated, then it probably wants to be able to substantiate this feeling. This PhD-study enables Member States and beneficiary banks to assess whether this feeling is correct. This PhD-study provides a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This framework is not only useful for challenging the restructuring measures. Indeed, it can be used to *anticipate* the "treatment", to *negotiate* the "treatment" and to *challenge* the "treatment".[11]

These three possible uses correspond to three different stages. The first stage is when a Member State designs the aid measure. The second stage is when the Member State and the beneficiary bank conduct negotiations with the Commission on the aid measure and the restructuring plan. The third stage is when the Commission has adopted a decision and when the Member State and beneficiary bank have to decide whether or not to challenge that decision before the Court of Justice of the European Union (CJEU).[12]

With respect to this third stage, Member States and beneficiary banks could use the framework of this PhD-study to estimate whether they can successfully challenge the decision before the CJEU by pleading a violation of the principle of equal treatment. Since the case-law from the CJEU usually receives more attention than decisions from the Commission, one could think that the third phase (the litigation-phase) is the phase in which the framework of this PhD-study can be best put to use. However, in my opinion, this is not the case. There are 90 bank State aid cases, and only in 15 cases, the Commission decision was challenged before the CJEU.[13] There are thus relatively few Member States and banks who challenged the Commission decision before the CJEU by bringing an action for annulment.

An important hurdle is the burden of proof: the applicant has to prove that the Commission did not respect the principle of equal treatment. Another – even more serious – obstacle is that the principle of equal treatment is interpreted very narrowly by the CJEU.[14] In my opinion, the narrow CJEU-definition[15] of the principle of equal treatment can be unsatisfactory, because the feeling that one is treated unfairly in comparison with others might be broader than the principle of equal treatment as defined by the CJEU. In other words: while the CJEU might conclude that the principle of equal treatment was not violated, the bank concerned may still have the feeling that it was treated

11. The "treatment" being the total package of restructuring measures that the Commission requires from the beneficiary bank.
12. In this PhD-study, I will mainly use the term 'CJEU'. However, for the sake of readability, I will sometimes speak of 'the Court of Justice' or simply 'the Court'.
13. As will be explained in section 5.19.
14. This will be explained in-depth in chapter 5 of this PhD-study.
15. In this PhD-study, I use the term 'CJEU-definition' to refer to the way how the principle of equal treatment is defined, interpreted and applied by the CJEU.

unfairly in comparison with other banks. Since this PhD-study aims to address that feeling – or more precisely: to address the lack of clarity that has caused that feeling – this PhD-study will not focus solely on the CJEU-definition of the principle of equal treatment. Instead, other interpretations of the principle of equal treatment will also be explored. As will be explained in chapter 6, it is possible that while there is no violation of the principle of equal treatment according to the CJEU-definition, there is a violation according to another definition/interpretation. While that other interpretation cannot be used to raise a plea regarding a violation of the principle of equal treatment, it might be able to be used to substantiate other pleas of law. Furthermore, the other interpretation is very useful in the negotiations with the Commission. As was explained in the previous section, doubts about the application of the principle of equal treatment by the Commission might undermine the public support for its State aid control. Since these doubts are not limited to the CJEU-definition of the principle of equal treatment, the Commission's concern for the public support is probably also not limited to the CJEU-definition of the principle of equal treatment.

Indeed, it is during the negotiation stage that the framework is most relevant. The framework can be used to assess whether the restructuring measures that the Commission demands from the beneficiary bank, are in line with the principle of equal treatment. If this assessment reveals that the required restructuring measures are too severe in comparison with other bank State aid cases, then this assessment can provide the Member State and bank concerned with arguments to negotiate less severe restructuring measures.

With respect to the first stage (i.e. setting-up the aid measure), the framework developed in this PhD-study will provide an insight into the Commission's approach to bank State aid. This insight can be useful to Member States when designing aid measures, because the insight resulting from this PhD-study allows them to better anticipate the "treatment" by the Commission.

One question remains: should a distinction be made between the relevance of this PhD-study to banks on the one hand and Member States on the other hand? They are two distinct parties and they have clearly different positions: the one is granting the aid, while the other one is receiving the aid. It should also be noted that the Commission decision is addressed to the Member State, not to the bank. However, the bank is directly and individually concerned by the decision[16], so it can challenge the Commission decision.[17]

16. "Directly and individually concerned" refers to the so-called "Plaumann-criteria" of case 25/62.
17. The ING-case is a good illustration of the fact that the Member State as well as the bank can initiate legal proceedings. The fact that they each lodged their own application illustrates that their position is not completely the same.

The bank's primary concern is its own interests, whereas the Member State needs to take into account the stability of the entire banking sector. This means that their interests may not always converge. However, this does not mean that this PhD-study is less relevant to them.

Relevance to the Commission
In addition to being relevant to Member States and banks, this PhD-study is relevant for the Commission. Just like Member States and banks can use the framework to assess whether a bank State aid decision complies with the principle of equal treatment, the Commission can use it in the same way to establish whether its decision is in line with the principle of equal treatment. In the first place, the aim of the Commission would be to evaluate its own decisional practice in terms of compliance with the principle of equal treatment. In the second place, it seems likely that the Commission would like to be able to demonstrate that its decisional practice does not violate the principle of equal treatment.

1.4 Scope of the study

This PhD-study focusses on State aid *to banks*. This focus on banks is due to the fact that State aid to banks is somewhat special. As will be explained in chapter 3, banks are different from non-financial firms. The Commission has recognised that State aid to banks is special: during the financial crisis, the Commission adopted the Crisis Framework (mainly consisting of the 2008 Banking Communication, the Recapitalisation Communication, the Impaired Assets Communication and the Restructuring Communication). In these Communications, the Commission gave guidance specifically aimed at State aid to banks. It should be noted that the Crisis Communications do not only apply to banks, but also to other firms in the financial sector (such as insurance companies[18], building societies[19] and credit unions[20]).

In that regard, it is worth stressing that the scope of application of the Crisis Communications is not sharply defined. The 2008 Banking Communication merely speaks of 'financial institutions', without providing a definition of

18. See, for instance: Ethias, 20 May 2010.
19. See, for instance: Dunfermline Building Society, 25 January 2010.
20. See, for instance: SA.41371 (1st prolongation of the Credit Union restructuring and stabilisation Scheme), 5 May 2015, footnote 5.

'financial institutions'. The Recapitalisation Communication and the Prolongation Communications specify that in these documents, for the convenience of the reader, financial institutions are referred to simply as 'banks'.[21]

The 2013 Banking Communication (which replaced the 2008 Banking Communication) is more precise about the scope of application of the Crisis Communications. In particular, point 25 of the 2013 Banking Communication provides that the Crisis Communications apply to 'credit institutions' (also referred to as 'banks'), as defined in Article 4(1) of Directive 2006/48/EC. The scope of application is not limited to banks, since point 26 of the 2013 Banking Communication provides that the Crisis Communications, where appropriate, also apply, mutatis mutandis, to insurance companies.[22]

The approach of the Commission in its Crisis Communications can be contrasted with the CRD IV-approach. Indeed, the CRR and CRD IV contain specific and detailed definitions of 'credit institutions' and 'financial institutions'. By contrast, the Crisis Communications are quite vague about the scope of their application. The Crisis Communications even seem to contradict the CRR-definitions. The terms 'banks', 'credit institutions' and 'financial institutions' are more or less used as synonyms in the various Crisis Communications, whereas CRR/CRD IV makes a sharp distinction between credit institutions and financial institutions.[23] However, it should be noted that CRR/CRD IV has a different purpose than the Crisis Communications. From a financial regulation perspective, it is important to clearly distinguish between the different types of financial firms. By contrast, from a State aid control perspective, this distinction is not that important. From a State aid perspective, the essential difference is between financial firms and non-financial firms. In that regard, the scope of application of the Crisis Framework is specific enough.[24]

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21. This was specified in footnote 1 of these Communications. In the same vein, footnote 3 of the Restructuring Communication indicates that although the Restructuring Communication refers to banks for ease of reference, "it applies, *mutatis mutandis*, to other financial institutions where appropriate".
22. Within the meaning of Article 6 of Directive 73/239/EEC, Article 4 of Directive 2002/83/EC or Article 1(b) of Directive 98/78/EC.
23. 'Financial institution' is defined in CRR as an undertaking *other than a credit institution* or investment firm, the principal activity of which is to […]. Thus, according to this definition, a credit institution cannot be a financial institution.
24. The question whether the Crisis Framework is applicable to a case, is rarely raised. Only in the case of ARCO, a financial cooperative company, the Commission assessed whether the beneficiary of State aid fell under the scope of application of the Crisis Framework. In its decision on ARCO (SA.33927, 3 July 2014, para. 120), the Commission concluded that financial cooperatives are not financial institutions for the purposes of the 2008 Banking Communication. The case of ARCO will be discussed in more detail in section 5.10.

In this PhD-study, I will analyse the bank State aid decisions of the Commission.[25] In this PhD-study, 'bank State aid decisions' are understood as every decision in which the Commission assessed the aid on the basis of the Crisis Framework.[26] An overview of the bank State aid decisions can be found in the table in Annex III.[27]

As regards the *temporal scope* of the study, all bank State aid decisions that are taken since the adoption of the Crisis Framework will be analysed. However, there are a few cases in which the public version of the decision is not (yet) available.[28] These decisions are not included in the analysis of the decisional practice, because the contents of the decisions is vital to that analysis. A final remark: this research was concluded on 1 August 2017. Developments after that date are not taken into account in this PhD-study.

1.5 Structure of the study

The aim of this PhD-study is to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This aim guides the structure of this PhD-study. Firstly, the foundations of the framework are laid down in chapters 2 to 5. These chapters provide a background to the topic of bank State aid. Secondly, chapter 6 delves

25. In this PhD-study, the decisional practice *of the Commission* will be analysed. It should be noted that the Commission is not the only institution that applies State aid rules: the EFTA Surveillance Authority also assesses State aid cases. The EFTA Surveillance Authority assesses State aid measures granted by Iceland, Liechtenstein and Norway (i.e. the EFTA States that are part of the EEA Agreement). NB: the EFTA (European Free Trade Association) consists of Iceland, Liechtenstein, Norway and Switzerland, while the EEA (European Economic Area) is an agreement between the EU and three of the EFTA States; Switzerland is not part of the EEA. The EEA Agreement extends the single market (i.e. the four freedoms) to the EEA and it mirrors the competition and State aid rules of the EU Treaties. Accordingly, the EFTA Surveillance Authority applies State aid rules that are broadly equivalent to the EU State aid rules. Nevertheless, this PhD-study focusses only on the Commission decisions. Decisions from the EFTA Surveillance Authority fall outside the scope of this PhD-study.
26. In this PhD-study, I will also use the term 'Commission decisions' to refer to the bank State aid decisions.
27. In this PhD-study, when referring to a Commission decision, I will usually provide the following information in a footnote: the name of the bank concerned, the case number, the date of the decision and the relevant paragraph. The case number can be used to find the bank State aid decision on the website of the Commission: http://ec.europa.eu/competition/state_aid/register/.
28. In these cases, the only information can be found in the press release. The table in Annex III (which gives an overview of all bank State aid decisions) also indicates the decisions of which the public version is not available.

into the question how the principle of equal treatment can be applied to bank State aid cases. Chapter 6 is thus a pivotal chapter, in the sense that it introduces my framework of analysis. Thirdly, the actual analysis of the bank State aid decisions takes places in the chapters 7 to 13. The conclusions can be found in chapter 14, the final chapter of this PhD-study.