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In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].

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Subject: State aid NN 39/2008 – Denmark
Aid for liquidation of Roskilde Bank

Sir,

I. PROCEDURE

- (1) By letter of 16 September 2008 the Danish authorities transmitted a draft notification of the measures for Roskilde Bank and on 23 September 2008 a meeting between the Danish authorities and the Commission representatives took place. On 25 September 2008 the Danish authorities contacted the Commission again to inform about the initiated sales process. A summary of the intended deal was provided on 26 September 2008. The formal notification of the aid measures was received by the Commission on 7 October 2008.
- (2) In view of the fact that the notified measures have been put into effect by the Danish authorities before the Commission has reached a decision on the case, the case has been registered with an NN- number.

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II. DESCRIPTION OF THE MEASURES

Background

- (3) As described in the Commission decision (K(2008)4138) of 31 July 2008, Roskilde Bank ("old RB" or "RB" depending on the context) ran into financial difficulties in the course of the month of July 2008. This led the Danish authorities to implement measures ("rescue measures") approved by the Commission in the above mentioned decision as partly no aid, partly aid compatible under the application of Article 87(3)(c) EC Treaty and the Community guidelines on State aid for rescuing and restructuring firms in difficulty¹ of 2004 (hereinafter "the R&R Guidelines").
- (4) Since the rescue measures were granted, a sales process has been launched and external auditors have submitted a preliminary result of the ongoing audit for 1H2008. On 24 August 2008 RB made a public announcement, the main elements of which were the following:
- a) Financial position: In the opinion of external auditors, the bank was no longer able to meet neither the individually assessed solvency requirement², nor the solvency requirement pursuant to the Financial Business Act. The Financial Supervisory Authority determined the deadline of 29 August 2008 for the reestablishment of the bank's capital base³. In spite of the credit facility granted, a large number of customers had withdrawn considerable funds from the bank.
 - b) Unsuccessful sale: The sales process resulted in no offers to buy Roskilde Bank in whole or in part⁴. The deadline for submitting bids was 22 August 2008. According to Roskilde Bank, the lack of any offer was mainly attributable to the uncertainty about the creditworthiness of the bank's loan portfolio and to the uncertainty as to the general credit culture of the bank.

The measures

- (5) The proposed measures are:
- a. Takeover of RB's assets and liabilities and subsequent recapitalisation;
 - b. Continuation of the credit facility provided by the DNB and approved by the Commission as compatible rescue aid.

The take over and the recapitalisation

- (6) In the light of the result of the sales process and the fact that RB could no longer meet the solvency requirements due to the need for additional write-downs⁵, the rescue aid measures proved to be insufficient to keep RB afloat. Therefore, on 24

¹ OJ C 244, 1.10.2004, p. 2.

² The need for solvency according to the Internal Capital Adequacy assessment was calculated to be 10.1% by the bank.

³ The Danish authorities informed DG Comp that this deadline would be prolonged.

⁴ Initially there were around 22 bidders and the last 2 bidders that made extensive assessment of the company decided that they would not present an offer only on the last day.

⁵ On 14 July 2008 RB announced that write-downs amounted to DKK 880-900 million. On 23 August 2008 the need for further write-downs of minimum DKK 1 billion was published. On 29 August 2008 the half-year report of 2008 showed a result of minus DKK 5.142 billion.

August 2008 the Danish National Bank (DNB) together with Det Private Beredskab⁶ (DPB), decided to take over all assets and assume all debts and other liabilities at a value of DKK 37.33 billion (EUR 5 billion), except for hybrid core capital, subordinated loan capital, the savings bank trust and equity of the bank through the creation of a newly established bank. The objective of the creation of new RB was a “controlled winding-up”, i.e. progressive sale/ liquidation of RB's activities ensuring that all senior⁷ creditors⁸ of RB are repaid.

(7) The decrease in value of assets since end of 2007 is shown in the table below.

Table 1: The balance sheet as of 29 August 2008 and in 2007, in millions of DKK⁹

	29.08.2008	Year 2007
<i>ASSETS</i>		
Cash and funds in financial institutions	3 789	5 676
Loans	29 790	32 551
Bonds	4 359	2 599
Other tangible and intangible assets	1 307	1 157
Adjusted transfer value	-1 915	0
Total assets	37 330	41 983
<i>LIABILITIES</i>		
Debts to credit institutions and central bank	11 531	11 564
Deposits and other liabilities	17 691	17 376
Bonds issued	7 396	7 304
Other liabilities and provisions	712	581
<i>Total senior liabilities</i>	<i>37 330</i>	<i>36 825</i>
Subordinated capital	2 525	2 526
Equity	-2 525	2 633
Total equity and liabilities	37 330	41 983
<i>Off balance items</i>		
Contingent guarantees, etc.	9 258	11 895

(8) The shareholders of "old" RB approved the transfer agreement on 1/09/2008 and a formal change of name of Roskilde Bank into "Selskabet af 1. September" A/S on 6 October 2008. The transfer agreement has become final upon authorisation by the Danish Financial Supervisory Authority ("FSA"), which was given on 6 October

⁶ Det Private Beredskab is an association set up by members of the Danish Bankers' Association. The participation of DPB in the new bank is limited to DKK 750 million, amounting to a 27% ownership.

⁷ Even if the Danish authorities use the term of "simple creditors", the more common term of "senior creditors" will be used instead in the decision. According to Barron's dictionary of Finance and Investment terms, senior debt loans or debt securities are the ones that have a claim prior to junior obligations and equity on a corporation's assets in the event of liquidation. Senior debt commonly includes funds borrowed from banks, insurance companies or other financial institutions, as well as notes, bonds, or debentures not expressly defined as junior or subordinated.

⁸ The main liabilities of RB as on 31 August 2008 consisted of the debt to central bank DNB (DKK 6.23 billion), the debt to mainly foreign credit institutions (DKK 0.85 billion of time deposits and DKK 9.61 billion of committed credit lines), deposits (DKK 11.62 billion), issued bonds (DKK 7.34 billion), interest payable (DKK 0.39 billion) and other (DKK 0.24 billion).

⁹ It follows from the table that under the scenario of zero earn-out, the owners of subordinated capital and equity in the bank have lost around DKK 5.2 billion in book value if compared to 2007.

2008, with retroactive effect as of 24 August 2008. On that same day the "old" RB initiated a procedure for suspension of payments under the Danish Bankruptcy Act.

- (9) To meet the solvency requirements during the period when new RB would operate with a banking licence, there was a need to inject significant capital into the new bank. On 6 October 2008 DPB injected capital of DKK 750 million (in the form of class B-shares), while the DNB injected DKK 1.72 billion (in the form of class A-shares). Upon the capital injection by DPB, its guarantee for the DNB's loan to RB of 10 July 2008 of DKK 750 million was released. Under a separate loan agreement, the DNB would provide DKK 2 billion as Tier 2 capital. RB will pay interest on the loan based on a quarterly interest rate corresponding to the rate set at any given time by the DNB for loans with an additional risk rate of 4.85% p.a. As Tier 2 capital, the loan is subordinated in respect of the other senior debt, yet senior to share capital. No collateral has been provided for the loan. In sum, Tier 1 and 2 capital will amount to around DKK 4.5 billion in "new" RB.
- (10) Once all the ordinary creditors of the "new" RB have been redeemed, the Tier 2 capital provided by the DNB must be redeemed before any payments can be made out to the shareholders of "new" RB (i.e. DPB and the DNB in its role of shareholder).
- (11) Furthermore, the distinction between class A-shares and class B-shares ensures that losses incurred by RB are covered first of all by the capital invested by DPB (DKK 750 million) prior to the capital invested by DNB.
- (12) Investors in old RB's equity and subordinated capital may only get some compensation via a so-called earn-out mechanism. In case any profit after the liquidation of the "new" RB is realised, first, the subordinated debt is to be repaid to the DNB, second, the senior class (A) shares held by the DNB are to be repaid for their subscription value plus interest (central bank base rate + risk premium of 4.85%), third, junior class (B) shares held by DPB are to be repaid at the same interest rate, and only the remaining profit, if any, is to be used to compensate for the holders of the subordinated debt and equity capital before the take over *i.e.* in old RB (in that order).
- (13) The earn-out mechanism was designed in order to avoid a difficult evaluation of the economic value of the transferred assets and liabilities, on the one hand, and the potential allegations of the investors that the acquired part of Roskilde Bank (essentially the whole bank) was underpriced, on the other hand.
- (14) The take over of old Roskilde Bank's assets by the new entity was chosen by the Danish authorities, because, according to the Danish legislation, nationalisation, without the creation of a new entity, is not possible without expropriation. The latter, on the other hand, is a very lengthy and heavy process and was considered not to be an appropriate solution in view of the bank's financial situation. Moreover, since the shareholders would not be expected to vote for a winding-up procedure without obtaining some form of coverage, the only remaining possibility was to perform a transfer of all assets and liabilities. Therefore, the procedure laid down in Article 246 in the Financial Business Act, which allows for the transfer of the activities of a bank under certain conditions, namely non fulfilment of the solvency requirements in this case, was used.

The credit facility

- (15) Overall, the DNB intends to provide sufficient funding to cover all the senior creditors of the "new" bank. This is done primarily through the credit facility, which was granted by the DNB in July 2008, and approved by the Commission as compatible rescue aid. The interest rate for it is set at 6.6% p.a. This rate is 2 percentage points higher than the DNB's ordinary interest rate for loans¹⁰ as well as being 1.1 percentage points above the reference rate adopted by the Commission. Table 2 below shows the evolution of the credit granted to RB as well as the drawn amounts.

Table 2: The state of the credit facility from 18/07/08 until 12/09/08, in millions of DKK

Date	18.07.08	25.07.08	01.08.08	08.08.08	15.08.08	22.08.08	29.08.08	05.09.08	12.09.08
Credit granted	4.300	6.700	6.700	5.300	5.300	8.300	8.300	23.400	24.100
Account balance	2.000	2.650	3.206	2.306	2.891	3.501	4.026	5.023	6.263

(millions of DKK)

- (16) By 6 October 2008 DKK 36.8 billion was drawn from the facility. According to the explanation of the Danish authorities, the increase in the credit granted was needed to include any early redemptions of debt arising on the initiative of counterparties of RB, i.e. the senior creditors, following the announcement of the takeover. The senior creditors are being redeemed on an ongoing basis throughout the month of October.
- (17) As stated by the Danish authorities, there was a legal obligation to repay the creditors at that moment for two reasons: (i) certain contracts have come to their maturity and the majority (if not all) of the creditors involved did/do not wish to extend these contracts, and (ii) the transfer of the assets and liabilities of "old" RB to the "new" RB constitutes an event of default at the side of RB¹¹. Therefore, the remaining creditors have the right to terminate their contracts and demand repayment of their claims upon the announcement of the transfer.
- (18) As a consequence, upon the implementation of the take-over, which happened on 6 October 2008 after approval was received from the Danish FSA, the creditors of the bank (apart from subordinated capital) were either transferred to "new" RB subject to their consent thereto, or could choose to be redeemed upon the transfer. The Danish authorities informed the Commission that all creditors would choose to be redeemed and that the process would be expected to be largely completed by the end of October.

¹⁰ The latter rate is floating and currently equals 4.6% p.a.

¹¹ In particular, the agreements between RB and the creditors contain clauses providing for a material breach of contract / default due to certain or all of the following situations: a) change of control; b) disposal of assets; c) cessation of business; d) material adverse changes; e) merger restrictions or f) other situations, such as the revocation of necessary authorisations and licenses. Furthermore, the creditors argued and could have litigated that even in absence of the abovementioned covenants, "a general unwritten principle of Danish contract law" providing to the creditors the right to terminate a contract in the event of an anticipated breach of the contract could be applied in this case.

- (19) The possible losses of the DNB (as a creditor and equity owner in RB) will only be quantifiable once the new bank has been finally wound-up. They will essentially depend on the value of RB's loans and bonds (see Table 1 above) or of the underlying assets serving as collateral. Even the potential buyers of RB, in spite of the time and efforts invested, had significant difficulties to evaluate the value of RB's assets as demonstrated by both sales processes (see below)¹². The losses of the DNB will be covered by a state guarantee.
- (20) According to the Danish authorities, it is planned that "new" RB will be wound up within two years. However, as the bank is a major creditor involved in certain high-profile bankruptcy estates, their settling may exceed two years in case of prolonged litigation.

Objective of the measures

- (21) Given the present turmoil in financial markets, the Danish authorities and the DNB found it necessary to intervene. The objective of the State intervention is to preserve the financial stability of the Danish financial system. With regard to this objective, the Danish authorities considered it necessary to cover all liabilities of RB towards senior creditors.
- (22) In particular, at the moment it took the decision, i.e. on 24 August 2008, the DNB considered that the default of RB could pose a considerable threat to financial stability in Denmark. The Danish banking sector has a substantial negative structural deposit surplus. The general trend is more reliance on market-based funding. The total dependence of the Danish banking sector on capital market funding amounts to no less than DKK 500 billion. Any losses on loans to RB may have led to adverse knock-on effects on other Danish medium-sized banks with similar funding structures. The possible suspension of payments by RB would have a potential negative effect on international trust in the Danish financial system, which is dependent on funding from international financial markets.
- (23) Given this objective, the controlled winding-up aims to ensure "the best possible financial gain from the liquidation of the activities transferred from RB" while providing full coverage for the senior creditors. As the Danish authorities explained, compared to forced, i.e. quick, realisation of assets which would imply the sale of assets at a discounted value, a controlled and prolonged winding-up might enable the realisation of a higher value of assets and therefore minimise costs. As regards the other alternative, restructuring, in view of the Danish authorities, if an unhealthy bank is forced to restructure, it may prove more costly to ensure viability without solving the problem in the long run.

¹² It can be added that according to the sales advisor, Danske Markets, "the lack of interest in buying [RB] was mainly attributable to the fact that in connection with the due diligence performed it was concluded that substantial uncertainty exists as to the creditworthiness of the [RB's] loan portfolio in general. Moreover, the potential buyers expressed severe uncertainty as to the general credit culture of [RB]." Even the buyers of the branches will still need [4-7]* weeks after the transaction is executed in order to perform due diligence of the loans.

As an example of magnitude of the difficulties RB faces, it can be noted that the bank has issued petitions for winding-up proceedings in respect of several companies and that in two instances the collateral only secures around 30 or 60% of the loan.

* Confidential information. Where possible, figures have been replaced by ranges in brackets.

- (24) The Danish authorities argued that the measures were designed in a way also to minimise potential adverse effects for the financial sector, including moral hazard speculations, i.e. speculations that owners of stocks, subordinated loan capital and hybrid core capital in other banks could rely on support from the government or the DNB in case of a crisis. For this reason, the Danish authorities have chosen to treat the senior creditors and the holders of the equity and quasi-equity capital in RB differently, i.e. not to cover any hybrid capital and subordinate capital.

The liquidation plan

- (25) Initially, the Danish authorities envisaged two scenarios for the liquidation process: a quick sale and a progressive one. However, the Danish authorities succeeded in realising a quick sale of a significant part of the bank. On 29 September 2008 "new" RB concluded a number of agreements with Nordea, the Nordic banking group partially-owned by the Swedish state, and two regional Danish lenders Spar Nord Bank and Arbejdernes Landsbank ("buyers") concerning the sale of rights and obligations regarding the largest part of the branch network of the old RB, covering deposits, loans, guarantees, employees, inventory, rental contracts, goodwill and service contracts belonging to the branches. The buyers bought respectively: Nordea - 9 branches, Spar Nord Bank - 7 branches and Arbejdernes Landsbank - 5 branches.
- (26) According to the Danish authorities, the quick sale allowed to maximise the price for RB's assets and liabilities as their value tended to decrease with the passage of time after it was publicly announced that the bank would be wound up. This decrease in the branch network's value (also in the phase between the moment the sales agreements were signed and the implementation date) was also reflected in the concluded sales agreements.
- (27) The sale of the branch network forms the second stage of the sales process of the assets and liabilities of RB. The initial attempt to sell those assets and liabilities (the first stage) took place from 15 July until 22 August 2008. During this first stage, contact was made to a large amount of potential buyers, foreign as well as domestic. As mentioned above, at the end of that process no potential purchasers submitted an offer.
- (28) During the second stage, contact was made with potential purchasers who showed an interest during the first stage. Furthermore, contact was made with a number of potential purchasers who had not previously shown an interest in being involved in a complete or partial purchase of RB. The process was also open for contact by potential purchasers on their own initiative, which actually occurred.
- (29) On the basis of the feed-back received from the potential buyers, a group of potential purchasers was prequalified. In exchange for a commitment under a non-disclosure agreement, the potential purchasers received information (a process letter) on the envisaged branch network. The process letter was sent to six interested potential buyers.
- (30) Out of the six interested potential purchasers, four accepted to participate in a meeting on Thursday 25 September 2008. One of the interested potential purchasers decided during the meeting not to proceed with the transaction. During this meeting, a general agreement was reached between the new RB and the three

remaining interested potential purchasers regarding the apportionment of the branch network and regarding the sales price, and the parties subsequently initiated a negotiation process regarding the specific contractual terms.

- (31) According to the Danish authorities, the fact that the sales agreement has been concluded with several purchasers has ensured acceptable conditions in an intense negotiation process. The negotiation process was open to all interested parties. In the end, the final purchasers were those who wished to conclude an agreement.
- (32) Consequently, the Danish authorities consider that the sale has been performed in an open and non-discriminatory manner, resulting in a sales price having been established on market terms.
- (33) The buyers took over loans worth around DKK 9.30 billion and deposits of DKK 4.91 billion (in book value). The total purchase price was fixed at DKK 9.85 billion. The buyers will pay by assuming liability for the deposits and make a cash payment equal to the difference between the assets (loans to customers) and the liabilities (deposits), and an additional DKK 550 million for the goodwill. The cash amount to be paid will thus reach DKK 4.95 billion. The value of loans has been established on 31 August 2008, on the basis of information received from the "old" RB. The sales price is settled on closing of the agreement by taking over of deposits and a cash payment. The final price will be adjusted on the basis of actual loans and deposits on the closing date¹³.
- (34) The value of the transferred assets and liabilities as split among the buyers is presented in the table below.

Table 3: The split of the sold assets and liabilities to the buyers, in millions of DKK

	Nordea Bank	Spar Nord Bank	Arbejdernes Landsbank	Total
Loans	[...]	[...]	[...]	9 304
Goodwill	[...]	[...]	[...]	550
Total assets	[...]	[...]	[...]	9 854
Deposits	[...]	[...]	[...]	4 907
Cash due	[...]	[...]	[...]	4 946
Total liabilities	[...]	[...]	[...]	9 854

- (35) The financial advisor to RB Danske Markets has issued a fairness opinion with regard to the purchase price settled. For this purpose Danske Markets assessed the value of the subsidiaries network by way of multiple analysis, which means that the

¹³ The "closing date" refers to the date, when the transfer of branches will take place. It had to follow the authorisation of the sale by Danish FSA (it occurred on 6 October 2008) and the Danish Competition Council as well as relevant foreign competition authorities. Given that the loans are being amortized and current deposits fluctuate with the time, minor adjustments in value are inevitable until the closing date.

price is compared with the trading price for companies which are similar to the branch network, or with companies that come closest to them when certain figures are compared. According to Danske Markets normally a multiple analysis would be supplemented by other valuation methods. However, because of the special and difficult situation of the RB, Danske Markets has concluded that there is no sufficient basis for establishing a discounted cash flow analysis. On the basis of this analysis, the advisor has emitted a positive fairness opinion concerning the price achieved for the sale of the branches.

- (36) It should be noted that the sales agreements contain two clauses. Clause 3.2.7 of the sales agreements allows the buyers to assess the loans taken over during a period of [4-7] weeks and return any of them (at book value) at their own discretion. The Danish authorities have estimated that in the worst case scenario buyers would return [between 30-60]% of the liabilities¹⁴. Clause 3.2.8 refers to a guarantee according to which the seller, i.e. the new RB, is required to indemnify the buyers for losses within a period of [18-30] months on so-called share loans which were placed in the taken over branches. The share loans are loans given by RB mostly to individuals to buy shares of RB. These clauses were necessary in view of significant uncertainty linked to the quality of the loans and/or the limited time for the buyers to make a proper due diligence.
- (37) This mechanism, i.e. a sale where part of assets can still be returned by a buyer allowed to avoid further value decrease and fixed the price to a certain extent as a margin above book value for the sold assets. The lengthy sales process in two stages has shown that other assets were in principle impossible to sell in current market circumstances.
- (38) The Danish authorities declared that the sales price adequately reflects the right of the buyers to return unwanted commitments and the special provision on share purchase loans under clauses 3.2.7 and 3.2.8. As it was paramount to preserve the value of the assets (branches) to the greatest extent possible by selling off those assets quickly, it was necessary to include clause 3.2.7 as an ex-post due diligence clause
- (39) The sales agreement is subject to the approval of the Danish FSA and the Danish Competition Council as well as relevant foreign competition authorities. It will hence only enter into force on the date all these agreements have been received.
- (40) In the first phase of the liquidation process of RB, i.e. during a few weeks after 6 October 2008 while the bank operates with a banking licence, the sale of the branches will be formally carried out and the creditors will be redeemed. The first phase will end by the withdrawal of the banking licence. The banking licence is needed because there are legal and formal requirements which must be observed before the creditors – especially those holding bonds and having deposits connected to their loans – can be redeemed. It is the intention of the Danish authorities that RB hands in its licence as soon as possible.

¹⁴ Clause 3.2.7 of the Conditional Branch Transfer Agreement further mentions that in case the returned loans and/or securities have a collective nominal value of more than 10% of the total nominal value by which the accumulated loans and securities were taken over by the buyers on the Divestment Day, the goodwill paid for the branches will be reduced proportionally.

- (41) During the brief period of time until it hands its licence in, the "new" RB has undertaken not to pursue any aggressive marketing strategies and any other acquisitive behaviour will be discontinued. It has also undertaken not to accept any new customers.
- (42) The Danish authorities estimate that by the end of October the creditors will be reimbursed. Afterwards the DNB will remain the sole creditor of the bank. In the second phase of the liquidation plan, when the transfer of branches has been carried out, the "new" RB will cease to operate its banking business (i.e. no new activities or new clients) and will initiate a winding-up process. In other words, the "new" RB will become a pure winding-up company and will no longer interact in a competitive environment. The main assets and liabilities that remain in RB after the sale of branches are: the branch in Glostrup¹⁵, the team serving corporate customers, the bigger part of the loans, the main creditors and the central staff.

III. THE ARGUMENTS OF THE DANISH AUTHORITIES

- (43) In the notification, the Danish authorities argue that the measures taken in relation to RB's liquidation do not constitute State aid under Art. 87(1) EC Treaty. The Danish authorities argue that creditors of RB will in fact not benefit from any advantage granted by the implemented measures. In this regard, the Danish authorities compare to the situation after the (already authorised) rescue aid was granted and argue that no additional advantage would be provided by the aid measures for the orderly liquidation of RB. They further argue that under Danish insolvency legislation, the senior creditors would in any event have had a better claim than those creditors representing the subordinated loan capital not benefitting from a transfer to "new" RB. The transfer would thus merely maintain the status quo. Furthermore, they consider that a penal interest rate for the credit facility combined with no ability to draw future funding would demonstrate that this particular measure does not constitute aid for RB either.
- (44) In addition thereto, the Danish authorities doubt that the measures will distort competition and have an effect on intra-community trade, as neither "old" RB, nor the "new" RB have any foreign subsidiaries and are operating regionally. The participation of RB's competitors (participating in DPB) in the measures would also highlight that the competitors do not consider the measure to distort the competition.
- (45) As regards potential aid to the parts of the new RB that have been sold, the Danish authorities point to the fact that the individual branches cannot be considered to be independent economic operators, as they are not separate undertakings. By reference to the case-law, they state that an entity cannot be defined as an undertaking where that entity enjoys no economic independence, or if the entity has no real freedom to determine its course of action on the market. Consequently, the Danish authorities consider that as the branches are first of all not separate legal persons, second have no independent business, third are completely under the control of management, and fourth that they during the course of the transfer

¹⁵ The relatively newly established branch in Hillerød will be closed down and its employees will be offered jobs in the Helsingør branch.

proceedings will never become independent of their respective owner, the branches cannot be viewed as separate undertakings within the meaning of Article 87(1) EC.

- (46) Notwithstanding the foregoing reasoning, the Danish authorities mention that, should the Commission view the measures as constituting State aid under Art. 87(1) EC Treaty, the measures would still constitute compatible aid under the application of Art. 87(3)(b) EC Treaty. In their view, the Commission should interpret Art. 87(3)(b) EC Treaty as allowing aid in situations, as the present one, in order to prevent a serious disturbance of a Member State's economy, when such disturbances occur throughout the Community. The Danish authorities further add that in the ECOFIN Statement¹⁶ the Commission acknowledged that smaller Member States, such as Denmark, may be confronted with a single systemically important bank in their market. The authorities argue in this context that as the "new" RB has taken over the activities of Denmark's 8th largest bank, the symbolic significance of a possible default of a financial institution such as the "new" RB could be equated with a systemic failure at this stage, with risk of spill-over into other business sectors.
- (47) The Danish authorities contend that the current situation in the Danish financial sector is highly tense. Several take-overs took place and as reported in the Danish news media, the large German bank HSH Nordbank which used to provide capital to a big part of Danish banks, has recently taken a more restrictive approach towards the Danish financial market. The Danish money market is presently not functioning at all well. The Danish authorities consider that in such situation a failure/ default of RB on its senior loans would have potentially very dangerous effects in particular for smaller and mid-level Danish banks as a group, and thereby for the Danish financial sector as a whole. This would consequently have a spill-over effect on the majority of business sectors.
- (48) Additionally, the Danish authorities argue that the measures may be found compatible under Article 87(3)(c) EC Treaty. To substantiate their claim of the measures being compatible, the Danish authorities state that even though the R&R Guidelines will not be applicable in this instance of liquidation aid, they can be applied by analogy to a large extent.
- (49) The Danish authorities mention that since the "new" RB was created as a (solvent) special purpose vehicle to effect an orderly winding down of business, there is for practical purposes identity between the "new" and "old" RB. Consequently, any aid to the "new" RB should not be seen as aid to a newly created company. Furthermore, the "new" RB remains a firm in difficulty, as per the R&R Guidelines, which is confirmed in an updated statement from the Danish Financial Services Authority.
- (50) The Danish authorities state that the banking sector is vital for the Danish economy, and should the foreign investors lose trust in the Danish financial sector, this could lead to a general crisis. Consequently, the measures were truly necessary in order to maintain (financial) stability and avoid major social difficulties. The Danish

¹⁶ See the Commission's memo regarding the "Application of the State aid rules of the EC Treaty in crisis situations in the banking sector – follow-up of the ECOFIN Council conclusions on Financial Stability of 9 October 2007".

authorities further believe that there will be no undue adverse spill-over effects to other Member States or undue distortion of competition.

- (51) The Danish authorities have presented the European Commission with a liquidation plan. The authorities also committed to provide a monitoring plan for the implementation of the measures.

IV. ASSESSMENT OF THE MEASURES

Rescue aid

- (52) By its decision of 31 July 2008 the Commission approved a rescue aid package to RB, consisting of a liquidity facility provided by the DNB, covered partly by a private guarantee and partly by a State guarantee. In the context of the present liquidation of RB, the credit facility from the DNB will be transferred after approval by the FSA (with retroactive effect as of 24 August 2008, i.e. the Transfer Date) to the new RB. As already mentioned above, there have been additional draw downs under this facility since the Transfer Date and the draw down amount reached DKK 36.8 billion as of 6 October 2008. The Danish authorities indicated to the Commission that further draw downs are expected, as the cash provided under the liquidity facility will be used by RB to reimburse the senior creditors. According to the Danish authorities, the repayment of the senior creditors has already started and is expected to be largely completed by the end of October.
- (53) The transfer of the assets and liabilities from "old" RB to "new" RB, accompanied by the provisions for the subsequent subscription of the equity capital and the redemption of the senior creditors implies a substantial change in circumstances from the rescue measures, as these State actions are irrevocable in nature. Furthermore, such a structural solution could not be avoided or postponed further since RB was no longer meeting the solvency requirements and could not be sold. Therefore, it should be assumed that the Transfer Date of 24 August 2008 marks the end of the rescue period and the start of the liquidation period. Consequently, the use of the liquidity facility from 24 August 2008 onwards is no longer covered by the Commission's approval of it as rescue aid, but should be reassessed as aid granted to ensure orderly liquidation of RB.

Existence of State aid within the meaning of Article 87 (1) of the EC Treaty

- (54) The Commission has to assess whether the scheme at hand constitutes State aid within the meaning of Article 87(1) of the EC Treaty, according to which "save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market".
- (55) Based on the information provided by the Danish authorities, the Commission has proceeded with an assessment of the measures under Article 87(1) EC Treaty. In this context the Commission noted that both measures, the liquidity facility and the capital injection involve the use of State resources. Unlike the rescue aid, the Commission considers that the liquidity facility would be financed from State

resources in its entirety, since the guarantee provided by DPB is no longer in force as it was converted into a junior equity share in "new" RB.

- (56) In the context of the aid measures, potential aid to a number of potential beneficiaries needs to be assessed. These are "old" RB/"new" RB (hereinafter "RB", when no distinction between "old" RB and "new" RB is made), the creditors of RB and the equity, hybrid- and subordinated capital holders of RB. The sale of parts of RB, on its turn, could entail State aid to the following beneficiaries: the acquirers of the branches of RB (i.e. Nordea Bank Danmark, Spar Nord Bank and Arbejdernes Landsbank), and the economic activity represented by the branches sold. The Commission will assess in turn which of these categories of potential beneficiaries indeed get an advantage from the measures (liquidity facility and capital injection) and/or through the sale of the branches of RB. If any advantage is granted, this advantage will have to be considered selective, as it is only aimed at specific beneficiaries. Furthermore, as the potential beneficiaries (potentially with the exception of the branches sold) are separate legal entities having an economic activity, they have to be considered to be undertakings.
- (57) **Roskilde Bank** : The creation of "new RB", with substantial contributions from the Danish authorities, allowed "old" RB not to declare bankruptcy immediately in August 2008, but to remain in business until 6 October 2008 (i.e. the date on which the transfer of activities to "new" RB has taken place, with retroactive effect as of 24 August 2008). This has provided an advantage to RB, which would not have been present without the State's intervention. Furthermore, all the assets and liabilities (except hybrid core capital, subordinated loan capital, enclosed savings bank trust and equity) of "old" RB have been transferred to the "new" RB (again, with retroactive effect as of 24 August 2008) and the whole economic activity is continued – albeit for a very limited period of time – by this entity. It has also received the capital injection from the DNB. We can consider that this also entails an advantage to new RB.
- (58) The market economy investor test does not seem to be fulfilled in this case, since the State assumed a significant risk, by taking over the bank in difficulties with the risky loans portfolio without having reasonable expectation of an appropriate return for the risks borne both as investor and as creditor. The fact that a private party – DPB – contributes to the capital injection does not change this assessment, since it contributes much less and it already assumed possible losses in the same amount when the rescue aid measures were provided. Furthermore, there is no business plan that envisages that the State will obtain a return on its investment.
- (59) As regards the credit facility and the fact that it is provided against a penalty interest rate, the Commission recalls that this measure was already considered to constitute State aid in its rescue aid decision. In addition, the Commission considers that this interest rate cannot be regarded as sufficient for the loan provided to the company that is being liquidated. In this regard, the Commission has compared the rate applied by the Danish authorities and a reference rate for companies in financial difficulties with low collateralisation as laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates¹⁷. Moreover, the credit facility forms part of a package of the support

¹⁷ 2008/C 14/02, OJ C of 19.1.2008, p. 6.

measures identified as aid and thus is inherently linked to the other measures found to constitute aid.

- (60) In particular, the profits, if any, are capped for the State (as well as for DPB), while the risk exposure of the State increases significantly, if compared to the rescue aid situation. In addition, the remaining two thirds of RB's loan portfolio¹⁸ (of around DKK 20 billion) are quite likely to be sold / liquidated at a loss (see footnote 12). The revenues from the sale of the branch network, earlier provisions for losses and the first coverage of losses until DKK 750 million by DPB may not be sufficient to cover the eventual losses. The State, therefore, is quite likely to bear the losses. Consequently, the aid measures implemented by the Danish authorities provide an advantage to the "new" RB.
- (61) **Creditors of RB:** The senior creditors of RB¹⁹ will have the right to get full reimbursement of their claims. The Danish authorities have indicated that they expect all senior creditors to make use of this right. Consequently, they have foreseen to use the money available to RB under the liquidity facility to provide funds for such repayments. If any of RB's creditors do not wish to be redeemed, their claims will be transferred to the "new" RB. Under an immediate bankruptcy scenario with no further State aid, the creditors would not benefit from such extensive rights of full reimbursement of their claims and would probably have suffered eventual losses. In addition, it is important to note, that these creditors until now received an interest rate that exceeds the risk free rate, while being freed of the ultimate risk of default. Therefore, the measures implemented provide them with a selective advantage to the extent that the creditors are undertakings and not individuals.
- (62) **Shareholders of old RB:** The investors having invested in old RB's equity and subordinated capital may only get some future compensation via a so-called earn-out mechanism after the DNB and DPB are repaid at subscription value plus interest²⁰. This mechanism was chosen in order to avoid a difficult evaluation of the economic value of the bank, on the one hand, and the potential allegations of the investors that the business acquired by the new RB (essentially the whole bank, except the equity at book value, since the latter has zero book value at this stage) was underpriced, on the other hand. In order to ensure that the bank was not overvalued at the time of transfer (which could have led to unjustified claims by the investors), an additional adjustment to the write-downs on loans and guarantees in value of DKK 2 billion was recorded in the 1H2008 balance sheet. According to the Danish authorities, in the highly unlikely event of a profitable winding-up of the new RB, the DNB would receive a suitable compensation for the provision of capital, and therefore no losses would be borne by the State. It follows, that any advantage that RB equity and quasi-equity holders should receive from the disbursement of surplus profits should therefore be regarded as a real value return on their investment.

¹⁸ The remaining loans equal to the loans as in the balance sheet of 29.08.2008 (see table 1) deducted by the sold ones (see paragraph (33)).

¹⁹ We note that the main creditors of "old" RB were foreign banks. The most important ones are: [...].

²⁰ The interest rate is the central bank base rate + risk premium of 4.85%. According to the Danish authorities, this interest rate corresponds to a normal interest payment for risk capital in banks.

- (63) Furthermore, the Commission considers that it is very improbable that the shareholders will receive any amount, since both DPB and the DNB are likely to make losses on the investment in RB. Any proceeds from the sale of branches will be used to pay the creditors of the bank. Therefore, we consider that no advantage was granted to the equity, hybrid- and subordinate old RB capital holders to the extent that they are remunerated only after all senior creditors (also including the State as a creditor), DPB and the State is reimbursed for the injected funds with an appropriate interest rate.
- (64) **Acquirers of branches of new RB:** The Danish authorities have ascertained that the bidding process for the sale of branches of RB has been open and non-discriminatory. All the banks that had first shown interest in acquiring parts of RB in July/August 2008 were re-contacted during the second stage of the sales process to provide them with the possibility to bid for the branches. In the end only three banks (Nordea Bank Danmark, Spar Nord Bank and Arbejdernes Landsbank) were interested in indeed acquired part of RB's business.
- (65) On the basis of the information provided by the Danish authorities on the sales process, including the analysis by Danske Markets, the Commission considers that the price achieved for the sale is the maximum possible market price. Therefore, it appears that there is no advantage to the acquirers of the branches.
- (66) **The economic activity, represented by the sold branches of RB:** As mentioned above, the lengthy sales process in two stages has shown that only the best assets could be sold quickly, if at all, in current market circumstances.
- (67) The assets and liabilities present in RB did not increase in value following the granting of the rescue / liquidation aid. The aid merely helped to keep the bank afloat by providing sufficient security to cover RB's liabilities as they matured in order not to trigger the bankruptcy procedure and to separate the equity and quasi-equity holders from the bank. On the contrary, after the objective of the liquidation aid i.e. a winding-up of RB, was made public on 24 August 2008, many customers and employees started to leave the bank, which decreased the value of its assets. According to the Danish authorities, the Danish insolvency legislation would formally speaking not have prevented the sale of branches, but had bankruptcy procedures been followed, it is likely that the sale would have occurred later and at a lower price. Indeed, it is in the creditors' interest to structure the sale in a way which maximises the price. Moreover, the Commission notes that the assets and liabilities were transferred to the buyers without any aid attached thereto. In other words, the buyers could not rely on any support from the State through a liquidity facility, a guarantee or any other form of State support following the sale. Consequently, there is no advantage at the level of the sold branches.
- (68) Furthermore, the branches sold have been divided over the three acquiring entities, and will be fully integrated into the branch network of the respective entities as soon as possible. Therefore, the economic activity of RB will not be continued as such and the sold branches cannot be seen as being separate from the buyers. Nor they can be considered to constitute separate undertakings.
- (69) **Conclusion on the existence of aid:** In view of the fact that most of the beneficiaries identified above (RB and part of the senior creditors) are financial

institutions, the selective advantage granted to them is very likely to distort competition on the financial market at least to some extent. The Commission is well aware of the fact that RB is only operating regionally, however, it should be kept in mind that some of its competitors are not only operating regionally, but also internationally (e.g. Nordea). Consequently, even though competition may be distorted at the regional level in Denmark, such a distortion can have an impact on intra-community trade. Such an effect can be even more pronounced when considering the advantage granted to the creditors, as practically all of them are foreign entities, operating internationally.

- (70) In view of the foregoing assessment, the Commission has come to the conclusion that the measures implemented by the Danish authorities constitute State aid under Art. 87(1) EC Treaty in favour of RB and the senior creditors, where the latter are undertakings.
- (71) As already mentioned, the losses of the DNB will be covered by a state guarantee. However, the Commission does not consider that the state guarantee needs to be assessed as a separate measure, since the measures provided by the DNB already constitute aid and the state guarantee covers the same measures.

Compatibility of the measures

Application of Article 87(b) EC Treaty

- (72) Given that the Danish authorities are conducting a controlled winding-up procedure, which will result in the disappearance of the bank, and the aid beneficiaries are the creditors and RB, the Commission considers that the aid does not constitute restructuring aid, but rather can be qualified as liquidation aid. It should hence be assessed whether the aid for liquidation of RB favouring RB and its creditors can be found compatible with the common market.
- (73) The Commission recalls, that in normal circumstances for companies in difficulties, the R&R Guidelines apply. In particular, when the objective is to keep a company afloat or to restructure it and to maintain it operating in the market, the abovementioned guidelines should apply rather than directly 87(3)(c) EC Treaty or alternatively 87(3)(b) EC Treaty. When the company is liquidated, i.e. its assets / activities are entirely sold to the other market participants (rather than being transferred to a succeeding entity), such aid is not covered by the R&R guidelines. However, in the context of the current financial crisis Article 87(3)(b) EC Treaty can be used directly as a basis for the compatibility assessment, as described in the Communication from the Commission on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (the “Communication”)²¹.
- (74) In this regard the Commission follows an established line that Article 87(3)(b) EC needs to be applied restrictively and must tackle a disturbance in the entire

²¹ Cf. the Communication from the Commission on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ 2008 C 270 of 25.10.2008.

economy of a Member State²². The Commission does not dispute the analysis of Denmark that there is a clear international market-failure where even healthy banks are having trouble getting access to liquidity and that it may have effect for other industry sectors and thus the entire Danish economy²³. However, the Commission points out that even in such exceptional circumstances like the current financial crisis certain general principles of State aid control, which are also reflected in the R&R Guidelines need to be applied²⁴.

Conditions for compatibility

- (75) In order for the aid to be compatible, any aid or aid scheme must comply with general criteria for compatibility under Article 87(3) EC, viewed in the light of the general objectives of the Treaty and in particular Articles 3(1)(a) and 4(2) EC, which imply compliance with the following conditions:
- a. *Appropriateness*: The aid has to be well targeted to its objective, i.e. in this case to remedy a serious disturbance in the economy and to liquidate an inefficient company from the market in an orderly way. The aid must be an appropriate policy instrument to achieve the objective.
 - b. *Necessity*: The aid measure must, in its amount and form, be necessary to achieve the objective. That implies that it must be of the minimum amount necessary to reach the objective, and take the most appropriate form.
 - c. *Proportionality*: The positive effects of the measures must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives. This follows from Article 3(1)g EC and Article 4(1) and (2) EC, which provide that the Community shall ensure the proper functioning of an internal market with free competition. Therefore, Article 87(1) EC prohibits all selective public measures that are capable of distorting trade between Member States. Any derogation under Article 87(3) EC which authorises State aid must ensure that such aid must be limited to what is necessary to achieve its stated objective, limiting to a minimum consequential distortions of competition and negative spill-overs on competitors, other sectors and other Member States.
- (76) In addition, the Commission considers that although the R&R guidelines are not directly applicable in this case, the provisions therein must nevertheless be applied

²² Cf. in principle case Joined Cases T-132/96 and T-143/96 Freistaat Sachsen and Volkswagen AG Commission [1999] ECR II-3663, para. 167. Confirmed in Commission Decision in case C 47/1996, Crédit Lyonnais, OJ 1998 L 221/28, point 10.1, Commission Decision in Case C28/2002 Bankgesellschaft Berlin, OJ 2005 L 116, page 1, points 153 et seq and Commission Decision in Case C50/2006 BAWAG, not yet published, points 166. See Commission Decision of 5 December 2007 in case NN 70/2007, Northern Rock, OJ C 43 of 16.2.2008, p. 1, Commission Decision of 30 April 2008 in case NN 25/2008, Rescue aid to WestLB, OJ C 189 of 26.7.2008, p. 3, Commission Decision of 4 June 2008 in Case C9/2008 SachsenLB, not yet published.

²³ Cf. Commission decision of 10 October 2008 in case NN 51/2008 Guarantee scheme for banks in Denmark, not yet published, at point 40.

²⁴ In this context we refer to point 10 of the Communication from the Commission on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ 2008 C 270 of 25.10.2008

mutatis mutandis to the extent relevant for a company in difficulties which is being liquidated.

Assessment of the conditions for compatibility

- (77) First, as regards appropriateness, the objective of the measures is to preserve the financial stability of the Danish financial system. As described above, it appears that the Danish banking sector is to a large extent dependant on capital market funding. Any losses on loans to RB may have led to adverse knock-on effects on other Danish banks. Furthermore, the possible suspension of payments by RB would have a potential negative effect on the international trust in the Danish financial system. Therefore, the Commission does not dispute the analysis of Denmark that the default of RB on its senior liabilities towards the financial institutions could pose a considerable threat to financial stability in Denmark. In addition, the Commission notes that during the current crisis the loss of confidence in the financial market of a particular state can lead to adverse effects in the economy as demonstrated by events in Iceland.
- (78) Consequently, the Commission considers that the Danish authorities had justified fears of a potential systemic risk and that the measures helped to maintain confidence in the Danish financial sector. In this regard, the Commission also notes that other distressed Danish banks were acquired by private companies, indicating a larger problem in the Danish financial market and that the Danish authorities implemented a guarantee scheme for deposits and senior debt in banks in Denmark on 10 October 2008, which was found compatible aid by the Commission²⁵.
- (79) The irreversible aid to the senior creditors and to RB appears to be necessary to remedy a serious disturbance of Danish economy in the current market situation. The measures allow ensuring the continuation of the senior debt funding among the financial institutions.
- (80) It is understandable that during crisis situations the solutions need to be timely and that quick procedures need to be chosen. Therefore, the Commission finds it appropriate that the initial bidding process was allowed to continue for a limited time.
- (81) Second, as regards necessity, the measures, whereby all claims by senior creditors are fully covered and the bank is liquidated in the minimum time needed, are limited to the minimum necessary in scope and in time.
- (82) As regards scope, the Commission does not dispute the position of Denmark that the measures are needed to restore confidence of lenders. In this respect it seems not sufficient to reduce the coverage of claims to retail deposits as this would only avoid bank runs but not restore confidence of the institutional lenders. Moreover, the Commission notes positively that subordinated debt is not to be covered by the state. This provision allows to minimise, if not to avoid, moral hazard, as senior debtors assume only limited risk compared to the subordinated ones.

²⁵ Cf. Commission decision of 10 October 2008 in case NN 51/2008 Guarantee scheme for banks in Denmark, not yet published.

- (83) As regards time the Commission notes positively that RB cannot pursue new business activities or to serve new clients and the banking licence would be given in by RB within a few weeks time. Even though RB could continue to operate with a banking licence during a first stage of liquidation, the Commission finds that it is a justified transitional measure in this case and this period is very brief.
- (84) The Commission also notes that the Danish authorities intend to conclude the liquidation of all the assets in two years, except for the claims against clients which were forced to declare bankruptcy. The Danish authorities explained that these claims are impossible to sell. Therefore the Commission accepts that for such claims there should be no limitation in time, as they have to follow the regular bankruptcy procedure. Furthermore, as the second phase of the liquidation relates to the winding up process, when the company is no longer active in the market, the competition distortions appears to be rather limited. Therefore, the Commission considers that two years are appropriate to wind up RB.
- (85) In this regard, the Commission notes that timely liquidation ensures that competitors are being compensated for the earlier unsustainable RB business strategy on the market, when it increased its share significantly at the expense of other market players, by having the possibility to acquire its assets.
- (86) Third, as regards proportionality, the amount of the aid and distortions of competition appear to be minimised.
- (87) Moreover, the aid amount is minimised through a private banks contribution to the support measures. The financial contribution of the participating banks is DKK 750 million and they are the first to cover losses incurred in the liquidation of RB prior to the capital invested by DNB.
- (88) Furthermore, a private sector solution was first tried without success before committing any additional state resources. In addition, the least expensive solution was chosen. In particular, as the sale of the entire bank was not successful, the winding-up rather than the restructuring of RB was sought by the Danish authorities considering the bad quality of the bank's loan portfolio. In this regard, the Commission does not dispute that restructuring of an inefficient company would have cost more and would not be appropriate.
- (89) The other principles that can be derived from the R&R guidelines for liquidation aid also appear to be satisfied in this case: i) a liquidation plan was provided, ii) RB is not "new company" in the sense of the R&R guidelines, iii) RB has not benefitted from liquidation/ restructuring aid to date, iv) biannual monitoring reports will be provided to the Commission.
- (90) As regards the provision in the R&R guidelines, whereby no rescue or restructuring aid is allowed for newly created companies, the Commission considers that in this case the rationale of this rule does not apply. In particular, given that a nationalisation in Denmark would not be possible in a short time, without creation of the new entity, and that the "new" RB essentially takes over everything from the previous Roskilde Bank (except for the equity and the quasi-equity, thus basically being an empty shell), it can be considered that, in principle, it is the same entity and thus eligible as a firm in difficulty under the guidelines. It is important to note

that in such case all the provisions of the R&R guidelines should apply as if it were the same entity.

- (91) As regards the monitoring of the granted liquidation aid, the Danish authorities committed to inform the Commission every 6 months on the state of play of the winding-up by the provision of a report showing the progress of the sale of assets, the reimbursement of liabilities etc.

V. CONCLUSION

- (92) On the basis of the foregoing assessment, the Commission has come to the conclusion that the measures implemented by the Danish authorities constitute State aid within the meaning of Article 87(1) of the EC Treaty. The Commission has, however, come to the conclusion that the measures at hand can be found compatible as liquidation aid under Article 87(3)(b) of the EC Treaty in the light of the principles set out in the Communication.

VI. DECISION

- (93) The Commission has decided, on the basis of the preceding assessment, not to raise any objections to the abovementioned measures, on the ground that they constitute State aid which is compatible with Article 87(3)(b) of the EC Treaty.
- (94) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/community_law/state_aids/index.htm

Your request should be sent by registered letter or fax to:

European Commission
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State Aid Greffe
SPA3 6/5
B-1049 Brussels
Fax No: +32 2 296 12 42

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission