EUROPEAN COMMISSION

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C(2013) 9055 final

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 […].		PUBLIC VERSION This document is made available for information purposes only.

Subject : State aid n° SA. 29832 (2013/N-3) – Netherlands
ING – IABF Termination

Sir,

1. PROCEDURE

1. By decision of 31 March 2009 ("the 31 March 2009 decision"), the Commission authorised an impaired assets measure ("the IA measure") for a portfolio of US Alt-A residential mortgage-backed securities ("RMBS") in favour of ING for a period of six months.[1] The Dutch authorities refer to the measure as the 'Illiquid Assets Back-up Facility' ("IABF"). Due to doubts on the conformity of certain aspects of the IA measure with the Communication from the Commission on the treatment of impaired assets in the Community banking sector[2] ("the Impaired Asset Communication"), by that same decision the Commission initiated the procedure laid down in Article 108(2) of the TFEU[3].

[1] Commission decision in case C 10/2009 (ex N 138/2009) ING, OJ C158, 11.07.2009, p. 13.
[2] OJ C 72, 26.3.2009, p. 1.
[3] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 respectively of the Treaty on the Functioning of the European Union. The two sets of provisions are, in substance,

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2. On 18 November 2009, the Commission adopted a decision[4] ("the 18 November 2009 decision") approving various measures in favour of ING. In Article 1 of that decision the Commission approved the IA measure granted in favour of ING subject to commitments provided by the Netherlands. In Article 2 of that decision the Commission approved restructuring aid in the form of a capital injection, a change of the repayment terms for the capital injection, the IA measure and liquidity guarantees granted in favour of ING, subject to a restructuring plan and commitments provided by the Netherlands.

3. On 2 March 2012, the General Court annulled the first and second paragraphs of Article 2 of the 18 November 2009 decision. The Commission took a new decision on the compatibility of the restructuring aid on 11 May 2012.

4. Annex I to the 18 November 2009 decision records a commitment by the Netherlands to notify to the Commission any measures which unwind the IA measure early, whether in full or in part.

5. On 12 November 2013, the Netherlands notified an unwinding of the IA measure.

6. The Netherlands informed the Commission that the Member State exceptionally accepts that this Decision is adopted in the English language.

2. FACTS

2.1. DESCRIPTION OF THE IA MEASURE AND THE ADJUSTMENTS TO THE IA MEASURE IN THE 18 NOVEMBER 2009 DECISION

7. The IA measure takes the form of a total return swap whereby all the cash flows (and credit risk) of the portfolio covered were transferred to the Netherlands. In return, the Netherlands pays to ING the 'guaranteed value' which is the effective purchase price. The transaction is accompanied by many streams of fees. The IA measure was described in detail in the 31 March 2009 decision. The structure of the measure is only briefly recalled in the present decision before the main changes in the remuneration and fee structure are explained.

8. ING agreed in October 2009 to make a series of additional payments to the Netherlands effectively resulting in a significant increase of the Netherlands' remuneration for the IA measure via the adjustments of the initial fee structure. That initial fee structure is described in recitals 8 and 9.

9. Since 26 January 2009 the Netherlands has received 80% of all the cash flows from an impaired US Alt-A RMBS portfolio (“the portfolio”) from ING. Those receipts are represented by Flow 4 in Figure 1, together with a guarantee fee (Flow 5). In return, ING receives the following risk-free cash flows from the Netherlands:

- A guaranteed value, representing cash flows of principal payments totalling USD 28 billion, which corresponds to 90% (the purchase price or transfer price) of 80% of the portfolio, that is to say 72% of the portfolio (Flow 1). Those cash flows are paid on a monthly basis, over the life of the portfolio;

- A funding fee (Flow 2);

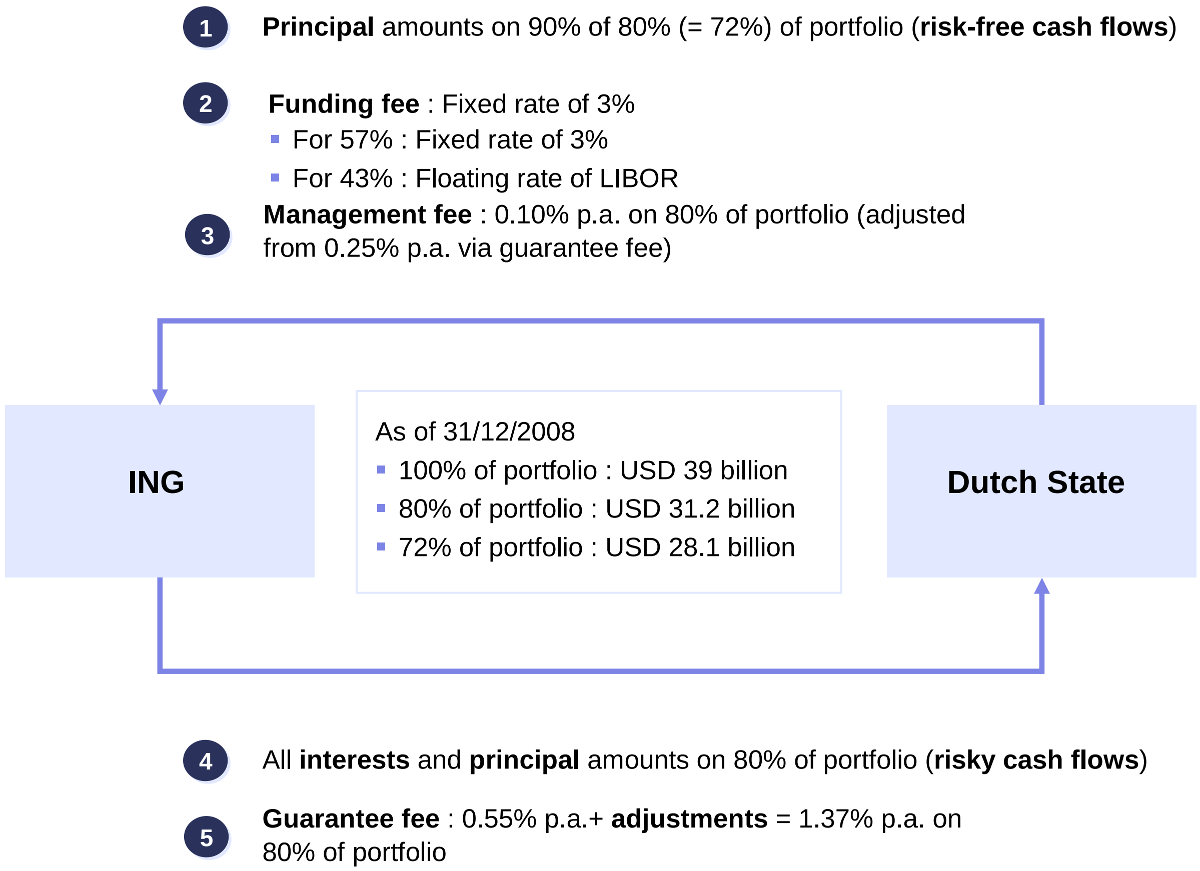
identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 respectively, of the EC Treaty where appropriate.

4 OJ L 278, 19.10.2010, p. 139.

- A management fee (Flow 3).

10. The cash flows originating from the remaining 20% of the portfolio were retained by ING and fall outside the scope of the cash flow swap.

Figure 1 – IABF fee structure after correction in Decision of 18 November 2009



11. The adjustments to the IA measure introduced in October 2009 are recorded in Annex I to the 18 November 2009 decision. Those adjustments are described in recitals 12 to 15.

12. First, from 25 October 2009, the Netherlands was to reduce the funding fee for 57% (made up of fixed-rate securities) of 72% of the portfolio by 50 basis points ("bp") per annum ("p.a.") from 3.5%[5] p.a. to 3% p.a. and to reduce the funding fee for 43% (made up of floating-rate securities) of 72% of the portfolio by 50 bp p.a. from LIBOR[6] + 50 bp p.a. to LIBOR flat.

13. Second, the management fee paid by the Netherlands to ING amounting to 25 bp p.a. on 80% of the outstanding amount of the portfolio was to be reduced by 15 bp to 10 bp through an increase of the guarantee fee which is described in recital 14.

14. Third, from 25 October 2009, ING was to increase the guarantee fee of 55 bp p.a. on the outstanding amount of the transferred portfolio by a further 82.6 bp p.a., bringing the total guarantee fee to 137.6 bp. Of that increase by 82.6 bp, 67 bp were to compensate for both the reduction in the management fee paid by the Netherlands to ING by 15 bp and a revision of the

[5] The funding fee is the sum of 3% (the alleged cost of funding in USD of the Netherlands) and a margin of 0.5%.
[6] London Interbank Offered Rate.

portfolio transfer price by 52 bp (corresponding to a decrease in transfer price from 90% to around 87%). The remainder of 82.6 bp increase (15.6 bp) was a claw-back adjustment for the period from 26 January 2009 (the start of the IA measure in its initial form) to 25 October 2009[7].

15. If the initial measure between the Netherlands and ING were to be unwound[8,] the amount of the unpaid additional payment that related to the period between 26 January 2009 and 25 October 2009 (that is to say the 15.6 bp included in the guarantee fee related adjustment) would still be payable. If a partial unwinding of the initial measure were to occur, such an amount would be payable proportionally. The additional payments, excluding the part related to the period between 26 January 2009 and 25 October 2009 (that is to say the 15.6 bp included in the guarantee fee related adjustment), were to have no residual settlement in case of an early unwinding of the IABF.

16. Following those adjustments to the IA measure, IFRS prescribed ING to provision to provision the additional fee payments which resulted in a provision charge of EUR 1.3 billion in the 2009 accounts.

17. A calculation method for the amount of additional payment relating to the 15.6 bp retroactive claw-back was fixed in the IABF contract between the Netherlands and ING to deal with the possibility of an early termination. That method is referred to as 'true up' by the Netherlands. The amount of that additional payment was fixed at USD 250 million netted of all payments that would have been made in respect of the 15.6 bp up to the point of termination. A true up was also agreed in respect of the guarantee fee which had to reach at least USD 977 million. If that level is not reached by 25 January 2048 and the measure is still in place after that date, the difference will be due and payable by ING.

18. On 13 November 2012, ING and the Netherlands agreed to amend the IA measure allowing ING to enter into repurchase agreements with third parties in which the receivable that ING holds vis-à-vis the Netherlands in respect of the guaranteed value of the IABF could be repurchased. The resulting benefit to ING in terms of reduced funding costs was agreed to be periodically paid to the Netherlands. That resulting benefit amounts to around EUR 2 million per month.

2.2. DESCRIPTION OF THE TERMINATION CONDITIONS OF THE IA MEASURE NOTIFIED BY THE NETHERLANDS

19. The size of the portfolio subject to the guarantee was USD 31.2 billion on 31 December 2008. At present 62% of the portfolio has been amortised. The outstanding amount is thus USD 12 billion. The maturity of the securities in the portfolio extends over 30 years. The cash flows received until now by the Netherlands were larger than expected. These excess cash flows have been used by the Netherlands to pre-pay the purchase price (the guaranteed value) which had been planned to be paid over time. On average the securities in the portfolio currently trade at above 70% of nominal. Against that background the Netherlands entered negotiations to terminate the IA measure.

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7 The increased fee was only applicable as from 25 October 2009. That adjustment of 15.6 bp captured both the reduction in funding fee by 50 bp paid by the Netherlands to ING and the increase in the guarantee fee by 67 bp paid by ING to the Netherlands.

8 […]

20. The termination will take place by selling the Alt-A RMBS securities portfolio that is covered by the IA measure. That sale will be fully completed until 1 January 2015 at the latest. The proceeds of each sale will be used by the Netherlands to repay the guaranteed value on the immediately succeeding monthly payment date at the latest.

21. The Netherlands provided a study by BlackRock Solutions ("BRS") which seeks to verify that the level of the accounting provision held by ING in respect of the additional fees introduced in October 2009 represents the net present value ("NPV") of ING's future payment obligations arising out of those additional fees.

22. The amounts of the payments due by ING are determined on the basis of the status of the portfolio and the outstanding obligations as of 30 September 2013. Those amounts have been verified by BRS (as explained in recital 21) and reviewed by Ernst & Young (the auditor of ING in the context of the validation of the […][*] accounts). Within ten days of signing of the amendment agreement terminating the IABF, ING will pay to the Netherlands USD 522 million. That amount is meant to compensate for the end of payments by ING for the guarantee, including the claw-back components of the guarantee fee. That amount of USD 522 million is made up of:

    a. an amount of USD 128 million which corresponds to the claw-back fee of 15.6 bp, including the so-called 'true up' included in the additional guarantee fee of 82.6 bp;

    b. an amount of USD 265 million which corresponds to the transaction price amendment of 52.0 bp included in the additional guarantee fee of 82.6 bp, from November 2009; and

    c. an amount of USD 129 million which corresponds to compensation from ING to the Netherlands for forgone future revenues relating to the guarantee fee.

23. The Netherlands will repay the part of the guarantee fee that ING has […] prepaid because that fee is paid annually and in advance. Therefore ING should be repaid amounts it had prepaid for the period as from the termination reference date of 30 September 2013 until the Netherlands makes that repayment. That repayment involves an amount of USD 26 million.

24. After the termination the Netherlands will continue to pay the following fees to ING until 1 January 2015 at the latest:

    - Funding fee of 3.5% and LIBOR + 0.5% on the outstanding guaranteed value relative to fixed and floating coupon RMBS securities respectively. That fee was corrected downwards to 3% and LIBOR respectively as is noted in the 18 November 2009 decision.

    - Management fee of 25 bp on the outstanding amount of the portfolio. That fee was corrected downwards to 10 bp as is noted in the 18 November 2009 decision.

25. After the termination ING will continue to pay to the Netherlands until 1 January 2015 at the latest the 0.5% fee correcting the funding fee and the 15 bp fee correcting the management fee.

[*] Confidential information

26. Table 1 provides an overview of the fees from an accounting perspective in relation to ING (the funding fee is not included). It illustrates the amounts of each fee paid to date and the amounts of currently outstanding provisions that could be released and generate an accounting profit in case of an early termination (reference point is 30 September 2013).

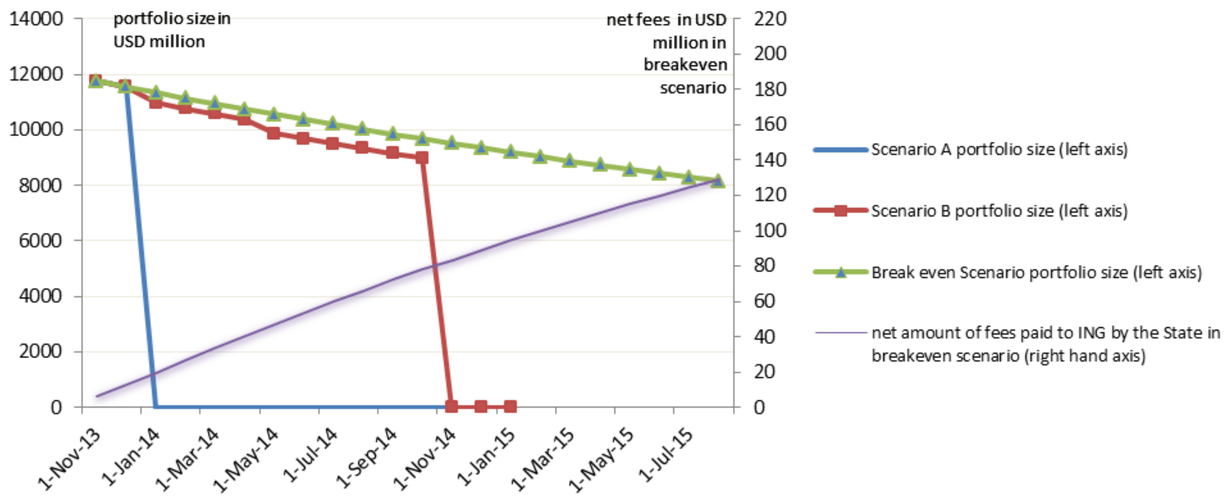
Table 1 – Overview of the accounting of the fees related to the IABF portfolio

September 2013 - Estimations	Amount	Initial NPV (in USD mln)	Payment	Received/Paid (in USD mln) until Sept2013	Net provisions (in USD mln) Sept 2013	Continuation after termination agreement
Assets						
Management fees	25 bps on RMBS portfolio	[250-500]	annually in advance	[250-500]	[0-250]	Continues
Accrued interest (remains upon termination)					[0-250]	N/A
MtM Loans					[250-500]	N/A
Total				[250-500]	[250-500]	
Liabilities						
Guaranteed fees	55 bps on RMBS portfolio	[750-1000]	annually in advance	[500-750]	[250-500]	No longer paid USD [0-250] million lump sum paid by ING (less USD 26 million prepaid)
Guaranteed fee true up to USD 977million			lump sum in 2048		[0-250]	
EC funding fees (correction of the funding fee)	50 bps on Loans	[500-750]	monthly	[250-500]	[0-250]	Funding fee of 3.5% or LIBOR+0.5% and the -0.5% correction continues
EC Guarantee fees (correction of themanagement fee)	15 bps on RMBS portfolio	[0-250]	annually in advance	[0-250]	[0-250]	Continues
EC Guarantee fees (claw-back)	52 bps on RMBS portfolio	[750-1000]	annually in advance	[250-500]	[250-500]	No longer paid USD [250-500] million lump sum paid by ING
EC Guarantee fees (retroactive claw-back)	15.6 bps on RMBS portfolio	[0-250]	annually in advance	[0-250]	[0-250]	No longer paid USD [0-250] million lump sum paid by ING
15.6 bp claw-back true-up to USD 250 million			lump sum at termination		[0-250]	
Total				[1500-1750]	[1000-1250]	**1) At termination: Lump sum paid by ING USD [500-750] million** **2) After termination: Net fees paid to ING capped at USD [0-250] million**

27. The net release on provisions by ING could be as high as USD [500-750] million[9]. That amount will be reduced by a USD [500-750] million lump sum payment by ING to the Netherlands upon termination. The 'true up' related to the claw-back fee of 15.6 bp and the guarantee fee amount together to USD [0-250] million in terms of provisions.

28. After the termination amendment enters into force and until the full sale of the portfolio the continuing payment will in net terms be favourable to ING. The cumulative net payment to ING after the termination will depend on the timing of the sale of the portfolio. The Netherlands provided the Commission with a number of illustrative scenarios, including a 'breakeven scenario' (the scenario under which the sale of the portfolio would be so slow that the fees paid to ING in net terms would represent USD 129 million and would therefore cancel out the initial lump sum payment relating to the guarantee fee of 55 bp). Such a breakeven scenario could in principle not arise under the notified amendment because the sale needs to take place before January 2015, whereas the breakeven point only occurs in July 2015.

[9] USD [1000-1250] billion release of provisions on the liabilities side minus USD [250-500] million effect on assets (the accrued interest component of USD [0-250] million is not to be deducted).



	Scenario A	Scenario B	Breakeven scenario
Description of amortisation profile	the whole of the outstanding Alt-A portfolio is sold in Dec ember 2013, at a price of 70%	Alt-A portfolio is sold in 3 tranches, 5% in Dec13, another 5% in Apr14 and the remainder in Oct14, all at a price of 70%	the breakeven scenario is constructed as the scenario under which the net fees paid by the State to ING will reach USD 129, the portfolio only decreases through amortisation and no sale; the breakeven point occurs in July 2015
Net amount paid to ING by the State	USD 19 million	USD 80 million	USD 129 million

3. POSITION OF THE DUTCH AUTHORITIES

29. Given the variations in the payment of the remaining fees which depend on how quickly the securities are sold and on other parameters such as the LIBOR, the Netherlands confirm that the total of the management and funding fees it will pay to ING after the termination of the IA measure will not exceed USD 129 million.

30. According to the Netherlands it does not intend to retain ownership of financial institutions. It also takes that attitude to the portfolio. It is therefore the goal of the Netherlands to restrict its interventions in the financial sector to those that are strictly necessary, and limit the period of time in which it assumes risk.

31. The Netherlands suffers a reduction in the EMU[10] balance for each premature termination of the IABF. That effect occurs because Statistics Netherlands entered the guarantee fees yet to be received as an asset of the State. That statistical treatment is unconnected to the price for which the portfolio will ultimately be sold. The talks by the Netherlands with ING have focused on the desirability of selling while at the same time limiting the impact on the EMU balance.

[10] Economic and Monetary Union.

32. There will be no consequences in terms of the spending framework because transactions connected to the financial crisis are not part of that framework. The amendment of the IABF does, however, have consequences for the EMU balance and EMU debt. In accordance with the relevant rules, all future guarantee fees are entered as an asset on the national balance sheet. Declaring the present value of those fees non-payable results in a one-off negative effect on the EMU balance at the time of the agreement. Currently, the present value amounts to EUR 618 million. Pursuant to the termination amendment, ING will pay EUR 395 million of that amount, so that the one-off negative impact on the EMU balance in 2013 will be EUR 223 million. The guarantee fees will be settled in full in that way. If the portfolio is sold the guaranteed value can be fully paid from the proceeds to ING. The termination according to the amended terms will reduce the EMU debt by approximately EUR 6.8 million (depending on the exact sale revenue of the portfolio).

4. ASSESSMENT OF THE NOTIFIED TERMINATION CONDITIONS

33. In its 18 November 2009 decision the Commission concluded in respect of the initial transaction as described in the 31 March 2009 decision that:

    (i) the transfer price fixed at 90% of the nominal was too high because it was above the real economic value ("REV")[11] and

    (ii) the management and funding fees paid to ING were too high[12].

34. The compatibility of the IA measure with the Impaired Assets Communication was achieved through a correction of the REV. That correction took the form of an increase of the guarantee fee by the claw-back components of 52bp and a retroactive claw-back component (for the period from January 2009 to 10 November 2009) of 15.6bp. The management and funding fees were both reduced, as explained in recitals 12 and 13.

35. The Commission considered in its decision of 18 November 2009 that setting the level of the guarantee fee at 55bp (guarantee fee without the correction for the claw-back) was in line with the remuneration requirements of the Impaired Assets Communication.

36. The 18 November 2009 decision requires a renotification if the IA measure is terminated early. According to Annex I to the 18 November 2009 decision, irrespective of the considerations as to the continuation of payment upon termination[13], the Commission must upon renotification verify whether the termination conditions confer an additional advantage on ING and whether the conditions of compatibility as described in the 18 November 2009 decision would still be in place if the measure were terminated as proposed by the Member State in its renotification.

37. The payment by ING to the Netherlands upon termination of the IA measure of the NPV of the future payments of the claw-back ensures that the transfer price remains at the REV. According to the auditors of ING and as confirmed by BRS, the amount of reserves related to the claw-back components of the guarantee fee of 52 bp and 15.6 bp corresponds to that NPV. If the NPV of those claw-back fees was not be paid back to the Netherlands upon termination, the transfer price correction from 90% of nominal to 87% would no longer be in place, as explained in recital 112 of the 18 November 2009 decision.

[11] Recital 112 of the 18 November 2009 decision.
[12] Recital 113 of the 18 November 2009 decision.
[13] Described in Annex I to that decision and in recital 15.

38. In fact, on the one hand ING pays to the Netherlands at the moment of the amendment USD 129 million from the release of the guarantee fee provision. That payment is not related to the claw-back fee. However, on the other hand, the part of the fees that will continue to be paid while the sale is underway (i.e. possibly until 1 January 2015) is in net terms favourable to ING. It is therefore necessary to ensure that the continuation of the fees cannot cancel out the additional payment of USD 129 million. First of all, the breakeven scenario described in recital 28 indicates that in the event of slow amortisation the net payments to ING would not exceed USD 129 million by 1 January 2015, which is the maximum time period allowed for the full sale of the portfolio under the amended conditions. Second, in so far as those estimations rely on projections, the commitment by the Netherlands in recital 29 will ensure that the payments will not exceed USD 129 million even if the economic situation differs from those projections.

39. Further, the management and the funding fees, which were considered as too high in the 31 March 2009 decision and whose correction was subsequently accepted in the 18 November 2009 decision, remain at those corrected levels. Those levels have been considered compatible in so far as the corrections fees related to them continue to be paid back by ING to the Netherlands, as explained in recital 25.

40. The compatibility requirements described in the 18 November 2009 decision therefore continue to be respected under the notified termination conditions. Nevertheless it has to also be assessed whether the new conditions confer an additional advantage on ING.

41. In particular, ING will be able to partially release provisions relating to the different fee components. Most of the potential provisions released will be paid to the Netherlands. The provision release relating to the non-continuation of the guarantee fee of 55 bp will not be fully paid to the Netherlands, which might result in an accounting profit. The fact that a company registers an accounting profit does not as such constitute additional aid if that accounting profit does not represent an economic benefit. In economic terms, all fees which have to be assessed in the present decision need to be assessed in combination since they arise from the same measure and are different mechanisms achieving the same overall purpose namely the remuneration of the Member State. While in relative terms the end of the guarantee fee could result in a lower cost to ING over time, the end of the funding fee payment would have the opposite effect for ING. The Commission notes in that regard that interest rates have decreased since the 18 November 2009 decision was adopted. As such, the fact that ING will not receive the fixed part of the fee creates in relative terms a loss for ING compared to the situation of 18 November 2009. Further, the 18 November 2009 decision did not record the 'true up' of the guarantee fee and the claw-back fee. Finally, the release of the related provisions can be attributed to the amendment of the IABF but cannot be attributed to an amendment of the remuneration terms for the IA measure which were recorded in the 18 November 2009 decision.

42. From a State aid perspective the guarantee fee of 55 bp was required to bring the IA measure into line with the requirements of the Impaired Asset Communication as to remuneration. It is a periodic remuneration, as opposed to the claw-back elements of the guarantee fee of 52 bp and 15.6 bp. The claw-back payments take place over time. However, the need for the claw-back payment is not periodic but arose at the moment of the transfer of the assets. The Commission sees favourably the early exit of the Netherlands from the IA measure and after the termination the Netherlands no longer needs to be remunerated for bearing a further downside risk in respect of the securities covered.

43. The Commission concludes that the termination amendment of the IABF as notified by the Netherlands preserves the compatibility of the IA measure and does not confer an additional advantage to ING compared to the terms of that measure recorded in the 18 November 2009 decision.

5. CONCLUSIONS

The Commission concludes that the IA measure in favor of ING continues to be compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of European Union.

The Commission notes that the Netherlands exceptionally accepts the adoption of this Decision in the English language.

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

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Yours faithfully,

For the Commission

Joaquín ALMUNIA

Vice-President