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***Case No COMP/M.5384 -  
BNP PARIBAS/ FORTIS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 7(3)  
Date: 27.10.2008



## COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.10.2008  
C(2008) 6421

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 7(3) DECISION

### **To the notifying party:**

Dear Madam,

**Subject :**     **Case No COMP/M.5384 – BNP Paribas/Fortis**  
                  **Request for derogation pursuant to Article 7(3) of Council Regulation**  
                  **N° 139/2004**

1. Reference is made to the application of October 23, 2008 for a derogation from the suspension obligation provided for in Article 7 (1) of Council Regulation (EC) N° 139/2004 (the "EC Merger Regulation") with regard to the proposed acquisition by BNP Paribas S.A. ("BNP Paribas") of sole control over Fortis Bank SA/NV ("Fortis Bank Belgium"), Fortis Insurance Belgium SA/NV ("Fortis Insurance Belgium") and Fortis Banque Luxembourg S.A. ("Fortis Banque Luxembourg"), together the "Fortis Entities", submitted on behalf of BNP Paribas, pursuant to Article 7 (3) of the EC Merger Regulation ("the Application").
2. Reference is further made to the Memorandum which was submitted to the European Commission to support the Application on October 24, 2008.

### **I. THE PARTIES AND THE TRANSACTION**

3. BNP Paribas is a banking group listed on Euronext Paris, with operations in more than 85 countries across Europe, North and South America, Africa, the Middle East, and Asia.
4. BNP Paribas has three core banking businesses: retail banking, asset management and services (comprising asset management, private banking, securities, investments and brokerage online for individuals, insurance, real estate), and corporate and investment banking.

5. The Fortis Entities provide banking services to individual, business and institutional customers in a large number of countries (with the exception of the Netherlands). Banking operations are centred in Belgium and Luxembourg. The Fortis Entities' core banking businesses are: retail banking, private banking, asset management, and merchant banking. The Fortis Entities are also active in the insurance sector in Belgium.
6. The Fortis Entities were formerly part of the Fortis Group, an international provider of banking and insurance services to individual, business and institutional customers.
7. Faced with mounting crisis and the need for immediate action, the governments of Belgium, the Netherlands and Luxembourg announced on September 29, 2008 that they would invest €1.2 billion in the Fortis Group to ensure that Fortis' banking and insurance activities would continue to operate, as a result of which the Kingdom of Belgium acquired, through the 100% state-owned company *Société Fédérale de Participations et d'Investissement*, "SFPI", 49.93% of the issued share capital of Fortis Bank Belgium, while the Grand-Duchy of Luxembourg agreed to grant a loan that would be mandatorily convertible into 49.9% of the share capital of Fortis Banque Luxembourg.
8. Subsequently to this, on October 3, 2008 the government of the Netherlands announced that it would acquire 100% of Fortis Bank Nederland, thereby nationalizing the Dutch assets of the Group. This transaction replaced the previously announced investment by the Kingdom of the Netherlands.
9. On October 9, 2008, the government of Belgium, BNP and the Fortis Group entered into a Memorandum of Understanding according to which BNP Paribas will acquire control of the operations of Fortis in Belgium and Luxembourg, as well as Fortis' international banking franchises, for a total consideration of approximately €[...] billion (the "Transaction").
10. The Transaction will be completed in several steps. For the purpose of this decision, the following steps appear to be directly relevant:

On October 10, 2008, the Belgian government announced that SFPI would acquire a further 50% plus one share in the outstanding share capital of Fortis Bank Belgium, as a result of which its shareholding was raised to the level of 99.93%. Fortis Bank Belgium in turn holds 100% of the share capital of Fortis Banque Luxembourg. At this stage, the share capital of Fortis Insurance Belgium is held 100% by Fortis Insurance N.V.

On December 4, 2008 subject to satisfaction or waiver of certain conditions precedent, including merger control clearance by the Commission and other regulatory authorisations:

SFPI will contribute in kind to BNP Paribas 54.55% of the share capital of and voting rights in Fortis Bank Belgium. SFPI will receive newly-issued shares representing 8.82% of the issued share capital of BNP Paribas;

simultaneously, BNP Paribas will purchase 100% of the issued share capital of Fortis Insurance Belgium from Fortis Insurance N.V.

Subject to approval by BNP Paribas shareholders, which is expected to be obtained prior to mid-December 2008, SFPI will contribute in kind to BNP Paribas shares representing 20.39% of the issued share capital of Fortis Bank Belgium and SFPI will receive 32,982,760 newly-issued shares of BNP.

11. In addition, according to the notify party, the Grand-Duchy of Luxembourg will convert into 49.9% of the share capital of Fortis Banque Luxembourg the € 2.4 billion it agreed to invest in this entity on 29 September, 2008, in the form of a mandatorily convertible loan. Subject to approval by BNP Paribas shareholders, which is expected to be obtained prior to mid-December 2008, the Grand-Duchy of Luxembourg will contribute in kind to BNP Paribas shares representing 16.57% of the issued share capital of Fortis Banque Luxembourg and it will receive 11,717,549 newly-issued shares of BNP Paribas.
12. Therefore, the contemplated Transaction consists in the acquisition by BNP Paribas of sole control of:
  - (i) Fortis Bank Belgium, by means of the purchase of 74.94% of the issued share capital from the Kingdom of Belgium;
  - (ii) Fortis Banque Luxembourg, through Fortis Bank Belgium which would hold 50.1% of the issued share capital prior to closing; in addition, BNP would acquire 16.57% of the issued share capital from the Grand-Duchy of Luxembourg;
  - (iii) Fortis Insurance Belgium, by means of the purchase of 100% of the issued share capital from Fortis Insurance N.V.
13. As a result of the acquisition of sole control of the Fortis Entities, BNP Paribas will acquire the following operations:
  - (i) Retail banking networks in Belgium, Luxemburg, Poland, France and Germany as well as a financial services joint venture with An Post (Postbank) offering current/savings accounts in Ireland;
  - (ii) Merchant banking activities outside the Netherlands;
  - (iii) Private banking services outside the Netherlands;
  - (iv) Investment management activities (including a large part of the former ABN AMRO Asset Management activity<sup>1</sup>); and
  - (v) Fortis' insurance business in Belgium.

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<sup>1</sup> This is without prejudice to any consequences deriving from the implementation or failure to implement the commitments agreed in Case COMP/M.4844 Fortis/ABN AMRO assets.

14. Following the transaction, BNP Paribas will control the majority of the voting rights and will thus be in a position to appoint the majority of board members of the Fortis Entities' corporate bodies. Therefore, the transaction qualifies as a concentration within the meaning of Article 3 (1) b of the EC Merger Regulation.

## **II. THE COMMUNITY DIMENSION**

15. In 2007, BNP Paribas' worldwide turnover was €92,376 million. Its Community-wide turnover was €[...] million and its EFTA-wide turnover was €[...] million.

16. The turnover of the Fortis Entities in 2007 was €100,962 million worldwide, €[...] million Community-wide and €[...] million EFTA-wide<sup>2</sup>.

17. BNP Paribas achieves more than two-thirds of its Community-wide turnover in France while the Fortis Entities achieve more than two-thirds of their Community-wide turnover in Belgium. Therefore, the present transaction has a Community dimension pursuant to Article 1 (2) of the Merger Regulation.

## **III. THE APPLICATION FOR DEROGATION**

18. BNP Paribas submits that the Fortis Entities are faced with dramatic and unparalleled financial difficulties, which require BNP to be allowed to carry out certain measures before the adoption of a final Commission decision under the EC Merger Regulation.

19. In order to handle the high levels of financial risk which arise during the transitional period from now until completion of the Transaction, the Parties have drawn up draft rules for a Steering Committee which will:

- scrutinize the evolution of the Fortis Entities' risks (including credit risks, market risks, liquidity risks and operational risks) during this transitional period;
- take, in agreement with the Fortis Entities' management and the Belgian authorities, all appropriate measures with respect to the management and operations of the Fortis Entities that will be required by the financial crisis, including the transfer or restructuring of any structured credit portfolio lines, the transfer of interests or activities or any modification of the share capital of the Fortis Entities;
- approve the possible secondment of BNP Paribas employees to the Fortis Entities as a temporary measure. These employees might have key positions, in particular, in the Fortis Entities' marketplace operations or in support desk services, although they will not act as managers.

20. The Steering Committee will be composed of eight members, among which four representatives of BNP Paribas and four representatives of Fortis Bank Belgium. It

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1. The turnover of the Fortis Entities has still to be adjusted to take into account the 2007 turnover achieved by the asset management operations of ABN AMRO which are included in the scope of the Transaction.

will meet at least once a week and decisions will be taken by a simple majority of votes present or represented. Working groups, composed of representatives of the operational services and the risk monitoring departments of BNP Paribas and the Fortis Entities, will be set up to assist the Steering Committee. The members of the working groups will minimize any exchange of sensitive information to what is strictly necessary. In particular, the information exchanged will not include specific information relating to identified clients of the Fortis Entities'. Moreover the number of BNP Paribas employees involved will be limited to what is strictly necessary.

21. As the Steering Committee will decide by simple majority, BNP Paribas will thus be in a position to veto any decisions taken by the Steering Committee. This implies the possible exercise of a decisive influence over the Fortis Entities and, hence, the early implementation of the Transaction before a possible clearance decision is issued by the European Commission.
22. In order to proceed as indicated above in due respect of the Merger Regulation, a positive response to BNP Paribas' request for the granting of derogation from the standstill obligation provided for in Article 7 (1) is required.
23. According to BNP Paribas its request is justified, among other reasons, in view of:

- (i) The unparalleled systemic financial crisis in which BNP Paribas and the Fortis Entities currently have to operate.

In this regard, the information submitted to the Commission shows that the solvency and liquidity positions of the Fortis Entities have rapidly deteriorated in recent weeks and that BNP Paribas is required to lend very significant amounts of money to the Fortis Entities on a daily basis.

- (ii) [...].

The split up of the Fortis group has separated some asset portfolios (owned by the Belgian entities of the Fortis Group) from the employees (traders) in charge of the management of these portfolios (who now work for Fortis Bank Netherlands). As a consequence, the Fortis Entities now hold a very significant volume of asset portfolios, which have encountered very significant reductions in market value in the last months, without the required employees to manage these portfolios. Under the present circumstances, it is extremely difficult for the Fortis Entities to replace these employees.

Given the transitory character of its investment, the Belgian government is very likely not in a position to take, by itself, appropriate measures to handle the financial risks incurred by the Fortis Entities during this transitory period.

- (iii) The need to adopt, as soon as possible, all the measures required in order for the merged entity to comply with regulatory financial ratios immediately upon closing of the transaction.

BNP Paribas argues that it is absolutely essential for it to have the clearest possible understanding of the financial risks associated with the Fortis Entities' operations. This is required, among other things, in order to start considering as soon as possible all the actions BNP Paribas will have to take after December 4 (anticipated

closing date) in order for the merged entity to comply with regulatory financial ratios immediately upon closing.

#### **IV. THE CONDITIONS FOR DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION**

24. Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on the basis of a reasoned request, grant a derogation from the obligation imposed by Article 7(1).
25. Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where the suspension required under the EC Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.
26. In deciding upon the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.

#### **A. THE TRANSACTION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7 (1) OF THE EC MERGER REGULATION**

27. Given that the proposed transaction appears to qualify as a concentration with Community dimension within the meaning of the EC Merger Regulation, it falls under the suspension obligation laid down in Article 7(1) of the EC Merger Regulation.

#### **B. THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND THIRD PARTIES**

28. According to the information provided by the notifying Party, which appears plausible *a priori*, the Fortis Entities are in serious financial distress. In the current context of major financial crisis there are serious risks of further rapid deterioration.
29. The derogation appears appropriate as otherwise there may be a considerable effect on Fortis, on its customers and creditors, as well as on BNP. In the current circumstances and according to the information submitted by BNP, Fortis is not able to finance its liquidity needs via the inter-banking lending market, but relies on BNP for providing very significant volumes of liquidity on a daily basis. Without being able to turn to BNP for those amounts, there would be considerable effects on Fortis' financial position. If BNP were not able to monitor the risks incurred by Fortis, BNP itself may not be able to monitor its own risks and the risks incurred with the lending to Fortis. Therefore, in the current circumstances, the absence of a derogation in relation to the risk monitoring measures requested could have very significant effects on Fortis, on Fortis customers and creditors, as well as on BNP.
30. Similarly, Fortis is exposed to very significant risks in relation to the asset portfolios which have already lost a very substantial part of their market value over the last months. [...].

31. The Belgian State, as an interim owner, would not seem to be in a position to carry out the measures envisaged instead of BNP.
32. In addition, the inability of BNP Paribas to reliably assess and manage its position post-Transaction might lead BNP Paribas to consider abandoning the transaction. If BNP Paribas were to abandon the transaction, the impact of such a development, could be considerable. Such a development could result in the need for further State intervention, which would be extremely onerous for the public authorities concerned and would create greater risks of distortions of competition than the alternative proposed by BNP Paribas in return for an outcome which would remain highly uncertain. The withdrawal of BNP Paribas from the transaction would also risk significantly affecting consumer confidence in the financial markets in general.

### **C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION**

33. On the basis of the provisional information submitted by BNP Paribas, the Parties' combined market share exceeds 15% in five markets:
  - the Belgian leasing market, where the new entity's market share will increase from [20-30]% to [30-40]%;
  - the French leasing market, where the Parties' market share will increase from [10-20]% to [10-20]%;
  - the Belgian market for consumer loans, where the Parties' market share will increase from [20-30]% to [20-30]%;
  - the Belgian market for mortgages, where the Parties' market share will marginally increase, from [20-30]% to [20-30]%;
  - the Belgian market for life insurance, where the Parties' market share will marginally increase, from [20-30]% to [20-30]%.
34. In the Belgian leasing market, the new entity will still face competition *inter alia* from three important operators (ING, KBC and Dexia) each having a market share of approximately 20%.
35. In the French leasing market, the new entity will face competition *inter alia* from Crédit Agricole, Natixis and Société Général, each having a market share of approximately 20%.
36. In the Belgian market for consumer loans, the new entity will face competition *inter alia* from KBC and ING, each having a market share of approximately 20%.
37. In the Belgian market for mortgages, the new entity will face competition *inter alia* from KBC, ING and Dexia, each having a market share of approximately 20%.
38. In the Belgian market for life insurance, the new entity will face competition *inter alia* from four significant operators (AXA, Ethias, Dexia, KBC), each having a market share of 10 to 15%.
39. From the above, it results that (i) the increment in the Parties' market share is limited and, (ii) the resulting entity will face strong competitors including, in Belgium,



Dexia, AXA (for life insurance), ING and KBC. Therefore, on the basis of the information provided by the Parties, the transaction is not likely, *prima facie*, to significantly impede effective competition within the EEA.

#### **D. BALANCE OF INTERESTS**

40. Based on the above it appears that the suspension obligation could seriously affect the financial interests of the parties, of Fortis customers and moreover may have an impact on the financial system in general. The benefits following from the derogation considerably outweigh any potential adverse effects that it may have on one or more of the parties or on any third party. Moreover, the scope of the measures as described in paragraphs 19 and 20, concerning the Steering Committee, the Working Groups and BNP Paribas employees, appears to be limited to what is necessary for BNP Paribas to have a clear understanding of the financial risks associated with the Fortis Entities operations and to make sure that vacant positions within those entities are filled by competent employees during the period before the adoption of a final Commission decision under the EC Merger Regulation. Therefore, the proposed risk management framework can be deemed to be reasonably necessary to safeguard or restore the viability of the Fortis Entities and thereby contribute to ensuring financial stability.

#### **V. CONCLUSION**

41. The Commission considers that the reasons given for derogation from the suspension obligations meet the requirements set out in Article 7(3) of the EC Merger Regulation.
42. On the basis of the above considerations, and in accordance with Article 7(3) of the EC Merger Regulation, BNP Paribas is granted a derogation from the obligations imposed by Article 7 (1) of the Merger Regulation in accordance with its application and until the Commission takes a final decision under the relevant provisions of the EC Merger Regulation.

For the Commission  
(*signed*)

Siim Kallas  
Vice-President