



EUROPEAN COMMISSION

Brussels, 3 December 2008
C(2008) 8085

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

WORKING LANGUAGE

**This document is made available for
information purposes only.**

**Subject: State aid NN 42/2008 - Belgium,
NN 46/2008 - Luxembourg
NN 53/A/2008 - Netherlands
Restructuring aid to Fortis Bank and Fortis Bank Luxembourg.**

Dear Minister,

1 PROCEDURE

- (1) By letter of 29 September 2008, the Belgian authorities informed the Commission of measures implemented the previous day and on that day in favour of Fortis Bank SA ('Fortis Bank' or 'the bank'). Those measures were formally notified on the following day. By letters of 8 and 13 October 2008, the Belgian authorities submitted further information on the development of the liquidity assistance operation ('the LA' or 'liquidity assistance') in favour of Fortis Bank. By letter of 24 October 2008, the Belgian authorities notified the operations formally concluded on 10 October 2008, which had been announced on 6 October 2008. The Commissioner for Competition requested additional information in a letter dated 30 October 2008 addressed jointly to the Belgian, Luxembourg and Netherlands authorities. A meeting was held between the Commission and representatives of the Belgian authorities on 6 November 2008. In response to the questions raised, the Belgian authorities submitted additional information by letter of 18 November 2008. The Commission requested further information by letter of 24 November 2008, to which Belgium replied by letter of 25 November 2008. A meeting between the Commission and the Belgian authorities in the presence of BNP Paribas was held on 27 November 2008. Prior to that meeting,

Son Excellence Monsieur
Karel DE GUCHT
Ministre des Affaires étrangères
Rue des Petits Carmes 15
B - 1000 Bruxelles

Zijne Excellentie de Heer
Maxime VERHAGEN
Minister van Buitenlandse
Zaken
Bezuidenhoutseweg 67
NL - 2500 EB Den Haag

Son Excellence Monsieur
Jean ASSELBORN
Ministre des Affaires étrangères
Rue Notre-Dame 5
L - 2911 Luxembourg

BNP Paribas had directly met with the Commission and provided information. In reply to questions put by the Commission, the Belgian authorities submitted further information by letters of 28 November 2008.

- (2) By letter of 29 September 2008, the Luxembourg authorities informally notified the Commission of the measures implemented the previous day in favour of Fortis Bank. Those measures were formally notified on 1 October 2008. Additional information was provided on 2 October 2008, 10 October 2008, 15 October 2008, 19 November 2008 and 27 November 2008.
- (3) By letter of 7 October 2008, the Netherlands authorities notified the Commission of the measures announced publicly on 3 October. The Netherlands authorities provided further information by letter of 15 October 2008. A meeting between the Commission and the Netherlands authorities was held on 20 November 2008, in the course of which the Commission reiterated and explained the requests for information made in the aforementioned letter of 30 October 2008 from the Commissioner for Competition.

2 SUBJECT-MATTER OF THIS DECISION

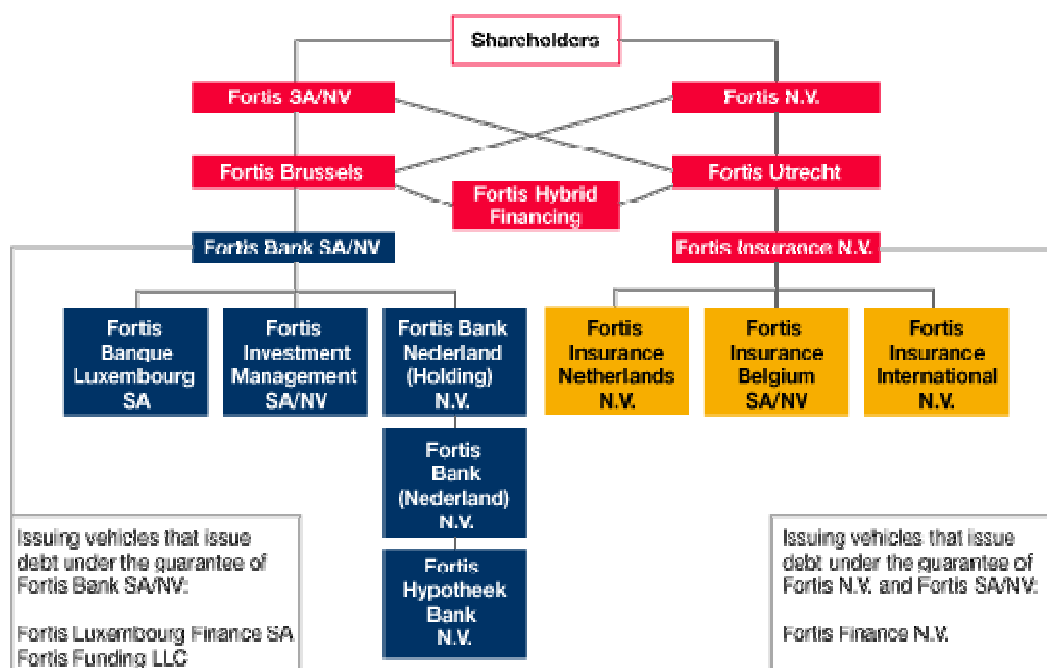
- (4) This decision assesses the measures implemented by Belgium and Luxembourg in favour of Fortis Bank and Fortis Bank Luxembourg ('FBL'). With regard to the measures notified by the Netherlands, the Commission has sufficient information to assess the purchase of Fortis Insurance Nederland. With regard to the purchase of Fortis Bank Nederland (FBN) and the provision of the financing to make that transaction possible, the Commission has sufficient information to assess that measure as possible State aid to Fortis Bank. That assessment will therefore be carried out in this decision, which will consequently deal with all the potential aid to Fortis Bank and FBL. With regard to whether the purchase of FBN and the associated provision of financing constitute possible aid to FBN, the Commission has not yet received all the information required to assess that point. It will therefore be addressed in a separate procedure (State aid Case NN 53/2008/B).

3 DESCRIPTION

3.1 Description of the beneficiaries (Fortis Bank and Fortis Bank Luxembourg)

- (5) Fortis Bank was, prior to the operations described below, a subsidiary of SA Fortis Brussels, itself controlled by Fortis SA/NV and Fortis NV ('Fortis' or 'the Fortis Group'), whose securities are listed *inter alia* on Euronext Brussels and Euronext Amsterdam. Fortis Bank Luxembourg was a subsidiary of Fortis Bank.

(6) The structure of the Fortis Group, as at the end of September 2008, is set out below.



(7) At the end of June 2008, Fortis Group had a total balance sheet of EUR 974 billion, of which 90 % (EUR 876 billion) related to banking activities. Fortis Bank is active in the retail banking market (including private banking), in financial services to business (corporate) and to institutional customers, in asset management and in financial services connected with the financial markets.

(8) The following table shows the size of Fortis Bank at the end of the first half of 2008, the size of the Netherlands activities sold on 3 October 2008 (see below), and the residual size of Fortis Bank following that sale:

	Fortis Bank – first half of 2008	Netherlands activities	Fortis Bank following sale of Netherlands activities
Total income (EUR million)	6 090	[...] ([20-30] %)	[...]
Net profit (EUR million)	1 185	[...] ([40-50] %)	[...]
Full-time equivalent employees	[...]	[...] ([40-50] %)	[...]
Retail branches	[...]	[...] ([30-40] %)	[...]

3.2 Description of the State measures analysed in this decision

- (9) On the evening of 28 September 2008, the Belgian, Netherlands and Luxembourg authorities publicly announced their commitment to invest EUR 11.2 billion in the banking activities of the Fortis Group. The Belgian Government, through the intermediary of Société Fédérale de Participation et d'Investissement ('SFPI'), subscribed to a capital increase in Fortis Bank of EUR 4.7 billion and thereby acquired a 49.93 % stake in the capital of Fortis Bank (measure 1a). The Luxembourg Government granted Fortis Bank Luxembourg a three-year convertible loan of EUR 2.5 billion (later reduced to EUR 2.4 billion). Its conversion would enable the Luxembourg Government to acquire 49.9 % of the borrower's capital. Immediately following the signing of the loan agreement, the Luxembourg Government requested that the conversion to shares be effected (measure 1b). The Netherlands State announced that it would subscribe to a capital increase of EUR 4 billion in FBN, which would allow it to acquire a 49 % stake in that bank's capital. That measure was ultimately never implemented and was replaced by the measures announced on 3 October and described below. It will therefore not be analysed in this decision.
- (10) On 29 September 2008, Banque Nationale de Belgique ('BNB') put in place an LA measure in favour of Fortis Bank (Measure 2). It took the form of overnight advances. [...].
- (11) On 3 October 2008, the Netherlands Government announced that it had acquired FBN, a subsidiary of Fortis Bank in which the assets of ABN AMRO were also incorporated. The price was EUR 12.8 billion. In the context of that transaction, the Netherlands authorities undertook to provide a maximum of EUR 34 billion to enable the repayment of FBN's short-term debts to Fortis Bank. The Netherlands authorities also undertook to allow the repayment of FBN's long-term debts to Fortis Bank, amounting to EUR 16 billion (measure 3a). At the same time, the Netherlands authorities acquired Fortis Insurance Nederland from Fortis Insurance for the price of EUR 4 billion (measure 3b).
- (12) On 5 October 2008, Belgium announced that it had purchased from Fortis, for the price of EUR 4.7 billion, the 50.1 % of Fortis Bank which it did not already own following the operation of 29 September. A new entity was also created which was to assume the most risky structured credits of Fortis Bank with a value of EUR 10.4 billion, of which Belgium would hold 24 %, BNP Paribas bank 10 % and the holding company Fortis SA the remaining 66 %. Belgium also announced that it was selling 75 % of its stake in Fortis Bank to BNP Paribas bank for the price of EUR 8.25 billion paid in BNP Paribas shares. Completion of the sale is subject to several suspensive conditions. Luxembourg announced the sale of 16 % of Fortis Bank Luxembourg to BNP Paribas for EUR 800 million, thereby increasing BNP Paribas' stake in Fortis Bank Luxembourg to 67 % (since by acquiring Fortis Bank, BNP Paribas acquired control of 50 % of Fortis Bank Luxembourg)¹ (measure 4).

¹ BNP also bought Fortis Insurance Belgium from Fortis Insurance N.V. for EUR 5.5 billion, paid in cash. Taking the view that that transaction between two private undertakings did not involve State intervention, Belgium did not formally notify it (see footnote 4 of the letter from the Belgian authorities of 24 October 2008). The Commission also considers that that transaction, although formally included in an agreement relating to several transactions including the sale of Fortis Bank to BNP Paribas, is a transaction between two

3.3 Description of Fortis Bank's difficulties

- (13) Fortis Bank's difficulties are the result of a combination of several factors, which are presented here separately but are in reality interlinked. The first cause of the difficulties was the involvement of Fortis Bank in the acquisition in October 2007 of the bank ABN AMRO by a consortium of Fortis and other banks. In that context, Fortis Bank agreed to a purchase price of EUR 24 billion, which required a vast financing plan that proved difficult to implement successfully.
- (14) The second cause was the subprime crisis. Some of the measures planned in order to mobilise the funds needed to pay the purchase price of ABN AMRO (such as the issuing of securities equivalent to regulatory own funds and securitisation operations) were made very difficult, if not impossible, following the subprime crisis and the resulting climate of general distrust. Moreover, Fortis Bank's investment in structured credits nominally valued at EUR 41.7 billion was subject to successive asset impairments.
- (15) The third source of difficulty was the delay in completing the sale of part of the capital of the subsidiary Fortis Investments to the Chinese group PING AN, which resulted in a shortfall of EUR 2.1 billion in Fortis Bank's receipts.
- (16) The fourth source of difficulty was the loss of confidence on the part of the financial markets. The factors listed above actually led the Fortis Group to take several decisions in June 2008 aimed at strengthening its solvency plan, but those measures gave rise to shareholder dissatisfaction and market distrust. Those various factors resulted in a loss of confidence on the markets. That accentuated the fall in Fortis Group shares.
- (17) The fifth source of difficulty was the liquidity crisis on the financial markets. The consequences of the loss of confidence were amplified by the liquidity crisis on the capital market (which gradually took the form of a tightening of conditions for granting interbank credits in general and to certain banks, including Fortis Bank, in particular). Fortis Bank was accordingly forced to use central bank liquidity facilities. The combination of all those factors therefore created the conditions for an imminent bank run (that is to say huge withdrawals by mistrustful savers).
- (18) For the reasons set out above, Fortis Bank (and the Fortis Group of which the bank formed part) was faced with an imminent crisis. On 25 September 2008, the Belgian supervisory authority – the Commission bancaire, financière et des assurances [Banking, Finance and Insurance Commission] ('the CBFA') – informed Fortis that it had to take immediate measures and consider its strategic options, including the support of a sounder partner, in view of the disturbances affecting the markets and Fortis in particular ². On Friday 26 September, the board of directors of Fortis concluded that the group could no longer raise sufficient funds on the market and that if no action were taken there would be a liquidity deficit of 30 billion by the following Monday.

private undertakings which does not involve State intervention. It is therefore not referred to in the remainder of this decision.

² This information, like some other information in this decision, is based on the minutes of meetings of Fortis' board of directors.

- (19) From that point onwards, and over the weekend of 27 and 28 September 2008, Fortis established contacts with various investors who could have been interested in launching a takeover bid for all Fortis' shares or in purchasing some of the group's activities. Crédit Agricole, KBC and Santander indicated that they were not interested; ING, BNP, Munich Re and Aegon visited the data room set up by Fortis, as did SFPI. ING made an offer of EUR 1.5 per Fortis share. BNP made an offer of EUR 2 per share, but requested additional guarantees from the Belgian Government. The latter took the view that, in the light of the closing share price on Friday 26 September, which was EUR 5.2 per share, those offers were too low and ultimately no formal offer was made.
- (20) The announcement made on the evening of Sunday 28 September of capital injections by the three Member States, as described above, was not sufficient to reassure the markets or customers. Withdrawals by institutional customers and companies increased substantially: between 29 September and 3 October 2008, EUR 35.9 billion was withdrawn, for example. On the interbank market, Fortis Bank found it almost impossible to borrow, retaining access solely to overnight borrowing. Fortis Bank had to obtain vast amounts using the aforementioned LA provided by BNB: [...].
- (21) In those circumstances, Fortis Bank was placed under a great deal of pressure by the Belgian and Netherlands supervisory authorities. The Netherlands supervisory authorities, suspecting that Fortis Bank was no longer capable of financing FBN, threatened to put FBN under trusteeship ('onder curatele plaatsen'). At the same time, the Netherlands Government began to negotiate the purchase of the Netherlands activities. Those negotiations resulted in the measures announced on 3 October by the Netherlands and described above.
- (22) The Belgian authorities, seeking a large bank with which to associate Fortis Bank, whose total balance sheet after the sale of FBN still amounted to EUR 750 billion, again contacted the investors who had expressed interest the previous weekend. ING indicated that it was no longer interested. The only potential purchaser which confirmed its continued interest was BNP Paribas. The negotiations resulted in the measures announced on 5 October 2008, as previously described.
- (23) The announced sale of 75 % of Fortis Bank to BNP Paribas, because it was not regarded as definite by the market, was not sufficient to remedy Fortis Bank's difficulties in accessing the interbank market. Fortis Bank continued to face very difficult financing conditions and BNP Paribas had to lend it very significant amounts. It was in that context that the Commission authorised on 20 November 2008 the State guarantees in favour of Fortis Bank³.

4 RECEIPT OF TWO COMPLAINTS

- (24) On 4 November 2008, a competitor of Fortis Bank operating on the Belgian market submitted two complaints to the Commission against the State measures in favour of Fortis. That competitor takes the view, *inter alia*, that the capital injection of 29 September 2008 constitutes State aid which is incompatible with the common market and asserts in particular that it allowed Fortis Bank to distort the market by

³ Commission decision of 20 November 2008 in Case N 574/2008, not yet published.

increasing the interest rates offered on individuals' deposits in on-line savings accounts, i.e. savings accounts which must be managed online.

- (25) By letter of 20 November 2008, a Fortis Bank shareholder submitted a complaint against the measures announced on 5 October 2008. He is of the opinion that the price paid by BNP Paribas was significantly below the real value of Fortis Bank at the time of the transaction and constitutes State aid to BNP Paribas.

5 COMMENTS OF THE MEMBER STATES CONCERNED

5.1 Belgium's comments

- (26) Belgium argues that none of the measures constitutes State aid. The capital injection of 28 September 2008 was made at a price consistent with Fortis' last stock exchange price, that is to say with that of 26 September 2008. The LA was provided at the discretion of BNB, acting in the context of its ordinary monetary remit. The purchase of the remaining 50 % of Fortis Bank and the sale to BNP Paribas took place at the same price as the capital injection of 28 September and therefore does not constitute aid. In the alternative, the Belgian authorities state that, if those measures constitute aid, they should be regarded as compatible on the basis of Article 87(3)(b) of the Treaty. In that regard, the Belgian authorities submitted information seeking to show that the measures make it possible to restore the viability of Fortis Bank, are minimal in view of the extreme situation in which the bank found itself and do not unduly distort competition.
- (27) With regard to the complaint submitted by a competitor of Fortis Bank, which the Commission sent to the Belgian authorities for their comments by letter of 17 November 2008, Belgium responded to the allegations by letter of 24 November 2008. Belgium repeated, in particular, that Fortis Bank faced not only a liquidity problem but also a solvency problem as a consequence of expected and actual losses on the assets purchased from ABN and on its structured credit portfolio. Accordingly, the capital injection of 28 September was necessary and proportionate. With regard to the claim that Fortis Bank offered very aggressive interest rates on the deposits made by individuals, Belgium points out that the offer in question related to only one specific type of product (deposits in online savings accounts) and was similar to competitors' offers for such products. Furthermore, in view of the very high cost of interbank financing at that time and the difficulty of raising funds thereby, that offer was a reasonable economic decision which made it possible to obtain cost-effective financing and did not undermine the solvency of Fortis Bank.

5.2 Luxembourg's comments

- (28) Luxembourg likewise takes the view that the capital injection into FBL of 28 September 2008 does not constitute State aid within the meaning of Article 87(1) of the Treaty, since the market price was paid for the shares purchased. The sale to BNP of a 16% stake was also based on the market price.
- (29) Should the Commission nonetheless consider that there is an element of State aid, the Luxembourg authorities point out that FBL was a leading bank and of systemic

importance in Luxembourg. The measures were therefore compatible on the basis of Article 87(3)(b).

- (30) They also point out that FBL was at the time of the measures in question a subsidiary of Fortis Bank, which held a 99.92 % stake in FBL. A policy was implemented to integrate the two banks, which resulted in a degree of interdependence between the two entities and their subsidiaries. That was particularly true with regard, amongst other strategic policies, to the group's liquidity management. It follows that the support provided by the Luxembourg State must also be regarded as support to Fortis Bank and its Luxembourg subsidiary as a whole.

5.3 The Netherlands' comments

- (31) The Netherlands takes the view that the transactions of 3 October do not constitute aid, because they were effected at market prices and the financing was provided at market prices. In the alternative, the Netherlands authorities state that, if those measures constitute aid, they should be regarded as compatible on the basis of Article 87(3)(b) of the Treaty.

6 THE COMMISSION'S ASSESSMENT

6.1 The existence of aid within the meaning of Article 87(1) of the EC Treaty

- (32) Under Article 87(1) of the EC 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'. It follows from that provision that, in order for a measure to be classified as State aid, the following cumulative conditions must be satisfied: (1) the measure at issue confers a selective economic advantage; (2) that advantage is financed through State resources; (3) that advantage distorts or threatens to distort competition and, lastly; (4) that advantage affects trade between Member States⁴. It is therefore necessary to analyse whether the measures in question satisfy those criteria and, if so, to identify the beneficiary of the aid.

6.1.1 *The capital injection by Belgium into Fortis Bank (measure 1a)*

- (33) Since Belgium states that the transaction is not aid because it was effected under market conditions, it is necessary to ascertain whether that transaction satisfies the market economy investor principle. According to that principle, the capital made available to the undertaking, directly or indirectly, in circumstances which correspond to normal market conditions, cannot be classified as State aid⁵.

⁴ See, for example, the judgment of the Court in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 129.

⁵ Communication of the Commission to Member States: Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, point (11)). This communication deals with the manufacturing sector but, by analogy, applies in the same way to all other economic sectors.

- (34) As stated above, Belgium negotiated the conditions of its investment based on the stock-exchange price of Fortis shares. On the basis of that price, and in accordance with a top-down valuation method attributing the stock-market capitalisation of the Fortis Group on 26 September 2008 to the various parts of the group, the estimated value of Fortis Bank (prior to the capital increase) was in the order of EUR 4 billion. The State took the view that the stock-market capitalisation on 26 September 2008 undervalued Fortis Bank for several reasons external to the Fortis Group, in particular the liquidity crisis affecting the financial sector as a whole and the uncertainty resulting from the absence of a comprehensive rescue plan for the US financial sector. The State therefore accepted that the intrinsic value of Fortis Bank as at 26 September 2008 could be estimated at EUR 4.7 billion.
- (35) The Commission notes that, before the Belgian Government made the capital injection, that Government and Fortis first sought a private investor to rescue Fortis and Fortis Bank. As previously described, they contacted several investors on Friday 26 September. Of those investors, only two submitted bids, the highest of which was EUR 2 per Fortis share. Those investors had access to a limited data room only from Saturday 27 September 2008 (as was also the case for SFPI which was acting on behalf of the State). They therefore had only limited time and information before submitting their bid. They were not in a position to conduct a proper due diligence analysis. It is nevertheless clear that they had access to better information on the situation of Fortis and Fortis Bank than the market had on Friday 26 September 2008. In that regard, it must be borne in mind that on that day Fortis again published a press release aiming to reassure the market about the group's liquidity and solvency situation, and that Fortis' management confirmed that reassuring message at a press conference. The Commission therefore considers that, in determining whether the State acted like a well-informed investor in a market economy, the relevant point of reference is not the closing price of Fortis shares on the stock exchange on Friday 26 September 2008, but the bids made by the investors who had been contacted and had the same information as SFPI. Accordingly, it must be concluded that the State did not act as a private investor would have done in similar circumstances because, to acquire 49.9 % of Fortis Bank it agreed to pay a price calculated on the basis of the stock-exchange price of Fortis shares on 26 September 2008 (i.e. EUR 5.2), whereas private investors in the same circumstances offered a considerably lower maximum price (i.e. EUR 2) ⁶. Moreover, the Belgian Government acknowledges that it intervened because the private bids were unacceptable.
- (36) The Commission therefore concludes that the transaction fails to satisfy the private investor in a market economy principle.
- (37) It is therefore necessary to analyse whether or not the other conditions for classification as State aid are fulfilled. Belgium states that SPFI is controlled by the State. The transaction is thus attributable to the State. The resources invested by SPFI are either provided by the State or guaranteed by it. The measure therefore entails State resources. The capital injection provides additional resources to Fortis Bank to tackle the difficulties it faces and remain active in the market. It thus favours

⁶ Although it is true that those bids related to the purchase of Fortis Group as a whole and not of specific parts, even taking into account a holding-company discount, the price offered by BNP Paribas is still considerably lower than the closing stock-exchange price of the shares on 26 September 2008.

Fortis Bank and distorts competition on the markets in which Fortis Bank operates. It must be noted that on the Belgian market Fortis Bank competes with subsidiaries of foreign banks. Moreover, Fortis Bank has activities in several Member States. The measure therefore affects trade between Member States.

- (38) Consequently, the capital injection contains an element of State aid to Fortis Bank⁷ within the meaning of Article 87(1) of the EC Treaty.
- (39) With regard to ascertaining the exact amount of aid, that issue may be left open since, as will be shown in the remainder of this decision, that assessment is not needed to conclude that the measures are compatible with the common market. This comment also applies to all the other aid measures identified in this decision.

6.1.2 *Luxembourg's capital injection into FBL by means of a convertible loan (measure 1b)*

- (40) Luxembourg's capital injection into FBL was closely coordinated with the Belgian authorities. It too was therefore made because the bids of private investors for Fortis were regarded as unsatisfactory. The capital injection is also based on a higher valuation than that proposed by the private investors. The arguments set out above concerning Belgium's capital injection into Fortis Bank therefore also apply to this transaction. The Commission therefore concludes that the transaction does not satisfy the private investor in a market economy principle.
- (41) The convertible loan was granted directly by the State. There is therefore no doubt that the measure is attributable to the State and financed by State resources. It confers a selective advantage on FBL by providing it with additional financial resources. It also benefits Fortis Bank since FBL forms part of Fortis Bank. It therefore distorts competition on the markets in which FBL and Fortis Bank operate. FBL competes on the Luxembourg market with subsidiaries of foreign banks. The measure therefore distorts trade between Member States.
- (42) Consequently, the capital injection contains an element of State aid within the meaning of Article 87(1) of the EC Treaty.

6.1.3 *The LA provided by BNB on 29 September (measure 2)*

- (43) In point 51 of its Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis⁸ ('the Communication'), the Commission stated that it considered that the provision of funds by a central bank to a financial institution does not constitute State aid where certain conditions are satisfied.
- (44) The first condition for precluding the existence of aid set out in the Communication is that '*the financial institution is solvent at the moment of the liquidity provision and the latter is not part of a larger aid package.*' However, in the present case, the LA was

⁷ The Commission notes that that measure, the aim and main effect of which is to rescue Fortis Bank, also indirectly benefits Fortis since, given that the State agreed to pay a higher price than the market price for a 49 % stake in Fortis Bank, the dilution of Fortis' stake in the capital of Fortis Bank is less than it would have been in the case of an operation effected under market conditions.

⁸ OJ C 270, 25.10.2008, p. 8.

granted shortly after the capital injection announced on the evening of 28 September, which, as previously concluded, constitutes State aid.

- (45) The second condition for precluding the existence of aid set out in the Communication is that *'the measure is taken at the central bank's own initiative, and in particular is not backed by any counter-guarantee of the State'*. In the present case, the Commission noted that the credits granted by BNB are backed by a guarantee from the Belgian State (with retroactive effect) under the Law of 15 October 2008 on measures to promote financial stability and establishing in particular a State guarantee relating to the credits granted and other operations carried out within the context of financial stability. The condition provided for in the Communication is therefore not met.
- (46) Several conditions set out in the Communication for precluding the existence of aid are therefore not satisfied. Accordingly, it is necessary to ascertain whether the conditions for classification as State aid are met. Since the activities of BNB are controlled by the State, its resources are State resources. That is particularly true in this case since the effect of the counter-guarantee is that any losses will be borne directly by the State. Unlike the other financing offered by BNB to Fortis Bank, the LA is a measure selectively granted to Fortis Bank, for which BNB accepted sureties which are ineligible in respect of monetary policy operations ([...]). The measure confers a selective advantage on Fortis Bank by providing it with financing which the bank can no longer obtain on the market. As already explained above, that advantage distorts competition and affects trade between Member States.
- (47) The Commission concludes that the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

6.1.4 *The purchase of FBN by the Netherlands on 3 October 2008 (measure 3a)*

- (48) As stated previously, this decision is concerned only with possible aid to Fortis Bank and FBL, and not with any aid to FBN, which will be addressed in the context of a separate procedure. In the following analysis, the Commission will not, therefore, assess whether aid was granted to FBN.
- (49) Since the Netherlands authorities take the view that the transaction was effected under market conditions, the Commission will begin by ascertaining whether that transaction satisfies the private investor in a market economy principle.
- (50) The Commission notes that the agreement to sell FBN to the Netherlands State stipulates that the amount of short-term debts owed by FBN to Fortis Bank will be payable immediately and that repayment will be guaranteed by the Netherlands State⁹. That sum amounts to EUR 34 billion. Furthermore, the Netherlands State undertook to allow the rapid repayment to Fortis Bank of FBN's long-term debts, which amounted to EUR 16 billion. To explain the existence of those substantial loans by Fortis Bank to FBN, it must be borne in mind that the liquidity management of Fortis Bank and its subsidiaries was centralised within Fortis Bank. The effective separation of FBN and Fortis Bank therefore required that Fortis Bank's lending to FBN should be drastically

⁹ Original text: 'Upon acquisition of the Shares the net short term debts of EUR 34 billion owed by FBNL Holding and its subsidiaries to Fortis Banque Belgium will be immediately due and payable and repayment will be guaranteed by the Dutch State.'

reduced. It follows from the foregoing that the Netherlands State, in addition to paying the purchase price for FBN in cash, undertook to provide EUR 50 billion of financing, a pre-condition for the separation of FBN and Fortis Bank. The Commission considers that at the precise moment when it became practically impossible to raise finance on the interbank market, no private investor would have been prepared (or even able) to conclude such a transaction requiring the provision of financing of EUR 50 billion¹⁰. The Netherlands State therefore did not act as a market economy investor would have done in those circumstances. As is clear from the reasons set out above, the Commission considers that, for the purposes of applying the principle of the market economy investor, the conduct of the State must be compared with that of private investors in the situation prevailing at the precise moment that the transaction was effected – that is to say investors who were greatly constrained in their financing by the almost complete drying-up of the interbank market¹¹ – and not the situation of the State, which, as a public authority, experienced no great difficulty in raising finance.

- (51) It is therefore necessary to analyse whether the other conditions for classification as aid are satisfied. The transaction is clearly financed by State resources. It confers an advantage on Fortis Bank by allowing it to obtain the immediate repayment of its loans to FBN and to receive the sale price at the very moment its access to market financing has virtually disappeared. Compliance with the other conditions for classification as State aid has already been analysed above.
- (52) The transaction, that is to say the inseparable combination of the purchase of FBN and the financing required to separate FBN and Fortis Bank, therefore contains an element of State aid to Fortis Bank within the meaning of Article 87(1) of the EC Treaty.

6.1.5 The purchase of Fortis Insurance Nederland by the Netherlands on 3 October 2008 (measure 3b)

- (53) Although it is included in the same agreement as measure 3a, the Commission considers that this transaction may be analysed separately, since unlike the preceding measure it does not require financing, is entered into with a different seller and relates to a different activity.
- (54) The Commission notes firstly that the merchant bank engaged by Fortis had valued Fortis Insurance Nederland at EUR 5.9 billion, that is to say a price considerably higher than the EUR 4 Billion paid by the Netherlands. Secondly, the price of EUR 4 billion paid by the Netherlands was in line with the current value ('waarde huidig') calculated by the merchant bank engaged by the Netherlands. Thirdly, the Commission notes that the price paid by the Netherlands represents valuation ratios¹²

¹⁰ All the more so since, given the general drying-up of the interbank market, it was extremely difficult to foresee when FBN – of which the State became the creditor in the place of Fortis Bank – would be in a position to raise finance independently on the market in order to be able to repay those loans which had been provided (or guaranteed) by the Netherlands State. The latter therefore did not know the term of the financing provided to FBN.

¹¹ The few banks which, given their quality, retained more extensive access to the market would also have ruled out a transaction entailing such a financing requirement, since, by increasing their financing requirement to such an extent, that transaction would have worsened their situation and thereby risked excluding them in turn from the wholesale funding market.

¹² Price/Earning ratio and Price/Embedded Value ratio.

lower than those paid two days later by BNP Paribas to acquire Fortis Insurance Belgium. Those three factors together suggest that the Netherlands State did not pay a price above the market price.

(55) The Commission therefore considers that the transaction does not contain aid.

6.1.6 *The transactions announced on 5 October 2008 (measure 4)*

(56) The transactions announced on 5 October 2008 are contained in three separate agreements, concluded several days after the announcement. In the first agreement, the Belgian Government (again through SFPI) purchased from Fortis the 50 % of Fortis Bank that it did not yet own for the price of EUR 4.7 billion. In the second agreement, it sold a 75 % stake in Fortis Bank to BNP Paribas. A vehicle was created to purchase EUR 10.4 billion of structured credit from Fortis Bank. According to the second agreement, the vehicle was to be financed by Fortis (66 %), Belgium (24 %) and BNP Paribas (10 %). According to the first agreement, if the second agreement (i.e. the sale to BNP Paribas) is not performed, the vehicle is to be financed in full by Fortis (73.3 %) and Belgium (26.6 %). Finally, in a third agreement, Luxembourg sold a 16.57 % stake in FBL to BNP Paribas.

(57) The Commission will first analyse whether BNP Paribas paid the market price to the Belgian and Luxembourg States. In that connection, the altogether specific and exceptional circumstances of the transaction must be borne in mind. As stated above, the partial nationalisation of 28 September failed to reassure the markets. Access to the interbank market was not re-established and withdrawals by institutional customers and by companies increased considerably. Fortis Bank survived that week solely by virtue of the huge loans provided by BNB. [...] As stated above, the sale of the Netherlands activities was going to reduce the financing requirement by tens of billions of euros¹³. It was therefore not sufficient to resolve Fortis Bank's liquidity problems. The Belgian authorities insisted on associating the bank with a large, sound private bank. They took the view that the risk attached to a stand-alone scenario (that is to say a scenario in which Fortis Bank would attempt to survive as an independent bank) in the prevailing circumstances was unacceptable, both for Fortis Bank and for the stability of the financial system. They therefore re-established contact with the two investors who had submitted offers the previous weekend. ING indicated that it was no longer interested. BNP Paribas, for its part, confirmed its interest¹⁴. Negotiations therefore continued with BNP Paribas to reach the agreement described above.

(58) The Commission considers, in general terms, that the highest purchase price proposed in the context of an open, transparent and unconditional invitation to bid is the market price, and that, accordingly, a purchase at that price confers no advantage on the purchaser. The Commission takes the view that the procedure for the sale of Fortis Bank and FBL may reasonably be compared to such an award procedure. Indeed, over the weekend of 27 and 28 September, the Belgian authorities sought a

¹³ The minutes of the meeting of the board of directors of Fortis of 5-6 October state 'it is difficult to assess and uncertain whether Fortis will further need the [LA] to be able to continue operations.'

¹⁴ It must be remembered that Fortis Bank was, after the sale of FBN, still an enormous bank with a balance sheet of approximately EUR 750 billion. Together with the fact that that bank was in great difficulty with a liquidity deficit of tens of billions of euros, this helps to explain why so few investors showed an interest in such a risky transaction.

purchaser for Fortis¹⁵. At the end of the week commencing 29 September, they renewed contact with the two institutions which had shown the most interest and continued negotiations with the only institution which confirmed its interest. The Commission also notes that, after the attempted sale of the first weekend, the whole market was aware that Fortis and its constituent parts were for sale. If an investor had been interested in acquiring Fortis Bank and FBL, it would have had the opportunity to come forward. However, no other investor did come forward. In those circumstances, the Commission takes the view that, given the urgency of finding a buyer for Fortis Bank, the procedure may be regarded as sufficiently open and transparent. Moreover, the Commission is not aware of any conditions laid down by the Belgian authorities which might have discouraged potential buyers.

- (59) On the basis of the foregoing, it is reasonable to take the view that no other investor was interested in acquiring Fortis Bank and FBL, and that the price paid by BNP Paribas¹⁶ – including the conditions of the sale (in particular the fact that the price was paid in shares¹⁷) – was therefore the market price.
- (60) That assumption is supported by the following factors. First, the Commission notes that the price paid by BNP Paribas is consistent with the valuation of Fortis Bank carried out by the merchant bank engaged by the Belgian Government in the days preceding the transaction with BNP Paribas. Secondly, the Commission also notes that, in its press release of 6 October 2008, BNP Paribas announced that it had acquired Fortis Bank and FBL at 0.7 times the book value, following further impairments¹⁸. That ratio is consistent with that for recent purchases of other banks in difficulty¹⁹. In other words, the price paid by BNP Paribas is in line with the market price for similar transactions.

¹⁵ As stated above, contacts were made with at the very least the following financial institutions: Crédit Agricole, KBC, Santander, ING, BNP, Munich Re and Aegon.

¹⁶ It must be borne in mind that the price offered by BNP Paribas represents a substantially higher valuation than the price proposed over the weekend of 27-28 September. BNP Paribas explains that the improvement in its offer was the result, in particular, of the following two factors: firstly, the scope of the sale during the second weekend was considerably reduced, following the sale of FBN. The remaining activities were activities of interest to BNP Paribas, whereas the Fortis Group as a whole, which was for sale on the first weekend, included many activities which were not of particular interest to BNP Paribas because they were not in line with its strategy. Secondly, the additional time had allowed BNP Paribas to perform more thorough due diligence on Fortis Bank. The very short time available over the first weekend had caused BNP Paribas to make a prudent bid that was reduced in view of the uncertainty involved (Fortis Bank's portfolio of structured credits is made up of thousands of different lines, for example). The Commission notes that this last point shows that the price that BNP Paribas agreed to pay on 5 October 2008 cannot be used as the benchmark for determining whether or not the price paid by the State on 28 September 2008 constitutes State aid.

¹⁷ In their letter of 25 November 2008, the Belgian authorities state that if BNP Paribas had had to pay the purchase price in cash, it would have paid a lower price. This confirms that payment in cash is more valuable than payment in shares.

¹⁸ Following a more in-depth analysis of Fortis Bank's accounts, it proved necessary to deduct certain additional elements, with the result that BNP Paribas paid 0.8 times the tangible net asset value.

¹⁹ The purchase of Bear Stearns by JP Morgan Chase, of Washington Mutual by JP Morgan Chase, of Sovereign Bancorp by Santander, of Alliance & Leicester by Santander, of HBOS by Lloyds and of Wachovia by Wells Fargo.

- (61) On the basis of the above factors as a whole, the Commission therefore concludes that the purchases by BNP Paribas of 75 % of Fortis Bank from the Belgian State and of 16.57 % of FBL from the Luxembourg State contain no element of aid to BNP Paribas, since the latter acquired those activities at their market price.
- (62) It is now necessary to assess whether the purchase by Belgium from Fortis of the remaining 50 % of the capital of Fortis Bank and Belgium's 24 % stake in the 'bad bank' may constitute aid to Fortis or Fortis Bank. The Commission notes that that transaction forms part of a series of aid measures aimed at rescuing Fortis Bank: the capital injection of 28 September 2008 in exchange for which the State acquired a 49.9 % shareholding in Fortis Bank and the provision of the LA on 29 September 2008. The Commission therefore considers that, in those circumstances, the State cannot claim that by investing additional State resources it is acting like a market economy investor.
- (63) In the alternative, the Commission notes that, even if it were necessary to assess the transaction on the basis of the market economy investor principle, it would have to be concluded that that principle is not satisfied. Indeed, the Commission notes that BNP Paribas, in order to acquire a 75 % stake in Fortis Bank, agreed to pay EUR 8.25 billion (in shares) and to take a 10 % stake in the 'bad bank' vehicle. In order to acquire a 50 % stake in Fortis Bank, the State would therefore have had to pay EUR 5.5 billion and agree to take a 6.66 % stake in the 'bad bank' vehicle. However, although the State paid EUR 0.8 billion less (EUR 4.7 billion in cash), it agreed to take a 24 % stake in the 'bad bank' vehicle²⁰, that is to say 17.34 percentage points (i.e. the difference between 24 % and 6.66 %) more than BNP Paribas. Since that portfolio amounts to EUR 10.4 billion, those 17.34 percentage points represent a risk of EUR 1.8 billion. Since the State is paying less but bearing a greater risk which is not easy to quantify, it is difficult to conclude whether or not the State's purchase of the 50 % stake is in itself acceptable for a private investor. However, if all the transactions announced on 5 October are analysed, it is clear that the State purchased that 50% stake in cash for EUR 4.7 billion and then immediately resold it for EUR 5.5 billion in BNP Paribas shares, while remaining exposed to the risk in the vehicle. In other words, the State paid cash for an investment which was illiquid (24-month retention clause applicable to most of the BNP Paribas shares received) and risky. Moreover, it has to bear a EUR 1.8 billion risk which is not easy to quantify (structured products for which there is no longer any market). It therefore seems that, at a time when all investors were avoiding exposure to structured credits (the creation of a 'bad bank' vehicle also reflects BNP Paribas' refusal to bear the risk associated with those products on its balance sheet) and when, given the difficulty in raising finance, they therefore avoided making illiquid investments, the transaction effected by the State would not have been regarded as attractive to a market economy investor.
- (64) The Commission notes that the measure is attributable to the State and financed by State resources (see the reasoning relating to SFPI set out above in the analysis of measure 1a).

²⁰ On that latter point, it must be emphasised that, according to the agreement with Fortis on the capital injection into Fortis Bank of 28 September 2008, Fortis had provided the Belgian State with a guarantee against the risk associated with Fortis Bank's structured credit portfolio. In other words, all the risks associated with that portfolio were borne by Fortis, although the State had a 49 % shareholding in Fortis Bank.

- (65) With regard to the existence of an advantage, the Commission recalls ²¹ that Fortis had significant debts, some of which became immediately payable in the event of loss of control over Fortis Bank. In the event of the sale of Fortis Bank, it was therefore necessary for Fortis to obtain a certain cash price in order not to become bankrupt. Moreover, BNP Paribas had made a proposal to the State to purchase Fortis Bank, entailing the payment, by BNP Paribas, of the purchase price in shares. [...]. It therefore appears that the sale of Fortis Bank to BNP Paribas could not have taken place without the intermediation of the Belgian State, which first of all purchased Fortis Bank in its entirety from Fortis, paying for it in cash, before selling it to BNP Paribas in exchange for shares. In conclusion, the State intervention conferred an advantage on Fortis Bank by making it possible for it to be bought by a sound private bank, the only scenario ²² which would allow it to restore its viability and avoid voluntary liquidation ²³.
- (66) The Commission, having already examined the question of compliance with the other conditions for classification as aid, concludes that the Belgian State's intervention contains an aid element for Fortis Bank.
- (67) The Commission nevertheless recognises that, since the price paid by the Belgian State for the remaining 50 % of Fortis Bank is only marginally higher than the price paid by BNP Paribas, the aid element remains limited.

6.2 Legal basis for the assessment of whether the aid is compatible

- (68) The Belgian, Luxembourg and Netherlands authorities rely on Article 87(3)(b) of the Treaty, which states that '*aid to remedy a serious disturbance in a Member State's economy*' may be regarded as compatible with the common market. Their argument is based on the assertion that the failure of Fortis Bank, which would entail the bankruptcy of its subsidiaries, would also result in a serious disturbance in their respective economies.
- (69) With a view to establishing whether or not the legal basis relied on by the Member States is applicable, it is necessary to identify the consequences of the bank's failure on the Belgian and Luxembourg economies. Since it will be concluded below that the failure of Fortis Bank would result in a serious disturbance in the economy of Belgium and in so far as this decision analyses the measures implemented by the Netherlands only to the extent that they contain an aid element for Fortis Bank (and not for FBN), it is not necessary to analyse the effect of FBN's failure on the Netherlands.

²¹ The Commission's view is based in particular on the letter from the Belgian authorities of 25 November 2008.

²² Given that the part-nationalisation of 28 September failed to restore market confidence and that, as a consequence of that lack of confidence, Fortis' exceptional liquidity deficit forced the State (via BNB) to finance it to the amount of almost EUR [...] billion in the week of 29 September, Belgium no longer regarded nationalisation as an option.

²³ By making the sale of Fortis Bank possible, the transaction conferred an indirect advantage on Fortis, since it enabled it to avoid voluntary liquidation.

6.2.1 *Risks of serious disturbance in the Belgian economy*

- (70) The Belgian authorities point out that the significance of Fortis Bank to the Belgian economy as a whole is reflected, first of all, in its close financial links with Belgian households, self-employed persons, professionals, SMEs, large undertakings operating in Belgium, local authorities and pension funds. In retail-banking terms, Fortis is the Belgian market leader. At the end of September 2008, Fortis Bank held [20-30]% of Belgian household deposits with banks established in Belgium. With regard to non-financial Belgian undertakings, [10-20%] of their deposits with banks established in Belgium were held by Fortis ²⁴.
- (71) In view of Fortis Bank's position on the Belgian market, the Belgian authorities consider that the failure of Fortis Bank would have resulted in a serious loss of public confidence, which would in turn have aggravated the present crisis of confidence in the Belgian banking system as a whole, in particular on account of the network of financial links between banking and financial establishments. That risk is further aggravated by the considerable volatility currently existing on the financial markets. BNB has confirmed that Fortis Bank has systemic importance for the Belgian banking sector and the Belgian economy ²⁵.
- (72) The Commission notes that Fortis holds [20-30%] of Belgian household deposits with banks established in Belgium and is by far the largest bank in that market. In the context of the last two and a half months, during which the crisis in the US and European banking sector has considerably worsened – the almost complete seizing up of the interbank loans market and the increasing number of banks in serious difficulty, leading either to their purchase by a competitor, State intervention or voluntary liquidation –, the Commission considers that it is reasonable to suppose that the collapse of the largest retail bank on the Belgian market would significantly worsen the crisis of confidence on the part of Belgian households towards the banking sector. The collapse of a bank with a total balance sheet of several hundred billion euros would, in the context of the aggravated banking crisis of recent weeks, also engender mistrust among foreign banks towards Belgian banks, which would have the effect of depriving the latter of any possibility, which is already very limited, of borrowing on the interbank market. That outcome coupled with the risk of a bank run means that the Belgian banks would find it impossible to raise finance, which would result in the voluntary liquidation of several of them. Banking activity in Belgium would accordingly be paralysed for a considerable time.
- (73) On the basis of the foregoing analysis, which is based on the size of Fortis Bank in conjunction with the exceptional context prevailing since mid-September 2008, the Commission considers that the aid seeking to prevent the collapse of Fortis Bank remedies a serious disturbance in the Belgian economy. The Commission therefore considers that the compatibility of that aid may be analysed on the basis of Article 87(3)(b) of the EC Treaty.

²⁴ Its market share in Belgian household lending amounted to [20-30]%. Its market share in lending to non-financial undertakings stood at [20-30]%.

²⁵ Letter from BNB of 30 September 2008.

6.2.2 *Risks of serious disturbance in the Luxembourg economy*

- (74) The Luxembourg authorities state that FBL is one of the largest financial institutions in the country. They state that on 30 September 2008 FBL held [15-25]% of the deposits of Luxembourg households with banks established in Luxembourg. It held [15-25]% of loans to households in Luxembourg granted by banks established in Luxembourg. The Commission de Surveillance du Secteur Financier [Financial Sector Supervisory Commission] confirms that the measures implemented by Luxembourg were urgently required to prevent harmful effects on the financial system or the economy as a whole.
- (75) The Commission notes that FBL was the largest retail bank for Luxembourg households. In the context of the last two and a half months, during which the crisis in the US and European banking sector has considerably worsened – the almost complete seizing up of the interbank loans market and the increasing number of banks in serious difficulty, leading either to their purchase by a competitor, State intervention or voluntary liquidation –, the Commission considers that it is reasonable to suppose that the collapse of the largest retail bank for Luxembourg households would considerably worsen the crisis of public confidence in the banking sector. The collapse of such a bank would, in the context of the aggravated banking crisis of recent few weeks, also engender acute mistrust among foreign depositors towards Luxembourg banks, entailing a real risk of a bank run by those customers, who represent a very significant proportion of the deposits taken by Luxembourg banks. This would mean that Luxembourg banks would find it impossible to raise finance. Banking activities in Luxembourg would therefore be paralysed for a considerable time, with the consequences which that would entail for the economy.
- (76) On the basis of the foregoing analysis, which is based on the size of FBL in conjunction with the exceptional context prevailing since mid-September 2008, the Commission considers that the aid seeking to prevent the collapse of FBL remedies a serious disturbance in the Luxembourg economy. The Commission therefore considers that the compatibility of that aid may be analysed on the basis of Article 87(3)(b) of the EC Treaty.

6.3 Compatibility of the aid on the basis of Article 87(3)(b) of the EC Treaty

- (77) In the Communication, the Commission set out the considerations which it regards as particularly relevant when examining whether aid to the banking sector in the present crisis is compatible under Article 87(3)(b) of the EC Treaty. The compatibility of the aid to Fortis Bank should therefore be assessed by reference to that Communication
- (78) According to point 15 of the Communication, in order for a measure to be compatible on the basis of Article 87(3)(b) of the EC Treaty, it must fulfil the following three cumulative conditions, which reflect the general principles underlying the Treaty rules applicable to State aid:
- The aid must firstly be well-targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy.
 - Next, the aid must be proportionate to the challenge faced, not going beyond what is required to attain this effect.

- Finally, the aid must be designed in such a way as to minimise the distortion of competition which it causes or threatens to cause. That distortion of competition must be kept to the minimum required to attain the desired effect.

(79) In the present case, the measures implemented by the Member States were *ad hoc* measures aimed at assisting a bank in difficulty to restore its long-term viability. The three compatibility criteria cited above must therefore be interpreted in line with point 31 of the Communication, which, as indicated in points 41 and 42 of the Communication, applies to State guarantees as well as capital injections. Point 31 states that, in the assessment of a restructuring plan, the Commission will be guided by the following requirements, which, as stated in point 42 of the Communication, are based on the principles set out in the guidelines on aid for rescuing and restructuring firms in difficulty ²⁶:

- to ensure the restoration of long-term viability of the financial institution in question,
- to ensure that aid is kept to the minimum and that there is substantial private participation to the costs of restructuring,
- to safeguard that there is no undue distortion of competition and no unjustified benefits.

6.3.1 Targeted aid: restoration of long-term viability

(80) The following table sets out the causes of Fortis Bank’s difficulties as described above and indicates how each difficulty will be remedied by the measures taken.

Problem identified	Measure taken
·Financing of ABN AMRO acquisition (EUR 24 billion).	·Purchase by the Netherlands Government (3 October 2008) of FBN (which includes ABN AMRO). ·Very substantial write-down by Fortis Bank on the assets sold (end of the uncertainty concerning the value of those assets).
·The subprime crisis and risks associated with structured credits in the amount of EUR 41.7 billion.	·Creation of an <i>ad hoc</i> company incorporating the most toxic credits. ·The association of Fortis Bank with BNP Paribas, a leading banking group.

²⁶ OJ C 244, 01.10.2004, p. 2.

<p>·Loss of confidence of the financial markets and general public, in particular arising from the anticipated losses on ABN AMRO and the structured credits, and the group's poor communication.</p>	<p>·Subscription by the Belgian and Luxemburg Governments to capital increases of EUR 4.7 billion and EUR 2.4 billion respectively.</p> <p>·The association of Fortis Bank with BNP Paribas, a leading banking group. Change in the management of Fortis Bank.</p>
<p>·Liquidity crisis on the financial markets.</p>	<p>·Subscription by the Belgian and Luxemburg Governments to capital increases of EUR 4.7 billion and EUR 2.4 billion respectively.</p> <p>·The association with BNP Paribas, which has the size and financial soundness needed to guarantee long-term viability.</p> <p>·The grant to Fortis Bank of a <u>temporary</u> State guarantee relating to interbank and institutional credits (measure forming the subject-matter of a separate procedure and approved by the Commission on 20 November 2008).</p>

- (81) With regard to the association of Fortis Bank with BNP Paribas, the Commission draws attention to the following factors which show that BNP Paribas has the capacity to ensure the long-term viability of Fortis Bank ²⁷. In 2007, BNP Paribas' net receipts from banking were EUR 31 billion and its net profit was EUR 7.8 billion (see BNP Paribas Annual Report 2007). In the third quarter of 2008, in spite of the impact of the financial crisis, BNP Paribas recorded net receipts from banking of EUR 7.6 billion and a net profit of EUR 901 million (or EUR 4.4 billion over the first 9 months of 2008) and an ROE after tax of 13.1 % over the first 9 months of 2008. BNP Paribas is recognised as being solvent, having Tier 1 Capital of EUR 40 billion as at 30 September (+ 9.6 % as compared with 1 January) and a stable Tier 1 Ratio of 7.6 % as at 30 September 2008. The Fortis transaction should have a positive net effect of about 35 basis points on that ratio. Within BNP Paribas' peer group (comprising UBS, Crédit Suisse, Deutsche Bank, RBS, Unicredit, Santander, Société Générale, Rabobank, Intesa Sao Paolo and Crédit Agricole), BNP Paribas enjoys the lowest spread on 5-year senior CDS (75 basis points as at 30 September and 60 as at 31 October).
- (82) The change in Fortis Bank's credit ratings following the announcement of its sale to BNP Paribas also shows that those ratings anticipate an improvement in the financial position of Fortis Bank following the purchase of its shares by BNP Paribas: for example, on 6 and 7 October, Fitch, Moody's and Standard & Poor's (S&P) all placed Fortis Bank on positive watch, with a view to the possible upgrading of its rating.

²⁷ A similar argument was put forward in the Commission Decision of 4 June 2008 in Case C 9/2008, SachsenLB, paragraph 106.

- (83) BNP Paribas has a positive rating which reflects its financial soundness. For example, S&P rates BNP Paribas as one of the three highest-rated banks in the world. Since August 2007, BNP Paribas has been rated AA+ by S&P. Following the announcement of the acquisition of Fortis, the credit rating agencies maintained the rating enjoyed by BNP Paribas after the acquisition, and as a whole took a positive view of the operation in the light of the rating of BNP Paribas.
- (84) The Commission therefore expects that once Fortis Bank forms part of BNP Paribas, Fortis Bank will no longer have any difficulty raising finance.
- (85) The Commission therefore concludes that the measures taken were well targeted and will make it possible to restore the long-term viability of Fortis Bank and its Luxembourg subsidiary, unless the international financial crisis takes a further turn for the worse, which it is not possible to anticipate on the day of the adoption of this decision.

6.3.2 *Proportionate aid limited to the minimum required/contribution of the beneficiary*

- (86) With regard to the recapitalisation of 28 September 2008 by Belgium and Luxembourg (measure 1a and 1b), the Commission takes the view that the recapitalisation of Fortis Bank was essential to Fortis Bank's long-term viability for the following reasons. First, the markets reacted very negatively to Fortis Bank's look-through solvency ratios (i.e. the anticipated ratios after the integration of ABN AMRO in June 2009), which were communicated to the public and indicated a deterioration in solvency in due course. That deterioration was anticipated by the financial markets on account of Fortis' difficulties in drawing up the solvency plan announced at the end of June 2008. Those difficulties stemmed, in turn, from the subprime crisis. The taking into account by the markets of the look-through solvency ratios had an adverse effect on market confidence in Fortis and, therefore, had a very negative impact on its stock-exchange price. The growing market mistrust and the fall in the share price contributed to the serious liquidity problems experienced by Fortis Bank at the end of September 2008. Secondly, the recapitalisation of Fortis Bank, which indeed improved the solvency ratios, was intended also and as a matter of urgency to restore market and public confidence in Fortis Bank and, in particular, to stop the bank run which had begun at the end of September. That bank run further aggravated the liquidity problems (and in particular the drying-up of the interbank credit market), jeopardising in the very short term the actual continuation of Fortis Bank's operations. Over the weekend of 27-28 September, urgent recapitalisation of that magnitude was therefore necessary. Moreover, this fact was confirmed by the write-downs announced in the following days. The Commission also notes that the fact that the two States had received shares in exchange for the injected capital and that the price of the shares received was based on the latest price of the shares on the stock exchange helps to keep the amount of aid to the minimum required.
- (87) With regard to the LA of 29 September (measure 2), it must be stated that without it Fortis Bank would have been unable to avoid voluntary liquidation that week. The Commission also notes that it took the form of overnight loans and that no loan was made on the basis of the LA after [...], following the sale of the Netherlands activities, which provided significant financing to Fortis Bank. In addition, those loans were granted at rates clearly above the normal rates for refinancing. In conclusion, the Commission considers that that measure was kept to the minimum required.

- (88) With regard to the sale of FBN on 3 October (measure 3a), that sale made it possible to reduce the amount borrowed from BNB, and the LA in particular. As stated above, the liquidity situation of Fortis Bank during the week ending 3 October was catastrophic, with borrowing from BNB approaching EUR [...] billion, as a consequence of withdrawals by customers and the impossibility of borrowing on the interbank market. Furthermore, the sale of the activities acquired from ABN AMRO made it possible to eliminate the uncertainty as to the value and financing of that acquisition, which had contributed to the market mistrust towards Fortis Bank. It is therefore clear that measure 3a helps to resolve Fortis Bank's problems. As regards keeping the aid to the minimum required, the Commission notes that the repayments facilitated by the Netherlands State are limited to the repayment to FBN of existing borrowing by Fortis Bank. As regards the price paid by the Netherlands State to acquire FBN, the Commission notes that it is significantly below the price initially requested by Fortis on the basis of an evaluation carried out by an investment bank, which valued FBN at EUR 16 billion (and all the Netherlands activities of Fortis at EUR 22 billion). The Commission also takes a positive view of the fact that the price paid by the Netherlands State is consistent with the present value ('waarde huidig')²⁸ as calculated by the merchant bank engaged by the Netherlands Government. Those considerations illustrate that the Netherlands State was keen to minimise the price paid for FBN and thereby minimise the financial transfers to Fortis Bank. The Commission therefore considers that the aid was kept to the minimum required.
- (89) With regard to the transactions of 5 October (measure 4), the Commission takes the view that, given the continued deterioration of the liquidity conditions of Fortis Bank following the capital injection and partial nationalisation of 28 September and, to a lesser degree, given the uncertainty as to Fortis Bank's future created by the sudden sale of FBN, it was necessary immediately to associate Fortis Bank with a major operator in the European financial sector which, on account of its size and financial soundness, would be in a position to restore confidence in Fortis Bank and ensure its long-term viability. As regards keeping the aid to the minimum required, the Commission views positively the fact that, as previously discussed, the price paid by Belgium to Fortis is consistent with the price at which Belgium sold Fortis Bank to BNP Paribas. This shows that Belgium attempted to keep the amount of aid included in measure 4 to the minimum required.
- (90) With regard to the rescuing and restructuring of Fortis Bank more generally, the Commission notes firstly that, before calling on the Government at the end of September 2008, Fortis Bank had attempted to resolve its problems using market solutions, in particular the sale of assets. In June 2008, Fortis cancelled the interim dividend (thereby allowing EUR 1.3 billion to be used to put it on a sounder footing) and increased its capital by EUR 1.5 billion. However, several measures proposed in that comprehensive solvency plan could not be implemented following the deterioration in the markets. It was only then that Fortis Bank called on the Government. Secondly, the Commission notes that the sale of FBN, although it cannot formally be regarded as a contribution by the beneficiary since it contains an aid element²⁹, nonetheless constitutes a real sacrifice by Fortis Bank which made it

²⁸ Taking into account the expected synergies stemming from the merger of FBN and ABN, which was the plan chosen by the Netherlands authorities.

²⁹ See the footnote relating to paragraph 44 of the guidelines on aid for rescuing and restructuring firms in difficulty (OJ C 244, 01.10.2004, p. 2).

possible to resolve the problem of financing the acquisition of ABN and to reduce Fortis Bank's dependence on the LA provided by BNB. Thirdly, the Commission takes a positive view of the fact that, by associating Fortis Bank with BNP Paribas, the Belgian and Luxembourg authorities opted for a market solution. Compared with a scenario involving nationalisation, which entails the State having a lasting stake in the bank and therefore State support to the bank in the event of further difficulty (or at least the expectation of such support in the event of difficulty, which is likely to confer an advantage on the nationalised undertaking and to distort competition), the chosen solution makes it possible to limit future aid by entrusting the bank to a leading private operator. The purchase by BNP Paribas also demonstrates that the market believes in the feasibility of a return to viability, which is one of the aims of the requirement to involve market operators in restructuring³⁰. Fourthly, the Commission notes that, from 7 October 2008, as the liquidity of Fortis Bank again began to deteriorate (after a significant improvement on 6 October following the sale of FBN), BNP Paribas was forced to provide very substantial loans to Fortis³¹. Those loans allowed Fortis Bank to refrain from using the LA. The Commission considers on the basis of the foregoing that, given the exceptional circumstances on the markets since mid-September, which make it difficult to raise funds from investors or to sell assets to them, the contribution by Fortis Bank and its shareholders to the financing of restructuring costs was very significant, thus making it possible to minimise the aid required to restructure the bank.

- (91) The Commission concludes that the aid was kept to the minimum required to remedy Fortis Bank's difficulties and to allow the restoration of its long-term viability and that of its subsidiary FBL.

6.3.3 *Minimising distortions of competition*

- (92) The Commission notes that the aid to Fortis Bank causes a significant distortion of competition by rescuing a bank which has taken greater risks than most banks have by investing more than forty billion euros in structured credits and by paying a high price for part of ABN AMRO without first securing the financing for that acquisition. The market exit of undertakings which are less efficient, in particular in the management of their risks, is a normal part of the operation of the market³².
- (93) The Commission considers in general that measures such as the sale of assets are capable of minimising distortions of competition³³. In the present case, the Commission notes that the aid did not have the effect of maintaining Fortis Bank in the market as it stood prior to its difficulties. Fortis Bank had to divest itself of FBN (which incorporated the assets bought from ABN). As described above, FBN represented [20-30]% of the total income of Fortis Bank in the first six months of 2008, [40-50]% of its net profits, [40-50]% of its workforce and [30-40]% of the retail branches. Moreover, it was a profitable and sound business (the structured credits held

³⁰ See paragraph 43 of the guidelines on aid for rescuing and restructuring firms in difficulty.

³¹ The exact amounts are confidential data which were provided by the Belgian authorities at the meeting with the Commission of 27 November 2008, attended by BNP Paribas.

³² This principle is referred to in paragraph 4 of the guidelines on aid for rescuing and restructuring firms in difficulty.

³³ See paragraph 39 of the guidelines on aid for rescuing and restructuring firms in difficulty.

by Fortis Bank are on the balance sheet of Fortis Bank and not on that of its subsidiaries). Accordingly, it was a sale which made Fortis Bank considerably smaller³⁴. The Commission considers that that very significant sale, which greatly reduced the size of the beneficiary, is capable of limiting the distortions of competition caused by the aid. That measure is particularly appropriate since it resulted in the almost complete disappearance of Fortis Bank from the markets in which it sought to expand by taking the significant risks which are in part the cause of the difficulties encountered. The Commission notes that BNP Paribas undertook not to acquire the assets bought by the Netherlands (measure 3a) for four years. Such an undertaking is necessary since it makes it possible to ensure that BNP Paribas will not recreate Fortis Bank as it stood prior to 3 October and thereby defeat the compensatory measure described above.

- (94) Moreover, Fortis Bank undertook not to offer [...] for a period of [...] years from the adoption of the Commission's decision, in the context of its internet banking activity, one of the [...] best interest rates on household deposits among the [...] largest players in that market established in Belgium. That undertaking [...] applies individually to each of the following products: [...]. At the end of each month and for the preceding period, a list will be sent to the Commission setting out the interest rates of each of those [...] largest operators for each of the [...] categories of products referred to above (taking into account each operator's highest rate, whether that offered on new deposits or that offered on existing deposits). That undertaking will cease to apply in the event that the difference in the interest rate on deposits between Fortis Bank and the operator offering the best rate [...] is more than [...] basis points. That undertaking will also cease to apply if Fortis Bank SA/NV's market share of deposits taken by banks established in Belgium falls below [20-30]% until Fortis Bank SA/NV regains a market share of [20-30]% (the market share at the end of August 2008, that is to say before the present crisis, amounted to [20-30]%). With regard to that undertaking, the Commission notes that the difficulties encountered by Fortis Bank are not the result of an expansion strategy or a predatory-pricing policy on the Belgian market. It is therefore not essential that, in addition to the aforementioned reduction in size following the sale of FBN, Fortis Bank also reduces its size on the Belgian market, which is the largest market on which Fortis Bank will remain active. Nevertheless, the abovementioned undertaking is necessary since it makes it possible to prevent the aid to Fortis Bank and its association with BNP Paribas from leading to a significant expansion of Fortis Bank on the Belgian online savings market, which is one of the fastest growing segments and where competition is very keen, as demonstrated by the complaint received by the Commission³⁵.

³⁴ Commission Decision of 4 June 2008 in Case C9/2008, SachsenLB, paragraph 128.

³⁵ With respect to that complaint, the Commission considers that the Belgian authorities provided convincing responses to the claims made by the complainant. With respect to the assertion that the aid allows Fortis Bank to offer very high interest rates, the Commission also notes that, as previously concluded, the aid is kept to the minimum required to ensure the liquidity and solvency of Fortis Bank and therefore does not provide excessive resources which Fortis Bank could use in a price war. The Commission notes that, as Belgium explained, the cost of funding on the interbank market at the start of October was so high and the amounts offered so small that Fortis Bank's attempt to raise funds from private individuals by increasing the rate offered on deposits was economically rational. In conclusion, this complaint does not call into question the foregoing conclusions.

- (95) Still with regard to minimising distortions of competition, the Commission notes that both the former shareholders of Fortis Bank and the management which took the decisions leading to the present difficulties are no longer involved in the bank's activities, which provides a valuable signal against moral hazard³⁶. Moreover, the sale of the bank to a competitor constitutes in itself a type of compensation for the distortion of competition to the detriment of competitors³⁷.
- (96) The Commission also notes that, when a State grants aid in the form of a capital injection, the Commission generally requires that measures should be taken to ensure that that period of public ownership of the bank is minimised. In exchange for the recapitalisation of Fortis Bank amounting to EUR 4.7 billion by the Belgian State (measure 1a), Belgium received 49 % of Fortis Bank's shares. Subsequently, Belgium sold BNP Paribas the majority of the Fortis Bank shares that it held. Given that the price paid by BNP Paribas per Fortis share is similar to the price paid by the Belgian State at the time of the capital injection, the Commission considers that the sale to BNP Paribas is equivalent to reimbursement of Belgium's capital injection and to a comparable injection by BNP Paribas. Similarly, the Luxembourg State sold part of the shares acquired at the time of the capital injection into FBL (measure 1b), with the result that BNP Paribas controls FBL. In those circumstances, the Commission considers that it is not necessary to impose any behavioural remedies, such as a prohibition on dividends or a reduction in management remuneration, which it generally imposes as an incentive to minimising the period of public ownership.
- (97) The Commission concludes on the basis of the foregoing that the aid to Fortis Bank will not unduly distort competition.

6.3.4 *Conclusion as to compatibility with Article 87(3)(b)*

- (98) On the basis of the foregoing, the Commission concludes that the conditions governing the compatibility of aid on the basis of Article 87(3)(b) are satisfied.

7 CONCLUSION

The injection of capital into Fortis Bank by Belgium in exchange for a 49.9 % stake in the bank's capital (measure 1a) constitutes State aid to Fortis Bank.

The provision by Luxembourg of a loan convertible into Fortis Bank Luxembourg shares (measure 1b) constitutes State aid to Fortis Bank Luxembourg.

The provision of liquidity assistance by Banque Nationale de Belgique (measure 2) constitutes State aid to Fortis Bank.

The transaction effected by the Netherlands consisting in the purchase of Fortis Bank Nederland and the provision of the resources needed to repay the loans provided to the latter by Fortis Bank (measure 3a) constitutes State aid to Fortis Bank. That conclusion is without prejudice to the analysis of whether those measures contain any aid to

³⁶ Cf. Commission Decision of 4 June 2008 in Case C9/2008, SachsenLB, paragraph 126.

³⁷ Cf. Commission Decision of 4 June 2008 in Case C9/2008, SachsenLB, and Commission Decision of 21 October 2008 in Case C 10/2008, IKB, not yet published.

Fortis Bank Nederland, which will be assessed by the Commission in a separate procedure (Procedure NN 53/20008/B).

The purchase by the Netherlands of Fortis Insurance Nederland from Fortis Insurance (measure 3b) does not constitute State aid.

The transactions effected by Belgium consisting in the acquisition of the remaining 50 % of Fortis Bank's capital, the 24 % stake in a 'bad bank' vehicle, and the sale of 75 % of the shares of Fortis Bank to BNP Paribas (measure 4) constitute State aid to Fortis Bank.

The purchase by BNP Paribas of 75 % of the shares of Fortis Bank and 16 % of Fortis Bank Luxembourg, from the Belgian State and the Luxembourg State respectively, does not constitute State aid to BNP Paribas.

For the reasons set out above, the Commission has decided to regard the aid described above as compatible with the common market.

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
Directorate General for Competition
State Aid Registry
SPA3 6/5
B-1049 Brussels
Fax No: +32 2 296 12 42

Yours faithfully,

For the Commission

Neelie Kroes

Member of the Commission