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| <p>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 [...].</p> | <p style="text-align: center;"><b>PUBLIC VERSION</b><br/><b>WORKING LANGUAGE</b><br/><b>This document is made available for information purposes only.</b></p> |
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**Subject: State aid C 11/2009 (ex NN 53/B/2008) – Netherlands**  
**Alleged aid to Fortis Bank Nederland and the ABN earmarked activities**

Sir,

The Commission wishes to inform the Netherlands that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

## **1 PROCEDURE**

- (1) On 3 October 2008 the Dutch State purchased Fortis Bank Nederland<sup>1</sup> (hereinafter "FBN") from Fortis Bank S.A./N.V. ("Fortis Bank") for EUR 12.8 billion<sup>2</sup> and provided a EUR 45 billion borrowing facility to it. In addition, the Dutch State purchased to Fortis Bank EUR 16 billion of long term loans the latter had granted to FBN. These

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<sup>1</sup> In the present decision, Fortis Bank Nederland is used for both *Fortis Bank Nederland (Holding) N.V.* and *Fortis Bank (Nederland) N.V.*

<sup>2</sup> In addition, the Dutch State purchased Fortis Insurance Nederland from Fortis Insurance N.V. for EUR 4 billion. In its decision of 3 December 2008, the Commission concluded that this measure does not constitute aid.

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measures were notified by the Dutch authorities on 7 October 2008 as non aid measures notified for reasons of legal certainty. This submission included a letter of the President of the Dutch central bank confirming that these measures had to be urgently adopted. On 15 October 2008, the Dutch authorities provided a copy of the valuation report made by an investment bank.

- (2) When it acquired FBN, the Dutch State therefore acquired indirect control on some activities which belonged to ABN AMRO. Indeed in 2007, Fortis group<sup>3</sup>, Banco Santander and Royal Bank of Scotland ("RBS") decided to acquire ABN Amro. The consortium created RFS Holding B.V. ("RFS"), which acquired the shares of ABN Amro for a total consideration of EUR 69 billion in cash. ABN Amro was divided in three business units. Each consortium member received a different class of RFS shares which conferred entitlement to a given business unit. Fortis group received the N-shares<sup>4</sup>, which entitled it to the following Dutch activities of ABN AMRO: the retail banking, private banking and banking services to small and mid-sized corporate ("the ABN earmarked activities"). Within the Fortis group, the RFS N-shares were held by FBN. When it acquired FBN, the Dutch State therefore acquired indirect ownership of the N-shares and thereby indirect control over the ABN earmarked activities
- (3) On 30 October 2008, the Commission wrote to the Minister of Finance of the Netherlands indicating that the measures seem to constitute aid and asked therefore the submission of the [...] plan. On 20 November 2008, a meeting was held between the Commission services and the Dutch authorities. By letter of 1 December 2008, the Commission requested additional information, which was provided on 12 December 2008.
- (4) By decision of 3 December 2008<sup>5</sup> (hereinafter "the decision of 3 December 2008") the Commission found the measures implemented by the Netherlands of 3 October 2008 constitute aid in favour of Fortis Bank, which is compatible with the common market. That decision explicitly refrained from assessing the existence of aid in favour of FBN, and indicated this would be assessed in a separate procedure<sup>6</sup>, hence the present procedure.
- (5) On 17 December 2008 the Dutch authorities informed the Commission of its intention to purchase the shares in RFS held by FBN at a price of EUR 6,5 billion. The transaction was implemented on 24 December 2008. The Dutch authorities formally notified the measure on 2 February 2009 as non-aid measure notified for reasons of legal certainty

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<sup>3</sup> In the present decision, "Fortis group" refers to all the entities which were controlled by Fortis S.A./N.V. and Fortis N.V. A graph presenting the structure of Fortis group appears in paragraph 6 of the decision of 3 December 2008. In the present decision, "Fortis holding" refers to Fortis S.A./N.V., Fortis N.V., Fortis Brussels, Fortis Utrecht and Fortis Insurance N.V.

<sup>4</sup> N-share was initially named F-share by the consortium members.

\* Confidential information

<sup>5</sup> Decision C(2008)8085 of 3 December 2008 on the state aid cases NN 42/2008 – Belgium, NN 46/2008 – Luxemburg, NN 53/A/2008 – Netherlands, Restructuring aid to Fortis Bank and Fortis Bank Luxemburg (Not published yet).

<sup>6</sup> See paragraph 4 of the decision of 3 December 2008.

- (6) By letter of 21 January 2009, the Dutch authorities provided additional information. By letter of 28 January 2009, the Commission asked additional information, which was submitted by letter of 2 March 2009.

## **2 SCOPE OF THE PRESENT DECISION**

- (7) In the present decision, the Commission will provisionally assess whether the measures of 3 October 2008 (the purchase of FBN by the State, the provision of financing to it and the purchase of the long term loans made by Fortis Bank), and the purchase on 24 December 2008 of the ABN earmarked activities from FBN constitute aid *to FBN and the ABN earmarked activities*, and if so, whether such aid might be compatible.

## **3 DESCRIPTION**

### **3.1 Description of the potential beneficiaries**

#### **3.1.1 FBN**

- (8) Before its purchase by the Dutch State on 3 October 2008, FBN was a subsidiary of Fortis Bank. The ABN earmarked activities excluded, FBN was the fourth largest bank on the Dutch retail and corporate market after Rabobank, ING and ABN.
- (9) The bank is organized into two businesses: retail banking and merchant & private banking. In particular, the retail banking part offers financial services to retail customers including individuals, self-employed people, members of the independent professions and small businesses. The merchant and private banking part encompasses a wide range of banking products and services for large companies and institutional clients, medium-sized enterprises and entrepreneurs, and private banking clients.
- (10) In 2007 FBN's net profit was EUR 1,3 billion. Its balance-sheet total was EUR 272 billion on 31 December 2007. Due to the sale for EUR 6,5 billion of the ABN earmarked activities which were recorded in the books at EUR 24,2 billion (reflecting the acquisition price), the bank registered a net loss of EUR 18,5 billion in 2008. The balance sheet total amounted to EUR 184 billion on 31 December 2008. At the end of 2008, FBN had a workforce of 9 793 FTE (full time equivalent).

#### **3.1.2 The ABN earmarked activities**

- (11) The banking activities of ABN AMRO planned to be transferred to the owner of the RFS N-shares represented the third largest bank on the Dutch retail market and the largest bank on the Dutch market for banking services to small and medium size firms.
- (12) It is organised in two main business units, namely the private banking unit and the banking unit comprising retail and commercial banking activities.
- (13) In 2007, it recorded an operating profit before tax of EUR 1,5 billion and had a balance sheet total of EUR 163 billion. On 30 September 2008, it had a workforce of 23 300 FTE.

### **3.2 Description of the measures assessed in the present decision**

- (14) On 3 October 2008, the Dutch State purchased FBN for EUR 12,8 billion from Fortis Bank, which was in deep difficulty (**measure A**).
- (15) FBN was strongly integrated within Fortis Bank. In particular, functions like IT,

administration and treasury were centralised within Fortis Bank.

- (16) Since FBN was lending more than it was collecting through the deposits of its clients, it constantly had a funding gap which, given the absence of a treasury department at FBN, was financed by Fortis Bank. Fortis Bank's net short and long term lending to FBN amounted to EUR [55-45] billion at the time of the transaction.
- (17) In this context, in order to separate effectively FBN from Fortis Bank, the parties to the contract of 3 October 2008 agreed that:
- FBN would reimburse immediately its EUR 34 billion short term debt to Fortis Bank. To allow FBN to do this reimbursement and to finance itself, the Dutch State provided to it a credit facility of EUR 5 billion for day-to-day needs and one of EUR 40 billion for longer maturities. The State charges an interest rate of Euribor plus 25 basis points for financing up to one year and 50 basis points for longer tenors (**measure B**).
  - Moreover, the Dutch purchased the EUR 16 billion long term loans of Fortis Bank to FBN. This took the form of a novation<sup>7</sup> ("*novatie*"), meaning that for FBN the original terms of the contracts continue to apply, except that the identity of the creditor is changed (i.e. the State instead of Fortis Bank). In other words, FBN was not relieved from part of its liabilities. As purchase price for these loans, the State paid to Fortis Bank EUR 6 billion in cash and transferred to it government bonds with a nominal value of EUR 10 billion. (**measure C**).
- (18) On 24 December 2008, the Dutch State purchased the RFS N-shares held by FBN for EUR 6,5 billion (**measure D**), acquiring thereby direct control over the ABN earmarked activities. The State paid the purchase price by foregoing loans to FBN amounting to EUR 6,5 billion.

### **3.3 The difficulties of Fortis Bank Nederland and of the ABN earmarked activities**

- (19) The problems that led Fortis Bank to the verge of bankruptcy have been described in paragraphs 13 to 21 of the decision of 3 December 2008. The Commission therefore refers to these paragraphs. In short, Fortis Bank encountered more and more difficulties due to the purchase of the ABN earmarked activities at a high price, due to the difficulty to finance this acquisition, and due to its significant portfolio of structured credits, of which the value has been severely impacted by the subprime crisis.
- (20) Since FBN was highly integrated into Fortis Bank and dependent on it for its funding, the severe difficulties of Fortis Bank directly threatened FBN. In addition, since the shares in RFS were held by FBN and valued in its books at their purchase price, FBN was directly impacted by the loss of value of the ABN earmarked activities. Furthermore, the Commission observes that at the end of 2008 FBN had to make a EUR 0,9 billion provision on loans made to funds which had directly or indirectly entrusted funds to *Bernard L. Madoff Investment Securities LLC*.
- (21) As regards the ABN earmarked activities, the Dutch authorities claim that the difficulties of FBN were threatening the ABN earmarked activities, but did not explain how the bankruptcy of FBN could have triggered the bankruptcy of the ABN earmarked activities. As confirmed by the the Dutch authorities, the ABN earmarked activities are not dependent upon FBN for their funding. It is recalled that the ABN earmarked

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<sup>7</sup> Substitution of one party in a contract with another party.

activities are not consolidated within FBN and still constitute a legally and operationally separate entity, being held within RFS.

#### **4 POSITION OF THE DUTCH AUTHORITIES**

- (22) As regards measure A, the Dutch authorities assert that they paid a market price for acquiring FBN. The investment bank hired by the Dutch government calculated that the value of FBN including the ABN earmarked activities comprised between EUR [...] and [...] billion<sup>8</sup>. The price of EUR 12,8 billion, which was the result of the negotiations with the seller, is therefore market-conform and the transaction does not constitute aid.
- (23) As regards measures B and C, the Dutch authorities assert that they provided financing to FBN at market conform price. Indeed, they assert that the price charged to FBN for short and medium term financing (measure B) is the same as the one which was charged by Fortis Bank until then. As regards the long term loans (measure C), the financing costs of FBN are not affected since the existing loan agreements remain in place. There is therefore no aid to FBN in measures B and C.
- (24) As regards measure D, the Dutch authorities claim no aid since the price was in line with the valuation made by the investment bank at the time of the transaction of 3 October. In addition, the Dutch authorities stress that Banco Santander and RBS, which had to give their approval to the sale of RFS shares to the Dutch State, have actually given their agreement. According to the Dutch authorities, these two banks thereby acknowledged that the price of EUR 6,5 billion is a fair value. They claim the price paid by the Dutch State has an influence on how high RFS is valued in Banco Santander and RBS accounts. There is therefore no aid to FBN in measure D.
- (25) The Dutch authorities claim that, if the Commission were to conclude that the measures constitute aid, they are compatible with the common market on the basis of Article 87 (3) (b). They claim that current market conditions had serious effect on the situation of Fortis Bank and FBN.
- (26) At the time of transaction of 3 October 2008, the liquidity situation of Fortis Bank and FBN had deteriorated so much that their survival was in danger. A bankruptcy of Fortis Bank and FBN would have also endangered the ABN earmarked activities. According to the Dutch authorities, FBN has to be considered a "*systemic relevant bank*" due to its market share in the Dutch banking market and its crucial role regarding clearing and settlement and money transfer. Consequently, to save FBN and avoid thereby a serious disturbance in the financial stability and harmful spill-over effect to the economy, the Dutch State acquired FBN. According to the Dutch authorities the decision to grant financing to FBN and purchasing the long term loans of Fortis Bank to FBN aimed at allowing the effective separation of the two banks without changing the terms and conditions of the funding agreements between FBN and Fortis Bank. The Dutch State intends to provide funding to FBN until a newly created treasury department will be able to operate and raise sufficient funds on the market. Asked by the Commission whether this financing benefited also to the ABN earmarked activities, the Dutch authorities indicated that it was not the case since there is no direct financing of the

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<sup>8</sup> This price does not include the potentially large synergies between the two banks.

State to the ABN earmarked activities and FBN is not providing financing to the ABN earmarked activities either.

- (27) As regards the purchase of the ABN earmarked activities (measure D), the Dutch State indicates that it had the effect of improving FBN's solvency ratio, which, due to the decrease of the value of the ABN earmarked activities<sup>9</sup>, risked to fall below the level of [...] % set by the Dutch central bank.

## **5 ASSESSMENT**

### **5.1 Existence of aid in the meaning of Article 87 (1) EC Treaty**

- (28) The Commission has first to assess whether the four measures implemented on 3 October 2008 and on 24 December 2008 constitute State aid. Article 87 (1) EC Treaty lays down that 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 is, insofar as it affects trade between Member States, incompatible with the common market.

#### **5.1.1 The measures of 3 October 2008 (measures A, B and C)**

- (29) Measures A, B and C were part of the same agreement. As indicated by the Dutch authorities, in order to separate FBN from Fortis Bank, it was not only necessary to purchase the shares of FBN from Fortis Bank (measure A) but also to end the voluminous financing of Fortis Bank to FBN. Hence the necessity of measures B and C. These three measures are therefore linked.
- (30) In paragraph 50 of the decision of 3 December 2008, the Commission already concluded that the Dutch State did not act as a private investor when entering in that transaction. The decision of 3 December 2008 indicates that "*at the precise moment when it had become nearly impossible to finance oneself on the interbank market, no private investor would have been willing (or even able) to enter in such a transaction requiring the granting of a financing of 50 billion*". The decision therefore considers that the transaction made of measures A, B and C does not fulfil the market economy investor test. In the present decision, it is therefore not necessary to assess again whether this transaction fulfils the market economy investor test. It is also recalled that the decision of 3 December 2008 concludes that the transaction contained aid in favour of Fortis Bank, which was found compatible with the common market.
- (31) In order to determine whether this transaction constitutes also aid to FBN and the ABN earmarked activities, it needs to be analysed whether it conveys an advantage to the latter banks.

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<sup>9</sup> In other words, the price at which the RFS N-shares were valued in FBN's accounts had to be reduced to reflect the decrease of the estimated value of the ABN earmarked activities.

- (32) The Commission observes that, taken separately, measure A does not seem to confer an advantage on FBN. There is no transfer of resources to FBN, since the purchase price is paid to the seller, namely Fortis Bank. If the State pays a too high price for *existing* shares of FBN, it would be an aid to the seller – Fortis Bank – but not an aid to the purchased entity. The Commission therefore concludes that, as such, this measure does not constitute aid to FBN. As will be show here after, this measure is however part of a transaction – the separation of FBN from Fortis Bank – which contains aid to FBN.
- (33) As regards measure B, the provision of a EUR 45 billion short and medium term borrowing facility by the State seems a significant advantage to FBN. It provides the latter with an amount of loans which FBN could not obtain on the market. Indeed, at the time of the transaction, FBN had simply no treasury department and therefore no access to the market. It seems also that until the end of 2008, FBN was able to raise only slightly more than EUR 10 billion on the market. The Commission invites the Dutch authorities to provide the details of the price paid by FBN for each of the loans raised in the market since 3 October 2008 and to indicate to which extent the financing provided by the State is cheaper than market financing.
- (34) Still as regards measure B, it seems also to represent an advantage to FBN compared to the situation pre-3 October 2008, when it was depending on Fortis Bank for its short and medium term financing. Short and medium term financing rapidly matures and therefore has to be regularly renewed for significant amounts. Fortis Bank was in an acute liquidity crisis and on the verge of bankruptcy. At any point, it could have been forced by the extreme deterioration in its own finances to have ceased renewing the short and medium term loans to FBN. The Dutch State is a more reliable source of financing and has a very low risk of bankruptcy. It is therefore much more advantageous to be dependent for its short term and medium term financing on the State than to be dependant on Fortis Bank. As regards pricing of the State support, the Dutch authorities claim that the interest rate on the State facility is similar to one charged by Fortis Bank until 3 October 2008. The Dutch authorities have not provided factual evidence of this point. The Commission therefore invites the Dutch authorities to provide evidence of the terms at which Fortis Bank was providing short and medium term funding in the last days preceding 3 October 2008. In addition, the Commission observes that, due to its very difficult liquidity situation and increasing funding costs, it is likely that Fortis Bank would have more or less rapidly increased the price charged to FBN if the latter would have continued to finance itself by the former.
- (35) In conclusion, measure B seems to convey an advantage to FBN.
- (36) The Dutch authorities have indicated that neither the State nor FBN is lending money to the ABN earmarked activities to a significant extent. However, the Dutch authorities have not explained in detail how the ABN earmarked activities finance themselves. Since nearly all the banks have had difficulties to find financing since the wholesale market dried up completely at the end of September 2008, it is reasonable to suppose that the ABN earmarked activities have asked financing to their mother company, namely FBN. At this stage, the Commission can therefore not exclude that the ABN earmarked activities have benefited from the measure. It invites the Dutch authorities to provide more information demonstrating that there is no direct or indirect lending to the ABN earmarked activities.

- (37) The Commission observes that measure B seems to fulfil all the other conditions laid down in Article 87 (1) EC for constituting state aid. It involves State resources. It is selective since it is granted only to FBN and – if confirmed - the ABN earmarked activities. This selective advantage allows these entities to remain on the market and to continue their operations. Consequently, the State intervention distorts competition. It also affects trades between Member States since some competitors of FBN and of the ABN earmarked activities on the Dutch banking market are subsidiaries of foreign banks
- (38) As regards measure C, the Commission observes that the existing loans to FBN have not changed. In other words, FBN has not received any new money and has not seen its debt reduced. There is also no promise of new financing. However, there could be an advantage to FBN if, under the loan contracts, Fortis Bank was entitled to call for the early redemption of the loans in the event of a change of ownership of FBN. The advantage would be that FBN did not have to immediately reimburse all these loans. The Commission therefore invites the Dutch authorities to provide details on the conditions under which Fortis Bank, under the loan agreements, were allowed to ask the reimbursement of the loans to FBN. In conclusion, at this stage, the Commission can not exclude that the purchase of the long term loans which had been granted by Fortis Bank to FBN conveys an advantage to FBN.
- (39) The Commission observes that if, as suggested above, measure C confers an advantage, it seems to fulfil all the other conditions laid down in Article 87 (1) EC for constituting state aid. It involves State resources. It is selective since it is granted only to FBN. This selective advantage allows FBN to remain on the market and to continue its operations. Consequently, the State intervention distorts competition. It also affects trades between Member States since some competitors of FBN on the Dutch market are subsidiaries of foreign banks.
- (40) On the basis of foregoing analysis, it seems, first, that measure B is an aid to FBN. At this stage, it can not be excluded that the ABN earmarked activities also benefited of this aid. Second, it can also not be excluded that measure C contains aid in favour of FBN.

### **5.1.2 The transaction of 24 December 2008 (measure D)**

- (41) As indicated above, the Dutch authorities consider that the terms on which the ABN earmarked activities were purchased did not provide aid to FBN. They claim that the price paid is market conform since it was in line with an expert valuation made beginning October 2008 and was accepted by the two other banks affected indirectly by the transaction.
- (42) The Commission notes that the investment bank hired by the Dutch authorities concluded at the beginning of October 2008 that the current value ("waarde – huidig") of the ABN earmarked activities was EUR [...] billion at that date. That value was calculated on the basis of the Price/Earning ratios ("Koers/Winst") observed on the market at that moment. The investment bank also calculated an average value over the cycle ("waarde door de cyclus") of EUR [...] billion<sup>10</sup>. That value was based on

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<sup>10</sup> Both the EUR [...] billion and the EUR [...] billion are based on a stand-alone valuation of the ABN



Price/Earning ratios observed on average during the economic cycle. The Commission observes that only the first value is relevant to determine the current market value of the ABN earmarked activities, since it is based on values currently observable on the market for other banks. The second value calculated by the expert is based on valuations observed on average during longer period and which are significantly higher than the one which were observed in the first days of October 2008. The current value of EUR [...] billion calculated by the expert is lower than the price paid by the Dutch authorities. The difference (EUR [0.5 – 2] billion) seems to constitute an additional source of funds that the Dutch State gave to FBN, in excess of the market price. Moreover, it is important to note that during the last quarter of 2008 there was a large decline in the price of the shares of the European banks. It seems therefore that the market value of the ABN earmarked activities at the time of the transaction of 24 December 2008 was significantly lower than the EUR [...] billion calculated by the expert in the first days of October. At this stage, the Commission considers that the market price of the ABN earmarked activities at the time of the transaction of 24 December 2008 could be approximated by decreasing the EUR [...] billion by a percentage equal to the decline of the index of European banks between 1 October and mid-December 2008, when the transaction was decided. The Dutch authorities are invited to comment on this proposed method.

- (43) As to the fact invoked by the Dutch authorities that RBS and Banco Santander accepted the price of EUR 6,5 billion, the Commission invites the Dutch authorities to precisely describe which influence the sale price of the ABN earmarked activities has on RBS and Banco Santander. It seems to the Commission that since the ABN earmarked activities in question were earmarked to be transferred to the Dutch State (which has replaced FBN as owner of these activities), an overestimation of the value of these activities would not be a significant concern for these two banks. In particular, if RBS has to consolidate the ABN earmarked activities as claimed by the Dutch authorities, its interest is to be sure that their value is not set at a too low level, in order to limit the size of the impairment it has to incur. In other words, at this stage, it seems that the fact that the price of EUR 6,5 billion has been accepted by RBS and Banco Santander does not demonstrate that this price is not higher than the market price since an overestimated price would not harm them.
- (44) In conclusion, it seems that the Dutch State purchased the ABN earmarked activities at a price exceeding their market value at the time of the transaction. Such transaction therefore seems to constitute an advantage to the seller, namely FBN, which receives a higher price than what it could have obtained from the market. As such it does not seem to constitute an advantage to the ABN earmarked activities, since the proceeds of sale go to FBN, not to them.
- (45) The Commission observes that this measure seems to fulfil the other conditions laid down in Article 87 (1) EC for constituting State aid. It involves State resources since the State paid the purchase price of the ABN earmarked activities by foregoing loans granted to FBN. It is selective since it is granted only to FBN. Without this selective advantage, the solvency ratio of FBN would have fallen below the level required by the

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earmarked activities and do not take into account potentially significant synergies between the ABN earmarked activities and FBN. It seems that there is no need to take into account these synergies to assess the price paid by the Dutch State on 24 December 2008 since the effect of this transaction was to separate the ABN earmarked activities from FBN.

banking regulator, which would have imperilled the continued operation of FBN. Alternatively, FBN would have had to raise capital at a high cost on the market. The State measure therefore distorts competition. As indicated above, some competitors of FBN are subsidiaries of foreign banks and trade between Member States is therefore affected. Consequently, the transaction seems to contain aid to FBN.

## 5.2 Compatibility of aid

### 5.2.1 Applicability of Article 87(3)(b) EC

(46) Article 87(3)(b) EC Treaty enables the Commission to declare aid compatible with common market if it is "to remedy a serious disturbance in the economy of a Member State". As indicated above, on 3 October 2008 Fortis Bank was in an exceptional liquidity crisis such that the risk of bankruptcy was high. Given the strong operational and financial links between the two, it is very likely that a bankruptcy of Fortis Bank would have led to the bankruptcy of FBN. At the end of December 2008, the State intervened because the solvency of FBN risked falling below the level of [...] % set by the Dutch central bank for FBN. The Commission acknowledges that, in the context of the exceptionally severe financial crisis prevailing since mid-September 2008, the failure of FBN, the fourth largest bank in the Netherlands, would have had systemic effects and would have seriously damaged the Dutch economy. The Commission therefore accepts that these measures aiming at saving FBN can in these exceptional circumstances be assessed under Article 87(3)(b) EC.

### 5.2.2 Compatibility of measures B and C under Article 87(3)(b) EC

(47) Since the beginning of the current crisis, the Commission has adopted three Communications where it explains how it will assess different types of aid measures. The Communication from the Commission of 13 October 2008 on "*The application of State aid rules to measure taken in relation to financial institutions in the context of the current global financial crises*"<sup>11</sup> (hereinafter the "Banking Communication") establishes the conditions under which the aids to the banking sector in the current crisis are compatible on the basis of article 87(3)(b). It contains detailed provisions concerning liquidity support in the form of State guarantee. The Communication from the Commission of 15 December 2008 "*The recapitalisation of financial institutions in the current financial crisis: limitation aid to the minimum necessary and safeguards against undue distortion of competition*"<sup>12</sup> (hereinafter the "Recapitalization Communication") explains how the Commission will assess recapitalisation in the current crisis. Finally, on 25 February 2009 the Commission adopted the Communication on the *Treatment of Impaired Assets in the Community Banking Sector*<sup>13</sup> ("the Impaired Assets Communication").

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<sup>11</sup> OJ C 270, 25.10.2008, p.8

<sup>12</sup> OJ C 10, 15.1.2009, p. 2

<sup>13</sup> OJ C 72, 26.03.2009, p.1

- (48) As discussed above, it seems that, within the transaction of 3 October 2008, State measures B and C confers aid on FBN by providing it with a large borrowing facility (measure B) and – if confirmed - avoiding FBN to have to reimburse early the large loans (measure C). The borrowing facility (measure B) may have benefited also to the ABN earmarked activities. This kind of State intervention is neither a recapitalisation nor an asset relief measure. Therefore, it does not seem to fall under the Recapitalisation Communication nor under the Impaired Assets Communication. Such aid should therefore be assessed under the general conditions laid down in the Banking Communication. Such an approach is appropriate since this liquidity support has similarities with State guarantees which aim at facilitating the access of banks to funding and on which there are detailed provisions in the Banking Communication.
- (49) According to paragraph 15 of the "Banking Communication", and in line with the general principles underlying their State aid rules of the Treaty, all support measures have to be:
- *" well-targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy,*
  - *proportionate to the challenge faced, not going beyond what is required to attain this effect, and*
  - *designed in such a way as to minimize negative spill-over effects on competitors, other sectors and other Member States"*
- (50) The Commission will start by assessing measure B.
- (51) As regards the first condition – the aid has to be well targeted – the Commission observes that it was necessary to provide this borrowing facility to FBN in order to separate it effectively from Fortis Bank. Without this facility, FBN would still be dependant for its short and medium term funding on Fortis Bank, which was on the verge of bankruptcy. It seems therefore that the measure was well-targeted.
- (52) As regard the second criteria - proportionality - the Commission has doubts whether the measure is proportionate.
- i. As regards the pricing of the State financing, the Commission recalls that it has assessed the level of the guarantee fees charged in the framework of the guarantees schemes notified by the Member States on the basis of the Communication of the European Central Bank of 20 October 2008. The latter recommends the following fees for State guarantees on bank liabilities: 1) for guarantees on bank liabilities with a maturity of 3 to 12 months, a fee equal to 50 basis points should be charged on annual basis; 2) for guarantees on bank liabilities with tenor longer than 1 year, a fee equal to 50 basis points increased by the historical CDS of the bank should be charged. The Commission has approved a guarantee scheme in the Netherland which follows exactly these recommendations<sup>14</sup>. To the Commission's knowledge, the debt instruments which received a State guarantee under this scheme and under similar schemes in other Member States have been issued with a positive spread above Euribor. In other words, the banks have to pay an interest rate higher than Euribor to the investors and, on top of that, they have to pay the guarantee fee to the State. As

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<sup>14</sup> State aid case N 524/2008, Commission decision C (2008)6616 of 31 October 2008 (OJ C 328, 23.12.2008, p.9)

described above, the Dutch State provides funding to FBN with an interest rate of 25 basis points above Euribor for loans shorter than one year and 50 basis points above Euribor for longer loans. This means that the margin above Euribor charged for the borrowing facility is lower than the guarantee fee which is charged in the framework of the guarantee schemes approved by the Commission. It seems therefore that the funding provided by the State to FBN is cheaper than the funding costs FBN would incur if it would issue on the market debt instruments guaranteed the State under the approved Dutch guarantee scheme. The Commission therefore doubts that the price charged by the Dutch State to FBN is sufficiently high to consider that the aid is limited to the minimum necessary.

- ii. The Commission also has doubts whether the time window for drawing loans under the State facility is limited to the minimum. Indeed, there is no fixed date for ending the facility. In the guarantee schemes approved by the Commission, there is a strictly limited time window for granting State guarantee. The Commission therefore doubts that the duration of the aid is limited to the minimum necessary.
  - iii. The Commission also asks the Dutch authorities to clarify which is the longest duration for the loans granted by the State. For notified guarantee schemes, the Commission has limited the duration of the guaranteed debt instruments to 3 years, and, in limited cases, to 5 years. Since it does not know what the longest duration allowed under the State facility is, the Commission can not assess whether the tenor of the loans provided to FBN is limited to the minimum necessary.
  - iv. The Commission also has doubts whether the volume of State lending to FBN is limited to the minimum necessary. The Dutch authorities are invited to explain in detail how they set the limit for the borrowing under the State facility and to explain why this would constitute the minimum necessary to allow FBN to continue operating on the market.
- (53) The Commission invites the Dutch authorities to comment on each of the foregoing doubts.
- (54) As regards the third condition - the measure must be designed in such a way as to minimize negative spill-over effects on competitors – the Commission doubts that it is fulfilled. First, as indicated above, the Commission doubts that the aid is proportionate and limited to the minimum necessary. It can therefore not be excluded that the measure provides excessive advantages to FBN and therefore distorts excessively the competition. Second, paragraph 27 of the Banking Communication provides that, in order to prevent undue distortions of competition, some safeguards measures should be implemented. At this stage the Commission doubts that sufficient safeguards such as listed in paragraph 27 of the Banking Communication are in place.
- (55) All the foregoing doubts also apply to the financing which the ABN earmarked activities may have directly or indirectly received under measure B.
- (56) For the foregoing reasons, the Commission has doubts whether the aid which seems to be included in measure B is compatible with the Banking Communication and with Article 87(3)(b) EC.
- (57) As to measure C, if Fortis Bank had the possibility to ask an early redemption of the loans to FBN and the State intervention is therefore aid to FBN, the aid seems well targeted since FBN could not have found financing to financing the early redemption of EUR 16 billion of debt. As to whether the aid is limited to the minimum in terms of duration and pricing, it is doubtful since it has not been demonstrated that the State

could not have replaced the existing loans with shorter and more expensive loans to FBN. Finally, as to the avoidance of undue distortions of competition, the same doubts apply as those raised for measure B. The Commission therefore doubts that aid which would be included in measure C would be compatible with the Banking Communication and with Article 87(3)(b) EC.

### **5.2.3 Compatibility of the transaction of 24 December 2008 (measure D) under Article 87(3)(b)EC**

- (58) As indicated above, it seems that the price paid by the State to FBN for purchasing the ABN earmarked activities is above market price. The part of the price in excess of the market price seems to have the same effect as a recapitalisation of the bank of an equivalent amount. The Dutch authorities acknowledge that the aim of the transaction was to improve the solvency of FBN which risked falling below the level set by the Dutch central bank for FBN. The Commission therefore considers at this stage that this measure has to be assessed under the Recapitalisation Communication.
- (59) The Recapitalisation Communication defines the principle and the rules to which the States have to comply with when recapitalising banks. In particular, it establishes the criteria for the remuneration of the measures adopted and the mechanisms to avoid undue distortions of the competition.
- (60) To assess a recapitalisation, the Commission pays particular attention to the risk profile of the beneficiary at the time of the measure. In particular, section 2.2 of the Recapitalisation Communication laid down conditions for recapitalisation of fundamentally sound banks while section 2.3 deals with recapitalisation of the other banks. It is therefore important to first establish whether FBN was fundamentally sound or not.
- (61) When evaluating a bank's risk profile for the purpose of the appreciation of a recapitalisation measure under State aid rules the Commission takes into account the bank's position with respect to the following indicators<sup>15</sup>:
- i. capital adequacy: the Commission values positively the assessment of the bank's solvency and its prospective capital adequacy as a result of a review by the national supervisory authority;
  - ii. size of recapitalisation: the Commission values positively a recapitalisation limited in size, such as for instance no more than 2% of the bank 's risk weighted assets;
  - iii. current CDS spreads: a spread equal or inferior to the average is an indicator of a lower risk profile;
  - iv. current rating of the bank and its outlook: a rating A or above and a stable or positive outlook is an indicator of a lower risk profile.

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<sup>15</sup> See Annex "*Indicators for the assessment of a bank's risk profile*" of Recapitalisation Communication.

- (62) As regards the capital adequacy, the Commission observes that the Dutch State has not submitted any assessment and review by the national supervisory authority. This evaluation is a key factor to establish if the FBN has to be classified as a "sound bank". On this point the Commission also observes that the bank has recorded a large net loss in 2008 as a result of the large loss (EUR 17,7 billion) on the sale of the stake in RFS and a provision of EUR 0,9 billion linked to the Madoff default. Without considering these two exceptional elements, the bank generated a net operating profit of EUR 604 million. Shareholders' equity decreased from EUR 21,7 billion at the end of 2007 to EUR 3 billion at the end of 2008. During the same period, the regulatory capital of bank remained nearly unchanged at around EUR [...] billion. The Commission invites the Dutch authorities to explain how FBN will produce sufficient profits in the next years and will have sufficient capital.
- (63) With reference to the size of recapitalisation, it is not clear yet whether the aid exceeds 2% of the risk weighted assets. Indeed, as indicated above, the size of the aid is not known yet. The aid will be calculated as the difference between the purchase price (EUR 6,5 billion) and the market value of the ABN earmarked activities at the time of the transaction (i.e. 24 December 2008).
- (64) As far as the current CDS spreads are concerned, the Commission invites the Dutch State to submit data on FBN CDS quotation, if it exists.
- (65) As regards the rating of the bank and its outlook, the Commission notes that the current credit ratings published by the main international credit agencies reflect to a large extent the circumstance that the bank is owned by the Dutch State<sup>16</sup>.

| <b>AGENCY</b>            | <b>LONG TERM<br/>RATING</b> | <b>SHORT TERM<br/>RATING</b> |
|--------------------------|-----------------------------|------------------------------|
| S&P (8 January 2009)     | A                           | A-1                          |
| FITC (6 October 2008)    | A+                          | F1+                          |
| MOODY (17 December 2008) | A1 (positive<br>outlook)    | P-1                          |

- (66) For this reason, it seems that these ratings do not reflect the intrinsic creditworthiness of FBN and the capacity to produce profits in the future. Similarly, the ratings pre-3 October 2008 were strongly influenced by the fact that FBN belonged to Fortis Bank and was highly integrated in it.
- (67) In conclusion, since significant information is missing in order to be able to apply the four criteria laid down in the Recapitalisation Communication, the Commission can not at this stage decide whether FBN has to be considered as a "sound bank" or not. It can not at this stage decide whether section 2.2 or section 2.3 of the Recapitalisation Communication applies.

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<sup>16</sup> In the last research published by Standard & Poor's on 8 January 2009 the credit agency says *"The current "A/A-1" Ratings on FBNH take into consideration its ownership by and support from the Dutch state as well as its current position as the fourth-largest Dutch banking group..... Ownership by the Dutch government is currently a key factor for FBNH and will remain important in the delicate period of integration with ABN Amro."*

(68) However, the Commission has already the following doubts as regards the fulfilments of the conditions which are common to sections 2.2 and 2.3 of the Recapitalisation Communication:

- i. If section 2.2 applies, the Dutch authorities will have to submit a viability plan while if section 2.3 applies, they will have to submit a restructuring plan. In other words, in both cases, the Dutch authorities have to submit a plan indicating how the bank will restore its viability. As of today, no detailed plan has been submitted by the Dutch authorities but the Commission has already been informed of their intention to restore the long term viability of FBN by merging it with the ABN earmarked activities. The Commission observes that by decision of 3 October 2007 it authorised the merger between these two entities under conditions of the implementation of remedies<sup>17</sup>. As of today, these remedies have not been yet implemented. It is clear that, if these remedies are not implemented, a plan based on the merger between the two banks could not be accepted by the Commission and the recapitalisation of FBN of 24 December 2008 would therefore constitute an incompatible aid.
- ii. As regards remuneration, the Commission observes that the Dutch State has not obtained any new FBN shares as remuneration for paying an above-market price. Under the Recapitalisation Communication, the State implementing a recapitalisation should receive shares or hybrid instruments providing an adequate remuneration for the risk taken. Even if it were accepted that issuing new shares is pointless since the State already owns nearly all the shares, the Commission observes that the Dutch State should have at least calculated ex-ante whether it is sufficiently plausible that the funds provided to FBN increase the value of FBN and/or a return through dividends by a sufficient amount to justify such an injection of capital. To the Commission's knowledge, the Dutch authorities did not carry out an ex-ante assessment of the enhanced profitability and value of FBN caused by this "indirect" injection of capital. Therefore the Commission doubts whether the remuneration of the measure D is appropriate and ensures that the aid is limited to the minimum.
- iii. Finally, the Commission observes that the measure does not present an incentive to redeem the capital provided by the Dutch State. There is no clear exit plan for realising the profit by selling the shares of the bank. The Commission therefore doubts whether the requirement of redemption incentives laid down in the Recapitalisation Communication is fulfilled.

(69) In conclusion, the Commission doubts that the measure implemented on 24 December 2008 (measure D) fulfils the conditions laid down in the Recapitalisation Communication and is compatible with Article 87(3)(b) EC.

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<sup>17</sup> Case M.4844 Fortis/ABN AMRO Assets

## DECISION

In the light of the foregoing considerations, the Commission has decided to initiate the procedure laid down in Article 88 (2) of the EC Treaty with respect to the provision of a EUR 45 billion borrowing facility to FBN, the purchase of the EUR 16 billion long term loans granted by Fortis Bank to FBN, and the purchase of the ABN earmarked activities from Fortis Bank Nederland at a price of EUR 6,5 billion. The potential beneficiary of these measures is Fortis Bank Nederland. At this stage it can not be excluded that also the ABN earmarked activities benefited of the borrowing facility.

The Commission requires the Netherlands, within one month of receipt of this letter, to provide in addition to the documents already submitted, information and data needed for the assessment of these measures.

In particular, the Commission would wish to receive comments on the points on which it raised doubts.

The Netherlands are requested to forward a copy of this letter to the potential recipients of the aid immediately.

The Commission wishes to remind the Netherlands that Article 88 (3) of the EC Treaty has suspensive effect, and would draw attention to Article 14 of Council Regulation (EC) No. 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the Netherlands that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Communities. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the Official Journal of the European Communities, and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, 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 publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
Rue de la Loi/Wetstraat, 200  
B-1049 Brussels  
Fax No: +32-2-296 12 42

For the Commission

*Neelie KROES*  
Member of the Commission