



EUROPEAN COMMISSION

Brussels, 12 May 2009
C(2009) 3907 final

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

PUBLIC VERSION

WORKING LANGUAGE

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

**Objet: State aid N 255/2009 – Belgium, and N 274/2009- Luxembourg
Additional aid for Fortis Banque, Fortis Banque Luxembourg and Fortis
holding**

Dear Sirs,

1 PROCEDURE

- (1) Following the notification by the Belgian authorities on 30 September and 10 October 2008, the Luxembourg authorities on 1 October 2008 and the Dutch authorities on 7 October 2008 of the application of measures to assist Fortis Banque SA/NV (hereinafter ‘Fortis Banque’), Fortis Banque Luxembourg (now the Banque Générale du Luxembourg, hereinafter ‘BGL’) and Fortis Bank Nederland (hereinafter ‘FBN’), the Commission issued a decision¹ on 3 December 2008 covering the following points (the numbering of measures follows that used in the decision of 3 December 2008): a capital injection by Belgium in Fortis Banque – through the Société financière de participations et d’investissement [Federal Participation and Investment Company] (hereinafter the ‘SFPI’) – in return for a 49.9% stake in the bank (**measure 1a**), the provision by Luxembourg of a convertible loan for Fortis Banque Luxembourg (**measure 1b**), the granting of liquidity assistance by the Banque Nationale de Belgique [National Bank of Belgium] (**measure 2**), the repurchase by the Netherlands of Fortis Bank Nederland and the provision of the necessary funding for the

¹ Restructuring aid for Fortis Banque and Fortis Banque Luxembourg, NN 42/2008, NN 46/2008, NN 53/A/2008, 3 December 2008, C(2008) (8085) (OJ C 80, 3.4.2009, p.7)

His Excellency Mr Karel DE GUCHT
Minister of Foreign Affairs
Rue des Petits Carmes, 15
B - 1000 Brussels

His Excellency Mr Jean ASSELBORN
Minister of Foreign Affairs
Rue Notre-Dame 5
L - 2911 Luxembourg

repayment of loans granted to the latter by Fortis Banque (**measure 3a**), the acquisition by the Netherlands of Fortis Insurance Nederland from Fortis Insurance (**measure 3b**), the purchase by Belgium of the remaining 50% share in Fortis Banque, financing equal to 24% (Fortis holding and BNP Paribas ('BNPP') respectively providing 66% and 10% of the remainder) of an investment vehicle to buy impaired assets from Fortis Banque, the sale of 75% of Fortis Banque's shares to BNPP and the sale by Luxembourg of 16% of BGL's shares to BNPP (**measure 4**). Annex 4 shows the structure of the Fortis Group as it was up until the end of September 2008.

- (2) The parties affected by the transactions included in measure 4 formally committed themselves to these steps in contracts signed on 10 October 2008. The contract for the sale of the remaining 50% of Fortis Banque to the Belgian State did not contain any conditions precedent, meaning that it could be concluded with immediate effect. This contract stipulated that, if the anticipated sale of 75% of Fortis Banque to BNPP did not go ahead, Fortis holding² and Belgium would finance the investment vehicle themselves, contributing 73.33% and 26.66% respectively. Conversely, the agreement of 10 October 2008 for the sale of 75% of Fortis Banque's shares to BNPP included several conditions precedent, meaning that the sale had still not closed at the time of the judgment referred to below.
- (3) Following the lodging of an interlocutory suspension order by Fortis holding shareholders, the Brussels Court of Appeal ruled, in a judgment of 12 December 2008, that the sale of Fortis Banque by Fortis holding required the approval of the latter's shareholders, and suspended the transfer by the SFPI of control of Fortis Banque to BNPP. This created huge uncertainty as to the validity and future of the contract for the sale of 75% of Fortis Banque to BNPP.
- (4) At an extraordinary general meeting on 11 February 2009, Fortis holding shareholders rejected the conditions of the transaction set out in the initial agreement and additional clause 1³. Subsequently, Fortis holding, BNPP and Belgium renegotiated the initial agreement of 10 October 2008 (through additional clauses 2, dated 27 February 2009⁴, and 3, of 12 March 2009). The new operating terms were approved by the general meeting of Fortis holding shareholders on 28 and 29 April 2009 with a majority of more than 70%.
- (5) The Belgian authorities notified additional clause 3 on 13 March 2009. The new operating terms and State measures were examined at meetings between the Commission, the Belgian authorities and the investment banks appointed by them, which were held on 16 March, 1 April and 22 April 2009. The Belgian Government replied on 14 April to a request for information issued by the Commission on 23 March. On 21 April, it communicated, through its legal representative, its observations regarding the planned measures. Its banking advisers also provided the Commission with written reference elements on 12 February 2009⁵, 6 February, 16 March and 25 April 2009⁶ and 20 and 31 March, 26, 27, 28, 29 and 30 April, and 1, 2, 3, 4, 5 and

² In this decision, 'Fortis holding' covers Fortis S.A./N.V., Fortis N.V., Fortis Brussels and Fortis Utrecht.

³ The Commission was given pre-notification of this clause on 3 February 2009. This pre-notification became null and void once the transaction was rejected by shareholders on 11 February 2009.

⁴ This clause simply extended the validity of the agreement.

⁵ For ICAP

⁶ For UBS

6 May 2009⁷ respectively. The latter exchanges of information were aimed at verifying in detail the valuation carried out by Société Générale.

- (6) On 15 April 2009, Luxembourg notified the additional State measure applicable in its regard, which is referred to in additional clause 3⁸.
- (7) In a letter of 5 May 2009, the Commission received a complaint concerning the measures implemented in favour of Fortis Banque and BNPP⁹.

2 DESCRIPTION OF THE NEW STATE MEASURES

- (8) This decision concerns the new measures taken by the Belgian and Luxembourg States with regard to the sale of Fortis Banque, which are in addition to the measures already approved in the decision of 3 December 2008.
- (9) In Belgium's case, several State measures have been drawn up, all of which relate directly or indirectly to the sale of 75% of Fortis Banque to BNPP and to the financing of the investment vehicle (measure 4 in the decision of 3 December 2008).
- (10) Additional clause 3 raises the Belgian State's contribution to the investment vehicle (since renamed Royal Park Investments, hereinafter 'RPI') in terms of structured credit from 24% to 43.5%. With RPI's overall capital (also known as the 'equity tranche') increasing to EUR 1.7 billion, the State's capital contribution will be EUR 740 million (**measure 4A**). As a result of this proportional increase in the State's contribution to RPI's equity tranche, Fortis holding's contribution has decreased from 66% to 44% (EUR 760 million). BNPP's stake has risen slightly, from 10% to 12% (EUR 200 million).
- (11) Additional clause 3 also stipulates that the payments to RPI will be divided into a senior and super-senior tranche¹⁰, each amounting to EUR 4.85 billion. With regard to the senior financing, BNPP will contribute EUR 485 million (10%) and Fortis Banque will initially provide EUR 4.365 billion (90%). This 90% will subsequently be financed through the issuing of commercial paper. This senior debt of EUR 4.365 billion¹¹ initially financed by Fortis Banque and later by commercial paper will be underwritten by the Belgian State (**measure 4B**). In other words, the Belgian State's exposure with regard to the senior financing of RPI will be 90% compared with 24% under the

⁷ For Société Générale

⁸ Article 18 of additional clause 3

⁹ The complainant maintains that the Commission should have opened proceedings, as the measures raise serious doubts, that it should deliver an opinion on the agreement as a whole, in particular, because the additional aid is unnecessary, that Belgium had ample time to launch a tender procedure for the sale of Fortis Banque and that BNPP was acquiring it at too low a price, and that the aid was disproportionate. Without prejudging whether this decision is of direct and individual concern to the complainant within the meaning of Article 230 of the EC Treaty, the Commission has examined the complaints and considers that none of them alters its assessment as set out in this decision.

¹⁰ In this decision, the Commission uses the terms used by the parties concerned. It notes, in particular, that the 'senior' tranche could have been referred to as a 'mezzanine' tranche, as it immediately follows the equity tranche.

¹¹ The precise amounts could have altered by the time the transaction goes ahead, depending on changes in the exchange rate. A significant proportion of the assets that will be bought from Fortis Banque by RPI are denominated in US dollars, while a smaller share is in UK Sterling and Australian dollars.

agreement of 10 October 2008¹². By contrast, Fortis holding no longer has any exposure in this regard, in contrast with 66% under the agreement of 10 October. The State's guarantee of 90% of the senior financing is funded by an annual fee of 70 basis points.

- (12) The scope of RPI has altered since the agreement of 10 October 2008. On one hand, the nominal value of the assets fell by approximately EUR 1 billion up to the end of February 2009, following capital repayments. On the other hand, additional clause 3 states that RPI will purchase further structured credits with a nominal value of EUR 2.4 billion from Fortis Banque for a sum of EUR 2 billion. In this decision, this topping-up of RPI will also be known as a 'refill' (**measure 4C**).
- (13) Additional clause 3 also stipulates that the Belgian State will provide a second-loss (or 'mezzanine') guarantee (**measure 4D**) on the structured credit portfolio retained by Fortis Banque (hereinafter the 'in' portfolio). The nominal value of the 'in' portfolio at the end of February 2009 was EUR 21 billion. Losses of up to EUR 3.5 billion on this portfolio will be borne by Fortis Banque. Beyond this amount, (the 'attachment point'), the State will compensate Fortis Banque for any losses up to a maximum of EUR 1.5 billion.
- (14) The Belgian authorities submitted valuation reports drawn up by Société Générale concerning the Fortis Banque structured credits covered by these four measures. Société Générale's findings were presented to and discussed with experts from the Banking, Finance and Insurance Commission (CBFA). In a letter to the Commissioner for Competition dated 24 April 2009, the chairman of the CBFA certified that, following this presentation and the ensuing discussions, the CBFA had no cause to question the methodology applied by the analyst for the classification and valuation of those Fortis Banque assets representing the portfolio transferred to RPI and the structured credit portfolio retained by Fortis Banque ('in' portfolio).
- (15) Under additional clause 3, the Belgian State also undertook to subscribe to up to EUR 2 billion in any Tier 1 instruments (ordinary or hybrid shares) issued by Fortis Banque in the aim of bringing the bank's Tier 1 ratio back to 9.2% if it should fall below this threshold (**measure 4E**). This commitment is in place for three years. It is not automatic, in the sense that, if its Tier 1 ratio falls below 9.2%, Fortis Banque has the option of not issuing shares or, alternatively, of issuing them but selling them to an investor other than the Belgian State.
- (16) Additional clause 3 also makes provision for the Belgian State to guarantee a loan of EUR 1 billion granted by Fortis Banque to Fortis holding (**measure 4F**). This loan is offered for four years, with half the principal to be repaid after a year, and the remainder in three equal sums at the end of the subsequent years. As collateral, Fortis holding will pledge 35 % of Fortis Insurance Belgium (hereinafter 'FIB') shares or another asset worth EUR 1.5 billion to the Belgian State. Remuneration of the guarantee will be at 70 basis points.

¹² In the agreement of 10 October 2008, the Belgian State also undertook to provide a loan of EUR 3 billion for the special-purpose vehicle (SPV). However, this loan was equivalent to the super-senior tranche under the new arrangements, as it was subject to repayment before any financing granted by Fortis holding was repaid and was secured by Fortis holding's participation in the investment vehicle. This loan of EUR 3 billion is not included in the new agreement.

- (17) On the basis of the agreements initially concluded following the sale of Fortis Banque, the ‘relative performance note’ (hereinafter ‘RPN’) applicable to CASHES¹³ should have been immediately cancelled by the payment by Fortis holding to Fortis Banque of up to EUR 2.35 billion. Additional clause 3 states that the RPN must remain in place until the CASHES securities have been repaid in full. In this regard, Belgium has undertaken to guarantee the payment of the interest (Euribor + 20 basis points) owed by Fortis holding to Fortis Banque in respect of the RPN (**measure 4G**). The State guarantee does not cover repayment of the principal, as the RPN does not provide for repayment of this sum. Remuneration of the guarantee is fixed at 70 basis points. This fee will be applied to the precise value of the RPN (i.e. the difference between the price of the CASHES securities and the Fortis holding shares), which is the principal on which interest is payable. In the case of this guarantee, the State has as collateral the FIB shares pledged by Fortis holding. The number of shares offered to the State as a security varies from quarter to quarter. This variation in the number of shares pledged is based on a margin ranging from a minimum of 10% of FIB capital to a maximum of 20%.
- (18) Finally, additional clause 3 provides for the Belgian State to grant Fortis holding the right to any gains on the BNPP shares it will hold following the sale of 75% of Fortis Banque to the French group (**measure 4H**). This call option consists of an exercise price of EUR 68 and is granted for a duration of six years from the end of the two-year lock-up period.
- (19) As regards Luxembourg, a new State measure has been introduced. On 12 December 2008, Luxembourg, in keeping with its commitment of 29 September 2008 to provide BGL with EUR 2.5 billion (2.4 billion of which were paid and approved by the decision of 3 December 2008 under measure 1b), subscribed to the issue of EUR 100 million of

¹³ CASHES means convertible and subordinated hybrid equity-linked securities. On 19 December 2007, Fortis Banque issued floating-rate CASHES with no maturity date worth EUR 3 billion. The coupons on the securities are payable quarterly on the expiry date at a variable interest rate equal to the three-month Euribor increased by 2%. Fortis Banque will not repay the principal CASHES amount in cash. The only claim holders of CASHES securities can make of the co-obligors regarding the principal is in terms of the 125 313 283 Fortis holding shares pledged to holders by Fortis Banque. The 125 313 283 Fortis holding shares were acquired by Fortis Banque at EUR 18.75, in order to inject capital into Fortis holding, putting the overall total at EUR 2.35 billion. The CASHES securities have no maturity date but are exchangeable for Fortis holding shares at a price of EUR 23.94 a share at the shareholder’s discretion. Fortis Banque and Fortis holding are joint debtors as regards this repayment in shares. For as long as the CASHES securities have still be repaid, Fortis Banque is obliged to continue to offer the 125 313 283 Fortis holding shares it has acquired. In order to minimise the impact of fluctuations in the fair value of Fortis holding shares on equity and/or the profit and loss account, Fortis Banque has decided to carry both the CASHES securities and the Fortis holding shares at their fair value via the profit and loss account. Fortis Banque had covered the net deviation from the fair value on the Fortis holding shares and CASHES securities by means of the RPN concluded with Fortis holding. This RPN effectively transfers the net fair value movements on Fortis holding shares and Fortis Banque’s CASHES securities to Fortis holding. The fair value of the RPN is extremely volatile and depends on the price movements of the CASHES securities and Fortis holding shares. For example, on 30 September 2008, the fair value was a positive EUR 238 million in favour of Fortis holding, compared with a negative value of EUR 320 million on 30 June 2008 in favour of Fortis Banque. The amount represented by the RPN is considered a debt owed by Fortis holding to Fortis Banque (or vice versa), which will not have to be paid back and on which only interest is payable, at the Euribor rate plus 20 basis points. The RPN has no impact on a consolidated basis (provided that it is intragroup debt); however, the acquisition by the Belgian State of almost all Fortis Banque’s shares, followed by the handover to BNPP of a controlling interest in Fortis Banque, has created debts/credit among companies that no longer belong to the same group. The agreement had anticipated the termination of the RPN, which would have resulted in a payment by Fortis holding to Fortis Banque of a maximum amount of EUR 2.35 billion.

bonds by BGL at an interest rate of 10%. According to additional clause 3, Luxembourg will transfer these securities to BGL against the issue of new BGL shares (**measure 1b a**).

3 POSITION OF THE MEMBER STATES

3.1 Position of Belgium

3.1.1 Absence of State aid

- (20) In Belgium's view, the changes made by additional clause 3 do not constitute State aid.
- (21) In terms of the financing of RPI (measures 4A and 4B), Belgium considers that the new financing scale involving broader participation by Fortis Banque and BNPP means that the State's role will be reduced in comparison with the arrangements assessed by the Commission in its decision of 3 December 2008.
- (22) Belgium takes the view that the refill of the RPI vehicle (measure 4C) is not imputable to the Belgian State.
- (23) As regards the guarantee on the second-loss ('mezzanine') tranche agreed for the structured credit portfolio retained by Fortis Banque (measure 4D), Belgium justifies its view that this guarantee paid at 70 basis points does not constitute State aid on the basis of the negligible probability that the guarantee will be activated.
- (24) In terms of the commitment to subscribe to Tier 1 instruments (measure 4E), Belgium considers that it does not constitute aid in favour of Fortis Banque in the sense that the subscription will be under market conditions. Nevertheless, in order to secure the Commission's approval of additional clause 3, Belgium has promised to notify the Commission prior to implementation of all transactions resulting from this commitment¹⁴.
- (25) Belgium deems that the guarantees provided for in measures 4F (guarantee of the EUR 1 billion credit facility granted to Fortis holding) and 4G (guarantee of Fortis holding's obligations under the RPN) do not constitute State aid in the sense that they pass the 'market economy investor' test. Belgium stresses that these guarantees: (i) are

¹⁴ The text setting out the Belgian authorities' commitment reads as follows:

'Article 19 of additional clause 3 provides for the possibility, solely in the event that Fortis Banque's tier 1 ratio falls below 9.2% in the three years from the date on which the transaction envisaged is performed, for Fortis Banque to issue Tier 1 instruments at the amount required in order to restore this ratio to 9.2%, and for a commitment by the Belgian State to subscribe, directly or through the SFPI, to these instruments (non-innovative hybrid or ordinary shares, as the Belgian State chooses) up to a maximum overall amount of EUR 2 billion.

The Belgian Government makes clear that there is nothing automatic about this arrangement and that Fortis Banque is not obliged to make use of this option.

The Belgian Government undertakes, for the purposes of the monitoring of State aid, to notify the Commission beforehand and seek its approval for any planned implementation of this commitment. Such notification will enable the Commission to assess the potential application of Article 19 in light of the circumstances prevailing at the time of notification by the Belgian authorities.'

paid at market conditions (70 basis points annually); and (ii) are accompanied by collateral of sufficient value to cover the commitments (lien of FIB shares).

- (26) Finally, with regard to measure 4H, Belgium considers that the purchase option granted to Fortis holding on the shares transferred to BNPP does not constitute State aid but should be seen as part of the transaction between the SFPI and Fortis holding in relation to the sale of Fortis Banque

3.1.2 Background to and need for the additional measures envisaged

- (27) If, however, the Commission were to consider these measures aid within the meaning of Article 87(1) of the EC Treaty, Belgium points out that all the measures taken are justified and necessary to prevent a serious disturbance in the Belgian economy.
- (28) Belgium stresses, first of all, that the Brussels Court of Appeal ruled in its judgment of 12 December 2008, that, *prima facie*, the board of Fortis holding was not authorised to dispose of Fortis Banque without seeking the approval of Fortis holding shareholders. On that basis, the Appeal Court forbade the SFPI, as a provisional measure, to hand over the 50% + 1 share in Fortis Banque, a ban that remained in place until 16 February 2009. This prevented the conclusion of the transfer of control to BNPP in accordance with the agreement. The Court of Appeal also ordered a general meeting of Fortis holding shareholders to be called for 12 February at the latest to discuss the transfers effected or agreed in October 2008. This meeting was held on 11 February 2009. Furthermore, a judgment of the Brussels Court of Appeal of 31 March 2009 confirmed that, in the Court's view, any transfer of Fortis Banque to BNPP continued to require the approval of Fortis holding shareholders.
- (29) The Belgian Government continues to believe that Fortis Banque's viability cannot be guaranteed unless it is secured by a major bank. BNPP was and remains the only major bank that is willing to accept this role under conditions acceptable to the Belgian Government. The Belgian authorities refer, in this regard, to paragraphs 57 to 59, 81 to 85 and 90 of the decision of 3 December 2008. At the same time, it is now urgent that the transaction should go ahead. Since 10 October 2008, the future of Fortis Banque has been in limbo, which has clearly made the bank's relations with its creditors, clients¹⁵, employees and suppliers increasingly difficult. The impossibility since December 2008 of carrying out restructuring measures (in particular the incorporation of Fortis Banque into the BNPP Group) is also at least partially to blame for the loss in value recorded since the agreement was concluded. It is under these circumstances that the Belgian State agreed to negotiate additional clause 3 to the agreement.
- (30) In order to obtain the approval of the shareholders' general meeting, which was called as a consequence of the aforementioned judgment of 12 December 2008, concessions in favour of Fortis holding shareholders were and remain unavoidable. This is why the Belgian State and BNPP agreed to alter some aspects of the transaction in Fortis holding's favour by means of additional clause 1 of 1 February 2009. This additional clause contained several measures aimed at improving the conditions of the planned transaction from Fortis holding shareholders' point of view. In spite of these concessions, at the general meeting of 11 February 2009, a slight majority of Fortis

¹⁵ Fortis Banque went from holding [20-30%] of the overall amount of Belgian household deposits at the end of August 2008 to [20-30%] in December 2008.

holding's historic shareholders rejected the sale of Fortis Banque to BNPP. The result of this vote shows that, in order to secure the approval of the majority of Fortis holding shareholders, further concessions were essential. For this reason, the Belgian authorities, Fortis holding and BNPP negotiated some additional changes to the agreement, resulting in the signing of additional clause 3 of the agreement.

- (31) The additional concessions in favour of Fortis holding shareholders were the result of long and arduous negotiations between the board of Fortis holding, the Belgian Government and BNPP. They were confined to what was considered strictly necessary, evidence of which is the fact that their approval by Fortis holding shareholders remained uncertain right up to the vote.
- (32) According to the Belgian authorities, the economic burden of the additional concessions to Fortis holding shareholders has been borne, for the most part, by BNPP, which has made substantial concessions in order to alter the balance of the transaction to secure greater participation by the private sector. The Belgian authorities note, in particular, that BNPP has agreed not to acquire more than 25% of FIB, to increase Fortis Banque's share in the financing of RPI, and to maintain the RPN, which means a shortfall for Fortis Banque approaching EUR 2.35 billion.
- (33) In addition to measures benefiting Fortis holding, additional clause 3 provides for further State measures in favour of Fortis Banque, including the 'in' portfolio guarantee (measure 4D) and the commitment to provide EUR 2 billion in additional capital (measure 4E). The Belgian authorities point out that these measures are rooted in the desire to secure further the transaction with BNPP, bearing in mind the relatively large cost for BNPP of the concessions granted to Fortis holding shareholders and the higher-than-anticipated loss in value Fortis Banque has suffered since the agreement was signed. The Belgian authorities stress that the signing of the agreement on 10 October 2008 was followed by the fall in the markets. The worsening of Fortis Banque's financial situation in the last quarter of 2008 can be explained, most notably, by the heightening of the financial crisis during that quarter and by the ongoing uncertainty surrounding Fortis Banque's absorption into the BNPP Group. The Belgian Government considers that some of the losses recently sustained could have been prevented if Fortis Banque could have been integrated into the BNPP Group in December 2008 (the original closing date). The volatile circumstances on the financial markets require a rapid reaction, which was impossible in Fortis Banque's case, as it is not part of a major banking group. The Belgian authorities also point out that Fortis Banque's share of the deposits market in Belgium went from [20-30%]* at the end of August 2008 to [20-30%] in December 2008[...].
- (34) The previous considerations demonstrate that all these measures were necessary to allow the sale of Fortis Banque to BNPP to go ahead, which was the only acceptable solution for safeguarding the bank's viability. The Belgian authorities provide additional arguments as evidence that the aid was restricted to the minimum necessary: with regard to the measures in favour of Fortis Banque, Belgium stresses that the 'in' portfolio guarantee will be activated only following losses of EUR 3.5 billion, a loss amount several times higher than the expected losses calculated by Société Générale. The risk for the State is therefore negligible. In terms of the measures in favour of Fortis holding, Belgium stresses that all State guarantees are secured by liens on Fortis holding

*Confidential information

assets (i.e. FIB shares) with a value greater than the commitments covered by the respective guarantees. As regards the option, Belgium points out that there is still a capital gain potential of 17% for the State (EUR 1.2 billion against an initial investment of EUR 7.2 billion). Furthermore, the market value of this option when additional clause 3 was concluded was a negligible amount per share (between EUR 0.2 and 0.25) compared with Fortis holding's loss of equity since the beginning of the financial crisis. Belgium also provided the Commission with details of Fortis holding's commitment to distribute to its shareholders, as far as the legal rules on dividends allow, the revenue resulting from this option¹⁶. In Belgium's view, this commitment should minimise distortions of competition, as Fortis holding will be able to retain only the funds generated by the option and will therefore be unable to use them for commercial operations.

(35) Finally, the Belgian authorities submitted to the Commission details of BNPP's commitment:

- not to acquire any credit institution or investment company on the Belgian or Luxembourg market and not to buy back all or part of FBN, with some well-defined and limited exceptions¹⁷.
- not to offer the most favourable interest rates on Internet accounts for a period of [...] years, provided that Fortis Banque's share of Belgian household deposit market is no lower than [20-30%]¹⁸ (prior to the decision of 3 December 2008, BNPP had made a similar commitment, but provided that the market share was greater than [20-30%])

¹⁶ [...]

¹⁷ BNP Paribas is prepared to undertake the following, with regard to both itself and its subsidiaries:

1. BNP Paribas is firmly committed, for a period of four years, not to acquire control of other credit institutions or investment companies (within the meaning of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments) that have their registered office, a subsidiary or a branch in Belgium or Luxembourg and have substantial operations there.

This commitment will not prevent BNP Paribas from acquiring control of credit establishments or investment companies outside Belgium or Luxembourg, provided that the acquisition:

- (i) excludes any subsidiaries or branches the institution in question may have in Belgium or Luxembourg and which have substantial operations there, or
- (ii) is accompanied by a commitment from BNP Paribas to transfer these subsidiaries or branches within a period of [...].

For the purposes of this commitment, the concept of control is as defined in Article 3 of Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

This commitment does not apply to the acquisition by BNP Paribas of the assets described in paragraph 3(i) below.

(...)

BNP Paribas reiterates its commitment of 30 November 2008, valid for four years, not to acquire any of the assets bought from Fortis by the Netherlands on 3 October 2008, with the exception of the following assets, regarding which BNP Paribas reserves the possibility to seek the prior authorisation of the Commission:

[...].

¹⁸ The precise commitment made by BNPP is as follows: 'Following the acquisition of Fortis Bank SA/NV, BNP Paribas undertakes to ensure that:

- Fortis Bank SA/NV does not, at any time during a period of [...] years from the adoption of the Commission's decision, offer as part of its Internet banking operations one of the [...] best returns available on household savings among the [...] largest operators in this market established in Belgium. This commitment not to be one of the top [...] applies to each of the following products individually:

[...].

The Commission will be provided with a ranking of the rates offered by the [...] largest operators at the end of each month of the preceding period with regard to each of the [...] aforementioned product categories (for each

3.2 Position of Luxembourg

- (36) Luxembourg acknowledges the Commission's conclusion in its decision of 3 December 2008 that the convertible loan of EUR 2.4 billion granted by the Luxembourg State to BGL constitutes State aid compatible with the common market.
- (37) Luxembourg notes that, in the same decision, the Commission considered that its sale of 16.57 % of BGL's shares to BNPP did not constitute State aid.
- (38) Luxembourg believes that, as the changes described above merely represent a slight extension of the transaction approved in the decision of 3 December, the Commission should be able to apply the same conclusions to the amended measures.

4 COMMISSION ASSESSMENT

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

- (39) 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, insofar as it affects trade between Member States, be incompatible with the common market.' As a result of this provision, for a measure to be classed as State aid, the following cumulative conditions must be met: 1) the measures in question confer a selective economic advantage; 2) this advantage is financed by State resources; 3) this advantage distorts or threatens to distort competition; and 4) this advantage affects trade between Member States¹⁹. The existence of aid is assessed in the light of the context applicable and the facts known on the date the measure was taken.²⁰
- (40) In the following sections, the Commission will examine each of the State measures individually. It notes that all the measures identified are clearly financed by State resources and selectively applied to Fortis holding, Fortis Banque or BGL. Fortis holding holds 75% of FIB and Fortis Insurance International. It is therefore part of a group active in the insurance sector and operating internationally. Furthermore, FIB's competitors on the Belgian market are subsidiaries of foreign groups. It appears, therefore, that the selective advantages the State has granted to Fortis holding distort competition and affect trade between Member States. Meanwhile Fortis Banque and its subsidiary BGL are competing on the Belgian and Luxembourg markets with subsidiaries of foreign banks. It accordingly appears that the State measures in favour of Fortis Banque and BGL distort competition and affect trade between Member States. Having established these facts, the Commission consequently considers the conditions of the presence of State resources, selectivity, distortion of competition and an impact

operator, taking account of the highest rate of those offered on new savings and of those offered on existing savings).

This commitment will cease to apply should the difference in the return offered by Fortis Bank SA/NV and by the operator with the best rate [...] be higher than [...] basis points. This commitment will also cease to apply if the Fortis Bank SA/NV market share drops below [20-30%] of the Belgian deposits market, until Fortis Bank SA/NV regains a share of the market equal to [20-30%].'

¹⁹ See, for instance, Case C-222/04 *Ministero dell'Economia e delle Finanze/Cassa di Risparmio* [2006] ECR I-289, paragraph 129.

²⁰ See, for instance, Case T-358/94 *Air France v Commission* [1996], paragraph 101.

on trade to have been met in the case of each of these measures. It will therefore concentrate on assessing whether an advantage exists.

- (41) The Commission notes that additional clause 3 introduces measures in the form of (i) a guarantee on Fortis Banque's impaired assets (measure 4D), (ii) financing of the purchase of these assets by RPI (measure 4A), or (iii) a guarantee on the financing of the purchase of these assets by RPI (measure 4B). In its Communication on the treatment of impaired assets in the Community banking sector ²¹ (hereinafter 'the Communication on impaired assets'), the Commission explained how it would assess the aid element of these measures. The communication specifies that the aid amount corresponds to the difference between the transfer value of the assets and the market price²².
- (42) Société Générale, the expert appointed by the Belgian authorities, calculated the market value of the portfolios in question on different dates. The Belgian authorities state that, in order to evaluate the transactions set out in additional clause 3, which was concluded at the beginning of March 2009, the market value of these assets at the end of January 2009 should be used. The Commission considers that a private market investor will always try to have the most up-to-date information at hand before deciding whether to buy or guarantee an asset. Before concluding additional clause 3 at the beginning of March, therefore, such an investor would have tried to find out or calculate the value of the assets at that particular time. The Commission will therefore assess all the transactions set out in additional clause 3 on the basis of the market value (and real economic value) of the assets at the end of February 2009.

4.1.1 Contribution to the financing of the RPI investment vehicle (measures 4A and 4B)

- (43) The Commission points out that, in the agreement of 10 October 2008, the Belgian State undertook to finance 24% RPI's capital and debt²³, the rest being financed by Fortis holding (66%) and BNPP (10%). Given that the Commission approved the State's 24% participation in RPI in its decision of 3 December 2008, it will not reassess its compatibility in this decision. Nevertheless, Annex 1 shows that if the aid element of this transaction were to be calculated using the method described in the Communication on impaired assets, it would be limited. RPI purchased structured credits with a nominal value of EUR 18 billion ('historic portfolio') at a price of EUR 10.33 billion (57.5%), while their market value at the end of September 2008²⁴ was only EUR [8-12] billion. This represents a latent capital loss of EUR [0-2] billion. This potential loss can be imputed to the capital of RPI, in which the SFPI had a 24% stake. There was therefore an element of aid to Fortis Banque in this transaction amounting to EUR [0-500] million.

²¹ OJ C 72, 26.3.2009, p.1

²² See the second footnote relating to paragraph 20(a) of the Communication on impaired assets.

²³ As already stated in footnote 12 to this decision, the Belgian State also undertook to provide a loan of EUR 3 billion for the special-purpose vehicle (SPV). However, this loan was equivalent to the super-senior tranche under the new arrangements, as it was subject to repayment before any financing granted by Fortis holding was repaid and was secured by Fortis holding's participation in the investment vehicle. This super-senior loan can be disregarded in the following analysis, as Annexes 1 and 2 show that, at the end of September 2008 and of February 2009, the market value of these assets was well above the level necessary for latent losses to be incurred by the RPI super-senior tranche.

²⁴ The transaction was concluded at the beginning of October 2008. The Commission is therefore applying the value of the assets at the end of September 2008.

- (44) Under additional clause 3 of 12 March 2009, the Belgian State will contribute to the financing of RPI in two ways: firstly, by taking a 43.5% share in the capital (measure 4A); and, secondly, by providing a guarantee on the whole sum of senior financing initially contributed by Fortis Banque (EUR 4.365 billion, measure 4B), which accounts for 90% of the senior tranche. In other words, the State is increasing its exposure with regard to the riskiest RPI tranches. The Commission notes that a private investor would never have agreed to such an increase in exposure. Indeed, when additional clause 3 was concluded, the market value of the structured credits bought by RPI under the agreement of October 2008 ('historic portfolio') had decreased significantly, so that RPI's latent loss came to EUR [1.5-4.5] billion²⁵. This amount used up the entire equity tranche of EUR 1.7 billion and part of the senior tranche (see Annex 2).
- (45) Where the Belgian State agrees to increase its exposure in place of Fortis holding, whose exposure decreases proportionally²⁶, this constitutes an advantage to Fortis holding. The latter has, in effect, seen a decline in its latent losses. More accurately, the increase of the State's share in the equity tranche from 24% to 43.5% in place of Fortis holding (measure 4A) prevents a latent loss for the latter of EUR 332 million (i.e. 19.5% of EUR 1.7 billion). The increase of the State's exposure from 24% to 90% in respect of the senior tranche (measure 4B) spares Fortis holding a latent loss of EUR [0.8-2.2 billion] (i.e. 66% of EUR [0.5-2.5] billion, which is the latent loss on the historic portfolio imputable to the senior tranche).
- (46) The Commission had already established in its decision of 3 December 2008 that both the injection of capital in Fortis Banque in return for a 49.9% stake (measure 1a) and the acquisition of the remaining 50% of Fortis Banque, together with participation in the SPV and the sale of 75% of Fortis Banque's capital to BNPP (measure 4), were State transactions that did not correspond to the behaviour of a private investor and that constituted State aid. As concluded above, measures 4A and 4B introduced by additional clause 3 altered the nature of the second transaction (measure 4) to present an even bigger risk for the State without any benefit in return. In other words, the State agrees to alter to its detriment a transaction that does not pass the 'private investor' test. This leads immediately to the conclusion that the State measures set out in additional clause 3 do not satisfy the 'private market investor' criteria.
- (47) In conclusion, measures 4A and 4B constitute State aid of which Fortis holding is the recipient.

²⁵ Following changes in the exchange rate, the purchase value of the historic portfolio rose, at that time, to EUR 10.728 billion. Without the repayments of EUR 1 021 billion, the purchase price therefore came to EUR 9 707 billion, compared with a market value (minus repayments) of EUR [5-9] billion. This resulted in a latent loss of EUR [1-4] billion.

²⁶ As indicated above, under the agreement of 10 October 2008, Fortis should have contributed 66% of RPI's equity and senior financing (if the Belgian State's loan of EUR 3 billion is considered to be super-senior). If the sale to BNPP did not go ahead, Fortis holding would have to bear 73.33% of this financing. Finally, if the sale to the Belgian State of the remaining 50% of Fortis Banque were cancelled, the contract of 29 September 2008 would apply, stipulating that Fortis holding should sustain all losses connected with Fortis Banque's structured credit portfolio.

4.1.2 *The RPI refill (measure 4C)*

- (48) If additional clause 3 merely restructured the financing of RPI by reducing Fortis holding's exposure and did not provide for the purchase by RPI of additional structured credits from Fortis Banque, there would be no direct advantage for Fortis Banque, as the sale to RPI of the historic structured credit portfolio was already in place under the agreement of 10 October 2008.
- (49) However, additional clause 3 also provided for the topping-up of RPI (measure 4C). In other words, RPI is to buy additional structured credits from Fortis Banque. These assets with a nominal value of EUR 2.47 billion are being bought at a price of EUR 2.04 billion, when their market value at the end of February 2009 was EUR [0.8-2] billion (the precise figures are given in Table 2, which appears later on in this decision). This refill therefore creates a latent loss of EUR [0.5-1] billion for RPI. Given that, as stated above, RPI's latent losses on the historic portfolio already exceed its equity tranche, the latent loss arising from the refill will be imputed to RPI's senior tranche, i.e. the tranche that the State agrees to guarantee at 90% (measure 4B). In other words, up to 90% of the latent loss resulting from the refill is borne by the State. The aid in favour of Fortis Banque therefore comes to EUR [500-700] million (see Annex 2). The Commission stresses that the agreement of 10 October 2008 did not provide for the purchase of these assets and that the State did not, therefore commit to financing a 24% share in these assets. That being the case, given that the agreement of 10 October 2008 did not provide for these assets to be financed by the State at a rate of 24%, the entire latent loss imputable to the State should be considered as fresh aid for Fortis Banque. In other words, this 24% of the latent loss cannot be deemed to have been covered by the decision of 3 December 2008. For the same reasons, there is no element of aid to Fortis holding, as the agreement of 10 October 2008 did not provide for the purchase of these additional structured credits. In other words, Fortis holding did not commit itself to a 66%-level of exposure with regard to these assets and, consequently, it cannot be concluded that the State's exposure replaces that of Fortis holding.
- (50) Belgium claims that this refill is not imputable to the Belgian authorities, as they do not control the majority of RPI's capital. The Commission notes that this refill is included in additional clause 3 signed by Belgium. Belgium could therefore have opposed this refill. This is all the more true considering that Belgium undertook in this additional clause to increase its exposure with regard to RPI's equity and senior tranches (measures 4A and 4B). The Belgian authorities' argument must therefore be disregarded.
- (51) The Commission concludes that measure 4C, in combination with measure 4B, constitutes aid to Fortis Banque, as it allows it to sell its impaired assets at higher than market value.

4.1.3 *The 'mezzanine' guarantee granted on Fortis Banque's 'in' portfolio (measure 4D)*

- (52) The second-loss guarantee on the structured credit portfolio retained by Fortis Banque will not be activated until losses of EUR 3.5 billion have been sustained. At the end of February 2009, the market value of the transferred portfolio was calculated to be EUR [15-20] billion against a nominal value of EUR 21 billion (the precise figures are given in Table 3, which appears later on in this decision). The latent capital loss

recorded at this date therefore consumes the entirety of the first loss tranche and is imputed to the State guarantee at EUR [0-1] billion (see Annex 3 to this decision). As a result, in line with the method set out in the Communication on impaired assets, the Commission estimates the sum of State aid to Fortis Banque to be EUR [250-750] million.

4.1.4 The State's commitment to subscribe to Tier 1 instruments issued by Fortis Banque if its Tier 1 ratio falls below the 9.2 % threshold (measure 4E)

(53) The Commission notes that the application of measure 4E in the form of recapitalisation is in the hands of Fortis Banque, which, if its Tier 1 ratio drops below 9.2%, may or may not decide to exercise its right to call on the Belgian State to proceed with such a transaction. The Commission also observes that the financial terms of the recapitalisation have not been determined in advance and will therefore have to be laid down when this measure is implemented. Finally, the Commission acknowledges Belgium's commitment to provide it with official notification of the recapitalisation exercise prior to any implementation of its commitment to Fortis Banque. For these reasons, the Commission will not present its opinion of this measure in this decision but will assess it at the time of its possible implementation.

4.1.5 The guarantee on the loan of EUR 1 billion granted by Fortis Banque to Fortis holding (measure 4F)

(54) Fortis Banque will grant a loan of EUR 1 billion to Fortis holding. The Belgian State has undertaken to guarantee this loan and will ask Fortis holding to pay a guarantee fee of 70 basis points. The guarantee is secured by a lien on 35% of FIB's shares. Based on FIB's intrinsic value of EUR 4.2 billion as at 31 December 2008, the value of the agreed lien comes to EUR 1.5 billion. Using a ratio of 0.7 times the intrinsic value, which is conservative compared with the ratios recorded on the market, a lien value of EUR 1 billion is obtained. The Commission therefore considers the loan to be secured to a high degree.

(55) On 11 March 2009, the day before additional clause 3 was signed, Fortis holding's five-year Credit Default Swap (CDS) was trading at around 281 basis points. Last month's average was 279 basis points. The Commission notes that the CDS price gives an indication of the market price for a guarantee on an unsecured loan. In the present case, the guarantee granted by the Belgian State is a highly secured loan. In general, highly secured guarantees and financing have market prices significantly lower than those of unsecured guarantees and financing. The Commission observes, for instance, that in its Communication on reference rates²⁷, it considers that banks ask for a margin (which includes the risk fee) of 400 basis points on poorly secured loans to borrowers rated BB like Fortis holding²⁸, while they ask for a margin of just 100 basis points on highly secured loans. The Commission notes that the Fortis CDS price trades at well below the 400 basis points indicated by the Communication on reference rates with regard to poorly secured loans to BB-rated borrowers. Therefore, using 100 basis points by extrapolation for a highly secured loan is a sensible approach. This level of prudence is justified by the significant guaranteed loan amount. Comparing the fee of 70 basis points paid by Fortis holding with the fee of 100 basis points, it appears that there is an

²⁷ OJ C 14, 19.01.2008, p.6

²⁸ Fortis holding is rated as follows: S&P(BB), Moody's (Baa2) and Fitch (BB)

annual aid component of 30 basis points. By applying this rate to the loan principal, the Commission calculates the aid amount at EUR 5.5 million.

4.1.6 *The guarantee on the interest payable by Fortis holding for the RPN (measure 4G)*

- (56) With regard to the guarantee on the interest payable by Fortis holding to Fortis Banque for the RPN described in footnote 13 to this decision, the State will receive an annual guarantee fee of 70 basis points. However, this will not apply to the amount guaranteed by the State – the interest – but to the principal (i.e. to the fair value of the RPN) on which the interest is calculated and which, itself, is not guaranteed (as it will never have to be repaid).
- (57) As indicated above, Fortis holding's CDS was trading at around 280 basis points when additional clause 3 was concluded. In order for the fee of 70 basis points received by the Belgian State on the fair value to represent 280 basis points of the guaranteed sum – the interest on the fair value – the interest rate must be 25%, which is several times higher than the current forward rates. This would indicate that the fee demanded by the Belgian State is sufficient.
- (58) Furthermore, the above calculation does not take account of the fact that the Belgian State receives collateral in the form of a lien on 10 to 20% of FIB shares. The precise amount of the shares pledged will be reviewed in the light of the annual interest amount owed by Fortis holding in respect of the RPN, multiplied by 15 (the number of reference years). Based on an intrinsic value of EUR 4.2 billion at the end of 2008, the shares placed in lien will represent a value of between EUR 420 million and 840 million.
- (59) At first glance, it appears, therefore, that the Belgian State's guarantee is adequately remunerated. However, it should be borne in mind that the amount on which interest is payable (the fair value of the RPN) could increase at a rapid rate. The Belgian authorities have simulated an extreme scenario whereby the fair value of the RPN increases rapidly to EUR 2 billion. In such a case, the value of the interest payable by Fortis holding would be EUR 1.7 billion. The possibility of a large increase in the amount on which interest guaranteed by the State is owing is a specific feature of the RPN that greatly heightens the risk for the Belgian State. The State could, after all, initially receive guarantee fees on low amounts and then, after a theoretical default by Fortis holding, have to pay interest to Fortis Banque on large amounts.
- (60) The sum of EUR 1.7 billion also shows that, in certain scenarios, the value of the shares placed in lien could be half that of the commitments guaranteed by the Belgian State.
- (61) For collateralisation levels of 50%, the Communication on reference rates indicates that the margin (which includes the risk fee) applicable to a loan to a BB-rated borrower should be 220 basis points. This figure is a conservative estimate²⁹, but such caution is justified by the significant amount of the guaranteed potential commitments. Applying 220 basis points to a sum of EUR 1.7 billion (the current value of the commitments guaranteed by the State) results in a figure of EUR 37 million.

²⁹ As previously stated, Fortis holding's CDS spread was trading at the time additional clause 3 was adopted below the 400 basis points indicated by the Communication on reference rates for poorly secured loans.

- (62) The Commission concludes that there is an aid element to the State guarantee, as a private investor would have been reluctant to guarantee commitments that were so difficult to quantify or to model. At the very least, the investor would have demanded the payment of an upfront fee and would not have been satisfied with a fee paid annually on a nominal value (i.e. the fair value of the RPN), which is currently a small amount but could suddenly increase dramatically. On the basis of the above calculations, the Commission estimates that the maximum aid amount included in the guarantee is EUR 37 million.
- (63) The Commission considers the recipient of this aid to be Fortis holding. It should be stressed that this guarantee was granted in order to encourage Fortis Banque to agree to abandon its demand for the termination of the RPN. The fact that the RPN has not been terminated enables Fortis holding to escape paying EUR 2.35 billion³⁰.

4.1.7 The entitlement to potential capital gain accorded to Fortis holding (measure 4H)

- (64) Belgium considers that the entitlement to any capital gain recorded by the SFPI on BNPP shares is a measure aimed at re-balancing the initial agreement in favour of Fortis holding shareholders, in view of the need to obtain their approval, as prescribed by the judgment of the Court of Appeal of 12 December 2008. The Commission notes that this capital gain option has been granted to Fortis holding ex post and without counterpart in the context of a transaction already deemed by the decision of 3 December 2008 to be State aid. Measure 4H caps the Belgian State's capital gain at EUR 1.2 billion, or 17 % of the agreed investment, which is a small amount relative to the risks incurred and the duration of the investment. The entitlement accorded by the Belgian State to Fortis holding cannot therefore be reconciled with the behaviour of a private market investor.
- (65) Measure 4H is imputable to the State. It results in a potential transfer of State resources (the potential capital gain on the BNPP shares it holds).
- (66) The value of the option, assuming normal volatility, was estimated at EUR 504 million³¹.
- (67) Fortis holding has undertaken to ensure that all revenue resulting from this option is paid back to its shareholders in the form of one or several exceptional dividends. This payout to shareholders will take place only if the legal conditions for issuing dividends are met (e.g. sufficient reserves are in place) and the agreement of shareholders is obtained.
- (68) The capital gain option granted by the Belgian Government therefore constitutes aid to Fortis holding, in that it allows Fortis holding additional resources (if the revenue resulting from the option is not paid out) and a higher stock exchange price, with shareholders receiving the future revenue derived from the option.

³⁰ The Commission notes that, even if Fortis Banque were considered to be the beneficiary of this measure, that would affect only marginally the ranking by size of aid in favour of Fortis Banque and Fortis holding, as the aid element is limited in comparison with the other aid measures. Its assessment of the compatibility of the measure would not, therefore, be altered.

³¹ Price indicated by Fortis holding in its circular to shareholders of 16 March 2009.

4.1.8 *Capital injection in BGL by Luxembourg through a convertible loan and the contribution in kind of EUR 100 million in return for BGL securities (measure 1b a).*

- (69) The developments that have occurred between October 2008 and April 2009 do not alter the Commission's view that measure 1b constitutes State aid, as stated in its decision of 3 December 2008. The transaction was agreed in the absence of any satisfactory offers from private investors. It provides BGL (formerly FBL) with a higher valuation than those proposed by the private investors who expressed an interest.
- (70) The terms of analysis applied to measure 1b in the Commission's decision of 3 December 2008 can be extended to the granting of an additional convertible loan of EUR 100 million and the contribution in kind to BGL in return for BGL securities. The context, purpose and conditions of the transaction certainly appear similar.
- (71) The transaction makes State resources available, confers a selective advantage on BGL and Fortis Banque by consolidating the former within the latter and consequently distorts competition on the markets on which BGL and Fortis Banque operate. It also affects trade between Member States. The maximum aid amount included in the measure is equal to the recapitalisation amount, namely EUR 100 million.

4.1.9 *Summary table*

- (72) The table below summarises the aid measures described above and indicates the beneficiary thereof.

TABLE 1	Aid amount (EUR)	Beneficiary
Measure 4A	332 million	Fortis holding
Measure 4B	[0.8-2.2 billion]	Fortis holding
Measure 4C (in conjunction with 4B)	[500-700] million	Fortis Banque
Measure 4D	[250-750] million	Fortis Banque
Measure 4E	-	-
Measure 4F	5.5 million	Fortis holding
Measure 4G	maximum 37 million	Fortis holding
Measure 4H	503 million	Fortis holding
Measure 1b a	maximum 100 million	BGL, which is part of Fortis Banque

4.1.10 Does additional clause 3 constitute aid to BNPP?

- (73) In its decision of 3 December 2008, the Commission concluded that no aid had been granted to BNPP. It must now determine whether that conclusion is still valid.
- (74) It is necessary, first of all, to examine whether the measures in favour of Fortis Banque do not also constitute State aid in favour of BNPP, in the sense that the purchase price fixed for Fortis Banque in the agreement of 10 October 2008 has not been upwardly revised. The Commission notes that the overall amount of aid received by Fortis Banque pursuant to additional clause³ is estimated at [0-1.5] billion, to which a maximum aid amount of EUR 100 million to its subsidiary, BGL, must be added. Nevertheless, it should be stressed that, in additional clause 3, Fortis Banque and BNPP agree that the RPN should not end prematurely. In so doing, Fortis Banque rules out the possibility of receiving a sum close to EUR 2.35 billion from Fortis holding. Certainly, the fact that the RPN continues to be in place allows Fortis Banque the prospect of receiving interest on the fair value of the RPN. However, as indicated in footnote 13, the fair value of the RPN is highly volatile and depends on the movements in the price of the CASHES securities and Fortis holding shares. In simple terms, withdrawing its call for the early termination of the RPN means a large cost for Fortis Banque. As stated in the assessment of the aid included in measure 4G, only in extreme circumstances would the interest received by Fortis Banque on the RPN be as high as EUR 1.7 billion. In view of the above, the Commission concludes that additional clause 3 means the provision of aid to Fortis Banque of a maximum of EUR [0.5-1.5] billion, which is counterbalanced by abandoning its request for the early closure of the RPN. This means that an upward revision of the sale price of Fortis Banque does not appear justified.
- (75) The Commission also notes that under the agreement of 10 October 2008, BNPP will pay the Fortis Banque purchase price by transferring to the Belgian State a fixed number of BNPP shares, the number having been decided on the basis of the stock exchange price at the time (EUR 68). In view of the noticeable drop in the price of BNPP shares on the stock exchange between this date and the conclusion of additional clause 3, the price that BNPP will pay has also decreased visibly. The Commission observes, however, that the fall in value of BNPP's shares during this period reflects a general decline in share value among Europe's banking groups³². It is therefore reasonable to assume that Fortis Banque's value has dropped by at least the same proportion during this period. After all, in addition to being affected, like all banks, by the rapid worsening of the international financial and economic crisis during the last quarter of 2008, the continuing deep uncertainty about the fate of Fortis Banque, owing to the various legal proceedings initiated in connection with its sale to BNPP³³, has undoubtedly dented its value. The ongoing uncertainty has therefore seen an erosion of its client base. The sum of deposits from retail customers has fallen visibly. Internally, the uncertainty has had a negative effect on staff. In summary, it is reasonable to assume that Fortis Banque's market value has fallen in the same proportions as the value of BNPP shares. The Commission concludes that there were no

³² Between closing on 9 October 2008 and closing on 11 March 2009 (the eve of the respective agreements), the BNPP price dropped by 59% while Stoxx600 Banks and Stoxx600 Banks euro area indexes fell by 56%.

³³ In this regard, it should be noted that Fortis Banque's fourth-quarter performance was also particularly bad, even excluding the impact of the sale of FBN, which was already known on 10 October 2008, when the agreement was signed.

grounds for the Belgian State to negotiate an upward revision of the number of shares received in return for the sale of Fortis Banque³⁴.

- (76) The Commission has therefore been unable to identify any State aid in favour of BNPP. It will not, therefore, assess whether or not such aid would have been compatible with the common market.

4.2 Legal basis for assessing the compatibility of the aid granted to Fortis Banque, BGL and Fortis holding

- (77) In section 6.2 of its decision of 3 December 2008, the Commission observed that, in the midst of the present international financial crisis, the collapse of Fortis Banque, the largest bank in Belgium and one of the largest banks in Luxembourg, would undoubtedly cause a serious disturbance to the Belgian and Luxembourg economies.

- (78) The persistence of deep tensions on the financial markets, resulting in an historically high level of volatility, strong aversion to risk among investors and disruptions on the interbank and credit markets, all of which characterised the situation in the financial sector in October 2008, continued to be felt in the first quarter of 2009. Furthermore, none of the developments that occurred on the Belgian and Luxembourg markets between October 2008 and March 2009 with regard to the respective competitiveness of Fortis Banque and BGL leads the Commission to question the risk of serious disturbances in Belgium and Luxembourg's economies following the collapse of Fortis Bank and BGL as identified in the decision of 3 December 2008.

- (79) The Commission notes, however, that much of the aid included in additional clause 3 benefits Fortis holding and not Fortis Banque. It appears that the aid provided for in additional clause 3 and in the context of the additional recapitalisation of BGL does not have the aim or effect of saving Fortis Banque at the present time. In particular, at the precise moment additional clause 3 was concluded, Fortis Banque was not on the verge of bankruptcy. It must therefore be determined whether or not Article 87(3)(b) is applicable to this aid.

- (80) It appears in fact that all the aid considered has the aim and effect of ensuring that the sale of Fortis Banque to BNPP goes ahead as planned in the agreement of 10 October 2008 and is not abandoned.

- (81) The Commission stresses that, although the closing of the sale to BNPP was expected to take place in the second half of December 2008, the judgment of the Brussels Court of Appeal of 12 December 2008 interrupted this process in an unforeseen manner. The judgment challenged the validity of this transaction, in particular for as long as it remained without the approval of Fortis holding shareholders. In view of this unexpected situation, the Belgian Government had two options:

- Attempting to safeguard the agreement of 10 October 2008: altering the terms in Fortis holding's favour with a view to obtaining the approval of its shareholders at a general meeting, which, according to the Court of Appeal ruling, was to take place by 16 February 2009. Given that the items on the agenda of the Fortis holding general

³⁴ The Commission also observes that no other bank spontaneously expressed an interest in acquiring Fortis Banque during this period.

meeting must be published in advance, this left a month and a half at most to reach an agreement if this were the path chosen.

- Allowing the contract with BNPP to expire – an expiry date of 28 February 2009 had been set – while continuing to explore other channels, such as (i) attempting to find a new buyer or (ii) deciding not to sell Fortis Banque and trying to make it more viable as a stand-alone institution. In this regard, it should be pointed out that the closing of the sale of the second 50% of Fortis Banque to the Belgian State took place with immediate effect in October 2008, meaning that, at the time of the judgment of 12 December 2008, the Belgian State officially owned 100% of Fortis Banque.
- (82) The Commission notes that the events of the end of September and beginning of October 2008 demonstrated that [...] the liquidity amounts that the National Bank of Belgium (BNB) must lend [...] are so high as to represent a clear risk to Belgium's financial stability [...]. As stated in the decision of 3 December 2008, at the height of the crisis, the overall amount lent to Fortis Banque by the BNB came to almost EUR [...] billion, which is more than [...] of Belgium's GDP. Moreover, it should be stressed that since October 2008, Belgium's finances have been weakened by the extensive measures taken to assist Dexia, Ethias and KBC. A repeat of the crisis of the end of September/beginning of October would have destabilised the country's economy further still. This increased risk was reflected in the Belgian State's CDS levels, which, in the days and weeks following the conclusion of additional clause 3, reached unprecedented highs.
- (83) The sale of FBN on 3 October 2008 only partially reduced Fortis Banque's liquidity shortfall. In addition, following the sale of FBN, Fortis Banque still had a balance sheet total of EUR 745 billion. In other words, the mere fact that FBN had been sold did not rule out a further crisis.
- (84) The Commission notes that the sale to BNPP, if it goes ahead, will secure Fortis Banque within a major banking group that is prudent and stable³⁵ and which, moreover, began immediately to provide liquidity of several EUR [...] billion in October 2008. This group also has the management resources needed to restore Fortis Banque's viability. This sale would therefore significantly reduce the risk that a crisis similar to one of late September/early October 2008 might recur.
- (85) By contrast, the Commission observes that finding a new buyer was a highly hypothetical situation given the scant interest shown by the market when the Belgian authorities began to search for one (see paragraphs 57 and 58 of the decision of 3 December 2008). Furthermore, the sale would probably have been suspended by a Belgian court for the same reason that prompted the Court of Appeal to freeze the sale to BNPP. A legal risk of this kind would have deterred the majority of hypothetical buyers. With regard to the stand-alone scenario, the Commission notes that it presented

³⁵ In terms of BNPP's stability, the Commission notes that developments since its decision of 3 December 2008 have confirmed its diagnosis of the group's ability to ensure the long-term viability of Fortis Banque. In 2008, BNPP registered a net banking income of EUR 27.4 billion and a net profit of EUR 3.1 billion. Its Tier 1 ratio was 8.4 % on 1 January 2009. Within its peer group, which includes UBS, Crédit Suisse, Deutsche Bank, RBS, Unicredit, Santander, Société Générale, Rabobank, Intesa San Paolo and Crédit Agricole), BNPP continues to enjoy the lowest spread on five-year senior CDS. BNPP remains one of the best-rated banks in the world. Accordingly, at the time of this decision, the group was rated (long-term rating) AA by S&P and Fitch and Aa1 by Moody's.

numerous uncertainties. Firstly, as indicated in paragraph 16 of the decision of 3 December 2008, the markets had lost confidence in the management of Fortis holding's and Fortis Banque. This was aggravated by the reassuring press release published on 26 September 2008, when the management was aware of the catastrophic situation, was looking for a buyer and was seeking assistance from the Government. If they were to continue to operate as stand-alone companies, Belgium would have had to find a credible management team able to steer the country's largest bank through the worst financial crisis of the post-war era. There was no certainty that it would have been successful in such a quest. Furthermore, it would have been necessary to regain the confidence of clients, who no longer trusted in the bank and the 'Fortis Banque' name. All these risks and uncertainties were amplified by the international financial and economic crisis.

- (86) On the basis of the above analysis, it appears that the stand-alone option or that of finding another buyer involved a risk that the disastrous events of the end of September could be repeated, meaning a much greater threat to Belgium's financial stability than the one inherent in the option of striving to reach an agreement with BNPP³⁶.
- (87) As stated above, the general meeting of Fortis holding shareholders had to meet before 16 February 2009. In the event, the meeting was held on 11 February 2009. At this meeting, shareholders rejected by a very small majority the transactions agreed at the beginning of October 2008.
- (88) At that point, the Belgian Government faced a dilemma similar to the one described above: amending the agreement of 10 October 2008 in order to comply with Belgian law and obtain the approval of Fortis holding shareholders so that the sale to BNPP could go ahead, or opting for a different solution. The arguments set out above also apply to this dilemma.
- (89) The Commission again observes that, if the chosen option were to keep open the possibility of a sale to BNPP, time was not unlimited, as the agreement was due to expire on 28 February 2009. BNPP would not have agreed to extend the deadline unless there was a genuine chance that the transaction would be approved by Fortis holding shareholders. In the absence of such a firm prospect, BNPP would have allowed the agreement to expire and withdrawn from the negotiating table.
- (90) The Commission concludes the above analysis by observing that the Belgian State's decision, following the judgment of the Brussels Court of Appeal of 12 December 2008, to favour the sale of 75% of Fortis Banque to BNPP, makes it possible, compared with other possible scenarios, to minimise the risk of another crisis for the bank such as the one experienced at the end of September/beginning of October 2008, and therefore to minimise the risk of a real threat to Belgium's financial stability. Belgium is even less able to run the risk of having to provide large-scale support for Fortis Banque now that its financial situation has been rendered more fragile following the deepening of the crisis and its interventions in favour of Dexia, KBC and Ethias. The Commission therefore considers that the aid granted to ensure that the sale of 75% of Fortis Banque's

³⁶ Moreover, the stand-alone option meant that the State would automatically have to provide Fortis Banque with large quantities of aid in cash, in place of that thus far granted by BNPP. In addition, without the sale of part of FIB to BNPP, Fortis holding would probably not have been able to contribute to the financing of RPI. As well as risking a repeat of the acute crisis of the end of September/beginning of October, this scenario would have involved a need to grant large quantities of aid immediately and for an indefinite amount of time.

capital to BNPP goes ahead can be assessed on the basis of Article 87(3)(b) of the Treaty.

- (91) As described below, this aid falls into two categories: (1) new aid in favour of Fortis holding with a view to ensuring that its shareholders approve the agreement of 10 October 2008 and the sale to BNPP, as required under Belgian legislation, and (2) aid in favour of Fortis Banque to compensate the concessions it must make to Fortis holding, which aims to ensure that BNPP remains interested in buying Fortis Banque under the terms of the agreement of 10 October 2008.

4.3 Compatibility of the aid in favour of Fortis holding (measures 4A, 4B, 4F, 4G and 4H) on the basis of Article 87(3)(b) of the EC Treaty

- (92) In 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 crisis of 13 October 2008³⁷ (hereinafter the ‘Communication on the financial crisis’), the Commission set out those considerations it felt were particularly relevant to the assessment of the compatibility within the meaning of Article 87(3)(b) of the EC Treaty of aid for the banking sector within the context of the present crisis. According to paragraph 15 of this communication, for a measure to be compatible pursuant to Article 87(3)(b) of the EC Treaty, it must satisfy cumulatively the following three conditions, which reflect the general principles underlying the rules on State aid:

- First of all, the aid must be well targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy.
- It must be proportionate to the challenge faced, not going beyond what is required to attain this effect.
- Finally, it must be designed in such a way as to minimise negative spill-over effects on competitors, other sectors and other Member States. This distortion of competition must be kept to the minimum necessary to achieve the desired effect.

- (93) The Commission notes that Fortis holding is not a bank and no longer has any banking operations. However, it considers that these three conditions are applicable to the aid for Fortis holding, firstly because these are general principles that apply to all aid, even outside the banking sector, and, secondly, because the measures taken in favour of Fortis holding are indirectly aimed at ensuring the viability of a bank in the context of the current financial crisis. It will therefore assess the aid granted to Fortis holding on the basis of these three conditions.

- (94) On the other hand, the Commission considers that the Communication on impaired assets does not apply to the aid in favour of Fortis holding identified in this decision, as it consists of increasing the State’s exposure to the financing of assets, the purchase of which from Fortis Banque had already been settled in the agreement of 10 October 2008, as approved by the Commission on 3 December 2008. The new aid granted to Fortis holding does not allow RPI to buy additional assets from Fortis Banque.

³⁷ OJ C 270, 25.10.2008, p.8

4.3.1 *Well-targeted aid*

(95) As concluded above, the aid granted to Fortis holding should be assessed in the light of legal constraints very specific to the transaction: as a consequence of the judgment of the Brussels Court of Appeal of 12 December 2008, it is the Fortis holding shareholders who determine whether the sale of Fortis Banque to BNPP by the SFPI goes ahead. The Commission notes that all aid in favour of Fortis holding was granted under additional clause 3 amending the agreement of 10 October 2008 and was aimed exclusively at obtaining the agreement of its shareholders to the sale of Fortis Banque to BNPP. As explained above, this sale was the best option for preventing a fresh crisis for Fortis Banque and, accordingly, a serious disturbance to the Belgian economy. The Commission therefore considers that the aid to Fortis holding is well targeted.

4.3.2 *Aid that is proportionate and kept to the minimum required*

(96) Belgium stresses that the aid in favour of Fortis holding provided for by additional clause 3 was the minimum required for the conclusion of the agreement leading to the sale of Fortis Banque to BNPP.

(97) The Commission notes that Fortis holding's shareholders rejected the terms of the transaction of 11 February 2009 in spite of changes made in additional clause¹ in Fortis holding's favour. This rejection blocked the sale of Fortis Banque to BNPP. The Commission observes that, compared with additional clause¹, additional clause³ contains only limited concessions to Fortis holding. It is therefore reasonable to assume that the aid included in additional clause 3 was the minimum necessary to win over Fortis holding's shareholders.

(98) The Commission also notes that, with regard to the guarantees on the loan to Fortis holding and Fortis holding's obligations arising from the RPN, the Belgian State has asked for guarantees in the form of a lien on a large number of FIB shares. In addition, it has demanded a significant guarantee fee (this also applies to the guarantee on the senior financing of RPI). Finally, the loan has a short average term, as half the principal should be repaid after a year, and the other half gradually over the next three years. These facts serve to keep the aid element in favour of Fortis holding to a minimum.

(99) The Commission therefore concludes that the aid to Fortis holding is proportionate and restricted to the minimum necessary.

4.3.3 *Minimisation of distortions of competition*

(100) The Commission observes that Fortis holding used to control a large financial group. Following the difficulties described in section 3.3 of the decision of 3 December 2008, the group had to part with the vast majority of its assets. Under additional clause 3, Fortis holding will control only FIB and Fortis Insurance International. This drastic cutback in the market presence of the group composed of Fortis holding and its subsidiaries is a factor limiting the risk that aid in favour of Fortis holding will cause a large distortion of competition.

(101) Furthermore, all these events have seriously weakened the group's financial stability, with it no longer having an investment-grade rating, as it is now rated BB³⁸. This

³⁸ See footnote 28.

financial fragility means that it has little or no available resources for implementing aggressive internal or external growth policies.

- (102) The Commission also observes, as stated previously, that Fortis holding will have to pay a significant fee and to provide sizeable pledges for the State guarantees in its favour. Furthermore, the loan guaranteed by the Belgian State is of limited duration. These facts have the effect of restricting the distortions of competition. As regards the option, Fortis holding undertakes, where it derives revenue from this option (either by monetizing it or by exercising it), to offer to pay this revenue to shareholders in the form of a dividend, provided that the legal conditions for the payment of a dividend are in place (e.g. the availability of sufficient resources). This commitment will ensure that, if the option generates income for Fortis holding, it will be rapidly distributed to shareholders or used to rebuild reserves, and will not allow the financing of behaviour liable to distort competition.
- (103) The Commission notes that, in view of the fact that Fortis holding was the shareholder of Fortis Banque, its own shareholders were indirectly Fortis Banque shareholders. In a market economy, it is usual for shareholders to bear the losses resulting from the high-risk conduct of the bank in which they hold capital.
- (104) The Commission observes that there are more than two billion Fortis holding shares. The sum of the aid granted to Fortis holding is less than EUR 2 billion. In other words, the aid amount per share is less than one euro. The stock exchange value of a Fortis holding share was EUR 22.5 at the end of 2005, EUR 27 at the end of 2006 and EUR 18 at the end of 2007 and has fallen over the last few months to under EUR 2. It is clear that Fortis holding shareholders have suffered an extremely large financial loss, which the aid will only partially compensate. The Commission concludes that the aid granted to Fortis holding is probably insufficient to create or aggravate a problem of moral hazard and, if such were the case, it would be of limited scope and proportionate to the requirement to obtain the shareholders' approval.
- (105) The Commission concludes that the aid to Fortis holding does not create disproportionate distortions of competition.

4.3.4 Conclusion on the aid granted to Fortis holding

- (106) In view of the above, the Commission is of the opinion that the aid in favour of Fortis holding is compatible with the common market pursuant to Article 87(3)(b).

4.4 Compatibility of the aid in favour of Fortis Banque and BGL (measures 4C, 4D and 1b a)

4.4.1 Compatibility of measures 4C and 4D with the Communication on impaired assets

- (107) The Commission notes that two of the measures applied to assist Fortis Banque (measures 4C and 4D) constitute measures in favour of impaired assets. They must therefore be examined on the basis of the conditions set out in the Communication on impaired assets.

(108) The table below illustrates the main characteristics of the two measures, as calculated by Société Générale:

TABLE 2: Refill portfolio characteristics (measure 4C) at the end of February 2009					
In EUR millions	Nominal value	Market value	Transfer price	Expected losses (baseline scenario)	Real economic value (nominal less expected losses)
CDO	117.5	[50-150]	102.1	[50-100]	[20-60]
EUR ABS	33.2	[0-75]	29.8	[0-10]	[15-45]
EUR RMBS	25.6	[0-20]	21.4	[5-10]	[15-25]
Other ABS	46.7	[10-50]	42.5	[0-20]	[25-75]
US ABS	151.5	[50-150]	134.0	[0-10]	[100-151,5]
US RMBS	2100.3	[800-1200]	1716.7	[50-150]	[1950-2050]
Total	2474.8	[850-1650]	2046.4	[150-200]	[2200-2400]

TABLE 3: 'In' portfolio characteristics (measure 4D) at the end of February 2009				
In EUR millions	Nominal value	Market value	Expected losses (baseline scenario)	Real economic value (nominal less expected losses)
EUR ABS	658.5	[300-800]	[0-10]	[300-1000]
EUR CDO	1752.3	[1000-1500]	[50-150]	[1500-1750]
EUR CMBS	942.9	[600-800]	[10-30]	[840-940]
EUR RMBS	4354,2	[3000-4000]	[50-100]	[4250-4350]
US ABS	1224.8	[500-1500]	[0-100]	[100-1500]
US CDO	2578.6	[1500-2000]	[125-175]	[2380-2480]
US RMBS	1856.5	[500-1500]	[25-75]	[1750-1850]
US Agency	763.4	[500-1000]	[0-20]	[665-765]
US Student loan	3639.8	[2000-4000]	[0-20]	[3540-3640]
US SBA	119.9	[50-150]	[0-20]	[75-150]
Scaldis	3076.7	[2000-4000]	[0-20]	[2500-3500]
Total	20967.6	[13000-20000]	[200-600]	[19700-20800]

(109) With regard to the eligibility of the assets, the Commission notes that both portfolios meet the criteria set out in section 5.4 of the Communication on impaired assets. In fact, they contain exclusively structured credits, which correspondingly fall under the asset category defined in paragraph 32 of the communication.

(110) In terms of evaluating the assets, the Commission observes that Belgium has satisfied the criteria laid down in paragraph 20(a) of the communication. As stated above, the Belgian authorities called on Société Générale to value the assets in question and Société Générale's method was submitted to the CBFA, which did not identify any flaws in it.

(111) The Commission has assessed whether the method adopted by Société Générale for evaluating the market value and real economic value met the requirements laid down in Annex IV to the Communication on impaired assets, and, in particular, whether (i) it was based as far as possible on observable market inputs; (ii) it was based on realistic and prudent assumptions about future cash flows; and (iii) it was based on rigorous stress-testing against a scenario of protracted global recession.

(112) This analysis of the method used by Société Générale to evaluate the assets was carried out with the technical assistance of experts from the European Central Bank. It was conducted for each of the asset categories and subcategories relevant to the portfolios under scrutiny. Based on the results of this analysis, the Commission believes that the work carried out by Société Générale satisfies the requirements in place:

- With regard to the calculation of the market value of the assets, the Commission notes that the methodology applied is reliable and appropriate:
 - (a) Market quotations from counterparties (market makers) reflecting the price levels at which a transaction could take place (tradable levels) were used where possible, alongside data control analysis performed with the help of established indexes (e.g. ABX, CMBX, LevX, LCDX) and/or indexes drawn up and published by third-party credit research departments, on the basis of samples of assets presenting the same underlying risk (asset type, seniority, rating etc.);
 - (b) Generic prices, derived from market quotations or indexes representative of a sample of similar assets (see above), were used where the market quotations for the assets in question were not held to be fully reliable (e.g. because, although a price was mentioned, it was not possible for the transaction to go ahead);
 - (c) A 'look-through' approach, which consists of looking at the market value of the assets underlying the structured product (using an approach similar to that described in paragraphs (a) and (b) above) and deriving the value after examining the level of subordination of the structured product in the capital structure (cash waterfall), was taken for some complex structured assets for which it was not possible to obtain appropriate and reliable market quotations. Some consistency checks were also carried out.
- With regard to the methodology and hypotheses used to evaluate the real economic value and losses, the consultant's work was also positively assessed by the Commission, which therefore notes that all the hypotheses applied were conservative in nature:
 - (a) For many assets, the constant default rates (CDRs) were subject to cautious projections on the basis of both historical and local trends in the performance of these assets, at levels deemed to be conservative, and with the help of roll rates also deemed to be cautious in comparison with some of the research documents publicly available;
 - (b) Once the stark deterioration in the credit quality of the portfolios has been taken into account, the default rates are generally assumed to be constant throughout the portfolio's residual period, disregarding any potential improvement following the end of the crisis period;
 - (c) Strict, or even extremely strict, recovery rates have been forecast, reflecting the high liquidation and recovery costs;
 - (d) The scenarios concerning early repayment are also conservative and in line with both the latest trends observed and the hypotheses held by other banks;

- (e) In terms of corporate exposure, a default probability level and recovery rate have been forecast that are far more pessimistic than the projections based on historical data (even taking account of the 1929 crisis).
- It should be stressed that all the calculations were made without updating the anticipated losses, which means that the current value of the latter has been considerably overestimated and, accordingly, the real economic value underestimated;
- (113) The Commission stresses that, within the structured credit portfolio of EUR 41 billion held by Fortis Banque, the riskiest assets were sold to RPI under the agreement of 10 October 2008 (at a price of 57.5% of the nominal value). This explains why the two portfolios at issue in additional clause 3 are of a very good quality. This is particularly true of the 'in' portfolio. Almost all the assets included in this portfolio have a high degree of seniority and 70% of them still enjoy a rating of AAA. This explains why such low losses are expected³⁹.
- (114) As regards the sharing of costs connected with the impaired assets, paragraphs 40 and 41 of the Communication on impaired assets specify that the transfer value should not normally exceed the assets' real economic value. In the present case, Table 2 shows that RPI bought the assets at a price significantly lower than their real economic value (in both a baseline and a stress scenario). Furthermore, it should be pointed out that BNPP retains exposure to the SPV, at 12% for the equity tranche and 10% for the senior tranche. As regards the 'in' portfolio, the expected losses are only EUR [250-750] million, while losses of up to EUR 3.5 billion will be borne by Fortis Banque. In other words, the transfer price is EUR 17.46 billion, whereas the real economic value is EUR [19-21] billion. The Commission notes, therefore, that Fortis Banque (and its future shareholder BNPP) carry a large share of the costs relating to the impaired assets included in the two portfolios in question. The fact that the transfer price is substantially lower than the real economic value is positive. It increases the burden for the bank and reduces the loss probability for the State. The costs are therefore adequately shared.
- (115) Section II of Annex 4 to the Communication on impaired assets stipulates that the State must secure adequate remuneration for its intervention. The communication states that '*Such remuneration may be provided by setting the transfer price of assets at below the 'real economic value' to a sufficient extent so as to provide for adequate compensation for the risk in the form of a commensurate upside*'. With regard to the restocking of RPI, the Commission notes that the assets were bought at a price [5-15]% lower than their real economic value. Under Société Générale's pessimistic scenario, the losses will rise from EUR [100-300] million to EUR [200-400] million. In that case, the purchase price of the assets remains [5-10]% lower than their 'stressed' real economic value. The Commission therefore considers that the assets' transfer price is sufficiently short of the real economic value to allow for remuneration that is proportionate to the risk. In terms of the 'in' portfolio, Société Générale's pessimistic outlook provides for losses to increase to EUR [0.5-1.5] billion. This is still several times lower than necessary to reach the loss level of EUR 3.5 billion beyond which the State will compensate Fortis

³⁹ Looking, for example, at the US RMBS Alt-A assets, which are present in both the 'in' portfolio and the historic portfolio sold to RPI: in the 'in' portfolio, almost all the positions were 'super senior AAA', while in the historic portfolio, 52% were 'super senior AAA', 46% were 'junior AAA' (i.e. 'senior' or 'senior support') and 2% were 'mezzanine'. Similarly, the proportion of 'vintage' 2006 or 2007 positions was 38% in the 'in' portfolio, and accounted for around 60% in the historic portfolio sold to RPI.

Banque. As a result, the annual fee of [0.5-1]% is sufficient with regard to the risk undertaken⁴⁰. The Commission concludes that the State's remuneration is in line with the Communication on impaired assets.

(116) Paragraph 20(b) of the communication sets out a requirement for a full review of the bank's activities and balance sheet, with a view to assessing its viability prospects. In the same way, section 6 of the communication specifies that the granting of measures in favour of impaired assets should be subject to the submission of a restructuring plan ensuring the restoration of viability and the adoption of the measures necessary to remedy the distortions of competition. In its decision of 3 December 2008, the Commission assessed Fortis Banque's viability, in particular with regard to its sale to BNPP. In the mean time, this sale has not taken place, for the reasons outlined earlier. The Commission will therefore set about reassessing in this decision the bank's viability prospects and the adequacy of the measures to remedy the distortions of competition. The results of this reassessment will show that both conditions have been met.

(117) The Commission therefore considers that measures 4C and 4D meet the requirements of the Communication on impaired assets.

4.4.2 Compatibility of measure 1b a

(118) The third measure (measure 1b a) is merely an increase by EUR 100 million of a measure equating to EUR 2.4 billion authorised by the Commission in its decision of 3 December 2008. It is therefore simply a question of assessing whether this increase is necessary and kept to the minimum necessary and whether or not it creates excessive distortions of competition. All the aid to Fortis Banque is assessed in this light in the next section.

4.4.3 Compatibility of all aid in favour of Fortis Banque with the restructuring requirements under Article 87(3)(b)

Restoration of long-term viability

(119) With regard to the restoration of long-term viability, the Commission explained in section 6.3.1 of its decision of 3 December 2008 that all those measures already implemented (sale of FBN) and those envisaged (transfer of structured credits to the investment vehicle and the sale of the bank to BNPP) satisfactorily addressed the sources of past difficulties and made it possible to restore long-term viability.

(120) The Commission believes that there is no cause to question this assessment. Additional clause³ retains or steps up the measures envisaged, which have not yet been able to go ahead. On the one hand, the additional clause provides for two new measures in favour of the impaired assets. On the other, it aims to allow the sale to BNPP to take place. As stated above (see footnote 35), the developments in the situation since December have done nothing to alter the conclusion that BNPP remains a large and stable bank able to support Fortis Banque successfully in the restoration of its long-term viability.

⁴⁰ The Commission also notes in this regard that the State guarantee will not result in a reduction of Fortis Banque's risk-weighted assets, as it is a second-loss guarantee.

Necessity of the aid and restriction to the minimum necessary

- (121) On 3 December 2008, the Commission authorised the aid included in measure 4, i.e. the purchase of the remaining half of Fortis Banque's capital, participation in the financing of the investment vehicle, and the sale of 75% of Fortis Banque to BNPP. As stated above, the Brussels Appeal Court ruled, in its judgment of 12 December 2008, that the management of Fortis holding should have sought the approval of Fortis holding shareholders for the sale of the second half of Fortis Banque's capital. In other words, the decision of 3 December 2008 was based on a transaction that was illegal under Belgian law unless it was approved by Fortis holding shareholders. With a view to securing this approval and making the transaction legal, it was necessary to alter the terms of the agreement of 10 October in Fortis holding's favour. To this end, Fortis Banque abandoned its demand for an early end to the RPN and, accordingly, the prospect of receiving a sum of almost EUR 2.35 billion from Fortis holding. This decision made the transaction more costly for Fortis Banque and therefore less attractive to BNPP. This meant a risk that BNPP would pull out of the transaction.
- (122) As pointed out above, ensuring that the sale to BNPP went ahead was the only option that made it possible to minimise the genuine risk of a serious disturbance in the Belgian economy.
- (123) In this context, the new aid in favour of Fortis Banque and its subsidiary BGL, which amounts to EUR [1-1.5] billion, mitigates the worsening of the terms of the agreement of 10 October 2008 for Fortis Banque. In this sense, the aid is restricted to the minimum necessary to persuade BNPP not to withdraw from the transaction.
- (124) The aid also represents a very limited amount in comparison with the tens of billions the BNPP has lent to Fortis holding since 6 October 2008. Moreover, with regard to the measures in favour of the impaired assets, it has been shown above that Fortis Banque is shouldering an adequate share of the costs relating to these assets.

Prevention of distortions of competition

- (125) The Commission notes that the additional aid in favour of Fortis Banque gives the latter an advantage and therefore distorts competition.
- (126) The Commission observes, however, that the sum of the additional aid—EUR [1-1.5] billion—is limited with regard to the aid already approved, which included EUR 7.1 billion in the form of recapitalisation, and is restricted to the minimum necessary to achieve the goal in question. This aid amount is also insignificant bearing in mind Fortis Banque's size: on 28 February 2009, Fortis Banque's balance sheet total was EUR 572 billion and the risk-weighted assets EUR 247 billion.
- (127) As stated in paragraph 93 of the decision of 3 December 2008, Fortis Banque has sold profitable operations accounting for 47% of its staff and 35% of its retail-client branches. The Commission stresses that this represents a substantial reduction in Fortis Banque's size and will restrict distortions of competition. After all, Fortis Banque has sold all its Netherlands operations, a market in which it had hoped to expand its share by acquiring parts of ABN Amro. The Commission notes that BNPP has undertaken not to purchase the Dutch assets sold by Fortis Banque, with certain specific exceptions. This is, therefore, a lasting disinvestment.

- (128) The Commission notes with satisfaction that, on the Belgian market, BNPP has made a firm commitment, valid for four years, not to acquire or take control of other credit institutions or investment companies that have their registered office or a subsidiary or branch in Belgium or Luxembourg and have substantial operations there, or, where the entity bought or controlled has subsidiaries or branches in Belgium or Luxembourg, to sell them. This commitment ensures that the aid received will not be used to buy out competitors in a market in which Fortis Banque is already dominant.
- (129) The Commission also notes that BNPP has strengthened its commitment set out in paragraph 94 of the decision of 3 December 2008. While the previous decision stated that the restriction on the interest rates offered on Internet accounts would begin only once Fortis Banque had a [20-30%] share of the deposits market, BNPP now undertakes to apply the restriction once Fortis Banque's market share reaches [20-27.5%]. This means that if Fortis Banque regains much of the market share lost since 2008 in the Belgian household deposits market (as stated earlier, its market share went from [20-30%] at the end of August 2008 to [20-30%] in December the same year), it will not be able to apply the highest rates in the market to Internet-only accounts, which is a growing market segment. This means that Fortis Banque will be unable to use the aid it receives to finance an interest rate higher than that of its competitors.
- (130) In summary, the Commission observes that the additional aid of EUR [1-1.5] billion is limited in comparison with the aid approved on 3 December 2008 and in relation to the size of Fortis Banque. Furthermore, Fortis Banque has cut back its presence on the market significantly by selling its Dutch operations. Finally, BNP Paribas has made additional commitments that restrict potential distortions of competition on the Belgian and Luxembourg market.
- (131) The Commission concludes, in the light of the above, that the additional aid for Fortis Banque will not generate an excessive distortion of competition.

Conclusion on the aid to Fortis Banque

- (132) On the basis of the above, the Commission concludes that the aid in favour of Fortis Banque meets the conditions for compatibility set out in Article 87(3)(b).

5 CONCLUSION

The Commission has therefore decided that:

- the increased participation by the Belgian State in RPI's capital (measure 4A);
- the guarantee granted on the 90% of RPI's senior tranche initially underwritten by Fortis Banque (measure 4B);
- the purchase of additional impaired assets by RPI (measure 4C);
- the mezzanine guarantee accorded by the State on Fortis Banque's 'in' portfolio (measure 4D);
- the guarantee on the loan of EUR 1 billion granted to Fortis holding by Fortis Banque (measure 4F);

- the guarantee on Fortis holding's obligations to Fortis Banque arising from the RPN (measure 4G)
- the option granted to Fortis holding with regard to the capital gain on BNPP shares (measure 4H)
- the increase of BGL's capital by EUR 100 million (measure 1b a)

constitute State aid compatible with the common market.

With regard to the Belgian State's commitment to subscribe to any Tier 1 instruments issued by Fortis Banque if its Tier 1 ratio falls below a threshold of 9.2% (measure 4E), the Commission acknowledges Belgium's commitment to notify it officially, if necessary, of the implementation of this commitment. It has not, therefore, assessed the existence or compatibility of the aid that would apply under these circumstances.

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:

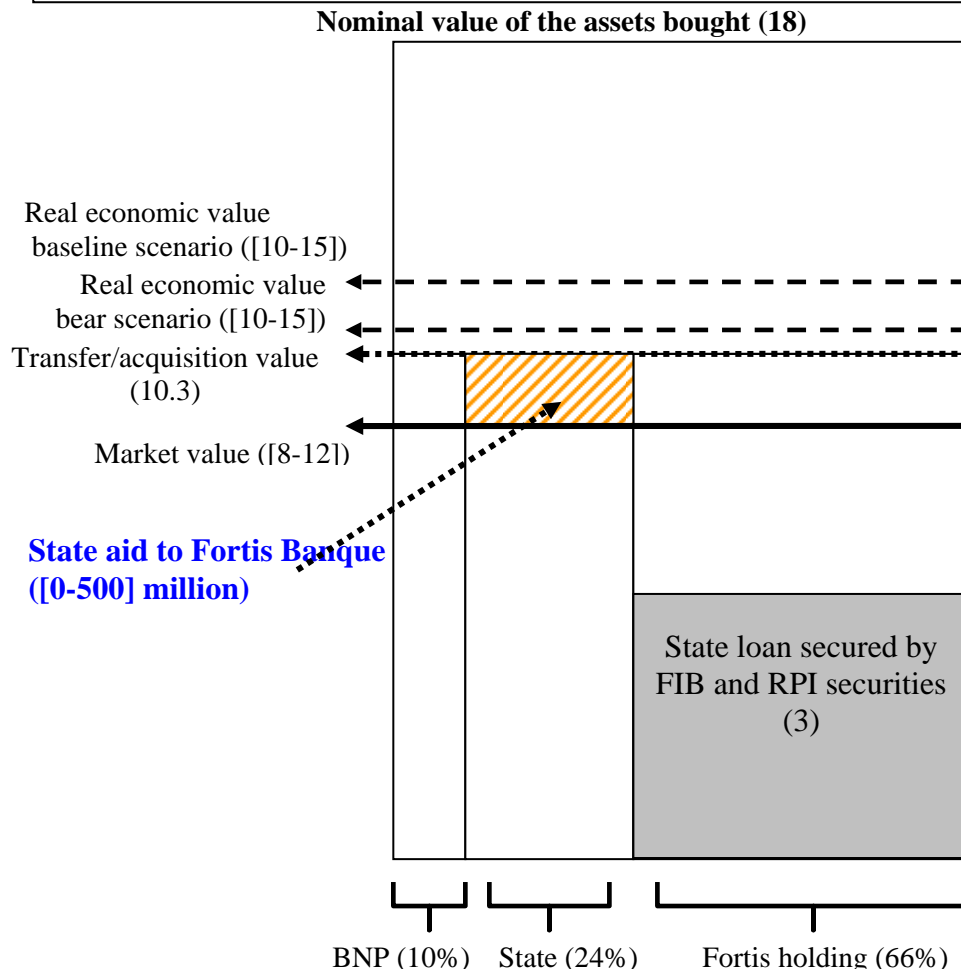
European Commission
Directorate-General for Competition
Grefte des aides d'Etat
SPA3 6/5
B-1049 BRUXELLES
Fax: +32 2 296 12 42

Yours faithfully,

For the Commission

Neelie Kroes
Member of the Commission

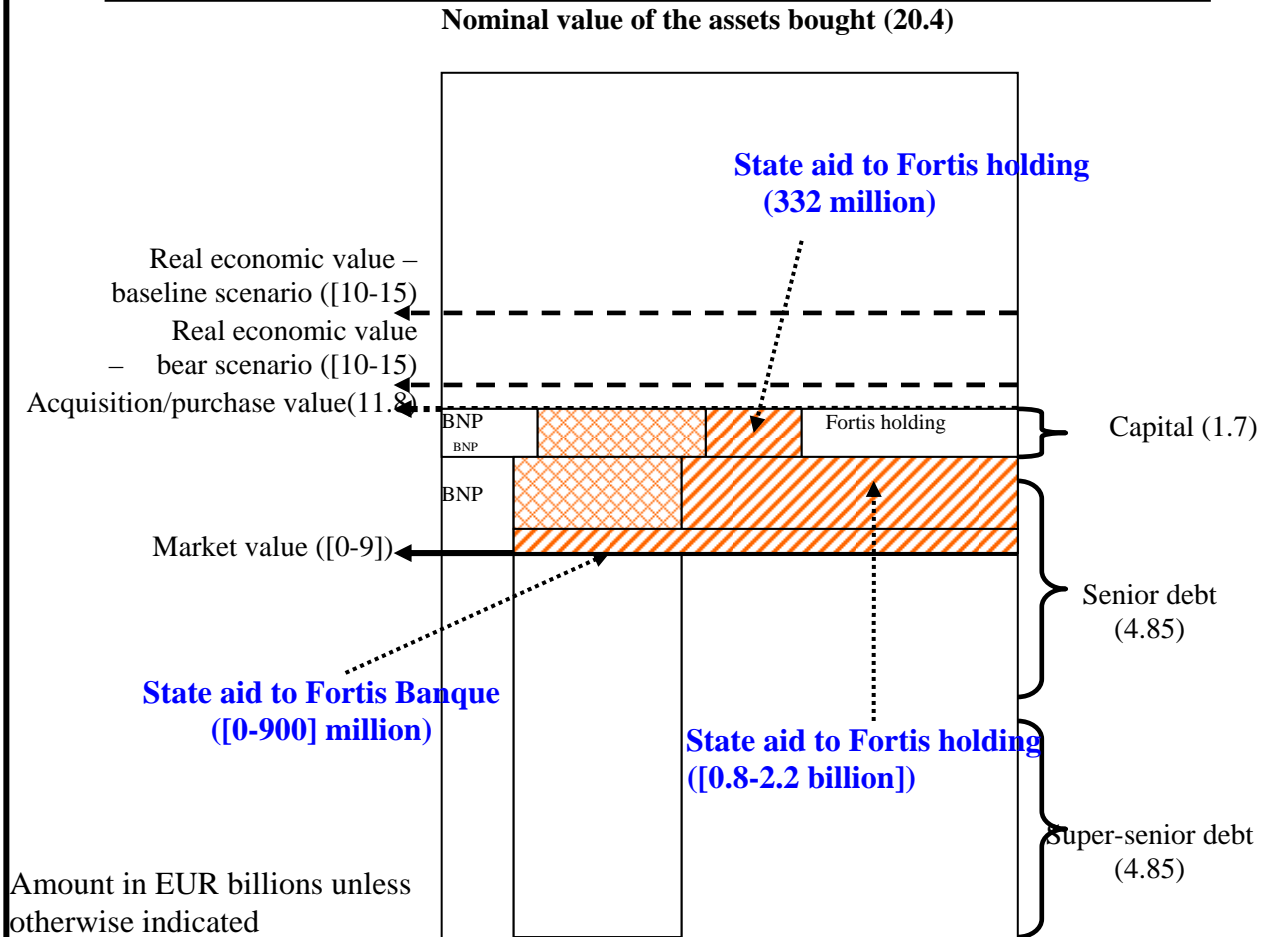
Table 1: Aid elements arising from the State's exposure in respect of RPI, as agreed by the parties on 10 October 2008 and approved by the Commission on 3 December 2008
(estimate based on the market value at the end of September 2008: [0-500] million)



Amount in EUR billions unless otherwise indicated

Annex 2

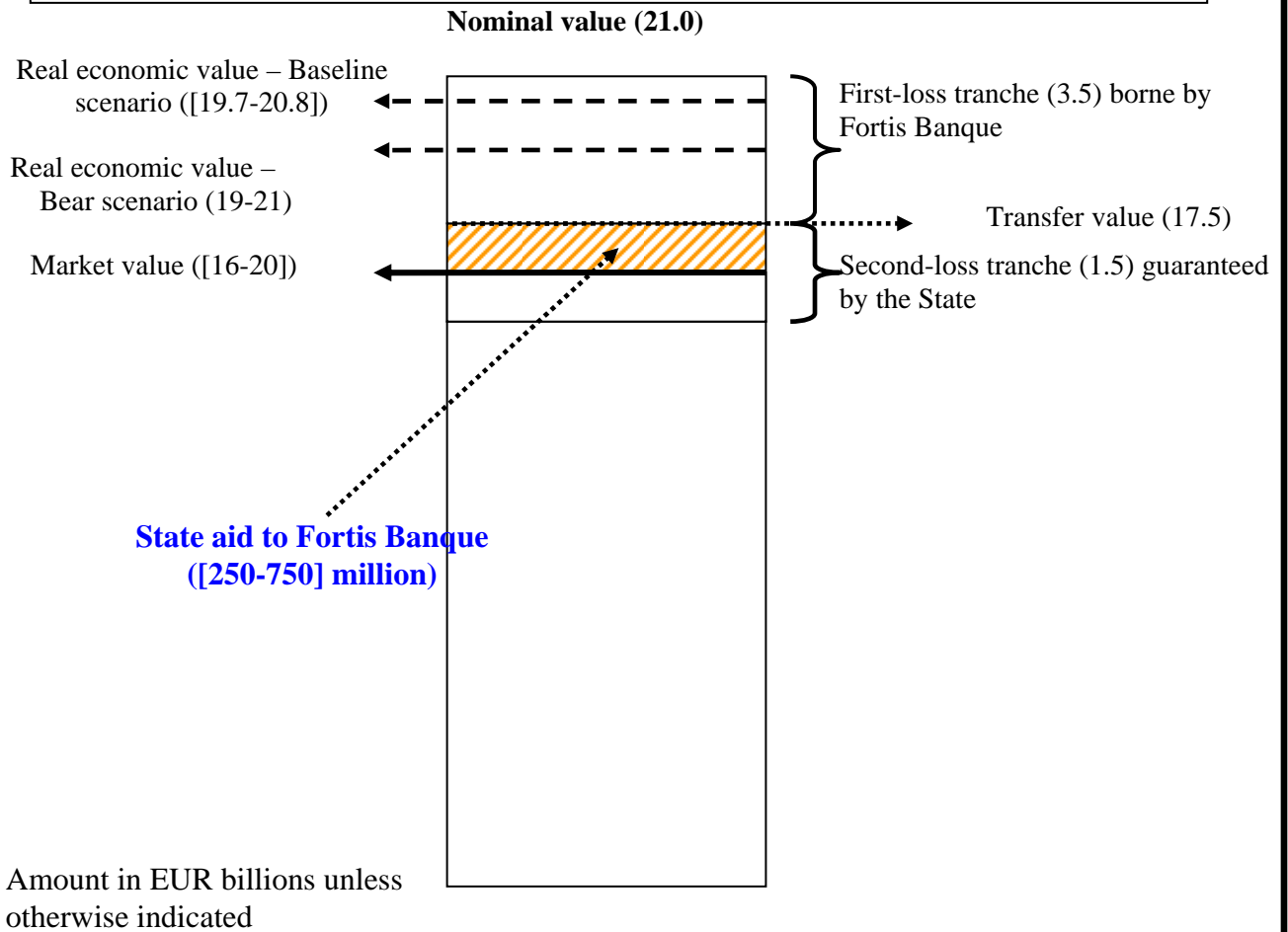
Table 2: Estimated aid amount arising from the increase in the State's exposure with regard to RPI and the RPI refill, as agreed by the parties on 10 March 2009 (estimate based on the market value at the end of February 2009: [1-3.5] billion)



The State's exposure under the agreement of 10 October 2008 has not been newly entered as aid. The State aid is restricted to the increase in State exposure:

1. The State agrees to subscribe to 43.5% of RPI's capital instead of the 24 % indicated in the agreement of 10 October 2008. Fortis holding's contribution to the capital is reduced accordingly (estimated aid to Fortis holding: 332 million)
2. The State agrees to guarantee 90% of the risk associated with the senior tranche compared with the 24% indicated in the agreement of 10 October 2008. Fortis holding's share in the senior financing is reduced accordingly (estimated aid to Fortis holding: [0.8-2.2 billion])
3. At the same time, the State agrees to the purchase by RPI of additional assets from Fortis Banque (refill) at a price higher than their market value when, in market value terms, the senior tranche has already been obtained (estimated aid to Fortis Banque:[0-900] million).

Table 3:
'Mezzanine' guarantee of EUR 1.5 billion on the 'in' portfolio
(estimate based on the market value at the end of February 2009: [250-750] million)



Annex 4

Structure of the Fortis Group to end of September 2008

