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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

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**Subject: State aid decisions N 344/2009 – Luxembourg
N 380/2009 – Belgium
Restructuring aid for Kaupthing Bank Luxembourg SA**

Sirs,

1. PROCEDURE

- (1) On 10 June 2009, the Luxembourg authorities notified the Commission of the set-up of a loan of EUR 320 million to Kaupthing Bank Luxembourg SA. The Luxembourg authorities submitted additional information on 23, 25 and 30 June and on 3 and 6 July 2009.
- (2) The Belgian State is financing half of the loan through an inter-state loan to Luxembourg of EUR 160 million. The Belgian authorities notified the Commission of the loan on 23 June 2009 and submitted additional information on 30 June and 6 July 2009.

2. DESCRIPTION OF THE MEASURES

2.1 The Bank

- (3) Kaupthing Bank Luxembourg SA (hereinafter ‘the Bank’) is a Luxembourg credit institution and a subsidiary of the Icelandic banking group Kaupthing Bank hf. It provides private banking services in Luxembourg and through its two branches in

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Belgium and Switzerland. It also accepts online deposits (under the name ‘Kaupthing Edge’) from retail banking customers in Luxembourg and Belgium.

(4) **2.2 The Bank’s difficulties**

- (5) In September 2008, following the fluctuations on the international financial markets, confidence among financial institutions declined and inter-bank liquidity quickly dried up. The announcement by the Icelandic Government on 29 September 2008 that Glitnir Bank was to be nationalised led to a drastic deterioration in Iceland’s economic situation. The credit ratings agencies downgraded the ratings given to the Icelandic State and the country’s banks, and foreign investors proceeded en masse to sell their Icelandic assets, causing the value of those assets to fall substantially.
- (6) Faced with that situation, on 8 October 2008, Kaupthing Bank hf. asked the Icelandic Banking Supervisory Authority to assume the powers of the meeting of shareholders. That decision immediately made it impossible for the Bank to refinance itself, either through its parent company or on the inter-bank market.
- (7) On 9 October 2008, the Bank was therefore placed under a ‘cessation of payments’ by the Tribunal d’arrondissement de Luxembourg [Luxembourg District Court]. That procedure involves the suspension of all payments by the institution, including any withdrawal of deposits. The bank’s organs remain in place during the suspension, but all its activities are supervised by court-appointed administrators.
- (8) Technically, the suspension of payments can come to an end in only two ways:
- either the institution succeeds in restoring the levels of solvency and liquidity necessary to pay all claims immediately payable when the suspension comes to an end (in particular those of depositors, whose funds are in principle payable immediately); some creditors may consent to the sums owed to them being repaid by instalments;
 - or the suspension of payments does not enable a recovery of the situation, in which case the Bank is put into judicial liquidation and all creditors are paid pro rata following the realisation of the Bank’s assets.

2.2 The call for tenders

- (9) In keeping with their task, the administrators immediately began to explore possible ways out of the suspension of payments. In October 2008, they therefore put all the Bank’s activities up for sale. While the receivers made direct contact with some 40 financial sector institutions which they considered likely to be interested in taking over all or part of the Bank’s operations, the call for tenders was open to all potential buyers who expressed an interest. The candidates all received the same information (through data rooms opened in Belgium and Luxembourg).
- (10) From the outset of the call for tenders, the Luxembourg authorities confirmed that they were willing to provide the public funding necessary to make up the difference between the Bank’s assets and its current liabilities. This fact was made known to potential buyers.

- (11) The administrators received the following bids:
- (a) With regard to the takeover of the Belgian branch, only Crédit Agricole Belgique and Keytrade Bank put forward a firm bid, which was accepted.¹
 - (b) In the case of the private banking operations in Luxembourg, the administrators initially received only one bid, from [...]*, a Libyan investment fund. However, this bid was rejected by the Bank's creditors, whose approval was required by law. Two further bids were subsequently received, from the investment funds J.C. Flowers and Blackfish Capital. The latter bid was accepted as being the more advantageous.²

2.3 The restructuring plan

- (12) On the basis of the outcome of the call for tenders, the receivers drew up a restructuring plan for the Bank consisting of three measures:³
- The private and online deposit banking activities in Belgium (EUR [350-400] million in deposits⁴) are transferred to Landbouwkrediet N.V./Crédit Agricole S.A. ('Crédit Agricole Belgique') and Keytrade Bank N.V./S.A. ('Keytrade Bank'), a subsidiary of the Crédit Agricole group. Deposits made by the Bank's online customers will be moved to accounts with Keytrade Bank, while Crédit Agricole Belgique will take over the Belgian branch's private banking customers. This takeover concerns only deposits and does not involve any transfer of the infrastructure necessary for the provision of banking services.⁵ Indeed, the buyers will incorporate the deposits within their existing banking operations.
 - The private and deposit banking activities in Luxembourg (EUR [275-325] million in deposits as at 13 March 2009) will be taken over by the UK investment firm Blackfish Capital. These activities will be transferred to a new entity, which is to be registered as a credit institution in Luxembourg under the name of Banque Havilland. The new bank will have a starting balance of EUR 1 305 million (of which EUR [750-800] million represents the bank's existing commitments to the Banque centrale du Luxembourg [Central Bank of Luxembourg] following its refinancing operations). The buyer will contribute EUR 50 million in capital and a further EUR [25-75] million in liquidities. The transfer covers the Bank's entire infrastructure, including its IT systems and headquarters. Banque Havilland will take on 100 of the Bank's employees and

¹ The financial conditions of the takeover proposed by Keytrade/Crédit Agricole are as follows:
[...]

* Confidential information

² In return for the transfer of the Luxembourg banking activities, Blackfish Capital pledged additional capital of EUR 50 million plus deposits of EUR [25-75] million. Blackfish Capital also undertook to allocate EUR [225-275] million to the special purpose vehicle (SPV).

³ Unless otherwise indicated, the information relating to deposits and the Bank's balance sheet is that applicable on 13 March 2009, the date of the last provisional balance sheet, which served as the basis for the restructuring plan.

⁴ EUR [175-225] million net already paid to depositors under the Luxembourg Deposit Guarantee Scheme.

⁵ [...] employees of the Bank will, however, take up posts at Crédit Agricole and Keytrade Bank.

will from the outset have access to the funding necessary for the orderly running of a bank.

- All the Bank's other assets (EUR 1 206 million), corresponding principally to the Bank's commercial lending operations, for which no buyer was found during the call for tenders,⁶ are transferred to a special purpose vehicle (SPV), the liabilities relating to which consist essentially of the Bank's debts to the Luxembourg State, the Association de Garantie des Dépôts du Luxembourg (AGDL – [Luxembourg Deposit Guarantee Association]), which operates Luxembourg's deposit protection scheme, and the Bank's interbank creditors (the 'inter-bank creditors'). The orderly sale of these assets should allow these creditors to be repaid. The SPV takes over only assets, not infrastructure or employees. It will be managed by a committee appointed by creditors with a stake in the SPV.
- (13) Technically, the legal person of the Bank (the Belgian activities of which will have been transferred) will be split into two legal persons that will become Banque Havilland and the SPV.⁷
- (14) The Bank's Swiss branch (EUR [15-35] million in assets) has been closed down and depositors are being reimbursed under the Swiss deposit guarantee scheme.
- (15) This restructuring plan was approved by a double majority vote of the inter-bank creditors on 5 June 2009. That approval was a legal requirement for implementation of the restructuring plan. The other stakeholders, including the AGDL, also agreed to the plan. By judgment of 8 June 2009, the court took formal note of that approval and extended the suspension of payments until 10 July 2009 to allow the plan to be carried out.

2.4 State intervention

- (16) The implementation of the plan drawn up by the receivers nevertheless requires the difference between the Bank's total current liabilities and its total assets to be covered. As at 31 December 2008, that difference was estimated at EUR 310 million. In the absence of other sources of financing, the State alone was able to contribute that financing.
- (17) The main purpose of that State contribution will be to cover potential withdrawals by depositors, who, at the end of the suspension of payments period, will be entitled to seek full reimbursement of their deposits.
- (18) Specifically, the intervention will take the form of a loan from the Luxembourg State to the Bank of EUR 320 million (made up of the liquidity shortfall of EUR 310 million plus a margin of EUR 10 million), which will be paid out in two tranches:
- a super-senior tranche of EUR 210 million, and
 - a senior tranche of EUR 110 million.

⁶ These assets are essentially loans granted by the Bank.

⁷ The shareholder in the SPV will be an 'orphan structure', as is usually the case in securitisation operations. In this case, it will be a foundation (*stichting*) under Dutch law. Decisions concerning the realisation of the SPV's assets will be taken by a steering committee composed of representatives of the creditors.

- (19) That loan will be granted to the Bank immediately prior to its split. The loan, which will not bear interest, will be repaid immediately, the State accepting bonds issued by the SPV by way of payment. In practice, therefore, the State, together with the inter-bank creditors, will be repaid in line with the outcome of the orderly liquidation of the assets in the SPV. Super-senior and senior bonds, representing the two tranches of the loan, will be issued by the SPV and given to the Luxembourg State. Priority will be given to repayment of the super-senior bonds. Senior bonds will be repaid *pari passu* with bonds representing the Bank's other debts and given to the AGDL and inter-bank creditors. According to the Luxembourg authorities' forecasts, the repayment via the SPV will come to an end in 2017 at the latest.⁸
- (20) The sums thus made available by the State will be transferred to an account controlled by the buyers of the activities of the Belgian branch to ensure that customers of the Belgian branch regain access to their deposits once the suspension of payments period ends (the availability of the sums deposited by customers of the Luxembourg parent company will be guaranteed by the buyer of the Bank's Luxembourg operations).
- (21) The difference between the loan amount of EUR 320 million and the EUR [350-400] million in transferred deposits will be covered by a transfer of funds from the AGDL.⁹ That amount corresponds to the compensation which the Bank's depositors would have been entitled to claim under the Luxembourg Deposit Guarantee Scheme if the Bank had been put into judicial liquidation. The AGDL will also receive SPV bonds in repayment of those funds.
- (22) As the bulk of the deposits stem from the Bank's Belgian activities, the loan from the Luxembourg State will be granted in cooperation with the Belgian authorities, who will agree to extend to the Luxembourg State a loan totalling EUR 160 million on condition that the Luxembourg authorities use those funds to finance the aforementioned loan to the Bank.¹⁰

⁸ The SPV's assets are expected to fall below EUR [...] million after [...]. When the balance has fallen below a certain threshold at which the handling fee is no longer justified, the balance of the assets will be ceded and the SPV wound up. According to forecasts, the SPV is expected to be wound up in 2016 or 2017 at the latest.

⁹ All of Luxembourg's banking institutions are members of the AGDL, which is governed by representatives of its members. Although the AGDL runs the national deposit guarantee scheme, the State plays no part in its decision-making process. While some measures taken by the AGDL in connection with the notified measures may go beyond the automatic consequences of implementing the guarantee and may therefore be taken at the discretion of the AGDL, the Commission has no reason to believe that such measures are attributable to the State and that they therefore constitute State aid. As a result, the AGDL's actions in relation to the notified measures will not be the subject of more extensive examination in this decision.

¹⁰ The loan from the Belgian State to the Luxembourg State will also be divided into two tranches: an initial tranche of EUR 105 million and a second of EUR 55 million, each representing 50% of the corresponding tranches of the loan from the Luxembourg State to the Bank. The financial conditions of the two tranches are aligned respectively with the super-senior and senior bonds that will be issued by the SPV and received by the Luxembourg State. The Luxembourg State will therefore repay the loan as and when it receives payments from the SPV.

3. ASSESSMENT OF THE LUXEMBOURG AND BELGIAN AUTHORITIES

- (23) Belgium notified the loan that it will grant to the Luxembourg State as aid within the meaning of Article 87(1) of the Treaty and designated the Bank as the recipient of the aid. Belgium considers that the aid is compatible with the common market under Article 87(3)(b) of the Treaty and states that it supports the notification from the Luxembourg authorities. The Commission assumes, therefore, that the Belgian authorities endorse all the facts and arguments cited by the Luxembourg authorities in support of their notification and will henceforth refer only to Luxembourg.
- (24) Luxembourg considers that, as the purpose of the loans from the Belgian State to the Luxembourg State, on the one hand, and from the latter to the Bank, on the other, is to ensure that depositors have access to all their deposits, the depositors are the main beneficiaries and the loans do not constitute State aid. The depositors are for the most part individuals and not undertakings within the meaning of Article 87(1) of the Treaty.
- (25) If the Commission were to consider that the loan may constitute State aid, it would still be compatible with the common market under Article 87(3)(b) of the Treaty. In this regard, Luxembourg makes the following points:
- (26) The justification for the aid should be assessed in the light of the circumstances at the time when the Bank was placed under a suspension of payments, thus depriving depositors of access to their savings. At the beginning of October, that is to say immediately following the acute difficulties at Dexia and Fortis, which had a considerable impact in both Luxembourg and Belgium, depositors' confidence in the banking system was severely impaired. As a result of the suspension of payments, the Bank's customers found their savings frozen and would have sustained substantial losses had the Bank collapsed.¹¹ This would have been instrumental in further shaking the confidence of depositors on the Belgian and Luxembourg markets. In those circumstances, the two States considered it necessary, for reasons of financial stability, to announce that, if necessary, they would take steps to help the Bank's depositors above and beyond the protection afforded by law for sums of up to EUR 20 000 under the Luxembourg Deposit Guarantee Scheme.
- (27) Luxembourg adds that the winding-up of the Bank, with the rapid sell-off of the Bank's assets in a market crippled by the crisis, would have led to substantial losses for a significant number of the Bank's inter-bank counterparts. An orderly solution for exiting the suspension of payments that would ensure a maximum rate of recovery for all the Bank's creditors was likely to prevent further erosion of inter-bank credit and help maintain confidence in the solidity of Luxembourg's regulatory and supervisory system.
- (28) The notified measure is no more than the fulfilment of the States' prior commitments. Those commitments were necessary to maintain the stability of the banking market. The aid must therefore be examined in the light of Article 87(3)(b) of the Treaty.

¹¹ The Luxembourg deposit guarantee covered amounts up to EUR 20 000. It was not increased to EUR 100 000 until 1 January 2009.

- (29) The Luxembourg authorities sent a letter to the Commission de Surveillance du Secteur Financier du Luxembourg (CSSF [Luxembourg Financial Sector Supervisory Commission]) stating that the judicial liquidation of the Bank would have knock-on effects on the financial system and national economy in general and that, for reasons of financial stability, there is a strong case for the adoption of the notified measures.
- (30) The aid must be considered compatible with the common market under Article 87(3)(b) of the Treaty, insofar as:
- The process of selling the Bank's operations is considered to be open and non-discriminatory.
 - The measure is restricted to the minimum, being equivalent to the Bank's liquidity requirement as calculated on the basis of its current liabilities and available assets as at 31 December 2008 (EUR 310 million), plus an additional margin (EUR 10 millions); in the case of the super-senior tranche of the loan, the risk incurred by the State is smaller than that taken by the Bank's other creditors.
 - The measure is not likely to create undue distortions of competition, as the Bank's sphere of activity will be considerably reduced (transfer of its Belgian operations, refocusing of its Luxembourg activities on private banking under a new franchise and transfer of a large proportion of its assets to the SPV).

4. ASSESSMENT OF THE NOTIFIED MEASURE

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

4.1.1 The loan from the Belgian State to the Luxembourg State

- (31) With regard to the loan of EUR 160 million from the Belgian State to the Luxembourg State, the Commission notes that this is simply a transfer of funds between States. Irrespective of how the States intend to use them, the fact is that those funds are being paid not to the Bank but to the Luxembourg State, which is responsible for how they will ultimately be used.
- (32) Consequently, there is no transfer of State resources to an undertaking and the loan from the Belgian State does not therefore constitute State aid within the meaning of Article 87(1) of the Treaty.

4.1.2 The loan from the Luxembourg State to the Bank

- (33) Under Article 87(1) of the Treaty, 'save as otherwise provided in this 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'.
- (34) The loan from the Luxembourg State to the Bank is charged to the State budget. The Commission therefore considers that this measure involves a transfer of State resources.

- (35) The Bank is an institution active in the financial sector, subject to strong international competition, and any advantage granted to it from State resources may affect trade between States and distort competition.
- (36) With regard to the criterion that the aid must give the beneficiary an advantage which the latter would not have had under normal market conditions, the Commission notes, in the first place, that the primary effect of the aid is to enable the Bank's restructuring plan to be implemented. Given the large number of stakeholders, however, it is appropriate to examine more closely the possibility of an advantage for four potential beneficiaries: (i) the Bank's depositors in Belgium and Luxembourg; (ii) the Bank; (iii) the transferees of the Bank's Belgian and Luxembourg operations; and (iv) the Bank's inter-bank creditors.¹²

The Bank's depositors

- (37) The aid primarily benefits depositors in that, unlike judicial liquidation, it allows them to regain prompt access to all their deposits. The Commission agrees with the Luxembourg authorities that the Bank's depositors are essentially private customers. As the latter are not undertakings, the measure cannot constitute State aid as far as they are concerned. Furthermore, while it cannot be entirely ruled out that some of the Bank's depositors may be small or medium-sized enterprises, everything indicates that the advantage granted would be *de minimis*. The Commission therefore considers that the measures do not constitute State aid for the benefit of the depositors¹³.

The Bank

- (38) The aid enables the Bank's restructuring plan to be carried out. Indeed, it is clear that, without an injection of funds to make up the Bank's shortfall, no restructuring plan could have been put in place and the Bank would therefore have had to be put into judicial liquidation. Thus the sale of certain intangible assets, such as the Belgian branch's customer relations, and the orderly liquidation of the Bank's financial assets would not have been possible without the loan and the value of those assets would have been considerably reduced in the event of judicial liquidation. The fact that the Bank's Belgian and Luxembourg operations were actually transferred is largely attributable to the value of these assets and the liquidity released, for the Bank's creditors, by the loan from the Luxembourg State.
- (39) It is also clear that no commercial operator would have agreed to grant the Bank the (non-interest bearing) loan while the latter was under a suspension of payments and its future was uncertain to say the least. In those circumstances, the public authorities alone were prepared to provide the loan, which therefore confers an advantage which the Bank would not have had on the credit market.
- (40) The Commission therefore considers that the grant of a loan of EUR 320 million by the Luxembourg State to the Bank constitutes State aid to the Bank allowing it to restructure and continue banking operations.

¹² See the Commission decisions of 1 October 2008 concerning State aid NN 41/2008 *Bradford & Bingley* (OJ 2008 C 290, p. 2) and of 5 November 2008 concerning State aid NN 39/2008 *Roskilde Bank*, paragraphs 64 and 65 (OJ 2009 C 12, p. 3).

¹³ See *Bradford & Bingley* decision, paragraph 34.

- (41) In this context, it is worth looking more closely at the entities that will succeed the Bank after restructuring in order to identify the economic activities which the aid will allow to continue on the market, and the implications of which in terms of distortion of competition must be assessed in the light of the rules on State aid. With regard to the economic activities transferred during the orderly liquidation process, the Commission notes that, where a transferred entity constitutes an undertaking within the meaning of Article 87(1) of the Treaty, that is to say where it can continue to offer the same goods and services on the market, it may be appropriate to determine whether that entity has benefited from State aid.
- (42) In this regard, the Commission considers that, even though the loan is formally made available to the buyers of the Belgian branch's operations, the restructuring plan must nevertheless be viewed as a set of inextricably linked transactions which the loan alone made possible. Under that measure, the State aid was a necessary condition for the transfer of the Belgian branch, for the takeover of the Bank's operations by Blackfish Capital and for the creation of the SPV. Nevertheless, there is State aid for the benefit of those entities only to the extent that they constitute undertakings within the meaning of Article 87(1) of the Treaty, that is to say to the extent that they offer goods or services within a given market.¹⁴ It is therefore appropriate to determine whether the latter criterion has been met in respect of the various entities to emerge from the restructuring.
- (43) With regard, first, to the SPV, the Commission notes that it is a vehicle the sole purpose of which will be to hold and manage a portfolio of assets with a view to generating an optimum return for a specific and closed group of beneficiaries. The SPV will not, therefore, supply any products or services to the market and, consequently, does not constitute an undertaking within the meaning of Article 87(1) of Treaty.
- (44) The situation is more complex in the case of the other two entities. As the Commission has observed in other decisions concerning aid in the banking sector, there may be some continuity of economic activity where the aid allows an entity to remain in the market not only as a distinct set of assets and liabilities, but as a business.¹⁵ On the other hand, the Commission has also had occasion to find that, in the case of the straightforward transfer of a bank's branches, which were then promptly integrated into the buyer's existing network of branches, the transferred branches could not be distinguished from those of their buyers and did not therefore constitute separate undertakings.¹⁶
- (45) The Commission notes that the Luxembourg operations transferred to Blackfish Capital account for almost 50 % of the Bank's balance sheet. They are made up of both assets and liabilities and, more specifically, of a distinct portfolio of private banking customers in Luxembourg who are incorporated into the buyer's business plan. The buyer is also taking over the Bank's entire Luxembourg infrastructure (property, IT equipment and human resources) and will therefore, as intended, be able to continue, without interruption, independently and under a separate identity, to

¹⁴ See, for instance, Case C-222/04 *Cassa di Risparmio di Firenze* [2006], paragraph 107 *et seq.*

¹⁵ *Bradford & Bingley* decision, paragraph 46: '...and aid to the economic transferred entity, which corresponds to the ability for this entity to remain in the market not as a collection of distinct assets and liabilities, but as a business'.

¹⁶ *Roskilde Bank* decision, paragraph 68.

provide banking services previously offered by the Bank in its private banking segment in Luxembourg.

- (46) The activities taken over by Blackfish Capital under the restructuring plan therefore constitute an economic activity and a continuation of the Bank's activities.
- (47) However, in the case of the transfer of the Belgian branch's operations, the buyers are taking over only some of the Bank's liabilities, without any infrastructure that would enable them to continue to offer banking services on the market independently. The deposits of the Bank's former customers will be immediately transferred to Crédit Agricole Belgique or Keytrade Bank accounts and will therefore be immediately integrated into the buyer's existing structures. Consequently, even though the aid has made possible the orderly and "en bloc" transfer of deposits from the Belgian branch to the buyers, this does not constitute the continuation of an independent undertaking but the transfer of a 'distinct set of liabilities'.
- (48) The Commission therefore concludes that the aid for the Bank's restructuring will confer an advantage on the economic activities which will be taken over by Blackfish Capital under the restructuring plan.

The transferees of the Belgian and Luxembourg economic activities

- (49) It should also be examined whether the loan is capable of constituting State aid in favour of the transferee institutions of the Bank's Belgian and Luxembourg operations (Crédit Agricole Belgique and Keytrade Bank, on the one hand, and Blackfish Capital, on the other). There could be an advantage for the buyers if the price paid were lower than the market price for the operations purchased.¹⁷
- (50) In the light of the information submitted by Luxembourg, the Commission considers that the sale of the Bank's activities was transparent and non-discriminatory, ensuring that the transfer of activities was effected under the best possible conditions. The Commission therefore has no reason to believe that the transfer of the Bank's Belgian and Luxembourg activities was carried out under anything less than market conditions or that the loan constitutes State aid in favour of the institutions to which those activities were transferred.

The inter-bank creditors

- (51) With regard to the inter-bank creditors, it should be noted that the series of payments made by the SPV (waterfall payments) gives priority to the Luxembourg State, which will therefore be the first to benefit from a share of those funds. Nevertheless, the Commission also notes that the restructuring plan gives inter-bank creditors an advantage by allowing them a recovery rate for their claims that is appreciably higher than the rate that could have been expected in the event of judicial liquidation.¹⁸ Consequently, it is not inconceivable that the loan will also provide inter-bank

¹⁷ See paragraph 49 of the 'Banking Communication'. See also the aforementioned Commission decisions in the *Bradford & Bingley* (paragraph 38) and *Roskilde Bank* (paragraphs 64 and 65) decisions.

¹⁸ On the basis of the studies submitted by the Luxembourg authorities, the SPV arrangement will provide inter-bank creditors with a recovery rate [...] % higher than the rate that would apply in the case of judicial liquidation.

creditors with an advantage, in which case they too would have to be regarded as beneficiaries of State aid.

4.2 Compatibility of the aid

4.2.1 Applicability of Article 87(3)(b) of the Treaty

- (52) In the current circumstances of international financial crisis, the Commission considers that the conditions necessary for the State aid measures to be assessed in the light of Article 87(3)(b) of the Treaty are met. That article provides that ‘aid [...] to remedy a serious disturbance in the economy of a Member State’ may be considered compatible with the common market.
- (53) The Commission takes the view that maintaining public confidence in the banking sector is necessary for the stability of the financial system, which, in turn, is a necessary condition for preventing serious disturbances in the economy as a whole. These considerations may therefore justify State aid the principal effect of which is to maintain depositors’ confidence by offsetting or absorbing the losses which they might otherwise incur if the Bank went into liquidation.¹⁹
- (54) The Bank’s modest size (a balance sheet of around EUR 2.3 billion) and the relatively small number of depositors (23 000 in total) do not, however, automatically support the conclusion that the judicial liquidation of the Bank without State intervention could under normal circumstances have created a risk of serious disturbance in the economy.
- (55) However, the Commission considers that the current financial crisis, characterised by a high level of instability and widespread mistrust of the banking sector, has given rise to exceptional circumstances in which the difficulties of a single bank may have adverse consequences for the financial system in general. This may also be true of a modestly-sized bank whose difficulties would not in other circumstances have had serious consequences.²⁰
- (56) In this instance, the Commission accepts that, in the particular circumstances of the case in question, and in particular in the light of the especially difficult situation in early October 2008, it may have been necessary, in order to preserve financial stability, for the State to undertake to compensate depositors beyond the legal minimum, which, in the light not least of the public commitments made by all the Member States at the ECOFIN Council of 7 October 2008, could have been perceived by the public as failing to provide an adequate level of protection and falling short of the public authorities’ responsibilities.²¹ These considerations apply equally to the Bank’s Belgian and Luxembourg depositors.

¹⁹ See the Commission decision of 21 January 2009 concerning State aid NN 41/2008 *Kaupthing Finland*.

²⁰ See, for example, Commission decisions NN 71/2008 *Banco Privado Português* (paragraphs 28-29) and NN 64/2008 *Carnegie Bank* (paragraphs 20 and 21). See also paragraph 5 of the aforementioned *Kaupthing Finland* decision.

²¹ Thus, the Commission notes that, in the ECOFIN Council conclusions of 7 October 2008, among a series of measures aimed at ‘restoring confidence and proper functioning of the [financial] sector’, the Member States agreed to raise the minimum deposit guarantee to EUR 50 000 for at least one year.

- (57) In accordance with paragraph 9 of the Banking Communication, the Commission also considers it particularly relevant that the CSSF states that there is a risk of serious disturbance in the Luxembourg economy.
- (58) In the light of the foregoing, the Commission accepts, in the particular circumstances of the case in question, that the aid is helping to remedy a serious disturbance in the economy and that its compatibility with the common market may be assessed in the light of Article 87(3)(b) of the Treaty.

4.2.2 *Compatibility criteria*

- (59) In its Banking Communication, the Commission gives more detailed information on the compatibility criteria applicable. Paragraph 15, for instance, reiterates that any aid must comply with certain general principles of State aid compatibility: the aid must be capable of achieving the objective of remedying a serious disturbance in the economy, it must not go beyond what is required to attain that objective and it must minimise the risks of distortion of competition.
- (60) Those general principles are given more specific expression in the sections of the Communication dealing with different forms of State intervention. With regard to ad hoc aid, the Commission states in paragraph 10 that such aid must be assessed in the light of the general principles laid down in the rescue and restructuring guidelines,²² and at the same time points out that the circumstances of the economic crisis may justify exceptional measures that deviate from those guidelines.
- (61) The aid in this case is State aid intended to restore the viability of an undertaking in difficulty.²³ Where aid is provided for the restructuring of an individual institution, it should therefore be ascertained whether the aid meets the following requirements (see paragraph 31 of the Communication):
- to ensure the restoration of the long-term viability of the financial institution;
 - to ensure that the beneficiary makes a contribution such as to ensure a fair distribution of the costs connected with the restructuring;
 - to ensure that distortions of competition are limited.

Restoration of viability

- (62) This involves an assessment of whether the restructuring plan ensures the long-term viability of those of the Bank's economic operations that will be continued within the newly-formed Banque Havilland.
- (63) The private banking activities in Luxembourg will be carried on by the future Banque Havilland, a subsidiary of the Blackfish Capital group, which will need to obtain a Luxembourg banking licence for that purpose. Upon takeover, Blackfish Capital will

²² OJ 2004 C 244, p. 1.

²³ According to paragraph 10(c) of the rescue and restructuring guidelines, a firm is considered to be in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. Pursuant to that principle, there is no doubt that the Bank, having been placed under a suspension of payments, is in difficulty.

itself provide the funds necessary for the continuation of operations (EUR 50 million in social capital and EUR [25-75] million in liquidity).

- (64) Banque Havilland's business plan will focus on the businesses of wealth management, private banking and asset management. The aim is gradually to build up the volume of assets entrusted to the Bank, in particular under discretionary management agreements.
- (65) In terms of ratios, Banque Havilland will have a liquidity ratio of [...] % and a solvency ratio of [...] %.
- (66) The first years of operation will be marked by a significant reduction in the balance-sheet total. Both the credit portfolio, already substantially smaller following the transfers to the SPV, and the share and bond portfolios are expected to be gradually reduced by comparison with the Bank. The main factor in the lowering of the balance-sheet total will, however, be the reduction, through the simple non-renewal of expiring loans, of the repurchase agreement with the Central Bank by some EUR [...] million at the start of the restructuring plan. As the refinancing operation is scaled back, Banque Havilland's balance-sheet total is expected to decrease from some EUR 1.3 billion in July 2009 to EUR [...] million at the end of the third year of operations.
- (67) In terms of the net banking income, the restructuring plan forecasts an initial increase in commission revenue, primarily from asset management services. Over the first three years, net commission revenue is expected to rise from EUR [...] to [...] million. That rise is expected to result from the growth in managed assets [...]. It will also come from an increase in revenue from managed assets, [...]. A part of that increase in profitability will stem both from the increase in the proportion of assets entrusted under discretionary management agreements and from the gradual movement of some of its customers over the coming years from conservative management focused on interest-based products to more active management including equity investment. Interest revenue, on the other hand, is expected to fall, in line with the reduction of the balance-sheet total, from EUR [...] to [...] million. The net banking income is expected to rise from EUR [...] million in the first year to EUR [...] in the third year.
- (68) Costs will consist mainly of staff costs and are expected to rise gradually as operations progress from EUR [...] million the first year to EUR [...] million the third year.
- (69) Banque Havilland expects profitability [...]. The operating profit is expected to remain relatively stable throughout the first three years [...].
- (70) The Commission notes that the causes of the Bank's difficulties were inextricably linked to the collapse of its parent company in Iceland and its inability to finance itself as a result. The sale to a buyer with adequate financing capacity, the implementation of a business plan based on a refocusing of activity on a conservative model of private banking and a considerable reduction in the Bank's balance sheet (and consequently its financing needs) should remedy the causes of the Bank's difficulties and set it back on the path to long-term viability. The Commission therefore considers that the first criterion has been fulfilled.

A fair distribution of costs

- (71) This criterion reflects the principle that restructuring costs must not be borne by the State alone, but that those who have invested in the undertaking must also assume their fair share. Thus, the undertaking and those with an interest in it (shareholders and subordinated creditors) must contribute to the restructuring to the extent that they are able. This principle is important in keeping State aid to the minimum and in avoiding any ethical pitfalls that might be created by an excessive contribution from the State.
- (72) First of all, it should be noted that the restructuring plan provides that the Bank's shareholder (that is to say the Icelandic parent company) must reduce its capital in the Bank to zero, with the result that it ceases to be a shareholder without receiving any compensation. To that degree, the Bank's shareholder will have participated in the costs by absorbing the losses to the maximum extent of its capital. [...].
- (73) The Bank's new shareholders will also provide EUR [75-125] million in capital and liquidities and will thus also contribute towards the restructuring costs.
- (74) Finally, it is clear that the Bank itself is contributing to the cost of its restructuring by transferring a very substantial proportion of its assets to the SPV to ensure, within the limits of its resources, that its debts and the restructuring aid are repaid.
- (75) The Commission considers that these measures will ensure a fair distribution of costs such as to minimise the State aid and avoid ethical pitfalls.

Measures to lessen undesirable effects on competition

- (76) This criterion seeks to ensure that the aid does not enable the Bank to exercise excessive competition on the market on which it has been able to remain as a result of the aid.
- (77) It should be noted that the restructuring plan provides for a very significant reduction in the Bank's balance sheet which will involve the discontinuation of large swathes of its business. Thus, the transfer of its Belgian operations means that the Bank is withdrawing from the Belgian market and abandoning its online banking services. Its Belgian operations accounted for 20 000 of its 23 000 depositors and two-thirds of the Bank's deposits. It should also be pointed out that, in placing almost all its commercial loans in the SPV, the Bank is essentially withdrawing from the commercial credit sector.
- (78) Under the restructuring plan, the Bank will dedicate itself exclusively to private banking activities in Luxembourg. The balance sheet for the restructured bank will be EUR 1.3 billion, as compared with EUR 2.3 billion prior to restructuring.
- (79) The Commission also notes that the Bank's restructuring has been the subject of an open and non-discriminatory call for tenders which has allowed all the Bank's competitors to put themselves forward to purchase the Bank's assets. That transparent procedure, which simulates as closely as possible a market situation in the absence of aid, should also limit distortions of competition.
- (80) The Commission considers that that very substantial reduction in the Bank's activities adequately serves to lessen any undesirable effects on competition.

5. CONCLUSION

In the light of the foregoing, the Commission finds as follows. The loan of EUR 160 million to be granted by Belgium to Luxembourg does not constitute State aid. The loan of EUR 320 million to be granted by Luxembourg to Kaupthing Bank Luxembourg constitutes State aid but is compatible with the common market under Article 87(3)(b) of the Treaty. The Commission has no objections to either of these measures.

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

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Yours faithfully,

For the Commission

Neelie KROES
Member of the Commission