



## EUROPEAN COMMISSION

Brussels, 7.10.2011  
C(2011) 7264 final

**Subject: SA 33639 (2011/N) – Denmark  
Rescue Aid for Max Bank**

Sir,

### **1. PROCEDURE**

- (1) On 21 September 2011, Denmark informed the Commission of its intention to rescue a bank in the coming weeks. On 26 September 2011 Denmark informed the Commission that the rescue was to be undertaken during the weekend of 8 and 9 October 2011.
- (2) The Danish authorities submitted further information and updates on 26, 29 and 30 September 2011. A meeting with the Commission services and the Danish authorities was held on 28 September 2011. Denmark notified the measures covered by this decision to the Commission on 30 September 2011.
- (3) Denmark has exceptionally agreed that the authentic language for this decision should be English.

### **2. DESCRIPTION OF THE BENEFICIARY**

- (4) Max Bank A/S (hereinafter "Max Bank" or "the bank") is a small-sized bank which had a balance sheet of DKK 9.4 billion (EUR 1.2 billion) at the end of Q2/2011.
- (5) Max Bank is mainly active in the southern and western parts of Zealand, Denmark. The bank's headquarter is located at Næstved Harbour. Max Bank has nine retail customer branches and four corporate centres. The retail customer branches are located in Faxe, Haslev, Korsør, Næstved City, Næstved, Skælskør, Slagelse, Sorø and Vordingborg. The corporate branches are located in Næstved, Slagelse, Skælskør and Vordingborg.

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- (6) In September 2010 Max Bank merged with Skælskør Bank, following which Max Bank became a significant regional bank in the southern and western parts of Zealand, Denmark. The Danish State owns (December 2010) 19.4 % of the bank's share capital due to a conversion of hybrid core capital previously injected into the bank under the Danish State aid scheme for the financial sector<sup>1</sup> (hereinafter "the Bank Aid Scheme") from 2008.
- (7) Max Bank has issued bonds with a State guarantee for DKK 3.3 billion (EUR 444 million).
- (8) The Danish Financial Supervisory Authority ("FSA") is still in the process of identifying the bank's problem assets and has therefore not finished the calculations of the bank's capital needs. Furthermore, the FSA is continuing discussions with the bank on specific exposures and their valuation. However, at present the bank's capital needs are estimated to lie in the range of DKK 150 to 350 million (EUR 20 to 47 million). That figure is, however, subject to significant uncertainty, as there are still several outstanding issues in relation to completion of the calculations. Those uncertainties may affect the figures favourably or unfavourably. Accordingly, further write-downs are not excluded.
- (9) In its Interim Report of H1/2011 (30 August 2011), Max Bank reported impairment losses of DKK 79.2 million (EUR 10.6 million) on loans and advances, as well as negative market value adjustments of DKK 8.6 million (EUR 1.2 million). The bank's performance was also influenced by total non-recurring costs of DKK 14.7 million (EUR 2.0 million) related to the Amagerbanken and Fjordbank Mors bankruptcies.
- (10) The Danish authorities have stated that Max Bank has loans in the amount of DKK 6.1 billion (EUR 0.82 billion), with a high exposure to property and real estate projects (27% of total loans). A significant proportion of that property-related lending has been ailing because of falling prices on Danish and foreign properties.
- (11) The Danish authorities have also stated that Max Bank has deposits in the amount of DKK 4.3 billion (EUR 0.58 billion), of which only approximately DKK 20 to 30 million (EUR 2.7 to 4.0 million) are not covered by the Guarantee Fund for Depositors and Investors or an individual government guarantee (DKK 558 million (EUR 75 million) are in deposits covered by an individual government guarantee).
- (12) Max Bank has been in contact with a sound bank concerning a potential transaction, but no agreement has been found. It was not possible for the bank to find a private solution nor was it feasible to solve the bank's problems using the mechanism set out in the Compensation scheme<sup>2</sup>. Consequently Denmark considered the need for another State intervention.

### **3. DESCRIPTION OF THE MEASURES**

- (13) As a consequence of the problems described, the bank requested the financial assistance of the State's bail-out fund *Afviklingselskabet til sikring af finansiel stabilitet A/S* (the "Financial Stability Corporation", hereinafter "the FSC") established under the Bank Aid Scheme<sup>3</sup>. The FSC acts on behalf of the State.

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<sup>1</sup> See Commission decision of 10 October 2008 in case NN 51/2008, *Guarantee scheme for banks in Denmark* (OJ C 273, 28.10.2008, p. 2).

<sup>2</sup> Commission Decision of 1 August 2011 in case SA.33001 (2011/N) – Part B, *Amendment of the Danish Winding Up Scheme for credit institutions*.

<sup>3</sup> See FN 3.

- (14) In what follows, the support measures to be used to rescue Max Bank and the process itself are described using the same terminology as Denmark has used ("Model I" and "Model II").
- (15) Denmark has set up the following sequence to identify the most appropriate State measure to rescue Max Bank:
- (i) **Compensation scheme.** The Guarantee Fund for Depositors and Investors (hereinafter "the Fund") provides a compensation in cash or under the form of guarantees to an acquiring bank for the purchase of the whole failing bank (excluding share capital and subordinated debt) limited to what the Fund would have had to pay out as depositor's guarantee compensation in case of a wind-down<sup>4</sup>. If the Compensation scheme is not workable, the failing bank can be resolved under Model I.
  - (ii) **Model I.** Under Model I, alongside the Fund, the FSC provides a compensation to an acquiring bank to allow for the purchase of the whole failing bank (excluding share capital and subordinated debt). The compensation of the FSC is limited to what would have had to be paid out to guaranteed senior creditors in case of a wind-down. A further description of Model I is set out below. If Model I is not workable, the failing bank can be resolved under Model II.
  - (iii) **Model II.** Under Model II, the failing bank is transferred to the FSC and is split into a Red bank (to be put in run-off) and a Green bank (to be sold). The State and the Fund provide a compensation to the Red bank to conduct the run-off without imposing a hit on creditors. A further description of Model II is set out below. If Model II is not workable, the failing bank will be resolved under the original winding-up scheme.
  - (iv) **Original winding up scheme**<sup>5</sup>. The failing bank is transferred to the FSC. A part is sold and a part is put in run-off. The proceeds of the sale and run-off serve to compensate senior creditors, who overall take a loss on their nominal exposure.
- (16) As Max Bank could not be resolved under the Compensation scheme, it will be resolved under Model I, Model II or the original winding up scheme. The model to be applied to Max Bank is not known at the time of this decision. Given the urgency of this case, the alternative solutions will be assessed in this Decision.

#### *Model I*

- (17) The Danish authorities have stated that the FSC would try to find a solution by which one individual bank would take over the entire bank in distress (excluding share capital and other subordinated debt) by applying Model I. In that case, the FSC would provide the acquiring bank with compensation in form of cash or guarantees, *in addition* to the compensation from the Fund.
- (18) The Danish authorities have stated that in order to identify the acquiring bank there would be a competitive process with several banks, in light of the suitability of their business models, being consulted on their interest in taking over Max Bank.

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<sup>4</sup> The existing compensation scheme allows the Fund to provide compensation (in cash or under the form of guarantees) to a bank willing to acquire the failing bank (the failing bank has a negative price). The compensation cannot be higher than the compensation the Fund would have granted to depositors if the failing bank had been resolved under the original winding up scheme. So far the compensation scheme has not been used.

<sup>5</sup> See Commission decision of 30 September 2010 in case N 407/2010, *Danish winding-up scheme for banks* (OJ C 312, 17.11.2010, p. 7).

- (19) Under Model I, the FSC compensation could not exceed the compensation the State would have paid to guaranteed senior creditors (because of the State guarantee) if Max Bank were wound down under the original winding up scheme<sup>6</sup>. In any case, Model I will thus be less or as expensive for the State and the Fund than the application of the original winding up scheme. Furthermore, under Model I the State compensation must not make up a greater part of the individual State guarantees of Max Bank than the part covered by the Fund (which is the compensation from the Fund made up of the deposits of Max Bank)<sup>7</sup>.
- (20) The FSC sets as a condition for its compensation that there will be a subsequent retrospective adjustment of the compensation (“earn out”) if, three years after the takeover, the takeover of Max Bank proves to generate more returns than expected for the acquiring bank. The retrospective adjustment will be based on valuation of the largest exposures of Max Bank at the time of takeover and three years after. The Danish authorities have indicated that the retrospective adjustment will be based on 20-30 biggest exposures which, according to their experience, will cover at least 50% of all exposures.
- (21) Under Model I, Max Bank's current equity and subordinated debt holders would not have a recourse to a retrospective earn out.
- (22) However, Denmark has informed the Commission that in spite of negotiations with one potential buyer for taking over all of Max Bank under Model I, there is no guarantee that those negotiations will bring any results. Accordingly, Model I may remain unused.

### *Model II*

- (23) If Model I is not workable, Denmark has indicated that the support measures in favour of Max Bank will be implemented under Model II. As part of that aid setup, Max Bank would be taken over by a subsidiary of the FSC (created for the purpose of winding down the bank) and split into two parts, a Green bank comprising the good assets and a Red bank comprising the impaired assets. The FSC would immediately resell the Green bank to a buyer, whereas the Red bank, which includes loans raised with an individual State guarantee, would remain in the FSC. Liabilities would be split between the Green and the Red banks. The split of assets would be subject to negotiation, with the potential acquiring banks consulted in the context of a competitive sale process similar to that set up under the Compensation scheme and Model I. It is also possible that two or more Green banks could be sold separately, though it is unlikely given the size of Max Bank. In any event, all depositors would be transferred to the Green bank. Existing shareholders and subordinated debtholders of the bank before the split into the Green and Red banks will be wiped out.
- (24) Under Model II, interested banks would be given the opportunity in a competitive procedure, during the weekend of 8 and 9 October 2011, to make an offer for the entire entity or only for the Green bank. The FSC would identify and contact banks that might

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<sup>6</sup> In case of winding down of a bank under the original winding up scheme, the senior creditors are repaid a fraction of their bonds (or other instruments) thanks to the sale and run-off of assets. The part that is not repaid is guaranteed by the State if the bonds are covered by the State guarantee. In that case, the State via the FSC will provide a compensation to the senior creditors so they do not suffer any loss. Unguaranteed senior creditors do not receive that State compensation.

<sup>7</sup> The compensation provided by the State (via the FSC) will account for a fraction [0-100%] of what the State should have paid to senior creditors in case of winding-up of the bank under the original winding up scheme. Similarly the compensation provided by the Fund will account for a fraction [0-100%] of what the Fund should have paid to depositors in case of winding-up of the bank under the original winding up scheme. However, the fraction to be paid by the State cannot exceed the fraction to be paid by the Fund.

possibly be interested in light of their business model, geographical activities and potential to generate synergies from a take-over of Max Bank taking into account the latter's product and geographical markets.

- (25) Following the split, there will be a shortfall of assets in the Red bank compared with liabilities. To cover that shortfall under Model II, the Fund and the State would provide a compensation in the form of cash or guarantees. The compensation provided by the Fund will respect the rules set under the Compensation scheme. Unlike in the original winding up scheme, senior creditors will not contribute to losses in the failing bank.
- (26) On the basis of available information, including valuation of the assets and liabilities of Max Bank based on the same principles as those used when determining compensation from the Fund, the FSC would have to assess whether the subsequent winding up of the Red bank (including compensation from the Fund, as well as the revenue from sale of the Green bank) would not leave the FSC worse off financially than if it were to handle Max Bank by winding it up under the existing scheme. The FSC would have to make its assessment on basis of the same valuation of assets and liabilities of Max Bank as when determining compensation from the Fund.
- (27) The compensation provided by the State must not make up a greater part of the individual State guarantees of the Red bank than the part covered by the Fund (which is the compensation from the Fund made up of the deposits of Max Bank)<sup>8</sup>. In any event, the compensation provided by the State must not exceed the compensation which it would have to pay to senior creditors covered by State guarantees if Max Bank were put in run-off under the original winding-up scheme. In any case, Model II will thus be less expensive for the State and the Fund than the application of the original winding-up scheme.
- (28) After recognition of the compensation granted by the Fund, State compensation and income from sale of the Green bank, the Fund sets an unlimited guarantee, which covers losses incurred by the FSC if after winding up Max Bank those losses turn out to be bigger than expected when taking over Max Bank.<sup>9</sup>
- (29) Under Model II an earn out mechanism similar to that set up under the original winding-up scheme is foreseen, by which shareholders and subordinated bondholders could receive a compensation if the sale of Green bank and the winding down of the Red bank generated profits.
- (30) If Max Bank cannot be resolved under Model II, it will be resolved under the existing winding-up scheme.

#### **4. DENMARK'S POSITION**

- (31) In line with the previous decisions on schemes<sup>10</sup> the Danish authorities accept that the rescue measure contains State aid elements.
- (32) Denmark submits that the measure does not make the State financially worse off than if the FSC was to handle the bank by winding it up and that the subsequent winding-up of

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<sup>8</sup> See footnote 9.

<sup>9</sup> Such mechanism was in place already in the original winding-up scheme.

<sup>10</sup> Decision N 407/2010 of 30.09.10, Decision SA 31939 N 537/2010 of 16.11.10, Decision SA 33001 (2011/N) – Part A of 28/06/2011, Decision SA 33001 (2011/N) – Part B of 01/08/2011.

the Red bank (including compensation from the Fund and State compensation as well as income from sale of the Green bank) is not expected to result in losses.

- (33) Denmark submits that it was not possible to find a private solution, in which a sound bank would have taken over Max Bank, without entailing a usage of State resources. Accordingly, Denmark had to step in and find a solution for rescuing Max Bank, which entails contribution from the State.

## **5. ASSESSMENT**

### **A. Existence of aid and potential beneficiaries**

- (34) The present decision assesses potential financial support that would be provided to Max Bank under Model I and Model II (collectively "the measures"). The Compensation scheme and the original winding-up scheme have been approved under different decisions and therefore do not need further assessment.
- (35) According to Article 107(1) TFEU, State aid is 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, in so far as it affects trade between Member States.
- (36) The Danish authorities do not dispute that the measures constitute State aid.

#### ***1. State resources***

- (37) The measures are provided through the FSC. The FSC is a key component of the existing winding-up scheme for banks in Denmark, as a vehicle set up by the Danish authorities to provide aid for the orderly winding-up of insolvent banks. Under both Model I and Model II, compensations are granted by the Fund and by the State (via the FSC).
- (38) In Commission Decision of 1 August 2011 on the Compensation scheme<sup>11</sup> it was established that whilst the Fund is financed by contributions from its private member banks, those contributions can be considered as being under public control. Hence they form part of State resources as, pursuant to section 10(2) of the Danish Financial Business Act, all Danish financial institutions are obliged to contribute to the Fund.
- (39) In the same Decision<sup>12</sup> the Commission clarified that the funds collected by the Fund are managed and apportioned in accordance with national legislation and that the influence of the State on the decision-making process of the Fund is decisive. That process is intended to allow the beneficiary bank to get financing in a situation in which it would have been unable to find adequate funding on the market. In that Decision the Commission concluded therefore that the use of the resources by the Fund is imputable to the State and constitutes State aid.
- (40) There has been no change in the funding model for the Fund (i.e. contributions by all Danish banks), its legal basis or its institutional set-up. Therefore, the Commission's assessment is not altered. Consequently, the intervention of the Fund under Model I and Model II includes State resources within the meaning of Article 107(1) TFEU.

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<sup>11</sup> See point 39ff.

<sup>12</sup> See points 42 to 50.

(41) The compensation provided by the State is paid from the State budget through the FSC. It is therefore paid from State resources within the meaning of Article 107(1) TFEU.

## ***2. Existence of an advantage***

(42) The measures in favour of Max Bank could entail a selective advantage to the following beneficiaries:

(i) under Model I: to the bank taking over the entire Max Bank and to the economic activity taken over;

(ii) under Model II: to the buyer of the Green bank, to the economic activity represented by the assets and liabilities sold (the Green bank), and to the Red bank.

### ***2.1 Model I - Advantage to the bank taking over the entire Max Bank and the economic activity taken over***

(43) The use of Model I would entail compensation in form of cash or guarantees from the State to the acquiring bank *in addition* to the compensation from the Fund as approved in the original winding-up scheme.

#### *The buyer*

(44) If Model I were used, the Danish authorities have stated that the process by which one individual bank is identified that would take over the entirety of Max Bank (excluding share capital and other subordinated debt) would be competitive and transparent. The Danish authorities have declared that several banks, in light of their business models, would be consulted on their interest in taking over Max Bank.

(45) Therefore, the outcome of that process should reflect the market price. There would thus be no reason to consider that there would be an advantage for a buyer of Max Bank under Model I.

#### *The economic activity taken over*

(46) In the sales transaction under Model I, the economic activity would be continued and not dissolved, since the assets and liabilities of Max Bank would remain intact and are unlikely to be fully and immediately integrated into the structure of the buyer. Therefore, the economic activity of the Max Bank would continue to exist as such.

(47) The use of Model I would constitute an advantage to the economic activity of Max Bank, since without it the bank's economic activity would have been run off.

### ***2.2 Model II - Advantage to the buyer of the Green bank, to the sold economic activity (Green bank), and to the Red bank***

#### *The buyer*

(48) The Danish authorities submit that the bidding process for the sale of the Green bank would be a competitive market process. According to the Danish authorities the sale of the Green bank to the buyer would be an arm's-length transaction, following a negotiation between the buyer and the FSC. The Danish authorities have submitted that even though the negotiations will take place at short notice and involve a limited number of potential buyers, it reflects the negotiation practices of the private sector in such circumstances, and

the transaction price (including the compensation to be paid by the Fund and by the State) is market-based.

- (49) On the basis of the information provided by Denmark on the sales process, the price to be achieved for the sale should be the maximum possible market price.
- (50) Therefore, there is no reason to consider that the price paid would not reflect the market price. Consequently, in line with paragraph 20 of the Restructuring Communication, the acquiring bank would not benefit from aid.

*The economic activity taken over (Green bank)*

- (51) With regard to the parts of the bank which would be sold, the sale process is not finalised at the moment of adoption of this decision. It cannot be excluded that the purchased undertaking's functional identity would continue to exist and the economic activity of the sold business be preserved. Potential buyers could choose the assets which they want to carve out of the Green bank and those for which they want to make an offer (the Green bank can be offered in parts). If all of the deposits were taken over together with a number of assets to be identified by the buyer, it would be likely that the functional identity of the sold economic entity would continue to exist to a large extent. Consequently the sold "good part" of the bank would be considered as a commercial entity that perpetuates the commercial activity of Max Bank and would thus be a beneficiary of State aid.
- (52) The split between the Red and the Green banks, made possible by the compensation paid by the Fund and the State to the subsidiary of the FSC, could allow the Green bank to continue in business. That split allows the "good" parts to be relieved from the liabilities allocated to the Red bank. The use of Model II could therefore constitute an advantage to the economic activity of the Green bank, since it would exist on the market thanks to the State support. Without the measure, the economic activity of the Green bank would have been run off.

*The economic activity in run-off (Red bank)*

- (53) Although it is ultimately to be liquidated, the Red bank would still carry out some economic activities, albeit limited to those necessary for an orderly winding-up within a limited period of time. Such activities include the sale of its assets and management of its portfolio. As such activities are also carried out by other operators on the market, the Red bank would potentially compete with them. It is therefore considered that use of Model II would confer a selective advantage to the Red bank. The Red bank would therefore be a beneficiary of State aid.

### **3. Selectivity**

- (54) The use of Model I or Model II would concern a single bank and its successor economic activities and would therefore be selective.

### **4. Distortion of competition and effect on trade between Member States**

- (55) The advantage procured by the measures would strengthen the beneficiaries' position compared to that of their competitors. Given the integration of the banking market at European level, that effect is felt by competitors both in Denmark (where banks from other Member States operate) and in other Member States. The measures, whether Model I or Model II, must therefore be regarded as potentially distorting competition and affecting trade between Member States.

(56) As a result, the Commission concludes that the measures constitute State aid within the meaning of Article 107(1) TFEU.

## **B. Compatibility of the aid**

### ***1. Legal basis for the compatibility assessment***

- (57) Article 107(3)(b) TFEU provides that State aid may be considered to be compatible with the internal market where it is intended to "*remedy a serious disturbance in the economy of a Member State*".
- (58) Given the present circumstances in the financial markets, the Commission considers that the measures may be examined under that provision.
- (59) The Commission accepts that the financial crisis has created exceptional circumstances in which the bankruptcy of one bank may undermine trust in the financial system at large, both at national and international level. That may be the case even for a bank of small size, such as Max Bank. It is particularly so in the case of a small economy such as Denmark where counterparts may tend not to distinguish between individual banks, thus extending the lack of confidence generated by the failure of one bank to the whole sector. Given the great uncertainty due to the financial crisis and the necessity of external funding for the Danish banking sector, a lack of confidence in the Danish financial system could severely affect the whole Danish economy.
- (60) The Commission therefore accepts that in the present turmoil failure of Max Bank could have entailed a serious disturbance of the Danish economy.
- (61) The general principles applicable for State aid granted to financial institutions are set out in point 15 of the Banking Communication<sup>13</sup>.
- (62) In line with the general principles underlying the State aid rules of the TFEU, which require that the aid granted does not exceed what is strictly necessary to achieve its legitimate purpose and that distortions of competition are avoided or minimized as far as possible, and taking due account of the current circumstances, all support measures have to be:
- well-targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy;
  - proportionate to the challenge faced, not going beyond what is required to attain that effect, and
  - designed in such a way as to minimize negative spill-over effects on competitors, other sectors and other Member States.
- (63) Furthermore, as both Model I and Model II provide for an immediate sale of (parts of) the Max Bank, certain principles of the Restructuring Communication<sup>14</sup> have to be respected. According to the Restructuring Communication, in order to be compatible with Article 107(3)(b) TFEU, the restructuring of a financial institution in the context of the current

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<sup>13</sup> 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, OJ C 270, 25.10.2008, p. 8.

<sup>14</sup> Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.08.2009, p. 9.

financial crisis, in particular, has to lead to a restoration of the viability of the bank or demonstrate how it can be wound-up in an orderly fashion. Whilst viability considerations play a role in the assessment of the measures, due to the specificities of the case (in particular the immediate sale of all or parts of Max Bank), this decision does not prejudge the full assessment which will be the subject to a future restructuring decision.

- (64) In addition, under Model II the split between the Green and Red banks is characteristic of an impaired asset relief. In a future restructuring decision the measures will thus need to be assessed under the Impaired Asset Communication (hereinafter 'IAC')<sup>15</sup>

## ***2. Assessment of the compatibility***

### *2.1 The aid is well-targeted*

- (65) The purpose of the aid is to eliminate the threat to the stability of the Danish economy that the failure of Max Bank would have entailed.
- (66) It is acknowledged that both a full take-over of Max Bank by an acquirer bank under Model I and the transfer and controlled winding-up of Max Bank under Model II are an appropriate means to preserve stability in Denmark's economy.

### *2.2 The aid is proportionate and limited to the minimum*

- (67) As set out in the Banking Communication, the aid should be restricted to the minimum necessary.
- (68) Under both Model I and Model II, the former shareholders will lose control of Max Bank and all financial stakes therein without any compensation. The same goes for the subordinated debtholders who were completely wiped out and suffered 100% losses. In line with its decisions on *Kaupthing Luxemburg*<sup>16</sup> and *Northern Rock*<sup>17</sup>, the Commission considers in such cases burden-sharing to be sufficient. Full burden-sharing by former owners and unsecured creditors contributes to ensuring that the aid is kept to the minimum.
- (69) The objective of Model I is to facilitate a market-based solution for bailing out Max Bank by allowing for a reduction of the difference between the inherent value of assets of that bank and its senior liabilities. As explained above, Model I will only be applied if that solution would be cheaper for the Fund than a winding-down or resolution under the Compensation scheme. Therefore the use of Model I would ensure that the aid is limited to the minimum necessary in those circumstances.

- (70) As regards the use of Model II, the competitive process should ensure that the Green bank will be sold at the highest price possible, thereby limiting the aid to the minimum necessary.

### *2.3 Distortion of competition*

- (71) As to the use of Model I, in principle the Commission favours a break-up in pieces over the sale of a failing bank as a whole. However, taking into account the particular features of Max Bank, namely, its business operations, its business locations and its size, as well as

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<sup>15</sup> Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1.

<sup>16</sup> Case N 344/2009, Commission decision of 9 July 2009, OJ C 247, 15.10.2009, p. 3.

<sup>17</sup> Case C 14/2008, Commission decision of 28 October 2009, OJ L 112, 05.05.2010, p. 38.

the relatively low concentration of the Danish banking sector, the Commission considers that an entire take-over of Max Bank by an acquiring bank would not raise issues of disproportionate aid. It also considers that a take-over would limit distortions of competition.

- (72) That evaluation is endorsed by the process through which Max Bank would be sold to a buyer, which is to be undertaken through a competitive tender among several competitors of Max Bank. The process is designed to ensure a competitive process within a very short period from Max Bank's failure. The sale of Max Bank would constitute a form of mitigation of potential distortions of competition. The sales process closely simulates the "counterfactual" situation that would have occurred in the absence of State aid, because a company in difficulty (or indeed in bankruptcy) will often seek a potential buyer in the market or, failing to do so, would be liquidated. The resemblance to that counterfactual is even greater if the sold entity is of relatively small size, allowing a large number of market players to acquire it. As a result, the envisaged rapid sales process in the present case would have the effect of limiting the distortions of competition and after the sale the continued economic activity of the failed bank would operate under the same conditions as other banks established in Denmark.
- (73) As to the use of Model II in relation to the Green bank, any sale of the Green bank will be undertaken within a competitive procedure, where competitors have the chance to bid. Model II will only be used if it proves impossible to sell the bank as a whole under the conditions of the Compensation scheme and Model I. The sale of Max Bank, whose activity would be the beneficiary of the aid, to a competitor in the framework of a competitive sale process constitutes a form of mitigation of potential distortions of competition<sup>18</sup>. Indeed, such a sales process would give a number of market players an opportunity to acquire part of the bank.
- (74) Furthermore such a sale would take place within a very tight timeframe, within a very short period from Max Bank's failure. As a result, the envisaged rapid sales process would have the effect of limiting the distortions of competition. Moreover, after the sale the continued economic activity of Max Bank would operate on the same conditions as other banks established in Denmark. In addition, the Green bank would be a small entity which would be unlikely to raise concerns regarding distortion of competition.
- (75) In view of the above, distortions of competition stemming from the Green bank are considered to be sufficiently limited under Model II in the rescue phase.
- (76) As to the use of Model II in relation to Red bank, the Danish authorities would orderly wind-up the Red bank.
- (77) The Red bank would thus not pursue any new activities but merely phase out the ongoing operations. It would be subject to commitments taken by Denmark regarding all banks in run-off in the FSC<sup>19</sup>. In particular, the Red bank would not engage in new business, would not offer interest rates among the most competitive in the country, and would be restricted in its capacity to restructure loans to existing customers.

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<sup>18</sup> Cf. Case C 10/2008, IKB Commission decision of 21 October 2008, OJ L 278, 23.10.2009, p. 32, recital 113; Case NN 42/2008, NN 46/2008 and NN/53/A/2008, Fortis Banque & Fortis Banque Luxembourg, Commission decision of 3 December 2008, recital 95; Case N 344/2009 and N 380/2009 Kaupthing Luxembourg Decision of 9 July 2009, recital 79; Case NN 19/2009 Dunfermline of 25 January 2010, recitals 126 and 130, Case C 26/2009 Restructuring of AS Parex banka, Commission decision of 15 September 2010, OJ L 163, 23.6.2011, p. 28, recital 152.

<sup>19</sup> Decision SA 33001 (2011/N) – Part A of 28/06/2011, point 12.

- (78) In view of the above, the Commission considers that distortions of competition stemming from the Red bank are sufficiently limited under Model II in the rescue phase.

#### *2.4 Viability*

- (79) As to the use of Model I, the objective of Model I is to facilitate a market-based solution for bailing out Max Bank by allowing for a reduction of the difference between the inherent value of assets of that bank and its senior liabilities.
- (80) As explained above, Model I will be applied only if two conditions are met: such a solution must be less costly for the Fund and the State; and the solution must be viable from a business perspective. The acquiring bank must demonstrate the viability of the integrated entity before Model I is activated.
- (81) It will be analysed and confirmed by the FSA that any measures taken under Model I must not put that viability in danger. Hence, any measures taken must be approved by the FSA. Accordingly, the acquiring bank has to be able to absorb even the impaired assets of Max Bank. It is thus considered that Model I would be an appropriate means leading to the restoration of viability of Max Bank.
- (82) As to the use of Model II in relation to the Green bank, since the business transferred to the acquiring bank would continue to carry out an economic activity and would have benefited from aid, the restructuring would have to ensure long-term viability of the business. The Restructuring Communication states in point 17 that a sale can contribute to the restoration of long-term viability if the purchaser is viable and capable of absorbing the transfer. To that end, the purchaser should demonstrate that the integrated entity will be viable.
- (83) The FSA would examine the financial strength of the acquirer, as in the original winding-up plan, and remove the good assets and the good liabilities from the Red bank. Given that only the viable, less risky parts will be transferred to the acquiring bank, the Commission is satisfied that the integrated entity would be viable as required by point 17 of the Restructuring Communication.
- (84) As to the use of Model II in relation to the Red bank, the FSC has already been used to successfully provide for an orderly winding-up of failing banks, which the Commission therefore considers guarantees an orderly winding-up of the Red bank under Model II.

#### *Conclusion*

- (85) Following from the above, the Commission concludes that the rescue aid measures provided for under both Model I and Model II for Max Bank are in line with the conditions of the Banking Communication because if they are used then (i) the aid is appropriate and well-targeted; (ii) the aid is limited to the minimum necessary; (iii) there is a sufficient own contribution by the bank, its shareholders and its subordinated debt holders; and (iv) there are sufficient measures limiting the negative spill-over effects for other competitors. In addition, the Commission preliminarily concludes that viability requirements would be satisfied.

## 6. DECISION

The Commission finds that the aid measures in favour of Max Bank constitute State aid within the meaning of Article 107(1) TFEU. However, on the basis of the foregoing assessment, those measures are found to be temporarily compatible with the internal market for reasons of financial stability. The measures are accordingly approved for six months or, if Denmark submits an in-depth restructuring plan within six months from the date of this Decision, until the Commission has adopted a final decision on that restructuring plan.

Denmark accepts exceptionally that the adoption of the decision be in the English language. 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:

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Yours faithfully  
For the Commission

Joaquín ALMUNIA  
Vice-President