

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 18 November 2009

on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan

(notified under document C(2009) 9000)

(Only the English text is authentic)

(Text with EEA relevance)

(2010/608/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on Member States and other interested parties to submit their comments pursuant to those provisions⁽¹⁾, the Commission received no comments from interested parties,

Whereas:

1. PROCEDURE

- (1) On 12 November 2008 the Commission authorised an emergency recapitalisation in case N 528/08. In the recapitalisation measure the Netherlands subscribed to a EUR 10 billion issue of Core-Tier 1 securities by ING. The measure has been authorised for a period of 6 months conditional on the submission of a credible plan within those 6 months⁽²⁾. The validity of the emergency recapitalisation measure was automatically prolonged with the submission of a restructuring plan until the Commission reached its decision on the plan.
- (2) On 31 March 2009, in case C 10/09 (ex N 138/09), the Commission authorised an impaired assets measure ('the IA measure') for a portfolio of US Alt-A residential mortgage backed securities ('RMBS') in favour of ING for a period of 6 months⁽³⁾. The Dutch authorities refer to the measure as the 'Illiquid Assets Back-up Facility' ('IABF'). Due to doubts on the conformity of

certain aspects of the IA measure with the Communication from the Commission on the treatment of impaired assets in the Community banking sector⁽⁴⁾ ('the Impaired Asset Communication') the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty.

- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*⁽⁵⁾. The Commission called on interested parties to submit their comments. The Commission received no comments from interested parties.
- (4) The authorisation of the IA measure was prolonged in the Commission Decision of 15 September 2009⁽⁶⁾.
- (5) In addition, under the Dutch Credit Guarantee scheme (approved in Commission decision in case N 524/08 from 30 October 2008 and prolonged in Commission decision in case N 379/09⁽⁷⁾ from 7 July 2009), the Netherlands granted guarantees on medium-term liabilities to ING amounting to (i) USD 9 billion (of which USD 8,25 billion has already been issued) and (ii) EUR 5 billion (of which EUR 4,15 billion has already been issued).
- (6) On 25 November 2008, 8 April 2009, 18 May 2009 and 9 November 2009 the Commission received information from market participants alleging that ING Direct Europe had, for a short period, been advertising the capital injection it received from the Netherlands and that it was perceived as engaging in aggressive commercial behaviour.

⁽¹⁾ Commission decision in case C 10/09 (ex N 138/09) ING, OJ C 158, 11.7.2009, p. 13.

⁽²⁾ Commission decision in case N 528/08, ING, OJ C 328, 23.12.2008, p. 10.

⁽³⁾ Commission decision in case C 10/09 (ex N 138/09) ING, OJ C 158, 11.7.2009, p. 13.

⁽⁴⁾ OJ C 72, 26.3.2009, p. 1.

⁽⁵⁾ See footnote 1.

⁽⁶⁾ Not yet published.

⁽⁷⁾ Commission Decision of 7 July 2009 in case N 379/09 and NN 16/09, not yet published.

- (7) A number of meetings, e-mail exchanges and telephone conferences took place between the Commission and the Dutch authorities.
- (8) With regard to issues pertaining to the asset valuation methodologies employed in the context of the IA measure, the Commission has drawn on technical assistance provided by external experts under contract to the Commission (Duff and Phelps and Professor Wim Schoutens) and by experts from the European Central Bank.
- (9) On 12 May 2009 the Netherlands submitted a restructuring plan for ING group to the Commission, which was complemented by additional information submitted on 7 July 2009. The restructuring plan was modified on 22 October 2009 (any reference to a restructuring plan made hereinafter refers to this last version of the restructuring plan). This modification included also a change in terms for repaying the capital injection from the Netherlands.
- (10) On 22 October 2009 the Netherlands provided a number of commitments as regards the implementation of the restructuring plan and the remuneration of the IA measure.
- (11) The Netherlands informed the Commission that for reasons of urgency they exceptionally accept that this Decision is adopted in the English language.

2. DESCRIPTION OF THE FACTS

2.1. The beneficiary

- (12) ING is composed of ING Groep N.V. ('ING Group'), the mother holding company that controls 100 % of ING Bank N.V. and ING Verzekeringen N.V., and two sub-holding companies controlling banking and insurance subsidiaries respectively. ING Group comprises more than 70 individual businesses with more than 2 500 legal entities operating in about 50 countries. As of the end of 2008, the group balance sheet totalled EUR 1,332 billion, of which more than 75 % is attributable to ING's banking activities.
- (13) At the end of 2008, and including the recapitalisation measure, ING's capital ratios for the bank were 9,3 % as regards its Tier 1 ratio and 7,3 % for the Core-Tier 1 ratio. For insurance the capital coverage ratio amounted to 256,5 %.
- (14) The capital structure of ING Group also includes so-called core debt, that is to say senior debt raised at the group level which is then invested as shareholder equity into ING Bank and ING Insurance holding (so-called double leverage). In addition, the ING Insurance

holding has itself raised EUR 2,3 billion of so-called core debt which can be used as shareholder equity in its insurance subsidiaries.

- (15) ING's investment portfolio comprised its Alt-A portfolio held, for the most part of it, by ING Direct US. ING Direct US had under the US law the status of a 'US Thrift institution', this status required from ING Direct US to invest the majority of its collected savings in US mortgages loans or US mortgage loan related investments. Consequently, ING allocated a significant amount of its investment portfolio to US Alt-A RMBS. The Alt-A portfolio was covered by the IA measure from the Netherlands (as described in section 2.3.2 below). ING's investment portfolio also comprised a significant proportion of commercial mortgage backed securities (CMBS), US RMBS and real estate investments that are not covered by the IA measure.

2.2. Business activities

- (16) At the end of 2008, ING was active in six business lines. ING was also active in asset management which was functionally part of the respective regional insurance business units.

2.2.1. Retail banking

- (17) ING offers retail banking services in the Netherlands, Belgium, Poland, Romania, Turkey, India and Thailand (retail banking services via ING Direct are not described in this section but in section 2.2.2). Private banking is offered in the Netherlands, Belgium, Luxembourg, Switzerland and various countries in Asia and Central and Eastern Europe. Small and medium sized enterprises and mid-corporate business is part of ING's retail banking.
- (18) In its retail banking activities in the Netherlands and in Belgium, ING combines a direct banking model and a branch network. ING provides current account services and payments systems, savings accounts, mortgage loans, consumer loans, credit card services and investment and insurance products. Mortgages are offered through a direct channel, through a tied agents sale force as well as through intermediary channels. Via its branch network, ING also offers a full range of commercial banking products as well as life and non-life insurance products.
- (19) In retail banking (private individuals) in the Netherlands its market share amounts to 40-50 %⁽⁸⁾ for main banking relations. Its market share for savings accounts amounts to 30-40 % by value and 20-30 % by numbers. Market shares for consumer loans by value, mortgages and private banking represent 10-20 %.

⁽⁸⁾ The market shares in recital 19 and recital 24 on the Dutch market are based on the public figures in the Commission Decision Case No. Comp/M.4844 *Fortis/ABN Amro Assets*. The market share deviates slightly from more actualised figures provided by the Netherlands. However, given that the differences are not significant for the decision, the Commission reports for reasons of coherence the verified figures.

(20) Market shares in Belgium amount to [10-15] (*) % for current accounts, [20-25] % for consumer credit, [15-20] % for mortgages, [10-15] % for savings and [10-15] % for mutual funds. Retail banking market shares in Poland amount to [5-10] % overall and [5-10] % in savings. In Romania, ING's market share amounts to [0-5] % of all liabilities and [0-5] % of all assets. Market shares in savings amount to [0-5] % in Turkey.

2.2.2. ING Direct — Retail banking

(21) ING Direct operates direct Internet based retail banking activities for customers in Australia, Austria, Canada, France, Germany, Italy, Spain, the United Kingdom and the United States. The main products offered are savings accounts and mortgages, and increasingly also mutual funds and payment accounts.

(22) For savings, the market share of ING Direct in Germany amounts to [5-10] %, [0-5] % in Italy, [0-5] % in Australia, [0-5] % in Canada, about [0-5] % in Spain, the United Kingdom and Austria, and roughly [0-5] % in the US and France. For residential mortgages market shares amount to [0-5] % in Australia, [0-5] % in Canada, [0-5] % in Italy and [0-5] % in Spain. Market shares for new residential mortgages amount to [0-5] % in Germany. The major non-European part of ING Direct is its US subsidiary where it has a residential mortgage market share of [0-5] % and a balance sheet of USD [...] (**) billion at the end of Q1 2009.

2.2.3. Wholesale banking

(23) Wholesale Banking's primary focus is on the Netherlands, Belgium, Poland and Romania, where it offers a full range of products, from cash management to corporate finance. Elsewhere, it takes a more selective approach to clients and products. Wholesale Banking has six business units: General Lending & Payments and Cash Management, Structured Finance, Leasing & Factoring, Financial Markets, Other Wholesale Products, and ING Real Estate.

(24) As regards corporate customers, ING's Dutch market shares are [20-30] % for main banking relations, documentary credits, international payments and international payment services, loans and current accounts and factoring. Higher market shares of [30-40] % are held in deposits/savings and domestic payments. ING's

market share for corporations in Belgium amounts to [25-30] % in current accounts, [15-20] % in loans, [15-25] % in leasing and [20-30] % in deposits.

2.2.4. Insurance and asset management activities in Europe

(25) The main insurance activities of ING in Europe are in the Netherlands (mainly under the brands ING, Nationale-Nederlanden and RVS). ING has a market share of [15-20] % in life insurance and [5-10] % in non-life (related to gross written premiums in 2008). Products are distributed via direct distribution channels (mainly branches from ING and Postbank, which was rebranded into ING in early 2009) and brokers. Outside the Netherlands ING is not active in the non-life insurance sector with the exception of Belgium (where it has a [0-5] % market share in non-life).

(26) ING's market shares in life insurance represent [30-35] % in Romania, [20-25] % in Hungary, [10-15] % in both the Czech Republic and Greece, [5-10] % in Poland, [5-10] % in the Slovak Republic and [5-10] % in Belgium. ING is also active — with much smaller market shares of below [0-5] % — in Spain, Bulgaria and Turkey. Pension fund management is part of its activities including mandatory (MPF) and voluntary (VPF) pension funds. In the MPF ING has a market shares of [20-25] % in Poland and [10-15] % in Slovakia. In the VPF, ING's market shares amount to [35-40] % in the Slovak Republic, [10-15] % in the Czech Republic and [5-10] % in Turkey. Combining MPF and VPF, its market shares amount to [35-40] % in Romania, [10-15] % in Hungary and [5-10] % in Bulgaria.

(27) In 2008 ING had assets in the respective geographical zones of EUR [...] billion in the Netherlands, EUR [...] billion in Belgium (and Luxembourg) and EUR [...] billion in Central and Eastern Europe.

2.2.5. Insurance and asset management activities in the Americas

(28) ING Insurance Americas operates in two main geographical areas: the United States and Latin America. Its activities in Canada were sold in early 2009. ING Insurance Americas offers life and non-life insurance, retirement services (primarily defined contribution plans), annuities, mutual funds, broker-dealer services and institutional products, including group reinsurance and institutional asset management products and services.

(*) Parts of this text have been replaced to ensure that confidential information is not disclosed. Those parts are enclosed in square brackets and marked with an asterisk.

(**) Parts of this text have been omitted to ensure that confidential information is not disclosed. Those parts are indicated by three full stops enclosed in square brackets and marked with two asterisks.

(29) In the US, its market share is [5-10] % in the variable annuities business, [0-5] % in life and about [0-5] % in both fixed annuities and group life. ING primarily provides pension products in Mexico, Chile, Peru, Colombia and Uruguay. Market shares for retirement funds are highest in Peru ([30-35] %), Chile ([20-25] %) and Uruguay ([15-20] %). Market shares for life insurance are most significant in Peru ([15-20] %) and in Chile ([10-15] %). In 2008 its assets amounted to EUR [...] billion in the US and EUR [...] billion in the rest of the American continents.

2.2.6. Life insurance and asset management in the Asia/Pacific region

(30) Insurance Asia/Pacific is a provider of life insurance and asset management products and services across Asia/Pacific with life insurance services in nine countries (Australia, New Zealand, Japan, South Korea, Malaysia, Hong Kong, Thailand, India and China) and asset management units in twelve (the nine countries above plus Taiwan, Philippines and Singapore). ING ranks as one of the largest international insurance companies and asset managers in the Asia/Pacific region. The value of assets held in this region amounts to EUR [...] billion.

2.3. The aid measures

(31) ING has benefitted from three aid measures from the Netherlands.

2.3.1. Capital injection

(32) The first measure consisted of a capital injection fully subscribed by the Netherlands which allowed ING Group to increase its Core-Tier 1 capital by EUR 10 billion⁽⁹⁾. The Commission noted in its decision approving the rescue aid (N 528/08) that the reasons for the loss of market confidence in ING, which triggered the State intervention, was due to the perceived toxicity of the Alt-A portfolio, market concerns about further write downs, the capital needs of ING Insurance and the deteriorating debt to equity ratio of ING group. According to the Netherlands, without the capital injection ING would have still survived but it would have faced a further decrease in confidence and an increased liquidity risk.

(33) The issue price for an injection of EUR 10 billion of Core-Tier 1 capital was EUR 10 per security. On the initiative of ING the securities can either be repurchased at EUR 15 per security (a 50 % redemption premium to

the issue price), or, after three years, be converted into ordinary shares on a one for one basis. If ING triggers the conversion option, the Netherlands has the choice to opt for the alternative redemption of the securities at a rate of EUR 10 per security plus accrued interest. A coupon will only be paid for the Netherlands if a dividend is paid on the ordinary shares.

(34) In the framework of the restructuring plan the Netherlands has submitted an amendment to the agreement for repayment of the Tier 1 securities by ING. According to the amended terms ING is able to repurchase up to 50 % of the Core-Tier 1 securities at the issue price (EUR 10), plus the accrued interest in relation to the 8,5 % annual coupon (around EUR 253 million), plus an early repayment penalty when the ING share price trades above EUR 10. The early redemption penalty increases with the ING share price. For the purpose of the calculation of the early redemption premium the share price increase is capped at EUR 12,45⁽¹⁰⁾. At that level the penalty is equal to 13 % on an annual basis. The early redemption penalty could amount to a maximum of EUR 705 million assuming that the EUR 5 billion are repaid after 400 days the date of issue. Furthermore the penalty premium has a floor of EUR 340 million, ensuring a minimum internal rate of return for the Netherlands of 15 %. In other words, considering that ING would normally have to pay EUR 2,5 billion redemption premium this amendment would result in an additional advantage for ING between EUR 1,79 and 2,2 billion depending on the market price of ING shares. The Netherlands explained that the reason for the amendment was to allow ING similar conditions for exit to those which had been granted to SNS⁽¹¹⁾ and Aegon⁽¹²⁾ on the capital injections that they received from the Netherlands. Those early prepayment conditions can only be applied to the repayment of EUR 5 billion (that is to say 50 % of the initial capital injection).

(35) ING may elect to make use of the repurchase option prior to 31 January 2010, but that date can, upon agreement with the Netherlands, be extended until 1 April 2010 due to exceptional market circumstances if ING can demonstrate that it was not economically feasible to raise sufficient Core-Tier 1 capital necessary to repurchase EUR 5 billion earlier. Such an extension would then be subject to Commission approval. ING aims to make use of the repurchase option prior to 1 January 2010. Repayment and conversion options on the remaining 50 % are unaltered.

⁽⁹⁾ The measure is described in detail in Commission decision N 528/08 of 12 November 2008.

⁽¹⁰⁾ The early repayment penalty is calculated as follows: EUR 650 000 000 * (number of securities repurchased/500 000 000) * (days from issue/365) * (prevailing price – 10)/(12,5 – 10) where prevailing price is the average of the market price 5 days before repayment, it is higher or equal to EUR 11,20 and lower or equal to EUR 12,45.

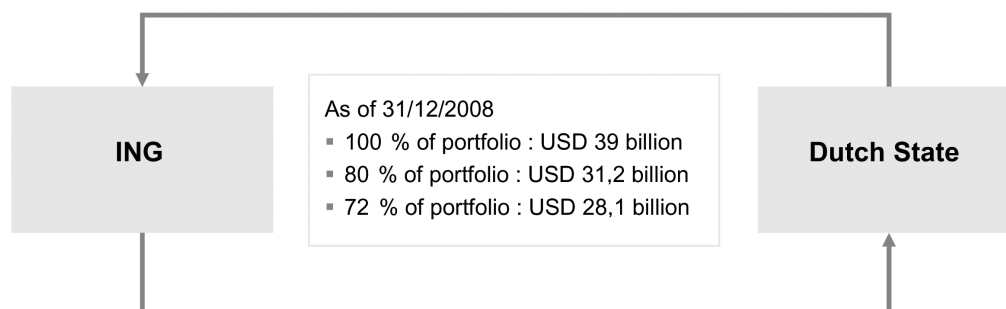
⁽¹¹⁾ Commission Decision in case N 611/08, OJ C 247, 15.10.2009, p. 2.

⁽¹²⁾ Commission Decision in case N 569/09, OJ C 9, 14.1.2009, p. 3.

2.3.2. The impaired assets measure

- (36) The second aid measure was an IA measure in relation to the Alt-A portfolio whose value has declined significantly, putting a strain on the negative revaluation reserve. The Netherlands authorities requested that the measure be approved before 31 March 2009, for reasons of financial stability. In addition, if the measure had been amended in any other than insignificant manner, a large accounting loss would have materialised for ING.
- (37) The IA measure was described in detail in the opening decision of 31 March 2009. The structure of the measure is only briefly recalled before the main changes in the remuneration and fee structure are explained.
- (38) Since 26 January 2009 the Netherlands has received 80 % of all the cash flows from an impaired US Alt-A RMBS portfolio (hereinafter referred to as 'the portfolio') from ING (represented by Flow 4 in the graph below, together with a guarantee fee (Flow 5). In return, ING receives the following risk-free cash flows from the Netherlands:
- a guaranteed value, representing cash flows of principal payments totalling USD 28 billion, which corresponds to 90 % (the purchase price or transfer price) of 80 % of the portfolio, that is to say 72 % of the portfolio (Flow 1). Those cash flows are paid on a monthly basis, over the life of the portfolio;
 - a funding fee (Flow 2);
 - a management fee (Flow 3).
- (39) The cash flows originating from the remaining 20 % of the portfolio are retained by ING and fall outside the scope of the cash flow swap.
- (40) ING has agreed to make a series of additional payments to the Netherlands effectively resulting in a significant increase of the State's remuneration for the IA measure via the adjustments of the fees described in recitals 41, 42 and 43:

- 1 **Principal amounts** on 90 % of 80 % (= 72 %) of portfolio (**risk-free cash flows**)
- 2 **Funding fee** : Fixed rate of 3 %
 - For 57 % : Fixed rate of 3 %
 - For 43 % : Floating rate of LIBOR
- 3 **Management fee** : 0,10 % p.a. on 80 % of portfolio (adjusted from 0,25 % p.a. via guarantee fee)



- 4 **All interests and principal amounts** on 80 % of portfolio (**risky cash flows**)
- 5 **Guarantee fee** : 0,55 % p.a. + **adjustments** = 1,37 % p.a. on 80 % of portfolio

- (41) First, from 25 October 2009, the Netherlands will reduce the funding fee for 57 % (fixed-rate securities) of 72 % of the portfolio by 50 basis points ('bp') per annum ('p.a.') from 3,5 % ⁽¹³⁾ p.a. to 3 % p.a. and will reduce the funding fee for 43 % (floating-rate securities) of 72 % of the portfolio by 50 bp p.a. from LIBOR + 50 bp p.a. to LIBOR flat.
- (42) Second, the management fee (paid by the Netherlands to ING) amounting to 25 bp p.a. on 80 % of the outstanding amount of the portfolio will be reduced by 15 bp to 10 bp through an increase of the guarantee fee (as below in recital 43).
- (43) Third, from 25 October 2009, ING will increase the guarantee fee of 55 bp p.a. on the outstanding amount of the transferred portfolio by a further 82,6 bp p.a., bringing the total guarantee fee to 137,6 bp. Of the increase of 82,6 bp, 67 bp compensate for the reduction in the management fee (paid by the Netherlands to ING) by 15 bp and a revision of the portfolio transfer price by 52 bp (corresponding to a decrease in transfer price from 90 % to around 87 %). 15,6 bp are a claw back adjustment for the period from 26 January 2009 (the start of the initial measure) to 25 October 2009 ⁽¹⁴⁾.
- (44) If the initial measure between the Netherlands and ING is unwound ⁽¹⁵⁾, the amount of the unpaid additional payment that relates to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 bp included in the guarantee fee related adjustment) will still become payable. If a partial unwinding of the initial measure occurs, such amount would be payable proportionally.
- (45) These amendments introduced in October 2009 will be implemented via a separate agreement between ING and the Netherlands, in order to keep the initial measure intact. The Netherlands commits to notify any early full or partial unwinding of the initial measure to the Commission.
- (46) Under the Dutch Credit Guarantee scheme (case N 524/08) the Netherlands also granted guarantees on
- medium-term liabilities to ING amounting to (i) USD 9 billion (of which USD 8,25 billion already issued) and (ii) EUR 5 billion (EUR 4,15 billion already issued). ING pays a guarantee fee of 84 bp on average on the guaranteed amount.
- (47) The Netherlands confirms that any additional guarantees granted to ING will be notified individually. The guarantee of up to EUR [...] billion committed to be granted by the Netherlands in the context of the implementation of the restructuring plan for the funding of Westland Utrecht Hypotheekbank (WUH)/Interadvies, as described in recital 55 and recital 85, will also be notified separately to the Commission. Those guarantees of up to EUR [...] billion are an integral part of the restructuring plan to which this Decision relates but the necessity and remuneration of those guarantees still need to be determined by the Netherlands and will be assessed by the Commission in a separate decision once the measure is individually notified.

3. THE RESTRUCTURING PLAN

3.1. Measures foreseen in the plan

- (48) ING is planning to simplify the group structure, reduce costs, reduce risk and make a number of divestments, develop a sustainable remuneration policy, adapt its capital structure, install new internal capital ratio targets, and extend the amount of long-term funding in non-deposits. The restructuring plan is to be implemented within a five year time period.
- (49) To simplify the group, ING regrouped its six business lines into two divisions, banking and insurance. Each division became responsible for its own strategy execution and balance sheet management. The restructuring plan envisages that ING will only pursue banking activities, while Insurance will be divested over time.
- (50) Banking activities will predominantly concentrate on Europe with selective growth opportunities to be pursued in other parts of the world. ING is planning to have a strategic focus on steady profit-generating retail banking in mature markets, selected retail banking growth opportunities in Central and Eastern Europe and a European-oriented commercial banking aligned with a retail bank and a speciality finance business. The bank will operate on the basis of standardised products and a high level of automation. Instead of acquiring investments such as asset backed securities (ABS), the group will increasingly originate own assets.

2.3.3. The Guarantees

- (46) Under the Dutch Credit Guarantee scheme (case N 524/08) the Netherlands also granted guarantees on

⁽¹³⁾ The funding fee is the sum of 3 % (the alleged cost of funding in USD of the Dutch State) and a margin of 0,5 %.

⁽¹⁴⁾ An increase in fee is only applicable as from 25 October 2009. An adjustment was required and was evaluated at 15,6 bp to compensate for the non payment between 26 January 2009 and 25 October 2009. This adjustment captures both the reduction in funding fee by 50 bp (received by ING from the Dutch State) and the increase in the guarantee fee by 67 bp (paid by ING to the Dutch State).

⁽¹⁵⁾ This would happen if ING buys back from the Dutch State the portfolio, in whole or in part.

- (51) Cost reductions amounting to EUR 1,3 billion are planned for 2009. 35 % of the cost reduction is to be achieved by a reduction of full time equivalents (FTE)-related cost, and 65 % through other expenditure reductions including expenses for external staff, marketing activities and Formula 1 racing. The head office contributes to the cost reductions. As of August 2009, a cost reduction of over EUR 800 million had already been realised. To achieve that cost reduction, ING established a restructuring provision of approximately EUR 450 million after tax.
- (52) ING also plans a number of risk reducing measures, such as hedging programs, reductions, closures and run-off of risky positions, and reduction of direct equity exposure. As regards its investment portfolio, ING has received an asset protection measure from the Netherlands in the form of the Alt-A IA measure. Further measures implemented by ING include a reclassification of a number of its ABS from the available for sale category into the held-to-maturity category, thus limiting the volatility of the negative revaluation reserve. ING will decrease its exposure to higher risk asset classes within US CMBS and US RMBS. ING will, furthermore, not start new initiatives that aim to increase its direct real estate exposure.
- (53) The Commission understands that ING will adopt a [prudent] business strategy in particular regarding ING Direct, given that ING wants to base its business [...] on fair pricing [...] ⁽¹⁶⁾ and will not act as a price leader.
- (54) ING is in the process of implanting a number of divestments with a significant effect as regards its balance sheet following its new business strategy. The restructuring measures presented in ING's revised restructuring plan will result in an expected balance sheet reduction of EUR 616 billion based on the sizes of the units on 30 September 2008. The EUR 616 billion balance sheet reduction consists of bank deleveraging and balance sheet integration initiatives (approximately EUR [...] billion), bank divestments (amounting to approximately EUR [...] billion) and the divestment of all of ING Insurance (amounting to approximately EUR [...] billion). Despite having a smaller balance sheet when compared with the bank, insurance accounted for about 50 % of ING's earnings pre-crisis ⁽¹⁷⁾. Compared to the balance sheet of the third quarter 2008 (that is to say EUR 1,376 billion), the total balance sheet reduction amounts to approximately 45 %.
- (55) As part of the divestitures, the restructuring plan foresees that ING will carve out a fully operating and divestible retail banking company in the Netherlands (see for details recital 85 below) consisting of the current Interadvies (Westland Utrecht Hypotheekbank, Westland Utrecht Effectenbank and Nationale Nederlanden Hypotheekbedrijf, Nationale Nederlanden Financiële Diensten) to which will be attached the consumer credit portfolio of the former Postbank. ING will seek to carve-out the Interadvies business (hereinafter 'WUH/Interadvies') [on the basis of a detailed schedule]. The total balance sheet of the entity will amount to about EUR [25-50] billion.
- (56) [...] the divestment of WUH/Interadvies raised no financial stability risk issues the Dutch authorities provided a study on the Dutch retail banking market by an independent expert showing that current accounts, although generally considered as an anchor product for cross selling in retail banking, are not essential for distributing mortgage and other banking products in the Netherlands, and in the case of ING in particular. In addition, the study points to the importance of Internet as a distribution channel in the Netherlands, reducing the necessity of a branch network for the distribution of banking products. According to the Dutch authorities other products can be attached to the mortgage products distributed by WUH/Interadvies. In particular the transferred consumer loans portfolio can serve as an entry point in other market products.
- (57) In detail, ING plans to sell or divest the following other businesses, activities or products:
- ING Life Taiwan (completed)
 - Stop selling Single Premium Variable Annuities (SPVA) in Japan (completed)
 - Run-off existing variable annuities book in the US
 - Run-off of Financial Products business in the US
 - Stop the planned launch of ING Direct Japan (completed)
 - Divest Non-life Insurance Canada (completed)
 - Divest Annuity and Mortgage Businesses in Chile (completed)
 - Divest Insurance Russia — Non State Pension Fund (completed)
 - Divest Insurance Argentina — Origenes Seg. De Retiro (completed)

⁽¹⁶⁾ [...]

⁽¹⁷⁾ 52 % of pre-tax income for the group on average for the period 2004-2007 came from insurance.

- Divest Insurance Asia — HK platform services (completed)
- Divest Private Banking Asia and Switzerland (signed)
- Divest US Group Re Insurance (signed)
- Divest Insurance Asia/Pacific (Australia (signed), New Zealand (signed) Japan, Korea, Hong Kong, India, Thailand, Malaysia)
- Divest Asset Management Asia/Pacific
- Divest US Employee Benefits
- Divest Insurance US (US Retirement Services, US FA, Traditional Life)
- Divest Asset Management US
- Divest ING Direct US
- Divest Insurance Latin America (Brazil, Chile, Mexico, Peru, Colombia, Uruguay)
- Divest Asset Management Latin America
- Divest Insurance Central Europe (Bulgaria, Czech Republic, Greece, Hungary, Poland, Romania, Slovakia, Spain)
- Divest Asset Management Europe.
- Divest Insurance Benelux (Nationale Nederlanden Insurance, RVS, Retail Insurance Netherlands (former Postbank Insurance), Insurance Belgium, Insurance Luxembourg)
- Divest the business of Interadvies (Westland Utrecht Hypotheekbank, Westland Utrecht Effectenbank, Nationale Nederlanden, Hypotheekbedrijf, Nationale Nederlanden Financiële Diensten), including the consumer credit portfolio of the former Postbank (see commitments from the Netherlands for further details).
- (58) ING projects an organic balance sheet growth for the bank of approximately [...] % per year during the restructuring period [...]. ING plans to achieve most of that growth by lending to the real economy (households and companies).
- (59) ING is also implementing a new remuneration policy whereby the ING Supervisory Board commits to develop a sustainable remuneration policy for the Executive Board and Senior Management. Those incentive schemes will be linked to long-term value creation, taking account of risk and restricting the potential for 'rewards for failure'.
- (60) ING is committed to eliminate double leverage as soon as possible but at the latest by [...].
- 3.2. Ability to achieve viability under a base and a stress scenario**
- (61) ING has submitted a base and a stress scenario with the aim of demonstrating its ability to achieve long-term viability.
- (62) In the base case, ING [...]. Further, it is assumed that equity markets will [...].
- (63) Under its projected base case scenario net income for the group [...]. The total earnings of the group [...]. The return on equity (RoE) would be [...]. ING insurance would [...].
- (64) For the bank, ING assumes an increase in risk weighted assets ('RWA') of about [...] annually (before divestments), partly due to [...]. Income (excluding fair value changes and impairments) is expected to [...] commercial banking is expected [...] and retail banking is expected to [...].
- (65) ING Bank expects to meet its internal capital targets throughout the projection period. ING has set new internal capital targets which are [...] % for the bank's Tier 1 ratio and [...] % for its Core-Tier 1 ratio. For ING Insurance, the target capital coverage ratio remains unchanged at 150 %.
- (66) In the base case scenario, its total solvency ratio (total capital to RWA) would amount to around [...] during the whole restructuring period, with the lowest points being [...].
- (67) ING insurance will be divested during the restructuring period [...]. In the base case the divestments are assumed to generate net proceeds of EUR [...].
- (68) In an alternative scenario where insurance is divested [...] ING would expect correspondingly higher net proceeds [...].
- (69) ING has also submitted a stress scenario [...].
- (70) [...]. In addition, significant increases in its probabilities of default are assumed. ING also assumes there will be higher loss given default (LGD) ratios.

- (71) Under this stress scenario, ING Group's underlying commercial result would [...].
- (72) Despite those stress case assumptions, ING's capitalisation would remain sufficient as it continues to fulfil the regulatory requirements. [...].
- (73) The Netherlands submits in that respect that ING applied LGD models in the stress scenarios to calculate the LGDs of its credit portfolios which have been approved by the financial supervisory authority, De Nederlandsche Bank (the Dutch Central bank, hereinafter 'DNB') [...].
- (74) Furthermore, ING has applied additional more severe stress assumptions — going significantly beyond the presented stress scenario for Dutch retail mortgages⁽¹⁸⁾ [...]. Also under these assumptions, ING's capitalisation remains sufficient as it continues to fulfil regulatory requirements and even retain a significant additional capital buffer.
- (75) The Netherlands submits that the bank has passed all stress tests of its supervisor as regards liquidity. [...].
- (76) In the ING base case scenario of the restructuring plan, the Core-Tier 1 securities will be repurchased by ING on the following basis:

3.3. Exit strategy

- (a) A first tranche presenting EUR 5,0 billion of notional amount is intended to be repurchased around 17 December 2009 at a minimum price of EUR 5,75 billion. This assumed price provides for a 15 % internal rate of return (IRR) to the Netherlands and includes the base 8,5 % return plus an additional premium of at least EUR 340 million and up to EUR 705 million⁽¹⁹⁾ reflecting some potential for appreciation in value related to ING's share price. The exact repurchase price will depend on ING's share price.
- (b) A [remaining] tranche presenting EUR [...] billion of notional amount will be repurchased in [...] at an assumed price of EUR [...] billion. This price assumes repurchase at 150 % of par (EUR 15 per share) plus 8,5 % accrued interest for one year in line with the original terms of the Core-Tier 1 securities agreement. Alternatively, ING could [after] 2011 [...] repurchase this tranche and then exercise its conversion option, whereby the Netherlands would receive either [...] million ING ordinary shares or
- (77) In total, the [...] transactions will provide indicatively a [15-25] % IRR to the Netherlands. The Netherlands are required to notify any alteration of the agreement to redeem the securities to the Commission.
- (78) To date, ING has not deferred any payment of coupons on hybrid Tier 1 instruments issued by the group.
- (79) On 14 October 2009 ING exercised a call option on a lower Tier 2 bond. ING informed the Commission that it regrets this and states that it was a misunderstanding [...]. Moreover, the Netherlands reiterates that it is understood by them that the Commission in principle does not consider a calling of Tier 1/Tier 2 capital instruments appropriate for banks in restructuring and agree that such a call will in the future be discussed on a case by case basis and subject to Commission approval, for three years starting from the date of the adoption of this Decision or until the date on which ING has fully repaid the core-Tier 1 securities to the Dutch State (including the relevant accrued interest of core Tier-1 coupons and exit premium fees), whichever is sooner.
- (80) There is no unilateral exit envisaged for the IA measure and the Netherlands commit to notify any termination of the IA measure by way of an agreement to the Commission. However, the restructuring plan assumes in the base case that the measure will stay in place until after 2013.

3.4. Commitments of the Netherlands

- (81) As regards the IA measures (that is to say the 'Illiquid Assets Back-up Facility' or IABF) the Netherlands commits to the following:
- Starting 25 October 2009, ING Group will make additional payments to the Netherlands, corresponding with an adjustment of the Alt-A remuneration of - 50 basis points on the funding fee received by ING and of + 82,6 basis points on the

⁽¹⁸⁾ [...]

⁽¹⁹⁾ Assuming repayment after 400 days of issuance.

guarantee fee paid by ING. The guarantee fee related adjustment includes 15,6 basis points representing an adjustment for the period from 26 January 2009 — the start of the IABF⁽²⁰⁾ (that is to say the IA measure) — until 25 October 2009. The additional payments will be applied to the extent and duration that the IABF agreement is in place.

— The additional payments will be implemented in the form of a separate agreement between ING Group and the Netherlands, in order to keep the original IABF intact.

— The additional payments, excluding the part related to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) have no residual settlement in case of an early unwinding of the IABF. The amount of the unpaid additional payments that relates to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) will become payable in case of partially or wholly unwinding of the original transaction. If the IABF is partially unwound, this early redemption settlement would be applied proportionally.

— The Netherlands commits to notify any measures of early full or partial unwinding of the IA measure to the Commission.

(82) As regards balance sheet reductions, the commitment for divestment of insurance, ING Direct US and other units to be divested before end of 2013, the Netherlands commits:

— ING will reduce 45 % of its balance sheet compared to 30 September 2008 by the end of 2013 and will divest a list of units as described in recital 57, in particular Insurance and ING Direct US [...].

— These figures refer to projections that do not take into account the possible impact of organic growth and exclude additional increases due to potential new regulatory requirements, such as for example if banks are required to hold significantly larger liquidity buffers due to (new) EU-wide regulations. Such requirements could increase the balance sheet significantly beyond the current organic growth projections.

— ING will not have a restriction on organic (that is to say not related to acquisitions) growth of the balance sheet of its businesses. [...]. In the future, ING will have a general policy to use its growth in funds entrusted by customers mainly to grow in lending to the real economy (corporates and consumers) and decrease its exposure to higher risk asset classes within US CMBS and US RMBS. [...] ⁽²¹⁾.

— With respect to units ING commits to sell (as listed in recital 57), if a divestment of any such unit has not taken place by 31 December 2013 (for example on the basis of a final binding sale agreement having been entered into), the Commission may where appropriate or due to exceptional circumstances, in response to a request from the Netherlands, grant an extension of this time period ⁽²²⁾. The Commission may also in such a case (i) request the Netherlands to appoint one or more (divestiture) trustee(s) ⁽²³⁾, preselected and proposed by ING (and subject to the Commission's approval), [...].

— Whenever the Netherlands seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. In exceptional circumstances, the Netherlands shall be entitled to request an extension within the last month of the time period.

(83) The Netherlands furthermore commits that ING will adhere to an acquisition ban:

— ING will refrain from acquisitions of financial institutions for a certain period. These commitments will apply for the shorter period of three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). ING will also refrain, for the same period, from any (other) acquisition of businesses that would slow down the repayment of the Core-Tier 1 Securities to the Netherlands.

— Notwithstanding this prohibition, ING may, after obtaining the Commission's approval, acquire businesses, in particular if this is essential in order to safeguard financial stability or competition in the relevant markets.

⁽²¹⁾ [...]

⁽²²⁾ In particular, whenever a divestment is being undertaken by an IPO process which has commenced and significant (30 % or more) share placements have been made prior to the end of the divestment period, the Commission (in consultation with the Dutch State, ING and the Trustee) will actively consider allowing the entity more time to place remaining shares.

⁽²³⁾ It is accepted that different trustees may be appointed with respect to different regions and/or business.

⁽²⁰⁾ Illiquid Assets Back Facility.

- (84) The Netherlands furthermore commits that ING will adhere to a price leadership ban:
- Without prior authorization of the Commission, ING will not offer more favourable prices on standardized ING products (on markets as defined below) than its three best priced direct competitors with respect to EU-markets in which ING has a market share of more than 5 %.
- (85) The Netherlands commits to a number of detailed provisions as regards the carve out of WUH/Interadvies:
- This condition is limited to ING's standardized products on the following product markets: (i) retail savings market, (ii) retail mortgage market, (iii) private banking insofar it involves mortgage products or saving products or (iv) deposits for SME's (SME defined according the definition of SME as customarily/currently operated by ING in its business in the relevant country). As soon as ING becomes aware of the fact that it offers more favourable prices for its products than its three best priced competitors, ING will as soon as possible adjust, without any undue delay, its price to a level which is in accordance with this commitment.
 - This condition will apply for three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of CT1 coupons and exit premium fees), whichever is shorter. A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.
 - Moreover, to support ING's long-term viability, ING Direct will refrain, without prior authorisation of the Commission, from price-leadership with respect to standardised ING products on the retail mortgage and retail savings markets within the EU, for the shorter period of three years from the date of the present Decisions or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). As soon as ING becomes aware of the fact that it has become the price leader on a retail mortgage or retail savings markets within the EU, ING will adjust its price to a level which is in accordance with this commitment as soon as possible without any undue delay.
 - A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.
 - ING will create a new company for divestment in the Netherlands, which will be carved out from its current Dutch retail banking business. The result has to be that this carved-out new company is a viable and competitive business, which is stand alone and separate from the businesses retained by ING and that can be transferred to a suitable purchaser. This new company will comprise the business of the WUH/Interadvies banking division, which is currently part of the Dutch insurance operations, and the Consumer Credit Portfolio of ING Bank. WUH/Interadvies is an ING business unit under the umbrella of Nationale Nederlanden Insurance unit. It is (predominantly) a mortgage bank operating on the basis of its own banking licenses. It is a viable 'standalone' player, having its own sales force for customer service and an independent organisation with a solid underlying income. The carve-out will be carried out under the supervision of the Monitoring Trustee in cooperation with the Hold-separate Manager. In this context, during the carve-out period, the Monitoring Trustee may recommend to ING such inclusions into the Divestment Business of tangible and intangible assets (related to the Divestment Business) as he considers objectively required to ensure full compliance with ING's above mentioned result oriented obligations and in particular the viability and competitiveness of the divestment business. If ING disagrees with the Monitoring Trustee about the objective requirement to include such tangible or intangible assets to ensure the viability and competitiveness of the Divestment Business, ING shall inform the Monitoring Trustee in writing. In such a case, ING's executive management and the Monitoring Trustee shall, within [...], hold a meeting with a view to reaching a consensus. If no consensus is reached, ING and the Monitoring Trustee shall jointly appoint, without undue delay, an independent third party with expertise in the financial sector (the 'Expert') to hear the parties' arguments and mediate a solution. If no such solution is reached, the Expert shall decide, within [...] from its appointment, on the objective

requirement to include the relevant related tangible or intangible assets into the Divestment Business to ensure its viability and competitiveness, and the parties shall accept the Expert's decision in this respect and will act accordingly. Issues relating to a disagreement shall be mentioned in the report of the Monitoring Trustee to the Commission.

- ING is committed to ensuring optimal divestment conditions by making a business plan, creating an Internet platform and dedicating sales capabilities for the carved out entity. Also, it will make payment capability available (on commercial terms) if the buyer so requests. In addition, ING will assist in creating a Treasury function and ensure funding for two years post-divestment, whereas ING's funding support will gradually decline in those two years. ING's funding support to the WUH business will be based on internal funding transfer prices. ING [...] to apply to the Netherlands for State guaranteed funding up to an amount of EUR [...] billion for the funding of the WUH business. In that case, the Dutch authorities commit to notify this measure separately.
- Moreover, ING will refrain for an interim period [...] from actively soliciting customers of the WUH business for products that the WUH-business is supplying to these customers on the date of adoption of the present Decision.
- ING will seek to carve-out the WUH business within [...]. After the carve-out period [...], ING will hold-separate the WUH business and seek to divest this business [...] ⁽²⁴⁾.
- A monitoring trustee and hold separate manager will be appointed within [...] after the date of the present Commission Decision and a Divestiture trustee will be appointed [...]. All trustees will be appointed by the Netherlands and preselected and proposed by ING. The trustees are subject to the Commission's approval.

(86) The costs of all trustees appointed during the restructuring process will be borne by ING.

(87) For restoring viability, the Netherlands commits that ING will adhere to the following:

⁽²⁴⁾ [...]

- ING commits to orientate its non-deposit funding towards longer term funding once markets revert to less stressed conditions by issuing more debt instruments with a maturity more than 1 year [...].

- ING endeavours to eliminate its double leverage (using core debt as equity capital in its subsidiaries) as soon as possible and commits to do so at the latest by [...]. The double leverage is automatically eliminated if and when ING Group reverts to being a regulated bank.

(88) Regarding the deferral of coupons and calling of Tier 1 and Tier 2 securities the Netherlands commits that ING will adhere to the following:

- If a rights issue of more than is needed to repay 50 % of the Core-Tier 1 securities, including the relevant accrued interest and the exit premium fee, ING will not be obliged to defer coupon payments on hybrids on 8 and 15 December 2009 ⁽²⁵⁾ and any coupon payments on hybrids thereafter.

- If such a rights issue does not take place and ING was loss-making in the preceding year, ING will be obliged to defer hybrid coupons, insofar as ING has the discretion to do so, for the three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees), whichever is shorter.

- The Dutch authorities understand that the Commission is against State aid recipients remunerating own funds (equity and subordinated debt) when their activities do not generate sufficient profits ⁽²⁶⁾ and that the Commission is in this context in principle against the calling of Tier 2 capital and Tier 1 hybrids. ING regrets the misunderstanding regarding the calling of a lower Tier 2 bond on 14 October 2009. The calling of Tier 2 capital and Tier 1 hybrids will in the future be proposed case by case to the Commission for authorisation, for the shorter period of three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest on Core-Tier 1 coupons and exit premium fees).

⁽²⁵⁾ Provided that it is clear that part of the proceeds of the rights issue will be used for the coupon payments

⁽²⁶⁾ See paragraph 26 of the 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, 19.8.2009, p. 9.

(89) The Netherlands commits that ING will refrain from mass marketing invoking the recapitalisation measure as an advantage in competitive terms.

(90) The Netherlands commits that ING will maintain the restrictions on its remunerations policies and marketing activities as previously committed to under the agreements concerning the Core-Tier 1 securities and illiquid assets back-up facility.

(91) ING and the Netherlands commit that the progress report about the implementation of the restructuring plan will be provided every six months to the Commission as of the date of the present Decision.

(92) The Dutch authorities commit that the full execution of ING's restructuring will be completed before the end of 2013.

4. REASONS FOR THE OPENING OF THE INVESTIGATION

(93) In the opening decision, the Commission expressed doubts on the compliance of the initial measure with the Impaired Asset Communication, and more particularly with regards to valuation and burden sharing. The Commission found however that the measure complied with the conditions on eligibility of assets, asset management arrangement, transparency and disclosure and a guarantee fee as stipulated in the Impaired Asset Communication.

(94) Regarding valuation, the Real Economic Value (REV) of the portfolio was claimed by the Netherlands to be 97,3 % of face value in a base case scenario and 88,8 % of face value in a stress case scenario. On this basis, the portfolio was transferred to the Netherlands at 90 % of face value. The Commission expressed doubts on the evaluation of the REV, in particular on the choice of the discount rate, the house price assumptions, the levels of credit enhancement and other valuation issues.

(95) Regarding burden sharing, the Commission expressed doubts about the level of the funding fee and the appropriateness of the management fee paid by the Netherlands to ING. Moreover, given that the Commission had doubts regarding the valuation of the portfolio, any negative conclusion on the review of the valuation could directly impact the assessment of the guarantee fee.

5. ASSESSMENT OF THE AID

5.1. Existence of aid

(96) According to Article 87(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

(97) The Commission has already established in the opening decision that the recapitalisation of ING constitutes State aid amounting to the sum of the injected capital, that is to say, EUR 10 billion.

(98) The amendment of the redemption premium also constitutes State aid in so far as the State waives its right to obtain revenues. As ING has already agreed to a redemption premium of 150 % any reduction is indeed forgone revenue. The modification of the repayment terms for the Dutch capital injection results in an additional benefit for ING. This represents additional aid of approximately EUR 2 billion as indicated above in recital 34.

(99) As regards the IA measure the Commission has found in the opening decision that the measure constitutes aid. The aid amount resulting from the IA measure is calculated as the difference between the transfer price (based on the real economic value) and the market price of the transferred portfolio. According to the information submitted by the Netherlands authorities the total face value of the Alt-A portfolio was USD 39 billion on 31 December 2008. 80 % of the portfolio has been transferred to the Netherlands at 87 % of face value (based on the amended measure) representing USD 27,1 billion. According to the information submitted by the Netherlands authorities the total market value of the Alt-A portfolio on 31 December 2008 was USD 25,8 billion, 80 % of which (USD 20,6 billion) has been transferred to the Netherlands. The resulting difference between the transfer price and the market price of the transferred portfolio is USD 6,5 billion, which corresponds to around EUR 5,0 billion⁽²⁷⁾. The aid amount resulting from the IA measure is therefore considered to be EUR 5 billion.

(100) The EUR 10 billion of capital injection has been initially allocated as follows within the group: EUR 5 billion to ING Bank, EUR 4 billion to ING Insurance and EUR 1 billion at the level of the holding. ING has the possibility to transfer the amount of capital injection at any time between ING Bank, ING Insurance and the holding level.

⁽²⁷⁾ Assuming a EUR/USD exchange rate of 1.3.

- (101) Furthermore 85 % of the cash flows transferred to the Netherlands under the IA measure covered assets held by ING Bank and 15 % assets held by ING Insurance. Of the total aid amount resulting from the IA measure (EUR 5 billion) EUR 4,25 billion is therefore to be attributed to ING Bank and EUR 0,75 billion to ING Insurance.
- (102) This results in a total aid amount for ING Bank of EUR 9,25 billion (representing 2,7 % of the RWA of ING Bank ⁽²⁸⁾), a total aid amount for ING Insurance of EUR 4,75 billion (representing 50 % of the solvency margin requirements of ING Insurance ⁽²⁹⁾) and EUR 1 billion remaining at the holding level.
- (103) For the sake of simplicity and for consistency with the terms used in the Impaired Asset Communication, the total aid amount can also be expressed in RWAs of ING Bank only. In that case, both measures together plus the additional aid from the reduction of the redemption premium of EUR 2 billion result in an aid element of about EUR 17 billion, which amounts to about 5 % of risk weighted assets of ING Bank.
- (104) In addition, ING received EUR 5 billion and USD 9 billion in aid from the Dutch guarantee scheme. On the basis of the prevalent exchange rate at the time of the granting of these measures of EUR/USD 1,3, the amount of the granted guarantees is about EUR 12 billion amounting to about 1 % of the entire balance sheet of the Group. The guarantees were granted at a time when market conditions were deteriorating and it was difficult for banks to raise funding. Therefore, those guarantees would not have been provided by a market investor and constitute additional aid, possibly up to the nominal amount ⁽³⁰⁾.
- (105) Furthermore, the Netherlands maintains that ING will [...] an additional EUR [...] billion of guarantees from the Netherlands for carving out the retail banking entity WUH/Interadvies, which has not been granted yet and the necessity of which is still to be established. The Netherlands consider this as additional restructuring aid for the beneficiary, which will be notified at a later stage. The Commission is in principle not opposed to such aid as long as it is limited to the minimum necessary for the restructuring of ING ⁽³¹⁾ and as long as it is sufficiently remunerated.
- (106) In total, therefore, ING will receive restructuring aid of up to EUR [12-22] billion in liquidity guarantees and about EUR 17 billion of other aid, amounting to about 5 % of RWA of the bank.

5.2. Compatibility

5.2.1. Application of Article 87(3)(b) of the Treaty

- (107) Article 87(3)(b) of the Treaty empowers the Commission to decide that aid is compatible with the common market if it is intended 'to remedy a serious disturbance in the economy of a Member State'. The Commission acknowledged in its recent approval of the prolongation of the Dutch guarantee scheme ⁽³²⁾ that, overall, the threat of a serious disturbance in the Dutch economy continues and that measures supporting banks are suitable to address that threat.
- (108) Given the significance of its lending activities for specific regional markets, its cross border presence, and its integration and cooperation with other banks, the Commission accepts that ING is a systemically relevant bank. [...]. It is therefore concluded that such a failure would entail serious consequences for the Dutch financial sector and the real economy. The aid must therefore be assessed under Article 87(3)(b) of the Treaty.

5.2.2. Compatibility of the IA measure

- (109) The treatment of asset relief measures by Member States under Article 87(3)(b) of the Treaty is assessed on the basis of the Impaired Asset Communication. The Impaired Asset Communication sets out principles that must be followed by any asset relief measure.
- (110) The doubts expressed in the opening decision that the IA measure does not fulfil the conditions for the compatibility of asset relief as set out in the Impaired Asset Communication are allayed.
- (111) The Netherlands authorities committed to amend the measure by means of an increase of the guarantee fee paid by ING to the Netherlands by 82,6 ⁽³³⁾ bp p.a. whereby the resulting transfer price of the measure, as well as the fee structure have been altered. Furthermore the funding fee has been reduced by 50 bp p.a.

⁽²⁸⁾ The RWA of ING Bank amounted to EUR 343 billion at the end of 2008.

⁽²⁹⁾ Considering the solvency margin requirements at the end of 2008.

⁽³⁰⁾ Commission Decision in case C 9/08 of 4 July 2008 *SachsenLB*, not yet published, Commission decision of 29 May 2009 in case N 264/09; Rescue aid to *HSH Nordbank AG*, OJ C 179, 1.8.2009, p. 1, Commission Decision of 7 May 2009 in case N 244/09 *Commerzbank*, OJ C 147, 27.6.2009, p. 4.

⁽³¹⁾ See point 7 last recital of the Restructuring Communication, as well as point 27.

⁽³²⁾ Commission Decision of 7 July 2009 in case N 379/09 and NN 16-09, not yet published.

⁽³³⁾ Composed of an adjustment of 52 bp p.a. for valuation, 15 bp p.a. for management fee and 15,6 bp p.a. for the payments foregone by the State for the period from 26 January and 25 October 2009.

Valuation

(112) First of all the Commission of the increase of 82,6 bp p.a. of the guarantee fee, 52 bp p.a. is intended to reduce the transfer price for the assets of the portfolio from 90 % of face value to 87 % of face value. The amended transfer price brings the transfer price in line with the REV estimations for the portfolio that would result from the use of reasonable assumptions. Following the opening decision the Dutch authorities have submitted revised valuations of the portfolio. After the Commission expressed doubts on the house price assumptions and the discount rates used in the initial valuation of the portfolio by Dynamic Credit Partners, the Netherlands authorities provided the Commission with valuation outputs using the same valuation methodology but based on more conservative assumptions on house prices and discount rates. The Commission adjusted the output for additional factors after consultation with its external experts. Based on that analysis it is concluded that a REV estimated at 87 % is acceptable in view of the requirements of the Impaired Asset Communication relating to valuation methodology and prudent assumptions, which were outlined in the opening decision. With the adjustment of the REV to 87 % the initial doubts of the Commission were therefore allayed.

Fee structure

(113) In its opening decision, the Commission expressed doubts on the level of the management fee that was initially set at 25 bp p.a. Through an increase of the guarantee fee of 15 bp p.a. (in addition to the 52 bp p.a. for valuation adjustment and 15,6 bp p.a. for time adjustment) the management fee is reduced to 10 bp p.a. which is an acceptable level given the size of the portfolio under management. Furthermore, the doubts of the Commission in respect of the funding fee expressed in the opening decision have also been addressed, in so far as the funding fee has been reduced by 50 bp p.a. In this way the funding fee is brought in line with the cost of funding of the Netherlands as presented to the Commission by the Dutch authorities⁽³⁴⁾. Therefore the Commission's initial doubts in respect of the management and the funding fee have been alleviated.

Burden sharing

(114) As regards burden sharing, the Impaired Asset Communication states in section 5.2 the general principle that banks ought to bear the losses associated with impaired assets to the maximum extent. The Commission is of the view that an appropriate level of burden sharing can only be achieved if the impaired assets are transferred to the State at a transfer price that does not exceed the REV⁽³⁵⁾. The Commission has been assured on this point by the revised transfer price as indicated above in recital 112.

⁽³⁴⁾ The Dutch State estimates its cost of funding in USD to be around 3 % for a maturity of 5-7 years, corresponding to the weighted average life of the portfolio.

⁽³⁵⁾ Presupposing an appropriate remuneration; this was presently provided.

(115) The adjustment of the transfer price is in this case achieved by an increase in the guarantee fee of 52 bp p.a. equivalent in terms of net present value to the difference between 90 % and 87 % of par value. This is in line with the opening decision where the Commission accepted the cash flow swap agreement and held that adjustments to valuation would be made by way of alteration to the guarantee fee. Therefore, the IA measure satisfies the conditions relating to appropriate burden sharing.

(116) Finally, the amended IA measure enters into force on 25 October 2009 whilst payments have been made under the initial transaction fee structure, which was more favourable for ING, from 26 January 2009 until 25 October 2009. In order to make up for the payments by ING to the State which have been foregone during that period the guarantee fee has been increased by an additional 15,6 bp p.a. That amendment is necessary in order to consider the measure compatible with the Impaired Asset Communication from 26 January 2009. However the increase does not raise the valuation of the portfolio or increase burden sharing, because it only ensures the application of the Impaired Asset Communication from the date of the IA measure coming into effect, i.e. retroactively.

5.2.3. Compatibility of restructuring aid

(117) The Commission must assess the continuation of all previous emergency aid measures as restructuring aid. The compatibility of the restructuring aid is assessed on the basis of the restructuring plan in the context of the 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⁽³⁶⁾ ('the Restructuring Communication'). Even if previous decisions have made reference to the Guidelines on State aid for rescuing and restructuring firms in difficulty⁽³⁷⁾, the Commission has clarified in point 49 of the Restructuring Communication that all aid notified to the Commission before 31 December 2009 will be assessed as restructuring aid to banks pursuant to the Restructuring Communication instead of the Guidelines on State aid for rescuing and restructuring firms in difficulty.

The degree of restructuring required

(118) The Restructuring Communication does not define the conditions under which a bank may need to present a restructuring plan but relies on previous communications.

⁽³⁶⁾ OJ C 195, 19.8.2009, p. 9.

⁽³⁷⁾ OJ C 244, 1.10.2004, p. 2. Reference was made explicitly in the banking communication at point 42.

(119) The Commission considers that ING should undergo in-depth restructuring in particular as the beneficiary has already received State aid that contributes to coverage or avoidance of losses which altogether exceeds 2 % of the total bank's RWA. This position is in line with point 4 of the Restructuring Communication and point 55 of the Impaired Asset Communication, as well as the previous commitments of ING ⁽³⁸⁾.

The restoration of viability

(120) When assessing a restructuring plan the Commission makes sure that the bank is able to restore long-term viability without State aid (section 2 of the Restructuring Communication).

(121) The Restructuring Communication recalls in this context that governments have recapitalised banks on terms chosen primarily for reasons of financial stability rather than for a return to viability. Long-term viability therefore requires that any State aid received is either redeemed over time, as anticipated at the time of the granting of the aid, or is remunerated according to normal market conditions, thereby ensuring that any form of additional State aid is terminated. The restructuring plan lays out a convincing strategy for repaying the Netherlands capital, which will be commenced even before the issuance of the present Decision.

(122) The Restructuring Communication explains that long-term viability is achieved when a bank is able to cover all its costs including depreciation and financial charges and provide an appropriate RoE, taking account of the risk profile of the bank. As indicated in recital 65 the restructuring plan demonstrates how ING will show adequate profitability to cover all its costs including depreciation and financial charges and provide an appropriate return on equity, taking account of the risk profile of the bank.

(123) The restructuring plan demonstrates that ING is also able to comply with the relevant regulatory requirements even in stress scenarios with a protracted global recession as required by point 13 of the Restructuring Communication. The information submitted by the Dutch authorities indicates that ING would be viable even in stress scenarios with conservative assumptions reviewed by the Commission. The Commission notes that regarding the LGD levels for the Dutch mortgage retail portfolio the models used by ING have been approved by the DNB, the Dutch supervisory authority. Regards the quality of the Dutch mortgage portfolio of ING additional severe stress assumptions for Dutch mortgage market were applied. Under the additional stress assumptions ING would still meet its capital requirements according to the information provided by the Netherlands authorities.

(124) The planned divestments will generate excess capital over time which should further strengthen the capital basis of ING.

(125) Second, in line with point 10 of the Restructuring Communication, the plan identifies the causes of the difficulties for the bank and its weaknesses and outlines how the proposed restructuring measures will remedy the past problems. To this end the restructuring plan states that the beneficiary will improve its capital structure by eliminating double leverage and increasing its core capital ratio. Therefore, ING will be in a better position to face possible adverse economic developments in the future and absorb unexpected losses even after repayment of the capital from the Netherlands.

(126) The Alt-A portfolio has been identified as a main reason for repeated need of State support. Concerns in the market place about possible write-downs on the Alt-A portfolio have been one of the triggers of the recapitalisation measure before being covered by the IA measure. Such concerns in the market have been allayed by the IA measure. [...]. In this respect the foreseen divestment of ING Direct US as submitted in the restructuring plan set aside a main source of difficulties that led to State intervention.

(127) ING will further decrease its exposure to higher risk asset classes and not aim to increase its real estate exposure. ING will also sell or reduce exposure to other risky businesses and assets.

(128) Furthermore, ING has initiated a broader 'de-risking' (i.e. a risk reduction policy) and cost cutting programme, which also addresses the complexity of the group by first creating banking and insurance divisions and by later divesting the entire insurance part of its business. The plan shows that in particular ING Direct will adapt a [prudent] business strategy and refrain from [...] pricing, which is underlined by the price leadership ban as described in recital 53 and recital 84.

(129) In addition, the plan illustrates that ING is adapting to the lessons learned from the crisis in line with point 11 of the Restructuring Communication. For example the plan explains that ING intends to amend its remuneration policy to orientate the bank more towards longer-term achievements and thus avoid rewards for failure. [...].

(130) Therefore, it is concluded that the restructuring plan is apt to restore its long term-viability.

⁽³⁸⁾ See the impaired asset decision of 30 March 2009, point 83.

Own contribution of the beneficiary

- (131) Furthermore, the restructuring plan provides for an appropriate own contribution to the restructuring costs (section 3 of the Restructuring Communication). The restructuring plan demonstrates that ING provides an appropriate burden sharing in line with the Restructuring Communication, which is important for addressing moral hazard.
- (132) First, the Netherlands has committed to adjust the terms of the IA measure which brings it in line with the requirements put forward in the Impaired Asset Communication.
- (133) Second, ING will pay an adequate remuneration of its capital injection in line with its Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition⁽³⁹⁾ (the Recapitalisation Communication). That assessment is not altered by the modification of the repayment terms as these constitute an early redemption premium. Such early redemption premium constitutes a modification of the recapitalisation decision. It is acceptable because the Commission encourages early repayment. The rationale for such redemption incentives is that redemption removes the ongoing effects of State aid benefits for the bank. This has been applied in Commission decisions taken following the Recapitalisation Communication such as *SNS* and *Aegon* (cf. recital (33)) and should be applied here *mutatis mutandis*. Moreover, in view of the fact that the capital injection will provide the Netherlands with a 15 % IRR, the reduction of the redemption premium also seems justified in itself as such an IRR is an adequate remuneration within meaning of the Recapitalisation Communication. Consequently, the reduction in the redemption premium should be considered as compatible restructuring aid.
- (134) Third, ING will pay an adequate remuneration for its guarantees on medium-term liabilities in line with the Dutch guarantee scheme which, in turn, is in line with the 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⁽⁴⁰⁾.
- (135) The Netherlands has also committed to a large number of planned divestments in ING's global insurance activities, its asset management business and its private banking activities in Switzerland and outside Europe, which contributes to covering the restructuring costs.
- (136) Furthermore, the restructuring plan foresees that ING will raise EUR 5 billion of capital via a share offering in 2009, which will result in a dilution of existing shareholder rights. This can be considered as a significant own contribution of existing capital providers.
- (137) A limitation of the aid to the minimum necessary is also ensured by the commitment of the Netherlands that the beneficiary will not acquire other financial institutions in general or other businesses if this slows-down the repayment of the capital provided by the Netherlands. This ensures that the bank will refrain from any acquisition [...].
- (138) ING has in the past however not complied with the Commission's policy on Tier 1 and Tier 2 capital instruments as stipulated in point 26 of the Restructuring Communication⁽⁴¹⁾. The Commission clarified there that in a restructuring context, the discretionary offset of losses (for example by releasing reserves or reducing equity) by beneficiary banks in order to guarantee the payment of dividends and coupons on outstanding subordinated debt, is in principle not compatible with the objective of burden sharing. While, the Commission acknowledges that ING will no longer call Tier 1 and Tier 2 instruments without formal Commission approval the call on 14 October 2009 did not respect that principle and should be compensated by additional measures mitigating distortions of competition.
- (139) In the same vein, it is unfortunate that ING made discretionary coupon payments in 2009 without any proper justification although it was loss making in 2008. Although, the Commission in principle considers a coupon ban is also necessary in the case of ING, it finds that such a ban should no longer be required in this case provided that ING repays EUR 5 billion before 31 January 2010. This would include the coupon payments of 8 and 15 December 2009. The early repayment of a significant part of the State aid granted to the Netherlands addresses existing concerns of the Commission that such coupon payments impede ING from achieving long-term viability without State aid. If a bank is able to raise such a significant amount of capital from the market and has a clear strategy in the medium term, it should no longer be restricted in the use of its capital if and where this does not threaten the implementation of its restructuring plan. This has been demonstrated in the restructuring plan.

⁽³⁹⁾ OJ C 10, 15.1.2009, p. 2.

⁽⁴⁰⁾ OJ C 270, 25.10.2008, p. 8.

⁽⁴¹⁾ MEMO/09/441 of 8 October 2009 — Commission recalls rules concerning Tier 1 and Tier 2 capital transactions for banks subject to a restructuring aid investigation

Measures addressing distortions of competition

- (140) The restructuring plan also entails sufficient structural and behaviour measures to address distortions of competition. The Restructuring Communication explains that distortions of competition can be created where some banks compete on the merits of their products and services, whereas others accumulate excessive risks and/or rely on unsustainable business models. State aid prolongs such distortions of competition by artificially supporting the market presence of beneficiaries. In this way it may create moral hazard within the banking system while weakening the incentives of the non-beneficiaries to compete, invest and innovate. State aid may also undermine the single market by creating entry barriers and undermining the incentives for cross-border activities.
- (141) Point 31 of the Restructuring Communication notes that when assessing the amount of aid and the resultant distortions, the Commission has to take into account both the absolute and relative amount in relation to the State aid received. In this respect ING has received a significant aid amount, representing 5 % of RWA if expressed in terms of RWA of ING Bank. This level is well above the 'trigger level' of 2 % of RWA⁽⁴²⁾. In addition ING has obtained a significant amount of guarantees, which should however not need to result in measures to mitigate distortions of competition pursuant to point 31 of the Restructuring Communication because that ING did not have a funding problem (which guarantees typically help to overcome) but was encouraged by the Netherlands to take the guarantees in order to lend to the real economy. Moreover, there does not appear to be any reason why, at this stage, the additional guarantees foreseen in the restructuring plan for the carve-out of WUH/Interadvies should require additional measures to mitigate distortions of competitions. That measure is, in itself, a measure intended to help address the market distortion since it is only envisaged in order to enable the carve-out of WUH/Interadvies.
- (142) It is therefore concluded that the amount of aid to the beneficiary is large. Consequently, significant measures are necessary in order to remedy the distortions of competition. The mitigating measures should be increased pursuant to point 31 of the Restructuring Communication due to the insignificant burden-sharing stemming from non-compliance with the Commission's policy on Tier-1 and Tier-2 instruments set out in point

⁽⁴²⁾ If only the aid amount allocated to insurance is considered, it represents 50 % of the solvency margin requirements of ING Insurance. This would be equivalent to 4 % of RWA for a bank, as it constitutes half of the minimum required capital for the entity to operate.

26 of the Restructuring Communication as explained in more detail in recital 138 et seq. of this Decision⁽⁴³⁾.

- (143) The Commission considers that ING has taken the necessary steps to address the very large competition distortions because the restructuring plan foresees a number of divestments reducing the market presence of the beneficiary. In that respect, the beneficiary will reduce its balance sheet by 45 % before the end of 2013 compared to the balance sheet of 30 September 2008. Those measures are only to a very limited part due to deleveraging and mainly entail the divestiture of ING's entire insurance and asset management business as well as retail banking in the Netherlands, private banking in Switzerland and banking activities elsewhere outside Europe. The scale of the proposed divestments is appropriate to mitigate the distortions of competition, also in view of the aggravating circumstances mentioned in recitals 138 and 139.
- (144) In addition, the restructuring plan also fosters effective competition and prevents market power and disincentives for cross-border activities pursuant to recital 32 of the Restructuring Communication by carving out an entity from ING's business in the Dutch retail market. The Commission has identified such market conditions in particular in the Netherlands where the retail banking market is highly concentrated and ING is one of the leading players able to maintain its high market share with the help of State aid. The WUH/Interadvies business is appropriate because it is apt to constitute a viable business in the future that can compete in the retail banking business in the Netherlands.
- (145) According to the Netherlands the carve out should be able to add competition in this highly concentrated market, given that it amounts to a good market share in the mortgage business and consumer loans and some savings activities. Moreover, the entity will be a fully fledged banking business that has a well equipped back office, and fully fledged Internet interface with a payments system and is funded by ING. The fact that it does not have a branch network which is typically an essential facility for a banking business in most Member States is at least partially compensated through Internet banking, which is also an important distribution channel for banking products in the Netherlands. Deposits can be attached to WUH/Interadvies via its received Internet platform. Also, given the know-how and human resources provided to the new entity, it will be in a position to further develop its existing business and possibly set up branches.

⁽⁴³⁾ The same seems to be true of ING adherence to the prohibition to advertise the recapitalisation measure which was not been respected in Italy and Spain for several days after the granting of the aid.

- (146) Furthermore, the Commission notes the argument of the Dutch authorities referred to in recital 56 concerning the relatively lesser importance of current account products in the Netherlands for cross selling other retail banking products. In that regard, and in the absence of any contrary indications, the Commission accepts that in the Netherlands current account products may be of relatively low importance for cross-selling other retail banking products.
- (147) Finally, the Commission takes note that ING has given several commitments to ensure that the business is viable, such as a 'hold separate' manager and a monitoring trustee. Both should ensure that the rights and other tangible and intangible assets of the (to-be-carved-out) business are protected, defended and preserved against ING. Also the arbitration mechanism in place which requires the new entity to receive all necessary inclusions for ensuring its viability will ensure the compliance of ING with its commitments under this Decision. Furthermore, ING will not target clients of the carved out entity regarding products transferred to WUH/Interadvies even if ING still has existing client relationships. Moreover, ING will provide funding for WUH/Interadvies for [...] post investment although the amount of funding will gradually decline over that period. Furthermore the Commission will [...] ensure that the business is sold with the help of a divestiture trustee [...]. All those elements ensure that the entity will be viable and thus increase competition in the Dutch retail banking market. The Commission therefore accepts that the divestment of WUH/Interadvies may enable a new competitor to develop business in the retail banking market in the Netherlands and may bring a new competitive force to that market.
- (148) Moreover, the Netherlands has also committed to an acquisition ban preventing ING from acquiring attractive businesses which will be likely brought to the market due to the general restructuring of financial firms and the overall sector⁽⁴⁴⁾. This prevents the non organic growth of ING and allows other firms not having received State aid to purchase such businesses.
- (149) Furthermore the Commission considers commitment to a price leadership ban in line with the Restructuring Communication requirements in order to ensure that State aid cannot be used to offer terms which cannot be matched by competitors which are not in receipt of State aid (recital 44). In line with point 32 of the Restructuring Communication, a price leadership commitment may not be necessary in markets where significant structural commitments have been provided. Depending on the specificities of each individual case, the ban may take different forms that aim at striking the most appropriate balance between individual treatment of aid distortions and competitive market conditions⁽⁴⁵⁾.
- (150) The Netherlands have opted for providing a general price leadership ban for ING whereby ING will not offer more favourable prices than its three best priced competitors. That commitment is appropriate as it targets all markets where the bank is well established with a market share of at least 5 %⁽⁴⁶⁾. Moreover, ING and the Dutch authorities committed to a price leadership ban independent of market share in respect of ING Direct Europe. This is justified because of the information received by the Commission pointing at aggressive commercial behaviour. The effect of the ban should be that, [...], ING will mainly compete on the basis of the quality of its products and services. This should alleviate the concerns stated in the information addressed to the Commission indicated above in recital 6 in that respect.
- (151) Finally, the Netherlands commits that ING will refrain from mass marketing that invokes the recapitalisation measure as an advantage in competitive terms.
- (152) However, in line with the Recapitalisation Communication, there is no longer any reason to insist upon a temporary balance sheet restriction, as imposed in Decision N 528/08.

5.2.4. Monitoring

- (153) The restructuring plan presented by the Netherlands will need to be properly implemented. In order to ensure a proper implementation, the Netherlands will provide the Commission with a bi-annual monitoring report. In addition, the restructuring plan and the commitments provided by the Netherlands foresee a number of trustees which will assist the Commission in monitoring the implementation of the restructuring plan and various provisions therein.

⁽⁴⁵⁾ In Commission Decision of 7 May 2009 in case N 244/09 *Commerzbank*, OJ C 147, 27.6.2009, p. 4, the Commission accepted a ban in respect of three best-priced competitors. In Commission Decision of 18 November 2009 in case C 18/09, *KBC*, not yet published, the Commission accepted a price leadership ban where KBC committed not to offer better prices than a best priced competitor among top ten market players in terms of market share on the relevant market.

⁽⁴⁶⁾ In Commission Decision of 7 May 2009 in case N 244/09 *Commerzbank*, OJ C 147, 27.6.2009, p. 4 and in Commission Decision of 18 November 2009 in case C 18/09, *KBC*, not yet published, the Commission considered it appropriate to limit the ban to markets where the bank has a significant presence, defined for the purpose of the price leadership ban as having a market share of at least 5 %.

⁽⁴⁴⁾ Similar: Commission Decision of 7 May 2009 in case N 244/09 *Capital injection into Commerzbank*, OJ C 147, 27.6.2009, p. 4, at para. 111.

(154) It is common practice for the Commission to allow a Member State to adapt the commitments in case of exceptional circumstances⁽⁴⁷⁾. Therefore whenever appropriate, in response to a request from the Netherlands showing good cause, the Commission will make changes when justified on the merits either to (i) grant an extension of the time period of the measures committed by the Netherlands in this decision or (ii) waive, modify or substitute one or more of the aspects of any commitment provided by the Netherlands in this decision.

6. CONCLUSION

(155) It is concluded, firstly, that on the basis of the amendments presented by the Netherlands on 20 October 2009 the IA measure is in line with the Impaired Asset Communication and should thus be declared compatible with the common market pursuant to Article 87(3)(b) of the Treaty.

(156) Second, it is concluded that the restructuring measures enable ING to restore its long-term viability, are sufficient with respect to burden sharing and are appropriate and proportional to offset the competition distorting effects of the aid measures in question. The restructuring plan submitted, fulfils the criteria of the Restructuring Communication and should therefore be considered compatible with the common market pursuant to Article 87(3)(b) of the Treaty. The capital injection measures and the guarantees which have already been granted can therefore be prolonged in accordance with the restructuring plan. However, the temporary balance sheet restrictions imposed in Decision N 528/08 should be removed.

(157) Thirdly, it is concluded that the additional aid measures presented in the framework of the restructuring plan, that is to say the modification of the terms of the repurchase of the Core Tier 1 securities from the Netherlands and the foreseen liability guarantees, should also be declared compatible with the common market pursuant to Article 87(3)(b) of the Treaty, given the depth of the measures for addressing market distortions

presented in the restructuring plan and the fact that the aid helps the beneficiary to enhance its viability. This also concerns the aid deriving from the changed terms of the repayment arrangements of the capital granted by the Netherlands,

HAS ADOPTED THIS DECISION:

Article 1

The impaired asset measure provided by the Netherlands for the so called Alt A portfolio of ING constitutes State aid within the meaning of Article 87(1) of the Treaty.

The aid is compatible with the common market, subject to the commitments set out in Annex I.

Article 2

The restructuring aid provided by the Netherlands to ING constitutes State aid within the meaning of Article 87(1) of the Treaty.

The aid is compatible with the common market, subject to the commitments set out in Annex II.

The temporary limitation on balance sheet growth set out in the Commission's decision of 12 November 2008 concerning the recapitalisation measure to ING, is lifted.

Article 3

This decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 18 November 2009.

For the Commission

Neelie KROES

Member of the Commission

⁽⁴⁷⁾ Commission Decision of 22 October 2008 in case C 10/08, *IKB*, OJ L 278, 23.10.2009, p. 32.

ANNEX I

As regards the impaired asset measure the following commitments have to be respected:

- Starting 25 October 2009, ING Group will make additional payments to the Netherlands, corresponding with an adjustment of the Alt-A remuneration of – 50 basis points on the funding fee received by ING and of + 82,6 basis points on the guarantee fee paid by ING. The guarantee fee related adjustment includes 15,6 basis points representing an adjustment for the period from 26 January 2009 — the start of the IABF (that is to say the A measure) — until 25 October 2009. The additional payments will be applied to the extent and duration that the IABF agreement is in place.
 - The additional payments will be implemented in the form of a separate agreement between ING Group and the Netherlands, in order to keep the original IABF intact.
 - The additional payments, excluding the part related to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) have no residual settlement in case of an early unwinding of the IABF. The amount of the unpaid additional payments that relates to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) will become payable in case of partially or wholly unwinding of the original transaction. If the IABF is partially unwound, this early redemption settlement would be applied proportionally.
 - The Netherlands commits to notify any measures of early full or partial unwinding of the IA measure to the Commission.
-

ANNEX II

As regards the restructuring aid the following commitments have to be respected:

(a) As regards balance sheet reductions, the commitment for divestment of insurance, ING Direct US and other units to be divested before end of 2013:

- ING will reduce 45 % of its balance sheet compared to 30 September 2008 by the end of 2013 and will divest a list of units as described in recital 57, in particular Insurance and ING Direct US, [...].
- These figures refer to projections that do not take into account the possible impact of organic growth and exclude additional increases due to potential new regulatory requirements, such as for example if banks are required to hold significantly larger liquidity buffers due to new EU-wide regulations. Such requirements could increase the balance sheet significantly beyond the current organic growth projections.
- ING will not have a restriction on organic (that is to say not related to acquisitions) growth of the balance sheet of its businesses. [...]. In the future, ING will have a general policy to use its growth in funds entrusted by customers mainly to grow in lending to the real economy (corporates and consumers) and decrease its exposure to higher risk asset classes within US CMBS and US RMBS. [...] ⁽¹⁾.
- With respect to units ING commits to sell (as listed in recital 57), if a divestment of any such unit has not taken place by 31 December 2013 (for example on the basis of a final binding sale agreement having been entered into), the Commission may where appropriate or due to exceptional circumstances, in response to a request from the Netherlands, grant an extension of this time period ⁽²⁾. The Commission may also in such a case (i) request the Netherlands to appoint one or more (divestiture) trustee(s) ⁽³⁾, preselected and proposed by ING (and subject to the Commission's approval), [...].
- Whenever the Netherlands seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. In exceptional circumstances, the Netherlands shall be entitled to request an extension within the last month of the time period.

(b) The Netherlands furthermore commits that ING will adhere to an acquisition ban:

- ING will refrain from acquisitions of financial institutions for a certain period. These commitments will apply for the shorter period of three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). ING will also refrain, for the same period, from any (other) acquisition of businesses that would slow down the repayment of the Core-Tier 1 Securities to the Netherlands.
- Notwithstanding this prohibition, ING may, after obtaining the Commission's approval, acquire businesses, in particular if this is essential in order to safeguard financial stability or competition in the relevant markets.

(c) The Netherlands furthermore commits that ING will adhere to a price leadership ban:

- Without prior authorization of the Commission, ING will not offer more favourable prices on standardized ING products (on markets as defined below) than its three best priced direct competitors with respect to EU-markets in which ING has a market share of more than 5 %.
- This condition is limited to ING's standardized products on the following product markets: (i) retail savings market, (ii) retail mortgage market, (iii) private banking insofar it involves mortgage products or saving products or (iv) deposits for SME's (SME defined according the definition of SME as customarily/currently operated by ING in its business in the relevant country). As soon as ING becomes aware of the fact that it offers more favourable prices for its products than its three best priced competitors, ING will as soon as possible adjust, without any undue delay, its price to a level which is in accordance with this commitment.

⁽¹⁾ [...]

⁽²⁾ In particular, whenever a divestment is being undertaken by an IPO process which has commenced and significant (30 % or more) share placements have been made prior to the end of the divestment period, the Commission (in consultation with the Netherlands, ING and the Trustee) shall actively consider allowing the entity more time to place remaining shares.

⁽³⁾ It is accepted that different trustees may be appointed with respect to different regions and/or business.

- This condition will apply for three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of CT1 coupons and exit premium fees), whichever is shorter. A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.
 - Moreover, to support ING's long-term viability, ING Direct will refrain, without prior authorisation of the Commission, from price-leadership with respect to standardised ING products on the retail mortgage and retail savings markets within the EU, for the shorter period of three years from the date of the present Decisions or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). As soon as ING becomes aware of the fact that it has become the price leader on a retail mortgage or retail savings markets within the EU, ING will adjust its price to a level which is in accordance with this commitment as soon as possible without any undue delay.
 - A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.
- (d) The Netherlands commits to a number of detailed provisions as regards the carve out of WUH/Interadvies:
- ING will create a new company for divestment in the Netherlands, which will be carved out from its current Dutch retail banking business. The result has to be that this carved-out new company is a viable and competitive business, which is stand alone and separate from the businesses retained by ING and that can be transferred to a suitable purchaser. This new company will comprise the business of the WUH/Interadvies banking division, which is currently part of the Dutch insurance operations, and the Consumer Credit Portfolio of ING Bank. WUH/Interadvies is an ING business unit under the umbrella of Nationale Nederlanden Insurance unit. It is (predominantly) a mortgage bank operating on the basis of its own banking licenses. It is a viable 'standalone' player, having its own sales force for customer service and an independent organisation with a solid underlying income. The carve-out will be carried out under the supervision of the Monitoring Trustee in cooperation with the Hold-separate Manager. In this context, during the carve-out period, the Monitoring Trustee may recommend to ING such inclusions into the Divestment Business of tangible and intangible assets (related to the Divestment Business) as he considers objectively required to ensure full compliance with ING's above mentioned result oriented obligations and in particular the viability and competitiveness of the divestment business. If ING disagrees with the Monitoring Trustee about the objective requirement to include such tangible or intangible assets to ensure the viability and competitiveness of the Divestment Business, ING shall inform the Monitoring Trustee in writing. In such a case, ING's executive management and the Monitoring Trustee shall, within [...], hold a meeting with a view to reaching a consensus. If no consensus is reached, ING and the Monitoring Trustee shall jointly appoint, without undue delay, an independent third party with expertise in the financial sector (the 'Expert') to hear the parties' arguments and mediate a solution. If no such solution is reached, the Expert shall decide, within [...] from its appointment, on the objective requirement to include the relevant related tangible or intangible assets into the Divestment Business to ensure its viability and competitiveness, and the parties shall accept the Expert's decision in this respect and will act accordingly. Issues relating to a disagreement shall be mentioned in the report of the Monitoring Trustee to the Commission.
 - ING is committed to ensuring optimal divestment conditions by making a business plan, creating an Internet platform and dedicating sales capabilities for the carved out entity. Also, it will make payment capability available (on commercial terms) if the buyer so requests. In addition, ING will assist in creating a Treasury function and ensure funding for two years post-divestment, whereas ING's funding support will gradually decline in those two years. ING's funding support to the WUH business will be based on internal funding transfer prices. ING intends to apply to the Netherlands for State guaranteed funding up to an amount of EUR [...] billion for the funding of the WUH business. In that case, the Dutch authorities commit to notify this measure separately.
 - Moreover, ING will refrain for an interim period [...] from actively soliciting customers of the WUH business for products that the WUH-business is supplying to these customers on the date of adoption of the present Decision.
 - ING will seek to carve-out the WUH business [...]. After the carve-out period [...], ING will hold-separate the WUH business and seek to divest this business [...] (*)
 - A monitoring trustee and hold separate manager will be appointed within [...] after the date of the present Commission Decision [...] and a Divestiture trustee will be appointed [...]. All trustees will be appointed by the Netherlands and preselected and proposed by ING. The trustees are subject to the Commission's approval.
- (e) The costs of all trustees appointed during the restructuring process will be born by ING.

(*) [...]

- (f) For restoring viability, the Netherlands commits that ING will adhere to the following:
- ING commits to orientate its non-deposit funding towards longer term funding once markets revert to less stressed conditions by issuing more debt instruments with a maturity more than 1 year. [...].
 - ING endeavours to eliminate its double leverage (using core debt as equity capital in its subsidiaries) as soon as possible and commits to do so at the latest by [...]. The double leverage is automatically eliminated if and when ING Group reverts to being a regulated bank.
- (g) Regarding the deferral of coupons and calling of Tier 1 and Tier 2 securities the Netherlands commits that ING will adhere to the following:
- If a rights issue of more than is needed to repay 50 % of the Core Tier 1 securities, including the relevant accrued interest and the exit premium fee, ING will not be obliged to defer coupon payments on hybrids on 8 and 15 December 2009 ⁽⁵⁾ and any coupon payments on hybrids thereafter.
 - If such a rights issue does not take place and ING was loss-making in the preceding year, ING will be obliged to defer hybrid coupons, insofar as ING has the discretion to do so, for the three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees), whichever is shorter.
 - The Dutch authorities understand that the Commission is against State aid recipients remunerating own funds (equity and subordinated debt) when their activities do not generate sufficient profits ⁽⁶⁾ and that the Commission is in this context in principle against the calling of Tier 2 capital and Tier 1 hybrids. ING regrets the misunderstanding regarding the calling of a lower Tier 2 bond on 14 October 2009. The calling of Tier 2 capital and Tier 1 hybrids will in the future be proposed case by case to the Commission for authorisation, for the shorter period of three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest on Core-Tier 1 coupons and exit premium fees).
- (h) The Netherlands commits that ING will refrain from mass marketing invoking the recapitalisation measure as an advantage in competitive terms.
- (i) The Netherlands commits that ING will maintain the restrictions on its remunerations policies and marketing activities as previously committed to under the agreements concerning the Core-Tier 1 securities and illiquid assets back-up facility.
- (j) ING and the Netherlands commit that the progress report about the implementation of the restructuring plan will be provided every six months to the Commission as of the date of the present Decision.
- (k) The Dutch authorities commit that the full execution of ING's restructuring will be completed before the end of 2013.

⁽⁵⁾ Provided that it is clear that part of the proceeds of the rights issue will be used for the coupon payments

⁽⁶⁾ See paragraph 26 Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules (Restructuring Communication).