

**COMMISSION DECISION****of 3 July 2014****on State aid SA.33927 (12/C) (ex 11/NN)****implemented by Belgium — Guarantee scheme protecting the shares of individual members of financial cooperatives***(notified under document C(2014) 1021)***(Only the Dutch and the French texts are authentic)****(Text with EEA relevance)**

(2014/686/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) By letter of 7 November 2011, the Belgian State notified the Commission that it had put in place a guarantee scheme ('the cooperative guarantee scheme' or 'the measure') to cover the shares of individual shareholders in those recognised cooperatives which are either under prudential supervision of the National Bank of Belgium ('NBB') or have invested at least half of their assets in an institution subject to such supervision ('financial cooperatives').
- (2) By letter of 6 December 2011, the Commission indicated to the Belgian State that the measure might represent unlawful State aid <sup>(2)</sup> and urged the Belgian State to refrain from further steps to implement the measure. The Commission invited the Belgian State to comment on its preliminary findings which the Belgian State did by letter of 22 December 2011.
- (3) By decision of 3 April 2012 ('the Opening Decision'), the Commission informed Belgium that it had initiated the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('the Treaty') in respect of the measure and it enjoined Belgium in accordance with Article 11(1) of Council Regulation (EC) No 659/1999<sup>99</sup> of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union <sup>(3)</sup> to suspend the measure until the Commission had decided on its compatibility with the internal market. The Commission required Belgium to immediately cease any action which would further implement the cooperative guarantee scheme and to abstain from any payments under the measure. The Commission decision to initiate the procedure — by which the Commission also invited interested parties to comment on the measure — was published in the *Official Journal of the European Union* <sup>(4)</sup>.
- (4) By letters of 24 April 2012 and 31 May 2012, the Belgian State asked for additional time to react on the Opening Decision, to which the Commission did not object. By letter of 18 June 2012, the Belgian State sent a reaction on the Opening Decision annexed to which was, among others, a letter from the Governor of the NBB to the Belgian Minister of Finance dated 7 October 2011.

<sup>(1)</sup> OJ C 213, 19.7.2012, p. 64.

<sup>(2)</sup> The Belgian Council of State also pointed to the potential State aid character of the measure. See Avis du Conseil d'Etat No 46.131/2 of 4 March 2009.

<sup>(3)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(4)</sup> See footnote 1.

- (5) On 17 August 2012, the Arco Group ('ARCO' <sup>(5)</sup>) also submitted a reaction to the Opening Decision. On 29 August 2012, the Commission forwarded that submission to the Belgian State, thereby giving the Member State the opportunity to react to ARCO's comments. On 16 October 2012, however, the Belgian State indicated it would not make use of that opportunity.
- (6) Follow-up questions from the Commission on the measure, in particular on 17 September 2012 and 24 July 2013, were answered by the Belgian State on 5 December 2012 and 20 September 2013 respectively.

## 2. FACTUAL BACKGROUND

### 2.1. Genesis of the notified measure

- (7) The establishment of the cooperative guarantee scheme was linked to rescue measures in another State aid case.
- (8) On 30 September 2008, Dexia announced a capital increase of EUR 6,4 billion, subscribed by its existing shareholders (one of which was ARCO) and by the authorities of Belgium, France and Luxembourg. Before a Special Commission of the Belgian Parliament investigating the circumstances of the dismantlement of Dexia (hereafter 'the Dexia Commission'), the Belgian Minister of Finance at the time State aid was granted to Dexia in 2008 explained that, following requests to intervene in favour of ARCO, there had already been in September/October 2008 a political decision to put the cooperative guarantee scheme in place. He explained that, in order to reach an agreement on Dexia, the government had to take at the same time a decision on ARCO and Ethias <sup>(6)</sup>. It is also clear from the statements of the current Belgian Minister of Finance that the commitment was made in 2008 in order to ensure that ARCO agreed to take part in the rescue of Dexia <sup>(7)</sup>.

#### (i) Press communications

- (9) On 10 October 2008, the Belgian government announced by way of press release from the services of the Minister of Finance that it had decided to:

— increase the coverage of the existing Deposit Guarantee Scheme for credit institutions from EUR 20 000 to EUR 100 000

<sup>(5)</sup> ARCO will be described in more detail in recitals 38 to 44.

<sup>(6)</sup> See ([http://www.dekamer.be/kvvcr/pdf\\_sections/comm/dexia/N031\\_20120125reynders.pdf](http://www.dekamer.be/kvvcr/pdf_sections/comm/dexia/N031_20120125reynders.pdf)) — Transcripts Dexia Commission — hearing of 25 January 2012 with Minister Reynders, page 7 and 32; Those transcripts read as follows: '... in 2008 a core group of members of the government worked together to urge the State to intervene on Ethias and Arco. In view of the prevailing crisis, the government committed itself, on 10 October 2008 and 21 January 2009, to protecting the paid-up capital of individual shareholders in financial cooperatives... by a political decision, at some point I therefore realised that neither the Prime Minister at the time nor I could reach an agreement with our counterparts [pro memoria: France and Luxembourg were the other Member States concerned in the Dexia-file] and with Dexia's management if no decisions were taken on Ethias and Arco at the same time... We therefore made this commitment to individual shareholders in financial cooperatives... Why in three stages and after quite a lot of time? Because we first had to translate this political agreement into a legal instrument'. ('...en 2008, des membres du gouvernement sont intervenus en Conseil restreint afin de demander à l'Etat d'intervenir pour Ethias et pour ARCO. Compte tenu de la situation de crise dans laquelle on était, le gouvernement s'est engagé le 10 octobre 2008 et le 21 janvier 2009 à protéger la part de capital des coopérateurs personnes physiques dans des sociétés coopératives... dans une décision politique, j'ai donc bien compris à un moment donné que je ne pourrais pas — et le premier ministre aussi à l'époque — boucler l'accord avec nos collègues [pro memoria: France and Luxembourg were the other Member States concerned in the Dexia-file] et avec la direction de Dexia — si en même temps, il n'y avait pas des décisions prises sur Ethias et sur ARCO. ...., Donc, pour les coopérateurs des coopératives, nous avions pris cet engagement .... Alors pourquoi en trois étapes et pourquoi avec pas mal de temps? Parce qu'il a d'abord fallu faire en sorte que cet accord politique puisse se traduire dans un texte'.

<sup>(7)</sup> In an article published in the magazine Trends of 15 May 2014, and also available on its website, the minister is quoted as saying 'at the end of September 2008, during the first Dexia crisis, we asked Holding Communal, ARCO and Ethias to participate in a capital increase for which they did not have the money. The people behind ARCO and Ethias needed a guarantee, otherwise they would have withdrawn their savings. That would have bankrupted ARCO. The guarantee has to be seen in the context of the time: ARCO, Ethias and Holding Communal were obliged to participate in raising Dexia's capital because there was no other solution. It was 2008...The federal government — with five political parties — gave a government guarantee. So the ARCO savers did not withdraw their money, thinking "We have to keep on providing support, and if things go wrong there's a safety net".' ('Eind september 2008, bij de eerste Dexia-crisis, werd aan de Gemeentelijke Holding, Arco en Ethias gevraagd om deel te nemen aan een kapitaalverhoging waarvoor ze het geld niet hadden. De achterban van onder andere Arco en Ethias had waarborgen nodig, anders zouden ze hun spaargeld weghalen. Dat had het faillissement van Arco betekend. Die waarborg heeft dus veel te maken met de context van dat moment. Arco, Ethias en de Gemeentelijke Holding waren verplicht om mee te gaan in de kapitaalverhoging van Dexia, omdat er geen andere oplossing was. Dat was 2008. [...] Op dat moment kende de federale wetgever — met vijf partijen — een overheidswaarborg toe. Het resultaat was dat de Arcospaarders hun geld lieten staan. Ze dachten: we moeten blijven steunen, en als het misloopt is er een vangnet.').

— make available a similar scheme to other financial products (in particular ‘branch 21’ life insurance products <sup>(8)</sup> and shares in financial cooperatives <sup>(9)</sup>).

- (10) On 21 January 2009, the Prime Minister and the Minister of Finance confirmed in a joint press release the commitment given by the previous government <sup>(10)</sup> to introduce a cooperative guarantee scheme <sup>(11)</sup>. On the same day, ARCO put that press release of the Belgian government on its website. By contrast, other financial cooperatives distanced themselves from the analogy between deposits and shares in financial cooperatives which underlies the cooperative guarantee scheme <sup>(12)</sup>.

(ii) *Legislative process*

- (11) On 15 October 2008, the Belgian Parliament approved a law <sup>(13)</sup> allowing the Belgian government to take measures to preserve financial stability. On 14 November 2008 <sup>(14)</sup>, the Belgian State published a Royal Decree increasing the level of coverage under the Deposit Guarantee Scheme for credit institutions to EUR 100 000, while also introducing an insurance guarantee scheme for ‘branch 21’ life insurance products. On 29 October 2008, the Financial Stability Board had given a favourable opinion on the draft version of that Royal Decree <sup>(15)</sup>.
- (12) On 14 April 2009 <sup>(16)</sup>, the Belgian State amended the Law of 15 October 2008, allowing the government to put in place by Royal Decree a system to guarantee the paid-up capital of individual shareholders in financial cooperatives. By Royal Decree of 10 October 2011 <sup>(17)</sup> the Belgian authorities modified the Royal Decree of 14 November 2008. The Royal Decree of 10 October 2011 contains further details on the cooperative guarantee scheme.
- (13) On 7 October 2011, the Governor of the NBB wrote a letter to the then Minister of Finance to give an opinion on the (draft) Royal Decree of 10 October 2011, a procedural step which was required under the Law on the organisation of the NBB <sup>(18)</sup>. The Governor noted that the government could legally take a Royal Decree on a cooperative guarantee scheme in case of a sudden crisis on the financial markets or in case of a serious threat of a

<sup>(8)</sup> A ‘branch 21’ life insurance product is defined in point 21 of Annex I to the Royal Decree on the supervision of insurance companies and relates to those insurance products which are not linked to an investment fund (as opposed to ‘branch 23’ life insurance products). ‘Branch 21’ products offer in principle a guaranteed investment return which can be increased by a participation in the investment result of the insurance company.

<sup>(9)</sup> The press release contains the following paragraph: ‘The government has decided to extend the protection provided by this fund to other institutions in the financial sector (in particular insurance companies and recognised cooperatives) which request such protection for deposit-like products, such as, for example, “branch 21” life insurance products. Certain bodies have already expressed their interest’. (‘Le gouvernement a décidé d’étendre la protection donnée par ce fonds à’autres institutions du secteur financier (notamment des compagnies d’assurances ou des coopératives agréées) qui en feraient la demande pour des produits assimilables à des dépôts bancaires comme par exemple certains produits faisant partie de la branche 21. Certains organismes ont déjà fait part de leur intérêt’).

<sup>(10)</sup> On 18 December 2008, the previous government resigned and on 30 December 2008 a new government took office.

<sup>(11)</sup> In that press release the Belgian government repeated its commitment to put in place a cooperative guarantee scheme: ‘The government confirms the commitment made by the previous government to offer a guarantee scheme to shareholders in recognised cooperatives’ (‘le gouvernement confirme l’engagement pris par le gouvernement précédent d’offrir un régime de garantie aux associés des sociétés coopératives agréées’). The press release also contained technical details on the cooperative guarantee scheme.

<sup>(12)</sup> ArgenCo explained in its cooperative share prospectus of 5 October 2010 (page 4): ‘cooperative shares do not qualify as debt issued by a credit institution and do not qualify as a deposit either. Consequently, the shares are not covered by any deposit guarantee scheme.’ A similar message was conveyed by Lanbokas/Agricaisse on page 6 of its 15 May 2009 prospectus where it stated that purchasers of cooperative shares should take into account the absence of protection from the deposit guarantee scheme.

<sup>(13)</sup> *Moniteur Belge*, 17.10.2008, Ed.2, N.2008 — 3690 [2008/03425].

<sup>(14)</sup> *Moniteur Belge*, 17.11.2008, Ed.2, N.2008 — 4088 [2008/03450].

<sup>(15)</sup> The Financial Stability Board concluded that the extension of the deposit guarantee scheme was indispensable for the stability of the Belgian financial system, stating its view that ‘the measures put forward are indispensable to maintain the stability of the Belgian financial system and must be brought into effect as quickly as possible’. (Le Comité de Stabilité Financière ‘estime que les mesures proposées sont effectivement indispensables afin de préserver la stabilité du système financier belge et doivent pouvoir entrer en vigueur dans les plus brefs délais’).

<sup>(16)</sup> *Moniteur Belge*, 21.4.2009, Ed.1, N.2009 1426 [2009/03147].

<sup>(17)</sup> *Moniteur Belge*, 12.10.2011, Ed.2, N.2011 2682 [2011/205241].

<sup>(18)</sup> After the introduction of the cooperative guarantee scheme, the Law on the organisation of the NBB was adjusted accordingly and Article 36/24 was introduced ([http://www.nbb.be/doc/ts/Enterprise/juridisch/F/loi\\_organique.pdf](http://www.nbb.be/doc/ts/Enterprise/juridisch/F/loi_organique.pdf)).

systemic crisis. The Governor concluded that those circumstances seemed to be met and that a cooperative guarantee scheme would help to limit the effects of such a crisis <sup>(19)</sup>. At the same time however, the Governor's letter expressly refrained from taking a view as to whether individual shares of financial cooperatives are in essence deposits <sup>(20)</sup>. The letter also indicated that the measure might raise State aid issues <sup>(21)</sup> and expressed concerns that the non-mandatory character of the cooperative guarantee scheme could lead to 'adverse selection' problems <sup>(22)</sup>.

- (14) On 13 October 2011, the three cooperative undertakings of ARCO (ARCOFIN, ARCOPAR and ARCOPLUS) applied to participate in the cooperative guarantee scheme. The Belgian government approved that request by a Royal Decree of 7 November 2011 <sup>(23)</sup>. As part of its application, ARCO also paid total fees of EUR 2,05 million <sup>(24)</sup>.
- (15) On 8 December 2011 the General Meetings of ARCOFIN, ARCOPAR and ARCOPLUS approved the proposals of their executive boards to go into liquidation.

## 2.2. Directive 94/19/EC on deposit guarantee schemes

- (16) Article 3 of Directive 94/19/EC of the European Parliament and the Council of 30 May 1994 on deposit guarantee schemes <sup>(25)</sup> (the DGS Directive) obliges every Member State to:

*'...ensure that within its territory one or more deposit guarantee schemes are introduced and officially recognized. Except in [certain] circumstances ..., no credit institution <sup>(26)</sup> authorized in that Member State ..., may take deposits <sup>(27)</sup> unless it is a member of such a scheme.'*

- (17) In 1998, the Belgian State transposed the DGS Directive into national law and put in place a deposit guarantee scheme covering aggregate deposits of a depositor in case of unavailability. The Belgian deposit guarantee was entrusted to a deposit guarantee fund. By means of the Royal Decree of 14 November 2008, the Belgian State subsequently created a 'Special Protection Fund', which covers later initiatives of the Belgian State <sup>(28)</sup>.

<sup>(19)</sup> 'The current circumstances appear to correspond to these conditions, since the sovereign debt crisis, the ongoing disruption in the financial markets and the dysfunctionality of the interbank markets put our economy at the risk of a serious systemic crisis. A State guarantee covering individual shares in certain recognised cooperatives would accordingly make it possible to limit the effects of such a crisis.' ('Les circonstances actuelles nous semblent répondre à ces conditions, en ce que la crise des dettes souveraines, les perturbations actuelles sur les marchés financiers et le dysfonctionnement des marchés interbancaires font peser sur notre économie un risque grave de cette crise systémique. A cet effet, une garantie d'Etat couvrant les parts des coopérateurs de certaines sociétés coopératives agréées permettrait de limiter les effets de cette crise.')

<sup>(20)</sup> 'The official reasoning for this measure is based on an analogy between individual shares in certain recognised cooperatives and bank deposits. Since this opinion is limited to the draft Royal Decree, there is no reason to examine here the said analogy.' ('Le législateur justifie cette disposition sur la base d'une assimilation des parts de coopérateurs de certaines sociétés coopératives à des dépôts bancaires. Le présent avis étant limité à l'avant-projet d'Arrêté royal, il n'examine pas l'assimilation pratiquée par le législateur.')

<sup>(21)</sup> 'At first sight, we believe that convincing the Commission that the measure that the draft Royal Decree seeks to implement is open to all comparable market players in the market and therefore falls outside of the scope of the State aid rules will be no easy matter.' ('Prima facie, il ne nous semble pas évident de convaincre à coup sûr la Commission de ce que la mesure que l'avant-projet d'Arrêté royal vise à exécuter s'adresse bien à tous les acteurs comparables du marché et ne relève donc pas du champ d'application des règles sur les Aides d'Etat.')

<sup>(22)</sup> 'The non-mandatory character of the scheme could give rise to "adverse selection" problems, in that the only cooperative societies actually contributing to the Special Protection Fund may be those with significant exposure to the risk of losses.' ('Ce caractère facultatif donne lieu à un risque de sélection adverse par lequel seules les sociétés coopératives fortement exposées à des risques de perte contribueraient effectivement au Fonds Spécial de Protection.')

<sup>(23)</sup> Moniteur Belge, 18.11.2011 Ed.2, N.2011 2974 [2011/03368].

<sup>(24)</sup> ARCOPAR paid in total EUR 1 794 102, ARCOFIN EUR 193 391 and ARCOPLUS EUR 63 265.

<sup>(25)</sup> OJL 135, 31.5.1994, p. 5.

<sup>(26)</sup> Article 1(4) of the DGS Directive defines a 'credit institution' as 'an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own accounts.'

<sup>(27)</sup> Article 1(1) of the DGS Directive defines a 'deposit' as 'any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution'.

<sup>(28)</sup> The deposit tranche between EUR 50 000 and EUR 100 000 and the coverage — up to EUR 100 000 — of branch 21 life insurance products and individual shares of financial cooperatives.

- (18) In its original form Article 7 of the DGS Directive provided that the aggregate deposits of each depositor had to be covered up to EUR 20 000. At its meeting of 7 October 2008, the Ecofin Council agreed that the deposit coverage then foreseen in the DGS Directive should be increased. According to its press release, it agreed that:

*'all Member States would, for an initial period of at least one year, provide deposit guarantee protection for individuals for an amount of at least EUR 50 000, acknowledging that many Member States determine to raise their minimum to EUR 100 000. We welcome the intention of the Commission to bring forward urgently an appropriate proposal to promote convergence of deposit guarantee schemes' (29).*

- (19) In terms of coverage, Article 2 of the DGS Directive provides that deposit guarantee schemes should not protect capital instruments of credit institutions (30).
- (20) Directive 2009/14/EC of the European Parliament and the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the pay-out delay (31) increased the coverage level of deposit guarantee schemes (first to EUR 50 000 minimum and then in principle to EUR 100 000 minimum and maximum by 31 December 2010).
- (21) Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (32) ('Investor Compensation Scheme Directive') provides for compensation for investors in cases where an investment firm is unable to return assets belonging to an investor. Such compensation is available for example where there is fraud or negligence at a firm or where there are errors or problems in the firm's systems. However, investor compensation schemes do not cover investment risk (for example when an investor has bought stocks which then fall in value).

### 2.3. Belgian legal framework for cooperative companies

- (22) The Belgian Company Code (33) — and in particular Articles 350 to 436 — detail the legal framework for cooperative companies. It provides that a cooperative in its Articles of Association must choose whether it takes the form of 'a limited liability company' (i.e. shareholders' losses cannot go beyond their capital investment) or of an 'unlimited liability company' (i.e. shareholders are personally liable for the debt of the company and can therefore lose more than their capital investment).
- (23) The Belgian Company Code (in particular Articles 362, 364, 366, 367 and 374) permits certain restrictions on the transferability of cooperative shares. Cooperative shares can be sold to other shareholders of the cooperative but the Articles of Association of the cooperative company can attach conditions to such a transfer. Transfers to third parties can only take place under conditions and only to persons which are defined in Article 366 of the Belgian Company Code.
- (24) The Belgian Company Code (Article 367) also provides that cooperative shareholders may only exit the cooperative in the first six months of the financial year. In the case of such an exit, Article 374 of the Belgian Company Code provides that a cooperative shareholder is entitled to the value of its shares which will be based on the cooperative's balance sheet.
- (25) While the Belgian Company Code sets the general framework for cooperative companies, the Royal Decree of 8 January 1962 (34) lays down criteria for 'recognised cooperatives' (35). Concretely, a recognised

(29) [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ecofin/103250.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/103250.pdf)

(30) Article 2 of the DGS Directive reads as follows: 'The following shall be excluded from any repayment by guarantee schemes: ... — all instruments which would fall within the definition of "own funds" in Article 2 of Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions'.

(31) OJ L 68, 13.3.2009, p. 3.

(32) OJ L 84, 26.3.1997, p. 22.

(33) Moniteur Belge, 6.8.1999, Ed 2, N.99-2630 [99/09646].

(34) [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a.pl?language=nl&caller=list&cn=1962010830&la=n&fromtab=wet&sql=dt='koninklijk%20besluit'&tri=dd+as+rank&rech=1&numero=1](http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?language=nl&caller=list&cn=1962010830&la=n&fromtab=wet&sql=dt='koninklijk%20besluit'&tri=dd+as+rank&rech=1&numero=1).

(35) The National Council of Cooperatives — set up by the Law of 20 July 1955 — plays an important role in the recognition process of recognised cooperatives.

cooperative cannot refuse new shareholders or exclude existing shareholders on speculative grounds; the cooperative shares have, irrespective of their value, equal rights; cooperative shareholders have equal voting rights in an annual general meeting ('AGM'); the AGM has to appoint the members of the board of directors and the supervisory board; the operational profits of the cooperative (after all costs have been deducted) can be distributed amongst shareholders but only pro rata to their transactions with the cooperative and the dividend paid on cooperative shares cannot exceed a certain percentage determined by Royal Decree.

- (26) Article 21 of the Belgian Tax Code provides that interest paid on cooperative shares of recognised cooperatives is exempt from withholding taxes up to a certain amount <sup>(36)</sup>.

#### 2.4. Description of the measure

- (27) The cooperative guarantee scheme covers the paid-up capital (and not the potential capital gains) of individual cooperative shareholders up to a limit of EUR 100 000.
- (28) In contrast to the deposit guarantee scheme for credit institutions, membership of the cooperative guarantee scheme is optional.
- (29) If financial cooperatives want to participate in the cooperative guarantee scheme, they must apply to the Minister of Finance. Within one month, the Council of Ministers will decide whether or not to allow the applicant financial cooperative to participate in the cooperative guarantee scheme, if necessary under conditions. Those conditions can include:
- (a) the obligation to reserve future public offerings to institutional shareholders;
  - (b) the commitment of all institutional shareholders not to withdraw shares or any money paid to the cooperative company and not to resign as a shareholder unless by way of transfer of shares; and
  - (c) a cap of 4,5 % p.a. on interest to be paid to shareholders.
- (30) Once a financial cooperative has applied for coverage, the financial cooperative cannot exit the scheme for a period of one year. After that period, the cooperative can terminate its participation by giving three months' notice. It will not be possible to reclaim any contributions paid in whatever form. If a cooperative decides to leave the cooperative guarantee scheme, it must wait for three years before being able to participate again.
- (31) Only cooperative shares which were issued before the entry into force of the Royal Decree of 10 October 2011 are covered by the measure.
- (32) The cooperative guarantee scheme is only available to individual shareholders and not to institutional shareholders of financial cooperatives.
- (33) The financing of the Special Protection Fund comes from:
- (i) an annual contribution of 0,15 % of the protected amount (payable by all participants); and
  - (ii) a one-off entry fee of 0,10 % of the protected amount (payable by the cooperatives).

<sup>(36)</sup> The same article of the Tax Code lists other financial products whose income is also partly or in full exempted from withholding taxes.

- (34) In addition, financial cooperatives can also be required to pay a capital gains contribution to the Special Protection Fund in connection with their listed equity holdings. The capital gains contribution corresponds to up to 10 % of the difference between the sale price of the relevant shares (or, if no sale occurs during a period of three years after the cessation of the protection system, the closing average stock price of the relevant share during a 30-day period before that third anniversary) and the reference price fixed by the government when a financial cooperative joins the cooperative guarantee scheme.
- (35) The Special Protection Fund will start making payments if the financial cooperative is bankrupt or if the financial supervisor has alerted the Special Protection Fund that the financial cooperative can no longer repay its shareholders wishing to exit.
- (36) If the Special Protection Fund has insufficient means to fulfil its duties, the Deposit and Consignment Office, which is a governmental body without legal status, will advance the necessary means. Depending on whether the failed institution is a mandatory participant or a financial cooperative, that advance will later be reimbursed by
- allocating 50 % of the annual contributions to be paid by mandatory participants;
  - allocating a special annual contribution to be paid by financial cooperatives (whose participation is voluntary)
- (37) If the Special Protection Fund intervenes, it takes over the rights of the individual cooperative shareholder, ranking *pari passu* with the other remaining shareholders. That feature differs from the deposit guarantee scheme for credit institutions where the Fund ranks *pari passu* with the other creditors of the relevant company.

## 2.5. Description of ARCO

- (38) Historically, ARCO was the shareholder of Artesia Banking Corporation NV (hereafter 'Artesia'), which itself owned 100 % of BACOB Bank and 82 % of the insurance company DVV. As a result of the merger of Artesia with Dexia in 2001, ARCO became the biggest shareholder of Dexia with a stake of around 15 % <sup>(37)</sup>.
- (39) ARCO is a group name for ARCOPAR, ARCOPLUS and ARCOFIN, which are all recognised cooperative companies <sup>(38)</sup>. ARCO has more than 800 000 members, 99 % of which are individual persons. The capital of individual shareholders in ARCOPAR, ARCOPLUS and ARCOFIN amounted to EUR 1,3 billion, EUR 46 million and EUR 140 million respectively.
- (40) The Articles of Association of ARCOPAR, ARCOPLUS and ARCOFIN provide that the three entities are limited liability companies <sup>(39)</sup>.
- (41) The Articles of Association of all three entities contain provisions which are relevant to shareholders wishing to exit.

<sup>(37)</sup> Source: 'Entreprendre avec du capital coopératif: Le Groupe ARCO 1935-2005'; Maarten Van Dijk, Kadoc, Lannoo, pages 176-177.

<sup>(38)</sup> It should be noted that ARCOFIN immediately after the Dexia transaction in 2001 temporarily gave up its status of recognised cooperative. In 'Entreprendre avec du capital coopératif' that period is described in the following manner (own translation): 'ARCO changed a few months after the Dexia transaction the Articles of Association of its cooperative entities to allow those shareholders, who were already shareholders before the Dexia transaction, to participate in the improved profit prospects for Dexia Group and the ARCO entities. The new Articles of Association provided that the minimum pay-out ratio and maximum pay-out ratio to shareholders would from then on amount to 80 % and 90 % of the ordinary annual profit. As a result, the ARCOFIN dividend in March could be increased from 6 % net to 8 % gross. Because that increase resulted in a breach of the foreseen maximum dividend (6 %) for recognised cooperatives, ARCOFIN lost its status as a recognised cooperative for the National Council for Cooperatives. This implied that the withholding tax exemption was no longer applicable. After withholding tax, the majority of cooperative shareholders still earned a net dividend of 6,8 %. In March 2005, the gross dividend was increased to 8,5 %.'

<sup>(39)</sup> [http://www.groeparco.be/website/groeparco/assets/files/arcopar/ARCOPAR\\_20100629\\_FR.pdf](http://www.groeparco.be/website/groeparco/assets/files/arcopar/ARCOPAR_20100629_FR.pdf)

- (42) ARCOPAR's Articles of Association provide, for instance, that the cooperative can restrict exits if more than 10 % of the total cooperative capital or 10 % of the shareholder base were to try to exit in the same financial year <sup>(40)</sup>. A shareholder wishing to exit ARCOPAR would get its capital back. Shareholders of 'A, B and C shares' of ARCOPAR <sup>(41)</sup> are also entitled to a 'bonus reserve' <sup>(42)</sup>.
- (43) Article 35 of the Articles of Association of ARCOPAR describes what ARCOPAR shareholders are entitled to receive in case of a liquidation. In essence, if there is a positive balance after repayment of debt and social costs, shareholders will be reimbursed <sup>(43)</sup>.
- (44) The risks of investing in ARCO shares were described for instance in the ARCOPAR prospectus approved by the Belgian authorities in June 2008 which was published for a capital market operation that took place between 7 July 2008 and 30 September 2008. That prospectus makes clear that Dexia-related profits represented more than 69 % of the ARCOPAR net profits in the financial years 2005/06, 2006/07 and 2007/08. The prospectus also referred to the risk of large exits, while also underlining that shareholders could lose everything in a liquidation. At the same time, the company's annual reports made clear that ARCO had leveraged its balance sheet by taking on debt in order to invest <sup>(44)</sup>.

## 2.6. Grounds for initiating the opening procedure

- (45) In its Opening Decision, the Commission's preliminary conclusion was that the notified measure met the four (cumulative) State aid criteria and it doubted whether the measure could be declared compatible with the internal market.
- (46) The Commission found the measure to be imputable to the Belgian State as it was financed by the Special Protection Fund. To that end, the Commission noted that Belgian legislation determined the contribution that participants had to pay to the Special Protection Fund and also determined how those funds would be used. Moreover, the Commission observed that the Deposit and Consignment Office would advance funds to the Special Protection Fund if the need were to arise. The Commission questioned how the Deposit and Consignment Office would be repaid as it was unclear whether financial cooperatives would have sufficient financial means available. The Commission also wondered whether the fact that participation is optional for financial cooperatives would hinder an effective refinancing of the Special Protection Fund.

<sup>(40)</sup> The Articles of Association specify that '... such withdrawals may be refused if, as a result of the withdrawal, more than one tenth of the shareholders or more than one tenth of the paid up capital were to be removed in the course of a single financial year...' ('...cette démission peut être refusée si à la suite de la démission, plus d'1/10 des actionnaires ou plus d'1/10 du capital placé devrait disparaître au cours du même exercice...').

<sup>(41)</sup> They are shares which predate the Dexia merger.

<sup>(42)</sup> ARCO explains on its website (<http://www.groeparco.be/faq/be-fr/150/detail/item/789/>) that the bonus reserve was introduced in 2004 in the company's Articles of Association. Insofar as the results of ARCOPAR allowed, the entity could add until 2010 an amount to the bonus reserve. Cooperative shareholders which were already shareholders before 3 July 2001 (i.e. the holders of A, B and C shares) are entitled to a proportional part of the bonus reserve. That bonus reserve comes on top of the capital value of their shares. Example: Shareholder X exits with a capital value of EUR 100 and the total capital amount of shares A, B and C amounts to EUR 10 000. As a result, shareholder X owns 1/100 of the total capital of the company. The total bonus reserve amounts to EUR 500. Applying the ratio 1/100 leads to an amount of EUR 5. Shareholder X will receive at the time of his exit EUR 100 capital + EUR 5 from the bonus reserve.

<sup>(43)</sup> Article 35 of the Articles of Association of ARCOPAR lays down that: 'Unless the General Meeting decides otherwise, all the company's assets are to be liquidated. In the event that not all shares are paid up to the same extent, the liquidators shall either request additional payments be made or make prior payments in order to ensure uniformity. After the payment of debt and social costs, all residual monies shall be used to repay the capital paid in on the shares. In any event, the proceeds of the liquidation shall be used in accordance with the company's objects' ('Sauf si l'Assemblée générale en décide autrement, tous les actifs de la société sont réalisés. Au cas où les parts ne sont pas toutes libérées dans la même mesure, les liquidateurs restaurent l'équilibre, soit en demandant des versements supplémentaires, soit en effectuant des paiements préalables. Après paiement des dettes et des charges sociales, le solde servira d'abord au remboursement des sommes libérées sur les parts. En tout cas, le solde éventuel de la liquidation doit être affecté en tenant compte des objectifs de la société').

<sup>(44)</sup> ARCOPAR's debt ratio (i.e. debt/total liabilities) amounted to 19,1 % (31 March 2011), while the debt ratios of ARCOPLUS and ARCOFIN amounted to 6,5 % (31 March 2011) and 25,9 % (31 December 2010) respectively.

- (47) The Commission came to the conclusion that financial cooperatives could be considered as undertakings and that the measure presented a selective advantage to them. As regards the selective advantage the cooperative guarantee scheme seemed to have helped cooperatives to either attract new capital or maintain existing capital, convincing existing cooperative shareholders not to withdraw from financial cooperatives. Such protection was particularly relevant in periods of financial uncertainty such as the period between autumn 2008 and the date on which the Royal Decree was adopted, when financial cooperatives were effectively shielded from the risk of significant exit disbursements.
- (48) The Commission also observed that the protection was far-reaching and that the Belgian State allowed entry into the cooperative guarantee scheme irrespective of the financial health of the applicant financial cooperative. In the example of ARCO, financial cooperatives had been allowed to enter into the cooperative guarantee scheme when they were already insolvent, only to enter into liquidation shortly thereafter.
- (49) The Commission also concluded that the measure distorted competition as financial cooperatives competed on the market for retail investment products where they benefited from a selective advantage that was not available to other market players with similar products.
- (50) The Commission also believed the cooperative guarantee scheme to have an impact on intra-Union trade. In fact, many international providers of investment products are active on the Belgian market and the market share that any financial cooperative is able to preserve thanks to the measure is unavailable to them.
- (51) The Commission wondered whether the financial cooperatives could be considered financial institutions and whether that factor had implications for the applicability of the 2008 Banking Communication<sup>(45)</sup>. The Commission concluded that as financial cooperatives do not seem to be financial institutions in the meaning of the 2008 Banking Communication, the aid would have to be evaluated directly under the Treaty.
- (52) Concretely, in order to be compatible with the internal market on the basis of Article 107(3)(b) of the Treaty, a measure has to be necessary, appropriate and proportionate. The Commission doubted that the measure met any of those three cumulative criteria. It doubted whether the protection of shareholders of financial cooperatives was necessary to avoid a serious disturbance of the Belgian economy. As regards potential spill-over effects, the Commission noted that Belgium had already put in place several measures (e.g. increasing coverage under the deposit guarantee scheme to EUR 100 000 and State aid measures to several banks in different forms (recapitalisation measures, liquidity measures, impaired asset measure and *ad hoc* measures)). It did not therefore see why, in addition to all those measures, it was necessary to protect shareholders of financial cooperatives.
- (53) The Commission doubted that it was appropriate to protect shareholders of financial cooperatives. In that regard, the Commission observed that the financial cooperatives are not financial institutions and given their size did not seem to be of systemic importance. It invited the Belgian State to explain via which channels investment losses — which also incurred for investors of, e.g., mutual funds — would have created major negative spill-over effects for the Belgian economy.
- (54) Finally the Commission doubted whether the measure was proportionate. First, it was not clear to the Commission whether financial cooperatives would be paying a fair remuneration for the guarantee. Second, the Commission observed that the discretion to enter combined with the absence of a viability check in the entry procedure of the Belgian State implied that financial cooperatives had an incentive to enter only once it is clear that the guarantee would be triggered. It could lead to situations where beneficiaries could use the guarantee while avoiding to a large extent any payment for it. Finally, the Commission also wondered whether the cooperative guarantee scheme would not unduly distort competition, as shareholders in competitors were not protected, thus facilitating access to capital for financial cooperatives and their overall retail investment market share.

<sup>(45)</sup> Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8).

### 3. COMMENTS FROM INTERESTED PARTIES ON THE OPENING DECISION

#### 3.1. Comments from ARCO

- (55) According to ARCO, the Belgian government decided and announced on 10 October 2008 the creation of the cooperative guarantee scheme as part of a broader package (increasing of deposit guarantee for savings deposits of credit institutions to EUR 100 000 and extending the guarantee scheme to 'branch 21' life insurance products and to individual shareholders of financial cooperatives). ARCO argued that the decision of 10 October 2008 was implemented for 'branch 21' products by the law of 15 October 2008 and Royal Decree of 14 November 2008 and for share certificates issued by financial cooperatives by the law of 14 April 2009 and Royal Decree of 10 October 2011.
- (56) ARCO claimed that the cooperative guarantee scheme is not State aid as it does not confer a selective advantage on financial cooperatives. ARCO also argued that the Commission concluded that a guarantee scheme for branch 21 products of insurance companies did not entail State aid, because it was open to all insurance companies and therefore not selective<sup>(46)</sup>. In addition ARCO affirms that the cooperative guarantee scheme is open to all financial cooperatives on equal terms and therefore not selective.
- (57) In line with observations of the Belgian government, ARCO argued that all the characteristics of shares in financial cooperatives confirm that they respond to the same client needs as deposits and are treated by the legislator as such. ARCO underlined that the Belgian government was concerned about a contamination effect. If the Belgian State had not introduced the cooperative guarantee scheme, it would have undermined investor confidence and could have led to a run on all savings products.

#### 3.2. Comments from the Belgian State

- (58) The Belgian State argued that the cooperative guarantee scheme does not meet all of the cumulative State aid criteria of Article 107(1) of the Treaty and is therefore not State aid. Concretely, the Belgian State stated that three State aid criteria are not met. First, the Belgian State defended the viewpoint that the measure represents only aid to individuals and not to undertakings. Next, the Belgian State argued that the measure does not represent a selective advantage to financial cooperatives and finally, the Belgian State contended that the measure is not distortive.
- (59) As regards the argument that the aid does not benefit undertakings, the Belgian State argued that the normal deposit guarantee scheme for credit institutions, including its extension (i.e. the cooperative guarantee scheme) had been adopted in implementation of and in accordance with the Decisions of the ECOFIN Council, the DGS Directive as amended and the Investor Compensation Scheme Directive.
- (60) The Belgian State defended the viewpoint that individual shares in financial cooperatives have all the characteristics of deposits and are also purchased as such. It pointed to the following features:
- (i) The (individual) beneficiaries of the cooperative guarantee scheme deserve the same protection as depositors with other institutions active in the same business area and subject to the same supervision.
  - (ii) For tax purposes, dividends paid by financial cooperatives and interest paid on deposits are both — up to a fixed amount — exempted from withholding tax<sup>(47)</sup>.
  - (iii) Individual shareholders of financial cooperatives can only subscribe to a specific maximum amount of capital, in line with provisions in the Articles of Association of the financial cooperative.

<sup>(46)</sup> Commission Decision in case N256/09 Restructuring aid Ethias (OJ C 252, 18.9.2010, p. 5). Recital 99 of that Decision reads as follows: 'The Commission notes that although the extension of the scheme has benefited Ethias, the scheme is available to all market participants on equal terms. In view of the above, the Commission considers that the advantage conferred by the measure is not selective and therefore does not constitute State aid in the meaning of Article 107(1) TFEU'.

<sup>(47)</sup> See recital 26 and footnote 36.

- (iv) Shareholders of financial cooperatives can only exit the company in the first six months of a financial year and a shareholder wishing to exit is not entitled to a pro rata part of the capital gains of the cooperative. According to the Belgian State, the value of cooperative shares does not reflect the value of the underlying assets of the financial cooperative and so shares in financial cooperatives do not compete with investment products in general but only with the subset of products which already benefit from a State guarantee (i.e. deposits and 'branch 21' life insurance products).
- (v) The shares in financial cooperatives are registered and their transferability is limited by law <sup>(48)</sup>. They cannot be sold freely in order to realise capital gains. Shareholders in financial cooperatives are only entitled to a modest (tax-exempt) dividend and a reimbursement when they cease to be shareholders.
- (vi) Shares in financial cooperatives cannot be qualified as an investment in shares in a corporation or listed entity.
- (vii) Shares of financial cooperatives cannot be considered to be a risk investment as shareholders of financial cooperatives are not entitled to receive capital gains.
- (viii) The cooperative guarantee scheme only protects the shares of natural persons (as opposed to institutions).
- (61) As to the absence of a selective advantage, the Belgian State pointed out that the cooperative guarantee scheme only covers financial cooperative shares issued before 10 October 2011. The Belgian State observed that after that date financial cooperatives could not use the cooperative guarantee scheme to position themselves in any market. The Belgian State also clarified that ARCO had not issued any new shares since September 2008.
- (62) The Belgian State also denied that the cooperative guarantee scheme helped financial cooperatives to maintain existing capital. In support of that argument, the Belgian State stated that the 10 October 2008 press release was merely a proposed policy initiative, making only a passing reference to financial cooperatives. According to the Belgian State, the 10 October 2008 press release was not a detailed agreement which had been coordinated with any concurrent press releases by financial cooperatives. In that regard, the Belgian State distinguished its press release from the press releases issued by the UK government and Lloyds in the Lloyds case <sup>(49)</sup> to which the Commission referred in the Opening Decision. The Belgian State concluded that the 10 October 2008 press release is not the type of measure that could grant a selective advantage to financial cooperatives. As regards the subsequent press release of 21 January 2009, the Belgian State considered it normal that ARCO had immediately put that press release of the government on its website, as all financial cooperatives (including ARCO) were closely following that matter at the time.
- (63) The Belgian State insisted that the Commission should follow the same approach as it had taken in regard to Ethias and conclude that the cooperative guarantee scheme was not selective. The Belgian State also argued that the special position of genuine cooperatives had already been recognised by the Court of Justice in *Paint Graphos* <sup>(50)</sup>. The Belgian State pointed in particular at paragraph 61 of *Paint Graphos*, from which it is clear that, in light of their particular characteristics, such cooperatives 'cannot, in principal, be regarded as being in a comparable factual and legal situation to that of commercial companies'.
- (64) The Belgian State also provided information on the number of shareholders of ARCO exiting the entity since the start of the crisis. In the financial years leading up to the voluntary liquidation, the number of ARCO shareholders which asked to have their capital refunded amounted to 9 764 in 2007/08, 21 150 in 2008/09 and 23 762 in 2010/11.
- (65) As regards the distortive impact of the measure, the Belgian State argued that the Commission should have explained to a reasonable extent with which financial products shares in financial cooperatives compete, even though the Belgian authorities acknowledged that the Commission in a State aid procedure is not obliged to proceed with a detailed market definition exercise. The Belgian State in essence claimed that the same level of protection was offered to individual shareholders of financial cooperatives as to investors in all similar deposit/savings products.

<sup>(48)</sup> See recital 23.

<sup>(49)</sup> Case N428/09: Restructuring of Lloyds Banking Group (OJ C 46, 24.2.2010, p. 2), recital 124.

<sup>(50)</sup> See Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 61.

- (66) The Belgian authorities also explained that the cooperative guarantee scheme serves the same purpose as the DGS Directive i.e. to protect the deposits of individual savers, to maintain depositor confidence and to attain greater stability of the financial markets. The Belgian State believes that deposit guarantee schemes of other Member States sometimes also cover non-classic deposit products and argued that the Commission should take that factor into account <sup>(51)</sup>.
- (67) The Belgian State also insisted that — if the Commission were to conclude that the cooperative guarantee scheme represented State aid — the aid should be considered compatible with the internal market on the basis of Article 107(3)(b) of the Treaty. The Belgian State considered that it is not relevant whether ARCO is a financial institution in the meaning of the 2008 Banking Communication. According to the Belgian State, the crucial question that the Commission should answer is whether the cooperative guarantee scheme is an appropriate and necessary response to prevent a serious disturbance of the economy.
- (68) The Belgian State defended the viewpoint that the measure is necessary, that its effects are limited to the minimum and that there are burden sharing mechanisms in place.
- (69) First, the Belgian State developed the argument that the cooperative guarantee scheme is appropriate and necessary to reassure depositors in Belgium.
- (70) Belgium conceded that it was theoretically possible that institutions that have protected deposits on their balance sheet might derive an indirect benefit from the existence of such protection schemes as they help to avoid a 'bank run'. However, it explained that deposit guarantee schemes are necessary to avoid 'bank runs' and a disturbance of the financial markets. The Belgian State contended the cooperative guarantee scheme was needed to avoid a reduction of public confidence in the Belgian financial system. The basic characteristics of cooperative shares as savings products and the fact that more than half of the funds held by cooperatives are invested in banks enhanced their similarity to deposits and highlighted their importance for the Belgian banking system. An uncontrolled default of financial cooperatives would have had a snowball effect on all financial institutions and the Belgian economy. Not to provide the same level of protection for financial cooperatives' shares as for basic deposits would have entailed the same risk as not providing protection to deposits. It would have had a great impact on the public confidence in all deposit products in Belgium and create a systemic risk. In support of its arguments, the Belgian State referred to the fact that the number of shareholders (natural persons) in financial cooperatives is large relative to the total population in Belgium <sup>(52)</sup>.
- (71) The Belgian State also strongly objected to the language that the Commission used in the Opening Decision, and in particular to the terms 'capital instruments' and 'risk capital' used in recital 62 and footnote 35 respectively.
- (72) In order to show the necessity of the cooperative guarantee scheme, the Belgian State also provided the Commission with letters from the Financial Stability Board and from the Governor of the NBB to the then Minister of Finance dated respectively 29 October 2008 <sup>(53)</sup> and 7 October 2011 <sup>(54)</sup>.
- (73) When commenting on the compatibility of the measure, the Belgian State refers to the Commission's decision on Ethias. According to the Belgian State, the Commission accepted measures in favour of Ethias, including the extension of the deposit guarantee scheme to 'branch 21' products, as appropriate and necessary to prevent a serious disturbance to the Belgian economy.
- (74) Second, the Belgian State reiterated its view that the measure is proportionate. The financial cooperatives share the burden, inter alia, through their contributions to the Special Protection Fund. The Belgian State considered the level of remuneration for the guarantee to be reasonable and similar to the contributions for guarantee schemes of other protected institutions. The Belgian State disagreed that the voluntary character of the cooperative guarantee scheme could make the measure disproportionate.

<sup>(51)</sup> The Belgian State refers for instance to the Irish Deposit Guarantee Scheme, which also covers deposits beyond the EUR 100 000 threshold, to the Danish Guarantee Fund for Depositors and Investors, which according to the Belgian State fully covers pensions accounts, lawyers' clients' accounts and deposits of the purchase price for real property up to nine months after the deposit has been made, and to the Cypriot Cooperative Societies' Supervision and Development Authority, which — according to the Belgian State — protects permanent deposits for the members of the Cooperative Savings Societies.

<sup>(52)</sup> The Belgian State explained that ARCO has 800 000 individual shareholders, Cera over 400 000, Lanbokas/Agricaisse 150 000 and ArgenCo almost 70 000.

<sup>(53)</sup> See also recital 11.

<sup>(54)</sup> See also recital 13.

- (75) The Belgian State submitted that if the Commission were to conclude that the measure is State aid, it should conclude that the measure was compatible liquidation aid. The Belgian State recalled that the Royal Decree of 7 November 2011 clearly provides that any payment by the Special Protection Fund in case of liquidation of any relevant cooperative would take place only after the issuance and the approval of the final order of the liquidation.
- (76) The Belgian State also defended the viewpoint that, because natural persons were not undertakings, the Commission's suspension injunction did not cover the payment of individuals after the liquidation of ARCO.
- (77) In a letter to the Commission dated 18 March 2014, which was after the time limit, Belgium made some further comments.
- (78) It argued that the Commission could not prohibit the payment of guarantees to individual shareholders. The Commission could not oblige Belgium to suspend any payments under the cooperative guarantee scheme nor could it recover the payments made under the scheme to individual shareholders.
- (79) Shareholders who were natural persons were not undertakings within the meaning of Article 107(1) of the Treaty and the payment of the guarantee to individual shareholders would have no impact on ARCO or the likelihood of the Belgian State recovering the aid received by these undertakings.

#### 4. ASSESSMENT OF THE MEASURE

##### 4.1. Beneficiary of the measure

- (80) First as a preliminary observation, the Commission recalls that in recital 18 of the Opening Decision, it argued that the cooperative guarantee scheme benefitted financial cooperatives. However, a careful analysis of the chronology and the characteristics of the measure revealed that ARCO was the only real beneficiary from the measure as will be described in this section.
- (81) In the case at hand, the Commission observes that there is an important difference between ARCO and the other financial cooperatives which were potentially eligible to participate in the cooperative guarantee scheme.
- (82) From the description of the facts <sup>(55)</sup>, it is clear that the cooperative guarantee scheme was from the beginning tailor-made for ARCO, which had run into trouble because of its investments in Dexia. ARCO was ultimately the only financial cooperative that applied to participate in the measure.
- (83) In relation to the other financial cooperatives, the Commission notes that the cooperative guarantee scheme is a voluntary scheme, that the Council of Ministers had discretion over whether and if so on what conditions to admit an applicant financial cooperative to the cooperative guarantee scheme, that none of the other financial cooperatives applied to join the cooperative guarantee scheme and that some of them actively distanced themselves from it. The Commission also observes that no other financial cooperative had problems with its investments to the same extent as ARCO had with Dexia.
- (84) Therefore, the Commission concludes that the only real beneficiary with economic activities from the cooperative guarantee scheme is ARCO.

<sup>(55)</sup> See in particular the account given by the then Minister of Finance to the Dexia Commission described in recital 8 and footnote 6. See also the current Finance Minister's statements published in the magazine Trends and quoted in footnote 7.

#### 4.2. Announcement and implementation of the measure form one single intervention

- (85) The Commission observes that the measure was decided and announced by the government on 10 October 2008 <sup>(56)</sup>. It is clear that the Belgian government had made the decision to offer ARCO the benefit of a cooperative guarantee scheme at the same time as the measure in favour of Dexia was designed in 2008 <sup>(57)</sup>. Another press release of 21 January 2009 further detailed the measure and after that the legal transposition of the government's commitment began.
- (86) The Commission takes note of the binding and unambiguous language in the press releases of 10 October 2008 and 21 January 2009, which used terms such as 'décidé' and 'l'engagement', thus creating a legitimate expectation as to their fulfilment.
- (87) The press releases were also sent out via the official channels: the press release of 10 October 2008 was sent out by the services of the Minister of Finance, while the press release of 10 January 2009 was sent on behalf of the Prime Minister and the Minister of Finance. The repeated nature of the press communication strengthened the underlying message.
- (88) The Commission notes that it was clear already at the time of the press release of 10 October 2008 that the cooperative guarantee scheme would be designed as an extension of the deposit guarantee scheme. The press release of 21 January 2009 contains further technical details. As soon as the press release of 21 January 2009 was published, ARCO put it on its website. The latter step was clearly taken with a view to reassuring its individual shareholders. Moreover the Commission notes the consistency of the measure over time given that the measure has not materially changed between the initial announcement on 10 October 2008 and the final Royal Decree.
- (89) In its judgment of 19 March 2013 in Joined Cases C-399/10 P and C-401/10 P <sup>(58)</sup> the Court of Justice held that the announcement of a measure and the effective implementation can be analysed as one single intervention, if to do so is justified by the chronology and purpose of the announcement and the implementation and by the circumstances of the undertaking at the time of such intervention. In a similar manner, in the case of this measure the Belgian State decided and announced a measure on 10 October 2008, which was later implemented for the same purpose in respect of the originally intended beneficiary. Moreover, in its own decisions, the Commission has considered an announcement and an implementation to be one measure and considered an advantage to have been created as of the date of the announcement <sup>(59)</sup>. Indeed, the current Belgian Minister of Finance qualified the measure in question as a commitment made in 2008 <sup>(60)</sup>.
- (90) Based on the information in recitals 85 to 89, the Commission concludes that the announcement and the implementation of the cooperative guarantee scheme have to be dealt with as a single measure.

<sup>(56)</sup> As was also confirmed by the account given by the then Minister of Finance to the Dexia Commission described in recital 8 and in footnote 6.

<sup>(57)</sup> 'En même temps' in the declarations of the then Minister of Finance to the Dexia Commission quoted in footnote 6.

<sup>(58)</sup> See Joined Cases C-399/10 P and C-401/10 P *Bouygues SA and Bouygues Télécom SA v European Commission and Others* [2013] ECR I-0000.

<sup>(59)</sup> See for instance recital 48 of Commission Decision of 30 March 2010 in case NN11/10 on Capital support measures in relation to Irish Nationwide Building Society (OJ C 60, 25.2.2011, p. 6), 'The Commission furthermore observes that the aid was effectively granted on 22 December 2009 on the basis of the indication by the Minister for Finance of his intention to recapitalise INBS'; recital 41 of Commission Decision of 10 August 2010 in case NN 35/10 on Third recapitalisation in favour of Anglo Irish Bank (OJ C 290, 27.10.2010, p. 4): 'The Commission furthermore observes that the recapitalisation was effectively granted on 30 June 2010, on the basis of the indication by the Minister for Finance to recapitalise Anglo', recitals 49 and 50 of the Commission Decision of 27 July 2012 in case SA.34824 on HFSF Recapitalisation commitment to National Bank of Greece (OJ C 359, 21.11.2012, p. 18) 'The bridge recapitalisation finalised on 28 May 2012 is the implementation of the obligation undertaken in the commitment letter and thus a continuation of the same aid'. Similar reasoning was also made in other Greek bank cases, HFSF Recapitalisation commitment to Alpha Bank SA.34823 (OJ C 357, 20.11.2012, p. 36); HFSF Recapitalisation commitment to Eurobank SA.34825 (OJ C 359, 21.11.2012, p. 31), and HFSF Recapitalisation commitment to Piraeus Bank SA.34826 (OJ C 359, 21.11.2012, p. 43).

<sup>(60)</sup> See footnote 7.

#### 4.3. Existence of aid

- (91) As stated in Article 107(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, insofar as it affects trade between Member States, be incompatible with the internal market, save as otherwise provided in the Treaty.
- (92) Both the Belgian State and ARCO argue that the Commission should analyse whether ARCO received State aid by basing itself on another decision of the Commission, namely that on Ethias <sup>(61)</sup>. However, State aid is an objective concept which is defined in the Treaty. In order to be classified as State aid, a measure has to meet the following four (cumulative) State aid criteria: the measure (i) should be granted by the State or through State resources; (ii) should provide a selective advantage to the aid beneficiary; (iii) should (potentially) distort competition; and (iv) should affect trade between Member States.
- (93) The Commission is obliged to evaluate those four criteria and will do so in recitals 94 to 110.

##### *State resources*

- (94) The Commission has to assess whether the cooperative guarantee scheme is financed through State resources and is imputable to the State.
- (95) According to settled case law <sup>(62)</sup>, all financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector, fall under Article 107(1) of the Treaty, provided that they constantly remain under public control, and remain therefore available to the competent national State.
- (96) In particular, State aid is involved when funds come from contributions imposed by State legislation and when those funds are managed and apportioned in accordance with provisions of that legislation, even if they are administered by institutions separate from the State. The status of the body or undertaking granting the aid in question is not regarded as a determining factor for the application of State aid rules.
- (97) As regards the organisation of the cooperative guarantee scheme, the Commission observes that Belgian legislation determines the contributions that participants have to pay and that Belgian legislation also determines how those funds will be used. Therefore, the funds of the Special Protection Fund are considered to be State resources even if they originally stemmed from private sources.
- (98) Moreover, if it is necessary for the Deposit and Consignment Office to do so that governmental body will advance the funds required to finance pay-outs that the Special Protection Fund is supposed to make. That aspect of the cooperative guarantee scheme creates in any event a sufficiently concrete economic risk of burdens on the budget of the Member State for State resources to be present for the purposes of Article 107(1) of the Treaty <sup>(63)</sup>.
- (99) As regards the imputability of the measure to the Belgian State, it is clear that the cooperative guarantee scheme cannot be seen as a transposition of the DGS Directive. The DGS Directive only obliges Member States to introduce a deposit guarantee scheme for deposits of credit institutions and Article 2 of that Directive explicitly provides that all instruments that fall within the definition of own funds of credit institutions are excluded from repayment by deposit guarantee schemes. If a Member State decides to establish other repayment schemes guaranteeing other financial products, such a decision does not stem from Union law but is an initiative from the

<sup>(61)</sup> As described in recitals 56 and 63.

<sup>(62)</sup> See Case C-262/12 *Vent de Colère* [2013] ECR I-0000, paragraph 21, and Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraphs 63 to 69.

<sup>(63)</sup> See Case C-279/08 P *Commission v Netherlands* [2011] ECR I-7671, paragraph 111.

Member State itself <sup>(64)</sup>. The Commission also observes that the Belgian State refers to the Investor Compensation Scheme but that comparison is irrelevant since investor compensation schemes are not designed to cover investment risk. As explained already in recital 21, investor compensation schemes are merely designed for cases where an investor firm is unable to return assets belonging to an investor for instance because of fraud or because of problems with the firm's systems.

#### *Selective advantage*

- (100) The Commission concludes that the cooperative guarantee scheme has created a benefit for ARCO. The Court of Justice has accepted that undertakings can obtain an advantage in the form of improved access to capital in circumstances in which a measure taken by a Member State in favour of investors increases the latter's willingness to place their money in a particular set of investment targets <sup>(65)</sup>. In the case of the measure, it has helped the entities in the ARCO Group to maintain their existing capital, convincing existing cooperative shareholders not to withdraw from those financial cooperatives <sup>(66)</sup>, which was a particularly important advantage in the nervous market situation which characterised the period immediately following the bankruptcy of Lehman Brothers. On 21 January 2009, ARCO put a press release from the Belgian government on its website to reassure its shareholders, which clearly shows that being able to reassure investors was a major advantage for ARCO. In that regard, the Commission observes that the ARCOPAR prospectus issued in summer 2008 <sup>(67)</sup> had referred to the risk of individual shareholders leaving the financial cooperative <sup>(68)</sup> <sup>(69)</sup>.
- (101) The measure is also clearly selective. In the first place, it only applies to holders of financial cooperative shares and not to persons holding investment products issued by competing undertakings. Thus financial players which offered conservative bond or money market funds or capital-guaranteed mutual funds could not offer their clients a similar guarantee. The Belgian State argues that individual shares of financial cooperatives are in essence similar to deposits <sup>(70)</sup>. However, a number of the elements which the Belgian State invoked refer to cooperatives in general not to financial cooperatives. In addition, the description of financial cooperative shares offered by the Belgian State does not contain references to relevant information, such as the risks of investing in those instruments <sup>(71)</sup>, which are not characteristic of deposits.
- (102) The selective nature of the measure can also be seen when the treatment of financial cooperatives is compared to other recognised cooperatives that are non-financial. The Belgian State relied on *Paint Graphos* to plead in favour of special treatment for individual shareholders of financial cooperatives. *Paint Graphos* was a preliminary ruling on an order for reference from an Italian court which wished to know whether tax benefits enjoyed by producers' and workers' cooperatives could be classified as State aid within the meaning of Article 107(1) of the Treaty. In its judgment, the Court concluded that the tax advantage had to be evaluated against the four cumulative State aid criteria and gave more detailed guidance in particular on how to evaluate whether such a tax benefit represents a selective advantage <sup>(72)</sup>. The Court held that it should be determined (i) whether such a tax benefit could be justified by the inherent characteristics of the tax system <sup>(73)</sup>, (ii) whether there were appropriate control and monitoring procedures in place <sup>(74)</sup> and (iii) whether the tax benefit was proportional and did not go beyond the minimum necessary <sup>(75)</sup>.

<sup>(64)</sup> See, in that regard, Case C-460/07 *Puffer* [2009] ECR I-3251, paragraphs 69 to 71, and Case T-351/02 *Deutsche Bahn v Commission* [2006] ECR II-1047, paragraphs 99 to 104.

<sup>(65)</sup> Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 26 and 27; and Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraphs 38 and 60 to 66. See also Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission* [2009] ECR II-289, paragraph 131.

<sup>(66)</sup> See also the current Belgian Finance Minister's statements published in the magazine *Trends* and quoted in footnote 7.

<sup>(67)</sup> See footnote 39.

<sup>(68)</sup> See recital 44.

<sup>(69)</sup> Additionally, ARCO derived an advantage from the measure inasmuch as it could have used the cooperative guarantee scheme to attract new capital, even though the Commission acknowledges that ARCO since 10 October 2008 has not made use of that possibility. By contrast, while other financial cooperatives like ArgenCo and Lanbokas/Agricaïsse did raise new capital, they explicitly distanced themselves from the cooperative guarantee scheme as described in footnote 12.

<sup>(70)</sup> See recital 60, describing what the Belgian State considers to be the key characteristics of individual shares of financial cooperatives.

<sup>(71)</sup> Recital 44 in particular shows that ARCO shareholders own a leveraged investment in assets, which are characterised by a high single-name risk (i.e. Dexia).

<sup>(72)</sup> See paragraphs 48 to 76 of the judgment.

<sup>(73)</sup> Paragraphs 67 to 73 of the judgment.

<sup>(74)</sup> Paragraph 74 of the judgment.

<sup>(75)</sup> Paragraphs 75 to 76 of the judgment.

- (103) The Commission considers that the argument of the Belgian State cannot succeed because the nature of the advantage conferred by the measure is qualitatively different from that which was examined by the Court in *Paint Graphos*. The measure put in place by Belgium involves the creation of a positive benefit and not relief from a fiscal burden or from an obligation to pay a charge. As such, the standard three-part analysis which the Union courts have endorsed when examining whether a fiscal advantage or exemption from a levy is selective cannot be applied to the measure.
- (104) In any event, even if the *Paint Graphos* analysis could be applied to the measure, the latter's specific features are such that its selective nature would remain.
- (105) First the Commission observes that *Paint Graphos* refers to all producers' and workers' cooperatives, not to a relatively small subsector such as financial cooperatives. If, as Belgium claims, there should be special treatment for 'genuine' cooperatives, that special treatment should apply to all recognised cooperatives. The limited focus of the measure on financial cooperatives only is therefore sufficient in itself to establish the selective nature of the measure.
- (106) Second, the Commission observes that in the view of the Belgian State, financial cooperatives seemed to deserve additional privileges as of 10 October 2008. The Commission observes that prior to that date recognised cooperatives got a form of favourable treatment as a result of their special status in the form of a withholding tax exemption <sup>(76)</sup>. The Commission does not take a view in the present Decision on whether that tax advantage is proportionate but it believes that there was no reason to introduce suddenly on 10 October 2008 additional compensation for, or protection of, companies which have the status of financial cooperatives.
- (107) Finally, even if the Commission were to enter into a *Paint Graphos* analysis as proposed by Belgium, it believes that there is no justification for providing a 100 % guarantee to individual shareholders of ARCO (i.e. part (i) of the *Paint Graphos* analysis), whose entities were limited liability companies. Because of the nature of such companies as determined by Belgium's general rules on company law, individual shareholders of ARCO should have been aware that they could lose their entire capital in case of a liquidation <sup>(77)</sup>. Moreover, protecting 100 % of all capital subscribed by the individual shareholders of financial cooperatives is not a proportionate measure (part (iii) of the *Paint Graphos* analysis) as those shareholders would be shielded from any risk, which would create an undue advantage for the undertakings of which they are shareholders <sup>(78)</sup>.

#### *Distortions of competition and effect on trade between Member States*

- (108) The cooperative guarantee scheme provides financial cooperatives with an advantage that other players offering retail investment products and other non-financial recognised cooperatives do not have. Thanks to the measure ARCO has been able to preserve market share for a longer period of time. ARCO did not suffer from capital outflows, or they only occurred later and at a lower level than would have been the case in the absence of the measure. As a result, capital that would otherwise have been available for investment did not become available to those other players, which had to compete on their merits and could not rely on the cooperative guarantee scheme. Therefore, the cooperative guarantee scheme distorts competition <sup>(79)</sup>.
- (109) Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to (further) penetrate the market are thereby reduced <sup>(80)</sup>. As there are many international providers of investment products active on the Belgian market, the measure most definitely has an effect on Union-wide trade.

<sup>(76)</sup> See recital 26.

<sup>(77)</sup> See the summary in recital 44 of the risk factors described in relation to the prospectus for ARCO shares issued in the summer of 2008.

<sup>(78)</sup> As the analysis in recital 107 suffices to show that the cooperative guarantee scheme does not meet the criteria described in *Paint Graphos*, the Commission does not have to pronounce in this Decision on the question as to whether there are appropriate control and monitoring procedures in place to prevent economic entities from choosing and changing their particular legal form for the sole purpose of taking advantage of certain benefits for that kind of undertaking (part (ii) of the *Paint Graphos* analysis).

<sup>(79)</sup> See, for a similar analysis, the findings of the Court in Case C-156/98 *Germany v Commission* [2000] ECR I-6857 at paragraphs 29 to 31.

<sup>(80)</sup> See Case C-197/11 *Libert and others* [2013] ECR I-0000, paragraphs 76 to 79.

*Conclusion*

- (110) Based on the analysis made in recitals 91 to 109, the Commission, concludes that the cooperative guarantee scheme involves State resources, represents a selective advantage to ARCO, distorts competition and affects intra-Union trade and therefore meets all the State aid criteria. All of those elements were in place at the latest when the Royal Decree of 10 October 2011 was adopted but the advantage created by the measure was already in existence as from the announcement by the Belgian authorities on 10 October 2008 that such a measure would be created. The entire amount of the advantage must be taken into account in examining the compatibility of the aid and, if necessary, recovery from its beneficiaries.

**4.4. Compatibility of aid**

- (111) After having established that the cooperative guarantee scheme is State aid within the meaning of Article 107(1) of the Treaty, the Commission must establish if that aid could be found compatible with the internal market.
- (112) Article 107(1) of the Treaty provides that State aid shall be incompatible with the internal market and therefore be prohibited, save as otherwise provided in the Treaty. Paragraphs (2) and (3) of Article 107 of the Treaty subsequently define two categories of compatible aid.
- (113) First, Article 107(2) of the Treaty lists categories of State aid that are automatically exempted from the prohibition principle, but the cooperative guarantee scheme does not fall within any of those categories.
- (114) Second, Article 107(3) of the Treaty covers several categories of aid that may be considered compatible with the internal market. In theory, subparagraphs (b) or (c) of Article 107(3) of the Treaty could apply.
- (115) With respect to Article 107(3)(c) of the Treaty, the Commission has explained in guidelines how it will apply the exemption laid down in that provision to certain types of aid. The Commission observes, however, that the measure does not correspond to any of the types of aid covered by those guidelines. Moreover, neither Belgium nor ARCO have given any indication of an objective of common interest for the purposes of that provision. As such, the Commission should examine the possible compatibility of the measure only on the basis of Article 107(3)(b) of the Treaty.
- (116) With respect to Article 107(3)(b) of the Treaty, the Commission observes that the Belgian State argues that, if the Commission concludes that the cooperative guarantee scheme involves State aid, the measure should be evaluated under Article 107(3)(b) of the Treaty. That provision allows aid to be declared compatible with the internal market if the aid is needed to remedy a serious disturbance of the economy of a Member State.
- (117) However, Article 107(3)(b) of the Treaty necessitates a restrictive interpretation of what can be considered a serious disturbance of a Member State's economy. The disturbance in question must affect the whole of the economy of a Member State and not merely the economy of one of its regions or areas of territory <sup>(81)</sup>.
- (118) When the financial crisis reached its first culmination point in the autumn of 2008, the Commission decided in the 2008 Banking Communication that Article 107(3)(b) of the Treaty would become available to evaluate State aid measures undertaken to address the problems of financial institutions <sup>(82)</sup>.

<sup>(81)</sup> See Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [1999] ECR II-3663, paragraph 167.

<sup>(82)</sup> At the same time, point (11) of the 2008 Banking Communication added that the use of Article 107(3)(b) of the Treaty should not be generalised beyond the financial sector at that time.

- (119) Outside the financial sector, the Commission also developed under Article 107(3)(b) of the Treaty the temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis ('Temporary Framework')<sup>(83)</sup>. However, that framework does not apply to the measure. Instead it aims at the real economy by enabling Member States to take suitable measures to improve access to finance for undertakings willing to invest during the financial crisis in a period when bank financing became scarcer. The problems of ARCO are not related to a lack of banking financing but to assets (i.e. Dexia shares) whose valuation had to be adjusted downward. Moreover, the cooperative guarantee scheme — which guarantees 100 % of a liability instrument — is not covered by any of the aid categories discussed in that framework under heading 4.3.
- (120) As financial cooperatives are not financial institutions for the purposes of the 2008 Banking Communication<sup>(84)</sup>, the aid will have to be evaluated directly under the Treaty. To comply with the general criteria for compatibility under Article 107(3) of the Treaty, the measure has to comply with the following conditions<sup>(85)</sup>:
- (a) *Appropriateness*: The aid has to be well targeted in order to be able to effectively achieve the objective of remedying a serious disturbance in the economy. It would not be the case if the measure were not appropriate to remedy the disturbance.
  - (b) *Necessity*: The aid measure must, in its amount and form, be necessary to achieve the objective. Thus, it must be of the minimum amount necessary to reach the objective, and take the most appropriate form to remedy the disturbance.
  - (c) *Proportionality*: The positive effects of the measure must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measure's objectives.
- (121) As to whether the measure is appropriate, the Commission observes that the impact of financial cooperatives on the broader economy is fundamentally different from that of traditional banks, which are exposed to 'bank runs'. If all holders of bank deposits were to decide to withdraw their money at the same time, a bank would be obliged to divest all its illiquid assets over a short period of time (thus triggering 'fire sales'), which would have grave consequences for lending to the real economy and might also create a downward spiral of asset prices. Financial cooperatives however do not lend to the real economy. They also have a statutory right to limit exits<sup>(86)</sup> so that any unorderly divestment of assets can in principle be avoided. That latter element highlights an important difference as regards systemic effects between deposits and cooperative shareholdings.
- (122) It is also clear that from a legal standpoint shareholders of financial cooperatives are shareholders of a limited liability company. As a consequence of that status individual shareholders of financial cooperatives are legally exposed to the possibility of losing part or all of their initial capital outlay. In that regard, the Commission also takes note of the fact that the Governor of the NBB did not confirm that shares of financial cooperatives were similar to savings deposits in a credit institution<sup>(87)</sup>.
- (123) The Commission also observes that individual shareholders of financial cooperatives have a very different position in the 'waterfall structure'<sup>(88)</sup> in the event of liquidation or bankruptcy of those entities than is occupied by a holder of a savings deposit in a credit institution. Credit institutions are regulated entities for which the regulator ensures that there is a certain amount of capital available. That capital constitutes a first cushion in case of liquidation or bankruptcy. Shareholders of financial cooperatives however enjoy no such protection. In case of a liquidation or bankruptcy they are first in line to take a hit.
- (124) Based on the arguments developed in recitals 121 to 123 the Commission concludes that the cooperative guarantee scheme merely protects financial cooperatives and their individual shareholders from the consequences of their past investments. However, it is not an appropriate measure to avoid a serious disturbance of the Belgian economy.

<sup>(83)</sup> OJ C 83, 7.4.2009, p. 1.

<sup>(84)</sup> Activities of financial institutions are for instance those listed in Annex I of the Directive 2006/48/EC of the European Parliament and of the Council (OJ L 177, 30.6.2006, p. 1).

<sup>(85)</sup> See Case 730/79 *Philip Morris* [1980] ECR 2671.

<sup>(86)</sup> See recital 41.

<sup>(87)</sup> As indicated in recital 13.

<sup>(88)</sup> When a company goes bankrupt, liability holders lose their exposure according to their seniority in the liability structure. That process is called the 'waterfall structure'.

- (125) As to whether the measure is necessary, the Commission recalls that the Belgian State had already taken significant measures to prevent a disturbance in its economy. It had already put in place other measures to stabilise the Belgian financial system and in particular the banks and other financial institutions in which financial cooperatives were investing. The Belgian Deposit Guarantee Scheme protected deposits up to a limit of EUR 100 000 and the Belgian State helped Fortis, KBC, Dexia and Ethias with recapitalisation, liquidity measures, impaired asset measures and ad hoc measures. The Commission concludes that it was not necessary to protect some individual shareholders in the case of financial cooperatives, which ultimately are limited liability companies.
- (126) As regards the letter of the Governor of the NBB to which the Belgian State referred, the Commission notes that it dates back to October 2011, long after 10 October 2008 when the measure was announced. Moreover the language of the letter does not say that the measure is necessary to avoid a serious disturbance of the Belgian economy. It merely says that the measure would allow <sup>(89)</sup> the negative effects of the (systemic) crisis to be limited. As regards the letter of the Financial Stability Board, the Commission observes that it merely discusses the increased coverage of the deposit guarantee scheme and the introduction of the guarantee scheme of 'branch 21' insurance products.
- (127) As to whether the measure is proportionate, the Commission observes that the design of the measure does not sufficiently guard against adverse selection <sup>(90)</sup>. The voluntary nature of the cooperative guarantee scheme in combination with the apparent lack of a viability test creates an incentive to enter only once it is clear that the guarantee will be triggered. In such a scenario, the beneficiary can use the guarantee while avoiding to a large extent a payment of guarantee fees until the very last moment before liquidation.
- (128) The Commission also believes that the cooperative guarantee scheme creates undue distortions of the normal functioning of the market. The measure has allowed ARCO to protect its market position on the market for retail financial products and as a result competitors which could not rely on the cooperative guarantee scheme have or could have experienced a negative impact on their market share and profitability.
- (129) In conclusion, the measure cannot be considered compatible with the internal market because it is neither appropriate nor necessary nor proportionate for the purposes of Article 107(3)(b) of the Treaty and it does not come within the scope of any other provision governing compatibility of State aid.

#### 4.5. Calculation of the aid

- (130) As regards the calculation of the advantage to be recovered from ARCO, the Commission takes into consideration the following parameters and facts <sup>(91)</sup>:
- the maximum amount of capital outflow as per ARCO's articles of association, which is limited to 10 % of the total capital or to 10 % of its shareholders' base <sup>(92)</sup>,
  - the fact that only individual shareholders are covered by the cooperative guarantee scheme,
  - the specific design of the cooperative guarantee scheme, which on the one hand was voluntary, leaving to the financial cooperatives the choice to participate or not, while on the other hand allowing even financial cooperatives in high risk of bankruptcy or liquidation to apply for the scheme (as happened when, on 8 December 2011, shortly after they were admitted to the scheme, the General Meetings of ARCOFIN, ARCOPAR and ARCOPLUS approved the proposals of their executive boards to go into voluntary liquidation,

<sup>(89)</sup> The Commission notes that the letter indeed uses the conditional form 'permettrait' and not the more assertive future form 'permettra'.

<sup>(90)</sup> See also the comments in the letter of the Governor of the NBB in recital 13.

<sup>(91)</sup> For the sake of simplicity, the Commission has developed a one-period model, which assumes that individual shareholders can only exit in that one period. That is a conservative assumption.

<sup>(92)</sup> See footnote 40.

- the fact that, long before it went into liquidation, ARCO was already in an unsound financial situation, as it had — as described in recitals 38, 44 and 82 — heavily invested in shares of Dexia, a bank that in the autumn of 2008 had to be rescued from bankruptcy by the Belgian, French and Luxembourg governments, with the result that any significant drop in the value of Dexia shares was still detrimental to the financial position of ARCO, in particular because ARCO had leveraged its participation in the rescue of Dexia by taking on debt,
- and the fact that in 2011 ARCO paid the entry fee and the annual guarantee premium.
- (131) The advantage that ARCO obtained was a protection from capital outflows which ARCO could otherwise only have stopped by applying the provisions of its Articles of Association once it had either lost 10 % <sup>(93)</sup> of its capital or 10 % of its shareholder base. Outflows of such magnitude were likely to happen as soon as ARCO would have either objectively entered into a situation of over-indebtedness, bankruptcy proceedings, or liquidation proceedings, or — more subjectively as in some other cases of bank-runs <sup>(94)</sup> — as soon as its shareholders would have perceived ARCO to be no longer a safe investment, for example because of its heavy exposure to the financial situation and market value of Dexia.
- (132) The Commission takes a conservative <sup>(95)</sup> approach in calculating the advantage that ARCO obtained, taking into account the potential outflow of just one annual period instead of multiple periods. By proceeding on that basis, the calculation should capture the minimum effect of the cooperative guarantee scheme, although in reality the guarantee may also have prevented ARCO from having had to cope several times with the maximum outflow of shareholders and capital. The Articles of Association allowed ARCO to stop an outflow of capital if either 10 % of capital or 10 % of the shareholder base had gone. For the purpose of calculating the aid amount, the Commission assumes that ARCO would have chosen the more effective alternative among those two options, namely the alternative which would have preserved the higher level of capital. With regard to the option that is linked to an outflow of the shareholder base, the Commission will refer to the lowest number of individual shareholders during the period when an advantage was created (starting from 10 October 2008) which is another conservative assumption, and attribute to those shareholders the average share of capital of that year. With regard to the option linked to the outflow of capital the Commission will also refer to the year with the lowest amount of capital.
- (133) The Commission also takes into account that the advantage of the measure was partially diminished by the fact that ARCO, as constituted by the three legal entities ARCOPAR, ARCOFIN and ARCOPLUS, had to pay a one-off entry fee and a guarantee fee for one year, even though those payments only took place in the autumn of 2011, just before ARCO filed for liquidation.
- (134) The advantage obtained by the measure is hence the lower amount resulting from the following two calculations: (a) 10 % of the capital of the year with the lowest capital in the period from 10 October 2008 until 8 December 2011 minus the total amount of fees already paid; and (b) 10 % of the lowest number of shareholders in the period of 10 October 2008 until 8 December 2011 multiplied by the average share of capital per shareholder of the same year minus the total amount of fees already paid.
- (135) In absolute terms, the likelihood of investors withdrawing capital grows over time, making it more difficult to calculate the interest that has to be paid for the advantage received. In order to allow the entirety of the advantage obtained by ARCO to be eliminated while at the same time allowing the Member State to have a workable method by which the recovery interest can be calculated <sup>(96)</sup>, the Commission considers that the entirety of the advantage was fully available at least as of 8 December 2011, and requests that the sums to be recovered bear interest from 8 December 2011 until their actual recovery.
- (136) In order to be able to verify the aid calculations, the Commission requests Belgium to provide the Commission with a list of the numbers of shareholders of ARCOPAR, ARCOFIN and ARCOPLUS respectively for the period from 10 October 2008 until 8 December 2011, as registered at the end of each year.

<sup>(93)</sup> The Commission observes that if the other shareholders of ARCO would not withdraw their money, individual shareholders would be able to withdraw a larger percentage. However, in order to take a conservative approach, the Commission for the purpose of these calculations has used a figure of 10 %.

<sup>(94)</sup> For a typical case of a bank that suffered a bank run in the context of the recent financial crisis compare the case of Northern Rock (OJ C 149, 1.7.2009, p. 16).

<sup>(95)</sup> i.e. it potentially underestimates the advantage.

<sup>(96)</sup> See Case C-403/10 P *Mediaset v Commission* [2011] ECR I-117\* Summ.pub., paragraphs 126 and 127, and the case-law cited there.

- (137) In their additional comments submitted more than a year and a half after the deadline for submitting comments on the decision to open the procedure, the Belgian authorities did not provide any new information on the substance of the case. They claim that the Commission may not prohibit the payment of guarantees granted to individual shareholders, may not require the State to suspend any payment under the cooperative guarantee scheme and may not recover payments made under that scheme to individual shareholders
- (138) In support of their arguments the Belgian authorities noted that the individual shareholders were not undertakings within the meaning of Article 107(1) of the Treaty and considered that the payment of the guarantee to individual shareholders would have no impact on ARCO or the likelihood of the Belgian State recovering the aid.
- (139) In reply the Commission pointed out that the sums to be recovered under this Decision were indeed aid to ARCO.
- (140) The Commission further stated that the fact of finding that aid granted by a State was incompatible with the single market under Article 108(2) of the Treaty was sufficient to justify ordering the State to abolish that aid<sup>(97)</sup>. The Belgian authorities therefore could not claim that the prohibition on paying a guarantee deemed to be incompatible aid was contrary to Union law.
- (141) They were therefore obliged to comply with the order contained in the decision to open the procedure to suspend implementation of the measure in question, and therefore not make any payment.
- (142) It is therefore also justified that Belgium should continue to abstain from making any payment under the aid measure.

#### *Conclusion*

- (143) The Commission finds that the cooperative guarantee scheme constitutes State aid in favour of ARCOPAR, ARCOFIN and ARCOPLUS that Belgium has unlawfully implemented in breach of Article 108(3) of the Treaty on the Functioning of the European Union. The Belgian State should withdraw the legislation underlying the cooperative guarantee scheme (in particular the Law of 14 April 2009 and the Royal Decree of 10 October 2011) and should recover the advantage from ARCOPAR, ARCOFIN and ARCOPLUS,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The guarantee scheme unlawfully adopted by Belgium for the financial cooperatives of ARCO, and in particular ARCOFIN, ARCOPLUS and ARCOPAR, in breach of Article 108(3) of the Treaty on the Functioning of the European Union is incompatible with the internal market.

#### *Article 2*

1. Belgium shall recover the incompatible aid referred to in Article 1 from the beneficiaries at the lower amount resulting from the following two calculations:
  - (a) 10 % of the capital of the year with the lowest capital in the period from 10 October 2008 until 8 December 2011 minus the total amount of fees already paid; or
  - (b) 10 % of the lowest number of shareholders in the period from 10 October 2008 until 8 December 2011 multiplied by the average share of capital per shareholder of the same year minus the total amount of fees already paid.
2. The sums to be recovered shall bear interest from 8 December 2011 until their actual recovery.

<sup>(97)</sup> See the ECJ judgment of 11 November 2011 in Case T-384/08, *Elliniki Nafpigokataskevastiki et al v. Commission* (ECR II, page 380, paragraph 133).

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(98)</sup>.

4. Belgium shall continue to refrain from making any payments under the scheme referred to in Article 1 with effect from the date of notification of this decision.

#### *Article 3*

1. Belgium shall terminate the aid measure referred to in Article 1 as the measure is incompatible with the internal market.

2. Recovery of the aid referred to in Article 1 shall be immediate and effective.

3. Belgium shall ensure that this decision is implemented within four months following the date of notification of this Decision.

#### *Article 4*

1. Within two months following notification of this Decision, Belgium shall submit the following information to the Commission:

(a) a detailed description of the measures already taken and planned to ensure compliance with this Decision;

(b) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

#### *Article 5*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 3 July 2014.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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<sup>(98)</sup> OJ L 140, 30.4.2004, p. 1.