PROCEDURY ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA

POMOC PAŃSTWA – NIDERLANDY

Pomoc państwa C 10/2009 (ex N 138/2009) – ING

Zaproszenie do zgłaszania uwag zgodnie z art. 88 ust. 2 Traktatu WE

(Tekst mający znaczenie dla EOG)

(2009/C 158/06)

Pismem z dnia 31 marca 2009 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Niderlandy o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 88 ust. 2 Traktatu WE dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka pomocy, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:
European Commission
Directorate-General for Competition
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Otrzymane uwagi zostaną przekazane władzom niderlandzkim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

STRESZCZENIE

PROCEDURA

W dniu 4 marca 2009 r. władze niderlandzkie powiadomiły Komisję o utworzeniu na rzecz ING Support Holding (bezpośrednia spółka zależna grupy ING) instrumentu wsparcia opartego na aktywach niepłynnych.

FAKTY

ING, z siedzibą w Niderlandach, jest jedną z największych instytucji finansowych na świecie, o całkowitej sumie bilansowej wynoszącej 1 332 mld EUR. W styczniu 2009 r. państwo niderlandzkie oraz ING podpisały umowę, mającą na celu przeniesienie ryzyka oraz zwrotu z części portfela papierów wartościowych ING w USA opartego na kredytach hipotecznych na nieruchomości. Portfel ten składa się głownie z papierów wartościowych opartych o kredyty typu Alt-A. Nieuregulowane saldo w ramach portfela ING wynosi 39 mld USD (wartość nominalna: 30 mld EUR).

Planowany środek polega na wymianie przepływów gotówkowych między państwem niderlandzkim a ING, w ramach której ING dokonuje transferu przychodów w wysokości 80 % wartości nominalnej portfela (spłata kapitału i odsetek) w zamian za gwarantowane płatności ze strony państwa z tytułu 72 % (tj. 80 % z 90 %) wartości nominalnej portfela (wyłącznie kapitału), uzupełnione o prowizję od pożyczki płaconą przez państwo na rzecz ING odpowiadającą 3,50 % w przypadku części portfela obejmującej papiery wartościowe o oprocentowaniu stałym oraz odpowiadającą jednomiesięcznej stawce USD Libor + 50 pb w przypadku części portfela obejmującej papiery wartościowe o oprocentowaniu zmiennym.

Państwo niderlandzkie płaci ING dodatkową prowizję za zarządzanie portfelem w wysokości 25 pb rocznie z tytułu pozostałej kwoty kapitału. W zamian za korzystanie z tego środka ING płaci państwu niderlandzkiemu roczną opłatę gwarancyjną odpowiadającą 55 pb z tytułu 80 % pozostałej części portfela.

OCENA

Komisja dokonała oceny transakcji w świetle wydanego przez Komisję komunikatu w sprawie aktywów o obniżonej jakości. Na obecnym etapie Komisja ma wątpliwości co do wyceny wartości, a w szczególności co do metod wyceny zastosowanych do określenia rzeczywistej wartości rynkowej. Komisja musi poddać dalszej analizie przyjęte założenia, przestawione przez państwo niderlandzkie w szczególności w związku z (i) wyborem stopy dyskontowej, (ii) założeniami dotyczącymi cen nieruchomości, (iii) poziomami wsparcia jakości kredytowej oraz (iv) innymi kwestiami związanymi z wyceną wartości.

W związku z powyższym Komisja ma również wątpliwości co do odpowiedniego podziału obciążeń między państwem a ING. Komisja podaje w wątpliwość, czy bank istotnie ponosi koszty różnicy między wartością nominalną portfela a jego rzeczywistą wartością rynkową, przy uwzględnieniu wyżej wspomnianych wątpliwości związanych z wyceną wartości. Komisja nie jest również pewna, czy wyżej wspomniana wymiana przepływów gotówkowych jest rzeczywiście tak korzystna dla państwa, jak zostało to przedstawione. W szczególności jeśli chodzi o prowizję za zarządzanie portfelem, Komisja ma pewne wątpliwości co do jej stosowności, ponieważ wydaje się, że w tym zakresie nie ma potrzeby prowadzenia istotnej działalności.

Jako że środek ten spełnia szereg warunków określonych w komunikacie w sprawie aktywów o obniżonej jakości oraz uwzględniając odpowiednio potrzebę zachowania stabilności finansowej, Komisja postanowiła zatwierdzić środek na okres sześciu miesięcy. Jednocześnie, w świetle wcześniej przedstawionych uwag, Komisja podjęła również decyzję o wszczęciu postępowania określonego w art. 88 ust. 2 traktatu WE w celu sprawdzenia warunków ustanowionych w komunikacie w sprawie aktywów o obniżonej jakości w odniesieniu do wyceny wartości (w tym metod tej wyceny) oraz kwestii podziału obciążeń w ramach przedmiotowego środka.

TEKST PISMA

„The Commission wishes to inform the Netherlands that, having examined the information supplied by your authorities on the measure referred to above, it has decided to approve the measure temporarily for six months and to initiate the procedure laid down in Article 88(2) of the EC Treaty since the Commission has doubts as to the compatibility of certain aspects of the measure when assessed in the light of the Commission's Communication on the treatment of impaired assets.

I. **PROCEDURE**

(1) On 26 January 2009 the Dutch authorities informed the Commission of their intention to implement an illiquid assets back-up facility in favour of ING Support Holding (a direct subsidiary of ING Group) subject to Commission approval. On 30 January the Commission sent an information request to the Dutch authorities, which was partially answered with the notification. On 4 March the Dutch authorities notified the measure formally with the Commission.

(2) The measure notified is the second individual aid announced in favour of ING in the context of this financial crisis. ING has already received an emergency recapitalisation of EUR 10 billion from the Netherlands which the Commission approved on 13 November 2008. [1] Furthermore, ING has access to the Dutch Credit Guarantee scheme where the Dutch State granted a guarantee in the amount of USD 9 billion (of which ING has already used USD 8 billion through bond issuance) and an additional EUR 5 billion of granted guarantees of which ING has already used EUR 4 billion by issuing a bond.

(3) On 17, 23 and 26 March meetings between the Dutch authorities and the Commission services were held. In the meantime a great number of information exchanges via email and phone took place.

(4) On 13 March, the Commission asked the Dutch authorities to waive the confidentiality requirements for allowing technical experts from the European Central Bank (ECB) to assist the Commission in the assessment of the ING US Residential Mortgage-Backed Security (RMBS) portfolio affected by the aid measure under the Impaired Assets Communication (IAC). Confirmation was provided on 19 March. Thereafter the Commission forwarded to the ECB designated expert all available information to which the technical experts from the ECB replied.

II. **DESCRIPTION OF THE FACTS**

1. **The beneficiary**

(5) Based in Amsterdam, ING Group offers banking, insurance and asset management to over 85 million private, corporate and institutional clients in more than 50 countries. With a global workforce of about 130,000 people, ING comprises a broad spectrum of prominent companies that serve their clients under the ING brand.

(6) ING is composed of ING Groep N.V., the mother holding company that controls 100 % of ING Bank N.V. and ING Verzekeringen N.V., two sub-holding companies respectively controlling ING's banking and insurance subsidiaries.

(7) ING is the 19th biggest financial institution globally by market value (based on October 2008 values) with a total balance sheet of EUR 1,332 billion at the end of 2008 and total risk weighed assets of EUR 343 billion. In Q4 2008 the group made a total net loss of EUR 3,7 billion and a loss of EUR 0,7 billion for the full year 2008. The Tier-1 capital ratio of ING stands at 9,3 % at the end of 2008. These numbers do not take into account the new measure.

2. **The US RMBS portfolio of ING**

(8) On January 26, 2009 the Dutch State and ING signed a term sheet to transfer the risk and cash flows of a portion of ING's US based RMBS portfolio (thereafter referred to as "the portfolio").

(9) […] (*)

[1] State aid N 528/2008 — The Netherlands Aid to ING Groep N.V., 13 November 2008.

(*) Confidential information.

(10) The outstanding balance of the portfolio amounts to USD 38,7 billion (par value, EUR 30 billion) ([2]), of which most is held by ING Direct (USD 34,1 billion), a US subsidiary of ING. ING Insurance Americas has a portfolio of USD 4,5 billion US mortgage-backed securities divided over several insurance companies.

(11) About 2/3rds of the portfolio is composed of Alt-A residential mortgage backed securities (RMBS) and about 1/3rd in Prime RMBS. All securities in the portfolio are senior RMBS tranches and were originally rated triple A, according to ING. This implies a high level of loss protection. However, following the recent developments in the US mortgage markets, a significant proportion of these tranches were downgraded by rating agencies. Currently, about 29 % of the securities (weighted by outstanding amounts) carry still a triple A rating, with a negative outlook attached to 6 % of them. Depending on the rating agency used and according to information provided by the Dutch authorities, about 56 % are now rated sub-investment grade. So far the level of credit enhancement provided in the structures has been sufficient and explains why few actual impairments have been accounted for on the portfolio and no actual credit loss has occurred.

(12) The Dutch authorities state that the market for Alt-A loans has dried up and there are few if any buyers and sellers willing to transact at these low levels.

(13) Although the Alt-A portfolio is not large in terms of ING's total balance sheet, it is significant relative to its equity. This was already noted in the explanation of the events triggering the State recapitalisation measure of ING during 2008, when the Commission noted that the "perceived toxicity of the Alt-A portfolio of ING was a particular cause for concern." ([3])

(14) The underlying mortgages of the portfolio are heavily concentrated in California (almost 39 % of all underlying mortgages) and another combined 5,5 % of mortgages were originated in Arizona and Nevada. A further 7,6 % were originated in Florida. In the portfolio, about 61 % of all mortgages were originated either in 2006 or in 2007. About 30 % of ING's total portfolio is currently made up of so-called Option adjustable rate mortgages (Option ARMS) ([4]) which are part of the almost 70 % of all mortgages which have adjustable interest rates. The remaining 30 % have fixed interest rates.

(15) The "fair value" of the portfolio — an available for sale asset — was alleged to be on the 31 December 2008 EUR 18,442 million that is 71,5 % of its book value (EUR 25,809 million). ([5]) The book value of the portfolio is for the most part based on a mark-to-model with valuation techniques not supported by observable market inputs. Due to this decline in valuation from the original value, the bank had to build a negative revaluation reserve of EUR 7 billion (pre-tax), which is subtracted from shareholder equity under IFRS ([6]). However, this negative revaluation reserve is not taken into account for regulatory capital calculations due to so-called prudential filters introduced by supervisors for mitigating the effects of fair value changes on regulatory capital. A valuation change in an "available for sales" asset is only reflected through the profits and loss account at the point when an asset against which there has been a negative revaluation reserve is "impaired". ([7])

(16) The par value of the portfolio is USD 38,7 billion. Due mostly to USD 2,7 billion (EUR 2,1 billion) impairments on the portfolio, the cost basis from an accountant's point of view under IFRS amounts to USD 36 billion as per 31 December 2008. The agreed base for the measure is 90 percent of the par value of the portfolio.

3. **The measure**

(17) In order to avoid dealing with the various subsidiaries holding the securities (see above) it is proposed that the legal owners of the securities enter into a participation agreement with ING Support Holding (a direct subsidiary of ING Group) to transfer 80 % of the economic risk from that portfolio while retaining legal ownership. ING Support Holding then enters into a so-called illiquid asset back-up facility for transferring this risk and all respective incoming payments (interest and principal repayments) to the Dutch State.

(18) The transaction is constructed as a cash-flow swap in which both the Dutch State and ING agree to exchange different cash flows over the duration of the deal. During the deal, the portfolio will not be actively managed as it mostly be held until maturity, although there might be activity expected due to possible legislative change in the US.

(19) In the transaction 80 % of the incoming payment flows, i.e. repayment and prepayment of principal and interest (thereafter called: portfolio cash flow) from ING's portfolio is swapped against an over-time payment from the Dutch State of the guaranteed amount of USD 28 billion which together with an interest component constitutes the funding fee. This interest component paid by the Dutch State amounts to 350 bp on the outstanding fixed part of the portfolio (amounting to 57 % of the portfolio) and to one month USD Libor + 50 bp on the variable part of the portfolio (amounting to 43 % of the portfolio).

([2]) Exchange rate about EUR/USD 1,3 assumed at the time of the deal announcement in January.

([3]) Commission Decision of 13.11.2008 in case State aid N 528/2008 — Aid to ING, point 8.

([4]) Where the borrower has the option to repay a very low amount in the first few years and these payments reset at a higher level thereafter.

([5]) At the time of purchase, Banks have to put their assets in four different baskets, with different consequences for accounting, the trading book, the available for sale category, the loans & receivables and hold-to-maturity. Following a legal change last October, it became easier to reclassify assets into the hold-to-maturity category.

([6]) IFRS accounting rules require to value assets booked in "available for sale" at fair value (i.e. profits and losses are directly affecting equity capital). For "fair valued": banks can chose three categories based on the availability of valuation input data: "marked to market", "marked to models with observable inputs" and "market to model with unobservable inputs".

([7]) Under both IFRS and US GAAP a debt security is considered impaired if, based on currently available evidence, there is a reasonable expectation that not all due interest and principal will be recovered.

(20) For evaluating the terms of this deal it is necessary to look at the expected net present value of the various cash flows. For arriving at a net present value of the above cash flows it is necessary to apply a discount rate. ([8]) The transaction foresees a discount rate of 3 % for all cash flows in the swap. This discount rate is applied to all cash flows, regardless of whether they come from the Dutch State, from ING or from the portfolio transiting via ING to the Dutch State. The reason why a 3 % discount rate is used is because the Dutch State estimates its cost of funding in USD to be around 3 % for a maturity of 5-7 years, corresponding to the weighted average life of the portfolio. The Dutch State has provided two supporting opinions on this from its primary dealers.

(a) *Valuation: methodology, scenarios and discount rate*

(21) The Dutch State commissioned Dynamic Credit Partners to analyse the portfolio of ING for determining the real economic value of the portfolio. The overall approach consists in projecting the probability of default and loss severities on a tranche per tranche basis for the whole portfolio in order to calculate the expected losses.

(22) Dynamic Credit performed a bottom up evaluation of the underlying mortgages in each securitization deal (from which ING bought a tranche) and was able to calculate the expected losses it estimated would arise on the underlying mortgage loans. Such calculations were based on — inter alia — factors such as the original ratio between the value of the house and the principal (loan to value), the type of loan, the type of lender, the location at postcode level and the estimated change in house prices at postcode level since the loan was granted.

(23) As a second step, the so-called cash waterfall is considered, as for a given securitization deal, there are various tranches each with different levels of seniority (or "credit cushion") and credit enhancement. In practice, this means that any incoming cash flow shortfalls are first to be taken by more subordinated tranches, while more senior tranches are still being serviced by remaining cash flows and reserves built-up during times when there had not been defaults. The Dutch authorities claim that ING's portfolio has only very secure senior tranches.

(24) Two scenarios are projected: a scenario deemed more likely by the Dutch State, the base case, and a less likely stress case scenario. According to the Dutch authorities, key assumptions in the base case are house price declines of about 35 % nationwide peak to trough (2006 to 2009) and up to 65 % in hardest hit areas such as California and a US unemployment rate of 8 % in 2009. An annual decline in US GDP is assumed by 6 % in the fourth quarter of 2008 and 3 % in the first quarter of 2009. The stress case scenario assumes US home price declines of 45 % peak-to-trough and a 70-75 % peak-to-trough decline in the most vulnerable areas and an increase of the US unemployment rate to 9,5 % in 2009. Both scenarios assume a voluntary prepayment rate of 5 % over the lifetime of the mortgages figure when compared with the pre-crisis period. The Dutch State points out that this is a prudent assumption. Both scenarios are then translated into different total expected losses on the portfolio.

(25) After having determined the expected net cash flows (net of expected losses), they are discounted at a discount rate of 3 % for arriving at a net present value. Alternatively, this corresponds to a discount rate of 4,19 % if gross cash flows (assuming no losses) were considered, under a base case valuation. Based on these calculations the Dutch authorities arrive at a valuation of 97 % of par in the base case scenario. In the stress case scenario, the value of the portfolio would be 89 % of par.

(b) *Effect on ING's capital ratio*

(26) The replacement of the risky portfolio by a secure government receivable reduces the capital required to be held against the risky asset by the bank. In regulatory terms, the Dutch authorities state that this results in a capital relief of EUR 1,26 billion, ([9]) deriving from a reduction of 13 billion risk weighted asset (RWA) based on 31 December 2008. This capital relief of EUR 1,26 billion can be used for additional lending.

(27) According to the Dutch authorities from an accounting point of view the IFRS equity capital relief is EUR 5,6 billion — 80 % of pre-tax of the total equity capital relief of EUR 7 billion — which translates into approximately EUR 5 billion post tax. This is caused by the release of the negative revaluation reserve that in turn resulted from a sharp deterioration in market prices of RMBS over the last two years. However, this EUR 5 billion cannot be used for additional lending without reducing the regulatory ratios.

(c) *Additional fees*

(28) In addition ING will pay a guarantee fee to the State amounting to 55 bp p.a. on the outstanding value of the portfolio. The guarantee fee will decline in line with the declining amounts outstanding on the portfolio, the declining RWA relief and the declining risk for the State. As an illustrative example in the first five years the expected guarantee fee will be: USD 170 million, (2009), USD 146 million (2010), USD 127 million (2011), USD 109 million (2012), USD 94 million (2013).

(29) Furthermore, the State has to pay to ING a management fee amounting to 0,25 bp p.a. of the outstanding portfolio, expected to amount in the first five years, for instance, to USD 77 million, USD 66 million, USD 58 million, USD 50 million, USD 43 million.

(d) *Remuneration of the measure*

(30) Given the above description of the measure the expected discounted cash flows are in the following table. This would imply according to the Dutch authorities that the state would make a gain in both scenarios.

([8]) This is because a dollar today has not the same value as a dollar paid in the future.

([9]) This relates to 26 January 2009 as risk weights of the portfolio fluctuate.

Table 1: Projected net present value flows (*), in million USD

	Base case	Stress case
P & I payments to State (**)	30,376	27,728
Guarantee fee to State	1,011	1,011
(Guaranteed value to ING) (***)	(28,844)	(28,844)
Expected gain (loss) to state	2,867	219

(*) 3 % discount rate;
(**) Principal and Interest payments (including pre-payments);
(***) net present value of flows from the state to ING.

(31) The Dutch authorities state, however, that the management fee is an integral part of the deal and this has to be taken into account when looking at remuneration. Table 2 recalculates therefore the calculations with the management fee included. Based on this calculation, the remuneration for the State amounts to slightly more than USD 2 billion in the base case, but the remuneration is negative in the stress case.

Table 2: Projected net present value flows (*), in million USD

	Base case	Stress case
P & I payments to State (**)	30,376	27,728
Guarantee fee to State	1,011	1,011
(Guaranteed value to ING) (***)	(28,844)	(28,844)
(Management fee to ING)	(460)	(460)
Expected gain (loss) to state	2,083	(564)

(*) 3 % discount rate;
(**) Principal and Interest payments (including pre-payments);
(***) net present value of flows from the state to ING.

(e) *Duration and end of the measure*

(32) The agreement between the State and ING provides for an exit mechanism whereby the State and ING will meet every year to discuss whether the entire facility should be terminated. If both parties wish to terminate the facility the value will be determined using an exit mechanism commonly used in major financial transactions:

(33) Each party will appoint an independent advisor to evaluate the outstanding portfolio. If there is little difference between these valuations the average of the two will be used as the basis for the transaction. If the valuations differ widely, the parties will jointly appoint a third independent advisor. The value will then be established as the average of the value as calculated by the third advisor and the value of whichever of the earlier valuations is closest to the third advisor's estimates.

(34) As an exit mechanism the State is entitled to compel ING to sell the underlying securities once they are being traded on the market again at the price which ING paid when it purchased them.

(35) If neither the exit mechanism nor the exit incentives lead to the portfolio being run down, or the State being bought out entirely, the facility can in theory remain in operation until the last mortgage has been repaid. This could mean that there will be cash flows between the State and ING resulting from this transaction up until 2047. However, the estimated cash flows are such that majority of the portfolio will be redeemed within a few years (the weighed average life of this portfolio is about 6 years).

III. THE POSITION OF THE NETHERLANDS

(36) The Dutch authorities informed the Commission on 17 March that in case the Alt-A Transaction does not close before 31 March 2009 and the risk transfer would not be effected, they would have serious concerns that this would result in a […] financial markets and the Dutch economy. A delay in closing would mean that the Alt-A Transaction would not have the intended positive effects on revaluation reserves, IFRS equity and capital adequacy ratios. In view of the volatility of the financial markets this might lead to substantial increase in uncertainty about the position of ING. Another issue that could increase the uncertainty about the position of ING is the accounting notion […] ([10]) […]. Both issues, i.e. a delay in closing or a significant change […], could, in the view of the authorities, have a material adverse effect on the stability of ING and hence the […] financial markets and economy. This is confirmed in a letter by the supervisory authority.

(37) In addition, they note that, without Commission approval, ING's […] with all the possible consequences this might have for confidence in the banking sector in general and ING in particular, but also for the Dutch and European economy in these times of uncertainty and recession. The Dutch authorities point to the Commission decision on the recapitalisation N 528/2008, where the Commission had already recognised the importance of ING for the Dutch economy.

(38) The Dutch authorities underline that ING is a sound financial institution with sufficient liquidity and solvency, but it is suffering from exceptional conditions worldwide. ING would therefore certainly not qualify as a firm in difficulties, as defined in the Community guidelines on state aid for rescuing and restructuring firms in difficulty.

(39) The Dutch authorities acknowledge that the measure constitutes state aid within the meaning of Article 87(1) EC, which is compatible with the Treaty pursuant to Article 87(3)(b) EC, for remedying a serious disturbance in the economy of a Member State. In particular, the measure has been specially designed for the current exceptional circumstances in which, because of their illiquidity, certain assets have to be written down more than their economic value would warrant, for satisfying accounting requirements. They note that the measure was appropriate at such time for tackling the specific problems and at the same time is the least far-reaching and least risky way for the State to assist ING.

([10]) […]

(40) The Dutch authorities confirmed that they have reviewed whether there has been a full prior transparency by ING having disclosed all impairments and there were no indications to believe that this was not the case. In addition, the Dutch authorities note that the valuation of the portfolio is performed by independent experts under an appropriate methodology. The Dutch authorities are of the view that the valuation of ING's portfolio was particularly complex as there was no active markets for these assets. The Dutch authorities have instructed Dynamic Credit who have undertaken an alternative valuation which they considered the best approximation of the true value of the portfolio. The valuation has been affirmed by the Dutch supervisory authority.

(41) The authorities state that the total package provides an adequate remuneration for the risk taken over by the state. The authorities point to the more likely base case scenario which shows an overall gain for the Dutch State. The Dutch authorities state that the management fee is part of the overall remuneration package. The total package was considered appropriate at such time. There is also adequate burden sharing, due to the first loss already borne by the bank, and a future loss split in the relationship of 80 % for the State and 20 % for the bank.

(42) As regards to the management of the assets, the authorities explain that ING remains partly responsible for the portfolio, giving it the perfect incentive to continue to manage the portfolio as efficiently as possible. They underline with reference to point 46 IAC that the Securities are held solely by ING Support Holding and not by ING Groep and that for the duration of this agreement the State, ING Support Holding and ING Groep will establish an operating committee to discuss recent developments, market outlook, data and pricing in respect of the Securities.

(43) The Dutch authorities state that it would be admissible to use a single discount rate for all cash flows involved. The Dutch authorities state that a higher discount rate for cash flows from ING or for cash flows transiting from ING to the State, due to their higher perceived riskiness, would over-adjust for the flow's riskiness. They explain that the credit risk in the portfolio is more than offset by the positive net present value for the State under the swap transaction.

(44) The Dutch government provides the following commitments:

— Presentation of a viability review in line with conditions set out in the IAC

— Presentation of a restructuring plan in line with conditions set out in the IAC

— The Dutch State is willing to change the provisions of valuation and burden sharing by means of claw back, increase of the Guarantee fee under the illiquid assets back-up facilities or any other form of remuneration, without compensating ING via changes in the other cash flows (i.e. the funding fee, the Alt A cash flows and management fee) if the Commission comes to the conclusion that the valuation at 26 January 2009 of the portfolio underlying the illiquid assets back-up facilities or its burden sharing proves to be materially in contradiction with EC State aid rules on impaired assets.

IV. CONSULTATION OF THE TECHNICAL EXPERTS FROM THE EUROPEAN CENTRAL BANK

(45) As explained in point 4, the Commission has been consulting the technical experts from the ECB for assistance in assessing the valuation of the portfolio. The experts of the ECB reviewed the provided documents and concluded that they did not have all the information needed to properly assess the valuation of the impaired assets portfolio of ING.

V. ASSESSMENT OF THE AID

1. Existence of aid

(46) The Commission first assesses whether the measures constitute state aid within the meaning of Article 87 (1) EC. According to this provision state aid is any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition, by favouring certain undertakings, in so far as it affects trade between Member States.

(47) The Commission finds that the measure reduces the amount of capital ING has to hold against these assets. Given that the market value of the portfolio is less than the price paid it is evident that no market operator would provide such a facility under similar conditions.

(48) As the measure is favouring only ING it is selective and leads to a distortion of competition and affects intra-Community trade because the banking sector operates internationally. Thus, the Commission concludes that the measure constitutes state aid.

(49) The IAC states that the aid amount corresponds to the difference between the transfer value of the assets (based on their real economic value) and the market price. To this end the assets should be valued on the basis of their current market value, whenever possible. Given that the market for the assets in the portfolio has mostly dried up, as claimed by the Dutch authorities, this implies that there is no market price in the absence of a market as defined by the IAC. Therefore the calculated aid amount as regards the portfolio is the full net present value of all the sums provided to ING by the Dutch government.

2. Compatibility of the financial support measures

(50) The Netherlands intends to provide impaired asset relief in favour of ING. Given the present circumstances in the financial market, the Commission considers that this measure may be examined directly under the Treaty rules and in particular under Article 87(3)(b) EC.

(51) Article 87(3)(b) EC empowers the Commission to declare aid compatible with the common market if it is intended "to remedy a serious disturbance in the economy of a Member State". The Commission would point out that the Court of First Instance has expressly stated that Article 87(3)(b) EC is to be applied restrictively so that the aid may not benefit only one firm or one sector of the economy, but must serve to remedy a disturbance in the whole economy of a Member State. ([11])

(52) The Commission considers that market conditions deteriorated all over the world in the last quarter of 2008 and certain assets classes are no longer frequently traded. This is problematic for financial institutions because accounting provisions (IFRS accounting standards) might require them to write down these illiquid assets (on the basis of their fair value) to a greater extent than is warranted by their economic value. The uncertainty in the market about the scale of the write-downs, the market value of these assets and the high leverage ratios have also had an impact on the financial institutions' overall risk perceptions. The present measure is designed to address these problems. Therefore it finds that the scheme aims at remedying a serious disturbance in the Dutch economy.

(53) The Commission has provided guidance on the treatment of asset relief measures by Member States under Article 87(3)(b) EC through the IAC. Impaired assets correspond to categories of assets on which banks are likely to incur losses (e.g. US sub-prime mortgage backed securities, Alt-A loans). The IAC complements and refines the Banking Communication ([12]) where the Commission set out the principles governing the application of the State aid rules to any support measure for banks in the context of the global financial crisis. The IAC sets out principles that must be followed by any asset relief measure. It should be noted that the Commission emphasises that a common European approach is needed to deal with the treatment of impaired assets, to make sure that foreseeable losses are disclosed, valued and accompanied by an adequate level in terms of burden sharing and remuneration.

(54) The IAC leaves the methods and design for impaired asset relief measures to the Member Sates, but defines impaired asset relief as all measures whereby a bank is dispensed from the need for severe downward value adjustments of certain asset classes. This is also the case for the present measure. Therefore the present measure must fulfil the conditions for the compatibility of asset relieve as spelled out in the IAC. ([13])

(a) *Eligibility of assets*

(55) As regards the eligibility of the assets, the IAC indicates in section 5.4 that asset relief requires a clear identification of impaired assets ([14]) and that certain limits apply in relation to eligibility to ensure compatibility. US mortgage backed securities (i.e. RMBS) are mentioned as prime examples of impaired assets which can be included in relief operations without doubts as to their eligibility. The Commission notes in this respect that all assets in the portfolio are related to US RMBS. The impaired assets are therefore sufficiently identified and do not raise issues of eligibility.

(b) *Transparency and disclosure*

(56) As regards transparency and disclosure the Commission notes that the IAC demands in section 5.1 full ex-ante transparency and disclosure of impairments by eligible banks on the assets which will be covered by the relief measures, based on adequate valuation, certified by recognised independent experts and validated by the relevant supervisory authority. In other word the IAC requires that disclosure and valuation should take place prior to government intervention. Moreover, transparency needs to be based on appropriate valuation certified by an independent expert and validated by a letter of the head of the supervisory authority.

(57) The Commission notes first that the Dutch authorities have engaged an independent expert. Second, as indicated above in point 42 the Dutch authorities have pursuant to point 20 IAC produced the necessary documents from the supervisory authorities.

(58) Finally, the Commission notes that the requirements concerning transparency and disclosure concerning the asset portfolio covered by the relief measure are met in principle, with the exception of the issue of proper valuation dealt with separately below. Full disclosure on the entirety of impaired assets on ING's balance sheet has not however been provided in the context of the notified measure and will have to be provided in the viability review. At this stage the provisions for transparency and disclosure are thus sufficiently complied with.

(c) *Management of assets*

(59) As regards the management of assets, the IAC in section 5.6 stipulates the necessity of ensuring a clear functional and organisational separation between the beneficiary bank and its assets, notably as to their management, staff and clientele. The Communication states in that respect that this should allow the bank to focus on the restoration of viability and to prevent possible conflicts of interest.

([11]) See in principle Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG* v *Commission* [1999] ECR II-3663, paragraph 167. Confirmed in the Commission's decisions in Case C 47/1996 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28, point 10.1), Case C 28/2002 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1, paragraphs 153 *et seq.*) and Case C 50/2006 *BAWAG*, not yet published, paragraph 166. See Commission decision of 5 December 2007 in Case NN 70/2007 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission decision of 30 April 2008 in Case NN 25/2008 *Rescue aid for WestLB* (OJ C 189, 26.7.2008, p. 3), and Commission decision of 4 June 2008 in Case C 9/2008 *Sachsen LB*, not yet published.

([12]) Commission Communication on The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270 of 25.10.2008, p. 8.

([13]) For a first application: Cf Commission Decision of 13 March 2009 in case C 9/09 *Dexia*, not yet published.

([14]) To be categorized in baskets in line with Annex 3 of the IAC.

(60) In that respect, the Commission notes that 80 % of the portfolio will be derecognised by ING. However ING remains the legal owner of all the assets. In order to achieve a functional and organisational separation, ING has appointed a special committee to deal with the portfolio as indicated above in point 42. In view of this arrangement the asset management is thus in line with the IAC.

(d) *Valuation*

(61) The IAC notes in section 5.5 that a correct and consistent approach to valuation is of key importance to prevent undue distortions of competition. The valuation of impaired assets should follow a general methodology established at the Community level, which should be closely co-ordinated ex-ante by the Commission and Member States.

(62) The Commission has to carefully scrutinize the valuation and in particular the underlying general methodology in order to ensure a consistent approach at Community level. In this respect its assessment should build on the expertise of existing bodies organised at EU level in order to ensure the consistency of valuation methodologies. For that purpose the Commission has called on the technical assistance provided by the experts from the ECB. The Commission notes that the technical experts from the ECB consider more information is needed.

(63) Valuation implies the determination first of the market value and second of the real economic value, the latter being defined in point 40 of the IAC as the long-term economic value on the basis of underlying cash flows and broader time horizons. The main aim of valuation is to establish the real economic value, given that this value represents the benchmark level in that a transfer of impaired assets and at this value indicates compatibility of aid ensuring the relief effect by exceeding current market value but keeping the aid amount to the minimum necessary.

(64) The Commission notes that, based on an independent expert i.e. Dynamic Credit, the Dutch State has established a real economic value of 97 cents on the dollar under the base case which is above the value at which the portfolio has been transferred at (90 percent of the par).

(65) Although the Commission does not question the qualification of the independent expert and its general approach it has some doubts on the conclusion reached on the establishment of this real economic value, given that it did not have all the information needed to properly assess the valuation of the impaired assets portfolio of ING (see confirmation by the technical experts from the ECB above in point (45)) and because the valuation is based on a number of assumptions as regards to which the Commission has significant doubts, in particular but not exclusively as regards (i) the choice of the discount rate, (ii) house price assumptions, (iii) the levels of credit enhancement, and (iv) other valuation issues.

(66) The Commission is first concerned about the use of a 4,19 % discount rate to discount all the cash flows of the portfolio, which suggests a spread premium above the USD Dutch government risk-free rate of 119 bp only.

— Given the recent developments in the market and higher loss expectations and the significant drop in credit quality of these tranches as translated by the rating downgrades from triple A to an average of BBB/BB, the spread premium and the discount rate to be used should be significantly higher.

— The 4,19 % rate does not capture the downside risk (unexpected losses) of deviating from the base case expected losses, as the Dutch State itself accepted a certain degree of probability of seeing the stress scenario materialising.

(67) The Commission considers at this stage that it can not dispel its doubts that the approach taken by the independent expert appears to lead to an overvaluation of the portfolio and to an overestimation of the benefit to the Dutch State.

(68) In addition, the Commission questions whether the house price assumptions applied in the valuations are prudent enough. In particular, it notes that, based on the documents received, the house prices are assumed to decrease only in 2009, then to remain stable in 2010, and then from 2010 onwards to increase by 5,8 % each year. The doubts on this point are highly relevant for assessing the real economic value of the portfolio given the important role played by house prices in the model for the calculation of the real economic value.

(69) The Commission is also in doubt about the stated levels of subordination/credit enhancement. The levels described for the ING portfolio are significantly higher for both Alt-A and Option ARMs tranches than average levels calculated by assessments from other experts in the context of other cases as well as available subordination/credit enhancement figures for respective typical securities from various asset classes all related to the US housing market from the rating agency Moody's. To this concern the Dutch State told the Commission that ING had only bought super senior AAA tranches, in structures with higher levels of subordination than other AAA tranches. However, when looking at another report provided by the Dutch authorities to the Commission (commissioned by ING), only 28,1 % of the tranches were qualified as "super senior", with the remaining being "senior" and "senior support". The Commission notes that this is relevant for assessing the real economic value of the portfolio as a lower level of subordination/credit enhancement would reduce the protection against losses if payments are not made. Also, the doubts of the Commission are deriving from the fact that a large part of the portfolio is based on mortgages originated during 2006 and 2007, vintages which have so far proven to be most vulnerable to default.

(70) Further doubts as to the appropriateness of valuation cannot be excluded at this stage in view of the fact that the Commission has not yet received full information both on the valuation methodology and on its application to the individual assets covered. A fully-fledged assessment of the Commission can only be carried out once the Commission is in possession of this information.

(71) In sum, the Commission has doubts as to the valuation methodology and cannot exclude that the real economic value is lower than that calculated by the independent expert of the Dutch State and intends to assess this in-depth.

(e) *Burden sharing*

(72) As regards burden sharing, the IAC states in section 5.2 the general principle that banks ought to bear the losses associated with impaired assets to the maximum extent. That implies first that the bank should bear the difference between the nominal value and the real economic value of the impaired assets. In fact the Dutch authorities submit that the transaction has the effect that ING will transfer the portfolio at 90 % of par.

(73) However, given that the Commission has doubts as regards the correct valuation of the assets prior to government intervention of the State for the relief measure, there are also doubts as regards the necessary degree of burden sharing included in this measure. In other words should the real economic value be lower than assessed by the Dutch authorities, the theoretical losses absorbed by the beneficiary would be insufficient.

(74) In that regard, the Commission does not see that the beneficiary is making up for additional possible losses if the real economic value would be lower than currently reported with the envisaged 80/20 division of the portfolio as this is a division pari passu and not a first loss attribution to the beneficiary. In other words, if the real economic value would be 80 instead of 90, the beneficiary would only take the first 10 % of losses from 100 to 90 while for the second part between 90 and 80 he would only take 2 % out of 10 while 8 would remain with the State; proper burden sharing would however require that the beneficiary takes all the losses until the real economic value, i.e. the full 20 %.

(75) Furthermore regarding the cash flow swap and its funding fee, the Commission doubts whether the respective assumptions as regards the net present value are acceptable. This concerns first the funding fee set at 3,5 % although the Dutch State's own funding costs in USD are only an estimated 3 %. The Commission also doubts second whether the applied discount rate is appropriate. This is so because the applied discount rate is the same regardless whether cash flows are risky (coming from ING to the State) or are not risky (from the Dutch State to ING). In the view of the Commission, this approach attaches to a more uncertain dollar in the future the same value as to a certain dollar. It therefore leads to an overvaluation of the expected proceeds from the portfolio and to an overestimation of the benefit to the Dutch State.

(76) In addition, the Commission has also doubt that the cash flow swap adequately compensates for the risk stemming from the difference between the base case of the real economic value and the stress test. This follows from the clear language in Annex 4 IAC that the "pricing of asset relief must include remuneration for the state that adequately takes account of the risk of future losses exceeding those that are projected in the determination of the real economic value". Therefore the Commission also requires an additional ex ante coverage of the difference between the real economic value in the base case and the stress case scenario. This is particular the case where the tail risk is significant. In this context the Commission recalls that according to Annex 4 of the IAC the valuation process should be based on rigorous stress-testing against a scenario of protracted global recession and reiterates its doubts on the valuation as set out above.

(77) Finally, the Commission has doubts about the appropriateness of the management fee charged by ING. It notes that such a fee is not contemplated by the IAC. The Commission acknowledges however the view of the Dutch authorities that the fee is essentially cost based but stresses that so far it has not obtained full information regarding the actual cost for ING to perform such services, such as costs and staff employed, cost for IT infrastructure, etc. The Commission observes moreover that the scope of work to be performed by ING is not clear given that an active management of an amortising portfolio appears unnecessary and because ING remains the legal owner of the entire portfolio and the economic owner of 20 %. To summarise, the Commission notes that if the fee is indeed covering the costs of ING, it would appear to the Commission that such a fee can be accepted on the condition of an adequate overall burden-sharing.

(78) In sum, the Commission reserves its final view on the issue of burden sharing until it has come to a conclusion on valuation and recalls that shortcomings in the valuation leading to an inadequate burden-sharing can be counter-balanced by higher remuneration. ([15])

(f) *Guarantee fee*

(79) Another element of a proper burden sharing is pursuant to point 21 IAC remuneration. It shall, as noted in Annex 4, ensure that "any pricing of asset relief must include remuneration for the State that adequately takes account of the risks of future losses exceeding those that are projected in the determination of the "real economic value" ".

(80) In order to assess the guarantee fee charged by the Dutch authorities it must be recalled that pursuant to the IAC the remuneration should be 'inspired' by the remuneration that would have been required for recapitalisation measures to the extent of the capital effect of the proposed asset relief. In principle such remuneration should amount to at least 10 %, in line with the first ING decision of November 2008. ([16])

([15]) Footnote 15 of the IAC.
([16]) IAC, Footnote 11.

(81) Therefore, the adequate capital effect of the measure needs to be identified. This effect comprises the regulatory capital that was freed due to the transaction (around EUR 1,26 billion = 8 % ([17]) of 13 billion RWA). A 10 % yield on EUR 1,26 billion would amount to 55 bp on the outstanding value of the portfolio. The current guarantee fee appears to reflect this calculation. Therefore the Commission finds the guarantee fee compatible at this stage.

(g) *Viability review and restructuring plan*

(82) As regards the need for an assessment of the banks balance sheet and activities the IAC states that an application for aid by an individual bank should be followed by a full review of that bank's activities and balance sheet, with a view of assessing the bank's capital adequacy and its prospects for future viability (viability review). The Commission considers it therefore necessary that such a viability review is performed. It notes positively a commitment in that respect.

(83) Furthermore, the Commission notes that the Dutch authorities commit to present a Restructuring plan complying with the conditions set out in the IAC. Such a plan is in any event required under the first recapitalisation decision and is due by 12 May 2009. The Commission notes that this plan will also cover the present measure and be made on the basis of the IAC. Therefore, the Commission's assessment of the restructuring plan will assess all aid measures granted to ING including the present one. The Dutch authorities have provided the necessary commitment in this respect.

(h) *Conclusion*

(84) The Commission finds that the measure complies with the conditions on eligibility of assets, asset management arrangement, transparency and disclosure and a guarantee fee as stipulated in the IAC but cannot at present conclude that it complies with the conditions relating to valuation and burden sharing.

3. **Temporary authorisation of the measure for six months**

(85) The Commission observes that if the transaction is not booked in the first quarter 2009 altering the level of valuation and remuneration would have as a likely consequence for ING […] an additional loss of […] in the 2008 annual result. This is due to the […] accounting rules […] (see above point 36). The Commission takes into consideration, as confirmed by the supervisory authority that the announcement effect would seriously threaten ING's reputation and thus financial stability.

(86) In view of the fact that the measure complies with the criteria for eligibility of assets, asset management arrangements, transparency and disclosure and the guarantee fee, the Commission can consider approving the asset relief measure as a temporary measure for six months. ([18]) The Commission considers that any approval should in any event be limited to six months on the basis of Annex 5 of the IAC.

(87) But according to Annex 5 this would normally require that all the conditions for compatibility as set out above are met. In the present case, the Commission finds that at this stage the conditions of the IAC on valuation and burden sharing are not fulfilled, and an in-depth investigation is needed.

(88) However, the Commission notes that the specific circumstances of this case require a decision before the end of the first quarter of 2009, in order to avoid that legal uncertainty about the operation obliges important losses to be incurred on the Alt-A portfolio, and that it is not possible to complete the assessment of the portfolio valuation in the necessary time frame. The Commission further notes that financial stability may be at risk, would ING have to […]. Finally, it can not be excluded that the valuation of the portfolio will be confirmed after a detailed assessment, even though doubts are present at this stage.

(89) The Commission accepts the cash flow swap arrangement between the State and ING and its affiliates and will not request changes regarding the transfer of risk from ING to the state and the State's payment obligations in the context of the cash flow swap. This does not preclude the Commission from requesting changes in its final decision to the burden sharing of the measure by way of claw back, increase of the Guarantee fee under the illiquid assets back-up facilities or any other form of remuneration without compensating ING for it, if such change results from the Commission coming to the conclusion that the valuation at 26 January 2009 of the portfolio underlying the illiquid assets back-up facilities or its burden sharing proves to be materially in contradiction with the EC State aid rules on impaired assets.

V. **CONCLUSION**

(90) The measure in favour of ING constitutes State aid. The Commission finds that the measure complies with the conditions on eligibility of assets, asset management arrangement, transparency and disclosure and a guarantee fee as stipulated in the IAC and in view of the serious threat to financial stability approves the measure for six months. At the same time, the Commission doubts at this stage that the measure complies with the conditions relating to valuation and burden sharing and opens a detailed investigation.

VI. **DECISION**

As it complies with a number of conditions of the IAC, and with due considerations for need to preserve financial stability, the Commission has decided to approve the measure for six months. In the light of the foregoing considerations, the Commission has also decided to initiate the procedure laid down in Article 88 (2) of the EC Treaty to verify the conditions of the IAC regarding valuation (including the valuation methodology) and burden sharing of the measure.

([17]) 8 % is equal to the minimum own capital requirements.

([18]) The Commission has taken similar decisions. For instance in Commission Decision of 13 March 2009 in case C 9/09 point 77, *Dexia*, not yet published, where it approved only some elements of compatibility. Similarly in Decision of 24.4.2007 in case NN 15/2006 (C13/2007), *New Interline*, OJ 2007 C 120/12, the Commission approved a rescue aid for six months and opened on the same rescuer aid thereafter.

The Commission requires the Netherlands to provide in addition to all documents already received, information and data needed for the assessment of the compatibility of the aid, and in particular as regards the individual tranches of the portfolio, an updated schedule of all cash flows on a monthly basis, the justification of the discount rate used to value the portfolio, a certified letter from the consultant on valuation on a stand alone basis and a written methodology report.

The Netherlands are requested to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission informs the Netherlands that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Communities. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the Official Journal of the European Communities, and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication."