

POMOC PAŃSTWA – BELGIA**Pomoc państwa SA.33927 (2012/C) (ex 2011/NN) – Program gwarancji chroniący udziały indywidualnych członków spółdzielni finansowych – Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej (TFUE)****(Tekst mający znaczenie dla EOG)**

(2012/C 213/04)

Pismem z dnia 3 kwietnia 2012 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Belgię o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 TFUE 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:

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Otrzymane uwagi zostaną przekazane władzom belgijskim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

1. PROCEDURA

Dla celów pewności prawnej dnia 7 listopada 2011 r. władze belgijskie zgłosiły przedłużenie systemu gwarancji depozytów (zwanego dalej „programem gwarancji spółdzielczych”) zabezpieczającego indywidualne udziały członków w zatwierdzonych spółdzielniach finansowych.

2. OPIS

Udział w programie gwarancji ma w przypadku spółdzielni finansowych charakter fakultatywny. Rada Ministrów podejmuje - na wniosek - decyzję o dopuszczeniu spółdzielni finansowej do udziału w programie gwarancji spółdzielczych z zastrzeżeniem określonych warunków.

Grupa ARCO była jedną z pierwszych oficjalnie uznanych spółdzielni finansowych, które wniosły o ochronę w ramach programu gwarancji spółdzielczych, i jest jak dotąd jedyną spółdzielnią objętą tym programem.

Z wypłat w ramach programu mogą korzystać jedynie udziałowcy indywidualni, tego prawa nie mają natomiast udziałowcy instytucjonalni. Środek dotyczy kapitału wpłaconego przez udziałowca spółdzielni. Nie obejmuje jednak (potencjalnych) zysków kapitałowych i jest ograniczony do maksymalnej kwoty 100 000 EUR. Ponadto środek dotyczy jedynie udziałów w spółdzielni wyemitowanych przed wejściem w życie dekretu królewskiego z dnia 10 października 2011 r.

Program gwarancji spółdzielczych finansowany jest ze składki rocznej i jednorazowej opłaty wstępnej. Ponadto spółdzielnia finansowa może być zobowiązana do wpłacania składki z tytułu zysków kapitałowych.

Jeśli środki na finansowanie programu gwarancji spółdzielczych (w ramach tzw. specjalnego funduszu ochrony) nie są wystarczające, niezbędne środki na pokrycie zobowiązań z tytułu gwarancji zapewni państwo belgijskie. Zwrot tych środków uzyskuje się następnie dzięki składkom uczestników obowiązkowo objętych programem gwarancji spółdzielczych i składkom wpłaconym przez wszystkie spółdzielnie finansowe.

3. OCENA

Na obecnym etapie postępowania Komisja uważa, że środki na finansowanie programu gwarancji spółdzielczych przekazywane przez specjalny fundusz ochrony stanowią pomoc państwa.

Wspomniany program mógł pomóc w przyciągnięciu nowego lub utrzymaniu istniejącego kapitału, stanowiąc dla udziałowców argument przemawiający za tym, by pozostać członkiem spółdzielni. Miało to szczególne znaczenie w okresie od jesieni 2008 r. do października 2011 r., kiedy ogólny brak stabilności na rynkach, a w szczególności na rynkach finansowych, mógł doprowadzić do wycofania się inwestorów lub skłonić ich do inwestowania w inne produkty, bezpieczniejsze niż inwestycje w udziały w spółdzielni. W związku z powyższym Komisja doszła do wstępnego wniosku, że program gwarancji spółdzielczych pomógł spółdzielniom finansowym utrzymać lub poprawić pozycję rynkową.

Komisja zauważa, że spółdzielnie finansowe mają przewidziane prawem możliwości ograniczania do pewnego stopnia wycofywania się aktualnych udziałowców.

Ponadto na obecnym etapie postępowania Komisja stwierdza, że program gwarancji spółdzielczych stanowi środek finansowany z zasobów państwowych i przyznaje w sposób wybiórczy korzyści spółdzielniom finansowym, zakłócając normalny mechanizm konkurencji i wpływając na wymianę handlową wewnątrz UE.

TEKST PISMA

„The Commission wishes to inform Belgium that it has decided to open the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

The Commission has also decided to issue a suspension injunction in accordance with Article 11(1) of Council Regulation (EC) N° 659/1999 (‘the Procedural Regulation’⁽¹⁾) to ensure that the Belgian State does not make pay-outs in relation to the guarantee scheme and to prevent the admission by the Belgian State of new cooperatives to that scheme.

1. PROCEDURE

- (1) On 7 November 2011, the Belgian State notified – for reasons of legal certainty – an extension of the Deposit Guarantee Scheme (hereafter ‘the cooperative guarantee scheme’) protecting shares held by individual shareholders in recognised cooperatives⁽²⁾ which are either under prudential supervision of the National Bank of Belgium (hereafter the ‘NBB’) or which have invested at least half of their assets in an institution subject to such prudential supervision (hereafter ‘financial cooperatives’).
- (2) The Commission indicated to the Belgian State – by letter of 6 December 2011 – that the measure might represent unlawful State aid and urged the Belgian State to refrain from further steps to implement the measure, invoking the possibility of a suspension injunction in accordance with Article 11(1) of the Procedural Regulation. The Commission invited the Belgian State to comment on its preliminary findings, which the Belgian State did by letter of 22 December 2011.
- (3) On 25 January 2012, a follow-up meeting took place between the Commission and representatives of the Belgian State and of ARCO⁽³⁾. During that meeting, ARCO indicated that it would provide the Commission with additional background information about the undertaking.

⁽¹⁾ OJ L 83, 27.3.1999, p.1

⁽²⁾ To be recognised, cooperatives must fulfil certain formal conditions (see Act of 20 July 1955 on a National Council for Cooperatives and Royal Decree of 8 January 1962 on the conditions for recognition of the national groups of cooperative companies and the cooperative companies, *Moniteur Belge* of 19 January 1962). This National Council ensures that its members abide by the spirit and rules of cooperative companies (voluntary membership; equality or limitation of the right to vote at the general meetings; appointment of the board of directors and the statutory auditor by the general meeting; position as a board member is, in principle, unpaid (attendance fees are permitted); payment of moderate interest (dividend) on the share certificates, the relevant percentage is limited by law to 6% per annum). A recognised cooperative enjoys certain tax benefits and is also exempted from publishing a prospectus when making public offerings.

⁽³⁾ The Arco group is an entity that includes several Belgian cooperative holdings. Among others, it includes the financial cooperatives Arcopar, Arcoplus and Arcofin. ARCO will be described more in detail in recital (19) and following.

- (4) On 16 February 2012, the Commission was provided with a copy of ARCO’s statutes, ARCO’s balance sheet as of 31 October 2011, a recent annual report of ARCO, the press release of the Belgian Ministry of Finance of 10 October 2008 (by which the cooperative guarantee scheme was announced) and a general overview document on the structure of ARCO.

2. DESCRIPTION

2.1 Guarantee scheme protecting individual shareholders of financial cooperatives

Timeline

- (5) In application of Directive 94/19/EC on Deposit Guarantee Schemes⁽⁴⁾, Belgium has put in place in 1998 a Deposit Guarantee Scheme covering aggregate deposits of a depositor in case of unavailability. Coverage was initially of EUR 20.000, and was successively raised to EUR 50.000 and EUR 100.000 as a result of Directive 2009/14/EC⁽⁵⁾. The Belgium Deposit Guarantee Scheme⁽⁶⁾ was entrusted to a deposit guarantee fund (hereafter ‘the Fund’) abounded by credit institutions (banks, savings banks, investment banks and stockbroking firms). For those companies, participation in the Fund is an indispensable condition to obtain accreditation from NBB.
- (6) In a press release dated 10 October 2008⁽⁷⁾, the Belgian government made public its intention to increase the amounts covered by the Deposit Guarantee Scheme and to extend the protection of the Fund to ‘branch 21’⁽⁸⁾ life insurance products and shares in financial cooperatives.
- (7) By law of 15 October 2008⁽⁹⁾, the Belgian State took measures to preserve financial stability. That law provided that the government could develop by Royal Decree a State system guaranteeing the commitments taken by institutions under financial supervision.

⁽⁴⁾ Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ L 135 of 31.05.1994, p 5.

⁽⁵⁾ Directive 2009/14/EC of the European Parliament and of 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, OJ L 68 of 13.03.2009, p. 3.

⁽⁶⁾ Up to an amount of EUR 50 000

⁽⁷⁾ <http://www.minfin.fgov.be/portail2/fr/downloads/composition/mp-fonds.pdf>

⁽⁸⁾ ‘Branch 21’ insurance savings are a form of life insurance that returns the capital to the investor at maturity or immediately upon death of the investor to the beneficiary of the investor. The capital of the investment is guaranteed. Often a minimum return is also guaranteed, although this can contractually be set a 0%. The biggest part of the return comes from a performance related premium, which is not limited by law. The best performing part of branch 21 insurance savings products had on average a return of around 5.50% – 6.25% per annum over the period 2005-2007. The maturity of ‘branch 21’ insurance savings products can be freely established, but the benefit from a tax advantage (exemption from withholding tax) only applies if the maturity exceeds 8 years and 1 month. Early withdrawals are possible, subject to a (usually declining) exit fee.

⁽⁹⁾ *Moniteur Belge*, 17.10.2008, Ed.2, N.2008 – 3690 [2008/03425]; http://www.ejustice.just.fgov.be/mopdf/2008/10/17_2.pdf

- (8) The Royal Decree of 14 November 2008⁽¹⁰⁾ implementing the law of 15 October 2008 created the new guarantee regime for 'branch 21' life insurance products. It also created a 'Special Protection Fund'. The Special Protection Fund covers the tranche between EUR 50,000 and EUR 100,000 for deposits on the one hand⁽¹¹⁾, and life insurance products up to EUR 100,000 for the 'branch 21' guarantee scheme on the other hand.⁽¹²⁾
- (9) On 14 April 2009, the Belgian State published another law with new legal provisions on financial supervision. That law provided that the government could also by Royal Decree put in place a system to guarantee the paid-up capital of individual shareholders in financial cooperatives.
- (10) By Royal Decree of 10 October 2011, the Belgian State modified the Royal Decree of 14 November 2008 which contains the details on the new cooperative guarantee scheme. The Royal Decree of 10 October 2011 and the law of 14 April 2009 completed the implementation of the policy which had been announced by the Belgian State on 10 October 2008 and on 21 January 2009⁽¹³⁾ by extending State guarantee not only to deposits and 'branch 21' life insurance products but also to shares in financial cooperatives. The extended scheme for financial cooperatives entered into force on 10 October 2011.
- Characteristics of the guarantee scheme for cooperatives' members (cooperative guarantee scheme)*
- (11) Participation in the Special Protection Fund is mandatory for those institutions that already participate in the Fund and for life insurance companies offering 'branch 21' insurance products. For financial cooperatives, participation in the Special Protection Fund is optional. Cooperative companies willing to participate in the Special Protection Fund have to send an official request via a registered letter to the Minister of Finance. Within one month, the Council of Ministers will decide whether or not to allow the financial cooperative in the cooperative guarantee scheme, if necessary under certain 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,
 - c) and a cap of 4.5% p.a on interests to be paid to shareholders.
- (12) The participation in the Special Protection Fund is mandatory for one year (defined as 31 December of the year following the year in which the protection entered into force). The cooperative can terminate its participation in the Special Protection Fund after that period by giving three months' notice to the Special Protection Fund prior to the end of the protection period, without being able to reclaim any of the contributions and fees paid to the Special Protection Fund. If a cooperative leaves the protection scheme, it must wait for three years before being able to participate again.
- (13) The cooperative guarantee scheme is only available to individual shareholders and not to institutional shareholders of financial cooperatives. The measure covers the paid-up capital of the cooperative shareholder but does not include (potential) capital gains and is limited to a maximum amount of EUR 100,000. Moreover, the measure only covers cooperative shares issued before the entry into force of the Royal Decree of 10 October 2011. Shares issued after that date are not covered by the measure.
- (14) The Special Protection Fund's financing comes from:
- (i) an annual contribution of 0.15% of the protected amount (payable by all participants)
 - (ii) a one-off entry fee of 0.10% of the protected amount (payable by cooperatives).
- (15) In addition, cooperative companies 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 (i) 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 the said third anniversary) and the reference price fixed by the government upon adherence to the protection scheme.
- (16) 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.
- (17) If the Special Protection Fund has insufficient means to fulfil its duties, the Deposit and Consignment Office – a governmental body without legal status – will advance the necessary means. Depending on whether the failed institution is a mandatory participant or a cooperative company, this advance will later be reimbursed by

⁽¹⁰⁾ Moniteur Belge, 17.11.2008, Ed.2, N.2008 – 4088 [2008/03450]; http://www.ejustice.just.fgov.be/mopdf/2008/11/17_2.pdf

⁽¹¹⁾ The first tranche being already covered by the Fund (see recital 5)

⁽¹²⁾ <http://www.fondsspecialdeprotection.be/fr/Intro.htm>

⁽¹³⁾ The financial cooperative ARCO informed its shareholders on 21 January 2009 of the commitment of the State by providing its shareholders on its website with a link to the government press release (<http://www.groeparco.be/news/be-nl/145/detail/item/1614/navigationcats/510>).

— allocating 50 % of the annual contributions to be paid by mandatory participants;

- allocating a special annual contribution to be paid by cooperatives

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 where the Fund ranks *pari passu* with the other creditors of the relevant company.

2.2 The direct and indirect beneficiaries

- (18) The individual shareholders of financial cooperatives are the direct beneficiaries of the cooperative guarantee scheme, but financial cooperatives – like ARCO Group – also seem to have benefited indirectly from the measure.
- (19) ARCO Group (hereafter ‘ARCO’) – or more precisely its three subsidiaries ARCOPAR⁽¹⁴⁾, ARCOPLUS⁽¹⁵⁾ and ARCOFIN⁽¹⁶⁾ – was the first recognised financial cooperative to ask for protection under the cooperative guarantee scheme, and so far is still the only cooperative covered.
- (20) ARCO sought to participate in the cooperative guarantee scheme on 13 October 2011, at a time when it was already clear that ARCO would have to be liquidated because of its Dexia exposure. In spite of that prospect, the Belgian State accepted ARCO’s request to enter the cooperative guarantee scheme.
- (21) ARCO has more than 800,000 members, of which 99% are physical persons. The average capital contribution is EUR 1,860 per person, representing an aggregate capital contribution of approximately EUR 1.5 billion. External legal entities have subscribed approximately EUR 600 million.
- (22) ARCO’s shareholders received each year a dividend – which was financed via cash flows coming from the investment portfolio – and on top of that members received a number of advantages in kind. They included for instance advantages for certain products of Dexia Bank Belgium and Dexia Insurance Belgium⁽¹⁷⁾.

3. POSITION OF THE MEMBER STATE

- (23) According to the Belgian State, the cooperative guarantee scheme is not State aid but a general measure aiming to protect the deposits of individual savers and helping to preserve financial stability.

⁽¹⁴⁾ ARCOPAR’s cooperative capital amounts to EUR 1.3 billion of which 95% is held by individual persons. ARCOPAR holds a diversified investment portfolio, including a majority participation in ARCOFIN and energy investments.

⁽¹⁵⁾ ARCOPLUS’s cooperative capital amounts to EUR 80 million, 58% held by individual persons and 42% by legal entities.

⁽¹⁶⁾ ARCOFIN is the core financial holding of the group. ARCOPAR and ARCOPLUS are important shareholders with stakes of respectively 56% and 10.5%.

⁽¹⁷⁾ https://www.dexia.be/info/FR/Media/ARCO%20Q%26A%20FR_tcm_10-25987.pdf

- (24) The Belgian State underlines that the cooperative guarantee scheme does not discriminate. It argues that there is no preferential treatment for specific entities or instruments and that coverage is limited to products with characteristics similar to those of savings deposits. According to the Belgian State, the shares of the financial cooperatives fit in that category. According to the Belgian State, those shares have no speculative character but have the same function as traditional savings deposits. To support its claim, the Belgian State points at the following elements: dividends of financial cooperatives and interest received on savings accounts are fiscally treated in a similar way⁽¹⁸⁾; individual shareholders in financial cooperatives can only subscribe to cooperative shares for a limited amount; and cooperative shares are registered shares, which cannot be transferred. The claim that cooperative shareholders may have on the reserves of the financial cooperatives⁽¹⁹⁾ is in case of liquidation governed by the cooperatives’ statutes.

- (25) The Belgian State also points out that the cooperative guarantee scheme is open to all recognised Belgian financial cooperative companies and adds that the procedure to become a recognised cooperative is objective, non-discriminatory and non-discretionary.

- (26) The Belgian State considers that, even if the Commission were to conclude that the cooperative guarantee scheme constituted State aid, the measure should be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, which foresees the possibility to allow aid to remedy a serious disturbance in the economy of a Member State. The Belgian State claims that the cooperative guarantee scheme was necessary, limited to the minimum necessary and did not lead to distortions of competition.

- (27) The Belgian State believes that the cooperative guarantee scheme was necessary to preserve financial stability.

- (28) Concretely, the Belgian State points to the fact that financial cooperatives invested heavily in the financial sector and that financial cooperatives used the retail network distribution of the financial institution in which they invested as distribution channel for those cooperatives’ shares. According to the Belgian State, those elements enhance the quasi-saving deposit status of the cooperative shares and the shareholders’ understanding that those placements are actually savings deposits.

⁽¹⁸⁾ Income received from savings deposits, dividends from recognized cooperative undertakings and interests and dividends from undertakings with a social character all benefit from a tax exemption up to a certain amount.

⁽¹⁹⁾ The statutes of for example ARCOPLUS contain a provision in Article 35, which reads as follows: ‘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.’

- (29) The Belgian State also highlights the importance of the cooperative shares for the Belgian financial sector. It believes that not providing protection to those products would entail the same risk as not providing protection to saving deposits.
- (30) The Belgian State also believes that the cooperative guarantee scheme is in line with the minimum necessary principle and contains sufficient burden-sharing elements.
- (31) Concretely, the cooperative guarantee scheme covers only cooperative shares issued before the entry into force of the Royal Decree of 10 October 2011. The pay-outs are limited to the nominal amount of paid-up capital (not including the reserves), up to a maximum of EUR 100,000 per shareholder per financial cooperative.
- (32) The Belgian State adds that the contribution obligations – as described in recitals (14) and (15) – provide for burden-sharing.

4. ASSESSMENT

4.1. Existence of aid

- (33) As stated in Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market, save as otherwise provided in the Treaty.

— State resources and imputability

- (34) The Commission has to assess whether the cooperative guarantee scheme is financed through State resources.
- (35) According to settled case-law, 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) TFEU, provided that they constantly remain under public control, and remain therefore available to the competent national State.
- (36) 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⁽²⁰⁾. 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; otherwise, given the growing interpenetration of the public and private sectors of the economy, a significant portion of State measures having the effects of State aid would escape the scrutiny of the Union's institutions⁽²¹⁾.

- (37) In the present case, State resources are involved in two ways in the funding of the measure.
- (38) First, the Commission observes that the Deposit and Consignment Office – a governmental body without legal status – plays a key role in the Special Protection Fund's financing. As described in recital (17), the Deposit and Consignment Office will – if necessary – advance funds to the Special Protection Fund. Those funds shall be recouped *ex post* either (i) by allocating 50% of the (ordinary) annual contributions from mandatory participants; or (ii) by allocating a special annual contribution to be paid by cooperatives, depending on whether the failing institution falls within the first or second category.
- (39) However, if the Deposit and Consignment Office had to advance funds, it is not clear how it would ever be able to actually recoup those funds. The only cooperative currently in the cooperative pillar of the Special Protection Fund is ARCO, which due to its liquidation will not contribute to the funding and had not contributed before calling the funds⁽²²⁾, as it applied only once in liquidation. In light of the overall amount that the Deposit and Consignment office will have to advance it seems furthermore questionable whether other cooperatives would have sufficient financial capacities available to *ex post* replace the advanced funds over time. Finally, effective refinancing of the Special Protection Fund is hindered by the fact that participation is optional for cooperatives. They might be hesitant to take over associated costs, in particular if coverage by the Special Protection Fund can still be achieved by entering the cooperative guarantee scheme at the very last moment.
- (40) Second, the funds of the Special Protection Fund are considered to be State resources anyhow. Belgian legislation determines the contribution that participants have to pay and 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.⁽²³⁾

⁽²⁰⁾ See Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 16.

⁽²¹⁾ See Case 78/76 *Steinike & Weinlig v Federal Republic of Germany* [1977] ECR 595, paragraph 21 and Opinion of Advocate General Poaires Maduro in Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 50.

⁽²²⁾ Except for an entry fee and one year of guarantee fee, which were paid at the time of entry.

⁽²³⁾ See also Denmark Decision SA.33001 (2011/N) – Part B of 01.08.2011 OJ C 271, 14.9.2011, p. 4.

(41) In light of the above, the Commission considers at this stage that the funds of the Special Protection Fund are imputable to the State and that the cooperative guarantee scheme involves State resources within the meaning of Article 107(1) TFEU ⁽²⁴⁾.

Selective advantage

(42) The shareholders of financial cooperatives benefit from the measure because they will be protected against losses up to the current limit of EUR 100,000. Since the shareholders benefitting from the measure are exclusively individuals, the advantage to them is not within the scope of this decision. ⁽²⁵⁾

(43) The Commission has to assess however whether the cooperative guarantee scheme confers (indirect) selective advantages to undertakings.

(44) *Prima facie*, the financial cooperatives are undertakings, carrying out economic activities. Indeed, financial cooperatives offer their cooperative share as an investment product, thereby competing with other providers of savings and investment products in the Belgian market. The Commission needs to further assess whether financial cooperatives are financial institutions ⁽²⁶⁾ in the meaning of the 4th Capital Requirements Directive and whether, as a result, the Banking Communication ⁽²⁷⁾ would apply. It is possible that a distinction will have to be made between those financial cooperatives which are supervised by the NBB themselves and those who merely invest more than half of their assets in such a supervised institution.

(45) The Commission has doubts whether the cooperative guarantee scheme does not entail aid to financial cooperatives. The cooperative guarantee scheme may have helped cooperatives to either attract new capital or maintain existing capital, convincing existing cooperative shareholders not to withdraw from the cooperative. That was especially relevant in the period between autumn 2008 and the date on which the Royal Decree was adopted (10 October 2011) ⁽²⁸⁾, when fragility of the markets in

general and financial institutions in particular might otherwise have encouraged investors to withdraw or to find alternative investment products that were safer than the investment in (cooperative) shares. Therefore the Commission has come to the preliminary conclusion that the cooperative guarantee scheme has helped financial cooperatives to maintain or improve their market position. The Commission invites interested parties to comment on that preliminary finding of the Commission.

(46) In any event, the Commission notes that financial cooperatives have statutory possibilities to limit exits of existing shareholders to some extent, which could be considered as an alternative for the measure. The Commission invites interested parties to comment on that preliminary finding.

(47) The Commission also remarks that the Belgian State allows entry into the cooperative guarantee scheme at any time, irrespective of the financial health of the applicant cooperative. That fact is well illustrated by the example of ARCO. In fact, ARCO was allowed to enter into the scheme when it was already insolvent. Thus, ARCO shareholders would be fully indemnified even though ARCO has not made financial contributions to the scheme, apart from the entry fee and the first-year annual contribution.

Distortion of competition and effect on trade between Member States

(48) The cooperative guarantee scheme has provided cooperatives which competed on the market for retail investment products with a selective advantage that was not available to other market players with similar products. Therefore, the Commission has doubts whether the measure has not distorted competition.

(49) The Commission also observes that the cooperative guarantee scheme only covered shareholdings in recognized cooperatives, prior to 10 October 2011. Therefore, it seems plausible that distortive effects have mainly occurred in the period between the announcement in the press release of 10 October 2008 and the implementation through the Royal Decree of 10 October 2011.

(50) The Commission also believes that the cooperative guarantee scheme has an impact on intra-EU trade. Many international providers of investment products are active on the Belgian market and the market share that ARCO or any other financial cooperative is able to preserve thanks to the measure does not become available to them.

(51) The Commission concludes at this stage that the cooperative guarantee scheme is a measure financed by State resources, giving financial cooperatives a selective advantage, while distorting or having distorted the normal competitive process and affecting trade inside the EU. Therefore, the cooperative guarantee scheme may constitute unlawful State aid in the meaning of Article 107(1) TFEU. The Commission invites interested parties to comment on that preliminary finding.

⁽²⁴⁾ The Commission further notes that the Conseil d'État has also pointed out that the measure concerned might have State aid implications, see the reference to the general observations in the Avis du Conseil d'État N° 46.121/2 of 4 March 2009, displayed in the publication by the Chambre des Représentants de Belgique of 17 March 2009, Doc 52 1887/001, p. 9.

⁽²⁵⁾ State aid refers to aid to 'undertakings'. An undertaking is defined as any entity, regardless of its legal status, which is engaged in economic activity and where there is a market in comparable goods or services. It does not have to be profit-making as long as the activity carried out is one which in principle has commercial competitors. It can include voluntary and non-profit-making public or private bodies when they are engaged in economic activity.

⁽²⁶⁾ The question raised refers to whether the principal activity of financial cooperatives is the acquisition of holdings (as per article 4 of CRD IV) and/or the trading for their own account in transferable securities (point 7 of Annex I) and / or portfolio management (point 11 of Annex I).

⁽²⁷⁾ 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

⁽²⁸⁾ The Commission recalls that the announcement date of the measure determines when the measure starts to have an impact on the behaviour on market participants and to potentially distort competition. See Case N428/2008: Restructuring of Lloyds Bank, OJ C 46, 24.02.2010, p. 2, paragraph 124

4.2 Compatibility of the aid

- (52) If the cooperative guarantee scheme involves State aid within the meaning of Article 107(1) TFEU, the Commission must establish if that aid could be found compatible with the TFEU.
- (53) Article 107(1) TFEU provides that State aid shall be incompatible with the TFEU and therefore be prohibited, save as otherwise provided in the TFEU. Article 107(2) and 107(3) subsequently define two categories of compatible aid.
- (54) First, Article 107(2) TFEU lists categories of State aid that are automatically exempted from the prohibition principle, but the cooperative guarantee scheme does not fit in one of those categories.
- (55) Second, Article 107(3) TFEU covers several categories of aid that – under certain conditions – may be considered compatible with the TFEU. In theory, subparagraphs (b) or (c) of Article 107(3) TFEU could apply.
- (56) With respect to Article 107(3)(c), the Commission has explained in guidelines how it will apply the exemption laid down in Article 107(3)(c) 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.
- (57) With respect to Article 107(3)(b), the Commission observes that the Belgian State argues that, should the Commission conclude that the cooperative guarantee scheme involves State Aid in the meaning of Article 107 TFEU, it should be evaluated under Article 107(3)(b), which 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. However, Article 107(3)(b) TFEU 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.⁽²⁹⁾
- (58) When the financial crisis reached its first culmination point in the autumn of 2008, the Commission decided in the Banking Communication⁽³⁰⁾ that Article 107(3)(b) would become available to evaluate State aid measures undertaken to address the problems of financial institutions⁽³¹⁾. At first sight, however, it is questionable that the financial cooperatives are financial institutions. At this

stage, it is not clear that the activities of the financial cooperatives sufficiently match with those of a typical financial institution, as defined in Annex I of the Banking Directive⁽³²⁾. More importantly, the fact that financial cooperatives are not directly under financial supervision of the regulatory authority (i.e. in Belgium the NBB) also seems to indicate that financial cooperatives are not treated as financial institutions. Consequently, it seems that the Banking Communication – which also provides guidance on the required characteristics of guarantees on debt instruments of financial institutions and on the winding-up of financial institutions – cannot be used directly to evaluate the compatibility of the measure for those financial cooperatives.

- (59) Outside the financial sector, the Commission developed – also under Article 107(3)(b) of the TFEU- the Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis⁽³³⁾, but also that framework does not seem to apply for the measure at stake. It rather aims at the real economy by enabling Member States to take suitable measures to improve access to finance for undertakings during the financial crisis. Moreover, the cooperative guarantee scheme does not seem to fit in the aid categories discussed in that framework.
- (60) As financial cooperatives do not seem to be financial institutions in the meaning of the Banking Communication, the aid would have to be evaluated directly under the Treaty. To comply with the general criteria for compatibility under Article 107(3) TFEU, the measure has to comply with the following conditions⁽³⁴⁾:
- 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.

⁽²⁹⁾ See also Joined cases T-132/96 and T-143/96, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachen GmbH v Commission, [1999], ECR UU-3663, at para 167.

⁽³⁰⁾ 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

⁽³¹⁾ At the same time, recital (11) of the the Banking Communication added that the use of Article 107(3)(b) should not be generalised beyond the financial sector.

⁽³²⁾ See also footnote 26.

⁽³³⁾ OJ C 83, 7.4.2009, p. 1

⁽³⁴⁾ See Case 730/79 Philip Morris [1980] ECR 2671

- (61) At first sight, the cooperative guarantee scheme is mainly meant to protect financial cooperatives and their members from the consequences of their past investments in financial companies and therefore, the Commission is at this stage not convinced that the measure was appropriate to remedy a serious disturbance of the Belgian economy. The Commission also points out that the financial cooperatives are at first sight not financial institutions and – also taken into account their size compared to the Belgian GDP – do not seem of systemic importance. The Belgian authorities are invited to explain via which channels investment losses – which also incurred for investors of e.g. mutual funds – would have created important negative spill-over effects to the Belgian economy to justify the need for a guarantee to shareholders of financial cooperatives.
- (62) The Commission is also not convinced that the cooperative guarantee scheme was necessary to avoid a serious disturbance of the Belgian economy. The Commission observes for instance that Belgium has put in place already other measures to stabilise the 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. At this stage, it is not clear to the Commission why – on top of all those measures – the Belgian authorities also deemed it necessary to protect shareholdings in financial cooperatives. The Commission also doubts whether it is necessary to avoid a serious disturbance of the Belgian economy to offer protection to shareholders of financial cooperatives.⁽³⁵⁾
- (63) Finally, the Commission has also doubts that the cooperative guarantee scheme was proportionate. First, it is at this stage not clear to the Commission whether the financial cooperatives will have to pay a fair remuneration for the guarantee. It is not clear whether the levels currently foreseen are sufficiently close to what can be considered market rates. Second, the Commission observes that the discretion to enter and the lack of a viability check in the entry procedure of the Belgian State imply that financial cooperatives have 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 the guarantee fees to be paid. Third, the Commission doubts whether the cooperative guarantee scheme does not distort competition excessively as it might have influenced or continue to influence the investment behaviour of retail clients.

⁽³⁵⁾ The Commission observes that under the Banking Communication, financial institutions are not allowed to use guarantees for capital instruments. Recital (23) of the Banking Communication explains for instance that protecting shareholders would ‘merely tend to safeguard the interests of shareholders and other risk capital investors’. Also in wind-down scenarios, the Banking Communication argues – in recital (46) – that ‘particular care has to be taken to minimize moral hazard, notably by excluding shareholders and possibly certain types of creditors from receiving the benefit of any aid in the context of the controlled winding-up procedure.’

- (64) In conclusion, the Commission has doubts that the measure is compatible with the internal market.

5. SUSPENSION INJUNCTION

- (65) The Commission has timely indicated by letter of 6 December 2011 to the Belgian state that the cooperative guarantee scheme might represent unlawful State aid and therefore asked to refrain from further steps to implement the measure.
- (66) In light of the doubts set out in this decision, the Commission considers it to be crucial to suspend the cooperative guarantee scheme before new cooperatives seek to enter the scheme which may create expectations among shareholders of the cooperatives.
- (67) Furthermore, should the Commission come to the final conclusion that the cooperative guarantee scheme is not compatible with the internal market, it will have to adopt a negative decision with a recovery order for any payments eventually made. In practice, however, the recovery of payments may be virtually impossible in light of the very large number of individual recipients, who are not themselves undertakings benefitting from State aid.
- (68) Therefore, the Commission decided that it is necessary to issue a suspension injunction in accordance with Article 11(1) of the Procedural Regulation.

6. CONCLUSION

- (69) The Commission has doubts that the cooperative guarantee scheme is compatible with the internal market. Consequently, the Commission also has doubts as to the compatibility of the coverage of ARCO shareholders under the cooperative guarantee scheme.
- (70) Since the cooperative guarantee scheme was notified to the Commission only after its entry into force, Belgium has not respected the standstill obligation and the measure might constitute unlawful aid.

7. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Belgium to submit its comments and to provide all such information as may help to assess the aid measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission reminds Belgium that Article 108(3) TFEU has a suspensory effect, and draws your attention to Article 14 of Council Regulation (EC) No 659/1999 which provides that unlawful aid may be recovered from recipients.

The Commission enjoins Belgium in accordance with Article 11(1) of Council Regulation (EC) No 659/1999 to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market (suspension injunction). The Commission requires Belgium to immediately cease any action which would further implement the cooperative guarantee scheme and to abstain from any payments under the scheme.

The Commission warns Belgium that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. 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 Union, 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.

The Commission notes that Belgium accepts exceptionally that the present decision be adopted in English.”
