

V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – DANIA

Pomoc państwa nr SA.34445 (2012/C) (ex 2012/N) – Przeniesienie aktywów związanych z nieruchomościami z FIH do duńskiej spółki stabilności finansowej

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 TFUE

(Tekst mający znaczenie dla EOG)

(2012/C 359/01)

Pismem z dnia 29.06.2012, zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Danię 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 wszczęła 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 duńskim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

Komisja Europejska zatwierdziła pomoc związaną z aktywami w wysokości 17,1 mld DKK (2,315 mld EUR) na rzecz FIH Erhvervsbank A/S, piątego pod względem wolumenu kredytów bankowych banku w Danii, posiadającego około 4 000 klientów. Wynagrodzenie państwa duńskiego („państwa”), reprezentowanego przez spółkę stabilności finansowej (ang. Financial Stability Company, „FSC”) odpowiedzialną za różne środki wiążące się z wykorzystaniem zasobów państwowych na rzecz instytucji finansowych w kontekście kryzysu finansowego, opiera się w odniesieniu do środka dotyczącego aktywów o obniżonej wartości na opcji *earn-out*, za pomocą której (i) państwo płaci na początku kwotę 2 mld DKK (269 mln EUR); (ii) państwo ma zagwarantowane odzyskanie pierwotnie zainwestowanych środków; (iii) państwo otrzyma wynagrodzenie w przypadku, gdy spółka przejmująca aktywa o obniżonej wartości wygeneruje na koniec zysk.

Pomoc związana z aktywami jest udzielana wraz z szeregiem środków towarzyszących. Obejmują one nieograniczoną gwarancję strat na rzecz FSC gwarantującą jej, że przy zamknięciu „NewCo” (nowej spółki zależnej FIH Holding, która następnie zostanie nabyta przez FSC) odzyska ona w pełni wszelkie swoje płatności i wkłady kapitałowe dokonane na rzecz NewCo. Jako zapłatę za gwarancję strat FIH Holding otrzyma płatność w wysokości równej 100 punktów bazowych rocznie w odniesieniu do środków FSC na rzecz NewCo. FSC zapewni ponadto NewCo prolongatę finansowania, gdy kredyty udzielone przez FIH w ramach gwarancji państwa staną się wymagalne w połowie 2013 r. W zamian FSC otrzyma od NewCo odsetki równoważne swoim własnym kosztom finansowania powiększonym o 100 punktów bazowych. Gdyby okazało się to konieczne, FSC ma także obowiązek finansowania i dokapitalizowania NewCo w procesie likwidacji.

W tym kontekście FSC zapewni NewCo bez wynagrodzenia instrument pożyczkowy o wartości 13 mld DKK (1,8 mld EUR). Ponadto FIH odkupi państwowe instrumenty hybrydowe za kwotę 2 mld DKK pierwotnie wypłaconą przez FSC w związku ze środkiem dotyczącym aktywów o obniżonej wartości.

Środek jest potrzebny w całości ze względu na ograniczenia w płynności finansowej, które mogą wyniknąć w czasie nadchodzących 12-18 miesięcy z uwagi na to, że FIH wydał gwarantowane przez państwo obligacje na około 42 mld DKK (5,7 mld EUR), których termin zapadalności przypada na 2012 r. i 2013 r. Gwarancji udzielono w ramach duńskiego programu gwarancji zatwierdzonego po raz pierwszy przez Komisję Europejską w 2008 r.

Środek został tymczasowo zatwierdzony w oparciu o art. 107 ust. 3 lit. b) Traktatu o funkcjonowaniu Unii Europejskiej (TFUE) na sześć miesięcy lub – jeżeli w tym terminie przedłożony zostanie plan dogłębnej restrukturyzacji – do czasu przyjęcia przez Komisję ostatecznej decyzji w sprawie planu restrukturyzacji. Ponadto Komisja podjęła decyzję o wszczęciu formalnego postępowania wyjaśniającego określonego w art. 108 ust. 2 TFUE w odniesieniu do stosowności środka, poziomu wkładu własnego banku, a zwłaszcza wynagrodzenia za środek pomocy związany z aktywami oraz środków służących ograniczeniu zakłócenia konkurencji.

Środek rzeczywiście poprawia profil płynności banku przez zamknięcie, między innymi, luk w finansowaniu poprzez wydzielenie aktywów przy pomocy instrumentu finansowania o wartości 13 mld DKK zapewnionego przez FSC na rzecz NewCo. Wydaje się on jednak niepotrzebnie skomplikowany do celów przyszłych wyzwań FIH związanych z płynnością. W szczególności nie jest jasne, w jakim stopniu poszczególne uzgodnienia poboczne i powiązania w formułach wynagrodzeń są konieczne i właściwe. Ze względu na wszystkie uzgodnienia poboczne, a zwłaszcza gwarancję udzieloną w ramach tzw. pożyczki 1 nie jest też jasne, w jaki sposób bank uzyskuje pomoc w postaci kapitału regulacyjnego ani dokonuje zabiegu księgowego polegającego na dekonsolidacji z przeniesienia aktywów.

Ponadto wątpliwe jest, czy pomoc jest ograniczona do niezbędnego minimum i czy wkład własny banku i jego akcjonariuszy jest wystarczający. FIH Holding zgodził się na udzielenie NewCo pożyczki pozwalającej absorbować straty w wysokości 1,65 mld DKK. Ponadto FIH Holding udzieli FSC dodatkowej gwarancji, aby zagwarantować, że w chwili pełnej likwidacji NewCo FSC

otrzyma co najmniej spłatę w wysokości swojej inwestycji początkowej opiewającej na 2 mld DKK. Jednak chociaż FIH i FIH Holding wnoszą swój wkład do środka pomocy, udzielając gwarancji, są one wynagradzane za tę usługę w formie opłaty gwarancyjnej wniesionej przez FSC. W przypadku gwarancji strat FIH Holding otrzyma w skali rocznej płatność 100 punktów bazowych w stosunku do kwoty finansowania wniesionej przez FSC na rzecz NewCo. Ponieważ zaległe wierzytelności NewCo wobec FSC nie są bezpośrednio związane z jakością kredytową portfela NewCo lub spodziewaną wartością końcową NewCo, jest sprawą wielce wątpliwą, czy udzielanie przez FIH i FIH Holding gwarancji należy uznać za wkład własny. Oprócz tego, że gwarancje te podlegają wynagrodzeniu, wynagrodzenie to może być niezgodne z przejętym ryzykiem. FIH spodziewa się również korzyści w przypadku odzyskania wartości przez aktywa dzięki mechanizmowi dostosowania cen. Ponadto poziom marży, jaką FSC może uzyskać za zapewnienie finansowania na rzecz NewCo, jest ograniczony do 100 punktów bazowych, co może być poniżej cen rynkowych. Nawet biorąc pod uwagę okoliczności łagodzące takie jak pożyczka pozwalająca absorbować straty, jest bardzo mało prawdopodobne, aby proponowane wynagrodzenie, które ma zostać wypłacone FSC tytułem przekazanych aktywów i pasywów, było zgodne z poziomem wynagrodzenia, o którym mowa w pkt 21 komunikatu w sprawie aktywów o obniżonej jakości⁽¹⁾, zgodnie z którym banki powinny w jak największym zakresie same pokrywać straty związane z aktywami o obniżonej wartości. W pkt 21 wymagane jest zapewnienie odpowiedniego wynagrodzenia władzom publicznym za środek pomocy związanej z aktywami, w dowolnej formie, tak by zagwarantować zrównoważenie odpowiedzialności udziałowców/akcjonariuszy i podziału obciążeń bez względu na rodzaj wybranego mechanizmu. W przypadku FIH nie można jednak wykluczyć, że FSC nie otrzyma żadnego wynagrodzenia w odniesieniu do środka w zakresie aktywów o obniżonej wartości. Ponadto należy wspomnieć, że restrukturyzacja nie obejmuje wkładu akcjonariuszy, chociaż akcjonariusze dysponują instrumentem wsparcia płynności w wysokości 10 mld DKK. Instrument ten zastąpił tylko jednak wcześniejszy instrument, który został renegocjowany i odnowiony w 2011 r., w związku z czym nie może być traktowany jako wkład w kontekście planu restrukturyzacji. Ponadto władze duńskie przedstawiły wstępne informacje, że FIH zamierza wycofać się z niektórych rodzajów działalności (tj. finansowanie nieruchomości, kapitał *private equity* oraz zarządzanie majątkiem prywatnym). Działanie to wydaje się jednak w dużej mierze wynikać ze względów rentowności, które są bezpośrednio związane z koniecznym ograniczeniem kosztów lub zmniejszeniem luki w finansowaniu. W związku z tym jest wątpliwe, czy środki zaproponowane przez Danię stanowią odpowiednią odpowiedź na zakłócenia konkurencji wynikające z pomocy państwa na rzecz FIH.

⁽¹⁾ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:072:0001:0022:PL:PDF>

TEKST PISMA

„The Commission wishes to inform Denmark that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

The Commission has also found the measures, which are described in section III of this decision, to be temporarily compatible with the internal market for reasons of financial stability. The measures are accordingly approved for six months or, if Denmark submits an in-depth restructuring plan within six months from the date of this Decision, until the Commission has adopted a final decision on that restructuring plan.

I. PROCEDURE

- (1) Denmark notified the measures on 6 March 2012.
- (2) Denmark exceptionally accepts that the decision is taken in the English language.

II. DESCRIPTION OF THE BENEFICIARY

- (3) FIH was founded in 1958 and has its headquarters in Copenhagen, Denmark.
- (4) The FIH Group consists of FIH Holding A/S ("FIH Holding"), the parent holding company, and its 100% owned subsidiary FIH Erhvervsbank A/S ("FIH"), together with wholly-owned subsidiaries of FIH. The principal subsidiaries are FIH Partners A/S (covering the business segment Corporate Finance), FIH Kapital Bank A/S ("FIH Kapital Bank") and Realkredit A/S, a mortgage credit institution. FIH's activities consist of three segments: banking ⁽²⁾, markets ⁽³⁾ and corporate finance ⁽⁴⁾.
- (5) FIH Holding is owned by a consortium of ATP (a Danish pension fund), PF I A/S (a Danish pension fund), Folksam (a Swedish insurance company), and C.P. Dyvig & Co. (a Danish independent private investor) (the "consortium") which acquired FIH pursuant to an agreement signed in September 2010 and closed in January 2011.
- (6) At the end of 2011 FIH Group had a balance sheet of DKK 83.5 billion (EUR 11.2 billion) ⁽⁵⁾ and its solvency was 17.8 %.
- (7) FIH is specialised in lending to Danish corporates with a focus on SMEs. FIH constitutes Denmark's fifth-largest bank by volume of bank lending with approximately

⁽²⁾ Banking consists of: 1) corporate banking, which is responsible for FIH's lending activities, in particular to small and medium-sized enterprises; 2) acquisition finance, providing structured financing for mergers and acquisitions in the Scandinavian market, and 3) property finance, providing capital and advisory services to property investors.

⁽³⁾ Provides financial advisory services for large and medium-sized companies relating e.g. to risk management, liability management and capital structure. Markets is also responsible for handling trading and customer oriented activities in the interest rate, foreign exchange and securities markets.

⁽⁴⁾ Financial advisory services on mergers and acquisitions, privatisations and capital injections etc.

⁽⁵⁾ With the exchange rates of 1 June 2012: EUR 1 = DKK 7.4307.

4 000 customers. The current market share of FIH in the wholesale sector is estimated at between 5 % and 15 % (depending on the respective segments) while its market share of the total retail market is significantly lower than 8.1 %. It is a Danish limited liability company regulated by Danish banking legislation and supervised by the Danish Financial Supervisory Authority (FSA).

- (8) FIH has performed poorly in recent years. In 2009 it reported a pre-tax loss of DKK 147 million (EUR 19.9 million). Though FIH had a pre-tax profit of DKK 316 million (EUR 42.5 million) in 2010, that result was mainly driven by non-recurring positive market value adjustments, including unrealised gains on an indirect holding. In 2011 FIH reported a pre-tax loss of DKK 1 266 million (EUR 170 million) due to impairment charges on loans and negative market value adjustments. In 2009-2010 Moody's downgraded the rating of FIH from A2 to Baa3. In 2010 the then owners (the Icelandic Financial Supervisory Authority and the Central Bank of Iceland) ⁽⁶⁾ agreed to sell their shares in FIH to the consortium. The new ownership was expected to bring about significant improvement to the credit rating of FIH, as the prior ownership by Kaupthing Bank hf was one of Moody's main concerns regarding FIH. However, mainly due to FIH's specific circumstances such as the refinancing of government-guaranteed bond issues, credit quality and exposure to the property sector, Moody's downgraded FIH further to B1 in 2011 with negative outlook.
- (9) The rating downgrade is commensurate with current market prices for FIH bonds that do not benefit from a government guarantee: its 2-4 year debt is now priced at spreads of 600-700 basis points ("bps") over EURIBOR.

III. DESCRIPTION OF THE MEASURES

3.1. Reasons for the measures

- (10) FIH has issued State-guaranteed bonds in the amount of approximately DKK 42 billion (EUR 5.7 billion), amounting to 50 % of the bank's balance sheet, which will expire in 2012 and 2013. The guarantees were provided within the framework of the Danish Guarantee Scheme ⁽⁷⁾. FIH has also received a hybrid core capital injection of DKK 1.9 billion (EUR 256 million) under that scheme in June 2009.
- (11) With the State-guaranteed bonds maturing in 2012-2013, FIH is about to face a funding problem. The FSA estimates that there is a [...] ^(*) risk of FIH of becoming unable to comply with liquidity requirements in the next 12-18 months as a result of its expected inability to obtain funding from the open markets.

⁽⁶⁾ In 2010, FIH Group was put up for sale by its previous owner, Icelandic Kaupthing Bank hf, which went into winding-down proceedings in 2008.

⁽⁷⁾ Commission Decision NN51/2008 of 10 October 2008 ("Guarantee scheme for banks in Denmark") (OJ C 273, 28.10.2008, p. 2); Commission Decision in case N31a/2009, *Danish bank recapitalisation scheme and guarantee scheme on new debt*, OJ C 50, 3.3.2009, p. 3 as prolonged and amended by the Commission Decision in case N415/2009 and NN 46/2009, *Prolongation and amendment of the recapitalisation scheme and prolongation of the guarantee scheme*, OJ C 277, 22.9.2009, p. 2.

^(*) Covered by the obligation of professional secrecy.

- (12) In order to tackle those prospective liquidity problems FIH is to carry out a substantial reduction of its balance sheet.
- (13) FIH has initially presented a business strategy that is based on a reduction of loans, an increase in deposits and the release of further liquidity through reduction of other assets (amongst others, shareholdings and corporate bonds) as well as a general reduction of the balance sheet which will reduce the regulatory liquidity requirement. The purpose of that strategy was to ensure that FIH will retain a strong foundation after the State-guaranteed bonds expire in 2013. Nevertheless, Denmark has informed the Commission that that initial stand-alone business strategy of FIH is no longer considered feasible because the loan reduction strategy had not been implemented early enough. In consequence, Denmark submits that the proposed impaired asset measure is necessary to respond to the funding challenge faced by FIH.
- (14) At present, FIH has no problems in meeting its regulatory solvency requirements.

3.2. Structure of the measures

- (15) To tackle the prospective liquidity problems of FIH, Denmark is proposing an impaired asset measure by which most problematic assets will be transferred to a separate bad bank. Denmark will provide funding and recapitalisation to the bad bank whenever needed.
- (16) Under the measure proposed by Denmark, certain assets of FIH Group in the amount of approximately DKK 17.1 billion (EUR 2.3 billion) are to be transferred to a new subsidiary of FIH Holding ("NewCo"), which subsequently will be purchased by the Financial Stability Company⁽⁸⁾ ("FSC"). Liabilities consisting of two loans and equity will be transferred as well. After the transfer of ownership to the FSC, the new subsidiary will be wound up in an orderly manner in accordance with the principles of the approved Danish winding-up scheme⁽⁹⁾. The winding up process is expected to last until December 2017 or, at the very latest, December 2019.
- (17) The measure proposed has an elaborate structure. It consists of **two phases** and several **side agreements**. The **remuneration of the FSC** for providing an impaired asset relief to FIH is also highly complex and depends on the capacity of NewCo to generate proceeds.
- (18) **Phase 1.** In the first phase there will be a demerger of some of the assets and liabilities of FIH and FIH Kapital Bank into a new company "NewCo" which is owned by the FIH Holding;
- i. The **assets** from FIH and FIH Kapital Bank to be transferred to NewCo will be real estate loans and securities amounting to approximately DKK 15.5 billion (EUR 2.1 billion) and derivatives of approximately DKK 1.6 billion (EUR 215 million).
- ii. The **liabilities** of NewCo will consist of two loans and equity:
- a. **Loan 1.** This is a loss-absorbing loan from FIH to NewCo of DKK 1.65 billion (EUR 222 million); the loan principal would only be repaid by NewCo to FIH if the winding up process of the transferred assets to NewCo generates proceeds in excess of the FSC's purchase price of DKK 2 billion (see below). As remuneration for Loan 1, NewCo is to pay the 5Y Danish Gov Bond rate + 1.15 %;
- b. **Loan 2.** This is a loan from FIH to NewCo of approximately DKK 13.45 billion (EUR 1.8 billion). As remuneration for Loan 2, NewCo is to pay DKK CIBOR 3m + 1.12 %. The maturity of Loan 2 will match the maturity of loans issued by FIH under the State guarantee and will thus mature fully in mid-2013. After the latter loans are repaid by NewCo to FIH, the FSC will provide the roll-over funding to NewCo.
- c. Equity worth DKK 2 billion, which is the starting book value difference between the assets and liabilities transferred to NewCo.
- (19) **Phase 2.** After the incorporation of NewCo, the FSC will buy all the shares in NewCo from FIH Holding.
- i. The price of NewCo will be the equity capital (net worth) of NewCo as of 1 January 2012 amounting to DKK 2 billion (EUR 269 million).
- ii. FIH Holding will use the proceeds from selling NewCo as new share capital in FIH, and FIH will use that capital to repay its State guaranteed bonds.
- (20) **Side agreements.** As part of the proposed measure, there are several side-agreements between FIH Holding and the FSC.
- i. FIH Holding will give an unlimited loss guarantee to the FSC guaranteeing that when NewCo is resolved, the FSC will fully recover all its payments and capital contributions to NewCo. As payment for the loss guarantee FIH Holding will receive a payment equivalent to 100 bps annually of FSC's outstanding loans to NewCo⁽¹⁰⁾.
- ii. The FSC will provide funding to NewCo once Loan 2 has matured (mid-2013) and will receive interest from NewCo equivalent to its own financing costs plus 100 bps.

⁽⁸⁾ The Danish State-owned vehicle to take care of the different measures entailing the use of State resources for financial institutions in the context of the financial crisis.

⁽⁹⁾ See Decision N 407/2010 of 30.09.2010 (OJ C 312, 17.11.2010, p. 7); Decision SA.31938 (N 537/2010) of 7 December 2010 (OJ C 117, 15.2.2011, p. 2); Decision SA.33001 (2011/N) – Part A of 28.06.2011 (OJ C 237, 13.8.2011, p. 2); Decision SA.33001 (2011/N) – Part B of 01.08.2011 (OJ C 271, 14.9.2011, p. 4); Decision SA.33757 (2011/N) of 9.12.2011 (OJ C 22, 27.1.2012, p. 5); and Decision SA.34227(2012/N) of 17.2.2012 (OJ C 128, 3.5.2012, p.3); as well as Decision "SA.33639 (2011/N) – Rescue Aid for Max Bank" of 7 October 2011 (OJ C 343, 23.11.2011, p. 13).

⁽¹⁰⁾ The Guarantee Fee is hence a function of the liabilities of NewCo towards FSC

iii. The FSC will be obliged to fund and recapitalise NewCo if it is necessary for the winding up process. The FSC will provide NewCo with a DKK 13 billion loan facility and it will not receive any facility fee for it.

(21) **Remuneration of the FSC.** The FSC will be remunerated for the asset relief to FIH by means of a purchase price adjustment along the following lines. When NewCo is **totally** resolved, the FSC is guaranteed to recoup at minimum its initial DKK 2 billion investment plus costs. To the extent that the winding up process will generate proceeds that are less than the purchase price of DKK 2 billion, the difference will be covered by FIH by means of the loss-absorbing loan (Loan 1) and by FIH Holding by means of the unlimited loss guarantee. If the proceeds of the winding up process exceed DKK 1.5 billion, an additional 25 % of any excess amount will be paid to the FSC on top of the initial DKK 2 billion investment adjusted for costs of both FIH and the FSC. All other proceeds in excess of DKK 1.5 billion will be paid to FIH Holding. For instance, if the final proceeds were below DKK 1.5 billion, the FSC would receive DKK 2 billion, while if the final proceeds were DKK 1.9 billion, FSC would get $\text{DKK } 2 + 0.25 \times [1.9 - 1.5] = 2.1$ billion.

(22) In summary, all risks in NewCo will be borne in theory by FIH (through the loss-absorbing loan) and FIH Holding (which "guarantees" to the FSC that it will recoup at minimum its initial investment). On the other hand, the remuneration of the FSC for providing asset relief to FIH results from an elaborate formula and there is no guarantee that the FSC will obtain a remuneration commensurate with its initial investment.

(23) **Commitments given to mitigate Competition Distortions.** The Danish authorities have committed to a number of temporary measures in respect of FIH to address distortion of competition in the six-month period from the date of this Decision or, after Denmark has submitted a revised in-depth restructuring plan within six months from the date of this Decision, until the Commission has adopted a final decision on that restructuring plan:

i. **Dividend ban**

FIH Holding will not pay dividends to its shareholders.

ii. **Discretionary Coupon ban**

FIH Group will only pay to third parties which are external to the group, by the end of the financial year for the previous financial year, coupons and profit distributions on the core capital instruments, silent participations, participation rights and participation certificates with a share in the loss and any other profit-related own capital financial instruments (e. g. hybrid capital instruments, participation certificates) (excluding shares) existing in FIH Group on the date of the Commission decision if and in so far as FIH Group is legally obliged to do so and can do so without releasing reserves.

iii. **Acquisition ban**

FIH Group will not acquire any stake in any undertaking. This commitment covers both undertakings which have the legal form of a company and packages of assets which form a business.

Notwithstanding that prohibition:

- FIH Group may, after obtaining the Commission's approval, acquire businesses if, in exceptional circumstances, such an acquisition is necessary to restore financial stability or to ensure effective competition, as contemplated in point 41 of the Restructuring Communication.
- FIH Group may acquire stakes in undertakings provided that the purchase price paid for any acquisition is less than 0.01 % of the balance sheet size of FIH Group at the date of the Commission decision and that the cumulative purchase prices paid by FIH Group for all such acquisitions over a period of six months or, after submission of a restructuring plan, until the Commission makes a final decision, is less than 0.025 % of the balance sheet size of FIH group at the date of the Commission decision.

The following activities fall outside the scope of that acquisition ban:

- Acquisitions that take place in the ordinary course of the banking business in the management of existing claims towards ailing firms (as part of normal debt management)
- Acquisitions that take place in the ordinary course of business provided that the transaction fits with the business plan and the annual budget of that unit. However, FIH will seek prior permission from the Commission before engaging in a transaction under this clause.

iv. **Buy-Back of Hybrids and Senior Debt**

FIH will seek prior approval from the Commission before any entity of FIH (FIH Group) exercises call options on hybrid instruments or other equity-like instruments, or buys back a Hybrid or other equity-like instrument or Senior Debt instrument.

IV. DENMARK'S POSITION

(24) Denmark argues that the set-up of the measures, as described in section III has two separate transactions: the demerger of FIH and FIH Kapitalbank and the sale of shares in NewCo. Denmark submits that the transfer involves State aid only to the transferred entity (NewCo). However, Denmark argues that any such aid is compatible with the internal market pursuant to Article 107(3)(b) TFEU. In that respect, the Danish Government notes that the transferred entity will be wound-up in line with the approved Danish winding-up scheme.

- (25) Denmark is of the view that the demerger takes place within the FIH Group and does not involve the FSC. FIH Holding creates a new company – NewCo – which contains all the relevant assets and liabilities from FIH and FIH Kapitalbank which allows it to sell those assets and liabilities as a whole to the FSC by a simple share purchase agreement. In that respect, the sale of the shares in NewCo from FIH Holding to the FSC should not be seen as a complicated measure and in any case no more complicated than a transfer of assets and liabilities.
- (26) The loss-absorbing loan of DKK 1.65 billion (Loan 1) and the guarantee from FIH Holding are intended to limit the FSC's risk involved in the measures. Denmark submits that the transaction could have been simpler if the FSC were not to get that guarantee but then the FSC's goal of reducing its risk would not have been met. According to Denmark, the same reasoning applies also for the cash contribution of DKK 2.0 billion from FIH Holding to FIH, which is aimed at securing that as much capital as possible can be transferred to FIH in order for it to be able to repay the State-guaranteed commitments when they mature and to reduce the FSC's risk. Denmark admits that the transaction could have been simpler if there were no purchase price adjustment (earn-out) when the winding up process comes to an end. However, it contends that the adjustment mechanism is a negotiated and agreed mechanism which both FIH and the FSC see as a reasonable way of dealing with the risks involved in the transfer. NewCo's profit at termination is distributed between the FSC (25 %) and the FIH Group (75 %), with FIH Holding guaranteeing that the FSC does not lose on the transaction. Profit is divided through a distributional system reflecting the parties' respective risks and exposures.
- (27) Both the FSC and FIH Group claim to have negotiated the transaction terms based on commonly accepted commercial considerations regarding the sharing of risk and profit etc. and thus maintain that the transaction is made on market terms. Furthermore, the parties have discussed the financial consequences of the transaction when entering the agreement.
- (28) Denmark submits that the purpose of the transaction that is described under section III is:
- i. to reduce the overall financial risks of the Danish State, including in particular the risk of taking a loss on the Government Guarantee and the capital injection,
 - ii. to ensure an orderly winding-up of impaired assets and avoid substantial damage to the already vulnerable Danish real estate market and a credit squeeze for the otherwise affected small and medium-sized companies, and
 - iii. to facilitate a restructuring of FIH in order to improve the bank's funding possibilities and allow it to continue to focus on its core business activity, which is to finance small and medium-sized companies in Denmark.
- (29) Hence, implementing the measure described under section III should result in (i) FIH continuing to lend to SMEs; and (ii) an improvement of FIH's risk profile, leading to an improvement of its credit rating and thereby an increased ability to address its funding challenge.
- (30) The Danish Government's view is further backed up by a letter from the FSA. The FSA notes that the FIH Group is currently under tightened supervision by the FSA in light of the Group's major funding challenge. There is a [...] risk that FIH will not be able to meet the statutory requirements regarding liquidity when the bank's Government-Guaranteed Bonds expire, and that the bank will be unable to comply with those requirements within a period determined by the FSA. A violation of those requirements would mean that the FSA would have to withdraw FIH's banking license.
- (31) FIH's funding is primarily ensured by way of Government-Guaranteed Bonds amounting to DKK 38 billion (EUR 5.3 billion), which will expire towards mid-June 2013. Accordingly, the bank has a major need for refinancing, which must be solved before mid-June 2013.
- (32) For a long period of time, the bank has actively worked to find a solution to its funding problems, including a substantial reduction of its balance sheet, an increase in deposits and alternative means of funding. However, the bank only has 12 months left to solve its funding challenge. Due to the time constraints, it will be very difficult for the bank to carry out supplementary initiatives if the measure described in section 3 is not implemented.
- (33) The envisaged transfer of loans etc. entails that FIH will reduce its balance sheet faster than initially expected. That reduction in turn will significantly increase the likelihood that FIH will be able to meet the challenge of refinancing its Government-Guaranteed Bonds in 2013. However, the FSA emphasizes [...]. Nevertheless, in the FSA's view, the transfer agreement makes a significant contribution towards reducing the likelihood of FIH becoming distressed. In light of that challenge, FIH remains under tightened supervision by the FSA.
- (34) Finally, the State's interventions are endorsed also by the Danish Central Bank, which is of the opinion that the demerger of FIH and the sale of the bank's property-related loans to the FSC are appropriate measures that will ensure that FIH will obtain funding and thus can continue financing SMEs in Denmark.

V. ASSESSMENT

A. Existence of aid and potential beneficiaries

- (35) The present decision assesses whether the the measure described in section III contains State aid.

(36) According to Article 107(1) TFEU, State aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States.

1. State resources

(37) Several elements in the package contain State resources as they are directly financed by the FSC, which is a State-owned company (through the Danish Ministry of Business Affairs) responsible for providing different kind of measures to Danish banks in the context of the financial crisis. ⁽¹¹⁾ First, the FSC is providing DKK 2 Billion in cash for the NewCo share purchase agreement. Second, the FSC commits to fund NewCo's assets as FIH is repaying its State Guaranteed loans. That commitment can exceed DKK 13 Billion. Third, the FSC is foregoing an amount of interest in order to pay for a guarantee from FIH Holding.

(38) Furthermore, the elements described in section III should be considered together and as part of a single transaction as they are all interdependent and have been designed altogether to address the funding problem of FIH.

(39) It is thus concluded that the measure described in section III seen as whole involves the use of State resources, imputable to the State.

2. Existence of an advantage

(40) The measure described in section III in favour of FIH provides FIH and FIH Group with an advantage as it will result in an asset relief for FIH, eventually enabling the bank to better address its funding problems.

3. Selectivity

(41) The use of the measure only concerns FIH Group and NewCo. The measure is therefore selective.

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

(42) The advantage procured by the measure will strengthen the position of FIH after the hive-off of assets and liabilities as regards capital and liquidity compared to those of its competitors who will not benefit from similar measures. The measure will therefore enable FIH to improve its market position. The measure therefore can lead to a distortion of competition.

(43) Given the integration of the banking market at European level, the advantage provided to FIH is felt by competitors

both in Denmark (where banks from other Member States operate) and in other Member States. The measures must therefore be regarded as potentially affecting trade between Member States.

5. Applicability of the market investor principle

(44) The Danish authorities initially argued that the measure is in line with the market economic investor principle ("MEIP") but communicated on 23 April 2012 that Denmark "will not for the moment supply the Commission with further arguments regarding the use of the Market Economy Investor Principle". The Commission does not consider that the MEIP is fulfilled, even if it were to be applicable to the measure (which it doubts). The information received shows that it is highly unlikely that the FSC will receive any remuneration, and that is clearly not in line with the behaviour of a market economy operator.

(45) Given that there is no other market participant, including even the consortium (see point 8 above), who would be prepared to grant equivalent measures to FIH, the measure in any case is not in line with the MEIP. Only Denmark, through the FSC, acting in the public interest, is ready and in a position to grant to FIH the measure described under section III. The requirements of the market economy investor are therefore not met.

Conclusion

(46) As a result, the Commission concludes that the measure as a package constitutes State aid within the meaning of Article 107(1) TFEU.

B. Compatibility of the aid

1. Legal basis for the compatibility assessment

(47) Article 107(3)(b) TFEU provides that State aid may be considered to be compatible with the internal market where it is intended to "remedy a serious disturbance in the economy of a Member State".

(48) Given the present circumstances in the financial markets, the Commission considers that the measures may be examined under that provision.

(49) The Commission accepts that the financial crisis has created exceptional circumstances in which the bankruptcy of one bank may undermine trust in the financial system at large, both at national and international level. That may be the case even for a bank of small size which is not in immediate difficulty but under tightened supervision by the Financial Regulator, such as FIH. The 2-4 year debt of that bank is currently priced at spreads of 600-700 bps over EURIBOR. That pricing level is a clear indication of imminent distress, even if the agency rating is still one notch away. In such cases, early intervention to avoid the institution concerned becoming unstable can be necessary to avoid threats to financial stability. It is particularly so in the case of a small economy such as Denmark where counterparts may tend not to distinguish between individual banks, thus extending the lack of confidence generated by the failure of one bank to the whole sector.

⁽¹¹⁾ The FSC's activities are governed by the Act on Financial Stability and the Financial Business Act and executive orders issued in pursuance thereof. In addition, the FSC is subject to special provisions regarding State-owned companies. Other measures previously provided by the FSC were found imputable to the Danish State in the Commission Decision NN51/2008 of 10 October 2008 ('Guarantee scheme for banks in Denmark') (OJ C 273, 28.10.2008, p. 2).

- (50) Given the great uncertainty due to the financial crisis and the necessity of external funding for the Danish banking sector, a lack of confidence in the Danish financial system could severely affect the whole Danish economy. ⁽¹²⁾
- (51) The general principles applicable for State aid granted to financial institutions are set out in point 15 of the Banking Communication ⁽¹³⁾. Those principles have been further elaborated in the Recapitalisation Communication ⁽¹⁴⁾. Both Communications were subsequently amended by the 2011 Prolongation Communication ⁽¹⁵⁾ and the 2012 Prolongation Communication ⁽¹⁶⁾.
- (52) Furthermore, the Impaired Assets Communication ⁽¹⁷⁾ lays down certain principles as regards the valuation and transfer of the impaired assets. Whilst valuation considerations play an essential role when determining the aid element regarding transferred assets, this decision does not prejudice the full assessment of those issues which will be undertaken in a future restructuring decision.
- (53) Finally, certain principles of the Restructuring Communication ⁽¹⁸⁾ have to be respected in the present case. According to the Restructuring Communication, in order to be compatible with Article 107(3)(b) TFEU, the restructuring of a financial institution in the context of the current financial crisis, in particular, has to lead to a restoration of the viability of the bank or a demonstration of how it can be wound-up in an orderly fashion. Whilst viability considerations play a role in the assessment of the measures, due to the specificities of the case, this decision does not prejudice the full assessment which will be undertaken in a future restructuring decision.
2. *Compatibility assessment*
- (54) In order to determine the compatibility of the measure with the internal market, it will be analysed under the different guidelines provided by the Commission in the context of the financial crisis. Accordingly, it will be analysed on the basis of the Banking Communication and the Communications that have further elaborated on or amended the Banking Communication and the Impaired Assets Communication.
- (55) According to the Banking Communication, the aid has to be:
- i. well-targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy;
 - ii. proportionate to the challenge faced, not going beyond what is required to attain that effect, and
 - iii. designed in such a way as to minimize negative spill-over effects on competitors, other sectors and other Member States.
- (56) In addition, the Impaired Assets Communication lays down that banks ought to bear the losses associated with impaired assets to the maximum extent, thereby contributing to burden-sharing.
- 2.1 *The aid is well-targeted*
- (57) FIH is currently under tightened supervision by the FSA in light of the Group's major funding challenge. The FSA is of the view that there is a [...] risk that FIH will not be able to meet the statutory requirements regarding liquidity when the bank's Government-Guaranteed Bonds expire, and that the bank will be unable to comply with those requirements within a period determined by the FSA. The objective of the measure described in section III is thus in particular to improve the access of FIH to the wholesale funding market.
- (58) Up to now, the bank has actively worked to find a solution to its funding problems, including through a substantial reduction of its balance sheet, an increase in deposits and alternative means of funding. However, the bank only has 12 months left to solve its funding challenge. The impaired asset relief under the measure involving the FSC allows for a rapid deleveraging of FIH, and provides a funding solution for the real estate assets of the bank
- (59) However, all downside risks associated with the portfolio transferred to NewCo and eventually to the FSC remain with FIH and FIH Holding. If the resolution of NewCo results in losses below the initial investment of the FSC, FIH and FIH Holding will have to absorb those losses. The Danish authorities have provided a preliminary assessment that FIH Group has a sufficient capital buffer to absorb losses in NewCo on the basis of a stress scenario. Those assumptions will need to be further assessed, in particular by conducting an evaluation of the value of the assets transferred.
- (60) Nevertheless, even under the hypothesis that FIH Group can absorb all the losses of NewCo under a stress scenario, it is unclear how investors will factor in the fact that the risks associated with the transferred portfolio remain with FIH Group. Thus, it is unclear whether investors will consider FIH as fully relieved from its worst assets, and whether they will be ready to provide funding under bearable conditions.

⁽¹²⁾ Denmark has introduced several schemes introducing measures for tackling that risk. Those schemes have ranged from resolution frameworks of failing banks to a merger scheme aiming at keeping banks on the market by means of a market-based solution. See footnote 11.

⁽¹³⁾ Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8.

⁽¹⁴⁾ Commission Communication on the Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2.

⁽¹⁵⁾ Commission Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 329, 7.12.2010, p. 7.

⁽¹⁶⁾ Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 6.12.2011, p. 7.

⁽¹⁷⁾ Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector, OJ C 72, 26.3.2009, p. 1.

⁽¹⁸⁾ Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.08.2009, p. 9.

(61) In conclusion, the Commission has doubts that the measures at stake are well-targeted for the purposes of the Banking Communication.

2.2 Appropriateness of the measure and own contribution

(62) As set out in the Banking Communication, the aid should be proportionate and restricted to the minimum necessary. It implies that the amount of aid is appropriate to address the difficulties of the bank and that it is adequately remunerated.

(63) The envisaged transfer of loans entails that FIH will reduce its balance sheet faster than expected, which will significantly increase the likelihood that FIH can meet the challenge of refinancing its Government-Guaranteed Bonds in 2013.

(64) The measure would thus indeed improve the liquidity profile of the bank. The threatening funding gap is closed through the hive-off of assets, with the help of the DKK 13 billion funding facility provided by the FSC to NewCo. In addition, the FSC undertakes to recapitalise NewCo over the lifetime of the measure, whenever necessary. As a result, any recapitalisation issues for FIH are pre-empted.

(65) Nevertheless, the measure appears to be unnecessarily complicated to fix the future liquidity challenges of FIH. In particular it is unclear to which extent the various side-agreements and the interconnectedness in the remuneration formulae are both necessary and appropriate. It is also unclear how the bank obtains regulatory capital relief as well as an accounting deconsolidation from the transfer of the assets, due to all the side-agreements and in particular the guarantee that is provided under Loan 1.

(66) Furthermore, it is doubtful whether the aid has been limited to the minimum and if there is sufficient own contribution of the bank and its shareholders.

(67) FIH Holding has agreed to provide a DKK 1.65 billion loss-absorbing loan to NewCo. In addition, FIH Holding will grant an additional guarantee to the FSC to guarantee that the FSC will at minimum be repaid its initial investment of DKK 2 billion when the NewCo is fully wound up.

(68) However, whilst FIH and FIH Holding contribute to the measure by providing guarantees, they are remunerated for that service in the form of a guarantee fee paid by the FSC. For the loss guarantee, FIH Holding will receive a payment of 100 bps annually on the amount of funding provided by FSC to NewCo. Because the outstanding liabilities of NewCo towards FSC are not directly related to the credit quality of the portfolio of NewCo or the expected terminal value of NewCo, it is highly questionable whether the provision of guarantees by FIH and FIH Holding should qualify as an own contribution. In addition to the fact that those guarantees are remunerated, the remuneration might be not in line with the risk assumed. FIH also stands to benefit should the assets recover through the price-adjustment mechanism.

(69) The Danish authorities have provided a preliminary assessment of the terminal valuation of NewCo in a standard base case scenario, under which the FSC will recover its initial investment only (applying the initial price adjustment) and will thus not receive any remuneration for the provision of the asset relief.⁽¹⁹⁾ In addition, the initial price-adjustment mechanism is by default constructed in such a way to limit the upside returns to the FSC if the winding down of NewCo generates higher proceeds than currently expected.

(70) The FSC will also receive remuneration for the provision of funding to NewCo. However, it is not obvious that its remuneration should also be counted as remuneration for the provision of asset relief, as it only compensates for the provision of funding. In addition, the margin that the FSC can extract for the provision of funding to NewCo is capped at 100 bps, which may be below market prices.

(71) Even taking into account mitigating factors such as the loss-absorbing loan, the suggested remuneration to be paid to the FSC for the transferred assets and liabilities is thus very unlikely to be in line with the remuneration level referred to in point 21 of the Impaired Asset Communication according to which banks ought to bear the losses associated with impaired assets to the maximum extent. Point 21 requires a correct remuneration of the State for the asset relief measure, whatever its form, so as to ensure equivalent shareholder responsibility and burden-sharing irrespective of the exact model chosen. In the case of FIH, however, it cannot be excluded that the FSC will get no remuneration at all for the impaired asset measure.

(72) Finally, it should be mentioned that the restructuring does not provide for a contribution of the shareholders although there is a shareholder liquidity facility of DKK 10 billion. That facility, however, has only replaced an already existing former facility which was renegotiated and renewed in 2011, and can thus not be considered as a contribution in the context of the restructuring plan.

(73) In conclusion, the Commission has doubts that the measure is proportionate and limited to the minimum, and that the measure provides sufficient own contribution by FIH.

2.3 Measures limiting distortion of competition

(74) The Danish authorities have provided preliminary indications that FIH intends to withdraw from certain business lines (property finance, private equity and private wealth management). However, those withdrawals seem to be largely driven by viability purposes as they are directly linked with necessary cost-savings or the reduction of the funding gap.

(75) Although Denmark has committed to a number of temporary measures to address distortion of competition

⁽¹⁹⁾ In particular, a preliminary independent assessment of the assets to be transferred indicates that additional provisions need to be taken in the amount of DKK 1.5-1.6 billion, thus decreasing the prospects for profits for NewCo.

(acquisition ban, coupon ban, consultation of the Commission for buy-back of and calls on hybrid instruments), FIH intends to aggressively enter the internet retail deposit market by pursuing a "price leadership" role. That entry into the internet retail deposit market is a core component of the strategy of FIH to address its funding problems, and may generate a substantially higher level of competition in that market. In the absence of the measure, it is unclear whether FIH would have been a going concern as a bank, and thus whether FIH could have been in a position to aggressively enter that market. Thus, it is doubtful whether the measures proposed by Denmark sufficiently address the distortion of competition resulting from the State aid to FIH.

(76) In conclusion, the Commission has doubts that the temporary measures proposed by Denmark sufficiently limit distortions of competition.

VI. CONCLUSION

(77) Denmark claims that the bank is in danger of becoming distressed on a stand-alone basis in the next 12-18 months, as a result of not being able to obtain funding from the open markets. Denmark also claims that FIH and the FSC need to close the deal in the coming months in order to give a clear strategic line to FIH. Without that closing, uncertainty as to the solution to address the bank's funding problem will severely affect the bank's reputation and viability prospects and force it to speedily run-down its loan portfolio to the detriment of the Danish economy.

(78) The measure constitutes State aid, and is to be assessed under Article 107(3)(b) TFEU to remedy a serious disturbance in the economy of Denmark

(79) The Commission however has doubts whether the proposed measure is compatible with the internal market. The impaired asset measure is complex and needs further assessment. Given the need to carry out an asset valuation and to assess the level of remuneration, the limited own contribution and lack of sufficient compensatory measures, the Commission will approve the measures temporarily and at the same time open the formal investigation proceedings, pursuant to Article 108(2) of the Treaty on the Functioning of the European Union.

(80) At this stage the Commission has in particular doubts as regards

i. the appropriateness of the measure;

ii. the limitation of the aid to the minimum necessary and the own contribution of the bank to the measure, in particular in view of the potential low remuneration of the FSC; and

iii. the inappropriateness of measures to address distortion of competition.

(81) Nevertheless, the Commission can authorise measures temporarily if they are needed for reasons of financial stability, when it cannot take a final decision due to doubts on compatibility of those measures. In light of the ongoing fragile situation of the financial markets the Commission bases its assessment on Article 107(3)(b) TFEU and authorises the notified measure temporarily.

VII. DECISION

On the basis of the foregoing assessment, the measure described in section III of this decision are found to be temporarily compatible with the internal market for reasons of financial stability. The measure is accordingly approved for six months or, if Denmark submits an in-depth restructuring plan within six months from the date of this Decision, until the Commission has adopted a final decision on that restructuring plan.

In the light of the foregoing considerations, the Commission has decided at the same time to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, and requests Denmark to submit its comments and to provide all such information as may help to assess the aid measure, 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 warns Denmark 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 publication of 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."