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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 December 2011

on the State aid C 40/2009 and C 43/2008 for the restructuring of WestLB AG

(notified under document C(2011) 9395)

(Only the German text is authentic)

(Text with EEA relevance)

(2013/245/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) ⁽¹⁾ thereof,

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

Having called on interested parties to submit their comments ⁽²⁾,

Whereas:

I. PROCEDURE

(1) By Decision of 12 May 2009 in case C 43/2008 ⁽³⁾ (hereinafter called "the May 2009 Decision"), the Commission conditionally approved a EUR 5 billion

risk shield for WestLB AG ⁽⁴⁾ (hereinafter called "WestLB"), the Landesbank of North Rhine-Westphalia, on a portfolio of structured securities (hereinafter called "the Phoenix portfolio"), referring to a restructuring plan submitted on 30 April 2009 (hereinafter called "the April 2009 restructuring plan").

(2) On 23 September 2009, Germany notified to the Commission additional aid to WestLB in the form of a temporary risk shield for tranches of the Phoenix portfolio in the amount of EUR 6,4 billion and committed to notify a revised restructuring plan.

(3) By Decision of 7 October 2009 in case N 531/2009 ⁽⁵⁾ the Commission decided that the temporary risk shield was compatible with the internal market as rescue aid.

(4) On 10 December 2009, Germany notified a support measure for WestLB in the form of an asset transfer to the newly created Erste Abwicklungsanstalt (hereinafter called "the EAA"). That measure is hereinafter called

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ OJ C 66, 17.3.2010, p. 15; OJ C 23, 25.1.2011, p. 9.

⁽³⁾ Commission Decision of 12 May 2009 in case C 43/2008, *Restructuring of WestLB AG*, OJ L 345, 23.12.2009, p. 1.

⁽⁴⁾ The WestLB group consists of WestLB AG (hereinafter called "WestLB") and affiliated companies, including Westdeutsche Immobilienbank AG and WestLB Mellon Asset Management Holdings Limited. A considerable number of the documents supplied by Germany to the Commission, such as the restructuring plan of 30 June 2011, the *Eckpunktevereinbarung* and the commitments given by Germany, sometimes speak of and/or refer to the WestLB group. In this Decision the Commission therefore does not differentiate between WestLB AG and the WestLB group, but rather takes WestLB AG – as the holding company of its subsidiaries – as *pars pro toto*. The same approach was taken in the May 2009 Decision.

⁽⁵⁾ Commission Decision of 7 October 2009 in case N 531/2009, *Assumption of risk for WestLB*, OJ C 305, 16.12.2009, p. 4.

"the first asset transfer". At that stage, Germany also submitted a modified restructuring plan for WestLB (hereinafter called "the December 2009 restructuring plan"). The first asset transfer replaced the measure notified on 23 September 2009 and rendered the Decision of 7 October 2009 otiose.

(5) By Decision of 22 December 2009 in case C 40/2009 ⁽¹⁾ (hereinafter called "the December 2009 Decision"), the Commission temporarily approved the first asset transfer for a period of six months for reasons of financial stability. By the same Decision, the Commission opened a formal investigation under Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) because of doubts regarding the compatibility of that measure with the internal market.

(6) In December 2009, the Commission engaged Société Générale, Bangert Research and Professor Wim Schoutens as experts to evaluate the impaired assets that WestLB had transferred to the EAA.

(7) On 1 February 2010, Germany submitted remarks on the reasoning underlying the December 2009 Decision.

(8) By Decision of 22 June 2010, in case N 249/2010 ⁽²⁾ (hereinafter called "the June 2010 Decision"), the Commission extended the temporary approval of the first asset transfer for reasons of financial stability until the final decision on the first asset transfer and the December 2009 restructuring plan had been taken.

(9) On 29 October 2010, the Commission provided Germany with a detailed valuation report on the assets that were the subject matter of the first asset transfer.

(10) On 5 November 2010, the Commission adopted a decision to extend the formal investigation procedure regarding the first asset transfer in case C 40/2009 ⁽³⁾ (hereinafter called "the November 2010 Decision"). In the November 2010 Decision the Commission expressed further doubts regarding the compatibility of the first asset transfer with the internal market.

⁽¹⁾ Commission Decision of 22 December 2009 in case C 40/09 (ex-N 555/09), *Additional aid for WestLB AG related to spin-off of assets*, OJ C 66, 17.3.2010, p. 15. That Decision replaces the Decision of 7 October 2009 in case N 531/2009.

⁽²⁾ Commission Decision of 22 June 2010 in case N 249/10, *Prolongation of temporary authorisation of additional aid for WestLB AG related to the spin-off of assets*, OJ C 230, 26.8.2010, p. 3.

⁽³⁾ Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9.

(11) In November 2010, the German authorities submitted comments which were supplemented on 21 December 2010. The Commission received no comments from other interested parties.

(12) On 21 December 2010, the Commission decided to postpone the date by which Westdeutsche ImmobilienBank AG ⁽⁴⁾ (hereinafter called "WestImmo") had to stop writing new business ⁽⁵⁾.

(13) On 15 February 2011, Germany submitted a modified restructuring plan for WestLB (hereinafter called "the February 2011 restructuring plan").

(14) On 15 April 2011, Germany submitted to the Commission a progress report of the divestiture trustee who had been appointed pursuant to the May 2009 Decision and a new restructuring plan for WestLB (hereinafter called "the new restructuring plan").

(15) On 23 June 2011, all important details of the winding-down of WestLB and of the burden-sharing between its shareholders were agreed between Germany's Federal Agency for Financial Market Stabilisation (hereinafter called "the FMSA"), all shareholders of WestLB and the EAA (the agreement is hereinafter called "the *Eckpunktevereinbarung*") ⁽⁶⁾.

(16) On 30 June 2011, Germany transmitted a final version of the new restructuring plan based on the *Eckpunktevereinbarung* to the Commission (that final version is hereinafter called "the June 2011 restructuring plan").

(17) On 28 October 2011, Germany requested the Commission to defer until 29 February 2012 WestLB's obligation to stop new business, because the May 2009 Decision requires WestLB to cease new business as of 1 January 2012. That request was submitted on a protective basis, in the event that the May 2009 Decision has not been replaced by a new decision by 1 January 2012.

(18) On 28 October 2011, Germany submitted detailed information about a further state aid measure for WestLB, in the form of a second asset transfer to the EAA (that measure is hereinafter called "replenishment").

⁽⁴⁾ Westdeutsche ImmobilienBank AG is WestLB's largest subsidiary and a significant provider of real estate financing in Germany.

⁽⁵⁾ Commission Decision of 21 December 2010 in case MC 8/2009, *WestLB divestments*, not yet published.

⁽⁶⁾ That agreement is reflected in a document called "*Eckpunktevereinbarung zum Restrukturierungsplan der WestLB*" signed by all shareholders, the EAA and the FMSA on 29 June 2011.

- (19) On 21 November 2011, Germany submitted updated information on the June 2011 restructuring plan.
- (20) On 1 December 2011, Germany submitted information on the amount of temporary short-term liquidity assistance that may be provided to WestLB up to 30 June 2012.
- (21) On 8 December 2011, Germany submitted a final catalogue of commitments to the Commission.
- (22) On 13 December 2011, Germany confirmed the intended take-over of an entity named Verbundbank, which will be carved out from WestLB in the context of the latter's restructuring, by Helaba Landesbank Hessen-Thüringen (hereinafter called "Helaba").

II. FACTS

1. THE BENEFICIARY

- (23) The beneficiary is WestLB. WestLB is the Landesbank of North Rhine-Westphalia with registered offices in Düsseldorf. Its shareholders are the Savings Banks Association of Westphalia-Lippe (hereinafter called "SVWL"), the Savings Banks and Giro Association of the Rhineland (hereinafter called "RSGV"; SVWL and RSGV are collectively called "the savings banks associations"), the Land of North Rhine-Westphalia (hereinafter called "NRW") and the two regional associations of the Rhineland (hereinafter called "LVR") and Westphalia-Lippe (hereinafter called "LWL"). The Sonderfonds Finanzmarktabstabilisierung (hereinafter called "SoFFin"), which is managed by the FMSA, has invested a silent participation in WestLB AG.
- (24) The main financial data of WestLB are summarised in the following table:

Table 1

Main financial data of WestLB

	31.12.2008	31.12.2009	31.12.2010	30.6.2011
Balance Sheet Figures (billion EUR)				
Total assets	288,1	242,3	191,5	160,4
Equity	3,8	3,7	4,1	4,2
Bank Regulatory Capital Ratios (SolvV)				
Core capital in billion EUR	5,7	5,3	5,5	4,9

	31.12.2008	31.12.2009	31.12.2010	30.6.2011
Own funds in billion EUR	8,9	7,6	7,7	7,3
Risk-weighted assets in billion EUR	88,5	83,0	48,6	45,4
Core capital ratio in %	6,4	6,4	11,4	10,7
Overall ratio in %	10,1	9,1	15,9	16,0

Employees

	5 957	5 214	4 712	4 622
Number of employees				
Full-time employees	5 663	4 971	4 473	4 376

- (25) WestLB serves as the central institution for the savings banks and as a link to the financial markets for the regionally operating savings banks in NRW and Brandenburg. It offers a broad range of products and services, including lending, customised structured finance, capital markets business, asset management, and transaction services to its German and international clients which include corporates, as well as institutional and public-sector clients.
- (26) The focus of WestLB's business activities has changed over the years. While it was initially limited to its function of a central giro institution for the savings banks, WestLB has turned more and more into an investment bank. Since 2001, when its public mission activities were separated from its economic businesses, WestLB has been undergoing restructuring ⁽¹⁾.
- (27) More recently, large investments in structured securities, partly booked in special purpose vehicles that had not been consolidated before 2007, caused significant losses and resulted in surging capital requirements, despite the relaxation of accounting standards that was adopted as a response to the financial crisis. Therefore, Germany and WestLB's shareholders granted the Phoenix risk shield in 2008 ⁽²⁾ and agreed in November 2009 on the establishment of a bad bank, the EAA, to which a nominal amount of around EUR 77.5 billion of assets and capital of approximately EUR 3 billion were transferred.

⁽¹⁾ See the Commission Decision of 20 October 2004 on aid from Germany for Westdeutsche Landesbank - Girozentrale (WestLB), now WestLB AG, OJ L 307, 7.11.2006, p. 22, and the Commission Decision of 14 December 2007, OJ C 4, 9.1.2008, p. 1.

⁽²⁾ See the Commission Decision in case NN 25/2008 of 30 April 2008, OJ C 189, 26.7.2008, p. 3.

2. THE AID MEASURES

a. THE FIRST SET OF MEASURES – THE RISK SHIELD FOR THE PHOENIX PORTFOLIO

- (28) In 2008, WestLB transferred a portfolio of structured securities to a special purpose vehicle ("SPV") called Phoenix Light, a private limited company established under Irish law, ring-fencing securities⁽¹⁾ with a total nominal volume of approximately EUR 23 billion off WestLB's balance sheet. The SPV was secured by guarantees of WestLB's shareholders which were given on 8 February 2008 to cover actual payment defaults of up to EUR 5 billion (hereinafter called "the risk shield for the Phoenix portfolio") and which were approved by the May 2009 Decision⁽²⁾. The risk shield consisted of two separate guarantees:

— a guarantee covering claims against Phoenix Light of up to EUR 2 billion, for which all shareholders of WestLB are liable in proportion to their respective shareholdings,

— and a subordinated guarantee issued only by NRW, covering further claims against Phoenix Light of up to EUR 3 billion.

b. THE SECOND SET OF MEASURES – THE FIRST ASSET TRANSFER TO THE EAA

- (29) On 24 November 2009, Germany and WestLB's shareholders agreed on the details of the establishment of a bad bank called Erste Abwicklungsanstalt under the German Law on the Fund for Stabilisation of the Financial Markets (Finanzmarktstabilisierungsfondsgesetz - "FMStFG") in order to ring-fence a portfolio of risk positions and non-strategic business units. WestLB's shareholders met and formally approved the necessary contractual agreements on 11 December 2009.

- (30) The first asset transfer measure⁽³⁾ comprised a EUR 3 billion capital injection, further guarantees from WestLB's shareholders and an asset transfer which was to take place predominantly by way of a spin-off. In addition, the EUR 5 billion Phoenix risk shield was not

terminated but transferred to the EAA. If the risk shield had not been transferred, the EAA would have needed an additional EUR 5 billion of capital in order to take over the Phoenix portfolio.

i) *The capital injection of SoFFin into WestLB*

- (31) The establishment of the EAA had to be preceded by a capital injection of EUR 3 billion by SoFFin into WestLB (hereinafter called "the capital injection"). That capital injection was made in three instalments, on 23 December 2009 (EUR 672 million), 4 January 2010 (EUR 1.5 billion) and 30 April 2010 (EUR 828 million). The capital was provided in the form of a non-callable silent participation, optionally convertible into ordinary shares after 1 July 2010. According to the terms agreed upon, SoFFin may not become majority shareholder of the company.

- (32) The contractual terms of the silent participation provide for a remuneration of 10 % per annum if WestLB shows a sufficient year-end profit according to HGB⁽⁴⁾. In the case of a year-end loss, however, no remuneration will be paid and the silent participation will participate *pari passu* in the losses. Since the silent participation was injected, WestLB has either been loss-making (in 2009) or posted no year-end profits (in 2010) according to HGB. As a result, no remuneration has been paid to date and the silent participation has participated in the losses with approximately EUR 1 million.

ii) *The guarantees by the shareholders*

- (33) The establishment of the EAA involves a guarantee from the WestLB's shareholders to cover further losses incurred by the transferred assets. In fact, all losses by the EAA that go beyond the transferred capital must, pursuant to the FMStFG, be covered by the shareholders of WestLB and the FMSA.

- (34) To that end the shareholders of WestLB provided an explicit guarantee in the total amount of EUR 1 billion, divided between NRW (EUR 482 million), the savings banks associations (EUR 501 million), and LVR and LWL (EUR 17 million). Moreover, regarding any additional loss coverage WestLB's shareholders agreed to cap the obligation of RSGV and WLSGV for further loss compensation to an amount of EUR 4 billion. Taking into account the EUR 501 million guarantee given by the savings banks associations, the maximum loss participation of RSGV and WLSGV is therefore capped at EUR 4,5 billion. In order to raise the EUR 4 billion, RSGV and WLSGV are permitted to build up adequate reserves for that obligation over a period of

⁽¹⁾ The Phoenix Light portfolio essentially consists of structured securities, commercial papers, medium-term notes and income and capital notes of three investment vehicles: Greyhawk, Harrier, and Kestrel. The distribution of the EUR 23 billion portfolio by security type can be summarised as follows: EUR 11,7 billion US and European collateral debt obligations, EUR 5,5 billion commercial mortgages, EUR 4,3 billion residential mortgages, EUR 1,7 billion other. 80 % of the securities are AAA-rated, based on S&P ratings of 31 December 2007.

⁽²⁾ For details see the May 2009 Decision.

⁽³⁾ For details see the December 2009 Decision, OJ C 66, 17.3.2010, p. 24, which approved the measure for six months.

⁽⁴⁾ HGB is the abbreviation for *Handelsgesetzbuch*; it is the German GAAP.

25 years. Any losses exceeding both the equity of the EAA and the guarantees given will be borne by the FMSA and NRW ⁽¹⁾.

iii) *The first asset transfers*

(35) The transfer of the toxic and non-strategic assets (and liabilities) took place in two steps. In a first step, securities (in particular mezzanine notes and other structured securities) with a total book value of approximately EUR 6,2 billion and liabilities with a book value of approximately EUR 5,5 billion were transferred ⁽²⁾ to the EAA by way of a spin-off that was recorded in the commercial register on 23 December 2009. In a second step, the remainder of the ring-fenced portfolio was spun off or synthetically transferred to the EAA on 30 April 2010 ⁽³⁾.

(36) The transaction was structured in such a way that WestLB benefited from retroactive effects of the transfer. The book values of the securities transferred on 23 December 2009 were determined based on the effective spin-off date of 31 December 2008/1 January 2009, while the book values of the remainder of the portfolio transferred on 30 April 2010 were determined based on the effective spin-off date of 31 December 2009/1 January 2010.

(37) The portfolio covers assets with a notional amount of EUR 77 billion (book value as of 31 December 2009 of EUR 68,117 billion ⁽⁴⁾), containing a diverse range of lending products, plain vanilla bonds ⁽⁵⁾, structured securities and derivatives. The portfolio also includes grandfathered liabilities in the amount of EUR 22,1 billion (book value according to the "*Spaltungsvertrag*"). Three main types of assets were transferred into the EAA:

— the "*structured securities portfolio*", containing the EUR 22,9 billion "Phoenix" portfolio, the EUR 2,8

billion "European Super Senior" tranches portfolio and EUR 3,4 billion of other asset-backed securities (hereinafter called "ABS");

— the "*securities portfolio*", containing EUR 17,7 billion of bonds, some of which are hedged by credit default swaps (CDS) in so-called "negative basis trades" ⁽⁶⁾;

— the "*lending portfolio*" of loans and (off-balance-sheet) loan commitments with a total notional amount of around EUR 30,6 billion inherited from various activities and branches of WestLB.

In addition, the assets were partly swapped (an interest rate and/or currency swap being attached to the security or loan) and some outright CDS positions were transferred, constituting the derivative part of the portfolio.

(38) While some of the assets, their issuers, counterparts or submarkets could be categorised as impaired, for a significant portion that was not the case. Germany classified EUR 4,2 billion (around 6 % of all assets) as "liquid", implying they belonged to markets that are not impaired ⁽⁷⁾.

(39) At its inception, the capital of the EAA consisted of net assets totalling EUR 3,267 billion. Those assets were composed of EUR 3 billion in capital and EUR 267 million arising from an internal liability coming from credit-linked notes (CLNs) within the European Super Senior tranches portfolio.

(40) As regards the management of assets, the EAA signed a service agreement with WestLB for a period of three years. Under that agreement WestLB provides portfolio management services to the EAA whose main objective is to wind down over time the entire portfolio and to minimise risks. Initially WestLB has acted as an exclusive counterparty to the EAA for funding purposes and derivatives.

iv) *Asset valuation*

(41) Germany valued both parts of the ring-fenced portfolio, the first part with 30 September 2009 as a reference date and the second part with 31 March 2010 as a reference

⁽¹⁾ That risk assumption of NRW, RSGV and WLSGV is clearly displayed and publicly communicated in the EAA's first annual report, see annual report of EAA Erste Abwicklungsanstalt, financial year 2009/2010, p. 7.

⁽²⁾ In fact, different transfer paths were chosen for the designated positions, i.e. spin-off, sub-participation, guarantee and sale, in order to account for different laws, regulations and tax regimes of the respective countries and supervisory authorities. Regardless of the path chosen, the economic risk of the assets and liabilities passed from WestLB to the EAA in full.

⁽³⁾ See the letter of 22 February 2010 "PEG Master COB 31 Dec 2009" with updated, modified and extended versions up until 7 May 2010.

⁽⁴⁾ Approximately EUR 6 billion of that amount consists of EUR- and USD-denominated "mezzanine notes", which were transferred first. Germany refers to that first transfer often as the "Kleine Aida", as opposed to the remaining EUR 62 billion ("Große Aida").

⁽⁵⁾ A so-called plain vanilla bond is a bond with no unusual features, paying a fixed rate of interest and redeemable in full on maturity.

⁽⁶⁾ Negative Basis Trade means a position in which a trader buys a bond and buys credit default swap protection on the same issuer name, where the credit default swap spread (premium to be paid) is less than the bond spread. A negative basis is relatively rare to observe, and carries default risks against the credit protection seller.

⁽⁷⁾ Letter from Germany of 7 May 2010.

date (for an overview see Table 2). Germany stated that the real economic value (hereinafter called "REV") of the combined portfolios was EUR 62,727 billion, which is EUR 5,389 billion lower than their combined book values ⁽¹⁾. That calculation was confirmed both by Blackrock ⁽²⁾ and by Deutsche Bundesbank ⁽³⁾ to be sufficiently conservative. For the quantification of the amount of state aid involved, Germany deducted from the REV shortfall (EUR 5,389 billion) the EAA's initial capitalisation ⁽⁴⁾ (EUR 3,267 billion, that amount being the difference between book values of assets and liabilities) and thereby arrived at the amount of EUR 2,123 billion as the net difference between the transfer value and the REV.

- (42) Like Germany, the Commission focused on the net difference between transfer values and REV's of assets and liabilities transferred (hereinafter called the "transfer delta") for its calculation of the amount of state aid involved.
- (43) The Commission reviewed the valuation submitted by Germany, making use of external experts, namely Société Générale, Bangert Research and Professor Wim Schoutens. The outcome of that review, which is described in detail in the November 2010 Decision ⁽⁵⁾,

led to the conclusion that, when adopting a prudent view, the transfer delta is EUR 1,606 billion higher than that stated by Germany (EUR 5,389 billion). In other words the REV is EUR 6,949 billion below the transfer value ⁽⁶⁾. The experts found, mainly at the sub-portfolio level, differences in the REV assessment of certain bonds (for the entire securities portfolio about EUR 600 million) due to a diverging assessment as to the impairment of those markets. For instance, contrary to WestLB, the experts considered several vanilla bond markets to be functioning markets so that the market value was considered to be the REV. Secondly, differences were found regarding the loans WestLB had transferred (in the entire lending portfolio of EUR 1 billion), on the basis of serious discrepancies in its loss-given-default (LGD) assessment. Large differences were also found in certain sub-categories of the structured securities portfolio but their net effect seemed to even out.

- (44) Germany further submitted potential mitigating factors and arguments to show that the transfer delta was less than zero.

The following Table taken from the November 2010 Decision summarises the findings per sub-portfolio.

Table 2

Findings regarding the first asset transfer as indicated in the November 2010 Decision

				Germany's Position		Commission's Position
Portfolio of Assets being transferred		Dec Book Value (TV)	WestLB Dec REV "inferred"	WestLB Dec REV - TV "inferred"	EU expert Dec REV estimate	EU expert Dec REV-TV estimate
Structured Securities' Portfolio	Phoenix	22 764	20 323	(2 441)	19 786	(2 978)
	European Super Seniors	2 918	1 751	(1 167)	2 276	(642)
	Other ABS	3 188	3 182	(6)	3 178	(10)
Securities' Portfolio	Bonds	16 501	16 323	(178)	15 762	(739)
	Banque D'Orsay Portfolio	2 749	2 733	(16)	2 770	21
	CDS & Derivatives	(65)	(45)	20	(102)	(37)

⁽¹⁾ Letter from Germany of 8 July 2010.

⁽²⁾ Interim Reports by Blackrock and the "Finale Version inklusive aller Hauptportfolio Aktiva" by Blackrock dated 12 May 2010, received by the Commission on 18 May 2010.

⁽³⁾ Letter from Germany of 16 June 2010.

⁽⁴⁾ According to Germany's comment submitted on 22 December 2010, the EAA's initial seed capital in cash amounted to only EUR 100 000. The majority of equity resulted from the split-off.

⁽⁵⁾ The experts have elaborated at length their methodology to arrive at an REV for each of the assets in their final report. For a detailed description of all findings see the Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 16, recitals 37 et seq.

⁽⁶⁾ For certain sub-portfolios, such as the European Super Senior ABS tranches, the Commission's experts took a less conservative view than WestLB itself. If they had always used WestLB's own assessment as the maximum value, the total difference would have been EUR 573 million higher.

				Germany's Position		Commission's Position
Portfolio of Assets being transferred		Dec Book Value (TV)	WestLB Dec REV "inferred"	WestLB Dec REV - TV "inferred"	EU expert Dec REV estimate	EU expert Dec REV-TV estimate
Lending Products	Drawn Positions	20 061	18 666	(1 395)	17 807	(2 254)
	Undrawn Commitments	—	(205)	(205)	(310)	(310)
Total		68 116	62 727	(5 389)	61 167	(6 949)
Source		22-Feb-10	8-Jul-10	8-Jul-10	23-Sep-10	23-Sep-10
Mitigation factors						
Capital of the EAA (difference between transfer values of assets and liabilities)				3 267		3 267
Transfer of Grandfathered Liabilities				882		not applicable
Future cash flows of transferred portfolio				880		not applicable
Transfer of Credit Linked Notes				268		268
Adjustment for undrawn committed lines				205		not applicable
Adjustment for discounting expected losses				75		not applicable
Total "Transfer Delta" = Transfer Price - REV - Mitigation				– 188		3 414

c. THE THIRD SET OF MEASURES – THE LIQUIDATION MEASURES

- (45) The June 2011 restructuring plan sets out an orderly winding down of WestLB for which a number of additional support measures will be required. Germany envisages the transfer of the remaining assets and liabilities of WestLB to the EAA; the replacement of capital, assumption of operating costs and liquidation costs for WestLB or its renamed successor (hereinafter called "SPM bank") as the case may be; and appropriate measures to ensure liquidity during the transformation phase.

i) *The second asset transfer to the EAA*

- (46) The June 2011 restructuring plan provides for an additional transfer of all remaining assets and liabilities, including risk-bearing off-balance sheet items and derivatives, from WestLB to the EAA (hereinafter called the "second asset transfer"). All those assets and liabilities of WestLB that have neither been sold to third parties nor became part of the Verbundbank will be taken over by the EAA by 30 June 2012⁽¹⁾. After the transfer

WestLB will no longer hold banking assets at its own risk (except for investments related to SPM bank's equity).

- (47) The overall portfolio has been discussed with the Commission and thereafter been submitted by the Germany on the basis of detailed figures, which can be summarised as follows:

Table 3

Findings regarding the second asset transfer (billion EUR)

Portfolio ⁽¹⁾	HGB book value	Portfolio market values	Difference
Assets	[120-150] (*)	[120-150]	[0,8-1,3]
Liabilities	[120-150]	[120-150]	[0,2-0,5]
Total			[1,0-1,8]

(¹) Including Verbundbank assets and liabilities. The values take hedge accounting effects according to HGB into account.

(*) Confidential information

(¹) The technical part of the transfer may take place after 30 June 2012. The replenishment will be based on the principles set out in applicable legal framework in the FMStFG, which allows for such subsequent replenishment of the EAA. In order for the FMSA to authorise a replenishment there must be, among other things, disclosure of all risks inherent to the assets and liabilities and a detailed wind-up plan for the transferred assets. The portfolios for the Verbundbank and the second asset transfer to the EAA will be ultimately disclosed in the half-year financial statements of WestLB on 30 June 2012 and will be legally or at least economically transferred immediately thereafter.

- (48) As regards the market values of the assets and liabilities which will be the subject matter of the second asset transfer to the EAA, Germany has stated that their respective market values, if assessed on an individual basis, are higher than those indicated in Table 3. Germany has in particular set out that the individual market values of the assets added up to EUR [120-150] billion, and those of the liabilities to EUR [120-150] billion. Germany argues that WestLB's remaining

portfolio has already been cleaned by the first asset transfer and only contains assets that are priced at recoverable values. In particular, Germany confirmed that the portfolio only contains securities and derivatives that were priced at their respective market values or loans and other financial instruments for which no established markets exist and that were hence priced on a Discounted Cash Flow method. The portfolio contains only a very limited amount of assets (less than EUR 1 billion) that would classify as international public finance or international sovereigns.

(49) However, after discussion with the Commission Germany submitted that for some parts of the portfolio, i.e. the loan portfolio and similar illiquid assets of approximately EUR [40-70] billion, a portfolio effect has to be taken into consideration, in view of the sheer size of the overall portfolio. If WestLB actually had to sell the whole portfolio on the market before 30 June 2012, excessive supply would push down the individual market values. In that case, based on the information received, Germany submitted that the portfolio market values should be calculated by discounting the individual market values by [2-5] %.

(50) According to the June 2011 restructuring plan, the second asset transfer to the EAA may include assets from WestImmo, which will transfer assets to the EAA in order to improve its own marketability. WestImmo will continue only business that is eligible for German covered bonds (*Pfandbriefe*) under the name "Pfandbriefbank" (that being a preliminary working title). In order to implement that concept, a large part of WestImmo's asset and liabilities may be carved out and transferred to the EAA in the first half of 2012. The carve-out portfolio will amount to approximately EUR [5-10] billion, including – on a sub-portfolio level – an unsecured commercial real estate portfolio, a portfolio with assets in Japan, and a bond and retail mortgage loan portfolio of EUR [2-4] billion that has already been transferred to the EAA synthetically in the context of the first transfer and is currently used as collateral in the covered bonds pool. After the transfer WestImmo will be a much smaller bank holding assets of approximately EUR [16-23] billion at inception. If WestImmo cannot be sold by 30 June 2012 those remaining assets will also be transferred to the EAA. They have therefore to be considered in addition to the amount identified in recital 51.

(51) In detail, the carve-out portfolio which has been discussed with the Commission and thereafter been submitted by Germany on the basis of detailed figures, can be summarised as follows.

Table 4

Valuation of WestImmo assets of the carve-out portfolio (billion EUR)

Portfolio	HGB book values	Market values	Difference
International Real Est.	[3,5-4,0]	[3,0-4,0]	[0,1-0,4]
German Real Estate	[1,1-1,6]	[1,1-1,6]	[0,01-0,05]
FI Portfolio	[0,7-1,3]	[0,5-1,25]	[0,1-0,3]
Total	[5,3-6,9]	[4,6-6,85]	[[0,3-0,8]

(52) Germany submitted a detailed explanation of why the valuation of the assets in the WestImmo carve-out portfolio should be considered to be sufficiently prudent. It claimed that 1) about one third of the portfolio consists of short-term positions; 2) the underlying collaterals structure is solid; and 3) the collateral valuation has been recent.

(53) Moreover, WestLB intends to sell the WestImmo Pfandbriefbank before 30 June 2012. However, if that proposed sale does not occur, the complete assets and liabilities of WestImmo would need to be transferred to the EAA. The estimated risk-adjusted book value (including the carve-out portfolio) is EUR [20-26] billion as of June 2011. That portfolio consists mainly of commercial real estate and retail mortgages. Germany submits that large parts of the initial portfolio has already been covered by the selection procedure for the first asset transfer so that the remaining part is clean and thus has a market value equal to the book value. Moreover, the commercial real estate portfolio is mainly used for issuing covered bonds and thus has a market value that is sufficient to match the transfer value.

(54) Finally, Germany submits that for the transfer of the WestImmo assets and the second transfer of assets from WestLB, their REV should be equal to their transfer values.

ii) The additional capital instrument for SPM bank

(55) Pursuant to the *Eckpunktevereinbarung* NRW will take full ownership of and responsibility for WestLB as of 30 June 2012. Because WestLB will pay back to SoFFin EUR 1 billion of SoFFin's silent participation in WestLB in the course of the restructuring, that part of the capital will need to be replaced. NRW has committed to provide

an additional capital instrument in line with the *Eckpunktvereinbarung* ⁽¹⁾ in the amount of EUR 1 billion for that purpose (hereinafter called "the additional capital instrument for SPM bank").

iii) **Assumption of further operating costs and liquidation costs of SPM bank**

- (56) The June 2011 restructuring plan sets out two different business cases for WestLB/SPM bank, one for a scenario that is described as base case, the other for a scenario that is described as bad case. The base case estimates that overall losses for operating and liquidating SPM bank over a five-year period (*Transformationskosten*), including the assumption of pension liabilities, will amount to EUR [3-6] billion. The bad case, which is based on different assumptions regarding staff reductions, the amount of depreciation required on buildings and IT investments, pension liabilities, and other exit costs, estimates that total losses over the five-year period will amount to EUR [4-7] billion. NRW takes full ownership of and responsibility for WestLB. Both the base case and the bad case scenario imply that the EUR 1 billion capital instrument provided by NRW will be consumed. In the bad case scenario NRW would have to provide additional funds, in line with the *Eckpunktvereinbarung*.

iv) **Commitment to provide liquidity support during the restructuring period**

- (57) The June 2011 restructuring plans also sets out that current liquidity is to be maintained during the restructuring period by the savings banks, NRW and the EAA. If additional liquidity support is necessary during the restructuring period until 30 June 2012, WestLB, its shareholders, and the EAA will in line with the *Eckpunktvereinbarung* agree upon suitable measures for the provision of liquidity during the transformation phase. According to information submitted by Germany on 1 December 2011, the use of the additional liquidity assistance [...] in the case of a stress scenario.

3. RESTRUCTURING PLANS

a. INTRODUCTION

- (58) Germany has submitted several restructuring plans to the Commission that have dealt with different state aid

measures and different restructuring concepts. A first set of documents, which covered only the EUR 5 billion risk shield, resulted in the April 2009 restructuring plan ⁽²⁾.

- (59) The two key elements of the April 2009 restructuring plan ⁽³⁾ were a reduction of the balance sheet of WestLB from EUR 250 billion to EUR 125 billion (including the divestiture of several assets such as WestImmo) and the refocusing and de-risking of all activities, followed by a sale of WestLB in an open, transparent and non-discriminatory tendering procedure. If such a sale was not achieved, WestLB would have to stop new business after 2011. Although WestLB's shareholders mandated a divestiture trustee as well as an investment bank with the sales process and publically launched a tender for WestLB on 30 September 2010, the tender procedure did not result in offers that WestLB's shareholders considered acceptable from an economic point of view.
- (60) New restructuring plans were submitted in December 2009 ⁽⁴⁾ and February 2011. The February 2011 restructuring plan indicated a further downsizing of the bank to a balance sheet of about EUR 80 billion but no claw back payments. A final restructuring plan was notified in June 2011. Germany has explicitly confirmed that the February 2011 restructuring plan has been withdrawn. In the present Decision only the June 2011 restructuring plan will therefore be examined.

b. THE JUNE 2011 RESTRUCTURING PLAN

- (61) The June 2011 restructuring plan is based on four key elements:
- (a) in the course of 2011 and before 30 June 2012 at the latest, the so-called Verbundbank activities – i.e. those business activities that are focused on cooperation with the regional savings banks – will be carved out in order to accommodate the resulting Verbundbank in the network of the savings banks. Helaba has indicated its willingness to take over the Verbundbank;
- (b) sales efforts for all other parts of WestLB will be continued as long as a sales agreement is possible before 30 June 2012;

⁽¹⁾ "Das Land NRW tritt im Gegenzug mit EUR 1 Mrd. zusätzlicher und möglichst nachrangiger Haftung in die WestLB ein. Die zusätzliche Haftung des Landes NRW entsteht an derjenigen Rangstelle in der SPM Bank, die mindestens erforderlich ist, um die aufsichtsrechtlichen Anforderungen in der SPM Bank mit Blick auf die Teilrückzahlung der Stillen Einlage des FMS zu erfüllen."

⁽²⁾ For details see the Commission Decision of 12 May 2009 in case C 43/2008, *Restructuring of WestLB AG*, OJ L 345, 23.12.2009, recitals 28 to 43.

⁽³⁾ See the Commission Decision of 12 May 2009 in case C 43/2008, *Restructuring of WestLB AG*, OJ L 345, 23.12.2009, recitals 34 et seq.

⁽⁴⁾ For details see the Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, recitals 55 et seq.

(c) on 30 June 2012 the EEA will take over those portfolios which have not been assigned to the Verbundbank, have not been taken over by the members of the savings banks finance group and have not been sold by 30 June 2012 by WestLB to third parties, and after 30 June 2012 WestLB will not engage in new banking business (except for business in connection with asset management) and will be transformed into a servicing platform including a run-down vehicle that holds legacy positions

commercially transferred to or hedged by the EEA, that deals with redundancies, and provides asset management services (called SPM bank);

(d) a part of SPM bank (hereinafter called "the servicing company") that provides asset management services to the EEA, the Verbundbank and third parties will be hived off.

(62) The plan can roughly be summarised as follows:

Table 5

Basic structure targeted by the June 2011 restructuring plan

Current structure < 30 June 2011	Target structure > 30 June 2012
WestLB Balance sheet size: EUR 160 billion RWA: 88,5 billion (in 2008, see table 1) Equity: EUR 4 billion Employees: 4 400 shareholder: NRW 48 %, regions 2 %, Savings banks: 50 %	SPM bank holding Balance sheet size: tbc (assets synthetically transferred to EAA) RWA: < 1 billion Employees: 4 400, < 400 in 2016 either in holding or operating company Equity: [...] Shareholder: NRW 100 %
WestImmo and other subsidiaries of WestLB	➔ Subsidiary = SPM operating company Balance sheet size: tbc (assets synthetically transferred to EAA) Employees: see holding
	➔ Subsidiary = SPM servicing company Balance sheet size: EUR < 1 billion Employees: max 1 000 in 2016 To be sold by 2016
	Transfer of the Verbundbank to Helaba Balance sheet size: EUR 40-45 billion Equity: EUR 1 billion by savings banks Employees: ~ 400 shareholder: transfer to Helaba
	Sale of assets by 30 June 2012 In particular WestImmo (Pfandbriefbank) Balance sheet size WestImmo: EUR [16-23] billion
EAA – bad bank as of April 2010 Nominal volume: EUR 77,5 billion (October 2011: 53) Equity: EUR 3 billion Stakeholders: NRW 48 %, regions 2 %, savings banks associations 50 %	EAA (replenished) – the bad bank Balance sheet size: ~ EUR [100-250] billion Equity: Equity as of 06/2012 plus additional capital for the loss-free round-down of the assets transferred on 30.6.2012 Stakeholders: NRW 48 %, regions 2 %, savings banks associations 50 %

i) **Verbundbank**

- (63) The Verbundbank business activities will be carved out to form an entity that is merged with another bank. During the procedure leading to the adoption of the present Decision, the savings banks have given up their earlier intention to establish a new bank on a stand-alone basis. The Verbundbank will act as a service provider and central bank to savings banks in NRW and Brandenburg, and employ approximately 400 former employees of WestLB. It may for a transitional period contract some services provided by WestLB/SPM bank.
- (64) The Verbundbank will have a low risk business model. It will offer services and products to the savings banks and their clients, to medium-sized corporates, and to public entities and institutional clients. Its products will mainly comprise corporate finance and plain vanilla capital market activities. Amongst the key financial figures of the Verbundbank are risk-weighted assets in the amount of EUR 8,3 billion and a balance sheet total in the range of EUR 40 to EUR 45 billion. At inception the Verbundbank will be equipped with capital of EUR 1 billion in order to have a regulatory equity ratio of 12 %. The capital will be provided by the savings banks associations in NRW (50 %) and the savings banks association at national level (DSGV – 50 %) ⁽¹⁾. Its liabilities will consist of deposits by savings banks, bonds and covered bonds as well as deposits from institutional investors. The major part of the funding will be provided through members of the savings banks finance group.
- (65) After submission of the June 2011 restructuring plan Landesbank Helaba indicated its readiness to take over the Verbundbank activities. On 12 December 2011 Helaba in principle concluded positively on a due diligence of a selected portfolio of assets and liabilities from WestLB and reiterated its willingness to take over the Verbundbank by mandating its executive board to enter into concrete negotiations on the integration of Verbundbank business ⁽²⁾. An integration of the Verbundbank into either Helaba or the savings banks sector was organised by the savings banks associations after it had become evident that the profitability of the Verbundbank – if run on a stand-alone basis – could be expected to be rather low, with a return on equity ranging from [2.0-3.0]% to [4.0-5.0]%. Reduced overhead costs and synergies stemming from the integration of the Verbundbank activities into Helaba or the savings banks sector would improve the expected profitability and bring it to an acceptable level.

ii) **Sale or transfer of assets**

- (66) As regards those parts of WestLB that do not qualify for the Verbundbank carve-out, the June 2011 restructuring plan sets out that as many parts as possible will be sold by 30 June 2012 (signing of the contracts). That process has been synchronised with the ongoing sales activities which had already been initiated to comply with the conditions of the May 2009 Decision. [...].
- (67) WestLB put up for sale larger entities such as the Corporates & Structured Finance and Capital Markets divisions which are WestLB's key revenue drivers, including smaller entities such as the Corporates, Structured Finance, Equity Markets, Debt Markets and Custodian Services business units, which can all be bought along with their respective electronic data processing systems and infrastructure, if required.
- (68) WestLB will evaluate offers based on a range of criteria, including the sales price and respective adjustment clauses, the effects of a sale on WestLB's balance sheet and profit & loss statement, the soundness of the offers as regards, for example, financing concepts and transaction experience of the buyer, legal aspects of a transaction, and the replenishment of the EAA.
- (69) On 30 June 2012 all of WestLB's assets and liabilities that have not yet been sold or have not been transferred to the Verbundbank will be transferred to the EAA. The applicable legal framework ⁽³⁾ allows for a subsequent replenishment of the EAA, provided that – among other things – sufficient equity is available, all inherent risks of the assets are disclosed and a detailed wind-down plan has been submitted.
- (70) The transfer methods for the second asset transfer will follow those which were already applied in December 2009 and April 2010 when the first two tranches of WestLB's first asset transfer were transferred to the EAA. Again, the split-off will be the preferred transfer method, and only if other appropriate transfer methods such as sale or sub-participation are not legally or technically possible or entail commercially unreasonable risks will a physical transfer be replaced by a synthetic transfer of underlying risks.
- (71) The aim of the transfer is to ensure that WestLB or SPM bank, as the case may be, will not engage in new banking

⁽¹⁾ If the Verbundbank is taken over by Helaba, the savings banks associations will thus become shareholders in Helaba.

⁽²⁾ Joint press release of 12.12.2011 by the State of Hessen, the State of Thuringia and the savings banks association of Hessen and Thuringia "Board of owners gives the green light".

⁽³⁾ FMStFG §8a.

business (except for business written in connection with its servicing activities) and will no longer be exposed to any credit or market risk on own account to be covered by a regulatory minimum of equity on the basis of the currently applicable regulatory framework ⁽¹⁾.

- (72) As regards the valuation of assets and liabilities, the transfer will take place at risk-adequate book values, meaning [...].

iii) **SPM bank**

- (73) After 30 June 2012 WestLB will not engage in new banking business (except for business written in connection with its servicing activities) and will give up its brand name WestLB and be rebranded SPM bank (preliminary working title). WestLB will be transformed into a unit which for winding down purposes holds legacy positions commercially transferred to the EAA and takes care of the remaining staff, and a servicing platform which will only provide asset management services.

- (74) [...].

- (75) Essentially SPM bank will become a holding company (hereinafter called "SPM bank holding") that is planned to have two subsidiaries, SPM Betriebsgesellschaft and SPM Servicegesellschaft, a servicing company (hereinafter called "the servicing company").

- (76) Assets that can not be physically transferred to the EAA for tax, legal or regulatory reasons will only be synthetically transferred. Such assets will be held on the balance sheets of SPM bank holding or of SPM Betriebsgesellschaft, but not of SPM Servicegesellschaft.

- (77) After completion of the replenishment, WestLB or SPM bank, as the case may be, will not hold any risk-weighted assets for credit and market risks ⁽²⁾ and only a comparatively small amount of risk-weighted assets in order to cover regulatory capital requirements for purely operational risks (less than EUR 1 billion, if calculated on a Basic Indicator Approach) ⁽³⁾.

⁽¹⁾ The scenario ignores potential risk-weighted assets under Basel II.5 and Basel III.

⁽²⁾ The scenario ignores potential risk weighted assets under Basel II.5 and Basel III.

⁽³⁾ The requirement to hold risk-weighted assets in order to cover regulatory capital requirements for purely operational risks is laid down in the Solvabilitätsverordnung. The coverage for operational risks cannot be transferred to another entity. WestLB currently makes use of an Advanced Measurement Approach (AMA) in order to calculate the required amount of RWAs for its operational risks; due to the fundamental differences between the business model of WestLB and that of SPM bank, it is intended to change the calculation method from a sophisticated AMA approach back to a Basic Indicator Approach, which, however, needs to be approved by the regulatory supervisor.

- (78) SPM Betriebsgesellschaft will hold the remaining pension obligations towards WestLB's current and former employees. The main task of SPM holding/SPM Betriebsgesellschaft will be to reduce staff from the current level of approximately 4 400 employees to 1 400 in 2016, of which 1 000 will be in the servicing company, and to shut down dispensable locations and systems. SPM Betriebsgesellschaft will provide only basic non-core services, e.g. maintenance of buildings and offices.

- (79) The servicing company will be spun off between 1 January 2012 and 31 December 2014 to provide asset management services for WestLB's remaining assets and liabilities. The fact that portfolios of assets have been transferred to the EAA (and the Verbundbank) creates a need for asset management services, as neither the EAA nor the Verbundbank can carry out the servicing of the portfolios on their own. The servicing company will offer those services to the EAA (and the Verbundbank) at usual commercial rates. All limitations on the business model of the servicing company (see also recitals 80 to 85) will end after the sale of the servicing company.

- (80) SPM holding or its subsidiaries will hold all banking licences that are still required for their activities. Germany commits that the scope and the number of banking licences is, however, restricted to the minimum necessary for the provision of asset management services.

- (81) Significant parts of the EAA portfolios are and will have to remain booked in overseas branches. As of 31 October 2011, WestLB had exposures in New York of approximately EUR [5-15] billion, in London of approximately EUR [15-25] billion, and in Asia of approximately EUR [5-10] billion. A physical transfer to the EAA of those portfolios was in the context of the first asset transfer for tax, legal or regulatory reasons either not possible or economically unreasonable and therefore could only happen synthetically. Those assets will be held by SPM holding or SPM Betriebsgesellschaft, partly in overseas branches or subsidiaries. Germany explains that overseas branches or subsidiaries cannot immediately be closed, but commits that SPM holding or SPM Betriebsgesellschaft will close all overseas branches or subsidiaries before the end of 2016, unless the closure is prevented by reasons of bank regulatory requirements.

- (82) Moreover, the servicing company will need to adequately service those portfolios. In order to preserve know-how for asset management, the servicing company will run a branch in New York, in London, and in one location in Asia. Approximately one-third of the employees expected to work for the servicing company will work in one of the overseas branches. The Commission thus understands that after a sale of the servicing company, SPM bank will

after 2016 no longer have any overseas branches or subsidiaries, unless individual closures are prevented by reasons of bank regulatory requirements.

the June 2011 restructuring plan until 31 December 2016, unless the Verbundbank is merged with another Landesbank before 31 December 2016.

(83) The servicing company will not only to be spun off but will also be sold subsequently, by 2016 at the latest. In order to facilitate the sale of the servicing company, SPM bank may during the period from 2012 and 2014 enter into contracts for the provision of asset management services for portfolios of third parties, i.e. portfolios that are not related to former portfolios of WestLB. The proceeds from those activities, however, must not exceed [40-60]% of the total gross revenues of the servicing company. That limitation will end after the sale of the servicing company.

— Germany commits that NRW will in future not buy any shares of the Verbundbank or provide any other form of financial support to it.

— Germany commits that a stand-alone spin-off of the Verbundbank will no longer be pursued and that the Verbundbank's assets and liabilities will be taken over by the savings banks sector before 30 June 2012.

(84) The servicing company is expected to generate a moderate return on sales of approximately [8-12]% which should be just sufficient to enable its marketability⁽¹⁾. The profit-and-loss calculation on which the profitability of the servicing company was assessed points out that until 2016 significant cost cuttings have to be achieved⁽²⁾.

— Germany commits that all parties will implement the obligations resulting from the *Eckpunktevereinbarung* without modification or delay, so that, based particularly on the subject of the transaction and the assessment that the entity has a company value of zero, sufficient transaction security is ensured and the disposal of the Verbundbank takes place by 30 June 2012t.

(85) If, however, SPM bank does not sell the servicing company by 31 December 2016, Germany commits that the servicing company will be wound down. In that case all existing contractual obligations will be terminated by 31 December 2017, which is the final date for the phase-out period of the servicing company (if not sold).

— Germany commits that Landesbank Hessen-Thüringen (Helaba) intends, in the event of a favourable outcome to the due diligence, to be available to take over the Verbundbank

4. COMMITMENTS BY GERMANY

(86) In addition to the June 2011 restructuring plan Germany has submitted a catalogue of commitments (see the Annex to the present Decision), which can be summarised as follows:

a) BRAND NAME

— As regards the brand name WestLB, Germany commits that the brand name WestLB will no longer be used after 30 June 2012 (a three-month grace period may apply if it proves necessary for technical reasons).

b) VERBUNDBANK

— Germany commits that the Verbundbank's business activities are restricted to what has been listed in

c) SPM BANK

— Germany commits that SPM bank will limit its activities to the following services:

i) Servicing of portfolios of the EAA, the Verbundbank and third parties, if needed, including workout management, clearing of securities, processing and utilization, credit evaluation, credit management and credit surveillance, credit risk controlling, regulatory reporting, management of collaterals of corporates including the respective data management, management of market risks, IT and back-office services, funding, hedging, cash-management, financial reporting, controlling, compliance, and management of participations.

ii) In the case of assets that have been transferred synthetically to the EAA, the EEA can as part of its winding down strategy also carry out, in particular, extensions, sales or securitisations of such assets; in these cases SPM bank will operate only on behalf and by order of the EAA⁽³⁾.

⁽¹⁾ According to the information that Germany provided on 21 November 2011.

⁽²⁾ In particular [...] has to be adjusted in order to achieve the required competitiveness.

⁽³⁾ The Commission understands that point (a) will be performed by the servicing company while SPM bank will serve as a holder and counterparty for the assets of the EAA that have only been synthetically transferred.

— Germany has provided a description of required banking licences and a commitment that all other banking licences will be returned by 31 December 2012.

— Germany commits that in SPM bank the workforce will be reduced from the current level of 4 400 to 1 000 in the servicing company in 2016. Indicative numbers have been given for the targeted staff counts in the course of that reduction.

— Germany commits that SPM bank will respect certain conditions when it offers services to third parties. The volume of third party business must not exceed [40-60]% of its total gross revenues. Third party contracts will only be provided by a separate entity (the servicing company that will have to be carved out) which will hold a banking licence limited to the minimum required.

— Germany commits that the servicing company will be sold by 31 December 2016. Third party contracts with maturities that extend beyond 2017 are permitted if the contract provides the client with a termination right for capacity reasons (with effect as of 31 December 2017).

— If the sale of the servicing company does not take place by the due date, Germany will ensure that with effect from 31 December 2017 all activities of the servicing company will be stopped or transferred. If the sale of the servicing company is successful all limitations on the business activities of the servicing company will be lifted.

— Germany commits that the following services will, in particular, not be provided by SPM bank: proprietary trading, emission of certificates of all kinds, project finance and trade financing, asset-based finance, securitisations and syndicated loans, and international corporate banking. For synthetically transferred assets guaranteed by the EAA, SPM bank is the lender of record, which may require SPM bank to extend loans, to sell loans or perform securitisations, but it may only do so if those actions are requested by the EAA.

— Germany commits that SPM bank will offer its asset management services only at fair market prices, and that the rates offered will be sufficient to cover the full costs of the servicing company.

— Germany commits that SPM bank will after 2016 no longer have any overseas branches or subsidiaries, unless individual closures are prevented by reasons of bank regulatory requirements. However, the

servicing company may have one overseas branch in London, one in New York and a third in Asia in order to have local expertise at its disposal, to cover time zones, to reduce operational risks and to be capable of competing.

— Germany commits that SPM bank will be part of the monitoring by a trustee.

d) EAA

— Germany commits that, after an extension and prolongation of the EAA service contract until 31 December 2016, the EEA will procure its required asset management services in line with the commitment on commercial pricing and by way of a public tender.

e) MONITORING

— Germany commits to supply detailed quarterly reports to the Commission on the measures taken on the basis of an understanding reached between the Commission and Germany on 16 December 2011.

III. OPENING OF THE FORMAL INVESTIGATION UNDER ARTICLE 108(2) TFEU

1. THE DECEMBER 2009 DECISION

(87) With the December 2009 Decision, the Commission had raised doubts under Article 108(2) TFEU regarding the compatibility of the asset relief measures examined in that decision with the communication from the Commission on the treatment of impaired assets in the Community banking sector⁽¹⁾ (hereinafter called “the Impaired Assets Communication”). Moreover, in the Commission’s opinion, the restoration of viability, adequate burden-sharing and the mitigation of distortion of competition caused by the (additional) aid had not been convincingly demonstrated in line with the Commission communication on the return to viability and the assessment of the restructuring measures in the financial sector in the current crisis under the State aid rules⁽²⁾ (hereinafter called “the Restructuring Communication”).

(88) The Commission indicated that it was not only investigating the new aid stemming from the transfer of assets into the EAA but also had to reconsider the aid authorised under the May 2009 Decision⁽³⁾.

⁽¹⁾ OJ C 72, 26.3.2009, p. 1.

⁽²⁾ OJ C 195, 19.8.2009, p. 9.

⁽³⁾ See the Commission Decision of 22 December 2009 in case C 40/09 (ex-N 555/09), *Additional aid for WestLB AG related to spin-off of assets*, OJ C 66, 17.3.2010, p. 15, recital 71.

(89) The Commission also indicated doubts regarding an adequate own contribution of the savings banks, considering that the savings banks' obligations stemming from the asset relief measure were capped and that the capital necessary to establish the EAA was raised only from Germany but not from the savings banks ⁽¹⁾.

(90) Germany was required to provide a revised restructuring plan taking into account the full amount of state aid granted, comprising adequate remuneration and additional in-depth restructuring.

2. THE NOVEMBER 2010 DECISION

(91) By the November 2010 Decision the Commission extended the procedure because of increased doubts regarding the compatibility of the first asset transfer with the Impaired Assets Communication and the compatibility of the December 2009 restructuring plan, which failed to demonstrate that it is apt to restore the viability of the beneficiary as well as to ensure adequate burden-sharing and mitigate the distortions of competition caused by the aid.

(92) In particular regarding the first asset transfer the Commission raised doubts regarding the eligibility of the impaired assets. It concluded on the existence of state aid and the amount of aid and assessed the amounts as being such that the aid would be incompatible with the Impaired Assets Communication if not clawed back or made up through additional restructuring pursuant to point 41 of the Impaired Assets Communication.

(93) In the November 2010 Decision, the Commission considered the aid amount attributable to the first asset transfer to be around EUR 6,9 billion, as established by its experts. That amount is calculated as the difference between the transfer value and the market value of the assets (around EUR 11 billion) ⁽²⁾, corrected by the initial equity provided to the EAA (around EUR 3,3 billion) ⁽³⁾, by the book values of certain credit-linked notes (around

EUR 0,3 billion) ⁽⁴⁾, and by a deduction for the transfer of grandfathered liabilities (around EUR 0,9 billion) ⁽⁵⁾.

(94) The Commission further endorsed the transfer delta as found by its experts, i.e., the net difference between transfer values and REV's of assets and liabilities. It considered that the transfer delta amounts to EUR 3.4 billion, once equity and credit factors are corrected for ⁽⁶⁾. Regarding the securities portfolio the Commission noted that in order to find the claimed asset classes to be impaired ⁽⁷⁾, further evidence would have been needed to conclude that markets for those assets would indeed have been dysfunctional, in absence of any buyers and sellers. Moreover, on the basis of its decision-making practice it agreed with the experts that the discount factors that WestLB had applied to establish the REV were too low, resulting in an excessively high end result for the REV. The Commission further concurred with the experts' finding that, due to insufficiently conservative LGD assumptions, the REV of the lending portfolio was around EUR 1,0 billion below WestLB's estimate. The Commission noted that the figures were compared at sector level in line with the Commission's decision-making practice ⁽⁸⁾. Furthermore the Commission reconsidered other mitigating factors submitted but decided that there was no basis to take them into account for the REV assessment.

(95) Moreover, the Commission expressed doubts as to the management of the impaired assets as they were still administered by WestLB. Furthermore, the Commission deduced from the fact that the EAA had recorded a loss of EUR 1 billion shortly after its establishment that losses could have already been incurred at the date of the

⁽¹⁾ See the Commission Decision of 22 December 2009 in case C 40/09 (ex-N 555/09), *Additional aid for WestLB AG related to spin-off of assets*, OJ C 66, 17.3.2010, p. 15, recital 76.

⁽²⁾ Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9, recital 74.

⁽³⁾ Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9, recital 90.

⁽⁴⁾ Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9, recital 91.

⁽⁵⁾ Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9, recital 98. EUR 6,6 billion as EUR (11,0 billion – 3,3 billion – 0,3 billion – 0,9 billion), accounting for a rounding error of EUR 0,1 billion. That calculation was not made explicitly in the November 2010 Decision and the assessment of the total aid amount was not made. Since then, on the basis of the final expert report, a more accurate assessment of the transferred portfolio market value was made.

⁽⁶⁾ Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9, recital 93.

⁽⁷⁾ "Impaired assets" is not meant in its strict accounting sense, but refers to assets belonging to a dysfunctional (impaired) market, where because of the absence of willing buyers and sellers, market prices do not relate to a long-term prudently assessed real economic value.

⁽⁸⁾ Commission Decision of 17 December 2009 in case N422/2009, *Royal Bank of Scotland*, OJ C 119, 7.5.2010, p. 1, Commission Decisions of 26 February 2010 in case N725/2009, *NAMA*, OJ C 94, 14.4.2010, p. 10, and of 3 August 2010 in case N331/2010, *Valuation of Assets under NAMA*, OJ C 37, 5.2.2011, p. 3.

transfer. That caused doubts as to whether the relevant assets fell within the scope of point 32 of the Impaired Assets Communication.

- (96) Germany was again required to provide a revised restructuring plan taking into account the additional aid granted to WestLB and dealing with the shortcomings indicated in that decision.

IV. POSITION OF GERMANY

- (97) Germany does not dispute that the measures constitute state aid within the meaning of Article 107(1) TFEU.

1. REGARDING THE FIRST ASSET TRANSFER TO THE EAA

- (98) Germany disputes some findings regarding the first asset transfer to the EAA.

a. APPLICABILITY OF THE IMPAIRED ASSETS COMMUNICATION

- (99) First, Germany reiterates its position of 2 February 2010, claiming that the Impaired Assets Communication is not applicable to the first asset transfer to the EAA. Germany argues that WestLB is in fact carrying the burden of the impaired asset measure, as WestLB transfers equity to the EAA. Referring to the May 2009 Decision, Germany claims that, in line with footnote 8 in recital 16 of that Decision, the Impaired Assets Communication is not applicable when a measure is being carried out by public shareholders in their capacity as owners.

b. ESTABLISHING THE REAL ECONOMIC VALUE OF THE FIRST ASSET TRANSFER

- (100) Second, Germany claims that the Commission made errors in assessing the transferred assets and the application of scaling factors.

- (101) While it claims that the Commission's assessment was in general too conservative, it elaborates on individual points for the individual asset classes "Structured Securities", "Other Securities" and "Credit Portfolio".

- (102) As regards the "Structured Credit" portfolio, Germany claims that the WestLB valuation methodology, criticised by the Commission, was considered to be acceptable by Deutsche Bundesbank. Furthermore, it pointed out that BlackRock Solutions, the company that was mandated as Germany's expert, established a higher REV for the portfolio than WestLB itself, which indicates that a sufficiently conservative approach was taken by WestLB.

- (103) For the "Other Securities" portfolio, Germany claims that the main differences between the valuation assessments stem from the discussion as to whether a market value is applicable. While WestLB proffered its own (mainly liquidity-based) criteria to determine whether a market is impaired, Germany criticises the Commission's experts for having insufficiently explained their finding that almost all assets belonged to unimpaired markets. As an example, Germany refers to sovereign bonds that make up a large portion of the securities portfolio and claims that falling market prices at the end of 2009 were an indication of market impairments.

- (104) For the valuation for the "Credit Portfolio", Germany states that the Commission's experts' opinion – which was drawn up without access to the detailed credit documentation – cannot be used to contradict the WestLB values. It criticises in particular a lack of transparency regarding the assessment parameters used, inherent contradictions, and an excessively conservative approach by the Commission's experts. Germany claims that the parameters used in the Committee of European Banking Supervisors (CEBS) stress tests should be applied, not those used by the Commission's experts. Germany particularly criticised one of the stress scenarios, in which the Commission's experts used a 70 % probability-of-default assumption and 30 % LGD assumption.

- (105) Finally, Germany addressed the doubts on eligibility by arguing that the first EAA annual report (30 June 2010) is not an indication of existing portfolio losses. It rebuts the Commission's doubts that the expected losses in the EAA structure were underestimated, arguing that the EAA's actual risk provisioning amount is mainly driven by the Phoenix portfolio. That amount was in fact EUR [0,5-1,5] billion lower than what was budgeted in the run down plan. Therefore, the EAA's treatment of provisioning did not contradict WestLB's assessment of expected losses.

c. MITIGATING FACTORS

- (106) Finally, Germany claims that the valuation of the transferred portfolios must take mitigating factors into account, in particular regarding (i) the transfer of grandfathered liabilities, (ii) future cash flows, (iii) undrawn committed lines, and (iv) discounting of expected losses.

(107) As regards grandfathered liabilities, Germany claims that by transferring such liabilities ⁽¹⁾ to the EAA WestLB foregoes an economic advantage of EUR 882 million that needs to be taken into account.

(108) As regards future cash flows, Germany claims that, by transferring the portfolios to the EAA, WestLB foregoes future cash flows (interest payments etc.) amounting to EUR 880 million that also should be taken into account.

(109) As regards undrawn committed lines, Germany claims that a correction is necessary for the transfer of undrawn committed lines to the EAA, as their potential risks have been included in the calculation of the REV, while their potential earning power has not been included in the overall assessment.

(110) As regards discounting of expected losses, Germany claims that the valuation of the portfolios should be based on discounted expected losses, as the conflicting concept of prudence has already been sufficiently applied when the REV was calculated.

2. REGARDING THE ADVANTAGE FOR THE SAVINGS BANKS

(111) Germany commented on the doubts that additional illegal aid might have been provided to the savings banks as follows:

(112) First, Germany sets out that WestLB's shareholders, among whom are the savings banks, were not obliged to establish a bad bank but rather did so based on an autonomous decision.

(113) Second, Germany points out that the FMStFG does not lay down an unlimited obligation to compensate for losses. The obligation to compensate for losses is rather restricted to the equivalent amount of equity invested into the beneficiary bank. Germany claims that the FMStFG allows for a contractual allocation of the loss compensation obligation that deviates from an equity-based pro-rata allocation, in order to take different financial capacities into account.

(114) Finally Germany argues that the savings banks, having assumed the obligation to compensate for potential

losses stemming from the EAA of up to EUR 4,5 billion, have taken an adequate share of the burden.

V. ASSESSMENT OF AID TO WESTLB

(115) The assessment of the restructuring aid to WestLB has to consider all aid granted to WestLB since 2008, as the aid granted after the May 2009 Decision has been granted for the same restructuring process that was approved under the May 2009 Decision. However, given the significant increase of aid and the changes made to the restructuring plan, a new assessment of the entire aid under the June 2011 restructuring plan is required.

1. STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(116) According to 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.

(117) The qualification of a measure as state aid requires that the following conditions are met: a) it must be financed by a Member State or through state resources; b) it must grant an advantage liable to favour certain undertakings or the production of certain goods; c) the measure must distort or threaten to distort competition; and d) the measure must have the potential to affect trade between Member States.

(118) The Commission maintains its view that those conditions are met for all measures, as it will explain below, even allowing for the fact that WestLB will discontinue its banking activities, because WestLB is still conducting economic activities such as asset management services. Given that those activities are still pursued in a context of international competition, the Commission considers that those measures have the potential to distort competition and also may affect trade between Member States ⁽²⁾.

a. THE RISK SHIELD FOR THE PHOENIX PORTFOLIO

(119) The Commission already established in the May 2009 Decision that the risk shield constitutes state aid. Germany has clarified that the risk shield still takes effect on the equity part of the Phoenix portfolio which has been transferred to the EAA.

⁽¹⁾ Grandfathered liabilities, issued before 18 July 2005, continue to benefit from the statutory guarantees of *Anstaltslast* and *Gewährträgerhaftung* and hence include a refinancing advantage.

⁽²⁾ Commission Decision of 29 June 2011 in cases SA.32504 (2011/N) and C 11/2010 (ex N 667/2009), *Anglo Irish Bank and Irish Nationwide Building Society*, recital 102, not yet published.

b. THE CAPITAL INJECTION

- (120) The Commission already concluded in its December 2009 Decision that the capital injection of EUR 3 billion constitutes state aid within the meaning of Article 107(1) TFEU.

c. THE ADDITIONAL CAPITAL INSTRUMENT FOR SPM BANK

- (121) According to the June 2011 restructuring plan NRW will issue an additional instrument in favour of SPM bank in the amount of EUR 1 billion in order to replace the part of WestLB's equity⁽¹⁾ that is going to be paid back to SoFFin. As the additional instrument for SPM bank is a replacement of capital it must also be fully loss absorbing, otherwise the regulator would not accept such a transaction. The new instrument must thus constitute capital as well. That capital is given by NRW and thus stems from State resources. It has the effect of covering up a capital shortage of an individual bank and amounts hence to a selective advantage to SPM bank. Given that SPM bank will be active in a sector in which undertakings from other Member State are present, that measure is likely to distort competition and to affect trade between Member States. It is thus state aid, as is confirmed by the analysis of similar capital measures⁽²⁾.

d. THE ADDITIONAL LOSS COVERAGE BY NRW FOR SPM BANK

- (122) According to the June 2011 restructuring plan, NRW will take over the losses for operating and liquidating SPM bank over a five-year period, as well as assume all pension liabilities. The overall losses that SPM bank will accumulate over its operating lifespan are assumed to range between EUR [3-6] billion in the base case scenario and EUR [4-7] billion in the bad case scenario. Those losses must be covered by the [...]. The commitment to take over losses generated by SPM bank is therefore similar to a capital injection ranging between EUR [100-700] million and EUR [0,5-2,0] billion. As with the additional capital instrument for SPM bank, the additional loss coverage also covers SPM bank's capital shortage and provides it with a selective advantage since there is nothing to indicate that the bank could obtain such capital on the market. As the measure stems from NRW, it is provided from State resources. Given the characteristics of the banking sector set out in recital 118, the measure is apt to distort competition and to affect trade between Member States. Hence it constitutes state aid.

⁽¹⁾ Invested by SoFFin in the form of a silent participation.

⁽²⁾ See the Commission Decision in case NN 25/2008 of 30 April 2008, OJ C 189, 26.7.2008, p. 3.

e. THE FIRST ASSET TRANSFER

- (123) The Commission already concluded in its December 2009 Decision that the impaired asset relief measure in the form of the establishment of a bad bank constitutes state aid⁽³⁾.
- (124) It does not agree with Germany in so far as the latter argues that the Impaired Assets Communication should not be applied. Instead, it recalls its decision-making practice to the effect that in the Impaired Assets Communication the Commission provided guidance on the treatment under Article 107(3)(b) TFEU of asset relief measures adopted by Member States on the basis that "Impaired assets correspond to categories of assets on which banks are likely to incur losses. The Commission considers that the IAC must cover any kind of support measures targeting impaired assets and subsequently providing effective asset relief to the recipient institution because the IAC defines asset relief as any measure whereby a bank is dispensed from the need for severe downward value adjustments of certain asset classes"⁽⁴⁾. The first asset transfer also falls into that category of measures, as it frees WestLB from facing the consequences of a downward adjustment of the value of its assets. Germany has in fact previously confirmed that WestLB would not have complied with regulatory minimum capital requirements any longer had it not been shielded by the state support measure⁽⁵⁾.
- (125) As regards its temporal scope, the Impaired Assets Communication must be applied to the asset transfer. The Commission recalls that it has to apply the law and guidelines in force at the time of the adoption of a decision, irrespective of the time at which the aid measures were designed or notified⁽⁶⁾. In fact, in the context of the current financial crisis the Commission has previously applied the Impaired Assets Communication to measures notified before the publication of the communication⁽⁷⁾.
- (126) The Commission has not changed that assessment, notwithstanding the objection made by Germany that it had not applied the Impaired Assets Communication in the May 2009 Decision. Although it might have been

⁽³⁾ See the Commission Decision of 18 July 2011 in case SA.28264 (C 15/2009, ex N 196/2009), *Hypo Real Estate*, not yet published, recital 71; the Commission Decision of 20 September 2011 in case C 29/2009, *HSH*, not yet published, recital 153; and the Commission Decision of 15 December 2009 in case C17/2009, *LBBW*, OJ L 188, 21.7.2010, p. 10, recital 44.

⁽⁴⁾ Commission Decision of 20 September 2011 in case C 29/2009, *HSH*, not yet published, recital 153.

⁽⁵⁾ See recital 6 of the Commission Decision of 5 November 2010 in case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 9.

⁽⁶⁾ See Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 53, where the Court of Justice confirmed that a notified measure should be assessed under the rules applicable at the date of the decision.

⁽⁷⁾ See the Commission Decision in case C 9/2009, *Dexia*, OJ L 274, 19.10.2010, p. 54, recital 153, and the Commission Decision of 20 September 2011 in case C 29/2009, *HSH*, not yet published, recital 155.

erroneous not to have applied the Impaired Assets Communication at that point in time, there is no legitimate expectation by Germany that such an approach would continue. In any event, the reasoning in the May 2009 Decision was to accept the nominal amount of the guarantee as the aid amount, which is not uncommon for impaired asset guarantees ⁽¹⁾; however, if that approach were to be applied in the present case, it would result in an amount that exceeded by far the aid amount established by the Impaired Assets Communication.

(127) The main issue thus remains the establishment of the amount of aid. According to point 39 of the Impaired Assets Communication, aid is granted by an impaired asset measure in so far as the transfer value exceeds the market value of the total portfolio.

(128) In the November 2010 Decision the Commission calculated a preliminary aid amount of EUR 11 billion which did not consider mitigating factors. To that end, the Commission made an assessment of a likely market value for assets that were not trading in the market and relied on expert advice. However, the Commission has been able, through in-depth analysis of the portfolio relying on the details of the final expert report, to refine its assessment.

(129) Table 6 provides an overview of the market value, listed by sub-portfolio:

Table 6

Market value of the first asset transfer (billion EUR)

Portfolio of Assets being transferred		Dec Book Value (TV)	Commission's Market Value Estimate
Structured Securities' Portfolio	Phoenix	22 764	13 200
	European Super Seniors	2 918	1 750
	Other ABS	3 188	2 900
Securities' Portfolio	Bonds	16 501	(722)
	Banque D'Orsay Portfolio	2 749	23 749
	CDS & Derivatives	(65)	(102)

⁽¹⁾ Commission Decision in case C 29/2009, *HSH*, not yet published, recital 157.

Portfolio of Assets being transferred		Dec Book Value (TV)	Commission's Market Value Estimate
Lending Products	Drawn Positions	20 061	17 355
	Undrawn Commitments	—	(748)
Total		68 116	52 887

(130) For the Securities portfolio as well as the ABS sub-portfolio of the Structured Securities portfolio, market values were either readily available or could be derived from valuations of proximity assets that had readily available market values (EUR 18,430 billion (that figure has been disaggregated: EUR 15,762 billion + EUR 2,770 billion – EUR 0,102 billion = EUR 18,430 billion)) and EUR 2,9 billion respectively).

(131) For the lending portfolio, a severe stress scenario ⁽²⁾ was used as a market value proxy resulting in a EUR 748 million discount on undrawn commitments (total EUR 16,607 billion, that figure has been disaggregated: EUR 17,355 billion – EUR 0,748 billion = EUR 16,607 billion).

(132) For the European Super Seniors sub-portfolio, the original WestLB estimate of expected principal losses is deemed to be very conservative and close to a market value calculation. As a result, the WestLB-inferred REV for the ESS portfolio could be used as a market value estimate (EUR 1,750 billion) ⁽³⁾. As regards the Phoenix Portfolio, which is a structured security with a complicated waterfall pay-off structure, an approximation of the market value can be made as follows: first, the mark-to-market (hereinafter called "MtM") of the underlying collateral was deemed to be around 54 % (EUR 12,375 billion). Taking into consideration the available cash (EUR 1,325 billion to be added) and the likely cash outflows (about EUR 0,5 billion in an adverse, MtM-like scenario, to be subtracted), the market value can be estimated at approximately EUR 13,2 billion ⁽⁴⁾.

(133) If one compares the total amount (EUR 52,887 billion) to the transfer value (EUR 68,116 billion), the aid amount is established, from which some mitigating factors have to be deducted. The mitigating factors are the above-mentioned (recital 93) EUR 3,267 billion for

⁽²⁾ See the Commission's experts' report WestLB AIDA Case C40/2009 REV Assessment Executive Summary, p. 22 (referring to Scenario 4A, with a credit conversion factor of 1).

⁽³⁾ See the Commission's experts' report WestLB Aida Final Detailed Analysis Report, p. 29 (Main findings) and see Table 2, column 2.

⁽⁴⁾ See the Commission's experts' report WestLB Aida Final Detailed Analysis Report, pp. 12 and 16 (MtM Table).

the EAA's capital; EUR 882 million through foregoing grandfathered liabilities; and EUR 268 million through the transfer of Credit-Linked Notes inside the Phoenix structure. Therefore the state aid amount totals EUR 10,812 billion, i.e. EUR 15,229 billion - EUR 4,417 billion.

- (134) That aid amount includes the guarantees provided by the WestLB shareholders to cover the losses of the EAA (see recitals 33 to 40) because those guarantees will replace the engagement that the Bund has given by acquiring the assets from WestLB via the EAA. It should be recalled that pursuant to the FMStFG the Bund must be compensated by the shareholders for any losses crystallising in the future. Hence that liability of the Bund is in fact being replaced by a liability of the WestLB shareholders internally. However, that replacement does not have any effect vis-à-vis the beneficiary and to treat those guarantees as a separate source of aid would amount to double counting of the support. Those guarantees therefore do not increase the aid amount in the first asset transfer to the EAA.

f. THE SECOND ASSET TRANSFER - REPLENISHMENT OF THE EAA

- (135) The second transfer concerns the potential replenishment of the EAA with all of WestLB's current assets and liabilities. It has to be borne in mind that only the transfer of the WestImmo carve-out portfolio to the EAA is certain to take place, while the transfer of assets and liabilities linked to the Verbundbank and Pfandbriefbank is merely a possibility. Furthermore, WestLB has put all its divisions and business units up for sale, and as a result related assets and liabilities may still be divested at market prices before 30 June 2012 and hence not be transferred to the EAA. The following assessment is, however, based on the precautionous assumption that as of 30 June 2012, all of WestLB's current assets and liabilities will be transferred to the EAA.

- (136) In the case of WestImmo, a carve-out portfolio with assets and liabilities of around EUR [5,3-6,9] billion (HGB book value) will be spun off and transferred to the EAA. The market value has been established as indicated in Table 4 above. The Commission has assessed the figures for the market value and finds the explanation why that amount should be considered sufficiently prudent plausible. Therefore it establishes the difference between transfer values and market values, i.e. the aid amount, for the WestImmo part of the second asset transfer to be EUR [300-800] million.

- (137) In addition, Germany submits that, if WestImmo, freed of the carve-out portfolio, cannot be sold as Pfandbriefbank but has to be transferred to the EAA, its transfer value would be equal to its market value. That

submission seems plausible, given that Pfandbriefbank has deliberately been released from impaired assets.

- (138) In the case of WestLB, assets and liabilities of around EUR [120-150] billion (HGB book value) will be spun off. The portfolio market values have been established to be EUR [1,0-1,8] billion lower than their HGB book values, as indicated in Table 3 at recital 52. The Commission has assessed the figures for the market value of the remaining WestLB assets and liabilities. It did not identify any inconsistencies in the market valuation. In fact, the Commission recalls that WestLB has been freed from impaired assets in the context of the first asset transfer, and that the resulting capital relief was quite large. Hence it does not seem surprising that the quality of the portfolio and so its market value is much better than that of the first transfer. Therefore the Commission accepts that the portfolio market values of the assets and liabilities are in total EUR [1,0-1,8] billion lower than the transfer values (HGB book values), and that the aid amount for the WestLB-part of the second asset transfer is hence equal to EUR [1,0-1,8] billion.

- (139) In total, the market values of the second asset transfer are EUR [1,3-2,6] billion lower than their transfer values. The total aid amount for the second asset transfer is hence EUR [1,3-2,6] billion.

g. PROVISION OF LIQUIDITY SUPPORT BY THE WESTLB SHAREHOLDERS IN THE FIRST HALF OF 2012

- (140) Once all assets of WestLB have been transferred into the EAA, the EAA will take care of their funding. Up to 30 June 2012 (that is, until the transfer takes place) the shareholders of WestLB will provide any liquidity support that is needed in order to ensure that the transfer of assets to the EAA occurs. That measure can be considered as an integral part of the overall liquidation scenario, because it merely shields the transformation period in case market turbulence occurs before 30 June 2012. It nevertheless constitutes an additional temporary advantage to WestLB⁽¹⁾, which [...]. Given the status of the WestLB shareholders as public authorities or entities under the ultimate control of public authorities to whom any decision to grant liquidity in the context of the transformation would be imputable, the measure stems from state resources. As explained in recital 118, the characteristics of the banking sector in Germany are such that the provision of such an advantage would be apt to distort competition and also to affect trade between Member States. As a result, the provision of liquidity support by the WestLB shareholders in the first half of 2012 constitutes state aid.

⁽¹⁾ The Commission has approved liquidity support under various schemes, see the Commission Decision of 20 March 2009 in case N637/2008, *Liquidity scheme to the financial sector in Slovenia*, OJ C 143, 24.6.2009, p. 2, and the Commission Decision of 14 January 2010 in case NN68/2009, *Liquidity scheme for Hungarian banks*, OJ C 47, 26.2.2010, p. 16.

h. CONCLUSION

In sum, WestLB has obtained the following state aid measures:

Table 7

Summary of aid measures

Capital or capital-like measures	Aid element (billion EUR)
The risk shield for the Phoenix portfolio	5
The capital injection in the context of the first asset transfer	3
The additional capital instrument for SPM bank	1
The additional loss coverage by NRW for SPM bank	[0,5-2,0]
The first asset transfer	10,812
The second transfer - replenishment of the EAA with WestImmo assets and liabilities (carve-out portfolio)	[0,3-0,8]
The second transfer - replenishment of the EAA with WestLB assets and liabilities	[1,0-1,8]
Total	[21,6-24,4]
Percentage of aid, compared with EUR 88,5 billion of RWAs (as of 30.12.2008)	[24,4-27,6]%
Liquidity measures	[...]

2. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

a. APPLICATION OF ARTICLE 107(3)(b) TFEU

- (141) Article 107(3)(b) TFEU empowers the Commission to find that aid is compatible with the internal market if it is intended "to remedy a serious disturbance in the economy of a Member State". The Commission has acknowledged that the global financial crisis can create a serious disturbance in the economy of a Member State and that measures supporting banks are apt to remedy that disturbance. That assessment has been confirmed in the Commission communication *The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition* ⁽¹⁾ (hereinafter called "the Recapitalisation Communication"), the Impaired Assets

Communication and the Restructuring Communication. The Commission still considers that requirements for state aid to be approved pursuant to Article 107(3)(b) TFEU are fulfilled in view of the reappearance of stress in financial markets. The Commission confirmed that view by adopting in December 2010 a Communication that prolongs until 31 December 2011 the application of state aid rules to support measures in favour of banks in the context of the financial crisis ⁽²⁾. The Commission has since extended the application of those rules beyond 31 December 2011 ⁽³⁾.

- (142) In respect of the German economy that analysis has been confirmed in the Commission's approval of various measures undertaken by the German authorities to combat the financial crisis, in particular in the approval and prolongations of the German rescue package ⁽⁴⁾.

- (143) An uncontrolled breakdown of a bank such as WestLB could directly affect the financial markets and thus the entire economy of a Member State. In the light of the current fragile situation of the financial markets, the Commission continues to base its assessment of state aid measures in the banking sector on Article 107(3)(b) TFEU.

b. COMPATIBILITY OF THE IMPAIRED ASSET MEASURES

- (144) For the reasons explained in recitals 125 and 126, the compatibility of the first asset transfer to the EAA has to be assessed on the basis of the Impaired Assets Communication. The compatibility assessment focuses on whether the asset transfer takes place above the market value but without exceeding the real economic value as defined in point 40 of the Impaired Assets Communication. In order for the aid measure to be compatible the transfer value should, according to point 41 of the Impaired Assets Communication, not exceed the REV and the transfer delta would be zero. The following assessment focuses first on the amount of the transfer delta (see recitals 144 to 159). If the transfer delta is not zero, i.e. it is above the REV, it should be reimbursed or clawed back (see recitals 161 and 162).

⁽²⁾ Communication from the Commission 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.

⁽³⁾ Communication from the Commission 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.

⁽⁴⁾ Commission Decision of 27 October 2008 in case N512/2008, *German bank rescue scheme*, OJ C 293, 15.11.2008, p. 2, amended by the Commission Decision of 12 December 2008 in case N625/2008, *German bank rescue scheme*, prolonged by the Commission Decision of 22 June 2009 in case N 330/2009, OJ C 160, 14.7.2009, p. 4 and by the Commission Decision of 23 June 2010 in case N 222/2010, OJ C 178, 3.7.2010, p. 1.

⁽¹⁾ OJ C 10, 15.1.2009, p. 2.

i) **Compatibility of the first asset transfer to the EAA**

- (145) Regarding the first asset transfer to the EAA, Germany disputed the establishment of the REV. Its comments aim at contradicting the finding in the November 2010 Decision that there is a transfer delta amounting to EUR 3.414 billion. The Commission has assessed the comments of Germany. The results of that analysis can be summarised as follows:

— **As regards the valuation in general**

- (146) As regards the overall valuation exercise, determining the REV of the assets to be transferred, the Commission maintains that its evaluation was not too conservative but was in accordance with point 37 of the Impaired Assets Communication. Point 37 of the Impaired Assets Communication obliges the Commission to apply a correct and consistent approach to asset valuation, including assets that are more complex and less liquid, so as to prevent undue distortions of competition. The Commission has explained in the November 2010 Decision that its approach is in line with existing decision-making practice. The approaches taken by other bodies such as CEBS are certainly credible, but they are not relevant for that exercise.
- (147) The Commission remains unconvinced that the approach proposed by WestLB is in line with state aid decision-making practice. The Commission indeed notes that the Bundesbank has not confirmed the REV proposed by WestLB but instead criticised both the methodology and parameter use of WestLB⁽¹⁾. That critical stance contradicts Germany's claim that WestLB's methodology is in general a "recognised technical expertise". The Commission therefore maintains that WestLB's methodology deviates from usual case practice⁽²⁾.

— **As regards the valuation at the level of sub-portfolios**

- (148) As regards the valuation in detail, first, regarding the "Structured Securities" portfolio, the Commission notes that no great divergences exist. In fact, the Commission's REV for the entire asset class lies very close to that as assessed by WestLB. The Commission has refrained from using conservative assumptions where to do so would validate or reject individual portfolio valuations. Instead,

it followed its experts' advice to re-assess WestLB's overly conservative approach for the "European Super Senior" sub-portfolio. The Commission has examined the detailed expert report, which included a review of the main asset sub-categories (ABS CDOs⁽³⁾, other CDOs⁽⁴⁾, US RMBS⁽⁵⁾, US CMBS⁽⁶⁾, US ABS⁽⁷⁾, EUR ABS⁽⁸⁾ and Financials), and found the methodologies and results used to be consistent with other cases, such as those mentioned in the opening decision.

- (149) Second, regarding the Lending Portfolio, the Commission does not accept Germany's claim regarding lack of transparency and inconsistencies in the valuation of its experts. It recalls that it has tried to give guidance as to the appropriateness of certain methodologies for assessing the REV. For instance, the Commission recommended a large sample asset re-underwriting of the loan portfolio in order to assess the appropriateness of the existing rating systems, the resulting probabilities-of-default (PDs) and the LGDs. Germany has not followed that recommendation. The Commission also emphasised that, as explained in point 41 of the Impaired Assets Communication, it had to use sufficiently prudent LGD and PD stresses. In line with the Commission's decision-making practice, a transfer of assets must be assessed based on the REV of the assets. In conclusion, the Commission confirms its previous assessment that the valuation must be corrected by around EUR 1 billion
- (150) Third, for the "Securities Portfolio" the Commission agrees with Germany that the differences stem from the assumption of whether the markets concerned are impaired. In fact, the question could also be whether that part of the portfolio should be considered eligible under the Impaired Assets Communication at all. It could be argued that, although some flexibility could be envisaged by allowing banks to be relieved of assets not primarily involved at the first stages of the financial crisis, assets that cannot be considered impaired at the time of transfer should not be covered by a relief programme. On that view, asset relief should not act as a form of open-ended insurance against the consequences of the recession. On the other hand, the off-loading of large, multi-billion-euro-sized portfolios might trigger precisely the distortion of those markets. To strike a balance between the objective of maintaining financial stability and the need to prevent distortions of competition, the Impaired Assets Communication allows for the transfer of those assets. However, because the

⁽¹⁾ Specific criticism as to methodology can be found in the Bundesbank reports, see Erster Teil des Berichts (Phase I) über die Prüfung nach §6 FMStFG bei der WestLB AG, Düsseldorf (5.10.2009); Zweiter Teil des Berichts (Phase I) über die Prüfung nach §6 FMStFG bei der WestLB AG, Düsseldorf (5.10.2009); Bericht (Phase II) über die Prüfung nach §6a bzw. §8a FMStFG bei der WestLB AG, Düsseldorf (26.11.2009).

⁽²⁾ November 2010 Decision, recital 83.

⁽³⁾ ABS CDOs stands for asset backed securities collateral debt obligations.

⁽⁴⁾ Other CDOs stands for other collateral debt obligations.

⁽⁵⁾ US RMBS stands for US residential mortgage backed securities.

⁽⁶⁾ US CMBS stands for US commercial mortgage backed securities.

⁽⁷⁾ US ABS stands for US asset backed securities.

⁽⁸⁾ EUR ABS stands for EUR asset backed securities.

market for those assets is fully functional (i.e. unimpaired), the REV will be equal or approximately equal to the market value.

- (151) While WestLB assesses the existence of a functioning market on the basis of a pure liquidity criterion, the Commission remarks ⁽¹⁾ that the starting point for an assessment of market impairment is a comparison with a well-functioning market for the particular asset. In a normally functioning market a transaction is executed between a willing buyer and a willing seller. The notion of a willing buyer and seller implies that the transaction is voluntary and therefore free of compulsion.
- (152) The Commission's experts have provided transparent criteria for a normal functioning market, which are endorsed by the Commission ⁽²⁾. While adequate liquidity or tight bid offer spreads indicate a functioning market, the reverse is not necessarily true. For instance, a privately placed security, issued by a solvent and stable issuer, might not be liquid. Nevertheless, if needed, a competitive market bid, close to a mark-to-model value computed from liquid proximity securities, could easily be obtained. Therefore, the criteria proposed by WestLB are too narrow to assess the normal functioning of a market.
- (153) It should be remarked that the misattribution of unimpaired assets as impaired assets is per se not a problem for the determination of the REV. One would expect that the REV calculated for such asset positions would be close to the market value of the asset, provided that a suitable method and calibration is used. Any REV calculation method should broadly converge to the market price, when a particular market is not impaired. Indeed, the instances of misattribution represent a test of the suitability of the REV calculation method and parameters used.
- (154) As regards Germany's claim that certain sovereign bond markets were impaired at the end of 2009, the Commission observes that criteria indicating a functioning market were fulfilled at that time. Instead, specific sovereign submarkets showed evidence of

impairment near the end of the second quarter of 2010 ⁽³⁾ and beyond, notably with interventions at ECB and other European levels. Nevertheless, it was not the case on 31 December 2009 or on 31 March 2010, which were the two reference dates used in the valuation exercise.

- (155) The Commission therefore maintains its view that WestLB used either a wrong valuation methodology or applied the wrong parameters in its valuation methodology, so that the valuation must be corrected by around EUR 600 million.
- (156) In conclusion, the Commission finds the REV assessment for each of the three sub-portfolios as indicated in the experts' report to be valid and consistent with its decision-making practice. As a result, the Commission deems the difference between the transfer value and the REV of the assets in the portfolio to be EUR 6,949 billion ⁽⁴⁾.
- (157) In the November 2010 Decision the Commission expressed doubts whether all of the assets were eligible for the transfer. The Commission took statements in EAA's first annual report as evidence that in some assets losses had already been incurred at the date of the transfer, although such assets would not fall within the scope of point 32 of the Impaired Assets Communication. However, Germany subsequently provided additional information and explained the amount of risk provisioning made by the EAA and the amount of losses that had been incurred in the assets transferred to the EAA. Those explanations were plausible and allay the Commission's concerns. There is therefore no need to make further corrections relating to a non-eligibility of assets.

— Mitigating factors

- (158) The Commission also does not accept mitigating factors beyond those already accepted in the November 2010 Decision. It also already accepted the compensatory effects of the equity injection (EUR 3,267 billion) and

⁽¹⁾ See the Commission's experts' report, WestLB AIDA – Case C40/2009 – REV Assessment Final Report (Société Générale, Dirk Bangert, Professor Wim Schoutens), p. 76, which was endorsed by the Commission.

⁽²⁾ Indications that markets are functioning normally are: A liquid market with medium to high volumes of transactions; tight bid-offer spreads; the perception that bids and offers could be obtained, if requested; a number of established participants in the market; the absence of structural restrictions on the market's operation; or the issuer not being subject to credit events or heightened concerns about credit quality. Indications that market operation is impaired are: No or very few market transactions; "thin" markets and low volumes; wide bid-offer spreads, bid only or offer only indications; for a prolonged time bids or offers cannot be obtained; few established participants in the market, some of which may consider leaving the market; structural restrictions on the market's operation; "market manipulation"; and an issuer being subject to credit events.

⁽³⁾ The experts' report mentions May 2010 (e.g. p. 86) as the date when the Sovereign Crisis effectively materialised.

⁽⁴⁾ Finally, it should be noted that in line with the November 2010 opening decision (see recital 105) an adjustment of the REV as proposed by Germany due to the difference between the effective date of the valuation of the assets and its transfer is not inappropriate. Germany had claimed that, when calculating the REV in March 2010, which would have been the reference date for the April 2010 transfer, it can do so by applying the ratio of the REV of December 2009 to book value of December 2009 and multiply that ratio by the book value of March 2010. According to the Commission's experts, while a change in the transfer value might have occurred any such intermediate amortisation of the portfolio was caused primarily by unproblematic assets. Therefore, it would be without impact for the REV and any adjustment would lead to an overestimation of the REV of the remaining portfolio and must thus be rejected.

the CLN notes (EUR 268 million)⁽¹⁾, as indicated in Table 2 at recital 44. Moreover, the Commission invited Germany to engage the Bundesbank to comment on the compensatory effects and have any proposed alteration in the portfolio valuation verified and confirmed by a regulatory authority such as the Bundesbank, in line with guidance from the Impaired Assets Communication. No such verification and confirmation by the regulatory authority has taken place.

- (159) Regarding the grandfathered liabilities, the Commission notes that the valuation of liabilities is per se not discussed in the Impaired Assets Communication. It needed therefore to assess how to deal with a transfer that mixed assets and liabilities as was done in this case. While the Commission recognises the potential economic disadvantage of transferring low-yielding liabilities, it had to strike a balance between compatible amounts on the asset side and the amounts on the liability side. As a result, while the Commission has taken the effect of grandfathered liabilities into account when assessing the total aid amount (see recital 133) the Commission does not consider it applicable in the assessment of REV.
- (160) Regarding the positive future results for the transferred assets, the Commission does not follow Germany's argument and insists that, once assets have been transferred, future profits should no longer be taken into account. That methodology of establishing the REV of the lending portfolio is in line with the Commission's decision-making practice⁽²⁾.
- (161) Regarding undrawn committed lines, the Commission confirms that an undrawn committed line can indeed carry a zero book value. That possibility does however not exclude that an undrawn committed line can have a negative REV contribution. The drawing of the line is not excluded, because contractually it cannot be avoided. Therefore, the fact that a line is not yet drawn will thus not change the REV even if such positions have zero book value.
- (162) Regarding discounting expected losses, the Commission observes that by discounting the expected losses WestLB simply alters its own valuation approach, and moreover does so without support from the Bundesbank. Germany thereby contradicts its own REV estimate but does not provide any additional arguments against the Commission's opinion.
- (163) In sum, as the REV has been endorsed above and is in line with points 40 and 41 of the Impaired Assets

Communication, the Commission therefore does not consider the expected losses or any of the other three mitigating factors advanced by Germany in its comments as relevant for the REV assessment.

— Asset management

- (164) The Commission's doubts as to the proper management of the impaired assets in the wake of the asset transfer have been allayed. The Commission had reservations that WestLB was to continue to manage the impaired assets, as a bank should concentrate on new activities and avoid any conflict between running down and new activities. However, as WestLB/SPM bank will after 30 June 2012 no longer conduct any new banking activities, but only asset management services, the Commission's doubts have been assuaged.

Conclusion

- (165) To conclude, having considered all additional potentially mitigating factors and arguments submitted by Germany, the Commission's doubts have not been allayed. Therefore, it continues to consider the transfer delta to be equal to EUR 3,414 billion.

ii) Claw back

- (166) According to point 41 of the Impaired Assets Communication, in order to mitigate the distortions of competition stemming from a transfer of the assets above the value that is considered acceptable to make up for the market failure at the relevant time, the transfer delta should be returned by the bank. If such a repayment is not immediately possible then it should be achieved over time in the form of a claw back. Where even such a repayment through a claw back is not possible without leading to technical insolvency, the distortion of competition needs to be compensated by in-depth restructuring, which can go as far as liquidation⁽³⁾.
- (167) WestLB indicated in its restructuring plan presented in February 2011 that it wasn't even able to pay back the EUR 3,4 billion from the first asset transfer to the EAA without jeopardising its viability. In addition, there is unlikely to be a sale of WestLB if a potential buyer had to repay the EUR 3,4 billion to Germany. In consequence, Germany has submitted the June 2011 restructuring plan which provides for a liquidation of WestLB within 12 months. The Commission considers that the liquidation of WestLB is sufficient to make up for the distortions of competition. Therefore, subject to the requirement that the liquidation plan is credible, which will be assessed in section c, the Commission

⁽¹⁾ Commission Decision of 5 November 2010 in Case C 40/2009, *WestLB Extension of Investigation*, OJ C 23, 25.1.2011, p. 27, recitals 109 et seq.

⁽²⁾ Commission Decision of 17 December 2009 in case N422/2009, *Royal Bank of Scotland*, OJ C 119, 7.5.2010, p. 1.

⁽³⁾ See the Commission Decision of 20 September 2011 in case C 29/2009, *HSH*, not yet published, recital 189, and the Commission Decision of 22 February 2010 in case C17/2009, *LBBW*, OJ L 188, 21.7.2010, recitals 59 et seq.

finds the aid to be in line with the Impaired Assets Communication and compatible with the internal market on the basis of Article 107(3)(b) TFEU.

iii) *Compatibility of the replenishment*

(168) The transfer of the second tranche must also in principle be assessed under the Impaired Assets Communication. However, the Commission considers, on the basis of the June 2011 restructuring plan, that the result of such an assessment would no longer have an impact. Any additional distortions of competition resulting from a transfer delta in respect of the second tranche would in any event be mitigated by the liquidation envisaged in the June 2011 restructuring plan. Therefore, in the current exceptional situation, the Commission considers that, where the entire aid amount can already be considered compatible under point 41 of the Impaired Assets Communication, it can abstain from an in-depth assessment of the valuation, i.e. a calculation of the REV.

(169) The transfer of assets is thus compatible because the potential distortions of competition are mitigated by the liquidation of WestLB and hence in line with point 41 of the Impaired Assets Communication.

c. COMPATIBILITY OF THE RESTRUCTURING/LIQUIDATION AID

(170) The Commission must assess the compatibility of all aid measures on the basis of its guidelines for dealing with banks in the financial crisis, in particular the Restructuring Communication and the Commission communication *The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis* ⁽¹⁾ (hereinafter called “the Banking Communication”).

(171) The Commission notes that the June 2011 restructuring plan needs to ensure the compatibility of the aid measures indicated in Table 7.

(172) Those measures amount to a total aid amount of EUR [21,6-24,4] billion, which is equivalent to an aid amount in relation to RWA as of 31 December 2009 of [24,4-27,6]%. That amount of aid must be considered a very large proportion of the beneficiary's size and thus requires in-depth restructuring or liquidation. Moreover, the restructuring plan also needs to consider the additional distortions of competition stemming from the a priori incompatible amount of aid identified by the transfer delta. The proposed restructuring or liquidation must be adequate to address that distortion.

(173) The June 2011 restructuring plan meets the criteria set out in the Restructuring Communication. Point 21 of the Restructuring Communication states that an orderly winding down or the auctioning off of a failed bank should be considered where a bank cannot credibly return to long-term viability. The Banking Communication provides for a procedure within the framework of which such an orderly winding down should take place ⁽²⁾. A controlled liquidation of that kind may be applied in individual cases after rescue aid has been given to an individual financial institution when it becomes clear that the latter cannot be restructured successfully.

(174) In order for liquidation aid to be compatible with Article 107(3)(b) TFEU, the liquidation aid has, according to the Commission's decision-making practice ⁽³⁾, to satisfy the following three general conditions:

(i) it should be demonstrated that the aid enables the bank to be effectively wound down in an orderly fashion, while limiting the aid amount to the minimum necessary in view of the objective pursued ⁽⁴⁾;

(ii) appropriate burden sharing should be ensured, in particular by excluding shareholders from receiving benefit of any aid in the context of the controlled winding-down procedure ⁽⁵⁾;

(iii) in order to avoid undue distortions of competition, the liquidation phase should be limited to the period strictly necessary for the orderly winding down. As long as the beneficiary financial institution continues to operate, it should not pursue any new activities, but merely continue the ongoing ones. The banking licence should be withdrawn as soon as possible ⁽⁶⁾.

⁽²⁾ See points 43 to 50 of the Banking Communication. In order to enable such orderly exit, liquidation aid may be considered compatible, when for instance needed for a temporary recapitalisation of a bridge bank or structure or satisfying claims of certain creditor classes if justified by reasons of financial stability. For examples of such aid and conditions under which it was found compatible, see the Commission Decision of 1 October 2008 in case NN 41/2008 UK, *Rescue aid to Bradford & Bingley*, OJ C 290, 13.11.2008, p. 2, and the Commission Decision of 5 November 2008 in case NN 39/2008 DK, *Aid for liquidation of Roskilde Bank*, OJ C 12, 17.1.2009, p. 3.

⁽³⁾ See the Commission Decision of 1 October 2008 in case NN 41/2008 UK, *Rescue aid to Bradford & Bingley*, OJ C 290, 13.11.2008, p. 2, and the Commission Decision of 6 June 2011 in case SA. 32634, *Rescue aid to Amagerbanken*, not yet published, recital 52.7.

⁽⁴⁾ See point 48 of the Banking Communication.

⁽⁵⁾ See point 46 of the Banking Communication.

⁽⁶⁾ See point 47 of the Banking Communication.

⁽¹⁾ OJ C 270, 25.10.2008, p. 8.

i) **Demonstration of an orderly winding down**

- (175) The Commission considers the June 2011 restructuring plan to represent an orderly winding-down scenario for WestLB which is based upon a burden-sharing agreement among the bank's shareholders. The June 2011 restructuring plan takes into account in particular the fact that other market-oriented possible solutions for WestLB which might have been less costly or less distortive have already been explored for more than two years without success. An uncontrolled liquidation procedure, on the other hand, would pose a threat to financial stability; that risk is better addressed by the orderly winding-down scenario. The June 2011 restructuring plan allows the Commission to assess the winding-down process and the potential competitive impact of the state measures involved therein.
- (176) The most important criterion for the classification as winding-down scenario is that the bank will stop all banking activities and remains in business only to run down the existing portfolios but not contract any new business.
- (177) The stopping of banking activities should be ensured inter alia by a sale or transfer of all of a bank's remaining assets and liabilities, so that only a rump would remain where that is necessary to assist in the run-down of existing assets in particular to ensure a value-preserving wind-down of its portfolios.
- (178) On the basis of the June 2011 restructuring plan, WestLB will transfer all its banking assets either to the savings banks or to the EAA. Therefore by 30 June 2012 the bank will remain with almost no risk-weighted assets. The remaining bank will, according to the commitments provided by Germany, no longer use its brand name "WestLB" but will be rebranded "SPM bank" within a period of not more than three months. Moreover, the bank will no longer continue banking activities on its own account but merely be a service provider for the EAA and to a limited amount eventually for third parties. Therefore significant and irreversible steps have been laid out in the restructuring plan, which mark an irrevocable exit from the market for the majority of WestLB's former activities within 12 months.
- (179) Second, in line with the requirement set out in point 47 of the Banking Communication, the liquidation phase is limited to the period strictly necessary for the orderly winding down in order to avoid undue distortions of competition. Although the winding down of WestLB will take several years, it can still be considered to be limited to the shortest period possible. Only the servicing company will engage in competition, offering a limited amount of asset management services to third parties.
- Germany has committed that the servicing company will be sold before 31 December 2016. The transformation period until 31 December 2016 is required to allow management to reorganise the organisational structures within SPM bank, to carve out the servicing company and to establish at least a short track-record in order to attract potential investors. SPM bank itself will remain responsible for assets that cannot be physically transferred to the EAA, and so its lifespan is therefore driven by the maturity of those assets. The value-preserving wind-down of the portfolios should take until 2028, and that time period cannot be shortened. However, serving as a holder of assets is as such not an economic activity so that it is without effect on competition. While the reduction of the workforce in SPM bank will take some years to reach the target size of 1 000 employees, that reduction in workforce is still in line with the reduction of the activity level of SPM bank, given that the reorganization of SPM bank will be a labour-intensive process even if banking activities are no longer pursued. In sum, all those processes can be deemed to be limited to the shortest period possible.
- (180) The third criterion is that the bank should not continue its activities in the market except for selling its assets, making sure that only an insignificant part of the former bank activities will as such stay in the market.
- (181) Some activities associated together as the Verbundbank will be taken over by Helaba. The Verbundbank activities represent in terms of balance sheet size less than 20 % of WestLB's former balance sheet (the Verbundbank portfolio will represent a balance sheet size of EUR 45 billion at maximum, compared with WestLB's total balance sheet of EUR 288 billion in 2008). In terms of staff size the Commission notes that less than 10 % of WestLB's former staff will continue working in the carved-out Verbundbank sector (approximately 400 employees in the Verbundbank sector, compared with WestLB's initial staff of 5 661 employees in 2008). Moreover, it should be noted that the Verbundbank will be carved out through a hive-off of assets and liabilities and not be transferred as a fully-fledged bank. As the transaction does thus not concern WestLB but only a small part of its assets and liabilities, the transaction cannot be considered a significant sale of the bank.
- (182) Moreover, the Commission has no indication that the requirements of point 49 of the Banking Communication are not fulfilled, according to which a transaction should take place on market terms and maximise the sales price for the assets and liabilities involved. In that regard the Commission notes that WestLB had set up an unsuccessful sales process that aimed to maximise the sales

price for all its assets and liabilities. However, WestLB did not receive any acceptable offers. Furthermore the company value of the Verbundbank activities, which include assets, liabilities, and an organisational structure with approximately 400 employees, is being reviewed by several external auditors on the basis of well-established valuation methods. Germany commits that the Verbundbank activities, which will either be taken over by Helaba or the savings banks sector, will have a company value of zero, in line with the *Eckpunktevereinbarung*. In fact, unlike other sales processes in liquidation cases⁽¹⁾, the divestment of the Verbundbank activities by WestLB will not require any additional payments by public authorities. The Commission can therefore not see any undue benefit to the entity that will take over the Verbundbank activities and therefore concludes that neither Helaba nor the savings banks obtain any aid arising from the divestment of the Verbundbank activities.

- (183) In any event, the rules for a sale of the entire bank envisaged in points 17 onwards of the Restructuring Communication are, even if they do not apply in this case⁽²⁾, also met in the present case. The rules for such a sale require meeting the following criteria: restoring viability, burden sharing and mitigating distortions of competition. The divestment to Helaba meets those criteria. First, Helaba should be able to ensure viability of the transferred bank, given that the Verbundbank – compared with Helaba – is rather small in terms of balance sheet size and headcount, and has only a small impact on the profitability of the merged entity. On the other hand the merger should lead to savings in relation to those costs that would prevent a positive assessment of the Verbundbank on a stand-alone basis⁽³⁾. Second, burden sharing is ensured because the WestLB shareholders will not receive any proceeds from the sale but instead lose their capital in WestLB. Third, as the activities of WestLB will be reduced to less than 20 % of those of the bank as it originally existed, the Commission's decision-making practice is not to require any additional compensatory measures for such a sale⁽⁴⁾.

⁽¹⁾ See the Commission Decision of 25 January 2010 in case N 194/2009 UK, *liquidation aid to Bradford & Bingley*, OJ C 143, 2.6.2010, p. 22, and the Commission Decision of 25 January 2010 in case NN 19/2009 UK, *Dunfermline Building Society*, OJ C 101, 20.4.2010, p. 8.

⁽²⁾ That provision is in fact displaced by point 49 of the Banking Communication in the context of a liquidation procedure.

⁽³⁾ It seems unlikely that the expected RoE of the Verbundbank, ranging from 2.2 % to 4.5 %, would have been sufficient to establish its viability as a stand-alone entity. The Commission in recent decisions has typically considered a RoE range of 8-10 % to be appropriate. See the Commission Decision of 18 July 2011 in case SA.28264 (C 15/2009, ex N 196/2009), *Hypo Real Estate*, not yet published, recital 111; the Commission Decision of 29 September 2010 in case C 32/09 (ex NN 50/09), *Sparkasse KölnBonn*, OJ L 235, 10.9.2011, p. 12, recital 82; the Commission Decision of 23 June 2011 in case SA.32745 (2011/NN), *Kommunalkredit Austria AG*, OJ C 239, 17.8.2011, p. 2, recital 80; and the Commission Decision of 23 May 2011 in case SA.31154 (N 429/10), *Agricultural Bank of Greece*, OJ C 317, 29.10.2011, p. 5, recital 77.

⁽⁴⁾ Commission Decision of 28 October 2009 in case C 14/2008, *Northern Rock*, OJ L 112, 5.5.2010, p. 57, recitals 154–156.

- (184) In addition, the Commission has no reason to assume that the Verbundbank as a bundle of assets can be seen as the economic successor of WestLB. Helaba is neither the legal successor of WestLB nor has the Verbundbank any significant functional identity with WestLB. Helaba does thus not meet the criteria for establishing the existence of a continuing economic entity which the Commission has used in order to establish whether state aid has been extended to a firm which continues the activity of the original firm⁽⁵⁾.

- (185) Finally, it is also ensured that the aid is limited to the minimum necessary. In particular, a transfer of assets to the EAA will only take place if they cannot be sold to private parties. Moreover, the additional injection of capital into SPM bank is necessary to cover for the expected run-down costs. Finally, the liquidity support can be considered an integral part of the overall liquidation scenario, because it merely shields the transformation period in case market turbulence occurs before 30 June 2012. The liquidity support thereby ensures that the orderly liquidation procedure will not turn into a disorderly wind-down before 30 June 2012.

ii) *Own contribution and burden sharing*

- (186) The second part of the assessment concerns burden sharing. Point 46 of the Banking Communication states that in the context of liquidation particular care has to be taken to minimise moral hazard, notably by excluding shareholders and possibly certain types of creditors from receiving the benefit of any aid in the context of a controlled winding-down procedure. In the cases of Northern Rock⁽⁶⁾ and HRE⁽⁷⁾, burden sharing was achieved by nationalisation. As in those cases, the shareholders here will lose all their equity. Moreover, WestLB's shareholders, as well as SoFFin as the principal provider of hybrid capital, will take individual responsibility for the different parts into which WestLB is to be split and provide additional capital.

⁽⁵⁾ See the Commission Decision of 2 June 1999 in case 2005/536/EC, *Seleco SpA*, OJ L 227, 7.9.2000, p. 24. That absence of economic succession is particularly evident from the purpose of the transfer, which was not to continue to operate cleansed parts of WestLB, but to find a safe haven for certain liabilities of the savings banks and to take over some of the burden for winding down parts of WestLB. Indeed the business objective of the Verbundbank is to focus on those products that are relevant for the cooperation with the savings banks (mainly loans to SMEs as well as simple capital market products) and differs substantially from the current business objective of WestLB. Finally, if the Verbundbank is transferred to Helaba there is also no identity of the shareholders apart from the savings banks associations, which become a minority shareholder in Helaba in return for the capital provided.

⁽⁶⁾ Commission Decision of 28 October 2009 in case C 14/2008, *Northern Rock*, OJ L 112, 5.5.2010, p. 38.

⁽⁷⁾ Commission Decision of 18 July 2011 in case SA.28264 (C 15/2009, ex N 196/2009), *Hypo Real Estate*, not yet published.

(187) In fact, the savings banks have accepted to take responsibility for the Verbundbank activities and will raise capital for that purpose, and NRW has accepted to take the major part of the burden, assuming all operating costs and liquidation costs of SPM bank. Furthermore, SoFFin has also accepted to take a significant part of the burden by leaving two thirds of its silent participation in WestLB, thereby very likely foregoing the repayment of its investment. Therefore the overall agreement takes sufficiently into account both the respective burden-sharing capacities of the parties as well as the degree to which they were formerly involved in setting the bank's strategy and their degree of influence on the bank's corporate governance.

iii) *Limiting distortions of competition*

(188) The liquidation plan ensures a limitation of distortions of competition of WestLB, as it will disappear from the market by 30 June 2012. Thereafter, WestLB will be turned into an entity without banking activities that will together with the EAA run down the assets.

(189) Moreover, undue distortions of competition in liquidation are avoided by ensuring that WestLB after 30 June 2012 continues to operate only as long as necessary for the winding down and will not pursue any new activities, but will merely phase out existing activities. In the present case, that principle is implemented by withdrawing those parts of the banking licence of WestLB that are not required for the holding of assets or provision of asset management services as soon as possible, and by 31 December 2012 at the latest.

(190) As regards SPM bank's intention to spin off a servicing company, offering asset management services to third parties and thereby entering into competition with other providers of that kind of service, the Commission notes that such a step is proposed in order to reduce the state aid in WestLB after 30 June 2012. In fact, NRW, which is responsible for SPM bank, has taken the largest burden of the WestLB shareholders. A reduction of SPM bank's operating cost by offering services to third parties can thus be justified.

(191) Moreover, the servicing company's potential to distort competition is ring-fenced by several commitments by Germany. First, third party contracts may only be provided by a separate entity of SPM bank that holds a banking licence limited to the minimum required and that is going to be sold by 31 December 2016. Second, the nature of the services that SPM bank may provide has been substantiated by an exhaustive list of eligible activities. In that context Germany commits that all banking licences of WestLB that are not required for the provision of asset management services will be returned by 31 December 2012. Third, the workforce in SPM bank will be considerably downsized in the

course of its restructuring and it will not exceed 1 000 employees in 2016, which is less than 20 % of WestLB's initial staff of 5 661 employees in 2008. Fourth, the volume of third party business that the servicing company of SPM bank may acquire on the market must not exceed [40-60]% of its overall revenues, which is an effective cap on its business perspective. Fifth, Germany commits that SPM bank will offer its asset management services only at fair market prices, and that the rates offered are sufficient to cover the full costs of the separate entity. Finally, Germany commits that, if the servicing company providing asset management services to third parties cannot be sold by 31 December 2016, SPM bank will be wound up as well. The combination of those restrictions ensures that only a small part of the former activities stays in the market and has very limited potential to distort competition.

(192) Moreover, the servicing company should be sufficiently profitable. Documentation submitted by Germany indicates that there is a realistic chance to make the servicing company sufficiently profitable, in particular after adjustment of the [...]. If the intended cost-saving measures are implemented and business opportunities are developed, there is a chance that the servicing company will attract market investors.

(193) The commitments given by Germany sufficiently ensure that SPM bank will not continue to offer services on the market if its activities turn out to be less profitable than anticipated so that it cannot be sold in 2016.

d. CONCLUSION

(194) The Commission therefore concludes that the June 2011 restructuring plan represents an orderly winding-down scenario for WestLB which, in view of the commitments set out in the Annex to the present Decision, fulfils all the relevant criteria of the Restructuring Communication and the Banking Communication and thus ensures compatibility of the aid measures indicated in Table 7. The Commission's doubt indicated in the opening decisions as regards the compatibility of the additional aid have therefore been allayed.

(195) In the course of the present Decision, the Commission has had to also consider the measures granted under the May 2009 Decision. That decision and its corresponding April 2009 restructuring plan did not cover the aid provided subsequently nor was the April 2009 restructuring plan apt to ensure the requisite viability, burden sharing and limitation of distortions of competition that would make the subsequent aid compatible. Therefore the Commission had requested in the December 2009

and November 2010 Decisions a new comprehensive restructuring plan. Such a plan was submitted in June 2011 and replaced all previous plans. Moreover, that plan transformed what had previously been envisaged as the restructuring of WestLB into a liquidation process. As indicated in recital 194, the June 2011 restructuring plan is able to ensure compatibility of all the aid provided between 2008 and 2012 to WestLB. Consequently, the May 2009 Decision has become otiose and should be repealed. That repeal should also extend to all of the commitments and obligations submitted in the context of the May 2009 Decision.

VI. ADVANTAGE TO THE SAVINGS BANKS

- (196) The Commission's doubts have been allayed that the savings banks have not adequately participated in the burden sharing and benefited extraordinarily from the asset relief measure.
- (197) First, the Commission's concern that the savings banks were under an obligation to contribute to the recapitalisation of WestLB could not be substantiated; the savings banks had in fact not undertaken such a special obligation.
- (198) Second, the Commission observes a good deal of burden sharing that makes up for the limitation of the exposure of the savings banks to EUR 4,5 billion. Admittedly, the obligation to compensate for losses that may occur at the resolution of the EAA has to some extent been alleviated for the savings banks, as their obligation has been capped at EUR 4.5 billion. However, the savings banks were under no obligation to transfer the assets to the EEA in the first place and had indeed some contractual freedom to arrange for the liability for the losses internally. Even so, since the December 2009 Decision the savings banks have undergone significant burden sharing and lost all their capital in WestLB. Therefore, there is no more reason to pursue the case against the savings banks in that respect.
- (199) Finally, it should also be noted that no advantage can be observed in favour of any members of the savings banks associations beyond the liquidation of WestLB. In particular the transfer of assets to Helaba as well as the provision of capital to Helaba in exchange for the receipt of Helaba shares can be seen as part of the liquidation of WestLB and has been arranged only for that purpose. Even if it constituted state aid, it would be compatible with the internal market in the context of the provision of liquidation aid to WestLB,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures which Germany implemented and is planning to implement for WestLB consisting of:

- a) the 2009 EUR 5 billion risk shield for the Phoenix portfolio;
- b) the 2010 EUR 3 billion capital injection in the context of the first asset transfer;
- c) the 2010 first asset transfer to Erste Abwicklungsanstalt with an aid amount of EUR 10,812 billion;
- d) the 2012 second transfer to Erste Abwicklungsanstalt with an aid amount of EUR [1,3-2,6] billion;
- e) the 2012 additional capital instrument for SPM bank of EUR 1 billion;
- f) the 2012 additional loss coverage of EUR [0,5-2,0] billion by Land NRW for SPM bank; and
- g) the provision of liquidity support by the WestLB AG shareholders in the first half of 2012 [...] constitute state aid.

2. The aid referred to in paragraph 1 is compatible with the internal market in the light of the commitments set out in the Annex.

Article 2

Germany shall ensure that, from the notification of this Decision, detailed quarterly reports are submitted to the Commission on the measures taken to comply with it.

Article 3

The Commission Decision of 12 May 2009 in case C43/2008 is hereby repealed.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 December 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

1. **Company name:** Germany undertakes that WestLB AG, the Verbundbank, the SPM bank and any (successor) company of the WestLB group will no longer use the name 'WestLB' after 30 June 2012, unless technical obstacles delay that change of name by up to three months. That exclusion applies also to any use of the word 'WestLB' as part of another name.
2. In respect of the **Verbundbank**, Germany undertakes that:
 - a) A stand-alone solution will not be pursued for the Verbundbank.
 - b) As set out under II.2 of the framework agreement of 23 June 2011 (i.e. the *Eckpunktevereinbarung*), responsibility for the Verbundbank will be transferred from WestLB to the savings bank associations and savings bank finance group by 30 June 2012 at the latest. The limitation of the business activities and scope described in the restructuring plan notified on 30 June 2011 will apply during the whole restructuring period, i.e. until 31 December 2016. This commitment will cease if a subsequent solution is found, such as the sale of the Verbundbank or its incorporation into another (Landes-) bank (particularly in the case of 2c)).
 - c) Subject to a positive outcome of due diligence, Landesbank Hessen-Thüringen (Helaba) intends to make itself available as a 'docking partner' for the Verbundbank.
 - d) All parties will implement the commitments under the framework agreement unchanged and on time so as to ensure sufficient transactional certainty, in particular with regard to the object of the transaction and 'zero company value', and transferral of the Verbundbank will be implemented by 30 June 2012 at the latest⁽¹⁾.
 - e) The company's value will be established on time by the auditor and all parties will respect the result on the basis of the framework agreement of 23 June 2011.
 - f) The *Land* NRW will in future not have any ownership position in the Verbundbank, acquire shares in it or otherwise financially support it. Any transfer of the giro centre function (*Girozentrafunktion*) by the *Land* NRW will not be deemed as support in this respect.

The above commitments will remain subject to the conditions and effectiveness requirements set out in section VIII of the framework agreement of 23 June 2011.

3. In respect of the **SPM bank** (the renamed successor of WestLB), Germany undertakes that:
 - a) The restructuring will be supervised for the entire period up to the end of 2016 with the help of a monitoring trustee and the implementation will be reported on in quarterly reports. There will be a separate agreement between the Federal Government, the *Land* of NRW, WestLB and the Commission for appointing, and specifying the tasks of, the monitoring trustee as from 30 June 2012.
 - b) The SPM bank will focus exclusively on asset management, will no longer operate as a universal bank and will perform banking transactions only as part of its asset management activities.

In this context, asset management means that the SPM bank may offer the following services:

- i. general portfolio management/control including workout management, liquidation and sale, credit risk analysis, credit risk processing and supervision;
- ii. credit risk controlling, regulatory reporting, operational risk, management of market risks;
- iii. credit administration, management and supervision of securities, general maintenance and administration of the securities database;
- iv. back office (group operations) including collateral management;
- v. funding, hedging, cash management;
- vi. financial reporting, controlling;
- vii. corporate centre functions, such as law, compliance, money laundering prevention, administration of holdings, safekeeping of relevant documents, auditing, project management tasks;

⁽¹⁾ The general understanding of the parties is that the portfolios to be hived off to the Verbundbank and the EAA will be included in WestLB's half-yearly financial statement for 2012 and only transferred immediately thereafter.

- viii. management of the bond pool if no buyer is found for the planned transfer of the bond business in WestLB to the Verbundbank/WestImmo;
- ix. IT services in the context of the above activities and as part of the provision of the operative platform;
- x. similar asset management activities not expressly mentioned.

The business activities of the SPM bank do not include, in particular, proprietary trading, the issuing of any kind of certificate or other underwriting activities, the financing of projects and commercial transactions, asset-based finance, securitisation and syndicated loan activities, and international corporate banking. As part of its liquidation strategy, the first winding-up institution (EAA) may extend, sell or securitise the assets synthetically transferred to it. In such cases, the SPM bank will act exclusively on behalf of and under the authority of the EAA.

- c) For the business activities of the SPM bank, on the basis of currently available information only the following partial authorisations will be required under the Banking Act (KWG):
- i. the acceptance of funds from others as deposits or of other repayable funds from the public (Article 1(1)(1) KWG) ⁽¹⁾;
 - ii. the operations mentioned in the second sentence of Article 1(1) of the Pfandbrief Act (Article 1(1)(1a) KWG);
 - iii. the granting of money loans and acceptance credits (lending business; Article 1(1)(2) KWG) ⁽²⁾;
 - iv. the purchase and sale of financial instruments in the credit institution's own name for the account of others (Article 1(1)(4) KWG);
 - v. the safe custody and administration of securities for the account of others (Article 1(1)(5) KWG);
 - vi. the assumption of guarantees and other warranties on behalf of others (Article 1(1)(8) KWG);
 - vii. the execution of cashless payment and clearing operations (Article 1(1)(9) KWG);
 - viii. the activities of a central counterparty within the meaning of paragraph 31 (Article 1(1)(12) KWG).

The Commission will be informed immediately if other compulsory partial authorisations should be required under the KWG.

As soon as possible and by 31 December 2012 at the latest, the partial authorisations for the current universal banking licence that are no longer required will be returned or the current banking licence will be transformed into an appropriately limited banking licence ⁽³⁾.

The need for banking licences for foreign operations and WestLB AG subsidiaries must still be analysed in connection with sub-project 3 on the 'sale of sub-areas' and the final means of transfer to the EAA of unsold portfolios.

- d) With regard to third-party business: the Land of NRW will convert WestLB into a service and portfolio management bank ('SPM bank') for bank portfolios, which may consist of several companies. In addition, the servicing of third-party portfolios business may be hived off to a service company and sold. WestLB staff numbers will be reduced from the current 4 400 to a maximum of 1 000 in the service company by 31 October 2016.

To enable a subsequent sale, the SPM bank may during the period from 1 January 2012 to 31 December 2014 also take over servicing with regard to third-party portfolios (i.e. third-party business outside WestLB portfolios) up to a maximum of [40-60]% of the SPM bank's gross revenues. Where this is the case, the servicing business must be hived off by 31 December 2014 to a subsidiary of the SPM bank, which will receive a substantive banking licence only to the extent necessary for servicing and which must be completely sold by 31 December 2016.

The named subsidiary of the SPM Bank, viz. the service company, may likewise carry out servicing for the EAA, the Verbundbank and other WestLB portfolios.

⁽¹⁾ Germany would clarify that this partial authorisation is necessary only on account of ECB access and the winding up of existing business. Therefore, no active business will be conducted on this basis and there will be no competitive presence in the market.

⁽²⁾ Germany would clarify that this partial authorisation is necessary only on account of the credit positions synthetically transferred to the EAA where the SPM bank is legally party to the credit contract. Therefore, no active business will be conducted on this basis and there will be no competitive presence in the market.

⁽³⁾ Upon request the Commission may agree to a more far-reaching arrangement.

The sale of the service company must be notified in advance to the Commission and requires its approval. If no such sale is possible by 31 December 2016, the service company will be gradually wound up. In such a case, it will immediately cease to acquire further third-party business and will exclusively fulfil its remaining contractual commitments. The service company's business may not be transferred back to the SPM bank or to other subsidiaries or locations of the SPM bank. In the event of the service company being wound up, customers who had concluded a servicing contract with the service company before 31 December 2016 may take over the service company's staff and infrastructure.

Service contracts of the service company which are valid beyond 31 December 2017 are permitted if the contract grants the customer a termination right, effective at 31 December 2017 at the latest, should the supplier (the service company) not have provided an adequate service or be unable to demonstrate the required capacity for the remaining period of the contract. If the planned sale is not successful, the service company will not have the required capacity for the remaining period of the contract. If privatisation fails, the German authorities will ensure that, with effect from 31 December 2017, either the service company ceases its activities or all shares are wound up, e.g. by means of a transfer.

- e) The SPM bank/its subsidiaries will offer their services, including to third-parties, only at market prices. The price structure of the service company must also cover overall costs (full cost allocation). Overheads will be allocated to individual contracts in line with the business case for the service company sent to the Commission on 21 November 2011.
 - f) The SPM holding/SPM operating company will close its foreign operations as soon as possible, at the latest by 31 December 2016, unless regulatory requirements mean an operation must be maintained beyond 31 December 2016. The Commission's agreement to a location being maintained must be obtained without delay. The Commission may require an appropriate form of proof, for example a legal opinion, showing that regulatory requirements make this necessary. Irrespective of this, to fulfil its asset management function, the service company will be represented in New York, London and Asia for reasons of local expertise, coverage of time zones, reduction of operational risks and competitiveness.
 - g) The limitations specified for the service company will no longer apply in the case of a complete sale of the service company.
4. In respect of the **servicing of the first winding-up institution**, Germany undertakes that any expansion or extension of the service contract until 31 December 2016 will respect the principles under 3e) and that subsequently the contract will be properly put out to tender and the termination rights under 3d) above will be provided for.
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COMMISSION DECISION

of 7 March 2012

on State aid No SA.29041 (C 28/2009, ex N 433/2009) Support measures in favour of Oltchim SA Râmnicu Vâlcea

(notified under document C(2012) 1369)

(Only the Romanian text is authentic)

(Text with EEA relevance)

(2013/246/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (hereinafter: 'TFEU'), and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid C 28/2009 (ex N 433/2009) ⁽²⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above, and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 17 July 2009 Romania notified two support measures (hereinafter: 'the notification') in favour of Oltchim SA Râmnicu Vâlcea (hereinafter: 'Oltchim' or 'the company'): (i) the conversion of debt towards the public authorities amounting to RON 538 million (approximately EUR 128 million ⁽³⁾) into equity and (ii) a state guarantee covering 80 % of a commercial loan amounting to EUR 424 million. Romania notified these

state support measures for reasons of legal certainty, arguing that they did not involve state aid within the meaning of Article 107(1) TFEU.

(2) Prior to this notification, on 10 April 2008, PCC SE (hereinafter: 'PCC'), a company based in Duisburg, Germany, which currently owns a minority stake of 18,31 % in Oltchim, submitted a formal complaint, alleging that the planned debt-to-equity conversion involved incompatible state aid.

(3) Following the registration of the complaint, the Commission exchanged correspondence and information with the Romanian authorities, Oltchim and the complainant, and met on several occasions with the Romanian authorities and representatives of Oltchim, on the one hand, and with representatives of the complainant, on the other hand.

(4) On 15 September 2009 the Commission opened a formal investigation procedure pursuant to Article 108(2) TFEU with regard to the notified measures (hereinafter: 'the opening decision'). Romania submitted comments on the opening decision on 3 November 2009.

(5) The opening decision was published in the *Official Journal of the European Union* on 29 December 2009 ⁽⁴⁾. By letters of 21 December 2009, the Commission invited eight companies potentially interested in the proceedings as competitors of Oltchim to submit comments on the opening decision.

(6) The Commission received comments from five third parties: by letter of 26 January 2010, from Vestolit GmbH & Co. KG (hereinafter: 'Vestolit'); by letter of 26 January 2010 from Ineos ChlorVinyls (hereinafter: 'Ineos'); by letters of 27 January 2010 and 28 January 2010, from two companies which requested confidentiality as regards their identity (hereinafter: 'Anonymous parties I and II'); and by letter of 29 January 2010, from Mr Virgil Bestea, a private individual.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU has also introduced certain changes in terminology such as replacement of the terms 'Community' and 'common market' by, respectively, 'Union' and 'internal market'. The terminology of the TFEU will be used in this Decision.

⁽²⁾ Commission Decision C(2009) 6867 final of 15 December 2009 (OJ C 321, 29.12.2009, p. 21).

⁽³⁾ The ECB exchange rate on 17 July 2009 was EUR 1 = RON 4,2. In this decision all RON figures are converted into EUR at this exchange rate, unless figures were only available/provided in EUR, in which case only the EUR value is used.

⁽⁴⁾ See footnote 2.

- (7) These comments were transmitted to Romania by letter of 2 March 2010. Romania replied to the above-mentioned third party observations by letter of 8 April 2010.
- (8) A sixth third party, Firebird Management LLC (hereinafter: 'Firebird') – an investment fund holding at the time 1,328 % of Oltchim's shares – submitted information and comments by letters of 27 May 2010 and 8 July 2010. Firebird's comments were transmitted to Romania by letters of 25 June 2010 and 27 July 2010 respectively.
- (9) PCC, the complainant, submitted information on the case by letters of 6 May 2010, 18 May 2010, 19 May 2010, 28 May 2010, 13 June 2010, 18 June 2010, 22 July 2010, 6 August 2010, 2 September 2010, 18 October 2010, 9 April 2011 and 14 April 2011. Besides these submissions, PCC sent numerous pieces of information related to the case, principally including various newspaper articles and other information, mostly publicly available.
- (10) Furthermore, Anonymous parties I and II (which also commented on the opening decision and which requested confidentiality as regards their identity) submitted further information on 21 September 2010, 22 February 2011, 28 February 2011, 26 July 2011 and 28 October 2011.
- (11) The Commission transmitted the comments referred to above in recitals (9) and (10) to Romania, when they contained new information and arguments and were relevant to the current procedure, by letters of 25 June 2010, 2 August 2010, 9 September 2010, 22 September 2010, 20 October 2010 and 23 November 2011.
- (12) Romania replied to the additional comments submitted by letters of 30 July 2010, 2 September 2010, 12 October 2010, 26 October 2010, 23 November 2010 and 7 December 2011. It also submitted additional information on the case by letters of 29 March 2011, 14 April 2011, 27 July 2011, 9 September 2011 and 21 September 2011.
- (13) Following the opening decision, several meetings took place in Brussels between the Commission's departments and the Romanian authorities: on 30 June 2010, 15 July 2010, 19 May 2011 and 12 September 2011. The Commission's departments also met on several occasions with representatives of the complainant PCC.
- (14) By letter dated 22 June 2011, the Romanian authorities withdrew their notification of 17 July 2009 with regard to the state guarantee for the loan of EUR 424 million. They also informed the Commission that they maintained their notification with regard to the debt-to-equity conversion.
- (15) On 10 August 2011 the Romanian Government approved a Memorandum mandating the representatives of the Ministry of Economy, Trade and the Business Environment, AVAS ⁽⁵⁾ and Oltchim to adopt a private-law convention between AVAS and Oltchim whereby the company would acknowledge interests accruing on the public debt since 1 January 2007.
- (16) By letter of 9 September 2011, the Romanian authorities announced that Oltchim and AVAS intended to conclude the above-mentioned private-law convention, and that AVAS would also convert the interests thus accrued into equity, together with the principal debt.
- (17) By letter of 21 October 2011, Romanian Prime Minister Emil Boc conveyed the Romanian Government's firm commitment to privatise Oltchim in full, including the whole stake accruing to the public authorities after the debt conversion. The privatisation announcement was to be released at the end of March 2012, and the privatisation was to be concluded by the end of May 2012. By letter of 16 February 2012, the new Romanian Prime Minister Mihai-Răzvan Ungureanu re-affirmed these commitments.
- (18) Romania submitted additional comments and information by letters of 12 October 2011 and 23 December 2011.
- (19) The letters mentioned in recitals 17 and 18 show that Romania modified the notification of Measure 1 in the sense that the conversion of the debt to the public authorities amounting to RON 538 million was to be followed by the privatisation of the resulting shareholding in Oltchim, and that the conversion has to be assessed in the light of the subsequent privatisation.

II. BACKGROUND TO THE CASE

II.1. The company

- (20) Oltchim is a large Romanian petrochemical manufacturer, producing PVC, caustic soda, chlorine, DOP and polyether polyols. The company's main product is PVC (currently about 37,5 % of its overall production), with an EU market share of 2,1 % in 2008 ⁽⁶⁾. Oltchim is one of the largest petrochemical companies in Romania and south-east Europe, manufacturing 78 types of 40 base chemical products. The company exports around 80 % of its production inside and outside Europe.

⁽⁵⁾ The Romanian Privatisation Agency. See footnote 10 below.

⁽⁶⁾ Oltchim's own figures.

(21) Oltchim is the main industrial employer in Vâlcea, a Romanian region assisted under Article 107(3)(a) TFEU. On 15 October 2011 the workforce consisted of 3 470 people ⁽⁷⁾. Owing to the current difficult financial situation, the company temporarily laid off 1 000 employees in December 2011 and a further 993 employees in January 2012 ⁽⁸⁾.

(22) The company started business in 1966, was reorganised in 1990 and was listed on the Romanian Stock Exchange in 1997. The Romanian State (currently via the Ministry of Economy) maintains a controlling stake of 54,8 % in the company. The principal minority shareholder is PCC, which is also the complainant in this procedure and also owns Rokita SA, a Polish competitor of Oltchim, with a stake of 18,31 %. The rest of the company shares are held by Nachbar Services Ltd (14,02 %), various individuals (11,04 %) and other legal entities (1,81 %).

II.2. Events prior to Romania's Accession to the EU

II.2.1. The origin of the public debt

(23) Over the period 1992-2008, Oltchim invested a total of approximately EUR 371 million in the modernisation of its production line (of which EUR 118,8 million was invested in 2007/2008). In relation to certain of these investments, Oltchim contracted over the period 1995-2000 a series of 12 commercial loans, totalling approximately DEM 171 million plus USD 60 million. The loans were backed by state guarantees, issued by the Ministry of Finance.

(24) Given that Oltchim was not able to repay the loans, the banks called on the state guarantees starting from November 1999.

(25) From 1999 to 2002, the Ministry of Finance made payments under the called guarantees. It charged substantial interest and penalties on the amounts thus paid on account of the state guarantees triggered between 1999 and 2002, fluctuating between 0,15 % and 0,3 % per day, i.e. 54 %-110 % per year ⁽⁹⁾.

(26) By June 2002, Oltchim's accrued debt towards the Ministry of Finance stemming from the state guarantees, plus the interest and penalties applied thereon, amounted to RON 303 million (approximately EUR 72 million). At that date, this amount was transferred from the Ministry

of Finance to the Romanian agency entrusted with the recovery of public debt, AVAS ⁽¹⁰⁾, and was consolidated in USD so as to preserve the value of the debt in the hyperinflationary environment, the resulting amount being USD 91 million.

(27) In accordance with Romanian law (GEO 51/1998), AVAS did not have a specific mandate to apply interest and penalties on the public debt that it was entrusted with recovering from the debtor companies.

II.2.2. The 2003 debt conversion

(28) The first attempt to privatise the company took place in 2001, when AVAS negotiated and signed with Exall Resources a sale agreement for the state's stake in the company. The sale agreement was cancelled owing to the buyer's inability to fulfil its payment obligations and its failure to guarantee the technological/environmental investments for the company.

(29) The second attempt to privatise Oltchim was made in October 2003, when the Romanian privatisation agency APAPS published an announcement for the sale of the State's stake. Potential investors were informed that the public debt would be converted into equity, with a view to increasing the attractiveness of the company to potential investors.

(30) However, as a potential investor (Rompetrol) and minority shareholders challenged the 2003 debt conversion in the Romanian courts, the privatisation offer was cancelled in early November 2003. Notwithstanding this, in November 2003 the AVAS debt of USD 95 million (i.e. the transferred USD 91 million plus further payments made by the Ministry of Finance in application of the guarantees and transferred to AVAS since June 2002), equal to RON 322 million, was converted into equity by decision of the Oltchim General Meeting of Shareholders (in which the state representatives had majority votes). The public stake in Oltchim thus increased from 53,26 % to 95,73 %.

(31) In November 2005, a commercial court in Vâlcea annulled the Oltchim General Meeting's decision on the debt conversion, on the ground that the debt conversion had been carried out without allowing the minority shareholders to also participate in the capital increase.

⁽⁷⁾ Company profile available from the Bucharest Stock Exchange, see <http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ticker=OLT:RO>.

⁽⁸⁾ Information available on Oltchim's website: www.oltchim.ro.

⁽⁹⁾ Taking account of the fact that the Romanian currency in circulation at the time, the ROL, was subject to hyperinflation.

⁽¹⁰⁾ Eventually, at the time, the debt was transferred to the Romanian agency named 'AVAB' (Autoritatea pentru Valorificarea Activelor Bancare – the Authority for Bank Assets Recovery), which in May 2004 was merged with the privatisation agency APAPS (the Authority for Privatisation and Management of State Ownership) and renamed AVAS (Autoritatea pentru Valorificarea Activelor Statului – the Authority for State Assets Recovery). For the sake of simplification in this Decision, AVAS and AVAB will be referred to as AVAS.

- (32) In June 2006 the Romanian Government issued an Emergency Ordinance⁽¹¹⁾ mandating the state representatives in the Oltchim General Meeting of Shareholders to vote not to appeal against the court ruling which had annulled the first debt conversion, and to take the necessary steps to reverse the conversion. The court decision annulling the debt conversion became final in August 2006. The share capital decrease effectively took place in November 2007. The debt resulting from the annulment of the debt conversion was re-entered in the accounts at its historical value of USD 95 million, subsequently equalling RON 317 million.

II.2.3. Further accumulated debt

- (33) After the first transfer of the debt in June 2002 to AVAS, over the period June 2002 to December 2006 the Ministry of Finance continued to make payments on account of the state guarantees which had been triggered in November 1999. Over the period 2003-2006, while the 2003 debt conversion was still in place, the total sum of extra payments made by the Ministry of Finance on account of the triggered guarantees amounted to RON 191 million. In application of the convention concluded in June 2002 between the Ministry of Finance and AVAS for the transfer of the public debt, the Ministry of Finance also transferred to AVAS, in successive instalments following the actual payments made on account of the guarantees, all these receivables. AVAS also consolidated these receivables in USD, which in 2006 totalled USD 60 million.
- (34) Thus on 1 January 2007, the date of Romania's accession to the EU, Oltchim's total debt to AVAS amounted to USD 60 million⁽¹²⁾.

II.3. Events after Romania's accession to the EU

II.3.1. Evolution of the debt

- (35) Since 1 January 2007, all payments concerning the external loans have been made by Oltchim. The Ministry of Finance no longer made any additional payment under the state guarantees.
- (36) In November 2007, the amount of the reversal of the debt conversion of USD 95 million was entered into Oltchim's accounts and added to the USD 60 million linked to the further payments, thus resulting in a total public debt of USD 155 million (RON 508 million). This public debt of USD 155 million is indicated in Oltchim's accounts in RON (i.e. RON 508 million). This USD-denominated debt has been reported since then in

Oltchim's accounts in RON, and the amount remained unchanged in the Romanian currency because, at every new reporting interval, the company reported in the balance sheet the historical RON value⁽¹³⁾, which was always higher than the then-applicable value, as the RON appreciated against the USD over time.

- (37) As an exception to the general rule provided by GEO 51/1998 (see recital (27) above), based on Article 2(2) of Government Emergency Ordinance 45/2006 (hereinafter: 'GEO 45/2006'), in 2007 AVAS charged interest amounting to RON 29,9 million, at the one-year LIBOR⁽¹⁴⁾ rate for deposits in USD, for the Oltchim receivables transferred to it by the Ministry of Finance that were the subject of the 2003 debt conversion, for the period 2003-2006.
- (38) Consequently, as from November 2007, the total amount owed by Oltchim to AVAS amounted to USD 155 million (RON 508 million) plus RON 29 million, for a total of RON 538 million. In what follows, this Decision will refer to the debt in RON as the notified debt conversion is also denominated in RON.

II.3.2. The second debt conversion

- (39) In January 2007, the Romanian Parliament validated through Law 30/2007 the GEO 45/2006, which authorised AVAS to reverse the first debt conversion and mandated it to implement a second one, this time also respecting the priority rights of the minority shareholders.
- (40) This second attempt to convert the debt into equity was opposed, however, by the new principal minority shareholder, PCC, which refused to participate in the operation.
- (41) PCC had acquired a 1,2 % stake in Oltchim for EUR 7,5 million in May 2007, i.e. after the date when the national court ruling which annulled the first debt conversion became final because neither Oltchim nor the Romanian authorities appealed. When the debt conversion was reversed on the company's accounts, PCC's share of 1,2 % became a share of 12 %⁽¹⁵⁾.

⁽¹¹⁾ Government Emergency Ordinance No 45/2006.

⁽¹²⁾ As explained above in recital 32 the amount of USD 95 million resulting from the reversal of the debt conversion was entered into Oltchim's accounts only in the course of 2007.

⁽¹³⁾ The RON replaced the ROL on 1 July 2005; 1 RON equals 10 000 ROL.

⁽¹⁴⁾ The London interbank offered rate.

⁽¹⁵⁾ In May 2011 PCC bought on the stock exchange a further 3,6 % stake for EUR 2,6 million. In June 2011, PCC SE concluded an alliance with the UK investment fund Carlson Ventures Ltd, which had also acquired Oltchim shares on the stock exchange. PCC and Carlson Ventures now hold together 32 % of Oltchim.

(42) In April 2008 PCC lodged a complaint with the Commission, alleging that the debt conversion involved incompatible state aid (see recital 2 above).

(43) The Romanian authorities decided, in order to ensure compliance with Article 108(3) TFEU, to obtain state aid clearance from the Commission prior to carrying out the second debt conversion, and notified the measure.

II.4. Oltchim's current situation

(44) The Romanian authorities argue that after the reversal of the 2003 debt conversion in 2006 they tried again to privatise the company with the debt, in 2006 and 2008 respectively. According to the Romanian authorities, no investor was interested in buying on such terms.

(45) Moreover, according to the Romanian authorities, the challenges the company has been facing since 2008 are: (i) the stoppage of supplies of key raw materials from the main supplier Arpechim; (ii) the negative impact on the company's net asset value caused by the reinstatement of a significant debt after the reversal of the 2003 debt conversion in November 2007; (iii) the undercapitalisation of the company, also due to the debt conversion reversal; and, finally (iv) the effects of the global financial and economic crisis.

(46) For the financial year 2008, Oltchim made an operating loss of RON 71 million (EUR 17 million), a net loss of RON 226 million (EUR 54 million), and the accumulated losses reached RON 1,367 billion (EUR 325 million). After the closure of the main ethylene supplier Arpechim in November 2008, the company functioned at 45 % of capacity and about one third of the staff was temporarily laid off.

(47) At the end of 2008, Oltchim's shares held until that time by AVAS were transferred to the Ministry of Economy's portfolio.

(48) In December 2009 Oltchim purchased the assets (ethylene installation) of its previous supplier Arpechim for EUR [0]-[10] (*) and paid for its stocks/inventories EUR [10]-[20] million. According to the Romanian authorities, the acquisition was financed from customer advance payments. Arpechim restarted operations in May 2011.

(49) On 31 December 2009, Oltchim's financial accounts for 2009 showed an operating loss of EUR 26 million

(RON 109 million), a net loss of EUR 52,4 million (RON 220 million), accumulated losses of EUR 377 million (RON 1,584 billion) and negative own funds in the amount of EUR 112 million (RON 469 million).

(50) On 31 December 2010, Oltchim's financial accounts showed an operating profit of EUR 56 million, a net profit of EUR 32 million (RON 220 million) and accumulated losses of EUR 383 million. The positive operating and net result was due to the fact that the Arpechim assets purchased for EUR [0]-[10] were revalued at EUR [80]-[100] million, and the difference was entered in the books as 'gain from a bargain purchase'.

(51) On 30 June 2011, Oltchim's six-months financial accounts⁽¹⁶⁾ showed an operating loss of EUR 7,4 million and a net loss of EUR 17,4 million, accumulated losses of EUR 401 million and negative own funds in the amount of EUR 358 million (without taking into account the debt to AVAS).

III. THE OPENING DECISION

(52) On 15 September 2009, the Commission opened a formal investigation into the two support measures in favour of Oltchim notified by Romania in July 2009:

— Measure 1: a debt conversion for the total value of RON 538 million (approximately EUR 128 million); and

— Measure 2: a 'shareholder guarantee' covering 80 % of a commercial loan of EUR 424 million for further modernisation investments. (Romania withdrew its notification with regard to Measure 2 by letter of 22 June 2011.)

(53) The Commission questioned whether, contrary to Romania's arguments, the notified support package conferred an undue advantage on the company and constituted state aid within the meaning of Article 107(1) TFEU.

(54) Furthermore, the opening decision identified as possible further state aid the fact that, since 1 January 2007, the State had not charged interest and/or penalties on the pending public debt (identified as 'Measure 3').

(55) Finally, the Commission doubted that the measures could be found compatible with the TFEU under the relevant state aid rules if found to involve state aid.

(*) Confidential information.

⁽¹⁶⁾ The figures in the 30 June 2011 interim accounts were indicated in EUR.

IV. ROMANIA'S COMMENTS ON THE OPENING DECISION

- (56) In their reply to the opening decision, the Romanian authorities maintained that none of the three measures constituted state aid within the meaning of Article 107(1) TFEU, as the behaviour of the Romanian State was consistent with market principles.
- (57) In particular, Romania insisted that the notified measures (the debt conversion and the shareholder guarantee) would have ensured Oltchim's return to profitability by resolving the undercapitalisation issue and by providing the necessary funds for its growth strategy. Moreover, Romania stressed that the Commission had to take account of the dual role of the State as shareholder and creditor to Oltchim.
- (58) Finally, Romania maintained that Measure 3 did not constitute state aid as the State's behaviour with regard to the non-enforcement of the past debt strictly related to the planned debt conversion, and that with regard to this debt the Romanian authorities had behaved consistently in line with what a market operator in a similar situation would have chosen to do.

V. COMMENTS FROM INTERESTED PARTIES

- (59) In its comments on the opening decision, dated 26 January 2010, Vestolit expressed concerns about the state support package notified in July 2009 by Romania. Vestolit considers itself a competitor of Oltchim, as both parties are active in the production of PVC. According to Vestolit, no private investor would have supported an investment programme exclusively geared to the purchase and revamping of the outdated Arpechim ethylene installation.
- (60) In its letter of 21 January 2010, Ineos argued that, based on the information in the opening decision, Oltchim seemed to be a firm in difficulty, and therefore the support measures to be taken by the Romanian State in its favour were unlikely to have been undertaken by a private investor. Ineos also drew attention to the fact that the European PVC market is characterised by significant overcapacity, and therefore any potential aid to one of the market players is likely to be highly distortive.
- (61) The comments submitted by Firebird on 28 May 2010 are of similar content to those presented by the above-mentioned interested parties.
- (62) By letter of 28 January 2010, another competitor of Oltchim, Anonymous party I, also made comments along the same lines as those of Vestolit and Ineos. It also stresses that operating aid cannot be found to be compatible with the TFEU, and there do not seem to be other grounds of compatibility in the case of Oltchim.

(63) By letter of 27 January 2010, Anonymous party II argued that all the support measures identified in the opening decision constitute incompatible aid. This Anonymous party II also maintained that:

- (a) the state guarantees granted to Oltchim during the period 1995-2000 were still in place after Romania's accession to the EU, namely until 31 October 2009, and therefore should be treated as of the accession date as new aid;
- (b) the difficulties that Oltchim has been facing since the triggering of the state guarantees in November 1999 are due to structural problems of the company (poor management, wrong business strategy choices, the lack of real and effective restructuring);
- (c) the acquisition of Arpechim is against the business interests of Oltchim; this will not generate profit in the future;
- (d) the subsequent payments made by the Ministry of Finance during the period June 2002 to December 2006 on the basis of the triggered state guarantees show that Oltchim was in difficulty throughout that period;
- (e) Romania truly attempted to privatise the company only once, in 2001, and the successive 'failed' privatisation attempts of 2003 and 2006 were only a strategy for not enforcing the public debt;
- (f) the business plan underlying the support package as notified in July 2009 was not credible, especially regarding the sensitivity analysis and the expected return on the investment;
- (g) the State would have incurred a substantial loss by supporting such a sizeable investment programme, as the revenues expected from Oltchim's privatisation would not have covered the costs of the support measures;
- (h) in view of the fact that the notified measures involved state aid, Romania should have proposed a restructuring plan for Oltchim, allowing an assessment of the compatibility of the aid under the Rescue and Restructuring Guidelines ⁽¹⁷⁾.

⁽¹⁷⁾ Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(64) Later in the course of the procedure, PCC drew the attention of the Commission to the fact that in June 2010 the Romanian environmental protection agency had imposed an environmental fine of EUR 14,34 million on Oltchim for late return of CO₂ certificates for the year 2009 ⁽¹⁸⁾. In the view of PCC, the possible non-enforcement of the fine involved further state aid to the company. Firebird's letter of 8 July 2010 also raises the issue of the environmental fine.

(65) In October 2010 and October 2011 PCC also informed the Commission that the state-owned electricity supplier SC Electrica SA (hereinafter: 'Electrica') and other publicly owned creditors (Salrom Exploatarea Minieră Rm. Vâlcea, a salt solution and limestone supplier; and SC CET Govora SA, a supplier of industrial steam) have substantial rescheduled claims vis-à-vis Oltchim.

VI. ROMANIA'S COMMENTS ON THE OBSERVATIONS OF INTERESTED PARTIES

(66) In its reply of 8 April 2010 to the observations of interested parties, Romania largely refers to the notification and its earlier comments submitted in response to the opening decision.

(67) In particular, Romania claimed that, contrary to what one of the third parties alleges, the acquisition and revamping of the Arpechim petrochemical assets includes all necessary restructuring and is essential for the long-term viability of the company, and that the operation of the integrated Oltchim-Arpechim petrochemical unit platform can be expected to generate profits.

(68) Romania also repeats its arguments that the actions taken for the enforcement of the receivables against Oltchim did not confer any advantage on Oltchim. Finally, Romania also insisted on its intention to privatise Oltchim.

VII. WITHDRAWAL OF THE NOTIFICATION WITH RESPECT TO THE STATE GUARANTEE (MEASURE 2)

(69) According to Article 8 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁹⁾, a Member State may withdraw the notification after the opening of the formal investigation procedure in due time before the Commission has

taken a decision on the aid character of the notified measure. In such a case, the Commission will close the procedure with a decision declaring the matter moot.

(70) The Romanian authorities have withdrawn the notification with respect to the state guarantee (covering 80 % of a loan up to EUR 424 million). Thus, as regards Measure 2, the Commission's investigation has become moot.

VIII. ROMANIA'S POSITION AFTER THE WITHDRAWAL OF MEASURE 2

VIII.1. Modification of measure 1 - Romania's intention to privatise

(71) In February 2011, a joint EU/International Monetary Fund (hereinafter: 'IMF') precautionary financial assistance programme was requested to support the re-launch of economic growth in Romania with a focus on structural reforms, while improving fiscal sustainability and consolidating financial stability. In May 2011, the Council adopted a decision ⁽²⁰⁾ to make available to Romania precautionary medium-term financial assistance of up to EUR 1,4 billion. In March 2011, the IMF approved a new Precautionary Stand-By Arrangement ⁽²¹⁾ for Romania. Under this Agreement, the IMF places at Romania's disposal SDR 3 090,6 million (EUR 3,5 billion) of financial assistance for the next two years. The financing is conditional upon Romania meeting a series of targets for reducing budgetary deficit, specified in a Letter of Intent presented by the Romanian authorities and reflected in a Technical Memorandum of Understanding (hereinafter: 'TMoU'). The TMoU targets include *inter alia* reductions of payment arrears and losses for publicly owned enterprises. In the Letter of Intent and the TMoU of 2 December 2011 ⁽²²⁾, Romania committed to announce the privatisation tender for Oltchim by the end of April 2012.

(72) This followed several public statements by the Romanian authorities that were made in the course of 2011 declaring the Romanian Government's intention to privatise Oltchim.

(73) Romania also declared its commitment to privatise Oltchim vis-à-vis the Commission. More specifically, by letter dated 21 October 2011 addressed to Vice-President Joaquín Almunia, Romanian Prime Minister Emil Boc declared that Romania was committed to privatising Oltchim fully (including the stake subject to the debt conversion) by May 2012. Following the appointment of a new government in Romania on 9 February 2012, the new Prime Minister, Mihai Răzvan Ungureanu, reconfirmed this commitment by letter dated 16 February 2012.

⁽¹⁸⁾ According to Government Decision 780/2006 implementing Council Directive 2003/87, operators must return the CO₂ certificates corresponding to the previous year by 30 April. Failure to surrender the certificates in time is punishable by a fine.

⁽¹⁹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁰⁾ Council Decision 2011/288/EU (OJ L 132, 19.5.2011, p. 15).

⁽²¹⁾ See <http://www.imf.org/external/pubs/cat/longres.aspx?sk=24767.0>.

⁽²²⁾ Available at <http://www.imf.org/external/np/loi/2011/rou/060911.pdf>.

- (74) In the light of its budgetary constraints, Romania therefore no longer intends to remain the owner of Oltchim and finance the necessary investments through a state guarantee, but seeks to sell its shareholding in Oltchim.

VIII.2. Developments regarding measure 3 - the interest agreement

- (75) By letter of 9 September 2011 the Romanian authorities informed the Commission that they intended to charge interest on the due AVAS debt amounting to RON 538 million as from 1 January 2007. Romania also explained that this would take place within a debt convention agreement between AVAS and Oltchim whereby the company would accept the interest due. In the same letter the Romanian authorities indicated that the interests thus accrued was also to be converted into

equity, along with the main public debt, as notified under measure 1.

- (76) By letter of 23 December 2011, the Romanian authorities provided a copy of the private law agreement concluded on 22 December 2011 between AVAS and Oltchim, whereby the company acknowledged the interest accruing on the public debt from 1 January 2007 until 31 December 2011 amounting to a total of RON 511 million. The Romanian authorities explained that the interest was calculated on a compound basis, using as default interest for the relevant periods the highest of the interest rates charged by the commercial banks for the loans granted effectively to the company since 1 January 2007 and using the applicable Commission reference and discount rates. This approach resulted in the following applicable interest rates and accrued interest on the AVAS debt:

Table 1

Breakdown of the interest charged by AVAS for the period 2007-2011

	2007	2008	2009	2010	2011
Applicable interest rate	1.1-30.6 -> 11,17 % 1.7-31.12 -> 10,24 %	14,86 %	18,85 %	14,00 %	13,22 %
Interest amount (rounded to RON million)	58	87	129	114	123
Total interest on AVAS debt since 2007: RON 511 million					

- (77) In the same correspondence, the Romanian authorities also stated that preparations for implementing the AVAS debt conversion amounting to RON 538 million plus the interest accrued thereon were to be launched with a view to complying with the privatisation timeline proposed.

VIII.3. Romania's arguments in view of the privatisation intention

- (78) As explained above, the Romanian authorities withdrew measure 2 (see section VII above). Following withdrawal of the notification with respect to the state guarantee, the Romanian authorities argued that the current measure 1, i.e. the conversion into equity of the AVAS debt amounting to RON 538 million plus the interest accruing on the AVAS debt from 1 January 2007 to 31 December 2011, amounting to an additional sum of RON 511 million, did not constitute state aid within the meaning of Article 107(1) TFEU. Romania argued that the measure would be in keeping with the market and as such would not confer an advantage on Oltchim. More specifically, the Romanian authorities argued that the creditor AVAS was better off by converting the entire debt into equity and selling its entire stake in the company in the short term than by enforcing the debt, as the market value of the resulting stake of AVAS in the company following the debt conversion was higher than

the sum that AVAS would obtain from the liquidation of the company.

- (79) Romania submitted a consultancy report prepared by Raiffeisen Capital & Investment SA (hereinafter: 'the consultancy report') in order to demonstrate that the state's best strategy for maximising its return was to perform the debt-to-equity debt conversion followed by the short-term sale of combined packages of shares.
- (80) The consultancy report examines, on the one hand, the value of the AVAS claim in a liquidation scenario and, on the other hand, its value in a debt conversion + privatisation scenario.
- (81) The liquidation assessment is based on two liquidation reports (a previous Raiffeisen liquidation report dating from February 2011, and a liquidation report by the independent consultancy Romcontrol SA Bucharest, dated March 2011). The outcome for the State in a debt conversion + privatisation scenario was estimated on the basis of the enterprise value method, which is one of the fundamental metrics used in business valuation. (A detailed description of the methodologies used and the outcome of the evaluation, as well as its critical assessment by the Commission, are to be found in section IX.3.3 below.)

- (82) The report concludes that converting its total debt into equity would allow for a smoother and faster privatisation process for the company, and that the financial outcome of this option is superior to the choice of liquidation for AVAS.

IX. ASSESSMENT

IX.1. General

- (83) In order to ascertain whether the measures under scrutiny constitute state aid, the Commission has to assess whether they fulfil the cumulative conditions of Article 107(1) TFEU. That provision states that '[s]ave as otherwise provided in the Treaties, 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'.

- (84) The Commission notes that, in the light of the withdrawal of the notification with regard to measure 2 (see section VII above), the following assessment concerns measures 1 and 3 only. Measure 1 has been modified, as Romania has linked the conversion of the debt into equity to the privatisation of Oltchim. The assessment of that latter measure is therefore carried out on the assumption that the equity stake which AVAS will hold after the conversion will immediately be sold to a private investor in a fair, open and transparent sales process, which aims at maximising the revenues for AVAS.

- (85) Furthermore, the Commission considers that the issue of whether the creditor AVAS conferred any undue advantage to Oltchim in the way it treated the debt after 1 January 2007 has to be assessed in the context of GEO 51/1998 (see recital (27) above) and Law 30/2007 mandating AVAS to re-perform the debt conversion, of the notification of the debt conversion to the Commission – identified as measure 1 in the opening decision – and of the modification of measure 1 as a consequence of the doubts raised by the Commission and the constraints resulting from the EU/IMF programme.

- (86) Moreover, the Commission notes that the intention to privatise the company in full by the end of May 2012, as communicated by the Romanian authorities in their letter of 21 October 2011 and re-confirmed in the letter from Prime Minister Ungureanu of 16 February 2012, is considered to be an integral part of measure 1.

- (87) With regard to the environmental fine on the one hand, and the company's pending debts towards Electrica SA, Salrom Exploatarea Minieră Rm. Vâlcea, and SC CET

Govora SA, on the other, the Commission notes that those alleged measures were not part of the opening decision. Therefore, they cannot form part of the present Decision. The Commission will inform the complainant in due time of the further course of action with regard to those allegations on the basis of Article 10 of Regulation (EC) No 659/1999.

IX.2. Competence of the Commission prior to accession

- (88) As indicated in section V above, Anonymous Party II argued that some of the state guarantees granted to Oltchim during the period 1995-2000 were still in place after Romania's accession to the EU, namely until 31 October 2009, and therefore should be treated as of the accession date as new aid. The Commission must therefore assess the validity of that argument and its possible implications for the assessment of the notified measure.

- (89) As a general rule, Article 107(1) TFEU is applicable only as of the date of accession onwards. An exception to that general rule is that of measures that were put into effect before accession and which continue to be applicable afterwards. Under the 2005 Accession Treaty between Romania and the EU⁽²³⁾, measures put into effect in Romania before the accession date which are still applicable after the date of accession (1 January 2007), which might constitute state aid within the meaning of Article 107(1) TFEU and do not qualify as existing aid for the purposes of Regulation (EC) No 659/1999⁽²⁴⁾, are to be considered potential new aid starting from the accession date for the purposes of applying Article 108(3) TFEU.

- (90) Point 2.1 of the second paragraph of Annex V to the 2005 Accession Act of Bulgaria and Romania⁽²⁵⁾, based on Article 22 of the same Accession Act, stipulates that 'all aid measures still applicable after the date of accession which constitute state aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purposes of the application of Article 88(3) of the EC Treaty'.

- (91) The above-mentioned provision thus covers measures put into effect before the accession date (1 January 2007) which are still applicable after that date. The notion of 'applicable after the accession date' has been defined in a series of Commission decisions⁽²⁶⁾ as covering schemes and individual measures that are either not limited in

⁽²³⁾ OJ L 157, 21.6.2005, p. 268.

⁽²⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁵⁾ OJ L 157, 21.6.2005, p. 268.

⁽²⁶⁾ See e.g. Commission Decision of 24.4.2007 in Case E 12/2005 Unlimited guarantee to Poczta Polska, OJ C 284, 27.11.2007, p. 2, Commission Decision of 18.7.2007 in Case C 27/2004 Agrobanka, OJ L 67, 11.3.2008, p. 3, Commission Decision of 28.1.2004 in Case CZ 14/2003 Česká spořitelna, a.s., OJ C 195, 31.7.2004, p. 2, and Commission Decision of 3.3.2004 in Case CZ 58/2003 Evrobanka, a.s., OJ C 115, 30.4.2004, p. 40.

time or where the exact liability of the State is not exactly delimited – in other words, cases where the exact exposure of the State is still not known on the date of accession. In the light of the above considerations, it must be determined whether the state guarantees issued in favour of Oltchim throughout the period 1995-2000 were ‘applicable after accession’ in the sense that has been defined in the above-mentioned case practice. To that end, it must be verified whether a situation obtained in which the state guarantees were either not limited in time or where the exact exposure of the State was not known before the date of accession.

- (92) Having examined the terms and conditions under which the state guarantees in question were issued, the Commission notes that they represented separate and individual, one-off measures, whereby the State backed up the company for taking out specified loans of determined amounts and determined duration. The date until which the guarantees were valid was established when they were issued, as the guarantees stipulated a validity period up to the expiry of the underlying loans, which was precisely defined in the underlying loans. That validity period was not modified afterwards. Therefore, upon accession their validity in time was indeed limited, and had been established at a date prior to accession, namely when the loan agreement was concluded. The Commission must therefore take note that the first of the situations in which a given measure will qualify as ‘new aid’ as of the accession date onwards, namely its lack of limitation in time upon the accession date, is not satisfied in the present case.
- (93) Secondly, the maximum liability of the State was delimited at the moment in time at which the guarantees were granted, as the guarantees cover only the specific loan for which they are granted. Therefore, it must also be concluded that the second case of ‘applicability after accession’, namely unknown exposure of the State as of the accession date onwards, is not applicable.
- (94) In addition, the Commission also observes that the state guarantees were triggered before the accession date. From the date of their triggering, the State became liable for the repayment of the outstanding amount of the loans that were taken with their back-up, and indeed, it subrogated itself into the obligations of the company for the repayment of the loans in question, becoming consequently a creditor of Oltchim for the amounts paid on account of the guarantees. As indicated in Section II.2 above, the payments made on account of the triggered guarantees lasted until 2006. No further payments were made on this account as of the accession date onwards, as Oltchim was able to service the still-outstanding part of the loans.
- (95) It is therefore to be concluded that the state guarantees granted to Oltchim during the period 1995-2000 cannot be qualified as new aid within the meaning of point 2.1 of the second paragraph of Annex V to the 2005 Accession Act of Bulgaria and Romania.

IX.3. Existence of aid: Advantage

IX.3.1. *The private creditor test*

- (96) Romania argues that the notified measure, consisting of converting RON 1 049 million of public debt into equity with a view to selling the total resulting public stake shortly afterwards (by the end of May 2012) does not confer any undue advantage on the company, because any private creditor in a situation similar to the one of the public creditor AVAS would have chosen that method of debt recovery rather than the liquidation of the company, which is financially less advantageous for the public creditor.
- (97) In order to determine whether the notified measure confers an undue advantage on Oltchim, the Commission should assess whether the public creditor AVAS pursued the recovery of the public debt with the same diligence as a private creditor seeking to maximise recovery of the debt owed to it⁽²⁷⁾. That perspective takes into account the fact that, with the transfer of the public debt to AVAS, recovery of the debt is pursued by an institution that has no other relationship with the company but the one of a creditor with its debtor. The assessment does not disregard the fact that the Ministry of Economy is the public shareholder of Oltchim, but it takes into account that the public shareholder does not have a role to play with respect to the recovery of the public debt, which is entrusted to the creditor AVAS. The Commission notes, however, that the effects of the debt conversion followed by privatisation for the current shareholder, i.e. the Ministry of Economy, must also be assessed in order to reach a conclusion on whether the proposed debt conversion followed by privatisation is a better financial solution for the State than wholly liquidating the company.

IX.3.2. *Recovery of the public debt – Assessment of measure 3*

- (98) In the opening decision, the Commission considered that an additional element of state aid could stem from the fact that the State has not charged any interest and/or late payment penalties on Oltchim’s overdue public debt after Romania’s accession to the EU. That public debt resulted from the triggering of the state guarantees (see description above in recitals 23-27 and assessment of the state guarantees above in recitals 88-95). In the opening decision, the Commission took the view that the failure to accrue interest or enforce the public debt conferred an advantage on Oltchim, given that the company enjoyed capital free of charge.
- (99) In order to assess whether Romania behaved like a private creditor with regard to the outstanding debt resulting from the triggering of the state guarantees, it is necessary to assess the behaviour of the Romanian State over the period from 2007 until today, based on the information available to the Romanian authorities at the relevant points in time.

⁽²⁷⁾ See Case C-342/96 *Spain v Commission (Tubacex)* [1999] ECR I-2459, paragraph 46, Case T-152/99 *HAMSA v Commission* [2002] ECR II-3049, paragraph 167.

- (100) The Commission first of all notes that the fact of not charging interest and penalties as of 2007 and until the modification of the notification of measure 1 results from GEO 51/1998 (see recital (27)). It also has to be seen against the background of Law 30/2007, mandating AVAS to re-perform the debt conversion. At the time the Romanian authorities were considering a continuation of Oltchim's activities and planning further investments rather than its liquidation.
- (101) Therefore, the Commission first of all needs to ascertain whether Romania, by deciding in 2007 to carry out the debt-for-equity swap, rather than seeking the enforcement of the debt and/or liquidation of the company, behaved like a private creditor. In that regard, the Commission notes that Romania had pursued the strategy of a debt-to-equity conversion with a view to continuing Oltchim's activities since the first (failed) attempt to do so in 2003. The behaviour of the Romanian authorities in that regard was therefore consistent with their prior behaviour. Reactions from the market to previous privatisation attempts, as well as the court actions of minority shareholders, showed that the market believed in the fundamental viability of Oltchim's business.
- (102) Furthermore, the Commission notes that Romania had at its disposal also a business plan ⁽²⁸⁾ for Oltchim which indicated that the company was viable.
- (103) In the light of those elements, the Commission considers that it was not unreasonable for Romania, in its role as creditor, to decide to perform the debt to equity conversion and to pass a law along those lines that did not envisage charging interest and penalties on the outstanding debt, as that debt was to be in any event converted into equity.
- (104) That analysis is not contradicted by the fact that Romania, prior to carrying out the debt-for-equity swap, sought state aid clearance. Indeed, by doing so, Romania merely fulfilled its obligations under Article 108(3) TFEU. Given the difficulties Romania had encountered with minority shareholders before, and kept encountering for the application of Law 30/2007, it made perfect sense to seek confirmation from the Commission that the planned operation did not amount to state aid.
- (105) Due to the state aid assessment and the application of the standstill obligation, the debt-for-equity swap was eventually delayed by five years. In that regard, the Commission observes first of all that, up to mid-2011, Romania had the firm intention of pursuing an expansive investment strategy with regard to Oltchim, which was explored by a number of expert studies ⁽²⁹⁾. It would have been against the State's strategy of making further investments in order to return the company to profitability and increase its value with a view to privatising in the medium-to-longterm to charge at the same time interest on the pending public debt.
- (106) As a result of the doubts the Commission had raised with regards to the expansive investment strategy in its opening decision and, more importantly, as a result of the budgetary problems and the EU/IMF programme, Romania changed its strategy in 2011 and decided to privatise the company immediately after the debt-for-equity swap. It thereby abandoned the initial plans to make further investments of EUR 424 million before privatising.
- (107) In the new context, the charging of interest on the debt became a sensible strategy for the State in order to maximise the recovery of the debt owed to it.
- (108) As outlined in recitals 75-77 above, further compound interest was charged on the public debt, corresponding to the period 1 January 2007 onwards, by means of a private agreement concluded in December 2011 between Oltchim and AVAS. In particular, the interest rates that were applied on the public debt corresponded to whatever were the higher: the Commission reference rates relevant for each period or the interest rates applied for private loans of the company for the same period which can be considered adequate.
- (109) On the basis of the above, the Commission concludes that Oltchim did not derive an advantage from the way in which the public authorities pursued, after accession, the recovery of the public debt to be now converted into equity.
- IX.3.3. *The debt conversion – measure 1*
- (110) The Commission must also assess whether measure 1, consisting (following modification of the notification – see recitals 14-16, 69-70 and 75-77 above) of converting into equity a total of RON 1 049 million of public debt, to be followed shortly by full sale of the resulting public

⁽²⁸⁾ In particular, there was a business plan prepared by Oltchim's management for the period 2006-2010, and an independent advisory opinion by Raiffeisen dated May 2007 and a Technical consultancy report by Techno Orbichem dated May 2007.

⁽²⁹⁾ e.g. the business plan notified to the Commission on 17 July 2009 and a study prepared by Roland Berger dated 13 April 2011, submitted by the Romanian authorities to the Commission on 14 April 2011.

stake (privatisation), confers any undue advantage on Oltchim. The total public debt to be converted into equity includes the main public debt, held by the privatisation agency AVAS, of RON 538 million, and the interest accruing on the AVAS debt from 1 January 2007 to 31 December 2011, of RON 511 million.

- (111) In order to assess whether the proposed debt conversion involves any undue advantage for Oltchim, it should be determined whether the debt conversion is indeed the best mechanism for maximising recovery of the public debt, as Romania argues. In practice, the Commission needs to determine whether a hypothetical private creditor in a situation comparable to the one of the privatisation agency AVAS, which is the creditor of Oltchim, would have indeed preferred that mechanism of recovering the debt to other recovery alternatives available, considering the fact that the debtor is facing serious financial difficulties. The Ministry of Economy, the current shareholder of Oltchim, does not have any role to play with respect to the recovery of the public debt, but nevertheless the outcomes of the two possible scenarios for the public shareholder are also taken into account in the analysis below.
- (112) Romania argues that, considering the current situation of the company (serious undercapitalisation and excessive indebtedness), the only realistic options that a private creditor in a situation comparable to the one of the public creditor AVAS would have are either (i) to liquidate the company, or (ii) to convert the debt into equity and subsequently sell the entire resulting stake in the company. Any private creditor faced with such choices would prefer the one that maximises recovery of the pending debt. In other words, the creditor would choose the 'debt conversion followed by privatisation' option if the return expected from privatisation exceeded the amount that could be recovered through liquidation.
- (113) In order to demonstrate that the debt conversion followed by a sale of the resulting stake brings more revenues to the creditor than liquidation, Romania submitted a report by an independent consultancy (see recitals 78-82 above) which compares the outcomes for the creditor of the two scenarios, i.e. debt conversion followed by privatisation and liquidation respectively.
- (114) The Commission has critically assessed the report, in order to verify whether its results withstand scrutiny and demonstrate indeed that, by converting its debt into equity, AVAS behaves like a private creditor. Having scrutinised the report, the Commission observes the following:
- (115) **Value of the AVAS claim in a liquidation scenario:** The liquidation assessment is based on a previous

Raiffeisen liquidation report dating from February 2011, and on a liquidation report by the independent consultancy Romcontrol SA Bucharest, dated March 2011.

- (116) Under Romanian law, companies in which the State holds a stake of at least 50 % + 1 are liquidated under the so-called 'special voluntary liquidation procedure' established by Government Emergency Order 88/1997, Government Decision 577/2002 and Law 137/2002. Under that special voluntary liquidation procedure, the amount obtained by the liquidator from the sale of the company's assets is to be used for covering the company's outstanding debts following the same order of preference as established by Law 85/2006 (the Romanian insolvency law). Accordingly, liquidation proceeds must be used for covering debts in the following order of preference: 1) liquidation costs; 2) salaries owed; 3) privileged debt (i.e. debt secured with pledges, mortgages and other special privileges); 4) budgetary debt (taxes and other fiscal obligations); 5) debt to the Ministry of Finance on account of triggered state guarantees; 6) debt from public loans; 7) ordinary (non-secured) debt; 8) shareholders. In the present case, AVAS would be within the third category of creditors (privileged creditors), yet ranking after several (private) privileged creditors of Oltchim, as the public debt was only partially secured.
- (117) The consultancy Romcontrol estimated the liquidation value of Oltchim's assets as of 15 December 2010, relying on the net adjusted asset method, which takes into account the limited time of exposure on the market of the assets put up for sale ⁽³⁰⁾.
- (118) On the basis of the results of the liquidation value of assets as estimated by Romcontrol, Raiffeisen estimated the outcome for the creditor AVAS and for the State as shareholder, by taking into account the company's liabilities as of 31 December 2010 and its preliminary financial statements of the same date ("the February 2011 Raiffeisen liquidation study"). That study estimates that the proceeds to be obtained from the sale of Oltchim's assets would allow for recovery of approximately [20]-[30]% of the company's total liabilities. The creditor AVAS, as a partially guaranteed creditor, would have recovered around RON [80]-[100] million (which represents [10]-[30]% of the then total claim of RON 538 million). Given the negative gap between the liquidation proceeds and the company's liabilities, the State in its capacity as shareholder would not collect anything.
- (119) In October 2011, Raiffeisen updated the estimates of the February 2011 liquidation study to take into account the 30 June 2011 financial data of the company and to include the interest charged on the public debt as of January 2007 onwards.

⁽³⁰⁾ The special voluntary liquidation procedure was estimated to last for approximately 18 months.

- (120) According to the updated estimate AVAS, being a partially guaranteed creditor of Oltchim, would collect RON [100]-120] million of its total debt towards the company (which represents [10]-[20] ⁽³¹⁾ of the total claim, i.e. the principal debt of RON 538 million plus interest). The Ministry of Economy, the public shareholder, would again collect nothing. The sum to be obtained by AVAS was subsequently discounted ⁽³²⁾ to its present value on 30 June 2011. As a result, AVAS would collect EUR [10]-[40] million in the event of the liquidation of the company.

Table 2

Collection of the State's claim in a liquidation scenario

	Claim (million EUR)	Collection total (million EUR)	Collection NPV at 10,7 % (million EUR)
AVAS (Creditor)	209,4	[20]-[30]	[10]-[30]
Ministry of Economy (shareholder)	Shareholding	[0]-[10]	[0]-[10]
State total		[20]-[30]	[10]-[30]

- (121) That amount must then be compared with the expected return of converting AVAS' claim into equity, followed by a privatisation of the company.

- (122) **Value of the AVAS claim in a debt conversion + privatisation scenario:** in the report, the outcome for the State in a debt conversion + privatisation scenario was estimated on the basis of the enterprise value (hereinafter: 'EV') method, which is one of the fundamental metrics used in business valuation.

- (123) With respect to the use of that method, the Commission notes that, in principle, there are several methods for estimating the value of the equity of an undertaking.

- (124) One of the methods often used is that of the multiple of the EBITDA (earnings before interest, taxes, depreciation,

and amortisation). It allows the value of the equity of an undertaking for year X to be assessed by multiplying the EBITDA of year X by a factor (the multiple) considered to be appropriate for the sector and subtracting the net debt from the result.

- (125) Another method is discounted cash flow analysis. The undertaking's nominal free cash flows for the coming years are discounted at the weighted average cost of capital, or WACC ⁽³³⁾, and the net debt is subtracted from the value obtained.

- (126) A third method is that of the multiple of turnover. It allows the value of an undertaking's equity in year X to be assessed by multiplying the turnover of year X by a factor (the multiple) considered to be appropriate for the sector and subtracting the net debt from the result.

- (127) All these methods (future EBITDA, cash flow or turnover) use projected values. In the case at hand not all estimation methods that are based on projected values in a business plan can be used meaningfully. Given the envisaged immediate privatisation of the company, only the new owner will be in a position to determine the company's future business strategy, and therefore the relevant business plan projections necessary for using these methods are not available, nor can they be anticipated ⁽³⁴⁾. As the new owner will have to undertake significant investments, nor can past results of the company be used to make predictions for the future.

- (128) Under those circumstances, the Commission takes the view that the only two methods available for estimating the value of the combined stake of the Romanian State, i.e. AVAS and the Ministry of Economy, are market capitalisation and the EV. It has to be noted that EV also includes the parameters used for market capitalisation.

- (129) Market capitalisation is defined as the share price multiplied by the number of shares in issue, providing a total value for the company's shares outstanding. This metric represents the public consensus on the value of a company's equity and could be used as a proxy for the public opinion of a company's net worth.

⁽³¹⁾ The recovery rate of [10]-[20]% is lower than the previously calculated [15]-[25]%, as in the meantime the additional interest charged by AVAS, which is non-secured debt, was also taken into account.

⁽³²⁾ Discounted to 30 June 2011 at a discount rate of 10.7 %, the value of WACC (weighted average cost of capital) determined by the consultancy firm Roland Berger, in a study dated 13 April 2011, submitted by the Romanian authorities to the Commission on 14 April 2011.

⁽³³⁾ See footnote 32.

⁽³⁴⁾ Although in the original notification Romania presented a business plan, the financial projections therein were based on extensive investments amounting to EUR 424 million, and therefore such projections cannot be relied upon in the current context, where the State renounced the further investment plans.

(130) Oltchim's market capitalisation was calculated on the basis of its share price observed on the Bucharest Stock Exchange⁽³⁵⁾ over a period of 44 months (2008-August 2011). That interval is sufficiently long to be relevant and the market capitalisation over that period is also a good indication of what the market is prepared to pay for the company.

(131) In that context, the Commission notes, as a positive aspect, the fact that the share price, during the recent period May-August 2011, was always higher than its 44 months average. More precisely, whereas the 44 months weighted average is RON 0,53 per share, the share price even reached RON 2,05 in July 2011⁽³⁶⁾. Thus, the data used for establishing the market value can be considered to be conservative.

(132) Furthermore, with regard to the share price development since September 2011 (the last data range used by the Raiffeisen study), the Commission notes, as a positive aspect, that, in the recent past (since mid-October 2011), the share price has risen significantly and has been constantly higher than the weighted average of RON 0,53 used in the market capitalisation formula.

Figure 1

Oltchim's share price development on the Bucharest Stock Exchange 23.2.2011-23.2.2012



Source: <http://www.bvb.ro/ListedCompanies/SecurityDetail.aspx?s=OLT&t=0>

(133) Before the planned debt conversion, Oltchim's market capitalisation in the observed period (January 2008-August 2011) was on weighted average⁽³⁷⁾ EUR 45 million and in the last three months of the

observed period (June-August 2011) it was constantly over EUR 100 million. The market capitalisation therefore clearly exceeds the liquidation value of Oltchim (EUR [10]-[40] million), which provides a first indication that selling the State's stake in a privatisation would be preferable to liquidating the company.

(134) The second method that can be used is the Enterprise Value (EV). EV is a measure of a company's value which is often used as an alternative to straightforward market capitalisation, because it is considered to provide a more accurate representation of the firm's value. EV is defined as the sum of the market capitalisation of a company and its net financial debt. That method was used by Raiffeisen Capital.

(135) Following the calculation of the market capitalisation, the other element in the EV formula, the net debt, was computed as the sum of all financial debts of the company (all interest-bearing debts of the company – namely, bank loans and overdue/rescheduled liabilities)⁽³⁸⁾.

(136) As a next step, it is then possible to calculate the median, average and weighted average of the EV and EV/share over the 44-month period. The report did so for two scenarios: with the interest charged on the debt under the agreement, and without it.

(137) On that point, the Commission is of the view that the interest charged under the agreement should not be taken into account for the purpose of calculating the enterprise value (EV) for the following reasons: *ceteris paribus*, if debt increases, equity goes down. Those two effects go in opposite directions and should in principle bring no change to the EV. If the market knew about the interest, it would price the shares downward accordingly. However, in the current case the interest amount was added ex post and not anticipated by the market. Therefore, the contemporaneous information held by the market at the moment of the valuation is relevant.

(138) Against those considerations, the following EV/share values have been calculated for the observed period.

⁽³⁵⁾ The percentage of shares traded in that period varied between 0,01 % and 13,45 % of total shares per month.

⁽³⁶⁾ In the period February 2011 – February 2012, the 52-week peak even reached RON 2,21 per share.

⁽³⁷⁾ The weighted average was calculated on the basis of traded share volume.

⁽³⁸⁾ The minority interest and preferential shares items are zero and the cash and cash equivalents, having insignificant values, were not considered in the computation of net debt.

Table 3

Calculation of Oltchim's EV/share value in the observed period

Period	Number of shares	Average share price	Market capitalisation (share price x number of shares)	Net debt in RON thou	Enterprise value (market capitalisation plus net debt) in RON thou	Enterprise value per share
Jan. -08	343 023 858	1,10	378	[1 200]-[1 400]	[1 700]-[1 800]	[4]-[6]
Feb. -08	343 023 858	0,91	314	[1 200]-[1 400]	[1 600]-[1 700]	[4]-[6]
Mar. -08	343 023 858	0,81	279	[1 200]-[1 400]	[1 600]-[1 700]	[4]-[6]
Apr. -08	343 023 858	0,87	300	[1 200]-[1 400]	[1 600]-[1 700]	[4]-[6]
May -08	343 023 858	1,04	358	[1 300]-[1 500]	[1 700]-[1 800]	[4]-[6]
Jun. -08	343 023 858	0,96	330	[1 300]-[1 500]	[1 700]-[1 800]	[4]-[6]
Jul. -08	343 023 858	0,72	247	[1 300]-[1 500]	[1 600]-[1 700]	[4]-[6]
Aug. -08	343 023 858	0,63	216	[1 300]-[1 500]	[1 600]-[1 700]	[4]-[6]
Sep. -08	343 023 858	0,47	160	[1 300]-[1 500]	[1 500]-[1 600]	[4]-[6]
Oct. -08	343 023 858	0,37	127	[1 300]-[1 500]	[1 500]-[1 600]	[4]-[6]
Nov. -08	343 023 858	0,21	71	[1 200]-[1 400]	[1 400]-[1 500]	[4]-[6]
Dec. 08	343 023 858	0,16	54	[1 400]-[1 600]	[1 400]-[1 500]	[4]-[6]
Jan. -09	343 023 858	0,15	51	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Feb. -09	343 023 858	0,13	45	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Mar. -09	343 023 858	0,15	53	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Apr. -09	343 023 858	0,25	84	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
May -09	343 023 858	0,27	93	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Jun. -09	343 023 858	0,30	104	[1 400]-[1 600]	[1 700]-[1 800]	[4]-[6]
Jul -09	343 023 858	0,33	113	[1 400]-[1 600]	[1 700]-[1 800]	[4]-[6]
Aug. -09	343 023 858	0,32	109	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Sep. -09	343 023 858	0,28	96	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Oct. -09	343 023 858	0,27	91	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Nov. -09	343 023 858	0,23	79	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Dec. -09	343 023 858	0,26	89	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Jan. -10	343 023 858	0,23	79	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Feb. -10	343 023 858	0,22	77	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Mar. -10	343 023 858	0,27	92	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Apr. -10	343 023 858	0,31	105	[1 600]-[1 800]	[1 800]-[1 900]	[4]-[6]
May -10	343 023 858	0,22	76	[1 600]-[1 800]	[1 800]-[1 900]	[4]-[6]
Jun. -10	343 023 858	0,21	71	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Jul. -10	343 023 858	0,18	62	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Aug. -10	343 023 858	0,19	64	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Apr. -10	343 023 858	0,19	66	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Oct. -10	343 023 858	0,22	76	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Nov. -10	343 023 858	0,22	75	[1 800]-[2 000]	[2 000]-[2 100]	[4]-[6]
Dec. -10	343 023 858	0,20	69	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]
Ian. -11	343 023 858	0,21	74	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]

Period	Number of shares	Average share price	Market capitalisation (share price x number of shares)	Net debt in RON thou	Enterprise value (market capitalisation plus net debt) in RON thou	Enterprise value per share
Feb. -11	343 023 858	0,26	88	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]
Mar. -11	343 023 858	0,30	102	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]
Apr. -11	343 023 858	0,44	152	[2 000]-[2 200]	[2 100]-[2 200]	[5]-[7]
May -11	343 211 383	0,77	265	[2 000]-[2 200]	[2 300]-[2 400]	[5]-[7]
Jun. -11	343 211 383	1,61	551	[2 000]-[2 200]	[2 600]-[2 700]	[6]-[8]
Jul. -11	343 211 383	2,05	702	[2 000]-[2 200]	[2 800]-[2 900]	[6]-[8]
Aug. -11	343 211 383	1,32	452	[2 000]-[2 200]	[2 600]-[2 700]	[6]-[8]

(139) On the basis of this table, the median, average and weighted average of EV per share was calculated.

Table 4

Oltchim's median, average and weighted average of EV per share

	Share price	Enterprise value per share
Median	[0,10]-[0,30]	[4]-[6]
Average	[0,30]-[0,50]	[4]-[6]
Weighted average	[0,40]-[0,60]	[4]-[6]

(140) The EV (median, average, weighted average) calculated as explained above can then be used for determining the value of the State's share 'post debt conversion' by deducting from this EV the company's debt that remains pending after the conversion; this will remain a liability of the company which has to be serviced.

(141) The result is the market value of total equity as shown in Table 5.

Table 5

Calculation of market value of equity based on the EV method

Calculation of the market value of total equity after the debt conversion	Scenarios		
	EV based on 44 months' median share price	EV based on 44 months' average share price	EV based on 44 months' weighted average share price
EV/share (RON)	[4]-[6]	[4]-[6]	[4]-[6]
Number of shares before conversion	343 211 383	343 211 383	343 211 383
Enterprise value (RON million)	[1 700]-[1 800]	[1 800]-[1 900]	[2 000]-[2 100]
Net debt after debt conversion (RON million)	[1 600]-[1 700]	[1 600]-[1 700]	[1 600]-[1 700]
Market value of equity (RON million)	[100]-[200]	[200]-[300]	[400]-[500]
Market value of equity (EUR million)	[20]-[30]	[50]-[60]	[90]-[100]

- (142) With respect to the net financial debt used in the above-described calculation, both steps of the calculation, viz. (i) the calculation of the EV formula and (ii) the subsequent subtraction in order to arrive at the market value of equity, should in principle be based on the market value of the company's debt.
- (143) However, the Commission notes first that, since Oltchim's debt is not traded and in the absence of a local market for debt trading, it is very difficult to establish a market price for that debt. Instead, one could theoretically determine the market value of the debt by establishing the rating of the company pre- and post-debt conversion. That rating could then be used to estimate the probability of default which in turn can be used to estimate the market value of debt. In the absence of such ratings, the Commission considered that such an exercise is not possible, and that the errors generated by the use of a poorly estimated market value would be significant.
- (144) Second, if one assumed that the net debt was traded at the same discount to its book value before and after the swap, then the results of the calculation consequently do not change at all, irrespective of the size of the discount. Any change in the value of the net financial debt would then lead to a proportionate change, of opposite sign, in the value of the market capitalisation. The impact of adding either the book value of debt or its market value is neutral, as the value of debt is first added to obtain EV and then subtracted to obtain the new equity value of shares.
- (145) Third, assuming that the debt remaining after the conversion is traded at a different discount than before the conversion, a meaningful calculation would need to take into account the fact that after the debt-for-equity swap the market value of the remaining debt would probably still be lower than its book value, but at any rate higher than the market value of the debt pre-swap. In the absence of a basis to establish those discounts, it is, however, not possible to simulate the effects of a change in those discounts, as too many parameters would need to be varied at the same time.
- (146) On the other hand, the Commission notes that Oltchim's financial statements have been prepared in accordance with IFRS standards and audited by the independent auditor KPMG. In those financial statements, financial liabilities are presented at their fair value according to the stipulations of IAS 39. IAS 39 defines fair value as the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in normal conditions of competition. On that basis, KPMG certified that the fair value of the company's long-term debt was not significantly different from its book value.
- (147) On the basis of the above considerations, the Commission is of the view that it is indeed appropriate to use the book value of the debt in order to calculate the market value of the equity.
- (148) However, in order to verify the robustness of the calculation, the Commission, in addition, carried out a sensitivity analysis, i.e. it determined the percentage difference between the book value and market value of the net debt pre-conversion which would equalise the present value of the State's stake post-conversion and the liquidation value, assuming that the market value of the debt will correspond to its book value following the debt-to-equity conversion. That percentage value can be considered a kind of 'margin of error' for the estimation of the market value of the debt.
- (149) The Commission is of the view that, of all scenarios (EV based on median, average, weighted average), the weighted average represents the most accurate scenario, as in that case the values are weighted by traded share volumes. For that scenario, the above-mentioned margin is 15 %. The Commission concludes that a margin of that size is sufficiently large to lead one to consider that the EV calculation is based on solid data.
- (150) Subsequently, once the market value of the equity has been calculated, one can calculate the value of the State's resulting stake from that market value of total equity based on the public shareholding, which will be as follows after the debt conversion ⁽³⁹⁾:

Table 6

The Romanian State's shareholding in Oltchim before and after the planned debt conversion

	Shareholding before debt conversion	Shareholding after debt conversion AVAS debt plus interest thereon is debt converted
AVAS	0 %	[80]-[100]%
Ministry of Economy	54,81 %	[0]-[5]%
State total	54,81 %	[80]-[100]%

- (151) As a result, after converting the AVAS main debt plus interest charged under the agreement, Oltchim will have a market value of equity ranging between EUR [20]-[30] and [90]-[100] million, which will lead to a present value ⁽⁴⁰⁾ of the combined public stake ([80]-[100]%) of between EUR [15]-[30] and [75]-[90] million. In Table 7, below, the EVs as assessed for all the scenarios are summarised and compared with the values applicable in the case of a liquidation.

⁽³⁹⁾ For the purposes of the analysis the report did not take into account the possible participation of private shareholders in the capital increase as its impact on the value of the Romanian State's stake is considered to be neutral.

⁽⁴⁰⁾ Discounted by the discount factor of 10,7 to 30 June 2011 similarly to the liquidation value.

Table 7

Comparison of the debt conversion followed by privatisation versus liquidation scenarios on the basis of the EV method

State's expected revenue EUR million	Debt conversion and immediate privatisation			Net present value of the revenues obtained through liquidation	Comparison
	EV based on 44 months' median share price	EV based on 44 months' average share price	EV based on 44 months' weighted average share price		
Market value of equity	[20]-[30]	[45]-[60]	[90]-[100]		
Market value of combined public stake	[15]-[40]	[45]-[60]	[80]-[100]		
Net present value of combined public stake (98,44 %)	[15]-[40]	[30]-[50]	[75]-[90]	[10]-[40]	Liquidation < Debt conversion and privati- sation
Net present value of AVAS stake (96,54 %)	[15]-[40]	[30]-[50]	[70]-[80]	[10]-[40]	Liquidation < Debt conversion and privati- sation
Net present value of Ministry of Economy stake (1,9 %)	[0]-[1]	[0]-[1]	[1]-[2]	[0]-[1]	Liquidation < Debt conversion and privati- sation

(152) In all assessed EV scenarios both the public creditor AVAS and the public shareholder Ministry of Economy obtain better results from the debt conversion followed by privatisation than if the company were liquidated. The shareholding of the current public shareholder, the Ministry of Economy, will be reduced by the debt conversion, which results in a stake of [80]-[100]% for the creditor AVAS. However, the Ministry has no reason to oppose the debt conversion as in the event of liquidation it would not obtain anything for its stake in the company. The public creditor AVAS would still obtain more even in the scenario with the lowest estimated EV than in the case of deciding to liquidate the company (EUR [10]-[30] million, versus EUR [10]-[30] million).

(153) On the basis of the above findings, it can be concluded that, if that the company is fully privatised in the short term after the debt conversion, the notified measure (conversion of the debt followed by full privatisation) does not involve an advantage for Oltchim as that measure allows the public creditor AVAS to recover more than if it decided to place the company in liquidation. In that respect, the Commission takes note of the commitment made by the Romanian authorities (see recitals 17 and 73 above) to privatise the company in full by 31 May 2012.

(154) The Commission considers that the quantitative assessment on the basis of the market capitalisation method and the EV method is also supported by the following two arguments, which were not quantified by the independent expert.

(155) First of all, the assessment is based on the stock market price. However, as the State's stake in Oltchim will be sold as one entity, the acquirer will be able to control the company. Therefore, the acquirer will be willing to pay a control premium for the stake, as is normally the case in comparable transactions.

(156) Second, the Commission observes that PCC was willing to pay in 2007 EUR 7,5 million for a de facto 12 % stake in Oltchim and in 2011 EUR 2,6 million for a further 3,6 % stake in Oltchim. This indicates on the one hand that one private investor considered that the value of Oltchim had increased in 2011 compared with 2007 (as it was willing to pay a higher price per share), and that, based on the 2011 transaction, 100 % of the shares would be valued at EUR 73 million, which is substantially above the liquidation value.

IX.4. Conclusion on the advantage criterion

(157) On the basis of the above findings, namely that: (i) the company did not derive any undue advantage from the way in which the public authorities pursued recovery of the public debt that is the subject of the notified measure, and (ii) the debt conversion as such does not confer any undue advantage on the company, the Commission concludes that the advantage criterion is not met by the currently notified measure (resulting from the combination of former measures 1 and 3). In the light of that finding, the other cumulative criteria in the definition of the concept of state aid stemming from Article 107(1) of the TFEU do not need to be analysed for the assessment of the currently notified measure.

X. CONCLUSION

- (158) The formal investigation procedure initiated under Article 108(2) TFEU with respect to measure 2 (the state guarantee) must be terminated as being moot, following withdrawal of the notification of that measure.
- (159) The currently notified measure (the combination of former measures 1 and 3) does not involve state aid within the meaning of Article 107(1) TFEU.
- (160) That conclusion is based on the firm intention of Romania to sell its stake in Oltchim in full, as expressed in the letter of Prime Minister Emil Boc of 21 October 2011, and re-confirmed in the letter of Prime Minister Ungureanu dated 16 February 2012,

HAS ADOPTED THIS DECISION:

Article 1

The Commission has decided to close the formal investigation procedure under Article 108(2) of the Treaty on the Functioning of the European Union in respect of the notified state guarantee (measure 2) in favour of Oltchim, in view of the fact that Romania has withdrawn its notification and will not pursue that measure further.

Article 2

Measure 1, notified by Romania on 17 July 2009 and amended on 22 June 2011, 9 September 2011, 21 October 2011 and 16 February 2012, does not constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

Measure 3, put in place by Romania in 2007, does not constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 4

This Decision is addressed to Romania.

Done at Brussels, 7 March 2012.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION

of 23 January 2013

on State aid SA.24123 (2012/C) (ex 2011/NN) implemented by the Netherlands Alleged sale of land below market price by the Municipality of Leidschendam-Voorburg

*(notified under document C(2013) 87)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

(2013/247/EU)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

(3) By letter of 26 January 2012, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ⁽²⁾ (hereinafter: "TFEU") in respect of a specific measure taken in the context of the real estate project. The Commission's decision to initiate the procedure (hereinafter "the opening decision") was published in the *Official Journal of the European Union* ⁽³⁾. By way of this decision, the Commission invited interested parties to submit comments on its preliminary assessment of the measure.

(4) By letter of 18 April 2012, the Dutch authorities submitted their observations on the opening decision, after having received two extensions of the deadline to comment and after a meeting with the Commission services on 12 March 2012 in the presence of the beneficiary of the measure.

1. PROCEDURE

(1) By letter of 10 September 2007, the Stichting Behoud Damplein Leidschendam (hereinafter "the Stichting"), a foundation set up in 2006 to defend the interests of residents located in the vicinity of the Damplein in Leidschendam-Voorburg (the Netherlands), submitted a complaint to the Commission concerning the alleged grant of State aid in the context of a real estate project initiated by the municipality of Leidschendam-Voorburg in co-operation with a number of private parties.

(2) By letter of 12 October 2007, the Commission forwarded the complaint to the Dutch authorities for their consideration, along with a request to reply to a number of questions. The Dutch authorities submitted their reply by letter of 7 December 2007. The Commission sent further requests for information to the Dutch authorities by letters of 25 April 2008, 12 September 2008, 14 August 2009, 12 February 2010 and 2 August 2011. The Dutch authorities replied to these requests by letters of 30 May 2008, 7 November 2008, 30 October 2009, 12 April 2010, 29 September 2011 and 3 October 2011, respectively. On 12 March 2010, a meeting took place between the Commission services and the Dutch authorities and, as a result, additional information was submitted to the Commission by letter of 30 August 2010.

(5) By letter of 16 April 2012, the Stichting submitted its comments to the Commission on the opening decision. The non-confidential version of these comments was forwarded to the Dutch authorities by letter of 16 May 2012. By letter of 14 June 2012, the Dutch authorities submitted their reaction to the Stichting's comments.

2. DESCRIPTION OF THE MEASURES

2.1. The beneficiaries and the parties involved

(6) The beneficiary of the measures is the partnership Schouten-de Jong Bouwfonds (hereinafter "SJB"). This partnership was set up by Schouten & De Jong Projectontwikkeling BV (hereinafter "Schouten de Jong") and Bouwfonds Ontwikkeling BV (hereinafter "Bouwfonds") for the purposes of the contested real estate project and does not have legal personality under Dutch law.

⁽¹⁾ OJ C 86, 23.3.2012, p. 12.

⁽²⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 of the TFEU, respectively. The two sets of provisions are, in substance, identical. For the purpose of this Decision, reference to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 of the EC Treaty respectively, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

⁽³⁾ See footnote 1.

- (7) As members of the SJB partnership, Schouten de Jong and Bouwfonds should also be considered beneficiaries of the measures ⁽⁴⁾.
- (8) Schouten de Jong, established in Voorburg, the Netherlands, is active in real estate project development in the Netherlands, in particular in the Leidschendam area. Its turnover amounted to EUR 60 million in 2011.
- (9) Bouwfonds, established in Delft, the Netherlands, and a subsidiary of Rabo Vastgoed, is the largest real estate developer in the Netherlands and among the top three largest players on the European real estate market. Bouwfonds is active, in particular, in the Netherlands, Germany and France. It had a turnover of EUR 1,6 billion in 2011.
- (10) The municipality of Leidschendam-Voorburg (hereinafter: "the Municipality") is located in the province of South Holland, close to The Hague, in the Netherlands.
- (11) A public-private partnership in the form of a *vennootschap onder firma* (hereinafter: the "PPP") was set-up by the Municipality and SJB to undertake the ground exploitation phase of the contested real estate project. Each party to the PPP was to bear 50 % of the costs and the risks associated with the ground exploitation phase of the project. The decision-making of the PPP was to be by unanimity. According to the information provided by the Dutch authorities, Schouten de Jong and Bouwfonds are each jointly and severally liable ("*hoofdelijk aansprakelijk*") for the fulfilment by SJB of its obligations under the PPP agreement ⁽⁵⁾.

2.2. The real estate project

- (12) On 6 April 2004, the Council of the Municipality adopted a Concept Ground Exploitation Masterplan Damcentrum and a Concept Masterplan Damcentrum laying down a framework agreement aimed at revitalising Leidschendam's city centre (hereinafter: the "Leidschendam Centrum Project") ⁽⁶⁾. The Leidschendam Centrum Project concerns an area of approximately

20.7 hectares and consists of demolishing approximately 280 mainly social housing units, renewing public spaces and utilities (sewerage, paving, lightning, etc.) and constructing approximately 600 new housing units – both social housing and free sector housing – as well as approximately 3 000 square metres of commercial (shopping) space, a two-level underground parking garage, and the relocation and rebuilding of a school. The Leidschendam Centrum Project was divided into various sub-projects, one of which is the real estate project concerning the Damplein (hereinafter: the "Damplein Project").

2.2.1. The construction phase

- (13) On the basis of the Leidschendam Centrum Project, the Municipality concluded a co-operation agreement with a number of private project developers, including with SJB, on 9 September 2004 (hereinafter: the "2004 Co-operation Agreement"). The 2004 Co-operation Agreement stipulates that the private project developers would, for each of the specific sub-parts of the Leidschendam Centrum Project assigned to them, construct and sell, for their own risk and expense, the envisaged real estate.
- (14) According to the 2004 Co-operation Agreement, the construction works would begin once the land had been made ready for construction (see recital (22) below) and the necessary building permits had been obtained. However, as regards the construction of the free sector housing units, the private developers were allowed to postpone construction until 70 % of these units, whether or not in combination with social housing units, in the sub-project area concerned had been pre-sold (Article 7.5 of the 2004 Co-operation Agreement, hereinafter: the "70 % clause"). This 70 % clause is commonly found in construction contracts in the Netherlands and seeks to limit the risks for project developers of constructing real estate which might not be sold. The agreement did not, however, provide for any possibility to postpone construction as regards the commercial premises and the underground parking garage.
- (15) According to both the 2004 Co-operation Agreement and a further project agreement concluded on 22 November 2004 (hereinafter: the "SJB Project Agreement"), SJB would build a total of 242 housing units, of which 74 were initially planned to be built on the Damplein ⁽⁷⁾. SJB would also build approximately 2 400 square meters of commercial space on the Damplein and construct the underground parking garage, which apart from a private section (75 parking spaces) also included a public section (225 parking spaces). The commercial premises and the housing units would both be built on top of the underground parking garage.

⁽⁴⁾ References to SJB throughout the remainder of this decision should therefore also be considered as constituting references to both Schouten de Jong and Bouwfonds.

⁽⁵⁾ Article 4.1 of the Ground exploitation/PPP agreement of 22 November 2004 provides the following: "Gemeente en SJB vormen met ingang van de datum van ondertekening van deze overeenkomst een VOF. Als zodanig dragen zij met ingang van die datum gezamenlijk op basis van separaat te sluiten project-gronduitgifteovereenkomsten, in goed overleg, zorg voor de uitvoering van de grondexploitatie. De daaraan verbonden kosen en risico's komen voor 50 % voor rekening van SJB en voor 50 % van de Gemeente. Schouten en Bouwfonds zijn ieder hoofdelijk aansprakelijk voor de nakoming door SJB van haar verplichtingen ingevolge deze Overeenkomst (de Sok en de projectovereenkomst)."

⁽⁶⁾ The project was initially called Dam centrum project but renamed to Leidschendam Centrum Project in 2005. In this decision "Leidschendam Centrum Project" is used to describe the real estate project.

⁽⁷⁾ The final plans for the Damplein only foresaw the construction of 67 housing units by SJB.

- (16) The Municipality, as also explicitly emphasised by the Dutch authorities in its submissions, was not involved in the construction phase of the project and bore no risks in relation to the sale of the housing units and commercial premises. Profits from these sales, if any, would accrue directly to the private developers. The construction phase of the project should be distinguished from the so-called ground exploitation phase of the project, where the Municipality was involved through the PPP with SJB and bore 50 % of the risks (see recital 18 below).

2.2.2. The ground exploitation phase

- (17) Before construction works in each part of the real estate project could commence, the land had to be acquired, the public infrastructure had to be re-arranged and the land had to be made ready for construction. Since this "ground exploitation phase" of the project was expected to entail high costs (estimated at the time at approximately EUR 30 million) and significant risks, the Municipality decided to set up a PPP with SJB to carry out these works⁽⁸⁾. To this end, the Municipality and SJB signed a ground exploitation/PPP agreement on 22 November 2004 (hereinafter: the "GREX").
- (18) In return for its participation in the ground exploitation phase of the project, SJB would obtain a share of the revenues of the PPP and receive the development rights on plots of land previously allocated to the Municipality⁽⁹⁾. According to the GREX, both the Municipality and SJB would make a direct financial contribution to the PPP to carry out the ground exploitation works⁽¹⁰⁾. The GREX further provides that the Municipality and SJB would each bear 50 % of the costs and the risks of the ground exploitation phase (Article 4.1 of the GREX) and that the final revenues/losses of the ground exploitation would be divided according to the rules laid down in the 2004 Co-operation Agreement (Article 14.3). This stipulated that at the end of the ground exploitation phase a negative or positive result of up to EUR 1 million would be equally divided between the Municipality and SJB, whereas the portion of a positive result exceeding EUR 1 million would be divided between the Municipality, SJB and the other private parties taking part in the construction phase of the real estate project (Article 10.9 of the 2004 Co-operation Agreement).
- (19) Besides making the land ready for construction, the ground exploitation phase also covered the construction, temporary exploitation and reselling of the public part of

the underground parking garage and the building of the school (Article 4 of the GREX). To this end, the PPP agreed with SJB that SJB would construct the underground public garage, which was considered to be intrinsically linked to the private section of the parking garage (article 9 of the GREX), for which SJB would receive a maximum amount of approximately EUR 4,6 million (value on 1 January 2003) from the PPP (Article 6 of the SJB Project Agreement). The construction of the private section of the parking garage would be financed by SJB itself. The PPP intended to sell the entire parking garage to a third party and the revenues from that sale were to flow to the PPP, which would share them between the Municipality and SJB.

- (20) Finally, the PPP would also contribute 50 % of the costs for the construction of a school in another plan area of the Leidschendam Centrum Project. The remaining 50 % would be financed directly by the Municipality (Article 8 of the GREX).
- (21) As follows from recitals 17 to 20 above, the costs of the ground exploitation phase of the project consisted essentially in the costs of the acquisition of the land insofar as it was not already owned by the Municipality, the costs of making the land ready for construction, the costs for the public section of the underground parking garage and 50 % of the construction costs for the school.
- (22) The PPP would generate revenues from the ground exploitation phase, first and foremost, through the sale of the land to private project developers, including SJB, after the PPP had made the land ready for construction. Each project developer was to purchase the part of the land assigned to it to construct housing units and commercial premises. The prices for the land were laid down in Article 10 and Annex 3a of the 2004 Co-operation Agreement. The 2004 Co-operation Agreement explicitly stated that these prices were minimum prices, which could be increased if more than the planned floor space was constructed. These prices were based on an independent expert valuation report, dated 11 March 2003, which considered the prices to be market-conform. Payment of the land price was due at the moment the private developer concerned obtained the necessary building permits and would take place, at the latest, at the moment of the legal transfer of the land (Article 10.5 of the 2004 Co-operation Agreement).
- (23) The price of the land sold by the PPP to SJB for the overall Leidschendam Centrum Project was determined at minimum EUR 18,5 million (value on 1 January 2003). The land in the Damplein area sold by the PPP to SJB was determined at minimum EUR 7,2 million (value on 1 January 2003), yearly indexed with 2,5 % until payment.

⁽⁸⁾ No public procurement procedure was carried out in this regard. This decision is without prejudice to any analysis the Commission could make concerning public procurement aspects related to the project.

⁽⁹⁾ Point 5.1.2 of the Ground Exploitation Masterplan Damcentrum of 10 February 2004.

⁽¹⁰⁾ According to the Ground Exploitation Masterplan Damcentrum of 10 February 2004 the Municipality would contribute EUR 7,3 million while SJB would contribute EUR 2,6 million.

- (24) Second, the PPP was to collect additional revenues by charging each private project developer a ground exploitation fee and a quality fee pursuant to Article 10.3 of the 2004 Co-operation Agreement⁽¹¹⁾. These fees were calculated on the basis of the number of housing units to be built by the private project developer and could be increased or decreased depending on the number of units actually constructed. These fees were due on 1 July 2004 at the latest and needed to be paid in a single instalment for all housing units constructed in the Leidschendam Centrum Project by the private developer concerned.
- (25) As regards SJB, the total ground exploitation fee was determined at approximately EUR 1,1 million and the quality fee at approximately EUR 0,9 million (value on 1 January 2003), indexed yearly by 2,5 % until payment, for all the housing units it planned to build in the Leidschendam centrum area. The final ground exploitation fee and quality fee due would depend on the number of housing units actually built.
- 2.3. The retroactive price decrease and waived fees**
- (26) According to the timeline which was set up in March 2004, construction works on the Damplein were initially planned to start in November 2005. However, due to several national court proceedings, the building permits SJB needed to commence construction were delayed and eventually only obtained in November 2008.
- (27) SJB started with the pre-sale of housing units in February 2007, but experienced difficulties selling these and eventually managed to pre-sell only 20 of the 67 planned units. Because of the delays encountered in obtaining the necessary building permits, these pre-sale contracts were annulled in September 2008 so that, when SJB finally obtained the permits to start construction works in November of that year, none of the housing units SJB was required to build on the Damplein had been pre-sold. In the meantime, the financial crisis had started and affected the Dutch real-estate market in particular.
- (28) In this context, SJB informed the Municipality that it would not start any of the construction works, notwithstanding the fact that the 2004 Co-operation Agreement only allowed it to postpone construction of the housing units if less than 70 % of these units had been sold. As explained in recital 14 above, the 70 % clause did not cover the construction of the commercial premises or the underground parking garage.
- (29) In the Autumn of 2008, SJB made a proposal to the PPP to pay EUR 4 million for the land on the Damplein, instead of the EUR 7,2 million (value on 1 January 2003) originally agreed, whereby SJB would start the construction works in April 2009 regardless of whether the housing units had been pre-sold. In return for this decrease in price, SJB was therefore willing to waive its right to invoke the 70 % clause contained in the 2004 Co-operation Agreement. SJB further proposed to contact an investor who would guarantee to buy the unsold housing units. According to the Dutch authorities this resulted in a price lower than that expected from a direct sale to private persons.
- (30) On 18 December 2008, the PPP and SJB decided in principle to the price decrease, but before seeking approval from the Municipality's Council, the Municipality contacted an independent expert to determine whether the price calculated by SJB was a market-conform price. In its report of 11 February 2009, the expert concluded that EUR 4 million (value on 1 January 2010) could, on the basis of the residual value method, be considered a market-conform price for the land on the Damplein in 2010, taking into account the fact that SJB committed to sell the unsold housing units to an investor and had agreed to lower its initially foreseen profit and risk margin from 5 % to 2 %. The report did not take into account the lowering of the ground exploitation fee and quality fee.
- (31) On the basis of this report and because, according to the Dutch authorities, the Municipality feared further delays and considered it of general interest that the construction phase was started as soon as possible, the Municipality's Council, in its meeting of 10 March 2009, decided that the PPP would agree to lower the price and fees originally agreed in 2004 with SJB for the land located on the Damplein. A proposal of 18 February 2009 from the Municipality, which was sent to the members of its Council, refers to a decrease in price for the land and a decrease in the ground exploitation and quality fees. The proposal further states that this decrease would turn the ground exploitation phase, which was budgeted to be break-even, into a loss-making project. The proposal also requested the Municipality to foresee the necessary provision for 50 % of the losses. The proposal further mentions that due to the financial crisis SJB was not able to obtain the necessary financing for the development of the Damplein.
- (32) The price decrease was formalised in an agreement concluded on 1 March 2010 (hereinafter: the "Supplementary Agreement") between the Municipality, the PPP and SJB. This agreement amended the 2004 Co-operation Agreement, the SJB Project Agreement and the Municipality Project Agreement of 22 November 2004. Article 2.1.2, first paragraph, of the Supplementary Agreement provides that, contrary to what was agreed to in the 2004 Co-operation Agreement, the price of the

⁽¹¹⁾ According to the "Exploatieverordening Gemeente Leidschendam-Voorburg 2009", the Municipality may ask private parties to contribute to the costs of infrastructure works. To this end, the 2004 Co-operation Agreement stipulates that the private parties will pay a ground exploitation fee and, as the Municipality decided to use high quality products to develop the public area, a quality fee to the PPP, on top of the price for the land.

land on the Damplein to be sold to SJB would be EUR 4 million. Article 2.1.2, second paragraph, of the Supplementary Agreement provides that the previously agreed ground exploitation fee and quality fee were no longer due. No reference is made in that second paragraph to the land on the Damplein in particular⁽¹²⁾.

- (33) The Supplementary Agreement also states that SJB started the construction works on the Damplein on 7 July 2009 and that it had to undertake those works without interruption. The works should be finished by December 2011. In case of late delivery, SJB was to reimburse part of the decreased price. Delivery of the land would take place at the latest in mid-March 2010 and payment would take place at the latest on the day of delivery.
- (34) Furthermore, on 13 July 2009, the PPP and SJB concluded a new agreement concerning the underground public parking garage⁽¹³⁾. According to this agreement, SJB would start the construction works on the public parking garage during the second quarter of 2009 and would complete these within a fixed period of time. The PPP would pay SJB EUR 5,4 million (value on 1 April 2009) for the construction of the public parking garage⁽¹⁴⁾; this amount would be fixed until delivery and would not be indexed.
- (35) On 15 January 2010, SJB and Wooninvest Projecten BV, a company related to one of the project developers who signed the 2004 Co-operation Agreement, signed a purchase/construction agreement ("*koop/aannemingsovereenkomst*") for the purchase of 43 housing units, which would be rented out to private persons by Wooninvest. In the case that SJB found a private purchaser for some of these housing units before 29 January 2010, the parties agreed that these units would not be sold to Wooninvest. The agreement also foresees a period between 29 January 2010 until the delivery of the units to Wooninvest during which SJB can repurchase the units sold to Wooninvest under the same conditions as they were sold to Wooninvest, plus compensation of the costs borne by Wooninvest and an interest of 6 % per year for the period between payment by Wooninvest to SJB and the redelivery of the units from Wooninvest to SJB (article 24).

⁽¹²⁾ Article 2.1.2 point 1 of the Supplementary Agreement provides the following: "In afwijking van het bepaalde in een of meer van de in de considerans genoemde overeenkomsten (i) wordt de koopsom van het Verkochte, welke koper bij levering verschuldigd is aan Verkoper, onder de in deze overeenkomst opgenomen voorwaarden nader bepaald op EUR 4 000 000,- (zegge: vier miljoen euro) exclusief btw kosten Koper Vermeerderd met 5 % rente vanaf 1 januari 2010. (ii) zijn de oorspronkelijk overeengekomen grex en kwaliteitsbijdragen niet verschuldigd, (iii) wordt de grond bouwrijp geleverd. De koopsom is gebaseerd op prijspeil 1 januari 2010 en is niet verrekenbaar."

⁽¹³⁾ This new agreement refers to 208 parking spaces i.e. less than the 225 initially foreseen.

⁽¹⁴⁾ This corresponds to the earlier agreed EUR 4,6 million (value on 1 January 2003) indexed by 2,5 % up to 1 January 2010.

3. THE OPENING DECISION

- (36) By way of the opening decision, the Commission initiated the formal investigation procedure laid down in Article 108(2) TFEU in respect of the retroactive price decrease of the land and the waiver of the ground exploitation and quality fees by the PPP in favour of SJB (hereafter: the "contested measures") on the grounds that these measures could entail State aid within the meaning of Article 107(1) TFEU and the Commission had doubts as to their compatibility with the internal market.
- (37) In particular, the Commission considered it unlikely that a hypothetical private vendor in a situation similar to that of the Municipality would have agreed to the same price reduction and waiver of fees as required by the market economy investor test (hereinafter: "MEIT"). By retroactively decreasing the sales price of the land it sold to SJB, the PPP and, therefore, the Municipality decided to carry the risk of a declining housing market. This behaviour is contrary to the Dutch authorities' own assertion that the construction phase of the project was to be entirely at the risk and the expense of the private project developers, including SJB. Since the PPP, as the seller of the land, had no financial involvement in this phase of the project, there was no reason to believe that a hypothetical private seller in a similar situation as the Municipality would agree to retroactively lower an agreed sales price for a plot of land because the intended buyer had problems selling housing units it planned to build on that land. Nor did the waivers granted for the ground exploitation and quality fees seem to conform with the MEIT, as it was unlikely that a private investor would retroactively waive an agreed contribution to its costs without any consideration in return.
- (38) Finally, the Commission expressed its doubts as to whether the contested measures could fall within the scope of any of the exceptions laid down in Article 107 TFEU.

4. COMMENTS FROM THE NETHERLANDS

- (39) By letter dated 18 April 2012, the Dutch authorities submitted their comments to the Commission's opening decision.

4.1. Comments regarding the facts

- (40) The Dutch authorities specified that, contrary to what was suggested by the wording of Article 2.1.2 of the Supplementary Agreement, the Municipality had not waived the full amounts of the initially agreed ground exploitation fee and quality fee under the 2004 Co-operation Agreement, but rather only those fees that were due by SJB for the housing units to be built on the Damplein. According to the Dutch authorities, those fees amounted together to EUR 551 544 (value on

1 January 2003, which would represent a total value of EUR 719 400 on 1 January 2010). To substantiate its position, the Dutch authorities referred to a proposal concerning the price decrease sent by the Municipality to its Council on 18 February 2009 and to a building programme annexed to the 2004 Co-operation Agreement which allocates a ground exploitation and quality fee of EUR 551 554 to the Damplein.

- (41) Furthermore, the Dutch authorities informed the Commission that price decreases with regard to SJB were discussed within the PPP already in 2006 and 2008. In 2006, the PPP apparently decided to lower the land sales price for the commercial premises due to the fact that less commercial space could be constructed than initially foreseen, whereas in 2008 the PPP apparently decided to grant SJB compensation for the delay in the delivery of the building permit. These decreases would be granted under the condition that SJB would receive a valid building permit by 1 October 2008. As this was not the case, the parties decided to renegotiate the decrease again. According to the Dutch authorities, the decrease in price for the land on the Damplein as well as the waived fees should be calculated as set out in Table 1 below.

Table 1

Calculation of the decrease in price and waived fees proposed by the Dutch authorities

Decrease Damplein	value 1.1.2010
Value land	8 622 480
Ground exploitation fee and quality fee	719 400
Total land and fees	9 341 880
Decreases agreed in 2006 and 2008	- 1 734 245
Reduced value	7 607 635
Value supplementary agreement March 2010	- 4 000 000
Total decrease	3 607 635

4.2. Comments regarding the existence of State aid

- (42) The Dutch authorities disagree that the contested measures qualify as State aid within the meaning of Article 107(1) TFEU. In essence, the Dutch authorities hold the view that the contested measures did not confer an advantage on SJB that it would not have obtained under normal market conditions.
- (43) Instead, the Dutch authorities are of the opinion that the Municipality acted in accordance with the MEIT, as the non-realisation of the Damplein Project would have had an effect on the entire Leidschendam Centrum Project and would have caused direct and indirect damages to the Municipality.

- (44) First, to calculate the direct damages, the Municipality assumed that it would have taken SJB at least two years to sell 70 % of the housing units during the crisis period and start the construction works in the absence of the Supplementary Agreement. The Municipality budgeted the direct damage of a further two-year delay at EUR 2,85 million for the PPP of which 50 % would be for the expense of the Municipality. Furthermore, it estimated an extra direct cost of EUR 50 000 for the Municipality alone to maintain the deteriorated area (see Table 2).

Table 2

Direct damages calculated by the Dutch authorities

Direct damages during 2 years	PPP	municipality (50 %)
Interest cost over a credit facility (5 % during 2 years outstanding amount on 01.01.2009 EUR 17 million)	1 800 000	900 000
Temporary provision of fences, road signs and maintenance	60 000	30 000
Provisions cost increase (indexation of 2.5 %)	385 000	192 500
Extra planning costs i.e. costs related to the project office such as financial administration, insurance, etc.	600 000	300 000
Maintenance deteriorated area		50 000
Total	2 845 000	1 472 500

- (45) In addition, the Dutch authorities claim that the Municipality would have suffered indirect damage from such a delay consisting in the further deterioration of the public space, loss of confidence in the area by its inhabitants and future purchasers of real estate, costs for the re-destination of shops, damage claims from enterprises, maintenance costs, and changes of plans for the other sub-projects. Such delay could also mean the end of shopping facilities in the development area whose presence contributes to the habitability of the entire area. Already before the start of the project, around 23 % of the shops were vacant and, by 2010, 27 % were out of business. Without the necessary revitalisation, the entire area would further deteriorate.
- (46) The Dutch authorities are therefore of the opinion that the Municipality acted as a market economy private investor would, by taking into account the financial forecasts and trying to limit, in its own interest, the direct and indirect damages resulting from a further delay of the project. At the same time, it obtained a guarantee that construction works on the Damplein would be undertaken.

- (47) Second, the Dutch authorities submitted that the Municipality had acted as a private investor would by granting the contested measures in return for a commitment from SJB that it would waive its right to invoke the 70 % clause. The fact that SJB could no longer invoke the 70 % clause had an implication on the assumptions made in the initial valuation of the land in 2003 and the price agreed in the 2004 Co-operation Agreement. According to the Dutch authorities, the decrease in the sales price for the land and the waiver of the fees was the consideration which the Municipality had to pay so that SJB would agree to waive its right to invoke the 70 % clause. Without the Supplementary Agreement, SJB would not have started construction on the Damplein.

4.3. Comments regarding the compatibility of the State aid

- (48) Should the Commission conclude that the contested measures qualify as State aid, the Dutch authorities contend that this aid would be compatible with the internal market, in accordance with Article 107(3)(c) TFEU.

4.3.1. General interest

- (49) The Dutch authorities claim that the Municipality had a public interest in the realisation of this project. As a large part of the land on the Damplein lay fallow and the area was deteriorating, the Municipality considered starting the constructions works on the Damplein as crucial not only for the development of the Damplein, but for the entire Leidschendam city centre. In particular, delaying the construction of the underground parking garage could jeopardise the realisation of the other sub-projects.

4.3.2. Objective of common interest

- (50) According to the Dutch authorities, the revitalisation of Leidschendam city centre contributes to the objective of economic and social cohesion, as laid down in Articles 3 and 174 TFEU. The revitalisation of the city centre makes efficient use of the scarce space available for new housing units, commercial facilities and underground parking in Leidschendam, while the amelioration of the public infrastructure contributes to the cohesion of the entire city centre.

4.3.3. Appropriateness of the Supplementary Agreement

- (51) The Dutch authorities contend that SJB could not be forced to start construction works on the Damplein due to the 70 % clause in the 2004 Co-operation Agreement. By the time SJB received a valid building permit, the credit crisis had had its effect on the Dutch real estate market, which made it even more unlikely that SJB would swiftly pre-sell 70 % of the free sector housing units. The 2004 Co-operation Agreement was therefore re-negotiated, since the Municipality considered it of the utmost importance to start the construction works on the Damplein. The Supplementary Agreement was therefore appropriate and necessary for the Municipality to achieve its goal of revitalising the Damplein.

4.3.4. Proportionality

- (52) In order for the Municipality to obtain an immediate start of the construction works, SJB had to give up its right to invoke the 70 % clause and had to start the construction works with the risk that the housing units might not be sold. Therefore, the previously agreed price was recalculated by SJB. Subsequently, this calculation was verified by an independent expert who declared the agreed price as market-conform.
- (53) According to the Dutch authorities, the fact that the price is declared market-conform by an independent expert indicates that the price decrease is proportionate. This would also imply that no overcompensation of SJB has taken place. The decrease in the price was the consideration which the Municipality had to pay so that SJB would agree to waive its right to invoke the 70 % clause. Without the Supplementary Agreement, SJB would not have started construction on the Damplein.

- (54) Furthermore, through its participation in the PPP, SJB will itself bear 50 % of the risks and the costs of the ground exploitation, thereby participating in the agreed decrease of the sales price. In order to arrive at break-even for the ground exploitation, it was decided that SJB should contribute EUR 2,6 million to the PPP (point 5.2.1 Ground Exploitation Masterplan Damcentrum) and, as the PPP bore 50 % of the costs of the school, 25 % of those costs is at the expense of SJB (EUR 0,7 million).

4.3.5. Distortion of competition

- (55) Finally, the Dutch authorities claim that the retroactive price decrease concerns the building of 67 housing units and 14 commercial premises which will be sold at market-conform prices valued by an independent expert. Therefore, the distortion of competition would be of a very local nature and would not outweigh the positive effects of the completion of the project.

5. COMMENTS FROM THIRD PARTIES

- (56) Only the Stichting provided comments in response to the opening decision. The Stichting welcomes the opening decision, but is of the opinion that the contested measures described in this decision are part of a much wider aid operation and refers to its complaint and additional submissions. In particular, the Stichting refers to the alleged free transfer of land by the Municipality to the PPP.
- (57) The Stichting is of the opinion that the delay in the project was not due to the national court proceedings initiated by them, nor that the financial crisis delayed the sales of the housing units on the Damplein. According to the Stichting, there has been no market demand for the kind of housing units proposed for the Damplein ever since the beginning of the project in 2004.

- (58) According to the Stichting, the land was not valued by an independent expert, neither in 2003, nor in 2009.

6. COMMENTS FROM THE DUTCH AUTHORITIES ON THIRD PARTY COMMENTS

- (59) The Dutch authorities stated that the set-up of the project by the Municipality has been transparent and described in the “Concept Masterplan Damcentrum”, approved on 6 April 2004. Only financially sensitive agreements or parts thereof were kept confidential.

- (60) Concerning the free transfer of land by the Municipality to the PPP, the Municipality explained that this is not part of the opening decision and referred to its submissions to the Commission in 2009, in which it explained that that transfer was not free of charge since the PPP provided services in return for it. In its earlier submissions, the Municipality stressed that the works carried out by the PPP should normally have been borne by the Municipality.

- (61) According to the Dutch authorities, both the different legal procedures initiated by the Stichting, which generated a lot of negative publicity for the project, and the credit crisis had a negative effect on the sales of housing units on the Damplein. However, when initial sales started in 2007, almost a third of the housing units were sold. These sales agreements were later cancelled due to the late delivery of the necessary building permits. It can therefore be concluded that there was a demand for these units at the beginning of the project.

- (62) The Dutch authorities further note that the independent experts were selected by the Municipality, which had no interest in obtaining a low value for the land.

7. ASSESSMENT OF THE CONTESTED MEASURES

7.1. The existence of State aid under Article 107(1) TFEU

- (63) Article 107(1) TFEU provides that: “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”.

- (64) First, it has not been challenged that SJB as well as Schouten de Jong and Bouwfonds, the members of this partnership, qualify as undertakings for the purpose of this provisions, since they pursue economic activities offering goods and services on the market, as indicated in the opening decision.

- (65) Second, the contested measures were granted by the PPP, which means with the necessary agreement of the Municipality, which holds a 50 % stake in the PPP. Since the decision-making of the PPP is by unanimity and these measures could not have been agreed to without the express approval of the Municipality's Council, the decision to grant the contested measures by the PPP are imputable to the State. Furthermore, had the Municipality not agreed to grant the contested measures, the extent of its financial exposure resulting from the PPP would have been proportionally lower. Therefore, the price decrease and waived fees agreed to by the PPP imply a loss of State resources.

- (66) Third, since the measures benefit only SJB and, ultimately, Schouten de Jong and Bouwfonds, the members of this partnership, they must be considered as selective in nature.

- (67) However, the Dutch authorities have challenged the contention that the Municipality, by agreeing to a reduction in the initially agreed sales price for the land sold to SJB and a waiver of fees, conferred an economic advantage on SJB which it would not have otherwise obtained under normal market conditions. It also challenges the contention that the contested measures distort competition and affect intra-Union trade.

- (68) For the reasons set out in recitals 69 to 89 below, the Commission disagrees with the Dutch authorities on these points.

7.1.1. The existence of an advantage

- (69) According to settled case law⁽¹⁵⁾, the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity may constitute State aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would be likely to have fixed.

- (70) The Commission notes, in this regard, that land sale transactions should, in principle, be assessed under the Commission Communication on State aid elements in sales of land and buildings by public authorities⁽¹⁶⁾ (hereinafter: “the Land Sale Communication”), which provides a set of guidelines for Member States to ensure that the sale of land and buildings by public authorities is free of State aid. The Land Sale Communication provides two methods to exclude the presence of aid from such transactions: first, a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid; and, second, an *ex-ante* valuation report prepared by an independent expert. These methods seek to ensure that the price at

⁽¹⁵⁾ Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, paragraph 34 and Case C-290/07 *P Commission v Scott* [2010] ECR I-7763, paragraph 68; Case T-244/08 *Konsum Nord ekonomisk förening v Commission* [2011] ECR II-0000, paragraph 61.

⁽¹⁶⁾ OJ C 209, 10.7.1997, p. 3.

which land is sold by a public authority adequately reflects, as much as possible, the market value of that land, thus conforming to the MEIT, so as to rule out that that sale confers an economic advantage on the purchaser of the land. It cannot be excluded, however, that other valuation methods may also be applied in such instances so long as it is assured that the price actually paid by the purchaser on the basis of those methods reflects, in so far as possible, the market value of that land ⁽¹⁷⁾.

(71) In the present case, no unconditional bidding procedure was organised. While an expert valuation was made in March 2003 to establish the sales prices laid down in the 2004 Co-operation Agreement, the price agreed with SJB for the purchase of the land on the Damplein was subsequently decreased and the fees earlier agreed were waived in 2010 as a result of the Supplementary Agreement.

(72) As regards the expert valuation of February 2009 referred to in recital (30) above, the Commission considers the residual value method used in that *ex post* assessment inappropriate to calculate the market value of the land sold to SJB, since the expected decrease in revenues from the sale of the housing units would be entirely absorbed by the price of the land. To calculate the value of land, the residual value method starts from the sales price of the housing units. From this price, the construction costs and a profit and risk provision are deducted. What is left is the residual value of the land. It is clear that in a declining housing market such as that *in casu* the residual value method shifts the decreasing value of real estate entirely to the value of the land. In theory, this could even result in a negative value for the land.

(73) Finally, the Dutch authorities claim that the Municipality, by agreeing to the contested measures, acted in accordance with the MEIT; that is, that a hypothetical private vendor in the same situation as the Municipality would have agreed to the same price reduction and fee waivers, so as to preclude the existence of an advantage as a result of the contested measures. First, according to the Dutch authorities, the Municipality had an important financial and social interest in starting the construction works on the Damplein as soon as possible, since further delays would lead to direct and indirect damages for the Municipality and these damages would be higher than the costs for the Municipality to agree to the contested measures. Second, the Dutch authorities contend that the Municipality behaved as a private investor by accepting a commitment from SJB to waive its right to invoke the 70 % clause of the 2004 Co-operation Agreement in return for the contested measures.

(74) The Commission does not accept this reasoning. As a preliminary matter, the Commission recalls that the

Municipality was only involved in the ground exploitation phase of the real estate project, while the construction phase of the project was at the risk and the expense of the private developers concerned, including SJB (see recitals 13 and 16 above). It is unlikely that a private investor, operating in normal competitive conditions, would have decided to take on the risk of a declining housing market from SJB, which it was previously not exposed to, by agreeing to a reduction in the initially agreed sales price for that land and a waiver of fees, without a clear financial compensation that would outweigh the losses stemming from that decision. As explained in recitals 75 to 86 below, neither the fact that the Municipality would suffer damages as a result of further delays, nor the fact that SJB decided to waive its right to invoke the 70 % clause, leads the Commission to a different conclusion in its application of the MEIT to the Municipality's actions.

Alleged damages

(75) As regards the direct damages the Municipality would allegedly suffer from further delays to the Damplein Project, the Commission notes that the costs estimated by the Dutch authorities in Table 2 above all relate to the ground exploitation phase of the entire Leidschendam Centrum Project. Assuming it would take at least another two years for SJB to start construction, the Dutch authorities estimated the reduced revenues for the PPP from the sale of the land to SJB, as well as assumed similar delays for the rest of the Leidschendam Centrum Project, to result in interest costs of approximately EUR 1,8 million on an outstanding loan of the PPP for the ground exploitation phase of the entire Leidschendam Centrum Project. A two year delay would also lead to extra planning and other costs of approximately EUR 1 million for the entire Leidschendam Centrum Project.

(76) However, as the Dutch authorities themselves acknowledge, it is the contested measures which contributed to the loss resulting from the ground exploitation phase of the project, since the PPP received a lower price for the land from SJB than that originally agreed under the 2004 Co-operation Agreement and waived certain fees ⁽¹⁸⁾. A private investor, operating under normal market conditions and seeking to maximise its return on the sale of its land, would not have likely agreed to the contested measures which contributed to a loss on the ground exploitation phase of the project, for which the private investor himself would be liable for 50 %. Rather, a private investor with only a financial participation in the ground exploitation phase of the project would have made sure the ground exploitation works were carried out promptly so that the land could be delivered to the project developers and would have requested the private developers to pay the sales price of the land and the fees as foreseen in the freely negotiated contracts.

⁽¹⁷⁾ Case C-239/09, *Seydaland Vereinigte Agrarbetriebe & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH*, ECR [2010] p. I-13083, point 39.

⁽¹⁸⁾ In its reply to the opening decision, the Municipality calculated a loss on the ground exploitation project of EUR 4,5 million (value on 1 January 2011), which was said to be caused, among others, by the price decrease and the waiver of the fees.

(77) In any event, even if the alleged direct costs referred to by the Dutch authorities could be taken into account to support the Municipality's decision to grant the contested measure, which the Commission contests, its calculations of these costs are nevertheless flawed. First, the interest costs are calculated in relation to a credit facility granted to the PPP covering the entire Leidschendam Centrum Project and not just the Damplein Project, which is but one of eight sub-projects. Similarly, the extra planning costs are calculated for the entire Leidschendam Centrum Project. It can therefore not be assumed that in the case that the Damplein Project would have been realised, all the other sub-projects would also have been realised, and thus that none of these interest costs would have been incurred.

(78) Second, the 5 % interest rate is not an actual interest rate, but a rate used for internal calculations. The actual interest to be paid on the credit facility agreed for the Leidschendam Centrum Project is considerably lower than this rate⁽¹⁹⁾ so that the interest costs suffered by the Municipality through the PPP would have been lower than those alleged by the Dutch authorities.

(79) Third, the outstanding credit facility, and therefore the interest costs, would have been much lower in the case that payment would have been made on the date and for the amount as foreseen in the 2004 Co-operation Agreement.

(80) Fourth, it is clear that, even in the calculations submitted by the Dutch authorities, the financial consequences of granting the contested measures for the PPP, estimated at approximately EUR 3,6 million, outweigh the alleged direct costs of further delaying construction of the real estate on the Damplein by SJB, estimated by the Dutch authorities at approximately EUR 2,8 million.

(81) Finally, as regards the alleged indirect costs of delaying the project by a further two years, the Dutch authorities have not quantified these damages so that it is impossible for the Commission to verify them.

The 70 % clause

(82) As regards SJB's commitment to waive its right to invoke the 70 % clause, the Commission notes at the outset that this clause, which also applied to the other private developers involved in the Leidschendam Centrum

Project, is not uncommon in the Netherlands. By agreeing to this clause, the Municipality accepted that the start of the actual construction of the free sector housing units would be determined by the success of the private project developers, including SJB, in pre-selling the housing units. This follows from the fact that the Municipality was only involved in the ground exploitation phase of the project, whereas the construction phase was carried out at the risk and the expense of the private developers. If the Municipality had indeed had an interest in a prompt start of the construction works, it was free, when negotiating the sale agreements with private developers in 2004, either not to agree to the 70 % clause in the contract or to incorporate penalties in case the construction phase would not be started and/or finished at a defined date.

(83) It should also be noted that the 70 % clause in the 2004 Co-operation Agreement was limited to the free sector housing units and did not include the construction of the commercial premises or the underground parking garage, whereas SJB refused to start any construction on the Damplein. In those circumstances, it is quite likely that a private investor, operating in normal competitive conditions and having an interest in the completion of the entire real estate project, would have requested SJB to fulfil its contractual obligations as regards the construction of the commercial premises and the underground parking garage. Even if the claim of SJB that these works could not be started because the different components of the real estate project would be technically linked was correct, this risk would be for SJB to bear, since it was solely responsible for the construction phase of the project. There is therefore no reason to believe that a private investor, operating in normal competitive conditions, would take over this risk from SJB.

(84) In this regard, it should further be recalled that, as regards the construction of the public part of the underground parking garage, the PPP had already decided to grant these works to SJB in 2004 for the lump sum of maximum EUR 4,6 million (value on 1 January 2003), without organising a public tender. There were therefore no financial reasons for SJB to refuse to start construction works on the parking garage and therefore no reasons for a private investor, operating in normal competitive conditions, to accept any further delays by making the construction of the parking garage dependent on the sale of the free sector housing units by SJB.

(85) It is therefore unlikely that a private investor, operating in normal competitive conditions, would have agreed to the contested measures in the manner the Municipality did without having first explored other commercially more attractive options, such as annulling the 2004 Co-operation Agreement, and claiming damages for the delay from SJB and putting out a call for tender. The Dutch authorities have provided no evidence that the PPP made any such assessment of its options.

⁽¹⁹⁾ According to the 2008 annual report of the PPP, the interest rate to be paid on the credit facility is the Euro OverNight Index Average (EONIA) plus 0,14 %. On the first day of 2009, the EONIA rate stood at 2,2 % and dropped steadily over the year; on the first day of 2010, the EONIA rate stood at 0,3 % and never exceeded 1 % during 2010. Therefore, the actual interest rate to be paid over the outstanding credit facility was well below 5 % during 2009 and 2010.

- (86) It can therefore be concluded that the contested measures confer an advantage on SJB and that they are not in line with the MEIT, as the Dutch authorities have not established that a hypothetical private seller, operating under normal market conditions, would have agreed to these measures.

7.1.2. *Distortion of competition and effect on intra-Union trade*

- (87) As the contested measures free SJB of costs it would otherwise have borne under the 2004 Co-operation Agreement, these measures reinforce its competitive position vis-à-vis that of other real estate developers operating on a market open to competition and trade at Union level and, by this very fact, are capable of distorting competition and affecting intra-Union trade. Indeed, any grant of aid to an undertaking pursuing its activities in the internal market is liable to cause distortions of competition and affect trade between Member States⁽²⁰⁾.
- (88) As regards the alleged limited scope or local nature of the project, the fact that subsidies are granted to an undertaking which provides only local or regional services and does not provide any services outside its Member State of origin does not in itself prevent those subsidies from having an effect on trade between Member States⁽²¹⁾. The Commission recalls in that regard that since there is cross-border trade within the Union in both the construction sector and in property development, and since real estate developers from other Member States or their subsidiaries could have taken part in the Leidschendam Centrum Project while SJB, which as a result of the contested measure is freed from a financial burden, can operate in Member States outside the Netherlands, the contested measures should be considered as capable of affecting intra-Union trade. Finally, the Commission notes that Bouwfonds, one of the companies in the SJB partnership, does indeed operate outside the Netherlands, in particular in France and Germany. Bouwfonds is the largest real estate developer in the Netherlands and among the top three largest players on the European real estate market. By favouring SJB, the contested measures also benefit Bouwfonds and are therefore liable to reinforce its position on the European real estate market.
- (89) Since the contested measures meet all the criteria of Article 107(1) TFEU, the Commission concludes that these measures constitute State aid within the meaning of that provision. Moreover, since this aid was granted to the beneficiaries without the prior notification to and

authorisation from the Commission as required by Article 108(3) TFEU, the contested measures constitute unlawful aid.

7.2. **Compatibility Assessment**

- (90) Having established that the contested measures constitute State aid within the meaning of Article 107(1) TFEU, it is necessary to examine the Dutch authorities' claim that these measures are compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (91) Article 107(3)(c) TFEU provides that aid may be considered compatible with the internal market where it facilitates the development of certain economic activities or of certain economic areas, so long as it does not adversely affect trading conditions to an extent contrary to the common interest.
- (92) When examining whether aid is compatible under Article 107(3)(c) TFEU, the Commission thus takes into account whether the aid is aimed at a well-defined objective of common interest, as well as whether it is appropriate and proportionate to achieve that objective, and whether it causes undue distortions of competition.

7.2.1. *Objective of common interest*

- (93) According to the Dutch authorities, the revitalisation of Leidschendam city centre contributes to economic and social cohesion, as laid down in Articles 3 and 174 TFEU, and without the contested measures SJB would not have started the construction works on the Damplein and the entire Leidschendam Centrum Project would have been jeopardised.
- (94) The Commission, however, is not convinced by this line of reasoning. On the one hand, the Dutch authorities have not established that the Damplein is a deprived urban area which suffers from market failure and that the market alone would not have decided to undertake the envisaged reconstruction of the Damplein. On the contrary, when the project was launched, several private developers, including SJB, were apparently willing to participate in the construction phase of the project at their own commercial risk and expense, as laid down in the 2004 Co-operation Agreement.
- (95) On the other hand, by concluding the 70 % clause in the 2004 Co-operation Agreement, the Municipality subordinated its interest in achieving the alleged objective of revitalising Leidschendam city centre to the commercial interest of SJB in case it would not be able to pre-sell 70 % of the planned housing units in advance of construction. The Municipality is therefore no longer in a position to argue that the contested measures, agreed to in 2010 on the condition that SJB committed to waive its right to invoke this clause, sought to attain a common interest objective.

⁽²⁰⁾ Case 730/79 *Philip Morris v Commission* [1980] ECR-2671, paragraphs 11 and 12; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 47-48; Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraphs 48-50, Joined Cases T-92/10 and T-103/00 *Diputación Foral de Álava/Commission* [2002] ECR II-1385, paragraph 72 Case T-222/04 *Italy v Commission* [2009] ECR II- 1877, paragraph 43.

⁽²¹⁾ Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg and Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, paragraphs 77-78.

7.2.2. Appropriateness of the aid

- (96) Even if it could be accepted that the contested measures sought to achieve the revitalisation of Leidschendam city centre, the Dutch authorities have not shown that those measures were an appropriate means to achieve that objective.
- (97) Indeed, it appears from the information provided that the other private developers involved in the Leidschendam Centrum Project also asked the PPP to decrease the initial sales price agreed for the land because of the difficulties they faced on the declining real estate market, but that the Municipality, rather than agreeing to such a decrease or a waiver of fees, considered amendments in the initial planning and development provisions to adapt to the changed demand on the market.
- (98) This demonstrates that other, more appropriate measures, which are better suited and less distortive of competition, were available to the Municipality to achieve the intended objective of revitalising Leidschendam city centre in light of the changed economic circumstances.

7.2.3. Proportionality of the aid

- (99) The Dutch authorities consider the contested measures proportionate to the intended objective of revitalising Leidschendam city centre since, in return for a price decrease and waiver of the fees, SJB agreed to waive its right to rely on the 70 % clause. Furthermore, the Dutch authorities consider the contested measures proportionate since SJB contributed financially to the ground exploitation phase. In particular, SJB paid a financial contribution of around EUR 2,6 million to the PPP and bore, via the PPP, 25 % of the costs for the school to be built in another sub area of the Leidschendam Centrum Project.
- (100) The Commission cannot follow this reasoning. Article 107(3)(c) requires that the aid measures must be proportionate to the intended objectives, not that there must be adequate trade-off between the aid that is granted and any concessions made by the beneficiaries to acquire that aid. Thus, the fact that SJB agreed to waive its right to rely on the 70 % clause in return for the price decrease and the fee waivers is of no relevance for the assessment into the proportionality of the contested measures. The same goes for any financial contributions SJB might have made to the ground exploitation phase.
- (101) The Dutch authorities have therefore failed to demonstrate that the contested measures were proportionate to the intended objective of common interest.

7.2.4. Undue distortions of competition

- (102) Finally, the Dutch authorities contest that the contested measures unduly distort competition, arguing that the positive effects of promptly completing the project outweigh the negative effects of the contested measures.
- (103) The Dutch authorities have, however, not substantiated this argument. On the contrary, as stated in recital 80 above, according to the Dutch authorities, a further delay in the contested real estate project would result in a cost of EUR 2,8 million for the PPP, while the agreed price decreases would amount to EUR 3,6 million. The Commission therefore concludes that the Dutch authorities have not demonstrated that the positive effects of completing the contested real estate project outweigh the negative effects of granting the contested measures.

7.2.5. Conclusion

- (104) Based on the considerations set out in recitals 93 to 103 above, the Commission concludes that the aid granted by the Municipality in favour of SJB by way of the contested measures is not compatible with the internal market on the basis of Article 107(3)(c) TFEU.

8. QUANTIFICATION AND RECOVERY OF THE AID

- (105) As explained in the section above, the contested measures constitute State aid within the meaning of Article 107(1) TFEU and cannot be considered compatible with the internal market. Moreover, since this aid was granted to the beneficiaries without the prior notification to and authorisation from the Commission as required by Article 108(3) TFEU, the contested measures constitute unlawful aid.
- (106) Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²²⁾ provides that: “where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary”.
- (107) While there is no provision of Union law that requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered ⁽²³⁾, it may include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty.

⁽²²⁾ OJ L 83, 27.3.1999, p. 1.

⁽²³⁾ See, in particular, Case C-480/98 *Spain v Commission* [2000] ECR I-8717, paragraph 25, and Case C-441/06 *Commission v France* [2007] ECR I-8887, paragraph 29

8.1. Quantification of the aid

- (108) As a result of the contested measures, SJB paid a lower price for the land on the Damplein than it had initially agreed under the 2004 Co-operation Agreement and was no longer required to pay the ground exploitation and quality fees it had also agreed to. Thus, to quantify the amount of illegal aid received by SJB, it is necessary to determine the amount of the price decrease and the value of the fees waived.

8.1.1. Quantification of the price decrease

- (109) As explained in recital 23 above, the price of the land on the Damplein sold to SJB by the PPP was set at EUR 7,2 million, indexed annually at 2,5 % until payment, by the 2004 Co-operation Agreement. This price was determined by an independent expert valuator. According to the Dutch authorities, the market value of this same plot of land on 1 January 2010 was EUR 8,6 million⁽²⁴⁾. The price which SJB had to pay for this land was subsequently reduced by the PPP by way of the Supplementary Agreement to EUR 4 million.
- (110) The advantage accruing to SJB as a result of the reduction in sales price for the land on the Damplein therefore corresponds to approximately EUR 4,6 million.
- (111) The claim of the Dutch authorities that the decrease of the sales price was less than EUR 4,6 million because the PPP had already decreased the initially agreed sales price of EUR 7,2 million in 2006 and in 2008 (see Table 1 above) cannot be accepted, as no evidence has been provided that these reductions were formalised by way of an agreement or that they led to an amendment of the initial sales price in the 2004 Co-operation Agreement.
- (112) The Commission further notes that the alleged 2006 reduction would run counter to the 2004 Co-operation Agreement, which clearly lays down minimum land prices and only foresees in an additional payment where more floor space could be achieved.
- (113) Finally, the Commission notes that both the alleged reduction in 2006, which was said to be due to the fact that less commercial space could be realised than initially foreseen, and the alleged reduction in 2008, which apparently related to delays in the construction permit for SJB, were granted under the condition that SJB would receive a building permit by 1 October 2008. This condition was apparently not fulfilled since, according to the Dutch authorities, SJB received the building permit only in November 2008.

- (114) The Commission therefore concludes that the amount of the aid granted to SJB by the PPP as a result of the decrease in the sales price originally agreed in the 2004 Co-operation Agreement amounts to approximately EUR 4,6 million (see amount in Table 3 below).

8.1.2. Waiver of the fees

- (115) As explained in recital (25) above, the fees SJB was required to pay under the terms of the 2004 Co-operation Agreement amounted to approximately EUR 2 million in total (value on 1 January 2003), indexed yearly by 2,5 % until payment. However, these fees were based on the number of housing units planned for construction⁽²⁵⁾ and the 2004 Co-operation Agreement stipulates that if fewer units are built than planned, these amounts would be adjusted accordingly.
- (116) Under the terms of the 2004 Co-Operation Agreement, SJB was required to build 74 housing units on the Damplein. However, according to the final agreement, only 67 housing units were in fact constructed. The fees should therefore be accordingly reduced, which leads to an amount of approximately EUR 1,9 million (value on 1 January 2003)⁽²⁶⁾. On 1 January 2010, these fees represented a value of approximately EUR 2,3 million.
- (117) As a result of the Supplementary Agreement, the fees as agreed under the 2004 Co-operation Agreement were no longer due as regards SJB. Thus, the amount of aid granted to SJB as a result of the waiver by the PPP of these fees amounts to approximately EUR 2,3 million (see Table 3 below).
- (118) The Dutch authorities contend that, in spite of the wording of the Supplementary Agreement, the PPP had only waived the fees related to the Damplein Project, representing a total amount of approximately EUR 0,6 million (value on 1 January 2003). To substantiate their position, the Dutch authorities refer to the building programme annexed to the 2004 Co-operation Agreement which allocates a ground exploitation fee and a quality fee of approximately EUR 0,6 million (value on 1 January 2003) to the Damplein and mentions a total ground exploitation fee and quality fee of approximately EUR 2 million (value on 1 January 2003) to be paid by SJB for the entire Leidschendam Centrum Project. Reference was also made to a proposal from the Municipality sent to its Council on 18 February 2009, which mentioned that the lowering of the fees would have a negative effect, at that moment in time, of approximately EUR 0,7 million on the result of the ground exploitation project.

⁽²⁵⁾ Ground exploitation fee: EUR 4 587 per housing unit; quality fee EUR 3 645 per housing unit.

⁽²⁶⁾ Reduction ground exploitation fee $(74 - 67) \times 4\,587 =$ EUR 32 109. Reduction quality fee $(74 - 67) \times 3\,645 =$ EUR 25 515.

⁽²⁴⁾ Letter of the Dutch authorities of 12 April 2010.

(119) The Commission does not consider it possible, however, to conclude on the basis of the building programme or on the basis of the proposal sent to the Council that the waiver of the fees related exclusively to the Damplein Project. In any event the wording of the Supplementary Agreement does not limit the waiver of the fees to the Damplein Project. The Dutch authorities have also not been able to provide any evidence that SJB actually paid all fees due for all housing units of the Leidschendam

Centrum Project on 1 July 2004, as it was obliged to do under Article 10.3 of the 2004 Co-operation Agreement.

8.1.3. Total State aid amount

(120) On the basis of the calculation set out in Table 3 below, the amount of State aid granted to SJB amounts to approximately EUR 6,9 million.

Table 3

	Co-operation agreement 2004		Supplementary agreement March 2010	Decrease
	Value 1.1.2003	value 1.1.2010	value 1.1.2010	value 1.1.2010
Land price	7 253 793	8 622 480	4 000 000	4 622 480
Ground exploitation fee	1 077 941	1 281 333	0	1 281 333
Quality fee	856 667	1 018 308	0	1 018 308
Total	9 188 401	10 922 121	4 000 000	6 922 121

8.2. Recovery of the aid

(121) Given that the contested measures constitute unlawful and incompatible aid, that aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall thus be ordered from the partnership SJB, set up by Schouten de Jong and Bouwfonds, as well as from these two companies, which are each jointly and severally liable for the fulfilment of SJB's obligations under the PPP agreement ⁽²⁷⁾.

(122) As explained in Table 3 above, the incompatible aid element of the measures should be calculated as EUR 6 922 121, consisting of the retroactive decrease of the sales price of the land (EUR 4 622 480), and the waiver of the ground exploitation fee (EUR 1 281 333) and the quality fee (EUR 1 018 308).

(123) The aid was granted to SJB on 1 March 2010. The aid to be recovered shall bear recovery interest for the period between 1 March 2010 until the date at which it will be effectively repaid.

partnership consisting of Schouten & De Jong Projectontwikkeling BV and Bouwfonds Ontwikkeling BV, in the form of a retroactive decrease of the sales price of land and a retroactive decrease of the agreed ground exploitation fee and quality fee agreed by the municipality of Leidschendam-Voorburg, is incompatible with the internal market.

Article 2

1. The Netherlands shall recover the incompatible aid referred to in Article 1 from Schouten-de Jong Bouwfonds and/or Schouten & De Jong Projectontwikkeling BV and/or Bouwfonds Ontwikkeling BV.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of Schouten-de Jong Bouwfonds and/or Schouten & De Jong Projectontwikkeling BV and/or Bouwfonds Ontwikkeling BV, namely 1 March 2010 until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽²⁸⁾.

Article 3

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

2. The Netherlands shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 6 922 121, unlawfully granted by the Netherlands on 1 March 2010, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Schouten-de Jong Bouwfonds, a

⁽²⁷⁾ Article 4.1 Ground exploitation/PPP agreement of 22 November 2004.

⁽²⁸⁾ OJ L 140, 30.4.2004, p. 1.

Article 4

1. Within two months following the date of notification of this Decision, the Netherlands shall submit the following information:

- (a) the total amount (principal and recovery interests) to be recovered from the beneficiaries;
- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The Netherlands shall keep the Commission informed of the progress of the national measures taken to implement this

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

Article 5

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 23 January 2013.

For the Commission

Joaquín ALMUNIA

Vice-president

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