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Contents

[1] Text with EEA relevance

EN

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.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) No 869/2014

of 11 August 2014

on new rail passenger services

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area ([1]) and in particular Articles 10(4) and 11(4) thereof,

Whereas:

(1) In accordance with Article 10 of Directive 2012/34/EU, Member States have opened their market for international rail passenger transport services provided by any railway undertaking licensed under the same Directive. In the course of an international rail passenger service, railway undertakings have the right to pick up passengers at any station located along the international route and set them down at another, including stations located in the same Member State.

(2) However, the introduction of new, open-access international rail passenger services with intermediate stops should not be used to open up the market for domestic passenger services, but should merely focus on stops that are ancillary to the international service. The principal purpose of the new services should be to carry passengers travelling on an international journey. At the request of competent authorities or interested railway undertakings, the regulatory body referred to in Section 4 of Chapter IV of Directive 2012/34/EU should determine the principal purpose of a proposed new service.

(3) Opening up international rail passenger services to competition may have implications for the organisation and financing of rail passenger services provided under a public service contract in accordance with Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([2]). In accordance with Article 11 of Directive 2012/34/EU, Member States may limit the right of access to the market where that right would compromise the economic equilibrium of those public service contracts. At the request of competent authorities, the infrastructure manager or the railway undertaking performing the public service contract, the regulatory body should determine whether a proposed new international rail passenger service would compromise the economic equilibrium of a public service contract.

(4) In order to avoid the interruption of a new rail passenger service that has already started, and to give legal certainty to this new service about its possibility to operate, the time period that is open for request for a principal purpose test or for an economic equilibrium test should be limited and linked to the time of the applicant's notification of its interest in operating a new international rail passenger service. For the same reason, the procedures of the regulatory body for those tests should also be limited in time.

([1]) OJ L 343, 14.12.2012, p. 32.

([2]) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

(5) A request for a principal purpose test should include all relevant information to justify that the principal purpose of the proposed new service is other than to carry passengers between stations located in different Member States. In order to meet this requirement, entities requesting for such a test should be able to use standard request forms published by the regulatory bodies.

(6) The regulatory body should carry out both a qualitative and quantitative analysis to identify the vocation of the proposed new service in the medium term, rather than its characteristics at a given moment. Assessment criteria should be determined in the methodology adopted by the regulatory body for the principal purpose test with regard to the specificities of rail transport in the Member State concerned. No quantified threshold should be applied strictly or in isolation.

(7) A request for an economic equilibrium test should include all relevant information to justify that the economic equilibrium of the public service contract would be compromised by the proposed new service. The economic equilibrium of a public service contract should be regarded as compromised by the proposed new service if there is a substantial change in the value of the public service contract which implies that services operated under that contract in a competitively structured market would no longer be sustainable and capable of operating with a reasonable level of profit.

(8) The assessment of the impact of the proposed new service on the economic equilibrium of a public service contract should be based on an objective method and assessment criteria to be determined in the methodology adopted by the regulatory body for the economic equilibrium test with regard to the specificities of rail transport in the Member State concerned. The economic analysis should focus on the economic impact of the proposed new service on the public service contract as a whole, including the services specifically affected, for its whole time-scale. No predefined quantified threshold should be applied strictly or in isolation. Beyond the economic analysis of the impact of the proposed new service on the public service contract, the regulatory body should also take into account the benefits to customers in the short and medium term.

(9) The possibility of reconsideration of a decision taken by the regulatory body resulting from an economic equilibrium test should be limited to cases when there is a significant change in the new service in comparison with the data analysed by the regulatory body or when there is a substantial difference between the real and estimated impact on the services under the public service contract. In order to guarantee a minimum of legal stability for the new service operator, there should be a certain period of time when no reconsideration may be requested.

(10) Without prejudice to the principle of independence of regulatory bodies in decision-making referred to in Article 55(1) of Directive 2012/34/EU, regulatory bodies should exchange information and, where relevant in individual cases, should coordinate their principles and actions related to principal purpose and economic equilibrium tests, in order to avoid major differences in their practice that would bring uncertainty to the market of international rail passenger services.

(11) In all their activities related to the principal purpose or the economic equilibrium tests, regulatory bodies should respect the confidentiality of commercially sensitive information received from the parties involved in these tests.

(12) Regulatory bodies have no obligation to request a fee for a principal purpose test, an economic equilibrium test or the reconsideration of an economic equilibrium test. However, Member States may decide to impose such a fee on entities making such requests for the work undertaken by the regulatory bodies covering the net cost of these assessments. In such a case, the fee should be non-discriminatory, reasonable and be effectively levied on all the requesting entities in a transparent manner.

(13) Taking into account the results of a stakeholders' consultation and exchanges of information with other regulatory bodies, regulatory bodies should develop a consistent methodology for principal purpose tests and, if appropriate, for economic equilibrium tests. This responsibility should not be constrained by other entities. The tests should rely on a case-by-case analysis, rather than simple application of predetermined thresholds. No thresholds should be determined in national legislative acts. The assessment method should be established in a way consistent with market developments, allowing its evolution over time, in particular in the light of the experience of regulatory bodies.

(14) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 62(1) of Directive 2012/34/EU,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation sets out the details of the procedure and criteria to be followed when determining:

(a) whether the principal purpose of a rail service is to carry passengers between stations located in different Member States;

(b) whether the economic equilibrium of a public service contract for rail transport is compromised by an international rail passenger service.

Article 1a

Exclusions from the scope

This Regulation does not apply to services organised by an undertaking to transport its own employees to and from work as well as to services for which no tickets are sold to the public.

Article 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

(1) 'new international passenger service' means an international passenger service that is proposed to be introduced on the market or implies a substantial modification in terms of increased frequencies or an increased number of stops of an existing international passenger service;

(2) 'principal purpose test' means the assessment process carried out by a regulatory body at the request of an entity referred to in Article 5 in order to determine whether the principal purpose of a proposed new rail service is to carry passengers between stations located in different Member States or to carry passengers between stations located in the same Member State;

(3) 'economic equilibrium test' means the assessment process carried out by a regulatory body at the request of an entity referred to in Article 10, only applicable in Member States that have decided, in accordance with Article 11 of Directive 2012/34/EU, to limit the right of access to rail infrastructure for international rail passenger services between a place of departure and a destination which are covered by one or more public service contracts, in order to determine whether the economic equilibrium of a public service contract would be compromised by a proposed new international rail passenger service;

(4) 'public service contract' means a public service contract as defined in Article 2(i) of Regulation (EC) No 1370/2007 that relates to rail transport;

(5) 'competent authority' means a competent authority as defined in Article 2(b) of Regulation (EC) No 1370/2007;

(6) 'net financial effect' means the effect of a public service contract on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the railway undertaking performing the public service contract and a reasonable profit, calculated in accordance with point 2 of Annex to Regulation (EC) No 1370/2007.

Article 3

Notification of a planned new international rail passenger service

1. The applicant shall notify the regulatory bodies concerned of its intention to operate a new international passenger service prior to requesting infrastructure capacity from the infrastructure manager.

2. Regulatory bodies shall develop and publish on their website a standard notification form to be used by applicants which shall contain the following information:

(a) the applicant's name, address, legal entity, registration number (if appropriate);

(b) contact data of the person responsible for queries,

(c) data of licence and safety certificate of the applicant or indication of the stage of the procedure to obtain them;

(d) detailed route indicating location of departure and destination stations as well as all intermediate stops and distance between them;

(e) planned starting date for the operation of the proposed new international rail passenger service;

(f) timing, frequency and capacity of the proposed new service, including the proposed departure times, intermediate stops, arrival times and connections as well as any deviations in frequency or in stops from the standard timetable, per direction;

(g) justification that the principal purpose of the proposed passenger service is to carry passengers between stations located in different Member States.

3. The information regarding the planned operation of the proposed new international rail passenger service shall cover at least the first three years and, as far as possible, the first five years of operation.

4. The regulatory body shall publish on its website the notification made by the applicant with the exception of any commercially sensitive information, without delay and inform thereof the entities referred to in Article 5 or 10, as appropriate.

5. The applicant shall justify any exclusion from publication of commercially sensitive information. If the regulatory body finds this justification acceptable, it shall keep the information confidential. If it does not, it shall communicate its refusal to the applicant requesting confidentiality. This procedure shall be without prejudice to an appeal procedure against this decision as provided for in national law.

6. All information provided by the applicant in standard form and any supporting documents shall be sent to the regulatory body in electronic form.

Article 4

Time-frame to request a principal purpose test or an economic equilibrium test

1. Requests by the entities referred to in Article 5 or 10, as appropriate, for a principal purpose test or for an economic equilibrium test shall be made within four weeks from the publication of the applicant's notification on the regulatory body's website. Entities that have the right to make requests for both tests may do so simultaneously.

2. If both the principal purpose and economic equilibrium tests are requested, they may be carried out at the same time. If a principal purpose test reveals that the principal purpose of the proposed service is other than to carry passengers between stations located in different Member States and a negative decision is taken, the economic equilibrium test shall be terminated by a decision referring to this negative decision on the principal purpose of the proposed service.

Article 5

Entities having the right to request for a principal purpose test

A principal purpose test may be requested by the following entities:

(a) competent authorities that have concluded public service contracts for rail transport in a geographical area affected by the proposed new service;

(b) any railway undertaking operating international or domestic passenger rail services on the route(s) to be served by the proposed new service, whether on a commercial basis or on the basis of a public service contract.

Article 6

Information to be provided in the request for a principal purpose test

1. In the request, the requesting entity shall provide the following information:

(a) the requesting entity's name, address, legal entity, registration number (if appropriate);

(b) contact data of the person responsible for queries;

(c) explanation of the requesting entity's interest in a decision on the principal purpose of the proposed new service;

(d) explanation why, in the requesting entity's opinion, the principal purpose of the proposed new service is other than to carry passengers between stations located in different Member States;

(e) information and documentation supporting explanations in (c) and (d).

2. The requesting entity shall justify any proposed exclusion of commercially sensitive information. If the regulatory body finds this justification acceptable, it shall keep this information confidential. If it does not, it shall communicate its refusal to the party requesting confidentiality. This procedure shall be without prejudice to an appeal procedure against this decision as provided for in national law.

3. Regulatory bodies shall publish on their websites a standard form to request a principal purpose test to be used by the requesting entities.

4. All information provided in the standard request form and any supporting documentation shall be sent to the regulatory body in electronic form.

Article 7

Procedure for the principal purpose test

1. The regulatory body shall examine the request submitted by the requesting entity.

2. If the regulatory body considers that the requesting entity has not provided full information with their request, it may request further information within three weeks of receipt of the request. If the requesting entity replies to this request for further information, and its reply is still incomplete, the regulatory body may make a second request for further information within three weeks of receipt of the response to the first request for further information. The requesting entity shall provide such information in response to the requests for further information within a reasonable period as set out by the regulatory body in accordance with Article 56(8) of Directive 2012/34/EU. If the requesting entity does not provide such information within the timescales set by the regulatory body, the request shall be rejected.

3. The regulatory body may ask the applicant to provide additional information. It may set one more deadline for clarification in case the information provided is unclear.

4. Where a request cannot be substantiated in accordance with Article 6(1)d), it shall be rejected.

5. The regulatory body shall take a decision within six weeks at the latest from the receipt of all relevant information.

Article 8

Assessment criteria for the principal purpose test

1. The regulatory body shall verify the principal purpose of a proposed new service. It shall carry out both a qualitative and quantitative analysis that takes into account the foreseeable evolution of the service as well as foreseeable changes in market conditions during the period covered in the applicant's notification.

2. During the assessment process and in addition to the information provided in the standard notification form, the regulatory body shall take into account in particular the following criteria:

(a) proportion of turnover and of volume derived from the transport of international passengers as expected by the applicant as compared to domestic passengers in the Member State where the regulatory body is established;

(b) the distance covered by the proposed new service in different Member States and the location of the stops;

(c) passenger demand for the new service;

(d) the marketing strategy of the applicant;

(e) nature of the rolling stock to be used in the new service.

3. The regulatory body may set and apply thresholds expressed as a proportion of the turnover or volume derived from the transport of international passengers. These thresholds shall not exceed 50 % of the turnover or of the volume derived from the transport of all passengers, estimated for the whole period covered by the decision of the regulatory body, to qualify the service as international and shall not be applied in isolation.

Article 9

Result of the principal purpose test

1. Following the assessment of the new proposed service, the regulatory body shall determine whether the principal purpose of the proposed new service is:

(a) to carry passengers between stations located in different Member States; or

(b) to carry passengers between stations located in the Member State where the regulatory body is established.

2. If the regulatory body takes a decision referred to in point (a) of paragraph 1, access to rail infrastructure shall be granted for the proposed new international passenger service.

3. If the regulatory body takes a decision referred to in point (b) of paragraph 1, the regulatory body shall requalify the application into an application for a national passenger service and inform the applicant thereof. The applicant shall then follow the relevant national rules to apply for the access to railway infrastructure.

4. The regulatory body shall notify the applicant of the decision taken.

5. The decision of the regulatory body shall be duly justified and published without delay on its website while respecting the confidentiality of commercially sensitive information.

Article 10

Entities having the right to request an economic equilibrium test

Where a Member State concerned by the proposed new international rail service has decided to limit the right of access to rail infrastructure for international rail passenger services between a place of departure and a destination which are covered by one or more public service contracts, an economic equilibrium test may be requested by the following entities:

(a) a competent authority or competent authorities that have concluded a public service contract covering a place of departure and a destination of the proposed new service;

(b) any other interested competent authority with a right to limit access under Article 11of Directive 2012/34/EU;

(c) the infrastructure manager in the geographical area covered by the proposed new international passenger service;

(d) any railway undertaking performing the public service contract awarded by the authority referred to in point (a).

Article 11

Information requirements for the economic equilibrium test

1. The requesting entity shall provide the following information:

(a) the requesting entity's name, address, legal entity, registration number (if appropriate);

(b) contact data of the person responsible for queries;

(c) explanation of the requesting entity's interest in a decision on the economic equilibrium test;

(d) evidence that the economic equilibrium shall be compromised by the new service;

(e) information and documentation supporting explanations in (c) and (d).

2. The regulatory body may request information from the entities involved in the test including but not limited to:

(a) from the competent authority:

(i) the copy of the public service contract;

(ii) national rules for awarding and amending public service contracts;

(iii) relevant journeys and revenue forecasts, including forecast methodology;

(b) from the railway undertaking performing the public service contract:

(i) the copy of the public service contract;

(ii) the business plan of this undertaking;

(iii) information on revenues gained by this undertaking;

(iv) timetable information for the services, including departure times, intermediate stops, arrival times and connections;

(v) its estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services) and plans for competitive responses to the new service, as well as possible cost savings induced by the new service;

(c) from the applicant:

(i) business plan;

(ii) forecast of revenue and journeys from domestic passengers, including forecast methodology;

(iii) pricing strategies;

(iv) ticketing arrangements;

(v) rolling stock specifications (e.g. load factor, number of seats, wagon configuration);

(vi) marketing strategy;

(vii) its estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services);

(d) from the infrastructure manager:

information regarding the relevant lines or sections, in order to ensure that the new international passenger service can be run on this infrastructure. This information obligation of the infrastructure manager shall be without prejudice to its obligations under the allocation procedure referred to in Chapter IV, Section 3 of Directive 2012/34/EU.

3. The entities involved in the economic equilibrium test shall justify any proposed exclusion of commercially sensitive information. If the regulatory body finds this justification acceptable, it shall keep this information confidential. If not, this shall be communicated to the party requesting confidentiality. This procedure is without prejudice to a possible appeal procedure against this finding in national law.

Article 12

Procedure for the economic equilibrium test

1. The regulatory body shall examine the request submitted by the requesting entity.

2. If the regulatory body considers that the requesting entity has not provided full information with their request, it may request further information within three weeks of receipt of the request. If the requesting entity replies to this request for further information, and its reply is still incomplete, the regulatory body may make a second request for further information within three weeks of receipt of the response to the first request for further information. The requesting entity shall provide such information in response to the requests for further information within a reasonable period as set out by the regulatory body in accordance with Article 56(8) of Directive 2012/34/EU. If the requesting entity does not provide such information within the timescales set by the regulatory body, the request shall be rejected.

3. Within one month from receipt of the request, the regulatory body shall ask for information referred to in Article 11 from other relevant parties, in particular the railway undertaking seeking access to rail infrastructure with a view to operating a new international rail passenger service. It may set one more time-frame for clarification in case the information provided is not clear.

4. Where a request cannot be sufficiently substantiated in accordance with Article 11(1)d), it shall be rejected.

5. If the information provided by the requesting entity justifies the request for an economic equilibrium test to be carried out, and the information provided by the applicant seeking access is not sufficient to invalidate the request for such a test, the access shall not be granted.

6. The regulatory body shall set a time-frame for the adoption of its decisions which shall not exceed six weeks from the receipt of all relevant information.

7. All the information shall be sent to the regulatory body in electronic form.

Article 13

Contents of the economic equilibrium test

1. The economic equilibrium of a public service contract shall be considered as compromised, when the proposed new service has a substantial negative impact on:

(i) the profitability of services operated under the public service contract, and/or

(ii) the net cost for the competent authority awarding the public service contract.

2. The regulatory body shall assess whether the economic equilibrium of a public service contract is compromised by the proposed new service. The analysis carried out by the regulatory body shall focus on the economic impact of the proposed new service on the public service contract as a whole, not on individual services operated under it, over its entire duration. Predetermined thresholds on specific criteria may be applied but not in isolation from other criteria.

3. The regulatory body shall also take into account the benefits to customers flowing from the new service in the short and medium term.

Article 14

Assessment criteria for the economic equilibrium test

During the assessment process the regulatory body shall take into account, in particular, the following criteria:

(a) impact on the net financial effect of services under the public service contract considered over the duration of this contract;

(b) possible competitive responses by the railway undertaking performing the public service contract;

(c) possible cost savings to be made by the railway undertaking performing the public service contract (such as in terms of non-replacement of rolling stock coming to expiration or staff whose contract ends) as well as potential benefits for this railway undertaking resulting from the proposed new service (such as by bringing international passengers who might be interested in a connection with a regional service within the public service contract);

(d) possibility to narrow the scope of the public service contract, in particular when it is close to expiry at the time of the assessment;

(e) impact on the performance and quality of railway services;

(f) impact on timetable planning for railway services;

(g) impact on rolling stock investments by railway undertakings or competent authorities, if appropriate.

Article 15

Result of the economic equilibrium test

1. As a result of the economic equilibrium test, the regulatory body shall take a decision under Article 11(1) of Directive 2012/34/EU, on the basis of which the right of access to the rail infrastructure shall be granted, modified, granted only under conditions or denied.

2. Before taking a decision that would result in denying access to rail infrastructure for the proposed new international passenger service, the regulatory body shall give the opportunity to the applicant to adjust the plan so that it would not compromise the economic equilibrium of the public service contract.

3. The decision of the regulatory body shall be published with its justification on the website of the regulatory body while respecting the confidentiality of commercially sensitive information.

Article 16

Reconsideration of a decision resulting from the economic equilibrium test

1. The entities listed in Article 11(3) of Directive 2012/34/EU may request a reconsideration of a decision resulting from the economic equilibrium test under the conditions set out by the regulatory body. These conditions may include:

(a) there is a significant change in the new international passenger service in comparison with the data analysed by the regulatory body; or

(b) there is a substantial difference between the real and the estimated impact on the services under the public service contract; or

(c) when the public service contract has expired before its initial term.

2. Unless the regulatory body provides otherwise in its decision, no reconsideration of a decision may be requested within three years from the publication of the decision, except in the case described in paragraph 1(a).

Article 17

Cooperation of the regulatory body with other regulatory bodies competent for the proposed new service

1. Upon receipt of the applicant's notification of its intention to start a new international passenger service, the regulatory body shall inform other regulatory bodies having competence for the route of the proposed new service. Those regulatory bodies shall check whether the information contained in the notification form published on the website of the regulatory body is consistent with the information received by them from the applicant. They shall inform the regulatory body of any inconsistencies.

2. Upon receipt of a request from entities referred to in Article 5 or 10 for either a principal purpose test or an economic equilibrium test, the regulatory body shall inform the other regulatory bodies having competence for parts of the route of the proposed new service.

3. Regulatory bodies shall communicate the results of the tests to the other regulatory bodies having competence for parts of the route of the proposed new service. They shall do it sufficiently ahead of the final adoption of their decision to give other regulatory bodies the opportunity to comment on the results of the tests.

4. During any exchange of information regarding the tests, regulatory bodies shall respect the confidentiality of commercially sensitive information received from the parties involved in the tests. They may only use the information for the case concerned.

Article 18

Fees

Member States or, where appropriate, regulatory bodies may request a fee for the principal purpose test, the economic equilibrium test or the reconsideration of an economic equilibrium test from the entity requesting the test or the reconsideration. In such a case, the fee shall be non-discriminatory, reasonable, effectively levied on all the requesting entities in a transparent manner, and it shall not exceed the cost of the work undertaken by the staff and the expenditure associated with the application.

Article 19

Methodology

1. The regulatory bodies shall develop a methodology for principal purpose tests and, if appropriate, for economic equilibrium tests, in line with the provisions of this Regulation. This methodology shall be clear, transparent and non-discriminatory and shall be published on the website of the regulatory body.

2. The methodology shall be established in a way consistent with market developments, allowing it to evolve over time, in particular in the light of the experience of regulatory bodies.

Article 20

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication the *Official Journal of the European Union*.

It shall apply from 16 June 2015.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 August 2014.

For the Commission
The President
José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 870/2014

of 11 August 2014

on criteria for applicants for rail infrastructure capacity

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area ([1]), and in particular Article 41(3) thereof,

Whereas:

(1) Article 41(2) of Directive 2012/34/EU provides for the possibility for infrastructure managers to set requirements with regard to applicants to ensure that their legitimate expectations about future revenues and utilisation of the infrastructure are safeguarded.

(2) These requirements should be appropriate, transparent and non-discriminatory. They can only include the provision of a financial guarantee that should not exceed an appropriate level proportional to the contemplated level of activity, and assurance of the capability of the applicant to prepare compliant bids for infrastructure capacity.

(3) Financial guarantees could take the form of advance payments or guarantees provided by financial institutions

(4) The appropriateness of the requirements referred to in Recital (2) should take account of the fact that the infrastructure of competing transport modes, such as road and air transport, sea ships and inland waterways, is often free of user charges and hence also free of financial guarantees thereon. In order to ensure fair competition between transport modes, financial guarantees should be limited to the strict minimum in terms of level and duration.

(5) These financial guarantees are only appropriate if they are necessary for the purpose of reassuring the infrastructure manager about the future revenues and utilisation of the infrastructure. Considering that infrastructure managers are able to rely on the checks and surveillance of the financial fitness of railway undertakings under the licensing procedure in accordance with Chapter III of Directive 2012/34/EU, and in particular Article 20 of that Directive, the need for financial guarantees is further reduced.

(6) The principle of non-discrimination applies to those guarantees, therefore there should be no distinction between the guarantee requirements for privately and publicly owned applicants.

(7) Guarantees should be commensurate with the level of risk posed by the applicant for the infrastructure manager at different stages of capacity allocation. The risk is considered generally to be low as long as the capacity can be reallocated to other railway undertakings.

(8) A guarantee which is requested in relation to the preparation of compliant bids can only be considered as appropriate, transparent and non-discriminatory if the infrastructure manager sets out clear and transparent rules for preparing a capacity request in the network statement, and offers the necessary support tools to applicants. Since it is not possible to objectively determine the capability of preparing compliant bids before the application procedure, any lack of capability can only be determined after that procedure, on the basis of a repeated failure to put forward those bids or provide the necessary information to the infrastructure manager. The applicant is responsible for that failure which carries a sanction involving the exclusion of the applicant from the application for a specific train path.

(9) The measures provided for in this Regulation are in accordance with the opinion of the Committee referred to in Article 62(1) of Directive 2012/34/EU,

([1]) OJ L 343, 14.12.2012, p. 32.

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation sets out requirements for financial guarantees that an infrastructure manager may request to ensure that its legitimate expectations about future revenues are met without exceeding a level proportional to level of activities contemplated by the applicant. The requirements include in particular the conditions when a guarantee or an advance payment may be requested and the level and duration of a financial guarantee. In addition, this Regulation sets out certain details as regards the criteria to assess the capability of an applicant to prepare compliant bids for infrastructure capacity.

Article 2

Definitions

For the purpose of this Regulation, the following definition applies:

'financial guarantee' means: (a) advance payments to reduce and anticipate future obligations to pay infrastructure charges; or (b) contractual arrangements by which a financial institution such as bank commits to ensure that such payments are effected once they are due.

Article 3

Conditions for financial guarantees

1. The applicant may choose to meet a request for financial guarantee by means of either advance payment or contractual arrangement in the meaning of Article 2. Where an infrastructure manager requires an applicant to provide an advance payment for infrastructure charges, it may not at the same time request other financial guarantees for the same contemplated activities.

2. An infrastructure manager shall not request applicants to provide financial guarantees unless the credit rating of the applicant suggests that he might have difficulties in effecting regular payments for infrastructure charges. The infrastructure manager shall mention such credit ratings in the section on charging principles of its network statement, if applicable. The infrastructure manager shall base his request for a financial guarantee on ratings not older than two years provided by a credit rating agency.

3. The infrastructure manager shall not request a financial guarantee:

(a) from the designated railway undertaking if a financial guarantee has already been granted or paid by the applicant, which is not a railway undertaking, to cover future payments for the same contemplated activities;

(b) if the infrastructure charge is to be paid directly to the infrastructure manager by a competent authority pursuant to Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([1]).

Article 4

Level and duration of financial guarantees

1. The level of financial guarantees regarding one applicant shall not exceed the estimated amount of charges incurred during two months of train operations requested.

2. Reservation charges paid in accordance with Article 36 of Directive 2012/34/EU shall be deducted from the maximum estimated amount of charges referred to in paragraph 1.

3. An infrastructure manager shall not require that a financial guarantee takes effect more than 10 days before the first of the month in which the railway undertaking starts the train operations the payment of infrastructure charges from which this financial guarantee is to cover. If the capacity is allocated after this point in time, the infrastructure manager may request the financial guarantee at short notice.

([1]) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

Article 5

Capability to prepare compliant bids for infrastructure capacity

The infrastructure manager shall not reject an application for a specific train path on grounds of failing to provide assurance of the capability to prepare a compliant bid for infrastructure capacity, within the meaning of Article 41(2) of Directive 2012/34/EU, unless:

(a) the applicant has failed to answer two subsequent requests requiring the provision of the missing information or has repeatedly responded in a way that does not satisfy the conditions set out in the network statement referred to in Article 27 of Directive 2012/34/EU and in Annex IV to that Directive regarding the application procedures for train paths; and

(b) the infrastructure manager is able to demonstrate at the request of and to the satisfaction of the regulatory body that it has taken all reasonable steps to support the correct and timely submission of applications.

Article 6

Transitional provision

Where necessary, infrastructure managers shall align their network statements to the provisions of this Regulation for the first timetable period following the entry into force of this Regulation.

Article 7

This Regulation shall enter into force on the twentieth day following that of its publication the *Official Journal of the European Union*.

It shall apply from 16 June 2015.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 August 2014.

For the Commission

The President

José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 871/2014

of 11 August 2014

operating deductions from fishing quotas available for certain stocks in 2014 on account of overfishing in the previous years

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 ([1]), and in particular Article 105(1), (2) and (3) thereof,

Whereas:

(1) Fishing quotas for the year 2013 have been established by:

— Council Regulation (EU) No 1262/2012 ([2]),

— Council Regulation (EU) No 1088/2012 ([3]),

— Council Regulation (EU) No 1261/2012 ([4]),

— Council Regulation (EU) No 39/2013 ([5]), and

— Council Regulation (EU) No 40/2013 ([6]).

(2) Fishing quotas for the year 2014 have been established by:

— Regulation (EU) No 1262/2012,

— Council Regulation (EU) No 1180/2013 ([7]),

— Council Regulation (EU) No 24/2014 ([8]), and

— Council Regulation (EU) No 43/2014 ([9]).

(3) According to Article 105(1) of Regulation (EC) No 1224/2009, when the Commission has established that a Member State has exceeded the fishing quotas which have been allocated to it, the Commission is to operate deductions from future fishing quotas of that Member State.

(4) Article 105(2) and (3) of Regulation (EC) No 1224/2009 provide that such deductions shall be operated in the following year or years by applying the respective multiplying factors as set out therein.

(5) Certain Member States have exceeded their fishing quotas for the year 2013. It is therefore appropriate to operate deductions on the fishing quotas allocated to them in 2014 and, where appropriate, in subsequent years, for the overfished stocks.

([1]) OJ L 343, 22.12.2009, p. 1.

([2]) Council Regulation (EU) No 1262/2012 of 20 December 2012 fixing for 2013 and 2014 the fishing opportunities for EU vessels for certain deep-sea fish stocks (OJ L 356, 22.12.2012, p. 22).

([3]) Council Regulation (EU) No 1088/2012 of 20 November 2012 fixing for 2013 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea (OJ L 323, 22.11.2012, p. 2).

([4]) Council Regulation (EU) No 1261/2012 of 20 December 2012 fixing for 2013 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Black Sea (OJ L 356, 22.12.2012, p. 19).

([5]) Council Regulation (EU) No 39/2013 of 21 January 2013 fixing for 2013 the fishing opportunities available to EU vessels for certain fish stocks and groups of fish stocks which are not subject to international negotiations or agreements (OJ L 23, 25.1.2013, p. 1).

([6]) Council Regulation (EU) No 40/2013 of 21 January 2013 fixing for 2013 the fishing opportunities available in EU waters and, to EU vessels, in certain non- EU waters for certain fish stocks and groups of fish stocks which are subject to international negotiations or agreements (OJ L 23, 25.1.2013, p. 54).

([7]) Council Regulation (EU) No 1180/2013 of 19 November 2013 fixing for 2014 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea (OJ L 313, 22.11.2013, p. 4).

([8]) Council Regulation (EU) No 24/2014 of 10 January 2014 fixing for 2014 the fishing opportunities for certain fish stocks and groups of fish stocks in the Black Sea (OJ L 9, 14.1.2014, p. 4).

([9]) Council Regulation (EU) No 43/2014 of 20 January 2014 fixing for 2014 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, to Union vessels, in certain non-Union waters (OJ L 24, 28.1.2014, p. 1).

(6) Considering that Denmark has overfished its total allowable catches for sandeel in Union waters of management areas 2 and 4 in 2013, it is required to operate deductions. In 2014, minimal catches have been allowed for sandeel in these waters in order to monitor the development of the stock and the recovery of the local populations. However, with the said deductions it is impossible to maintain the monitoring system advised by the International Council for the Exploration of the Sea (ICES) to manage sandeel. Therefore, deductions for the quotas overfished by Denmark in 2013 in these areas should be operated from sandeel management area 3.

(7) Spain has overfished in 2012 its quota for the stock of Norway lobster in area IX and X; EU waters of CECAF 34.1.1 (NEP/93411). The deduction of 75,45 tonnes that resulted was applicable in 2013 and was spread at Spain's request over three years starting in 2013. The remaining annual deduction applicable to the Spanish NEP/93411 stock amounts to 25 tonnes in 2014 and 19 tonnes in 2015, without prejudice to any further quota adaptation.

(8) Commission Implementing Regulation (EU) No 770/2013 [1] and Commission Implementing Regulation (EU) No 1402/2013 [2] have provided for deductions from fishing quotas for certain countries and species for 2013. However, for certain Member States the deductions to be applied for some species were higher than the respective quotas available in 2013 and could therefore not be operated entirely in that year. To ensure that in such cases the full amount for the respective stocks will be deducted, the remaining quantities should be taken into account when establishing deductions for 2014 and, where appropriate, from subsequent quotas.

(9) Deductions from fishing quotas, as provided for by this Regulation, should apply without prejudice to deductions applicable to 2014 quotas pursuant to Commission Regulation (EU) No 165/2011 [3] and Commission Implementing Regulation (EU) No 185/2013 [4].

(10) Since quotas are expressed in tonnes or entire pieces, deductions have been rounded down to the tonne or piece, and quantities below 1 tonne or one piece have not been considered,

HAS ADOPTED THIS REGULATION:

Article 1

1. The fishing quotas fixed in Regulations (EU) No 1262/2012, (EU) No 1180/2013, (EU) No 24/2014, and (EU) No 43/2014 for the year 2014 shall be reduced as set out in the Annex to this Regulation.

2. Paragraph 1 shall apply without prejudice to deductions provided for in Regulation (EU) No 165/2011 and Implementing Regulation (EU) No 185/2013.

Article 2

This Regulation shall enter into force on the seventh day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 August 2014.

For the Commission

The President

José Manuel BARROSO

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[1] Commission Implementing Regulation (EU) No 770/2013 of 8 August 2013 operating deductions from fishing quotas available for certain stocks in 2013 on account of overfishing in the previous years (OJ L 215, 10.8.2013, p. 1).

[2] Commission Implementing Regulation (EU) No 1402/2013 of 19 December 2013 operating deductions from fishing quotas available for certain stocks in 2013 on account of overfishing of other stocks in the previous year and amending Implementing Regulation (EU) No 770/2013 as regards amounts to be deducted in future years (OJ L 349, 21.12.2013, p. 61).

[3] Commission Regulation (EU) No 165/2011 of 22 February 2011 providing for deductions from certain mackerel quotas allocated to Spain in 2011 and subsequent years on account of overfishing in 2010 (OJ L 48, 23.2.2011, p. 11).

[4] Commission Implementing Regulation (EU) No 185/2013 of 5 March 2013 providing for deductions from certain fishing quotas allocated to Spain in 2013 and subsequent years on account of overfishing of a certain mackerel quota in 2009 (OJ L 62, 6.3.2013, p. 62).

ANNEX

DEDUCTIONS FROM QUOTAS FOR STOCKS WHICH HAVE BEEN OVERFISHED

Mem-ber State	Species code	Area code	Species name	Area name	Initial quota 2013	Permitted landings 2013 (Total adapted quantity in tonnes)(1)	Total catches 2013 (quantity in tonnes)	Quota con-sumption related to permitted landings (%)	Over-fishing related to permitted landing (quantity in tonnes)	Multi-plying factor(2)	Addi-tional Multi-plying factor(3)(4)	Remaining deduction from 2013	Outstan-ding balance(5)	To be deducted in 2015 and following year(s) (quantity in tonnes)	Deduc-tions in 2014 (quantity in tonnes)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
BE	HAD	7X7A34	Haddock	VIIb-k, VIII, IX and X; Union waters of CECAF 34.1.1	157,000	167,600	174,700	104,24	7,100	/	/	/	/		7
BE	HER	4CXB7D	Herring	IVc, VIId except Blackwater stock	9 285,000	14,000	22,200	158,57	8,200	/	/	/	/		8
BE	PLE	7FG.	Plaice	VIIf and VIIg	46,000	160,000	185,700	116,06	25,700	/	/	/	/		25
BE	SRX	07D.	Skates and rays	Union waters of VIId	72,000	75,300	87,700	116,47	12,400	/	/	/	/		12
BE	SRX	2AC4-C	Skates and rays	Union waters of IIa and IV	211,000	218,800	229,800	105,03	11,000	/	/	/	/		11
DK	HER	*3BCDC	Herring	Union waters of Subdivi-sions 22-32	1 972,720	1 972,720	2 039,210	103,37	66,490	/	/	/	/		66
DK	MAC	2A34.	Mackerel	IIIa and IV; Union waters of IIa, IIIb, IIIc and Subdivi-sions 22-32	15 072,000	16 780,390	17 043,000	101,56	262,610	/	/	/	/		262
DK	NOP	04-N	Norway pout and associated by-catches	Norwegian waters of IV	0	0	4,980	N/A	4,980	/	/	/	/		4
DK	POK	1N2AB.	Saithe	Norwegian waters of I and II	/	20,000	21,680	108,40	1,680	/	/	/	/		1

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
DK	SAN	234_2	Sandeel	Union waters of sandeel management area 2	16 549,000	16 837,980	21 144,000	125,57	4 306,020	1,4	/	/	/		6 028 (6)
DK	SAN	234_4	Sandeel	Union waters of sandeel management area 4	3 773,000	3 999,300	5 064,000	126,62	1 064,700	1,4	/	/	/		1 490 (6)
EL	BFT	AE45WM	Bluefin tuna	Atlantic Ocean, east of 45° W, and Mediterranean	129,07	177,520	177,557	100,02	0,037	/	C	1,435	/		1,49
ES	ALF	3X14-	Alfonsinos	EU and international waters of III, IV, V, VI, VII, VIII, IX, X, XII and XIV	70,000	59,470	61,770	103,87	2,300	/	A	/	/		3
ES	BLI	5B67-	Blue Ling	Union and international waters of Vb, VI, VII	79,000	79,000	138,649	175,49	59,640	/	/	4,22	0,07		63
ES	BSF	56712-	Black scabbard-fish	EU and international waters of V, VI, VII and XII	174,000	102,030	109,190	107,02	7,16	/	A	/	/		10
ES	BSF	8910-	Black scabbard-fish	EU and international waters of VIII, IX and X	12,000	2,770	3,340	120,58	0,570	/	A	32,85	/		33
ES	BUM	ATLANT	Blue marlin	Atlantic Ocean	27,20	16,920	44,040	260,28	27,120	/	/	/	/		27
ES	COD	N3M.	Cod	NAFO 3M	2 019,000	2 318,240	2 360,100	101,81	41,86	/	/	/	/		41
ES	DGS	15X14	Spurdog/ dogfish	Union and international waters of I, V, VI, VII, VIII, XII and XIV	0	0	1,670	N/A	1,670	/	A	/	/		2
ES	DWS	56789-	Deep-sea sharks	EU and international waters of V, VI, VII, VIII and IX	0	0	5,330	N/A	5,330	/	A	/	/		8
ES	GFB	89-	Greater fork-beard	EU and international waters of VIII and IX	242,000	185,560	214,640	115,67	29,080	/	A	/	/		43
ES	GHL	1/2INT	Greenland halibut	International waters of I and II	/	0	4,700	N/A	4,700	/	/	/	/		4

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
ES	GHL	1N2AB.	Greenland halibut	Norwegian waters of I and II	/	0	12,370	N/A	12,370	/	/	/	/		12
ES	GHL	N3LMNO	Greenland halibut	NAFO 3LMNO	4 262,000	4 228,560	4 287,200	101,39	58,640	/	C	/	/		87
ES	HAD	5BC6A.	Haddock	Union and international waters of Vb and VIa	/	5,850	13,550	231,62	7,700	/	A	10,72	/		22
ES	HAD	7X7A34	Haddock	VIIb-k, VIII, IX and X; Union waters of CECAF 34.1.1	/	0	8,540	N/A	8,540	/	/	/	/		8
ES	NEP	9/3411	Norway lobster	IX and X; Union waters of CECAF 34.1.1	62,00	36,850	31,340	85,05	– 5,51	/	N/A	*44,79* (7)		19	25
ES	OTH	1N2AB.	Other species	Norwegian waters of I and II	/	0	15,530	N/A	15,530	/	/	/	/		15
ES	POL	08C.	Pollack	VIIIc	208,000	208,000	239,310	115,05	31,310	/	/	/	/		31
ES	POR	3-1234	Porbeagle	French Guiana waters, Kattegat; Union waters of Skagerrak, I, II, III, IV, V, VI, VII, VIII, IX, X, XII and XIV; Union waters of CECAF 34.1.1, 34.1.2 and 34.2	0	0	3,160	N/A	3,160	/	/	/	/		3
ES	RED	51214D	Redfish	Union and international waters of V; international waters of XII and XIV	433,000	2 209,000	2 230,300	100,96	21,300	/	/	/	/		21
ES	SOL	8AB.	Common sole	VIIIa and VIIIb	9,000	8,720	8,810	101,03	0,090	/	A+C	3	/		3
ES	USK	567EI.	Tusk	Union and international waters of V, VI and VII	46,00	40,320	85,000	210,81	44,680	/	A	22,87	/		89
ES	WHM	ATLANT	White marlin	Atlantic Ocean	30,500	30,500	36,330	119,11	5,830	/	/	/	/		5
FR	GHL	1N2AB.	Greenland halibut	Norwegian waters of I and II	/	0	17,500	N/A	17,500	/	/	/	/	/	17

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
FR	PLE	7FG.	Plaice	VIIf and VIIg	83,000	92,250	94,300	102,22	2,050	/	/	/	/		2
FR	RED	51214D	Redfish	Union and international waters of V; international waters of XII and XIV	230,000	23,000	41,500	180,43	18,500	/	/	/	/		18
IE	HAD	1N2AB.	Haddock	Norwegian waters of I and II	/	20,500	25,630	125,02	5,130	/	/	/	/		5
IE	HAD	7X7A34	Haddock	VIIb-k, VIII, IX and X; Union waters of CECAF 34.1.1	3 144,000	2 696,760	2 698,749	100,07	1,989	/	/	/	/		1
IE	PLE	7FG.	Plaice	VIIf and VIIg	197,000	66,790	79,817	119,60	13,027	/	/	/	/		13
IE	PLE	7HJK.	Plaice	VIIh, VIIj and VIIk	61,000	49,700	51,823	104,27	2,123	/	/	/	/		2
LT	GHL	N3LMNO	Greenland halibut	NAFO 3LMNO	22,000	15,700	0	N/A	– 15,700	/	N/A	120,279	/		104
NL	HKE	3A/BCD	Hake	IIIa; Union waters of Subdivisions 22-32	/	0	0,671	N/A	0,671	/	C	/	/		1
NL	SRX	07D.	Skates and rays	Union waters of VIId	4,000	3,000	1,932	64,40	– 1,068	/	/	0,015	/		0
NL	SRX	2AC4-C	Skates and rays	Union waters of IIa and IV	180,000	275,430	357,115	129,66	81,685	/	/	/	/		81
PL	SAL	3BCD-F	Atlantic salmon	Union waters of Subdivisions 22-31	6 837,000	5 061,000	5 277,000	104,27	216,000	/	/	/	/		216 (in pieces)
PL	SPR	3BCD-C	Sprat and associated catches	EU waters of Subdivisions 22-32	73 392,000	76 680,000	80 987,740	105,62	4 307,740	1,1	/	477,314	/		5 215
PT	ALF	3X14-	Alfonsinos	EU and international waters of III, IV, V, VI, VII, VIII, IX, X, XII and XIV	203,000	153,810	160,350	104,25	6,540	/	A	/	/		9
PT	ANF	8C3411	Anglerfish	VIIIc, IX and X; Union waters of CECAF 34.1.1	410,000	603,440	625,929	103,73	22,489	/	/	/	/		22

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
PT	GHL	N3LMNO	Greenland Halibut	NAFO 3LMNO	1 782,000	2 119,790	2 120,980	100,06	1,190	/	C	/	/		1
PT	GHL	1N2AB	Greenland halibut	Norwegian waters of I and II	/	0	2,000	N/A	2,000	/	/	/	/	/	2
PT	HAD	1N2AB	Haddock	Norwegian waters of I and II	/	34,400	34,000	98,84	– 0,400	/	/	/	376,126		375
PT	MAC	8C3411	Mackerel	VIIIc, IX and X; Union waters of CECAF 34.1.1	5 308,000	4 134,300	4 170,525	100,88	36,225	/	/	1,07	/		37
PT	PLE	8/3411	Plaice	VIII, IX and X; Union waters of CECAF 34.1.1	66,000	61,200	44,601	72,88	– 16,599	/	/	1,906	/		0
PT	POK	1N2AB.	Saithe	Norwegian waters of I and II	/	16,700	17,000	101,80	0,300	/	/	/	209,76		210
PT	RED	N3LN	Redfish	NAFO 3LN	/	1 070,980	1 101,260	102,83	30,280	/	/	/	/		30
PT	WHM	ATLANT	White marlin	Atlantic ocean	19,500	18,300	12,212	66,73	– 6,088	/	/	3,021	/		0
UK	COD	N1GL14	Cod	Greenland waters of NAFO 1 and Greenland waters of XIV	309,000	876,300	920,000	104,99	43,700	/	A	/	/		65
UK	DGS	15X14	Spurdog/ dogfish	Union and international waters of I, V, VI, VII, VIII, XII and XIV	0	0	5,800	N/A	5,800	/	/	/	/		5
UK	GHL	514GRN	Greenland halibut	Greenland waters of V and XIV	195,000	0	0,800	N/A	0,800	/	/	1	/		1
UK	HAD	7X7A34	Haddock	VIIb-k, VIII, IX and X; Union waters of CECAF 34.1.1	1 415,000	1 389,200	1 457,800	104,94	68,600	/	/	/	/		68
UK	HER	1/2-	Herring	Union, Norwegian and international waters of I and II (HER/1/2-)	8 827,000	8 208,600	8 342,100	101,63	133,500	/	/	/	/		133

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
UK	HER	4AB.	Herring	Union and Norwegian waters of IV north of 53° 30′ N	65 901,000	58 841,000	58 951,300	100,19	110,300	/	/	/	/		110
UK	MAC	2CX14-	Mackerel	VI, VII, VIIIa, VIIIb, VIIId and VIIIe; Union and international waters of Vb; international waters of IIa, XII and XIV	158 825,000	156 199,200	162 468,500	104,10	6 269,300	/	/	/	/		6 269
UK	PLE	7FG.	Plaice	VIIf and VIIg	43,000	35,900	40,200	111,98	4,300	/	/	/	/		4
UK	PLE	7HJK.	Plaice	VIIh, VIIj and VIIk	18,000	33,700	39,900	118,40	6,200	/	/	/	/		6
UK	SOL	7FG.	Common sole	VIIf and VIIg	309,000	195,410	205,400	105,11	9,990	/	/	/	/		9

([1]) Quotas available to a Member State pursuant to the relevant fishing opportunities Regulations after taking into account exchanges of fishing opportunities in accordance with Article 20(5) of Regulation (EC) No 2371/2002 and Article 16(8) of Regulation (EU) No 1380/2013, quota transfers in accordance with Article 4(2) of Council Regulation (EC) No 847/96 and/or reallocation and deduction of fishing opportunities in accordance with Articles 37 and 105 of Council Regulation (EC) No 1224/2009, Commission Regulation (EU) No 165/2011 and Commission Regulation (EU) No 185/2013 where relevant

([2]) As set out in Article 105(2) of Council Regulation (EC) No 1224/2009. Deduction equal to the overfishing * 1,00 shall apply in all cases of overfishing equal to, or less than, 100 tonnes.

([3]) As set out in Article 105(3) of Council Regulation (EC) No 1224/2009.

([4]) Letter 'a' indicates that an additional multiplying factor of 1.5 has been applied due to consecutive overfishing in the years 2011, 2012 and 2013. Letter 'c' indicates that an additional multiplying factor of 1.5 has been applied as the stock is subject to a multiannual plan.

([5]) Remaining quantities related to overfishing in years preceding the entry into force of the Control Regulation (EC) No 1224/2009 and that cannot be deducted from another stock.

([6]) To be deducted from SAN/234_3.

([7]) At Spain's request, the pay-back due in 2013 was spread over three years.

COMMISSION IMPLEMENTING REGULATION (EU) No 872/2014

of 11 August 2014

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ([1]),

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ([2]), and in particular Article 136(1) thereof,

Whereas:

(1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.

(2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 August 2014.

For the Commission,
On behalf of the President,
Jerzy PLEWA
Director-General for Agriculture and Rural Development

([1]) OJ L 299, 16.11.2007, p. 1.
([2]) OJ L 157, 15.6.2011, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0707 00 05	TR	81,4
	ZZ	81,4
0709 93 10	TR	91,9
	ZZ	91,9
0805 50 10	AR	157,4
	CL	76,2
	TR	74,0
	UY	160,5
	ZA	140,4
	ZZ	121,7
0806 10 10	BR	182,4
	CL	187,7
	EG	210,1
	MA	172,1
	MX	247,3
	TR	154,3
	ZZ	192,3
0808 10 80	AR	173,0
	BR	96,2
	CL	104,9
	CN	121,1
	NZ	121,8
	US	142,8
	ZA	115,8
	ZZ	125,1
0808 30 90	AR	213,8
	CL	80,2
	TR	149,2
	ZA	89,9
	ZZ	133,3
0809 30	MK	64,7
	TR	138,8
	ZZ	101,8
0809 40 05	BA	47,9
	MK	66,1
	TR	127,6
	ZA	206,8
	ZZ	112,1

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

DECISIONS

COMMISSION DECISION

of 20 March 2013

on the measures SA.23425 (11/C) (ex NN 41/10) implemented by Italy in 2004 and 2009 for SACE BT S.p.A.

(notified under document C(2013) 1501)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2014/525/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]),

Whereas:

I. PROCEDURE

(1) By a complaint lodged on 5 June 2007, registered on 7 June 2007, the Commission was informed that, in May 2004, SACE S.p.A. ('SACE') had implemented an initial capital allocation of EUR 100 million in favour of its newly established subsidiary SACE BT S.p.A. ('SACE BT') ('the first measure').

(2) By letter dated 6 November 2009, the complainant submitted additional arguments to support its complaint and informed the Commission about an additional measure in the form of reinsurance cover provided by SACE to SACE BT in 2009 ('the second measure').

(3) During its preliminary investigation, the Commission discovered that SACE BT had benefited from two capital injections granted by SACE on 18 June and 4 August 2009 (respective 'the third measure' and 'the fourth measure').

(4) By letter dated 23 February 2011, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the four measures ('the opening decision').

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the measures.

(6) The Commission received comments only from SACE which were submitted on 5 May 2011. SACE annexed thereto various supporting documents, including a resubmission of the business plan for 2005-2008 for the operation of the short-term insurance prepared by SACE with the help of an external advisor, KPMG, and approved by the Board on 18 May 2004 ('the initial business plan'), a letter from an external advisor of 7 July 2004, specifying the additional services provided ('the advisor letter'), supplementary analyses to the business

([1]) OJ C 177, 17.6.2011, p. 6.
([2]) Cf. footnote 1.

plan regarding the Italian market of the commercial information, the Italian market of the recovery of credits and its principal actors and the credit insurance market in the Central and Eastern Europe of March 2004 ('the supplements to the business plan'), the adjustment of the Business Plan 2005-2009 approved on 19 November 2004 ('the adjusted business plan'), extracts of the minutes of the Board of 28 April 2004, 18 May 2004, a business plan regarding potential acquisition of Assicuratrice Edile S.p.A. of May 2005 ('Assedile acquisition business plan'), revised budget for SACE BT of 31 March 2009, SACE BT business plan for 2010-2011 of 4 August 2009 ('the 2010-2011 business plan').

(7) On 5 May 2011, Italy submitted its reply to the opening decision.

(8) On 23 June 2011, the Commission requested additional information. On 13 July 2011, a meeting was held with the Italian authorities and the company's representatives. Following this meeting, the request for information sent on 23 June 2011 was complemented by additional questions resulting from the discussions. The supplemented request for information was sent on 4 August 2011. By letter dated 15 September 2011, Italy submitted the reply to the request for information. It annexed thereto various supporting documents, including an invitation letter of 17 December 2003 to tender for consultancy services to draw a business plan for the preparation of the business plan for operation of the short-term export-credit insurance in the industrialised markets ('the invitation letter'), additional documents prepared by an external consultant regarding potential acquisition of Assicuratrice Edile S.p.A. and the notes presented to the Board of SACE BT in May 2005 — September 2008 regarding various opportunities for international acquisitions and other forms of international expansion.

(9) By letter dated 25 January 2012 ([3]), the Commission requested further information. Italy submitted the reply on 5 March 2012. It also annexed to its submission minutes of the meetings of the Board of SACE and its predecessor, the Institute for external trade insurance services — SACE, of 21 November 2003, 3 December 2003, 10 November 2004, 1 April 2008, 1 October 2008, 28 November 2008, 11 February 2009, 1 April 2009, 26 May 2009, 1 July 2009 and 9 September 2009, the additional documents regarding the acquisition of Assedile and a comparison between the financial indicators projected in the initial business plan and the actual figures.

(10) Since Italy had focused its earlier submissions on trying to demonstrate the absence of aid in the measures and had provided only limited information on potential compatibility grounds in case the measures would constitute aid, by letter of 21 February 2012 ([4]), the Commission services requested Italy to submit additional elements that could demonstrate the potential compatibility of the aid.

(11) Italy submitted on 30 March 2012 a compilation of internal documents of SACE aiming to demonstrate the compliance of the measures granted in 2009 (the second, third and the fourth measures) with the market economy investor principle. They mainly contain:

(a) the minutes of the Board of 10 December 2008 and Annexes thereto regarding organisational changes, with the view to strengthen risk control;

(b) a summary of management changes for the period 2009-2012;

(c) the minutes of the Board of 24 November 2011 with Annexes thereto regarding the update of the business plan for 2011-2013 and

(d) the financial report for year-end 2011.

II. **DESCRIPTION OF THE MEASURES**

II. 1. SACE AND ITS INVOLVEMENT IN THE MARKETABLE RISKS ([5])

(12) SACE, the parent company of SACE BT, is a joint stock company wholly owned by the Italian State. SACE is the Italian export-credit agency (ECA). Since the beginning of 2004, it was converted from a public body into a joint stock company wholly owned by the Italian State. SACE insures short-term and long-term non-marketable risks within the meaning of the Commission Communication on short-term export credit insurance ([6]) ('the Export-credit Communication') with the guarantee of the State.

([3]) An advanced copy in English was sent on 4 January 2012.
([4]) An advanced copy in English was sent on 2 February 2012.
([5]) Marketable risks are defined following two criteria: (i) geography (location of the debtor in the EU and/or OECD area), and (ii) duration (risk period of less than two years).
([6]) OJ C 281, 17.9.1997, p. 4. Starting with 1 January 2013, the Commission applies the new Communication on short-term export-credit insurance published on 19 December 2012 (OJ C 392, 19.12.2012, p. 1).

(13) According to Article 2.3 of the Legislative Decree n. 143 of 31 March 1998 ([7]) which restated the guarantee applicable to SACE as per Law n. 227 of 24 May 1977, the operations and insurable risks, including, amongst others, the geographical coverage, are to be defined by the Inter-ministerial Committee for the Economic Programming (Comitato Interministeriale per la Programmazione Economica, 'CIPE'). Every year not later than on 30 June, CIPE has to deliberate the financial projections as well as financial needs related to certain risks and to define global limits for the risks to be assumed under the State guarantee distinctly for the guarantees of the duration inferior and superior than 24 months.

(14) In 1997 the Commission adopted the Export-credit Communication which provides that no State aid is to be granted to support export-credit insurers in respect of marketable risks and that public export-credit insurers will, at the very least, have to keep a separate administration and separate accounts for their insurance of marketable risks and non-marketable risks for the account or with the guarantee of the State, demonstrating that they do not enjoy State aid in their insurance of marketable risks. In order to comply with the Export-credit Communication, SACE's Board of Directors ('Consiglio di Amministrazione') in its meeting of 7 July 1998 decided to stop the activity of marketable risks (defined as such at the time, i.e. short-term export-credit insurance in respect of the 15 Member States of the Union, 'EU-15') regarding direct insurance contracts as from 18 September 1998.

(15) In 2001, the amendments of the Export-credit Communication ([8]) included, inter alia, the replacement of the list of names of all the Member States which appeared in the Annex to the 1997 version of the Communication with a generic reference to the Member States of the European Union so that the future enlargement of the European Union will not necessitate further amendments of the Communication.

(16) Consequently, at the time of accession of the 10 Member States on 1 May 2004 ('EU-10'), the non-marketable short-term risks for these countries became marketable risks. As a result, the provisions set out in the Export-credit Communication in respect of marketable risks apply to those risks thereafter.

(17) Article 6 of the Legislative Decree n. 269 of 30 September 2003 (converted with modifications into Law n. 326 of 24 November 2003) — which laid down the rules for the transformation as from 1 January 2004 of 'the Institute for external trade insurance services — SACE' into a limited liability publicly held company (SACE S.p.A.) — has set out the scope of operations of the company, which takes into account the evolution of the market at issue. In particular, Article 6.12 provides: 'SACE S.p.a. can carry out the activity of insuring and guaranteeing marketable risks as defined by the EU rules. Such activity has to have separate accounting in respect of the activity benefiting from the State guarantee or a limited liability company has to be established to that end. In the latter case the participation of SACE S.p.a. in such company cannot be lower than 30 % [and certain previously allocated funds] cannot be used for the subscription of its capital. [The activity of insuring marketable risks] does not benefit from the State guarantee.'

(18) Upon the changes in the legislative framework mentioned in recitals 14-16, SACE decided to establish SACE BT.

(19) In order to comply with Union rules, SACE decided to establish and use separate accounting for marketable risks ([9]) for the period between the date when the respective risks became automatically marketable (1 May 2004) and when SACE BT was established (27 May 2004) (see Table 1 under recital 19 of the opening decision). No capital was allocated to these activities in the separate accounts. The accounts were separated as per Italian legal provisions. The statutory auditors also refer thereto in SACE's Annual Report 2004 and provide that the separate accounting of marketable risks closed at the end of 2004 ([10]).

II. 2. THE BENEFICIARY, SACE BT

(20) On 27 May 2004 ([11]), SACE BT was established with a share capital of EUR 100 million, paid up in full by SACE, following the approval of the initial business plan by SACE's Board of Directors ('Consiglio di Amministrazione') on 18 May 2004. In addition, the capital contribution into reserves (so-called 'Fondo di organizzazione') of SACE

([7]) It enabled the establishment of the Institute for external trade insurance services — SACE.
([8]) OJ C 217, 2.8.2001, p. 2.
([9]) The usage of separate accounting until SACE's marketable risks insurance had been established was already envisaged by SACE on 3 December 2003, during the discussions in the context of the preparation of the initial business plan. See p. 13 of Annex No 11 to the submission of Italy of 5 March 2012.
([10]) See p. 68 of the 2004 Annual Report available online at: http://www.sace.it/GruppoSACE/export/sites/default/download/ar_bilanci/AR_e_bilanci/annual_report2004.pdf
([11]) SACE, Annual Report, 2004.

BT in the amount of EUR 5,8 million was provided by SACE ([12]), which was subsequently used to absorb losses, e.g. in 2004 and 2005 ([13]). On 3 July 2004, SACE BT received the authorisation from the regulatory authority, *Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo — ISVAP*, as an insurance provider and started to operate on 15 October 2004.

(21) Presently, SACE BT operates in the credit (54 % of premiums in 2011), surety (30 %) and other damage to property insurance sectors (13 %).

(22) Within the credit insurance segment, SACE BT is active in the short term export-credit insurance business of 'marketable risks' within the meaning of the Export-credit Communication. It also provides credit insurance for transactions within Italy (insurance of domestic trade transactions). For a small part of its portfolio, SACE BT has remained active in the short-term non-marketable risks (see Table 1). As submitted by Italy, this activity, as the others, is carried out on market terms and without the guarantee of the State.

Table 1

SACE BT's geographical split of credit insurance risks

(%)

	2005 (*)	2006 (*)	2007 (*)	2008	2009	2010	2011
Domestic, within Italy	42,5	47,5	55,4	67,3	73	76,7	77,4
Foreign — marketable	39,8	46,6	37,4	25,1	21	18,1	17,3
Foreign — non-marketable	17,7	5,9	7,2	7,6	6	5,2	5,3

(*) For 2005, 2006 and 2007 it was considered that the risks in the OECD countries are entirely marketable, while those in the non-OECD countries — non-marketable.

Source: Submissions of Italy, SACE and SACE BT Financial statements.

(23) SACE BT's surety business has developed from an acquisition of Assicuratrice Edile S.p.A. ('Assedile'). In 2005, SACE BT acquired an initial stake of 70 % thereof. The acquisition process was initiated in March 2005. Assedile was specialised in surety business and offered guarantees for the construction risk and changed its name to SACE Surety in January 2009. Following the acquisition of the remaining outstanding minority stakes in SACE Surety, SACE BT became its sole owner and merged it through incorporation into SACE BT ([14]).

(24) SACE BT is the sole shareholder of SACE Servizi S.r.l., a company set up to provide services in connection with the acquisition and management of commercial information. In 2011, SACE Servizi has also started the activity of recovery of credits for the account of SACE BT.

(25) The departments responsible for SACE BT's internal auditing, risk management and compliance are externalised to the parent company, SACE ([15]).

(26) In the second year after its creation SACE BT recorded a small profit, with Return On Equity (ROE) of 0,11 %. However, starting from 2007 (third year of its operation) it recorded losses (see Table 2).

([12]) See Annexes 5 and 6 to the Notes ('Nota Integrativa') to SACE's Financial Accounts of 2004 illustrating the financial relations between SACE and its controlled entities. These financial accounts illustrate the incremental increase of SACE BT's capital through the funds provided by SACE in the year 2004 (EUR 100 million increase in social capital and EUR 5,8 million as other increases).

([13]) SACE BT's losses amounting EUR 152 087 (at the end of 2004) and EUR 1 573 090 (at the end of 2005) were covered from the Organisational Fund (Fondo di organizzazione).

([14]) On 14 January 2009, SACE announced the incorporation of SACE Surety into SACE BT. The merger was authorised by ISVAP in December 2008. See SACE Annual Report, 2008.

([15]) See Annex No 14 — ISVAP: Minutes of the inspection findings at SACE BT, 11 October 2010 (Verbale degli accertamenti ispettivi effettuati presso SACE BT, 11.10.2010), p. 11, submission of Italy of 5 March 2012.

Table 2

SACE BT's ROE

(%)

Year	ROE
2005	– 1,51
2006	0,11
2007	– 1,02
2008	– 38,0
2009	– 30,6
2010	– 4,4
2011	0,23

Source: SACE BT's Financial Reports.

(27) Notably, SACE BT registered significant losses both in 2008 (of around EUR 29,5 million) and in 2009 (of around EUR 34 million). In 2009, the insurance claims paid by SACE BT amounted to EUR 66,4 million, up 42,6 % compared to 2008 ([16]). While the major credit insurance and surety companies reduced their volumes insured in 2009, SACE BT insured transactions for a total of EUR 20,4 billion, an increase of 34,2 % compared to the EUR 15,2 billion insured in 2008.

(28) The situation of the company improved in 2010 when the combined ratio ([17]) decreased to 108 %, from 163 % in 2009 (see Table 5) and in 2011 when the company registered a small profit (of EUR 0,247 million).

II. 3. THE COMPLAINT

(29) The complainant argued that the initial capital allocation to SACE BT from the parent company, SACE, carried out in 2004 and amounting to EUR 100 million (the first measure) is imputable to the State, is not compliant with the market economy investor principle ('MEIP') and constitutes incompatible State aid (see recitals 29 and 30 of the opening decision). On 6 November 2009, the complainant also informed the Commission about the reinsurance granted by SACE to SACE BT that was allegedly imputable to the State and did not meet the MEIP test, thus constituting a new aid measure incompatible with Article 107 of the Treaty (the second measure).

(30) On the opening decision, the complainant did not provide any comments.

II. 4. DESCRIPTION OF THE MEASURES COVERED BY THE PRESENT DECISION

(31) The formal investigation, initiated by the Commission on 23 February 2011, concerns the following four measures granted by SACE to SACE BT (for further details see recitals 33-41 of the opening decision):

(a) **First measure**: the initial capital allocation of EUR 100 million in the form of share capital and the capital contribution into reserves (so-called 'Fondo di organizzazione') of EUR 5,8 million in 2004 ([18]);

([16]) Information available on the website of SACE.

([17]) An insurer's underwriting performance is measured in its combined ratio which is the ratio of losses and expenses to insurance premiums. A combined ratio of less than 100 per cent indicates underwriting profitability, while anything over 100 indicates an underwriting loss. A company with a combined ratio over 100 % may nevertheless remain profitable due to investment earnings. In non-life insurance segment and notably in the case of credit insurance, a combined ratio is expected to be lower than 100 per cent.

([18]) The capital investment into SACE BT of EUR 105,8 million was recorded in the annual accounts of SACE for 2004 (as investments in the controlled entities).

(b) **Second measure**: reinsurance coverage, of the type Excess of loss reinsurance ([19]) for the marketable credit risk of 2009, provided on 5 June 2009. The second measure was granted by SACE, when SACE BT did not succeed to place 100 % of it with the private market participants. In particular, it seems that prior to 2009 SACE BT obtained its reinsurance prevalently from the private operators. However, when renewing its reinsurance contracts for the year 2009 in the context of the financial crisis, SACE BT faced difficulties. Albeit SACE BT contacted a significant number of market operators, it succeeded in raising cover solely from five private reinsurers for 25,85 % of the Excess of loss reinsurance for the marketable credit risk of 2009. The contracts were signed on 30 January 2009. 16 other operators contacted by SACE BT were offered the same terms as those having provided the cover, but they decided not to participate in the reinsurance coverage. The reinsurers had to cover the part of the loss that exceeded EUR 5 million up to EUR 40 million. The five private reinsurers that participated in the excess of loss reinsurance in 2009 were: Hannover Rückversicherung AG (10 %), Sirius International Insurance Corporation (7,5 %), DEVK Rückversicherungs und Beteiligungs AG (3 %), Atradius Reinsurance Ltd (2,5 %), and Assurisk S.A. (2,85 %). The parent company, SACE, subscribed the remaining part of the coverage, i.e. 74,15 % on 5 June 2009, on the same terms of priority, capacity and premium as the five private reinsurers.

(c) **Third measure**: a recapitalisation of EUR 29 million carried out on 18 June 2009 so as to cover losses registered in 2008;

(d) **Fourth measure**: a recapitalisation of EUR 41 million carried out on 4 August 2009 ([20]).

(32) A chronology of the four measures and the main decisions and milestones for SACE and SACE BT (as per the information and the supporting documents submitted to the Commission) are presented in Table 3. This Table also illustrates the time when certain documents were produced or discussed, documents which are referred later in the present decision.

Table 3

Chronological order of the four measures and main decisions and milestones for SACE and SACE BT

21.11.2003	— Study of an external consultant, McKinsey, regarding the scenarios for the potential market of SACE;
17.12.2003	— Invitation letter to tender for consultancy services to draw a business plan for the short-term credit insurance activity of SACE;
1.1.2004	— Transformation of 'the Institute for external trade insurance services — SACE' into a limited liability publicly held company (SACE S.p.A.);
March 2004	— KPMG carried out supplementary analyses to the business plan regarding the Italian market of the commercial information, the Italian market of the recovery of credits and its principal actors and the credit insurance market in the Central and Eastern Europe;
28.4.2004	— Calculation of the 'free capital' of SACE;

([19]) The reinsurance structure for the marketable risks of SACE BT, as approved by its Board of Directors on 22 April 2008 includes a quota share reinsurance and an excess of loss reinsurance (See Annex No 14 — ISVAP: Minutes of the inspection findings at SACE BT, 11 October 2010 (Verbale degli accertamenti ispettivi effettuati presso SACE BT, 11.10.2010), p. 55, submission of Italy, 5 March 2012). The quota share reinsurance is a form of reinsurance in which the ceding insurer cedes an agreed-on percentage of every risk it insures that falls within a class or classes of business subject to a reinsurance treaty. An excess of loss reinsurance contract is one in which the reinsurance responds only when a particular loss (or group of losses) exceeds an agreed-upon level, called the retention, and typically responds only up to an agreed limit.

([20]) This capital increase was subsequently partially (EUR 31,5 million) used to cover the losses registered by SACE BT in 2009. See Annex No 14 — ISVAP: Minutes of the inspection findings at SACE BT, 11 October 2010 (Verbale degli accertamenti ispettivi effettuati presso SACE BT, 11.10.2010), p. 5, submission of Italy of 5 March 2012. When approving the financial statements for the year ending 31 December 2009, the General Assembly of Shareholders of SACE BT decided on 20 April 2010 to cover the losses registered at the end of 2009, i.e. EUR 34 081 254, by using 'Fondo di Organizzazione' for an amount of EUR 2 534 805 and the capital transfer (*'versamento in conto capitale'*) for an amount of EUR 31 546 449.

1.5.2004	— Accession of the 10 new Member States to the Union; — The non-marketable short-term risks for EU-10 became marketable risks;
18.5.2004	— KPMG presents the business plan that includes the main elements supporting profitability expectations for the period 2005-2008 to SACE's Board of Directors ('Consiglio di Amministrazione'). — SACE's Board of Directors ('Consiglio di Amministrazione') approves the business plan for 2005-2008 regarding the establishment of SACE BT;
27.5.2004	— SACE BT was established; — The capital of EUR 105,8 million was granted thereto; **(first measure)**
3.7.2004	— SACE BT received the authorisation from the regulatory authority, *ISVAP*, as an insurance provider;
15.10.2004	— SACE BT started to operate;
19.11.2004	— SACE BT's Board of Directors approves the adjustment to the business plan for 2005-2009;
March 2005	— The process of acquisition of Assedile was initiated ([1]);
15.4.2005	— Presentation on the valuation of Assedile by the external consultant, KPMG (preceded by the examination of the data room); — Discussion by the Board of SACE BT regarding the potential acquisition of Assedile;
18.4.2005	— The first non-binding offer of SACE BT for 70 % of Assedile;
30.5.2005	— Presentation of the addendum to the valuation of Assedile by the external consultant, KPMG;
30.9.2005	— SACE BT signs the final contract for the acquisition of 70 % of Assedile;
19.9.2006	— Business plan — joint bid of SACE BT and Ducroire for the acquisition of 66 % of KUP;
December 2006	— Report of the external consultant to SACE BT and Ducroire on the valuation of 66 % of KUP;
October 2007	— SACE BT and Ducroire jointly acquire 66 % of KUP;
6.3.2008	— SACE BT acquires the remaining 30 % in Assedile;
30.1.2009	— SACE BT succeeds in raising from five private reinsurers 25,85 % of the Excess of loss reinsurance for the marketable credit risk;
25.2.2009	— SACE BT sells at a loss to SA Ducroire its 33 % shareholding in KUP;
26.5.2009	— SACE's Board of Directors approves the transfer of EUR 29 million to SACE BT;
5.6.2009	— SACE subscribes the remaining 74,15 % of the Excess of loss reinsurance for the marketable credit risk; **(second measure)**

18.6.2009	— The Ordinary Assembly of shareholders of SACE BT approves to cover the losses registered at the end of 2008 by means of the transfer of EUR 29 million from SACE **(third measure)** and of EUR 0,49 million from reserves 'Fondo di organizzazione';
1.7.2009	— SACE's Board of Directors ('Consiglio di Amministrazione') approves the capital transfer ('*versamento in conto capitale*') of EUR 41 million to SACE BT;
4.8.2009	— The Ordinary Assembly of shareholders of SACE BT approves the capital transfer ('*versamento in conto capitale*') of EUR 41 million from SACE; **(fourth measure)** — SACE BT's Board of Directors ('Consiglio di Amministrazione') approves the business plan for 2010-2011;
7.12.2010	— SACE BT's Board of Directors approves a business plan for 2011-2013;
24.11.2011	— The meeting of SACE BT's Board of Directors: Adjustment of the business plan for 2011-2013;
23.2.2012	— The meeting of SACE BT's Board of Directors: Revision of the organisational model of SACE BT.

([1]) See SACE — Reply to the request for information, 15 September 2011, p. 11.

II. 5. GROUNDS FOR INITIATING THE PROCEDURE

(33) As regards the **first measure**, the Commission first clarified that the qualification of aid could be excluded from the initial capital endowment if it was provided to non-marketable risks and/or if it was simply the transfer to SACE BT of capital that had already been allocated to short-term insurance activity that existed before within SACE (including to previously non-marketable risks turned into marketable risks on 1 May 2004). The Commission indicated that at that stage it had not sufficient information to assess whether these conditions were met or not.

(34) Secondly, the Commission raised doubts that Italy acted as a private investor would have acted in similar circumstances. This is the so called MEIP test, which, if fulfilled, excludes the existence of an advantage for the beneficiary of the measure.

(a) As regards the **first measure**, based on the information submitted, the Commission raised doubts that the assessment of expected profitability of SACE BT done at the time of its establishment in 2004 would have been sufficient to convince a market economy investor to make the capital contribution. The Commission underlines that the sole business plan submitted at the time merely provided projections for the years 2005-2008, with Return On Average Equity (ROAE) reaching only 5 % in 2008 (including a deduction of EUR 1,1 million for equalisation reserve) ([21]). No further assessment of a potential further increase in returns to cover for the initial losses appeared as having been made. The Commission at the time was not made aware of any analysis of the potential profitability of possible acquisitions in the sector. Italy was invited to present additional elements that would demonstrate that the investment was done on market terms.

(b) As regards the **second measure**, based on the information provided by the Italian authorities illustrating the difficulties to find the reinsurance cover on the market, the Commission raised doubts whether the second measure has not conferred an advantage to SACE BT.

(c) As regards **the third and the fourth measures**, the Commission considered that in view of the registered losses by SACE BT, it could not have raised that capital on the market.

([21]) For purposes of calculating ROAE, a figurative fiscal effect ('effetto fiscale figurativo') has been taken into account, when determining net profit (see p. 163 of the initial business plan).

(35) Thirdly, the Commission indicated that the measures granted by SACE (a public undertaking) seemed to be imputable to the State (State resources criterion), but did not take a final position on that issue.

(36) Finally, the Commission raised doubts that, if the measures were to be found aid, they could not be found compatible with the internal market. There seems to be no legal basis to find such aids compatible.

III. **COMMENTS FROM INTERESTED PARTIES**

(37) The Commission received comments only from SACE.

IV. **COMMENTS ON THE OPENING DECISION AND ADDITIONAL SUBMISSIONS OF ITALY AND SACE**

IV. 1. IMPUTABILITY

(38) Italy and SACE maintained that all the four measures granted by SACE would not be imputable to the Italian State. In the reply to the opening decision, Italy quotes extensively the Court judgments in the Stardust Marine ([22]), Olympic Airways ([23]) and SIC-RTP ([24]) cases. At the request of the Commission, Italy has submitted a list provided by SACE that included SACE Board members at the time when each of the four measures at stake was adopted by SACE's Board of Directors ([25]). When applicable, SACE indicated the position held in the public administration by the respective Board member.

(39) Furthermore, as regards the first measure, Italy argued that the investment into SACE BT was very small as compared to the size of SACE and hence this should also indicate that the State had no reason to be involved in such a small investment, which is therefore not imputable.

(40) As regards the second measure, Italy clarified that CIPE does not decide on the reinsurance activity of SACE ([26]).

IV. 2. ADVANTAGE CRITERION: THE FIRST MEASURE

(41) In the submissions after the opening decision, Italy and SACE provided that the investment was in line with market practices.

(42) To complement previously submitted documentation mainly consisting from the initial business plan, Italy and SACE notably submitted additional supporting documents (see recitals 6-9). In reply to an additional question of the Commission, Italy also communicated that there were no exchanges between ISVAP and SACE/SACE BT as from 2003 regarding projections made by SACE/SACE BT on the capital requirements and available capital, nor assessments made in this respect by the national supervisory authority ([27]).

(43) First, SACE stresses that it is a profitable company. It is a well-managed company and there is therefore no ground to put into doubt that it made the investment into SACE BT as a normal investor. To illustrate this, SACE provided data showing that SACE was profitable in 2004-2010 with ROE exceeding 6 % for all those years and annual dividend pay-out ratio varying from 40 % to 95 % of the profits summing up to the total amount of dividends of EUR 2,1 billion in addition to the restitution of part of the capital of EUR 3,5 billion to the State as a shareholder. SACE also claims that its investment into SACE BT was made out of 'free capital' unused and available at SACE, quantified at around EUR 250 million on 28 April 2004 ([28]). Moreover, SACE submits that the amount of capital was negligible compared to the assets and the profits generated by SACE (the amount invested into SACE BT in 2004 was equivalent to only 1,2 % of the equity of SACE and 20 % of net profit of SACE in 2004) ([29]).

([22]) *Stardust Marine* Judgement of 16 May 2002 in case C-482/99 [ECR I] p 4397.
([23]) CFI, T-68/03, ECR 2007, II-2911 — *Olympic Airways/Commission*.
([24]) CFI, T-422/03, ECR 2008, II-1161 — *SIC/Commission*.
([25]) See Annex 1 to the Reply of the Ministry of Economy and Finance, 15 September 2011.
([26]) *Source:* Ministry of Economy and Finance, Reply to the request for information, submitted on 5 March 2012, p. 2.
([27]) *Source:* SACE — Reply to the request for information, point 9, submitted on 5 March 2012, p. 2.
([28]) The material prepared for the meeting of SACE's Board of Directors of 28 April 2004 had the specific objective to provide the estimations for the 'free capital' of SACE in view of the capital endowment of SACE 2 — the future SACE BT. See Annex 1 — Comunicazione dell'AD al CdA di SACE S.p.A. in vista della riunione del CdA del 28 aprile 2004, to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision.
([29]) For the data, see p. 4 of the Comments of SACE submitted on 5 May 2011 in reply to the opening decision.

(44) In that context, Italy also clarified that it is not SACE which has been benefitting of the counter-guarantee of the State, but such a guarantee was intended to counter-guarantee SACE's counterparties. In this regard, Italy stressed that, during the period 2004-2010, the counter-guarantee was never called, nor the State had carried out payments in favour of SACE in that period ([30]).

(45) Secondly, SACE submitted that the investment aimed at the diversification of risks insured by SACE group (in terms of geographical and sector coverage). The coverage of credit risks by SACE group, previously limited to non-marketable countries, was thus to be expanded into Italy and the area of marketable export-credit risks (short-term risk within OECD). In addition, the scope of business was to be expanded into other lines of business as exploited by the three largest private market players.

(46) Thirdly, SACE argued that there were significant unexploited market opportunities for a new market entrant, such as SACE BT. This consideration was analysed before making the investment. In particular, the domestic Italian market had a significantly lower credit insurance penetration ratio if compared to other big European markets. Also, there was an opportunity to operate in the markets of the EU-10, where the major credit insurance market players were not yet present at the time. Before the investment was made, the market opportunities were also analysed by the external consultant in great details.

(47) Fourthly, SACE argued that the ROE of SACE BT cannot be compared to the market average because SACE BT was a start-up at the time while the other short-term export-credit insurance companies were already established in the market.

(48) Fifthly, SACE argued that, when it created SACE BT in 2004 so as to enter the short-term export-credit market, the management expected a sufficient profitability to be achieved from the capital invested through a **three pillars strategy** ([31]) relying on organic growth in credit insurance business (of start-up character for which the initial business plan contains four years forecast) for the first pillar, on ancillary activities to the credit insurance (other types of insurance or services), potentially including acquisitions of other firms, in Italy (diversification in terms of business lines) for the second pillar and on geographical expansion through acquisitions of companies operating abroad (geographical diversification) for the third pillar.

(49) According to SACE, the rationale for such strategy was underpinned by the external consultant's analysis ([32]).

(50) According to SACE, it should be evident that the economic and financial projections elaborated in 2004 could not incorporate or anticipate the effects of future acquisitions which were carried out in the following years ([33]). In other words, the projections were based solely on the organic growth of SACE BT in the Italian credit insurance market (first pillar mentioned in recital 48) ([34]).

(51) Given the start-up character of the company, the parent company chose to **inject more capital at once in the initial stage**. Italy is arguing that this approach is comparable with the one used by private equity funds which are investing up-front money to be used for potential transactions, which should however be subject to independent evaluations and consistent with the pre-determined strategy ([35]).

(52) Further, Italy argued that even if the initial plan included solely the profitability for the first pillar of business, the other two pillars of business were mentioned/contemplated at the time. They were mentioned as early as in the letter dated 17 December 2003 inviting a consultant to provide an offer to draw a business plan for the short-term activity of SACE ([36]). In particular, in the invitation to tender to the external consultant, SACE requested the presentation of a limited number of scenarios (maximum 2), which should envisage an endogenous growth of SACE using its own resources and means and a collaboration with other entities, either Italian or foreign which might include various options such as a collaboration with one of the biggest market players, a collaboration with a secondary player (e.g. CESCE — Spain, OND — Belgium) and a collaboration with an Italian player operating in another market segment or in another financial sector.

([30]) *Source:* Ministry of Economy and Finance — Reply to the request for information, submitted on 5 March 2012, p. 2.
([31]) *Source:* Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 8, and minutes of the meeting between the representatives of SACE BT, SACE, the Italian authorities and the Commission services of 13 July 2011.
([32]) See, for instance, Chapter II, p. 7 of the initial business plan.
([33]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 9. SACE reiterated the position already expressed by Italy before the opening decision. See paragraph 1 on p. 15 of the submission of Italy of 12 February 2008.
([34]) The initial business plan envisaged that SACE BT would hold a share of 12,6 % in the Italian market in 2008 with a volume of premiums of EUR 67,2 million.
([35]) See SACE — Reply to the request for information, 15 September 2011, p. 17.
([36]) See Annex 1 to the Reply of SACE, 15 September 2011, p. 8.

(53) As regards possible relations with third parties, the consultant was requested to underline the possible advantages deriving from putting in common technology and expertise, economies of scale and specialisation and upstream and downstream integration of activities.

(54) SACE argued that the Board of Directors started discussing such opportunities around the same period when SACE BT was created. To further support that allegation, SACE provided a preliminary outline of cooperation with OND (Belgium) and CESCE (Spain) prepared on 5 March 2004, i.e. before granting the first measure ([37]).

(55) To provide basis for future expansion into other markets and lines of business, in March 2004, the consultant provided SACE with detailed analysis of market players operating in other business segments in Italy (commercial information services and recovery of credits) and credit insurance in the Central and Eastern Europe ([38]) and benchmarking to the market practices (mainly major market players) in terms of costs (i.e. for provision of commercial information, for credit recovery), timing of business operations, multiple analysis of the pricing of recent acquisitions in the sector of provision of commercial information as well as benchmarking to the best market practices — so considered due to their leadership position in the respective market segment — in terms of operative business solutions.

(56) Italy recalls that the acquisition strategy started to be put in place in less than one year of the start of operations by SACE BT (the first non-binding offer of SACE BT for 70 % of Assedile dates from 18 April 2005, while the whole process was initiated in March 2005, five months after the start of operations by SACE BT). Further, Italy submitted to the Commission various communications presented to the Board of Directors of SACE BT in the period 2006-2008 considering the subsequent opportunities for acquisitions ([39]) (all of them were underpinned by the valuations by the external advisors, due diligence exercise, etc., though a number of them were not successful for various reasons).

Financial projections

(57) In the invitation letter to tender for the consultancy services, SACE asked for financial projections for three years ahead, 2005-2007. inter alia, SACE asked for a quantification of the financial resources (i.e. capitalisation) necessary for the development of the short-term activity and the expected profitability (i.e. return on invested capital) ([40]).

(58) SACE argued that, as the acquisition opportunities were not yet clear and their valuation not yet available, the initial business plan was conservatively solely based on the first pillar of business (organic growth in credit insurance business). The projected profitability, even if limited since not including acquisition strategies, was still positive starting from 2007 (third full year of business) ([41]) and, if synergies with the parent company (i.e. SACE) were to be included, from 2006 (second full year of business).

(59) Further, already in November 2004, after only one month after the start of operations by SACE BT, an adjustment to the business plan for 2005-2009 ([42]) was discussed by the Board ([43]) ('the adjusted business plan'), containing an analysis of SACE BT's operations at the start of its business, new assumptions for its development, economic-financial simulations and scenarios for development. The accompanying note to the Board clearly specifies the extension of the business into the surety market and the delineation of the evolutionary scenario regarding other opportunities of the external growth into the sectors presenting opportunities for synergies with the activity of SACE BT, so as to realign the return on the entire capital investment into SACE BT with the market benchmarks.

([37]) Annex 8 to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision.
([38]) See Annexes 5-7 to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision.
([39]) See Annex 2 to the Reply of SACE submitted on 15 September 2011, where several initiatives for acquisitions are mentioned, either in cooperation with other operators, i.e. KUP (with SA Ducroire) in the communication dated 19 July 2006, TINUBU SQUARE (with ONDD and CESCE) in the communications dated 19 July and 8 September 2006 and MEHIB (with SA Ducroire) in the communication dated 8 February and 18 June 2007, or on a stand-alone basis, i.e. CGIC (with the option that the parent company, SACE, might decide to participate itself as a bidder instead of SACE BT) in the communication dated 15 September 2008.
([40]) See Annex 1 to the Reply of SACE submitted on 15 September 2011, p. 8.
([41]) SACE also submitted that ahead of the plan SACE BT generated profits already in 2006 and provided the following comparison between the actually recorded profits/losses and those projected. In 2005: EUR – 1,5 million (in the plan: EUR – 2,4 million); in 2006: EUR + 0,1 million (in the plan: EUR – 0,4 million); in 2007: EUR – 1 million (in the plan: EUR + 3,1 million); in 2008: EUR – 29,4 million (in the plan: EUR + 3,7 million). See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 6, footnote 2.
([42]) Thus also including extension of projections into 2009.
([43]) See Annex 9 to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision.

(60) In particular, in the adjusted business plan, the different pillars of future development of the business were mentioned explicitly: organic growth in credit insurance business (first pillar, see recital 48), expansion into other business segments in Italy (second pillar, see recital 48) and external growth, with a mention 'to be developed further' (second and third pillars, see recital 48), depending on the activities of a target firm). Capital required for the first pillar was estimated at EUR 40,3 million. As regards the second pillar, only endogenous expansion into surety business ('cauzioni') was specified in detail including separate financial projections for that line of business and estimated capital at EUR 3,7 million.

(61) Further, a more detailed analysis of expected profitability in function of capital allocated to the credit insurance and surety businesses was added: ROAE for the first two types of products (credit insurance and surety — cauzioni) on the required capital of EUR 44 million was estimated at 12,5 % (with respectively EUR 40,3 million and 12,1 % for solely credit insurance business) ([44]). The document stated that the analysis was preliminary and to be further elaborated upon preparation of the restated business plan for the regulatory purposes (expected in February/March 2005).

(62) According to the adjusted plan, the projected profits were of EUR 4,8 million in 2008 and the estimated ROAE on the entire amount of capital was projected to reach 4,4 % in 2009.

(63) Further, in its submissions dated 15 September 2011 and 5 March 2012, Italy provided SACE's calculation of an 'implied *ex ante*' profitability which includes the synergies and the acquisitions of KUP and Assedile (see Table 4). To construct such analysis, Italy took into consideration the *ex ante* valuations as available at different periods of time: when the initial business plan was prepared, when the acquisition of 70 % of Assedile was contemplated and evaluated, when the acquisition of 100 % of Assedile and 33 % of KUP was contemplated and evaluated. The expected synergies from acquisitions are presented separately at the bottom of the table. The initiated and evaluated, but not finalised acquisitions are not taken into account in such analysis. Any excess capital not needed for the acquisitions mentioned in recital 56, before they are identified and evaluated, is allocated to the standalone credit insurance business (the first pillar).

Table 4

SACE's calculation of 'implied *ex ante*' profitability

		Reference year	Amount of capital (EUR million)	Profit, after taxes expected in the reference year (EUR million)	ROE
Situation as of 18 May 2004					
	Standalone credit insurance business as per the May 2004 initial business plan	2008	105	3,7	3,5 %
			105	**3,7**	**3,5 %** (*)
'Implied *ex ante*' after the acquisition of 70 % of Assedile					
	Acquisition of Assedile ([1])	2009	27	2,7	10,2 %
	Stand alone after the acquisition of Assedile	2008	78	3,7	4,7 %
			105	**6,4**	**6,1 %**

([44]) See p. 8 and 10 of the adjusted business plan.

		Reference year	Amount of capital (EUR million)	Profit, after taxes expected in the reference year (EUR million)	ROE
'Implied *ex ante*' after the acquisition of 100 % of Assedile and 33 % of KUP					
	Acquisition of Assedile (70 % + 30 %)	2009	41,7	3,9	9,4 %
	Acquisition of KUP (33 %) ([2])	2011	13,3	1,2	8,7 %
	Stand alone after the acquisition of Assedile + KUP	2008	50	3,7	7,4 %
			105	**8,8**	**8,3**
'Implied *ex ante*' after acquisitions and the revenues from synergies					
	Synergies SACE BT/SACE			1,9	
	Synergies SACE BT/Assedile			0,6	
			105	**11,3**	**10,8 %** (*)

(*) In case the reference year is 2009 (as provided in the adjusted plan) and not 2008, and hence the profit of EUR 4,8 million is taken into consideration, the 'implied *ex ante*' ROE after acquisitions and synergies reaches **11,8 %**.

([1]) According to Italy's submission of 5 March 2012 — Reply of SACE (point 16, p. 5), the external consultant projected for 2009 (in the fifth year after the acquisition) a ROE of 9,8 % for an acquisition of 100 % in Assedile valued at around EUR 40 million (See Progetto Zorro, 30 May 2005, p. 30). Thus, SACE calculated a profit of EUR 3,9 million following the acquisition of 100 % in Assedile: EUR 40 million * 9,8 % ROE (and EUR 2,7 million for 70 % of Assedile).

([2]) According to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision (p. 21), the financial projections prepared by the external consultant for the acquisition of KUP provided for expected net profits of EUR 3,5 million in 2011 (in the fifth year after the acquisition). Thus, 33 % * 3,5 million = EUR 1,2 million. Dividing the expected return by the initial investment, SACE BT would achieve a ROE of 8,7 %.

(64) As to the rate of return, a private investor would have requested to make a similar investment ('requested rate of return'), Italy contested the ratio provided by the complainant (ROE of 11,5 %). Italy considers that the sample of companies on which the ROE was calculated was not representative and the time period over which that ROE was calculated was not adequate. SACE provided that the adequate rate of return for the credit insurance business in Italy should be established on the basis of average profitability of companies operating in Italy, i.e. Coface Italy (Viscontea Coface) and Euler Hermes SIAC, in the years 1998 to 2003 and would equal 10,25 % based on non-weighted average. SACE explained that Atradius (Italy) was excluded from the calculations as during the period considered it showed a volatility that significantly influenced the results to such an extent that the results showed a negative benchmark (– 2,4 % in case of using simple non-weighted average) ([45]).

(65) However, Italy argued in favour of the required rate of return being based on the weighted average rate. In Italy's submission, SACE calculated the weighted average ROE rate for the period 1998-2003 of Coface Italy and Euler Hermes SIAC by weighting their ROE averages of the period with the weight percentage share of gross premiums written for the same period for their credit insurance business. Thus calculated, the rate of return would equal 8,7 %.

([45]) See SACE — Reply to the request for information, 15 September 2011, p. 4.

(66) Italy argues that the difference between the estimated rate of return using non-weighted and weighted averages, i.e. between 10,25 % and 8,7 %, is not significant enough so as to substantially impact the decision of an investor with a time horizon of medium to long-term. Nonetheless, Italy considered more appropriate to use the weighted average ROE, as provided above, for the following two reasons ([46]):

(a) a weighted average calculation is a better method compared with a non-weighted average, because it reflects better the required rate of return in a sector with 2 players with significant differences in terms of return among the players and among the years and significant differences in turnover between the two players ([47]);

(b) as the basis for weighting, Italy used gross premiums written in the credit insurance business with the goal of having a homogeneous sample comparison with the activity of the new SACE BT back in 2004 (it started with credit insurance business and only later expanded into other related activities). The surety insurance business ('ramo cauzioni') was excluded from the basis of the calculation, as being characterised by a different dynamics than the credit insurance business. Only Coface operated in surety business in 2004 ([48]).

(67) Italy also provided that a calculation of the required rate of return based on total premiums (i.e. without limiting solely to credit insurance premiums as explained above) would amount to 9,5 %.

IV. 3. ADVANTAGE CRITERION: THE SECOND MEASURE

(68) SACE argues that the measure was driven by profit consideration and thus corresponded to reinsurance activity in line with market practices. It stresses that the main terms of the reinsurance cover provided by SACE to SACE BT in 2009 were the same as those agreed to by the private reinsurers a few months earlier (see recital 31). *Ex post*, it can be concluded that it only benefited the parent company, SACE, which received EUR 1,56 million ([49]) of premium income, as SACE BT did not make use of the reinsurance to cover the pre-specified excess of loss.

(69) Furthermore, Italy asserts that at the level of capital requirements ('*requisito patrimoniale*') calculated according to the Solvency 2 proposal at that time in 2009 (QIS4 technical specifications), the second measure did not reduce the capital requirements of SACE BT. In particular, the coverage of excess of loss did not produce any benefits because it is not recognised within the standard formula used by SACE BT as a method for quantifying the capital requirements. As regards the impact on the capital absorption ('*assorbimento di capitale*'), Italy explained that per definition all forms of reinsurance produce effects on the level of capital, including reinsurance in the form of excess of loss cover ([50]). The Commission has specifically requested Italy on 4 January 2012 to provide the amount of capital relief at SACE BT's level following the excess of loss reinsurance concluded in 2009 with SACE. Italy did not provide the requested information, but repeated that the excess of loss reinsurance does not generate any relief in terms of supervisory capital requirements ('*requisiti patrimoniali di vigilanza*') ([51]).

(70) However, SACE submitted ([52]) that one of the main purposes of reinsurance is to increase the capacity of the ceding insurer to subscribe further contracts.

(71) As regards the application of the escape clause laid down in the Export-credit Communication ([53]), Italy submitted that it did not find appropriate to grant public support to this sector and decided not to make use of the escape clause ([54]). SACE did not find relevant the request of the Commission to submit information that might prove lack of coverage on the market for exporters ([55]).

([46]) See SACE — Reply to the request for information, point 12, submitted on 5 March 2012, p. 2-3.
([47]) In accordance with the adjusted business plan, in 2003 in Italy, Euler Hermes SIAC held a market share of 47,5 %, Atradius-SIC (Italy) of 20,1 % and Coface Italy (Viscontea Coface) of 17,9 %.
([48]) This allegation of Italy is not supported by the initial business plan prepared by the external advisor. According to Annex 1 to the plan — 'La best practice del mercato. Benchmarking sui principali players', dated February 2004 (see submission of Italy of 12 February 2008, Annex 1), both Viscontea Coface and Euler Hermes SIAC were active in surety business (see p. 17 and 34 thereof).
([49]) For the remuneration paid by SACE BT to SACE see the Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 30.
([50]) See SACE — Reply to the request for information, 15 September 2011, p. 7.
([51]) See SACE — Reply to the request for information, point 13, submitted on 5 March 2012, p. 3.
([52]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 25.
([53]) According to the Export-credit Communication, the escape clause is used in the case of temporarily non-marketable risks, i.e. marketable export-credit risks for which coverage may be temporarily unavailable from private export-credit insurers or from public or publicly supported export-credit insurers operating for their own account, owing to a lack of insurance or reinsurance capacity. In such circumstances, those temporarily non-marketable risks may be taken on to the account of a public or publicly supported export-credit insurer for non-marketable risks insured for the account of or with the guarantee of the State. Any Member State intending to use that escape clause has to notify it immediately to the Commission.
([54]) See Comments of the Ministry of Economy and Finance submitted on 5 May 2011 in reply to the opening decision, p. 5.
([55]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 29.

IV. 4. ADVANTAGE CRITERION: THIRD AND FOURTH MEASURES

(72) SACE argues that by the adoption of the third and the fourth measure, SACE wanted to bring SACE BT in a status of 'financial equilibrium' with the objective to guarantee the solvency of the enterprise, according to the constraints imposed by the legislative framework. Once the solvency of SACE BT been guaranteed, it would have been possible to reach a sufficient profitability level ([56]). Moreover, SACE underlines that many private Italian competitors of SACE BT have registered losses in 2008 and 2009. This triggered the intervention of their shareholders, which contributed with important capital injections (internationally also Natixis recapitalised Coface twice in 2009 and beginning of 2010, whilst Coface recorded losses of EUR 163 million in 2009).

(73) SACE also notes that, while basically all market operators have been affected by the economic crisis, the effects of the crisis have had a particularly severe impact on SACE BT. In this respect, SACE argues that SACE BT is still in the start-up phase. For this reason, SACE BT could not make use of the 'equalisation provision' ('riserva di perequazione') ([57]) to cope with the economic and financial contingencies as this reserve has not yet been established. All other major competitors of SACE BT — including also Coface — have benefited from this reserve during the present economic crisis.

(74) In reply to the Commission's request in the opening decision to provide the estimated costs that could be incurred by SACE, if it were to sell or liquidate SACE BT, SACE submitted that the liquidation of SACE BT is a purely theoretical option which cannot be put in place at this moment. The main reasons quoted by SACE refer to: (i) the lack of an immediate benefit to SACE as a shareholder, since the liquidation would have rather crystallised the negative results in the context of particularly adverse circumstances of the market at the time and would have caused significant reputational damage for SACE; (ii) the possibility that such action could be interpreted by the markets as a crisis of liquidity within SACE; (iii) the likely event that the price of sale would not be adequate ([58]). When replying to the separate Commission's request regarding the exposure of SACE in respect of SACE BT at the time before granting the second, third and fourth measures, Italy indicated that, in theory, in the case of termination of activity and liquidation of SACE BT's assets during 2009, liabilities totalling EUR 2,09 million towards SACE were potentially at risk. Italy indicated that the net balance between assets and liabilities towards SACE for the year 2008 had been positive at EUR 8,43 million ([59]), meaning that in net terms SACE would owe money to SACE BT.

(75) SACE stated that the application of the MEIP has to take also into consideration the legislative constraints. […] (*) Moreover, SACE argues that an investor is not only focused on the profitability of an investment, but also on other considerations, such as safeguarding the group's public image or a reorientation of its business operations ([60]).

(76) Italy provided that the amount of EUR 70 million (third and fourth measures) was part of the capital needs identified in May 2009 by the Risk Management department ([61]) necessary to comply with the future Solvency 2 requirements ([62]) ([63]). This simulation was based on the revised budget for 2009.

(77) According to SACE, the decisions to recapitalise SACE BT were taken in view of the expected return to profitability, with the break-even in 2011 ([64]).

(78) According to Italy, starting with 2009, SACE BT was subject to deep transformations in the organisation, management and business processes, which have restored the long-term viability of the company, allowing it to return to profit in 2011, ahead of the forecasts made in the business plan for 2011-2013. In light of the changing

([56]) Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 33, 36 and 37.
([57]) According to the Insurance Directives the purpose of the equalisation provisions is to equalise fluctuations in loss ratios in future years or to provide for special risks. Equalisation provisions are part of the technical provisions on the balance sheet and the change in equalisation provisions is included in the technical account of the profit and loss account. See CEIOPS — Summary of a survey on equalisation provisions, January 2009, p. 2, available online at: https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/reports/CEIOPS-DOC-32-08-Summary-of-a-survey-on-equalisation-provisions.pdf.
([58]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 45. SACE quotes the data of the company Dealogic which found that mergers and acquisitions in the European financial sector in 2009 (EUR 176 billion) have basically halved compared to 2008. Around 50 % of transactions in 2009 focused on distressed assets.
([59]) See SACE — Reply to the request for information, point 14, submitted on 5 March 2012, p. 4.
(*) Confidential information.
([60]) To illustrate that argument Italy referred to the following Court case: C-303/88, ECR 1991, I-1433 — Italy/Commission ('ENI/Lanerossi'), paragraph 21 (see Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 36).
([61]) The risk management is externalised to the parent company, SACE. See recital 25.
([62]) See SACE — Reply to the request for information, point 19, submitted on 5 March 2012, p. 6.
([63]) […].
([64]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 33.

economic and market terms, SACE BT's business plan for 2011-2013 was updated to take into account the ongoing crisis and to set out a number of initiatives to further improve profitability (see Table 5). The adjusted business plan for 2011-2013 was approved by SACE BT's Board of Directors on 24 November 2011. The minutes of the meeting of the Board of 24 November 2011 (i.e. two years after the capital injections) refer to the objective of gradually improving profitability (as measured in terms of ROE) so as to reach the sector average.

Table 5

SACE BT's financial highlights provided in the business plan for 2010-2011 and the adjusted plan for 2011-2013

	Actual			Projected in the business plan for 2010-2011 approved by the Board on 4 August 2009 (1)			Projected in the adjusted business plan for 2011-2013 approved by the Board on 24 November 2011 (2)		
EUR million	2008 (*)	2009	2010	Revised budget 2009	Business Plan 2010	Business Plan 2011	2011 Proj.	2012 Proj.	2013 Proj.
Gross written premiums (3)	99,7	95,2	94,6	[…]	[…]	[…]	[…]	[…]	[…]
Insurance technical expenses born by SACE ('Sinistri di competenza')	– 70,6	– 104,9	– 59,8	[…]	[…]	[…]	[…]	[…]	[…]
General expenses	– 36,1	– 38,2	– 37,3	[…]	[…]	[…]	[…]	[…]	[…]
Technical result before reinsurance	– 63,0	– 60,0	18,2	[…]	[…]	[…]	[…]	[…]	[…]
Technical result after reinsurance	– 39,3	– 56,4	5,0	[…]	[…]	[…]	[…]	[…]	[…]
Income before tax	– 39,5	– 47,3	– 4,8	[…]	[…]	[…]	[…]	[…]	[…]
Net income	– 29,5	– 34,1	– 4,8	[≤ 0]	[≤ 0]	[≤ 0]	[…]	[…]	[…]
ROE pre Tax (%) (4)	na	–41,7%	– 4,4 %	na	NA	na	[…]	[…]	[…]
ROE post Tax (%) (5)	–38,0%	–30,6%	– 4,4 %	na	NA	na	[…]	[…]	[…]
Loss Ratio (%)	**131,0%**	**119 %**	**67 %**	[…]	[…]	[…]	[…]	[…]	[…]
Cost ratio (%)	**44,6 %**	**43 %**	**41 %**	[…]	[…]	[…]	[…]	[…]	[…]
Combined ratio (%)	**175,6%**	**163 %**	**108 %**	[…]	[…]	[…]	[…]	[…]	[…]

(*) includes also the life insurance ('include il ramo vita'), which was divested in 2009.

(1) Projections included in the Business Plan 2010-2011, p. 8, approved by the Board of Directors of SACE BT on 4 August 2009 (See Annex 4 — Minutes of the meeting of SACE BT's Board of Directors, 4 August 2009, submitted on 9 June 2010).

(2) Projections included in the Adjusted Business Plan 2011-2013 ('Aggiornamento Piano Industriale'), p. 8 and 19, approved by SACE BT's Board of Directors on 24 November 2011. (See Annex 8 — Minutes of the meeting of SACE BT's Board of Directors, 24 November 2011, submitted on 30 March 2012).

(3) Gross premiums as opposed to premiums net of reinsurance cost cover also the cover of part of risk ceded to reinsurers.

(4) ROE calculated as income before taxes/net worth ('patrimonio netto'), assuming undistributed profits and a capital endowment of EUR 108,7 million at 31 December 2011.

(5) Commission's calculations on the basis of the financial statements and the projections for 2011-2013.

(79) In the last submission of 30 March 2012, Italy reiterated the non-imputability of the measures to the State and their compliance with the MEIP. Firstly, Italy explained that those were intragroup decisions to protect the reputation of the group. Secondly, Italy argued that SACE operates like a market operator and invests its resources in the development of the business in which it operates without relying in any way on public support. During the crisis, the parent company, SACE, remained profitable and distributed dividends to the State. For this reason, Italy submitted that SACE never deemed necessary to draw up a restructuring plan to be submitted to the Commission in accordance with the Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ('Restructuring Communication') ([65]). Nor the national supervisory authority, ISVAP, raised any objection or requested particular procedures after the recapitalisation of SACE BT. Finally, Italy recalled its assessment that it would have been very difficult at that time to find a potential buyer for SACE BT.

(80) Italy argues that SACE BT's crisis was not caused by internal processes, changes in demand or other factors that would impose a deep rethinking of the business model and a subsequent restructuring, but rather by the significant increase of claims triggered by the crisis. In light of this situation, Italy submits that SACE decided to provide the additional capital and introduce the necessary organisational and management changes in total autonomy and according to the perspective of a market operator.

IV. 5. COMPATIBILITY OF AID

(81) Italy and SACE devoted the largest part of their comments to the opening decision on arguing that the measures are MEIP compliant and not imputable to the State and, hence, do not involve aid. In case the Commission would nevertheless find that these measures constitute state aid in the meaning of Article 107(1) of the Treaty, SACE submitted that the measures should be recognised and declared compatible with the internal market ([66]). As regards the second measure, SACE considers the doubts expressed by the Commission on the compatibility of that measure as purely speculative ([67]). As regards the third and the fourth measures, SACE reiterated that in any case it would be possible to find them compatible with the internal market under Article 107(3)(b) of the Treaty on the basis of the Communications quoted by the Commission ([68]).

V. **ASSESSMENT OF THE MEASURES**

V. 1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

(82) It has to be examined whether the four measures set out in Section II.4 constitute State aid within the meaning of Article 107(1) of the Treaty. As set out in Article 107(1) of the Treaty any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market, save as otherwise provided.

(83) The qualification of a measure as State aid therefore presupposes that the following conditions are met: it must be imputable to the State and financed by a Member State or through State resources, it must grant a selective advantage susceptible to favour certain undertakings or the production of certain goods and it must distort or threaten to distort competition and have the potential to affect trade between Member States.

(84) These conditions being cumulative, they must all be present before a measure is characterised as State aid. As a result, if one of the conditions is not fulfilled then the relevant measure cannot be considered to be State aid.

(85) In recital 61 of the opening decision, the Commission indicated that the part of measures which would meet one of two following conditions would not constitute aid:

(a) the capital/reinsurance benefiting the non-marketable risks (as opposed to marketable risks) (**the first exclusion criterion**); indeed, there is no market for these risks and therefore state support would not distort competition between insurance firms, such that the qualification of aid could be excluded; and

(b) the amount of capital endowed to SACE BT that was already implicitly allocated to (turned) marketable risks within SACE (since such capital, if transferred to SACE BT with activities it was supporting already within SACE, would be the continuation of the same activity with the same capital under a different legal form. The transfer of that capital would therefore not constitute an advantage to these activities and the qualification of aid could be excluded) (**the second exclusion criterion**).

([65]) OJ C 195, 19.8.2009, p. 9.
([66]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 52.
([67]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 30-31.
([68]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 47.

(86) As regards the second exclusion criterion, SACE confirmed that no capital was allocated to the non-marketable risks in relation to the EU-10 Member States that turned into marketable risks before the creation of SACE BT ([69]). This is coherent with Italy's repeated line of reasoning that the company was a start-up (see also recitals 96-100).

(87) As regards the first exclusion criterion, in reply to the Commission's request to provide the division between marketable and non-marketable risks ([70]), SACE replied that the relative volumes of non-marketable activities in SACE BT are very small ([71]). Moreover, Italy submitted that SACE BT is managing the non-marketable risks at market terms, without the guarantee of the State and they are not subject to the threshold established by CIPE every year for the non-marketable risks inferior than 24 months ([72]).

(88) The Commission notes that the Export-credit Communication provides that if Member States wishes to subsidise their non-marketable risks, they have to introduce separate accounting, ensuring that there is no flow of aid to the marketable risks. In the present case, none of SACE's measures was targeted specifically at supporting the small non-marketable risk activities. Italy does not invoke that it wanted to aid the non-marketable risks and considers that all the measures were granted to SACE BT as a whole (and not to one specific activity) and on market terms. Italy does not contest that all these measures are analysed under the MEIP test to identify the presence of an advantage.

(89) The Commission therefore agrees with Italy and SACE that the exclusions provided in chapters 4.1.1 and 4.1.2 of the opening decision do not apply in the present case. Hence, the qualification of aid of (part of) the four measures cannot be excluded based on these exclusion criteria. The entire capital injected into SACE BT of EUR 105,8 million (first measure) and the other measures in their entirety could constitute aid and are subject to the assessment.

V.1.1. *Presence of an advantage*

V.1.1.1. General principles for the assessment of the presence of an advantage

(90) As provided in recitals 80-82 of the opening decision, in accordance with settled case-law, in order to establish whether a capital injection is granting a competitive advantage it is necessary to assess whether, in similar circumstances, a private investor in a market economy would have made capital contributions of the same size ([73]), having regarded in particular to the information available and foreseeable developments at the date of those contributions ([74]).

(91) The MEIP is a test that should be applied *ex ante*, i.e. one should determine whether at the time of planning the investment a private investor in a market economy would have prevailed upon making such a capital contribution. A market investor would duly take into account the risks associated with the investment — so as to require higher profitability from more risky investments. It would take as a constraint the existing regulatory framework, e.g. in the financial services sector. If the specific regulatory requirements on the minimum capital, liquidity and similar makes the investment not profitable, a market economy investor would not proceed with the investments, instead of proceeding with an investment which complies with the regulatory requirement but does not provide an adequate level of profitability.

(92) A private investor is not content merely with the fact that an investment does not cause him a loss or that it produces only limited profits. A market economy investor would attempt to maximise the return on his assets in accordance with the circumstances in his interests, even in the case of an investment in an undertaking in which he already had a shareholding ([75]). Even if the average return in the sector is only one of the elements the Commission may consider, a prudent market economy investor, when making estimations of the appropriate remuneration, would, in principle, require a minimum return for the investment being at least of the level of the average profitability in the respective sector ([76]).

([69]) Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 6-7.
([70]) See recital 64 of the opening decision.
([71]) See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 7.
([72]) See Ministry of Economy and Finance — Reply to the request for information, 15 September 2011, p. 6.
([73]) Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 8; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 21; Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraph 13.
([74]) See, points 3.1 and 3.2 of the Export-credit Communication, the Commission's notice regarding *Application of Articles 92 and 93 of the EEC Treaty [now 107 and 108 of the TFEU] to public authorities' holdings*, Bulletin EC 9-1984, and the Commission Communication to the Member States on the application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).
([75]) See judgment of 6.3.2003, T-228/99, T-233/99 WestLB and the Lando f Nordrhein-Westfalen vs Commission, paragraph 314.
([76]) See judgment of 6.3.2003, *Westdeutsche Landesbank Girozentrale/Commission* (T-228/99 and T-233/99, ECR II-435, paragraphs 254-255, 270).

(93) According to the recent jurisprudence ([77]), a Member State that invokes the MEIP compliance must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder, i.e. that it acted on market terms. In that regard, it may have to produce evidence showing that the decision was based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability. For the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment was taken. That is especially so where, as in the present case, the Commission is seeking to determine whether there has been State aid in relation to an investment which was not notified to it and which, at the time when the Commission carries out its examination, has already been made by the Member State concerned.

(94) The Commission, when making its own assessment regarding the compliance with the MEIP, has to carry out a global assessment, taking into account — in addition to the evidence provided by the Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder, i.e. as a market economy investor, or as a public authority. In particular, the nature and subject-matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject ([78]).

V.1.1.2. Presence of an advantage in the first measure

(95) In recitals 95 and 96 of the opening decision, the Commission expressed doubts on whether the first measure met the MEIP. In the opening decision, the Commission provided that the parameter that needs to be ascertained is the expected profitability of the investment according to the business plan. Indeed, according to the established case-law and practice ([79]) the parent company, SACE, as would a market investor in comparable circumstances, had the alternative not to allocate capital and to use it for its other activities or return it as dividends to the State.

(96) It is noteworthy that SACE used separate accounting for the marketable risks for the period between the date when the respective risks became automatically marketable (1 May 2004) and when SACE BT was established (27 May 2004) (see Table 1 under recital 19 of the opening decision). However, no assets, liabilities or contracts were transferred from the established separate account to SACE BT (the contracts for marketable risks accounted in the separate accounting ended either as a result of natural expiration of insurance contracts, either through the termination of contracts in place; the marketable risks in question were gradually covered under new insurance contracts within SACE BT ([80])). The business activity of the latter was started anew.

(97) Further, it has to be emphasised that SACE BT was established to focus on new business activities, which were not previously operated by SACE. Before the establishment of SACE BT and granting the initial capital thereto, already at the end of 2003, SACE sought external expertise to confirm and further elaborate the business opportunities identified by SACE so as to enter into the segment of marketable risks. The main opportunities were identified in the market segments, where the major credit insurance market players were not yet present at the time, i.e. provision of credit insurance in Italy for domestic credits and export-credit insurance for the Italian exporting companies, mainly SMEs, towards the marketable risk countries.

(98) Also, the business plan of SACE BT was based on market benchmarking and creating the structure of the company anew, rather than the continuation of any past business. In other words, it was not based on the existing track record of the business (or restructuring of the past business), but it was set up anew.

(99) Therefore, SACE BT is not the continuation of an activity which existed within SACE, but the result of a decision to set up a start-up and develop an economic activity which was not carried out within SACE.

([77]) See *Commission* v *Électricité de France (EDF)* judgment of 5 June 2012 in case C-124/10 P [ECR I] p. 0000, paragraphs 82-84 and 105.
([78]) See *Commission* v *Électricité de France (EDF)* judgment of 5 June 2012 in case C-124/10 P [ECR I] p. 0000, paragraph 86.
([79]) As regards the comparison of the State intervention to the alternative scenario of winding up the respective business and the costs that would need to be taken into account in the latter scenario, see judgments of 28.2.2003, *Gröditzer* (ECR I-1139, C-334/99, paragraphs 133-141) and of 14.9.1994, *Kingdom of Spain* v *Commission of the European Communities* (ECR I-04103, joined cases C-278/92, C-279/92 and C-280/92, paragraphs 21-22).
([80]) See p. 41 of Annex 22 — Financial statements of SACE at 31.12.2004, submission of Italy of 12 February 2008: '*Detta "gestione" si è conclusa nel corso dell'anno, sia in seguito alla naturale scadenza dei contratti assicurativi che prevedevano la copertura dei rischi di mercato, sia mediante disdetta dei contratti in essere. I rischi in argomento sono stati progressivamente assunti con nuovi contratti dalla società partecipata SACE BT S.pA., costituita in data 27 maggio 2004.*'

(100) As a result, it can be concluded that the factual elements provided by Italy and SACE in the framework of the formal investigation procedure allow the Commission to conclude that SACE BT was created as a start-up and was not the mere continuation of activities carried out already within SACE.

(101) The Commission considers that the business plan prepared for a start-up should consist of a careful analysis of business opportunities into the market in which the start-up intends to operate in and the likely return to be generated, demonstrating thereby that the expected profitability is sufficient for the initial investment to be worthwhile.

(102) However, there may be a degree of uncertainty and thus some scope for adjustment and refinement of the scope of operations and of the financial forecasts. This may particularly be the case in the initial years of the company's operation. By definition, start-ups do not have a history of financial performance on which to base a valuation. Therefore, the investor has to develop a process for valuing the company based on comparable businesses (benchmarking) and financial projections. Since young businesses may take time to become profitable, the key of valuing start-ups is to focus on the activities allowing generation of adequate profits in the future.

(103) There are sufficient factual elements confirming that, before deciding to create SACE BT and to allocate its initial capital, SACE has undertaken analysis of the market in which SACE BT would operate. Initial discussions and preliminary elements of the business plan for the development of SACE's activities for the years 2004-2006 have been presented in the meetings of SACE's ([81]) Board of Directors of 21 November and 3 December 2003 ([82]). During the meeting of 21 November 2003, SACE's Board of Directors discussed the new directions for development and the possibility to operate in the short-term credit insurance in the OECD countries on the basis of a study prepared by an external consultant and SACE. The Board of Directors concluded that for the marketable risks, the resources, investments and objectives would be defined on the basis of a feasibility study (*studio di fattibilità*) ([83]).

(104) Consequently, a business plan was sought from a reputable external consultant. The tasks of the consultant were, amongst others, to identify the opportunities related especially to the short-term risks in OECD countries (where SACE evaluated the size of the market to EUR 2,5-5 billion ([84])) and set out the operational terms for a new undertaking.

(105) In the tender letter of 17 December 2003, it was clearly stated that the start-up will not be able to rely on any State support, either directly (financial support) or indirectly (using the resources allocated to the non-marketable risks) ([85]).

(106) The initial business plan drawn on 18 May 2004 contained benchmarking ([86]) to the market practices (mainly major market players) in terms of expected pricing, claims expenses and other costs ratios and other details on how to set up and operate the business in line with market practices. This could serve as a solid basis for a start-up company to make its operations conform to market practices.

(107) In light of the foregoing, the Commission concludes that the process and steps followed by SACE before taking the decision to invest the initial capital into SACE BT were comparable to market practices in similar circumstances. Notably, before deciding on the investment, SACE sought a feasibility study from an external advisor and before proceeding with the investment it carefully assessed and identified significant market opportunities for growth in the credit insurance market in Italy as well as to further expansion into the CEE markets or into other services related to the credit insurance.

(108) As regards the limited time period of the financial projections contained in the initial business plan (i.e. only the four years 2005-2008) and limited profitability to be achieved at the end of that period, the Commission observes that it was due to the fact that some of key elements still had to be refined and the plan therefore only contained financial projections only for part of the envisaged activities (first pillar, see recital 48).

([81]) At that time the Institute for external trade insurance services — SACE (Instituto per i Servizi Assicurativi del Commercio Estero — SACE).

([82]) See Annexes No 10 and 11, SACE — Reply to the request for information, submitted on 5 March 2012.

([83]) See Annex No 10 — Minutes of the meeting of the Board of Directors of the Institute for external trade insurance services — SACE of 21 November 2003 (Verbale della riunione del Consiglio di Amministrazione dell'Instituto per i Servizi Assicurativi del Commercio Estero, 21 novembre 2003), p. 5-7, submission of Italy, 5 March 2012.

([84]) See Annex No 10 — Presentation to the Board of Directors: Evaluation of the potential market for SACE for possible development, 21 November 2003 (Presentazione al Consiglio di Amministrazione: Valutare il mercato potenziale di SACE per definirne gli spazi di crescita possibili, 21 novembre 2003), p. 43, submission of Italy, 5 March 2012.

([85]) See Annex 1 to SACE's reply to the request for information, 15 September 2011, p. 7.

([86]) Evaluating or checking by comparison with a benchmark (a standard or point of reference against which things may be compared or assessed).

(109) In that context, the Commission notes that the adjusted business plan — formally adopted by SACE's Board of Directors only one month after the start of operations of SACE BT, changed some of the initial assumptions, extended the financial projections with one year, up to 2009, and presented estimations of the required capital and its return separately for the endogenously developed credit insurance business (first pillar) for which the required capital in relation to the projected premiums was estimated at EUR 40,3 million. The projected return upon this capital for 2009 was EUR 4,8 million and the expected ROAE was 12,1 %). The accompanying note to the Board clearly specified the extension of the business into surety market and the delineation of the evolutionary scenario regarding other opportunities of the external growth into the sectors presenting opportunities for synergies with the credit insurance activity of SACE BT, so as to align the return on the entire capital investment into SACE BT with the market benchmarks. The document stated that the analysis had to be further elaborated upon preparation of the restated business plan for the regulatory purposes (expected in February/March 2005).

(110) Italy and SACE also provided documents showing that the plan was constantly kept under review. This demonstrates that the plan was really followed and used by the management and updated regularly on the basis of new information. This practice appears to be comparable to that expected to be done in the case of a start-up, where evaluation of future profitability is uncertain and needs to be adjusted after the start of operations of the start-up.

(111) As regards other pillars of business, i.e. expansion of SACE BT operations through acquisitions ('external growth strategy'), the Commission observes that the company identified at an early stage, with the help of a reputable external advisor (see recital 113), market opportunities in other market segments, which present significant synergies to its core credit insurance activity (including the potential targets for acquisitions). Given the concentrated structure of the market in Western Europe, SACE explored opportunities to expand in the CEE markets, where, at the time, the three big credit insurance players were significantly less present than in Western Europe.

(112) The Commission observes that, while SACE BT received a capital larger than the one needed for the organic growth of its credit insurance business (first pillar), Italy and SACE have provided documents showing that SACE had already considered and analysed the national and international expansion of SACE BT (respectively second and third pillar) before establishing SACE BT on 27 May 2004.

(113) Notably, the second and the third pillars were considered in the letter dated 17 December 2003 (see recitals 52 and 53) where the external consultant, apart from being requested to look at the endogenous growth of SACE, it had been requested to analyse a collaboration with other entities, either Italian or foreign (such as a collaboration with one of the biggest market players, a collaboration with a secondary player (e.g. CESCE — Spain, OND — Belgium) and a collaboration with an Italian player operating in another market segment or in another financial sector). Moreover, in March 2004, the external consultant had already provided supplementary analyses regarding the Italian market of the commercial information, the Italian market of the recovery of credits and its principal actors on the credit insurance in the Central and Eastern Europe (the supplements to the business plan). Consequently, even though at the time when the first measure was granted no exact financial projections were made regarding the expected profitability from expansion into other services in Italy and other geographical markets by means of acquisitions, SACE had already had the analysis prepared by a reputable external consultant to support such prospective identification of potential targets.

(114) The Commission acknowledges that further consolidation of the smaller players in the market could reasonably be expected as well as potential privatisation of the credit insurers in the CEE. It also understands the difficulties of SACE in spite of iterative process to precisely evaluate in money terms the amount of capital to be spent for these future acquisitions and the returns to be generated by such companies, before the owner of the potential target agrees to sell and the expected returns are evaluated for such potential acquisition targets.

(115) In light of the considerations of SACE done before the investment as well as the detailed analysis sought from the reputable external advisor, which preliminary identified the potential targets, the Commission can agree with the claim of Italy and SACE that the acquisition plans were considered by SACE, when investing the capital into SACE BT, without being able to estimate their profitability or expected synergies without having access to internal data of such potential targets and without knowing the sale price.

(116) In view of the extensive acquisition strategy, common to the sector and expected by SACE, the Commission can also agree with the argument of Italy and SACE that the capital to be used in the future acquisitions can be approximated to an investment into an equity fund. Indeed, in an equity fund only expected rate of return may

be defined in line with market benchmarks (in this case approximating the required rate of return by the three biggest credit insurance players having expanded significantly through acquisitions), whilst more specific evaluation is done before each investment, once such opportunity arises. There may also be some delay before all the capital is invested.

(117) In terms of profitability from acquisitions, the Commission observes that an external consultant's advice was consistently sought before making acquisitions. As regards Assedile, the price offered was below (for the first acquisition of 70 % of the stake in Assedile) or within the valuation range (when considering combined acquisition of 100 % of Assedile) proposed by the external consultant ([87]). However, as regards investment in KUP in 2007 jointly with SA Ducroire, the price paid was above the valuation made by the consultant (Rothschild) by 5 %. On the other hand, quite quickly after realising that KUP's profitability could not be restored, SACE BT sold this investment ([88]). SACE BT sold its participation in KUP at a loss to SA Ducroire on 25 February 2009 to minimise its future losses ([89]).

(118) The Commission also notes that SACE, being a firm working on long-term export credit insurance, has some knowledge of the market for credit insurance risk. It was therefore not investing without any own knowledge of the sector.

(119) In summary, the Commission notes that the business plan was prepared *ex ante* and with the help of a reputable external consultant which looked into new market opportunities that were presented to SACE before the creation of SACE BT. Moreover, the investment was clearly targeted to a start-up company and was underpinned by a plan based on a detailed benchmarking to market practices, notably in terms of costs and pricing, and adequately identifying business opportunities for its growth and development. Finally and, as a subsidiary argument, the performance of the start-up has been subject to close monitoring by the parent company and timely adjustments in its first years of business.

(120) Given all the circumstances listed above and notably the level of profitability that could be expected from the second and the third pillars of business of SACE BT, which was explored in detail at the time, it can be concluded that an expectation to reach an adequate return from the initial capital investment, i.e. from the first measure, was realistic and in line with market practices.

(121) Therefore, it can be concluded that when SACE injected money in SACE BT, it required (as stipulates in the minutes and notes to the Board) and could have reasonably expected a sufficient return on its investment.

(122) In conclusion, the first measure is deemed as not having conferred an advantage to SACE BT. Hence, it did not constitute aid and the other criteria required to qualify as state aid do not have to be assessed.

V.1.1.3. Presence of an advantage in the second measure

(123) In recital 100 of the opening decision, the Commission expressed its doubts that the reinsurance by the market operators and parent company SACE was provided under comparable terms. The reinsurance provided by the State indirectly (i.e. via a public export-credit insurer SACE) seems to lead to the artificial creation of capacity that would not be available from the private market. Furthermore, in recital 103 of the opening decision the Commission did not exclude that the second measure conferred an advantage to SACE BT.

(124) Italy and SACE did not provide new factual elements that would change the preliminary assessment set out in the opening decision.

([87]) The total price paid for 100 % of Assedile was EUR 41,8 million, with the consultant providing a range between EUR 41,2-44,7 million (see Comments of SACE S.P.A. submitted on 5 May 2011 in reply to the opening decision, p. 20, and Annex 11 thereto). As for the initial acquisition of 70 % of Assedile, the price was even below the valuation range, EUR 27 million for 70 %, corresponding to EUR 38,5 million for the entire company. The price for the acquisition of 30 % of Assedile on 6 March 2008 was determined on the basis of a re-evaluation of Assedile, as envisaged in the shareholders' agreement at the date of buying the 70 % (30 September 2005). The price corresponded to a value of around EUR 41,8 million for 100 %, thus SACE BT paid in 2008 the remaining part of EUR 14,8 million (See SACE — Reply to the request for information, 15 September 2011, p. 10-11).

([88]) According to SACE BT Annual Report 2008 (see p. 22-23), due to the global crisis the strategy of international expansion has been rethought and the emphasis was increased on the domestic market. Since KUP was attaining worse financial results than expected and in the light of the economic situation in the Eastern Europe the Board considered that the amounts invested would not be recovered.

([89]) SACE BT registered a loss of EUR 2,2 million as compared to the acquisition value of EUR 13,3 million. At the end of 2009, Ducroire booked a EUR 12,3 million downward adjustment for the valuation of its 66 % share in KUP (for which it paid EUR 13,3 million for 33 % and further EUR 11,1 million to SACE BT = EUR 24,4 million), see observations of SACE of 5 May 2011 at p. 22 and Annual Report 2009 of Ducroire, p. 28.

(125) According to point 4.2 of the Export-credit Communication, the Member States were requested to end granting of certain types of State aid within one year of the publication of this Communication, including a reinsurance by the State, either directly, or indirectly via a public or publicly supported export-credit insurer, on terms more favourable than those available from the private reinsurance market, which leads either to under-pricing of the reinsurance cover or to the artificial creation of capacity that would not be forthcoming from the private market (point 4.2(f)). Point 4.2 further states that existing complementary reinsurance arrangements remained permissible for an interim period, provided that, inter alia, the State reinsurance is a minority element in the insurer's overall reinsurance package and the State reinsurance for marketable risks is open to all credit insurers who are able to satisfy the common eligibility criteria. It is very clear that the latter provisions are not complied with in the case at hand since the State took the majority of the reinsurance. In addition, it did not open a scheme open to all credit insurers.

(126) In the assessment of the existence of an advantage, the Commission will first demonstrate that the measure could not be obtained from the rest of the market. Secondly, it will demonstrate that SACE did not act as a private reinsurer. Third, it will demonstrate that even when one takes into account the fact that SACE was the parent company of SACE BT, this does not allow to conclude that SACE acted as a private company in such a situation would have done. Fourth, the Commission will demonstrate that the reinsurance provided by SACE provides an advantage to SACE BT.

(127) The Commission observes that, in order to renew its reinsurance contracts for 2009, on 30 January 2009, SACE BT succeeded in raising 25,85 % of the Excess of loss reinsurance from the market for the marketable credit risk of 2009 ([90]). A number of market operators were approached and declined to provide reinsurance for the remaining part in spite of its alleged profitability (16 operators decided not to participate). Consequently, '*after numerous attempts to reach an agreement with the market participants*' ([91]), SACE BT decided to seek the remaining part of the excess of loss reinsurance from SACE. SACE subscribed 74,15 % of the excess of loss reinsurance on 5 June 2009 on the same terms of priority, capacity and premium as the private reinsurers. It is therefore clear that the provision by SACE of 74,15 % excess of loss reinsurance could not have been received from the rest of the market ([92]).

(128) To ascertain whether such measure constitutes an advantage, one has also to verify that, by granting this measure, SACE did not act as a private insurer would have done in similar circumstances. The Commission observes that Italy and SACE themselves acknowledged that the global financial crisis influenced significantly the world reinsurance market and triggered restrictive reinsurance conditions in 2009. As a result, a number of private reinsurers have significantly reduced their credit insurance capacity by decreasing their activity in this sector and were refocusing on more profitable areas which had an impact on the availability of such credit insurance and reinsurance on the market. Secondly, the failure of SACE BT to find reinsurance on the market was also caused by its difficult financial situation and various private reinsurers involved in the discussions on the renewal of SACE BT's reinsurance have raised concerns about the situation of the company. SACE BT had registered significant losses in 2008 (around EUR 29,5 million). This weak situation entails that the risk on the reinsurance was higher ([93]). The behaviour of the reinsurers which participated in the reinsurance demonstrates that a private reinsurer would only take a limited part of such a risky reinsurance in the absence of a significantly higher fee. It would never accept to cover such a high percentage as 74 % and under same conditions as were required by reinsurers for much smaller percentage of reinsurance. A rational investor would have asked for a fee that takes into account the higher level of risk assumed ([94]). Thus, the fee charged by SACE should have been in fact higher than the fee charged by the five private reinsurers for the much smaller percentage of reinsurance ([95]). Therefore, the Commission calculates the aid amount in the second measure as the difference between the reinsurance fee that a private reinsurer would have charged for such a high portion of reinsurance and the one that was charged from SACE BT. In line with the Commission's case practice ([96]), the Commission considers that the fee for such a high portion of reinsurance and risk should have been at least 10 % higher than the fee charged by the private reinsurers for the smaller part of reinsurance and risk. For an amount of EUR 1,56 million paid by SACE BT to

([90]) As per submission of Italy of 8 April 2010 (p. 5, paragraph 2), the cover relates solely to the marketable risks.
([91]) See Annex No 14 — ISVAP: Minutes of the inspection findings at SACE BT, 11 October 2010 (Verbale degli accertamenti ispettivi effettuati presso SACE BT, 11.10.2010), p. 56, submission of Italy, 5 March 2012.
([92]) […].
([93]) […].
([94]) See recital 93 of the Commission Decision C(2011) 7756 final of 23 November 2011 in case SA.27386 (C 28/2010) — Short-term export-credit insurance scheme — Portugal, not yet published.
([95]) See recital 68 of the Commission Decision C(2011) 7756 final of 23 November 2011 in case SA.27386 (C 28/2010) — Short-term export-credit insurance scheme — Portugal, not yet published.
([96]) In the case of the Short-term export-credit insurance scheme — Portugal (Commission Decision C(2011) 7756 final of 23 November 2011 in case SA.27386 (C 28/2010), recital 93, not yet published), the Commission has developed a method for the calculation of the amount to be recovered (explained in the Annex to that decision) based on reasonable assumptions and on common market practice. Under that method, a theoretical market price of the cover granted by the State is equal to 110 % of the price (in terms of premium rate) charged by the private insurer in the case of each individual client.

SACE, the aid amounts to EUR 156 000. Finally, the Commission notes that the allocation of such a high portion of reinsurance to one single company might have not been in compliance with the company's general principles on reinsurance, i.e. '*the number of participating reinsurers to the treaties shall be such as to ensure an appropriate allocation of risk*' ([97]). For the above reasons the Commission concludes that SACE did not act as a private reinsurer.

(129) As regards the question whether a parent company would have provided such a large share of reinsurance in a situation where its subsidiary would not be able to find on the market enough reinsurance at the proposed price, one has to note that such reinsurance contract increases the exposure of the parent company towards the operations of the subsidiary. In the present case, SACE was in 2009 in a situation where it needed a large recapitalisation and reinsurance. The decision to grant this measure should therefore be analysed in parallel with the granting of the third and fourth measures. Indeed, the second, third and fourth measures were all contemplated by SACE's Board of Directors already on 26 May 2009 ([98]) in order to support SACE BT ([99]). As it will be concluded in the assessment of those measures, a private investor would not have proceeded with these recapitalisations but would have let the company go bankrupt. It has therefore to be concluded that a private parent company would not have proceeded with providing the second measure, which increases even more the exposure of the parent company to its subsidiary.

(130) Finally, as regards the question whether the reinsurance provided an advantage to SACE BT, as acknowledged by SACE (see recital 70), the measure allowed SACE BT to increase its credit insurance provision capacity and hence allowed it to subscribe more contracts than it would have been able to do otherwise. Alternatively, without this measure SACE BT would have had to support these risks on its balance sheet/putting its own capital more at risk or offer a higher premium to obtain that reinsurance, at least 10 % higher (see recital 128). Therefore, the measure allowed SACE BT to obtain reinsurance at a lower price, reinsurance which allowed it to subscribe more insurance than what it could have done without SACE's reinsurance or to bear less of risks on its own account.

(131) The Commission concludes that the second measure provided an advantage to SACE BT corresponding to the difference between the fee actually paid by SACE BT and that, at least 10 % higher, that a private reinsurer would have requested taking into consideration the higher level of risk assumed.

V.1.1.4. Presence of an advantage in the third and fourth measures

(132) In recital 107 of the opening decision, the Commission expressed its doubts on the possibility that a private economic operator would have invested the amount currently assessed in SACE BT. As acknowledged by the Italian authorities, the third and the fourth measures cover the needs of capital of SACE BT in order to cope with the effects of the financial crisis ([100]). In the document for discussion (*materiale per discussione*) in the SACE BT's Board of Directors of 31 March 2009 it is provided that SACE BT '*needs a recapitalisation (ricapitalizzazione) of up to EUR 70 million in order to constitute adequate assets to cover the reserves at the end of 2009*' ([101]). The same document provides that already at the end of the first semester of 2009 the assets were insufficient to cover the reserves, i.e. an amount of EUR 23 million was needed at the end of June 2009 and EUR 68 million at the end of 2009. The opening decision indicates that it seems that SACE BT was not in a position to cover the losses registered at the end of 2008 and its assets at the time were not sufficient to cover reserves. It seems that SACE BT could not have raised the capital injected into the company on the market since its expected profitability was insufficient. There is no evidence that SACE BT had a positive value at that time.

(133) In recital 108 of the opening decision, the Commission invited Italy to comment, whether the third measure was necessary to allow SACE BT to continue operating and, if so, what would be the estimated costs that could be incurred by SACE, if it were to sell or to liquidate SACE BT. The Commission noted that a parent company would have recapitalised its subsidiary, but only if there is a reasonable likelihood that the assisted undertaking will become profitable again ([102]). A market economy investor would not have injected additional capital into SACE BT, if in economic terms this was more costly than to liquidate the respective assets (e.g. by selling the respective investment).

([97]) […].
([98]) At that time, the parent company, SACE, was already aware of the significant losses that SACE BT had registered in the first quarter of 2009.
([99]) See Annex No 1 — Minutes of the meeting of SACE's Board of Directors of 26 May 2009 (Verbale della riunione del CdA di SACE S.p.A., 26 maggio 2009), p. 4, submission of Italy, 5 March 2012.
([100]) See submission of Italy by letter dated 8 June 2010, p. 2.
([101]) See submission of Italy by letter dated 8 June 2010, Annex 7, p. 29.
([102]) See CFI, T-129/95, T-2/96 and T-97/96, [1999] ECR II-00017 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH* v *Commission*, paragraph 116.

(134) In recitals 111 and 117 of the opening decision, the Commission raised doubts on the compliance of the third and fourth measures with the MEIP. The Commission further provided that the two measures seemed to have conferred an advantage to SACE BT.

(135) The opening decision (recital 109) indicates that the plan available at the time of the investment plays a central role. The plan has a key significance because a private investor will provide fresh capital to a company with an earnings deficit only if he expects a return to a sufficient profitability level. Otherwise, the invested capital would only go towards repayment of the company's existing debt, without ensuring that it will begin to earn a profit again in the future ([103]). Without a compelling 'restructuring' plan, a rational private investor would not invest ([104]).

(136) The Commission noted that in the business plan for the period 2010-2011 SACE BT envisaged mainly measures to increase the market share and the expansion of the activity rather than measures to return to profitability, e.g. to cut costs and restructure the business model. SACE BT expected to increase its market share in the credit insurance and surety business market up to a target level of 15 % in 2011 and to become the second market player in the credit insurance by 2011. For 2009, SACE BT estimated that it would rank third or fourth in the credit insurance and surety business market. As for SACE BT's distribution network, the plan provides, inter alia, the assessment of possible opportunities for further acquisitions. Moreover, the business plan relies, inter alia, on exogenous factors like the improvement of the economic and market scenario and a progressive opening of the reinsurance market starting with 2011 rather than on internal changes.

(137) The elements submitted by Italy and SACE during the formal investigation procedure have not changed the Commission's initial assessment laid down in the opening decision.

(138) The Commission's position regarding the qualification of the third and the fourth measures as a capital increase ('*aumenti di capitale*') has not changed. Even though according to Italy the operation did not increase the amount of the share capital ('*capitale sociale*'), the Commission notes that it influenced positively the shareholders' equity ('*patrimonio netto*'), being a wider category than the share capital ('*capitale sociale*'), by means of transfer from the parent company SACE to SACE BT's capital ([105]).

(139) According to SACE, the decisions to recapitalise SACE BT were taken in view of the expected return to profitability in 2011.

(140) However, the Commission recalls that, when it granted the third measure, SACE did not dispose of updated financial projections or a business plan taking into account the capital injection and the latest financial data. Therefore, SACE had no basis to expect SACE BT's return to profitability.

(141) The main document considered by SACE when granting the fourth measure consists of the business plan for 2010-2011. The Commission notes that this business plan was a very short document, which merely set out the negative outlook in the market and, with specific regard to SACE BT, only provided few main financial ratios and figures for 2010 and 2011. In particular, the business plan provided data illustrating that the market situation was worsening (the loss ratio was progressively deteriorating, increased by 71,4 % in 2008 as compared to 2007) and the losses amounted to approximately half of the turnover of the sector. In that context, the plan projected a significant improvement in SACE BT's credit insurance ratios so as to reach zero profitability in 2011 (see Table 5). However, it did not detail the changes to the pricing or how the reduction of costs would be achieved to that end.

(142) It has to be emphasised that the business plan for 2010-2011 only included a projection of zero profitability in 2011, while it did not provide any element indicating that the situation would improve after 2011, nor any estimation of future profitability of SACE BT after that date (in fact the possibility that the company would produce profits after 2011 was not even mentioned). Also, the stated objective in the plan was limited to stop generating the losses by the company and to further expand its market presence, without foreseeing any future profit. In that respect, the Commission considers that a prudent market investor would have required a reliable estimation of restoration of future profitability to adequate levels.

([103]) See Commission Decision 96/278/EC (OJ L 104, 27.4.1996, p. 25) — Iberia, paragraph 15 of Part VII.

([104]) See ECJ, C-305/89, ECR 1991, I-1601, paragraph 22 — Italy/Commission ('ALFA Romeo'); Commission Decision 94/662/EC (OJ L 258, 6.10.1994, p. 26), paragraph 21 of Part VII — Air France; and Commission Decision 97/789/EC (OJ L 322, 25.1.1997, p. 44) — Alitalia, paragraph 6 of Part VII.

([105]) As per SACE 2009 Financial Accounts and Annexes 5-7 to notes to the Accounts, the increases in the controlled entity SACE BT amounted to EUR 70 million.

(143) It also appears from the minutes of the Board of Directors of SACE approving the third and fourth measures that it agreed to the capitalisation measures so as to cover the losses and to satisfy the regulatory requirements, thus allowing the company to continue the business. No consideration of the future profitability of the company was provided in those minutes. The Board did not take into consideration a potential liquidation of SACE BT, comparing a liquidation scenario with the chosen path to inject further capital into the company in difficulty. Hence, it did not require nor consider any estimation of liquidation costs and, therefore, was not in a position to conclude that the injection of capital would have led to a better economic outcome than the liquidation of the company.

(144) As a result, the Commission concludes that, when adopting those measures, SACE did not assess whether providing the additional capital was a more economically beneficial scenario for it as a shareholder than the liquidation of the subsidiary. Given the market circumstances and the absence of any profitability forecasts for SACE BT at the time, a prudent private market operator would not have proceeded with the investment without such consideration. For this reason alone, one can therefore conclude that SACE did not behave like a prudent private market operator and, therefore, the capital injections made with the third and fourth measure should be qualified as state aid.

(145) The Commission also adds, for the sake of completeness, that it is not in a position to support SACE's argument that the compliance with the regulatory capital requirements would have been sufficient to a prudent private market investor to inject further capital into a company. As provided in the Commission communication on the application of Articles 92 and 93 of the EEC Treaty ('MEIP Communication') ([106]), investors are often obliged by law to contribute with additional equity to firms whose capital base has been eroded by continuous losses to below a predetermined level. To answer Member States' claims that these capital injections cannot be considered as aid as they are merely fulfilling a legal obligation, the MEIP Communication provides that private investors faced with such a situation would consider all other options — including the liquidation or run-down ([107]) — and choose the one which is financially the most advantageous.

(146) In the present case, the Commission considers that SACE could have let SACE BT go bankrupt, as it was a limited liability company. SACE would not have to cover the liabilities of SACE BT. SACE is correct to argue that other considerations like public image ([108]) may be taken into account by private investors. The Court of Justice ruled in ENI/Lanerossi that a parent company's temporary absorption of losses generated by a subsidiary 'which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization', could be justified not only by the prospect of an indirect material benefit, but also by other considerations, i.e. the protection of public image of the group and the reorientation of its operations ([109]). However, the Court ruled that if there is no prospect of profitability, even in the long-term, then any capital infusions should be viewed as state aid ([110]). Consequently, as upheld by the case-law, the arguments have limited significance in connection with the application of the private investor test in the absence of any prediction, at the time of the capital injections, that SACE BT could produce profits after 2011, not even in the longer term.

(147) In addition, Italy and SACE did not provide any element to show and quantify the negative economic effects that the alleged deterioration of SACE's public image would produce for this company.

(148) The Commission also observes that the insurance activities of SACE are operated under a state guarantee. Consequently, the insured parties know that the state will ensure that they are paid any indemnification they are entitled to under those insurances. So the Commission fails to see why insured customers of SACE would be worried that a subsidiary of SACE which is not state guaranteed and has the form of a liability company is liquidated. Italy and SACE did not provide justification why these activities of SACE operated under the state guarantee would be affected.

([106]) Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307/3 of 13 November 1993.
([107]) See Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty, paragraph 36.
([108]) SACE also quotes the reorientation of business operations as one of the arguments (See Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 36.). However, in practice, following a specific request from the Commission, Italy submits that SACE does not foresee a significant change of SACE BT's business (See SACE — Reply to the request for information, 15 September 2011, p. 13)
([109]) See ENI/Lanerossi judgment, paragraph 21.
([110]) See ENI/Lanerossi judgment, paragraph 22.

(149) Moreover, the Commission considers that, since SACE operates its insurance activities with a state guarantee, they do not constitute market activities which a private operator could carry out (precisely, the guarantee on the insurance activities of SACE does not constitute aid because these activities are considered not to be offered by the market and therefore there is no distortion of competition). The Commission considers that, when assessing whether a private investor in the position of SACE would have let a subsidiary like SACE BT go bankrupt or recapitalise it, one cannot take into account the possible negative effect of the liquidation of SACE BT on these non-market activities carried out by SACE, since a private investor would never be in the position of carrying out such activities.

(150) As indicated, at the time when it took the third and the fourth measure SACE did not compare a liquidation scenario with the chosen path to inject further capital into SACE BT despite its difficulties. For the sake of completeness, in the paragraphs below the Commission will in any event show that, if SACE had made such a comparison, it would have realised that the liquidation of SACE BT would have been more convenient than injecting further 70 million of capital in SACE BT despite its difficulties.

(151) To determine whether SACE, as the only shareholder of SACE BT, was better off investing additional capital of EUR 70 million rather than liquidating SACE BT (running down its activities), one has to compare the expected cash flows, if any, to SACE as a shareholder in the liquidation (running down) scenario with those expected in the capital injection scenario. Based on the information submitted, Italy and SACE have not made at the time (nor *ex post*) the valuation of the equity stake in SACE BT in pre-injection or post-injection scenarios.

(152) The Commission observes that at the end of May 2009 and early July 2009, when the Board of SACE BT decided to grant the third and fourth measures, it was already expected that, on top of the large losses recorded in 2008 (EUR 29,5 million), SACE BT was estimated to generate further significant losses in 2009 (of EUR 53,4 million ([111])), such that the remaining capital at the end of 2009 was expected to amount to EUR 24,2 million. In particular, at the end of first quarter 2009 (1Q2009) SACE BT's book value of equity (taking into account the losses recorded in that period of EUR 22,6 million) was of EUR 55 million and the expected losses for the whole year 2009 were of EUR 53,4 million. Hence, in a pre-injection scenario the expected book value of equity at the end of 2009 would amount to the difference between book value at 1Q2009, EUR 55 million, and the remainder of the expected losses for the year, i.e. EUR 30,8 million (EUR 53,4 million minus EUR 22,6 million), equalling EUR 24,2 million.

(153) In the post-injection scenario, the book value of the equity would be expected to be increased by the amount of the recapitalisations (EUR 70 million) and to amount to EUR 94,2 million.

(154) In that context, it has to be noted that in the liquidation scenario, shareholders are only entitled to the residual proceeds, if any remain after covering all liabilities of the company and all due costs of liquidation. The outcome of the liquidation depends on the value and saleability of the assets of the company.

(155) To make a very conservative assessment, the Commission considers the hypothesis that in the liquidation scenario SACE would not have recovered any of its capital investment in SACE BT.

(156) As a next step, in order to assess the relative attractiveness of the injection of EUR 70 million of capital in SACE BT compared to a liquidation scenario, it has to be assessed what was the value of the company (i.e. market value of a 100 % equity stake in the company) after this EUR 70 million injection.

(157) If the value of the company after the 2009 capital injections was equal or higher than EUR 70 million, then a private investor could have been inclined to proceed with this investment.

(158) Such value of the company depends on the estimation of the present value of future cash flows (cash flow stream) to the shareholder.

(159) In that respect, the Commission recalls that in the business plans and/or projections available at the time there was no expected stream of future profits which could demonstrate that the market value would be close to EUR 70 million. In addition, since the company was not profitable pre-crisis, one could not expect that, once the macroeconomic situation and the financial markets would normalise, the company would automatically return to adequate profitability. The Commission therefore concludes that, based on the absence of expected cash flow stream projected for SACE BT, there was no indication that the market value thereof after the implementation of third and fourth measures could be equal or higher than EUR 70 million. As a result, a prudent private investor would have preferred to let SACE BT go bankrupt (or sell it, if a buyer could be found) instead of proceeding with its recapitalisation. Hence, also this additional analysis shows that SACE, when granting the third and fourth measures, did not behave as a market economy investor.

([111]) *Source:* submission of Italy by letter dated 8 June 2010, Annex 7, p. 28.

(160) As a secondary argument, an investor may have used another indicator to value the company, such as the valuation method of multiplying a price-to-book multiple (P/B), derived from comparable companies the shares of which are traded on stock exchange, by the book value of the company.

(161) To the Commission's knowledge Euler-Hermes is the only European credit insurance company quoted in the stock exchange, and hence its P/B may be observed. It is a company of relatively low risk ([112]), since it proved to overcome the past downturns relatively well, was profitable in 2008 and 1Q2009 and even distributed dividends in 2008. Hence, the value of a higher risk company such as SACE BT would fall below the valuation resulting from applying P/B multiple of Euler-Hermes. P/B of Euler-Hermes at 1Q2009 was of around 0,60 ([113]). Hence, applying this multiple to SACE BT expected book value at the end of 2009 of EUR 94,2 million, the value of the company would amount to EUR 56,52 million, if the risk profiles of the companies were comparable.

(162) However, the Commission notes that SACE BT was not profitable pre-crisis (contrary to its own business plan) and there was no business plan showing the possibility for it to return to profitability. As a result it can be considered a significantly riskier company than Euler-Hermes at the time, and hence the value of the company at the times of granting the measures would have been significantly lower than EUR 56,52 million.

(163) Furthermore, Italy also acknowledged that the market circumstances were such that the market valuation of the insurance companies at the times was highly depressed ([114]).

(164) In conclusion, similarly to the application of a valuation based on future cash flows, the application of the price to book valuation would also lead a private investor to conclude that it is better off with letting its subsidiary go bankrupt instead of investing an additional 70 million in it.

(165) Also as a result of the above analysis, it can therefore be concluded that SACE was worse off after granting the third and the fourth measures than in the liquidation scenario.

(166) The Commission further notes that, as stressed by SACE, several market investors injected further capital into their export credit subsidiary during the crisis. Given the high level of uncertainty and urgency, fully fledged projections may not have been immediately available to these investors at the time of their investments. However, the export credit companies which received recapitalisations from their shareholders had a track record of profitability pre-crisis, such that it was more likely that a return to profitability could be achieved. However, SACE BT had a track record of losses. In front of a subsidiary which was already loss making or just break-even in the years before the crisis (whereas its business plan anticipated a steady increase in profitability), a private investor would be more reluctant to inject a large amount of capital. It would verify whether there is any hope to make that company sufficiently profitable one day. The Commission observes that no financial forecasts showing the way to profitability were made in 2009. A prudent investor would not invest a large amount of additional capital into the company in such circumstances.

(167) SACE argues that SACE BT was still in a start-up phase and thus, it was more difficult for the company to cope with the effects of the financial crisis. First, the Commission observes that the year 2008, when the crisis broke out, was already the fourth year of activity for SACE BT. From the Commission's practice, a company is in principle considered as newly created for the first three years following the start of operations in its relevant field of activity ([115]). Secondly, even if it had been true that SACE BT was still in a start-up phase, it is not clear what effect this would have had on the application of the MEIP. Indeed, a private investor would still compare the expected market value of the company post-recapitalisation (based on its expected profitability) and compared it with the option of letting the company fail or sell it. Italy and SACE did not demonstrate that, because SACE BT would still be in a start-up phase, SACE could expect from it a higher profitability in the future. As indicated in recital 77, the only business plan available at the time just showed a return to break-even accounts in 2011. It did not show a return to profits.

([112]) Its Beta, a measure of riskiness of the company as compared to the overall financial market, was 0,8 in 2000-2004, where 1 would correspond to the overall financial market risk.

([113]) Source for the data used in the calculation: for the book value of equity — http://www.eulerhermes.com/finance/financial-resources/Documents/Financial-results/2009/Q1/Q1-2009-Presentation-analysts.pdf, for share price: http://www.eulerhermes.com/finance/share/share-price.aspx

([114]) In the presentation of its 1Q2009 results dating from 6 May 2009, Euler-Hermes stated that the world was experiencing the deepest trade recession since 50 years and the business insolvencies were on the rise (see p. 5 and 7 of the presentation available at http://www.eulerhermes.com/finance/financial-resources/Documents/Financial-results/2009/Q1/Q1-2009-Presentation-analysts.pdf).

([115]) See Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2, paragraph 12.

(168) The Commission therefore concludes that the third and the fourth measures constitute an advantage to SACE BT, by providing it with capital it could not have found on the market. This capital allowed the company to survive despite the lack of projections indicating that it would produce profits, not even in the long-term.

V.1.2. *Imputability and State resources*

(169) In recitals 73-78 of the opening decision, the Commission applied the 'Stardust Marine' ([116]) indicators to prove the imputability of the measure, taking into consideration that SACE is fully owned by the State. According to settled case-law (see, in particular, the *Stardust Marine* judgment), even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. Consequently, it is necessary to determine whether the public authorities must be regarded as having been involved in any way in the adoption of the measures at stake.

(170) Nonetheless, according to the *Stardust Marine* judgment:

'53. It cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty.

54. Moreover, it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities.

55. For those reasons, it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken.'

(171) Subsequently, the Court has indicated the following indicators allowing to infer the imputability to the State of a measure taken by a public undertaking: (i) the fact that the undertaking in question could not take the contested decision without taking account of the requirements of the public authorities; (ii) the fact that, apart from factors of an organic nature which linked the public undertakings to the State, a public undertaking, through the intermediary of which aid had been granted, had to take account of directives issued by a central government body, i.e. Comitato Interministeriale per la Programmazione Economica (CIPE); (iii) integration of the public undertaking to the structures of the public administration of the State; (iv) the nature of the undertaking's activities and whether such activities are exercised out on the market in normal conditions of competition with private operators; (v) the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law); (vi) the intensity of the supervision exercised by the public authorities over the management of the undertaking, or (vii) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or *the unlikelihood of their not being involved, having regard also to the compass of the measure*, its content or the conditions which it contains.

(172) The Commission further concluded in recital 79 of the opening decision that it was highly unlikely that the measures under investigation had been adopted without any State involvement.

(173) In reply to the opening decision, Italy and SACE maintain that none of the four measures is imputable to the State as the decisions were taken by SACE acting in complete independence from the State. Italy provided additional factual elements and justification arguing that the measures are not imputable to the State.

(174) To assess the case-law invoked by Italy, it has to be noted that in the **Olympic Airways** case, the Commission decision mentioned the 'Stardust Marine' criteria but did not really apply them. The Court observed that in fact the Commission simply assumed the measure was attributable to the Greek State, without mentioning any reasons which might support its assumption ([117]). The Court therefore found the Commission's reasoning insufficient to establish imputability to the case, not that the measure was in itself not imputable.

([116]) *Stardust Marine* Judgement of 16 May 2002 in case C-482/99 [ECR I] p 4397.
([117]) CFI, T-68/03, ECR 2007, II-2911 — *Olympic Airways/Commission*, paragraph 312-319.

(175) As regards the SIC-RTP judgment ([118]), evoked by the Italian authorities, the Commission notes that in that judgment the CFI confirmed the Commission's assessment that certain contested decisions of the formerly State owned company Portugal Telecom (consisting in the acceptance of late payments of the network fee by the public broadcaster RTP) were not imputable to the State. However, the CFI judgment was based on the specific circumstances of that case. In particular, in the SIC-RTP case the CFI noted — inter alia — that the applicant did not contest the Commission's assessment that the payment facilities were mainly caused by a dispute between RTP and Portugal Telecom as to the level of the network fee ([119]). Moreover, the CFI noted that the Commission had found, without being contested by the applicant, that Portugal Telecom's behaviour did not change after its privatisation ([120]). It is therefore clear that the CFI assessment concerned a particular situation which was very different from that of the present decision.

(176) The Commission found further evidence on the imputability of the measures in the additional documents submitted by Italy and SACE. Similar to the opening decision, the 'Stardust Marine' indicators are applied in the present decision in order to prove the imputability of the second, third and fourth measures.

(177) Even though SACE is not integrated in the public administration and does not exercise official authority, the Commission considers that the following general indicators demonstrate imputability of measures granted by SACE to the State ([121]):

(a) All members of SACE's Board of Directors ('Consiglio di Amministrazione') are nominated on a proposal of the Italian State, according to Article 6(2) of Legislative Decree No 269/2003 ([122]).

(b) SACE does not exercise its activities 'on the market in normal conditions of competition with private operators':

(i) The mission of SACE in 2004 was (and, to this day, continues to be) to maintain and promote the competitiveness of the Italian economy and it essentially covers non-marketable risks within the meaning of the Export-credit Communication (i.e. it operated in the field, which is not considered to be subject to normal conditions of market competition).

(ii) The activity of SACE has always benefited of a State guarantee, unlike allowed under the state aid rules for other public undertakings operating in competition with private market operators.

(iii) The financial statements of SACE are subject to the control of the Court of Auditors and the Ministry of Economy and Finance has to present annual reports to the Italian Parliament as regards its activity.

(iv) Regarding the influence of the State on the allocation of SACE's resources, the CIPE has to deliberate every year not later than on 30 June on the financial projections as well as financial needs related to certain risks and to define global limits for the non-marketable risks to be assumed by SACE, distinctly for the guarantees of the duration inferior and superior than 24 months ([123]).

(c) The Statutes of SACE BT provide that besides the legal provisions regularly applying to private insurance companies, SACE BT is also subject to the provision of a law ([124]) stating that in case a new legal entity is created to provide cover for marketable risks, SACE should hold not less than 30 % of its capital. It would thus appear that even after the constitution of SACE BT the continuous support to it (second, third and fourth measures) was influenced by the Italian State to the extent that the above mentioned legislative provision excluded that such risks be run down and/or sold in their entirety to a market operator ([125]).

([118]) Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161.
([119]) Point 110.
([120]) Point 105.
([121]) See paragraphs 52, 54, 55 and 56 of the *Stardust Marine* judgment.
([122]) See also Article 13(2) of the SACE's Statutes available at: http://www.sace.it/GruppoSACE/export/sites/default/download/normativa/nuovo_statuto.pdf
([123]) See *Stardust Marine* judgment of 16 May 2002 in case C-482/99 [ECR I] p. 4397, paragraph 55 quoting Case C-303/88, *Italian Republic* v *Commission*, [1991] ECR I-01433, paragraph 11 and 12 and Case C-305/89, *Italian Republic* v *Commission*, [1991] ECR I-01603, paragraphs 13 and 14.
([124]) Article 6.12 of the Decree Law n. 269 of 30 September 2003 as converted with the modifications to the Law n. 326 of 24 November 2003.
([125]) In that context, it is to be noted that when considering the first measure, the Ministry of Economy and Finance had been consulted on the amount of social capital of SACE BT. See Annex 2 — Minutes of the meeting of SACE's Board of Directors ('Consiglio di Amministrazione') of 28 April 2004 (Verbale della Riunione del Consiglio di Amministrazione di SACE S.p.A., 28 aprile 2004), to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision, p. 74-75: '… as regards the amount of social capital of SACE 2 [the temporary name of the new company to be created, the subsequent SACE BT], after hearing the Ministry of Economy and Finance, this was preliminary quantified to EUR 100 million' ('… riguardo all'ammontare del capitale sociale di Sace 2, sentito il Ministero dell'Economia e delle Finanze, esso e stato preliminarmente quantificato in 100 milioni di euro'.)

(178) In addition to the general indicators provided in recital 177, other indicators specific to the conditions of granting the second, third and fourth measures can be identified:

(a) Two of the four members ('Consiglieri') of the Board of Directors of SACE ('Consiglio di Amministrazione') had management positions in the Italian administration ([126]), i.e. the former Ministry of Foreign Trade (the current Ministry for Economic Development) and the Ministry of Foreign Affairs, at the time when the second, third and fourth measures were granted. From this position, the member of SACE's Board of Directors, also having a management position in the Ministry of Foreign Affairs (Minister Plenipotentiary, Director-General for Multilateral Economic and Financial Cooperation, Italian Ministry of Foreign Affairs), stated in SACE's meeting of the Board of Directors of 1 April 2009 that a decrease of the insurance capacity should not occur, 'nor in the non-marketable sector, nor for the marketable risks' ([127]). Moreover, the member of SACE's Board of Directors, also having a management position in the Ministry of Foreign Trade (the current Ministry for Economic Development — Director of the General Division for the internationalisation policy of the Ministry for Foreign Trade), stated in the same meeting of SACE's Board of Directors of 1 April 2009 that 'the support provided to the system [of Italian enterprises] by the businesses carried out by SACE is not always clearly perceived externally, which coincides, also, with the importance of supporting SACE BT, also through its recapitalisation' ([128]).

(b) The role of the parent company, SACE, and the other companies of the group, thus includingSACE BT, was recognised as an important one in the recovery of the Italian economy. In its meeting of 1 April 2009, SACE's Board of Directors recognised the importance of supporting SACE BT, whereby SACE Group fulfils its institutional function of sustaining the Italian companies ([129]). This position was repeated in the press release of 1 April 2009 on the publication of the consolidated results of SACE Group ([130]) where it was stated that: 'The Board of Directors stressed the SACE Group's role in supporting the Italian economy. This role is of particular strategic importance in the current economic and financial situation, which is not merely a typical business cycle downturn. The Board is confident that SACE's financial measures and expertise can make a major contribution to the recovery of the Italian economy'. Such statements confirm the above-stated conclusion that the nature of SACE's activities is not purely profit oriented and on normal conditions of market competition ([131]). In this way, SACE distinguishes from other State owned companies which have purely commercial objectives, such as to solely generate the return on equity and distribute the generated profits through dividends. This reinforces the conclusion that SACE has been used by the State as an instrument to discharge its main mission of promoting economic development of the country. Similarly, from the minutes of SACE's Board of Directors of 26 May 2009, when the Board stated its intentions to support SACE BT through the second, third and fourth measure, it appears that such support was motivated also by SACE BT's role of contributing to the development of Italian enterprises ([132]). Furthermore, it appears that the measures taken during the financial crisis in support of SACE BT may also relate to the group's role in supporting the recovery of the Italian economy.

([126]) In 2004, when SACE became a joint-stock company and the first measure was granted, most of the members of the Board of Directors ('Consiglio di Amministrazione') of SACE maintained their position in the Italian administration, i.e. the Ministry of Economy and Finance, Ministry of Foreign Affairs or other public institutions (Institute of Industrial Promotion — Istituto per la Promozione Industriale, the Communication Regulatory Authority — Autorità per le garanzie nelle comunicazioni and the Italian Institute for Foreign Trade — Istituto nazionale per il Commercio Estero). In particular, the president of the Board of Directors of SACE at the time also preserved his management position within the Ministry of Economy and Finance. The field of responsibility concerned international financial relations.

([127]) See Annex No 8 — Minutes of the meeting of SACE's Board of Directors of 1 April 2009 (Verbale della riunione del CdA di SACE S.p.A., 1 aprile 2009), p. 8, submission of Italy, 5 March 2012:
'… (iii) sull'opportunità che, in tale ottica, non vi sia una diminuzione di volume tanto sul versante assicurativo "non a mercato" quanto sel versante dell'assicurazione dei rischi a mercato'.

([128]) See Annex No 8 — Minutes of the meeting of SACE's Board of Directors of 1 April 2009 (Verbale della riunione del CdA di SACE S.p.A., 1 aprile 2009), p. 9, submission of Italy, 5 March 2012:
'… l'attività di support al sistema delle imprese svolta dalla SACE non sempre viene chiaramente percepita all'esterno, concordando, altresì, sull'importanza del percorso di sostegno a SACE BT, anche mediante la ricapitalizzazione della stessa'.

([129]) See Annex No 8 — Minutes of the meeting of SACE's Board of Directors of 1 April 2009 (Verbale della riunione del CdA di SACE S.p.A., 1 aprile 2009), p. 8, submission of Italy, 5 March 2012:
'… (ii) l'importanza del percorso di sostegno a SACE BT, mediante il quale il Gruppo SACE adempie alla propria funzione istituzionale di supporto al sistema delle imprese italiane'.

([130]) See p. 1 of the press release available at: http://www.sace.it/GruppoSACE/export/sites/default/download/comunicati/2009/20090401_-_Comunicato_Bilancio_2008_Gruppo_SACE_e_controllate_-_final__11_.pdf

([131]) SACE was a public body subject to public law and became a limited company on 1 January 2004, i.e. only shortly before SACE BT was created and the first measure was granted. Further, the fact that SACE BT was created with a capital of EUR 105,8 million shortly after the change of legal status of SACE seems to indicate that the State's decision to reorganise SACE in 2004 included the creation of SACE BT.

([132]) See Annex No 1 — Minutes of the meeting of SACE's Board of Directors of 26 May 2009 (Verbale della riunione del CdA di SACE S.p.A., 26 maggio 2009), p. 3-4, submission of Italy, 5 March 2012:
'[…]'.

(c) There are sufficient elements to claim that the mission of SACE BT goes beyond the goals of a private economic operator. Such mission was also recognised in the minutes of the meeting of SACE BT's Board of Directors ('Consiglio di Amministrazione') of 27 May 2009 as regards the discussions on the revised budget of SACE BT for 2009, where a recapitalisation of EUR 70 million was needed in order to comply with the solvability requirements: '[…]' ([133]) ([134]).

(179) As regards the second measure, SACE's Risk Management division, in a note dated 19 March 2009 ([135]) (which had as objective to verify if the estimated profitability of SACE resulting from the reinsurance contract was in line with the risks taken), gave a favourable opinion to SACE's management regarding the company's participation in the reinsurance contract. In its meeting of 1 April 2009, SACE's Board of Directors approved the participation of SACE into SACE BT's Excess Loss contract for the amount not covered by the market reinsurers and up to a potential loss of EUR 48 million, in the same conditions like the ones accepted by the private reinsurers. This measure in favour of SACE BT would help the company in maintaining its insurance capacity, in particular for small and medium-sized enterprises ([136]).

(180) In conclusion, the assessment provided by the Commission in recitals 177, 178 and 179 demonstrates that SACE is strictly linked to the Italian public authorities and it is used to implement tasks in economic matters that traditionally fall within the responsibility of the former. Considering also the economic and policy significance of the measures at stake and the persistent tight links between the State and SACE, the Commission considers that there are enough elements to consider the second measure, the third measure and the fourth measure as imputable to the State.

V.1.3. *Selectivity*

(181) As regards the **second measure**, the Commission takes note that Italy submitted that SACE had the possibility to conclude reinsurance and co-insurance contracts with other private insurers than SACE BT, according to SACE's by-laws ([137]). However, despite that provision, Italy did not demonstrate that SACE could have offered reinsurance to all private insurers under the same conditions. In any event, it has been demonstrated that it concluded a reinsurance contract only with SACE BT and at terms that did not correspond to market conditions. There is therefore no doubt that this specific measure concerning SACE BT is selective

(182) As regards the **third measure**, the operation envisaged only one company, SACE BT. Consequently, the measure is selective.

(183) As regards the **fourth measure**, the operation envisaged only one company, SACE BT. Consequently, the measure is selective.

V.1.4. *Distortion of competition*

(184) As regards the **second measure**, it allowed SACE BT to subscribe more insurance than what it could have done without SACE's reinsurance or to bear less of risks on its own account. The Commission therefore concludes that the second measure distorted competition ([138]).

([133]) Minutes of the meeting of SACE BT's Board of Directors ('Consiglio di Amministrazione') of 27 May 2009 (Verbale della Riunione del Consiglio di Administrazione di SACE BT S.p.A., 27 maggio 2009), submitted on 9 June 2010, p. 5: 'nella valutazione dei risultati della Società e del *revised budget* deve considerarsi la *mission* di sostegno al mercato che SACE BT deve continuare a perseguire'.

([134]) Furthermore, it is noted that in 2009, when approving the transfer of life insurance from SACE BT to Vittoria Assicurazioni S.p.A., the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato) presented SACE BT as '[…] a company indirectly controlled by the Ministry of Economy and Finance […]'. See Bollettino n. 15 del 4 maggio 2009, p. 7, C10007 — Vittoria Assicurazioni/Ramo di Azienda di SACE BT, Provvedimento n. 19768, available online at: http://www.agcm.it/trasp-statistiche/doc_download/868-15-09.html

([135]) See Annex No 16 — 'Memo Risk Managament SACE S.p.a., 19 March 2009', to the Comments of SACE submitted on 5 May 2011 in reply to the opening decision. The note was based on the report drafted by the insurance broker […], dated 14 November 2008: 'Analisi pro Rinnovo 2009 — Portafoglio Marketable'. The report includes a detailed analysis of the technical trend of the company, and especially the impact that the current reinsurance contracts (the ones at the end of 2008) have had on the results and the present and future capital requirements ('*requisiti patrimoniali*').

([136]) See Annex No 5 — Minutes of the meeting of SACE's Board of Directors of 1 April 2009 (Verbale della riunione del CdA di SACE S.p.A., 1 aprile 2009), p. 3, submission of Italy, 5 March 2012:
'… una dotazione riassicurativa da parte di SACE S.p.A. in favore della controllata SACE BT, al fine di consentirle un mantenimento della propria capacità di affidamento, in particolare nel segmento delle piccole medie imprese.
Il Consiglio di Amministrazione approva la partecipazione della società al Tratatto Excess Loss a copertura delle quote non accettate da riassicuratori di mercato e fino ad una massima perdita potenziale di EUR 48 mln. Le condizioni economiche praticate dovranno essere a mercato e pari a quelle accettate dai riassicuratori privati'.

([137]) Article 4(6) of SACE's Statutes provides that: 'The company may conclude reinsurance and co-insurance contracts with authorised Italian entities or firms, with foreign entities or companies or international organizations, as well as enter into contracts to cover insurable risks, at market conditions, with leading operators on the market' ('La Società può concludere accordi di riassicurazione e coassicurazione con enti o imprese italiani autorizzati, con enti o imprese esteri o con organismi internazionali, nonché stipulare contratti di copertura del rischio assicurativo, a condizioni di mercato, con primari operatori del settore').

([138]) See also points 3 and 2.1 of the Export-credit Communication.

(185) Regarding the **third and the fourth measures**, point 3.2 of the Export-credit Communication states that the provision of capital by the State granted to certain enterprises which involve State aid if the latter did not act as a private investor in a market economy, distorts competition ([139]). The Commission has serious doubts whether SACE BT's activity could have continued under normal conditions without the measures taken by SACE. It is likely that without that capital SACE BT could not have fulfilled its regulatory capital requirements and would have been insolvent. At the very least, without the State capital injection, SACE BT would have had to write much less new insurance. It would have had to severely reduce its market presence. However, as illustrated in Table 6, it significantly expanded its market presence. Thus also the third and fourth measures distorted competition.

V.1.5. *Effect on trade*

(186) The export credit insurance market and other insurance services in which SACE BT is active are open to trade between Member States and many operators from different Member States are active in the Union. In Italy, SACE BT is in competition with subsidiaries of foreign firms (see Table 6).

Table 6

SACE BT's position in the Italian credit insurance and surety business market (%)

		2006	2007	2008	2009	2010
1.	Gruppo Allianz	27,3	27,1	25,5	23,3	20,8
2.	Coface Assicurazioni	14,2	13,7	13,5	13,7	15,9
3.	Atradius	13,4	12,6	11,0	8,8	7,7
4.	Gruppo Fondiaria-SAI	8,5	8,8	9,1	9,3	9,7
5.	Gruppo Generali (*)	10,3	8,6	8,4	9,0	8,8
6.	**Gruppo SACE BT**	**4,7**	**6,4**	**8,2**	**9,0**	**8,6**
7.	Gruppo Unipol (UGF)	4,4	4,4	4,4	4,3	4,3
8.	Gruppo Reale Mutua	4,4	4,3	4,3	3,9	4,3
9.	Gruppo Zurich Italia (*)	3,1	2,7	3,1	2,9	2,7
10.	Others	9,6	11,3	12,5	15,7	17,2

(*) The information available refers only to the surety business (i dati riportati sono relativi solo at ramo cauzioni)

Source: Business Plan 2010-2011, approved by SACE BT's Board of Directors of SACE BT on 4 August 2009 and the Adjusted Business Plan 2011-2013, approved by SACE BT's Board of Directors on 24 November 2011.

(187) As a consequence, and in line with point 3.2 of the Export-credit Communication, any advantage provided to the company has an effect on trade.

V.1.6. *Application of the Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid ('de minimis aid Regulation')* ([140])

(188) Regulation (EC) No 1998/2006 defines a threshold under which aid measures are deemed not to meet all the criteria of Article 107(1) of the Treaty and therefore do not fall under the notification procedure provided for in Article 108(3) of the Treaty. In light of the amounts of aid granted to SACE BT, the threshold of EUR 200 000 provided in *de minimis* Regulation would not be exceeded only for the second measure. In recital 128 the Commission has calculated that the aid in the second measure amounts to EUR 156 000.

([139]) '3.2. The types of treatment listed in paragraph 3.1 [inter alia the provisions of capital] give, or may give, the export-credit insurers that receive them a financial advantage over other export-credit insurers. Such financial advantages granted to certain enterprises distort competition and constitute State aid within the meaning of Article 92(1) of the Treaty.
[…]
The financial advantages listed in paragraph 3.1 in respect of marketable risks […] lead to variations in the insurance cover available for marketable risks in different Member States, thereby distorting competition between companies in Member States' (the Commission's highlight).

([140]) OJ L 379, 28.12.2006, p. 5.

(189) However, Italy did not invoke Regulation (EC) No 1998/2006 and did not prove that, at the time of granting the second measure, SACE BT met the conditions specified in that regulation.

(190) Moreover, Regulation (EC) No 1998/2006 does not apply to undertakings in difficulty. In this respect, Italy did not consider SACE BT as an undertaking in difficulty in line with the Rescuing and Restructuring Guidelines ([141]). However, Italy has not provided enough evidence to support this position. As provided in the Rescuing and Restructuring Guidelines, increasing losses, excess capacity and falling or nil net asset value are among the usual signs of a firm being in difficulty. SACE BT registered significant losses both in 2008 (around EUR 29,5 million) and in 2009 (around EUR 34 million) which triggered the intervention of its shareholder with a significant recapitalisation. Moreover, as submitted by Italy, already at the end of the first semester of 2009 the assets were insufficient to cover the reserves, i.e. an amount of EUR 23 million was needed at the end of June 2009 and EUR 68 million at the end of 2009 ([142]).

(191) Secondly, even if SACE BT were to be eligible for the *de minimis* aid, prior to granting such aid, Italy should have obtained a declaration from SACE BT about any other *de minimis* aid received during the previous two fiscal years and the current fiscal year ([143]). In addition, if Italy had intended to grant *de minimis* aid to SACE BT, it should have informed SACE BT in writing of the prospective amount of aid (expressed as gross grant equivalent) and of its *de minimis* character. Italy has not provided the Commission with such documents.

(192) Considering all the above, the Commission cannot consider the second measure as *de minimis* aid.

V.1.7. *Conclusion on the existence of State aid*

(193) In view of the above, the Commission concludes that the second, third and fourth measures constitute State aid.

V. 2. QUALIFICATION AS NEW AID OR EXISTING AID

(194) The Commission considers that the second, third and fourth measures cannot be considered being granted before the acceptance of the Export-credit Communication by Italy and, hence, must be qualified as new aid.

(195) More specifically, Italy accepted the recommendations of the Export-credit Communication of 1997 at the latest on 14 September 2001 when it accepted the version of the Export-credit Communication of 2001 (see recital 5 of the opening decision). As the second, third and fourth measures have been granted after that date, those measures are qualified as new aid.

(196) Therefore, they are considered as unlawful aid, since Italy has not notified them to the Commission before their implementation in 2009.

V. 3. COMPATIBILITY OF THE POTENTIAL AID WITH THE INTERNAL MARKET

(197) As it was found in the above section that the second, third and fourth measure constitute State aid within the meaning of Article 107(1) of the Treaty, their compatibility with the internal market should be assessed.

V.3.1. *Legal basis for the assessment of compatibility*

(198) As Italy and SACE considered the measures not to constitute aid, they did not provide reasoning and evidence on how the measures would meet compatibility conditions. As stated in recital 81, SACE invoked the Recapitalisation Communication and the Restructuring Communication ([144]) as possible compatibility grounds for the third and fourth measures. However, neither Italy, nor SACE substantiated their arguments that the conditions of those Communications would be fulfilled.

([141]) See Opening decision, recital 137.
([142]) See submission of Italy by letter dated 8 June 2010, Annex 7, p. 29.
([143]) See Rescuing and Restructuring Guidelines, Article 3(1).
([144]) Communication from the Commission — Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2).

(199) The Commission recalls that, according to points 3.2 and 4.1 of the Export-credit Communication, the exemptions provided for in Article 107(2) and (3) of the Treaty to the prohibition laid down in Article 107(1) do not apply to marketable risks ('State aid […] enjoyed by public supported export-credit insurers for the marketable risks […] may distort competition and would therefore be ineligible for exemption under the State aid rules of the Treaty'). Therefore no grounds for compatibility can normally be found for aid in support of credit insurers operating in the area of marketable risks.

(200) Nevertheless, the Commission will demonstrate that the three aid measures would in any event not meet any of the conditions to be found compatible under Article 107(3) of the Treaty.

V.3.2. *Compatibility under the Community Guidelines on State aid for rescuing and restructuring undertakings in difficulty ('the Rescue and Restructuring Guidelines')* ([145])

(201) The Rescue and Restructuring Guidelines define rescue aid as a short-term aid, granted in principle for a period of no longer than six months to give the beneficiary the necessary breathing space to develop a detailed restructuring or liquidation plan. By its nature, rescue aid is temporary and reversible. Rescue aid consists usually of loan guarantees or loans granted to an ailing firm while its future is being assessed.

(202) As regards the possibility to find the second measure compatible as rescue aid, the Commission notes that the second measure does not present the characteristics of a liquidity support nor had as primary objective to keep SACE BT afloat. Therefore, the second measure cannot be qualified as rescue aid. As regards the third and fourth measures, they cannot be qualified as rescue aid since they are a permanent and irreversible capital injection.

(203) Under the Rescue and Restructuring Guidelines, the beneficiaries of restructuring aid:

(a) have to show that they can achieve long-term viability without State aid within a reasonable period of time;

(b) need to demonstrate that they would contribute at least 50 % of the costs of restructuring for large firms (or less in the case of small or medium-sized enterprises) from their own resources.

(c) have to provide measures to address the distortions of competition caused by the aid, in particular through capacity reductions and through divestments going beyond those required to restore viability.

(204) However, the Commission notes that the second, third and fourth aid measures do not fulfil such conditions to be found compatible as restructuring aid under the Rescue and Restructuring Guidelines. It observes for instance the following problems:

(a) Firstly, the business plan of 2009 for 2010-2011 does not demonstrate that it would lead to long-term market-conform profitability of SACE BT (see sections V.1.1.3, V.1.1.4 and V.3.4 assessment);

(b) Second, there was no measure to limit distortion of competition. On the contrary, according to Italy, SACE BT planned to dramatically increase its market presence up to […] % market share in 2011 in the credit insurance and surety business market and to become the […] market player in the credit insurance by 2011.

V.3.3. *Compatibility under the Export-credit Communication and the Temporary Framework*

(205) As the second, third and fourth measures have been unlawfully granted in 2009, in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([146]), the Commission is assessing their compatibility according to the provisions of the Export-credit Communication applicable at that time (i.e. the 1997 Export-credit Communication, subsequently amended and prolonged in 2001 ([147]), 2004 ([148]) and 2005 ([149])) ([150]).

([145]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).
([146]) OJ C 119, 22.5.2002, p. 22.
([147]) OJ C 217, 2.8.2001, p. 2.
([148]) OJ C 307, 11.12.2004, p. 12.
([149]) OJ C 325, 22.12.2005, p. 22.
([150]) After being amended again in 2010 (OJ C 329, 7.12.2010, p. 6), after the adoption of the measures in question, this Export-credit Communication has recently been replaced by a new Communication on short-term export-credit insurance (OJ C 392, 19.12.2012, p. 1), which applies only as from the 1 January 2013 ('the new Export-credit Communication'). In any event, the Commission notes, for the sake of completeness, that its assessment as explained in the paragraphs below would not change following the provisions of the new Export-credit Communication.

(206) Under point 4(2) of the Export-credit Communication, the Member States were requested to amend their export-credit insurance systems for marketable risks in such a way that the granting of certain types of State aid to public or publicly supported export-credit insurers in respect of such risks is ended within one year of the publication of this Communication. Among the prohibited measures mentioned in point 4(2)(d) of the Export-credit Communication is *'award of aid or provisions of capital or other forms of finance in circumstances in which a private investor acting under normal market conditions would not invest in the company or on terms a private investor would not accept'*. Therefore, the third and the fourth measures, consisting in recapitalisation, are not compatible under the Export-credit Communication. As the Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis ([151]), applicable at the time when the measures were granted, does not cover the public provisions of capital, the third and the fourth measures cannot be found compatible under that legislative framework.

(207) As regards the **second measure**, in recital 142 of the opening decision, the Commission expressed its doubts on the compatibility of that measure with the Export-credit Communication and the Temporary Framework.

(208) The escape clause provided in the Export-credit Communication (reiterated in the Temporary Framework) aims at addressing temporary lack of insurance coverage available to exporters. It thus allows for the State supported insurance or reinsurance to be provided in line with the State aid rules during the crisis subject to the following: a Member State should demonstrate the lack of coverage in the market for the provision of short-term export-credit insurance to the exporters by providing sufficient evidence of the unavailability of cover for the risk in the private insurance market, the scheme is open to all operators and the State charges a price in line with the one that would be charged by private operators for the risks covered (in case practice this provision was interpreted that the State by covering residual risk should apply a higher fee).

(209) First, in order for Italy to comply with the escape clause, the Commission provided that Italy should submit the respective evidence. However, Italy decided not to make use of the escape clause. SACE replied that it did not find relevant the request of the Commission to submit information that might prove lack of coverage on the market for exporters.

(210) Second, Italy and SACE repeated their position that the provision of reinsurance by SACE was open to all market operators, as stipulated in the by-laws of SACE. In this case, SACE intervened by providing reinsurance coverage in favour of SACE BT, an insurer, and allegedly available to other private insurers. However, we have no evidence that there was lack of coverage in the market for the provision of short-term export-credit insurance to the exporters. As the limited availability of cover would seem to have affected also other operators in the market, the Commission does not have evidence whether other operators than SACE BT had also difficulties to obtain reinsurance cover on the market and, if so, whether they could obtain reinsurance cover from SACE under the same conditions as well. In practice, none of the operators requested this. Without this information, the Commission cannot conclude that the measure is proportional to the objective, i.e. to remedy the serious disturbance in the economy of Italy. It has to be therefore concluded that, instead of applying a measure opened to all operators, Italy implemented a selective measure in favour of one operator, SACE BT.

(211) Third, as regards the premium charged, as indicated previously, SACE did not charge a higher price but a price equal to the private reinsurers, whilst it assumed a higher risk (because residual and much larger) that the market participants were not ready to insure, given the situation on the market and SACE BT's financial situation.

(212) Finally, the Commission observes that the aid amount calculated for the second measure, i.e. EUR 156 000, cannot be declared compatible with the internal market on the basis of the conditions provided in point 4.2.2 of the Temporary Framework because the second measure was not granted in the form of a scheme and because there was no declaration on *de minimis* aid.

(213) In conclusion, the aid as it was granted under the second measure is not in line with the provisions of the Export-credit Communication and the Temporary Framework.

([151]) OJ C 16, 22.1.2009, p. 1.

V.3.4. *Compatibility under the Recapitalisation Communication and the Restructuring Communication*

(214) In recital 144 of the opening decision, the Commission raised doubts on the compatibility of the third and fourth measures with the Recapitalisation Communication and the Restructuring Communication for the financial sector during the crisis. As the second measure was also granted during the financial crisis, the Commission will also assess its compatibility under this legal framework.

(215) As following Italy's and SACE's comments to the opening decision the Commission found the submitted information still insufficient to allow for a complete assessment of the measures as potential restructuring aid, in February 2012 the Commission offered Italy the possibility to provide additional elements on potential compatibility ground, by submitting a fully-fledged restructuring plan, in line with the Restructuring Communication. The Commission's letter set out the main elements that the restructuring plan should include with references to the relevant points of the Restructuring Communication.

(216) The Commission found that the documents submitted by Italy included only a compilation of internal documents of SACE which aimed at reiterating Italy's position that the three measures implemented in 2009 are not imputable to the State and comply with the MEIP.

(217) The Commission notes that, at the time the three measures were granted, Italy did not envisage the possibility to submit a restructuring plan to the Commission according to the requirements of the Restructuring Communication. Italy argues that such restructuring measures were not either requested by the national supervisory authority, ISVAP.

(218) According to point 10 of the Restructuring Communication, the restructuring plan should identify the difficulties and weaknesses of the aid recipient and outline how the proposed restructuring measures remedy the beneficiary's problems. In this respect, Italy argues that SACE BT's crisis was not caused by internal processes, changes in demand or other factors that would impose a deep rethinking of the business model and a subsequent restructuring, but rather by the significant increase of claims triggered by the crisis. The Commission does not find this information sufficient, in particular because SACE BT suffered severe losses in 2008 and 2009. Also, private reinsurers have raised concerns regarding the situation of the company when refusing to participate in the reinsurance coverage of SACE BT for 2009. Moreover, SACE BT had not succeeded to become profitable in its first years of operation (2005-2007) contrary to the forecasts of the business plan. This demonstrates that the difficulties encountered by SACE BT were not only triggered by the financial crisis, but also by its own weaknesses.

(219) As regards the restoration of long-term viability, the Commission notes that starting with 2009 SACE BT was subject to some transformations in the organisation, management and business processes. Among the measures taken to improve its situation, SACE BT increased premiums, reduced costs, changed its management. Moreover, SACE BT sold its participation in KUP on 25 February 2009.

(220) However, the Commission considers that these measures were insufficient to expect a restoration of SACE BT's long-term viability.

(221) The projections done at the time in the business plan for 2010-2011, approved on 4 August 2009 (when the fourth measure was implemented), for solely two years ahead showed break-even in the second projected year 2011, but not a return to profitability. There was therefore no evidence of possibility to achieve appropriate profitability within a reasonably short period, in principle, not exceeding five years, i.e. not later than by the end of 2014. Moreover, the underlying assumptions should have been explained and stress-tested. Italy did not submit information in this respect.

(222) Italy submitted an update of the business plan for 2011-2013, approved on 24 November 2011, i.e. two years after the measures had been granted. SACE BT's objective of gradually improving profitability (ROE) so as to reach […], as stated by the company's Board of Directors of 24 November 2011, was not supported by sufficiently detailed and robust financial projections as required in the Restructuring Communication. As per the financial projections as of end-2011, SACE BT expects to achieve a pre-tax ROE of only […] % in 2013, which correspond to a (post tax) ROE of […] %. The latter is manifestly below the cost of capital previously estimated by Italy to be of around [5-10] %.

(223) In line with points 22-23 of the Restructuring Communication, the restructuring plan should have demonstrated that the aid granted is limited to the minimum necessary, i.e. the aid restores viability of SACE BT, but does not allow it to expand in the new markets or market segments. On the contrary, according to the submitted data, during the crisis, SACE BT slightly increased its market presence in the credit and surety ('*cauzioni*') market in Italy, moving from sixth position in 2008 to fifth in 2010 (at the same time, for instance, Atradius reduced its market presence from third position to sixth) (see Table 6).

(224) In short, the basic elements of a restructuring plan, such as identification of the difficulties, viability under base case and stressed scenario, limitation of the aid to the minimum necessary and compensatory measures are entirely missing.

(225) In conclusion, even if the measures submitted by Italy and the adjusted business plan for 2011-2013 were to be accepted as a restructuring plan, they do not fulfil the restructuring plan requirements of the Restructuring Communication.

(226) As regards the Recapitalisation Communication, it defines the terms which a recapitalisation instrument has to comply with. If these terms are complied with, the aid can be temporarily approved. In order to be definitively approved, such recapitalisation aid has to be accompanied by a restructuring plan complying with the Restructuring Communication. However, no plan complying with the Restructuring Communication existed. Consequently, it is not necessary to assess whether the terms of the third and fourth measures comply with the Recapitalisation Communication since in any event they could not be found definitively compatible.

V.3.5. *Conclusion on compatibility*

(227) The Commission did not find any grounds for the compatibility of the second, third and fourth measures. The Commission concludes that Italy did not use the opportunity to provide the needed elements to claim the aid granted under the second, third and fourth measures as compatible restructuring aid. The submitted documents do not meet the requirements of the Restructuring Communication as the cumulative requirements for compatibility of restructuring aid, i.e. establishment of long-term viability, limitation of the aid to the minimum necessary and measures to limit distortions of competition, are not met.

VI. **CONCLUSION**

(228) The Commission finds that the initial capital allocation of EUR 100 million in the form of share capital and the capital contribution into reserves (so-called 'Fondo di organizzazione') in the amount of EUR 5,8 million by SACE for the establishment of SACE BT in 2004 (first measure) did not confer an advantage to SACE BT and thus do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(229) The Commission finds that Italy has unlawfully implemented the aid granted under the second, third and fourth measure in breach of Article 108(3) of the Treaty and concludes that the aid has to be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The initial capital allocation of EUR 105,8 million from SACE for the establishment of SACE BT in 2004 which included the share capital paid up in full by SACE amounting to EUR 100 million and SACE's contribution of EUR 5,8 million to SACE BT's reserves ('Fondo di Organizzazione') does not constitute aid within the meaning of Article 107(1) of the Treaty.

Article 2

The 74,15 % Excess of loss reinsurance provided by SACE on 5 June 2009 in favour of SACE BT contains aid, which has been put into effect in breach of Article 108(3) of the Treaty and which is incompatible with the internal market.

The aid element within the measure corresponds to the difference between the reinsurance fee that a private reinsurer would have charged for such a high portion of reinsurance and the one that was charged from SACE BT. In line with the Commission's case practice ([152]), the Commission considers that the fee for such a high portion of reinsurance and risk should have been at least 10 % higher than the fee charged by the private reinsurers for the smaller part of reinsurance and risk. For an amount of EUR 1,56 million paid by SACE BT to SACE, the aid to recover amounts to EUR 156 000.

Article 3

The recapitalisation of SACE BT carried out on 18 June 2009 in the form of a transfer of EUR 29 million to cover SACE BT's losses registered in 2008 constitutes aid, which has been put into effect in breach of Article 108(3) of the Treaty and which is incompatible with the internal market.

Article 4

The recapitalisation of SACE BT carried out on 4 August 2009 when the Ordinary Assembly of SACE BT's Shareholders approved the transfer of the amount of EUR 41 million from SACE into the capital account of SACE BT (*'versamento in conto capitale'*) constitutes aid, which has been put into effect in breach of Article 108(3) of the Treaty and which is incompatible with the internal market.

Article 5

1. Italyshall recover from SACE BT the incompatible aid such as defined in Articles 2, 3 and 4.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of SACE BT until their actual recovery, namely: EUR 156 000 as of 5 June 2009 (Article 2), EUR 29 million as of 18 June 2009 (Article 3) and EUR 41 million as of 4 August 2009 (Article 4).

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 ([153]).

4. Recovery of the aid shall be immediate and effective.

5. Italy shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

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

(a) the total amount (principal and recovery interests) to be recovered from SACE BT;

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

(c) documents demonstrating that SACE BT has been ordered to repay the aid.

2. Italy 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 Articles 2, 3 and 4 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 SACE BT.

Article 7

This Decision is addressed to the Italian Republic.

Done at Brussels, 20 March 2013.

For the Commission
Joaquín ALMUNIA
Vice-President

([152]) See Commission Decision C(2011) 7756 final of 23 November 2011 in case SA.27386 (C 28/2010) — Short-term export-credit insurance scheme — Portugal, not yet published.
([153]) OJ L 140, 30.4.2004, p. 1.

ANNEX

INFORMATION ABOUT THE AMOUNTS OF AID RECEIVED, TO BE RECOVERED AND ALREADY RECOVERED

Identity of the beneficiary	Total amount of aid received under the scheme (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) Million of national currency.

COMMISSION IMPLEMENTING DECISION

of 6 August 2014

setting up the Digital Research Infrastructure for the Arts and Humanities as a European Research Infrastructure Consortium (DARIAH ERIC)

(2014/526/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) [1], and in particular point (a) of Article 6(1) thereof,

Whereas:

(1) Austria, Belgium, Croatia, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Serbia and Slovenia requested the Commission to set up the Digital Research Infrastructure for the Arts and Humanities Research Infrastructure as a European Research Infrastructure Consortium (hereinafter 'DARIAH ERIC').

(2) France has been chosen by Austria, Belgium, Croatia, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Serbia and Slovenia as the Host Member State of DARIAH ERIC.

(3) The measures provided for in this Decision are in accordance with the opinion of the Committee established by Article 20 of Regulation (EC) No 723/2009,

HAS ADOPTED THIS DECISION:

Article 1

1. The Digital Research Infrastructure for the Arts and Humanities as a European Research Infrastructure Consortium (DARIAH ERIC) is hereby established.

2. The Statutes of DARIAH ERIC are set out in the Annex. The Statutes shall be kept up to date and made publicly available on the website of DARIAH ERIC and at its statutory seat.

3. The essential elements of the Statutes for which amendments shall require approval by the Commission in accordance with Article 11(1) of Regulation (EC) No 723/2009 are provided for in Articles 1, 2, 23–30.

Article 2

This Decision shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 6 August 2014.

For the Commission

The President

José Manuel BARROSO

[1] OJ L 206, 8.8.2009, p. 1.

ANNEX

STATUTES OF DARIAH ERIC

AUSTRIA,

BELGIUM,

CROATIA,

CYPRUS,

DENMARK,

FRANCE,

GERMANY,

GREECE,

IRELAND,

ITALY,

LUXEMBOURG,

MALTA,

THE NETHERLANDS,

SERBIA,

SLOVENIA,

Hereinafter referred to as 'The Founding Members'

RECOGNISING the important role for Observers and Cooperating Partners of DARIAH ERIC;

WISHING to support the arts and humanities in Europe;

WISHING to create a state of the art infrastructure for digitally enabled research across the arts and humanities;

HAVING IN MIND the results of the DARIAH Preparatory Phase Project, funded by the European Commission under the Grant Agreement No 211583;

REQUESTING the European Commission to establish the Digital Research Infrastructure for the Arts and Humanities as a European Research Infrastructure Consortium (DARIAH ERIC);

HAVE THEREFORE AGREED ON THE FOLLOWING PROVISIONS:

CHAPTER 1

GENERAL PROVISIONS

Article 1

Name, seat, location and working language

1. There shall be a European Research Infrastructure called the 'Digital Research Infrastructure for the Arts and Humanities', hereinafter referred to as 'DARIAH'.

2. DARIAH shall have the legal form of a European Research Infrastructure Consortium (ERIC) incorporated under the provision of Regulation (EC) No 723/2009 and be named 'DARIAH ERIC'.

3. DARIAH ERIC shall be a distributed research infrastructure. Its activities shall be carried out through the Virtual Competency Centres.

4. The statutory seat of DARIAH ERIC shall be in Paris, France.

5. The working language of DARIAH ERIC shall be English. These Statutes shall be deemed authentic in English, French and all other official EU languages. No linguistic version shall prevail.

Article 2

Objectives, coordination and distribution of activities

1. The mission of DARIAH ERIC shall be to enhance and support digitally-enabled research across the humanities and arts. DARIAH ERIC shall develop, maintain and operate an infrastructure in support of ICT-based research practices.

2. DARIAH ERIC shall work with research and education communities in order to:

(a) Explore and apply ICT-based methods and tools to enable new research questions to be asked and old questions to be posed in new ways.

(b) Improve research opportunities and outcomes through linking distributed digital source materials.

(c) Exchange knowledge, expertise, methodologies and practices across domains and disciplines.

3. The DARIAH-EU Coordination Office (DCO), as defined in Article 3, shall be responsible for the coordination of the activities of DARIAH ERIC. It shall initially have offices in France, Germany and The Netherlands.

4. The description, the organisation and the distribution of the activities of the DARIAH-EU Coordination Office (DCO) shall be decided by the Board of Directors.

Article 3

Definitions

In these Statutes the following capitalised terms shall have the meaning provided hereafter:

Cooperating Partner: An institution, either public or private, which serves a public mission, located on the territory of a Non-Participating Country, which has been accepted by DARIAH ERIC to participate in the work of one or more VCCs, as defined in Article 5 hereof.

DARIAH-EU Coordination Office (DCO): A unit, which is responsible for the coordination of the activities of DARIAH ERIC. It supports and integrates all levels of DARIAH ERIC (General Assembly, Scientific Board, Board of Directors, Senior Management Team, National Coordinator Committee and the Joint Research Committee). In its role as coordinator, the DCO oversees the interactions with all DARIAH ERIC partners and boards and takes on a variety of vertical tasks (e.g. controlling administrative procedures) and horizontal tasks (e.g. central services, overall financing, legal and tax requirements, transfer of skills and knowledge).

National Coordinating Institution: An institution appointed by each Member and Observer to coordinate national DARIAH activities.

National Coordinator: A person appointed by each Member or each Observer, who is responsible for the preparation of the national DARIAH roadmap and national in-kind contributions.

Partner Institution: An institution, either public or private, which serves a public mission, which has been accepted by DARIAH ERIC to participate in the work of one or more VCCs.

VCC: A Virtual Competency Centre is a virtual team, made up of people from Partner Institutions, to undertake the operational activities of DARIAH ERIC.

VCC Chair: A Partner Institution which leads the activities of one VCC and which is appointed by the Board of Directors.

VCC Head: The person recommended by the VCC Chair and appointed by the Board of Directors as responsible for the coordination of the VCC activities.

CHAPTER 2

MEMBERSHIP, OBSERVERSHIP, PARTNERSHIP

Article 4

Members, Observers and Cooperating Partners

1. Member States, associated countries, third countries other than associated countries and intergovernmental organisations shall have the right to become Members of DARIAH ERIC, subject to the formalities provided for herein and the decisions of the General Assembly.

2. Member States, associated countries, third countries other than associated countries and intergovernmental organisations may become Observers in DARIAH ERIC, subject to the formalities provided for herein and the decisions of the General Assembly.

3. DARIAH ERIC shall have at least a Member State and two other countries that are either Member States or associated countries as Members.

4. Member States or associated countries shall hold jointly the majority of the voting rights in the General Assembly.

5. Members shall appoint national public institutions or private institutions with a public service mission as National Coordinating Institutions, as listed in Annex I. National Coordinating Institutions shall represent the Members in the operations of DARIAH ERIC.

6. Observers shall appoint national public institutions or private institutions with a public service mission as National Coordinating Institutions, as listed in Annex I. National Coordinating Institutions shall represent the Observers in the operations of DARIAH ERIC.

7. Members, Observers and their representing entities are listed in Annex I. The Members at the time of submission of the ERIC application shall be referred to as Founding Members.

8. DARIAH ERIC may conclude agreements with Cooperating Partners.

Article 5

Admission of Members, Observers and Cooperating Partners

1. Any State or intergovernmental organisation interested in becoming a Member, Observer, or any institution interested in becoming a Cooperating Partner, shall apply in writing to DARIAH ERIC.

2. Members and Observers must include in the application the name of the National Coordinating Institution who shall coordinate national DARIAH activities.

3. The Board of Directors shall forward the application to the General Assembly, with a recommendation for the acceptance or not of the applicant.

4. The General Assembly shall decide on the acceptance of the new Member, Observer or Cooperating Partner.

5. DARIAH ERIC and the Cooperating Partner shall enter into a binding agreement, defining the framework of the cooperation, based on the recommendations of the General Assembly, for a period of at least two years, at the end of which the cooperation shall be evaluated.

Article 6

Termination of Member or Observer status

1. If the General Assembly decides that a Member or an Observer is acting in serious breach of the Statutes and the Internal Rules of Procedure, and if the Member or Observer has failed to rectify such breach within a period of six months, the General Assembly may decide to expel the defaulting Member or Observer.

2. The vote of the defaulting Member shall not be counted for the decision.

3. The defaulting Member or Observer shall have the right to explain to the General Assembly its position, before the General Assembly makes any decision on the issue.

4. Within the first five years of the membership or observership of DARIAH ERIC, no Member or Observer may withdraw unless exceptionally agreed otherwise by the General Assembly.

5. Members or Observers who do not initially commit for five years shall sign a statement specifying the shorter period which shall be recorded by the General Assembly when deciding on the acceptance in accordance with Article 5(4).

6. After the first five years of the membership or observership of DARIAH ERIC, a Member or Observer may withdraw with a notification of at least six months, prior to the effective date of the withdrawal.

7. The Member or Observer wishing to withdraw shall be required to pay in full its financial obligations for the whole financial year of withdrawal.

CHAPTER 3

RIGHTS AND OBLIGATIONS OF MEMBERS, OBSERVERS AND COOPERATING PARTNERS

Article 7

Members

1. Members in DARIAH ERIC may use all tools and services and participate in all activities. They shall have the right to participate and vote in the General Assembly. Their Partner Institutions shall have the right to chair a VCC, subject to the procedure provided herein.

2. Members shall pay their annual contribution to the DARIAH ERIC budget, based on principles and the method of calculation provided in Article 18(1) and in Annex II hereof.

3. The Board of Directors shall recommend the contribution of an Intergovernmental Organisation and countries not recognised by the Council of Europe to the General Assembly for approval.

Article 8

Observers

1. Observers in DARIAH ERIC may use all tools and services and participate in all activities. Additionally, Observers may be present and take the floor in all General Assembly meetings but without voting rights.

2. Observers shall pay their annual contribution to the DARIAH ERIC budget, based on principles and the method of calculation provided in Article 18(1) and in Annex II hereof.

3. The Board of Directors shall recommend the contribution of an Intergovernmental Organisation and countries not recognised by the Council of Europe to the General Assembly for approval.

Article 9

Cooperating Partners

The binding agreement as described in Article 5(5) shall specify the rights and obligations of the Cooperating Partner.

CHAPTER 4

GOVERNANCE

Article 10

General Assembly

1. The General Assembly shall be the governing body of DARIAH ERIC and shall be composed of representatives of the Members of DARIAH ERIC. Representatives of the Observers of DARIAH ERIC may be present and take the floor in all General Assembly meetings, but without voting rights.

2. Each entity representing a Member or an Observer shall nominate one official representative. Additionally, each Member or each Observer may bring their National Coordinator or other experts. Each delegation of Members or Observers may consist of up to three persons.

3. Each Member or each delegation of Members shall carry one single vote.

4. The votes of Members in default of paying their contribution on the day of the General Assembly meeting shall be suspended.

5. Member States and associated countries shall always have the majority of votes in the General Assembly. In case extra voting rights are necessary to implement this provision, the allocation of such extra voting rights shall be given effect with a decision of the General Assembly.

6. The General Assembly shall elect its Chair and its Vice-Chair by simple majority of the votes, among its Members, for a three year term, renewable. The Vice-Chair shall substitute the Chair in his/her absence and in case of conflict of interest. The Chair, or a person authorised by the Chair, shall be responsible for updating Annex I, so there shall be at all times an accurate list of the Members, Observers and their representing entities.

7. The General Assembly shall meet annually in an ordinary meeting or in a repeat meeting if the ordinary meeting has been adjourned, and may hold extra meetings.

8. The operational details of organising any kind of General Assembly meeting (such as ordinary meetings, repeat meetings, extra meetings, representation at meetings, invitation deadlines, agendas, minutes etc.) shall be stated in the Internal Rules of Procedure.

9. In an Ordinary Meeting, if at least two thirds of the Members, who are entitled to vote, are present or represented, the quorum requirement shall be met. In a repeat meeting of the General Assembly, the quorum shall be considered met, irrespective of the number of Members present or represented.

10. A simple majority shall be formed when the count of votes cast in favour of the decision is higher than the count of votes cast against. Decisions may be subject to additional majority conditions as set out in paragraphs 13 to 17.

11. The General Assembly shall validly:

(a) hold a meeting only if the quorum requirements have been met;

(b) make a decision only if the majority requirements have been met.

12. On all items, the General Assembly shall use their best efforts to achieve consensus. Failing consensus, the General Assembly shall decide the issues in accordance with the weighted voting system as defined in paragraphs 13 to 17.

13. The General Assembly, with simple majority, shall:

(a) accept new Members, Observers, and Cooperating Partners;

(b) approve the financial reports and the annual activity report;

(c) appoint or dismiss members of the Scientific Board;

(d) extend the duration of DARIAH ERIC;

(e) appoint the auditors;

(f) accept an exceptional withdrawal of a Member or an Observer.

14. The General Assembly, with simple majority including the positive vote of the Members representing at least fifty per cent of the annual DARIAH ERIC contributions as defined in Article 18(1) and in Annex II, shall:

(a) have the right to amend the budget at any time and may amend all appropriations and calculations of contributions according to the principles described in Annex II;

(b) approve the strategic orientation and the activity programme including each VCC programme and budget;

(c) appoint or dismiss a director at any time, according to the rules that it has defined.

15. Without prejudice to Article 9(3) of Regulation (EC) No 723/2009, the General Assembly, with simple majority including the positive vote of the Members representing at least seventy five per cent of the annual DARIAH ERIC contributions as defined in Article 18(1) and in Annex II, shall:

(a) approve any late addition of an item to the agenda regarding a proposal to amend the Statutes;

(b) propose an amendment of the Statutes in accordance with the provisions laid down in Regulation (EC) No 723/2009;

(c) adopt the Internal Rules of Procedure;

(d) approve the annual budget, including the in-kind contributions, no later than November of the preceding fiscal year.

16. The General Assembly with a unanimous decision shall:

(a) expel Members and Observers. The vote of the Member in question shall not be counted for the decision;

(b) dissolve DARIAH ERIC;

(c) approve an annual increase of the contributions of Members and Observers, which would exceed two percent;

(d) approve the DARIAH Data Policy.

17. The General Assembly shall decide on any matter concerning DARIAH ERIC, which is not referred to in the previous paragraphs, in accordance with paragraph 16.

18. The members of the General Assembly shall be bound by the provisions of the Internal Rules of Procedure.

Article 11

Scientific Board

1. The Scientific Board shall consist of between five and ten individuals, appointed by the General Assembly, for renewable terms of three years.

2. The Scientific Board shall elect one of its members as the Chair.

3. The Chair shall convene and chair all meetings of the Scientific Board.

4. The General Assembly shall ensure that the members of the Scientific Board have significant experience in the field of arts and humanities including the application of information technology in the arts and humanities.

5. The Scientific Board shall meet annually and provide advice and guidance to the General Assembly and all other DARIAH bodies on scientific and technical matters.

6. The Scientific Board shall prepare an annual report for the General Assembly on current technological and scientific advancements including recommendations for improving the DARIAH infrastructure.

7. The members of the Scientific Board shall be bound by the provisions of the Internal Rules of Procedure.

Article 12

Board of Directors

1. The Board of Directors shall be the executive body of DARIAH ERIC and its legal representative. It shall be composed of three directors, appointed by the General Assembly. The directors shall be qualified individuals, with significant experience in the field of arts and humanities including the application of information technology in the arts and humanities. The Board of Directors is accountable to the General Assembly.

2. Each director shall be appointed for a term of up to three years and may be re-appointed. However, no director shall be allowed to serve more than two consecutive terms.

3. In the case that a director resigns or becomes unable to exercise his or her duties, the General Assembly shall appoint another director for the remainder of the former director's term.

4. The Board of Directors shall elect a President amongst its members, for a three year term, renewable, in compliance with Article 12(2). The President shall convene and chair all meetings of the Board of Directors.

5. The Board of Directors shall:

(a) provide leadership for DARIAH ERIC and propose its strategic objectives and directions;

(b) sign on behalf of DARIAH ERIC all contracts, agreements and other binding documents, after approval of the General Assembly when its agreement is required;

(c) represent DARIAH ERIC before all European, international and national authorities and courts and function as its primary contact;

(d) ensure the availability of adequate financial resources and prepare the budget;

(e) prepare the Internal Rules of Procedure;

(f) control the efficiency of DARIAH ERIC's performance in relation to the strategic objectives and directions prescribed by the General Assembly;

(g) prepare the annual activity report as outlined in Article 21(1);

(h) supervise the Senior Management Team;

(i) manage and employ members of the DARIAH-EU Coordination Office (DCO) as outlined in Articles 2(4) and 28(7);

(j) approve the creation, amendment (including split, merger or change of focus) or dissolution of VCCs after consultation with the Senior Management Team;

(k) appoint or dismiss VCC Chairs and associated VCC Heads after consultation with the Senior Management Team;

(l) appoint or dismiss the Chair of the Joint Research Committee after consultation with the Senior Management Team.

6. The members of the Board of Directors shall be bound by the provisions of the Internal Rules of Procedure.

Article 13

Senior Management Team

1. There shall be a Senior Management Team that shall be composed of the Chair and the Vice-Chair of the National Coordinator Committee, and the Chair and the Vice-Chair of the Joint Research Committee. Relevant officers of the DARIAH-EU Coordination Office (DCO) and the Chair of the Scientific Board shall be invited to attend Senior Management Team meetings.

2. The Board of Directors shall consult the Senior Management Team for all general matters including drawing up proposals for the General Assembly, establishing and modifying annual work plans related to DARIAH ERIC and ensuring consistence, coherence and stability of the research infrastructure services.

3. The President of the Board of Directors shall convene and chair all meetings of the Senior Management Team.

4. The members of the Senior Management Team shall be bound by the provisions of the Internal Rules of Procedure.

Article 14

National Coordinator Committee

1. The National Coordinator Committee shall be one of the two operational organs of DARIAH ERIC. Its aim is to integrate and coordinate national DARIAH activities at the European level.

2. It shall consist of one National Coordinator for each Member and each Observer appointed by that Member or Observer. The National Coordinator shall be appointed for a renewable term of three years. Each Member and each Observer may change their National Coordinator at any time. Relevant officers of the DARIAH-EU Coordination Office (DCO) and the Board of Directors shall be invited to attend the National Coordinator Committee.

3. The National Coordinator Committee shall elect, with simple majority, its Chair and its Vice-Chair among its members, for a renewable term of one year. The Chair and Vice-Chair shall be members of the Senior Management Team where they shall represent the collective view of the National Coordinator Committee.

4. The National Coordinator Committee shall meet ordinarily two times per year.

5. The National Coordinator Committee shall support the Board of Directors, in particular by producing an annual synthesis of the national DARIAH roadmaps of each Member and each Observer. Within the National Coordinator Committee, each National Coordinator shall propose the annual in-kind contributions of each Member and each Observer to the Board of Directors for presentation to the General Assembly for approval in accordance with Article 10(15)(d).

6. The members of the National Coordinator Committee shall be bound by the provisions of the Internal Rules of Procedure.

Article 15

Joint Research Committee

1. The Joint Research Committee shall be one of the two operational organs of DARIAH ERIC. Its aim is to organise the scientific and technical integration of DARIAH activities.

2. It shall consist of all the VCC Heads, who shall elect, with simple majority, their Vice-Chair among their members, for a renewable term of one year. The Chair is appointed by the Board of Directors for a renewable term of one year, according to a procedure which shall be stated in the Internal Rules of Procedure. Other relevant officers of the DARIAH-EU Coordination Office (DCO) and the Board of Directors shall be invited to attend the Joint Research Committee.

3. The Chair and Vice-Chair shall be members of the Senior Management Team where they shall represent the collective view of the Joint Research Committee.

4. The Joint Research Committee shall meet ordinarily two times per year.

5. The Joint Research Committee shall support the Board of Directors, in particular by:

(a) compiling and assessing any in-kind contributions;

(b) producing a Virtual Competency Centres annual plan and report of activities;

(c) organising at least one DARIAH general meeting per year with the Member or Observer hosting the DARIAH general meeting and the relevant officers of the DARIAH-EU Coordination Office (DCO).

6. The members of the Joint Research Committee shall be bound by the provisions of the Internal Rules of Procedure.

CHAPTER 5

BUDGET

Article 16

Preparation and adoption of the budget

1. The Board of Directors with the competent officer of the DARIAH-EU Coordination Office (DCO) shall prepare a draft budget for the next budgetary period, which shall be presented to the General Assembly in the first quarter of the preceding fiscal year.

2. The draft budget shall include all appropriations and a calculation of the Member and Observer contributions for the next budgetary period and a projection of costs and contributions for the following two budgetary periods.

3. If the budget is not adopted for the beginning of the fiscal year the total appropriations which may be entered monthly in DARIAH ERIC should be subject to the limitations of the previous budgetary year.

Article 17

Budgetary Period

1. Each DARIAH ERIC fiscal year shall begin on 1 January and shall end on 31 December of each year.

2. The budgetary period shall encompass one fiscal year.

Article 18

Cash and In-kind Contributions

1. The contribution of each Member and each Observer shall consist of two parts. One part shall be the cash contribution and the other the in-kind contribution. These two parts contribute to a percentage of the annual cash budget and the annual in-kind budget of DARIAH ERIC, and shall be based on the GDP figures of each country. The principles and the method of calculation are provided in Annex II.

2. Members and Observers shall be responsible for the transfer of the cash contribution to DARIAH ERIC.

3. In-kind contribution shall be any agreed non-cash contribution to the DARIAH ERIC budget.

4. Any in-kind contribution shall be compiled and assessed by the Joint Research Committee, which shall consult the Senior Management Team in case of difficulties.

5. The Internal Rules of Procedure shall set out the procedure for the evaluation of in-kind contributions.

CHAPTER 6

VIRTUAL COMPETENCY CENTRES

Article 19

Virtual Competency Centres

1. DARIAH ERIC shall organise its operation around Virtual Competency Centres (VCCs), each of which shall address particular areas of expertise.

2. Each Partner Institution may participate as a contributor in the work of more than one VCC.

Article 20

Virtual Competency Centres Chair

1. Only Partner Institutions from Members may chair a VCC.

2. Any Partner Institution, in accordance with Article 20(1), wishing to chair a VCC shall apply to the Board of Directors. The application shall include the name(s) of the VCC Head(s).

3. After consultation with the Senior Management Team, the Board of Directors shall appoint one or more Partner Institution(s) as Chair of the VCC, and shall appoint the associated VCC Head(s).

4. Partner Institution(s) appointed by the Board of Directors as Chair of a VCC shall be bound by the provisions of the Internal Rules of Procedure.

CHAPTER 7

REPORTING, ACCOUNTS AND AUDITING

Article 21

Reporting

1. DARIAH ERIC shall produce an annual activity report, containing in particular the scientific, operational and financial aspects of its activities. The report shall be presented to the General Assembly by the Board of Directors, for approval, and transmitted to the European Commission and relevant public authorities within six months from the end of the corresponding financial year. This report shall be made publicly available.

2. The ERIC shall inform the European Commission of any circumstances which threaten to seriously jeopardise the achievement of DARIAH ERIC tasks or hinder DARIAH ERIC from fulfilling requirements laid down in Regulation (EC) No 723/2009.

Article 22

Accounts and Auditing

DARIAH ERIC shall be subject to the requirements of the law of the Host State as regards preparation, filing, auditing and publication of accounts.

CHAPTER 8

POLICIES

Article 23

Procurement policy and VAT exemption

1. DARIAH ERIC shall follow the principles of relevant European Union Public Procurement Directives and subsequent applicable national legislation.

2. Procurement by Members and Observers concerning DARIAH ERIC activities shall be done in such a way that due consideration is given to DARIAH ERIC needs, technical requirements and specifications issued by the relevant bodies.

3. VAT exemption based on Articles 143(1)(g) and 151(1)(b) of Council Directive 2006/112/EC [1] and in accordance with Articles 50 and 51 of Council Implementing Regulation (EU) No 282/2011 [2], shall be limited to the value added tax for such goods and services which are for official use by DARIAH ERIC, exceed the value of EUR 150, and are wholly paid and procured by DARIAH ERIC. Procurement by individual Members shall not benefit from these exemptions.

4. VAT exemption shall apply to non-economic activities, not to economic activities.

5. VAT exemption shall be applied to goods and services for the scientific, technical and administrative operations undertaken by DARIAH ERIC in line with its principal tasks. This also includes expenses for conferences, workshops and meetings directly linked to the official activities of DARIAH ERIC. However travel and accommodation expenses shall not be covered by VAT exemption.

Article 24

Liability

1. DARIAH ERIC shall be liable for its debts.

2. DARIAH ERIC Members shall be liable up to their respective annual contributions provided to DARIAH ERIC, unless they have signed a statement undertaking additional liability for DARIAH ERIC debts.

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[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).
[2] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

3. The Board of Directors shall negotiate and sign an appropriate insurance policy on behalf of DARIAH ERIC.

Article 25

Access policy

1. The tools and services offered by DARIAH ERIC shall in principle be freely available for use by the scientific and educational community.

2. The General Assembly may decide that some services shall be offered against a fee and shall specify the conditions in the Internal Rules of Procedure.

Article 26

Scientific Evaluation and Dissemination Policy

1. DARIAH ERIC shall be operating an infrastructure with no limitations on access based on time, space or other considerations, in principle, free to the scientific and educational community.

2. If for any reason access must be restricted, either temporarily or permanently, access may only be provided after peer review on the basis of excellence and best practices. The General Assembly, following consultation with the Scientific Board, shall adopt the necessary implementing rules.

3. DARIAH ERIC shall take all appropriate action to promote the infrastructure and its use by researchers.

4. Such actions may include, among others, the creation of a web portal, the issuing of a newsletter, the organisation of and participation in conferences and workshops, etc.

Article 27

Intellectual Property Rights, Data Policy and Protection of privacy

1. Intellectual Property shall be governed by the national legislation of the Members or Observers and by international agreements to which Members or Observers are parties.

2. Generally open source and open access principles shall be favoured.

3. A DARIAH Data policy shall be developed and shall be approved by the General Assembly.

4. Use and collection of DARIAH ERIC data shall be subject to European and national laws of data privacy.

Article 28

Employment Policy

1. DARIAH ERIC is an equal opportunity employer.

2. Employment contracts shall follow the national laws of the country in which the staff is employed.

3. DARIAH ERIC shall not discriminate in any way between directly employed and seconded personnel.

4. DARIAH ERIC shall advertise all vacancies and shall set an adequate time-period for the receipt of applications.

5. DARIAH ERIC shall not offer any position to any applicant before the lapse of the above mentioned time period.

6. DARIAH ERIC shall not offer any position to any person who cannot lawfully accept employment in the European Union and/or the Host State and/or at the place of employment according to European Union and local legislation.

7. The Board of Directors shall be responsible for the hiring of personnel and shall be assisted by the DARIAH-EU Coordination Office (DCO).

CHAPTER 9

DURATION, WINDING UP, DISPUTES, SET UP PROVISIONS

Article 29

Duration

The duration of DARIAH ERIC shall be 20 years, renewable according to the majority rule defined in Article 10(13)(d).

Article 30

Amendment, winding up

1. Amendment proposals may be submitted to the General Assembly by any Member, by the Board of Directors and by the Scientific Board.

2. Amendment proposals shall be included in the items on the agenda communicated with the invitation to the General Assembly.

3. The Annexes may be updated by the General Assembly without constituting an amendment of the Statutes.

4. The winding up of DARIAH ERIC shall follow a decision of the General Assembly in accordance with Article 10(16)(b).

5. Without undue delay and in any event within 10 days after adoption of the decision to wind up DARIAH ERIC, DARIAH ERIC shall notify the European Commission about the decision.

6. Assets remaining after payment of DARIAH ERIC debts shall be apportioned among the Members in proportion to their accumulated annual contribution to DARIAH ERIC. Liabilities remaining after including DARIAH ERIC assets shall be apportioned among the Members, in accordance with Article 24(2).

7. Without undue delay and in any event within 10 days of the closure of the winding up procedure, DARIAH ERIC shall notify the Commission thereof.

8. DARIAH ERIC shall cease to exist on the day on which the European Commission publishes the appropriate notice in the *Official Journal of the European Union*.

Article 31

Applicable Law

DARIAH ERIC shall be governed, by precedence:

a. by Union law, in particular Regulation (EC) No 723/2009;

b. by the law of the Host State in case of a matter not covered, or only partly covered, by Union law;

c. by these Statutes and their implementing rules.

Article 32

Disputes

1. The Court of Justice of the European Union shall have jurisdiction over litigation among the Members and Observers in relation to DARIAH ERIC, between the Members, Observers and DARIAH ERIC and over any litigation to which the European Union is a party.

2. European Union legislation on jurisdiction shall apply to disputes between DARIAH ERIC and third parties. In cases not covered by European Union legislation, the law of the Host State shall determine the competent jurisdiction for the resolution of such disputes.

Article 33

Availability of Statutes

The Statutes shall be kept up to date and made publicly available on the DARIAH ERIC website and at the statutory seat.

Article 34

Setting-up provisions

1. A constitutional meeting of the General Assembly shall be called by the Host State as soon as possible but no later than forty-five calendar days after the Commission decision setting up DARIAH ERIC enters into force.

2. The Host State shall notify the Founding Members of any specific urgent legal action that needs to be taken on behalf of DARIAH ERIC before the constitutional meeting is held. Unless a Founding Member objects within five working days after being notified, the legal action shall be carried out by a person duly authorised by the Host State.

ANNEX I

LIST OF MEMBERS AND OBSERVERS

(Last updated: 11 June 2014)

Members

Country or Intergovernmental organisation	Representing entity	National Coordinating Institution
Austria	Austrian Ministry of Science and Research	Austrian Academy of Sciences — Institute for Corpus Linguistics and Text Technology (ICLTT)
Belgium	Belgian Science Policy Office	Ghent Centre for Digital Humanities (University of Ghent)
Croatia	Ministry of Science, Education and Sports	Institute of Ethnology and Folklore Research
Cyprus	Digital Champion of Cyprus, Ministry of Energy, Commerce, Industry and Tourism	Cyprus University of Technology in Limassol
Denmark	Danish Agency for Science, Technology and Innovation	Danish Digital Humanities Laboratory
France	Centre National de la Recherche Scientifique	Huma-Num (Centre National de la Recherche Scientifique)
Germany	German Federal Ministry of Education and Research	Georg-August-Universität Göttingen
Greece	General Secretariat for Research and Technology/Ministry of Education and Religious Affairs	Academy of Athens
Ireland	Irish Research Council	National University of Ireland Maynooth
Italy	MIUR-Ministry of Education, University and Research	National Research Council of Italy
Luxembourg	Ministère de l'Enseignement supérieur et de la Recherche	Centre Virtuel de la Connaissance sur l'Europe
Malta	Ministry for Education and Employment	Malta Libraries Council
The Netherlands	Netherlands Organisation for Scientific Research	Data Archiving and Networked Services
Serbia	Ministry of Culture and Information	Belgrade Center for Digital Humanities
Slovenia	Ministry of Education, Science and Sport	Inštitut za novejšo zgodovino/Institute of Contemporary History

Observers

Country or Intergovernmental organisation	Representing entity	National Coordinating Institution

ANNEX II

PRINCIPLES FOR CALCULATION OF CONTRIBUTIONS

1. The annual cash and in-kind contributions of Members and Observers shall be determined using the following variables:
   (a) Scale of contribution;
   (b) DARIAH unit of ownership, in short: DARIAH unit;
   (c) Cash budget;
   (d) In-kind budget;
   (e) The Members and Observers selected by the General Assembly to calculate the DARIAH unit.
2. The scale of contribution for a country shall be calculated with the following formula: divide the GDP of the country by the sum of the GDPs of the Council of Europe Member States, and then round the scale of contribution to two figures after the decimal point. For countries that join DARIAH ERIC as Observers, their scale of contribution shall be half of what it would have been if they had joined as Members.
3. The DARIAH unit for the cash budget (x) shall be calculated with the following formula: divide the cash budget by the sum of the scales of contribution of the Members and Observers selected by the General Assembly to calculate the DARIAH unit for the cash budget.
4. The DARIAH unit for the in-kind budget (y) shall be calculated with the following formula: divide the in-kind budget by the sum of the scales of contribution of the Members and Observers selected by the General Assembly to calculate the DARIAH unit for the in-kind budget.
5. Contributions for cash and in-kind shall be calculated according to the following formula:
   (a) **Cash contribution**: The scale of contribution for a country is multiplied by the DARIAH unit for cash (x), and the result is then rounded up the nearest hundred euro.
   (b) **In-kind contribution**: The scale of contribution for a country is multiplied by DARIAH unit for in-kind (y), and the result is then rounded up to the nearest thousand euro.
6. The General Assembly may change the cash and in-kind budgets every year, and the reference GDP after three years, in accordance with the weighted voting system as defined in Articles 10(14) and 10(16).
7. If the General Assembly does not change the variables of the budget (as described in principle 1 above), the annual contribution shall be the contribution of the previous year with an annual increase of two per cent to compensate for inflation and increase in costs.
8. Intergovernmental organisations shall pay the contribution according to their status as Member or Observers.
9. The contribution for entities joining during the course of a year shall be proportional to the number of remaining months in that year, starting on the first day of the month of joining.
10. The annual contribution for Members or Observers not initially committing for five years shall be raised by twenty five per cent, as long as the commitment for the remaining period has not been made. If a commitment for the remaining part of the five years is made or if the Member or the Observer stays for five years, arrangements shall be made to ensure that the Member or the Observer shall not pay more in total than the standard contribution for those five years.

ANNEX III

PROVISIONAL BUDGET AND CONTRIBUTIONS

Countries	Length of Commitment	Estimated Cash Year 1 (*) (EUR)	Estimated In-kind Year 1 (*) (EUR)	Estimated Total Year 1 (EUR)
Austria (**)	3 years	28 250,00	231 250,00	259 500,00
Belgium	5 years	27 700,00	227 000,00	254 700,00
Croatia	5 years	3 400,00	28 000,00	31 400,00
Cyprus	5 years	1 300,00	11 000,00	12 300,00
Denmark	5 years	18 000,00	147 000,00	165 000,00
France	5 years	149 200,00	1 221 000,00	1 370 200,00
Germany (**)	until 26.2.2016	242 125,00	1 981 250,00	2 223 375,00
Greece	5 years	15 600,00	128 000,00	143 600,00
Ireland	5 years	11 800,00	96 000,00	107 800,00
Italy	5 years	118 100,00	966 000,00	1 084 100,00
Luxembourg	5 years	3 200,00	26 000,00	29 200,00
Malta	5 years	500,00	4 000,00	4 500,00
The Netherlands	5 years	45 100,00	369 000,00	414 100,00
Serbia	5 years	2 500,00	21 000,00	23 500,00
Slovenia	5 years	2 700,00	23 000,00	25 700,00
	Total	**669 475,00**	**5 479 500,00**	**6 148 975,00**

(*) In the following years, the annual contribution is the contribution of the previous year with an annual increase of 2 % cent to compensate for inflation and increase in costs (cf. principle 7, Annex II).

(**) As the length of commitment is less than 5 years the increase of 25 % has been included (cf. principle 10, Annex II).

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