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(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)

DECISIONS

COMMISSION DECISION

of 26 January 2010

on State aid C 56/07 (ex E 15/05) granted by France to La Poste

(notified under document C(2010) 133)

(Only the French text is authentic)

(Text with EEA relevance)

(2010/605/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ('TFEU') [1], 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 [2],

Whereas:

1. PROCEDURE

(1) On 21 December 2005 the Commission approved the transfer of the banking and financial business of the French Post Office (La Poste) to its subsidiary La Banque Postale [3]. In its Decision the Commission stated that the question of the unlimited state guarantee in favour of La Poste would be the subject of a separate proceeding.

(2) On 21 February 2006, in accordance with Article 17 of Council Regulation (EC) No 659/1999 [4] laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ('the Procedural Regulation'), the Commission informed the French authorities of its preliminary finding as to the existence of an unlimited state guarantee which resulted from the legal form of La Poste and which constituted State aid within the meaning of Article 107(1) TFEU, and it invited them to submit their comments. Inasmuch as this presumed unlimited state guarantee was in force before 1 January 1958, the Commission applied the rules of procedure concerning existing aid in accordance with Article 1(b) of the Procedural Regulation [5].

(3) The Commission received the French authorities' reply on 24 April 2006.

(4) On 4 October 2006, in accordance with Article 18 of the Procedural Regulation, the Commission called on France to withdraw, by 31 December 2008, the guarantee given, on all its liabilities, to La Poste by virtue of its legal form.

(5) On 6 December 2006 the Commission received a memorandum from the French authorities challenging the findings presented by the Commission in its letter of 4 October 2006.

(6) Following a meeting with the Commission department in charge of competition questions ('DG Competition'), by letter dated 16 January 2007 the French authorities submitted to the Commission a draft amendment to the Decree implementing Law No 80-539 of 16 July 1980 on the penalties imposed in administrative matters and on the execution of judgments by legal entities governed by public law [6] ('the Law of 16 July 1980'), namely Decree No 81-501 of 12 May 1981 adopted for the implementation of the Law of 16 July 1980 on the penalties imposed in administrative matters and on the execution of judgments by legal entities governed by public law [7] ('the Decree of 12 May 1981').

(7) Following a request from the Commission for clarification, the French authorities sent a memorandum, which was received on 1 February 2007, explaining the situation of creditors of La Poste should the latter find itself in financial difficulties.

(8) By memorandum dated 19 March 2007 the French authorities made an additional proposal consisting in undertaking, together with La Poste, to mention in any financing agreement or issuing prospectus of La Poste the fact that no guarantee was being provided.

(9) By letter dated 29 November 2007 the Commission informed France of its decision to open the procedure provided for in Article 108(2) TFEU in respect of the measure ('the opening decision').

(10) The opening decision was published in the *Official Journal of the European Union* [8]. The Commission called on interested parties to submit their comments on the measure.

(11) The Commission received no comments from interested parties.

(12) By letter dated 23 January 2008 the Commission received comments from France.

(13) The Commission published on DG Competition's website an invitation to tender for carrying out a study into the unlimited guarantee given by the French Republic to La Poste. Four bids were received before the deadline of 21 April 2008. The study was entrusted to Ms Sophie Nicinski, *professeur des universités, agrégée de droit public,* Doctor of Laws and author of publications on the subject of state guarantees for publicly owned establishments of an industrial and commercial character. The expert ('the Commission's expert') submitted her report on 17 November 2008.

(14) Following the appearance in the French press of information about the adoption by the French Government of a draft law approving the change of La Poste's legal form, on 20 July 2009 the Commission asked France whether it would agree to undertake to convert La Poste into a public limited company subject to the compulsory administration and winding-up procedures provided for under ordinary law. Under cover of its letter, the Commission forwarded its expert's report to the French authorities.

(15) By memorandum transmitted on 31 July 2009, France informed the Commission that on 29 July 2009 the Council of Ministers had adopted a draft law on La Poste and postal activities, scheduling La Poste's conversion into a public limited company for 1 January 2010. The French authorities also indicated that they would be sending their comments on the Commission's expert's report.

(16) After two reminder letters from the Commission dated 9 September and 6 October 2009, France made known, by memorandum transmitted on 27 October 2009, its comments on the Commission's expert's report and forwarded an opinion by Mr Guy Carcassonne, *professeur des universités* and *agrégé des facultés de droit* ('the French authorities' expert').

(17) An amendment to the draft law on La Poste and postal activities was tabled on 11 December 2009, postponing La Poste's conversion into a public limited company until March 2010.

2. **DESCRIPTION OF THE MEASURE**

(18) Law No 90-568 of 2 July 1990 on the organisation of public postal and telecommunication services [9] ('the Law of 2 July 1990') converted the former Directorate-General for Posts and Telecommunications into two legal entities governed by public law: La Poste and France Telecom.

(19) Some legal entities governed by public law are not, legally speaking, publicly owned establishments of an administrative character (*établissements publics à caractère administratif* — EPAs) or publicly owned establishments of an industrial and commercial character (*établissements publics à caractère industriel et commercial* — EPICs) [10]. Such is the case with La Poste. In its judgment of 18 January 2001 (2nd Civil Division) [11], the Court of Cassation nevertheless held that La Poste is to be deemed equivalent to an EPIC [12]. The legal consequences of La Poste's legal form are as follows:

2.1. *INAPPLICABILITY OF INSOLVENCY AND BANKRUPTCY PROCEDURES TO LA POSTE*

(20) Article 1 of the Law of 2 July 1990 states that La Poste is a legal entity governed by public law. Now, in France, legal entities governed by public law are not subject to ordinary law as regards the compulsory administration and winding up of firms in difficulty.

(21) The inapplicability of insolvency and bankruptcy procedures to legal entities governed by public law apparently derives from the general principle of the immunity from seizure of the assets of legal entities governed by public law, which has been recognised by the French courts, including the Court of Cassation, since the late 19th century [13].

(22) Moreover, Article 2 of Law No 85-98 of 25 January 1985 on the compulsory administration and winding up of undertakings [14] ('the Law of 25 January 1985'), which defines the scope of the ordinary-law procedures of compulsory administration and winding up of undertakings in France, and which has become Article L 620-2 of the Commercial Code, provides that 'administration and winding-up procedures shall apply to traders, persons registered with the craftsmen's register, farmers and private-law entities'. It follows from the wording of that article and from the interpretation of it by the French courts [15] that ordinary-law collective procedures do not apply to legal entities governed by public law.

2.2. *APPLICABILITY TO LA POSTE OF THE LAW OF 16 JULY 1980 AND OF THE PRINCIPLE OF LAST-RESORT STATE LIABILITY FOR THE DEBTS OF LEGAL ENTITIES GOVERNED BY PUBLIC LAW*

(23) The Law of 16 July 1980 is applicable to La Poste, which is categorised by the Law of 2 July 1990 as a legal entity governed by public law.

(24) Article 1, Section II, of the Law of 16 July 1980 provides that 'Where a judicial decision which has become final orders a local authority or a publicly owned establishment to pay a sum of money the amount of which is fixed in the decision itself, payment of the sum must be ordered within two months of notification of the decision. If payment is not ordered within that period, the representative of the State in the *département* or the supervisory authority shall issue a mandatory payment order. If insufficient funds are available, the representative of the State in the *département* or the supervisory authority shall give the authority or establishment formal notice to create the necessary resources; if the decision-making body of the authority or establishment has not released or created the resources, the representative of the State in the *département* or the supervisory authority shall do so, and if necessary shall issue a mandatory payment order'.

(25) The fourth subparagraph of Article 3-1 of the Decree of 12 May 1981 provides that 'If the notice given has had no effect by the time these deadlines expire [16], the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources either by reducing the appropriations allocated to other expenditures and still available or by increasing resources.' Lastly, the fifth subparagraph of Article 3-1 of the same Decree provides that 'If within eight days following notification of entry of the appropriation the local authority or publicly owned establishment has not ordered payment of the sum due, the representative of the State or the authority responsible for supervision shall within one month issue a mandatory payment order'.

(26) The Decree of 12 May 1981 was repealed and replaced by Decree No 2008-479 of 20 May 2008 on the enforcement of financial penalties imposed on public entities. Nevertheless, Article 10 of the new Decree reproduces the wording of the fourth and fifth subparagraphs of Article 3-1 of the Decree of 12 May 1981 [17]. It is therefore substantively the same.

(27) The circular of 16 October 1989 [18] states that 'Where there are no or insufficient appropriations, which situation is referred to in the second subparagraph of Section II of Article 1 of the Law of 16 July 1980, the authorising officer shall also, before the expiry of the four-month period, inform the creditor of that fact by registered letter with acknowledgement of receipt, specifying the amount the payment of which will subsequently be ordered. Such payment order will cover either the whole amount due where there are no appropriations or the balance where there are insufficient appropriations'.

(28) It is clear from all these provisions that the Law of 16 July 1980 and its implementing rules are intended only to ensure the enforcement of final judicial decisions ordering either the State, a local authority or a publicly owned establishment to pay a sum of money. They do not prescribe any compulsory administration or winding-up procedure.

(29) The Law of 16 July 1980 and its implementing rules expressly identify the State as the authority responsible for covering the debts of publicly owned establishments. The State has important prerogatives: first, the issuing of a mandatory payment order, and second, the creation of sufficient resources. This calls for an examination of the extent to which the possibilities for creditors to obtain compensation through the liability of the State in the event of La Poste defaulting can be likened to a form of guarantee.

(30) In addition to noting the above-mentioned two elements (inapplicability of insolvency procedures and applicability of the Law of 16 July 1980), the Commission observed in its opening decision that rules applicable to certain EPICs might apply also to La Poste:

2.3. *TRANSFER OF THE LIABILITIES OF AN EPIC THAT HAS BEEN WOUND UP TO ANOTHER PUBLICLY OWNED ESTABLISHMENT OR TO THE STATE*

(31) Codifying instruction No 02-060-M95 of 18 July 2002 on the financial and accounting regulation of national publicly owned establishments of an industrial and commercial character [19] ('the codifying instruction') provides that two situations may arise in the event of the closure of an EPIC with a public accountant:

— either a new publicly owned establishment replaces the former EPIC and takes over its property, rights and obligations,

— or the publicly owned establishment is declared wound up, in which case 'the instrument winding up the establishment may already designate the beneficiary of the balance of the liquidation, which will generally be the State' [20].

(32) The guide to the financial organisation of the creation, conversion and abolition of national publicly owned establishments and of public interest groups of 14 November 2006 ('the guide to financial organisation'), which is available on the website of the Ministry of Finance, states [21]: 'The instrument abolishing the establishment must explicitly provide for the transfer of the rights, property and obligations of the abolished establishment to the structure which is to take over its activity or its assets (i.e. either a publicly owned establishment or the State) […] More generally, it must be provided that the new establishment will replace the entities whose activities it is taking over in respect of the rights and obligations resulting from the contracts concluded for the purpose of performing the tasks assigned to it'.

(33) Although the provisions of the codifying instruction and of the guide to financial organisation are applicable only to EPICs which have a public accountant, there is evidence to suggest that EPICs which do not have a public accountant would also, in the event of their being closed down, have their debts transferred to the State or to another publicly owned establishment.

(34) Thus, Charbonnages de France stated in the notes to its accounts of 31 December 2000 that all the rights and obligations of an EPIC must, in the event of closure, be transferred either to another legal entity governed by public law or to the French Government itself, and that the terms and conditions of such a transfer must be specified in the law adopted with a view to closing down the EPIC in question. This statement does not apply only to EPICs with a public accountant, Charbonnages de France being in fact an EPIC without a public accountant.

(35) According to some rating agencies, if ERAP [22] were to be wound up, although it is also an EPIC without a public accountant, the balance of its debt and of its assets would also be transferred to the State. According to Fitch [23], as an EPIC, ERAP is not subject to winding-up procedures. It can be wound up only by a legislative procedure and, in that event, the balance of its debt and of its assets will revert to the State. According to Moody's [24], ERAP cannot be the subject of restructuring measures imposed by the compulsory winding-up procedures court. Hence, in the event of the company being wound up, its assets/liabilities would be transferred to the authority responsible for creating it, i.e. the State itself.

(36) In the light of the foregoing, and despite the fact that La Poste does not have a public accountant [25], it should be examined whether, in the event of a winding up, the principle of the transfer of the debts to the State or to another legal entity governed by public law is applicable to La Poste given that it is treated as equivalent to an EPIC. If that were the case, creditors would be assured of not losing the money they are owed and could make do with a lower rate of interest or grant more favourable payment terms and conditions than they would if there were no such assurance. Such a transfer would therefore have the same effects as a guarantee.

2.4. *DIRECT ACCESS TO TREASURY ACCOUNTS*

(37) Again according to Fitch [26], ERAP's liquidity is guaranteed by its instant access to Treasury imprest accounts. As ERAP is an EPIC, the access which La Poste might also have to Treasury imprest accounts should be examined.

3. OBSERVATIONS AND PROPOSALS BY THE FRENCH AUTHORITIES

(38) Following the opening decision, the French authorities submitted their observations and proposals to the Commission by letter dated 23 January 2008. That letter supplemented the observations and proposals set out in the previous letters from the French authorities [27] that were summarised in the opening decision.

3.1. *OBSERVATIONS BY THE FRENCH AUTHORITIES*

(39) The French authorities dispute the existence of both a guarantee and an advantage for La Poste.

3.1.1. ABSENCE OF GUARANTEE

(40) First, according to the French authorities, publicly owned establishments do not enjoy an automatic guarantee because of their legal form (A) and, second, the Commission's argument in the opening decision is flawed (B).

A. ***Publicly owned establishments do not enjoy an automatic guarantee because of their legal form*** (28).

(41) First, no legislation or decision lays down the principle that the State would, out of principle, indefinitely guarantee the debts of EPICs.

(42) Second, the courts have found against the existence of guarantees. In particular, in its judgment in *Société de l'hôtel d'Albe* (29), the Council of State held that 'the national tourism office, which has civil personality and financial independence […] was a publicly owned establishment, so that the State cannot be liable for satisfying the debts contracted by the establishment; the Minister for Public Works therefore correctly refused to accede to the [creditor's] demand'. The same reasoning was followed with regard to local authorities in the two decisions by the Council of State in the *Campoloro* case (30).

(43) Third, the Organic Law of 1 August 2001 governing the Finance Act (31) ('LOLF') lays down that only a provision of a finance act can create a guarantee (32). Accordingly, according to the French authorities' expert (33), it has been legally possible to give an implied guarantee since the full entry into force of the LOLF on 1 January 2005. Debts contracted by La Poste since 1 January 2005 are not, therefore, covered by an implied guarantee. As for debts incurred before 1 January 2005, the French authorities' expert takes the view that, in the absence of a court judgment, it is impossible to determine whether the lapsing of the implied guarantees given before 1 January 2005, the giving of which was not expressly authorised by a finance act, could be rejected on the basis of respect for constitutionally protected creditors' rights.

(44) Fourth, if EPICs enjoyed a state guarantee, the change in their legal form would require the introduction of new measures to protect creditors' rights. Such a mechanism has never been introduced. On the contrary, when the Administration of Posts and Telecommunications was converted into an independent legal entity (La Poste) on 1 January 1991, the State, by order (*arrêté*) of 31 December 1990, granted an express guarantee for debts incurred before 31 December 1990 and transferred to La Poste. That would not have been necessary if La Poste, as an establishment equivalent to an EPIC, had enjoyed a statutory state guarantee. Legislative and regulatory provisions granting a state guarantee to certain activities of ERAP and of the French Development Agency (*Agence française du développement*), both of which are EPICs, have also been adopted.

(45) Finally, the French authorities refer to an article (34) by Mr Labetoulle, the former President of the litigation division of the Council of State. According to Mr Labetoulle, 'in law, there is nothing automatic about the granting, enjoyment and scope of this guarantee [a state guarantee that applies *ipso jure* to state-owned public establishments]'.

B. ***The Commission's argument concerning the existence of a guarantee is flawed*** (35)

(a) **The reimbursement of individual claims is not guaranteed**

1. *The Law of 16 July 1980 cannot form the basis of a guarantee*

(46) According to the French authorities (36), the Law of 16 July 1980 grants the supervisory authority power of substitution for the executive of the person whom it replaces. Therefore, the supervisory authority may exercise only the powers of that executive, which do not include the possibility of having access to the state budget. The Law of 16 July 1980 does not, therefore, provide an obligation for the State to commit its own resources.

(47) In support of this interpretation, the French authorities cite the preparatory debates for the Law of 16 July 1980. During the debates, the Government opposed the amendments seeking to make it compulsory for the State to pay an exceptional subsidy to a regional or local authority whose resources were insufficient to implement a court judgment.

(48) The French authorities also refer to academic articles (37). These articles point out that the expression *'y pourvoit'* in Article 1 of the Law of 16 July 1980 refers to a power of 'substitution' in which 'it is a matter of principle that the substitute has the same powers as the substitutee', the granting of an exceptional subsidy being, moreover, 'outside the scope of the power of substitution' and therefore not provided for by the Law of 16 July 1980.

(49) Finally, the French authorities cite the decisions of the Council of State of 10 November 1999 [38] and 18 November 2005 [39] in the *Campoloro* case. The Council of State took the view that the financial substitution by the State of the defaulting local authority does not feature on the list of obligations imposed by the Law of 16 July 1980. Moreover, by investigating whether there were grounds for incurring the State's liability in the limited area of fault — gross negligence at that — the Council of State excluded out of principle all forms of *ipso jure* liability and therefore any form of guarantee.

2. *It is not possible to incur the strict liability of the State solely on the ground of lack of assets*

(50) Moreover, the French authorities assert that the possibilities of compensation opened by incurring liability, under restrictive conditions, to creditors of legal entities governed by public law cannot be considered equivalent to a form of guarantee. A guarantee requires the guarantor to accept the fact of the guarantee. If it is a matter of incurring liability for a fault or, in the case of strict liability, the consequences of one's own action, there can be no question of a guarantee.

(51) Then the French authorities maintain that, in any event, the liability of the State cannot be incurred on the sole ground that the Prefect or supervisory authority was unable to take any measures that could allow the claim to be repaid because of the financial and asset situation of the regional or local authority or publicly owned establishment.

(52) First of all, in the field of fault — gross negligence at that — the failure by the Prefect or the supervisory authority to exercise their powers where no measure can enable the claim to be repaid by the regional or local authority or the publicly owned establishment cannot in itself constitute a fault.

(53) With regard to strict liability, at least two aspects suggest the idea be dismissed:

— first, the liability of the person from whom compensation is sought can be incurred only if the fact (including an omission) of which he is accused was the direct cause of the injury. Now, in the case of lack of assets, the action or omission by the administrative authority would not be the cause of the injury suffered by the creditor, rather the insolvency of the regional or local authority or the publicly owned establishment,

— second, strict liability stems from the principle of equality before public burdens. Now, according to the French authorities, in the case in point it is hard to see how the injury suffered by the creditor could lead to a breach of the principle of equality before public burdens. Unlike the case that gave rise to the *Couitéas* case law [40], in the present case, no state authority decided not to execute the judgment for imperative reasons of public interest. The case in question is one where the public authority is faced with the practical impossibility of taking measures that would enable the court judgment to be executed and the creditors to be reimbursed, and not an impossibility determined on the grounds of requirements of the public interest. According to the French authorities, liability for a breach of equality before public burdens cannot, therefore, be incurred simply because of insolvency. With regard to the Commission's argument, set out in recital 59 of its opening decision, that 'if the representative of the State gave preference to maintaining the continuity of the public service over the right of the creditor to have his debt repaid, it cannot be excluded that the strict liability of the State could be incurred', the French authorities recognise that the requirement of continuity of the public service is imposed on the representative of the State when implementing the procedure laid down by the Law of 16 July 1980. Nonetheless, according to the French authorities, even if the judge were to order the creditor to be compensated, such compensation would have the effect of reinstating the creditor to the situation in which he would have been under ordinary law because, in this latter case, the good in question would have been sold and the body of creditors would have received the corresponding amount. There would therefore be no advantage to the creditor.

(b) **[…]** (*)

1. *The inapplicability to legal entities governed by public law of administration and winding-up procedures under ordinary law does not exclude the possibility of the bankruptcy of an EPIC or of bankruptcy proceedings against it*

(54) According to the French authorities, the Commission's analysis is based on its 2000 Notice on State aid in the form of guarantees ('the 2000 Guarantees Notice') [41], and in particular point 2.1.3 thereof, which provides that 'The Commission also regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'.

(55) While noting that the rules of the Treaty take precedence over the 2000 Guarantees Notice, the French authorities identify two factors which, in their view, remove the case in question from the scope of Notice:

— the 2000 Guarantees Notice stresses the fact that any aid would arise from 'more favourable funding terms' that would be imputed to the exclusion of the possibility of bankruptcy proceedings; but the Commission has not demonstrated the existence of 'more favourable funding terms',

— the 2000 Guarantees Notice examines the case where the legal form excludes all bankruptcy or insolvency proceedings and not specific proceedings; but the Commission has not established that La Poste cannot go bankrupt, nor that insolvency proceedings are impossible.

(56) According to the French authorities, the Law of 25 January 1985 is merely a procedural law. The fact that EPICs lie outside its scope does not mean that an EPIC cannot be in default, nor that the law prohibits administration, winding-up or *ad hoc* bankruptcy proceedings being taken against it.

2. *The application of the 'procedure' introduced by the Law of 16 July 1980, rather than the collective procedure under ordinary law, does not confer any advantage on the creditor*

(57) The French authorities, having analysed recital 68 of the opening decision, conclude that the Commission uses two criteria to assess whether the application of a specific procedure in the event of insolvency confers an advantage on the entity subject to the procedure in relation to undertakings subject to commercial law:

— a criterion relating to publicity: the procedure to be followed in the event of La Poste's insolvency should be defined and made public,

— a criterion relating to equivalence: this procedure should be either the private-law procedure or a procedure that gives the creditors of La Poste rights that are no better than those they would have under commercial law.

(58) Although the French authorities challenge the need to fulfil these two criteria [42], in so far as they are regarded as necessary and sufficient by the Commission, they have been used by the French authorities to analyse whether the application of the provisions of the Law of 16 July 1980 confers an advantage on the creditors of legal entities governed by public law compared with the creditors of undertakings subject to collective procedures under ordinary law.

(59) With regard to the criterion relating to publicity, the French authorities take the view that the procedure introduced by the Law of 16 July 1980 is correctly identified by the rating agencies as applicable in the event of the insolvency of an EPIC, as reported by the rating agencies referred to by the Commission in relation to ERAP.

(60) With regard to the criterion relating to equivalence, the French authorities draw a distinction between the case where a requirement for continuity of the public service would apply and where such a requirement would not apply.

(i) the 'procedure' introduced by the Law of 16 July 1980 analysed from the perspective of an equivalence test — leaving aside the requirement for continuity of the public service

(61) According to the French authorities, if La Poste were unable to repay its debts and if there were no requirement for continuity of the public service, the following procedure would apply: in the unlikely event of genuine financial difficulty and before reaching the stage of lack of assets, the undertaking would initially be required to open negotiations with its creditors in order to establish a plan for rescheduling liabilities. Next, if the plan was judged unsatisfactory or if it did not bring an end to the financial difficulties, and in the absence of a new agreement with creditors, they — or some of them — could refer the case to the competent court to obtain a judgment against the debtor and therefore have their claim recognised. The procedure introduced by the Law of 16 July 1980 would then be implemented. Where necessary, the procedure could result in the supervisory authority replacing the executive of La Poste to take the decisions needed for the payment of its debts using the establishment's resources. If the procedure introduced by the Law of 16 July 1980 were to come up against La Poste's lack of assets, and if the supervisory authority were therefore faced with financial impossibility, not having any more assets to sell in order to generate the resources needed to pay the amount due, the procedure provided for by the Law of 16 July 1980 would be terminated.

(62) Therefore, according to the French authorities, assuming that there is no requirement for continuity of the public service, the application of the 'procedure' introduced by the Law of 16 July 1980 could result in all La Poste's assets being sold but, in the event of lack of assets, the procedure would not enable all La Poste's creditors to be

repaid. At the end of the procedure, the creditors of an entity subject to the Law of 16 July 1980, taken together, would have recovered the same amount as the creditors of an entity subject to commercial law, i.e. the proceeds from the sale of the assets.

(63) This procedure differs in only two respects from the procedure applicable under commercial law:

— the absence of a single procedure for all creditors: unlike the procedure under private law, whereby claims are processed *en masse* and creditors are satisfied in decreasing order of priority and pro rata from the amounts available, the procedure introduced by the Law of 16 July 1980 is different in that only action by the creditor enables him to protect his rights. The logic of the Law of 16 July 1980 is 'first come, first served',

— it is the representative of the State who, under the supervision of the administrative court (monitoring for gross negligence as established by the Council of State in the *Campoloro* judgment of November 2005 cited above), takes on the role equivalent to that of the court-appointed liquidator and administrator.

(64) The French authorities take the view that at the end of the procedure the creditors would no longer have any redress. According to the French authorities, the State cannot be held liable solely on the ground of lack of assets. Likewise, under the private-law procedure, the creditors '*do not recover their right to take individual action*', save in exceptional circumstances, at the end of the compulsory winding-up procedure ([43]).

(ii) the 'procedure' introduced by the Law of 16 July 1980 analysed from the perspective of an equivalence test — taking into account the requirement for continuity of the public service

(65) In the event that the continuity of the public service would have to be guaranteed, the French authorities admit that the representative of the State, when exercising the powers conferred by the Law of 16 July 1980, could decide not to sell certain assets needed to perform a public service task. The failure to sell certain goods, for reasons relating to the requirement for continuity of the public service, would be reflected, if the State did not pay compensation, in lower proceeds from the assets and a corresponding reduction in the amounts recoverable by creditors. The procedure would not confer on La Poste's creditors rights greater than those they would have had under commercial law. According to the French authorities, the criterion relating to equivalence set by the Commission would therefore be met *a fortiori*.

(66) Nonetheless, the French authorities admit that, in such an event, the State's strict liability would then be likely to be incurred and reflected in compensation to creditors of the amount of the loss they have suffered, i.e. at most the market value of the assets that the State representative lawfully decided not to sell. According to the French authorities, any such compensation would nonetheless merely reinstate the creditor in the situation that would result from the application of ordinary law and could not, therefore, confer on him, with regard to the equivalence test, any rights greater than those he would have under ordinary law.

(67) The French authorities conclude that the procedure introduced by the Law of 16 July 1980 fulfils the equivalence and publicity criteria set by the Commission, which are sufficient to rule out the existence of an advantage. They take the view that there is therefore no justification for subjecting La Poste directly to the procedure under ordinary law, which is cumbersome and complex.

3. *The instruments cited by the Commission on the future of the obligations once the establishment's resources have been exhausted do not apply to La Poste*

(68) According to the French authorities, the instruments referred to by the Commission in the opening decision, in particular in recital 69, are neither applicable nor transferable to La Poste.

3.1.2. ABSENCE OF ADVANTAGE

(69) According to the French authorities, the Commission's analysis of the existence of a selective advantage follows two threads:

— a circular argument that is based on the 2000 Guarantee Notice,

— an analysis of the presumed influence of the alleged measure on the rating agencies.

A. ***The Commission's 2000 Guarantees Notice cannot be used to conclude that there is an advantage in the case in question***

(70) The French authorities take the view that the Commission, in recital 77 of the opening decision, wrongly interprets point 2.1.3 of the 2000 Guarantees Notice. According to the French authorities, point 2.1.3 implies that, in the case of an enterprise whose legal form rules out bankruptcy or other insolvency procedures, if the enterprise enjoys more favourable funding terms, those terms constitute State aid in the

form of a guarantee. According to the French authorities, nothing in point 2.1.3 of the Commission's 2000 Guarantees Notice indicates that the Commission considers that the fact that the legal form of an enterprise excludes the possibility of bankruptcy proceedings necessarily leads to the enterprise enjoying more favourable funding terms.

(71) Moreover, the French authorities take the view that La Poste falls outside the scope of point 2.1.3 of the Commission's 2000 Guarantees Notice because the notice addresses the case where the legal form excludes all bankruptcy and insolvency proceedings, not a specific procedure. But, according to the French authorities, the Commission has not established that La Poste cannot go bankrupt, nor that all insolvency proceedings were inapplicable.

B. *Absence of imputability and of state resources*

(72) In recital 79 of the opening decision, the Commission points out the influence of the rating agencies on the funding terms obtained by undertakings.

(73) After highlighting the weaknesses of the rating agencies, the French authorities confirm that the position taken by a rating agency, where it is not underpinned by a precise analysis of the legal framework in force, cannot be used to create an advantage imputable to the State that may constitute State aid. In addition, even though this assessment would in practice provide an EPIC with advantageous access to funding, in law and in practice it would provide no access to state resources, which would be necessary to establish the existence of State aid.

(74) The French authorities add that the analyses by the rating agencies are based, not on an objective legal basis, but on a subjective assessment of state support in the event of the undertaking in question running into difficulty.

C. *Circular argument*

(75) According to the French authorities, the Commission's argument is circular:

— the Commission has based its argument on the statements by the rating agencies to highlight an economic advantage,

— the market and the rating agencies have accepted the absence of a state guarantee for La Poste but continue to harbour a doubt that is generated only by the position expressed by the Commission.

D. *Absence of effect on La Poste's rating*

(76) In any event, according to the French authorities, the opening decision does not establish that La Poste's rating would be higher because of an alleged unlimited state guarantee.

(a) **The doctrine of the rating agencies is not sufficient to identify any effect**

(77) The French authorities make a number of comments on the study by Standard and Poor's entitled '*Influence of Government Support on Ratings*', cited by the Commission in recital 80 of the opening decision. In the study, Standard and Poor's identifies a number of categories of government-supported postal companies; the classification determines the methodology applied by Standard and Poor's to set the rating of the company in question.

(78) The French authorities point out that inclusion in Category 1 ([44]) depends on broad criteria, such as the nature of the activity and the economic and social environment, but does not refer to the legal form of the rated operator.

(79) The French authorities note that on 22 November 2004 the French and Italian Post Offices were classified in Category 2 ([45]). The French authorities conclude from the Standard and Poor's document that the financial performance of Poste Italiane did not justify its rating. According to the French authorities, the Italian Post Office therefore benefited from a rating that was influenced by its owner's rating, even though the Italian Post Office is an SpA under ordinary law.

(80) The French authorities point out that Standard and Poor's eventually classified La Poste in Category 3 ([46]). According to the French authorities, the major reforms implemented since the end of 2004 gradually led Standard and Poor's to classify La Poste in the third category. The French authorities conclude that it cannot be established that La Poste's rating is imputable solely to its legal form or to any state guarantee mechanism, nor that the rating may constitute State aid.

(81) Nonetheless, the French authorities admit that the Standard and Poor's 2004 study raised the question of La Poste's legal form. However, they confirm that the discussions they have had since with Standard and Poor's have clarified the question. The French authorities also informed Fitch about the absence of any state guarantee for La Poste, following which the agency undertook to reconsider the question.

(b) **There are many cases in the private sector where the rating of a subsidiary is linked to the parent company's rating**

(82) According to the French authorities, the influence of the presence of a stable majority shareholder, which was identified by the rating agencies in the case of the Italian Post Office independently of any specific features relating to legal form, is also found in the case of private groups. The French authorities cite as examples a Standard and Poor's press release on AGF dated 3 December 2003 ([47]), a press release on Volkswagen Bank GmbH ([48]) and a press release on VWFS ([49]). According to the French authorities, this type of approach is therefore in no way specific to the public sector.

(c) **La Poste's rating would not be adjusted if its legal form were changed**

(83) Using the analysis for Standard and Poor's rating of La Poste, the French authorities seek to demonstrate that the rating does not depend on La Poste's legal form.

(84) First, the French authorities point out that when they made their observations, Standard and Poor's rated La Poste AA– with a stable outlook. The rating downgrade was justified by Standard and Poor's by the forthcoming deterioration in the group's financial structure linked to the payment by La Poste of EUR 2 billion to reform the financing of civil servants' pensions and by 'La Poste's greater autonomy in relation to its shareholder'. The French authorities take the view that the downgrade, which did not occur after a change in La Poste's legal form, cannot be explained if La Poste's rating were simply a consequence of its legal form.

(85) Second, despite the detail ([50]) provided by Standard and Poor's in its note dated 3 April 2007, which was cited in recital 84 of the opening decision, the French authorities find it difficult to see how La Poste, if it enjoyed a state guarantee, could be rated 3 notches below the State. Likewise, if the Law of 16 July 1980 were interpreted by the rating agencies as establishing, for the benefit of the creditors of the legal persons concerned, a mechanism comparable to a state guarantee, the French authorities do not understand how regional and local authorities could be rated BBB+ while the sovereign rating is rated AAA.

(86) Third, the French authorities stress that the Standard and Poor's note dated 3 April 2007 is based on a list of the strengths and weaknesses of the company that does not mention its legal form. The two factors mentioned by Standard and Poor's in support of the rating, i.e. the economic importance of La Poste's public service tasks and strong shareholder backing, are factors distinct from La Poste's legal form. The French authorities maintain that strong shareholder backing does not mean financial support in breach of EU law but the interest shown in La Poste's development by the State at arm's length ([51]). The French authorities conclude that La Poste's legal form is not an essential factor behind the rating.

(87) Fourth, the French authorities point out that in the same note dated 3 April 2007 the rating agency makes clear that it is continuing to use a top-down methodology, which allows an entity to be rated up to two categories below the sovereign State. According to the agency, this methodology is justified by the fact that the State will have to remain the 100 % shareholder in La Poste in the medium term. The French authorities conclude that this approach is in no way justified by La Poste's legal form. Lastly, relying on a quotation from Standard and Poor's ([52]), the French authorities argue that it is not the change in legal form but an opening-up of the capital that would lead Standard and Poor's to adopt a bottom-up methodology for La Poste. They add that, given the expected improvement in La Poste's fundamentals, such a change in methodology would not necessarily be reflected in a change in rating.

(88) Fifth, the French authorities point out that the outlook set by the rating agency is stable, despite the proceedings opened by the Commission against the unlimited state guarantee that La Poste is alleged to enjoy by virtue of its legal form. Now, if the legal form had an influence on the undertaking's solvency, the prospect of changing it should be reflected in a negative and unstable outlook. Moreover, Standard and Poor's justifies the stable outlook by the fact that the State is expected to remain 100 % shareholder in the undertaking for the next two years, despite a possible change to its legal form. Referring to another statement by Standard and Poor's ([53]), the French authorities conclude that it is the undertaking's own performance, and the possibility of a change of ownership, that are taken into account by Standard and Poor's to determine movements in the rating and not a possible change in the legal form.

(89) Sixth, the French authorities, citing another extract from the Standard and Poor's 2007 rating ([54]), stress that the rating agency does not reflect the Commission's statement that the consequence of the legal form is to improve the financing conditions granted to La Poste. Based on the citation from Standard and Poor's that: 'The ratings on La Poste were unaffected by this recommendation since we consider that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins LP's ratings and that has been reaffirmed by recent government decisions' ([55]), the French authorities conclude that La Poste's legal form has no influence on its rating.

E. ***Absence of effect on La Poste's financing conditions***

(90) Lastly, the French authorities examine La Poste's actual financing conditions to determine whether they are affected by an alleged state guarantee.

(91) According to the French authorities, neither the announcement by the Commission of the existence of the alleged guarantee, its alleged incompatibility with EU law and, consequently, its impending removal, nor the denials by the French authorities concerning the existence of the guarantee made to rating agencies and to the press, have had any influence on La Poste's financing conditions. Accordingly, in October 2006 La Poste issued bonds to the value of EUR 1,8 billion with two maturities, 7 and 15 years, just after the Commission announced that it had recommended measures be taken. La Poste referred to the recommendation in the prospectus and made clear, during the meetings with investors, that it did not enjoy a state guarantee. Now, after the bond issue, La Poste's cost of finance had not changed significantly (56). The two issues were widely subscribed by European investors with the usual investor profile for La Poste, i.e. investors who hold their bonds until maturity. The French authorities conclude that the Commission's request to withdraw the alleged guarantee and the publicity surrounding the State's position on this issue did not have any influence on La Poste's financing conditions on the bond market. The markets took the view that La Poste's financing conditions were not based on the *de jure* or *de facto* existence of any guarantee.

(92) The French authorities conclude that:

— the analysis set out by the Commission in its opening decision is flawed: La Poste does not, in fact, enjoy any state guarantee,

— the Commission has not demonstrated the existence of an advantage for La Poste deriving from its legal form,

— the Commission has not, therefore, demonstrated the existence of State aid to La Poste.

3.2. *PROPOSALS BY THE FRENCH AUTHORITIES*

(93) Nonetheless, in order to dispel any doubts on the part of the Commission, the French authorities have indicated that they were willing to implement the following measures if the Commission agreed to close the procedure by a decision that no aid is involved, in accordance with Article 7(2) of the Procedural Regulation:

— clarification of the Decree implementing the Law of 16 July 1980,

— incorporation of a reference spelling out the absence of a guarantee in La Poste's contracts involving a claim,

— a mechanism for transferring from La Poste to the State any negative effect on the spread linked to the fact that La Poste is not subject to collective procedures under ordinary law.

3.2.1. CLARIFICATION OF THE DECREE IMPLEMENTING THE LAW OF 16 JULY 1980

(94) According to the French authorities, there is no need to amend the substance of the provisions in question, but simply to clarify how they are interpreted. They are therefore proposing to amend the Decree implementing the Law (57). The amendment would apply to the fourth subparagraph of Article 3(1) of the Decree, which organises the supervisory power conferred on the Prefect or on the supervisory authority. The amendment must dispel any misgivings harboured by the Commission concerning the scope of the expression 'shall do so' ('*y pourvoit*'). It is therefore proposed to spell out that the representative of the State or the supervisory authority must release resources from the budget of the regional or local authority, or the establishment.

(95) Duly amended, the provision in the Decree would read:

'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources *from the budget of the defaulting authority or establishment*, either by reducing the appropriations allocated to other expenditures and still available or by increasing resources' (the amendment is shown in italic).

(96) According to the French authorities, this proposal, in association with the observations and the academic articles supplied during the previous discussions on the opening letter, prevents the Prefect or the representative of the State, under the procedure introduced by the Law of 16 July 1980, from increasing the resources of the local authority or establishment concerned by a subsidy from the State or an injection of public resources.

3.2.2. INCORPORATION OF A REFERENCE SPELLING OUT THE ABSENCE OF GUARANTEE IN LA POSTE'S CONTRACTS INVOLVING A CLAIM

A. ***The initial proposal by the French authorities***

(97) In recital 59 of the opening decision, the Commission took the view that the proposal by the French authorities to amend the Decree implementing the Law of 16 July 1980 'does not exclude the possibility that, where the resources of La Poste are exhausted, the creditor who has not obtained repayment of his claim under application of the Law of 16 July 1980 could bring legal action to render the State liable on the basis of a breach of the principle of equality before public burdens'.

(98) Although the French authorities deny that the State can be held liable solely on the grounds of La Poste's insolvency, in order to dispel any doubts in the Commission, the French authorities are making a proposal based on the exception of accepted risk. This exception, which applies both to the liability of the State with or without fault, is based on the principle that the injury resulting from a situation to which the victim knowingly exposed himself precludes the victim from having any right to compensation (see the judgments by the Council of State in *Sille* ([58]) and *Meunier* ([59]).

(99) Consequently, in order to ensure that this exception is applied, the French authorities propose to confirm officially to La Poste's creditors that their claim does not enjoy a state guarantee and that, in the event of insolvency, the State would not be obliged to substitute itself for the undertaking financially to pay the claim. Such a notification is not against the law since the law in no way provides that in the event of La Poste's insolvency, the State should replace the undertaking financially in order to pay its debts.

(100) Beyond the clarification of the Decree implementing the Law of 16 July 1980, the French authorities therefore undertake, jointly with La Poste, to include the following statement in the financing contract for each transaction (for all instruments covered by a contract):

'The issue/programme/loan does not enjoy any form of direct or indirect state guarantee. In the event of insolvency, the State would not be obliged to act as financial substitute for La Poste for payment of the claim'.

B. ***The Commission's misgivings set out in the opening decision***

(101) In recital 61 of the opening decision, the Commission sets out the following misgivings concerning the above proposals by the French authorities:

— the exception of accepted risk is a rule established by case law that could develop,

— 'this argument, which is derived from the fundamental principles of public law, through secondary law instruments, appears imperfect because those instruments would be likely to be annulled in the event of conflict',

— finally, La Poste's debts are not only financial but also commercial or other; these scenarios are not addressed by the additional proposal by the French authorities.

C. ***Information provided by the French authorities to address these misgivings***

(102) As pointed out above, according to the French authorities the State's strict liability cannot be incurred solely on the grounds of La Poste's lack of assets because making the State liable requires a decision by the State to act or not to act, and in this case there is a practical impossibility of acting. The French authorities' proposal therefore has value only as an additional means of clarification for creditors since the proposal would incidentally remove any risk of the State's strict liability being incurred thanks to the exception of accepted risk.

(103) According to the French authorities, the Commission's first objection amounts to taking the view that, even if the national law of a Member State did not include a provision, the mere risk of a change in case law, i.e. a change in national law, is enough to constitute State aid. The French authorities challenge that reasoning. According to them, the exception of accepted risk is a general principle of public law that has been confirmed by case law on many occasions, never contradicted and widely commented. The Commission cannot argue that there is State aid because of a possible change in the law, which in this case is highly improbable.

(104) The Commission's second objection relates to the fact that these secondary law instruments are easily annulled in case of conflict. It is true that the law and the regulation take precedence over the contract. However, for the Commission's objection to have real weight, it would have to rely on a higher-ranking text. According to the French authorities, there is nothing to support the Commission's objection on this point.

(105) However, the French authorities admit that the third objection, which is that bond issues are not the only instruments giving rise to claims, is pertinent, although of limited scope in the case of La Poste because financial debt is La Poste's main form of debt and the vast majority is bond debt.

D. ***Extension of the proposal***

(106) The French authorities have therefore indicated that they would be willing, if the Commission closed the formal investigation procedure by a decision to the effect that there is no aid within the meaning of Article 7(2) of the Procedural Regulation, to extend their proposal to include a statement concerning the absence of a guarantee to all contracts involving a claim. According to the French authorities, this extension would make it possible to avoid any risk of incurring the State's strict liability based solely on La Poste's insolvency. Moreover, incurring the State's strict liability because of a decision by the supervisory authority not to sell the assets needed for the continuity of the public service would simply have the effect of placing La Poste's creditors in the same situation they would have been in had they been creditors of a public limited company.

E. ***Assessment by the French authorities of the classification of the measures as aid following their proposals***

(107) According to the French authorities, the two clarification measures proposed above would allow La Poste's creditors to be made fully aware of their rights. Consequently, the French authorities cannot be considered as 'responsible for the expectations created in the minds of La Poste's creditors concerning the existence of a guarantee' and as voluntarily maintaining 'an opaque legal situation' that could lead the State 'to be obliged to repay La Poste's debts if it were no longer able to meet its commitments', as the Commission maintains in recital 74 of its opening decision.

(108) According to the French authorities, the fact that La Poste is subject not to collective procedures under ordinary law but to the provisions of the Law of 16 July 1980 does not mean that it is possible to conclude that there is a state guarantee; second, the proposed clarification measures make it possible to dismiss any State responsibility for the market's alleged faith in such a guarantee.

(109) Under these conditions, it is not possible to hold the State responsible for any potential effect. The criterion of imputability is therefore not met, contrary to what the Commission states in recital 76 of the opening decision.

(110) Likewise, recital 75 of the opening decision, in which the Commission refers to the 2000 Guarantees Notice to justify the presence of state resources, is no longer valid because the facts do not support the existence of a state guarantee.

3.2.3. TRANSFER MECHANISM

(111) In order to supplement the proposed mechanism, the French authorities would be willing to consider with the Commission the following approach.

(112) The proposed approach results from the analysis of the Commission position in point 2.1.3 of its 2000 Guarantees Notice: 'The Commission also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'. Likewise, in recital 114 of its opening decision, the Commission points out that it regards as a problem the fact that 'France is not taking all measures necessary to prevent this legal form producing economic effects to the benefit of an undertaking that operates on competitive markets'.

(113) The French authorities challenge the applicability to La Poste of point 2.1.3 of the Commission's 2000 Guarantees Notice and maintain that the Commission has been unable to establish that the fact that La Poste is not subject to collective procedures under private law is reflected in more favourable financing conditions.

(114) Nonetheless, the French authorities have offered to examine with the Commission the setting up of a transfer mechanism by La Poste to the State, on a euro-for-euro basis, of any adverse effect on the spread that is linked to the fact that La Poste is not subject to collective procedures under private law, using a calculation method that would be validated by the Commission and could be audited. According to the French authorities, the introduction of such an approach would complement the clarification proposals set out above in order to extinguish the myth of a state guarantee, while definitively avoiding any risk of aid.

4. **ASSESSMENT**

4.1. *CLASSIFICATION AS AID*

(115) Article 107(1) TFEU reads: 'Save as otherwise provided in this 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 common market'.

4.1.1. UNLIMITED STATE GUARANTEE: STATE RESOURCES

(116) As was pointed out in recital 56 of the opening decision, La Poste has the status of a publicly owned establishment of an industrial or commercial character, or 'EPIC', and consequently enjoys a special legal position with regard to the payment of its creditors and its continuation in business in the event of insolvency.

(117) By way of introduction, the Commission would point out that La Poste is not subject to the ordinary law rules governing the administration and winding up of firms in difficulty [60]. The French authorities do not contest this point, but deny that there is any mechanism that might be equivalent to a state guarantee for La Poste. However, according to the Commission Notice on the application of Articles 107 and 108 of the TFEU to State aid in the form of guarantees ('the 2008 Guarantees Notice'), point 1.2, second paragraph, fourth indent [61], the Commission considers that there is aid in the form of a guarantee where more favourable funding terms are obtained by enterprises 'whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State'. Consideration must therefore be given to the arguments by which the French authorities seek to show that there is no state guarantee here.

A. ***Guarantee of payment of individual claims***

(118) In order to establish whether there is a guarantee for individual claims, the Commission will first consider whether, as the French authorities contend, any such guarantee is ruled out by the legislation or the case law (a).

(119) The Commission will then examine the steps to be taken by creditors of La Poste in order to recover their claims in the event that La Poste should be in financial difficulty and should be unable to pay its debts (b). The Commission will seek to determine whether the procedure to be followed is such that the position of a creditor of La Poste is comparable to that of a creditor of a firm governed by commercial law.

(a) **Contrary to the French authorities' affirmation, French law does acknowledge the existence of implied guarantees, and in particular the existence of a state guarantee deriving from the status of publicly owned establishment**

1. *The arguments of the French authorities* [62]

(120) First, the French authorities assert that there is no legislation or decision laying down the principle that the State is to guarantee the debts of EPICs.

(121) The Commission observes that while it is true that there is no legislation or decision providing expressly for a state guarantee for EPICs — just as there is no legislation or decision expressly ruling out any state guarantee for such establishments — this does not mean that there can be no implied guarantee.

(122) Second, according to the French authorities, the courts have held, notably in the judgment in the case of *Société de l'hôtel d'Albe* [63] and in *Campoloro* [64], that there is no such guarantee.

(123) The Commission would observe that in *Société de l'hôtel d'Albe*, as pointed out by the Commission's expert, the Council of State merely refused to grant an application brought by a creditor directly against the Minister for Public Works. A guarantee would come into play in the event of insolvency. The judgment cited did not concern the specific situation in which a guarantee might be invoked. A guarantee mechanism does not require the State to pay a debt of a publicly owned establishment whenever a creditor so requests.

(124) The Commission's analysis of the *Campoloro* case is set out in section 4.1.1.A(b)(3) of this Decision. It will be shown that the judgment in *Campoloro* establishes a scheme of state liability in proceedings for the recovery of the debts of publicly owned establishments which displays all the characteristics of a guarantee mechanism.

(125) Third, the French authorities' expert concludes that the debts contracted by La Poste since the entry into force, on 1 January 2005, of the Organic Law governing the Finance Act ('LOLF') do not qualify for an implied guarantee. With regard to debts contracted before that date and whose lifetime extends beyond it, the expert acknowledges that two views are possible.

— On the first view, the Constitutional Council has found that guarantees do not lapse merely because they are not expressly authorised by the Finance Act, and the constitutional grounds on which it made this finding, in particular the principle of equality before public burdens and the right of property [65], apply to guarantees whether express or implied. In so far as there is an implied guarantee for the debts of La Poste, therefore, the fact that it was not authorised by the Finance Act would not mean that it would lapse in respect of debts contracted by La Poste before 1 January 2005.

— On the second view, rights as indisputable and decisive as these cannot be claimed by the holders of a supposed implied guarantee. In so far as there is an implied guarantee for the debts of La Poste, therefore, the fact that that guarantee is not authorised in the Finance Act means that it also lapses in respect of debts contracted before 1 January 2005.

(126) The Commission notes that the French authorities' expert accepts that it is not certain that the absence in the Finance Act of authorisation for an implied guarantee means that the guarantee lapses in respect of debts contracted before 1 January 2005. More fundamentally, the Commission believes that, in order to determine whether or not the implied guarantee given by the State to La Poste has lapsed as a result of the Organic Law governing the Finance Act, what has to be considered is not the dates on which the debts were contracted by La Poste, but the date from which La Poste has enjoyed the guarantee. The guarantee links the State and La Poste; creditors of La Poste benefit only indirectly; and the guarantee covers not just the payment of individual claims (see Section 4.1.1.A of this Decision) but also the continued existence of La Poste or its obligations or both (see Section 4.1.1.B). The implied state guarantee to La Poste dates from before 1 January 2005, and the Commission takes the view that the argument that there can be no implied guarantee since 1 January 2005 is false.

(127) In paragraph 110 [66] of its decision of 25 July 2001 on the Organic Law on the Finance Act, the Constitutional Council found that guarantees which were given before the enactment of the Organic Law governing the Finance Act and which have not been identified and listed have not lapsed as a result. According to the Commission's expert, this reasoning applies squarely to implied guarantees, linked to the status of publicly owned establishments, which have not yet been identified and listed but which nevertheless remain valid.

(128) But although the Constitutional Council has indeed found that guarantees given without the authorisation of the Finance Act have not lapsed, the French authorities' expert doubts whether the arguments that led to that conclusion apply without distinction to express guarantees and to implied guarantees. He takes the view that holders of a supposed implied guarantee cannot claim rights as indisputable and decisive as those conferred by an express guarantee.

(129) The French authorities' expert merely expresses doubt, so his argument is not decisive, and the Commission notes that it is not suggested in this paragraph 110 of the Constitutional Council's decision that guarantees given expressly do not lapse whereas implied guarantees do. Article 61 of the Organic Law on the Finance Act, to which the paragraph relates, does not confine itself to express guarantees either. The Commission believes that the opinion of the Constitutional Council that a guarantee does not come to an end merely because it is not authorised in the Finance Act applies whether the guarantee is express or implied. The Commission takes the view, therefore, that the fact that the implied guarantee given by the State to La Poste has not been authorised in the Finance Act does not mean that it has lapsed.

(130) In addition, as the Commission's expert pointed out, the obligation to enter state guarantees in a Finance Act is confined to the 'giving' *(octroi)* of such guarantees. To 'give' a guarantee the State must by an express manifestation of its intention confer a guarantee on an organisation or an operation. The scope of the obligation to enter guarantees in the Finance Act does not extend to guarantees that arise out of the legal form of an organisation, or out of an obligation established in case law, which are guarantees of an implied and automatic character. This category is not the result of a decision of the State, but of the fact that the State places itself in an existing legal framework, the guarantee being only one effect of that framework. The existence of this second category outside the scope of Article 34 of the Organic Law on the Finance Act explains why the rule established by the case law on guarantees given by concessionaires has continued beyond 2001. It also explains why when the State is a shareholder or partner in a company or grouping whose debts are covered under the Commercial Code by an unlimited guarantee, the State is not required to specify that fact in a Finance Act.

(131) The Commission concludes that the argument put forward by the French authorities on the basis of the Organic Law on the Finance Act is not convincing, and that the fact that it is not stated in any Finance Act that the State extends a guarantee to La Poste by reason of its legal form does not mean that there is no such guarantee. The Commission would emphasise that it is not in any event bound by the description of the measure as a 'guarantee' for purposes of French law, or by the fact that a guarantee is or is not caught by the Organic Law on the Finance Act. From the Commission's point of view the only relevant consideration is how the measure is to be described for purposes of Community law, and the Guarantees Notice in particular. Community law recognises the existence of a guarantee once a Member State legally has to repay a claim on another person in the event of that person's defaulting [67].

(132) Fourth, the French authorities contend that if EPICs enjoyed a state guarantee, any change in their legal form would necessitate measures to preserve the rights of creditors arising before the change. No such mechanism has ever been set up (for example in connection with the conversions of France Télécom, Gaz de France, EDF or ADP) [68], which proves, it is claimed, that there is no guarantee.

(133) The Commission's expert explains that this assertion is based on a very broad interpretation of the constitutional protection of the right of property. According to the French authorities' argument, the protection of the right of property requires that all claims be preserved. The constitutional protection of the right of property is not confined to cases where the right of property depends on a public body; on the French authorities' interpretation, therefore, claims would have to be protected whenever they were rendered more fragile by any event in the life of any company. But in French positive law as it stands there is nothing to preserve such claims. If the argument is confined to claims guaranteed by the State, it would mean that a right of property that had once been guaranteed by the State would enjoy constitutional protection superior to other property rights. There is nothing to suggest that this is so. Lastly, a claim is a right *in personam*, not to be confused with a right of property, which by its nature is a right *in rem*. Rights *in personam* cannot be brought within the more far-reaching protection extended to rights *in rem*.

(134) The Commission concludes that, when an EPIC is converted into a company that can be made the subject of court proceedings for administration or winding up, the right of property does not require that a specific measure be taken to preserve the entitlements of creditors. The fact that no such measure has been taken, therefore, does not constitute evidence that there is no implied guarantee.

(135) Contrariwise, the French authorities argue that, if La Poste had enjoyed a state guarantee by reason of its legal form, there would have been no need to give an express guarantee for the debts contracted by the old Administration of Posts and Telecommunications which were transferred to La Poste. But, they argue, such a guarantee was in fact given, in an order dated 31 December 1990.

(136) The Commission points out that the fact that the French authorities may have decided to give an express guarantee does not mean that there was no implied guarantee. The same reasoning applies to an argument put forward by the French authorities regarding the guarantee given by the State for certain activities of ERAP or the French Development Agency. In choosing to give an express guarantee in certain cases even though there was already an implied guarantee, the State may have been motivated for example by a concern for transparency and a desire to augment the creditors' legal certainty. As the French authorities' expert asserts, 'holders of a supposed implied guarantee cannot claim rights as indisputable and decisive as those conferred by an express guarantee'.

(137) Last, the French authorities cite an article by Mr Labetoulle, former president of the litigation division of the Council of State ([69]). This article will be considered along with the judgment in *Campoloro* in the section of this Decision dealing with the liability of the State ([70]).

(138) The Commission concludes that:

— contrary to the affirmations of the French authorities, there is no legislation or decision that excludes the existence of a state guarantee to La Poste; and

— the fact that there is no legislation expressly providing for such a guarantee does not mean that there can be no implied guarantee.

2. *The existence of implied guarantees arising out of the legal form of publicly owned establishments is confirmed by a memorandum of the Council of State*

(139) The existence of an implied guarantee arising out of the legal form of publicly owned establishments is confirmed by a memorandum of the Council of State drawn up in 1995 in the *Crédit Lyonnais* case, which was cited in the opening decision ([71]). The Council of State there took the view that the organisation concerned enjoyed an implied guarantee by reason merely of its character as a publicly owned establishment: 'In connection with the draft law on state involvement in the recovery plans for Crédit Lyonnais and Comptoir des Entrepreneurs, the Council of State […] took the view that there was a state guarantee for this establishment which derived without any express legislative provision from the very fact that it was a publicly owned establishment' ([72]).

(140) The Commission has repeatedly asked the French authorities to send it the full text of this memorandum.

(141) The French authorities have replied that the memorandum in question was not drawn up at the request of the Government and was not given formal status in any official document ([73]). According to the French authorities, the memorandum to which the Commission refers consisted only of the one sentence quoted in the annual report.

(142) In addition, the French authorities argue, that opinion cannot be transposed to the case of La Poste, for several reasons: because it concerned a publicly owned establishment with a public accountant set up specifically to manage state support for the recovery of Crédit Lyonnais; because it predated the Organic Law on the Finance Act, which was adopted on 1 August 2001; and because its application is contrary to the subsequent case law of the Council of State.

(143) The Commission would point out that the interpretation put forward by the French authorities according to which the Council of State's opinion cannot be transposed to the case of La Poste contradicts that opinion's very wording. The Council of State does not refer to the aims of the establishment. And it speaks of publicly owned establishments, and not of publicly owned establishments with public accountants. The French authorities do not explain why it should apply to publicly owned establishments only if they have a public accountant.

(144) As regards the arguments put forward by the French authorities to the effect that the opinion is not applicable because it predates the Organic Law on the Finance Act, and is contrary to the subsequent case law of the Council of State, the Commission has already shown here that the Organic Law does not stand in the way of an implied guarantee given by the State to La Poste.

(145) The Commission takes the view, therefore, that the Council of State's opinion is indeed applicable to La Poste, and that it acknowledges the existence of a state guarantee deriving from the public character of an organisation.

(146) That there are state guarantees that derive from an administrative or legislative act which 'produces and entails financial consequences for the State' is confirmed in a memorandum from the Minister for Economic Affairs, Finance and Industry dated 22 July 2003, concerning a 'Census of implied and express guarantee arrangements granted by the State'. That memorandum shows that a state guarantee can derive from legal acts of very different kinds ([74]).

(147) In an explanatory note attached to the memorandum, in part 3, under the heading 'Experience of calls made on guarantees and the judgments of the Council have clarified a number of textbook cases of guarantees which need to be identified', the French authorities affirm that 'Some legal forms by their structure entail a liability on the part of their shareholders; this is true in particular of [the forms of partnership known as] the *société en nom collectif*, or SNC, and the *groupement momentané d'entreprises*, or GIE. With these last two forms third parties will always seek out the State shareholder. The same applies to the creation of publicly owned establishments and to some shareholdings in public limited companies'. Here the French authorities themselves point out that the setting up of a publicly owned establishment entails an implied guarantee given by the State to the establishment's creditors.

(b) **A creditor of La Poste can be sure that his claim will be repaid**

(148) The Commission will now consider the steps to be taken by creditors of La Poste in order to settle their claims if La Poste were to be in financial difficulty and unable to meet its debts. The Commission will seek to determine whether, at the end of a procedure that is defined in advance and conducted in public, a creditor of La Poste will be in a position comparable to that of a creditor of an enterprise governed by commercial law.

(149) This examination will show that:

— the conventional obstacles to the settlement of a claim against a body governed by private law are absent in the case of a publicly owned establishment (1);

— the procedure laid down by the Law of 16 July 1980 for the recovery of the debts of a publicly owned establishment that has been found by a court to be in default does not in any way lead to the cancellation of the debt (2);

— the rules governing the liability of the State in the procedure for the recovery of the debts of a publicly owned establishment have all the characteristics of a guarantee mechanism (3);

— even if he were to fail to obtain satisfaction, a creditor could always invoke the effects of a legitimate mistake that he made when his claim arose regarding the prospect that it would always be honoured (4).

1. *The conventional obstacles to the settlement of a claim against a body governed by private law are absent in the case of a publicly owned establishment*

(150) It was made clear in the description of the measure that La Poste is not subject to the ordinary law rules governing the compulsory administration or winding up of firms in difficulty. A creditor of La Poste is not in danger of seeing his claim cancelled because compulsory winding-up proceedings have been brought ([75]), or of obtaining only partial payment of his initial claim at the end of compulsory administration or winding-up proceedings under the ordinary law.

(151) In addition, as the Commission's expert has pointed out, the fact that La Poste has legal personality is no bar to the existence of a guarantee given by the French State. There are commercial forms of enterprise such as public limited companies (SAs) or private limited companies (SARLs) whose members are not obliged to pay the debts of the organisation in which they take part, but there are also many categories of organisation or legal person carrying on a commercial activity in which private members are indeed liable for the debts of the

organisation they have set up. This is true of the forms of partnership known as the *société en nom collectif*, the *groupement d'intérêt économique*, or the *société civile*. Thus there is no express principle of ordinary law governing the liability of members for debts. In the absence of legislation, it cannot be said that the principle that applies must necessarily be that debts or losses are not guaranteed. In French law, the independence conferred by legal personality, or the existence of funds that belong only to the company, is not a test that allows it to be determined how the debts contracted by a legal person are guaranteed. It may also be concluded that there is nothing to prevent the legislature from providing that a publicly owned establishment can be set up by a public body that will bear any loss only up to the limit of its initial contribution or endowment.

(152) The Commission's expert has sought to complete the picture by considering whether there is an implicit principle of ordinary law governing the guaranteeing of debts in cases where the partners or members in an organisation have not chosen to join together in one of the legal forms offered by the legislature; the Commission's expert finds an answer in Articles 1871 *et seq*. of the Civil Code. These articles deal with partners who have not registered their partnership. Article 1871-1 provides as follows: 'Unless another form of organisation has been provided for, the relations between partners are governed, to the extent reasonable, either by the rules applying to *sociétés civiles*, if the partnership is of a civil character, or, if the partnership is of a commercial character, by the rules applicable to *sociétés en nom collectif*'. It has been explained above that both of these forms of partnership are legal persons whose members have unlimited liability for their debts. The expert concludes that in so far as there is a principle of ordinary law, it would be a principle whereby those who set up a legal person guarantee its debts.

(153) In their memorandum of 27 October 2009, the French authorities dispute this view. The conclusion, they argue, is not based on any legislation, since the reference in Article 1871-1 of the Civil Code is concerned with 'relations between partners' and not relations with third parties. The legislation is silent on the matter, and its silence cannot be made to imply a principle of guarantee without infringing the rights of the defence that apply in French law and in the law of the Union.

(154) The Commission would observe, however, that Article 1871-1 of the Civil Code provides that every partner in an unregistered partnership contracts in his own name and is liable personally to third parties. Thus every partner has unlimited liability for the debts he has contracted. The Commission does not seek to deduce from this one consideration that the State is liable for the debts of La Poste; but it does believe that the French authorities' argument does not invalidate the Commission's expert's argument that in so far as there is a principle of ordinary law it would be a principle of guarantee. In addition, the Commission would point out that in the explanatory note attached to the memorandum of 22 July 2003 from the Minister for Economic Affairs, Finance and Industry [76], the French authorities themselves draw a parallel between the liability of a shareholder for a *société en nom collectif* and the liability of the State for a publicly owned establishment.

(155) The Commission concludes that:

— unlike the creditors of undertakings governed by commercial law, creditors of La Poste (which is not subject to the ordinary law rules governing the compulsory administration and winding up of firms in difficulty) are not in danger of seeing their claim cancelled in whole or in part following court liquidation proceedings;

— the fact that La Poste has legal personality is no bar to a state guarantee to La Poste; and

— in the absence of any express limitation on the State's liability in respect of La Poste, La Poste's creditors may legitimately act on the principle that the State will bear the debts of La Poste, even though La Poste possesses legal personality.

2. *The procedure laid down by the Law of 16 July 1980 for the recovery of the debts of a publicly owned establishment that has been found by a court to be in default does not in any way lead to the cancellation of the debt*

(156) The Commission will now consider the procedure for the recovery of the debts of publicly owned establishments that have been found by a court to be in default, in order to determine whether the procedure can result in the extinction of a claim on La Poste, which would make the outcome for the creditor similar to that of insolvency proceedings in the courts, as the French authorities assert. The procedure is laid down in the Law of 16 July 1980 and in implementing provisions which are cited in the section of this Decision describing the measure [77].

(i) The Law of 16 July 1980 confers important prerogatives on the State: the mandatory payment order and the creation of sufficient resources

(157) As has been explained in the description of the measure, the Law of 16 July 1980 provides that 'if the decision-making body of the authority or establishment has not released or created the resources […] the supervisory authority shall do so, and if necessary shall issue a mandatory payment order'. The Decree of 12 May 1981, which on this point remains unchanged by the amending Decree of 2008, states that the representative of the State or the authority responsible for supervision 'shall, as appropriate, release the necessary resources, either by reducing the appropriations allocated to other expenditures and still available, or by increasing resources'.

(158) Thus the Law of 16 July 1980 and the measures implementing it designate the State as the authority responsible for covering the debts of publicly owned establishments. They also confer important prerogatives on the State: the mandatory payment order and the creation of sufficient resources.

(159) The French authorities deny that the resources referred to here can ever be state resources. As has been indicated in the part of this Decision concerning the observations of the Member State [78], the French authorities contend that the power conferred on the supervising authority by the Law of 16 July 1980 is only one of substitution. The supervising authority is empowered only to exercise the powers of the executive into whose shoes it steps, and those powers do not include the power to avail itself of the state budget. In support of this interpretation the French authorities cite the legislative history of the Law of 16 July 1980, a number of scholarly articles, and the decisions of the Council of State in *Campoloro*. They acknowledge, however, that the 1980 Law does not in principle prevent the State from providing financing to support the public body concerned.

(160) The Commission accepts that the legislation does not expressly require the State to subsidise a publicly owned establishment on an exceptional basis if it is in financial difficulty. This does not in any way invalidate the demonstration of the existence of an implied guarantee.

(161) The Commission also accepts that the resources to be released in the first place are the resources of the establishment itself. But this does not prevent a finding that once a publicly owned establishment's own resources are exhausted its debts can be honoured only out of state funds [79]. Such a finding is consistent with the fact that a guarantee mechanism is a subsidiary mechanism, in that the debtor's own resources are called upon before those of the guarantor.

(ii) The Law of 16 July 1980 and the measures implementing it do not lay down a procedure for liquidation with cancellation of obligations: a shortage of funds will be covered, or will be only temporary

(162) The Commission will now consider the interpretation of the French authorities which maintains that at the end of the procedure laid down by the Law of 16 July 1980 some creditors may see their claim irrevocably cancelled [80], and that their situation is equivalent to that of creditors of undertakings subject to court proceedings.

(163) The Commission's expert [81] observes that the Law of 16 July 1980 and the Decree implementing it support the view that in the event that funds are insufficient there are only two possibilities open: either the supervising authority releases the necessary resources, or the payment is deferred. At no stage does the procedure indicate that in the event of a continuing insufficiency of funds the debt will come to an end.

(164) The Law of 16 July 1980 and the measures implementing it do provide for a situation where funds are insufficient, but they treat this situation as a temporary one, pending the creation of additional resources, which is the only outcome they envisage. At no stage do they contemplate a situation where the creation of additional resources is impossible or the resources thereby created are in turn insufficient. After the creation of resources, the legislation indicates that the responsible authority is to issue a mandatory payment order. The 1989 circular referred to above is more precise with regard to a shortage of funds, stressing that it is necessarily of a temporary character, since the creditor must be informed of the balance that will be paid later. According to the Commission's expert, 'from a reading of this legislation, creditors can conclude that if their claim is not met immediately it will be met at a later date'.

(165) The Commission's expert also rightly observes that the procedure laid down by French law is a procedure only for the recovery of claims, and not for winding up. In the case of private persons the legislation links cessation of payments to winding up. The prospect of a cessation of payments may be grounds for a suspension of payments [82], and a cessation of payments is expressly stated to be grounds for winding up under the supervision of the court [83]. But in the case of public bodies in general, and publicly owned establishments in particular, the legislature and the regulatory authorities have passed over the situation of cessation of payments, without linking it to any form of winding up, and have thus given creditors to understand that their claims will be honoured without limitation, if necessary by a third party such as the State.

(166) Lastly, the Commission's expert observes that in the course of the reform of 2008, which took place after the opening decision in these proceedings, the French authorities did not take the opportunity to make it clear that the resources to be released had to be the establishment's own, and that state resources would not be drawn upon. Such a clarification would have sent a strong signal to creditors at a time when in proceedings initiated by the Commission an express link was being made between a state guarantee and the vague wordings in the legislation. The fact that the necessary clarification was not supplied supports the affirmation that the French State does not wish to deny that it may supply the necessary resources itself.

(167) In the memorandum they sent on 27 October 2009, the French authorities argue that the statement of the Commission's expert that 'from a reading of this legislation, creditors can conclude that if their claim is not met immediately it will be met at a later date' rests on a biased reading of the relevant wordings: apart from the fact that these are merely circulars, rather than statutes or regulations, there is nothing in them to show that state resources are to be substituted for those of the publicly owned establishment. There is no reason why publicly owned establishments should not become dormant, leaving their creditors unable to force them to pay their debts. In addition, the French authorities take the view that publicly owned establishments could fail to meet a claim without automatically being in a state of cessation of payments.

(168) The Commission will now consider whether, once a court has ordered a publicly owned establishment to pay a sum of money, and the order is no longer open to appeal, it is legally possible for the establishment to be allowed to fall into dormancy, with the result that the claim will never be honoured, as the French authorities contend. The Law of 16 July 1980 and the measures implementing it are binding on the State. In the case least favourable to the creditor, they require the State to inform the creditor of the balance that will be paid later. If no payment follows, the creditor can always claim that the State is liable (this point will be developed in Section 3 below). On the theoretical hypothesis that the debtor were to become dormant, therefore, the debt would not in any event be extinguished. In addition, the French authorities have not provided any specific example where this situation has actually arisen.

(169) The Commission concludes as follows:

— The specific procedure laid down by the Law of 16 July 1980 and the measures implementing it is a procedure only for the recovery of claims, and not a procedure for winding up. At the end of the procedure the claim is not cancelled, whereas at the end of winding-up proceedings a judgment terminating the proceedings on the ground that the assets are insufficient, without penalty, prevents creditors from pursuing the proceedings further.

— The Law of 16 July 1980 and the measures implementing it provide for the deferral of a payment order, and nowhere envisage a cessation of payments, and thereby give creditors to understand that there are or that there will be the resources necessary to settle a claim they hold on a legal person governed by public law.

— It follows that a shortage of funds will be covered, if necessary by the State, or is temporary only. But winding-up procedures never provide for the possibility that a third party can become liable for the debts of the insolvent party, except of course in the case of a guarantor, or of a partnership with unlimited liability.

(iii) An exceptional subsidy can be envisaged that would be granted by the State to enable a publicly owned establishment to meet its obligations, and such a subsidy is in fact envisaged by certain legislation

(170) The Commission's expert observes that:

(α) […] (*)

(171) In order to establish that the guarantee arising out of La Poste's legal form constitutes State aid, it is not necessary to show that the resources of its own that La Poste would be able to mobilise in the event of a shortage of funds are limited; but the Commission would nevertheless point out that this is in fact so. The sale of assets [84] and the prices charged for providing the universal postal service [85] are both subject to very strict rules laid down by the French legislature. The difficulty of mobilising the undertaking's own capital and reserves in order to meet its debts exacerbates the need for state action in the event of a shortage of funds. First, the fact that resources cannot be mobilised by selling assets means that more frequent use has to be made of other guarantee mechanisms (advances, efforts to establish a liability on the part of the State, etc.). Second, in the event of a default on the part of La Poste, the fact that the legislature has laid down rules protecting the assets might be invoked in any dispute in which it is alleged that there is a strict liability resting on the State [86].

(172) In their memorandum of 27 October 2009 the French authorities deny that it is 'impossible' for La Poste to mobilise its own capital and reserves.

— As regards the sale of assets, the State is free to determine at its discretion whether an asset is 'indispensable' for the provision of the public service. Even if it does object to a sale, it does not thereby incur any obligation to compensate via a guarantee mechanism. As a matter of fact the State never has objected to a sale of assets under Article 23 of the Law of 2 July 1990, which has in any event fallen into desuetude since 2005, when La Poste transferred almost all of its immovable property assets (including post offices) to a subsidiary that was not subject to this system of prior authorisation.

— As regards increases in charges for the universal postal service, ARCEP, the postal regulator, does not decide prices, and sets a price cap only for La Poste's regulated activities, below which prices can be determined freely (with the exception of the prices of stamps, which are laid down by the Minister responsible for posts, who must stay within the price cap). It is reasonable to suppose that ARCEP would have difficulty refusing an increase in rates that was indispensable to the survival of La Poste and the public service functions it provides. The price cap applies only to the regulated sector, which accounts for less than half of the La Poste group's operating profit.

(173) The Commission takes note of the clarifications provided by the French authorities, and makes two observations.

— The French authorities contend that even if the State were to object to a sale, that would not entail a guarantee. Nevertheless, they have acknowledged that in applying the procedure laid down in the Law of 16 July 1980 the representative of the State is bound by the requirement of continuity of public service ([87]), which means that the State might have strict liability for a breach of the principle of equality before public burdens, as will be shown below ([88]).

— Creditors of La Poste cannot turn to another company in the La Poste group to seek satisfaction of their claims, so that the proportions between the regulated area and the reserved area have to be considered in relation of the turnover of La Poste, and not of the La Poste group as a whole. Given the scope of the regulated sector in France ([89]), it is clear that regulated activities form a preponderant part of the business of the public undertaking La Poste. Thus the share of La Poste's business which is subject to the price cap is large, and the charges for reserved services are set by ministerial order.

(β) Some functions and schemes provided for in the state budget could be used to help a publicly owned establishment to repay its debts

(174) The programmes identified by the Commission's expert are the following:

— Programme No 823, advances to organisations distinct from the State that manage public services: The object is 'to allow the State to grant advances to various organisations, distinct from the State, that manage public services' ([90]). 'The purpose of such advances is to respond to emergency situations, whether in order to ensure the continuity of public business, or to expedite the implementation of a particular measure. The advances also allow an unforeseen funding requirement to be met provisionally, pending a permanent source of finance. This means that financing does not have to be obtained from banks or the market, and prevents greater fragmentation of the debt of public departments or an increase in their interest charges'.

— Under the heading 'State financial holdings' there are two programmes, entitled 'Capital transactions with regard to state financial holdings' (programme No 731) and 'Reduction of the debts of the State and of publicly owned state establishments' (programme No 732). In this latter programme there is a measure No 1 which relates to 'increases in capital, contributions to capital, shareholders' advances and equivalent loans'.

(175) The funds allocated to these advances are substantial. For programme No 732 there is express provision for a reserve of EUR 85 million. Payment appropriations for measure No 1 in programme No 732 amount to EUR 600 million. Payment appropriations for programme No 823 amount to EUR 50 million.

(176) In the event of financial difficulties at La Poste, the State would be able to help it with funding from these programmes. There is no legislation limiting the possibility of granting advances to EPICs carrying on an economic activity and operating in the competitive sector.

(177) In their memorandum of 27 October 2009, the French authorities argue that they have never denied that publicly owned establishments may receive state advances — which would be granted expressly — but that this in no way implies that publicly owned establishments are entitled to draw on the state budget; as the Commission's expert indicates, shareholders' advances may be available in respect of any state holding, whatever the legal form involved, so that no conclusion can be drawn in respect of EPICs alone; and contrary to what the Commission's expert maintains, these advances take full account of the constraints imposed by the Community, because they would be the act of a prudent investor.

(178) The Commission draws the following conclusions:

— In the event of a shortage of funds, French legislation authorises or indeed encourages the State to provide capital to publicly owned establishments, rather than expecting them to secure conventional bank loans. Access to these resources is in no way conditional on prior compliance with the rules governing State aid. The 'additional resources' referred to in the Law of 16 July 1980 may consist of contributions of this kind.

— The relevant legislation is known to creditors, who consequently have good reason to believe that the supervising authority will be in a position to secure the resources necessary to ensure that their claims are satisfied.

— However, La Poste has no entitlement to draw on these resources.

(179) Given

— that the Law of 16 July 1980 and the measures implementing it do not provide for winding up with the cancellation of rights and obligations,

— that the Law of 16 July 1980 and the measures implementing it do not at any stage contemplate the possibility that resources might not be available, and

— that the budgetary documentation shows that EPICs may receive exceptional advances in the event of an urgent funding requirement,

the Commission takes the view that the probability that a creditor might fail to obtain satisfaction of his claim under the procedures laid down by the Law of 16 July 1980 is low.

(180) The Commission has not found that publicly owned establishments have any direct access to the accounts of the Treasury, 'direct access' being taken to mean a facility by which an EPIC can itself decide to draw directly on funds belonging to the State and placed at its disposal, without any action being required on the part of the State.

(iv) The French authorities' proposal for a clarification of the Decree implementing the Law of 16 July 1980 is not sufficient

(181) The Commission would like to emphasise straight away that the French authorities have not made the change in the Law of 16 July 1980 that will be discussed in this section. The Commission must necessarily examine the existence or otherwise of a guarantee to La Poste on the basis of the legislation actually enacted, rather than seeking to assess whether proposals which seek to exclude any guarantee but which have not yet been adopted are or are not adequate. The purpose of the analysis that the Commission will carry out in this section is essentially to provide a complete description of the proceedings that have taken place before the Commission.

(182) In order to establish that the resources released by the supervising authority must come from the resources of the defaulting authority or establishment itself, the French authorities propose to amend the Decree implementing the Law of 16 July 1980 as follows (the amendment is shown in italic): 'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources *from the budget of the defaulting authority or establishment* either by reducing the appropriations allocated to other expenditures and still available or by increasing resources'.

(183) As the Commission pointed out in recital 58 of the opening decision, neither in its present wording nor in the amended wording proposed by the French authorities does the legislation prevent an increase in resources from being made possible by a subsidy or injection of public funds.

(184) The Commission will now go on to examine the courses open to a creditor in the unlikely event that the procedure laid down by the Law of 16 July 1980 does not result in payment. The Commission will give particular consideration to the rules governing the liability of the State, in order to determine whether they have the characteristics of a guarantee mechanism.

3. *The rules governing the liability of the State in the procedure for the recovery of the debts of a publicly owned establishment have all the characteristics of a guarantee mechanism*

(185) According to the French authorities, the State has in principle no liability, whether for a fault on its part or in the absence of any such fault [91]. The French authorities acknowledge that if there is a requirement of continuity of public service that is binding on the representative of the State in the procedure laid down by the Law of 16 July 1980, a court may order that the creditor be compensated. But, they argue, this merely places the creditor in the position in which he would have been under the ordinary law, so that the creditor is not given any advantage.

(186) The Commission would point out, however, that under the ordinary law creditors, or at any rate unsecured creditors, will not as a general rule recover the whole of their claims. In addition, the enterprise being wound up will not have its debts paid by a third party, as happens here.

(187) The French authorities further argue that any possibility of compensation of creditors that may be opened up if the State is held liable cannot in any event be considered equivalent to a guarantee.

(188) The Commission takes the view, however, that in the procedure for the recovery of the debts of the public bodies referred to in the Law of 16 July 1980 the liability of the State, with or without fault, is indeed equivalent to a guarantee mechanism for purposes of Community law, as will be seen, because it ensures creditors that if La Poste should default the Member State will be required to meet their claims. In addition, the judgment of the European Court of Human Rights in the *Campoloro* case establishes something like an automatic guarantee. Although they are free to do so, the French authorities have not limited these liability or guarantee mechanisms.

(i) The earlier case law, illustrating the special character of the scheme introduced by *Campoloro*

(189) The Commission's expert has observed that before the *Campoloro* case, which will be considered below, when a creditor of a public body subject to the Law of 16 July 1980 sought to render the State liable for its use of the prerogatives provided for in the Act, an administrative court would distinguish between two kinds of injury. The creditor suffered one kind of injury because his claim had not been settled: this was due only to the insolvency of the debtor. The creditor might also suffer a separate injury due to shortcomings in the exercise of the State's prerogatives — delays, reluctance to act, refusal to initiate proceedings, initiation of proceedings in respect of only part of the subject-matter, etc. This second kind of injury could not be evaluated by reference to the amount of the debt, but rather by estimating the cost of a delay or a refusal to exercise the prerogatives provided for by the law. That was the approach accepted by the Administrative Court of Appeal in the *Campoloro* case [92].

(ii) The judgment given by the Council of State in the *Campoloro* case in 2005

(190) In the view of the Commission's expert, the judgment given by the Council of State in *Campoloro* marks a development, in that one of the possibilities it contemplates is no longer a case of liability as such but instead operates as a guarantee mechanism.

(191) The judgment delivered by a division of the Council of State on 18 November 2005 in *Société fermière de Campoloro*, No 271898, found as follows:

'In the event of a failure on the part of a local or regional authority to ensure the application of a judgment no longer open to appeal, after proper notice, the legislature here sets out to give the representative of the State the power to step into the shoes of that authority, in order to release or create the resources that will allow the judgment to be enforced in its entirety. The representative of the State consequently has a duty, subject to judicial review, to take the measures necessary in the light of the situation of the authority and the requirements of the public interest. Such measures include the possibility of selling assets belonging to the authority, provided they are not indispensable to the proper operation of the public services for which the authority is responsible. If the prefect refuses or neglects to exercise the prerogatives conferred on him by law, a creditor of the authority is entitled to bring an action against the State in case of serious fault committed in the exercise of the supervisory power. In addition, if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets, or by reason of requirements of the public interest, the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind'.

(192) The Council of State here establishes a dual mechanism.

(193) First, there is a liability on the State for a failure in the exercise of the prerogatives conferred by the Law of 16 July 1980 and its implementing measures. This is a scheme of liability for serious fault. It has been made to depend on serious fault because of a desire to avoid an automatic transfer of debt from the debtor authority to the State. A learned commentator observes ([93]), ‘if the prefect takes measures that seek to release additional resources, but these then prove to be insufficient in view of the scale of the debts of the municipality, the court will probably take the view that no fault has been committed’. The liability for serious fault described here is of a conventional kind, and does not operate as a guarantee mechanism in the event of an insolvency of the debtor, because the liability does not arise merely as a consequence of the insolvency.

(194) Second, the judgment provides for strict liability in two cases.

(195) The first case is one where ‘by reason of requirements of the public interest, the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full’. This is a classic case of inaction on the part of public administration motivated by the public interest, and in such a case the public administration may be liable for breach of equality before public burdens. The debtor is in theory not insolvent, but the State decides not to exhaust the debtor’s potential resources on grounds of the public interest. There is no guarantee mechanism here, because the injury to the creditor is the result of a decision of the State, and not of the debtor’s financial situation. But the consequences are identical to those of a guarantee mechanism.

(196) The second case of strict liability resembles a guarantee mechanism more closely. The Council of State finds that ‘if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets […] the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind’. Here the liability arises only out of the financial situation of the debtor authority. Liability has not been made to depend on fault, and the burden of proof resting on the creditor is lighter, as the creditor has to show only the factual situation that gives rise to liability, the causal link, and the damage.

(197) In the view of the Commission’s expert there are two similarities between this scheme of liability and a guarantee system. First, the liability arises out of something that is not objectively imputable to the State, namely the situation of the debtor organisation: liability of this kind is triggered by the insolvency of the debtor, like a guarantee. Second, the injury to which the Council of State refers appears, in the absence of any indication to the contrary, to be the failure to pay the debt itself, which is likewise the trigger for a guarantee.

(198) It is true that the Council of State restricts the liability of the State to injury ‘of an abnormal and specific kind’. As regards the ‘abnormal’ character of the injury, the Commission’s expert takes the view that one can proceed by elimination. Either the debt is a small one, in which case it is fair to suppose that it will not leave a national publicly owned establishment, or La Poste in particular, in a position of insolvency; or the debt is a large one, in which case the injury will necessarily be abnormal. As regards the ‘specific’ character of the injury, it may be supposed that creditors making large claims on publicly owned establishments will not be numerous. Thus the restriction imposed by the Council of State is a restriction in appearance rather than in fact, because it is fair to suppose that the claims involved will always be large, so that the injury will always be abnormally serious.

(199) This is the interpretation accepted by the best academic opinion. According to the commentary by P. Bon already cited, ‘in that case, which very likely corresponds to the case under consideration, given the flagrant disproportion between the sum that the court has ordered the municipality to pay and the smallness of the municipality’s resources, the prefect is in an impossible situation, because he is not likely to be able to release sufficient resources to enable the municipality to pay the whole of the debt. But equity demands that after so many years the two applicant companies should be compensated […] it turns the State into a forced insurer of the damage caused by the incompetence [of the municipality]’. The Commission’s expert observes that the correct term is not ‘forced insurer’ but rather ‘forced guarantor’.

(200) In their report on the judgment in *Société fermière de Campoloro* ([94]), C. Landais and F. Lenica, who were in charge of documentation at the Council of State at the time the judgment was delivered, stress the singularity of this second case, and refuse to interpret it as transferring to the State the burden of the debts of local and regional authorities’. The Commission’s expert points out that this interpretation is debated precisely because on a reading of the judgment it has to be envisaged. The end of the commentary is revealing: the commentators speak of a loan or an exceptional subsidy. It will be observed that commentators who refuse to consider this scheme of liability to be equivalent to a guarantee mechanism ultimately invoke other components of a guarantee mechanism, such as subsidies.

(201) The Commission's expert also rejects the assessment made by D. Labetoulle in an article on strict liability in administrative law [95] which is cited by the French Government in its observations. Labetoulle observes that the Council of State held in *Campoloro* only that in the event of a decision taken legitimately by the prefect the State 'may be liable'. He deduces that liability is not automatic. According to the Commission's expert, this interpretation is not convincing. The Council of State found that the prefect's decision could render the State liable *(est susceptible d'engager la responsabilité)* 'if the injury is of an abnormal and specific kind'. What is uncertain is not the principle of the existence of liability, or the fact that liability is incurred if the conditions that give rise to it are met, but the existence of injury presenting certain features. As has been explained, once the injury is specific and abnormal, nothing stands in the way of liability. Thus by its very nature the liability does indeed arise automatically, and has all the characteristics of a guarantee.

(202) Finally, the Commission's expert observes that none of the commentators on the *Campoloro* judgment has envisaged the possibility that the claim might go unpaid.

(203) The Commission's expert concludes that the Council of State's judgment in Campoloro installed a scheme of liability which has the characteristics of a guarantee mechanism.

(iii) Settlement of the *Campoloro* case by the European Court of Human Rights (ECHR)

(204) In a judgment of 6 December 2006 — *Société de gestion du port de Campoloro* and *Société fermière de Campoloro* v *France* [96], the ECHR settled the *Campoloro* case by making the State liable for all of the sums due to the applicant companies by Santa-Maria-Poggio Commune. The case demonstrates that, in this instance, the liability accepted by the French State operates as an implied guarantee of the public authorities' liabilities and is not linked to any condition relating to loss.

(205) Before the Court, the French authorities attempted to base their case on the absence of, firstly, an operative event imputable to the State and, secondly, a guarantee on the part of the State to public authorities possessing legal personality. '[The French Government]', we read, 'considers that only objective reasons concerned exclusively with its being materially impossible for the commune to release sufficient resources have delayed the complete enforcement of the judgments'; 'The Government therefore maintains that the non-enforcement of the judgments given is not the result of a deliberate refusal to enforce them on the part of the national authorities, State or commune. The absence of funds is not a pretext, but a reality due to the insolvency of the debtor legal entity'; 'The non-payment of the debt is due entirely to the commune's financial difficulties, and these circumstances do not appear to be such as either to release the authority from its obligations or to transfer the burden of its debt to the State (Council of State, commune of Batz-sur-Mer, 25 September 1970). There is no legal basis under national law for substituting the State for the commune where the payment of compensation is concerned. Nor can Article 6-1 of the Convention form the basis of any such substitution in so far as a solution of that kind would be contrary to the very concept of legal personality, which presupposes autonomy and a distinct set of assets'. While the French Government attempted specifically to invoke the differences — highlighted above — between the liability scheme and the guarantee mechanism, these arguments were not in the end accepted by the Court.

(206) To reinforce the point being made, the applicants' arguments — which were, in contrast, accepted by the Court — need also to be reproduced.

'That is why no arrangements to soften the blow have been made under national law to confront a situation of default on the part of the commune'; 'The State cannot offload its obligation to implement judicial decisions by invoking the absence of funds or the autonomy of regional or local authorities — an autonomy that it has not been able to guarantee to date, since the commune is in no position to pay its debts. The applicants therefore denounce the State's incapacity to adopt positive measures that would have enabled the commune to contribute in accordance with its obligation'. 'The applicants note that, in its judgment of 18 November 2005, the Council of State held that the legislature intended to give the representative of the State, in the event of a local or regional authority's not being able to implement a judicial decision, the power to take the place of that authority's decision-making bodies in order to release or create the resources enabling the judicial decision concerned to be fully implemented. It is on the basis of these omissions on the part of the French State that the applicants demand both acknowledgement of Article 6-1's having been breached and the resulting compensation — an initiative that no more contradicts the concept of legal personality than it does the concepts of independence and of a distinct set of assets'.

(207) The Court finally noted that a breach of Article 6-1 of the European Convention on Human Rights had taken place and added that: 'These judgments need, therefore, to be implemented, and the Court would point out that a State authority cannot use lack of resources as a pretext for not honouring a debt based on a judicial decision (Bourdov, cited above, Section 30)'.

(208) The Court also noted that a breach of Article 1 of Protocol No 1 to the European Convention on Human Rights had taken place: 'The interested parties' inability to have these judgments implemented constitutes interference with those parties' property rights — interference such as is referred to in the first sentence of the first paragraph of Article 1 of Protocol No 1. The Government has provided no justification at all for such interference, and the Court considers that lack of resources cannot legitimise the omission concerned (ibid)'. 'In sum, the Court considers that the applicant companies have been, and are still, subject to a huge and special burden due to the non-payment of the sums from which they should have benefited in implementation of the aforesaid judgments dated 10 July 1992. There has therefore been a breach of Article 1 of Protocol No 1'. The Court ended by charging the whole of the debtor communes' debt to the State: 'In view of the above, the Court holds that it is for the defendant state to pay the applicants or, if appropriate, their legal successors the sums (including interest) due to them as from the delivery, on 10 July 1992, of the judgments of the Bastia administrative tribunal (ibidem) until the day on which this judgment has been given'.

(209) The Commission's expert deduces from this case law that the State must cover the debts of the public authorities.

(210) The Commission considers this to have three important implications:

— liability functions as an implied guarantee. Firstly, the French State is required to pay the whole of the debt, and no distinction has been made between debt conceivably due to the public authority's insolvency and possible defaults imputable to the State. The terms used are worth emphasising, since the Court does not refer to a possible liability on the part of the State but holds that it is the responsibility of the State to 'ensure' that payment is made. Such terms relate more to the concept of a guarantee than to that of liability. What is more, the Court does not at any time seek an operable event imputable to the State and looks no further than the debtor's insolvent status. Finally, the Court transfers the whole of the offending communes' debt to the State. These various factors tend to show that this system of liability operates in reality as a guarantee mechanism. It will be noted, however, that the applicants must first obtain a judicial decision recognising their claim. Moreover, this guarantee is implied because it is not set out in any legislation. This demonstrates that a judicial mechanism under national law can be interpreted as an implied guarantee,

— this liability covers the debts of public authorities possessed, however, of legal personality. The existence of legal personality and of assets specific to the authority was expressly invoked by the French Government in its opposition to holding the French State liable. This argument was rejected by the Court,

— the scope of the state guarantee extends to include public authorities dependent on the State. The guarantee is therefore intimately connected with the debtor's public law legal form.

(211) It must be pointed out that the solution adopted by the ECHR in the *Campoloro* case is not an isolated one and stems from a well established tradition of case law. Thus, in its judgment of 13 May 1980 in *Artico* v *Italy* ([97]), the ECHR decided that, where a failure to act is imputable to an entity other than the State, it is for the State, as giver of the guarantee provided for in Article 6-1, to act in such a way that the applicant in practice enjoys the right conferred on him by that Article. In Case No 59498/00 of 19 March 1997, *Bourdov* v *Russia*, the Court also held that an authority of the State cannot use lack of resources as a pretext for not honouring its debt.

(iv) Examination of the observations of the French authorities

(α) Observation relating to the difference between regional or local authorities and publicly owned establishments

(212) According to the French authorities ([98]), the case made out by the Commission's expert is by no means conclusive and is limited to comparing various interpretations of the *Campoloro* judgment; above all, it draws no distinction between publicly owned establishments and local authorities, although this difference is central to the issue of whether a claim can remain unpaid. On this matter, the French authorities adopt the opinion of their expert. The latter questions the premise underlying the Commission's arguments based on the *Campoloro* case law: the Commission's argument rests on likening local and regional authorities to publicly owned establishments, which are all legal entities separate from the State and governed by public law. In fact, these two types of body do not have the same constitutional status. Thus, the existence of local authorities is a constitutional requirement, and the State has an obligation to guarantee the survival of such bodies. EPICs do not have anything like the same constitutional status and do not have to survive. The *Campoloro* case law, which relates to cases of default on the part of local authorities, cannot therefore be used in relation to publicly owned establishments.

(213) The Commission will now examine whether the difference in constitutional status between local or regional authorities and publicly owned establishments is likely to place a question mark over the conclusions drawn by its expert on the basis of the decisions taken in the *Campoloro* case by the ECHR and the Council of State.

(214) The Commission notes that the ECHR's decision is based on the need to preserve, not the existence of the local or regional authority concerned, but the rights of the creditor, that is to say his right to a fair trial (Article 6-1 of the European Convention on Human Rights) and the protection of his property (Article 1 of Protocol No 1): whether the debtor is a publicly owned establishment or a local or regional authority, the creditor's rights are infringed in the same way.

(215) As for the decision of the Council of State, a distinction needs to be made between the various liability schemes:

— the liability due to gross negligence scheme is based on the State's deficient use of the prerogatives introduced by the Law of 16 July 1980; it is therefore independent of the nature of the debtor: local or regional authority, or publicly owned establishment,

— the strict liability scheme is, for its part, based on two scenarios,

(a) in the first scenario, the prefect refuses to take certain measures because of requirements of the public interest: these might include the need to preserve not only the existence of the regional or local authority but also the public service task. The French authorities' expert emphasises that continuity is required only of the service and not of the establishment that manages the service. It nonetheless remains the case that, in the short term and until such time as the public service task is conceivably transferred to an establishment capable of taking over that task, the continuity of public service may involve the prefect's taking a number of measures, for example measures to preserve the assets necessary to the public service task or to increase the resources required to pay the claim. Moreover, the French authorities recognise that the representative of the State is required to preserve the continuity of public service in implementing the procedure introduced by the Law of 16 July 1980;

(b) in the second scenario, the strict liability scheme can be invoked if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets, […] the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind. As indicated above, the operative event giving rise to the liability is nothing but the financial situation of the debtor authority. Moreover, the latter may just as well be an establishment as a local or regional authority.

(216) In conclusion, the Commission considers that the difference in constitutional status between local or regional authorities and publicly owned establishments does not invalidate the conclusions drawn from the *Campoloro* case law by the Commission's expert. Moreover, the Commission would observe that the set of arguments put forward by the French authorities is designed to question the relevance of the *Campoloro* judgment in this particular case, which does not relate to a local or regional authority; yet the *Campoloro* judgment was first invoked by the French authorities themselves in support of their position.

(β) Observation relating to the lack of any basis for holding the State liable

(217) Moreover, the French authorities fail to see on what basis the State might incur strict liability in the event of a publicly owned establishment defaulting, since the State can be held liable in such a context only if the act (or omission) imputed to it has been the direct cause of the injury, which is not the case here.

(218) The Commission nonetheless notes that the decisions of the Council of State and the ECHR clearly establish that the State can be held strictly liable.

(γ) Observation relating to the lack of abnormal and specific injury

(219) Finally, the French authorities fail to see why the judge would consider the injury to be 'specific' when it apparently concerns all the creditors of the establishment, or as 'abnormal' if creditors agreed to supply funds to a body in an uncertain financial situation.

(220) The Commission would observe that, according to the case law of the Council of State, the existence of an abnormal and specific injury does in practice limit the liability of the State. The French authorities doubt that the injury is abnormal in a situation in which creditors agreed to supply funds to a body in an uncertain financial situation. The Commission would point out, in this connection, that this argument presupposes that there is no guarantee (and that the creditors think that there is no guarantee), whereas the analysis given above shows the opposite to be true. Indeed, if the creditors believe in the existence of the guarantee, any creditor will view the establishment's financial situation as being much less of a crucial factor both when he decides to grant funds to the establishment and when he negotiates the conditions under which such funds are to be granted. Moreover, it has to be borne in mind that the debt may have been incurred either when the publicly owned establishment was not in danger or when the creditor could not reasonably have been aware of the establishment's financial difficulties. In any case, the concept of abnormal injury has to be understood as going beyond the issues of whether or not the establishment was aware of the financial difficulties and even of whether the injury was sustained by all the creditors or by only one. According to the case law relating to strict administrative liability ([99]), the existence or otherwise of abnormal and specific injury is assessed with reference to the public interest. To be categorised as abnormal and specific, the injury to the person concerned must be out of proportion to the public interest intended to be served. The Commission deduces from this that the abnormal and specific character of the injury undoubtedly constitutes a filter that may prevent a number of claims from being met, but that the higher the debt the less likely it is that this filter will come into play. Finally, the Commission would point out that the existence of an abnormal and specific injury is not a condition imposed by the ECHR's case law. Any creditor may, therefore, in principle obtain compensation from the State, covering his debt, at the conclusion of judicial proceedings.

(v) Absence of limitation of liability and/or of a guarantee by the State

(221) The Commission would emphasise that, as has been seen above, there is nothing to prevent the legislature — as it does in the case of a number of companies — from providing that the State will pay the EPICs' debts only up to the limit of its initial contribution (or endowment). In particular, there is nothing to prevent the legislature from providing for a limitation of liability or from quite simply specifying that the State as shareholder can be liable for an EPIC's debt only in the event of a fault or situation distinct from the EPIC's mere insolvency — a state of affairs directly imputable to the EPIC and the cause of a particular injury. It is therefore possible for the legislature to preclude the State's guarantee in respect of EPICs and to limit the State's liability in relation to the injuries sustained by creditors. However, these clarifications have not been supplied by the French authorities.

(vi) Commission's conclusion

(222) The Commission concludes from points (i) to (v) that, as French law currently stands, a creditor who has not obtained the payment of his claim through the use of the procedures set out in the Law of 16 July 1980 may receive all of the sums corresponding to the unmet claim by invoking the State's last-resort liability. This is the opposite of what happens within the framework of winding-up proceedings under ordinary law where the reimbursement of the creditor is limited by the value of the available assets. The State's liability is treated as a guarantee. It is not the subject of any limitation by French legislation. It is intrinsically connected with the public-law legal form possessed by the debtor body.

(vii) Analysis of the French proposal relating to the clause in the contracts

(223) If the Commission were to adopt a decision finding that there was no aid, the French authorities would be prepared to extend their proposal for recording the absence of a guarantee so that it includes all contracts involving claims. The French authorities consider that such an extension would make it possible to prevent any risk of triggering the State's strict liability based on La Poste's insolvency alone.

(224) Firstly, the Commission wishes to point out that the remark made in recital 181 is obviously applicable to this section of the present Decision. Moreover, as indicated in the opening decision, the Commission acknowledges that this is a measure likely to restrict the opportunities for a creditor who has signed such a contract to obtain payment of his claim through legal proceedings. The Commission nonetheless has doubts about the durability of this solution, the exception for accepted risk being a rule established by case law, which could always evolve (the overturning of existing case law is all the more likely as the trend in case law is towards extending the scheme of strict liability on the part of the State). In response to the observations of the French authorities, the Commission would emphasise that the preceding remarks do not lead the Commission entirely to reject the French authorities' proposal but to emphasise how fragile the resultant legal framework would be.

(225) Moreover, the Commission considers the French authorities' proposal to be inadequate as the State's guarantee could come into play for any type of liability including, for example, non-contractual liability and criminal liability, which present the same characteristics from this point of view: it is impossible to make it contractually clear in advance to debtors that the State is not liable for La Poste's debts. In general, La Poste may find itself indebted towards a third party through a variety of judicial mechanisms — a state of affairs that would imply a guarantee on the part of the State in the event of insolvency. For example, if La Poste were to absorb another structure (another publicly owned establishment), the rights and obligations of that structure would be transferred to it at the same time. If it were subsequently to meet that structure's debts towards a third party, no contract or other legal document would have laid down that the State was not required to pay La Poste's debts towards creditors of the absorbed structure, since no one would have been able to foresee the situation. Thus, through a mechanism (such as merger or absorption) for converting certain public sector structures, La Poste may acquire a number of debts towards third parties, without its being possible contractually to provide for a limitation of the guarantee on the part of the State. It is not, therefore, enough to insert such a clause into the 'contracts' with the 'creditors', as the clause would not cover all eventualities. Such a formulation would be likely to overlook claims by initially unidentifiable third parties. Only a text of general scope applicable in any situation and to any type of third party, indicating that the State is not the guarantor of La Poste, would be enough.

(226) Finally, even in a scenario in which the French proposals would make it quite impossible for a creditor of La Poste to hold the State liable for paying its claim (a scenario that the Commission considers not to have been shown to exist), such proposals would not enable it to be clearly established what would happen in the event of La Poste's becoming insolvent. Indeed, a creditor of La Poste who had not been able to have his claim met by requesting payment of his individual claim could always hope to obtain payment within the framework of an overall State-financed restructuring of La Poste, as will be shown subsequently in this Decision.

4. *Even if he were to fail obtain satisfaction, the creditor could invoke legal effects from the legitimate mistake he made, when the claim arose, that it would always be honoured.*

(227) Use of the theory of appearance [100] enables what has been demonstrated to be confirmed. Indeed, even if one were to follow the French authorities' argument, according to which there is no unlimited guarantee in favour of La Poste because of the latter's legal form — an argument refuted by the Commission — the factors analysed above legitimately lead creditors to believe that such a guarantee does nonetheless exist. The theory of appearance amplifies the effect produced by the concordance of a series of indices.

(228) The main relevant indices in relation to the theory of appearance are noted below:

— regarding the state guarantee in favour of EPICs, a variety of legislative instruments (Law of 16 July 1980 and the measures implementing it) or official (budgetary) documents lead the creditor to believe that the State would take over EPICs' debts in the event of their having a shortage of funds or that it would assume liability for those debts,

— the lack of clarification of the legal situation following the *Campoloro* case and of the initial procedures undertaken by the Commission on the legal form of EPICs also increases creditors' confidence that such a guarantee does in fact exist,

— the lack of any clear indication as to the effects of a situation in which an EPIC is in default also militates in favour of this view,

— the reaction of the rating agencies is also relevant in this context in that, rightly or wrongly, third parties attach importance to the legal form of the debtor, attributing to the latter a rating whose role is crucial in the matter of funding (this will be demonstrated in section 4.1.2(a) of this Decision).

(229) In accordance with the conclusions of its expert, the Commission has arrived at the view that, even if, in the scenario championed by the French authorities, it was in error that a creditor came to consider that the State was required to guarantee the debts of publicly owned establishments and of La Poste in particular, his error would be legitimate given the above-mentioned factors, and the law could impart effects to it. If, exceptionally, the creditor did not succeed in obtaining the payment of his claim, he could nevertheless rest assured that there was no likelihood of the claim being cancelled.

B. *Guarantee of the continued existence of La Poste and/or of its obligations*

(230) As will be shown, even if, within a reasonable period and after the use of the procedures described in the previous section, the creditor does not succeed in obtaining the payment of his claim, he will be secure in the knowledge that the claim will not be cancelled. When a company constituted under private law is closed down, its rights and obligations are likely to disappear with it. The procedure for winding up companies provides no guarantee at all that claims will be paid. The situation regarding publicly owned establishments is different. As shown above, there is no procedure for the closing down/winding up of publicly owned establishments in default, involving the elimination of those establishments' debts. In the event of publicly owned establishments being closed down following a decision of the public authority — and despite the fact that no legislation expressly provides for this — experience and certain basic principles of administrative law tend to show that the rights and obligations of publicly owned establishments that are closed down as such are always taken over by another body and, failing that, by the State. There is no public authority-motivated winding up/closing down of publicly owned establishments in which the rights and obligations of the establishments are also cancelled. Each creditor can therefore be certain that the right arising from his claim may be invoked against another body and that his claim will not, therefore, be cancelled.

(231) This demonstration is based on a practical study of organic developments affecting publicly owned establishments. This study, conducted by the Commission's expert, shows that the debts of publicly owned establishments are always transferred to another legal entity, which cannot refuse them.

(232) The Commission's expert has identified three reasons why publicly owned establishments may be closed down [101]: because they have reached the ends of their lives (1), because the tasks assigned to them no longer need to be carried out (2), and (the case most frequently encountered) because the tasks assigned to them have been transferred elsewhere, necessarily implying a transfer of the rights and obligations (3).

(a) **Publicly owned establishments that have reached the ends of their lives**

(233) There are few cases of publicly owned establishments reaching the ends of their lives. The only example [102] found by the Commission's expert shows that the rights and obligations of the publicly owned establishment — particularly its debts (which are expressly referred to) — are transferred to other legal entities governed by public law.

(b) **Publicly owned establishments closed down due to their tasks no longer needing to be carried out**

(234) The cancellation of the task of the publicly owned establishment is almost always preceded by the cancellation of a public-service task, meaning that the public authorities no longer wish to see a particular activity as representing a public-interest task that they are obliged to take over or guarantee. In fact, the trend is to identify more and more activities as public services. This explains why the cancellation of public service tasks is a very rare phenomenon.

(235) It is necessary, however, to set aside cases of publicly owned establishments without a public-service task whose closing down due to the cancellation of their task does not imply the prior cancellation of a public-service task. La Poste does not fall into the latter category. Even in this hypothetical case, experience in any case demonstrates that the rights and obligations of these establishments are systematically taken over by another legal entity governed by public law, more often than not the State itself, as shown by the numerous legislative instruments and examples identified by the Commission's expert [103] on the basis of the study carried out by S. Carpi-Petit [104].

(c) **Transfer of the task, implying a transfer of the rights and obligations**

(236) Transfer of the task of a publicly owned establishment to another body, implying a transfer of the rights and obligations, is the most frequent scenario. The principle of continuity of public service implies a transfer of the assets assigned to the task and, therefore, a transfer of the rights and obligations.

(237) A basic principle emerges: if the task remains, the debts of the former publicly owned establishment are transferred to the body that takes over the task.

(238) More often than not [105], the task is transferred to a single body and, as a result, the assets are transferred in their entirety rather than being split up. The same principle applies in scenarios in which the assets are transferred to a private person [106].

(239) There are also scenarios in which assets are split up, showing in this case too that there is continuity in the rights and obligations of publicly owned establishments.

(240) Article 1 of Decree No 74-947 of 14 November 1974, concerning the transfer to the *Institut de l'audiovisuel* of the ORTF's assets, rights and obligations, gives concrete expression to the existence of a principle whereby a successor body is appointed 'by default': 'it will be possible for the assets, rights and obligations of the *Office de radiodiffusion-télévision française* that have not been transferred […] to the public broadcasting establishment or to one of the companies created by this law to be transferred to the *Institut de l'audiovisuel* as from 1 January 1975 by order of the Prime Minister'.

(241) The scenarios in which the assets are transferred in more than one stage confirm the trend described above ([107]).

(242) When a publicly owned establishment is converted into a public limited company, there are several 'conversion' procedures:

— closing down/abolition: the simplest procedure is that of closing down by abolition, the publicly owned establishment then being wound up,

— closing down/substitution: as B. Plessix expresses it ([108]), closing down by substitution is 'the abolition of the publicly owned establishment, accompanied by the creation of a new legal entity to which is entrusted the statutory task for which the wound-up establishment was responsible'. In other words, a new legal entity is substituted in the rights and obligations of the wound-up publicly owned establishment; a new legal entity inherits the tasks of the abolished establishment',

— conversion without abolition: conversion without abolition, or without closing down, is an operation based on organising the continuity of the converted legal entity.

(243) The legislature has committed itself in recent years to conversion without closing down. Where the initial conversions, and especially that of France Télécom, were concerned, the legislature abolished the EPIC, then transferred all of its assets, rights and obligations to a new legal entity taking the form of a company governed by private law ([109]). Then, in the course of the subsequent operations, the legislature effected only a change in legal form without creating a new legal entity. There is therefore no transfer of the assets, rights and obligations of the EPIC, nor cessation of activity but, rather, the organisation of legal continuity by the legislature, as shown for example by Article 25 of Law No 2004-803 of 9 August 2004 relating to the public gas and electricity service and to gas and electricity companies: 'conversion into the companies *Electricité de France* and *Gaz de France* involves neither the creation of new legal entities nor the cessation of activity. The assets, rights, obligations, contracts and authorisations of any kind of the companies *Electricité de France* and *Gaz de France*, both within France and outside France, are those of each of the publicly owned establishments at the time when their legal form is changed. Such a conversion does not allow these assets, rights, obligations, contracts and authorisations to be in any way called into question and, in particular, has no effect on the contracts concluded with third parties by *Electricité de France*, *Gaz de France*, etc. The operations brought about by this conversion do not lead to the collection of duties or taxes of any kind' ([110]).

(244) Guided by its expert, the Commission concludes that analysis of the various scenarios whereby publicly owned establishments are closed down enables the following conclusions to be drawn:

— although there is no overall judicial scheme for organising the closing down of publicly owned establishments, experience shows that the legislation always provides for transferring the rights and obligations of the establishment that is to be closed down either to the State or to the body that is to take over its task. To the Commission's knowledge, no example of legislation is to be found noting the cancellation of the debts,

— it is the 'rights and obligations' that are transferred, with the term 'obligations' undoubtedly referring to debts. Some legislation uses the vaguer term, 'assets' [*patrimoine*]. According to Cornu's *Vocabulaire juridique* ([111]), by 'assets' is meant a 'collection of the property and obligations of one and the same person (that is to say of his duties and charges assessable in monetary terms)' — a formulation that would also include debts. The only example found of the pure and simple closing down of a publicly owned establishment involves, in any case, the transfer of the 'debts' themselves,

— even when the task disappears, the establishment's rights and obligations are, in practice, taken over by another body,

— the practice described is in accordance with codifying instruction No 02-060-M95 of 18 July 2002 and the *Guide sur l'organisation financière des créations, transformations et suppressions des établissements publics nationaux* [Guide to the financial organisation of the creation, conversion and abolition of national publicly owned establishments]. Even though such legislation concerns only establishments with a public accountant — such as La Poste does not have — it nonetheless confirms the lessons drawn from actual practice, namely that the rights and obligations of a wound-up EPIC go either to the State or to the legal entity that will take over the establishment's task.

(245) The Commission concludes that this analysis shows that the creditor of such a publicly owned establishment can be certain that his claim will not be cancelled with the closing down of the establishment.

(246) The demonstration would not be complete without examining the issue of whether, on the model of successions under private law, the heir may refuse the succession, particularly if the debts are too great. It appears that there is only very limited scope for refusing a succession under administrative law.

(247) According to S. Carpi-Petit [112]: 'unlike in civil law, which makes the option available to all beneficiaries, the ability to exercise an option is not a general principle of administrative law governing successions. It is offered only to certain beneficiaries, depending on the nature of the operation carried out. Thus, the transfers implied by abolition pure and simple are not optional. As for transfers brought about by replacements, whether or not they are optional depends on the pre-existence of the testator'. Where abolitions pure and simple are concerned, S. Carpi-Petit deduces from his exhaustive study that 'there being no option available for the benefit of the State is a situation that also obtains in administrative law. This implies that, where the existence or otherwise of the right to exercise an option is concerned, the simplest scenario is doubtless that in which a national publicly owned establishment is abolished, without its task being taken over. In that case, the successor in title is always the State. If the State were to refuse the assets left by the abolished publicly owned establishment, the assets would then necessarily have no one in charge of them — a state of affairs that is not permitted. Moreover, it is not possible to impute the burden of the succession to another property. Thus, there is no ability to exercise an option in the case of the abolition pure and simple of a national publicly owned establishment'.

(248) With regard to possible ways of finding a replacement body to carry out an establishment's task, 'there are two types of replacement in administrative law in relation to successions. In the first scenario, a legal entity to replace the natural person/testator is created for this function. This legal entity then constitutes the universal successor in title. It therefore seems only right to refuse it the right to exercise an option'.

(249) The Commission's expert points out that, when it comes to the abolition pure and simple of publicly owned establishments through the abolition of their tasks, the objection could be made to this reasoning that the fact that the State is in no position to refuse the assets does not necessarily imply that it is also unable to refuse the debts. It nonetheless seems that, where publicly owned entities are concerned, inability to refuse a succession is based mainly on the public law status of publicly owned establishments rather than on its not being possible to leave assets with no one in charge of them.

(250) Guided by its expert, the Commission concludes that the debts of publicly owned establishments are in practice always transferred to another legal entity governed by public law in the event of the closing down of the publicly owned establishment that carried out the task concerned. The creditors of these publicly owned establishments, such as La Poste, therefore have a guarantee that their unpaid claims will not be cancelled.

C. *Conclusion regarding the existence of a state guarantee in favour of La Poste*

(251) On the basis of the evidence of the existence of a guarantee ensuring the payment of individual claims and the continued existence of La Poste's obligations, the Commission concludes that:

— the creditors of La Poste do not encounter the usual private and public law obstacles to the payment of a claim,

— in recovering the amounts owed to them, the creditors of La Poste may use specific procedures authorising the State to force the debtor body to settle the claim and, if need be, enabling the State to increase La Poste's resources for settling it,

— nowhere does French law give the creditors of La Poste to understand that La Poste could face, for good, a situation in which it had a shortage of funds,

— the budgetary documents indicate that, if there is a shortage funds, the State could give an exceptional grant to public sector bodies, of which La Poste is one,

— if the procedures described above do not enable the creditor to obtain satisfaction, he can hold the State liable in order to obtain the payment of his claim in full,

— if the actions envisaged above were to be spread out over time, the creditor can be certain that his claim will not be cancelled, even if La Poste were to be subject to organic development of the kind that, as experience shows, in fact takes place.

(252) These special factors are intrinsically linked to La Poste's legal form as a publicly owned establishment.

(253) The procedures described above imply that the State performs the role of guarantor of last resort. It may therefore be legitimately concluded that La Poste benefits from an unlimited guarantee on the part of the French State because of its legal form as a publicly owned establishment.

(254) The unlimited state guarantee to La Poste results in a transfer of state resources within the meaning of point 2.1 of the 2008 Communication on guarantees [113]. Indeed, La Poste pays no premium for this guarantee, and the State therefore waives the remuneration that normally accompanies guarantees. Moreover, the guarantee creates the risk of a potential and future claim on the resources of the State, which could find itself obliged to pay La Poste's debts [114].

(255) Finally, the State's unlimited guarantee to La Poste is imputable to the State because it derives from the combination of La Poste's public-law legal form, principles of national law and two legislative acts, namely the Law of 25 January 1985, now the Commercial Code, and the Law of 16 July 1980 and the measures implementing it.

4.1.2. EXISTENCE OF A SELECTIVE ADVANTAGE

(256) The guarantee is an essential component of state support, thanks to which La Poste enjoys more favourable borrowing terms that it would have obtained had it been judged solely on its own merits (a). Given the unlimited nature of the guarantee, it is not possible to calculate the amount of the market premium that La Poste should pay to the State, which renders the transfer mechanism proposed by the French authorities inapplicable (b). The more favourable borrowing terms obtained by La Poste thanks to the implicit state guarantee constitute a selective advantage (c).

(a) **The guarantee is an essential component of state support, thanks to which La Poste enjoys more favourable borrowing terms that it would have obtained had it been judged solely on its own merits.**

1. *Borrowing terms are set on the basis of the financial rating in particular*

(257) Borrowing terms are set on the basis of the financial rating in particular [115]: the more an undertaking's rating deteriorates because of an increased risk of insolvency, the higher the remuneration required by the investor. *A contrario*, an undertaking with a very low risk of insolvency will be able to borrow on very favourable terms.

2. *Contrary to what the French authorities maintain, the rating agencies take the view that the guarantee is a determining factor of state support for La Poste, thanks to which the latter enjoys a higher rating than it would have obtained had it been judged solely on its own merits*

(i) The guarantee, as an essential component of state support for La Poste, influences La Poste's financial rating

(α) Rating-agency analyses [116] concerning the existence of a state guarantee in favour of La Poste

(258) In a study on the influence of government support on the ratings of postal operators dated 22 November 2004, Standard & Poor's point out that 'La Poste's legal status, which ensures a last-recourse sovereign guarantee, confers the ultimate statutory guarantee of the Republic of France on its obligations' [117].

(259) On 3 April 2007, Standard & Poor's confirmed its conclusion that the status of publicly owned establishment confers on La Poste an ultimate state guarantee, even though the guarantee is not timely and express, as reflected by the rating differentiation between La Poste and the Republic of France [118].

(260) As for Fitch, another leading rating agency, it pointed out on 31 March 2006, when confirming the AAA rating given to La Poste,that La Poste was a public group that enjoyed a guarantee from the French State.

(261) However, on 17 April 2008, Fitch downgraded La Poste's rating to AA, basing its decision on the fact that 'La Poste's status as a public operator no longer justifies its ratings being automatically aligned on the State.' Although Fitch pointed out that it 'did not presuppose the existence of an implied state guarantee', it nonetheless confirmed that 'the statutory obligation on the State to assume La Poste's commitments remains'. In this respect the Commission would point out that, from the perspective of EU law, it does not matter whether the obligation on the State to assume liability for La Poste's commitments derives from what is termed a guarantee under national law or from a simple statutory obligation. Under both scenarios, there is a state guarantee from the perspective of EU law (see the 2008 Guarantees Notice, which explains that public guarantees may be linked to the status of the undertaking itself and imply coverage of losses by the State ([119]).

(262) On 4 September 2009 Fitch pointed out ([120]): 'However, as the agency had pointed out in 2008 when downgrading La Poste's rating from AAA to AA, it does not recognise the existence of an implied state liquidity guarantee in favour of La Poste. Since 2006 it has been possible to activate State aid schemes only if the liquidity requirements are consistent with European competition rules; accordingly, La Poste's status as a public operator no longer justifies automatically aligning its ratings on those of the State. Therefore, access to advances from the Treasury in the event of a liquidity crisis is no longer guaranteed, which may substantially delay state support when needed'. Fitch therefore takes the view that it has not been possible to activate the liquidity guarantee since 2006 because it no longer complies with European competition rules. This confirms that the agency took the view that, before 2006, there was such a guarantee that could be activated. Fitch attaches decisive importance to the Commission letter dated 26 February 2006 which informed France of its preliminary findings concerning the existence of an unlimited state guarantee ([121]). However, Fitch does not take account of the fact that the Commission, in that letter, classified the guarantee as existing aid and that the letter dated 26 February 2006 contained only a preliminary, non-binding assessment as to the existence of the guarantee, which did not prevent it being called upon if necessary. Therefore, if a guarantee existed before 2006, its existence and the possibility of activating it were not rendered null and void by the Commission letter dated 26 February 2006. That would be possible only by the annulment of the guarantee itself, either by France or the Commission on the basis of an act with binding legal effect. In conclusion, even though Fitch mistakenly believes that the Commission letter invalidates the guarantee, Fitch nonetheless continues to recognise the 'exceptional level of support that La Poste can receive from its principal, and the high probability that it would be provided if necessary'.

(β) The guarantee, as an essential component of state support for La Poste, influences La Poste's financial rating

(263) An examination of the analyses and methodologies of Standard & Poor's and Fitch demonstrates that the guarantee, as a determining factor of state support, influences the financial rating.

— Standard & Poor's (S & P) Methodology

(264) In the above-mentioned study on the influence of government support on the ratings of postal operators, S & P explains that it decides on the methodology to be used to set the rating of a postal operator on the basis of the estimated degree of government support for the operator. S & P distinguishes postal operators that receive government support (the French and Italian Post Offices, for example) from those that do not receive any (Deutsche Post and TNT, for example). Within the category of government-supported postal companies, S & P identifies three broad categories:

— entities whose rating is the same as the state owner: this category includes entities that are highly integrated into the mechanisms of government and extremely unlikely to be privatised; no postal company falls into this category,

— entities whose rating is notched down from that of the state owner (by up to two categories or 6 notches): entities that, while autonomous in their operations, are largely public-policy based institutions still in receipt of substantial direct or indirect financial backing from the state, even though there is a high level of uncertainty surrounding the level and timeliness of the state support ([122]); La Poste was classified in this category at least until the study was published,

— entities whose rating is based on the entities' own merits, with notching up depending on the level of state support. Classification in the third category assumes that the postal operator receives state support but in the form of policy, regulation or the potential for emergency support rather than regular direct financial subsidy.

(265) In the same study, S & P explains that it assesses state support to the postal operator (and hence the methodology to use to determine the rating of the operator and *in fine* the rating) on the basis of the four following factors: the operator's status, the likelihood of privatisation, governance and the regulatory regime. With regard to the operator's status, S & P correctly cites the case of the French Post Office by highlighting the 'extremely strong' state support and by adding immediately thereafter that La Poste enjoys the ultimate statutory guarantee of the Republic of France ([123]).

(266) S & P therefore illustrates the influence of the 'extremely strong' support from the French State for La Poste by the existence of an ultimate statutory guarantee. S & P concludes from this extremely strong support that La Poste's rating may be determined on the basis of that of the French Republic, notching down by up to three categories or six notches. Although the rating given to La Poste by S & P was gradually downgraded, it was never more than 4 notches below the rating of the French Republic (AAA) ([124]).

(267) The Commission infers from the above that the state guarantee enjoyed by La Poste is a fundamental factor in S & P's analysis that La Poste receives 'extremely strong' state support. It is because of the 'extremely strong' state support that S & P applies a top-down methodology to La Poste. If S & P applied a bottom-up methodology or, worse still, did not increase La Poste's rating because of its state support, as is the case for Deutsche Post and TNT, La Poste's rating would be lower than it is currently. In the study on the influence of government support on the rating of postal operators, S & P takes the view that the commercial and financial performance of Deutsche Post and TNT are better than that of La Poste. Yet the ratings of Deutsche Post and TNT, cited in the S & P study, are lower than La Poste's rating. If La Poste were assessed on its own merits, it would therefore have a rating below its current rating, which is thanks to the 'extremely strong' state support that is illustrated by S & P by the existence of the ultimate statutory guarantee.

— Latest ratings

(268) In its assessment of La Poste dated 3 April 2007, S & P refers to the change in capital structure involving a change in status and a loss of the guarantee as a factor taken into account in its rating ([125]). S & P points out that it already takes into account the probable change in these three factors (capital structure, legal status and guarantee) in the long term. Until the changes occurs, S & P continues to apply a top-down methodology. The previous paragraph demonstrated that, thanks to this methodology, La Poste can and does obtain a better rating than it would have obtained on its own merits.

(269) However, the Commission accepts that in the same analysis dated 3 April 2007, S & P stresses that La Poste's rating was not affected by the Commission recommendation because S & P considers that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins La Poste's rating and that has been reaffirmed by recent government decisions ([126]). The Commission would point out that there are factors other than the guarantee that are taken into account by S & P when it comes to the conclusion that La Poste receives strong state support justifying a top-down methodology. These factors may offset the pressures that exist on La Poste's status and which lead S & P to anticipate a change in the status and the removal of the guarantee in the long term. It remains true that S & P regards the guarantee as an essential component of state support, which influences the rating.

(270) In its assessment dated 21 January 2009 that followed the announcement on 18 December 2008 by the President of the French Republic of a draft law converting La Poste into a public limited company, S & P lowered La Poste's rating to A+ with a negative outlook. The negative outlook was justified by the likely change in the company's legal status and ownership the next two years ([127]). According to S & P, these initiatives could limit the government's ability to provide the postal operator with exceptional support where necessary. Once again, the company's legal status, to which the guarantee is linked, is cited as an indication of the strong state support for La Poste.

— Fitch Ratings

(271) Fitch based the AAA rating, awarded to La Poste until 17 April 2008, on the fact that La Poste is a public group that enjoys a guarantee from the French Government.

(272) On 4 October 2006, the day the Commission recommended that France terminate the unlimited guarantee enjoyed by La Poste as a legal entity governed by public law, the rating agency Fitch lowered its rating (from AAA stable to AAA negative) on the grounds that 'the European Commission's recommendation' had to be interpreted as 'the first tangible sign of pressure on La Poste's legal status and, therefore, on its rating'. The rating downgrade, and the justification given by Fitch, illustrates the link between the legal status and the guarantee enjoyed by La Poste on the one hand and the rating by Fitch on the other.

(273) On 17 April 2008, Fitch downgraded the rating to AA. Fitch nonetheless continues to apply a top-down methodology, which it justifies by the fact that La Poste belongs to the public sector. As pointed out above, Fitch based its decision on the fact that 'La Poste's legal status as a public operator no longer justifies its ratings being automatically aligned with the sovereign rating'. Fitch explains that La Poste's ratings are now based on the support from the parent company, i.e. the State, to its subsidiary, La Poste. Fitch now also uses the top-down methodology: La Poste's rating is no longer the same as the sovereign rating but, having regard to the strong state support for La Poste, whose statutory obligation to take on La Poste's commitments is an essential component, La Poste's rating is derived from the sovereign rating and not only on the basis of the undertaking's economic situation. This approach, and the rating, were confirmed by the assessment dated 4 September 2009.

— Conclusion

(274) The Commission concludes from the above analyses that the ultimate statutory guarantee in favour of La Poste was regarded by Fitch, at least until 2008, and by S & P as an essential component of the state support for La Poste. It is because of that support that the rating agencies adopted a top-down methodology, which resulted in La Poste having a higher rating than it would have obtained on its own merits. The Commission therefore regards the guarantee as constituting or having constituted an essential factor in La Poste's rating, even though it is not the only factor. Given that Fitch and S & P are two leading rating agencies and it is established that the market takes their ratings into account for the purpose of assessing the credit to be granted to a given undertaking, a rating by these agencies (either or both) higher than would have been the case without the guarantee is likely to produce an advantage for La Poste that it would not have obtained under normal market conditions.

(ii) Refutation of the arguments put forward by the French authorities

(α) The essential nature of the existence of an implied guarantee in the rating of entities governed by the Law of 1980 is not contradicted by the finding that their rating may be lower than the sovereign rating

(275) The French authorities dispute the economic impact of the Law of 16 July 1980 by arguing that if that Law were interpreted by the rating agencies as establishing, for the benefit of the creditors of the legal persons concerned, a mechanism comparable to a state guarantee, it would be difficult to understand how regional and local authorities could be rated BBB+ or AA–. Moreover, the French authorities find it difficult to understand how La Poste could have a rating below the sovereign rating if it enjoyed a state guarantee ([128]).

(276) In this regard, the Commission would refer to the S & P analysis dated 22 November 2004 on the influence of government support on ratings of postal entities, the analysis dated 14 June 2006 on rating government-related entities ([129]) and the 2007 study on La Poste. According to these analyses, the rating of an undertaking that enjoys strong state support is derived from the sovereign rating; however, it may be downgraded by two categories (or 6 notches) where the financial links between the undertaking in question and the State may change in the medium or long term ([130]). The fact that La Poste's rating is lower than the sovereign rating can therefore be explained by the fact that S & P expects state support to fall in the years ahead, which clearly demonstrates that state support, of which the guarantee is an essential component, allows La Poste to obtain a better rating than would otherwise be the case.

(277) S & P adds that in 1991 La Poste became an independent publicly owned entity with *établissement public* status, which ensures La Poste an ultimate state guarantee on its obligations, but not a timely and express guarantee, as reflected by the rating differentiation between La Poste and the Republic of France ([131]). Therefore, although S & P downgraded La Poste's rating in relation to the sovereign rating, it certainly takes the view that La Poste enjoys an implied state guarantee by virtue of its status as an *établissement public*, which has a direct effect on the method used to determine the rating.

(278) The above reasons explain why S & P decided to differentiate La Poste's rating from that of the State. However, the Commission is not obliged to take a view on the analysis of the reasons that explain the difference between the sovereign rating and the rating of regional and local authorities because that question is not the subject of this investigation.

(β) The French authorities draw incorrect conclusions because their argument is not based on the *ceteris paribus* assumption

(279) According to the French authorities, the analyses by the rating agencies are based not on an objective legal analysis but on a subjective assessment of what state support would be in the event that La Poste ran into difficulty. In support of that statement, France refers to the S & P analysis dated 3 April 2007. As pointed out above, S & P states in the analysis that La Poste's rating was unaffected after the Commission announced its letter recommending the end of the guarantee, because S & P considers that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins La Poste's ratings and that has been reaffirmed by recent government decisions ([132]).

(280) The Commission acknowledges that there are factors other than the guarantee that are taken into account by S & P when coming to the conclusion that La Poste receives strong state support justifying a top-down methodology. In the case in question, recent government decisions, in particular the resolution of the issue of the financing of civil service pensions, the maintenance of services reserved for La Poste, the support for the distribution of the *livret A* and the increase in postal tariffs (which incidentally also constitute government acts, if not State aid in themselves) offset the effect of the Commission's recommendation letter. This does not mean that the Commission's recommendation letter and, more generally, the pressure exerted on the change in La Poste's legal status, and therefore the guarantee enjoyed by La Poste, are not taken into account by the rating agencies. Of course, these pressures are taken into account and analysed as a weakening of the support that the State could provide to La Poste: they therefore influence the rating. Moreover, that is why, on 4 October 2006, the day the Commission recommended that France terminate the unlimited guarantee enjoyed by La Poste as a legal entity governed by public law, the rating agency Fitch lowered its rating (from AAA stable to AAA negative) on the grounds that 'the European Commission's recommendation' had to be interpreted as 'the first tangible sign of pressure on La Poste's legal status and, therefore, on its rating', which confirms that the legal status is a key factor.

(281) In order to illustrate the need to argue on the basis of the *ceteris paribus* assumption, the Commission would point out that S & P, in the same note from 2007, also spelled out that a change in La Poste's ownership structure (and hence a loss of the guarantee) would lead to a change in the methodology applied to determine the rating, but that the change would not necessarily lead to a change in the La Poste's rating given the expected improvement in La Poste's stand — alone situation in the coming years ([133]). This seems to confirm that in the absence of this status, La Poste would have to improve its stand-alone situation to maintain the same rating. However, assuming that La Poste's stand-alone situation were to remain constant, the weakening in the state support given to La Poste would lead to its rating being downgraded ([134]).

(γ) The French authorities' arguments intended to demonstrate that La Poste's legal status and the resulting guarantee are not the only factors taken into consideration by the rating agencies in no way invalidate the Commission's argument

(282) Most of the observations made by the French authorities intended to demonstrate the alleged 'absence of effect of the guarantee on La Poste's rating' ([135]) simply amount to demonstrating that the guarantee is not the only factor taken into account by the rating agencies. The Commission accepts this point: it in no way invalidates the finding that the guarantee is taken into account by the rating agencies when determining the rating of postal operators. Moreover, the French authorities do not argue on the basis of the *ceteris paribus* assumption.

— Arguments by the French authorities drawn from the rating agencies' doctrine on the rating of postal entities

(283) The French authorities examine the methodology used by the rating agencies set out in the S & P note on the influence of government support on the ratings of postal operators ([136]). They stress that, in the classification described by S & P, qualification for category 1 is based on broad criteria but does not refer to the status of the operator being rated. The French authorities conclude that legal status is not an important factor for the rating agencies.

(284) The Commission challenges this analysis and points out that S & P clearly defines the legal status of operators as one of the key factors in assessing the strength of state support (see paragraphs 264-267 on S & P methodology).

(285) Moreover, the French authorities stress that the Italian Post Office was classified by S & P in the same category as La Poste, even though it is governed by private law and its financial performance does not justify its being classified in this category ([137]).

(286) The finding that a postal operator governed by private law, namely Poste Italiane, may be regarded by a rating agency as enjoying strong state support and classified in the same category as La Poste in no way invalidates the Commission's argument to establish that the existence of a guarantee dependent on La Poste's legal status is taken into account by the rating agencies. The Commission recognises that postal entities such as Poste Italiane may be classified in the same category as La Poste without enjoying a guarantee because other factors show that they also have strong state support. In order to demonstrate that the guarantee has no influence on the rating, it would have to be shown that Poste Italiane and La Poste were in a strictly comparable situation with regard to the different factors taken into account by the rating agencies to estimate the level of state support and that the only difference between them was the existence of a guarantee enjoyed by La Poste. In other words, in order for the comparison to be meaningful, it must be shown that *ceteris paribus* applies, which the French authorities have not done.

(287) Moreover, even if the French authorities had demonstrated that the situations of Poste Italiane and La Poste are strictly comparable — apart from the existence of a guarantee in favour of the French Post Office (which has not been demonstrated) — it should be noted in any event that S & P has a different assessment of the degree of support provided by the Italian and French States to their respective post offices. S & P takes the view that the potential support provided by the Italian State to the Italian Post Office is 'strong', whereas the support provided by the French State to La Poste is 'extremely strong' ([138]). The Commission does not rule out that this difference in assessment should be seen as the influence of the guarantee, whose existence was recalled by S & P in the same note just after the confirmation that La Poste enjoyed extremely strong support ([139]). In any event, there are no grounds for drawing any conclusions about the reasons why the Poste Italiane was, at a particular moment, classified in the same category as La Poste. First, the current proceedings do not address those reasons. Second, the many different factors that the rating agencies have to take into account in their assessments means that it is not possible to draw conclusions about the specific effect on the rating of the existence or otherwise of an ultimate statutory guarantee.

— Arguments by the French authorities drawn from ratings in the private sector

(288) The French authorities recall that 'there are many cases in the private sector where the rating of a subsidiary is linked to the parent company's rating'. They conclude that this type of approach is therefore not a specific feature of the status of a legal entity governed by public law.

(289) The Commission does not deny that the rating of a subsidiary may be linked to that of its parent company, including in the private sector, and in particular to the estimated degree of support that the parent company is willing to offer its subsidiary, which may possibly be reflected in guarantee commitments made by the parent. This argument serves only to confirm the Commission's analysis. It illustrates that the status of *établissement public* and the resulting guarantee are factors demonstrating state support that have been taken into account by the rating agencies when rating La Poste.

— Arguments by the French authorities drawn from La Poste's rating

(290) The French authorities also stress that in 2005 La Poste's rating was downgraded by S & P to AA– with a stable outlook even though there had been no change to its legal status. The French authorities conclude that La Poste's rating is not a consequence of its legal status ([140]). The French authorities also point out that the two factors mentioned by S & P in support of the rating are the economic importance of the public service tasks and the strong shareholder backing, not the legal status ([141]).

(291) As pointed out above, the Commission recognises that the existence of a guarantee is not the only factor taken into account by the rating agencies when assessing the degree of support that the public authorities are willing to provide to an undertaking in difficulty. In basing its argument on the S & P study on the influence of government support on the ratings of postal operators ([142]), the Commission has nonetheless shown that the existence of a guarantee is taken into account by the rating agencies as an essential component of the state support for La Poste.

(292) In this regard, the Commission challenges the analysis by the French authorities that the strong shareholder backing referred to by S & P in its note dated 3 April 2007 is distinct from the question of the public status and of the guarantee. The study on the influence of government support on the ratings of postal operators shows that the legal status and the guarantee are indeed essential factors when estimating the level of state support for La Poste.

(293) The Commission also challenges the interpretation by the French authorities of the note dating from April 2007 stating that S & P chose a top-down methodology solely on the basis of its hypothesis that the State would remain a 100 % shareholder in La Poste over the medium term and not at all on the basis of La Poste's status as an entity governed by public law and the guarantee associated with that status. The Commission would point out that the 'likelihood of a change in the group's capital structure' which, according to S & P, would lead to the loss of the status of a publicly owned establishment and the guarantee attached to that status, is explicitly taken into account by S & P in its rating ([143]). It is therefore clear that for S & P, it is not only the change in the capital structure that is important, but also the implications (loss of publicly owned establishment status and of the guarantee); the change in capital structure is the most far-reaching step in the La Poste's increasing independence from the State.

3. *The borrowing terms actually obtained by La Poste*

(294) The French authorities argue that the announcement by the Commission of the existence of the guarantee and of its imminent removal as a result have had no effect on La Poste's financing terms. During the bond issue in October 2006, just after the Commission's announcement of its recommendation that measures be taken, La Poste obtained a mid-swap spread [144] of 12 basis points for the 15-year bond and 4 basis points for the 7-year bond. In 2004, on the occasion of the previous bond issue of a 15-year bond, the mid-swap spread was 8 basis points. The French authorities conclude that La Poste's financing terms were not based on the *de jure* or *de facto* existence of a guarantee.

(295) The Commission takes the view that the French authorities' conclusion that the Commission's announcement had no effect on the financing terms is unfounded since, on the contrary, the spread deteriorated, moving from 8 to 12 basis points.

(296) In addition, even assuming that the spread had been reduced, which is not the case, the Commission had misgivings about the conclusions that could be drawn about the influence of the Commission's announcement on La Poste's financing costs, since many other factors are also taken into account by investors, for example La Poste's financial structure, which changed between 2004 and 2006.

(297) Moreover, even if the financing terms before and after the Commission's announcement had been identical, or if the difference had not been significant, that would not prove that the guarantee does not influence borrowing terms. At the time of the bond issue referred to by the French authorities, the guarantee enjoyed by La Poste was classified as State aid. It therefore remained valid and covered the bond issues. The guarantee becomes illegal aid, if that is the case, only from the date set by this decision for it to be withdrawn.

(298) Lastly, provided that the Commission has demonstrated that the guarantee deriving from La Poste's legal status is likely to provide an advantage to La Poste because of the positive impact on its rating, the Commission takes the view that it does not have to demonstrate the specific effects that the guarantee has had in the past. It is an established principle of the State aid rules that the Commission does not have to prove the real effects of aid measures because in that case, the Member States which do not notify aid measures would be at an advantage compared to those that do [145]. A Member State notifying an unlimited guarantee would have the measure prohibited because of its potential effects only, whereas a Member State which did not notify the aid would be able to defend itself by demonstrating that, in the specific case, the guarantee has not produced any advantages to the beneficiary. Moreover, as for new measures, the Commission must assess the compatibility of existing measures with the Treaty rules for the future and must not necessarily demonstrate that the measure has, in the past, produced effects that are incompatible with the Treaty [146]. Moreover, the Commission cannot order recovery of the advantages that may already have been generated by an existing aid measure. Accordingly, nor is it necessary to demonstrate the specific effects of the guarantee on borrowing terms.

(b) **Given the unlimited nature of the guarantee, it is not possible to calculate the amount of the market premium that La Poste should pay to the State, which renders the transfer mechanism proposed by the French authorities inapplicable**

(299) On the basis of the above, the Commission concludes that the guarantee enjoyed by La Poste is unlimited with regard to duration, amount and scope, and is not remunerated. Moreover, it covers both universal service activities and competitive activities. The Commission takes the view that, having regard to the unlimited nature of the state guarantee in favour of La Poste, and in accordance with the Commission's decision-making practice [147], it is not possible to calculate the amount of the market premium that La Poste would have to pay to the State for granting it the unlimited guarantee. For any guarantee, the aid is granted at the time the guarantee is offered. In the case of an unlimited guarantee, which may potentially cover all the undertakings debts for an unlimited period, it is impossible to determine in advance the amount of aid granted at the time the guarantee is given, and therefore impossible to calculate an appropriate market premium [148]. This makes the transfer mechanism proposed by the French authorities inapplicable.

(c) **The more favourable borrowing terms obtained by La Poste thanks to the implied state guarantee constitute a selective advantage**

(300) The advantage is selective because La Poste's competitors do not enjoy the same advantage: La Poste's competitors are, in effect, subject to compulsory liquidation and winding-up procedures; they do not benefit from the unlimited state guarantee linked to the status of publicly owned establishment.

4.1.3. DISTORTION OF COMPETITION AND EFFECT ON TRADE

(301) The measure at issue is liable to result in a reduction in La Poste's operating costs, which would have the effect of favouring La Poste and hence of distorting competition within the meaning of Article 107(1) TFEU. Moreover, in view of the fact that the sectors in which La Poste is active, i.e. *inter alia* the distribution of parcels, unaddressed deliveries and letters the distribution of which is not reserved for La Poste, are largely open to intra-Community trade, such measures might have an unfavourable impact on undertakings which carry on, or which wish to develop, a similar economic activity in France. It should be noted here that, pursuant to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directives 2002/39/EC and 2008/6/EC [149] ('the Postal Directive'), all postal services will have to be subject to competition in France by 1 January 2011. In these circumstances, the existence of an unlimited guarantee in favour of La Poste is liable to distort competition and affect trade within the meaning of Article 107(1) TFEU.

4.1.4. CONCLUSION AS TO THE AID NATURE OF THE MEASURE

(302) The state guarantee in favour of La Poste by virtue of its having the legal form of a publicly owned establishment therefore leads to a transfer of state resources imputable to the State and distorts or threatens to distort competition and trade between Member States by favouring La Poste. The Commission concludes that this guarantee constitutes State aid within the meaning of Article 107(1) TFEU.

4.2. *COMPATIBILITY*

(303) In view of the fact that the measure at issue falls within the scope of Article 107(1) TFEU, it must be examined whether it can be declared compatible by the Commission under the exemptions provided for in Articles 107(2) and (3) and 106(2) TFEU.

(304) Clearly, the unlimited state guarantee in favour of La Poste does not satisfy any of the tests for exemption provided for in Article 107(2) TFEU, given that the measure at issue has none of the objectives mentioned in that provision.

(305) Article 107(3)(a) TFEU provides that an aid measure may be declared compatible with the internal market where it is intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. In view of the fact that the unlimited state guarantee in favour of La Poste is an individual measure granted in a discretionary manner which does not pursue any regional objective, that it is of unlimited duration, that it is not linked to any investment and that it is not degressive, the exemption provided for in Article 107(3)(a) TFEU does not apply.

(306) As for the exemptions provided for in Article 107(3)(b) and (d) TFEU, the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the French economy. Nor is the unlimited state guarantee in favour of La Poste intended to promote culture and heritage conservation.

(307) The exemption provided for in Article 107(3)(c) TFEU provides that aid may be considered compatible if it is intended to facilitate the development of certain economic activities or of certain economic areas, where such aid does not affect trading conditions to an extent contrary to the common interest. The unlimited state guarantee in favour of La Poste concerns neither an investment nor job creation and therefore constitutes unconditional operating aid. In keeping with its decision-making practice the Commission cannot consider such aid as being intended to facilitate the development of certain economic activities or of certain economic areas.

(308) Lastly, the unlimited state guarantee in favour of La Poste cannot be considered to be compatible on the basis of Article 106(2) TFEU. This exemption provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are to be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

(309) French law has imposed public service obligations on La Poste. On that basis, the postal operator may receive financial compensation or enjoy certain prerogatives derogating from certain generally applicable rules of law. However, such financial measures or prerogatives must be limited to what is necessary to offset the additional costs incurred by La Poste by virtue of its public service obligations.

(310) The Community framework for State aid in the form of public service compensation sets out the conditions under which the Commission considers such compensation to be compatible under Article 106(2) TFEU. In particular, the compensation paid cannot exceed the cost of providing the public service, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(311) In the present case, such an analysis would presuppose a market valuation of the unlimited state guarantee in favour of La Poste in order to verify that its value does not exceed the net cost of providing the universal postal service. However, this analysis is impossible to carry out, which rules out application of the exemption provided for in Article 106(2) TFEU.

(312) Moreover, even if such a valuation were possible, it could relate only to the activities covered by the universal postal service task. In its current form, however, the unlimited state guarantee covers all the activities of La Poste, including those not covered by the universal postal service task.

(313) The Commission is of the opinion that the development of trade is thus affected to an extent contrary to the interests of the Union.

(314) Nor has France presented any evidence demonstrating the compatibility of the measure with Articles 107(2) or (3) or 106(2) TFEU, but has merely disputed the existence of the guarantee. Hence it has not demonstrated the compatibility of the aid despite the fact that under the case law the burden of proof rests with it.

(315) In conclusion, even in amended form following the French proposals concerning clarification of the Decree implementing the 1980 Law and inclusion of a restrictive clause in contracts of La Poste involving a claim, the measure at issue constitutes existing State aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999 and, in accordance with the Commission's decision-making practice concerning unlimited state guarantees granted to undertakings entrusted with economic activities [150], this aid does not satisfy any of the tests for exemption laid down in the TFEU. Consequently, the above-mentioned unlimited state guarantee is incompatible with the internal market.

4.3. *NEUTRALITY WITH REGARD TO THE RULES GOVERNING THE SYSTEM OF PROPERTY OWNERSHIP*

(316) By this conclusion the Commission is in no way disputing the State's ownership of La Poste, nor is it challenging its status as a legal entity governed by public law as such. The Commission simply views as problematic the guarantee flowing from that status, as French law stands, for La Poste.

(317) Under Article 345 TFEU the Union is neutral with regard to the rules governing the system of property ownership in the Member States and no provision of the Treaty prevents a State from owning enterprises (whether wholly or partly). That being so, the rules of competition must be applied equally to private and public enterprises. Neither of these two types of enterprise may be placed at an advantage or disadvantage by the application of those rules. In the present case, the guarantee stems, not from the ownership, but from the legal form, of the enterprise. The Member States are free to choose the legal form of enterprises, but they must, when making their choice, comply with the competition rules of the Treaty. In particular, the mere fact that the state guarantee is automatically linked to a special legal form does not prevent the guarantee from constituting State aid within the meaning of Article 107(1) TFEU if the necessary conditions are met [151]. This conclusion is not affected by Article 345 TFEU. On the contrary, in a competitive scenario the neutrality principle would involve abolishing any unjustified advantage for the benefit of publicly owned enterprises to the detriment of their private competitors. An identical approach was followed by the Commission, for example, in the case concerning publicly owned credit institutions in Germany [152] and in that concerning EDF [153].

4.4. *THE DRAFT LAW ON LA POSTE AND POSTAL ACTIVITIES*

(318) In their letter dated 31 July 2009, the French authorities communicated to the Commission the draft law on La Poste and postal activities adopted by the Council of Ministers on 29 July 2009, converting La Poste into a public limited company on 1 January 2010.

(319) An amendment to this draft law was subsequently adopted, postponing the date of the conversion of La Poste into a public limited company until March 2010.

(320) Article 1, second paragraph, of the draft law as amended, modifying Law No 90-568 of 2 July 1990 on the organisation of the public service of La Poste and France Telecom provides that 'The public-law entity La Poste shall be converted as from 1 March 2010 into a public limited company called La Poste [….]'.

(321) The French authorities have stated that the conversion of La Poste into a public limited company will have the effect of making it subject to the ordinary law rules applicable to companies undergoing compulsory administration or winding up.

(322) The Commission agrees that the effective conversion of La Poste into a public limited company as provided for by the draft law transmitted by the French authorities will directly result in the unlimited guarantee which it enjoys being withdrawn. The Commission considers that this conversion constitutes a measure that will remove the State aid from which La Poste currently benefits.

(323) Adoption of the draft law by Parliament is scheduled for January 2010. On 4 October 2006, in accordance with Article 18 of the Procedural Regulation, the Commission asked that the unlimited guarantee be withdrawn by 31 December 2008. In view, however, of the circumstances of the case, the fact that the discussions with the French authorities lasted until October 2009 and the time needed to approve the legal instruments terminating the guarantee, the Commission considers it reasonable to ask the French authorities to effectively withdraw the unlimited guarantee by 31 March 2010,

HAS ADOPTED THIS DECISION:

Article 1

The unlimited guarantee given by France to La Poste constitutes State aid that is incompatible with the internal market. France must withdraw it by 31 March 2010.

Article 2

The Commission considers that the effective conversion of La Poste into a public limited company will result in the unlimited guarantee which La Poste enjoys being withdrawn. The effective withdrawal of the unlimited guarantee by 31 March 2010 is a measure that will remove, in accordance with Union law, the State aid referred to in Article 1.

Article 3

France shall provide the Commission, within two months of notification of this Decision, with a detailed description of the measures already taken and planned for the purpose of complying with this Decision.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 26 January 2010.

For the Commission

Neelie KROES

Member of the Commission

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

(2) OJ C 135, 3.6.2008, p. 7.

(3) Case N 531/05, Measures relating to the creation and operation of La Banque Postale (post office bank) (OJ C 21, 28.1.2006, p. 2).

(4) OJ L 83, 27.3.1999, p. 1.

(5) Since the reasons for classifying the aid as existing aid have already been set out in recitals 93 to 97 of the decision to open the formal investigation into the aid (see footnote 2) and the Commission has received no comments on this point, the Commission will not return to this issue but will simply confirm the preliminary assessment contained in the said decision.

(6) *Official Journal of the French Republic* of 17 July 1980, p. 1799.

(7) *Official Journal of the French Republic* of 14 May 1981.

(8) See footnote 2.

(9) *Official Journal of the French Republic* of 8 July 1990.

(10) In France, besides the public authorities themselves such as central and local government, there are two main categories of legal person governed by public law, namely publicly owned establishments and public interest groups, which were created by Law No 82-610 of 15 July 1982. Within the publicly owned establishment category, a distinction can be drawn between publicly owned establishments of an administrative character (EPAs), which perform the tasks normally associated with an administrative authority, and publicly owned establishments of an industrial and commercial character (EPICs), which pursue economic activities.

(11) The Court of Cassation followed the reasoning in a judgment of the Douai Court of Appeal of 22 October 1998, in which La Poste was likened to a publicly owned establishment of an industrial and commercial character.

(12) In a report submitted to the French Senate in 2003, the Economic Affairs Committee stated that it was common knowledge that, since the reform of 1990, the parent company, La Poste, had a legal form similar to that of a publicly owned establishment of an industrial and commercial character.

(13) See the judgment of the Court of Cassation of 21 December 1987 (1st Civil Division).

(14) *Official Journal of the French Republic* of 26 January 1985, p. 1097.

(15) Administrative Court of Appeal, Paris 15 February 1991, JCP E1991, pan. 742; Court of Cassation, Soc. 6 November 1991, JCP E1992, pan. 85, Bull. V No 476.

(16) The deadlines in question are those mentioned in the third subparagraph of Article 3-1 of the Decree.

(17) Article 10 of Decree No 2008-479 provides that 'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources either by reducing the appropriations allocated to other expenditures and still available or by increasing resources'.

(18) *Official Journal of the French Republic* of 20 February 1990.

(19) *Bulletin officiel de la comptabilité publique*. NOR: BUD R 0200060 J.

(20) See Chapter 3 of codifying instruction No 02-060-M95 of 18 July 2002 on the financial and accounting regulation of national publicly owned establishments of an industrial and commercial character, *Bulletin officiel de la comptabilité publique*.

(21) See Part IV, B: '*Quelles dispositions juridiques prévoir?*', p. 21.

(22) Established in 1965, ERAP is an EPIC whose purpose is to acquire, at the request of the State, shareholdings in undertakings in the energy, pharmaceutical and telecommunications sectors.

(23) See Article '*Fitch attribue la note préliminaire AAA au programme EMTN garanti de EUR 10 MD de ERAP*'. Consultable on ERAP's website: www.erap.fr/pdf/CP_Fitch_Ratings_fr.pdf

(24) See Article '*Moody's attribue la notation Aaa au programme d'EMTN de l'ERAP portant sur 10 milliards d'euros*'. Consultable on ERAP's website: www.erap.fr/pdf/CP_Fitch_Ratings_fr.pdf

(25) In accordance with article 15 of Law No 90-568 of 2 July 1990 the accounts of La Poste comply with the rules applicable to commercial enterprises.

(26) See Article '*Fitch attribue la note préliminaire AAA au programme EMTN garanti de EUR 10 MD de ERAP*'.

(27) See, in particular, the letters from the French authorities dated 24 April 2006, 6 December 2006, 16 January 2007, 1 February 2007 and 19 March 2007.

(28) See Part III of the letter from the French authorities dated 23 January 2008.

(29) Council of State, 1 April 1938, *Société de l'hôtel d'Albe*, reported in *Receuil*, p. 341. See recital 33 of the opening decision.

(30) Council of State, 10 November 1999, *Société de gestion du port de Campoloro*, reported in *Receuil*, p. 348; Council of State, 18 November 2005, *Société de gestion du port de Campoloro*, reported in *Receuil*, p. 515. See recital 34 of the opening decision.

(31) *Official Journal of the French Republic*, No 177, 2 August 2001, p. 12480.

(32) See Part IIIB of the memorandum from the French authorities dated 23 January 2008 and the observations sent by the French authorities on 27 October 2009.

(33) See the memo from the French authorities sent on 27 October 2009.

(34) D. Labetoulle, '*La responsabilité des AAI dotées de la personnalité juridique: coup d'arrêt à l'idée de "garantie de l'Etat"*' in *RJEP/CJEG* No 635, October 2006.

(35) See Part IV of the letter from the French authorities dated 23 January 2008.

(36) See paragraph 78 of the letter from the French authorities dated 23 January 2008.

(37) P. Bon, '*Le Préfet face à l'inexécution par une collectivité territoriale d'un jugement la condamnant pécuniairement*', in *RFDA* — March April 2006, p. 341. C. Landais and F. Lenica, '*Le pouvoir de substitution du préfet en cas d'inexécution de la chose jugée par les collectivités territoriales*', in *AJDA*, 23 January 2006, p. 137.

(38) Council of State, 10 November 1999, *Société de gestion du port de Campoloro*, cited above.

(39) Council of State, 18 November 2005, *Société de gestion du port de Campoloro*, cited above.

(40) Council of State, 30 November 1923, reported in *Receuil*, p. 789.

(*) parts of this text have been omitted to ensure that confidential information is not disclosed. Those parts are indicated by three full stops enclosed in square brackets and marked with two asterisks.

([41]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

([42]) According to the French authorities, compliance with these criteria is sufficient, albeit not necessary, to rule out the existence of any advantage In particular, it would be counter-intuitive to regard the alleged existence of a doubt about the procedure applicable in the event of insolvency to be reflected in more favourable funding terms.

([43]) Article L 643-11 of the Commercial Code.

([44]) 'Category 1: equalization of ratings with those of the state owner. This first category includes those entities […], generally loss making or with poor financial profiles, and extremely unlikely to be privatized […] given the nature of their activity, as well as their home country's economic, social and political environment. None of the postal companies currently rated by Standard & Poor's falls into this category […]'.

([45]) 'Category 2: notching down with respect to the state owner's rating. […] La Poste and Poste Italiane currently fall within this category.'

([46]) 'Category 3: notching up from the postal entity's stand-alone rating. […] The entity's postal activities are still a key public service, but the clear aim of the entity is to achieve a high level of operational and financial independence, either through privatization or commercial autonomy (state ownership, but independent management) […]'.

([47]) 'Standard & Poor's Ratings Services lowered its counterparty credit […] ratings on French issuer AGF […] to "A" from "A+" […], following a review of AGF's parent, the Munich-based Allianz group (AA–/Negative/A–1+). […] The downgrade of AGF, the holding company, is not specific to any issues within the French franchise and generally reflects the Allianz group's financial leverage and fixed-charge coverage, which are increasingly aggressive relative to the group's ratings and are a result of the group's weakened consolidated capital base and reduced earnings.'

([48]) 'The ratings also take into account the unchallenged status of both it and its parent, Germany-based Volkswagen Financial Services AG (VWFS), as core and captive finance entities to VW' and 'the ratings on VW Bank could moderately diverge (generally not more than one notch) from the ratings on VW or VWFS; currently only its outlook differs.'

([49]) 'The ratings on Germany-based Volkswagen Financial Services AG (VWFS) are based on its unchallenged status as a core subsidiary of German automaker Volkswagen AG (VW; A–/Negative/A–2) and reflect its strategic importance for and close operational integration into its parent.'

([50]) 'The rating of a company that enjoys strong state support […] may be lowered by two categories because the financial relationship between the company and the State may change in the medium or long term.'

([51]) Similarly, according to the French authorities, the 'strong state support' referred to by the Commission in recital 84 of the opening decision bears no relation to the legal form of the company or any guarantee mechanism, but refers to decisions such as the setting up of the Banque Postale and the reform of pensions financing, which are intended to provide La Poste with the resources to grow on a level playing field with its competitors and at arm's length from the State. However, some of these measures themselves constitute a considerable amount of State aid (see in particular the Commission Decision dated 10 December 2007 concerning the reform of the financing of the pensions of public sector workers employed by La Poste). Consequently, they cannot be indicators of the State's arm's-length interest in La Poste's growth.

([52]) 'A change in the group's ownership structure would lead Standard & Poor's to shift to a bottom-up rating approach, focusing more on LP's stand-alone business and financial profiles. This rating approach may not necessarily translate into rating changes given the expected improvement in LP's stand-alone situation in the coming years.'

([53]) 'The ratings could come under pressure if the group significantly underperforms its operational and financial trajectory at the dawn of full postal deregulation, or if an ownership changes occur sooner than we expect.'

([54]) 'The EC recently recommended that the French government end this guarantee by year-end 2008, which they believe provides LP with more favorable financing conditions than its competitors in a market in the process of being liberalized.'

([55]) Original in English.

([56]) According to the French authorities, the mid-swap spread was 12 basis points for the fifteen-year bonds (i.e. 33 basis points on fungible treasury bonds) and 4 basis points for the seven-year bonds. By way of comparison, the French authorities indicate that the previous bond issue, made in 2004, concerned a fifteen-year bond for EUR 580 million and had led to a mid-swap spread of 8 basis points. The mid swap is the median between the rate offered and the rate proposed by the banks at any moment for their interbank dealings by maturity, i.e. it is the fixed rate that a bank is willing to exchange for a 6-month Euribor as a general rule. That rate is the market reference for bond issues in particular.

([57]) Decree No 81-501. When the French authorities made their proposal, the implementing decree was Decree No 81-501 of 12 May 1981 for implementation of the Law of 16 July 1980 on penalties imposed in administrative cases and the enforcement of judgments by legal entities governed by public law and relating to the 'Reports and Studies' Section of the Council of State.

([58]) Council of State, 16 November 1998, *Sille*: 'First, having regard to the fact, as the judges in the court of first instance decided, whether the public authorities can be held liable, even without fault, on the grounds of the principle of the equality of citizens before public burdens, where a measure lawfully adopted has the effect of causing a special loss of a certain degree of gravity to a natural or legal person, that does not hold true in this case because Mr Sille, in his capacity as a real-estate professional, could not be unaware of the risks necessarily involved in the execution of a building project such as that planned in this case, in respect of which it was necessary, in particular, to amend the provisions of the land-use plan and obtain the agreement of the local council that Mr Sille should have contemplated the possibility or, faced with the negative findings of the public enquiry and the hostility encountered by the project, that it would be dropped by the local authority; that having taken on the risk in full knowledge of the facts, he cannot usefully maintain that he has suffered an abnormal loss and that the local authority must bear the substantial consequences for him arising from the shelving of the project'.

([59]) Council of State, 10 July 1996, *Meunier*: 'By taking the view that, as a result of choosing to locate the business in such a place and of a letter from the mayor concerning the possibility of land slip, the interested party had accepted in full knowledge of the facts the risks of instability to which his establishment was exposed, the Administrative Appeal Court made a final decision on the facts. By taking the view that the loss resulting from a situation to which the interested party knowingly exposed himself did not give him grounds for compensation, the Court did not fail to apply the rules governing the liability of legal entities governed by public law'.

([60]) For further details see recitals 11 to 13 of the opening decision.

([61]) OJ C 155, 20.6.2008, p. 10.

([62]) See Section 3.1.1.A of this Decision.

([63]) See footnote 29.

([64]) See footnote 30.

([65]) Constitutional Council, decision No 2001-448, 25 July 2001: 'On the basis of Article 34 of the Constitution, Article 61 could properly require any guarantee given by the State to be authorised by the Finance Act within three years, in order to ensure clarity in the State's financial commitments; but it does not follow that if no such authorisation is granted the guarantee concerned must lapse. Such a consequence would be contrary to the principle of equality before public burdens *(égalité devant les charges publiques)* and, if the injury caused is especially serious, to the right of property. In any event, the legislative history makes it clear that the purpose of Article 61 is to ensure that Parliament is informed of guarantees given by the State, and not to bring an end to any guarantees given in the past which have not been authorised within the time laid down. That being so, Article 61 is not contrary to the Constitution'.

([66]) Paragraph quoted in the preceding footnote.

([67]) Court of First Instance in Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraphs 124 to 127. See also the Guarantees Notice.

(68) See paragraphs 62 to 68 of the French authorities' letter of 23 January 2008.

(69) See footnote 34.

(70) Section 4.1.1.A(b)3 of this Decision.

(71) Opening decision, footnote 39. The memorandum is not public, but it was referred to in the annual report for 1995.

(72) This part of the memorandum was published in the annual report for 1995 (p. 219).

(73) Memorandum from the French authorities to the Commission sent on 9 September 2008.

(74) See point 5 in the annex to that memorandum, which lists different acts including for example 'a ministerial letter, or any other basis'.

(75) It may be borne in mind that a judgment closing compulsory winding-up proceedings without penalty, on the ground that the assets are insufficient, prevents the creditor from reopening proceedings: his claim is definitively lost.

(76) See recital 147.

(77) The section of this Decision describing the measure explains the terms of the Law of 16 July 1980, the Decree of 20 May 2008 replacing the decree of 12 May 1981, and the Circular of 16 October 1989.

(78) See Section 3.1.1.B(a)1 of this Decision, which in turn refers to Section IV.A.1, pp. 19-20, of the French authorities' letter of 23 January 2008.

(79) As the Commission's expert points out, if the publicly owned establishment's funds are insufficient, the possibilities open to the supervisory authority for dealing with the situation are limited. The necessary funds may come from resources that were previously allocated to other expenditure and are now reallocated in order to honour the debt. They may come from the sale of assets or an increase in charges, if those courses are feasible. The establishment may also borrow. But if these few possibilities are not feasible, the only solution remaining is to obtain funding from the State as shareholder.

(80) In cases where continuity of public service is not a requirement.

(81) Expert's report, section I.2.A.2, p. 18.

(82) Article 620-1 of the Commercial Code.

(83) Article 640-1 of the Commercial Code provides that 'a procedure is established for winding up under the supervision of a court which is open to any debtor in any of the categories referred to in Article L 640-2 of the Commercial Code who is insolvent and whose reconstruction is manifestly impossible'.

(84) La Poste's assets were brought under ordinary law by the Law of 11 December 2001, known as the Murcef Law. But that law provides that 'where the terms of a transfer of an asset to or from La Poste compromise the proper performance by La Poste of its statutory or regulatory obligations or commitments entered into in its programme contract […] the State shall object to the transfer or make it subject to the condition that it must not prejudice the proper performance of those obligations'.

(85) Charges for services in the reserved area have to be approved by ARCEP, the postal regulator. Charges for universal services are restricted by ARCEP.

(86) See Section 4.1.1.A(b)3 of this Decision.

(87) See paragraphs 112 and 113 of the French authorities' letter of 23 January 2008.

(88) See Section 4.1.1.A(b)3.

(89) According to the French regulator, ARCEP, regulation extends to the activities of postal services comprising the clearance, sorting, transport and delivery of postal items in regular rounds. It does not include the distribution of unaddressed advertising material, urban parcel deliveries, and express deliveries.

(90) See the strategic presentation of the annual performance plan.

(91) For a more detailed account of the position of the French authorities see in particular Section 3.1.1.B(a)2 of this Decision.

(92) Administrative Court of Appeal, Lyon, 6 June 1996, *Société fermière de Campoloro*, No 95LY00935.

(93) P. Bon cited in footnote 37.

(94) See footnote 37.

(95) See footnote 34.

(96) No 57516/00.

(97) Series A, No 37.

(98) See Memorandum transmitted on 27 October 2009.

(99) Council of State, 29 December 2004, *Société d'aménagement des coteaux de Saint-Blaine*, No 257804: compensation in respect of public easements is possible when the owner bears a specific and exorbitant burden out of proportion to the public interest objective pursued.
Administrative Court of Appeal, Bordeaux, 14 October 2003, *Mr and Mrs Claude X.*, No 99BX01530: disruption to motor vehicle traffic on local roads damaged in a landslip may cause abnormal and special loss to the owner who thereby finds himself isolated. The administrative judge held, in particular, that the duration of the loss (traffic was disrupted for seven months — the time taken to carry out the work required) lent it an abnormal and specific character, placing a greater than usual burden on the two users of the public highway, and that compensation needed therefore to be provided.
Administrative Court, Montpellier, 23 June 1999, *Mr Van der Velden*, No 97-03716: The once-and-for-all closure of a camp site because of a major risk of flooding caused the owner an abnormal and specific injury such as to entitle him to compensation in so far as the closure brought the interested party's only professional activity to an end and caused the total loss of the goodwill relating to his business.

(100) The concept of legitimate error such as to impart legal effects is linked to the theory of appearance. According to Cornu's *Vocabulaire Juridique*, appearance is 'the aspect resulting — intentionally or otherwise — from the combination of external signs through which states and functions (status as representative, heir, owner, etc.) normally manifest themselves and that give rise to the belief that the person invested with these signs really does possess such a state or function'. The theory of appearance is a 'praetorian theory according to which appearance alone is enough to produce effects in respect of third parties who, following a legitimate error, have been unaware of the real state of affairs'. The theory of appearance is used in case law and has even led to some high-profile outcomes (ECHR, 7 June 2001, Kress). It is used in private law when it is necessary to impart legal effects to a contract in respect of which one of the parties has legitimately relied on simple appearance. The examples of apparent domicile or, in public law, of *de facto* officials whose decisions are likely to remain legitimate may also be cited. The theory of appearance has the advantage of making it easier to demonstrate the existence of a legal attribute or legal effect not expressly and explicitly affirmed by any legislation.

(101) Distinction drawn on the basis of the developments of the thesis of S. Carpi-Petit, *Les successions en droit administratif*, PUR, 2006.

(102) This emerges from the Decree of 15 July 2002 (*Official Journal of the French Republic* of 23 July 2002), establishing the means of winding up the *Université thématique d'Agen*, Article 1 of which provides that the liquidator is responsible for 'proposing to the Minister for Higher Education that the assets, claims, debts and balance of the liquidation account remaining at the end of the winding-up period be distributed between Bordeaux I and Bordeaux IV universities'.

(103) — Decree No 53-404 of 11 May 1953, winding up the *Caisse de compensation pour la décentralisation de l'industrie aéronautique*, *Official Journal of the French Republic* of 12 May 1953, Article 3: 'in accordance with Article 7 of the above-mentioned decree of 24 May 1938, the installations and plant belonging to the *Caisse* and the sums still available after the discharge of liabilities will become the property of the State' (in this case, the balance is obviously positive).

— Article 2 of Decree No 75-926 of 6 October 1975 relating to the abolition of the *Bourse d'échanges de logements*: 'transactions for paying the debts, recovering the claims and liquidating the assets of the *Bourse d'échanges de logements*', and (if appropriate) legal proceedings for the purposes both of bringing and defending actions in connection with the *Bourse* will fall within the competence of the Minister for Economic Affairs and Finance. The entries will be transferred to a special Treasury 904.14 account entitled 'Winding-up of public Government bodies and para-administrative or professional bodies, and various windings up'.

— Decree No 81-1009 of 12 November 1981, abolishing the *Institut Auguste Comte pour l'étude des sciences et de l'action*: any surplus on the winding up is paid to the State.

— Decree No 83-1185 of 27 December 1983, winding up the *Etablissement public chargé de l'aménagement de la ville nouvelle de Lille-Est*: 'the assets and liabilities of the *Etablissement public d'aménagement de la ville nouvelle de Lille-Est* shall be transferred on this date to the *Communauté urbaine de Lille* under the conditions established by the above-mentioned agreement of 5 December 1983, with the exception of the goods listed in the Annex to this decree, which shall be transferred to the *Institut de recherche des transports*'.

— Decree No 83-1263 of 30 December 1983 relating to the winding up of the *Service national d'examen des permis de conduire*: 'the transactions are listed in the special "Winding up of publicly owned establishments" Treasury account'.

— Article 1 of Decree No 87-590 of 30 June 1987, laying down the conditions for winding up the *Centre mondial informatique et ressources humaines*: 'as from 1 July 1987, the date on which the *Centre mondial informatique et ressources humaines (CMIRH)* is wound up, the movable property and rights and obligations of this establishment shall be transferred to the State'.

— Decree of 17 November 1987 relating to the winding up of the *Centre d'étude des systèmes et des technologies avancées* (*Official Journal of the French Republic* of 18 November 1987) and Article 1 of Decree No 87-1167 of 31 December 1987, laying down the winding-up conditions: 'the assets, rights and obligations of the *Centre d'études des systèmes et technologies avancées (CESTA)* shall be transferred to the State as from 1 January 1988, the date on which this establishment is to be wound up'.

— Judgment of 28 September 1988, laying down the conditions for completing the winding up of the *Agence de l'informatique* (*Official Journal of the French Republic* of 23 December 1988): the winding up operations shall be carried out by the Minister for Industry and Town and Country Planning.

— Decree No 93-775 of 26 March 1993 relating to the abolition of the publicly owned establishment *Musée de la Poste (Official Journal of the French Republic* of 30 March 1993): transfer of the rights and obligations to La Poste.

— Decree of 26 December 1996, winding up the publicly owned establishment *Caisse française des matières premières* (Official Journal of the French Republic of 29 December 2006): 'the assets, rights and obligations of this establishment shall be transferred to the State'.

— Decree No 97-882 of 26 September 1997, winding up the *Etablissement public du centre de conférences international de Paris*: the surplus on the winding up shall be paid to the State.

— Article 2 of Decree No 99-1151 of 29 December 1999, winding up the publicly owned establishment *Musée national de la Légion d'honneur*: 'the tasks and the assets, rights and obligations of this publicly owned establishment shall be transferred as from the same date to the *Ordre national de la Légion d'honneur*'.

— Decree No 2000-1126 of 22 November 2000, transferring the surplus for the winding up of the *Etablissement public d'aménagement de la ville nouvelle du Vaudreuil*: the balance shall be transferred to the State budget, and Article 2 specifies that 'the rights and obligations arising from the activities of the establishment or during the winding-up period and not known about at the end of the winding-up period shall be transferred to the State'.

— Decree No 2001-1383 of 31 December 2001, winding up the *Etablissement public chargé de l'aménagement des rives de l'Etang de Berre*: Article 6 provides that a decree will determine the transfer to the State of the assets and liabilities remaining at the close of the liquidation account and of the rights and obligations arising from the establishment's activities or during the winding-up period and not known about at the end of that period. Decree No 2004-234 of 17 March 2004, including a variety of provisions relating to the winding up of the public establishment responsible for land use on the banks of the Etang de Berre transfers 'disputes arising from the establishment's activities' to the State.

— Article 4 of the Decree of 29 April 2004, winding up the *Syndicat mixte pour le développement de la zone industrielle et portuaire Eure-Calvados (Official Journal of the French Republic* of 6 May 2004): 'the charges remaining on the date when the *Syndicat mixte* is wound up shall be distributed between its members in accordance with its articles of association'.

(104) S. Carpi-Petit, *Les successions en droit administratif*, PUR, 2006.

([105]) — Judgment of 24 February 2004, winding up *Les Houillères de bassin du centre et du Midi* (*Official Journal of the French Republic* of 28 February 2004): transfer of the activities, assets, rights and obligations to *Charbonnage de France*.
— Order No 59-80 of 7 January 1959, reorganising the tobacco and matches tax monopolies: creation of the publicly owned establishment *SEITA*, with allocation of funds.
— Decree No 65-116 of 17 December 1965 concerning the unification of the *Régie autonome des pétroles* and the *Bureau de recherches du pétrole*: 'all the assets, rights and obligations of the *Régie autonome des pétroles* and of the *Bureau de recherches de pétrole* shall be transferred *ipso jure* to the *Entreprise de recherches et d'activités pétrolières*'.
— Article 2 of Decree No 67-796 relating to the unification of the *Mines domaniales de potasse d'Alsace* and the *Office national industriel de l'Azote*: 'all the assets, rights and obligations of the *Mines domaniales de potasse d'Alsace* and the *Office national industriel de l'azote* shall be transferreed *ipso jure* to the *Entreprise minière et chimique*'.
— Decree No 68-369 of 16 April 1968, merging the *Houillères du bassin du centre et du midi*: 'all the assets, rights and obligations of the abolished *Houillères du bassin* shall be transferred *ipso jure* to the *Houillères du bassin du centre et du midi*'.
— Decree No 69-69 of 24 January 1969 relating to the transfer of the ORTF: 'as from 1 January 1969, the movable and immovable assets, rights and obligations of the *Office de coopération radiophonique* shall be transferred to the ORTF'.
— Article 2 of Decree No 93-1176 of 13 October 1993, winding up the publicly owned establishment of *l'Opéra de la Bastille*: 'the assets, rights and obligations of the *Etablissement public de l'Opéra de la Bastille* shall be transferred to the *Etablissement public du parc de La Villette*'.
— Article 2 of Decree No 2000-1294 of 26 December 2000, winding up the *Etablissement public chargé de l'aménagement de la ville nouvelle d'Evry* and transferring its rights and obligations to the *Agence foncière et technique de la région parisienne*: 'the assets and liabilities of the *Etablissement public chargé de l'aménagement de la ville nouvelle d'Evry* shall be transferred on this date to the *Agence foncière et technique de la région parisienne*' […]. 'it shall take over all the rights and obligations relating to the activity carried on by the *Etablissement public*'.
— Decree No 2004-103 of 30 January 2004 relating to *Ubifrance*, the French agency for the international development of undertakings: 'transfer to *Ubifrance* […] of the rights, obligations and immovable and movable assets of the *Centre français du commerce extérieur*'.
— Article 6 of Law No 2004-105 of 3 February 2004, creating the *Agence nationale pour la garantie des droits des mineurs*: 'Subject to the winding up, by decision of its general meeting, of the *Association nationale de gestion des retraités des Charbonnages de France et des Houillères de bassin ainsi que de leurs ayants droit*, the assets, rights and obligations of this association shall be transferred to the *Agence nationale pour la garantie des droits des mineurs*'.
— Decree No 2004-186 of 26 February 2004, creating the *Université en sciences des organisations* and bringing about the decision of *Paris-Dauphine*:'the assets, rights and obligations of *Université Paris IX* shall be transferred to *Université Paris-Dauphine*'.

([106]) — Article 2 of Law No 80-495 of 2 July 1980, amending the legal form of the *Service d'exploitation industrielle des tabacs et allumettes*: 'the assets of the EPIC known as *Service d'exploitation industriel des tabacs et allumettes* shall be transferred to the company created by this law, in accordance with the procedures laid down by the competent authority'.
— See also Decree No 80-1025 of 19 December 1980 relating to the transfers of assets, rights and obligations from the *Caisse nationale des marchés de l'Etat, des collectivités et établissements publics* to the company known as CEPME.
— Article 1 of Law No 88-50 of 18 January 1988 relating to the mutualisation of the *Caisse nationale de crédit agricole*: 'The assets of the *Caisse nationale de crédit agricole* and those of the *Fonds commun de garantie* shall be transferred to the company specified in paragraph 1, above — holder of all of the rights and obligations of the *Caisse nationale* and of the *Fonds commun de garantie*, together with the guarantees and sureties attached to them'.
— Decree of 19 April 1989, authorising the *Centre d'études des systèmes d'information des administrations* to transfer all of its assets, rights and obligations to the limited company *Cesia* and winding up this establishment.
— Law No 92-665 of 16 July 1992, adapting the legislation applicable to insurance and banking to the single European market: transfer to a limited company of all the assets, rights and obligations of the EPIC *Caisse nationale de prévoyance*.
— Decree No 2001-1213 of 19 December 2001, authorising the publicly owned State establishment *Agence pour la diffusion de l'information technologique* to transfer its assets to a limited company with the same name, winding up this public establishment and authorising the transfer of this company to the private sector.

([107]) The example may be referred to of the abolition of the *Caisse nationale des marchés de l'Etat, des collectivités et établissements publics*: Decree No 80-1025 of 19 December 1980 provides that the assets, rights and obligations of the publicly owned establishment shall be transferred to a public limited company (CEPME) and that the publicly owned establishment shall receive shares in exchange. Then, by Decree No 80-1076 of 23 December 1980, the publicly owned establishment shall be abolished and its assets transferred to the State. The same mechanism shall be put in place for abolishing the *Agence pour la diffusion de l'information technologique* (Decree No 2001-1213 of 19 December 2001).

([108]) 'Publicly owned establishments', J-cl. admi. fasc. 135, 2007.

([109]) For example, Law No 80-495 of 2 July 1980 relating to the conversion of the *Service d'exploitation des tabacs et allumettes* into a national company; Article 1 of Law No 96-660 of 26 July 1996 relating to the national undertaking *France Télécom*: 'The legal entity governed by ordinary law *France Télécom*, referred to in Article 1, shall be converted as from 31 December 1996 into a national undertaking to be known as *France Télécom*, more than half of whose share capital shall be held directly by the State'; 'The assets, rights and obligations of the publicly owned legal entity *France Télécom* shall be transferred *ipso jure*, as per 31 December 1996, to the national undertaking *France Télécom*'. This procedure is obviously the only conceivable one when the service concerned is a state service that is supplied with an additional budget and that is 'converted' into a company governed by private law. Article 1 of Law No 93-1419 of 31 December 1993 relating to the *Imprimerie nationale*: 'All of the rights, assets and obligations of the State relating to the tasks of the departments concerned with the additional budget of the *Imprimerie nationale* shall be transferred to a national company to be known as *Imprimerie nationale*'; more recently, Article 78 of the amending Finance Law for 2001, No 2001-1276 of 28 December 2001, converting the DCN national service into a public limited company and transferring to it the rights, assets and obligations of the State that relate to the service.

([110]) The same procedure was used for *Aéroports de Paris (ADP)* through Article 1 of Law No 2005-357 of 20 April 2005 relating to airports: 'The publicly owned establishment *Aéroports de Paris* shall be converted into a public limited company. This conversion entails neither the creation of a new legal entity, nor consequences for the legal arrangements to which the staff are subject'.

([111]) G. Cornu, *Vocabulaire juridique*, PUF.

([112]) See S. Carpi-Petit, *Les successions en droit administratif*, cited above, p. 207.

([113]) See footnote 61.

([114]) Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraphs 80 and 81.

([115]) The financial rating is a required step for obtaining funding for undertakings on the capital markets; in addition, it is increasingly used as a benchmark for bank lending. In this regard, see footnote 46 to the opening decision.

([116]) Standard & Poor's and Fitch, two of the leading global rating agencies.

([117]) Extract from 'International Postal Entities: Influence of government support on ratings', Standard & Poor's, 22 November 2004. Original in English.

([118]) Extract from '*Ratings direct*' on La Poste, S & P, 3 April 2007. Original in English.

([119]) Second and fourth indents of Point 1.2 of the 2008 Guarantees Notice.

([120]) See article '*Fitch confirme la note "AA" attribuée à La Poste*', Fitch Ratings, Paris/London, 4 September 2009.

([121]) See recital 2 of this Decision.

([122]) Extract from 'International Postal Entities: Influence of government support on ratings'. Standard & Poor's, 22 November 2004: 'Category 2: notching down with respect to the state owner's rating. The second category includes those entities that, while autonomous in their operations, are largely public-policy-based institutions, still in receipt of substantial direct or indirect financial backing from the State. There is, however, a high level of uncertainty surrounding the level and/or timeliness of this state support. A top-down approach that assumes notching down from the sovereign rating by up to two categories (six notches) applies to such postal entities. La Poste and Poste Italiane currently fall within this category'.

([123]) Extract from 'International Postal Entities: Influence of government support on ratings'. Standard & Poor's, 22 November 2004: 'Unlike the credit quality of companies that operate in a commercial manner at arm's length from the government, like SingPost, Deutsche Post or TPG, a major factor underpinning La Poste's robust credit quality is its extremely strong state support. La Poste's legal status confers the ultimate statutory guarantee of the Republic of France (AAAA/Stable/A–1+) on its obligations'.

([124]) The most recent downgrade of La Poste's rating took place on 21 January 2009, shortly after the President of the French Republic had announced the conversion of La Poste into a public limited company: La Poste's rating was downgraded to A+, which once again confirms that La Poste's status as a public entity does indeed have an important influence on the rating, *ceteris paribus*.

([125]) Extract from '*Ratings direct*' on La Poste, S & P, 3 April 2007: 'S & P continues to follow a top-down rating methodology for La Poste — which allows for a governement supported entity to be rated by up to two categories below the sovereign — as we expect the French state to remain La Poste's 100 % shareholder in the medium term. The ratings nevertheless already factor in the long-term likelihood of a change in the group's capital structure, which would require a change in its current '*établissement public*' legal status and result in the loss of the state's ultimate guarantee on LP's financial obligations, the elimination of which was recently recommended by the European Commission'.

([126]) Extract from '*Ratings Direct*' on La Poste, S & P, 3 April 2007: 'The EC recently recommended that the French government end this guarantee by year-end 2008, which they believe provides LP with more favorable financing conditions than its competitors in a market in the process of being liberalized. Original in English'.

([127]) Extract from *ADP news* dated 21 January 2009: 'S & P lowers ratings on La Poste with negative outlook' […] 'The announced legal status and ownership change will give the company a greater autonomy from the government, which is why its rating has a four-notch differential with the rating on the Republic of France, rated AAA/A–1+ with a "stable" outlook. S & P's "negative" outlook reflects concerns that the changes in the company's legal status and ownership, likely to take place in the next two years as part of a capital hike, could pressure the ratings. These initiatives could limit the government's ability to provide the postal operator with exceptional support without improving its standalone profile in the short term, as the capital hike should not decrease La Poste's debt relative to its cash generation'.

([128]) See point 197 of the observations submitted by France on 23 January 2008.

([129]) 'Rating Government-Related Entities: A Primer'. Standard & Poor's, 14 June 2006.

([130]) See also '*Ratings Direct*' on La Poste, S & P, 3 April 2007: 'The entities' credit standing is linked to that of the government, but ratings can be notched down from those on the State by up to two categories as the financial links between these companies and the state may be increasingly subject to change in the medium or long term'.

([131]) Extract from '*Ratings Direct*' on La Poste, S & P, 3 April 2007: Original in English.

([132]) Extract from '*Ratings Direct*' on La Poste, S & P, 3 April 2007. 'The EC recently recommended that the French government end this guarantee by year-end 2008, which they believe provides LP with more favorable financing conditions than its competitors in a market in the process of being liberalized. The ratings on La Poste were unaffected by this recommendation since we consider that a change in La Poste's status would not necessarily reflect a decrease in the strong state support that underpins La Poste's ratings and that has been reaffirmed by recent government decisions'.

([133]) Extract from '*Ratings Direct*' on La Poste, S & P, 3 April 2007: 'A change in the group's ownership structure would lead Standard & Poor's to shift to a bottom-up rating approach, focusing more on LP's stand-alone business and financial profiles. This rating approach may not necessarily translate into rating changes given the expected improvement in La Poste's stand-alone situation in the coming years'.

([134]) Extract from 'Ratings Direct' on La Poste, S & P, 3 April 2007: 'The ratings on La Poste could be downgraded, however, if state backing for the company were to weaken'.

([135]) See section 3.2.1.D of this Decision and part V.4 of the observations submitted by the French authorities on 23 January 2008.

([136]) Part V.4(a) of the observations submitted by France on 23 January 2008.

([137]) See point 186 of the observations submitted by France on 23 January 2008.

([138]) See Table 1 in '*Ratings Direct*' on La Poste, S & P, 3 April 2007.

([139]) Extract from 'International Postal Entities: Influence of government support on ratings', Standard & Poor's, 22 November 2004: 'Unlike the credit quality of companies that operate in a commercial manner at arm's length from the government, like SingPost, Deutsche Post or TPG, a major factor underpinning La Poste's robust credit quality is its extremely strong state support. La Poste's legal status confers the ultimate statutory guarantee of the Republic of France (AAAA/Stable/A–1+) on its obligations'.

([140]) See point 196 of the observations submitted by France on 23 January 2008.

(141) See points 198-200 of the observations submitted by France on 23 January 2008.

(142) 'International Postal Entities: Influence of government support on ratings', Standard & Poor's, 22 November 2004.

(143) Extract from '*Ratings Direct*' on La Poste, S & P, 3 April 2007: The ratings nevertheless already factor in the long-term likelihood of a change in the group's capital structure, which would require a change in its current '*établissement public*' legal status and result in the loss of the state's ultimate guarantee on LP's financial obligations, the elimination of which was recently recommended by the European Commission'. Moreover, La Poste's identified weaknesses include: 'Likely capital structure change at company or bank level in the long term'.

(144) The mid swap is the median between the rate offered and the rate proposed by the banks at a particular moment for their interbank dealings by maturity, i.e. it is the fixed rate that a bank is willing to exchange for a 6-month Euribor as a general rule. That rate is the market reference for bond issues in particular.

(145) Judgment of the Court of Justice in Case C-301/87 *France* v *Commission, 'Boussac'*, [1990] ECR I-307, paragraph 33.

(146) Judgment of the Court of First Instance in Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraphs 166 and 167.

(147) In particular, in its decision on EDF (paragraph 57 of the Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries, OJ L 49, 22.2.2005, p. 9), the Commission took the view that 'EDF cannot be subject to administration or compulsory liquidation proceedings, and therefore cannot be declared bankrupt, is equivalent to a general guarantee covering all its liabilities. Such a guarantee cannot be the subject of any remuneration according to the rules of the market. Such a guarantee, which is unlimited in scope, time and amount, constitutes State aid'.

(148) See the third paragraph of point 2.1 of the 2008 Guarantees Notice.

(149) OJ L 15, 21.1.1998, p. 14.

(150) See, for example, Decision 2005/145/EC.

(151) See *inter alia* point 1.5 of the Guarantees Notice, which confirms the principle of neutrality, and point 1.2, which explains that a state guarantee may result from the simple fact of the legal form (second and fourth indents of this point).

(152) Case E 10/2000, *Anstaltslast und Gewährträgerhaftung*, point 5 of the proposal for appropriate measures of 8.5.2001. Consultable on the Commission website: *http://ec.europa.eu/community_law/state_aids/comp-2000/e010-00-1.pdf*

(153) See Decision 2005/145/EC.

COMMISSION DECISION

of 26 February 2010

on State aid C 9/09 (ex NN 49/08, NN 50/08 and NN 45/08) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA

(notified under document C(2010) 1180)

(Only the French text is authentic)

(Text with EEA relevance)

(2010/606/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**

1.1. *EMERGENCY MEASURES FOR DEXIA*

(1) On 30 September 2008, the authorities of Belgium, France and Luxembourg ('the Member States concerned') publicly announced the implementation of the capital increase described in section 3.1 of this decision ('the capital increase'). On 9 October 2008, the Member States concerned announced the implementation of the guarantee described in section 3.2 ('the guarantee').

(2) By communications of 1 and 2 October 2008, recorded the same day at the Commission, the authorities of the Member States concerned informed the Commission of the measures they had taken in the context of the capital increase. Reasoned letters, justifying the urgency of the measures taken by the Member States concerned in the context of the capital increase, were then addressed to the Commission:

— letter from the Banque nationale de Belgique ('BNB'), received on 1 October 2008,

— letter from the Banque de France, received on 2 October 2008,

— letter from the Commission luxembourgeoise de surveillance des services financiers ('CSSF'), received on 10 October 2008.

(3) By communications of 9, 13 and 17 October 2008, the Member States concerned informed the Commission of the implementation of the guarantee.

(4) By communications of 2, 13 and 14 October 2008, the Member States concerned undertook to present to the Commission, within a period of six months from 3 October 2008, a restructuring plan for Dexia, taking into account the measures taken on 3 and 9 October 2008.

(5) By letters of 8 and 13 October, in a concern for transparency, the BNB informed the Commission of a liquidity assistance operation ('the LA operation'), put in place by the BNB, in cooperation with the Banque de France, on account of Dexia's temporary liquidity problems. It has kept the Commission informed of the amounts drawn on that operation.

(6) On 14 November 2008, the Belgian and French States publicly announced the establishment of a guarantee relating to the financial products of Dexia's subsidiary, Financial Security Assurance (FSA) ('the FSA measure').

1.2. *FIRST COMMISSION DECISION: NOT TO RAISE OBJECTIONS TO THE EMERGENCY MEASURES*

(7) By decision of 19 November 2008 [2], the Commission decided not to raise any objections to the LA operation and the guarantee by the Member States concerned in respect of certain of Dexia's liabilities. The Commission considered these measures to be rescue aid to an undertaking in difficulties and therefore compatible with the internal market on the basis of Article 107(3)(b) TFEU [3], and authorised these measures for a period of six months from 3 October 2008, specifying that after that time the Commission would have to re-evaluate the aid as a structural measure.

[1] OJ C 181, 4.8.2009, p. 42.

[2] See footnote 1.

[3] OJ C 115, 9.5.2008, p. 91.

(8) The decision of 19 November 2008 also expressly provided that the other aid measures would be examined separately as part of a later decision.

1.3. *COMPLAINT BY A THIRD PARTY AGAINST ALLEGED STATE AID RECEIVED BY DEXIA*

(9) By letter received on 6 November 2008, a complaint was lodged with the Commission against allegedly illegal State aid received by Dexia. This complaint was lodged by a competitor of Dexia Banque Belgique ('DBB') and refers in particular to the EUR 3 billion capital increase subscribed to by the authorities and Dexia's Belgian shareholders and the guarantee issued by the Belgian State in respect of interbank and similar loans in favour of Dexia.

(10) A non-confidential version of the complaint form and its enclosures was forwarded by the Commission to the Belgian authorities by letter dated 13 November 2008. The Belgian authorities sent their observations on the complaint to the Commission by letter dated 19 November 2008.

1.4. *EXTENSION OF THE MEASURES AND DEXIA'S RESTRUCTURING PLAN*

(11) In accordance with their commitments, a Dexia restructuring plan ('the initial restructuring plan') was notified to the Commission by the authorities of the Member States concerned on 16, 17 and 18 February 2009 respectively. Additional information on the initial restructuring plan was submitted on 27 February and 3, 5, 6, 7, 8 and 9 March 2009.

(12) Furthermore, under this initial restructuring plan, the authorities of the Member States concerned asked the Commission to authorise the extension of the guarantee mechanism until the deadline provided for in the guarantee agreement, that is to say 31 October 2009, and the continuation of the preferential remuneration rate of 25 basis points for the guarantee covering bonds with a maturity of less than one month. In addition, the Commission was also asked to confirm that, if the guarantee were to be extended beyond October 2009 (to October 2010), that extension would be compatible with the common market.

(13) As a precautionary measure, the Belgian Government also requested the extension until 31 October 2009 of the possibility of Dexia using LA operations provided by the BNB.

(14) Finally, the Belgian and French Governments notified the Commission of the implementation of the FSA measure, publicly announced on 14 November 2008.

1.5. *SECOND COMMISSION DECISION: INITIATION OF THE FORMAL PROCEDURE*

(15) By letter of 13 March 2009, the Commission notified the Belgian, French and Luxembourg authorities of its decision to initiate the procedure laid down in Article 108(2) TFEU concerning all the aid granted to Dexia [4]. However, the letter specifies that, in order to allow the rapid sale of FSA, the Commission did not raise any objection to certain aspects of the FSA measure which were considered to be compatible with the internal market, on the basis of Article 107(3)(b) TFEU. Finally, the letter specifies that the guarantee by the Member States concerned in favour of Dexia, valid until 30 October 2009, could be considered to be compatible with the internal market, on the basis of Article 107(3)(b) TFEU, pending the Commission's final decision closing the formal procedure.

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

(17) The Commission received no comments on this subject from interested parties.

(18) With regard to the questions relating to the FSA measure (valuation of the assets covered by the measure and remuneration of the measure), the Commission relied on the technical analysis of external experts under contract with the Commission (Oliver Wyman).

1.6. *THIRD COMMISSION DECISION: EXTENSION OF THE GUARANTEE*

(19) Since the guarantee agreement concluded between Dexia and the Member States concerned was due to expire on 31 October 2009, the Member States concerned notified the Commission on 27 October 2009 of the renewal of the guarantee agreement until 28 February 2010, subject to certain adjustments. Information on the changes made to the guarantee agreement was communicated to the Commission on 10 September, 8 October and 27 October 2009.

(4) See footnote 1.
(5) See footnote 1.

(20) By decision of 30 October 2009 [6], the Commission authorised the extension of the guarantee until 28 February 2010 or until the date of the Commission decision on the compatibility of the aid measures and Dexia's restructuring plan, if this decision is taken before 28 February 2010. The Commission specifies in its decision that the measures proposed in the initial restructuring plan did not allow a decision to be taken on the compatibility of the aid at this stage.

1.7. *ADDITIONAL MEASURES TO DEXIA'S RESTRUCTURING PLAN*

(21) By communication of 9 February 2010, the Member States concerned sent the Commission information on the additional measures planned to supplement the initial restructuring plan notified in February 2009. The set of restructuring measures notified in this way between February 2009 and February 2010 constitute Dexia's restructuring plan ('the restructuring plan').

(22) By communication of 10 February 2010, the Belgian authorities informed the Commission that, in the interests of this decision being adopted as soon as possible, they agree to this decision being adopted in the French language.

II. **DESCRIPTION OF THE BENEFICIARY**

(23) Dexia is a financial group active in the banking and insurance sectors. The parent company, Dexia SA, is incorporated as a limited company under Belgian law and listed on the Euronext Paris and Euronext Brussels stock exchanges. On 31 December 2008, its market capitalisation was EUR 5,64 billion. Dexia was formed in 1996 by the merger of France's Crédit Local and Belgium's Crédit communal. It specialises in loans to local authorities but also has 5,5 million private customers, mainly in Belgium and in Turkey, via its local subsidiary DenizBank.

(24) Following the capital increase, which took place on 3 October 2008, the stakes of the principle shareholders of Dexia SA are as follows:

Subscribed by	% held before the operation	Amount of subscription (million EUR)	% held at 31 December 2008
Belgian Federal Government	—	1 000	5,73
Flemish Region	—	500	2,87
Walloon Region	—	350	2,01
Brussels Capital Region	—	150	0,86
Holding Communal SA	17	500	14,34
Arcofin SCRL	18,08	350	13,92
Ethias	6,37	150	5,04
French Government	—	1 000	5,73
CDC	11,89	1 710	17,61
CNP Assurances	2	288	2,97
Employees	3,92		2,57
Free float	40,74	—	26,86

[6] OJ C 305, 16.12.2009, p. 3.

(25) Dexia is organised around a parent holding company (Dexia SA) and three operational entities located in France (Dexia Crédit Local, 'DCL'), Belgium ('DBB') and Luxembourg (Dexia Banque Internationale à Luxembourg, 'Dexia BIL'). Whereas the total balance sheet of the group was EUR 651 billion at 31 December 2008, that of the three operational entities was:

— EUR 414 billion for DCL,

— EUR 263 billion for DBB,

— EUR 67 billion for Dexia BIL.

(26) Since it was formed, Dexia's activities have been divided among four main business lines:

— financial services to the public and semi-public sector ('Public and Wholesale Banking' or 'PWB'): this business line covers loans to local authorities, project finance, the credit enhancement activities carried out by DCL's subsidiary FSA, sold to Assured Guaranty in July 2009, and holding and active management of a portfolio of bonds and asset-backed securities ('ABS'); a significant proportion of these activities are directed by DCL and its international subsidiaries, with the exception of PWB activities in Belgium, which come under DBB,

— financial services to private individuals ('Retail and Commercial Banking' or 'RCB'): this business line covers deposit-taking and lending to private individuals and businesses in Belgium, Turkey, Slovakia and Luxembourg, as well as private banking in Luxembourg and Belgium; these activities are directed by DBB and Dexia BIL, and, as far as the activities in Turkey are concerned, DenizBank, a direct subsidiary of Dexia SA,

— treasury and financial markets ('Treasury, Funding and Markets' or 'TFM') which covers all the treasury, asset-liability management ('ALM') and proprietary trading activities of Dexia,

— the other activities which cover the asset management activities (grouped under Dexia asset management, 'Dexia AM'), investor services (offered by the joint subsidiary of Dexia and the Royal Bank of Canada, RBC Dexia Investor Services, 'RBC Dexia IS') and the insurance activities of the group, carried out in Belgium, France (Dexia Epargne Pension, 'DEP'), Turkey and Ireland.

(27) From the time it was formed until the crisis in autumn 2008, the salient characteristics of Dexia's business activity, differentiating it from other European commercial banks, were as follows:

— a core clientele, the local authorities, characterised by low credit margins and outstanding loans with relatively long maturities,

— a majority of short-term funding obtained on the interbank and money markets as against long-term assets (loans to local authorities, project finance, bond portfolio),

— considerable dependence for funding on less stable sources, such as the interbank market, or funding from institutional investors,

— the search for margins outside the group's traditional activities (the financing of local authorities, businesses and private individuals), by means in particular of:

(i) credit enhancement through the monoline insurance subsidiary FSA;

(ii) proprietary trading;

(iii) proprietary investments in a portfolio mainly comprising bonds which, at 31 December 2008, was estimated at EUR 233 billion (that is to say 36 % of Dexia's total balance sheet at that date);

(iv) sales of derivatives and structured products.

(28) On account of these specific characteristics, the refinancing profile of the group also displays particularities, since a significant proportion of the group (principally DCL) has structural financing needs which it meets in particular through funding from other parts of the group (essentially DBB and Dexia BIL) and from the money, bond and mortgage bond markets.

(29) Therefore when, in September 2008, following the bankruptcy of Lehman Brothers, the interbank market and the mortgage bond market dried up, Dexia found itself with a dynamic short-term funding requirement amounting to EUR [200-300] (*) billion ([31-46] % of the group's total balance sheet, at 31 December 2008). The bank's situation deteriorated in September and October 2008 on account of its significant exposures to bank and sovereign counterparties in difficulties (American, Irish and Icelandic banks), impairment of assets held directly by Dexia or enhanced by its subsidiary FSA, and the falling prices of shares held by the group. The total losses and asset impairments recorded by the group amounted to EUR 6,5 billion at 30 September 2009 (of which EUR 5,9 billion at 31 December 2008).

(30) For further details of the events at the origin of Dexia's difficulties, the Commission refers to its decisions of 19 November 2008, 13 March 2009 and 30 October 2009.

(31) In response to these difficulties, the group's new management, appointed on 7 October 2008, implemented a transformation plan designed to refocus the group's activities on its core business (comprising the PWB and RCB activities) and to reduce its risk profile and short-term funding needs. This transformation plan consisted of the following main measures:

— sale of FSA's credit enhancement activities to Assured Guaranty, with the FSA investment portfolio ('Financial Products') remaining under Dexia's ownership [7],

— reduction in the scale of the international PWB activities (i.e. DCL's PWB activities outside France, Italy and Spain),

— placing a substantial proportion of the bond portfolio in run-off (EUR 158 billion at 31 December 2008),

— cessation of all TFM proprietary trading activities and merger of ALM and treasury activities in a new business line 'Group Center',

— cost reduction programme.

(32) Following the implementation of the transformation plan, at the start of 2009, Dexia's situation improved, enabling it to record a positive net result of EUR 808 million in the first three quarters of 2009.

III. DESCRIPTION OF THE AID MEASURES

3.1. *THE CAPITAL INCREASE*

(33) The Commission refers to its decision of 19 November 2008. The EUR 6 billion capital increase by the Belgian and French shareholders, consisting in the issue of ordinary Dexia SA shares, became definitive on 3 October 2008. The underwriting of this reserved capital increase is broken down as follows:

(a) Belgium:

— the Belgian State invested EUR 1 billion in Dexia SA,

— the Flemish Region invested EUR 500 million in Dexia SA,

— the Walloon Region invested EUR 350 million in Dexia SA,

— the Brussels Capital Region invested EUR 150 million in Dexia SA,

— Holding Communal SA invested EUR 500 million in Dexia SA,

— Arcofin SCRL invested EUR 350 million in Dexia SA,

— Ethias invested EUR 150 million in Dexia SA,

(b) France:

— the French State invested EUR 1 billion in Dexia SA. This holding will be managed by the Agence des participations de l'État,

— the Caisse des Dépôts et Consignations (CDC) group invested EUR 1,71 billion in Dexia SA,

— CNP Assurances invested EUR 288 million in Dexia SA.

(*) Confidential information […].

(7) For further information on the activities and sale of FSA, the Commission refers to its decision of 13 March 2009.

(34) The Luxembourg State undertook in September 2008 to invest EUR 376 million in Dexia BIL, in the form of convertible bonds with a maturity of three years, interest of 10 % a year and conversion to ordinary shares on terms to be agreed. In the restructuring plan notified in February 2010, Dexia indicated that it was definitively waiving the benefit of the Dexia BIL convertible bond, with immediate effect from the date of this decision.

3.2. *THE BOND GUARANTEE*

(35) The guarantee of Dexia's bond liabilities, granted on 9 October 2008 by the Member States concerned, was already the subject of the decision of 19 November 2008. Under the guarantee agreement, the three Member States concerned jointly undertook to guarantee, from 9 October 2008 to 31 October 2009, the new interbank and institutional financing and new bond financing, with a maximum maturity of three years, raised by Dexia SA, Dexia BIL, DCL and DBB. The guarantee initially covered bond liabilities amounting to a maximum of EUR 150 billion in the proportion of 60,5 % for Belgium, 36,5 % for France and 3 % for Luxembourg.

(36) In its above-mentioned decision of 19 November 2008, the Commission authorised the guarantee, as an emergency rescue measure, for a period of six months from the time it was set up. Under this decision, since a plan for restructuring the beneficiary has been submitted in accordance with the undertakings given by the three Member States concerned, this period is automatically extended until the Commission takes its decision on this restructuring plan.

(37) However, since the guarantee agreement between Dexia and the Member States concerned was due to expire on 31 October 2009, the latter notified the Commission on 27 October 2009 of the renewal of the guarantee agreement until 28 February 2010, subject to certain modifications.

(38) The conditions of the guarantee were changed as follows compared with the initial guarantee concluded between the Member States concerned and Dexia on 9 October 2008:

(a) the maximum amount of Dexia's bonds guaranteed by the Member States concerned was reduced from EUR 150 billion to EUR 100 billion. In an amendment to the agreement, Dexia undertook to take every possible step to ensure that the global undertaking by the Member States concerned would not exceed EUR 80 billion after 1 November 2009;

(b) the final maturity for the bonds covered by the guarantee was postponed from 31 October 2011 to 31 October 2014 ([8]);

(c) from 16 October 2009, the guarantee no longer covers the group of contracts with a maturity of less than one month or sight deposits, which are treated in the same way as contracts with a maturity of less than one month in the guarantee mechanism.

(39) None of the other conditions in the initial guarantee concluded on 9 October 2008 were changed. The conditions concerning remuneration, in particular, remain as follows:

(a) the remuneration of the guarantee consists of a commission that Dexia will have to pay every month on the *pro rata temporis* amount outstanding, equal to 50 basis points on an annual basis for all bonds with a maturity of up to twelve months or indefinite maturity;

(b) for all guaranteed bonds that have a maturity exceeding one year, the remuneration of the guarantee will be equal to 50 basis points on an annual basis, plus the lower of the following two values, applied to each guaranteed bond: either the median value of the Dexia five-year senior CDS spreads over a period starting on 1 January 2007 and ending on 31 August 2008 (provided that these spreads are representative), or the median value of the five-year CDS spreads during the same period for all credit institutions with a long-term credit rating equivalent to that of Dexia.

(40) In each case, the commission is calculated on the average amount of the outstanding guaranteed bonds with the maturity in question and covered by the guarantee during the previous month.

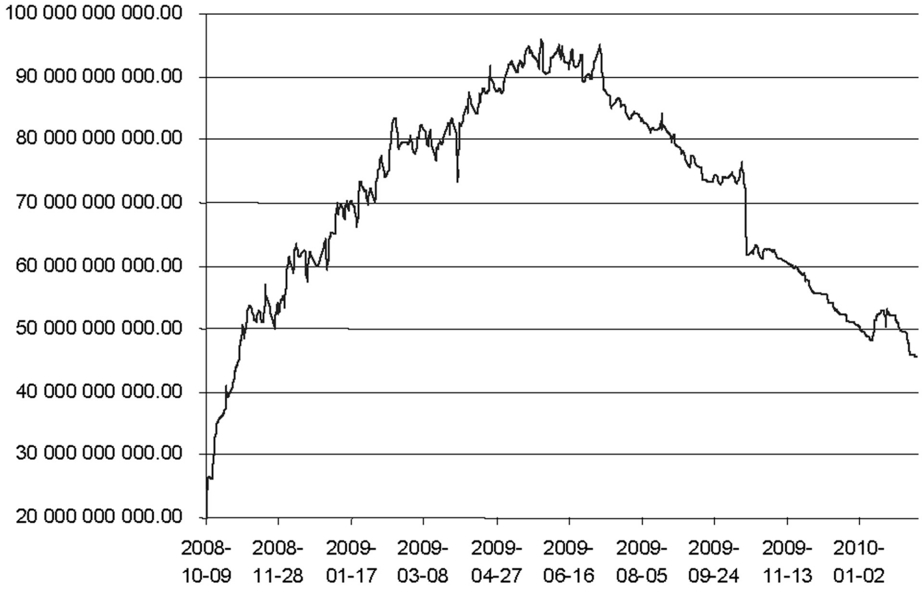
(41) The maximum amount of Dexia's bond liabilities covered by the guarantee comes to EUR 95,9 billion at 27 May 2009 ([9]). Fig. 1 illustrates the trend in the volume of Dexia bonds covered by the guarantee between 9 October 2008 and 11 February 2010.

([8]) The postponement of the final maturity applies only to bonds issued after the adoption of the Commission decision of 30 October 2009.

([9]) See: http://www.nbb.be/DOC/DQ/warandia/index.htm

Fig. 1

Trend in the volume of Dexia bonds covered by the guarantee



(*Source:* BNB, 11 February 2010)

(42) In its decision of 30 October 2009, the Commission raised no objections to the extension of the guarantee by the Member States concerned in favour of Dexia until 28 February 2010, in so far as the guarantee constitutes an emergency rescue measure compatible with the internal market, on the basis of Article 107(3)(b) TFEU.

3.3. *THE LA OPERATION*

(43) The LA operation provided by the BNB in cooperation with the Banque de France has already been the subject of the Commission decision of 19 November 2008. […]

(44) Pursuant to the Law of 15 October 2008 ([10]) on measures to promote financial stability and introducing in particular a State guarantee on credits granted and other operations conducted in the context of financial stability, the credits granted by the BNB to Dexia are covered by the guarantee from the Belgian State automatically and with retroactive effect. This guarantee does not cover the portion of the LA operation granted on behalf of the Banque de France.

(45) According to the information communicated by the BNB to the Commission, the LA operation was approved by the Governing Council of the European Central Bank ('ECB') up to a maximum amount of EUR […] billion. This facility was used by Dexia essentially between October and November 2008.

(46) In its decision of 19 November 2008 mentioned above, the Commission authorised the LA operation as an emergency rescue measure for a period of six months from its establishment. However, in its notification to the Commission of the Dexia restructuring plan, on 17 February 2009, the Belgian Government also requested, as a precautionary measure, the extension until 31 October 2009 of the possibility of Dexia using LA operations provided by the BNB, if the Commission were to consider that this measure contained State aid elements.

([10]) *Moniteur belge* of 17 October 2008, edition 2, pp. 55634 *et seq.*

3.4. *THE FSA MEASURE*

(47) The FSA measure was the subject of the Commission decision of 13 March 2009. Under this measure, the Belgian and French Governments provide a guarantee to allow Dexia to honour a put agreement whereby FSA Asset Management ('FSAM'), a former subsidiary of FSA not sold to Assured Guaranty, will have the option of selling certain assets included in the FSAM portfolio to Dexia SA and/or DCL upon the occurrence of certain trigger events (see recitals 50 to 59).

3.4.1. CONTEXT

(48) To recap, the Financial Products ('FP') activity was excluded from the FSA activities sold to Assured Guaranty. The FP activity essentially consists in (i) the collection of deposits from third parties whom FSA undertakes to remunerate for those deposits at a specific level under guaranteed investment contracts (or 'GICs') and (ii) the reinvestment of these deposits in securities with a higher yield than the cost of the guaranteed investments, thereby generating in principle a positive net profit margin. Technically, the GICs are concluded by subsidiaries of FSA ('GIC Companies'), which, in turn, lend the proceeds of those deposits to another company in the group, FSAM, which puts together and manages the asset portfolio intended to meet the liabilities and repayment obligations towards the counterparties of the GICs. FSAM and the GIC Companies, which come under the FP activity, were thus excluded from the group of activities sold to Assured Guaranty and remained under Dexia's ownership.

(49) FSAM's portfolio of assets essentially comprises securities linked to the US real estate sector, whose market value and/or ratings have declined sharply due to the subprime crisis and the financial crisis. To the extent that FSA guarantees assets and liabilities of the FP activity, the exclusion of this activity from the scope of the sale necessarily means that Dexia must guarantee the FP activities, so that guarantees given by FSA are not called upon. Given Dexia's difficult financial situation and the maximum theoretical amount of the guarantee under the GICs, it was vital from the point of view of the purchaser of FSA, Assured Guaranty, that Dexia should be itself guaranteed by the Belgian and French States.

3.4.2. MAIN TERMS

(50) The put is a contract under which FSAM is entitled to sell to Dexia SA and/or DCL certain assets included in the FSAM portfolio as of 30 September 2008 (totalling USD 16,98 billion in residual nominal value) upon the occurrence of certain trigger events, as listed below:

— in the event of asset default, i.e. a failure to pay the principal or the interest due on the assets of the portfolio at the final maturity: in this case, the put relates to the assets concerned, which are sold to Dexia at their residual nominal value plus accrued interest,

— in the event of Dexia's insolvency, in which case the put relates to all the assets of FSAM's portfolio to which the put option relates or to a number of assets with a residual nominal value equal to the total value of the liabilities pursuant to the GICs, if this amount is lower. The assets concerned are sold at their residual nominal value plus accrued interest,

— in the event of liquidity default, i.e. a failure by Dexia to meet its obligations under liquidity agreements concluded or to be concluded in favour of FSAM: in this case, the put relates to a number of assets with a residual nominal value equal to the amount of the liquidity default, which are sold to Dexia at their residual nominal value plus accrued interest,

— in the event of collateral default, i.e. failure by Dexia to provide FSAM with collateral in an amount equal to the difference between the value of the liabilities pursuant to the GICs and the market value of the assets of FSAM, after applying a haircut to these assets: in this case, the put relates to a number of assets with a residual nominal value equal to the amount of the collateral default, which are sold to Dexia at their residual nominal value plus accrued interest.

(51) Under the States' guarantee contract, the Belgian State (62,4 %) and the French State (37,6 %) each undertake to guarantee severally, but not jointly, Dexia's obligations under the put agreement referred to above, but after deduction of excluded assets ('excluded assets') to a value of approximately USD 4,5 billion so that the par value of the assets included in the portfolio to which the guaranteed put relates ('covered assets') is equal to USD 12,48 billion. The States' guarantee is autonomous, first demand, irrevocable and unconditional. It is capped at a total of USD 16,98 billion (consisting of a maximum of USD 12,48 billion of repayment of residual nominal value and USD 4,5 billion of interest), which will gradually be reduced with the amortisation of the portfolio.

(52) Should one of the trigger events occur, FSAM, acting via its agent, will first of all ask Dexia to honour its commitments under the put agreement, and subsequently make that request to the States upon expiry of certain time limits in the event of default by Dexia or its bankruptcy.

(53) The States will be reimbursed by Dexia for being called upon under the guarantee (i) in cash where the total payments remain less than or equal to a first tranche of USD 4,5 billion and (ii) in shares and, where applicable, in profit shares, beyond that amount. However, although the excluded assets referred to above are not covered by the States' guarantee, calls made in relation to the excluded assets will be offset against the amount of the first tranche of USD 4,5 billion, for which the States shall be entitled to direct recourse in cash against Dexia.

(54) The guarantee gives rise to remuneration payable annually by Dexia to the Belgian and French States of 113 basis points in relation to coverage of the risk of default on the guaranteed put, plus 32 basis points in relation to coverage of the risk of Dexia failing to honour its liquidity commitments towards FSAM.

(55) FSA (without FP) was sold on 1 July 2009 and the FSA measure took effect at the same time. The latest study of the valuation of the FSAM portfolio was communicated to the Commission on 18 March 2009 and was carried out by Société Générale ('the consultant'), the independent expert appointed by the Belgian State, on the basis of the data as at 31 January 2009.

(56) Table 1 below shows the key data of the FSAM portfolio:

Table 1

Key data of the FSAM portfolio (total)

Asset categories	Nominal value		Market value		Expected losses (baseline)		Expected losses (stress)	
	In million USD	As % of total	In million USD	As % of total	In million USD	As % of total	In million USD	As % of total
RMBS standard (without 'wrap')	10 582	63,8	[4 000-5 000]	[…]	[1 500-2 500]	[…]	[…]	[…]
Subprime	7 317	44,1	[3 000-4 000]	[…]	[1 000-1 500]	[…]	[…]	[…]
Alt-A	2 424	14,6	[500-1 000]	[…]	[0-1 000]	[…]	[…]	[…]
Option ARMs	694	4,2	[0-500]	[…]	[0-500]	[…]	[…]	[…]
Prime	147	0,9	[0-100]	[…]	[0-10]	[…]	[…]	[…]
CES/HELOCs/ Wrapped RMBS (*)	817	4,9	[0-500]	[…]	[0-500]	[…]	[…]	[…]
NIMs	277	1,7	[0-200]	[…]	[0-30]	[…]	[…]	[…]
ABS CDO	36	0,2	[0-20]	[…]	[0-40]	[…]	[…]	[…]
CLOs	413	2,5	[0-400]	[…]	[0-100]	[…]	[…]	[…]
US Agency RMBS	1 338	8,1	[1 000-1 500]	[…]	[0-100]	[…]	[…]	[…]
Other	3 119	18,8	[1 000-2 000]	[…]	[0-400]	[…]	[…]	[…]
Total	16 582	100,0	[7 000-9 000]	[…]	[2 000-3 000]	[…]	[3 500-4 500]	[…]

(*) CES = Closed-end second mortgages / HELOC = Home equity line of credit

(57) The portfolio mainly comprises 'US RMBS standard', accounting for nearly 64 %, and more specifically 'subprime' securities (44 % of the portfolio) and 'Alt-A' (15 % of the portfolio). To a lesser extent, the portfolio is also exposed to 'US Agency RMBS' (8 % of the portfolio) and to securities enhanced by monoline insurers. The nominal value of the portfolio was USD 16,6 billion at 31 January 2009 and its average market value at the same date was [42,2-54,3] % of

the nominal value, i.e. USD [7-9] billion. The expected losses, in a baseline scenario, amounted to USD [2-3] billion, whereas in a stress scenario they were estimated at USD [3,5-4,5] billion. The real economic value ('REV') at 31 January 2009 was USD [13,6-14,6] billion under the baseline scenario and USD [12-13] billion under a stress scenario.

(58) Table 2 below shows the key data of the FSAM portfolio, after deduction of the excluded assets:

Table 2

Key data of the FSAM portfolio (after deduction of the excluded assets)

Asset categories	Nominal value		Market value		Expected losses (baseline)		Expected losses (stress)	
	In million USD	As % of total	In million USD	As % of total	In million USD	As % of total	In million USD	As % of total
RMBS standard (without 'wrap')	9 755	79,9	[3 500-4 000]	[…]	[1 500-2 500]	[…]	[…]	[…]
Subprime	6 544	53,6	[2 500-3 000]	[…]	[1 000-1 500]	[…]	[…]	[…]
Alt-A	2 371	19,4	[500-1 000]	[…]	[0-1 000]	[…]	[…]	[…]
Option ARMs	693	5,7	[0-500]	[…]	[0-500]	[…]	[…]	[…]
Prime	147	1,2	[0-100]	[…]	[0-10]	[…]	[…]	[…]
CES/HELOCs/ Wrapped RMBS (*)	817	6,7	[0-500]	[…]	[0-500]	[…]	[…]	[…]
NIMs	276	2,3	[0-200]	[…]	[0-30]	[…]	[…]	[…]
ABS CDO	36	0,3	[0-20]	[…]	[0-40]	[…]	[…]	[…]
CLOs	413	3,4	[0-400]	[…]	[0-100]	[…]	[…]	[…]
Other	909	7,4	[200-600]	[…]	[0-400]	[…]	[…]	[…]
Total	12 205	100,0	[4 500-5 500]	[…]	[2 000-3 000]	[…]	[3 500-4 500]	[…]

(*) CES = Closed-end second mortgages / HELOC = Home equity line of credit

(59) Net of excluded assets, the nominal value of the portfolio was USD 12,2 billion at 31 January 2009 and its average market value at the same date was [36,9-45,1] % of the nominal value, i.e. USD [4,5-5,5] billion. The expected losses, under a baseline scenario, amounted to USD [2-3] billion, whereas under a stress scenario they were estimated at USD [3,5-4,5] billion. The REV at 31 January 2009 was USD [9,2-10,2] billion under a baseline scenario and USD [7,7-8,7] billion under a stress scenario.

IV. **THE RESTRUCTURING PLAN**

(60) The restructuring plan aims to refocus Dexia's activities on its principal business lines and markets (that is to say, PWB and RCB activities in France, Belgium and Luxembourg); to reduce its risk profile and leverage; and to restore balance in its liquidity profile. This includes, in particular, abandoning, reducing and selling certain activities and the introduction of two separate internal reporting lines, one relating to traditional banking activities ('core division'), comprising the bulk of the PWB and RCB activities, representing 72 % of Dexia's total balance sheet at end-2009, and the other relating to the activities in run-off called the 'Legacy Portfolio Management Division' ('LPMD'), mainly comprising the bond portfolio and, more marginally, international PWB activities, representing 28 % of Dexia's total balance sheet at end-2009. The improvement in the liquidity profile is achieved by reducing market and short-term funding and increasing the average maturity of the funding and through recourse to more stable funding (retail and commercial deposits and mortgage bonds).

(61) The restructuring plan consists of a series of measures already put in place by Dexia and behavioural and structural measures which Dexia will have to implement during the restructuring period, under the supervision of the Member States concerned which have undertaken to ensure that they are observed.

(62) Together, these measures allow a 35 % reduction in Dexia's total balance sheet at 31 December 2014, compared to 31 December 2008, taking account of new turnover.

4.1. *RESTORATION OF THE LONG-TERM VIABILITY UNDER NORMAL AND STRESS CONDITIONS*

(63) The Member States concerned have communicated detailed information to the Commission on the business model of the bank. This information provides details notably on the following:

— group business plan for the period from 2009 to 2011 and projections of certain balance sheet and profit and loss account data to 2014 and 2017,

— volumes and margins of outstanding amounts and new turnover by business line (PWB, RCB and other) and by geographical area, from 2009 to 2011,

— volumes and average costs of funding the group by source of funding (repos, guaranteed and unguaranteed bonds, mortgage bonds, deposits and other).

(64) On the basis of this information, Dexia forecasts positive results throughout the restructuring period, from 2009 to 2014, and a Core Tier 1 ratio of between 11 % and 15 %. Table 3 below shows Dexia's projected results and Core Tier 1 ratio for each year from 2009 to 2014.

Table 3

Dexia's projected results and Core Tier 1 ratio during the restructuring period

(Million EUR and %)

	2009	2010	2011	2012	2013	2014
Core division						
Net results before tax	[…]	[…]	[…]	[…]	[…]	[…]
LPD						
Net results before tax	[…]	[…]	[…]	[…]	[…]	[…]
Total Dexia group						
Net results before tax	[…]	[…]	[…]	[…]	[…]	[…]
Core Tier 1 ratio	[…]	[…]	[…]	[…]	[…]	[…]

(65) The Member States concerned also provided three types of stress simulations to establish the group's resilience to external shocks.

(66) The first type of stress test carried out by Dexia aimed to test the group's resilience, until 2011, to the following variables: (i) GDP growth rate in various countries, (ii) three-month and five-year interbank rates and (iii) exchange rates of certain foreign currencies. With regard to the growth rate, hypotheses were drawn up for a baseline scenario and a stress scenario in line with the hypotheses used for other similar exercises recently conducted in Europe. The results of the stress test, as carried out by Dexia, suggest that the group would remain in profit in 2010 and 2011, even in a stress scenario. The pre-tax profit would amount to EUR […] million in 2010 and EUR […] million in 2011.

(67) The second type of stress test carried out by Dexia was designed to test the resilience of the group to a rise in its market funding costs over a year of (i) 100 basis points and (ii) 200 basis points. The results of the stress test, as carried out by Dexia, indicate that the impact on the results of the group can be evaluated at EUR […] million, in the case of its funding costs rising by 100 basis points, and EUR […] million in the case of its funding costs rising by 200 basis points.

(68) The third type of stress test carried out by Dexia was designed to test the group liquidity and more specifically the group liquidity position in exceptional circumstances, by comparing the liquidity potentially required with the liquidity potentially available in such circumstances. The stress test horizon is one month. The scenario applied combines the impact of an idiosyncratic shock linked to Dexia and the consequences of a general liquidity crisis. This liquidity stress test was undertaken both by Dexia and by its supervisory authority (the Banking, Finance and Insurance Commission, 'CBFA'). […] [11] […].

4.2. *BEHAVIOURAL COMMITMENTS*

(69) The restructuring plan, notified on 9 February 2010, consists firstly in reducing short-term funding, lengthening the average maturity of long-term funding and increasing the group's stable sources of funding. In this respect, the Member States concerned undertake to ensure that Dexia complies with three quantitative funding ratios.

— Dexia is to maintain the 'short-term funding [12]/total balance sheet' ratio at 30 % at 31 December 2009, at a level below or equal to 23 % at 31 December 2010, below or equal to 20 % at 31 December 2011, below or equal to 14 % at 31 December 2012, below or equal to 13 % at 31 December 2013 and below or equal to 11 % at 31 December 2014.

— Dexia is to lengthen the maturity of its funding by maintaining the average life of the liabilities of the group [13] at a level exceeding or equal to the levels shown in Table 4 below:

Table 4

Trend in the average life of Dexia's liabilities (in years)

31.12.2009	31.12.2010	31.12.2011	31.12.2012	31.12.2013	31.12.2014
[…]	[…]	[…]	[…]	[…]	[…]

— Dexia is to increase its stable sources of funding: a ratio is calculated, with the numerator equal to the sum of the funding in the form of mortgage bonds and the funding in the form of RCB and PWB commercial deposits and with the denominator equal to the sum of all Dexia's assets. This ratio, equal to 36 % at 31 December 2009, must be above or equal to 40 % at 31 December 2010, above or equal to 45 % at 31 December 2011, above or equal to 53 % at 31 December 2012, above or equal to 55 % at 31 December 2013 and above or equal to 58 % on 31 December 2014.

— An independent expert is to verify compliance with these three funding ratios every six months.

(70) Dexia rules out lending to its PWB customers at a level of risk-adjusted return on capital ('RAROC') below 10 %. The RAROC is calculated as the ratio between the net margin after tax and the economic capital [14].

(11) […]
(12) The short-term funding consists of: repo operations (sale and repurchase agreements) of all kinds (with the central banks, bilateral or triparty), certificates of deposit and commercial paper, interbank deposits, fiduciary deposits, central bank deposits and other wholesale funding.
(13) The group's liabilities included in this ratio comprise: (i) the long-term stock of mortgage bonds issued by the group and issues in EMTN format (guaranteed, unguaranteed and placed on the interbank market or via the retail banking network) and (ii) the short-term stock of all the short-term funding included in the balance sheet of the group.
(14) The economic capital is calculated according to the methodology of the Basel Committee on Banking Supervision (see '*International Convergence of Capital Measurement and Capital Standards: a Revised Framework*' (June 2006)).

— The gross margin is the difference between the margin invoiced to the customer (expressed in basis points above the IBOR reference rate) and Dexia's funding cost (expressed in basis points above the IBOR reference rate) represented by the internal transfer price.

— The internal transfer price reflects the estimated cost of Dexia's new funding, taking account of the characteristics (maturity, eligibility for funding by mortgage bonds, etc.) of the loans to PWB customers.

— The net margin is equal to the gross margin less (i) costs of all kinds (overheads, salary costs, operating costs, amortisation and depreciation, etc.) estimated on the basis of the observation of the costs of lending to PWB customers, (ii) cost of average risk calculated for each transaction in accordance with the Basel II methodology (cost of average risk over a long period) and (iii) a tax charge.

— An independent expert verifies every six months that the RAROC reflects the costs of the PWB division, that the commitment referred to above to comply with a minimum RAROC of 10 % for the PWB activity is observed and that the methodology and calculation of the RAROC and its components are correct.

(71) Dexia is to end the intra-group finance currently made available to its Turkish subsidiary DenizBank by 30 June 2011 at the latest and will not grant it any new financing until 31 December 2014.

(72) By 30 June 2010, Dexia is to set up an LPMD reporting line. The assets assigned to this line are to be placed in run-off or sold. These assets are:

— the credit spread portfolio (CSP) and public sector portfolio (PSP) (estimated at approximately EUR 134 billion at 31 December 2009),

— the financial products portfolio of FSAM assets retained by Dexia (estimated at approximately EUR 10,7 billion at 31 December 2009), and

— the non-core PWB loans portfolio (estimated at approximately EUR 17 billion at 31 December 2009).

All guaranteed funding raised by Dexia will be allocated to this line.

(73) Dexia is to limit new annual PWB turnover to EUR 12 billion in 2009, EUR 15 billion in 2010 and EUR 18 billion from 2011 to 2014.

(74) Dexia is to reduce its operating costs by 15 % by 31 December 2012.

(75) Dexia is to reduce its trading activities (44 % reduction in terms of value of the average annual risk, which amounted to EUR 126 billion in 2008) and to end its proprietary trading activities from the date of this Commission decision.

(76) With immediate effect from the date of the Commission decision, Dexia is to definitively waive the Dexia BIL EUR 376 million convertible bond, which Luxembourg had undertaken to subscribe to in September 2008.

(77) Dexia's recourse to the guarantee on funding by the Member States concerned is limited by the following conditions:

— end of the guarantee for all deposit contracts concluded from 31 March 2010,

— end of the guarantee on funding for all short-term issues (at less than one year) from 31 May 2010,

— end of the guarantee on funding for all (including long-term) issues or contracts concluded from 30 June 2010,

— the total outstanding amounts guaranteed may at no time exceed EUR 100 billion;

— during the period covered by the guarantee, Dexia will pay the Member States concerned additional remuneration on any amount exceeding the following thresholds of outstanding amounts guaranteed:

Table 5

Additional remuneration payable on exceeding the amount of bond liabilities guaranteed

Threshold/tranche (outstanding amount guaranteed in EUR billion)	60-70	70-80	80-100
Additional remuneration for excess (in basis points)	+ 50	+ 65	+ 80

(78) Until 31 October 2014, Dexia will not use its status as a bank with a guarantee by the Member States concerned for commercial advertising purposes and will not use the guarantee for purely arbitrage transactions.

(79) Until 31 December 2011, Dexia SA and the subsidiaries over which it exercises exclusive or joint control will not make any acquisition of more than 5 % of the share capital of other credit institutions or investment firms or insurance companies, unless authorised to do so by the Commission. This commitment does not impede the acquisition by Dexia, subject to the prior agreement of the Commission, of a holding, as remuneration for a contribution of holdings or business activities carried out as part of a divestment or pooling (by merger or contribution) of assets or business activities, provided that, in such a case, this holding does not confer on Dexia the exclusive or joint control of the entity receiving the contribution or resulting from the merger. Dexia will inform the Commission in advance of any acquisition plans, including any plans considered by undertakings over which Dexia exercises joint control.

(80) Until 31 December 2014, Dexia will limit the amount of:

— any form of dividends distributed by Dexia SA in respect of its ordinary shares, and

— any discretionary early repayment or payment of coupons on hybrid Tier 1 instruments or Tier 2 instruments (i) issued by entities over which Dexia has exclusive control (ii) held by persons or entities other than Dexia SA and its subsidiaries and (iii) the payment or exercise of which is discretionary by virtue of the contractual provisions covering these instruments, so that, after the distribution or the payment under consideration (and taking account of any payments which have become mandatory on account of the payment of a dividend in respect of ordinary shares), Dexia's Core Tier 1 (calculated by reference to the latest consolidated annual accounts prepared in accordance with IFRS),

— remains above or equal to the level below:

31.12.2009	31.12.2010	31.12.2011	31.12.2012	31.12.2013	31.12.2014
10,7 %	10,6 %	[…]	[…]	[…]	[…]

— and remains above or equal to the sum of (i) 12,5 % of the risk-weighted assets of the Legacy Portfolio Management Division and (ii) 9,5 % of the risk-weighted assets of the other activities of the group (the 'Core Division'),

(81) The commitment mentioned under recital 80:

— is without prejudice to the distributable profit requirement (within the meaning of Article 617 of the Belgian Companies Code) at Dexia level,

— is without prejudice to the operations which Dexia will be required to undertake in respect of hybrid Tier 1 or Tier 2 instruments legally or by virtue of contracts concluded before 1 February 2010, and

— may be revised in the event of significant change in the definition of the prudential own funds and accounting standards applicable to Dexia.

(82) Moreover, without prejudice to the operations which Dexia may be legally required to undertake in respect of hybrid Tier 1 or Tier 2 instruments legally or by virtue of contracts concluded before 1 February 2010, Dexia shall refrain until 31 December 2011 from:

— making any payments of coupons on hybrid Tier 1 or Tier 2 instruments held by persons or entities other than Dexia SA and its subsidiaries, the payment of which is discretionary by virtue of the contractual provisions covering these instruments,

— approving or voting in favour of the payment of any form of dividend by any entity over which Dexia SA directly or indirectly exercises exclusive control (including entities which it fully owns) when such a payment would involve an obligation to pay a coupon on hybrid Tier 1 or Tier 2 instruments held by persons other than Dexia SA and its subsidiaries, and

— exercising a discretionary early repayment option for the hybrid Tier 1 or Tier 2 instruments referred to in the first indent above.

(83) Dexia SA will refrain from the distribution of dividends on ordinary shares until 31 December 2011. This prohibition will not apply to distributions of dividends made entirely by the allocation of new shares, provided that the amount of these distributions is (i) in accordance with recital 80 and (ii) below or equal to 40 % of the net result made by Dexia SA for the financial year 2009 as regards the distributions made in 2010 and below or equal to 40 % of the net result made by Dexia SA for the financial year 2010 with regard to the distributions made in 2011 ([15]).

([15]) The Member States concerned communicated to the Commission a letter from Dexia dated 12 February 2010 confirming that there are no hybrid subordinated debt securities issued by the entities of the group with terms and conditions providing for a coupon payment obligation ('coupon pusher'), assuming that Dexia SA would make payment of a dividend in shares, with the sole exception of the issue of EUR 500 million by Dexia Funding Luxembourg SA in 2006 (ISIN code: XS0273230572).

(84) In this respect, it should be recalled that, under commitments entered into by the Member States concerned in the context of the Commission decision of 30 October 2009 extending the guarantee, since the date of that decision and until the date of the present decision, Dexia is required to refrain from:

(i) declaring any interim dividends or proposing to the Dexia SA General Meeting of Shareholders the payment of any form of dividend to Dexia SA shareholders;

(ii) approving or voting in favour of the payment of any form of dividend by entities over which Dexia SA directly or indirectly exercises exclusive control but does not fully own, directly or indirectly;

(iii) approving or voting in favour of the payment of any form of dividend by any entity over which Dexia SA directly or indirectly exercises exclusive control (including entitles which it fully owns) when such a payment would involve an obligation to pay a coupon on hybrid Tier 1 instruments or perpetual Upper Tier 2 instruments held by persons or entities other than Dexia SA and its subsidiaries;

(iv) making any payments of coupons on hybrid Tier 1 instruments or perpetual Upper Tier 2 instruments held by persons or entities other than Dexia SA and its subsidiaries, the payment of which is discretionary by virtue of the contractual provisions covering these instruments. However, if non-payment were likely to lead to suspension of payment of dividends by Dexia SA with respect to the 2009 results, the above prohibition may not apply provided that Dexia has informed the Commission in advance and the Commission has approved the payment of the coupon on an *ad hoc* basis; or

(v) exercising a discretionary early repayment option for the hybrid instruments referred to in points (iii) and (iv) of this recital.

(85) With a view to boosting competition and transparency still further regarding local authorities' bank loans, France undertakes to ensure that the local authorities develop their competitive procurement practices when procuring money or capital. The State will expressly issue recommendations along these lines to the local and regional authorities before the end of 2010, concerning both bank finance and the use of complex financial products. These recommendations will stress the inherent economic interest, in this sector, of implementing competitive procurement measures and will indicate the different practical arrangements under which these measures can be implemented. The good practices advocated will provide for the public nature of the competitive procurement for the largest borrowings. These recommendations will be brought to the attention of the departments responsible for providing the local and regional authorities in particular with assistance and advice. If these recommendations were to prove insufficient to ensure by 2013 the generalisation of transparent, non-discriminatory calls for tender by the local authorities for bank finance, France undertakes to make proposals for legally binding measures to this effect.

(86) With a view to boosting competition and transparency still further regarding local authorities' bank loans, the Belgian Government, in agreement with the Regions, undertakes to monitor the publication by the contracting authorities of contract award notices relating to the financing of the local public authorities.

4.3. *DIVESTMENTS AND RUN-OFFS*

(87) Dexia is undertaking the divestment of assets listed in this recital:

(a) divestment or stock exchange flotation of the 70 % stake held by the group in its Italian subsidiary, Crediop, by 31 October 2012 ([16]);

(b) divestment by 30 June 2010 of DEP, French subsidiary of Dexia Insurance Belgium ('DIB'), which operates in the fields of life assurance and collective insurance. The sales agreement was signed on 9 December 2009 and the sale should be completed during the first half of 2010;

(c) divestment or stock exchange flotation by 31 December 2010 of Dexia's 51 % stake in AdInfo, a subsidiary active in the provision of IT services to local authorities in Belgium;

(d) divestment of Dexia's stake in SPE, a Belgian energy undertaking, by 31 December 2010;

(e) divestment of Dexia's 20 % stake in Crédit du Nord (this divestment took place on 11 December 2009);

(f) closure by 2010 of about 80 branches in Belgium under the new group distribution model;

(g) cessation of the following activities of RCB International:

([16]) Dexia will not be required to dispose of its stake in Crediop at an excessively depressed price (less than […] times the book value in 2010 and 2011 and […] times the book value in 2012).

(i) the divestment of Experta Jersey, the run-off of Dexia 'Private Bank' (PB) Jersey, the cessation of Montevideo's PB activities, the cessation of the PB development project in Singapore, the cessation of the consumer finance project in Russia and the cessation of the activities of Dexia Asset Management ('DAM') in the countries of Central and Eastern Europe and the divestment of the trust activities of Experta in Switzerland were carried out in 2009 and early 2010;

(ii) the divestment of Experta's trust activities in the Bahamas and the divestment of the Danish subsidiary of Dexia BIL by 31 December 2011;

(h) divestment or stock exchange flotation by 31 October 2012 of Dexia's stake in the Slovak subsidiary Dexia Banka Slovensko ('DBS') ([17]);

(i) cessation and run-off of the following PWB international activities:

(i) India: entity sold in 2009;

(ii) Switzerland (Dexia Public Finance Switzerland) and Sweden (Dexia Norden): closure and liquidation by 31 December 2010;

(iii) Mexico, Australia and Japan: run-off of the balance sheet;

(j) divestment of FSA (finalised on 1 July 2009) then divestment of Dexia's holding in Assured Guaranty by 31 December 2011;

(k) divestment of the group's 49 % stake in Kommunalkredit Austria (KA), which took place in the 4th quarter of 2008;

(l) divestment or stock exchange flotation of Deniz Emeklilik, the insurance subsidiary of DenizBank by 31 October 2012;

(m) divestment of the group's 60 % stake in Dexia Sabadell by 31 December 2013;

(n) fast-track divestment of Dexia's bond portfolio at the rate of EUR [10-20] billion per year in 2010 and 2011, EUR [5-15] billion to EUR [10-20] billion in 2012, EUR [0-10] billion to EUR [5-15] billion per year in 2013 and 2014;

(o) run-off of the Standby Bond Purchase Agreements ('SBPA') and Tender Option Bonds ('TOB') activities (USA/Canada).

(88) The restructuring plan leads to a 35 % reduction in Dexia's total balance sheet by 31 December 2014 compared to its size at 31 December 2008. The Member States concerned undertake that Dexia will make the following reductions in the size of its balance sheet shown in Table 6 below.

([17]) Dexia will not be required to sell DBS at an excessively depressed price (less than […] times the book value in 2010 and […] times in 2011).

Table 6

Reduction in the size of the group's balance sheet, the core division and the LPMD

(In EUR billion)

	31.12.2008	31.12.2009	31.12.2010	31.12.2011	31.12.2012	31.12.2013	31.12.2014
Total balance sheet of the group	651	580	[510-550]	[485-545]	[425-490]	[405-465]	427
Total LPMD		162	[120-140]	[100-120]	[80-110]	[70-100]	79
Total core division		419	[390-410]	[385-415]	[345-380]	[335-365]	353

4.4. *IMPLEMENTATION OF THE COMMITMENTS*

(89) An independent expert will submit a half-yearly report to the Commission on the implementation of the commitments provided for in the restructuring plan. This report includes in particular a detailed survey on (i) compliance with the reduction in the size of the balance sheet referred to in recital 88, (ii) compliance with the three liquidity and funding ratios referred to in recital 69 and (iii) compliance with the RAROC commitment ([18]) referred to in recital 70. In addition:

— this report will be submitted no more than one month after the presentation of the half-yearly accounts and the approval of the annual accounts and in any event before 1 October and 30 April of each year,

— if, in his report presented before 1 October of each year, the independent expert considers it possible that the annual objectives provided for in the restructuring plan may not be attained at the end of the year in progress, the authorities of the Member States concerned will present to the Commission, within a month of submission of the report, the measures planned with Dexia to enable these objectives to be attained by the appropriate means before the end of the year,

— if, in his report presented before 30 April of each year, the independent expert finds that the annual objectives provided for in the restructuring plan have not been attained, the authorities of the Member States concerned will present to the Commission, within a month following the submission of the report, the measures planned with Dexia to enable these objectives to be attained by the appropriate means before 30 June of the current year,

— if the measures envisaged are not presented within the time limit laid down or if the objectives are not attained by 30 June (concerning the measures presented, where appropriate, after the report to be filed by 30 April), the Commission may, pursuant to Council Regulation (EC) No 659/1999 ([19]), reopen the formal investigation procedure […].

(90) The Belgian, French and Luxembourg authorities will submit to the prior approval of the Commission, and at the latest one month after this decision, a list of one to three persons, chosen in agreement with Dexia, to be appointed as independent expert. The independent expert must have the required skills and may not be exposed to conflicts of interest when performing his task. The Commission may either approve or reject the independent expert(s) proposed. If the Commission rejects the independent expert(s) proposed, Dexia and the Belgian, French and Luxembourg authorities will propose, within one month of communication of the rejection, one to three new candidates who will also have to be approved or rejected by the Commission. If all the candidates proposed are finally rejected by the Commission, the Commission will designate an independent expert. The costs of the services of the independent expert will be paid by Dexia.

([18]) RAROC reflects the costs of the PWB division and the methodology and calculation of the RAROC and its components are correct.
([19]) OJ L 83, 27.3.1999, p. 1.

(91) In the absence of fulfilment of any of the asset divestment commitments referred to under points (a), (c), (d), (h), (l) or (m) of recital 87 within the time limits set, and in the absence of approval of an alternative commitment by the Commission, the French, Belgian and Luxembourg authorities will submit for prior approval by the Commission, no later than one month after the time limit set for the sale, a list of one to three persons, selected in agreement with Dexia, for appointment as agent(s) responsible for carrying out the aforementioned sales. The agent responsible for the sale must be independent, possess the required skills and may not be exposed to conflicts of interest when performing his task. The Commission may either approve or reject the agent(s) proposed. If the Commission rejects the agent(s) responsible for the sale proposed, Dexia and the French, Belgian and Luxembourg authorities will propose, within one month of communication of the rejection, one to three new candidates who will also have to be approved or rejected by the Commission. If all the candidates proposed are finally rejected by the Commission, the latter will designate an agent, whom Dexia will appoint or contribute to appointing, on the basis of a mandate approved by the Commission.

(92) The French, Belgian and Luxembourg authorities undertake that Dexia will grant the necessary and appropriate powers of attorney to the agent responsible for the sale (i) to carry out the sale of the assets referred to in recital 91 (including any necessary powers to ensure satisfactory execution of the documents required to carry out the sale), and (ii) to perform any action or make any declaration necessary or appropriate to carry out the sale, including the appointment of advisers to accompany the sale process. The agent responsible for the sale will include in the contract of purchase and sale the usual, reasonable terms and conditions he considers appropriate to conclude the sale in the year following his appointment. The agent responsible for the sale will organise the sale process in such a way as to ensure a divestment […]. The costs of the services of the agent responsible for the sale will be paid by Dexia.

V. REASONS FOR THE OPENING OF THE FORMAL PROCEDURE

(93) The Commission recalls that the formal investigation procedure opened by its decision of 13 March 2009 covers both Dexia's initial restructuring plan notified to the Commission by the Member States concerned in February 2009 and the FSA measure.

(94) Firstly, in view of the difficulties experienced by Dexia during the financial crisis and the very large amount of aid received, the Commission expressed doubts about:

— the capacity of the initial restructuring plan to restore the group's long-term viability without State aid and within the shortest possible period of time,

— the nature of the restructuring measures proposed which failed to match up to the requirements under 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 [20] ('Restructuring Communication'),

— the ability of the proposed measures to guarantee that the distortions of competition are limited and that moral hazard is addressed by aid limited to the minimum necessary and appropriate burden-sharing of the costs between the beneficiaries and the Member States concerned.

(95) Then, with regard to the FSA measure, the Commission considered, in its decision of 13 March 2009, that the guarantee as such and its coverage in terms of assets and the burden-sharing of the costs between Dexia and the Member States concerned were compatible with the internal market. However, the valuation of the assets and the remuneration for the guarantee, including that in the form of securities to be issued by Dexia beyond the first tranche of USD 4,5 billion for calls on the put contract, were still to be ascertained. The Commission therefore decided to include these aspects of the FSA measure in the formal investigation procedure opened in respect of the Dexia restructuring plan. The Commission also specified in the same decision that the existence of the guarantee, the portfolio of assets covered and the level of the initial losses incurred by Dexia fell outside the scope of the procedure initiated by this decision.

VI. OBSERVATIONS OF THE INTERESTED PARTIES

(96) The Commission points out that no comments have been received from interested parties under the formal investigation procedure opened in respect of aid measures in favour of Dexia.

(97) On the other hand, before the procedure was opened, a complaint was formally lodged with the Commission services by one of DBB's competitors against the capital increase of EUR 3 billion subscribed to by the authorities and the Belgian shareholders of Dexia and against the guarantee granted by the Belgian State to cover interbank and assimilated loans in favour of Dexia. The grounds for the complaint are as follows:

[20] OJ C 195, 19.8.2009, p. 9.

— the aid could not be considered to be proportionate, notably because of the subscription price of the ordinary shares issued by Dexia under the recapitalisation measure: the price of EUR 9,9, based on the average price of the thirty days preceding the operation, exceeds the price which would have been paid by a private market economy investor, given the greatly impaired conditions for financial assets at the time of the issue,

— the aid could not be considered to be confined to the minimum necessary in so far as the amount of recapitalisation boosted Dexia's Tier 1 capital ratio from 11 % to 14 %, making it one of the European banks with the highest capital endowment,

— the aid would lead to significant distortions of competition in so far as it would have enabled Dexia to apply rates on customer deposits above the average of those applied by banks traditionally active in the Belgian market.

VII. **OBSERVATIONS OF THE MEMBER STATES**

7.1. *OBSERVATIONS OF THE BELGIAN GOVERNMENT ON THE COMPLAINT RECEIVED BY THE COMMISSION*

(98) The Belgian authorities drew up their observations on the various grounds for the complaint on the basis of the non-confidential complaint form filed with the Commission services.

(99) With regard to the subscription price for the shares issued by Dexia under the recapitalisation operation, the Belgian authorities emphasise that the price of EUR 9,9 per share, which corresponds to the average price in the thirty days preceding the operation, was set in accordance with the provisions of Article 598 of the Belgian Companies Code. The latter specifies that in the case of a capital increase against cash contribution reserved to one or more specific persons, the issue price of the new shares may be no lower than the average price of the thirty days preceding the operation. The price of the shares issued under the Dexia recapitalisation operation was therefore set in accordance with binding legal obligations for the parties involved.

(100) Secondly, the Belgian authorities stress that the complainant calls into question the need for recapitalisation on the grounds that Dexia was experiencing a liquidity crisis, and not a solvency crisis, and that the recapitalisation would result only in increasing Dexia's Tier 1 capital to a level in excess of that of comparable European banks. However, according to the Belgian authorities, these allegations do not take account of Dexia's solvency requirements at the end of September 2008, as resulted from the higher risks and foreseeable losses in the 3rd and 4th quarters of 2008 imputable to the group's exposures to various institutions which were bankrupt or in difficulties (Lehman Brothers, Depfa, Bradford & Bingley, Irish and Icelandic banks), expected losses from FSA exposures and a large number of asset impairments linked to the downgrading of the ratings of various credit enhancement institutions which had guaranteed securities held by Dexia.

(101) Finally, with regard to the distortions of competition caused by the aid measures in favour of Dexia, the Belgian authorities stress that the *ad hoc* interventions by the Belgian State in favour of Dexia were justified to avoid a systemic crisis and do not differ, in this respect, from interventions by other Member States authorised by the Commission under Article 107(3)(b) TFEU. Moreover, as regards rates applied by Dexia to customer deposits, the Belgian authorities provided a note by Dexia comparing the rates applied by Dexia with those applied by its competitors for the same type of services offered on the Belgian market (ING, Deutsche Bank, Fortis, Axa, Citibank, Rabobank and KBC). This means that the rates applied by Dexia seem to be line with those of its competitors. In the same note, Dexia also stresses that these rates, referred to in the complaint, cover only the deposits received by Internet, which represent only a small proportion ([10-15] %) of customer deposits as a whole.

(102) In this way, the Belgian authorities consider, contrary to the arguments set out in the complaint, that the aid measures in favour of Dexia are compatible with the internal market on the basis of Article 107(3)(b) TFEU.

7.2. *OBSERVATIONS BY THE MEMBER STATES ON THE OPENING OF THE PROCEDURE*

(103) The Member States concerned submitted their joint observations to the Commission on the formal investigation procedure opened by the decision of 13 March 2009. The observations of the Member States concerned relate to both the classification of the measures notified as aid and the compatibility of these measures with the internal market.

7.2.1. CLASSIFICATION OF THE MEASURES NOTIFIED AS AID

7.2.1.1. ***The capital increase***

(104) In their observations, the Member States concerned consider, firstly, that the Dexia shares subscribed to by its historic shareholders (Caisse des Dépôts et Consignations, 'CDC', CNP Assurances, Holding Communal, Ethias and Arcofin) under the recapitalisation operation do not contain any State aid elements. The Member States concerned recall that these institutions jointly

committed to Dexia via a shareholders' pact concluded in the form of an agreement under private law on 28 August 2007. In order to safeguard the interests of this block of shareholders, it was essential for each of them to participate in the capital increase. Moreover, in view of the urgency of the recapitalisation operation, it was logical for Dexia to turn to its reference shareholders as a priority to undertake this operation. The Member States concerned emphasised that they had played no part in the decision by CDC, CNP Assurances, Holding Communal, Ethias and Arcofin to participate in the capital increase which, furthermore, in the case of Arcofin and Ethias, was not financed through State resources.

7.2.1.2. ***The LA operation***

(105) Moreover, the Belgian authorities consider that the LA provided to Dexia by the BNB, in cooperation with the Banque de France, is not State aid within the meaning of Article 107(1) TFEU on the grounds that LA operations come under the normal tasks of national central banks and, in particular, their role to contribute to the stability of the financial system as lender of last resort in the case of temporary liquidity problems of an otherwise solvent bank. In fact:

— at the time when the LA operation was put into place, the financial authorities confirmed that they had no reason to think that Dexia was insolvent,

— the granting of LA was guaranteed by adequate collateral supplied by Dexia, to which the BNB and the Banque de France applied substantial safety margins ('haircuts'), depending on the quality of this collateral,

— the LA was granted at penalising, and even prohibitive, interest rates,

— the BNB and the Banque de France at all times took totally autonomous and discretionary decisions on granting LA, on extending it and on the sums lent in this context,

— granting LA is a temporary measure: the credits granted under the LA operation are limited to one day ('overnight'), renewable in accordance with a decision taken by the lending central bank.

(106) In addition, the Belgian authorities stress that the LA provided to Dexia was approved by the Governing Council of the European Central Bank ('ECB') (up to a maximum amount of EUR […] billion). Classifying the LA operation as State aid would make it incompatible with the principle of the prohibition of monetary financing enshrined in Article 123 TFEU. In fact, by virtue of this principle, it is legally impossible to attribute to a Member State the actions laid down by a national central bank when performing its tasks, provided that the central bank in question respects the conditions laid down for the performance of this task by the ECB. The LA provided to Dexia fulfils all the conditions imposed by the ECB. In particular, it meets the requirement that decisions by the national central bank(s) concerned on the provision of LA must be entirely independent and discretionary.

(107) According to the Belgian authorities, the mere fact that any LA provided by the BNB automatically benefits from the guarantee of the Belgian State makes no difference to this conclusion. Firstly, at the time when the BNB Executive Committee, entirely independently, took the decision to provide LA to Dexia, the State guarantee did not exist. Consequently, this could not be taken into account when the decision was taken. Above all, the fact that the Belgian legislator came to provide for an explicit guarantee of the Belgian State for these operations – without any link to the Dexia file – whereas this is not always the case in other Member States, results from the specific nature of the shareholders of the BNB, which is a listed company with private shareholders, whereas the other national central banks generally speaking do not have private shareholders. This guarantee is consequently an integral part of the Statute of the BNB and its purpose is to allow the BNB to perform its task of lender of last resort. Such an explicit guarantee is not necessary in the case of other central banks, which are fully owned by their respective State. Express provision has been made for the automaticity of the State guarantee in order to ensure that the LA operations of the BNB do in fact conform to the principles of prohibition of monetary financing and in this way meet the criteria of the Commission's decision-making practice as set out, in particular, in its Northern Rock decision ([21]).

(108) The Belgian authorities finally emphasise that if the Commission were nevertheless to consider the LA operation to be State aid within the meaning of Article 107(1) TFEU, the amount of aid would have to be calculated on the basis of the difference between the rate applied and the reference rate referred to in the Commission Communication on the revision of the method for setting the reference and discount rates ('Reference Rates Communication') ([22]). In addition, the amount of aid should in any case be limited to half the total amount of the LA, corresponding to the amount in fact granted to Dexia by the BNB, the other half having been granted on behalf and at the risk of the

([21]) Commission decision of 5 December 2007, Northern Rock, case NN 70/07 (OJ C 43, 16.2.2008), and press release IP/08/1557 of 16 February 2008.

([22]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

Banque de France. The latter does not benefit from any explicit guarantee on the part of the French State and the guarantee of the Belgian State obviously cannot apply to an operation carried out on behalf and at the risk of a foreign central bank.

7.2.1.3. ***The FSA measure***

(109) The authorities of the Member States concerned consider it to be very unlikely that calls will be made on the guarantee granted by the Belgian and French States on the assets of FSAM: the USD 4,5 billion threshold, which is the cap for the exposure to first losses borne by Dexia, is higher than the most pessimistic scenarios for the economic losses on the portfolio. Consequently, the volume of any aid by the States should be considered to be zero even in a pessimistic scenario.

7.2.2. COMPATIBILITY OF THE MEASURES NOTIFIED

7.2.2.1. ***The FSA measure***

(110) First of all, the Member States concerned pointed out to the Commission that, in their opinion, the FSA measure does not come within the scope of the Commission Communication on the treatment of impaired assets in the Community banking sector [23] ('the Impaired Assets Communication') on the grounds that:

— strictly speaking, the FSA measure is not an asset guarantee, but a guarantee of Dexia's obligations towards FSAM under its own guarantee (through the put): it is only if Dexia does not honour its obligations to purchase the assets concerned from FSAM if the put is exercised that a call will be made on the guarantee of the Belgian and French States; consequently, the FSA measure does not entail a transfer or an automatic sale of assets,

— the purpose of the measure is not to guarantee the FSAM portfolio in favour of Dexia, but to enable a sale to be made as a matter of urgency which is necessary for restructuring Dexia,

— this sale was made following an open, transparent process which, by analogy with the cases of privatisation, should lead to the conclusion that it contains no element constituting State aid,

— the measure, notified before the date of adoption of the Impaired Assets Communication (25 February 2009), having been declared compatible with point 16 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [24], there is no need to require it also to be compatible with the Impaired Assets Communication.

(111) In addition, the Member States concerned stress that, even if the FSA measure were to be assessed in the light of the Impaired Assets Communication, the Commission is in possession of all the elements enabling it to find that this measure is compatible with the internal market on the grounds, in particular, that:

— the burden-sharing of the costs is in accordance with the Impaired Assets Communication, in particular as the amount of the first losses borne by Dexia, which represents over 36 % of the nominal value of the portfolio of the covered assets, is a threshold which is well above the 10 % minimum laid down in the Impaired Assets Communication; in addition, if a call is made on the guarantee of the Belgian and French States beyond the first tranche of losses, they are reimbursed by Dexia in securities constituting own funds, the issue of which will have a dilution effect on the other shareholders of the group,

— the measure is subject to remuneration at market conditions equal to the median value of the Dexia five-year CDS spreads (over the period from 1 January 2007 to 31 August 2008) plus 70 basis points, i.e. 113 basis points; the Member States concerned stress, in this respect, that the remuneration rate has been increased by 21 basis points compared to the amount initially notified to the Commission,

— the economic loss on the assets covered by the measure, as valued by independent parties, according to a methodology validated by the national supervisory authorities, is borne in full by Dexia in so far as, as mentioned above, the maximum loss remains below the amount of the first losses borne by Dexia.

(112) Consequently, the Member States concerned consider the FSA measure to be compatible with the internal market and the amount of aid contained in the measure to be zero.

7.2.2.2. ***The initial restructuring plan***

(113) The Member States concerned do not share the doubts raised by the Commission concerning the capability of the initial restructuring plan notified to the Commission in February 2009 to restore the long-term viability of the bank, to prevent excessive distortions of competition and to ensure appropriate burden-sharing of the restructuring costs.

(23) OJ C 72, 26.3.2009 p. 1.
(24) OJ C 244, 1.10.2004, p. 2.

(114) In fact, in their observations, the Member States concerned consider that the measures notified to the Commission allow Dexia's long-term viability to be ensured in so far as:

— the planned reduction of Dexia's bond portfolio for 2010 amounts to EUR [15-30] billion (of which EUR […] billion in sales), the same amount as for 2011, which seems credible and even rather conservative in the light of Dexia's recent experience,

— the liquidity recovery scenario, with the aim in particular of reducing Dexia's short-term funding needs by EUR 100 billion at the end of 2010, is realistic, especially on account of the recovery in funding conditions on the bond market and the mortgage bond market,

— the macroeconomic assumptions underlying Dexia's restructuring plan are very conservative,

— the uncertainties referred to by the Commission concerning the future trend in the market for local authority financing have only a limited impact on Dexia's activities, in so far as this market is not very sensitive to macroeconomic conditions and, moreover, a decline in the new turnover in loans to the local authorities has a marginal impact on Dexia's income.

(115) In addition, the Member States concerned emphasise that all the restructuring measures notified in February 2009 concern profitable activities, whether PWB activities or the reduction of the scope of the RCB activities. Consequently, all the measures proposed must be taken into account in the evaluation of the measures designed to reduce excessive distortions of competition.

(116) Finally, the Member States concerned consider that the Commission's evaluation of the aid amount in its decision of 13 March 2009 is inaccurate as it adds together incorrect amounts of different types in order to arrive at total aid in the order of EUR [170-210] billion. This amount, on the basis of which the burden-sharing of the restructuring costs between Dexia and the Member States concerned is to be evaluated, would therefore be an overestimate. Conversely, according to the Member States concerned, Dexia's participation in the restructuring costs is underestimated in so far as it does not take account of the reduction in new turnover in loans foreseen by Dexia and the Member States concerned in the restructuring plan, which must be considered as an own contribution by Dexia to the restructuring costs.

(117) In conclusion, the Member States concerned support the Commission's decision to authorise the FSA measure definitively in order to allow the sale of FSA to Assured Guaranty, which is an essential component of restoring viability and reducing the risk profile of the group. On the other hand, they consider the Commission's doubts concerning the other measures to be unfounded.

7.3. *OBSERVATIONS OF THE MEMBER STATES ON THE RESTRUCTURING PLAN*

(118) As a supplement to the observations above, made on the basis of the initial restructuring plan notified to the Commission in February 2009, the Member States concerned informed the Commission of their observations on the complementary restructuring measures notified to the Commission on 9 February 2010.

(119) In this respect, the Member States concerned consider that the restructuring plan would enable the long-term viability of the group to be strengthened, enabling Dexia to speed up the exit from the funding guarantee mechanism, and would address all the other concerns raised by the Commission in its decisions of 13 March 2009 and 30 October 2009. The group of restructuring measures notified between February 2009 and February 2010, considered as a whole, would constitute a plan for restructuring and compensation for any distortions of competition, in accordance with the requirements laid down by the Commission in its decisions and during meetings with the representatives of the Member States concerned and Dexia.

(120) The Member States concerned also emphasise that, to assess the restructuring plan, the Commission will have to take account of the objective differences between Dexia's situation and that of the other banking institutions for which the Commission has approved restructuring plans in recent months. In particular, unlike these other institutions:

— Dexia has already returned to profitability, with a positive net result since the first quarter of 2009 and during the following quarters,

— the execution of the plan ensuring Dexia's return to long-term viability has already made good progress, especially with the sale of FSA and the reduction in the short-term funding need of EUR 100 billion, an objective already 75 % achieved in the third quarter of 2009,

— the risk profile of Dexia's core business activities (PWB and RCB) is intrinsically weak. The remuneration expected by a market investor takes account of this differentiation factor and allows a lower return on equity (ROE) than that of other higher risk institutions,

— Dexia has paid and will continue to pay the Member States concerned remuneration for the aid granted. This remuneration is significant, with the level in certain cases (notably the guarantee on FSA's FP portfolio) exceeding the level laid down in the Commission guidelines.

VIII. **ASSESSMENT OF THE AID**

8.1. *EXISTENCE OF AID*

(121) The Commission must assess whether the measures in question are State aid within the meaning of Article 107(1) TFEU. This Article stipulates that: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.' The Commission must therefore examine, for each measure, whether the cumulative criteria set out in Article 107(1) TFEU are met.

8.1.1. THE CAPITAL INCREASE

(122) Regarding the existence of aid relating to the capital increase, the Commission refers to its decision of 13 March 2009, in which it established that the interventions of the Belgian State and regions and of the French and Luxembourg States constitute State aid within the meaning of Article 107(1) TFEU. The Commission considers, moreover, that in the specific circumstances of the case, the behaviour of CDC and Holding Communal can also be attributed to the State.

(123) According to the case-law, the mere fact that an economic operator is under State control is not sufficient for measures taken by that operator to be attributed to the State [25]. However, it also arises from the Court of Justice case-law that, in so far as it is very difficult for the Commission, on account of the special relations existing between CDC and Holding Communal and their respective State, to show that in this case the decisions to inject capital in Dexia were in fact taken on the instruction of the public authorities, the imputability to the State of these measures may be inferred from a set of indicators arising from the circumstances in which these measures were taken [26].

(124) Indicators such as, in particular, 'integration [of the undertaking] into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or 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' may be relevant to conclude that an aid measure taken by a public undertaking is imputable to the State [27].

(125) In this case, it should be noted on the one hand that:

— CDC is a public undertaking, placed by the French Finance Act of 28 April 1816 under the supervision and guarantee of the legislature, which carries out general interest missions (financing of public services bodies, in particular), is governed by statutory and regulatory rules and its director-general and senior directors are appointed by the President of the French Republic and the French

(25) See, along these lines, the judgment of 16 May 2002 in case C-482/99 *France* v *Commission* (*Stardust* judgment) [2002] ECR I-4397, paragraphs 52 and 58.

(26) Case *France* v *Commission*, cited above, paragraphs 52, 55 and 56.

(27) *Stardust* judgment cited above, paragraphs 56 and 57:

'(56) Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or 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.

(57) However, the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot, having regard to the autonomy which that legal form is capable of conferring upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State (Case C-305/89 *Italy* v *Commission*, cited above, paragraph 13). The existence of a situation of control and the real possibilities of exercising a dominant influence which that situation involves in practice makes it impossible to exclude from the outset any imputability to the State of a measure taken by such a company, and hence the risk of an infringement of the Treaty rules on State aid, notwithstanding the relevance, as such, of the legal form of the public undertaking as one indicator, amongst others, enabling it to be determined in a given case whether or not the State is involved.'

Government [28]; at the time the events took place and by way of derogation from ordinary law, CDC was not subject to the supervision of the Commission bancaire or the Agence des Participations de l'Etat, or to the company tax law granting a 'voluntary contribution' to the Treasury,

— Holding Communal has as its shareholders 599 Belgian municipalities and provinces and is the local authorities' primary financing vehicle; all the members of its board are municipal councillors, mayors or aldermen; the statutes of Holding Communal stipulate that it is subject to the supervision of the Ministry of Finance and the Ministry of the Interior according to the arrangements laid down by law; in this respect, it should be pointed out that the two Government Commissioners (representing the Minister for Finance and the Minister for the Interior respectively) have the power to oppose decisions of the Holding Communal board; according to case-law [29], the existence of a right of veto or power of approval of the State indicates that the conduct of a legal entity is imputable to the State, which applies in the present case to Holding Communal.

On the other hand, it has to be noted that, in the present case, the capital injection by CDC and Holding Communal occurred concomitantly with the other measures taken by the States (direct capital injection by the States and regions, guarantee by the States, FSA measure, LA operation guaranteed by the Belgian State). These injections with the other measures form a consistent whole designed to rescue Dexia at the end of September 2009.

The concomitance of these interventions in combination with the elements referred to above make it unlikely that the public authorities were not involved in the decisions of CDC and Holding Communal to participate in the Dexia capital increase. There is therefore reason to consider that the capital injections granted by CDC and Holding Communal are imputable to their respective Member States.

(126) The Commission considers that the recapitalisation carried out by the 'historic' shareholders does not satisfy the case-law criterion of the private investor in a market economy. In fact, the participation in the recapitalisation of Dexia by shareholders whose behaviour is not imputable to the State, limited to 12,4 % of the total capital increase, is insufficient to conclude that the historic shareholders acted as private investors in a market economy. The principle of the private investor in a market economy applies only under normal market conditions [30]. The historic shareholders intervened to rescue Dexia at the height of the financial crisis under entirely abnormal market conditions. In addition, this intervention by the 'historic' shareholders was part of a group of measures designed to rescue Dexia, an undertaking in serious difficulties, of systemic importance for the economies of the three Member States concerned. It should be pointed out that public, economic and social policy considerations must be disregarded in the assessment of the principle of the private investor in a market economy [31]. Then, to satisfy the criterion of the private investor in a market economy, the credibility of the investment must be corroborated by an *ex ante* business plan and, preferably, an *ex ante* business plan validated by independent auditors and stress tests [32].

(127) Finally, even where the public investor has owner status (which is the case of the 'historic' shareholders whose conduct is imputable to the State, i.e. CDC and Holding Communal), it is appropriate, when comparing it to a private investor in a market economy, to check that the investor behaves as a well-informed investor who does not take more risks than a private investor in a market economy would take [33]. The historic characteristic of the investor could not therefore justify 'more flexible' application of the principle of the private investor in a market economy.

(128) Moreover, the Commission considers that the capital increase imputable to the Member States concerned is selective, since it only relates to a single undertaking, the Dexia group. Given the size of Dexia and its

[28] In the *Air France* judgment, these elements sufficed to justify CDC being considered as a public-sector body whose conduct is imputable to the State (see in particular paragraphs 58 to 61 of the judgment of 12 December 1996 in case T-358/94 *Air France* v *Commission* [1996] ECR II-2019).

[29] See, in particular, the judgment of the Court of Justice of 2 February 1988 in joined cases 67, 68 and 90/85, *Van der Kooy and others* v *Commission* [1988] ECR 219, paragraph 36.

[30] Since its letter to the Member States of 17 September 1984 (SG(84) D/11853) on the application of Articles 92 and 93 of the EEC Treaty to public holdings in company capital, the Commission has specified that the principle of the private investor in a market economy applies only under normal market conditions. The Court confirmed this point in its WestLB judgment of 6 March 2003 in joined cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 267.

[31] See the Meura judgment of 10 July 1986 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14.

[32] See the Commission decisions of 2005 relating to the recapitalisation of the German 'Landesbanken', such as NN 71/05, HSH Nordbank, and NN 72/05, Bayern LB, not published in the OJ. Also see its decision in the Shetland Shellfish case (Decision 2006/226/CE (OJ L 81, 18.3.2006, p. 36)). The Commission rejected two reports produced by the public authority in Shetland with a view to the investment, which contained a projected profit-and-loss account, a projected balance sheet and a projected cash flow statement for 2000, 2001 and 2002. The United Kingdom contended that the studies were *ex ante* and the assumptions on which they were based were 'conservative and prudent', but the Commission concluded that they would have been considered insufficient by a private investor in the market economy, despite the fact that relatively small amounts were involved.

[33] *West LB* judgement, cited above, paragraph 255.

importance on the Belgian, French and Luxembourg markets, and the fact that, without the interventions, the group could have found itself insolvent, which would have changed the structure of the banking market significantly in the three territories, the Commission considers that the measures in question affect trade between Member States.

(129) In conclusion, the Commission considers that the capital injection by CDC and Holding Communal therefore constitutes an element of the aid received by Dexia, within the meaning of Article 107(1) TFEU.

(130) On the other hand, the Commission considers that the resources made available to Dexia by virtue of the conduct of Ethias (which was not nationalised at the time of the capital increase), Arcofin (the majority of whose capital is held by private shareholders) and CNP Assurance (the majority of whose capital belongs to private shareholders, i.e. the Banque Populaire Caisses d'Épargne group and the holders of floating capital) are not State resources.

8.1.2. THE GUARANTEE BY THE STATES

(131) The Commission established that the guarantee constituted aid in its decisions of 19 November 2008 (recitals 24 to 27) and 30 October 2009 (recital 13). In this respect, the Commission considers that the reasoning set out in these decisions remains applicable and that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

8.1.3. THE LA OPERATION

(132) With regard to the existence of aid associated with the LA operation, the Commission notes the observations made by the Belgian authorities regarding the LA operation put in place by the BNB in favour of Dexia. The Commission considers, however, that these observations are not of a nature to modify its conclusions concerning the aid element associated with the LA operation, as set out in its decision of 19 November 2008.

(133) In point 51 of its communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis [34] ('the Banking Communication'), the Commission indicated that it considered that the provision of funds by a central banks to a financial institution did not constitute aid when a number of conditions are met [35].

(134) One of the conditions for the absence of aid defined by the Banking Communication is that 'the measure […] is not backed by any counter-guarantee of the State'. In this case, the Commission noted that the credits granted by the BNB benefit from a guarantee from the Belgian State (with retroactive effect) pursuant to the Act of 15 October 2008 on measures to promote financial stability and introducing in particular a State guarantee on credits granted and other operations conducted in the context of financial stability. Since the LA operation granted by the BNB benefits from a guarantee from the Belgian State, the condition provided for in the Communication is therefore not met.

(135) The conditions defined in the Banking Communication to exclude the presence of aid are therefore not met in full. Consequently, it is a matter of verifying whether the conditions constituting State aid are in fact met. Since the BNB is a Belgian State body, its resources are public resources. This is all the more so in the present case as the counter-guarantee has the effect that any loss will be borne directly by the Belgian State. What is more, the LA is a measure granted selectively to Dexia. Finally, the measure benefits Dexia selectively by granting it the funding that the bank can no longer obtain on the market. Since Dexia operates in several Member States and, in most of its activities, is in competition with other financial institutions, most of which did not receive comparable aid, this advantage distorts competition and affects trade between Member States.

(136) The Commission concludes that the LA operation put in place by the BNB on its own account does indeed constitute State aid within the meaning of Article 107(1) TFEU.

8.1.4. THE FSA MEASURE

(137) The Commission established that the FSA measure constitutes aid in its decision of 13 March 2009 (recitals 53 to 56) and considers that the observations of the Member States concerned are not of a nature to call its conclusions into question.

(138) The Commission concludes that the FSA measure constitutes State aid within the meaning of Article 107(1) TFEU.

8.2. *QUANTIFICATION OF THE AID*

(139) In its decisions of 19 November 2008 and 13 March 2009, the Commission already carried out a first evaluation of the amount of aid associated with the measures in question. On the basis of this first evaluation and additional information communicated by the Member States concerned since 13 March 2009, the Commission calculates an aid amount comprising the following elements:

[34] OJ C 270, 25.10.2008, p. 8.

[35] See also Decision Northern Rock and press release IP/08/1557.

8.2.1. THE CAPITAL INCREASE

(140) The capital injection announced on 30 September 2008 comes to a total amount of EUR 6,4 billion, from which should be deducted, for the reasons set out above, the capital injections by Ethias, Arcofin and CNP Assurance, amounting to EUR 150 million, EUR 350 million and EUR 288 million respectively.

(141) The Commission also notes that, under its restructuring plan, Dexia waived the benefit of the EUR 376 million in the form of Dexia BIL convertible bonds, to which the Luxembourg State was to subscribe and which were never subscribed to. Consequently, this amount is also deducted from the amount to be taken into account in the aid elements relating to the capital increase.

(142) In conclusion, the total amount of aid relating to the capital increase amounts to EUR 5,2 billion ([36]).

8.2.2. THE GUARANTEE BY THE STATES

(143) In accordance with the guarantee agreement signed between Dexia and the Member States concerned on 9 October 2008, the guarantee of the Member States concerned covers a maximum amount of EUR 150 billion. This amount was reduced to EUR 100 billion under the guarantee agreement which entered into force on 1 November 2009.

(144) In their observations relating to the decision to open the procedure, the Member States concerned contend that the amount of aid associated with the guarantee should be calculated in accordance with the Commission Communication on the revision of the method for setting the reference and discount rates ('the Reference Rates Communication') ([37]). According to this Communication, the aid elements related to the guarantee would be equal to the difference between the remuneration rate on the guarantee and a reference rate defined as the interbank market reference rate (IBOR) plus 75 basis points.

(145) In response to these observations, the Commission notes that in the case of undertakings in difficulties, the application of a reference rate based on market rates is not relevant as, without a guarantee, Dexia could not have raised any funding on the markets. For this reason, in accordance with constant practice in the cases of restructuring submitted to it, the Commission considers that the aid element to be taken into account in the guarantee may extend up to the amounts in fact covered by the guarantee, i.e. EUR 100 billion, which corresponds to the maximum amount of Dexia's liabilities which may in fact be covered by the guarantee since 1 November 2009 ([38]).

8.2.3. THE LA OPERATION

(146) By way of analogy with the reasoning applied to the guarantee above, the Commission considers that the aid element contained in the guarantee by the Belgian State for the LA operation put in place by the BNB may extend to the amounts in fact covered by the guarantee, i.e. EUR […] billion, which corresponds to the portion of the maximum amount of the LA, as approved by the Governing Council of the ECB, covered by the BNB and guaranteed by the Belgian State.

8.2.4. THE FSA MEASURE

(147) In accordance with the Impaired Assets Communication ([39]), the Commission considers that the amount to be taken into account to assess the amount of aid linked to an impaired assets measure is the difference between the transfer value and the market price of the portfolio considered. According to Commission practice ([40]), the transfer value is defined as the residual nominal value less the first tranche which is payable in full by the bank benefiting from the measure.

(148) The FSA measure presents certain specific characteristics in relation to other measures for the treatment of impaired assets on which the Commission has had to decide:

— the FSAM portfolio (residual nominal value of USD 16,98 billion at 30 September 2008) comprises two sub-portfolios: (i) excluded assets (residual nominal value of USD 4,5 billion), which are the subject of an unguaranteed put contract and (ii) covered assets (residual nominal value of USD 12,48 billion) which are covered by a guaranteed put, in the sense that a guarantee agreement provides that the Belgian and French States undertake to guarantee Dexia's obligations under the put agreement for these covered assets. Nevertheless, the Commission notes that all the calls under the put contract (on both covered assets and excluded assets) are taken into account for the amortisation of the first tranche of USD 4,5 billion retained by Dexia. This first tranche of USD 4,5 billion does not therefore cover only the portfolio of assets covered by the measure, but the entire FSAM portfolio,

([36]) 6,376 – (0,150 + 0,350 + 0,288 + 0,376) = EUR 5,212 billion.

([37]) OJ C 14, 19.1.2008, p. 6.

([38]) The maximum amount of Dexia's liabilities covered by the guarantee has never exceeded EUR 100 billion, even between 9 October 2008 and 1 November 2009, the period during which the maximum amount under the guarantee agreement was EUR 150 billion. The maximum amount of guarantees used by Dexia is EUR 95,6 billion, an amount recorded on 27 May 2009.

([39]) See point 20.

([40]) See in particular the Commission Decision of 15 December 2009, LBBW, case C 17/09 (not yet published), and press release IP/09/1927 of 15 December 2009.

— in addition, the measure provides for intervention if necessary by the Belgian and French States upon first demand even in respect of the first tranche of EUR 4,5 billion, with the Belgian and French States then having recourse against Dexia which must then reimburse this intervention in cash. This mechanism therefore exposes the Belgian and French States to a risk of losses on the covered assets and a risk of default by Dexia, even with regard to the first tranche of USD 4,5 billion. This specific characteristic is not usually to be found in measures relating to impaired assets.

(149) On account of these specific characteristics, the portfolio considered for which the transfer price is calculated is the total FSAM portfolio and not only the portfolio of covered assets. At 31 January 2009, the nominal residual value amounted to USD 16,6 billion. The transfer value is therefore USD 12,1 billion (this being the difference between USD 16,6 billion and 4,5 billion). The market price was USD [7-9] billion, so the amount of aid comes to USD [3,1-5,1] billion or EUR [2,4-4,0] billion [41].

8.2.5. TOTAL AMOUNT OF THE VARIOUS AID MEASURES

(150) As emphasised by the Member States concerned in their observations on the decision to open the procedure, the Commission recognises that it is not relevant to add together the amounts of aid corresponding to recapitalisation with guarantees of liabilities as the two types of measures do not have the same effects of distortion of competition. Consequently, the Commission notes that the aid received by Dexia in the form of a capital increase and of aid for the treatment of impaired assets (FSA measure) comes to a total of EUR 8,4 billion and the aid in the form of a guarantee and LA operation may amount to up to EUR [95-135] billion.

8.3. *COMPATIBILITY OF THE AID*

8.3.1. LEGAL BASIS

(151) Under Article 107(3)(b) TFEU, 'The following may be considered to be compatible with the internal market: […] aid […] to remedy a serious disturbance in the economy of a Member State'. In view of the situation on the financial markets since the measures in question were granted, the Commission considers that the measures in question can be assessed on the basis of Article 107(3)(b) TFEU. As regards the Belgian, French and Luxembourg economies, this was confirmed by the various Commission decisions approving the measures taken by the authorities of these Member States to overcome the financial crisis [42]. Consequently, following the example of the decisions of 19 November 2008, 13 March 2009 and 30 October 2009 relating to Dexia, the legal basis for the assessment of the aid measures in question is still Article 107(3)(b) TFEU.

(152) In the context of the present crisis, the Commission specified the conditions on which the aid for the treatment of impaired assets and the aid for restructuring of firms in difficulty should be applied. These principles are set out in the Impaired Assets Communication and in the Restructuring Communication.

8.3.2. COMPATIBILITY OF THE FSA MEASURE

(153) As mentioned in the decision of 13 March 2009, the FSA measure falls within the scope of the Impaired Assets Communication, even though its primary objective was to allow the operation consisting in the sale of FSA. This measure must therefore be analysed on the basis of the conditions provided for in the Impaired Assets Communication. In this respect, the Commission concluded in its decision of 13 March 2009 that the guarantee as such and its coverage in terms of assets and the burden-sharing of the costs between Dexia and the Belgian and French States were compatible with the internal market. The valuation of the assets, the remuneration for the measure and the remuneration for the securities to be issued by Dexia beyond the first tranche of USD 4,5 billion still had to be ascertained.

8.3.2.1. ***Valuation of the assets***

(154) The Commission analysed whether the valuation method applied for the REV corresponded to the requirements laid down in the Impaired Assets Communication, and in particular whether (i) it was based as far as possible on observable inputs, (ii) it made realistic and prudent assumptions about future cash flows, and (iii) it was based on prudent stress-testing at the time that the valuation was carried out.

(41) At the exchange rate of EUR 1 for USD 1.2 816 applicable on 30 January 2009.

(42) See in particular the Commission decisions in State aid cases N 574/08, State guarantee for Fortis (OJ C 38, 17.2.2009, p. 2); NN 42/08, Fortis (OJ C 80, 3.4.2009, p. 7); NN 57/09, Emergency aid for Ethias (OJ C 176, 29.7.2009, p. 1); C 18/09 KBC (OJ C 216, 10.9.2009, p. 10); decision of 18 November 2009, C 18/09, KBC (not yet published); N 548/08, Scheme for refinancing financial institutions – France (OJ C 123, 3.6.2009, p. 1); N 251/09, Extension of the refinancing scheme for financial institutions – France (OJ C 174, 28.7.2009, p. 2); N 613/08, Capital-injection scheme – France (OJ C 106, 8.5.2009, p. 15); N 29/09, Amendment to the capital-injection scheme – France (OJ C 116, 21.5.2009, p. 5); C 123/09, Amendment to the capital-injection scheme – France (OJ C 123, 3.6.2009, p. 3); N 23/09, Temporary scheme for aid in the form of guarantees – France (OJ C 62, 17.3.2009, p. 11); N 128/09, Temporary guarantee scheme with a view to economic recovery – Luxembourg (OJ C 106, 8.5.2009, p. 9).

(155) This analysis of the methods used for the valuation of the assets was carried out with the technical assistance of experts contracted by the Commission. It was carried out for each of the main classes of assets in the FSAM portfolio under review and under a baseline scenario and a stress scenario. Following examination, the Commission assessed the methodology and the assumptions made for the valuation of the REV positively. The Commission therefore finds that the assumptions made are conservative on the whole:

— default rates were projected prudently, using the latest performance trends of these assets, at levels considered to be conservative,

— prudent recovery rates (including the costs of winding-up and recovery) were projected, reflecting the latest trends and not projecting any improvement in the coming years,

— the assumptions relating to early repayments are also conservative and in line with the latest trends observed.

(156) […]

(157) The first tranche of USD 4,5 billion, which must be reimbursed in cash by Dexia, is higher than the level of expected losses, estimated prudently and in line with the Impaired Assets Communication, in both the baseline scenario and the stress scenario, and in respect of both the FSAM portfolio in its entirety and the FSAM portfolio after deduction of the excluded assets. The transfer value, established at USD 12,1 billion is below the REV, in both the baseline scenario (USD [13,6-14,6] billion) and the stress scenario (USD [12-13] billion).

8.3.2.2. ***Remuneration of the FSA measure***

(158) The remuneration on the FSA measure, payable annually by Dexia to the Belgian and French States, is 113 basis points as cover for the risk of default on the put covered by the guarantee, to which is added 32 basis points as cover for the risk of default by Dexia in honouring its liquidity commitments to FSAM.

(159) The Commission takes a positive view of the fact that the first tranche of USD 4,5 billion, which must be reimbursed in cash by Dexia, exceeds the level of expected losses, at 31 January 2009, in both the baseline scenario and the stress scenario, as this reduces the risk borne by the Belgian and French States. More specifically, the Commission views positively the level of remuneration granted to the Belgian and French States for the FSA measure, compared with the level of the residual risk assumed by the Belgian and French States. Moreover, according to the Impaired Assets Communication, reference can be made to the freeing of regulatory capital generated thanks to the measure for the purpose of evaluating the remuneration for the FSA measure. In view of the considerable size of the first tranche and the fact that it is weighted at 1 250 % with a view to calculating the regulatory capital associated with this first tranche, it was shown by the Belgian and French States that the FSA measure does not free any regulatory capital. As indicated in point 21 (footnote 11) of the Impaired Assets Communication, the asset relief measures must be remunerated in a comparable manner to a capital injection. The amount of capital which would be comparable to the FSA measure is zero here since no regulatory capital is freed. On the other hand, the FSA measure covers a wider field of trigger events than just losses on assets covered. Consequently, the Commission considers that the annual remuneration for the FSA measure is appropriate.

8.3.2.3. ***Remuneration for the securities to be issued***

(160) The Commission notes that the compensation received by the Belgian and French States in the case of calls made on the guarantee exceeding the first tranche of USD 4,5 billion exceeds the amount required by the Impaired Assets Communication.

8.3.2.4. ***Conclusion on the compatibility of the FSA measure with the Impaired Assets Communication***

(161) The Commission therefore concludes that the FSA measure is compatible with the principles of the Impaired Assets Communication.

8.3.3. COMPATIBILITY OF THE RESTRUCTURING PLAN

8.3.3.1. ***Degree of restructuring required***

(162) As pointed out above, the total amount of aid associated with the capital increase and the FSA measure comes to EUR 8,4 billion. In accordance with point 4 of the Restructuring Communication, it is this amount which must be taken into account in assessing the obligation to present a restructuring plan. The aid elements associated with the guarantee and the LA operation put in place by the BNB, for their part, must be taken into account in the assessment of the compatibility of the restructuring plan with the internal market ([43]).

([43]) See in particular point 31 of the Restructuring Communication.

(163) As indicated under point 4 (footnote 4) of the Restructuring Communication, the specific criteria and circumstances leading to the obligation to present a restructuring plan refer in particular, but not exclusively, to situations where a distressed bank has been recapitalised by the State, or where a bank benefiting from asset relief has already received State aid in whatever form that contributes to coverage or avoidance of losses which altogether exceeds 2 % of the total bank's risk-weighted assets. The Commission has already shown in its decisions of 19 November 2008, 13 March 2009 and 30 October 2009 that Dexia was an undertaking in difficulty at the time when the aid measures were introduced.

(164) The aid elements associated with the capital increase and the FSA measure represent 5,5 % of the group's risk-weighted assets calculated at 31 December 2008, which is an amount well in excess of that of 2 % of the risk-weighted assets and intended to cover the losses incurred by Dexia. In accordance with these principles, Dexia must therefore present a restructuring plan.

(165) The degree of restructuring required depends on the seriousness of the problems encountered by each bank and the amount of aid received. In this respect, the aid to be taken into account is the total aid resulting from the measures for recapitalisation and treatment of the impaired assets, as well as the guarantees obtained. The compatibility of the restructuring plan must be assessed in the light of the conditions set out in the Restructuring Communication. These conditions are the following:

— the restructuring plan must enable the long-term viability of the institution to be restored,

— the restructuring plan must ensure equitable burden-sharing of the costs of restructuring between the States and the bank,

— the restructuring plan must allow the correction of excessive distortions of competition arising from the aid.

8.3.3.2. ***Restoration of the long-term viability of the institution***

(166) In accordance with section 2 of the Restructuring Communication, the restructuring plan must enable the long-term viability of the institution to be restored, i.e. the restructuring plan should be comprehensive, detailed and based on a coherent concept, demonstrating how the bank will restore long-term viability without State aid as soon as possible (within a maximum of five years). The restructuring plan should include a comparison with alternative options, including a break-up, or absorption by another bank, it should identify the causes of the bank's difficulties, provide information on the business model, provide for withdrawal from activities which would remain structurally loss-making, provide for an appropriate return on equity (under a baseline scenario and a crisis scenario) and consider arrangements for repaying the State aid.

(a) **Evaluation of Dexia's business model**

(167) The Commission first of all welcomes the fact that Dexia has recorded positive results for the first three quarters of 2009. However, in the light of these results, the Commission also notes the following points:

— the group's operational performance has deteriorated relatively during 2009, decreasing by 44 % between the first and the third quarters of 2009,

— a significant proportion of the group's results, estimated at approximately EUR [300-500] million in 2009 by Dexia, come from cash-flow and more specifically transformation activities, which are possible thanks to the sharp steepening of the curve for maturities at less than one year,

— Dexia would probably not have made profits if it had not received quite a large allocation of funding guaranteed by the Member States concerned (the volume of which is among the highest in Europe).

(168) On the basis of the detailed information communicated to it by Dexia and the Member States concerned, the Commission has isolated two main sources of profit for Dexia: the recurring profits linked to Dexia's traditional banking activities, on the one hand, and the less robust profits, on the other. The former mainly comprise the income from loans and the bond portfolio, commission income, the costs of funding, the cost of the risk and operational costs. The latter come from short-term transformation activities, proprietary market activities and extraordinary income drawn, for example, from the sale of assets, write-back of provisions or open positions in derivatives.

(169) According to the information communicated to the Commission by the Member States concerned, […], so that the analysis of the main sources of the group's profit can be conducted in terms of margins in relation to the interbank reference rates. This analysis, carried out for the year 2009, led the Commission to consider that Dexia's traditional banking activities would have yielded very low, and even negative, profitability. Such an analysis is not contradicted by the examination of the positive results recorded in the first three quarters of 2009, which arise from special circumstances, as indicated above.

(170) In addition, the projections which may reasonably be inferred with regard to the future trend in the group's principal sources of profit do not in fact suggest a possible improvement in the results of Dexia's traditional banking activities. In fact:

— the average margin on the PWB lending activities and the bond portfolio would remain low on a long-term basis on account of (i) the low level of income generated from these activities (between […] basis points, according to the information contained in the restructuring plan), (ii) the relatively slow amortisation profile of these assets in view of the (long) average maturity of the PWB loans and the bonds and (iii) Dexia's difficulty in replacing these assets reaching maturity with new loans generating higher income. In this last respect, the Commission notes that Dexia had fixed a new turnover target in the PWB activity of EUR […] billion in 2009, achieved in respect of […] of the amount planned (EUR […] billion), over the first 11 months of the year 2009, on account of keener competition for these activities in Dexia's traditional markets and downward pressure on margins,

— the commission income, of which an important source in the past was the sale of structured products as part of the financial services offered by Dexia to the local authorities, would be liable to fall in the future because this source is expected to dry up (decline in the marketing of structured products on account of the fall in new PWB turnover and the minimal appetite of the local authorities for this type of products in the future) and keener competition for the commission-generating activities,

— the costs of funding would increase because Dexia would need gradually to replace short-term funding and/or funding obtained from the central banks by longer-term funding either (i) on the bond market, at higher costs than those observed before the financial crisis, or (ii) on the mortgage bond market, also at higher costs than before the crisis and within the limits of the absorption capacities of this market, which are likely to diminish in the future on account of the expected tightening up regarding eligible collateral at the ECB, or (iii) by means of commercial and institutional customer deposits, but in a more competitive environment,

— the operational and structural costs (expressed in basis points in relation to total balance sheet) would be liable to remain at the current level, or even increase, despite the plan to reduce costs by 15 % by 31 December 2012, as this reduction has to be considered in the perspective of the reduction in the total balance sheet of the group over the same period, which is greater than 15 %,

— finally, the cost of the risk is an element which could evolve favourably in the years to come, as shown by the write-backs of provisions carried out by Dexia in 2009. However, the fall in the cost of the risk will remain limited on account of the deterioration in the credit standing of certain public sector entities to which Dexia has an exposure.

(171) At the end of this analysis, the Commission therefore considers that the restructuring plan should (i) deleverage Dexia in order, in particular, to enable it to assume higher funding costs and low margins on assets, (ii) improve the quality and composition of its sources of funding and (iii) reduce its fixed cost base.

(172) In this respect, the Commission considers that if the restructuring plan notified on 9 February 2010 is carried out in accordance with the commitments undertaken by the Member States concerned, it will provide satisfactory responses to the question of the long-term viability of the group.

(173) Firstly, the restructuring plan allows a reduction in Dexia's total balance sheet of 35 % by 2014, compared to the amount at 31 December 2008, and a refocusing of the group's activities on its traditional banking business:

— the sale of FSA to Assured Guaranty, which took place on 1 July 2009, significantly improved Dexia's risk profile by reducing its exposure to public sector risks and American structured products. The Assured Guaranty securities received by Dexia under the sale of FSA will also be sold, thereby reducing by the same amount Dexia's exposure to the monoline insurance sector,

— a significant proportion of the bond portfolio management activity and certain PWB activities in Dexia markets which are not its historical markets (in particular in Australia, Japan, Mexico, Sweden and Switzerland) are isolated from the group's traditional banking activity and placed in run-off. These activities ringfenced in the LPMD together totalled EUR 161,7 billion at 31 December 2009, i.e. 27,9 % of Dexia's total balance sheet at that date. The Member States concerned foresee progressive amortisation of the LPMD, as indicated in Table 4. The Commission notes that, despite the accelerated sale of the bond portfolio provided for in the restructuring plan, the pace of amortisation of the LPMD activities is slow on account of the long maturity of the assets concerned (LPMD would represent 17,9 % of Dexia's total balance sheet by 2014). These activities will therefore continue to burden the profitability of the group in the years to come. Nevertheless, the Commission notes favourably that the application of conservative rules for the capitalisation of LPMD (respect of a core Tier 1 ratio of [10-15] %) restricts the group's distribution capacity and therefore contributes to the capitalisation of the results. In addition, respect of strict funding rules (allocation to LPMD of stable resources: guaranteed or unguaranteed bond issues, mortgage bonds and deposits) must also allow the liquidity and transformation risks associated with LPMD to be contained. Finally, the segregation of the activities of LPMD from the rest of the group's activities will facilitate their monitoring by market observers,

— Dexia's PWB activities outside its historical markets (France, Belgium and Luxembourg) have also been reduced significantly: the Italian subsidiary (Dexia Crediop, with a total balance sheet of EUR 61,2 billion at 30 June 2009) and Spanish subsidiary (Dexia Sabadell, with a total balance sheet of EUR 15,6 billion at 31 December 2008) will be sold by 31 December 2012 and 31 December 2013 respectively, as were Dexia's stake in Kommunalkredit Austria in 2008 and the Indian PWB entity in 2009. The cessation of PWB activities outside Dexia's historical markets should contribute to easing the pressure on the margins of Dexia's PWB activities,

— finally, proprietary trading activities will be halted, from the date of this decision, and market activities will be significantly curtailed, enabling a reduction in Dexia's exposure to market risks and counterparty risks in off-balance-sheet transactions: the SBPO and TOB activities will be placed in run-off and Dexia's value-at-risk limits have been cut by 44 % compared to 2008. The complete cessation of the proprietary trading activities means that Dexia will maintain trading activities only to receive, transmit and execute its customers' orders to buy and sell. Under no circumstances will Dexia retain open positions on its own account, except if such positions result from the incapacity of Dexia to execute certain customer orders and this will be within clearly determined limits so that they do not compromise the solvency and/or liquidity position of the group.

(174) Dexia's deleverage and the refocusing of its activities on traditional banking business will allow the group gradually to restore the equilibrium of its balance sheet by reducing the share of the activities generating low margins (PWB outstandings and bond portfolio, in particular) and by increasing the share of the more profitable activities (new turnover PWB and RCB and project financing, in particular). In this respect, the Commission takes a positive view of the fact that this refocusing of Dexia's activities is accompanied by close supervision of the profitability of these activities and especially PWB. In fact, in so far as Dexia refrains from lending to its PWB customers at a RAROC of under 10 %, from the date of this decision, it will be possible to ensure a minimum level of profitability of the economic capital in the PWB sector until 31 December 2014. The projections of Dexia's results for the period 2009-2014, communicated by the Member States concerned to the Commission [44], confirm that the overall profitability of the activities of the group can be ensured during this period and that the foreseeable losses from the activities in run-off (LPMD) can be offset by the profits from the Core division.

(175) Finally, the refocusing of Dexia's activities on its traditional activities and markets is accompanied by a gradual improvement in the group's liquidity profile, by adjusting the maturity of its funding more to the maturity of its assets. This improvement of the liquidity profile results from three main measures:

— the lengthening of the average maturity of the long-term funding and the increase in the sources of stable funding of the group. In this respect, the Commission views favourably the target ratios set by the restructuring plan for the short-term funding in relation to the total balance sheet, the average maturity of the liabilities of the group and the stable sources of funding in relation to the total assets of the group. The Commission considers that, on the strict condition that these ratios are respected at the deadlines set, the reduction in Dexia's exposure to the liquidity and transformation risks will make a positive contribution to restoring its long-term viability. Such a trend is also consistent with the new international standards for liquidity measurement and monitoring, currently under discussion at the Basel Committee on Banking Supervision,

— the gradual early exit from the guarantee mechanism for Dexia's bond liabilities by 30 June 2010. The Commission views an early exit of this kind from the guarantee as a positive factor in the context of restoring Dexia's long-term viability without State support,

— the ending of the funding made available by Dexia to its subsidiary DenizBank. This measure ensures that the planned development in DenizBank's RCB activity is financed from its own funds and does not further burden the financing needs of the group as a whole.

[44] See recital 64.

(b) **Stress scenarios communicated under the restructuring plan**

(176) In accordance with point 13 of the Restructuring Communication, the Commission asked the Member States concerned to carry out some stress test exercises to test Dexia's resilience to a series of shocks which could arise in the coming years and to draw conclusions on the long-term viability of the group.

(177) It is important to specify that the Commission based its analysis on the results of the tests as submitted by the Member States concerned. […].

(i) *First stress test*

(178) The Commission makes the following observations concerning the first stress test, which was designed to test Dexia's resilience to a change in the main macro-economic variables (GDP, interest rate and exchange rate):

— firstly, the variation in Dexia's profit seems at first sight to be relatively inelastic to the levels of stress applied to the growth rate. Despite simulating extremely stressed growth rates compared with historic observations, Dexia would still to a large extent remain in profit, although its profit would of course fall because of a rise in the cost of the risk. This could be imputable to (i) the relatively large proportion and good credit quality of the 'Public Finance' portfolio and the bond portfolio in run-off [45] and (ii) the fact that Dexia made the justified choice of not really adjusting the group income in the case of stress in its model,

— secondly, it appears that in the Dexia model used for the stress test, no material link is established between the growth rate and Dexia's funding cost and, more generally, the 'funding cost' variable, i.e. the margin above the interbank rate which Dexia would pay for new funding, was not stressed. This would also help to explain the relative inelasticity of Dexia's profit in the case of stress. This element is all the more pertinent when one considers that Dexia depends significantly on market-based and short-term funding, which increases both the extent to which and speed at which such an increase in the financing costs could impact on Dexia. In order to analyse this point, the Commission has asked for a second type of stress test to be carried out separately,

— thirdly, as regards the other two variables, the assumptions in a stress scenario were relatively similar to those used in a baseline scenario. For example, for interest rates, in both the baseline and the stress scenarios, the 3-month EURIBOR rates were projected at […] %, and the 5-year swap rates were projected at […] % and […] % respectively, suggesting negligible flattening of the curve. The exchange rates were also similar in both scenarios. For this reason, the Commission asked for a sensitivity analysis to be conducted separately (see recitals 186 to 195).

(179) Consequently, as far as this first stress test is concerned, the Commission concludes that, on account of the relatively large proportion and good credit quality of the 'Public Finance' portfolio and the bond portfolio in run-off, Dexia is capable of withstanding a significant increase in the cost of the risk in the event of a significant deterioration in the macroeconomic climate and consequently passes the stress test.

(ii) *Second stress test*

(180) As regards the second stress test, designed to test Dexia's resilience to an increase in the cost of its market-based funding, it appears that an additional rise of 100 basis points and of 200 basis points in the cost of funding over a period of 3 months would lead to a reduction in its pre-tax profit of EUR […] million and EUR […] million respectively. The impact would probably be materially greater if Dexia had used the assumptions laid down by the Commission in its stress test, […]. The assumptions amended by Dexia are the following,

— the rise in the cost of funding was simulated over a shorter period of […]. In this respect, the Commission notes that certain factors, such as Dexia's CDS or the cost of long-term senior unsecured funding increased by more than […] basis points and for a period exceeding […]. As regards the cost of short-term funding, without the unprecedented interventions by the Member States concerned and the central banks, which are due to disappear, this cost of funding would also have increased sharply,

— Dexia changed its funding mix and assumes, during the period when the cost of funding is stressed, that only short-term funding is carried out. In this respect, the Commission notes that such assumptions are not consistent with Dexia's recent experience, since despite the sustained increase in its cost of funding, Dexia increased the proportion of long-term funding,

— in the stress scenario, Dexia did not use assumptions in line with those used for other similar exercises recently conducted in Europe.

[45] For example, for the EUR 161,7 billion of assets comprising the LPMD division at 31 December 2009, 97 % have an 'investment grade' rating (AAA 32 %, AA 28 %, A 25 %, BBB 12 %).

(181) The Commission therefore concludes from this that […]. The Commission also notes that this parameter is not really taken into consideration in the other stress tests carried out by Dexia, i.e. the stress test conducted as part of other similar exercises recently carried out in Europe and the liquidity stress test.

(182) Dexia maintains that (i) the assumptions made in its business plan, before simulation of an increase of […] or […] basis points, are already inherently stressed as they reflect the funding conditions in July 2009, which were admittedly better than those at the end of 2008 or the beginning of 2009, but do not reflect the positive trend in the second half of 2009; (ii) an assumption of no change in the funding mix would not reflect the behaviour of a market operator in such circumstances. The Commission confirms that the projected assumptions of the cost of funding before stress simulation are conservative in view of Dexia's experience in 2009. However, given the exceptional measures granted to the banking sector in 2009 and the uncertain future context, the Commission is not able to pronounce on the future trend in the cost of Dexia's funding. The stress test on this last element is useful, as it allows the conclusion to be drawn that it is important that the restructuring plan (i) reduces Dexia's dependence on market-based financing and (ii) lengthens the average maturity of its funding, with a view to reducing Dexia's sensitivity to an increase in the cost of funding. This is precisely one of the elements which Dexia's management took into account between 30 September 2008 and 30 September 2009 and which the restructuring plan aims to cover. On the basis of a dynamic short-term funding requirement of EUR [200-300] billion at end-2008, this was reduced to EUR [150-200] billion at 30 September 2009, and the restructuring plan provides that the 'short-term funding/total balance sheet' ratio is reduced from 30 % at 31 December 2009 to 11 % at 31 December 2014. Such a level of short-term funding is entirely satisfactory for the Commission, as it significantly reduces Dexia's sensitivity to shocks of prolonged increases in the cost of funding.

(183) Consequently, as regards this second stress test, the Commission concludes that, although Dexia's current funding structure makes it vulnerable to extreme shocks to its cost of funding, the restructuring plan provides a gradual, satisfactory response to Dexia's sensitivity to an increase in its funding cost. Furthermore, the Commission takes a positive view of the fact that Dexia has a large stock of assets (including the assets of the LPMD division), which are of good quality and are eligible to obtain financing at a marginally lower cost in the interbank repo market and, if necessary, from central banks.

(iii) *Third stress test*

(184) As regards the third stress test, which is designed to test the group's liquidity profile, the Commission notes that both the stress test carried out by Dexia and that carried out by the CBFA suggest that the group meets the requirements of the test at a horizon of one month. The Commission notes the following elements:

— the liquidity stress test models, as established by Dexia and by the regulator, do not seem to make assumptions about the cost of this liquidity in exceptional circumstances and without State aid. In this respect, the Commission asked the group to carry out a separate stress test designed to simulate the 'funding cost' variable (see recitals 180 to 183),

— the stress test assumptions made by the CBFA, as set out in the Circular of 8 May 2009, are conservative and reflect the recent experience of the crisis. They include the following assumptions, for example: (i) the institution can no longer obtain unsecured financing on the money and capital markets; (ii) application of conservative haircut levels for repo financing; (iii) withdrawal by the retail customers of 5 % of their sight deposits and savings deposits within the period of one week and 20 % of these deposits within one month; (iv) withdrawal by wholesale customers of 100 % of their deposits repayable on sight (and not secured by liquid financial assets) and their deposits of uncertain maturity within the period of one week; (v) non-rollover of all time deposits of the institution at their next due date,

— the positive results of the liquidity stress test reflect (i) improvements made by Dexia's management during 2009 with a view to reducing the dynamic short-term funding needs, and (ii) financial market conditions which were favourable on the whole. However, passing a liquidity stress test at a given moment is no guarantee that it will be passed in the future. It is therefore important for a certain discipline (in financing policy) to be maintained during the coming months and years in order to be able to meet this stress test continuously. In this respect, the commitments notified in the restructuring plan not only point towards an improvement in the liquidity of the group, but also allow their implementation to be verified periodically.

(185) Consequently, the Commission concludes that Dexia passes this third stress test.

(iv) *Other considerations concerning the stress tests*

(186) Firstly, on the basis of the examination of certain assumptions retained in Dexia's models, it appears that:

— for certain types of sectors or counterparties, the assumptions concerning the probability of default and/or of loss given default ('LGD') are not very prudent when they are compared to certain publicly available information,

— for the portfolio of loans to local authorities, no rating migration assumption is made reflecting the deterioration in the future trend of public finances.

(187) However, it is important to stress that comparison with the publicly available data is difficult, since the scope of Dexia's exposures is not similar to that of the publicly available information. The method used by Dexia to calculate the expected losses is based on internal ratings, integrating average, long-term, conservative and through-the-cycle probability of default and LGD parameters, adjusted to reflect the uncertainty and volatility with regard to certain data. Such parameters are examined and validated by the CBFA, the French Commission bancaire and the CSSF. According to the Member States concerned, the risk parameters used by Dexia display a level of conservatism which is 10 % to 30 % above the minimum requirements under the prudential rules of Basel II.

(188) Secondly, the Commission notes the very large exposure, in both absolute and relative amounts, to the debt of certain countries and certain financial institutions. In particular, as regards the exposure to sovereign risks, the Commission notes the exposure, at the end of 2008, to […]. […].

(189) However, it is important to emphasise that:

— such exposures should not *a priori* have a material impact on the group result, especially if the group does not intend to sell these assets before contractual maturity (they could increase the volatility of the AFS reserve, which is shown in the group balance sheet),

— under Dexia's restructuring plan, these exposures would be reduced as provision is made for a substantial reduction in the bond portfolio.

(190) Thirdly, the Commission takes a favourable view of the trend in the group's need for short-term funding. However, the Commission emphasises that the group has essentially reduced its need for funding between 0 and 1 month. As shown in Table 7 below, as a percentage of the total funding, it appears that the funding between 0 and 1 month has been reduced by […] % to […] % between 31 December 2008 and 30 September 2009. However, the proportions of funding between 1 and 3 months, and between 6 and 12 months have increased from […] % to […] %, and from […] % to […] % respectively. The funding between 1 and 5 years has been increased from […] % to […] %. However, the bulk of the funding in this period is between 1 and 2 years. […].

Table 7

Share of the different sources of funding in Dexia's total funding

[…]

(191) In this respect, the restructuring plan notified to the Commission provides for (i) a reduction of EUR 83 billion in the bond portfolio of the LPMD division; (ii) an increase in the proportion of more stable sources of financing (such as commercial deposits and mortgage bonds) from 36 % to 58 %; (iii) a gradual lengthening of the average maturity of the liabilities. These factors will probably reduce the risks of refinancing problems for Dexia. Moreover, it is important to stress that the incremental rise in the costs of funding associated with this change in funding policy is integrated in the projections for the group's profit and loss account and confirms that Dexia would remain in profit during its restructuring period.

(192) Fourthly, despite the improvement in market conditions, Dexia's cost of funding remains relatively high in comparison with other banks. The level of 5-year CDS is among the highest in Europe and remains at about 180 basis points; the secondary levels of Dexia's credit spreads of unguaranteed benchmark-size issues remain high and stand at about 140 to 150 basis points for maturities of between 4 and 5 years; the cost of funding in covered bonds also remains high and stands at about 50 to 60 basis points for relatively similar terms to those of the assets financed.

(193) Fifthly, in order to measure Dexia's sensitivity to a variation in interest rates, Dexia communicated a table showing the sensitivity to a rate shock of 1 % for each maturity. This shows that in the event of a uniform rise in the rate curve, Dexia considers it will not lose more than EUR […] million ([46]). This level of sensitivity seems perfectly reasonable and is attributable in part to Dexia's policy of […], thereby reducing the sensitivity to rate variations. However, the Commission notes that in this sensitivity calculation exercise, EUR […] billion of the group's short-term funding is not included, which suggests that Dexia remains relatively sensitive to movements in the rates curve for maturities of less

([46]) At 30 September 2009.

than one year. This was confirmed by Dexia, since the group considers it made about EUR […] million in profit in 2009 merely through the effect of steepening of the curve of the interbank rates for less than one year. The effect of a significant reduction in transformation income was nevertheless considered in Dexia's projections and indicates that the group would remain in profit in the coming years.

(194) Sixthly, both the absolute and the relative level of Dexia's negative AFS reserve remain very high, despite the improvement observed during 2009. The negative AFS reserve improved from EUR 12,7 billion at 31 March 2009 to EUR 7,2 billion at 30 September 2009. Given (i) the level of Dexia's capital (EUR 17,1 billion in Tier 1 capital and EUR 19,6 billion in total regulatory capital at 30 September 2009), (ii) the current non-inclusion of the AFS reserve in the calculation of the regulatory capital, the Commission is concerned that the inclusion of this AFS reserve in the regulatory capital ratios, currently under discussion at the Basel Committee, will penalise Dexia. In this respect, the Commission notes the following factors:

— even if the negative AFS reserve had been included in full in the calculation of the regulatory capital, Dexia would still have satisfied the regulatory capital requirements at 30 September 2009. The Tier 1 capital ratio would have stood at […] and the total capital ratio at […],

— such a change in the regulations would have an impact on a large number of other banks,

— such a change in the regulations would not be applicable, according to the Member States concerned, before 2012. Between now and then, the restructuring plan provides for a reduction of 30 % to 40 % of the portfolio of the LPMD division (which is mainly responsible for the creation of this negative AFS reserve), which, all other things being equal, should reduce the amount of the negative AFS reserve.

(195) Seventhly, despite their reduction during 2009, Dexia still has certain relatively large off-balance-sheet commitments. However, according to Dexia, the latter were taken into consideration in the stress tests.

(c) **Derivatives activities**

(196) Analysis of the Dexia balance sheet shows that, at the end of 2008, the market value of the derivatives is EUR 55 billion on the assets side and EUR 75 billion on the liabilities side of the balance sheet, creating a significant negative difference in the order of EUR 20 billion, which stems mainly from interest rate derivatives. The Commission compared this difference with that reported by other financial institutions. Expressed as a percentage of the total balance sheet and as a percentage of capital, this difference is not only negative, but is also particularly large for Dexia compared to these other institutions.

(197) Dexia justifies this by (i) the almost systematic policy of […], (ii) the fall in interest rates (iii) the considerable difference between the average maturity of the assets and that of the liabilities, (iv) […]. The Commission accepts these explanations, but nevertheless notes that (i) the size of this negative difference really is very large and (ii) the latter probably requires considerable collateral for Dexia, which may reduce its eligible collateral base for financing from the central banks or in the interbank repo market. Nevertheless, as far as this latter point is concerned, such needs were taken into consideration in the stress tests.

(d) **Conclusion concerning viability**

(198) The Commission concludes from the analysis above that the restructuring plan will allow Dexia's long-term viability to be restored. In this respect, the Commission also notes that the restructuring plan will enable Dexia to cope with the expected tightening up of the prudential regulations. On the one hand, the deleveraging resulting from the restructuring is in line with the possible introduction of a maximum leverage ratio. On the other hand, the improvement in and diversification of Dexia's sources of financing are consistent with the introduction of new standards on liquidity risk measurement and monitoring for credit institutions ([47]).

8.3.3.3. ***Own contribution by the institution***

(199) According to section 3 of the Restructuring Communication, the restructuring plan must ensure fair burden-sharing of the costs of restructuring between the Member States concerned and the bank, i.e. the restructuring plan must provide for the highest possible contribution by the bank and its shareholders from their own resources. Such a contribution is necessary to ensure that rescued banks bear adequate responsibility for the consequences of their past behaviour and to create appropriate incentives for their future behaviour.

(200) Dexia, its shareholders and the Member States concerned have already made an own contribution to the restructuring effort in particular through the dilution of the share of the capital stock held by existing shareholders when the bank's capital was increased (the French and Belgian authorities directly subscribed to EUR 3 billion of the EUR 6,4 billion capital increase announced in September 2008).

([47]) See in particular Basel Committee on Banking Supervision, *International framework for liquidity risk measurement, standards and monitoring (Consultative Document)*, December 2009.

(201) The Commission notes, moreover, that a certain number of adverse factors accompany the suspension of the distribution of dividends provided for in the restructuring plan:

— the subsidiaries in which Dexia has a 50 % stake are not concerned by the suspension of distribution of dividends, since this applies only to the entities over which Dexia SA directly or indirectly exercises exclusive control ([48]), and

— under the terms of the restructuring plan, the suspension (until the end of 2011) of the distribution of dividends on hybrid Tier 1 or Tier 2 instruments is without prejudice to the operations which Dexia is required to undertake by virtue of contracts concluded before 1 February 2010.

(202) The Commission also notes that the suspension of payment of a dividend or a coupon on hybrid Tier 1 or Tier 2 instruments applies to the contracts concluded before 1 February 2010, in so far as, by virtue of the decision of 30 October 2009 ([49]), Dexia was required, for a period of four months, not to pay coupons and not to exercise early repayment options on its hybrid capital instruments (Tier 1 and Upper Tier 2). In this respect, the Commission notes that the volume of Dexia's hybrid instruments amounted to EUR 1,4 billion at 31 December 2008.

(203) Therefore, in order to ensure that no payment of coupon will be made on Dexia's hybrid instruments (Tier 1 and Upper Tier 2) contrary to the principles of the Restructuring Communication, the Commission makes its present decision conditional on Dexia, before making any payment of coupons on hybrid Tier 1 or Upper Tier 2 instruments issued before 1 February 2010, and no later than two weeks before the start of the notification period for payment of the coupon to investors, notifying the Commission, until 31 December 2011, of its intention to pay a coupon of this kind and showing that this payment (i) is mandatory, (ii) cannot be deferred, (iii) is not discretionary, and (iv) is not triggered automatically by a dividend payment, whatever the form, by Dexia SA or one of its subsidiaries, with the exception of the Tier 1 issue by DFL. The Commission reserves the right not to authorise such a payment if one of these four cumulative conditions above is not satisfied.

(204) Moreover, the Commission also notes that the suspension of payment of a dividend does not apply to the distributions of dividends undertaken entirely by allocation of new shares. However, it should be noted that the payment of dividends by allocation of new shares, made possible by the generation of profits available for distribution, is not contrary to the Restructuring Communication in so far as such payment would be posted to Dexia's accounts as incorporation in the reserve capital and a distribution of dividends taken from the profit of the last completed financial year and contributed by the shareholders to Dexia's capital. The allocation of shares would therefore have no impact on Dexia's capital.

(205) The Commission also notes that the payment of a dividend in Dexia shares does not involve the payment of a coupon on any of Dexia's hybrid instruments (Tier 1 or Tier 2), with the sole exception of an issue floated by Dexia Funding Luxembourg SA ('DFL') carried out in 2006. However, it should be specified that this exception was approved in the overall context of the restructuring plan. In general, as indicated in recital (204), the Commission is not opposed to a distribution of dividend paid exclusively in the form of shares on condition that this does not entail the obligation to pay a dividend or a coupon on other categories of securities constituting capital. In the present case, Dexia's obligation to pay a coupon on the DFL issue is not liable to change the Commission's approach in view of the fact that the exception comes under the restructuring plan, relates to a single issue which involves the payment of a limited coupon and Dexia forecasts a profit during the restructuring period.

(206) Finally, the Commission notes that the aid is limited to the minimum necessary by:

(a) divestments of assets and subsidiaries, including fairly profitable subsidiaries, such as 'Dexia Sabadell', 'Dexia Banka Slovensko' ('DBS') and 'Deniz Emeklilik' (the insurance subsidiary of its subsidiary DenizBank which operates mainly in the RCB market in Turkey); and

(b) appropriate remuneration for the aid received in the form of a guarantee by the Member States concerned on Dexia's liabilities and its impaired assets (see recitals 158 to 159).

(207) The factors set out above more than offset the many conditions and reservations noted as being adverse by the Commission, which accompany the suspension of the dividend distribution provided for in the restructuring plan. Consequently, the Commission considers that Dexia and its shareholders are making a sufficient contribution to the restructuring from their own resources.

([48]) See point 9 of Annex I to this decision.

([49]) See *State aid: Commission recalls rules concerning Tier 1 and Tier 2 capital transactions for banks subject to a restructuring aid investigation*, MEMO/09/441 of 8 October 2009, available at the Commission Internet site at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/441&format=HTML&aged=0&language=FR&guiLanguage=fr

8.3.3.4. ***Measures to correct the distortions of competition***

(208) According to section 4 of the Restructuring Communication, the restructuring plan must permit the limitation of excessive distortions of competition caused by the aid, i.e. the restructuring plan must provide for structural measures (divestment and/or reduction of business activities) and behavioural safeguards. Appropriate measures must be put in place to minimise the distortions of competition and avoid the State aid in favour of Dexia prolonging past distortions caused by excessive risk-taking and an unsustainable business model.

(209) According to point 30 of the Restructuring Communication, the nature and form of measures to limit the distortions of competition will depend on two criteria: first, the amount of the aid and the conditions and circumstances under which it was granted and, second, the characteristics of the market or markets on which the beneficiary bank will operate.

(210) With regard to this latter criterion, the Commission observes that Dexia is a key player on the local authority financing market ('PWB'), especially in France, Belgium and Italy, and has a significant presence in Spain. The PWB market is heavily concentrated in Belgium ([50]), France ([51]) and Italy ([52]) and the entry barriers there are high ([53]).

(211) The Commission notes, moreover, that the restructuring plan guarantees that Dexia will take the necessary steps to open up the local authority financing market and limit the distortions of competition on this market generated by the aid received:

— firstly, the reduction in the scope of the PWB activities on Dexia's core markets, through the limitation, and even the abandonment, of the PWB International turnover will enable competition to be increased on certain markets. In this respect, Dexia undertook to sell Crediop, a key player in local authority financing in Italy, and Dexia Sabadell, which operates in the Spanish market,

— secondly, in the core markets where Dexia still operates, the limitation of the volume of new turnover will also allow the entry of new operators and will promote competition in these markets (Dexia is limiting new annual turnover in PWB to EUR 12 billion in 2009, EUR 15 billion in 2010 and EUR 18 billion from 2011 to 2014, which represents a significant reduction compared to the level of EUR 34 billion recorded in 2008),

— finally, Dexia has undertaken to abandon its majority stake in AdInfo, a subsidiary which provides IT services to the local authorities in Belgium. This subsidiary provides Dexia with access to a large number of public-sector customers throughout Belgium and has enabled it to strengthen its position as reference banker for local operators in Belgium and to develop technological solutions compatible with the financial services it offers the local authorities. In this respect, the Commission considers that the sale of this subsidiary will allow greater competition in the PWB market in Belgium.

(212) Moreover, Dexia has undertaken that the RAROC on each loan granted to PWB customers will remain over 10 %, which will ensure that the rates applied by Dexia to these customers are in line with market rates and prevent Dexia assuming a dominant position in this market in the future by applying rates which are below market rates.

(213) Dexia is less present on the retail banking market than in local authority financing. The group engages in retail banking through its subsidiaries in four main countries: Belgium through DBB, Luxembourg through Dexia BIL, Slovakia through Dexia Banka Slovensko (DBS) and Turkey through DenizBank. Measured in terms of deposits, Dexia has a market share of about [10-15] % in Belgium, [10-15] % in Luxembourg, [0-5] % in Slovakia and [0-5] % in Turkey.

(214) Since the retail banking market is not as concentrated as that of local authority financing in France, Belgium, Italy and Spain, there is less need for measures to limit the distortions of competition. In particular, in Belgium where Dexia has its largest market share, it occupies only third place.

([50]) See in particular the Commission Decision regarding concentrations in case M. 2400 (*Dexia/Artesia*). In this decision, the Commission points out that Dexia is a heavily dominant player in the Belgian market with a market share of 80 % to 85 % of the national 'local authorities' financing market and of 65 % to 70 % if non-local authorities, like regions or communities, are also taken into account.

([51]) In France, according to the information available to the Commission, Dexia Crédit Local accounts for the lion's share, i.e. [40-45] %, of the stock of long-term loans to the local authorities, its main competitors being the savings banks (about 20 %), Crédit Agricole (about 15 %), Société Générale and BNP Paribas.

([52]) In Italy, according to the information available to the Commission, four banking groups share 80 % of the market, with Dexia in second place (about [20-30] %) after Cassa Depositi et Prestiti ('CDP'). The other two players are Intesa SanPaolo (14 %) and BNL (10 %).

([53]) A certain number of factors tend to indicate, inter alia, that the tendering procedures are not always organised transparently and openly and that the costs of transfers are quite high for the local authorities (especially as the historical operating banks offer a whole range of services to the authorities, such as treasury management services, financing being only one aspect).

(215) In any case, the Commission welcomes Dexia's commitment to the following measures in the retail banking sector:

— divestment of Dexia Banka Slovensko,

— abandonment of intra-group financing to DenizBank until end-2014,

— divestment of Dexia Epargne Pension, which operates in the field of collective insurance and life assurance in France,

— divestment of the holding in Crédit du Nord, which operates in the retail market in France; and

— divestment of the insurance business in Turkey.

(216) The restructuring plan will lead to a 35 % reduction in Dexia's total balance sheet in 2014 compared to 2008. This downsizing also results from the run-off of the activities ringfenced in the LPMD, the refocusing of Dexia's activities on its historical markets, the divestment of activities and the limitation of its new PWB turnover.

(217) Dexia is subject to certain behavioural safeguards, such as not making any acquisition (until 30 December 2011) of more than 5 % of the share capital of other credit institutions or investment firms ([54]). This safeguard ensures that in principle Dexia will not make the acquisition of another credit institution or investment firm in order to exercise control over it within the meaning of the merger rules. This principle is consistent, in particular, with point 40 of the Restructuring Communication.

(218) In the light of Dexia's own contribution and the measures in its core markets, the Commission concludes that the structural measures as a whole contained in the restructuring plan are sufficient to limit the excessive distortions of competition arising from the aid in question.

(219) Finally, Dexia will implement the principles of remuneration agreed by the G-20 and the national bodies concerned regarding the remuneration of members of the Management Board and the Executive Committee of Dexia and its main operating entities.

([54]) See point 2 of Annex I to this Decision.

8.3.4. MONITORING OF THE MEASURES

(220) The Commission notes that point 46 of the Restructuring Communication recommends that a detailed report should be submitted regularly by the Member States concerned to the Commission to enable the latter to verify that the restructuring plan is being applied in accordance with the commitments notified. In this respect, half-yearly reports will be addressed to the Commission by the independent expert in charge of monitoring the restructuring plan, before 1 October and 30 April each year.

IX. **CONCLUSIONS**

(221) The Commission finds that Belgium, France and Luxembourg unlawfully implemented aid in the form of a capital increase, guarantee and guaranteed LA operations, in breach of Article 108(3) TFEU.

(222) On the basis of the information and commitments communicated to the Commission by the Member States concerned, the Commission authorises Dexia's restructuring plan and the conversion of the emergency aid into restructuring aid under the conditions provided for under Article 2. The Commission also considers that the restructuring plan responds to the allegations made in the complaint communicated to it, without prejudice to the complainant asserting his rights for the period when the aid in question was not authorised,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures implemented by Belgium, France and Luxembourg in favour of Dexia, for an amount of EUR 8,4 billion, in the form of a capital increase and aid for the treatment of impaired assets, and for an amount of EUR [95-135] billion, in the form of a guarantee and guaranteed liquidity assistance operation ('liquidity assistance' or 'LA'), constitute State aid within the meaning of Article 107(1) TFEU.

2. This aid is compatible with the internal market under the conditions provided for in Article 2.

Article 2

1. Belgium, France and Luxembourg shall respect all the commitments and conditions set out in Annex I to this decision within the time limits fixed.

2. Before making any payment of coupons on hybrid Tier 1 or upper Tier 2 instruments issued before 1 February 2010, and at the latest two weeks before the start of the notification period for the payment of the coupon to investors, Dexia shall notify the Commission, until 31 December 2011, of its intention to pay such a coupon and shall demonstrate that this payment:

(i) is mandatory;

(ii) cannot be deferred;

(iii) is not discretionary; and

(iv) is not triggered automatically by a dividend payment, whatever the form, by Dexia SA or one of its subsidiaries, with the exception of the Tier 1 issue by DFL (ISIN code XS0273230572).

The Commission reserves the right not to authorise such a payment if any of the four cumulative conditions set out above is not satisfied.

Article 3

Belgium, France and Luxembourg shall inform the Commission, within a period of two months from the date of notification of this decision, of the measures taken to comply therewith.

Belgium, France and Luxembourg shall submit to the Commission, throughout the period of the restructuring plan, on a six-monthly basis, a detailed report on the achievement of the restructuring measures set out in their commitments notified to the Commission on 9 February 2010 (attached as Annex I to this decision). The first report shall be communicated within six months of the date of this decision.

Article 4

This decision is addressed to the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg.

Done at Brussels, 26 February 2010.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX I

COMMITMENTS OF THE MEMBER STATES CONCERNED NOTIFIED TO THE COMMISSION ON 9 FEBRUARY 2010

Behavioural commitments

1. Unless otherwise specified, the commitments below, with the exclusion of the commitment under point 7 below, shall apply until 31 December 2014.

2. Until 31 December 2011, Dexia SA and the subsidiaries over which it exercises exclusive or joint control ('Dexia') shall not make any acquisition of more than 5 % of the share capital of other credit institutions or investment firms (within the meaning of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments) or insurance companies, unless authorised to do so by the Commission.

   The commitment above shall not impede the acquisition by Dexia, subject to the prior agreement of the Commission, of a holding, as remuneration for a contribution of holdings or business activities carried out as part of a divestment or pooling (by merger or contribution) of assets or business activities, provided that, in such a case, this holding does not confer on Dexia the exclusive or joint control of the entity receiving the contribution or resulting from the merger.

   Dexia shall inform the Commission in advance of any acquisition plans, including any plans considered by undertakings over which Dexia exercises joint control.

3. (a) Dexia shall refrain from lending to its PWB customers at a level of risk-adjusted return on capital ('RAROC') below 10 %. The RAROC shall be calculated as the ratio between the net margin after tax and the economic capital. Within the meaning of this commitment letter:

      (i) the gross margin is the difference between the margin invoiced to the customer (expressed in basis points above the IBOR reference rate) and Dexia's funding cost (expressed in basis points above the IBOR reference rate) represented by the internal transfer price;

      (ii) the internal transfer price will reflect the estimated cost of Dexia's new funding, taking account of the characteristics (maturity, eligibility for funding by covered bonds, etc.) of the loans to PWB customers;

      (iii) the net margin is equal to the gross margin less (i) costs of all kinds (overheads, salary costs, operating costs, amortisation and depreciation, etc.) estimated on the basis of the observation of the costs of lending to PWB customers, (ii) cost of average risk calculated for each transaction in accordance with the Basel II methodology (cost of average risk over a long period) and (iii) a tax charge. The economic capital is calculated in accordance with the Basel II methodology.

   (b) An independent expert shall be appointed, in accordance with the terms and conditions set out under point 17 below, to verify every six months that:

      (i) the RAROC within the meaning of this commitments letter and its components (costs of new funding, overheads, wage costs, operating expenses, amortisation and depreciation, cost of risk, tax charge, etc.) reflects the contribution of the activity of lending to PWB customers to the profitability of the group;

      (ii) The calculation of the RAROC is correct; and

      (iii) The methodology is respected.

   (c) The independent expert shall verify every six months that the commitment entered into under point 3(a) is respected.

   (d) The independent expert shall have access to Dexia's internal rules of procedure, specifying and generalising the use of the RAROC (within the meaning of this commitments letter) and to the list and conditions of each loan granted by Dexia to its PWB customers.

4. Dexia shall end the intra-group finance currently made available to its Turkish subsidiary DenizBank by 30 June 2011 at the latest and shall not grant it any new financing until 31 December 2014.

5. Dexia shall reduce the proportion of short-term funding in its balance sheet and shall lengthen the average maturity of its long-term funding. Compliance with this commitment shall be assessed overall by means of three quantitative indicators. In this context:

(a) Dexia shall maintain the 'short-term funding/total balance sheet' ratio defined in Annex II to this decision, at 30 % at 31 December 2009, at a level below or equal to 23 % at 31 December 2010, below or equal to 20 % at 31 December 2011, below or equal to 14 % at 31 December 2012, below or equal to 13 % at 31 December 2013 and below or equal to 11 % at 31 December 2014. For the purposes of this commitment, the ratio shall also be monitored as an annual average over the entire reference period.

(b) Dexia shall lengthen the maturity of its funding and shall reduce its duration gap by maintaining the average term of the liabilities of the group as defined in Annex II to this decision, at a level above or equal to the levels below:

(years)

31.12.2009	31.12.2010	31.12.2011	31.12.2012	31.12.2013	31.12.2014
[…]	[…]	[…]	[…]	[…]	[…]

(c) Dexia shall increase its stable sources of funding. A ratio shall be calculated, with the numerator equal to the sum of the funding in the form of covered bonds and the funding in the form of RCB and PWB commercial deposits and with the denominator equal to the sum of all the assets of the Dexia group. This ratio, equal to 36 % at 31 December 2009, must be above or equal to 40 % at 31 December 2010, above or equal to 45 % at 31 December 2011, above or equal to 53 % at 31 December 2012, above or equal to 55 % at 31 December 2013 and above or equal to 58 % at 31 December 2014.

6. Until 31 October 2014, Dexia:

(i) shall not use its status as a bank with a guarantee by the States for some of its commitments for commercial advertising purposes in relation to third parties other than third party beneficiaries; and

(ii) shall not use the guarantee for purely arbitrage transactions.

7. By 30 June 2010, Dexia shall establish a reporting line known as '*Legacy Portfolio Management Division*'. The assets allocated to this line shall be placed in run-off or sold under the commitment set out under point 13(n) below. These assets shall be the following: (i) the CSP/PSP portfolios (estimated at approximately EUR 134 billion at 31 December 2009), (ii) the FP portfolio (estimated at approximately EUR 10,7 billion at 31 December 2009) and (iii) the non-core PWB loans portfolio (estimated at approximately EUR 17 billion at 31 December 2009). The funding raised by Dexia with the funding guarantee shall be allocated in full to this line.

8. Dexia shall limit the amount of:

(a) any form of dividends distributed by Dexia SA in respect of its ordinary shares; and

(b) any discretionary early repayment or payment of coupons on hybrid Tier 1 instruments or Tier 2 instruments (i) issued by entities over which Dexia has exclusive control (ii) held by persons or entities other than Dexia SA and its subsidiaries and (iii) the payment or exercise of which is discretionary by virtue of the contractual provisions covering these instruments;

so that, after the distribution or the payment under consideration (and taking account of any payments which have become mandatory on account of the payment of a dividend in respect of ordinary shares), the Dexia group's Core Tier 1 (calculated by reference to the latest consolidated annual accounts prepared in accordance with IFRS).

(i) remains above or equal to the level below:

31.12.2009	31.12.2010	31.12.2011	31.12.2012	31.12.2013	31.12.2014
10,7 %	10,6 %	[…] %	[…] %	[…] %	[…] %

(ii) and remains above or equal to the sum of:

(i) 12,5 % of the risk-weighted assets of the Legacy Portfolio Management Division, as defined in point 7 above; and

(ii) 9,5 % of the risk-weighted assets of the other activities of the group (the 'Core Division').

The commitment above:

(i) shall be without prejudice to the distributable profit requirement (within the meaning of Article 617 of the Belgian Companies Code) at Dexia level;

(ii) shall be without prejudice to the operations which Dexia shall be legally required to undertake in respect of hybrid Tier 1 or Tier 2 instruments or operations which Dexia shall be required to undertake in relation to such instruments by virtue of contracts concluded before 1 February 2010;

(iii) shall be revised in the event of significant change in the definition of the prudential own funds and accounting standards applicable to Dexia; and

(iv) shall apply to any distribution made up to 31 December 2014.

9. Moreover, without prejudice to the operations which Dexia may be legally required to carry out, or the operations which it may be required to carry out by virtue of contracts concluded before 1 February 2010, relating to hybrid Tier 1 or Tier 2 instruments, Dexia shall refrain until 31 December 2011 from:

(a) making any payments of coupons on hybrid Tier 1 or Tier 2 instruments held by persons or entities other than Dexia SA and its subsidiaries, the payment of which is discretionary by virtue of the contractual provisions covering these instruments;

(b) approving or voting in favour of the payment of any form of dividend by any entity over which Dexia SA directly or indirectly exercises exclusive control (including entities which it fully owns) when such a payment would involve an obligation to pay a coupon on hybrid Tier 1 or Tier 2 instruments held by persons other than Dexia SA and its subsidiaries; and

(c) exercising a discretionary early repayment option for the hybrid Tier 1 or Tier 2 instruments referred to in point (a) above.

Dexia SA shall refrain from the distribution of dividends on its ordinary shares until 31 December 2011. This prohibition shall not apply to distributions of dividends made entirely by the allocation of new shares, provided that the amount of these distributions is (i) in accordance with point 8 above and (ii) below or equal to 40 % of the net result made by Dexia SA for the financial year 2009 as regards the distributions made in 2010 and below or equal to 40 % of the net result made by Dexia SA for the financial year 2010 with regard to the distributions made in 2011.

10. Dexia shall continue to implement the principles of remuneration agreed by the G-20 and the national bodies concerned regarding the remuneration of members of the Management Board and the Executive Committee of Dexia SA and of the main operating entities of the Dexia group.

11. In accordance with the restructuring plan submitted on 17 December 2009, Dexia:

(a) under its new turnover policy, shall limit new PWB turnover to EUR 12 billion in 2009, EUR 15 billion in 2010 and EUR 18 billion from 2011 to 2014;

(b) shall reduce its operating costs by 15 % by 31 December 2012;

(c) in its trading activities, shall ensure that it does not take risks on its own account which would not be in line with the objective of returning to viability on the basis of prudent management. Consequently, Dexia shall reduce its trading activities (44 % reduction in terms of value of average annual risk, which amounted to EUR 126 billion in 2008) and shall cease its proprietary trading activities from the date of the Commission Decision;

(d) shall definitively waive the benefit of the Dexia BIL convertible bond for an amount of EUR 376 million, to which Luxembourg had undertaken to subscribe in September 2008, with immediate effect from the date of the Commission Decision.

Funding guarantee

12. Dexia's recourse to the funding guarantee, as extended by the addendum of 14 October 2009 ('the Guarantee') shall be limited under the following conditions:

(a) The possibility for Dexia to make use of the Guarantee shall be ended for all deposit contracts concluded as from 31 March 2010;

(b) The possibility for Dexia to make use of the funding Guarantee shall be ended for all short-term issues (at less than one year) as from 31 May 2010;

(c) The possibility for Dexia to make use of the funding Guarantee shall be ended for all issues floated or contracts concluded as from 30 June 2010;

(d) The total outstanding amounts guaranteed may at no time exceed EUR 100 billion;

(e) During the period covered by the guarantee, Dexia shall pay the States additional remuneration on any amount exceeding the following thresholds of outstanding amounts guaranteed:

Threshold/tranche (outstandings guaranteed in EUR billion)	[60-70]	[70-80]	[80-100]
Additional remuneration for excess in basis points	+ 50	+ 65	+ 80

Divestments and run-offs

13. Dexia shall undertake the divestments of the assets according to the list and schedule set out below:

(a) Divestment or stock exchange flotation of the group's 70 % stake in its Italian subsidiary, Crediop, by 31 October 2012. Under point 15 of the Bank Restructuring Communication, Dexia shall not be required to sell its stake in Crediop at an excessively depressed price (less than […] times the book value in 2010 and 2011 and […] times the book value in 2012).

(b) Divestment by 30 June 2010 of Dexia Epargne-Pension (DEP), French subsidiary of DIB (Dexia Insurance Belgium), which operates in the fields of life assurance and collective insurance. The sales agreement was signed on 9 December 2009 and the sale should be completed during the first half of 2010.

(c) Divestment or stock exchange flotation by 31 December 2010 of Dexia's 51 % stake in AdInfo, a subsidiary active in the provision of IT services to local authorities in Belgium.

(d) Divestment of Dexia's stake in SPE by 31 December 2010.

(e) Divestment of Dexia's 20 % stake in Crédit du Nord. This divestment took place on 11 December 2009 (actual transfer of the securities and cash).

(f) Closure by 2010 of about 80 branches in Belgium under the new group distribution model.

(g) Cessation of the following activities of RCB International:

(i) the divestment of Experta Jersey, the run-off of Dexia PB Jersey, the cessation of Montevideo's PB activities, the cessation of the PB development project in Singapore, the cessation of the consumer finance project in Russia and the cessation of the activities of Dexia Asset Management (DAM) in the countries of Central and Eastern Europe and the divestment of the trust activities of Experta in Switzerland were carried out in 2009 and early 2010;

(ii) the divestment of Experta's trust activities in the Bahamas and the divestment of the Danish subsidiary of Dexia BIL, which engages in asset management, private banking and market activities/structuring are to be realised by 31 December 2011.

(h) Divestment or stock exchange flotation by 31 October 2012 of Dexia's stake in its Slovak subsidiary Dexia Banka Slovensko (DBS). Under point 15 of the Bank Restructuring Communication, Dexia shall not be required to sell DBS at an excessively depressed price (less than […] times the book value in 2010 and […] times the book value in 2011).

(i) Cessation and run-off of the following PWB international activities:

1. India: sale of the entity carried out in 2009;

2. Switzerland (Dexia Public Finance Switzerland) and Sweden (Dexia Norden): closure and liquidation by 31 December 2010;

3. Mexico, Australia and Japan: run-off of the balance sheet and staff cuts. The Mexican entity was closed in 2009 and its assets were transferred to DCL New York where they are placed in run-off; the workforce in Japan and Australia was halved in 2009 and the related activities will be placed in run-off.

(j) Divestment of FSA (finalised on 1 July 2009) then divestment of Dexia's holdings in Assured Guaranty (AGO) by 31 December 2011.

(k) Divestment of the group's 49 % stake in Kommunalkredit Austria (KA), which took place in the fourth quarter of 2008.

(l) Divestment or stock exchange flotation of Deniz Emeklilik, the insurance subsidiary of DenizBank by 31 October 2012.

(m) Divestment of the group's 60 % stake in Dexia Sabadell by 31 December 2013.

(n) Fast-track divestment of Dexia's bond portfolio at the rate of EUR [10-20] billion per year in 2010 and 2011, EUR [5-15] billion to EUR [10-20] billion in 2012, EUR [0-10] billion to EUR [5-15] billion per year in 2013 and 2014.

(o) In accordance with the restructuring plan submitted on 17 December 2009, run-off of the Standby Bond Purchase Agreements (SBPA) and Tender Option Bonds (TOB) activities (USA/Canada).

The divestment commitments listed in points (a) to (n) above shall be deemed to have been met when Dexia and the purchaser have concluded a binding, definitive agreement (i.e. an agreement which cannot be cancelled unilaterally by Dexia without payment of a penalty) for the divestment of Dexia's entire holding in the entity or asset concerned, even if all the authorisations or declarations of non-objection have not yet been obtained from the competent supervisory authorities when the agreement is signed.

14. The divestments of assets described under point 13 above, and the amortisation of Dexia's assets and liabilities shall lead to the following results:

(a) The 35 % reduction in Dexia's total balance sheet by 31 December 2014 compared to its amount at 31 December 2008, under the conditions and according to the accounting conventions described in the additional measures of Dexia's restructuring plan notified to the Commission on 17 December 2009. In absolute value, the total balance sheet shall be reduced from EUR 651 billion at 31 December 2008, to EUR 580 billion at 31 December 2009, EUR [510-550] billion at 31 December 2010, EUR [485-545] billion at 31 December 2011, EUR [425-490] billion at 31 December 2012, EUR [405-465] billion at 31 December 2013 and EUR 427 billion at 31 December 2014, i.e. a reduction of EUR 224 billion. These amounts will have to be corrected for the trend in the market value of the derivatives recorded in Dexia's balance sheet if this trend differs from that described in Dexia's restructuring plan and provided that such a divergence does not result from a significant rise in the notional amount of these derivatives.

(b) The total balance sheet of the Core Division shall amount to EUR [390-410] billion at 31 December 2010, EUR [385-415] billion at 31 December 2011, EUR [345-380] billion at 31 December 2012, EUR [335-365] billion at 31 December 2013 and EUR 353 billion at 31 December 2014, i.e. a reduction in the order of 45 % in relation to the group's total balance sheet at 31 December 2008. The annual trend in sizes of the balance sheet of the activities of the Core Division and Legacy Portfolio Management Division respectively shall be consistent with the description given in Annex II to this decision.

Agent responsible for the sale

15. (a) In the absence of compliance with any of the asset divestment commitments referred to under points 13(a), 13(c), 13(d), 13(h), 13(l) or 13(m) within the time limits set above, and in the absence of approval of an alternative commitment by the Commission, the French, Belgian and Luxembourg authorities shall submit for prior approval by the Commission, no later than one month after the time limit set for the sale, a list of one to three persons, selected in agreement with Dexia, for appointment as agent(s) responsible for carrying out the aforementioned sales.

(b) The agent responsible for the sale must be independent, possess the required skills and may not be exposed to conflicts of interest when performing his task.

(c) The Commission may either approve or reject the agent(s) proposed. If the Commission rejects the agent(s) responsible for the sale proposed, Dexia and the French, Belgian and Luxembourg authorities shall propose, within one month of communication of the rejection, one to three new candidates who shall also have to be approved or rejected by the Commission. If all the candidates proposed are finally rejected by the Commission, the latter shall designate an agent, whom Dexia shall appoint or contribute to appointing, on the basis of a mandate approved by the Commission.

(d) The French, Belgian and Luxembourg authorities undertake that Dexia shall grant the necessary and appropriate powers of attorney to the agent responsible for the sale:

(i) to carry out the sale of the assets referred to in point (a) above (including any necessary powers to ensure satisfactory execution of the documents required to carry out the sale); and

(ii) to perform any action or make any declaration necessary or appropriate to carry out the sale, including the appointment of advisers to accompany the sale process.

(e) The agent responsible for the sale shall include in the contract(s) of purchase and sale the usual, reasonable terms and conditions he considers appropriate to conclude the sale in the year following his appointment. The agent responsible for the sale shall organise the sales process in such a way as to ensure a divestment […].

(f) The costs of the services of the agent responsible for the sale shall be paid by Dexia.

Implementation

16. If a change occurs in the control of Dexia, the Commission may decide that some or all of the commitments set out above cease to apply. It shall take account of the effect of the proposed change on the long-term viability and competition and, in particular, shall apply the principle that the sale of the beneficiary of aid to a competitor in itself constitutes a form of compensation for any distortions of competition.

17. (a) The Belgian, French and Luxembourg authorities shall submit to the prior approval of the Commission, and at the latest one month after this final decision, a list of one to three persons, chosen in agreement with Dexia, to be appointed as independent expert responsible for detailed verification of the application of the commitments above (the 'independent expert').

    (b) The independent expert must have the required skills and may not be exposed to conflicts of interest when performing his task.

    (c) The Commission may either approve or reject the independent expert(s) proposed. If the Commission rejects the independent expert(s) proposed, Dexia and the Belgian, French and Luxembourg authorities shall propose, within one month of communication of the rejection, one to three new candidates who shall also have to be approved or rejected by the Commission.

    (d) If all the candidates proposed are finally rejected by the Commission, the Commission shall designate an 'independent expert'.

    (e) The costs of the services of the independent expert shall be paid by Dexia.

18. (a) Throughout the restructuring plan, the Commission shall have unrestricted access at all times to the information necessary to implement its decision approving the restructuring plan. With the agreement of the Belgian, French and Luxembourg authorities, it may apply to Dexia directly to obtain the required explanations and specifications. The Belgian, French and Luxembourg authorities and Dexia shall provide full cooperation with regard to all the verifications which the Commission or, where appropriate, the independent expert may request.

    (b) The independent expert, in cooperation with Dexia, shall submit a half-yearly report to the Commission on the implementation of the commitments above. This report shall include a detailed account of the progress in the implementation of the restructuring plan and shall cover in particular: (i) the reduction in the size of the balance sheet as provided for in point 14 above, (ii) the liquidity and funding ratios as provided for in point 5 above; (iii) compliance with the RAROC commitment during the previous six months provided for in point 3 above; (iv) the divestments and closures of activities provided for in point 13 above, including the date of the divestment or closure, the book value of the assets at 31 December 2008, the value of the divestment, the capital gains or losses made and the details of the measures still to be implemented under the restructuring plan. This report shall also include the cost components and the calculation of the RAROC (mentioned in point 3 above) applicable for the six months following the submission of the report. This report shall be submitted no more than one month after the presentation of the half-yearly accounts and the approval of the annual accounts and in any event before 1 October and 30 April of each year.

    (c) If, in his report presented before 1 October of each year, the independent expert considers it possible that the annual objectives provided for above may not be attained at the end of the year in progress, the Belgian, French and Luxembourg authorities shall present to the Commission, within a month of submission of the report, the measures planned with Dexia to enable these objectives to be attained by the appropriate means before the end of the year.

    (d) If, in his report presented before 30 April of each year, the independent expert finds that the annual objectives provided for above have not been attained, the Belgian, French and Luxembourg authorities shall present to the Commission, within a month following the submission of the report, the measures planned with Dexia to enable these objectives to be attained by the appropriate means before 30 June of the current year.

19. If the measures envisaged under points 18(c) and 18(d) above are not presented within the time limit laid down or if the objectives are not attained by 30 June (concerning the measures presented, where appropriate, after the report to be filed by 30 April), the Commission may, pursuant to Regulation (EC) No 659/1999, reopen the formal investigation procedure. […]

Revision of the commitments

20. On the basis of a duly substantiated request by France, Belgium and Luxembourg, the Commission may:

    (a) authorise Dexia to delay the divestment of one or more assets referred to in point 13 above; or

    (b) authorise Dexia to substitute for the divestment of one or more assets referred to in point 13 above a divestment of assets representing an equivalent proportion of Dexia's balance sheet; or

(c) decide that one or more of the commitments set out above no longer applies;

(d) take account of Dexia’s ability to cover its short-term funding need by mobilising its asset reserves eligible for repos if one or other of the indicators defined in point 5 is not achieved.

21. The Commission may take one of the decisions mentioned in the previous paragraph if it considers that such a decision is necessary, for example to maintain effective competition in the market or to restore financial stability in the event of a lasting financial or economic crisis, or if the trend in the economic environment, and notably the exchange rates, or accounting and prudential rules, so justify.

Competition and transparency regarding the bank loans of the local authorities

22. With a view to boosting competition and transparency still further regarding local authorities’ bank loans, France undertakes to ensure that the local authorities develop their competitive procurement practices when procuring money or capital.

The State shall expressly issue recommendations along these lines to the local and regional authorities before the end of 2010, concerning both bank finance and the use of complex financial products.

These recommendations shall stress the inherent economic interest, in this sector, of implementing competitive procurement measures and shall indicate the different practical arrangements under which these measures can be implemented. The good practices advocated shall provide for the public nature of the competitive procurement for the largest borrowings.

These recommendations shall be brought to the attention of the departments responsible for providing the local and regional authorities in particular with assistance and advice. If these recommendations were to prove insufficient to ensure by 2013 the generalisation of transparent, non-discriminatory calls for tender by the local authorities for bank finance, France undertakes to make proposals for legally binding measures to this effect.

23. With a view to boosting competition and transparency still further regarding local authorities’ bank loans, the Belgian Government, in agreement with the Regions, undertakes to monitor the publication by the contracting authorities of contract award notices relating to the financing of the local public authorities.

ANNEX II

1. Trend in the size of the balance sheet for the Core Division and Non-Core activities, including intra-division financing

(EUR billion)

	2009	2010	2011	2012	2013	2014
Total Core assets	419	[390-410]	[385-415]	[345-380]	[335-365]	353
Total Non-core assets	162	[120-140]	[100-120]	[80-110]	[70-100]	79

2. Total size of the group's consolidated balance sheet

(EUR billion)

31.12.2008	31.12.2009	31.12.2010	31.12.2011	31.12.2012	31.12.2013	31.12.2014
651	580	[510-550]	[485-545]		[405-465]	427

3. Definition of RAROC under point 3(a) of the commitments

The RAROC is calculated using the following formula:

$$EC_{t=0} = \sum_{t=1}^{T} \frac{(Revenues_t - EL_t - Costs_t) \times (1 - taxes) + (EC_{t-1} - EC_t)}{(1 + RAROC)^t}$$

where:

EC = economic capital

EL = expected loss

Costs = costs allocated to the transaction under the business line

4. Definition of the group's short-term funding covered in point 5(a) of the commitments

The short-term funding referred to under point 5(a) comprises: repo operations of all kinds (with the central banks, bilateral or triparty), certificates of deposit and commercial paper, interbank deposits, fiduciary deposits, central bank deposits and other wholesale financing. This group is monitored by the liquidity competence centre within the group and its composition is subject to rules which will be transmitted to the independent expert.

5. Definition of the group's liabilities covered in point 5(b) of the commitments

The liabilities of the group referred to in point 5(b) comprise:

(i) the long-term stock of all the covered bonds issued by the group and issues in EMTN format (guaranteed, unguaranteed and placed on the interbank market or via the retail banking network);

(ii) the short-term stock of all the short-term funding recorded in the group's balance sheet.

COMMISSION DECISION

of 27 April 2010

on the State aid implemented by Belgium for the restructuring of the Ostend fish auction

(State aid C 30/08 (ex NN 21/08))

(notified under document C(2010) 2520)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2010/607/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 [1], and in particular Article 62(1)(a) thereof,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2], and in particular Article 7(5) and Article 14 thereof,

Having called on interested parties to submit their comments [3] pursuant to the first subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) [4] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 16 February 2006 the Commission received a complaint concerning aid granted by the Belgian authorities to the Ostend fish auction, registered under reference number CP 40/06. On 31 July 2007 an additional complaint was received pertaining to the same issue.

(2) By letters of 13 March 2006, 26 June 2006 and 11 July 2007, the Commission has requested the Belgian authorities to provide information about these measures, to which they responded by letters of 11 May 2006, 20 October 2006 and 27 November 2007.

(3) After examination of the information and documents provided by the Belgian authorities, the Commission informed the Belgian authorities on 3 July 2008 of its decision to initiate the procedure laid down in Article 108(2) of the TFEU and Article 6 of Regulation (EC) No 659/1999.

(4) By letter of 16 July 2008 the Belgian authorities have transmitted to the Commission certain documents relating to the privatisation of the Ostend fish auction contemplated by the City of Ostend.

(5) By letter of 25 July 2008 the Belgian authorities requested an extension until the 8 September 2008 to submit their comments. The extension was granted on 4 August 2008.

(6) By letter of 8 September 2008 the Belgian authorities submitted their comments on the decision to initiate the formal investigation procedure.

(7) The Commission Decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* [5]. The Commission has invited interested parties to submit their comments within one month of the date of the publication.

(8) The Commission met the Belgian authorities on 9 October 2008. During this meeting, the Belgian authorities gave information about the manner in which they intended to organise the privatisation of the fish auction.

(9) The Commission received comments from the following interested third parties: EAFPA (European Association of Fishing Ports and Auctions), NOVA (Nationaal Overleg Visafslagen), Flanders Ship Repair, Zeebrugse Vis Promotie vzw (ZVP), Grimsby Fish Market, Zeebrugse Visveiling (ZV) and European Fish Centre (EFC) and Gardec (a ship repair undertaking).

[1] OJ L 1, 3.1.1994, p. 3.
[2] OJ L 83, 27.3.1999, p. 1.
[3] OJ C 238, 17.9.2008, p. 12.
[4] From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.
[5] See footnote 4.

(10) By letter of 4 November 2008, the Commission forwarded these comments to Belgium, which was given the opportunity to react. Belgium did not send any observations further to the comments from third parties.

(11) By letter dated 8 September 2009 with reference C(2009) 6907, Commission issued an information injunction in accordance with Article 10(3) of Regulation (EC) No 659/1999 requiring a complete answer to the questions raised in its letters of 13 March 2006, 26 June 2006 and 11 July 2007 and in the decision to initiate the formal investigation procedure.

(12) By letter of 7 October 2009 the Belgian authorities requested an extension until 9 November 2009 to submit the information. The extension was granted on 9 October 2009. In their letter, the Belgian authorities also asked the Commission to transmit to the Belgian authorities the comments submitted by third parties. Together with granting the delay extension, the Commission re-transmitted the comments of third parties and a copy of the letter of 4 November 2008.

(13) By letter of 22 October 2009 the Belgian authorities informed the Commission that they had never received the Commission letter of 4 November 2008. For this reason, they requested a new period of one month in order to submit their observations further to the comments submitted by third parties.

(14) By letter of 5 November 2009 the Commission granted the Belgian authorities an extension until 27 November 2009 in order to give them the opportunity to react to the comments submitted by third parties.

(15) The Belgian authorities gave their answers to the information injunction as well as additional information on the privatisation of the fish auction.

(16) By letter of 30 November 2009 Belgium transmitted its observations further to the comments submitted by third parties.

2. RESTRUCTURING OF THE OSTEND FISH AUCTION IN 2001

(17) The Ostend fish auction, originally a State owned auction, had been highly fragmented and — according to the Belgian authorities themselves — badly managed for years. It was performing badly. From 1991 to 2001, its share in terms of fish arrivals in Belgian harbours had fallen from approximately 37 % to 20 % [6]. From 1997 to 2001 its turnover dropped from EUR 20 550 000 to EUR 13 440 000 [7] and over many years, the City of Ostend (hereinafter referred to as 'the City'), in relation to the auction, had been recording an average annual loss of EUR 1 850 000 (including in 2001).

(18) In 2001 the City had to make a choice between closing down the fish auction and restructuring it. On 23 November 2001 the City decided to restructure the Ostend fish auction into an autonomous municipal company under Belgian Law, with the City as its sole shareholder.

(19) The decision to restructure the auction was based on a financial plan presenting one hypothesis (described as positive) and a two-page business plan, drawn up by HAMA Consult NV. These documents indicate that the fish auction could become profitable within a period of nine years provided that it was transformed into a separate legal entity with starting capital of BEF 250 million (around EUR 6,2 million), to be paid up in full over a period of five years. This separate company was called the 'Autonoom Gemeentebedrijf Vismijn Oostende' (hereinafter referred to as 'AGVO'). AGVO took over the financial charge relating to the reimbursement of various bank loans relating to the former Ostend fish auction.

2.1. *COMPANY STRUCTURE*

2.1.1. AGVO

(20) As mentioned in recital 18, in order to restructure the fish auction, the City established, on 23 November 2001 [8], the autonomous municipal company AGVO. Such an autonomous municipal company is a separate legal entity, established under Article 261 of the New Municipality Law, intended for the organisation of municipal institutions and services outside the general municipal services, focused on institutions or services of a commercial or industrial nature and managed in accordance with industrial and commercial methods.

(21) As regards both shareholding and management bodies, the City, as the establishing municipality, is required by law to have the majority of votes. The City actually has 100 % of shares in AGVO and — according to AGVO's articles of association — appoints all members of the Board of Directors. The majority of the directors must be members of the City Council.

[6] De Belgische Zeevisserij — Anvoer en Besomming 2007, Vlaamse overheid, Departement Landbouw en Visserij (http://www2.vlaanderen.be/landbouw/downloads/vis/aanvoer_besomming_2007.pdf), p. 12.

[7] Vlaamse overheid, Departement Landbouw en Visserij, Jaaroverzicht Zeevisserij 1998, 1999, 2000 en 2001 (http://lv.vlaanderen.be/nlapps/docs/default.asp?fid=122).

[8] AGVO was established on 23 November 2001 by the City. This decision of the City was approved on 14 March 2002 by the Flemish Minister for internal affairs.

(22) AGVO has currently at least two wholly-owned subsidiaries: NV Exploitatie Vismijn Oostende (hereinafter referred to as 'EVO'), and NV Pakhuizen (hereinafter referred to as 'PAKHUIZEN').

2.1.2. EVO

(23) EVO was established on 8 August 2002 to run the auction and all activities relating thereto. EVO was provided with an initial capital of EUR 371 840. The ownership was shared in 15 000 equal shares without nominal value between AGVO, which held 14 999 shares, and Mr Miroir, Member of the City Council, with 1 share.

(24) EVO is managed by a Board of Directors. The board members are appointed by the shareholders for a period of six years, with a possibility of renewal. In terms of shareholding, EVO is fully controlled by AGVO.

2.1.3. PAKHUIZEN

(25) PAKHUIZEN was set up in 1988 by vessel-owners in order to manage moveable and immovable assets. In 2005, PAKHUIZEN was taken over by AGVO through the purchase of all its shares for EUR 350 000.

(26) PAKHUIZEN is managed by a Board of Directors. The board members are nominated by the shareholders for a period of six years, with a possibility of renewal. Since 2005, PAKHUIZEN is owned and controlled by AGVO.

2.2. *TASKS*

2.2.1. AGVO

(27) According to its articles of association, AGVO is entrusted with tasks which are classified by the Belgian authorities as tasks in the public interest and commercial tasks. The 'public tasks' are performed by AGVO itself; the 'commercial tasks' are performed by the wholly-owned subsidiaries EVO and, since 2005, PAKHUIZEN.

(28) As regards the 'public tasks', the Belgian authorities have indicated that AGVO was entrusted with the management of the Ostend fishing port (which includes the management and maintenance of matters falling within the public and private domain situated within the boundaries of the fishing port), the inspection of fish landed for consumption, the setting of tax duties on auction prices while checking that the catch landed is subjected to the VAT requirement, the operation of the locks between the channel and the fisheries dock (which is used not only by fishing vessels), public relations functions on behalf of the local authorities and the renovation and provision of buildings to public-law or semi-public-law institutions such as the Flemish Region, West Flanders Province etc.

2.2.2. EVO

(29) EVO operates the Ostend fish auction. The activities in this context concern mainly organising and running the fish auction, letting warehouses and other subsidiary activities. In the context of the operation of the auction, EVO applies an auction charge of 6 % of the price. Buyers at the auction are charged with a buyer's commission of between 1 % and 3 % and must bear the hire fee for the fish crates. It is not known how much they pay for the latter.

(30) Moreover, EVO grants loans to customer vessel-owners. Some of the recent loans were granted at a rate of Euro Interbank Offered Rate (Euribor) + 2 %. It seems, however, that not all loans were granted under those conditions. In exchange for the loan, the vessel-owners are required to auction their fish in Ostend.

(31) In addition, EVO provides vessel-owners with certain facilities, such as by contributing part or all of the costs of refrigerated transport.

2.2.3. PAKHUIZEN

(32) The activities of PAKHUIZEN are mainly aimed at converting, restoring, (re-)decorating, (re-)constructing, and demolishing, exploiting, managing and letting immovable property.

2.3. *THE AID MEASURES AT ISSUE*

2.3.1. INITIAL CAPITAL AND CAPITAL INCREASES

(33) At the time of its establishment, on 23 November 2001, AGVO was granted a starting capital of BEF 250 million (EUR 6 179 338,12) by the City to be paid in equal yearly instalments over a period of five years. Since 2002, six instalments of the initial capital have been paid, amounting to a total of EUR 3 596 665,62: EUR 619 734 have been paid on 28 June 2002, EUR 570 155 on 26 June 2003, EUR 570 155 on 25 June 2004 and EUR 570 155 on 26 June 2005. In their comments in the context of the formal investigation procedure Belgium has indicated that in 2006 and 2007 two more instalments of EUR 619 734 were paid. So far as the Commission is aware, the remaining part of the starting capital of EUR 2 582 672,5 has not yet been claimed by AGVO.

(34) The Belgian authorities have indicated that AGVO has used the starting capital partly for 'public purposes' and for repayments of current bank loans in capital and interest. It has also used it to buy shares in Pakhuizen. Finally it has used it in order to pay up EVO's initial capital and to grant loans to EVO which were later (31 December 2004, 31 December 2005 and 21 December 2007) converted into capital by means of a remission of debts.

(35) At the time of its establishment on 8 August 2002, EVO was provided with an initial capital of EUR 371 840,29. Subsequently, AGVO has increased EVO's capital by cancelling its debts. On 31 December 2004, the capital was increased by EUR 1 387 044; on 31 December 2005 by EUR 710 000,75 and on 21 December 2007 by EUR 1 500 114,96. In total AGVO has provided EVO with a capital of EUR 3 969 000.

(36) Although the Belgian authorities had informed the Commission that EVO's initial capital had been increased and that it amounted to EUR 2 468 885 by 31 December 2006, they did not inform the Commission of the particular form of the capital increases. Following observations received from third parties, the attention of the Commission was drawn to the capital increase of 21 December 2007 and to the fact that the capital had been increased by way of a remission of debts. Belgium did not comment on this aspect of the third parties' observations.

2.3.2. GUARANTEES FOR LOANS

(37) Apart from the initial capital, the City assisted both AGVO and EVO by providing, free of charge, guarantees for obtaining private loans.

(38) So far as concerns AGVO, the guarantees were for three loans, granted on 26 March (EUR 609 379,40) and 23 April 2004 (EUR 2 117 500) and 22 April 2005 (EUR 550 000), totalling BEF 132 199 987 (EUR 3 276 879).

(39) So far as concerned EVO, the guarantees were for loans, granted on 28 June and 27 September 2002. However, according to the information submitted by the Belgian authorities, in the end the loans concerned were not taken up. On 23 April 2004 and 22 April 2005, the City again provided guarantees free of charge for loans to EVO, which enabled the latter to take up loans amounting to BEF 145 505 820 (EUR 3 606 995). Without mentioning any date, the Belgian authorities have indicated that the City had also guaranteed an additional loan of EUR 78 000. Given that this was indicated in the comments of the Belgian authorities of 4 September 2008 and that the previous comments were dated 23 November 2007, the Commission assumes that this additional guarantee was provided some time between those dates.

(40) AGVO has also provided guarantees free of charge to EVO for two loans for a total of EUR 600 000. No information was given as to the date of the decision to grant the free guarantees. Given that EVO was established on 22 August 2002 and that the document submitted by the Belgian authorities mentioning the two loans was describing the situation on 3 August 2006, the Commission assumes that the guarantee was provided some time between those dates.

2.3.3. LAND AND BUILDINGS

(41) According to Article 30 of its Articles of association of 23 November 2001, AGVO is granted the exclusive right to use, free of charge, the land and buildings of the Ostend fishing port [9].

(42) Article 30 of the articles of association also indicates that the City can at a later stage transfer the property rights (or other rights) in those land and buildings to AGVO.

(43) This was the case on 26 March 2004, when the City made a contribution to AGVO by transferring to it its property rights in various buildings located in the Ostend fishing harbour consisting of 57 500 m^2. This contribution was made at the inventory value entered in the municipal accounts, which was EUR 14 891 524. The transfer concerned only buildings (fish auction, offices, and warehouses) and not the ground on which the buildings were erected. The ground itself is used by the City on the basis of an open-ended concession from the Flemish Region, the owner of the plots of land. AGVO continued to have the exclusive right to use these lands on the basis of Article 30 of its articles of association.

[9] 'De Stad Oostende kan aan het AG Vismijn Oostende de volle eigendom, respectievelijk de bestaande zakelijke rechten en beheersrechten overdragen van de goederen die zich bevinden binnen of behoren bij het in artikel 3.1 omschreven Visserhavengebied of die nodig en/of nuttig zijn voor de realisatie van de doelstellingen van het AG Vismijn Oostende […]. In afwachting van de overdracht van de onroerende goederen krijgt het AG Vismijn Oostende het uitsluitend recht deze goederen zonder vergoeding te gebruiken.'

(44) The transfer of immovable property of 26 March 2004 included 14 754 m^2 of buildings subject to a long-term lease between the City and PAKHUIZEN concluded in 1989 for a period of 45 years. Under this contract, PAKHUIZEN pays a token rent of BEF 1 000 (EUR 25) per year for the use of the buildings. In return, PAKHUIZEN is contractually required, at its expense and without entitlement to compensation, to renovate the warehouses described in the long-term lease so that they will comply with future regulations. Furthermore, after 27 years of lease (in 2016), the City will be granted 50 % every year of PAKHUIZEN's net annual profit. The Belgian authorities have indicated that PAKHUIZEN did not comply with its obligations and the specified warehouses were not renovated, as contractually required, at least not before 2005. However, the Belgian authorities indicated that after AGVO purchased PAKHUIZEN shares, it spent EUR 257 872 in 2005 and EUR 68 816 in 2006 on renovation and maintenance works. The exact amount of the costs of the works undertaken in 2007 is not known.

(45) From 26 March 2004, the date on which the City transferred the ownership of the building to AGVO, AGVO replaced the City as the contracting party in the long-term lease with PAKHUIZEN. By doing so, AGVO became entitled to collect the EUR 25 per year, as well as to obtain after 27 years of lease, 50 % of PAKHUIZEN's net annual profit.

(46) According to the information provided by Belgium, the 57 500 m^2 thus made available to AGVO are distributed as follows:

— 13 600 m^2 used by the subsidiary EVO to house the fish auction, as working/storage space and administrative buildings,

— 14 754 m^2 rented to PAKHUIZEN, of which 955 m^2 are used for port activities,

— 2 700 m^2 of warehouses rented to (semi-) public-law institutions,

— 8 156 m^2 of public roads,

— 2 488 m^2 which are used as free public parking,

— 2 400 m^2 which are used as a container park for fisheries activities,

— 13 402 m^2 of docks.

(47) EVO does not pay rent for the use of the buildings. Belgium has stated that, in return, EVO pays for all maintenance and renovation costs. PAKHUIZEN continues to pay 25 EUR per year.

(48) The Belgian authorities have indicated that between 31 December 2002 and 31 December 2007 EVO and PAKHUIZEN have paid respectively EUR 182 377,31 and EUR 381 835,16 for renovation and infrastructure works and EUR 193 255,70 and EUR 133 895,35 for maintenance costs.

2.4. *COMMERCIAL STRATEGY*

(49) During the years following the restructuring, both AGVO and EVO have registered losses that kept increasing despite a slight profit for AGVO in 2003/04. By the end of 2006, AGVO had cumulated losses of almost EUR 3 000 000 and short- and long-term debts for more than EUR 4 000 000 while, also at the end of 2006, EVO had to carry over losses of an amount of more than EUR 3 400 000, short-and long-term debts for more than EUR 5 800 000 and a negative capital of almost EUR 1 000 000.

(50) Despite those cumulated losses, AGVO and EVO engaged in speculative activities and in expanding their activities. For instance in 2006 AGVO took a 51 % shareholding in a company called HAF Holding BO established in Iceland, while EVO engaged in a King crab project ([10]) in 2006 (Polardrift, an undertaking established in Norway). EVO was also involved in the Icelandic HAF Holding. Furthermore, in 2005 EVO concluded a contract with a sales agent under which the agent was mandated to purchase high quality fish on Icelandic auctions which would then be resold at the Ostend fish auction.

(51) The commercial strategy of EVO has been described by the various stakeholders as unfair competition consisting of offering, among others, to bear all or part of the costs of the transport of fish embarked in foreign harbours to Ostend and of offering loans to vessel-owners at advantageous conditions on the condition that they auction their catches in Ostend.

([10]) Project consisting of fishing/buying crab in Norway in order to (try) to sell it on the Asian market.

(52) These projects, as well as the commercial strategy described by third parties, seem to indicate that EVO undertook to expand its market share and its turnover at any cost. In any event, the annual accounts of AGVO and EVO indicate that EVO could maintain its presence on the market, despite its precarious financial situation, only thanks to the support of the City [11].

3. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

3.1. *ADVANTAGES GRANTED TO AGVO*

(53) AGVO has been granted an initial capital of BEF 250 million (EUR 6 179 338). Considering the heavy losses of the past and the very short and incomplete business plan, the Commission concluded in the decision to open the formal investigation procedure that a private investor would not have invested such an amount in the fish auction and that this starting capital therefore qualifies as State aid. The Commission expressed doubts regarding its compatibility with the internal market since the conditions laid down in the Guidelines for aid for rescuing and restructuring firms in difficulty, applicable at the time the aid was granted, (hereinafter 'the 1999 R & R Guidelines') [12] did not seem to be fulfilled.

(54) The City also contributed its buildings to AGVO without requiring any consideration or imposing obligations on AGVO of a similar value. The Commission considered that a private investor would have required a reasonable price for such a contribution, so that the contribution of the buildings had to be considered State aid. This aid, which seemed to reduce AGVO's production costs, appeared to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Guidelines for the examination of State aid to fisheries and aquaculture (hereinafter 'the Fisheries Guidelines') [13] that would enable it to allow the aid.

(55) The City also provided guarantees for loans for AGVO. While a private operator would have required a premium for the guarantee, the City granted it free of charge. Thus, the Commission concluded that these guarantees had to be considered State aid. Again, this aid appeared to reduce the production costs of AGVO and thus to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would have allowed it to consider it compatible with the internal market.

(56) Finally, the City empowered AGVO to establish and collect community tax duties, and to use the proceeds, an advantage which a private undertaking generally does not have. The Commission considered that the conditions laid down in *Altmark* [14] were not fulfilled and that the advantages deriving from the right to levy and collect the community tax duties should be considered State aid. In the absence of any information on that levy, the Commission concluded that it had at first sight to be analyzed as operating aid and that no provision in Article 107 TFEU or in the Fisheries Guidelines would make this aid compatible with the internal market.

3.2. *ADVANTAGES GRANTED TO EVO*

(57) The City and AGVO provided guarantees for loans for EVO. While a private operator would have required a premium for the guarantees, the City and AGVO granted them free of charge and the Commission concluded that they must be considered State aid. This aid appeared to reduce the production costs of EVO and to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would have allowed the Commission to consider it as compatible with the internal market. It therefore expressed its doubts that these measures could be found compatible with the internal market.

(58) AGVO allowed EVO the continuous free use of the buildings owned by AGVO of a total of 13 600 m^2. The Commission considered that a private investor would have required a reasonable price for it and that making the buildings available free of charge had to be considered State aid. This aid, which seemed to reduce EVO's production costs, appeared to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would have allowed it to consider it compatible with the internal market. it therefore doubted whether these measures could be considered compatible with the internal market.

[11] Jaarrekening AGVO 2005, p. 26 (verslag van de Raad van Bestuur aan de aandeelhouders over de waardering van de aandelen in EVO): 'Tenslotte is het niet onbelangrijk dat in deze fase de engagementen van de Stad Oostende een wezenlijke buffer vormen om op verantwoorde wijze een waardering in going concern toe te passen zodat de waardering zoals beschreven in art. 66§2 mag aangehouden worden en niet naar een waardering in discontinuïteit moet overgegangen worden.'

[12] OJ C 288, 9.10.1999, p. 2.

[13] OJ C 19, 20.1.2001, p. 7; OJ C 229, 14.9.2004, p. 5; OJ C 84, 3.4.2008, p. 10.

[14] Judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747.

3.3. *ADVANTAGE GRANTED TO PAKHUIZEN*

(59) The effect of the terms of the long-term lease between the City and PAKHUIZEN was that PAKHUIZEN could benefit from a yearly reduction of its operating costs. The Commission concluded that this advantage qualified as State aid and did not fall within the scope of any of the measures mentioned in the Fisheries Guidelines, or within the objectives of other horizontal or specific guidelines which could be applicable to this kind of undertaking. Both under the relevant Fisheries Guidelines as well as the horizontal rules on State aid, such type of aid would be considered operating aid which is incompatible with the internal market. The Commission therefore doubted whether this measure could be considered compatible with the internal market.

3.4. *ADVANTAGES GRANTED TO FISHERIES UNDERTAKINGS*

(60) The Commission further observed that fisheries undertakings making use of the Ostend fish auction were granted advantages by EVO through the provision of services at rates below those which a normal private operator would charge, and by PAKHUIZEN letting buildings at rates below those which a normal private operator would charge.

(61) The Commission considered those advantages to constitute State aid and could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would make this aid compatible and therefore doubted whether these measures could be found compatible with the internal market.

3.5. *CONCLUSION*

(62) In light of the foregoing and the information at its disposal, the Commission considered that all measures mentioned under section 3 had to be regarded as State aid and had doubts as to the compatibility of these aids with the internal market.

4. **COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES**

(63) All interested third parties which submitted observations on the decision to open the formal investigation procedure agreed with the arguments put forward in that decision. Furthermore they indicated that they had suffered damage as a result of the illegal aid granted to AGVO, EVO and PAKHUIZEN (loss of clients and revenues) and urged the Commission to take the necessary steps to forbid the aid and seek its recovery.

4.1. *EAFPA*

(64) EAFPA stresses that the aid measures at issue distort the market and calls on the Commission to forbid the aid and to seek its recovery.

4.2. *NOVA*

(65) As complainant, NOVA supports the Commission's Decision to open a formal investigation. It considers it important to ensure transparency in the auction market and to guarantee a level playing field. It further calls on the Commission to adopt appropriate steps to ensure recovery of the aid which may be incompatible.

4.3. *FLANDERS SHIP REPAIR*

(66) Flanders Ship Repair explains that the effect of the State aid has been to attract shippers to Ostend. This has led, according to Flanders Ship Repair, to a loss of revenue, since the shippers who have gone over to Ostend no longer had their ships repaired in Zeebrugge. Flanders Ship Repair asks for a negative decision with recovery as well as for provisional measures.

4.4. *ZVP*

(67) ZVP, an association of fish purchasers and processors on the Belgian East coast, states that the unlawful State aid, together with other advantages, has allowed the Ostend fish auction to artificially attract foreign vessels and vessels from Zeebrugge. Moreover, through numerous interviews and press releases by local politicians and members of EVO's Board of Directors (stating in particular that in Belgium there probably is room for only one fish auction, namely Oostende), doubts have been cast concerning the future of the Zeebrugse fish auction and consequently the surrounding business park. This has resulted in loss of revenues and a decrease in, suspension or withdrawal of investments and marketing efforts.

(68) ZVP also mentions that it has tried to make the local authorities aware of this problem, but without success.

(69) Finally ZVP points out that EVO has — by using a 'front' and obtaining public funds — established a filleting company, called Ostend Filleting Factory, which is also engaging in unfair competition.

4.5. *GRIMSBY FISH MARKET*

(70) Grimsby Fish Market, a UK fish auction, indicates that around 2005/06, EVO started to buy fish straight from Icelandic fishermen at (high) fixed prices and sold by Dutch auction in Ostend, frequently at lower prices, and concludes that these losses have been paid for by public money. Grimsby Fish Market urges an audit of EVO's accounts to investigate the means by which the Icelandic fish supplies were financed and the losses incurred by EVO as a result of such sales methods.

4.6. *ZV AND EFC*

(71) ZV and EFC draw the attention of the Commission on other possible unfair practices and State aid measures, namely the use by AGVO/EVO of the City's staff, free of charge, and price guarantees granted by EVO and based on the auction price at the Zeebrugse Visveiling.

(72) They further explain why in their view competition is distorted and trade between Member States affected.

(73) They also draw the attention of the Commission on additional injection of capital into AGVO and in EVO (through remission of debts).

(74) Finally they note that the Belgian authorities have not suspended the aid.

4.7. *GARDEC*

(75) Gardec is a ship repair undertaking located in Zeebrugge. It supports the Commission Decision. It adds that it has suffered injury from the unfair commercial practices in Ostend (decrease in turnover) and notes that the loans granted to firms in difficulty had the effect of allowing them to survive in Ostend while their debts remained unpaid in Zeebrugge.

5. **BELGIUM'S OBSERVATIONS FOLLOWING THE DOUBTS EXPRESSED IN THE DECISION TO INITIATE THE INVESTIGATION PROCEDURE**

(76) In their observations of 8 September 2008 following opening of the formal procedure, the Belgian authorities consider that the Commission should limit its investigation to the fish auction market. As neither AGVO nor PAKHUIZEN are active on those markets, the measures taken in their favour are irrelevant for the present procedure. More in general they consider that the Commission has not properly defined the scope of the investigation and that there is a risk of double counting of the aid.

5.1. *THE AID TO AGVO*

(77) The Belgian authorities insist upon the fact that AGVO has no commercial activities and that there can therefore be no impact on competition. The aid granted to AGVO cannot therefore qualify as State aid. They add that at most, only the funds that have been used for EVO could be taken into account for the investigation (for instance the part of the initial capital that has been passed on to EVO through AGVO). They submit that the rest has been used for public interest tasks and cannot have any impact on the competition in the fish auction market.

(78) The Belgian authorities note that, even though an initial start capital of EUR 6 197 338,12 has been promised to AGVO, AGVO has so far received only EUR 3 569 667.

(79) With regard to the right to levy taxes or fees, the Belgian authorities consider such a right is linked to AGVO's public interest tasks and cannot be regarded as State aid and that, in any event, AGVO does not have the power to levy taxes for the locks and the slipways.

(80) With regard to the buildings, they submit that it would not make any difference whether the buildings are the property of the City or of another public entity. They consider the contribution of the buildings to AGVO as a merely internal allocation of property. The Belgian authorities recall that AGVO has no commercial activities and that the contribution of the buildings cannot therefore be qualified as State aid. They add that the contribution of the buildings is linked to the obligation to repair and maintain them in a good state and thus dispute that AGVO has been advantaged by the contribution.

(81) They consider further that the free guarantees cannot qualify as State aid because they were provided for loans entered into by AGVO for repair works on buildings rented to public authorities. They however admit that one of the guaranteed loans (loan of EUR 550 000) was used for EVO.

(82) Finally, the Belgian authorities note that the *Altmark* judgment is not relevant because the public tasks of AGVO are non-economic. They add that there is no risk of cross-subsidy because AGVO has no commercial activity.

5.2. *THE AID TO PAKHUIZEN*

(83) Belgium submits that Ostend has only a limited right to the land and the long lease is therefore of reduced commercial value. Moreover, PAKHUIZEN is required to repair and renovate the buildings, which is presented as an onerous obligation which amply makes up for the token rent.

(84) The Belgian authorities add that PAKHUIZEN is only active on the market for the management of buildings used in the fishing sector. They take the view that this activity can hardly be considered commercial because of the renovation obligations involved and because of the poor value of the buildings. Finally, because the buildings managed by PAKHUIZEN can only be rented for activities linked to the fishing sector, the Belgian authorities argue that PAKHUIZEN does not compete with anyone.

(85) The Belgian authorities further observe that AGVO bought the PAKHUIZEN shares at market price and that PAKHUIZEN rents the buildings at market prices (considering that they were not in good state of repair).

5.3. *THE AID TO EVO*

(86) The Belgian authorities indicate that the fact that the buildings are at the disposal of EVO free of charge is compensated by the fact that EVO has to bear renovation costs that normally fall upon the owner of the buildings.

(87) They further submit that the free guarantees granted for loans to EVO are to be analysed in the framework of the privatisation and restructuring plan of the auction. They take the view that, in the framework of the restructuring of the fish auction the City acted like a private investor, in so far as the recapitalisation of the fish auction was more profitable from an economic point of view than the closing of the auction and that through the privatisation, the City would be able to recoup its investment through the rent it will ask from the private owner of the auction. They also stress that already in 2002 there were plans to privatise the fish auction and that privatisation was only possible after restructuring.

(88) More specifically on the free guarantee, they observe that the loans were used to complete the financing of the fish auction, which was primarily financed through a capital injection (to AGVO and, through AGVO, to EVO) from the City. The Belgian authorities note that through the guarantee the City has substantially reduced the costs incurred for the restructuring. They add that without the guarantee of the City no loan would have been granted and point out that it is normal commercial practice that a parent undertaking offers a guarantee for loans engaged into by its subsidiary.

5.4. *THE AID TO FISHING UNDERTAKINGS/SHIP-OWNERS*

(89) The Belgian authorities observe that the Commission has counted the same aid twice and that there is either aid to EVO or to the fishermen but not to both. They take the view that, should the measures concerned constitute State aid, they then constitute State aid at the level of EVO and PAKHUIZEN and distort competition at that level but not at the level of vessel-owners and fishing undertakings. They add that in any event, EVO and PAKHUIZEN do not offer their services below market prices. Specifically, so far as EVO is concerned, they explain that EVO offers services that are also proposed elsewhere. They also observe that EVO does not purport to offer any storage facilities, does not offer electricity free of charge and is not responsible for the manage of the port and the slipways. They indicate that the price for the water is included in the auction fee and that EVO does not grant any loan under market prices to ship-owners. Finally, they state that, in practice, EVO has never enforced the contract articles obliging ship-owners to auction their catches at its auctions.

6. **PRIVATIZATION PROCEDURE LAUNCHED AFTER INITIATION OF THE INVESTIGATION PROCEDURE**

(90) Belgium has informed the Commission that it has been decided on 22 May 2008 to privatise the Ostend fish auction and that the City has launched a public selection procedure in order to attract an operational partner run EVO.

(91) In its comments, Belgium explains that the privatisation will take place through the establishment of a new undertaking ('NewCo') that will carry out the operation of the fish auction. The buildings of the fish auction will return to the City and NewCo will have to sign a lease agreement with the City. NewCo will not be obliged to take over the other assets of the fish auction (employees, fish boxes, contracts, loans to ship-owners, etc.).

(92) As the sale and the rental agreement will be negotiated at market prices, no aid will be transferred to NewCo and no aid can be recovered from NewCo.

(93) In its letter of 16 November 2009, Belgium informed the Commission of the further developments of the privatisation process.

(94) It indicates that, as a first step, the property of the buildings belonging to AGVO has been transferred back, free of charge, to the City on 4 September 2009, as well as rights and obligations relating to the buildings (rental contracts). The City has also taken over various loans from AGVO and PAKHUIZEN. Subsequently, the property of the buildings was transferred to the Flemish Region which paid the City in various forms: the Flemish Region paid EUR 3 500 000 to the City and the City was granted the right to collect until 1 January or, in certain cases, until 30 June 2010 the rent paid by the public and semi-public organisations renting the buildings. Finally the Flemish Region took over various debts and/or loans from the City.

(95) Belgium argues that the fact that the property of the buildings has been transferred back to the City puts an end to the State aid issue.

(96) Belgium has further indicated that PAKHUIZEN has decided to terminate the long-term lease agreement concluded with the City in 1989. Belgium expects that PAKHUIZEN will be wound-up soon, which would render the State aid procedure devoid of purpose.

(97) So far as EVO is concerned, Belgium has explained that the candidate fulfilling the selection criteria did not offer conditions which were satisfactory for the City. EVO will therefore continue to exist until a suitable candidate is found to take over EVO's assets.

(98) Finally, Belgium indicated that AGVO would continue to exist until all remaining debts/obligations are settled.

(99) Belgium asks the Commission to postpone its decision until the privatisation process is finished.

7. BELGIUM'S OBSERVATIONS FOLLOWING THE COMMENTS FROM THIRD PARTIES

(100) Belgium indicates, so far as the Icelandic issue is concerned, that EVO never directly purchased fish from Icelandic ship-owners or fishermen but only from Icelandic fish auctions, through a sales agent.

(101) Belgium adds that it soon became clear that the resale of the Icelandic fish was not profitable. Thus, after approximately one year, it was decided, on 17 March 2006, to put an end to these purchases and resales. Belgium has submitted a copy of the said decision.

(102) Belgium explains that the reason why fish was bought against high prices at Icelandic fish auctions and then resold in Ostend at lower prices was not due to any strategy aiming at attracting Icelandic fish to Ostend but was due to the fact that the fish of higher quality which was bought by the sales agent in Iceland and meant for EVO never reached EVO but instead was directly bought by a private filleting undertaking, Luna Fish, whereas Icelandic fish of lesser quality arrived at EVO and could then not be sold at profitable prices, given its lesser quality. Belgium concludes that EVO was therefore rather a victim of these practices. The delegated administrator of AGVO/EVO and the commercial director were dismissed when the problem was discovered.

(103) So far as the alleged free secondment of staff for administrative, accountancy and maintenance tasks is concerned, Belgium submits that ZV's statements are based on mere suspicions and that EVO has its own employees to perform those tasks and that, furthermore, some of EVO's employees sometimes discharge public interest tasks (maintenance of the fish auction road).

(104) Belgium also mentions that the statement made by ZV that EVO would guarantee a minimum price by reference to the auction price at the Zeebrugse fish auction is not supported by any evidence. Belgium adds that fishing undertakings might have alleged this when negotiating with ZV, as part of a strategy to obtain better commercial conditions from ZV.

(105) As for the Ostend Filleting Factory (OFF) issue, Belgium stresses that the documents submitted by third parties only indicate that OFF was set up by private parties and do not reveal how OFF would have engaged in unfair competition. Belgium states that it was only in March 2006 that PAKHUIZEN acquired 60 % of the shares in OFF. The name 'OFF' was then changed to 'Ostend Premium Fish bvba' and the company finally went bankrupt on 14 January 2008.

(106) On the alleged losses suffered by Gardec and Flanders Ship Repair as a result of the State aid, Belgium considers that, even if State aid were to induce vessels to go to Oostende instead of Zeebrugge, the causal link with the loss would still not be demonstrated. Belgium submits that ship-owners do not always let their vessel be repaired in their home port and instead make use of cheaper repair services in Eastern Europe (Poland). Belgium observes that there has been a clear decline in ship repair work in Oostende.

8. **INFORMATION INJUNCTION**

(107) By letters of 13 March and 26 June 2006 the Commission asked the Belgian authorities for information about the legal situation of the Ostend fish auction, the involvement of the State and for details about the financial flows between the State and the fish auction.

(108) In their letter of 19 October 2006, the Belgian authorities underlined the fact that in addition to its commercial activity (running of the fish auction), AGVO was entrusted with public interest tasks. The information provided on this point was, however, very sketchy and contained nothing to enable the Commission to assess whether the advantages granted by the City to AGVO could be considered compensation for tasks of general (economic) interest and whether there were no over-compensation and risks of cross-subsidies.

(109) Therefore, by letter dated 11 July 2007, the Commission asked the Belgian authorities, in accordance with Article 10(2) Regulation (EC) No 659/1999, to provide detailed information on the public tasks entrusted to AGVO. In particular, it asked whether and on which basis those tasks could be considered tasks of public service within the meaning of Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [15].

(110) By letter of 27 November 2007 the Belgian authorities merely stated that none of the tasks entrusted to AGVO were economic and that Decision 2005/842/EC was not relevant. They stated that AGVO is not compensated for any of the public tasks it performs.

(111) In its decision of 2 July 2008 to initiate the formal investigation procedure, the Commission found that AGVO, EVO and PAKHUIZEN formed a group of undertakings active on the market for fish auctioning and ancillary services and were given various advantages from the City that distorted competition on the market. On the issue of compensation for public tasks, the Commission noted that there was no element in the file indicating that the criteria developed by the Court of Justice in its *Altmark* judgment were fulfilled. Moreover, given the lack of information on that point, the Commission was not in a position to determine whether in particular the right to establish and collect tax duties could be considered compensation granted for services of public interest and thus doubted the compatibility of the aid. Consequently, in recital 121 of its decision to initiate the formal investigation, the Commission invited the Belgian authorities to communicate any information that might be of use for the assessment of the measures at issue.

(112) In their observations, received on 8 September 2008, and during a follow-up meeting on 9 October 2008, the Belgian authorities did not provide any additional element to enable the Commission to examine whether the advantages granted to AGVO could be considered compensation for tasks of general (economic) interest. Instead, the Belgian authorities reiterated that the *Altmark* criteria were not relevant because AGVO was involved exclusively in public tasks.

(113) This answer was, however, unsatisfactory, since AGVO was also involved in economic activities.

(114) Pursuant to Article 10(3) Regulation (EC) No 659/1999, the Commission thus requested by way of an information injunction of 8 September 2009 any useful information and in particular:

— a list of the various activities entrusted to AGVO divided into economic activities, tasks of non-economic public interest and tasks of general economic interest,

— the parameters for calculating, controlling and reviewing the compensation for the tasks of non-economic public interest on the one hand and the compensation for the tasks of economic public interest on the other hand,

— the arrangements for avoiding and repaying any over-compensation,

[15] OJ L 312, 29.11.2005, p. 67.

— the costs incurred in the discharge of, and the revenue relating to, the economic public services obligation, the non-economic public services obligation and the other services,

— abstracts from internal accounts showing separately the costs and receipts associated with the service of general economic interest and those associated with the service of general non-economic interest and those of other services, as well as the parameters for allocating costs and revenues,

— if available, documents showing that AGVO complies with the fourth criterion laid down in *Altmark*, i.e. that the level of compensation needed has been determined on the basis of an analysis of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the obligations.

(115) In their letter of 16 November 2009, the Belgian authorities reiterate that AGVO is entrusted with the following public interest tasks: management of the fishing port, renovation and renting of buildings to public and semi-public organisations, and management and maintenance of the public domain (including maintenance of the road leading to the fish auction). They submit that those tasks are of public interest since they are not carried out in favour of specific beneficiaries. They do not make a distinction between tasks of general non-economic interest and services of public economic interest but admit that some or all public tasks might be of economic nature.

(116) The Belgian authorities acknowledge that AGVO, through its subsidiary EVO, is engaged in a commercial activity, i.e. the running of the fish auction, which is not of public interest.

(117) The Belgian authorities state that AGVO does not actually receive any compensation for its tasks of general interest. They are financed out of AGVO's budget. There is thus no methodology to calculate the compensation. The Belgian authorities add that it is not possible on the basis of AGVO's and EVO's accounts to distinguish between costs and revenues relating to the tasks of general interest and the commercial tasks.

9. **SCOPE OF THE INVESTIGATION**

(118) It is apparent from various recitals of the preamble (for instance recital 85) to the decision to initiate the formal investigation procedure that the scope of the investigation is larger than the fish auction market and also concerns activities linked to the fish auction (rental of buildings around the fish auction, management of the fishing port, etc.). Therefore, the advantages granted to AGVO or PAKHUIZEN which do not directly relate to the operation of the fish auction also form part of the current procedure.

(119) The Commission has also analysed the advantages granted to EVO, either directly by the City or by AGVO. In the decision to initiate the formal investigation procedure, EVO's initial capital and the subsequent capital increases had not been analysed as separate measures from the capital instalments granted to AGVO. They were merely taken into account as one of the uses that AGVO has made of the capital instalments received from the City. However, in their comments, the Belgian authorities claimed that the Commission had not sufficiently distinguished between the activities and tasks performed by AGVO, PAKHUIZEN and EVO and that, due to the division of tasks between AGVO and EVO, the advantages granted to AGVO were relevant for the current investigation only to the extent that they had been 'transferred' to EVO. Therefore, for the sake of clarity and in order to meet the Belgian authorities' concerns, the provision of EVO with its initial capital and the subsequent capital increases are examined separately in point 10.1.2.2.3. The issue of the real beneficiary of the aid is examined in recital 319.

10. **ASSESSMENT**

10.1. *EXISTENCE OF STATE AID*

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

10.1.1. UNDERTAKINGS

(121) As explained above, this investigation concerns the possible aid granted to AGVO, EVO and PAKHUIZEN, and the fisheries undertakings making use of the Ostend fish auction and EVO's and PAKHUIZEN's services. All these must be qualified as undertakings within the meaning of Article 107 of the TFEU. The only entity in respect of which the Belgian authorities seriously contest this is AGVO, which according to the Belgian authorities only performs public interest tasks.

(122) The Belgian authorities have mentioned that AGVO performs 'public interest tasks' ('taken van openbaar belang'). However, it appears that AGVO engages in economic activities and must therefore be considered an undertaking [16] within the meaning of Article 107(1) of the TFEU, for the reasons detailed in recitals 123 to 129 inclusive.

(123) AGVO offers buildings for rent to public and semi-public institutions and to undertakings. AGVO is thus directly offering services (rental services) on the market.

(124) AGVO is also entrusted with the operation and management of the fishing port. As the General Court and the Court of Justice have confirmed in the *Aéroports de Paris* [17] case, the management of infrastructure facilities can constitute an economic activity. This has been confirmed, so far as port infrastructure is concerned, among others in the Flemish Ports and Rotterdam port development cases [18]. The Commission notes that AGVO is offering services, goods and infrastructure facilities against payment. Indeed, according to its articles of association, AGVO is entitled to establish and levy fees for the remuneration of its services.

(125) Moreover, AGVO also offers indirectly, through its subsidiaries EVO and PAKHUIZEN, goods and services on the market.

(126) AGVO holds a controlling interest in EVO and PAKHUIZEN and actually exercises that control by involving itself directly or indirectly in the management:

— almost all members of the Board of Directors in AGVO are also members of the Board of Directors of EVO and PAKHUIZEN. Between 2005 and 2007 AGVO and EVO were members of the Board of Directors of PAKHUIZEN;

— according to its articles of association, AGVO is entrusted with the management, development and operation of the fish auction and the fish dock of Ostend and its annexes as well as with the development of all directly and indirectly related activities.

In other words, AGVO is compelled by its articles of association to involve itself in the management of the fish auction.

(127) There are other links between AGVO, EVO and PAKHUIZEN which further illustrate the existence of organisational and functional links between AGVO and its subsidiaries: AGVO has guaranteed loans granted to EVO; AGVO puts buildings at the disposal of EVO and PAKHUIZEN and AGVO's annual accounts reveal that AGVO has regularly granted loans to EVO and PAKHUIZEN.

(128) All these elements allow AGVO to exercise functions relating not only to control, but also to direction and financial support of EVO and PAKHUIZEN. For those reasons AGVO must also be considered an undertaking for the purposes of competition law, in particular through its participation in EVO and PAKHUIZEN [19].

(129) The Commission notes that the Belgian authorities have acknowledged that EVO and PAKHUIZEN are the operating arms of AGVO, that through EVO, AGVO participated in commercial activities and that measures favouring AGVO can have an impact on the market through EVO. In their comments and answers they tend to treat AGVO, PAKHUIZEN and EVO as one single undertaking and have also explicitly claimed that AGVO and EVO should be seen as one single entity.

(130) Finally, it should be noted that AGVO does not have any separate accounts for its economic and non-economic tasks, so that cross-subsidies cannot be excluded.

10.1.2. ADVANTAGES FOR THE UNDERTAKINGS CONCERNED

10.1.2.1. *Advantages for AGVO*

10.1.2.1.1. **Initial Capital**

(131) Public investments are regarded as State aid where it is apparent that a public authority which injects capital in a company is not merely providing equity capital under normal market economy conditions. This is the case where the financial position of the company, and particularly the structure and volume of its debts, is such that a normal return (in dividend or capital

(16) Judgments in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraph 46; C-222/04 *Ministero dell'Economia* v *Cassa di Risparmio* [2006] ECR I-289, paragraphs 107-112.

(17) Judgments in Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 78, and Case T-128/98 *Aéroports de Paris* v *Commission* [2002] ECR II-3929, paragraphs 122-124.

(18) Decision of 20 October 2004, N 520/03 — Flemish ports; Decision of 24 April 2007, N 60/06 — Project Mainportontwikkeling.

(19) Case C-222/04, cited above, paragraphs 110-117.

gains) cannot be expected within a reasonable time from the capital investment. It is thus necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the restructuring of that undertaking or whether it would instead have chosen to wind it up having regard in particular to the information available and foreseeable developments at the date of those contributions [20].

(132) The Belgian authorities argue that the decision of the City to provide an initial capital to AGVO of BEF 250 million (EUR 6 179 338) was an economically rational choice. The choice to restructure the auction was made on the basis of a financial and business plan showing that, with a limited investment, the auction could become profitable again after eight years if it did not take over the losses of the past. The Belgian authorities claim that a private investor in the same situation would have made the same decision.

(133) On the basis of the information available to it, the Commission cannot share this opinion.

(134) As indicated above, the Ostend fish auction was performing badly and its market share had been decreasing constantly in the years preceding the restructuring. The Commission considers that a normal private operator, in a similar situation, would not have made the choice to provide an initial capital of more than EUR 6 000 000 on the basis of merely one financial plan, containing the financial forecast for the period 2002/10 in a 'positive hypothesis', and a business plan of just two pages.

(135) This is all the more so since, as set out in greater detail in recital 259, AGVO, as the continuation of the Ostend fish auction, could be described as a company in difficulty at the time when the initial capital was granted. When faced with a company in difficulties, a normal private operator would have sought solid assurances as to the future prospects of the company and would not have been satisfied with the documents on the basis of which the City took its decision.

(136) The Commission points out the scale of the investment on the one hand and the long-term situation of ongoing losses of the Ostend fish auction [21] on the other hand. Especially in the light of these facts, combined with the facts that the firm was operating in a highly competitive but shrinking market, a normal private operator would have based its decision on a much more thorough financial and business plan containing different hypotheses and scenarios instead of taking into account a financial plan based only on one hypothesis, which was, moreover, qualified as 'positive'.

(137) It would also seem appropriate for a normal private operator to ask for a study of, in particular, the market space available in the industry at the time, based on existing figures for landings and local demand and to require a plan explaining how the activity was to be restructured as well as what measures were contemplated to avoid the recurrence of the heavy losses of the past and to boost productivity (new investments, new marketing strategy, etc.).

(138) However the business plan does not contain any of these elements.

(139) Moreover, it is based on a number of assumptions and factual elements which are taken for granted but are not explained or justified and sometimes seem to be highly hypothetical or unlikely. It is for instance difficult to accept the assumption that the turnover of the auctioning activities will increase by 10 % during the next five years, although in the period before the restructuring the landings and turnover had been steadily decreasing, the market had become highly competitive and the fish quotas were on a decreasing trend. There are furthermore no explanations concerning the calculation of the social and outsourcing costs and of the water and energy costs. Moreover, in the business plan these costs are indicated as remaining absolutely constant over the nine years following the creation of AGVO. This seems however hardly possible, especially when the turnover is expected to double in the same period.

(140) As a result, the financial plan and the business plan not only appear to be very short and incomplete, they also lack credibility. A normal private investor would not have relied on them in order to invest BEF 250 million in a loss-making undertaking in a shrinking market [22].

[20] Judgments in Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 133; in Case C-482/99 *France* v *Commission* (Stardust Marine) [2002] ECR I-4397, paragraph 70; in Case C-261/89 *Italy* v *Commission* [1990] ECR I-4437, paragraph 8; in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 21 and in Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraph 13.

[21] At the time, the City was faced with an average annual loss of EUR 1 850 000.

[22] Judgments in Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 132; in Joined Cases C-328/99 to C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 44 and in C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 18 et seq.

(141) Even if it were accepted that the financial and the business plan were complete and reliable, quod non, the Commission observes that a private investor would still not have invested the same amount as the City. Indeed, on the basis of the financial plan and the business plan, it appears that a smaller amount of capital would have been sufficient. Given the low return on capital, a normal private operator would not have invested such an amount when it was not necessary.

(142) The Belgian authorities consider that the decision to pursue the on-going fish auction activities was more rational than closing down.

(143) However, the Belgian authorities do not give any indication relating to the costs of winding up these activities and neither do they explain why closing down was not a rational decision.

(144) The Belgian authorities further try to justify the rationality of the decision taken in 2001 to inject BEF 250 million in AGVO by means of the decision to privatise the fish auction. They submit that the current privatisation was part of the restructuring plan decided in 2001 and that no privatisation of the fish auction was possible without the restructuring.

(145) The Commission points out that according to consistent case law and practice, in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation ([23]).

(146) The Belgian authorities claim that the current privatisation forms part of the restructuring decision of 2001 and that the rationality of the decision to restructure the fish auction must be assessed in the light of the privatisation procedure. However, the various documents submitted by the Belgian authorities do not support their claim. In particular, this intention to privatise the fish auction is not mentioned in the decision to restructure the fish auction, the business plan nor in the financial plan. Nothing in those documents indicates that the decision to invest EUR 6 200 000 in the fish auction was (among others) motivated or justified by the fact that this investment would make it possible to privatise the fish auction after a certain amount of time. Their claim is also hard to reconcile with AGVO's articles of association that indicate that AGVO is established for an indefinite time, that the City has the intention to control AGVO and that subsidiaries or companies in which AGVO holds shares must be controlled by AGVO (and thus by the City).

(147) Moreover, one would expect that the decision to privatise would be contemplated once the fish auction were again profitable in order to obtain a better price for the fish auction, that is to say a price which would make it possible to recover at least the additional BEF 250 million investment. However, not only was privatisation not mentioned in either the financial or the business plan, the decision to privatise was not even taken when the fish auction had become profitable. It was on the contrary taken after two years of heavy losses affecting both AGVO and EVO and after the Commission had started its investigation. This all seems to indicate that privatisation played no part in the restructuring decision taken by the City in 2001.

(148) In addition, the Belgian authorities have indicated that the future private partner will take over the goodwill of EVO and can choose the assets he wishes to take over (i.e. to take or leave employees, machinery, fish slates, etc.). He will not have to take over the liabilities of EVO. In such circumstances, it is hard to understand why a similar approach could not have been taken in 2001/02 (without investing an additional BEF 250 million).

(149) Moreover, if all this had been part of the restructuring plan of the fish auction in 2002, no private investor would have agreed to invest BEF 250 million in the fish auction with a view to reselling it later, as he could not reasonably expect on the basis of the business plan to be able to recoup this investment by the mere sale of the business a few years later. In this regard, the Court has held that a private investor pursuing a structural policy — whether general or sectoral — and guided by prospects of viability in the long-term could not reasonably allow itself, after years of continuous losses, to make a contribution of capital that is linked to the sale of the undertaking, which removes any hope of profit, even in the longer term ([24]).

([23]) Judgments in Case C-482/99, cited above, paragraph 71; in Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 76; in Joined Cases T-228/99 to T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 246.

([24]) Judgments in joined cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke* v *Commission* ECR II-17, paragraph 124; joined cases C-278/92, C-279/92 and 280/92 *Spain* v *Commission*, cited above, paragraph 26.

(150) The Belgian authorities add that restructuring followed by privatisation will allow recovery of the investments through the rent to be charged for the fish auction buildings.

(151) However, this argument is not convincing either. The financial plan indicated that over the next eight years, the City would lose BEF 121 603 000 (in addition to the accumulated past losses) before being able to recover part of the BEF 250 million capital injection decided in 2001. The Commission notes that the City could already have decided in 2002 to rent the fish auction buildings to a third party. This might have allowed the City already to recover from 2002 part of the considerable amount of money spent for the Ostend fish auction before its restructuring or at least to cover the financial burden of the repaying the bank loans instead of running the very high risk — especially in light of the earlier poor performance of the auction — of increasing the losses that would need to be recovered at a later stage.

(152) The Belgian authorities further stress that the decision to restructure the fish auction was not taken lightly, as the decision was first rejected by the public authority monitoring the City (*toezichtautoriteit*) because there was not enough likelihood that the fish auction could become viable. Indeed, the documents provided to the Commission show that the decision to restructure the auction was first rejected because, on the basis of a first financial plan, cumulated losses of BEF 190 million were to be expected after five years.

(153) Instead of making the decision more rational this element reveals that from the start the intention to restructure the fish auction and provide it with fresh additional capital was not even based on the idea that the fish auction would become profitable again after a certain period. Moreover, it makes the second financial plan appear even less complete and reliable, as no explanation is given as to how it was possible to come to such different results in the first and the second plan. It is thus even less likely that a private investor would have taken the decision to invest an additional BEF 250 million in the auction under the same circumstances.

(154) On the basis of the above elements, the Commission concludes that the decision to invest BEF 250 million in the auction would not have been taken under the same circumstances by a normal private investor. This is also confirmed by the documents provided to the Commission. They show that one of the reasons why it was decided to restructure the auction instead of winding it up was of a political and social nature, since the restructuring would help maintain employment in a city where unemployment rates were over 12 % ([25]), a reason that a private investor would not have taken any account of ([26]).

(155) Consequently, this action provides AGVO with an advantage compared to its competitors and thus favours this undertaking within the meaning of Article 107(1) of the TFEU.

10.1.2.1.2. **Land and buildings**

(156) According to Article 30 of its articles of association, since its establishment AGVO has had the exclusive right to use, free of charge, the land and buildings of the Ostend fishing port.

(157) In 2004, various buildings and infrastructures located in the Ostend fishing port and representing, according to the City's records of that time, 57 500 m^2, were contributed to AGVO by granting it full ownership. According to the municipal accounts, this property had at that time a book value of EUR 14 891 524. The Commission has not received information that would allow it to determine the market value of the real estate at the time it was transferred to AGVO.

(158) The Belgian authorities submit that the decision to transfer the ownership of the real estate to AGVO could never be viewed as State aid as it merely concerned a transfer of real estate between two public authorities as AGVO does not participate in commercial activities.

([25]) Answer of the Belgian authorities of 19 October 2006, p. 2: 'De Stad koos voor deze laatste oplossing: […] — de locale economie rondom de vismijn scheepsherstel, scheepsbenodigheden, opslag- en diepvriesbedrijven, ijsfabrieken, groot- en kleinhandels, toerisme …) bleef behouden, wat in de naweeën van de sluiting (1997) van de plaatselijke (verlieslatende) Regie der Maritiem Transport (verlies van 1,700 arbeidsplaatsen) een belangrijke considerans was binnen een Stad met meer dan 12 % werkloosheid'. Answer of the Belgian authorities of 19 October 2006, p. 6: 'Dit belet niet dat de gedelegeerd bestuurder van een bedrijf dat voor 100 % gehouden wordt door een lokale overheid ook oog heeft voor de maatschappelijke en sociale rol die de vismijn van Oostende binnen de regio kan vervullen en die de Stad anno 2001 heeft gemotiveerd om niet radicaal tot sluiting over te gaan.'

([26]) Judgments in Joined Cases C-328/99 to C-399/00, cited above, paragraph 44; and Case C-303/88, cited above, paragraphs 18 et seq.

(159) However, as shown in point 10.1.1 of this Decision, AGVO participates directly and indirectly through its subsidiaries in commercial activities and must therefore be considered to be an undertaking. Accordingly, the decision to transfer the ownership of the real estate to AGVO cannot be viewed as a mere transfer of real estate between two public authorities, especially since the real estate concerned is largely used for the economic activities concerned (rental services, operation of the fish auction, managing the fishing port).

(160) The Commission considers that a normal private operator would not agree to a transfer of ownership of buildings of such value without obtaining a reasonable price for it.

(161) The Belgian authorities stated that the buildings were in very poor condition and that, therefore, the book value of the buildings was overestimated. Moreover, they argued that the costs for renovation, to be paid by AGVO, were of such magnitude that the transfer of ownership could be viewed as a null operation.

(162) However, the Belgian authorities have not provided the Commission with evidence showing that the book value of the assets in question had been overestimated, nor has the Commission received any evidence showing that the renovation costs would be equal to the actual value of the property rights in the buildings involved.

(163) The information available to the Commission shows on the contrary that the Belgian authorities' argument cannot be accepted.

(164) First and foremost, prior to the transfer of ownership and since its establishment AGVO had been granted the exclusive right to use, free of charge, the lands and buildings of the fishing harbour, including the fish auction. The articles of association do not contain any specific obligation concerning mandatory renovation works to be undertaken by AGVO. According to Article 3 of the articles of association, AGVO has the right to undertake, should it wish to do so, any maintenance, repair or modernisation works on the buildings ([27]) but the articles of association do not contain any provision that would put AGVO under the obligation to renovate certain buildings.

(165) AGVO has thus had the lands and buildings of the fishing port at its disposal since its establishment without having to pay any rent or any other kind of remuneration. A private operator would not have agreed to grant exclusive usage rights to an undertaking without receiving a proper remuneration.

(166) The Deed of Transfer by means of Contributing Immovable Property, of 30 December 2004, by which the right of ownership of the buildings was transferred from the City to AGVO, does not contain any particular conditions or obligations for AGVO regarding specific renovation works either. In fact, it is a general deed whereby the City hands over all rights and obligations in respect of the buildings concerned to AGVO. The responsibilities imposed on AGVO in the deed do not seem to be of such a nature as to justify that no payment would be required for taking the ownership of the buildings.

(167) Furthermore, it is not disputed that AGVO also has the right to offer the buildings for rent or to grant concession rights. The buildings, at least part of them, have a commercial value. The Belgian authorities have admitted that a part of them was rented to public and semi-public organisations and a part for private purposes (see recital 46 of this Decision).

(168) Finally, the Commission notes that AGVO has been granted another advantage in relation to the said renovation costs. The Belgian authorities have sent the Commission a list of guarantees that were given, free of charge, for certain loans. According to the list transmitted to the Commission, some of those guaranteed loans aimed at financing the renovation costs. Thus, in addition to the fact that AGVO was not obliged to engage in such renovation, the costs of at least some of the renovations that AGVO performed was reduced by these guarantees. It is for this reason also that the argument that the transfer of ownership took place, free of charge, as a kind of 'compensation' for particularly high renovation costs which AGVO was obliged to perform, cannot be accepted.

(169) Even if the renovation costs could be considered particularly significant and constitute a kind of remuneration for the transfer of ownership of the buildings, which has not been demonstrated by the Belgian authorities, the fact that AGVO had since its establishment already been provided with the exclusive right

([27]) 'Het AG Vismijn Oostende beslist vrij over het aanleggen, het bouwen, het onderhouden, het herstellen, het verbeteren, het bedienen, het zelf exploiteren en het aan derden ter beschikking stellen van roerende en onroerende goederen'.

to use the land and buildings of the Ostend fishing port free of charge would still have to be considered an advantage to be regarded as State aid. Indeed, the question whether the City acted as a normal private investor must be examined in the light of the elements available at the time the decision was taken ([28]). In the present case, when the decision was taken, the City must have known that it was granting an advantage to AGVO, since point 11 of the business plan prepared by HAMA Consult NV on 9 November 2001 clearly mentions that, since the fish auction had recently been modernised, no significant investments were to be expected in the next 10 years.

(170) Furthermore, according to the Commission Communication on State aid elements in sales of land and buildings by public authorities ([29]), in order for a transfer of the ownership of publicly owned buildings to be considered to conform to market value, the sale would normally either have to be by way of an unconditional bidding procedure, or following an independent expert evaluation. Neither of these procedures has been followed. An expert evaluation of the value of the buildings and the proper remuneration for the exclusive usage right granted to AGVO and then the transfer of ownership would in the present case have been all the more necessary since the Belgian authorities considered that the book value did not correspond to the real value.

(171) Consequently, it appears that the provision free of charge and subsequently the contribution of the buildings by the City to AGVO is an act which cannot be considered to comply with normal economic standards, such as a normal private investor in similar conditions would have undertaken.

(172) The Belgian authorities consider that since the property has been transferred back to the City (without compensation) puts an end to the State aid issue.

(173) The Commission, however, cannot agree with this position.

(174) The Commission would point out that the fact that the property has been transferred back to the City does not affect the fact that from 2002 to 2009 AGVO benefited, free of charge, from the exclusive right to use the concerned buildings, be it on the basis of Article 30 of its articles of association or on the basis of the Deed of Property Transfer of 30 December 2004. In particular, it is not certain that the value of the property as it has been recently transferred back is at least equal to the value of the benefits referred to in the previous sentence, plus the interest which is due under the State aid rules over illegal and incompatible aid which has to be recovered.

(175) Moreover, the Commission considers that to the extent that AGVO would continue to use these buildings free of charge or for a below-market rent after the transfer of property, AGVO would continue to benefit from State aid ([30]).

10.1.2.1.3. **Free guarantees for loans**

(176) According to point 2.1.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form or guarantees (the 'Notice on guarantees') ([31]), a State guarantee is considered to benefit a certain undertaking where it would allow the borrower to obtain better financial terms for a loan than those normally available on the financial markets without paying a market premium for the guarantee. In order to determine the normal market conditions, the conduct of the City ought to be compared with that of a private creditor acting with a view to realising a reasonable profit ([32]).

(177) The Notice on guarantees gives a certain number of indications as to how a guarantee is assessed within the scope of State aid rules. In particular it states that for a guarantee not to be considered State aid, it must fulfil certain criteria. Some of them raise problems in the current case.

(178) No market price has been paid for the guarantees, since the guarantees were completely free of charge.

(179) Moreover, the guarantees covered more than 80 % of the outstanding loan, as they covered the totality of the loan. This reinforces the advantage received because in the case of a 100 % State guarantee there is no incentive for the lender to properly assess the creditworthiness of AGVO and thus to properly determine the financial terms of the loan in accordance with the risk profile of AGVO ([33]).

([28]) Judgments in Case C-482/99, cited above, paragraph 71; in Case T-16/96, cited above, paragraph 76; in Joined Cases T-228/99 to T-233/99, cited above, paragraph 246.

([29]) OJ C 209, 10.7.1997, p. 3.

([30]) For this reason, the operative part of this Decision will also cover the eventuality that the property is currently put at the disposal of AGVO for a fee, but at a rate below the market price.

([31]) OJ C 71, 11.3.2000, p. 14.

([32]) Judgments in Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459; Case C-256/97 *DTM Transports* [1999] ECR I-3913, and Case T-152/99 *HAMSA* v *Commission*, cited above.

([33]) Point 3.4 of the Notice on guarantees.

(180) It is therefore clear that these guarantees allowed AGVO to obtain better financial terms for loans than those normally available on the financial markets ([34]), especially in light of the poor and often negative results of AGVO and its subsidiaries.

(181) The Belgian authorities submit that it would be normal for a shareholder to provide a guarantee free of charge in favour of an undertaking he controls. This statement is, however, not substantiated by any evidence or example. It is moreover particularly difficult to reconcile this with the behaviour of a private creditor.

(182) Indeed, the decision of the City to provide guarantees to financial institutions for loans taken out by AGVO, without any charges, is particularly unusual under normal conditions on the financial markets. In a normal situation, such a guarantee would be remunerated by an appropriate premium, which reflects the risks connected with the guarantee ([35]), even if the guarantor is a shareholder holding a controlling majority ([36]). Moreover, a normal private creditor providing guarantees would take out certain securities before granting it and verify beforehand the conditions of the loan, the risk involved etc. while the information provided by Belgium shows this has not been the case ([37]). This is all the more problematic in the present case given the financial situation of the fish auction, which has suffered recurrent and heavy losses in the past years and operates in a highly competitive and shrinking market ([38]).

(183) As set out in greater detail in recital 259, AGVO must be considered a company in financial difficulties in the sense 1999 R & R Guidelines. According to established practice, guarantees granted to companies in difficulties are deemed as likely to constitute State aid ([39]).

(184) The Belgian authorities argue that the guarantees were granted for loans relating to renovation works to undertake on buildings rented to public and semi-public bodies. They add that since this is part of AGVO's public task, the guarantee must be seen as participating in this public task and consequently cannot be considered State aid.

(185) It should first be noted that it is not certain that the guaranteed loans were actually used for the intended purpose. Even if it is true that the information submitted to the Commission seem to indicate that the City granted the guarantees on the basis of AGVO's intention to use the loans for the financing of renovation works, it also appears that the City did not link the free guarantees to the carrying-out of renovation works, nor did the City withdraw the free guarantees or ask for a remuneration when it was later established that the loans had in fact been used for other purposes.

(186) The Belgian authorities have explained that the loans have at times been used for purposes other than the announced aim. For instance a Fortis loan which was initially intended to finance the purchase of the shares in PAKHUIZEN was finally not used for that purpose but apparently for renovation works.

(187) The Belgian authorities have furthermore admitted that the EUR 550 000 loan from the ING Bank, initially intended for renovation works, was eventually used to support EVO. It is undisputed that the free guarantee for this loan cannot be regarded as a contribution to renovation tasks. In other words, it cannot be said that the City behaved as a normal private guarantor would do (including one that controlled the company concerned), namely to first examine whether the loan for which the guarantee would give cover would in all likelihood be repaid, and then to verify whether the loan was strictly used for the project for which it was originally intended.

(188) As for guaranteed loans which were actually (entirely or partly) used to finance renovation works, it must be recalled that the renting activity of AGVO is an economic activity and that the provision of a free guarantee favours AGVO on the rental market. Moreover, the free guarantee improves AGVO's financial situation in general, allowing it to use the financial resources that, under normal circumstances, it would have had to use in order to pay the premium for other purposes than the renovation of the buildings rented to public and semi-public organisms.

([34]) Decision C 5/03 (ex NN 115/02) of 21 January 2003 — Aid to MobilCom AG (OJ C 80, 3.4.2003, p. 5).

([35]) Judgment in joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 82.

([36]) For a case concerning a guarantee provided by the mother company, see Guarantee of CDC to its subsidiary CDC IXIS: decisions of 21 January 2003 and 30 April 2003 on aid E 50/01 (OJ C 154, 2.7.2003, p. 13). The guarantee had been remunerated but not under market conditions and it was therefore found to contain State aid.

([37]) The Belgian authorities have admitted that the City does not even always have a copy of the contractual documents relating to the loan and the guarantee, see Annex B to letter of 27 November 2007.

([38]) Judgment in Case C-334/99 *Germany* v *Commission*, cited above, paragraph 138; Decision 1999/720/EC, ECSC of 8 July 1999 — aid to Gröditzer Stahlwerke (OJ L 292, 13.11.1999, p. 27, paragraph 45).

([39]) See for instance point 17 1999 R & R Guidelines.

(189) Finally, even if it were to be accepted that the rental of buildings to public and semi-public organisations could be considered a service of general economic interest entrusted to AGVO, the conditions laid down in the *Altmark* case are not fulfilled, so that it must be concluded that the free guarantees constitute State aid within the meaning of Article 107(1) of the TFEU.

(190) In its judgment in *Altmark* the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107(1) of the TFEU if it fulfils the cumulative following criteria: '(…) First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined (…); (…); (…) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (…); (…) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public services obligation, taking into account the relevant receipts and a reasonable profit (…); and (…) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant a public procurement procedure, which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the obligations.'

(191) In the present case, these criteria are not fulfilled. Apart from the fact that it can be disputed whether AGVO was entrusted with public service obligations in connection with the rental of buildings to public or semi-public organisations, the Commission notes that the Belgian authorities have explicitly confirmed that no parameters for compensation had been established. Moreover, AGVO has not opted for a system of separate accounts and nothing prevents overcompensation and cross subsidies between the various activities of AGVO. Moreover, AGVO has not been chosen pursuant a public procurement procedure, and the Belgian authorities did not demonstrate that the services are provided at the least cost to the community.

10.1.2.1.4. **Tax duties**

(192) The City granted AGVO the right to establish and collect the community tax duties for the use of the fishing harbour and the auction.

(193) The tax duties thereby collected by AGVO appear to constitute resources at the disposal of the State, which have partly [40] been transferred to AGVO. Moreover, they constitute an advantage which it would normally not receive and, consequently, favour this undertaking within the meaning of Article 107(1) of the TFEU.

(194) In the present case, the Belgium authorities have indicated that the collection of the levy forms part of, and in fact constitutes a retribution for, the public interest tasks entrusted to AGVO, in particular the task of managing the fishing port. Belgium submits that the transfer of the tasks and the right to collect the tax duties should be seen as a mere allocation of tasks within the State and cannot qualify as State aid.

(195) However, as already demonstrated in point 10.1.1 of this Decision, AGVO qualifies as an undertaking within the meaning of Article 107(1) of the TFEU, which the Belgium authorities have also acknowledged in their letter of 27 November 2009. As explained in recital 124, the management of the fishing port constitutes an economic activity.

(196) The Commission has examined whether the right to collect the tax duties and use the proceeds could qualify as a compensation for services of general economic interest and whether the cumulative criteria laid down in the Altmark judgment were fulfilled.

(197) However, as already established in recital 191 of this Decision, these criteria are not fulfilled, since for instance no parameters for compensation have been established.

(198) Finally, even if it were accepted that the right to collect tax duties and use its proceeds should be seen as a compensation/remuneration for tasks of public (non-economic) interest, it is nevertheless true that AGVO also carries out commercial activities, which has explicitly been acknowledged by the Belgian authorities. Since the Belgian authorities have also admitted that AGVO had no separate accounts and that it was not possible to isolate the costs and revenues relating to AGVO's non-commercial tasks, cross subsidies cannot be avoided and the tax duties must be seen as an advantage.

[40] Belgium has stressed several times that the City had kept the right to establish and collect tax duties for the use of the slipways and harbour locks.

10.1.2.1.5. **Conclusion**

(199) In view of the foregoing recitals, the actions mentioned in 10.1.2.1.1 to 10.1.2.1.4 inclusive provided AGVO with an advantage within the meaning of Article 107(1) of the TFEU.

10.1.2.2. ***Advantage for EVO***

(200) The Commission considers that aid has been granted to EVO directly by the City by way of granting it free guarantees for loans from private banks, and, through AGVO, by allowing it free use of 13 600 m^2 of buildings, by granting free guarantees for loans from private banks and by providing it with an initial capital and capital increases.

10.1.2.2.1. **Free guarantee for loans**

(201) As regards the guarantees from the City and AGVO, the Commission observes that no market price has been paid for the guarantees, since the guarantees are completely free of charge. Moreover they cover more than 80 % of the outstanding loan.

(202) The Belgian authorities submit that it would be normal for a shareholder holding a controlling interest in a company to provide a guarantee free of charge in favour of the company he controls. This statement is, however, not substantiated by any evidence. It is moreover particularly difficult to reconcile with the behaviour of a private investor. In a normal situation, such a guarantee would be remunerated by an appropriate premium, which reflects the risks connected with the guarantee [41], even if the guarantor is a parent company [42]. Moreover, the Court has already found that commercial operations even within a group of public undertakings have to be remunerated according to normal market conditions [43].

(203) It should further be noted that, as set out in greater detail in recital 306, EVO must be considered a company in financial difficulties within the meaning of the 1999 R & R Guidelines and the 2004 Guidelines on State aid for rescuing and restructuring firms in difficulty [44] (‘2004 R & R Guidelines’). Its financial situation remained difficult throughout the whole period 2003/08. At the end of 2003, more than half of its registered capital had disappeared, a situation which did not change in the following years despite the successive increases in capital.

(204) According to established practice, guarantees granted to companies in difficulties are deemed as likely to constitute State aid [45].

(205) The Belgian authorities add that without the free guarantee from the City, EVO would not have been able to obtain the loans. In the Commission’s view, this acknowledgement and the constant bad financial situation of EVO reveal that the loans granted by private banks under a free guarantee provided by the City (or AGVO) would not have been obtained either without that guarantee. Accordingly, the guaranteed loans also grant an advantage to EVO [46].

(206) Finally the Belgian authorities submit that the guarantees should be viewed as being part of the restructuring of the fish auction.

(207) The Commission notes, however, that neither the free guarantee, nor the investments for which the loans were apparently obtained were mentioned in the business plan. Moreover, the loans and guarantees at issue (i.e. those that were actually put in place) were not granted in 2002 when EVO was established but later on in 2004 and 2005. The numerous guarantees provided also reveal that they were granted on demand each time that it was claimed that EVO needed a guarantee to obtain a loan from a credit institution. The Commission also observes that one of the loans granted by Fortis and guaranteed by the City was actually used to grant loans to vessel owners and it is difficult to see how this can be viewed as part of a restructuring or even the privatisation plan of the fish auction.

(208) Accordingly, the Commission takes the view that the free guarantees granted by the City and AGVO favoured EVO within the meaning of Article 107(1) of the TFEU.

(41) Judgment in joined Cases T-204/97 and T-270/97 *EPAC* v *Commission*, cited above, paragraph 82.

(42) For a case concerning a guarantee provided by the mother company, see Guarantee of CDC to CDC IXIS, decision of 17 January 2003, aid 50/01. The guarantee had been remunerated but not under market conditions and it was therefore found to contain State aid.

(43) Judgment in Case C-39/94 *SFEI* v *La Poste* [1996] ECR I-3547, paragraph 61.

(44) OJ C 244, 1.10.2004, p. 2.

(45) See for instance point 17 1999 R & R Guidelines.

(46) Decision 96/563/EC in case Jadecost (OJ L 246, 27.9.1996), confirmed in the judgment in Case C-288/96 *Germany* v *Commission* [2000] ECR, I-8237, paragraph 41.

10.1.2.2.2. **Buildings**

(209) The Belgian authorities have argued that the decision of AGVO to grant EVO the right to use the buildings without charge can be considered to correspond with normal market standards such as a normal private investor in similar conditions would have undertaken.

(210) The Commission cannot accept such a statement. This statement is already contradicted by the fact that the Belgian authorities have indicated that the future strategic partner will have to conclude a rental agreement for the use of the buildings of the fish auction and will have to pay a rent. Moreover, it cannot be claimed that AGVO, being the full owner of EVO ([47]), expected EVO's profits to be substantial so that the capital gains it would thus realise justified not charging any rent. After all, the auction had been running high average annual losses.

(211) The Belgian authorities submitted that the absence of rent was compensated by the fact the EVO had to bear renovation and repair costs for the fish auction which would normally have to be borne by the owner. According to the Belgian authorities, EVO paid EUR 182 377,31 since 2002 for renovation and infrastructure works on the fish auction.

(212) The Commission first notes that the Belgian authorities have not submitted any documents confirming that EVO was under the obligation to bear all renovation costs for the fish auction buildings; nor have they submitted any documents confirming that EVO actually paid EUR 182 377,31 for renovation works.

(213) The Commission further notes that the Belgian authorities have not demonstrated that it would be so unusual for a tenant to bear renovation costs or that when this is the case he would have no rent to pay. Nor have they indicated what kinds of works were undertaken, so that it is not possible for the Commission to determine whether the works concerned were unusual for a tenant. Moreover, it appears from the document received that AGVO, also, undertook renovation works relating to the fish auction between 2004 and 2007 for an amount of EUR 36 497,40. This does not seem consistent with the statement of the Belgian authorities whereby EVO would have to bear all maintenance and renovation costs.

(214) Furthermore, the Belgian authorities have not provided any evidence showing that the EUR 182 377,31 allegedly paid by EVO for renovation works would correspond to the rent to be paid for more than five years of use of 13 600 m^2 buildings under normal market conditions.

(215) Moreover, even if the renovation costs could be considered particularly significant and a kind of remuneration for the use of the buildings, which has not been demonstrated by the Belgian authorities, the business plan of 21 November 2001 clearly mentioned that since the fish auction had recently been modernised, no significant investments were to be expected in the next 10 years. Accordingly, when AGVO decided in 2002 to put the buildings at the disposal of EVO free of charge, without any reasonable expectation that the costs resulting from alleged obligation on EVO to finance their maintenance would be at least equal to the rent which an operator would be prepared to pay for them, AGVO was granting EVO an advantage. As the question whether AGVO acted as a normal private investor must be examined in the light of the elements available at the time the decision was taken ([48]), it must be concluded that EVO received State aid within the meaning of Article 107(1) of the TFEU by being granted the use of 13 600 m^2 of buildings free of charge in 2002.

10.1.2.2.3. **Initial capital and subsequent capital increases**

(216) So far as the initial capital of about EUR 370 000 to EVO is concerned, the Commission would refer to its analysis in point 10.1.2.1.1 of this Decision. Indeed, the Belgian authorities have confirmed that the initial capital in EVO was financed through the initial capital in AGVO. As the Commission has already observed, a private investor would not have chosen to restructure the fish auction and invest BEF 250 million in it; he would certainly not established a 100 % subsidiary with part of the fresh capital.

(217) So far as the capital increases by way of a remission of debt by AGVO are concerned, the Commission would also refer to its analysis in point 10.1.2.1.1 of this Decision. Indeed the Belgian authorities have confirmed that the capital increases had also (partly ([49])) been financed through the initial capital in AGVO.

([47]) Except for one share out of EUR 15 000 shares.

([48]) Judgments in Case C-482/99, cited above, paragraph 71; in Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 76; in Joined Cases T-228/99 to T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 246.

([49]) EVO's capital has been financed through other means than merely AGVO's initial capital. Indeed, the amount of capital injected into EVO is higher than the amount of capital put into AGVO.

(218) There are, moreover, other reasons why it must be considered that AGVO did not act as a private investor would have done in the same situation.

(219) Public investments are regarded as State aid where it is apparent that the financial position of the company concerned, and particularly the structure and volume of its debts, is such that a normal return (in dividend or capital gains) cannot be expected within a reasonable time from the capital investment.

(220) The Commission observes that the first increase in capital by remission of debt occurred on 31 December 2004 after almost 1,5 years existence of EVO. The increase in capital was evidently conceived as a measure in order to offset the heavy losses of EVO. The same can be said about the increase in capital in 2005 and 2007. The measures were obviously not taken with a view to obtaining some return on capital in the short or even the long-term but merely to offset past losses. A private investor would never have decided to grant the increases in capital, especially not the last two increases. EVO was not in a good financial and economic position and the situation was clearly not developing according to the business plan, according to which the losses were supposed to decrease steadily, instead of growing fast. Indeed, already at the end of 2003 more than half of EVO's registered capital had disappeared, a situation which did not change in the following years despite of the successive increases in capital. Without any prospect of future return on capital, a private investor would not have chosen to increase the capital of the company in order to offset losses ([50]). Instead he would seriously have considered the other options available (winding up, selling, etc.) and would at least have required some guarantees or restructuring measures. Also the particular form the capital increase took (remission of debt) confirms that those capital increases cannot be viewed as part of the restructuring planned in 2001.

(221) In addition, it should be noted that EVO must be considered a company in financial difficulties ([51]). According to established practice, an increase in capital granted to companies in difficulties is deemed to constitute State aid ([52]).

(222) Consequently, the successive increases in capital which EVO benefited from favoured EVO within the meaning of Article 107(1) of the TFEU.

10.1.2.3. ***Advantage for PAKHUIZEN***

(223) So far as concerns the long-term lease for the use of buildings ([53]) to PAKHUIZEN, having regard to the information available, the Commission takes the view that it grants an advantage. First, the charge of only EUR 25 per year cannot be regarded as normal pay for a long-term lease of 45 years relating to 14 754 m^2 of buildings, even when in very poor condition and needing renovation. The fact that PAKHUIZEN is required to renovate the buildings does not change this. Indeed, according to Belgian law ([54]), the owner of the buildings is not under the obligation to repair the buildings. By contrast, the tenant is under the obligation to maintain the buildings in good condition and to undertake any ordinary repair works. The Belgian authorities have not demonstrated that the renovation works PAKHUIZEN was bound to undertake under the long-term lease would go beyond 'ordinary repair works'. Moreover, the Belgian authorities have not provided any evidence that the cost flowing from that obligation is equal to the rent which could have been obtained for the buildings under normal market conditions.

(224) In addition, the Belgian authorities have admitted that PAKHUIZEN has not fulfilled its renovation obligations and has not respected the destination of the buildings. The City has obviously not taken any action against PAKHUIZEN in order to enforce the agreement, although it was entitled to do so. Therefore, even if having regard to the renovation costs, the rent of EUR 25 per year could have been regarded as corresponding to the market price — quod non — PAKHUIZEN would in any event have received an advantage from the moment it became apparent that the City had not enforced the contract.

(225) Moreover, as regards the lease of the buildings to PAKHUIZEN subject to the conditions of maintaining and renovating the buildings, according to the market economy investor principle, to the conditions established in the Commission Communication on State aid elements in sales of land and buildings by public authorities, a public authority can be considered to be acting as a market economy operator if it offers its contracts at the highest possible price within an open, transparent and non-discriminating tender, to the highest bidder or following an estimation of the market value by an independent expert. This seems however not to have been the case.

(226) Finally, the fact that after 27 years the owner of the buildings (originally the City, then AGVO) is entitled to half the yearly profit of PAKHUIZEN, does not change

([50]) See also paragraph 99 of Commission Decision 2006/740/EC of 20 October 2004 relating to case Hamburgische Landesbank — Girozentrale (OJ L 307, 7.11.2006, p. 110).
([51]) See recitals 203 and 306 of this Decision.
([52]) See for instance point 17 of the 1999 R & R Guidelines.
([53]) See recital 44 of this Decision.
([54]) Article 5 of the Law of 10 January 1824 on the long lease, Belgian Official Gazette XIX, No 14.

the above analysis. Such an advantage is too distant and uncertain to have any genuine net present value for the owner of the buildings. Furthermore, even if it had any such value, the Belgian authorities have not shown that this value — even when taken together with the EUR 25 a year plus the (unusual) renovation costs — is so high that it amounts to a market-price rent for the use of the real estate by PAKHUIZEN.

(227) Accordingly, PAKHUIZEN benefits from a yearly advantage in its operating costs which constitutes an advantage within the meaning of Article 107(1) of the TFEU.

(228) As regards the period after 26 March 2004, the date on which AGVO became the owner of the buildings concerned, the Commission notes that the lease continued to apply under the same conditions as before, and that the advantage for PAKHUIZEN therefore continued to exist.

10.1.2.4. *Advantage for fisheries undertakings making use of EVO's and PAKHUIZEN's services*

(229) In the decision initiating the formal investigation procedure, the Commission observed that EVO and possibly also PAKHUIZEN were offering their services to fisheries undertakings using the auction at a rate below that which a normal private operator would offer.

(230) It appears that EVO repays all or part of the costs of container transport of fish to be auctioned in Ostend from various destinations in Europe. Moreover, EVO provides loans seemingly below market rates on condition that the borrowing undertaking sell its catches at the Ostend auction.

(231) The comments submitted by third parties suggest that EVO has also adopted other practices which distort normal competition on the market but the Commission has not received any evidence to confirm this. The Belgian authorities have contested that EVO have been offering services under market conditions.

(232) Although the Commission has received very little evidence regarding the commercial conditions under which EVO was offering its services, it could still be the case that undertakings using the Ostend fish auction are favoured within the meaning of Article 107(1) of the TFEU. However, for the time being, the Commission also sees some force in the argument of the Belgian authorities that the fact that, thanks to the State aid, EVO was able to offer its services at better conditions than it would otherwise have done does not necessarily mean that State aid was passed on in favour of the vessel-owners and fishing undertakings.

(233) For those reasons, the Commission considers that it is not possible to conclude with certainty that an advantage has been passed on to the ship-owners. Moreover, it is likely that, since the Commission in the present Decision orders the termination and recovery of the aid to AGVO, EVO and PAKHUIZEN, any such advantages will discontinue or at least be strongly diminished. Finally, in any event the main beneficiary of the aid is the restructured fish auction which has used the aid to maintain itself on the market and to increase its market share by offering services at a loss and thereby distorting the normal functioning of the market.

10.1.3. STATE RESOURCES AND IMPUTABILITY

(234) The Commission notes that the activities at issue concern actions of the City itself as well as actions funded through State resources and imputable to the City.

10.1.3.1. *Aid granted by the public authority*

(235) First, the City granted aid to AGVO by providing it with an initial capital, funded from the City budget; by granting AGVO free guarantees for loans from private banks; by transferring the ownership of its buildings to AGVO and by empowering AGVO to establish and collect community tax duties. It also granted aid to PAKHUIZEN through the long-term lease for the use of its buildings and to EVO by granting it free guarantees for loans from private banks.

(236) These measures are therefore financed from State resources and imputable to the State.

10.1.3.2. *Actions imputable to the public authority*

(237) Secondly, as regards the advantages granted by AGVO to EVO and by AGVO to PAKHUIZEN, the Commission notes that, according to the articles of association, AGVO is the sole shareholder of EVO (apart from Mr Miroir, who has 1 share out of the 15 000 shares and is in fact a Member of the City Council) and of PAKHUIZEN and that it appoints all members of the Board of Directors of those undertakings. Furthermore, the City is the sole shareholder of AGVO and the City Council appoints all Member of the Board of AGVO. Consequently, the City is in a position where it is able to exercise a dominant influence over AGVO.

(238) Further, according to its articles of association, AGVO is entrusted with the management, development and operation of the fish auction and the fish dock of Ostend and its annexes as well as with the development of all directly and indirectly related activities. In other words, AGVO is compelled by its articles of association to involve itself in the management of the fish auction.

(239) As regards specifically the long-term lease of buildings to PAKHUIZEN, this lease was granted directly by the City.

(240) Thus, in the light of the *Stardust* case [55] and given the public assistance provided to those undertakings as outlined above, AGVO must be regarded as a body controlled by the State and its decisions regarding capital injections into EVO, free guarantees for loans to EVO and the right for EVO to use buildings free of charge as decisions financed through State resources and imputable to the public authority.

(241) The Belgian authorities do not dispute those findings. They have on the contrary confirmed that the City controlled EVO and PAKHUIZEN through AGVO [56].

10.1.4. DISTORTION OF COMPETITION AND EFFECT ON TRADE

(242) The activities of the City benefit AGVO, EVO and PAKHUIZEN. AGVO, EVO and PAKHUIZEN form a group of companies operating in a common market, auctioning fish and providing related services to the fisheries sector.

(243) The market for fish auctions is a very competitive market in which the auctions from neighbouring Member States compete directly with each other to attract fishermen from various Member States. Consequently, any benefit provided to a player on this market would distort or threaten to distort competition between the auctions and could thus affect trade between the Member States.

(244) This is confirmed by the comments received from third parties. Fish auctions and fish auction associations from the United Kingdom, the Netherlands and other European countries have shown interest in the procedure and described the effect they consider the State aid measures has had on their business.

(245) Finally the Commission notes that the Belgian authorities have indicated that not only Belgian but also other fish auctions from other Member States had shown interest in purchasing the Ostend fish auction.

(246) As for the markets for rental services, aid to undertakings active in those sectors can distort competition with undertakings providing rental services in other fishing ports, including in other Member States, and with undertakings offering buildings for rent close to the Ostend fishing port (which may well include undertakings from other Member States). Moreover, the aid measures could have helped to maintain or strengthen the market position of AGVO and PAKHUIZEN, whose business would or could have been taken over by another undertaking, if there had been no aid. It should be recalled that according to the case law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared to other competing undertakings, by giving it an economic benefit which it would not otherwise have received in the normal course of its business, points to a possible distortion of competition [57].

(247) As for the fishing ports management activities, the Commission considers that aid to such undertakings could distort competition with undertakings managing other fishing ports competing with the Ostend fishing port. Furthermore, the aid measures could have helped to maintain or strengthen the market position of an undertaking, the activity of which would or could have been taken over by another undertaking, if there had been no aid [58].

(248) The Commission would add that, although AGVO and PAKHUIZEN are not directly active on the fish auction market, they provide services which are auxiliary to that activity and which have an impact on the attractiveness of the fish auction. The Commission notes moreover that AGVO is indirectly active on the fish auction market through its subsidiary EVO. Aid granted to AGVO and PAKHUIZEN cannot therefore only distort competition and affect trade between Member States on the specific market where they are active (rental market and fishing port market) but also on the fish auction market.

(55) Judgment in C-482/99 *France* v *Commission*, cited above.

(56) See answer submitted by the Belgian authorities of 19 October 2006, p. 3: 'zowel op het niveau van aandeelhouderschap als dat van de organen (bestuur) dient de Gemeente (achter AGVO) krachtens de wet de meerderheid te hebben in de stemrechten. Dit is hier het geval.'

(57) See judgment in Case 730/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12.

(58) See *Philip Morris* judgment, cited above.

10.1.5. CONCLUSION

(249) In view of the foregoing, the Commission takes the view that the following activities must be considered to fulfil the conditions of Article 107(1) of the TFEU and thus to constitute State aid:

(a) The advantages provided to AGVO by the following decisions of the City:

— to provide AGVO with a starting capital of BEF 250 million (EUR 6 179 338),

— to provide AGVO with the exclusive right to use the lands and buildings located within the fishing port,

— to contribute buildings to AGVO, and

— to provide free guarantees for loans for AGVO, and

— to provide AGVO with the right to collect and use the community tax duties;

(b) The advantages provided to EVO by the decision of:

— the City to provide free guarantees for loans for EVO,

— AGVO not to charge EVO rent for the use of its buildings, and

— AGVO to provide EVO with an initial capital and capital increases amounting to EUR 3 969 000;

(c) The advantages provided to PAKHUIZEN, by the City and/or subsequently by AGVO, by the long-term lease for the use of its buildings.

10.2. *COMPATIBILITY*

(250) State aid can be declared compatible with the internal market if it complies with one of the exceptions provided for in the TFEU. The undertakings concerned are undertakings active predominantly in the fisheries sector. They are also active on the market for rental services. The Commission considers that AGVO as a manager of the fishing port and EVO as an operator of the fish auction are undertakings a significant part of whose activities should be considered to come within the scope of the fisheries sector. As regards PAKHUIZEN, it seems less evident that this undertaking can be considered active in the fisheries sector.

(251) As regards State aid to the fisheries sector, State aid measures can be deemed to be compatible with the internal market only if they comply with the conditions of the Fisheries Guidelines. According to point 5.3 of the current Guidelines, an 'unlawful aid' within the meaning of Article 1(f) of Regulation (EC) No 659/1999 will be appraised in accordance with the guidelines applicable at the time when the administrative act setting up the aid entered into force. Consequently, the aid needs to be appraised on the basis of the Fisheries Guidelines of 2001, 2004 and 2008.

(252) Insofar as PAKHUIZEN cannot be considered to be a fisheries undertaking, the Commission notes that the assessment of the aid should be based on the general rules applicable to all sectors and on the basis of the objectives of the aid.

(253) Finally the Commission notes that the Belgian authorities have not contested the analysis of the Commission so far as compatibility was concerned.

10.2.1. AID GRANTED TO AGVO

(254) As regards the State aid granted by the City to AGVO, it is necessary for the assessment to distinguish between the various actions and the dates on which they took place.

10.2.1.1. ***Initial capital***

(255) The Belgian authorities have submitted that the initial capital has to be seen in the framework of the restructuring of the Ostend fish auction.

(256) According to point 2.2.4 of the 2001 Fisheries Guidelines, applicable at the time of the restructuring, aid for the restructuring of firms in difficulty needs to be assessed in accordance with the Guidelines for aid for rescue and restructuring firms in difficulty, applicable at the time the aid was granted, i.e. in this case, the 1999 R & R Guidelines, including when it relates to undertakings active in the fisheries and aquaculture sector [59].

[59] See also point 12 of the 1999 R & R Guidelines that provides that these 1999 R & R Guidelines also apply to the agriculture and fisheries sector.

(257) In point 2.1 of the 1999 R & R Guidelines, a firm is considered to be in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term. The usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(258) In the Commission's view, there is no doubt that the Ostend fish auction bore all the signs of a 'firm in difficulty' in 2001. Indeed, as explained in recital 17, from 1991 until 2001, its share in terms of fish arrivals in Belgian harbours had fallen from approximately 37 % to 20 %. From 1997 to 2001 its turnover dropped from EUR 20 550 000 to EUR 13 440 000 and, over many years, the City had been recording an average annual loss of EUR 1 850 000. Consequently, in 2001 the City had to decide whether it would close the auction or restructure it. The Commission therefore considers that the Ostend fish auction qualifies as a 'firm in difficulty' within the meaning of the 1999 R & R Guidelines. The Belgian authorities have not contested to this conclusion.

(259) Though AGVO is a newly set up legal entity, the Commission notes that the constitution of the initial capital of AGVO was part of the restructuring plan of the Ostend fish auction. As the latter was a company in difficulties and AGVO was only created for the purposes of the restructuring of the Ostend fish auction and as AGVO took over not only the assets of the Ostend Fish auction but also the financial charge of various bank loans, AGVO can be considered a company in difficulty at the time when the initial capital was granted. Hence, it can be considered that the initial capital constitutes restructuring aid [60] within the meaning of the 1999 R & R Guidelines.

(260) Though AGVO is eligible for aid under point 30 of the 1999 R & R Guidelines, the aid for the restructuring of the auction, by way of establishing AGVO, providing it with a starting capital of BEF 250 million (EUR 6 179 338), does not comply with the conditions as to compatibility with the internal market laid down in paragraph 32 of the 1999 R & R Guidelines.

(261) In particular, according to point 32 of those Guidelines, 'the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions'. The Commission does not consider that the restructuring plan referred to in recital 19 meets those conditions. In this respect, the Commission notes that the plan does not contain specific internal measures to improve the operation of the auction and to abandon loss-making activities.

(262) In addition, contrary to what is required under point 32 of the 1999 R & R Guidelines, the restructuring does not appear to have been based on a market survey providing information on future prospects for supply and demand, an analysis of the market concerned and the other information mentioned in Annex I to the 1999 R & R Guidelines.

(263) Nor does the restructuring plan does not contain the elements mentioned in point 33 of the 1999 R & R Guidelines, that is the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate; the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions, and the firm's specific strengths and weaknesses.

(264) Furthermore, the Commission finds that the available information does not contain any evidence showing that the aid has been limited to the strict minimum needed as required in point 40 of the 1999 R & R Guidelines, or that the beneficiary has been required to make any contributions from its own resources. In this respect, it is also relevant to note that, according to point 41 of the 1999 R & R Guidelines, the aid must be used only for restoring the firm's viability and should not enable the recipient during the implementation of the restructuring plan to expand production capacity. However, as noted above, the financial plan drafted in 2001 suggests that the fish auction could have recovered after eight years without needing the entirety of the BEF 250 million. The business plan also foresees a 10 % increase of the turnover for the first five years the restructured fish auction would operate on the market, which could imply that the fish auction intended to expand. The recovery plan thus appears not to have been designed to ensure that the aid would be used only for restoring the firm's viability and seems to place the fish auction in a position to use the additional liquidities to expand its production capacity, its activities

(60) Commission Decision 2008/849/EC of 16 July 2008, State aid C 14/07 (ex NN 15/07), Italy, Restructuring aid to NGP (OJ L 301, 12.11.2008, p. 14).

and/or to act aggressively on the market. From the information received, it appears that the aid was indeed used for extending the auction's activities [61] and for aggressive, market-distorting activities [62].

(265) The Commission observes further that the restructuring plan does not include any measures ensuring the full implementation of the plan and observance of all conditions thereof.

(266) Moreover, Belgium has not demonstrated either that compensatory measures had been taken in accordance with points 35-39 of the 1999 R & R Guidelines or, alternatively, that the specific (alternative) conditions for agriculture (including fisheries) laid down in points 73-82 of the 1999 R & R Guidelines have been met [63]. Indeed the City does not appear to have taken any measures to mitigate so far as possible any adverse effects of the aid on the competitors, contrary to what is required under point 35 of the 1999 R & R Guidelines. Yet, having regard to the specific situation of fish auctions in particular with regard to the limited supply due to the restrictive conservation measures adopted annually at Union level, it is highly likely that the aid would adversely affect competing auctions and the City should have paid special attention to that point.

(267) Consequently, the aid granted to AGVO for the restructuring of the fish auction is not compatible with the conditions of the 1999 R & R Guidelines nor with the 2001 fisheries guidelines which refer to the rescue and restructuring guidelines.

(268) With regard to the question as to whether the provision of capital could be considered compensation for public service obligations, the Commission refers to its analysis in point 10.2.1.4 of this Decision.

10.2.1.2. ***Transfer of ownership of buildings and exclusive rights to use the land and buildings***

(269) As established in point 10.1.2.2.2 of this Decision, the granting of the exclusive right to use the buildings free of charge from 14 March 2002 and subsequently the transfer by the City of the ownership of several buildings representing a surface of 57 500 m^2 occurred without imposing obligations on AGVO of a similar value. As already observed, neither the articles of association nor the transfer deed appear to be linked to any specific and unusual condition or obligation that would justify the absence of rent or remuneration.

(270) Such an action must therefore be considered to be an aid intended to improve the situation of the undertaking and increase its business liquidity, which has the effect of reducing the recipient's production costs.

(271) The Commission has not found that this aid would comply with any of the rules on compatibility with the internal market provided for in the 2001 Fisheries Guidelines, nor have the Belgian authorities submitted any information in this regard.

(272) With regard to the question as to whether the exclusive use rights and the transfer of ownership, free of charge, should be viewed in the framework of the restructuring of the fish auction, the Commission has already established in paragraphs 260 et seq of this Decision that, although AGVO would have been eligible at the time of the granting of the measures for restructuring aid (i.e. qualified as a company in difficulty), the conditions of the 1999 R & R Guidelines are not fulfilled.

(273) With regard to the question as to whether the exclusive use rights and the transfer of ownership could be considered compensation for public service obligations, the Commission refers to its analysis in point 10.2.1.4 of this Decision.

10.2.1.3. ***Loan guarantees***

(274) The Belgian authorities consider that a distinction must be drawn between free guarantees for loans which were used for renovation works and those that were used to support EVO.

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[61] Acquisition by AGVO of Pakhuizen in 2004 and acquisition of a shareholding of 51 % in Haf Holding BO (Ijsland) in 2006. EVO also engaged in several projects, such as Pollar Drift (King Crab project) and Novafish-project (HAF Holding), mentioned in the annual accounts for 2005. See also the comments submitted by Grimsby Market suggesting that 'EVO started around 2005/2006 to buy fish straight from the Icelandic fishermen at (high) fixed prices and auctioned this fish by means of the clock in Ostend, frequently at lower prices'. The Belgian authorities did not contest any of the comments submitted by the third parties. Moreover, the tender documents submitted by the Belgian authorities confirm that EVO had engaged before 2007 in foreign activities but stopped them in 2007 (see Memorandum, p. 39).

[62] Loans subject to the condition that the borrower would auction his fish in Ostend, intervention (sometimes up to 100 %) in transport costs when the fish is auctioned in the Ostend fish auction, guaranteed minimum auction price, etc.

[63] Point 70 of the 1999 R & R Guidelines provides that points 35-39 of the 1999 R & R Guidelines apply to all enterprises of the agricultural sector, including SMEs. In the agricultural sector, as far as compensatory measures are concerned, Member States have the possibility to choose between complying either with points 35-39 of the 1999 R & R Guidelines or with the special rules for the agricultural sector contained in points 73-82 of the 1999 R & R Guidelines.

(275) They have acknowledged in this regard that a EUR 550 000 loan had been used to support EVO.

(276) The Belgian authorities have submitted that free guarantees for loans which were used to support EVO should be seen in the framework of the restructuring of the fish auction.

(277) The Commission notes, however, that as established in paragraphs 260 et seq of this Decision, though AGVO would have been eligible at the time of the granting of the measures for restructuring aid (i.e. qualified as a company in difficulty), the compatibility conditions provided for in the 1999 R & R Guidelines are not fulfilled.

(278) Moreover, the Commission notes that the free guarantees are aid measures which are not mentioned in the restructuring plan. The Commission recalls that according to point 3.2.3 of the 1999 R & R Guidelines and to point 3.3 of the 2004 R & R Guidelines [64], restructuring aid should only be granted once. Therefore, even assuming that the original aid, namely by way of initial capital and so forth, complied with the applicable R & R Guidelines — quod non — the free guarantees do not comply with the 'one time, last time' condition.

(279) The Belgian authorities seem to imply that eventually the City chose to grant free guarantees for loans instead of paying out the further annual instalments of the initial capital. However, the Commission observes that the restructuring plan was not revised in accordance with point 52 of the 1999 R & R Guidelines and the 2004 R & R Guidelines. Moreover, it is not clear whether the amount of aid was increased, decreased or whether the form of the aid was amended. Indeed, although the instalments of the initial capital were not all paid annually as initially intended, it is nevertheless true that AGVO legally had the right to require its shareholder to pay out the rest of the initial capital. In fact, AGVO has exercised this right in 2006 and 2007, when further instalments were paid out to AGVO.

(280) Accordingly, the Commission considers that the free guarantee for the loan of EUR 550 000 is not compatible with the conditions of the 1999 R & R Guidelines and 2004 R & R Guidelines nor with the 2004 fisheries guidelines which refer to the rescue and restructuring guidelines.

(281) As for free guarantees for loans which were used for renovation works, the Commission refers to its analysis in point 10.2.1.4 of this Decision.

10.2.1.4. *Tax duties and public service compensation*

(282) The Belgian authorities have argued that part of the initial capital, part of the buildings and part of the guaranteed loans had been used for the provision of services of general (economic) interest, namely the management of the fishing port and the renting of buildings to public and semi-public organisations. They also considered that the right to collect (and use) tax duties from users of the fishing port should be seen as part of AGVO's public tasks.

(283) The Belgian authorities have not demonstrated that these measures can be declared compatible under Article 106(2) of the TFEU. It must be recalled that it is incumbent on a Member State which invokes Article 106(2) TFEU as a derogation from the fundamental rules of the Treaty, to show that the conditions for application of that provision are fulfilled [65]. In any event, the Commission has examined whether the aid measures could to some extent be considered public service compensation granted in accordance with the conditions laid down in Article 106(2) of the TFEU.

(284) In this regard, the Commission has — in the 1996 [66] and 2001 [67] Communications on services of general interest in Europe as well as in the 2005 Community framework for State aid in the form of public service compensation [68] — spelled out the conditions under which State aid can be considered to be compatible pursuant to Article 106(2).

(285) One of these conditions is that the undertaking beneficiary of the aid must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest. Such act or acts of entrustment must, at the very least, specify the precise nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned.

(286) The Commission could agree that through its Act of Association AGVO have been entrusted with the management of the fishing port and that this entrustment implies certain specific obligations.

(64) OJ C 244, 1.10.2004, p. 2.

(65) Judgment in Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 54.

(66) OJ C 281, 26.9.1996, p. 3.

(67) OJ C 17, 19.1.2001, p. 4.

(68) OJ C 297, 29.11.2005, p. 4.

(287) However, so far as the rental activities of AGVO are concerned, the Commission observes that the public service obligations imposed on AGVO are not clearly defined. In particular it could not find any provision imposing specific obligations on AGVO in this respect and the Belgian authorities have not submitted further information on this issue. The Belgian authorities seem to consider that the fact that the organisations renting the buildings are public or semi-public organisations implies necessarily that the undertakings renting buildings to those organisations are themselves discharging a public service. The Commission, however, cannot agree with such a position, since this fact in itself does not imply any entrustment or any imposition of specific public service obligations that would differ from obligations falling upon any private lessor. The Commission therefore concludes that Belgium has not demonstrated that AGVO had been entrusted with public service obligations in connection with its rental activities.

(288) Furthermore, the Commission considers that the aid measures granted to AGVO do not comply with the requirement of necessity and proportionality either.

(289) The requirements of necessity and proportionality of compensation are defined as follows (see among others paragraphs 14, 15, and 17 of the 2005 Community framework for State aid in the form of public service compensation):

— the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,

— the amount of compensation includes all advantages granted by the State or through State resources in any form whatsoever — irrespective of their classification for the purposes of Article 107 of the TFEU,

— the amount of compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation used to operate on other markets is not justified, and consequently constitutes incompatible State aid.

(290) The Commission observes that the necessity and proportionality requirements have not been complied with in this case. Belgium has admitted that no parameters had been defined for the compensation. The Belgian authorities have further explained to the Commission that it was not possible to determine the costs incurred in discharging the public service obligations and the receipts for discharging those obligations. The Commission further observes that AGVO does not operate separate accounts for its various categories of activities. Consequently, compensation for public service obligations can be used to operate on other markets. Several elements in the file indicate that there has actually been overcompensation. For instance, so far as free guarantees for loans are concerned, it has been established in paragraphs 186 et seq of this Decision that guaranteed loans could be used and have been used for other purposes than the intended initial purpose. Since the amount of capital put into EVO (EUR 3 969 000) and the price paid to buy the PAKHUIZEN shares (EUR 350 000) (in total: EUR 4 319 000) go beyond the amount of capital actually paid to AGVO (EUR 3 596 665,62), AGVO has necessarily used loans and possibly tax duties in order to finance them.

(291) For the above reasons, the Commission cannot consider the aid measures to be compatible with the conditions imposed in Article 106(2) of the TFEU.

10.2.2. AID GRANTED TO EVO

(292) As regards the State aid granted by the City and by AGVO to EVO, it is necessary for the assessment to distinguish between the various actions and the dates on which they took place.

(293) The following decisions need to be assessed under the 2001 Guidelines:

— the decisions taken by the City to provide a free guarantee for loans on 28 June 2002, 27 September 2002 and 23 April 2004,

— the decision taken by AGVO to allow EVO from 8 August 2002 onward continuous free use of the buildings owned by AGVO of a total of 13 600 m^2,

— the decision taken by AGVO to provide EVO with a starting capital of EUR 371 840 on 22 August 2002.

(294) The following decisions need to be assessed under the 2004 Guidelines:

— the decisions taken by the City to provide a free guarantee for a loan on 22 April 2005,

— the decisions taken by AGVO to increase EVO's capital by a remission of debts on 31 December 2004, 31 December 2005, 21 December 2007.

(295) The following decision need to be assessed under both the 2001 and 2004 Guidelines:

— the decisions taken by AGVO to provide free guarantees for loans of EUR 600 000 between 22 August 2002 and 3 August 2006.

(296) The following decision need to be assessed under both the 2004 and 2008 Guidelines:

— the decision taken by the City to provide a free guarantee for a loan of EUR 78 000 between 27 September 2007 and 4 September 2008.

10.2.2.1. ***Guarantees for loans, right to use the fish auction free of charge***

(297) According to point 1.2 of the 2001 Fisheries Guidelines and point 3.7 of the 2004 Fisheries Guidelines State, aid which is granted without imposing any obligation on the part of recipients and which is intended to improve the situation of the undertakings and increase their business liquidity or is calculated on the quantity produced or marketed, product prices, units produces or the means of production, and which has the effect of reducing the recipient's production costs or improving the recipients income is, as operating aid, incompatible with the internal market. According to point 3.4 of the 2008 Fisheries Guidelines, operating aid which, for example, increases the business liquidity of the recipient or is calculated on the quantity produced or marketed, product prices, units produces or the means of production, and which has the effect of reducing the recipient's production costs or improving the recipients income is in principle incompatible with the internal market. It may be considered compatible only if the aid clearly and firmly contributes to serving the objectives of the Common Fisheries Policy.

(298) From the information available it appears that the free guarantees for loans and the right to use the fish auction, free of charge, have been granted without imposing any particular obligation on EVO that would render the aid compatible with any of the conditions laid down in the Fisheries Guidelines.

(299) Indeed, the free guarantees for loans appear to have been granted on mere demand for loans serving various purposes and do not seem to have been subject to any particular conditions or obligations.

(300) The information provided by the Belgian authorities even shows that the fact that the guaranteed loan was finally used for a purpose different from the purpose initially announced did not result in any sanction or annulment of the guarantee. For example, it appears that even though it was first announced that the loan of EUR 1 795 000 provided by Fortis was intended among others to buy additional machines and fish crates and to finance several modification works, it (or at least a part of it) was actually used to grant loans to owners of vessels. The guarantee has not been retracted and guarantees have been provided also after this situation occurred without apparently prompting the City to impose any conditions on EVO for the guarantee.

(301) The free guarantees have increased the business liquidity of EVO; not only did it not have to pay for the guarantee it appears also appears that, without the guarantee, EVO would not have obtained the loans.

(302) Also the right to use the auction building, free of charge, has increased EVO's liquidities, since it was spared the costs of the rent that it would have otherwise had to pay under market conditions.

(303) The Commission does not see how the free guarantees of the right to use the buildings, free of charge, can be considered contributing to the objectives of Common Fisheries Policy. The Belgian authorities have not submitted any information in this regard.

(304) The Belgian authorities have submitted that the measures had to be assessed in the framework of the restructuring of the fish auction.

(305) First, it must be assessed whether EVO would be eligible under the Rescue and Restructuring Guidelines. EVO could be considered a company in difficulty within the meaning of the 1999 and 2004 R & R Guidelines respectively.

(306) According to point 8 of the 1999 R & R Guidelines and point 13 of the 2004 R & R Guidelines, a company belonging to a larger business group is normally not eligible for rescue or restructuring aid. It could, however, be eligible if it has been created by a firm in difficulty. EVO was created by AGVO, which itself is the new legal form of the Ostend Fish auction restructured in 2001. It should be noted that AGVO is the continuation of the former Ostend fish auction, which was State owned and had no legal personality. As stated in recital 259 of this Decision, the Commission considers that AGVO, though newly created, qualifies as a firm in difficulty and is eligible under the 1999 R & R Guidelines. Since EVO has been set up in the context of the restructuring of AGVO, EVO, together with AGVO, can be regarded as a company in difficulty and could receive aid under the conditions laid down in the R & R Guidelines.

(307) However, even if EVO is eligible under the R & R Guidelines, it is nevertheless true that it has been demonstrated in recitals 260 et seq of this Decision that the compatibility conditions laid down in the 1999 R & R Guidelines are not fulfilled. Moreover, since the concerned aid measures were not provided for in the restructuring plan, they raise the same concerns as those mentioned in recitals 278 et seq of this Decision.

(308) The free guarantees for loans and the right to use the fish auction, free of charge, must therefore be considered operating aid in the sense of the 2001, 2004 and 2008 Fisheries Guidelines and do not contribute to serving the objectives of the Common Fisheries Policy. They are thus not compatible with the internal market.

10.2.2.2. *Initial capital and subsequent capital increases*

(309) EVO was established in the framework of the restructuring of the Ostend fish auction. The Belgian authorities have moreover confirmed that part of the initial capital of AGVO (i.e. EUR 371 840) was used as initial capital for the establishment of EVO and for subsequent capital increases.

(310) Hence, it is to be assessed whether the initial capital and subsequent capital increases could be considered Rescue and Restructuring aid within the meaning of the 1999 R & R Guidelines and the 2004 R & R Guidelines respectively.

(311) EVO, together with AGVO, can be considered a company in difficulty within the meaning of the 1999 R & R Guidelines and the 2004 R & R Guidelines respectively as described in point 10.2.2.1.

(312) However, as already indicated above in recitals 260 et seq of this Decision, the compatibility conditions for restructuring aid are not met in this case.

(313) The initial capital and the subsequent capital increases cannot therefore be considered compatible with the internal market.

10.2.3. AID GRANTED TO PAKHUIZEN

(314) The effect of the terms of the lease between the City and PAKHUIZEN was that PAKHUIZEN could benefit from a yearly reduction of its operating costs. This type of aid does not fall within the scope of any of the measures mentioned in the Fisheries Guidelines, or within the objectives of other horizontal or specific guidelines which could be applicable to this kind of undertaking. Under both the relevant Fisheries Guidelines and the horizontal rules on State aid, such type of aid must be considered operating aid which is incompatible with the internal market.

10.2.4. CONCLUSION

(315) In view of all the foregoing, the Commission concludes that the measures mentioned in point 10.1.5 of this Decision must be regarded as State aid, that they are not compatible with the internal market and that they must be recovered as described in section 11.

11. RECOVERY

(316) In accordance with Article 14(1) of Regulation (EC) No 659/1999, where negative Decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary. The purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it.

(317) Regulation (EC) No 659/1999 does not lay down any limitation period for the examination of unlawful aid within the meaning of Article 1(f) thereof, i.e. aid implemented before the Commission is able to reach a conclusion about its compatibility with the common market. However, Article 15 of that Regulation stipulates that the powers of the Commission to recover aid is subject to a limitation period of 10 years, that the limitation period begins on the day on which the aid is awarded to the beneficiary and that that limitation period is interrupted by any action taken by the Commission.

(318) The limitation period was interrupted by the request for information sent to Belgium on 13 March 2006. Accordingly, the recovery shall be limited to the aid received after 13 March 1996.

(319) In order to determine what has to be recovered from AGVO, EVO and PAKHUIZEN, account should be taken of the fact that part of the aid granted to AGVO has been transferred to EVO. As pointed out by the Belgian authorities, this aid should be recovered only once from the real beneficiary.

(320) For that reason, in those situations where aid granted by the City finally benefitted EVO, the aid to be recovered from AGVO is the part of the aid which was not transferred to EVO.

11.1. *RECOVERY FROM EVO*

(321) The aid to be recovered from EVO is composed of:

— the initial capital for an amount of EUR 371 840,

— the subsequent capital increases of EUR 1 387 044, EUR 710 000,75 and EUR 1 500 114,96,

— the advantage received thanks to the provision of free guarantees for loans, and

— the advantage derived from the free use of the fish auction between 22 August 2002 and the last day EVO has had the fish auction at its disposal.

(322) As for the aid element of the free guarantees, this is in principle the amount of the loans guaranteed, unless the Belgian authorities provide evidence that it would have been possible for EVO to obtain such guarantees on the market; in that case, the aid element consists of what the likely market premium would have been for the guarantee.

(323) The Belgian authorities have declared that the two loans for which a guarantee was provided in 2002 were in the end not taken up by EVO. As a consequence, though the aid had been granted (the decision to provide the free guarantee had been adopted), EVO has not actually benefited from it. The aid resulting from the free guarantees for loans agreed on 28 June and 27 September 2002 does not therefore need to be recovered. Consequently, an amount of EUR 4 284 995 (3 606 995 + 78 000 + 600 000) should be recovered.

11.2. *RECOVERY FROM PAKHUIZEN*

(324) The aid to be recovered from PAKHUIZEN is composed of the advantage derived from the fact that the long-term lease agreement was not concluded at a market price.

(325) According to Article 15 of Regulation (EC) No 659/1999, the recovery shall be limited to a period of 10 years back from 13 March 2006.

(326) The advantage consists of the remuneration (rent) that would have been paid under normal market conditions for the long-term lease agreement for the buildings minus (a) the EUR 25 paid annually and (b) any renovation costs that PAKHUIZEN has had and which it would not have needed to pay under the normal rules of Belgian law ([69]). The period at issue runs until the day of recovery or — in the case the lease agreement was ended before recovery was ordered — the day the lease agreement was ended.

11.3. *RECOVERY FROM AGVO*

(327) The aid to be recovered from AGVO is composed of the initial capital, the advantage derived from the provision of free guarantees for loans, the advantage derived from the exclusive use of the lands and buildings in the Ostend fishing port between 14 March 2002 and 25 March 2004 (for the buildings that were subsequently transferred to AGVO) and between 14 March 2002 and the day of recovery (for the rest of land and buildings that were not part of the property transfer deed concluded on 26 March 2004) and the advantage derived from the transfer on 26 March 2004, free of charge, of the ownership of 57 500 m^2 of buildings located in the Ostend fishing port.

(328) So far as the initial capital is concerned, the information provided to the Commission shows that though the aid was granted for an amount of BEF 250 million (EUR 6 200 000), it has not been entirely paid out yet. Recovery should therefore be limited to the amount actually paid to AGVO, that is EUR 3 596 665,62 according to the last information submitted to the Commission. If more than this amount has been paid to AGVO the surplus has to be recovered as well.

([69]) As already noted, it is so uncertain that the condition that after 27 years, the lessor is entitled to half the profit of PAKHUIZEN, has any real value that nothing can be deducted on this basis. Moreover, the lease has been terminated so that this clause will never be applied.

(329) As for the aid element of the free guarantees, this is in principle the amount of the loans guaranteed, unless the Belgian authorities provide evidence that it would have been possible for AGVO to obtain such guarantees on the market; in that case, the aid element consists of what the likely market premium would have been for the guarantee, when they were agreed (26 March 2004, 23 April 2004 and 22 April 2005).

(330) Where the market does not provide guarantees for the type of transaction concerned the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate AGVO would have borne without the guarantee and the interest rate obtained by means of the State guarantee. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates ([70]) are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.

(331) So far as concerns the advantage derived from the exclusive use, free of charge of the lands and buildings of the Ostend fishing port, the aid amounts to the rent AGVO would have had to pay under market conditions for the exclusive use of the lands and buildings in the Ostend fishing port between 14 March 2002 and the day of recovery or the last day that AGVO had the right to use the buildings, free of charge, either on the basis of its articles of association, the Deed for transferring the ownership of the buildings or otherwise.

(332) The Commission is aware of the fact that part of the lands and buildings were of limited or no commercial value (for example the roads). The Commission observes however, that part of the lands and buildings had a clear commercial value (fish auction, offices, warehouses) and that another part of the lands and buildings (infrastructure of the fishing port) allowed AGVO to provide services to vessel-owners and that AGVO had the right to levy a fee in exchange for the services provided. These elements must be taken into account in order to calculate the rent.

(333) So far as the advantage derived from the collection of tax duties is concerned, the aid amounts to the tax collected since its establishment and the day of recovery or the last day AGVO was entitled to collect those duties.

(334) Finally, the Commission notes that the amount to be recovered from AGVO should be diminished by the amount of aid that has been transferred to EVO in the form of capital (EUR 3 969 000) and free disposal of the buildings where the fish auction is operated.

(335) The Commission is aware of the fact that AGVO was entrusted with some non-economic public tasks (inspection of fish landed for consumption, checking that the catch landed is subjected to the VAT requirement, public relations functions) and with the management of the fishing port. The Commission considers that the amount to be recovered from AGVO should be diminished by the costs for which it can be proved that they were made when discharging these tasks.

11.4. *IMPACT OF THE RESTRUCTURING OF THE FISH AUCTION ON THE RECOVERY ISSUE*

(336) The Belgian authorities have informed the Commission that the City and AGVO were planning to privatise the fish auction. They have argued that once privatisation was completed, there would no longer be an issue of State aid and the procedure would be rendered devoid of purpose.

(337) The Commission would recall in this regard that though the privatisation could put an end to the aid measures at issue, it does not erase the advantages granted to the beneficiaries of the aid for the period prior to the ending of the aid measures. Recovery precisely serves the purpose of re-establishing the previously existing situation in order to ensure a level-playing field in the internal market. The Commission draws the attention of the Belgian authorities in this respect to the Notice from the Commission 'Towards an effective implementation of Commission Decisions ordering Member States to recover unlawful and incompatible State aid' ([71]), in particular point 3.2.4 thereof which deals with the recovery of State aid from companies which are being wound up and insolvent beneficiaries. As regards the request to postpone taking this Decision (see recital 99), that would be inappropriate since it is important that unlawful and incompatible State aid be recovered as quickly as possible,

([70]) OJ C 14, 19.1.2008, p. 6.

([71]) OJ C 272, 15.11.2007, p. 4.

HAS ADOPTED THIS DECISION:

Article 1

1. The aid granted to NV Exploitatie Vismijn Oostende (EVO) for an amount of EUR 3 969 000 in the form of an initial capital and loans which were later transformed into capital increases is incompatible with the internal market.

2. The aid granted to EVO for an amount of EUR 4 284 995 in the form of free guarantees for loans is incompatible with the internal market.

3. The aid granted to EVO in the form of the right to use, free of charge, the buildings of the fish auction located in the Ostend fishing port, is incompatible with the internal market.

Article 2

1. The aid granted to Autonoom Gemeentebedrijf Vismijn Oostende (AGVO) for an amount of EUR 6 200 000 in the form of an initial capital is incompatible with the internal market.

2. The aid granted to AGVO in the form of free guarantees for loans is incompatible with the internal market.

3. The aid granted to AGVO in the form of the right to use, free of charge and/or at a rate below the market price, lands and buildings located in the Ostend fishing port, is incompatible with the internal market.

4. The aid granted to AGVO in the form of the transfer of ownership, free of charge, between 26 March 2004 and 4 September 2009, of 57 500 m^2 of buildings located in the Ostend fishing port is incompatible with the internal market.

5. The aid granted to AGVO in the form of the right to collect tax duties since 14 March 2002 is incompatible with the internal market.

Article 3

The aid granted to NV Pakhuizen (PAKHUIZEN) and resulting from the long-term lease agreement concluded in 1989 with the City of Ostend, is incompatible with the internal market.

Article 4

1. Belgium shall recover the aid referred to in Article 1 and Article 2(2) to (5) from the beneficiaries.

2. Belgium shall recover the aid referred to in Article 2(1) to the extent it has already been paid to AGVO (EUR 3 596 665,62).

3. Belgium shall recover the aid referred to in Article 3 to the extent it has been granted since 13 March 1996.

4. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiaries until their actual recovery or the last date on which they were placed at the disposal of the beneficiaries, should the aid measures have ended before recovery took place.

5. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 [72] and with Commission Regulation (EC) No 271/2008 [73] amending Commission Regulation (EC) No 794/2004.

6. Belgium shall cancel all outstanding payments of and/or other forms of granting the aid referred to in Articles 1, 2 and 3 with effect from the date of adoption of this Decision.

Article 5

1. Recovery of the aid referred to in Articles 1, 2 and 3 shall be immediate and effective.

2. Belgium shall ensure that this Decision is implemented within four months of the date of its notification.

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(72) OJ L 140, 30.4.2004, p. 1.
(73) OJ L 82, 25.3.2008, p. 1.

Article 6

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

(a) the total amount (principal and recovery interest) to be recovered from AGVO, EVO and PAKHUIZEN;

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

(c) documents demonstrating that AGVO, EVO and PAKHUIZEN have been ordered to repay the aid.

2. Belgium 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 1 to 3 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 AGVO, EVO and PAKHUIZEN.

Article 7

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 27 April 2010.

For the Commission

Maria DAMANAKI

Member of the Commission

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 18 November 2009

on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan

(notified under document C(2009) 9000)

(Only the English text is authentic)

(Text with EEA relevance)

(2010/608/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on Member States and other interested parties to submit their comments pursuant to those provisions [1], the Commission received no comments from interested parties,

Whereas:

1. PROCEDURE

(1) On 12 November 2008 the Commission authorised an emergency recapitalisation in case N 528/08. In the recapitalisation measure the Netherlands subscribed to a EUR 10 billion issue of Core-Tier 1 securities by ING. The measure has been authorised for a period of 6 months conditional on the submission of a credible plan within those 6 months [2]. The validity of the emergency recapitalisation measure was automatically prolonged with the submission of a restructuring plan until the Commission reached its decision on the plan.

(2) On 31 March 2009, in case C 10/09 (ex N 138/09), the Commission authorised an impaired assets measure ('the IA measure') for a portfolio of US Alt-A residential mortgage backed securities ('RMBS') in favour of ING for a period of 6 months [3]. The Dutch authorities refer to the measure as the 'Illiquid Assets Back-up Facility' ('IABF'). Due to doubts on the conformity of certain aspects of the IA measure with the Communication from the Commission on the treatment of impaired assets in the Community banking sector [4] ('the Impaired Asset Communication') the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [5]. The Commission called on interested parties to submit their comments. The Commission received no comments from interested parties.

(4) The authorisation of the IA measure was prolonged in the Commission Decision of 15 September 2009 [6].

(5) In addition, under the Dutch Credit Guarantee scheme (approved in Commission decision in case N 524/08 from 30 October 2008 and prolonged in Commission decision in case N 379/09 [7] from 7 July 2009), the Netherlands granted guarantees on medium-term liabilities to ING amounting to (i) USD 9 billion (of which USD 8,25 billion has already been issued) and (ii) EUR 5 billion (of which EUR 4,15 billion has already been issued).

(6) On 25 November 2008, 8 April 2009, 18 May 2009 and 9 November 2009 the Commission received information from market participants alleging that ING Direct Europe had, for a short period, been advertising the capital injection it received from the Netherlands and that it was perceived as engaging in aggressive commercial behaviour.

(1) Commission decision in case C 10/09 (ex N 138/09) ING, OJ C 158, 11.7.2009, p. 13.
(2) Commission decision in case N 528/08, *ING*, OJ C 328, 23.12.2008, p. 10.
(3) Commission decision in case C 10/09 (ex N 138/09) ING, OJ C 158, 11.7.2009, p. 13.
(4) OJ C 72, 26.3.2009, p. 1.
(5) See footnote 1.
(6) Not yet published.
(7) Commission Decision of 7 July 2009 in case N 379/09 and NN 16/09, not yet published.

(7) A number of meetings, e-mail exchanges and telephone conferences took place between the Commission and the Dutch authorities.

(8) With regard to issues pertaining to the asset valuation methodologies employed in the context of the IA measure, the Commission has drawn on technical assistance provided by external experts under contract to the Commission (Duff and Phelps and Professor Wim Schoutens) and by experts from the European Central Bank.

(9) On 12 May 2009 the Netherlands submitted a restructuring plan for ING group to the Commission, which was complemented by additional information submitted on 7 July 2009. The restructuring plan was modified on 22 October 2009 (any reference to a restructuring plan made hereinafter refers to this last version of the restructuring plan). This modification included also a change in terms for repaying the capital injection from the Netherlands.

(10) On 22 October 2009 the Netherlands provided a number of commitments as regards the implementation of the restructuring plan and the remuneration of the IA measure.

(11) The Netherlands informed the Commission that for reasons of urgency they exceptionally accept that this Decision is adopted in the English language.

2. DESCRIPTION OF THE FACTS

2.1. **The beneficiary**

(12) ING is composed of ING Groep N.V. ('ING Group'), the mother holding company that controls 100 % of ING Bank N.V. and ING Verzekeringen N.V., and two sub-holding companies controlling banking and insurance subsidiaries respectively. ING Group comprises more than 70 individual businesses with more than 2 500 legal entities operating in about 50 countries. As of the end of 2008, the group balance sheet totalled EUR 1,332 billion, of which more than 75 % is attributable to ING's banking activities.

(13) At the end of 2008, and including the recapitalisation measure, ING's capital ratios for the bank were 9,3 % as regards its Tier 1 ratio and 7,3 % for the Core-Tier 1 ratio. For insurance the capital coverage ratio amounted to 256,5 %.

(14) The capital structure of ING Group also includes so-called core debt, that is to say senior debt raised at the group level which is then invested as shareholder equity into ING Bank and ING Insurance holding (so-called double leverage). In addition, the ING Insurance holding has itself raised EUR 2,3 billion of so-called core debt which can be used as shareholder equity in its insurance subsidiaries.

(15) ING's investment portfolio comprised its Alt-A portfolio held, for the most part of it, by ING Direct US. ING Direct US had under the US law the status of a 'US Thrift institution', this status required from ING Direct US to invest the majority of its collected savings in US mortgages loans or US mortgage loan related investments. Consequently, ING allocated a significant amount of its investment portfolio to US Alt-A RMBS. The Alt-A portfolio was covered by the IA measure from the Netherlands (as described in section 2.3.2 below). ING's investment portfolio also comprised a significant proportion of commercial mortgage backed securities (CMBS), US RMBS and real estate investments that are not covered by the IA measure.

2.2. **Business activities**

(16) At the end of 2008, ING was active in six business lines. ING was also active in asset management which was functionally part of the respective regional insurance business units.

2.2.1. *Retail banking*

(17) ING offers retail banking services in the Netherlands, Belgium, Poland, Romania, Turkey, India and Thailand (retail banking services via ING Direct are not described in this section but in section 2.2.2). Private banking is offered in the Netherlands, Belgium, Luxembourg, Switzerland and various countries in Asia and Central and Eastern Europe. Small and medium sized enterprises and mid-corporate business is part of ING's retail banking.

(18) In its retail banking activities in the Netherlands and in Belgium, ING combines a direct banking model and a branch network. ING provides current account services and payments systems, savings accounts, mortgage loans, consumer loans, credit card services and investment and insurance products. Mortgages are offered through a direct channel, through a tied agents sale force as well as through intermediary channels. Via its branch network, ING also offers a full range of commercial banking products as well as life and non-life insurance products.

(19) In retail banking (private individuals) in the Netherlands its market share amounts to 40-50 % [8] for main banking relations. Its market share for savings accounts amounts to 30-40 % by value and 20-30 % by numbers. Market shares for consumer loans by value, mortgages and private banking represent 10-20 %.

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[8] The market shares in recital 19 and recital 24 on the Dutch market are based on the public figures in the Commission Decision Case No. Comp/M.4844 *Fortis/ABN Amro Assets*. The market share deviates slightly from more actualised figures provided by the Netherlands. However, given that the differences are not significant for the decision, the Commission reports for reasons of coherence the verified figures.

(20) Market shares in Belgium amount to [10-15] (*) % for current accounts, [20-25] % for consumer credit, [15-20] % for mortgages, [10-15] % for savings and [10-15] % for mutual funds. Retail banking market shares in Poland amount to [5-10] % overall and [5-10] % in savings. In Romania, ING's market share amounts to [0-5] % of all liabilities and [0-5] % of all assets. Market shares in savings amount to [0-5] % in Turkey.

2.2.2. *ING Direct — Retail banking*

(21) ING Direct operates direct Internet based retail banking activities for customers in Australia, Austria, Canada, France, Germany, Italy, Spain, the United Kingdom and the United States. The main products offered are savings accounts and mortgages, and increasingly also mutual funds and payment accounts.

(22) For savings, the market share of ING Direct in Germany amounts to [5-10] %, [0-5] % in Italy, [0-5] % in Australia, [0-5] % in Canada, about [0-5] % in Spain, the United Kingdom and Austria, and roughly [0-5] % in the US and France. For residential mortgages market shares amount to [0-5] % in Australia, [0-5] % in Canada, [0-5] % in Italy and [0-5] % in Spain. Market shares for new residential mortgages amount to [0-5] % in Germany. The major non-European part of ING Direct is its US subsidiary where it has a residential mortgage market share of [0-5] % and a balance sheet of USD […] (**) billion at the end of Q1 2009.

2.2.3. *Wholesale banking*

(23) Wholesale Banking's primary focus is on the Netherlands, Belgium, Poland and Romania, where it offers a full range of products, from cash management to corporate finance. Elsewhere, it takes a more selective approach to clients and products. Wholesale Banking has six business units: General Lending & Payments and Cash Management, Structured Finance, Leasing & Factoring, Financial Markets, Other Wholesale Products, and ING Real Estate.

(24) As regards corporate customers, ING's Dutch market shares are [20-30] % for main banking relations, documentary credits, international payments and international payment services, loans and current accounts and factoring. Higher market shares of [30-40] % are held in deposits/savings and domestic payments. ING's market share for corporations in Belgium amounts to [25-30] % in current accounts, [15-20] % in loans, [15-25] % in leasing and [20-30] % in deposits.

2.2.4. *Insurance and asset management activities in Europe*

(25) The main insurance activities of ING in Europe are in the Netherlands (mainly under the brands ING, Nationale-Nederlanden and RVS). ING has a market share of [15-20] % in life insurance and [5-10] % in non-life (related to gross written premiums in 2008). Products are distributed via direct distribution channels (mainly branches from ING and Postbank, which was rebranded into ING in early 2009) and brokers. Outside the Netherlands ING is not active in the non-life insurance sector with the exception of Belgium (where it has a [0-5] % market share in non-life).

(26) ING's market shares in life insurance represent [30-35] % in Romania, [20-25] % in Hungary, [10-15] % in both the Czech Republic and Greece, [5-10] % in Poland, [5-10] % in the Slovak Republic and [5-10] % in Belgium. ING is also active — with much smaller market shares of below [0-5] % — in Spain, Bulgaria and Turkey. Pension fund management is part of its activities including mandatory (MPF) and voluntary (VPF) pension funds. In the MPF ING has a market shares of [20-25] % in Poland and [10-15] % in Slovakia. In the VPF, ING's market shares amount to [35-40] % in the Slovak Republic, [10-15] % in the Czech Republic and [5-10] % in Turkey. Combining MPF and VPF, its market shares amount to [35-40] % in Romania, [10-15] % in Hungary and [5-10] % in Bulgaria.

(27) In 2008 ING had assets in the respective geographical zones of EUR […] billion in the Netherlands, EUR […] billion in Belgium (and Luxembourg) and EUR […] billion in Central and Eastern Europe.

2.2.5. *Insurance and asset management activities in the Americas*

(28) ING Insurance Americas operates in two main geographical areas: the United States and Latin America. Its activities in Canada were sold in early 2009. ING Insurance Americas offers life and non-life insurance, retirement services (primarily defined contribution plans), annuities, mutual funds, broker-dealer services and institutional products, including group reinsurance and institutional asset management products and services.

(*) Parts of this text have been replaced to ensure that confidential information is not disclosed. Those parts are enclosed in square brackets and marked with an asterisk.

(**) Parts of this text have been omitted to ensure that confidential information is not disclosed. Those parts are indicated by three full stops enclosed in square brackets and marked with two asterisks.

(29) In the US, its market share is [5-10] % in the variable annuities business, [0-5] % in life and about [0-5] % in both fixed annuities and group life. ING primarily provides pension products in Mexico, Chile, Peru, Colombia and Uruguay. Market shares for retirement funds are highest in Peru ([30-35] %), Chile ([20-25] %) and Uruguay ([15-20] %). Market shares for life insurance are most significant in Peru ([15-20] %) and in Chile ([10-15] %). In 2008 its assets amounted to EUR […] billion in the US and EUR […] billion in the rest of the American continents.

2.2.6. *Life insurance and asset management in the Asia/Pacific region*

(30) Insurance Asia/Pacific is a provider of life insurance and asset management products and services across Asia/Pacific with life insurance services in nine countries (Australia, New Zealand, Japan, South Korea, Malaysia, Hong Kong, Thailand, India and China) and asset management units in twelve (the nine countries above plus Taiwan, Philippines and Singapore). ING ranks as one of the largest international insurance companies and asset managers in the Asia/Pacific region. The value of assets held in this region amounts to EUR […] billion.

2.3. **The aid measures**

(31) ING has benefitted from three aid measures from the Netherlands.

2.3.1. *Capital injection*

(32) The first measure consisted of a capital injection fully subscribed by the Netherlands which allowed ING Group to increase its Core-Tier 1 capital by EUR 10 billion [9]. The Commission noted in its decision approving the rescue aid (N 528/08) that the reasons for the loss of market confidence in ING, which triggered the State intervention, was due to the perceived toxicity of the Alt-A portfolio, market concerns about further write downs, the capital needs of ING Insurance and the deteriorating debt to equity ratio of ING group. According to the Netherlands, without the capital injection ING would have still survived but it would have faced a further decrease in confidence and an increased liquidity risk.

(33) The issue price for an injection of EUR 10 billion of Core-Tier 1 capital was EUR 10 per security. On the initiative of ING the securities can either be repurchased at EUR 15 per security (a 50 % redemption premium to the issue price), or, after three years, be converted into ordinary shares on a one for one basis. If ING triggers the conversion option, the Netherlands has the choice to opt for the alternative redemption of the securities at a rate of EUR 10 per security plus accrued interest. A coupon will only be paid for the Netherlands if a dividend is paid on the ordinary shares.

(34) In the framework of the restructuring plan the Netherlands has submitted an amendment to the agreement for repayment of the Tier 1 securities by ING. According to the amended terms ING is able to repurchase up to 50 % of the Core-Tier 1 securities at the issue price (EUR 10), plus the accrued interest in relation to the 8,5 % annual coupon (around EUR 253 million), plus an early repayment penalty when the ING share price trades above EUR 10. The early redemption penalty increases with the ING share price. For the purpose of the calculation of the early redemption premium the share price increase is capped at EUR 12,45 [10]. At that level the penalty is equal to 13 % on an annual basis. The early redemption penalty could amount to a maximum of EUR 705 million assuming that the EUR 5 billion are repaid after 400 days the date of issue. Furthermore the penalty premium has a floor of EUR 340 million, ensuring a minimum internal rate of return for the Netherlands of 15 %. In other words, considering that ING would normally have to pay EUR 2,5 billion redemption premium this amendment would result in an additional advantage for ING between EUR 1,79 and 2,2 billion depending on the market price of ING shares. The Netherlands explained that the reason for the amendment was to allow ING similar conditions for exit to those which had been granted to *SNS* [11] and *Aegon* [12] on the capital injections that they received from the Netherlands. Those early prepayment conditions can only be applied to the repayment of EUR 5 billion (that is to say 50 % of the initial capital injection).

(35) ING may elect to make use of the repurchase option prior to 31 January 2010, but that date can, upon agreement with the Netherlands, be extended until 1 April 2010 due to exceptional market circumstances if ING can demonstrate that it was not economically feasible to raise sufficient Core-Tier 1 capital necessary to repurchase EUR 5 billion earlier. Such an extension would then be subject to Commission approval. ING aims to make use of the repurchase option prior to 1 January 2010. Repayment and conversion options on the remaining 50 % are unaltered.

[9] The measure is described in detail in Commission decision N 528/08 of 12 November 2008.

[10] The early repayment penalty is calculated as follows: EUR 650 000 000 * (number of securities repurchased/500 000 000) * (days from issue)/365) * (prevailing price – 10)/(12,5 – 10) where prevailing price is the average of the market price 5 days before repayment, it is higher or equal to EUR 11,20 and lower or equal to EUR 12,45.

[11] Commission Decision in case N 611/08, OJ C 247, 15.10.2009, p. 2.

[12] Commission Decision in case N 569/09, OJ C 9, 14.1.2009, p. 3.

2.3.2. *The impaired assets measure*

(36) The second aid measure was an IA measure in relation to the Alt-A portfolio whose value has declined significantly, putting a strain on the negative revaluation reserve. The Netherlands authorities requested that the measure be approved before 31 March 2009, for reasons of financial stability. In addition, if the measure had been amended in any other than insignificant manner, a large accounting loss would have materialised for ING.

(37) The IA measure was described in detail in the opening decision of 31 March 2009. The structure of the measure is only briefly recalled before the main changes in the remuneration and fee structure are explained.

(38) Since 26 January 2009 the Netherlands has received 80 % of all the cash flows from an impaired US Alt-A RMBS portfolio (hereinafter referred to as 'the portfolio') from ING (represented by Flow 4 in the graph below, together with a guarantee fee (Flow 5). In return, ING receives the following risk-free cash flows from the Netherlands:

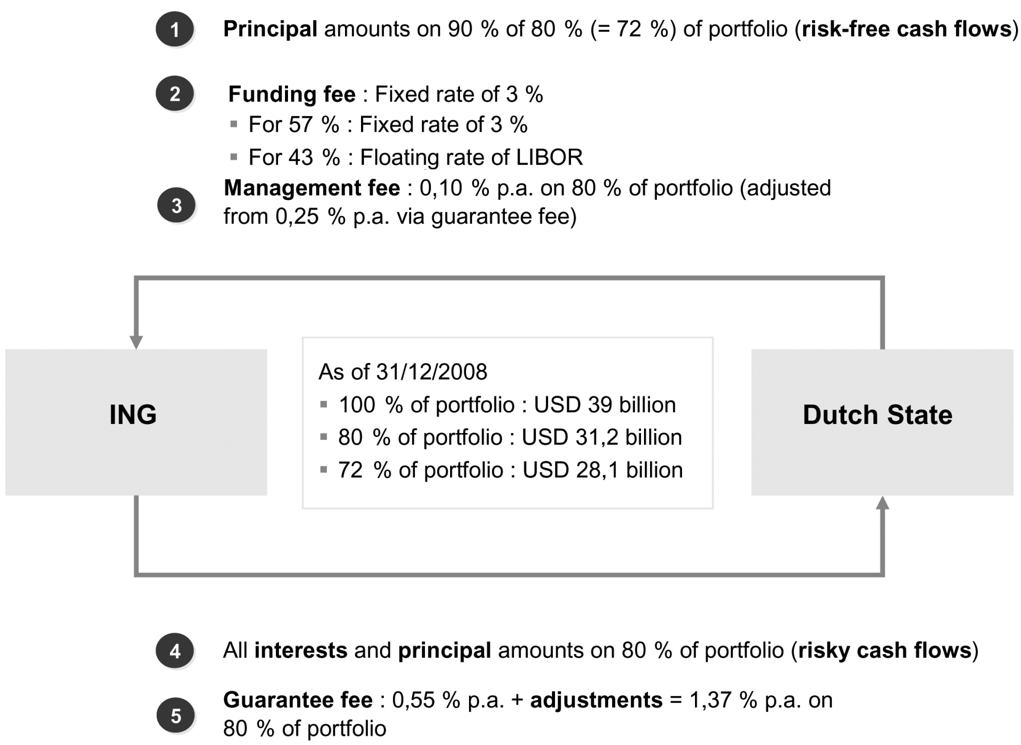
— a guaranteed value, representing cash flows of principal payments totalling USD 28 billion, which corresponds to 90 % (the purchase price or transfer price) of 80 % of the portfolio, that is to say 72 % of the portfolio (Flow 1). Those cash flows are paid on a monthly basis, over the life of the portfolio;

— a funding fee (Flow 2);

— a management fee (Flow 3).

(39) The cash flows originating from the remaining 20 % of the portfolio are retained by ING and fall outside the scope of the cash flow swap.

(40) ING has agreed to make a series of additional payments to the Netherlands effectively resulting in a significant increase of the State's remuneration for the IA measure via the adjustments of the fees described in recitals 41, 42 and 43:



(41) First, from 25 October 2009, the Netherlands will reduce the funding fee for 57 % (fixed-rate securities) of 72 % of the portfolio by 50 basis points ('bp') per annum ('p.a.') from 3,5 % ([13]) p.a. to 3 % p.a. and will reduce the funding fee for 43 % (floating-rate securities) of 72 % of the portfolio by 50 bp p.a. from LIBOR + 50 bp p.a. to LIBOR flat.

(42) Second, the management fee (paid by the Netherlands to ING) amounting to 25 bp p.a. on 80 % of the outstanding amount of the portfolio will be reduced by 15 bp to 10 bp through an increase of the guarantee fee (as below in recital 43).

(43) Third, from 25 October 2009, ING will increase the guarantee fee of 55 bp p.a. on the outstanding amount of the transferred portfolio by a further 82,6 bp p.a., bringing the total guarantee fee to 137,6 bp. Of the increase of 82,6 bp, 67 bp compensate for the reduction in the management fee (paid by the Netherlands to ING) by 15 bp and a revision of the portfolio transfer price by 52 bp (corresponding to a decrease in transfer price from 90 % to around 87 %). 15,6 bp are a claw back adjustment for the period from 26 January 2009 (the start of the initial measure) to 25 October 2009 ([14]).

(44) If the initial measure between the Netherlands and ING is unwound ([15]), the amount of the unpaid additional payment that relates to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 bp included in the guarantee fee related adjustment) will still become payable. If a partial unwinding of the initial measure occurs, such amount would be payable proportionally.

(45) These amendments introduced in October 2009 will be implemented via a separate agreement between ING and the Netherlands, in order to keep the initial measure intact. The Netherlands commits to notify any early full or partial unwinding of the initial measure to the Commission.

2.3.3. *The Guarantees*

(46) Under the Dutch Credit Guarantee scheme (case N 524/08) the Netherlands also granted guarantees on medium-term liabilities to ING amounting to (i) USD 9 billion (of which USD 8,25 billion already issued) and (ii) EUR 5 billion (EUR 4,15 billion already issued). ING pays a guarantee fee of 84 bp on average on the guaranteed amount.

(47) The Netherlands confirms that any additional guarantees granted to ING will be notified individually. The guarantee of up to EUR […] billion committed to be granted by the Netherlands in the context of the implementation of the restructuring plan for the funding of Westland Utrecht Hypotheekbank (WUH)/Interadvies, as described in recital 55 and recital 85, will also be notified separately to the Commission. Those guarantees of up to EUR […] billion are an integral part of the restructuring plan to which this Decision relates but the necessity and remuneration of those guarantees still need to be determined by the Netherlands and will be assessed by the Commission in a separate decision once the measure is individually notified.

3. THE RESTRUCTURING PLAN

3.1. **Measures foreseen in the plan**

(48) ING is planning to simplify the group structure, reduce costs, reduce risk and make a number of divestments, develop a sustainable remuneration policy, adapt its capital structure, install new internal capital ratio targets, and extend the amount of long-term funding in non-deposits. The restructuring plan is to be implemented within a five year time period.

(49) To simplify the group, ING regrouped its six business lines into two divisions, banking and insurance. Each division became responsible for its own strategy execution and balance sheet management. The restructuring plan envisages that ING will only pursue banking activities, while Insurance will be divested over time.

(50) Banking activities will predominantly concentrate on Europe with selective growth opportunities to be pursued in other parts of the world. ING is planning to have a strategic focus on steady profit-generating retail banking in mature markets, selected retail banking growth opportunities in Central and Eastern Europe and a European-oriented commercial banking aligned with a retail bank and a speciality finance business. The bank will operate on the basis of standardised products and a high level of automation. Instead of acquiring investments such as asset backed securities (ABS), the group will increasingly originate own assets.

([13]) The funding fee is the sum of 3 % (the alleged cost of funding in USD of the Dutch State) and a margin of 0,5 %.

([14]) An increase in fee is only applicable as from 25 October 2009. An adjustment was required and was evaluated at 15,6 bp to compensate for the non payment between 26 January 2009 and 25 October 2009. This adjustment captures both the reduction in funding fee by 50 bp (received by ING from the Dutch State) and the increase in the guarantee fee by 67 bp (paid by ING to the Dutch State).

([15]) This would happen if ING buys back from the Dutch State the portfolio, in whole or in part.

(51) Cost reductions amounting to EUR 1,3 billion are planned for 2009. 35 % of the cost reduction is to be achieved by a reduction of full time equivalents (FTE)-related cost, and 65 % through other expenditure reductions including expenses for external staff, marketing activities and Formula 1 racing. The head office contributes to the cost reductions. As of August 2009, a cost reduction of over EUR 800 million had already been realised. To achieve that cost reduction, ING established a restructuring provision of approximately EUR 450 million after tax.

(52) ING also plans a number of risk reducing measures, such as hedging programs, reductions, closures and run-off of risky positions, and reduction of direct equity exposure. As regards its investment portfolio, ING has received an asset protection measure from the Netherlands in the form of the Alt-A IA measure. Further measures implemented by ING include a reclassification of a number of its ABS from the available for sale category into the held-to-maturity category, thus limiting the volatility of the negative revaluation reserve. ING will decrease its exposure to higher risk asset classes within US CMBS and US RMBS. ING will, furthermore, not start new initiatives that aim to increase its direct real estate exposure.

(53) The Commission understands that ING will adopt a [prudent] business strategy in particular regarding ING Direct, given that ING wants to base its business […] on fair pricing […] ([16]) and will not act as a price leader.

(54) ING is in the process of implanting a number of divestments with a significant effect as regards its balance sheet following its new business strategy. The restructuring measures presented in ING's revised restructuring plan will result in an expected balance sheet reduction of EUR 616 billion based on the sizes of the units on 30 September 2008. The EUR 616 billion balance sheet reduction consists of bank deleveraging and balance sheet integration initiatives (approximately EUR […] billion), bank divestments (amounting to approximately EUR […] billion) and the divestment of all of ING Insurance (amounting to approximately EUR […] billon). Despite having a smaller balance sheet when compared with the bank, insurance accounted for about 50 % of ING's earnings pre-crisis ([17]). Compared to the balance sheet of the third quarter 2008 (that is to say EUR 1,376 billion), the total balance sheet reduction amounts to approximately 45 %.

(55) As part of the divestitures, the restructuring plan foresees that ING will carve out a fully operating and divestible retail banking company in the Netherlands (see for details recital 85 below) consisting of the current Interadvies (Westland Utrecht Hypotheekbank, Westland Utrecht Effectenbank and Nationale Nederlanden Hypotheekbedrijf, Nationale Nederlanden Financiële Diensten) to which will be attached the consumer credit portfolio of the former Postbank. ING will seek to carve-out the Interadvies business (hereinafter 'WUH/Interadvies') [on the basis of a detailed schedule]. The total balance sheet of the entity will amount to about EUR [25-50] billion.

(56) […] the divestment of WUH/Interadvies raised no financial stability risk issues the Dutch authorities provided a study on the Dutch retail banking market by an independent expert showing that current accounts, although generally considered as an anchor product for cross selling in retail banking, are not essential for distributing mortgage and other banking products in the Netherlands, and in the case of ING in particular. In addition, the study points to the importance of Internet as a distribution channel in the Netherlands, reducing the necessity of a branch network for the distribution of banking products. According to the Dutch authorities other products can be attached to the mortgage products distributed by WUH/Interadvies. In particular the transferred consumer loans portfolio can serve as an entry point in other market products.

(57) In detail, ING plans to sell or divest the following other businesses, activities or products:

— ING Life Taiwan (completed)

— Stop selling Single Premium Variable Annuities (SPVA) in Japan (completed)

— Run-off existing variable annuities book in the US

— Run-off of Financial Products business in the US

— Stop the planned launch of ING Direct Japan (completed)

— Divest Non-life Insurance Canada (completed)

— Divest Annuity and Mortgage Businesses in Chile (completed)

— Divest Insurance Russia — Non State Pension Fund (completed)

— Divest Insurance Argentina — Origines Seg. De Retiro (completed)

([16]) […]

([17]) 52 % of pre-tax income for the group on average for the period 2004-2007 came from insurance.

— Divest Insurance Asia — HK platform services (completed)

— Divest Private Banking Asia and Switzerland (signed)

— Divest US Group Re Insurance (signed)

— Divest Insurance Asia/Pacific (Australia (signed), New Zealand (signed) Japan, Korea, Hong Kong, India, Thailand, Malaysia)

— Divest Asset Management Asia/Pacific

— Divest US Employee Benefits

— Divest Insurance US (US Retirement Services, US FA, Traditional Life)

— Divest Asset Management US

— Divest ING Direct US

— Divest Insurance Latin America (Brazil, Chile, Mexico, Peru, Colombia, Uruguay)

— Divest Asset Management Latin America

— Divest Insurance Central Europe (Bulgaria, Czech Republic, Greece, Hungary, Poland, Romania, Slovakia, Spain)

— Divest Asset Management Europe.

— Divest Insurance Benelux (Nationale Nederlanden Insurance, RVS, Retail Insurance Netherlands (former Postbank Insurance), Insurance Belgium, Insurance Luxembourg)

— Divest the business of Interadvies (Westland Utrecht Hypotheekbank, Westland Utrecht Effectenbank, Nationale Nederlanden, Hypotheekbedrijf, Nationale Nederlanden Financiële Diensten), including the consumer credit portfolio of the former Postbank (see commitments from the Netherlands for further details).

(58) ING projects an organic balance sheet growth for the bank of approximately […] % per year during the restructuring period […]. ING plans to achieve most of that growth by lending to the real economy (households and companies).

(59) ING is also implementing a new remuneration policy whereby the ING Supervisory Board commits to develop a sustainable remuneration policy for the Executive Board and Senior Management. Those incentive schemes will be linked to long-term value creation, taking account of risk and restricting the potential for ‘rewards for failure’.

(60) ING is committed to eliminate double leverage as soon as possible but at the latest by […].

3.2. **Ability to achieve viability under a base and a stress scenario**

(61) ING has submitted a base and a stress scenario with the aim of demonstrating its ability to achieve long-term viability.

(62) In the base case, ING […]. Further, it is assumed that equity markets will […].

(63) Under its projected base case scenario net income for the group […]. The total earnings of the group […]. The return on equity (RoE) would be […]. ING insurance would […].

(64) For the bank, ING assumes an increase in risk weighted assets (‘RWA’) of about […] annually (before divestments), partly due to […]. Income (excluding fair value changes and impairments) is expected to […] commercial banking is expected […] and retail banking is expected to […].

(65) ING Bank expects to meet its internal capital targets throughout the projection period. ING has set new internal capital targets which are […] % for the bank’s Tier 1 ratio and […] % for its Core-Tier 1 ratio. For ING Insurance, the target capital coverage ratio remains unchanged at 150 %.

(66) In the base case scenario, its total solvency ratio (total capital to RWA) would amount to around […] during the whole restructuring period, with the lowest points being […].

(67) ING insurance will be divested during the restructuring period […]. In the base case the divestments are assumed to generate net proceeds of EUR […].

(68) In an alternative scenario where insurance is divested […] ING would expect correspondingly higher net proceeds […].

(69) ING has also submitted a stress scenario […].

(70) […]. In addition, significant increases in its probabilities of default are assumed. ING also assumes there will be higher loss given default (LGD) ratios.

(71) Under this stress scenario, ING Group's underlying commercial result would […].

(72) Despite those stress case assumptions, ING's capitalisation would remain sufficient as it continues to fulfil the regulatory requirements. […].

(73) The Netherlands submits in that respect that ING applied LGD models in the stress scenarios to calculate the LGDs of its credit portfolios which have been approved by the financial supervisory authority, De Nederlandsche Bank (the Dutch Central bank, hereinafter 'DNB') […].

(74) Furthermore, ING has applied additional more severe stress assumptions — going significantly beyond the presented stress scenario for Dutch retail mortgages ([18]) […]. Also under these assumptions, ING's capitalisation remains sufficient as it continues to fulfil regulatory requirements and even retain a significant additional capital buffer.

(75) The Netherlands submits that the bank has passed all stress tests of its supervisor as regards liquidity. […].

3.3. **Exit strategy**

(76) In the ING base case scenario of the restructuring plan, the Core-Tier 1 securities will be repurchased by ING on the following basis:

(a) A first tranche presenting EUR 5,0 billion of notional amount is intended to be repurchased around 17 December 2009 at a minimum price of EUR 5,75 billion. This assumed price provides for a 15 % internal rate of return (IRR) to the Netherlands and includes the base 8,5 % return plus an additional premium of at least EUR 340 million and up to EUR 705 million ([19]) reflecting some potential for appreciation in value related to ING's share price. The exact repurchase price will depend on ING's share price.

(b) A [remaining] tranche presenting EUR […] billion of notional amount will be repurchased in […] at an assumed price of EUR […] billion. This price assumes repurchase at 150 % of par (EUR 15 per share) plus 8,5 % accrued interest for one year in line with the original terms of the Core-Tier 1 securities agreement. Alternatively, ING could [after] 2011 […] repurchase this tranche and then exercise its conversion option, whereby the Netherlands would receive either […] million ING ordinary shares or cash in the amount of EUR […] billion plus approximately EUR […] million accrued interest.

(c) […].

(77) In total, the […] transactions will provide indicatively a [15-25] % IRR to the Netherlands. The Netherlands are required to notify any alteration of the agreement to redeem the securities to the Commission.

(78) To date, ING has not deferred any payment of coupons on hybrid Tier 1 instruments issued by the group.

(79) On 14 October 2009 ING exercised a call option on a lower Tier 2 bond. ING informed the Commission that it regrets this and states that it was a misunderstanding […]. Moreover, the Netherlands reiterates that it is understood by them that the Commission in principle does not consider a calling of Tier 1/Tier 2 capital instruments appropriate for banks in restructuring and agree that such a call will in the future be discussed on a case by case basis and subject to Commission approval, for three years starting from the date of the adoption of this Decision or until the date on which ING has fully repaid the core-Tier 1 securities to the Dutch State (including the relevant accrued interest of core Tier-1 coupons and exit premium fees), whichever is sooner.

(80) There is no unilateral exit envisaged for the IA measure and the Netherlands commit to notify any termination of the IA measure by way of an agreement to the Commission. However, the restructuring plan assumes in the base case that the measure will stay in place until after 2013.

3.4. **Commitments of the Netherlands**

(81) As regards the IA measures (that is to say the 'Illiquid Assets Back-up Facility' or IABF) the Netherlands commits to the following:

— Starting 25 October 2009, ING Group will make additional payments to the Netherlands, corresponding with an adjustment of the Alt-A remuneration of – 50 basis points on the funding fee received by ING and of + 82,6 basis points on the

([18]) […]
([19]) Assuming repayment after 400 days of issuance.

guarantee fee paid by ING. The guarantee fee related adjustment includes 15,6 basis points representing an adjustment for the period from 26 January 2009 — the start of the IABF [20] (that is to say the IA measure) — until 25 October 2009. The additional payments will be applied to the extent and duration that the IABF agreement is in place.

— The additional payments will be implemented in the form of a separate agreement between ING Group and the Netherlands, in order to keep the original IABF intact.

— The additional payments, excluding the part related to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) have no residual settlement in case of an early unwinding of the IABF. The amount of the unpaid additional payments that relates to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) will become payable in case of partially or wholly unwinding of the original transaction. If the IABF is partially unwound, this early redemption settlement would be applied proportionally.

— The Netherlands commits to notify any measures of early full or partial unwinding of the IA measure to the Commission.

(82) As regards balance sheet reductions, the commitment for divestment of insurance, ING Direct US and other units to be divested before end of 2013, the Netherlands commits:

— ING will reduce 45 % of its balance sheet compared to 30 September 2008 by the end of 2013 and will divest a list of units as described in recital 57, in particular Insurance and ING Direct US […].

— These figures refer to projections that do not take into account the possible impact of organic growth and exclude additional increases due to potential new regulatory requirements, such as for example if banks are required to hold significantly larger liquidity buffers due to (new) EU-wide regulations. Such requirements could increase the balance sheet significantly beyond the current organic growth projections.

— ING will not have a restriction on organic (that is to say not related to acquisitions) growth of the balance sheet of its businesses. […]. In the future, ING will have a general policy to use its growth in funds entrusted by customers mainly to grow in lending to the real economy (corporates and consumers) and decrease its exposure to higher risk asset classes within US CMBS and US RMBS. […] [21].

— With respect to units ING commits to sell (as listed in recital 57), if a divestment of any such unit has not taken place by 31 December 2013 (for example on the basis of a final binding sale agreement having been entered into), the Commission may where appropriate or due to exceptional circumstances, in response to a request from the Netherlands, grant an extension of this time period [22]. The Commission may also in such a case (i) request the Netherlands to appoint one or more (divestiture) trustee(s) [23], preselected and proposed by ING (and subject to the Commission's approval), […].

— Whenever the Netherlands seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. In exceptional circumstances, the Netherlands shall be entitled to request an extension within the last month of the time period.

(83) The Netherlands furthermore commits that ING will adhere to an acquisition ban:

— ING will refrain from acquisitions of financial institutions for a certain period. These commitments will apply for the shorter period of three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). ING will also refrain, for the same period, from any (other) acquisition of businesses that would slow down the repayment of the Core-Tier 1 Securities to the Netherlands.

— Notwithstanding this prohibition, ING may, after obtaining the Commission's approval, acquire businesses, in particular if this is essential in order to safeguard financial stability or competition in the relevant markets.

(20) Illiquid Assets Back Facility.

(21) […]

(22) In particular, whenever a divestment is being undertaken by an IPO process which has commenced and significant (30 % or more) share placements have been made prior to the end of the divestment period, the Commission (in consultation with the Dutch State, ING and the Trustee) will actively consider allowing the entity more time to place remaining shares.

(23) It is accepted that different trustees may be appointed with respect to different regions and/or business.

(84) The Netherlands furthermore commits that ING will adhere to a price leadership ban:

— Without prior authorization of the Commission, ING will not offer more favourable prices on standardized ING products (on markets as defined below) than its three best priced direct competitors with respect to EU-markets in which ING has a market share of more than 5 %.

— This condition is limited to ING's standardized products on the following product markets: (i) retail savings market, (ii) retail mortgage market, (iii) private banking insofar it involves mortgage products or saving products or (iv) deposits for SME's (SME defined according the definition of SME as customarily/currently operated by ING in its business in the relevant country). As soon as ING becomes aware of the fact that it offers more favourable prices for its products than its three best priced competitors, ING will as soon as possible adjust, without any undue delay, its price to a level which is in accordance with this commitment.

— This condition will apply for three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of CT1 coupons and exit premium fees), whichever is shorter. A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.

— Moreover, to support ING's long-term viability, ING Direct will refrain, without prior authorisation of the Commission, from price-leadership with respect to standardised ING products on the retail mortgage and retail savings markets within the EU, for the shorter period of three years from the date of the present Decisions or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). As soon as ING becomes aware of the fact that it has become the price leader on a retail mortgage or retail savings markets within the EU, ING will adjust its price to a level which is in accordance with this commitment as soon as possible without any undue delay.

— A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.

(85) The Netherlands commits to a number of detailed provisions as regards the carve out of WUH/Interadvies:

— ING will create a new company for divestment in the Netherlands, which will be carved out from its current Dutch retail banking business. The result has to be that this carved-out new company is a viable and competitive business, which is stand alone and separate from the businesses retained by ING and that can be transferred to a suitable purchaser. This new company will comprise the business of the WUH/Interadvies banking division, which is currently part of the Dutch insurance operations, and the Consumer Credit Portfolio of ING Bank. WUH/Interadvies is an ING business unit under the umbrella of Nationale Nederlanden Insurance unit. It is (predominantly) a mortgage bank operating on the basis of its own banking licenses. It is a viable 'standalone' player, having its own sales force for customer service and an independent organisation with a solid underlying income. The carve-out will be carried out under the supervision of the Monitoring Trustee in cooperation with the Hold-separate Manager. In this context, during the carve-out period, the Monitoring Trustee may recommend to ING such inclusions into the Divestment Business of tangible and intangible assets (related to the Divestment Business) as he considers objectively required to ensure full compliance with ING's above mentioned result oriented obligations and in particular the viability and competitiveness of the divestment business. If ING disagrees with the Monitoring Trustee about the objective requirement to include such tangible or intangible assets to ensure the viability and competitiveness of the Divestment Business, ING shall inform the Monitoring Trustee in writing. In such a case, ING's executive management and the Monitoring Trustee shall, within […], hold a meeting with a view to reaching a consensus. If no consensus is reached, ING and the Monitoring Trustee shall jointly appoint, without undue delay, an independent third party with expertise in the financial sector (the 'Expert') to hear the parties' arguments and mediate a solution. If no such solution is reached, the Expert shall decide, within […] from its appointment, on the objective requirement to include the relevant related tangible or intangible assets into the Divestment Business to ensure its viability and competitiveness, and the parties shall accept the Expert's decision in this respect and will act accordingly. Issues relating to a disagreement shall be mentioned in the report of the Monitoring Trustee to the Commission.

— ING is committed to ensuring optimal divestment conditions by making a business plan, creating an Internet platform and dedicating sales capabilities for the carved out entity. Also, it will make payment capability available (on commercial terms) if the buyer so requests. In addition, ING will assist in creating a Treasury function and ensure funding for two years post-divestment, whereas ING's funding support will gradually decline in those two years. ING's funding support to the WUH business will be based on internal funding transfer prices. ING […] to apply to the Netherlands for State guaranteed funding up to an amount of EUR […] billion for the funding of the WUH business. In that case, the Dutch authorities commit to notify this measure separately.

— Moreover, ING will refrain for an interim period […] from actively soliciting customers of the WUH business for products that the WUH-business is supplying to these customers on the date of adoption of the present Decision.

— ING will seek to carve-out the WUH business within […]. After the carve-out period […], ING will hold-separate the WUH business and seek to divest this business […] ([24]).

— A monitoring trustee and hold separate manager will be appointed within […] after the date of the present Commission Decision and a Divestiture trustee will be appointed […]. All trustees will be appointed by the Netherlands and preselected and proposed by ING. The trustees are subject to the Commission's approval.

(86) The costs of all trustees appointed during the restructuring process will be borne by ING.

(87) For restoring viability, the Netherlands commits that ING will adhere to the following:

— ING commits to orientate its non-deposit funding towards longer term funding once markets revert to less stressed conditions by issuing more debt instruments with a maturity more than 1 year […].

— ING endeavours to eliminate its double leverage (using core debt as equity capital in its subsidiaries) as soon as possible and commits to do so at the latest by […]. The double leverage is automatically eliminated if and when ING Group reverts to being a regulated bank.

(88) Regarding the deferral of coupons and calling of Tier 1 and Tier 2 securities the Netherlands commits that ING will adhere to the following:

— If a rights issue of more than is needed to repay 50 % of the Core-Tier 1 securities, including the relevant accrued interest and the exit premium fee, ING will not be obliged to defer coupon payments on hybrids on 8 and 15 December 2009 ([25]) and any coupon payments on hybrids thereafter.

— If such a rights issue does not take place and ING was loss-making in the preceding year, ING will be obliged to defer hybrid coupons, insofar as ING has the discretion to do so, for the three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees), whichever is shorter.

— The Dutch authorities understand that the Commission is against State aid recipients remunerating own funds (equity and subordinated debt) when their activities do not generate sufficient profits ([26]) and that the Commission is in this context in principle against the calling of Tier 2 capital and Tier 1 hybrids. ING regrets the misunderstanding regarding the calling of a lower Tier 2 bond on 14 October 2009. The calling of Tier 2 capital and Tier 1 hybrids will in the future be proposed case by case to the Commission for authorisation, for the shorter period of three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest on Core-Tier 1 coupons and exit premium fees).

([24]) […]

([25]) Provided that it is clear that part of the proceeds of the rights issue will be used for the coupon payments

([26]) See paragraph 26 of 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, OJ C 195, 19.8.2009, p. 9.

(89) The Netherlands commits that ING will refrain from mass marketing invoking the recapitalisation measure as an advantage in competitive terms.

(90) The Netherlands commits that ING will maintain the restrictions on its remunerations policies and marketing activities as previously committed to under the agreements concerning the Core-Tier 1 securities and illiquid assets back-up facility.

(91) ING and the Netherlands commit that the progress report about the implementation of the restructuring plan will be provided every six months to the Commission as of the date of the present Decision.

(92) The Dutch authorities commit that the full execution of ING's restructuring will be completed before the end of 2013.

4. REASONS FOR THE OPENING OF THE INVESTIGATION

(93) In the opening decision, the Commission expressed doubts on the compliance of the initial measure with the Impaired Asset Communication, and more particularly with regards to valuation and burden sharing. The Commission found however that the measure complied with the conditions on eligibility of assets, asset management arrangement, transparency and disclosure and a guarantee fee as stipulated in the Impaired Asset Communication.

(94) Regarding valuation, the Real Economic Value (REV) of the portfolio was claimed by the Netherlands to be 97,3 % of face value in a base case scenario and 88,8 % of face value in a stress case scenario. On this basis, the portfolio was transferred to the Netherlands at 90 % of face value. The Commission expressed doubts on the evaluation of the REV, in particular on the choice of the discount rate, the house price assumptions, the levels of credit enhancement and other valuation issues.

(95) Regarding burden sharing, the Commission expressed doubts about the level of the funding fee and the appropriateness of the management fee paid by the Netherlands to ING. Moreover, given that the Commission had doubts regarding the valuation of the portfolio, any negative conclusion on the review of the valuation could directly impact the assessment of the guarantee fee.

5. ASSESSMENT OF THE AID

5.1. **Existence of aid**

(96) According to Article 87(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 common market.

(97) The Commission has already established in the opening decision that the recapitalisation of ING constitutes State aid amounting to the sum of the injected capital, that is to say, EUR 10 billion.

(98) The amendment of the redemption premium also constitutes State aid in so far as the State waives its right to obtain revenues. As ING has already agreed to a redemption premium of 150 % any reduction is indeed forgone revenue. The modification of the repayment terms for the Dutch capital injection results in an additional benefit for ING. This represents additional aid of approximately EUR 2 billion as indicated above in recital 34.

(99) As regards the IA measure the Commission has found in the opening decision that the measure constitutes aid. The aid amount resulting from the IA measure is calculated as the difference between the transfer price (based on the real economic value) and the market price of the transferred portfolio. According to the information submitted by the Netherlands authorities the total face value of the Alt-A portfolio was USD 39 billion on 31 December 2008. 80 % of the portfolio has been transferred to the Netherlands at 87 % of face value (based on the amended measure) representing USD 27,1 billion. According to the information submitted by the Netherlands authorities the total market value of the Alt-A portfolio on 31 December 2008 was USD 25,8 billion, 80 % of which (USD 20,6 billion) has been transferred to the Netherlands. The resulting difference between the transfer price and the market price of the transferred portfolio is USD 6,5 billion, which corresponds to around EUR 5,0 billion [27]. The aid amount resulting from the IA measure is therefore considered to be EUR 5 billion.

(100) The EUR 10 billion of capital injection has been initially allocated as follows within the group: EUR 5 billion to ING Bank, EUR 4 billion to ING Insurance and EUR 1 billion at the level of the holding. ING has the possibility to transfer the amount of capital injection at any time between ING Bank, ING Insurance and the holding level.

[27] Assuming a EUR/USD exchange rate of 1.3.

(101) Furthermore 85 % of the cash flows transferred to the Netherlands under the IA measure covered assets held by ING Bank and 15 % assets held by ING Insurance. Of the total aid amount resulting from the IA measure (EUR 5 billion) EUR 4,25 billion is therefore to be attributed to ING Bank and EUR 0,75 billion to ING Insurance.

(102) This results in a total aid amount for ING Bank of EUR 9,25 billion (representing 2,7 % of the RWA of ING Bank ([28])), a total aid amount for ING Insurance of EUR 4,75 billion (representing 50 % of the solvency margin requirements of ING Insurance ([29])) and EUR 1 billion remaining at the holding level.

(103) For the sake of simplicity and for consistency with the terms used in the Impaired Asset Communication, the total aid amount can also be expressed in RWAs of ING Bank only. In that case, both measures together plus the additional aid from the reduction of the redemption premium of EUR 2 billion result in an aid element of about EUR 17 billion, which amounts to about 5 % of risk weighted assets of ING Bank.

(104) In addition, ING received EUR 5 billion and USD 9 billion in aid from the Dutch guarantee scheme. On the basis of the prevalent exchange rate at the time of the granting of these measures of EUR/USD 1,3, the amount of the granted guarantees is about EUR 12 billion amounting to about 1 % of the entire balance sheet of the Group. The guarantees were granted at a time when market conditions were deteriorating and it was difficult for banks to raise funding. Therefore, those guarantees would not have been provided by a market investor and constitute additional aid, possibly up to the nominal amount ([30]).

(105) Furthermore, the Netherlands maintains that ING will […] an additional EUR […] billion of guarantees from the Netherlands for carving out the retail banking entity WUH/Interadvies, which has not been granted yet and the necessity of which is still to be established. The Netherlands consider this as additional restructuring aid for the beneficiary, which will be notified at a later stage. The Commission is in principle not opposed to such aid as long as it is limited to the minimum necessary for the restructuring of ING ([31]) and as long as it is sufficiently remunerated.

([28]) The RWA of ING Bank amounted to EUR 343 billion at the end of 2008.

([29]) Considering the solvency margin requirements at the end of 2008.

([30]) Commission Decision in case C 9/08 of 4 July 2008 *SachsenLB*, not yet published, Commission decision of 29 May 2009 in case N 264/09; Rescue aid to *HSH Nordbank AG*, OJ C 179, 1.8.2009, p. 1, Commission Decision of 7 May 2009 in case N 244/09 *Commerzbank*, OJ C 147, 27.6.2009, p. 4.

([31]) See point 7 last recital of the Restructuring Communication, as well as point 27.

(106) In total, therefore, ING will receive restructuring aid of up to EUR [12-22] billion in liquidity guarantees and about EUR 17 billion of other aid, amounting to about 5 % of RWA of the bank.

5.2. **Compatibility**

5.2.1. *Application of Article 87(3)(b) of the Treaty*

(107) Article 87(3)(b) of the Treaty empowers the Commission to decide that aid is compatible with the common market if it is intended 'to remedy a serious disturbance in the economy of a Member State'. The Commission acknowledged in its recent approval of the prolongation of the Dutch guarantee scheme ([32]) that, overall, the threat of a serious disturbance in the Dutch economy continues and that measures supporting banks are suitable to address that threat.

(108) Given the significance of its lending activities for specific regional markets, its cross border presence, and its integration and cooperation with other banks, the Commission accepts that ING is a systemically relevant bank. […]. It is therefore concluded that such a failure would entail serious consequences for the Dutch financial sector and the real economy. The aid must therefore be assessed under Article 87(3)(b) of the Treaty.

5.2.2. *Compatibility of the IA measure*

(109) The treatment of asset relief measures by Member States under Article 87(3)(b) of the Treaty is assed on the basis of the Impaired Asset Communication. The Impaired Asset Communication sets out principles that must be followed by any asset relief measure.

(110) The doubts expressed in the opening decision that the IA measure does not fulfil the conditions for the compatibility of asset relief as set out in the Impaired Asset Communication are allayed.

(111) The Netherlands authorities committed to amend the measure by means of an increase of the guarantee fee paid by ING to the Netherlands by 82,6 ([33]) bp p.a. whereby the resulting transfer price of the measure, as well as the fee structure have been altered. Furthermore the funding fee has been reduced by 50 bp p.a.

([32]) Commission Decision of 7 July 2009 in case N 379/09 and NN 16-09, not yet published.

([33]) Composed of an adjustment of 52 bp p.a. for valuation, 15 bp p.a. for management fee and 15,6 bp p.a. for the payments foregone by the State for the period from 26 January and 25 October 2009.

Valuation

(112) First of all the Commission of the increase of 82,6 bp. p.a. of the guarantee fee, 52 bp p.a. is intended to reduce the transfer price for the assets of the portfolio from 90 % of face value to 87 % of face value. The amended transfer price brings the transfer price in line with the REV estimations for the portfolio that would result from the use of reasonable assumptions. Following the opening decision the Dutch authorities have submitted revised valuations of the portfolio. After the Commission expressed doubts on the house price assumptions and the discount rates used in the initial valuation of the portfolio by Dynamic Credit Partners, the Netherlands authorities provided the Commission with valuation outputs using the same valuation methodology but based on more conservative assumptions on house prices and discount rates. The Commission adjusted the output for additional factors after consultation with its external experts. Based on that analysis it is concluded that a REV estimated at 87 % is acceptable in view of the requirements of the Impaired Asset Communication relating to valuation methodology and prudent assumptions, which were outlined in the opening decision. With the adjustment of the REV to 87 % the initial doubts of the Commission were therefore allayed.

Fee structure

(113) In its opening decision, the Commission expressed doubts on the level of the management fee that was initially set at 25 bp p.a. Through an increase of the guarantee fee of 15 bp p.a. (in addition to the 52 bp p.a. for valuation adjustment and 15,6 bp p.a. for time adjustment) the management fee is reduced to 10 bp p.a. which is an acceptable level given the size of the portfolio under management. Furthermore, the doubts of the Commission in respect of the funding fee expressed in the opening decision have also been addressed, in so far as the funding fee has been reduced by 50 bp p.a. In this way the funding fee is brought in line with the cost of funding of the Netherlands as presented to the Commission by the Dutch authorities [34]. Therefore the Commission's initial doubts in respect of the management and the funding fee have been alleviated.

Burden sharing

(114) As regards burden sharing, the Impaired Asset Communication states in section 5.2 the general principle that banks ought to bear the losses associated with impaired assets to the maximum extent. The Commission is of the view that an appropriate level of burden sharing can only be achieved if the impaired assets are transferred to the State at a transfer price that does not exceed the REV [35]. The Commission has been assured on this point by the revised transfer price as indicated above in recital 112.

(115) The adjustment of the transfer price is in this case achieved by an increase in the guarantee fee of 52 bp p.a. equivalent in terms of net present value to the difference between 90 % and 87 % of par value. This is in line with the opening decision where the Commission accepted the cash flow swap agreement and held that adjustments to valuation would be made by way of alteration to the guarantee fee. Therefore, the IA measure satisfies the conditions relating to appropriate burden sharing.

(116) Finally, the amended IA measure enters into force on 25 October 2009 whilst payments have been made under the initial transaction fee structure, which was more favourable for ING, from 26 January 2009 until 25 October 2009. In order to make up for the payments by ING to the State which have been foregone during that period the guarantee fee has been increased by an additional 15,6 bp p.a. That amendment is necessary in order to consider the measure compatible with the Impaired Asset Communication from 26 January 2009. However the increase does not raise the valuation of the portfolio or increase burden sharing, because it only ensures the application of the Impaired Asset Communication from the date of the IA measure coming into effect, i.e. retroactively.

5.2.3. *Compatibility of restructuring aid*

(117) The Commission must assess the continuation of all previous emergency aid measures as restructuring aid. The compatibility of the restructuring aid is assessed on the basis of the restructuring plan in the context of 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 [36] ('the Restructuring Communication'). Even if previous decisions have made reference to the Guidelines on State aid for rescuing and restructuring firms in difficulty [37], the Commission has clarified in point 49 of the Restructuring Communication that all aid notified to the Commission before 31 December 2009 will be assessed as restructuring aid to banks pursuant to the Restructuring Communication instead of the Guidelines on State aid for rescuing and restructuring firms in difficulty.

The degree of restructuring required

(118) The Restructuring Communication does not define the conditions under which a bank may need to present a restructuring plan but relies on previous communications.

[34] The Dutch State estimates its cost of funding in USD to be around 3 % for a maturity of 5-7 years, corresponding to the weighted average life of the portfolio.

[35] Presupposing an appropriate remuneration; this was presently provided.

[36] OJ C 195, 19.8.2009, p. 9.

[37] OJ C 244, 1.10.2004, p. 2. Reference was made explicitly in the banking communication at point 42.

(119) The Commission considers that ING should undergo in-depth restructuring in particular as the beneficiary has already received State aid that contributes to coverage or avoidance of losses which altogether exceeds 2 % of the total bank's RWA. This position is in line with point 4 of the Restructuring Communication and point 55 of the Impaired Asset Communication, as well as the previous commitments of ING ([38]).

The restoration of viability

(120) When assessing a restructuring plan the Commission makes sure that the bank is able to restore long-term viability without State aid (section 2 of the Restructuring Communication).

(121) The Restructuring Communication recalls in this context that governments have recapitalised banks on terms chosen primarily for reasons of financial stability rather than for a return to viability. Long-term viability therefore requires that any State aid received is either redeemed over time, as anticipated at the time of the granting of the aid, or is remunerated according to normal market conditions, thereby ensuring that any form of additional State aid is terminated. The restructuring plan lays out a convincing strategy for repaying the Netherlands capital, which will be commenced even before the issuance of the present Decision.

(122) The Restructuring Communication explains that long-term viability is achieved when a bank is able to cover all its costs including depreciation and financial charges and provide an appropriate RoE, taking account of the risk profile of the bank. As indicated in recital 65 the restructuring plan demonstrates how ING will show adequate profitability to cover all its costs including depreciation and financial charges and provide an appropriate return on equity, taking account of the risk profile of the bank.

(123) The restructuring plan demonstrates that ING is also able to comply with the relevant regulatory requirements even in stress scenarios with a protracted global recession as required by point 13 of the Restructuring Communication. The information submitted by the Dutch authorities indicates that ING would be viable even in stress scenarios with conservative assumptions reviewed by the Commission. The Commission notes that regarding the LGD levels for the Dutch mortgage retail portfolio the models used by ING have been approved by the DNB, the Dutch supervisory authority. Regards the quality of the Dutch mortgage portfolio of ING additional severe stress assumptions for Dutch mortgage market were applied. Under the additional stress assumptions ING would still meet its capital requirements according to the information provided by the Netherlands authorities.

(124) The planned divestments will generate excess capital over time which should further strengthen the capital basis of ING.

(125) Second, in line with point 10 of the Restructuring Communication, the plan identifies the causes of the difficulties for the bank and its weaknesses and outlines how the proposed restructuring measures will remedy the past problems. To this end the restructuring plan states that the beneficiary will improve its capital structure by eliminating double leverage and increasing its core capital ratio. Therefore, ING will be in a better position to face possible adverse economic developments in the future and absorb unexpected losses even after repayment of the capital from the Netherlands.

(126) The Alt-A portfolio has been identified as a main reason for repeated need of State support. Concerns in the market place about possible write-downs on the Alt-A portfolio have been one of the triggers of the recapitalisation measure before being covered by the IA measure. Such concerns in the market have been allayed by the IA measure. […]. In this respect the foreseen divestment of ING Direct US as submitted in the restructuring plan set aside a main source of difficulties that led to State intervention.

(127) ING will further decrease its exposure to higher risk asset classes and not aim to increase its real estate exposure. ING will also sell or reduce exposure to other risky businesses and assets.

(128) Furthermore, ING has initiated a broader 'de-risking' (i.e. a risk reduction policy) and cost cutting programme, which also addresses the complexity of the group by first creating banking and insurance divisions and by later divesting the entire insurance part of its business. The plan shows that in particular ING Direct will adapt a [prudent] business strategy and refrain from […] pricing, which is underlined by the price leadership ban as described in recital 53 and recital 84.

(129) In addition, the plan illustrates that ING is adapting to the lessons learned from the crisis in line with point 11 of the Restructuring Communication. For example the plan explains that ING intends to amend its remuneration policy to orientate the bank more towards longer-term achievements and thus avoid rewards for failure. […].

(130) Therefore, it is concluded that the restructuring plan is apt to restore its long term-viability.

([38]) See the impaired asset decision of 30 March 2009, point 83.

Own contribution of the beneficiary

(131) Furthermore, the restructuring plan provides for an appropriate own contribution to the restructuring costs (section 3 of the Restructuring Communication). The restructuring plan demonstrates that ING provides an appropriate burden sharing in line with the Restructuring Communication, which is important for addressing moral hazard.

(132) First, the Netherlands has committed to adjust the terms of the IA measure which brings it in line with the requirements put forward in the Impaired Asset Communication.

(133) Second, ING will pay an adequate remuneration of its capital injection in line with its Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ([39]) ('the Recapitalisation Communication'). That assessment is not altered by the modification of the repayment terms as these constitute an early redemption premium. Such early redemption premium constitutes a modification of the recapitalisation decision. It is acceptable because the Commission encourages early repayment. The rationale for such redemption incentives is that redemption removes the ongoing effects of State aid benefits for the bank. This has been applied in Commission decisions taken following the Recapitalisation Communication such as *SNS* and *Aegon* (cf. recital (33)) and should be applied here mutatis mutandis. Moreover, in view of the fact that the capital injection will provide the Netherlands with a 15 % IRR, the reduction of the redemption premium also seems justified in itself as such an IRR is an adequate remuneration within meaning of the Recapitalisation Communication. Consequently, the reduction in the redemption premium should be considered as compatible restructuring aid.

(134) Third, ING will pay an adequate remuneration for its guarantees on medium-term liabilities in line with the Dutch guarantee scheme which, in turn, is in line with the Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ([40]).

(135) The Netherlands has also committed to a large number of planned divestments in ING's global insurance activities, its asset management business and its private banking activities in Switzerland and outside Europe, which contributes to covering the restructuring costs.

([39]) OJ C 10, 15.1.2009, p. 2.

([40]) OJ C 270, 25.10.2008, p. 8.

(136) Furthermore, the restructuring plan foresees that ING will raise EUR 5 billion of capital via a share offering in 2009, which will result in a dilution of existing shareholder rights. This can be considered as a significant own contribution of existing capital providers.

(137) A limitation of the aid to the minimum necessary is also ensured by the commitment of the Netherlands that the beneficiary will not acquire other financial institutions in general or other businesses if this slows-down the repayment of the capital provided by the Netherlands. This ensures that the bank will refrain from any acquisition […].

(138) ING has in the past however not complied with the Commission's policy on Tier 1 and Tier 2 capital instruments as stipulated in point 26 of the Restructuring Communication ([41]). The Commission clarified there that in a restructuring context, the discretionary offset of losses (for example by releasing reserves or reducing equity) by beneficiary banks in order to guarantee the payment of dividends and coupons on outstanding subordinated debt, is in principle not compatible with the objective of burden sharing. While, the Commission acknowledges that ING will no longer call Tier 1 and Tier 2 instruments without formal Commission approval the call on 14 October 2009 did not respect that principle and should be compensated by additional measures mitigating distortions of competition.

(139) In the same vein, it is unfortunate that ING made discretionary coupon payments in 2009 without any proper justification although it was loss making in 2008. Although, the Commission in principle considers a coupon ban is also necessary in the case of ING, it finds that such a ban should no longer be required in this case provided that ING repays EUR 5 billion before 31 January 2010. This would include the coupon payments of 8 and 15 December 2009. The early repayment of a significant part of the State aid granted to the Netherlands addresses existing concerns of the Commission that such coupon payments impede ING from achieving long-term viability without State aid. If a bank is able to raise such a significant amount of capital from the market and has a clear strategy in the medium term, it should no longer be restricted in the use of its capital if and where this does not threaten the implementation of its restructuring plan. This has been demonstrated in the restructuring plan.

([41]) MEMO/09/441 of 8 October 2009 — Commission recalls rules concerning Tier 1 and Tier 2 capital transactions for banks subject to a restructuring aid investigation

Measures addressing distortions of competition

(140) The restructuring plan also entails sufficient structural and behaviour measures to address distortions of competition. The Restructuring Communication explains that distortions of competition can be created where some banks compete on the merits of their products and services, whereas others accumulate excessive risks and/or rely on unsustainable business models. State aid prolongs such distortions of competition by artificially supporting the market presence of beneficiaries. In this way it may create moral hazard within the banking system while weakening the incentives of the non-beneficiaries to compete, invest and innovate. State aid may also undermine the single market by creating entry barriers and undermining the incentives for cross-border activities.

(141) Point 31 of the Restructuring Communication notes that when assessing the amount of aid and the resultant distortions, the Commission has to take into account both the absolute and relative amount in relation to the State aid received. In this respect ING has received a significant aid amount, representing 5 % of RWA if expressed in terms of RWA of ING Bank. This level is well above the 'trigger level' of 2 % of RWA [42]. In addition ING has obtained a significant amount of guarantees, which should however not need to result in measures to mitigate distortions of competition pursuant to point 31 of the Restructuring Communication because that ING did not have a funding problem (which guarantees typically help to overcome) but was encouraged by the Netherlands to take the guarantees in order to lend to the real economy. Moreover, there does not appear to be any reason why, at this stage, the additional guarantees foreseen in the restructuring plan for the carve-out of WUH/Interadvies should require additional measures to mitigate distortions of competitions. That measure is, in itself, a measure intended to help address the market distortion since it is only envisaged in order to enable the carve-out of WUH/Interadvies.

(142) It is therefore concluded that the amount of aid to the beneficiary is large. Consequently, significant measures are necessary in order to remedy the distortions of competition. The mitigating measures should be increased pursuant to point 31 of the Restructuring Communication due to the insignificant burden-sharing stemming from non-compliance with the Commission's policy on Tier-1 and Tier-2 instruments set out in point 26 of the Restructuring Communication as explained in more detail in recital 138 et seq. of this Decision [43].

(143) The Commission considers that ING has taken the necessary steps to address the very large competition distortions because the restructuring plan foresees a number of divestments reducing the market presence of the beneficiary. In that respect, the beneficiary will reduce its balance sheet by 45 % before the end of 2013 compared to the balance sheet of 30 September 2008. Those measures are only to a very limited part due to deleveraging and mainly entail the divestiture of ING's entire insurance and asset management business as well as retail banking in the Netherlands, private banking in Switzerland and banking activities elsewhere outside Europe. The scale of the proposed divestments is appropriate to mitigate the distortions of competition, also in view of the aggravating circumstances mentioned in recitals 138 and 139.

(144) In addition, the restructuring plan also fosters effective competition and prevents market power and disincentives for cross-border activities pursuant to recital 32 of the Restructuring Communication by carving out an entity from ING's business in the Dutch retail market. The Commission has identified such market conditions in particular in the Netherlands where the retail banking market is highly concentrated and ING is one of the leading players able to maintain its high market share with the help of State aid. The WUH/Interadvies business is appropriate because it is apt to constitute a viable business in the future that can compete in the retail banking business in the Netherlands.

(145) According to the Netherlands the carve out should be able to add competition in this highly concentrated market, given that it amounts to a good market share in the mortgage business and consumer loans and some savings activities. Moreover, the entity will be a fully fledged banking business that has a well equipped back office, and fully fledged Internet interface with a payments system and is funded by ING. The fact that it does not have a branch network which is typically an essential facility for a banking business in most Member States is at least partially compensated through Internet banking, which is also an important distribution channel for banking products in the Netherlands. Deposits can be attached to WUH/Interadvies via its received Internet platform. Also, given the know-how and human resources provided to the new entity, it will be in a position to further develop its existing business and possibly set up branches.

[42] If only the aid amount allocated to insurance is considered, it represents 50 % of the solvency margin requirements of ING Insurance. This would be equivalent to 4 % of RWA for a bank, as it constitutes half of the minimum required capital for the entity to operate.

[43] The same seems to be true of ING adherence to the prohibition to advertise the recapitalisation measure which was not been respected in Italy and Spain for several days after the granting of the aid.

(146) Furthermore, the Commission notes the argument of the Dutch authorities referred to in recital 56 concerning the relatively lesser importance of current account products in the Netherlands for cross selling other retail banking products. In that regard, and in the absence of any contrary indications, the Commission accepts that in the Netherlands current account products may be of relatively low importance for cross-selling other retail banking products.

(147) Finally, the Commission takes note that ING has given several commitments to ensure that the business is viable, such as a 'hold separate' manager and a monitoring trustee. Both should ensure that the rights and other tangible and intangible assets of the (to-be-carved-out) business are protected, defended and preserved against ING. Also the arbitration mechanism in place which requires the new entity to receive all necessary inclusions for ensuring its viability will ensure the compliance of ING with its commitments under this Decision. Furthermore, ING will not target clients of the carved out entity regarding products transferred to WUH/Interadvies even if ING still has existing client relationships. Moreover, ING will provide funding for WUH/Interadvies for […] post investment although the amount of funding will gradually decline over that period. Furthermore the Commission will […] ensure that the business is sold with the help of a divestiture trustee […]. All those elements ensure that the entity will be viable and thus increase competition in the Dutch retail banking market. The Commission therefore accepts that the divestment of WUH/Interadvies may enable a new competitor to develop business in the retail banking market in the Netherlands and may bring a new competitive force to that market.

(148) Moreover, the Netherlands has also committed to an acquisition ban preventing ING from acquiring attractive businesses which will be likely brought to the market due to the general restructuring of financial firms and the overall sector [44]. This prevents the non organic growth of ING and allows other firms not having received State aid to purchase such businesses.

(149) Furthermore the Commission considers commitment to a price leadership ban in line with the Restructuring Communication requirements in order to ensure that State aid cannot be used to offer terms which cannot be matched by competitors which are not in receipt of State aid (recital 44). In line with point 32 of the Restructuring Communication, a price leadership commitment may not be necessary in markets where significant structural commitments have been provided. Depending on the specificities of each individual case, the ban may take different forms that aim at striking the most appropriate balance between individual treatment of aid distortions and competitive market conditions [45].

(150) The Netherlands have opted for providing a general price leadership ban for ING whereby ING will not offer more favourable prices than its three best priced competitors. That commitment is appropriate as it targets all markets where the bank is well established with a market share of at least 5 % [46]. Moreover, ING and the Dutch authorities committed to a price leadership ban independent of market share in respect of ING Direct Europe. This is justified because of the information received by the Commission pointing at aggressive commercial behaviour. The effect of the ban should be that, […], ING will mainly compete on the basis of the quality of its products and services. This should alleviate the concerns stated in the information addressed to the Commission indicated above in recital 6 in that respect.

(151) Finally, the Netherlands commits that ING will refrain from mass marketing that invokes the recapitalisation measure as an advantage in competitive terms.

(152) However, in line with the Recapitalisation Communication, there is no longer any reason to insist upon a temporary balance sheet restriction, as imposed in Decision N 528/08.

5.2.4. *Monitoring*

(153) The restructuring plan presented by the Netherlands will need to be properly implemented. In order to ensure a proper implementation, the Netherlands will provide the Commission with a bi-annual monitoring report. In addition, the restructuring plan and the commitments provided by the Netherlands foresee a number of trustees which will assist the Commission in monitoring the implementation of the restructuring plan and various provisions therein.

(44) Similar: Commission Decision of 7 May 2009 in case N 244/09 Capital injection into Commerzbank, OJ C 147, 27.6.2009, p. 4, at para. 111.

(45) In Commission Decision of 7 May 2009 in case N 244/09 *Commerzbank*, OJ C 147, 27.6.2009, p. 4, the Commission accepted a ban in respect of three best-priced competitors. In Commission Decision of 18 November 2009 in case C 18/09, *KBC*, not yet published, the Commission accepted a price leadership ban where KBC committed not to offer better prices than a best priced competitor among top ten market players in terms of market share on the relevant market.

(46) In Commission Decision of 7 May 2009 in case N 244/09 *Commerzbank*, OJ C 147, 27.6.2009, p. 4 and in Commission Decision of 18 November 2009 in case C 18/09, *KBC*, not yet published, the Commission considered it appropriate to limit the ban to markets where the bank has a significant presence, defined for the purpose of the price leadership ban as having a market share of at least 5 %.

(154) It is common practice for the Commission to allow a Member State to adapt the commitments in case of exceptional circumstances ([47]). Therefore whenever appropriate, in response to a request from the Netherlands showing good cause, the Commission will make changes when justified on the merits either to (i) grant an extension of the time period of the measures committed by the Netherlands in this decision or (ii) waive, modify or substitute one or more of the aspects of any commitment provided by the Netherlands in this decision.

6. CONCLUSION

(155) It is concluded, firstly, that on the basis of the amendments presented by the Netherlands on 20 October 2009 the IA measure is in line with the Impaired Asset Communication and should thus be declared compatible with the common market pursuant to Article 87(3)(b) of the Treaty.

(156) Second, it is concluded that the restructuring measures enable ING to restore its long-term viability, are sufficient with respect to burden sharing and are appropriate and proportional to offset the competition distorting effects of the aid measures in question. The restructuring plan submitted, fulfils the criteria of the Restructuring Communication and should therefore be considered compatible with the common market pursuant to Article 87(3)(b) of the Treaty. The capital injection measures and the guarantees which have already been granted can therefore be prolonged in accordance with the restructuring plan. However, the temporary balance sheet restrictions imposed in Decision N 528/08 should be removed.

(157) Thirdly, it is concluded that the additional aid measures presented in the framework of the restructuring plan, that is to say the modification of the terms of the repurchase of the Core Tier 1 securities from the Netherlands and the foreseen liability guarantees, should also be declared compatible with the common market pursuant to Article 87(3)(b) of the Treaty, given the depth of the measures for addressing market distortions presented in the restructuring plan and the fact that the aid helps the beneficiary to enhance its viability. This also concerns the aid deriving from the changed terms of the repayment arrangements of the capital granted by the Netherlands,

HAS ADOPTED THIS DECISION:

Article 1

The impaired asset measure provided by the Netherlands for the so called Alt A portfolio of ING constitutes State aid within the meaning of Article 87(1) of the Treaty.

The aid is compatible with the common market, subject to the commitments set out in Annex I.

Article 2

The restructuring aid provided by the Netherlands to ING constitutes State aid within the meaning of Article 87(1) of the Treaty.

The aid is compatible with the common market, subject to the commitments set out in Annex II.

The temporary limitation on balance sheet growth set out in the Commission’s decision of 12 November 2008 concerning the recapitalisation measure to ING, is lifted.

Article 3

This decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 18 November 2009.

For the Commission

Neelie KROES

Member of the Commission

([47]) Commission Decision of 22 October 2008 in case C 10/08, *IKB*, OJ L 278, 23.10.2009, p. 32.

ANNEX I

As regards the impaired asset measure the following commitments have to be respected:

— Starting 25 October 2009, ING Group will make additional payments to the Netherlands, corresponding with an adjustment of the Alt-A remuneration of – 50 basis points on the funding fee received by ING and of + 82,6 basis points on the guarantee fee paid by ING. The guarantee fee related adjustment includes 15,6 basis points representing an adjustment for the period from 26 January 2009 — the start of the IABF (that is to say the A measure) — until 25 October 2009. The additional payments will be applied to the extent and duration that the IABF agreement is in place.

— The additional payments will be implemented in the form of a separate agreement between ING Group and the Netherlands, in order to keep the original IABF intact.

— The additional payments, excluding the part related to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) have no residual settlement in case of an early unwinding of the IABF. The amount of the unpaid additional payments that relates to the period between 26 January 2009 and 25 October 2009 (that is to say the 15,6 basis points included in the guarantee fee related adjustment) will become payable in case of partially or wholly unwinding of the original transaction. If the IABF is partially unwound, this early redemption settlement would be applied proportionally.

— The Netherlands commits to notify any measures of early full or partial unwinding of the IA measure to the Commission.

ANNEX II

As regards the restructuring aid the following commitments have to be respected:

(a) As regards balance sheet reductions, the commitment for divestment of insurance, ING Direct US and other units to be divested before end of 2013:

— ING will reduce 45 % of its balance sheet compared to 30 September 2008 by the end of 2013 and will divest a list of units as described in recital 57, in particular Insurance and ING Direct US, […].

— These figures refer to projections that do not take into account the possible impact of organic growth and exclude additional increases due to potential new regulatory requirements, such as for example if banks are required to hold significantly larger liquidity buffers due to new EU-wide regulations. Such requirements could increase the balance sheet significantly beyond the current organic growth projections.

— ING will not have a restriction on organic (that is to say not related to acquisitions) growth of the balance sheet of its businesses. […]. In the future, ING will have a general policy to use its growth in funds entrusted by customers mainly to grow in lending to the real economy (corporates and consumers) and decrease its exposure to higher risk asset classes within US CMBS and US RMBS. […] ([1]).

— With respect to units ING commits to sell (as listed in recital 57), if a divestment of any such unit has not taken place by 31 December 2013 (for example on the basis of a final binding sale agreement having been entered into), the Commission may where appropriate or due to exceptional circumstances, in response to a request from the Netherlands, grant an extension of this time period ([2]). The Commission may also in such a case (i) request the Netherlands to appoint one or more (divestiture) trustee(s) ([3]), preselected and proposed by ING (and subject to the Commission's approval), […].

— Whenever the Netherlands seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. In exceptional circumstances, the Netherlands shall be entitled to request an extension within the last month of the time period.

(b) The Netherlands furthermore commits that ING will adhere to an acquisition ban:

— ING will refrain from acquisitions of financial institutions for a certain period. These commitments will apply for the shorter period of three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). ING will also refrain, for the same period, from any (other) acquisition of businesses that would slow down the repayment of the Core-Tier 1 Securities to the Netherlands.

— Notwithstanding this prohibition, ING may, after obtaining the Commission's approval, acquire businesses, in particular if this is essential in order to safeguard financial stability or competition in the relevant markets.

(c) The Netherlands furthermore commits that ING will adhere to a price leadership ban:

— Without prior authorization of the Commission, ING will not offer more favourable prices on standardized ING products (on markets as defined below) than its three best priced direct competitors with respect to EU-markets in which ING has a market share of more than 5 %.

— This condition is limited to ING's standardized products on the following product markets: (i) retail savings market, (ii) retail mortgage market, (iii) private banking insofar it involves mortgage products or saving products or (iv) deposits for SME's (SME defined according the definition of SME as customarily/currently operated by ING in its business in the relevant country). As soon as ING becomes aware of the fact that it offers more favourable prices for its products than its three best priced competitors, ING will as soon as possible adjust, without any undue delay, its price to a level which is in accordance with this commitment.

([1]) […]
([2]) In particular, whenever a divestment is being undertaken by an IPO process which has commenced and significant (30 % or more) share placements have been made prior to the end of the divestment period, the Commission (in consultation with the Netherlands, ING and the Trustee) shall actively consider allowing the entity more time to place remaining shares.
([3]) It is accepted that different trustees may be appointed with respect to different regions and/or business.

— This condition will apply for three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of CT1 coupons and exit premium fees), whichever is shorter. A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.

— Moreover, to support ING's long-term viability, ING Direct will refrain, without prior authorisation of the Commission, from price-leadership with respect to standardised ING products on the retail mortgage and retail savings markets within the EU, for the shorter period of three years from the date of the present Decisions or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees). As soon as ING becomes aware of the fact that it has become the price leader on a retail mortgage or retail savings markets within the EU, ING will adjust its price to a level which is in accordance with this commitment as soon as possible without any undue delay.

— A monitoring trustee preselected and proposed by ING, will be appointed by the Netherlands to monitor this condition. The monitoring trustee is subject to the Commission's approval.

(d) The Netherlands commits to a number of detailed provisions as regards the carve out of WUH/Interadvies:

— ING will create a new company for divestment in the Netherlands, which will be carved out from its current Dutch retail banking business. The result has to be that this carved-out new company is a viable and competitive business, which is stand alone and separate from the businesses retained by ING and that can be transferred to a suitable purchaser. This new company will comprise the business of the WUH/Interadvies banking division, which is currently part of the Dutch insurance operations, and the Consumer Credit Portfolio of ING Bank. WUH/Interadvies is an ING business unit under the umbrella of Nationale Nederlanden Insurance unit. It is (predominantly) a mortgage bank operating on the basis of its own banking licenses. It is a viable 'standalone' player, having its own sales force for customer service and an independent organisation with a solid underlying income. The carve-out will be carried out under the supervision of the Monitoring Trustee in cooperation with the Hold-separate Manager. In this context, during the carve-out period, the Monitoring Trustee may recommend to ING such inclusions into the Divestment Business of tangible and intangible assets (related to the Divestment Business) as he considers objectively required to ensure full compliance with ING's above mentioned result oriented obligations and in particular the viability and competitiveness of the divestment business. If ING disagrees with the Monitoring Trustee about the objective requirement to include such tangible or intangible assets to ensure the viability and competitiveness of the Divestment Business, ING shall inform the Monitoring Trustee in writing. In such a case, ING's executive management and the Monitoring Trustee shall, within […], hold a meeting with a view to reaching a consensus. If no consensus is reached, ING and the Monitoring Trustee shall jointly appoint, without undue delay, an independent third party with expertise in the financial sector (the 'Expert') to hear the parties' arguments and mediate a solution. If no such solution is reached, the Expert shall decide, within […] from its appointment, on the objective requirement to include the relevant related tangible or intangible assets into the Divestment Business to ensure its viability and competitiveness, and the parties shall accept the Expert's decision in this respect and will act accordingly. Issues relating to a disagreement shall be mentioned in the report of the Monitoring Trustee to the Commission.

— ING is committed to ensuring optimal divestment conditions by making a business plan, creating an Internet platform and dedicating sales capabilities for the carved out entity. Also, it will make payment capability available (on commercial terms) if the buyer so requests. In addition, ING will assist in creating a Treasury function and ensure funding for two years post-divestment, whereas ING's funding support will gradually decline in those two years. ING's funding support to the WUH business will be based on internal funding transfer prices. ING intends to apply to the Netherlands for State guaranteed funding up to an amount of EUR […] billion for the funding of the WUH business. In that case, the Dutch authorities commit to notify this measure separately.

— Moreover, ING will refrain for an interim period […] from actively soliciting customers of the WUH business for products that the WUH-business is supplying to these customers on the date of adoption of the present Decision.

— ING will seek to carve-out the WUH business […]. After the carve-out period […], ING will hold-separate the WUH business and seek to divest this business […] ([4]).

— A monitoring trustee and hold separate manager will be appointed within […] after the date of the present Commission Decision […] and a Divestiture trustee will be appointed […]. All trustees will be appointed by the Netherlands and preselected and proposed by ING. The trustees are subject to the Commission's approval.

(e) The costs of all trustees appointed during the restructuring process will be born by ING.

([4]) […]

(f) For restoring viability, the Netherlands commits that ING will adhere to the following:

— ING commits to orientate its non-deposit funding towards longer term funding once markets revert to less stressed conditions by issuing more debt instruments with a maturity more than 1 year. […].

— ING endeavours to eliminate its double leverage (using core debt as equity capital in its subsidiaries) as soon as possible and commits to do so at the latest by […]. The double leverage is automatically eliminated if and when ING Group reverts to being a regulated bank.

(g) Regarding the deferral of coupons and calling of Tier 1 and Tier 2 securities the Netherlands commits that ING will adhere to the following:

— If a rights issue of more than is needed to repay 50 % of the Core Tier 1 securities, including the relevant accrued interest and the exit premium fee, ING will not be obliged to defer coupon payments on hybrids on 8 and 15 December 2009 [5] and any coupon payments on hybrids thereafter.

— If such a rights issue does not take place and ING was loss-making in the preceding year, ING will be obliged to defer hybrid coupons, insofar as ING has the discretion to do so, for the three years starting from the date of the Commission decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest of Core-Tier 1 coupons and exit premium fees), whichever is shorter.

— The Dutch authorities understand that the Commission is against State aid recipients remunerating own funds (equity and subordinated debt) when their activities do not generate sufficient profits [6] and that the Commission is in this context in principle against the calling of Tier 2 capital and Tier 1 hybrids. ING regrets the misunderstanding regarding the calling of a lower Tier 2 bond on 14 October 2009. The calling of Tier 2 capital and Tier 1 hybrids will in the future be proposed case by case to the Commission for authorisation, for the shorter period of three years starting from the date of the present Decision or up to the date on which ING has fully repaid the Core-Tier 1 securities to the Netherlands (including the relevant accrued interest on Core-Tier 1 coupons and exit premium fees).

(h) The Netherlands commits that ING will refrain from mass marketing invoking the recapitalisation measure as an advantage in competitive terms.

(i) The Netherlands commits that ING will maintain the restrictions on its remunerations policies and marketing activities as previously committed to under the agreements concerning the Core-Tier 1 securities and illiquid assets back-up facility.

(j) ING and the Netherlands commit that the progress report about the implementation of the restructuring plan will be provided every six months to the Commission as of the date of the present Decision.

(k) The Dutch authorities commit that the full execution of ING's restructuring will be completed before the end of 2013.

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(5) Provided that it is clear that part of the proceeds of the rights issue will be used for the coupon payments

(6) See paragraph 26 Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules (Restructuring Communication).

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