COMMISSION DECISION

of 26 January 2011

on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (*Sanierungsklausel*)

(notified under document C(2011) 275)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/527/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [2],

Whereas:

1. PROCEDURE

(1) By letters dated 5 August 2009 and 30 September 2009 the Commission asked Germany for information about §8c Corporate Income Tax Act (*Körperschaftsteuergesetz*, hereinafter: KStG). The German authorities replied to these requests by letters dated 20 August 2009 and 5 November 2009. By decision of 24 February 2010, the Commission opened the formal investigation procedure in respect of the aid laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

(2) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit comments.

(3) The German authorities submitted their reply by letter dated 9 April 2010.

(4) Two meetings with the German authorities were held in Brussels on 9 April 2010 and 3 June 2010. Germany submitted further information on 2 July 2010. The Commission did not receive any comments from interested parties.

2. DESCRIPTION OF THE MEASURE

2.1. Background

(5) Corporate taxation in Germany is based mainly on the Income Tax Act (*Einkommensteuergesetz*, hereinafter: EStG) and the KStG. §10d(2) EStG allows losses incurred in a tax year to be carried forward, i.e. according to the ability-to-pay principle, taxable income in future tax years may be reduced by setting off the losses up to a maximum of EUR 1 million each year. Under §8(1) KStG, this possibility to carry forward losses also applies to entities subject to corporate income tax.

(6) The possibility of carry-forward of losses resulted in trade in empty-shell companies (*Mantelgesellschaften*), which had long ceased any economic activity but still retained losses that had been carried forward.

(7) To counteract the trade in empty-shell companies, in 1997 the German legislator restricted the possibility of carrying forward losses by introducing in §8(4) KStG the shell acquisition rule (*Mantelkaufregelung*). The rule restricted loss carry-forward to those corporate entities that were legally and economically identical to the entity that incurred the losses. The rule does not contain a definition of 'economically identical', but gives one negative and two positive examples:

(a) a corporate entity is not economically identical if more than half of its shares are transferred and if the entity then continues its economic activity or starts it again with predominantly new assets;

(b) a corporate entity is economically identical, however, if the injection of new assets is solely for the purpose of restructuring the loss-making entity and if the activity which gave rise to the unrelieved loss carry-forward continues on a comparable scale for the following five years;

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became 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 where appropriate as references to Articles 87 and 88, respectively, of the EC Treaty.

[2] OJ C 90, 8.4.2010, p. 8.

[3] See footnote 2.

(c) a corporate entity is also economically identical if, rather than injecting new assets, the acquiring entity covers the losses that have accrued at the loss-making entity.

(8) The last two examples were commonly referred to as the '*Sanierungsklausel*' (clause allowing for restructuring of companies in difficulty).

(9) §8(4) KStG was repealed with effect from 1 January 2008 by the Business Taxation Reform Act 2008 (*Unternehmensteuerreformgesetz*).

(10) The same act introduced the new §8c(1) KStG, which imposes much tighter restrictions than §8(4) KStG on loss carry-forward in the case of changes in the shareholding of a corporate entity. Under the new rule:

(a) unused losses are forfeited entirely if more than 50 % of the share capital, membership rights, ownership rights or voting rights is transferred to an acquirer;

(b) if, within a period of five years, more than 25 % but not more than 50 % of the share capital, membership rights, ownership rights or voting rights is transferred, unused losses are forfeited on a pro rata basis.

(11) Initially the new rule did not provide any exception for companies in the process of restructuring and at the same time subject to a significant change in ownership.

(12) According to the explanatory memorandum adopted by the German Parliament with the Business Taxation Reform Act 2008, the purpose of replacing §8(4) KStG by the new §8c(1) KStG was to simplify the rules (the explanatory memorandum states that the practical application of §8(4) KStG had raised many difficult legal questions) and to better target abuse (4). The legislator was aware that the change meant that, in the case of a restructuring of an undertaking in difficulty which implied a change in ownership, carry-forward of losses would no longer be possible. This was regarded as acceptable, however, since the tax authorities could waive tax debts in such a situation based on considerations of equity, even without explicit legislative provision (5).

(4) *Bundestagsdrucksache* 16/4841, p. 74.

(5) *Bundestagsdrucksache* 16/4841, p. 76, referring to a circular from the Federal Ministry of Finance dated 27 March 2003; BStBl I, p. 240.

2.2. **The measure**

(13) In June 2009 an amendment to §8c KStG introduced §8c(1a) KStG, under which loss carry-forward is still possible where a company in difficulty is acquired for the purpose of restructuring. This amendment formed part of the Citizens' Relief Act — Health Insurance Fund (*Bürgerentlastungsgesetz Krankenversicherung*) (6). The new provision is again referred to as *Sanierungsklausel* or new *Sanierungsklausel* in order to distinguish it from its predecessor §8(4) KStG. It creates an exception to the limitation of tax loss carry-forward introduced with effect from 1 January 2008 by §8c(1) KStG.

(14) Under §8c(1a) KStG, a corporate entity can carry forward losses despite a change in its shareholding that is caught by §8c(1) KStG provided the following requirements are met:

(a) the acquisition serves the purpose of restructuring the corporate entity (7);

(b) the company is, or is likely to be, insolvent or over-indebted at the time of the acquisition (8);

(c) the company's fundamental business structures are preserved, which requires:

— the corporate entity to honour an agreement between management and works council (*Betriebsvereinbarung*) on the preservation of jobs, or

— preservation of 80 % of the jobs (in terms of the average annual wage bill) for the first five years following the acquisition, or

(6) *Gesetz zur verbesserten steuerlichen Berücksichtigung von Vorsorgeaufwendungen* (*Bürgerentlastungsgesetz Krankenversicherung*), 16 June 2009, BGBl. I No 43, p. 1959.

(7) Restructuring (*Sanierung*) is a measure to avoid or overcome insolvency (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*). Accordingly, eligibility is limited to companies that are, or are likely to be, insolvent or over-indebted when the change in shareholding takes place.

(8) The terms 'insolvency', 'risk of insolvency' and 'over-indebtedness' are defined in German insolvency legislation (*Insolvenzordnung*, hereinafter: InsO). In particular, Insolvency (§ 17 InsO): the debtor is deemed unable to meet due payment obligations. As a rule, a debtor is presumed to be insolvent if it has ceased payments. Risk of insolvency (§ 18 InsO): the debtor is deemed to be at risk of insolvency if it is unlikely to be able to meet its existing payment obligations on the due date. Over-indebtedness (§ 19 InsO): the debtor is over-indebted where its assets no longer cover its existing liabilities; unless it is highly likely, given the circumstances, that the company will continue to exist.

— injections of significant business assets or write-off of debts which still have an economic value within 12 months; business assets are significant if they represent at least 25 % of the assets of the previous financial year; any transfer back to the acquiring entity within the first three years are deducted;

(d) the company does not change sector of activity during the five years following the acquisition;

(e) the company had not ceased operation at the time of the acquisition.

(15) §8c(1a) KStG entered into force on 10 July 2009 and applies retroactively from 1 January 2008.

(16) Initially, §8c(1a) KStG was introduced only for a limited time, until 31 December 2009. However, on 22 December 2009, as part of the Economic Growth Acceleration Act 2009 (*Wachstumsbeschleunigungsgesetz*) ([9]), the German Parliament adopted a provision that deleted the corresponding sunset clause from the KStG.

(17) It should be noted that the losses carried forward can be offset only against the profits of the company that is being restructured. The acquiring company cannot offset the losses against its own profits.

(18) This holds true even if the acquiring company consolidates its tax liabilities at group level since §15, first sentence, number 1 KStG prohibits loss carry-forward if a controlled subsidiary company (*Organgesellschaft*) forms part of an integrated group (*Organschaft*) ([10]).

(19) However, under German corporate tax law such losses are not forfeited; they are merely 'frozen' at the level of the entity and may be used only once the company is no longer consolidated. There is no time limit for the carry-forward of these 'frozen' losses.

(20) The acquiring company benefits indirectly from §8c(1a) KStG because, once the restructuring process has been successfully completed, the tax burden of the restructured entity is reduced. Furthermore, the acquiring company may of course merge part or all of its activities into the acquired company and hence use the losses carried forward.

2.3. **Comparison between §8c(1a) KStG and §8(4) KStG**

(21) The new rule in §8c(1a) KStG differs from the preceding rule, the repealed §8(4) KStG, in one important aspect which is crucial for the assessment for State aid purposes.

(22) Under §8c(1) KStG, a company forfeits its loss carry-forward where more than half of the shares are transferred, unless the *Sanierungsklausel* is applicable. Thus, the general rule is the forfeiture of loss carry-forwards on significant changes in ownership. The existing *Sanierungsklausel* therefore is the exception to the general rule.

(23) Under the earlier §8(4) KStG, the general rule was continuation of loss carry-forwards in the case of significant changes in ownership, provided that the company was economically identical. This exception was intended to prevent abuse, for example in the form of trading in shell companies.

3. **THE OPENING DECISION**

(24) By letter dated 24 February 2010 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of this measure.

(25) In the opening decision, the Commission took the view that §8c(1a) KStG differentiates between financially sound loss-making companies and companies that are (potentially) insolvent or over-indebted, by benefiting only the latter. §8c(1a) KStG thus seemed to depart from the system of reference, according to which both types of companies would not be eligible for loss carry-forward. The Commission therefore reached the preliminary conclusion that the measure is selective and constitutes State aid, since the preconditions of Article 107(1) TFEU appeared to be fulfilled. Finally, the Commission expressed its doubts about the compatibility of the measure with Article 107(3)(b) TFEU, as interpreted by the Temporary Framework ([11]), and with Article 107(3)(c), as interpreted by the Rescue and Restructuring Guidelines ([12]) and the Regional Aid Guidelines ([13]).

([9]) *Gesetz zur Beschleunigung des Wirtschaftswachstums* (*Wachstumsbeschleunigungsgesetz*), 22 December 2009 (BGBl I, p. 3950), Article 2(3)(b).

([10]) Losses at sub-group level, cf § 15 No 1 KStG.

([11]) Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

([12]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

([13]) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

(26) The decision to initiate the procedure was published in the *Official Journal of the European Union* [14]. The Commission invited Germany and interested parties to submit comments.

(27) After the opening of the formal investigation procedure, the German Federal Ministry for Finance instructed the tax authorities responsible for tax collection to cease applying §8c(1a) KStG until the Commission had adopted a final decision in the case and to inform the entities concerned that in the event of a negative final decision by the Commission, State aid would have to be recovered [15].

4. COMMENTS BY GERMANY

(28) Germany takes the view that §8c(1a) KStG does not constitute State aid, for three reasons:

(a) it complies with the private market creditor principle (see 4.1);

(b) it is not selective (see 4.2);

(c) it is justified by the nature and the overall structure of the German tax system (see 4.3).

(29) Germany further argues that the new *Sanierungsklausel* in §8c(1a) KStG corresponds in essence to the old *Sanierungsklausel* in §8(4) KStG, which had never been criticised by the Commission (see 4.4) and that a number of other Member States had similar tax rules in place (see 4.5).

4.1. Compliance with the private market creditor principle

(30) This argument was put forward by the German authorities for the first time in their letter dated 2 July 2010. Germany claims that the private creditor principle may be also invoked with respect to tax debts or quasi-tax debts [16]. The relationship of the German State towards its taxpayers is argued to be comparable with the relationship between a private creditor and a debtor, which are linked by a long-term contract, such as a rent contract or an employment contract. In the view of the German authorities, a private creditor party to a long-term contract would forego part of their future claims, if that enabled another undertaking to take over the debtor, thus ensuring the continuation of the long-term contract.

4.2. Absence of selectivity

(31) Germany takes the view that §8c(1a) KStG is a general measure, since it may be used by all undertakings, regardless of their region, sector and size. Germany points out that any undertaking could potentially find itself in financial difficulties outside its control and be a candidate for application of the rule.

(32) The German authorities note that the Commission itself had taken the view, in its 1998 Notice on business taxation, that, ‘provided that they apply without distinction to all firms and to the production of all goods’, tax measures of a purely technical nature, such as rules on loss carry-overs, were not selective, and that ‘the fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid’ [17].

(33) Germany takes the view that these considerations were of particular importance for tax incentives for research and development, but also for environmental protection, training and employment. In the view of the German authorities, tax rules that favour undertakings making particular efforts in these areas are not selective, since they are open to all undertakings, even if de facto they are of greater benefit to undertakings active in certain sectors than others. In Germany’s view, the same reasoning should also apply to tax rules that favour undertakings in difficulty which are acquired in order to be restructured.

(34) Germany argues that the Court and the General Court had accepted that a measure benefiting exclusively undertakings in difficulty may, in principle, constitute a general measure, which is not selective. In this context Germany cites in the first instance *DMT*, where the Court held with regard to a Belgian payment facility for undertakings in difficulties that [18]:

‘The French Government argues that payment facilities in relation to social security contributions do not constitute State aid if they are granted in identical circumstances to any undertaking experiencing financial difficulties. That would seem to be the case under the regime established by the Belgian legislation. The Commission, however, claims that the ONSS has a discretionary power in regard to the grant of payment facilities.

(14) See footnote 2.

(15) Circular from the Federal Ministry of Finance dated 30 April 2010 addressed to the tax authorities of the *Länder* (responsible for tax collection): http://www.bundesfinanzministerium.de/DE/BMF_Startseite/Aktuelles/BMF_Schreiben/Veroffentlichungen_zu_Steuerarten/koerperschaftsteuer_umwandlungsteuerrecht/009.html

(16) Germany cites the following cases: Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraphs 15 and 26, and Case C-256/97 *Déménagements-Manutention Transport SA* (*DMT*) [1999] ECR I-3913, paragraphs 22 and 25.

(17) Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3), recitals 13 and 14.

(18) *Déménagements-Manutention Transport SA* (*DMT*), cited above, recitals 26 to 28.

It follows from the wording of Article 92(1) of the Treaty that general measures which do not favour only certain undertakings or the production of only certain goods do not fall within that provision. By contrast, where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (see, to that effect, Case C-241/94 France *v* Commission *[1996] ECR I-4551, paragraphs 23 and 24)*.

It is for the national court in the main proceedings to determine whether the ONSS's power to grant payment facilities is discretionary or not and, if it is not, to establish whether the payment facilities granted by the ONSS are general in nature or whether they favour certain undertakings.'

(35) Germany also cites *HAMSA*, where the Spanish authorities had argued that a measure is not selective because it applies to all undertakings in difficulty. On that point, the General Court held that [19]:

'In the present case, the argument relied on by the applicant and the Kingdom of Spain to the effect that the Spanish law of 26 July 1922 concerning suspension of payments institutes a general procedure, applicable to all companies in difficulty, cannot be accepted. Whilst it is true that the law does not have authority to apply selectively in favour of certain categories of undertakings or sectors of activity, it must be remembered that the debt remissions criticised by the Commission do not flow automatically from the application of the law, but from the discretionary decisions made by the public bodies in question. It is, moreover, settled case-law that where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (Case C-256/97 DM Transport *[1999] ECR I-3913, paragraph 27)*.'

(36) The German authorities argue that, unlike the measures in *DMT* and *HAMSA*, §8c(1a) KStG does not provide for discretionary decisions by public bodies, but that its application flows automatically from the law. Therefore, applying the *a contrario* argument, §8c(1a) KStG is not selective.

(37) Germany also takes the view that §8c(1a) KStG forms part of the body of rules under German insolvency law. In particular, the eligibility of an undertaking is based on the notions of insolvency, risk of insolvency and overindebtedness, which are defined in the InsO and which provide grounds for the opening of insolvency procedures.

(38) On the question of selectivity, Germany concludes that the Commission's view would mean that any tax reduction constituted State aid, even if it were generally applicable, and that such a position was in breach of the TFEU.

4.3. **Justification by the nature or overall structure of the tax system**

(39) Germany asserts that the exemption created by §8c(1a) KStG is justified by the nature and overall structure of the German corporate tax system. It claims that there is an objective difference between undertakings in difficulty which are in need of restructuring and other undertakings, and that this objective difference justifies different treatment of undertakings in difficulty which are acquired in view of restructuring. The German authorities base their argument on three considerations.

(40) Firstly, whereas financially sound undertakings have a choice between seeking finance on the capital markets and looking for an undertaking to acquire them, undertakings in difficulty only have the latter option, as they will not be able to raise debt on the capital market or obtain a bank loan. As a result, undertakings in difficulty will systematically forfeit the possibility of carrying forward their losses, whereas healthy undertakings always have the choice between debt financing and looking for a buyer.

(41) Secondly, the *ratio legis* of §8c(1) KStG, i.e. preventing trade in empty-shell companies with accumulated losses, does not require the exclusion of loss carry-forward in situations where the acquisition is for the purpose of restructuring rather than simply tax optimisation. Without the restriction of §8c(1a) KStG to acquisitions of undertakings in financial difficulty in view of restructuring, i.e. if other acquisitions were also included, the *ratio legis* could no longer be maintained.

(42) Thirdly, the purpose of §8c(1) KStG is to ensure that the sale price of stakes in undertakings is based solely on the economic value of the undertaking and that the value of accumulated losses for tax optimisation does not affect the sale price. In the case of the acquisition of an undertaking in difficulty in view of restructuring, however, the possible value of accumulated losses plays no particular role. To substantiate this argument, Germany points out that accountants do not attach any value, in commercial group accounts, to potential carried-forward losses of an ailing undertaking.

[19] Case T-152/99 *Hijos de Andrés Molina SA* (*HAMSA*) [2002] ECR II-3049, paragraph 157.

(43) For these three reasons taken together, Germany considers that, even if §8c(1a) KStG were prima facie selective, it is in any event justified by the nature and overall structure of the German corporate tax system.

4.4. **Link between new and old *Sanierungsklausel***

(44) Germany observes that, with effect from 1 January 2008, §8c KStG replaced a similar rule that was repealed at the same time, namely §8(4) KStG. Both rules pursue the same objective, i.e. the prevention of trade in empty-shell companies with accumulated losses.

(45) Germany notes that the Commission had never expressed any concerns with regard to §8(4) KStG, and that it therefore appears that this rule did not constitute State aid.

(46) Germany therefore regards the Commission's position in this regard as incoherent.

4.5. **Similar rules in other tax systems**

(47) Germany has pointed out that many other Member States have comparable rules to §8c(1a) KStG. Examples are Austria, Belgium, Finland, Italy, Luxembourg and the Netherlands. It notes that the Commission has not taken any action under the State aid rules against these Member States, despite the great similarities between the systems.

(48) In relation to paragraph 34 of the opening decision, which sets out the action the Commission has taken with respect to the French system, Germany stresses that the German system differs from the French system, which is limited to certain sectors of the economy and provides a complete exemption from corporate income tax.

5. **ASSESSMENT OF THE MEASURE**

(49) Article 107(1) TFEU lays down that any aid granted by a Member State through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade among Members States, is incompatible with the internal market.

5.1. **State resources and imputability**

(50) A measure must be financed through State resources, and the use of State resources must be imputable to the State. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. By allowing companies to reduce their corporate tax burden through loss carry-forward, Germany is foregoing revenue, which constitutes State aid. Germany has informed the Commission that implementation of the measure could lead to a tax revenue shortfall of EUR 900 million every year. Since the measure implies a loss of State resources, it is therefore granted through State resources. The aid is granted by a law, and is therefore imputable to the State.

5.2. **Selective advantage**

(51) In addition, the measure must confer a selective advantage on the beneficiary. It is settled case-law that the concept of aid covers not only positive benefits, but also action which, in various forms, mitigates the charges which are normally included in the budget of an undertaking ([20]).

(52) Pursuant to §8c(1) KStG, certain changes in the ownership structure of an undertaking mean the partial or complete forfeiture of the possibility of carrying forward past losses for tax purposes.

(53) §8c(1a) KStG creates an exception to that rule where the change in ownership concerns an undertaking in difficulty and takes place for the purpose of restructuring.

(54) §8c(1a) KStG could therefore grant a selective advantage to companies fulfilling those conditions, since it enables them to set off past losses against future profits for the purpose of calculating their taxable income.

(55) As explained in recital 28, Germany argues that §8c(1a) KStG does not constitute such a selective advantage, for three reasons:

(a) §8c(1a) KStG complies with the private market creditor principle (5.2.1);

(b) §8c(1a) KStG is not prima facie selective (5.2.2);

(c) §8c(1a) KStG is justified by the nature and the overall structure of the German tax system (5.2.3).

(56) Germany also points out the similarities between §8c(1a) KStG and its predecessor, §8(4) KStG (see 5.2.4) and that other Member States have similar rules (see 5.2.5).

([20]) Joined Cases C-182/03 and C-217/03 *Belgium* (C-182/03) and *Forum 187 ASBL* (C-217/03) v *Commission* [2006] ECR I-5479, paragraphs 86-87.

5.2.1. *Possible application of the private market creditor principle*

(57) Germany argues that §8c(1a) KStG complies with the private market creditor principle, because it corresponds to the behaviour of a private market creditor engaged in a long-term contract with a debtor.

(58) The Commission considers that this claim is ill-founded, for several reasons. According to the case-law of the Court and the General Court, the private market creditor principle is applicable only if the State acts like an economic operator, but not when it exercises its prerogatives as a public authority [21]. In this case, the State exercises its monopoly of taxation in its capacity as a public authority.

(59) The Commission takes the view that the case-law cited by Germany does not alter this assessment. §8c(1a) KStG concerns the establishment of a tax debt, whereas the facts that gave rise to the judgments of the Court in *Spain* v *Commission* [22] and *DMT* [23] concerned situations where the administration had the possibility to waive existing tax debts. Therefore, the private market creditor principle is not applicable in this case.

(60) Secondly, even if it were applicable, which the Commission disputes, the Commission notes that the tax advantage is granted automatically, without a prior assessment of the total losses (which determine the maximum amount of the future tax reductions), the prospects of the beneficiary returning to viability, or whether the debtor has strategic importance. A private market creditor would not provide, in their general terms and conditions, such an automatic waiver of future debts, without knowing in advance the possible amount of the waiver, the debtor's financial prospects and its strategic importance.

(61) Thirdly, the Commission notes that, contrary to a long-term contractual relationship, §8c(1a) KStG does not concern a waiver for existing debts, but a reduction of possible future debts, which might arise once the debtor's financial health has been restored. In other words, when the State allows the loss carry-forward, there are no outstanding debts.

(62) Fourthly, the Commission observes that usually, in the event of insolvency, the debtor's business is taken over by another company. Since the State has a monopoly on taxation, it will be able to collect taxes from the other company. Therefore, a debtor that exits the market will be replaced by another debtor. Contrary to a private market creditor, the concept of an existing customer's loyalty has no bearing on the decision of the State.

(63) The Commission concludes that the private market creditor principle is not applicable in this case because the State has acted using its prerogatives in the public policy remit, and not as an economic operator. Even if the private market creditor principle were applicable in this case, the Commission has shown that a private creditor in a long-term contractual relationship, placed in the same position as the State, would not have adopted a measure comparable to §8c(1a) KStG.

5.2.2. *Prima facie selectivity*

(64) According to the case-law of the ECJ concerning the selectivity of a tax measure, Article 107(1) TFEU requires assessment of whether, under a particular statutory scheme, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the scheme, are in a comparable factual and legal situation [24].

(65) Consequently, when assessing the selectivity of a tax provision, the Commission must first determine the general or 'usual' rules applicable to the field of taxation concerned under the existing tax system ('system of reference'). It must then determine whether the measure is an exception to the system of reference by differentiating between economic operators who, in the light of the objective pursued by the tax system of the Member State concerned, are in a comparable factual and legal situation.

5.2.2.1. System of reference

(66) The Commission is of the opinion that the system of reference is the German corporate income tax system in its present form, and in particular the rules on tax loss carry-forward for companies subject to change in their shareholding, which are laid down in §8c(1) KStG. As described above in recital 10, under this rule

[21] Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraphs 84-85; Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraphs 133-134.

[22] Cited above.

[23] Cited above.

[24] Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; see also Commission Notice on the application of the State aid rules to measures relating to direct business taxation.

unused losses are forfeited entirely if more than 50 % of the ownership rights are transferred to an acquirer; they are forfeited pro rata if, within a period of five years, more than 25 % but less than 50 % of the ownership rights is transferred. The Commission therefore concludes that forfeiture of losses is the general rule, i.e. the system of reference, in the case of a change of ownership of a company.

(67) The Commission notes that it had already used §8c(1) KStG as a system of reference in a previous case [25]. There, the Commission declared incompatible with the internal market an exception to §8c(1) KStG allowing companies acquired by venture capital companies to carry forward losses despite the change in ownership. The reasoning developed in that decision also applies to this case.

5.2.2.2. Differentiation between companies in a comparable factual and legal situation in the light of the objective of the tax system

(68) By way of departure from the reference scenario, §8c(1a) KStG enables companies that are, or are at risk of being, insolvent or over-indebted at the time of their acquisition for the purpose of restructuring to carry forward their losses, provided that certain conditions are met (see recital 14).

(69) Germany argues that the objective of §8c(1a) KStG is to remove a tax obstacle to the restructuring of undertakings in difficulty. In the light of the objective of the tax system, only undertakings in difficulty are in a comparable factual and legal situation. Since §8c(1a) KStG applies to all undertakings in difficulty, it is not selective.

(70) Germany takes the view that the judgments in *DMT* [26] and *HAMSA* [27] support this position. Germany contends that the Court and the General Court concluded that the measures in these cases were selective because they required discretionary decisions by the public authorities. It follows *a contrario* from these judgments that a measure applicable to all undertakings in difficulty, and which does not leave any discretion to the public authorities, is not selective.

(71) The Commission would point out first that the objective of the tax system must be established at the level of the system of reference rather than at the level of the exception [28]. The objective of the corporate income tax system is to generate revenue for the budget. The question arises whether this objective is taken into account where companies unduly reduce their tax base by using loss carry-forwards from shell companies. §8c(1) KStG is intended to prevent companies which change ownership from carrying forward their losses. This is clear from the explanatory memorandum to the law which introduced §8c(1) KStG and repealed §8(4) KStG [29]. Therefore, all companies which change ownership are, in the light of the objective of the tax system, in a comparable factual and legal situation.

(72) The Commission points out that only companies in difficulty are eligible for the exception provided for by §8c(1a) KStG. However, companies which are not insolvent or over-indebted, or at risk thereof at the time of acquisition, might also be loss-making, but are not eligible for loss carry-forward.

(73) The Commission therefore concludes that §8c(1a) KStG differentiates between loss-making companies that are otherwise healthy and those that are insolvent or over-indebted, or at risk thereof, by benefiting the latter. §8c(1a) KStG thus differentiates between companies that are, with regard to the objective of the tax system, in a comparable factual and legal situation.

(74) Secondly, the Commission stresses that, contrary to the German view, the case-law of the Court and the General Court has never regarded a measure applicable to all undertakings in difficulty and which does not leave any discretion to the public authorities as, by definition, not selective.

(75) With regard to *DMT*, it should be noted that, in response to the observation by the French government, which corresponds to the view held by Germany in this case, the Court concludes in recital 28 that even if the national authorities enjoyed no discretion, it was still for the national court to determine whether the national measure in question was general in nature or selective. Thus, the Court recognises implicitly that a national measures open to all undertakings in difficulty, and which does not leave any discretion to the public authorities, may still be selective.

[25] Case C 2/2009 *MoRaKG*, Conditions for capital investments (OJ L 6, 9.1.2010, p. 32).
[26] Cited above.
[27] Cited above.
[28] Case T-55/99 *CETM* [2000] ECR II-3207, paragraph 53.
[29] See Bundestagdrucksache 16/4841, p. 75 et seq. and description above.

(76) With regard to *HAMSA*, the Commission observes that the *obiter dictum* in paragraph 157 refers to the general Spanish insolvency legislation. The measure at issue in *HAMSA*, however, was not a measure under insolvency law, but a debt waiver granted by the Spanish authorities on a voluntary basis, without there being any legal obligation, and which was much higher than the debt waivers agreed by private investors. The case is therefore not relevant to the assessment of the measure in question.

(77) Advocate General Fennelly, in his opinion in *Ecotrade*, confirms that rules which are applicable to all undertakings in difficulty may be selective and constitute State aid ([30]).

(78) Therefore, contrary to the position of Germany, the Commission's analysis of the measure in question is in line with the case-law of the Court and the General Court.

(79) The Commission therefore considers §8c (1a) KStG to be prima facie selective.

5.2.3. *Justification on the basis of the nature or the general scheme of the tax system of which it is part*

(80) According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part, does not fulfil that condition of selectivity ([31]).

(81) Therefore, where, as in the present case, the Commission comes to the conclusion that the measure in question prima facie appears to be selective, it must assess whether the differentiation is justified by the nature or general scheme of the tax system of which it forms part.

(82) The Commission notes that it is settled case-law of the Court that it is for the Member State to provide such justification ([32]).

(83) The Court has further clarified that a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary to achieve such objectives. Only the second mechanisms qualify for a justification by the nature or the general scheme of the tax system of which it is part.

(84) The Commission considers that it is necessary in this case to distinguish between the objective of §8c(1) KStG and the objective of §8c(1a) KStG.

(85) As Germany recognises in its submissions, the objective of §8c(1) KStG is to prevent abuse of the loss carry-forward allowed by the German tax system in the form of purchases of empty shell companies.

(86) The Commission notes in this respect that §8c(1) KStG has a much broader scope than its predecessor, §8(4) KStG. Whereas the latter ruled out the carrying forward of losses only when two cumulative conditions were met, namely acquisition by another corporate entity and new economic activity, the new provision does not contain the second condition. Acquisition by another corporate entity is therefore enough to forfeit the possibility of loss carry-forward. The legislator was aware of this difference in scope since the explicit purpose of the change in legislation was to finance a reduction in the corporate income tax rate from 25 % to 15 % ([33]).

(87) §8c(1a) KStG, on the contrary, is not intended to prevent abuse. That is clear from the explanatory memorandum with the introduction of the new *Sanierungsklausel* published by the German Parliament. The explanatory memorandum states that §8c(1a) KStG was introduced to tackle the global financial and economic crisis ([34]). During the crisis, the restrictions on loss carry-forward were perceived to be a particular obstacle to the restructuring of companies.

(88) The Commission notes that Germany, in its comments on the opening decision, stresses the fact that §8c(1a) KStG does not constitute an anti-abuse measure, but was introduced to support ailing companies during the financial and economic crisis.

(89) The Commission concludes that the objective pursued by this specific tax measure is extrinsic to the tax system. According to the case-law of the Court, the pursuit of such an extrinsic objective cannot be relied upon to justify a measure by the nature and overall structure of the tax system ([35]). It can be analysed only in the compatibility assessment.

([30]) Case C-200/97, opinion delivered on 16 July 1998, paragraphs 26-32.

([31]) Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33; Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33; *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited above, paragraph 42; *GIL Insurance*, cited above, paragraph 72; *Heiser*, cited above, paragraph 43; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52.

([32]) *Portugal* v *Commission*, cited above, paragraph 81.

([33]) Bundestagdrucksache 16/4841, p. 30 et seq.

([34]) Bundestagdrucksache. 16/13429, p. 50, and Bundestagdrucksache 16/12674, p. 10.

([35]) *Portugal* v *Commission*, cited above, paragraph 82, which refers to 'cohesion' and 'regional development' as extrinsic objectives.

(90) The three arguments presented by Germany cannot alter this assessment.

(91) With regards to Germany's argument that a company in difficulty has no choice for but to obtain finance through an investor, whereas a healthy company, which is temporarily loss-making, has the choice between obtaining finance on the capital market and acquisition by an investor with subsequent refinancing, the Commission is of the opinion that the way a company finances its business is irrelevant in the light of the objective of the tax system. A corporate tax system is based on the taxation of profits and the declaration of losses. As could be observed during the financial and economic crisis, financially sound companies also reported losses temporarily. But these financially sound companies are not eligible for the loss carry-forward in application of the *Sanierungsklausel* and are thus at disadvantage compared with ailing loss-making companies in the event of a change of ownership and subsequent refinancing by the new shareholders. Furthermore, the Commission also notes that during the financial and economic crisis healthy companies, which temporarily recorded losses, had great difficulties accessing the capital markets. Therefore, even the factual assumptions underlying the first argument are inaccurate. The Commission therefore rejects Germany's first argument.

(92) With regard to Germany's second argument, that the exception provided in §8c(1a) KStG to the general prohibition on loss carry-forward in the event of a change of ownership laid down by §8c(1) KStG was justified by the *ratio legis* of §8c(1) KStG, because there was no risk of abuse in the case of the restructuring of a company in difficulty, the Commission observes that this argument does not justify the restriction of §8c(1a) KStG to companies in difficulty. The Commission points out that there is no risk of abuse either when a financially sound company is acquired. The risk of abuse exists only in relation to empty-shell companies. As pointed out above, the *ratio legis* of §8c(1) KStG goes further than combating abuse. Its objective is also to increase the German corporate tax base and to offset the reduction in the corporate income tax rate from 25 % to 15 %. This explains why §8c(1) KStG also includes a number of acquisitions of interests where there is no risk of abuse. The Commission therefore rejects Germany's argument that the exception introduced by §8c(1a) KStG corresponds to the *ratio legis* of §8c(1) KStG.

(93) With regard to Germany's third argument, that losses of ailing companies are usually not attributed any value by auditors when calculating deferred tax for consolidated financial statements, and therefore the possibility of carrying forward losses has no impact on the sale price of the ailing company, the Commission notes first that this is based on accounting criteria and is therefore irrelevant for tax considerations. Secondly, the Commission notes that this argument contradicts Germany's statement that the inability to carry forward losses constitutes an obstacle to restructuring. This is true only if the acquiring company attributes a certain monetary value to the possibility of carrying forward losses. Therefore, the Commission also rejects Germany's third argument.

(94) Moreover, Germany claims that other Member States also provide tax relief for the restructuring of companies, such as the French aid scheme for the takeover of firms in difficulty. The Commission cannot accept Germany's argument, which is based on a comparison. Firstly, in order to justify a measure, the Member States may refer only to principles inherent to their tax system, as the system of reference by which to assess whether an undertaking obtains an advantage with the meaning of the State aid rules. The fact that comparable tax measures might exist in the other Member States is of no consequence since any such measures could themselves be caught by the provisions in the Treaty. Secondly, the conditions imposed on measures under the French scheme differ from §8c(1a) KStG. The French scheme provides for a tax exemption for newly created companies which take over a firm in difficulty. After the scheme was declared incompatible within the common market by the Commission in 2004, [36] France changed it to comply with the State aid rules. The benefits provided are now partly *de minimis*. The other part of the aid is compatible as regional aid or SME aid. [37]

(95) The Commission therefore concludes from the above that the measure in question does not derive directly from the basic principles of the tax system and is not justified by the nature and general scheme of the tax system.

5.2.4. *The link between the old and new Sanierungsklausel*

(96) Germany argues that §8c(1a) KStG essentially corresponds to the old §8(4) KStG and that the Commission had never considered §8(4) KStG to be State aid.

[36] Case C 57/02 *Tax exemption for the takeover of firms in difficulty* (OJ L 108, 16.4.2004, p. 38).

[37] Case N 553/04 *Tax exemption for the takeover of firms in difficulty* (OJ C 242, 1.10.2005, p. 5).

(97) The Commission points out that Germany never notified §8(4) KStG. The Commission has therefore not yet taken a view on whether it involved State aid.

(98) This procedure concerns only §8c(1a) KStG, since the opening of the formal investigation procedure was limited to this provision. Germany cannot rely on the argument that the Commission has never formally objected to §8(4) KStG in order to justify §8c(1a) KStG because the German authorities have never notified §8(4) KStG.

(99) The Commission reserves the right to analyse §8(4) KStG under the State aid rules, should it transpire that this provision may have provided undertakings with a selective advantage.

5.2.5. *Similar tax schemes in other Member States*

(100) The fact that other Member States have similar or identical tax schemes in operation, which they have not notified to the Commission, has no bearing on the analysis of the question whether a given measure constitutes State aid.

(101) The Commission will analyse the information submitted by Germany pursuant to Article 10 of the Procedural Regulation [38].

5.2.6. *Conclusion on the existence of a selective advantage*

(102) The Commission therefore concludes that §8c(1a) KStG provides a selective advantage to the companies to which it applies.

5.3. **Effect on intra-Union trade**

(103) The measure must be liable to affect intra-Union trade and distort or threaten to distort competition. §8c(1a) KStG is not sector-specific, i.e. all sectors can benefit from it. Virtually all sectors of the German economy are active on markets open to competition and intra-Union trade. Hence, the measure is liable to affect intra-Union trade and to distort or threaten to distort competition.

(104) The Commission observes that, according to the information provided by Germany, all undertakings eligible for the measure are eligible for insolvency proceedings under German insolvency law (see recital 14 and footnote 7). Therefore, all potential beneficiaries of the measure are undertakings in difficulty within the meaning of point 10(c) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter: the Rescue and Restructuring Guidelines). As a consequence, none of the beneficiaries is eligible for *de minimis* aid pursuant to Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [39], as Article 1(h) of that Regulation excludes undertakings in difficulty from its scope.

5.4. **Conclusion**

(105) Therefore, as all the requirements laid down in Article 107(1) TFEU are met, the Commission takes the view that the scheme on the tax carry-forward of losses in the case of restructuring of companies in difficulty constitutes State aid within the meaning of that article.

6. **ASSESSMENT OF THE COMPATIBILITY OF THE MEASURE**

(106) The Commission may declare State aid compatible with the internal market pursuant to Article 107(3) TFEU. According to the settled case-law of the Court, the burden of proof for demonstrating that a measure is compatible lies with the Member State [40]. The Commission notes in this respect that Germany, despite the explicit invitation by the Commission in the opening decision, has not submitted any information regarding the matter to the Commission. For that reason alone, the Commission cannot declare the aid measure compatible with the internal market.

(107) The Commission has nevertheless examined whether the measure could be declared compatible with the internal market. The Commission has wide discretion in aid cases falling under Article 107(3) TFEU [41]. Exercising this discretion, it has issued guidelines and notices setting forth criteria for declaring certain types of aid compatible with the internal market under Article 107(3) TFEU. It is settled case-law that the Commission is bound by the guidelines and notices that it issues in the area of

[38] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

[39] OJ L 379, 28.12.2006, p. 5.

[40] Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen* (T-132/96) and *Volkswagen AG and Volkswagen* (T-143/96) v *Commission* [1999] ECR II-3663, paragraph 140; Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 81.

[41] Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 56, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36.

supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States ([42]).

(108) It is therefore necessary to assess first whether the notified aid falls under the scope of one or more guidelines or notices, and can be declared compatible with the internal market because it fulfils the conditions for compatibility set out therein.

6.1. **Possible compatibility on the basis of the Temporary Framework** ([43])

(109) Since §8c(1a) KStG was introduced in order to tackle the problems resulting from the financial and economic crisis, the Commission examined whether it could be declared compatible under Article 107(3)(b) TFEU, as interpreted by the Temporary Framework.

(110) In the light of the current financial and economic crisis and its impact on the overall economy of the Member States, the Commission considers that certain categories of State aid are justified, for a limited period, to remedy this crisis and they can be declared compatible with the internal market under Article 107(3)(b) TFEU. The Temporary Framework sets out the conditions under which the Commission will declare such aid schemes compatible.

(111) However, §8c(1a) KStG does not fall under any of the measures set out in the Temporary Framework because it concerns tax breaks for companies in difficulty. However, the Temporary Framework does not provide for State aid in the form of tax breaks.

(112) The Commission therefore takes the view that §8c(1a) KStG does not meet the requirements for being declared compatible under Article 107(3)(b) TFEU, as interpreted by the Temporary Framework.

(113) The Commission notes, however, that a limited amount of aid to certain beneficiaries may be declared compatible with the internal market pursuant to section 4.2 of the Temporary Framework provided that it meets all the conditions of a German aid scheme which the Commission has approved on this legal basis. In order to be eligible for this type of aid, the beneficiary must demonstrate in particular that it was not an undertaking in difficulty on 1 July 2008 within the meaning of the Rescue and Restructuring Guidelines (for large undertakings) or within the meaning of Article 1(7) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation — GBER) ([44]) (for SME) and that the gross grant equivalent of the aid is not higher than EUR 500 000. Furthermore, the other conditions in section 4.2.2 of the Temporary Framework and of the decision authorising the German aid scheme must be met.

6.2. **Possible compatibility on the basis of the Rescue and Restructuring Guidelines** ([45])

(114) Since §8c(1a) KStG concerns tax advantages for ailing companies, the Commission examined its compatibility under the Rescue and Restructuring Guidelines. Under these Guidelines, only companies in difficulty are eligible for aid. Whereas an insolvent or over-indebted company can be considered as being in difficulty within the meaning of the Guidelines, paragraph 13 of the Rescue and Restructuring Guidelines provides that a firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid. One of the requirements of §8c(1a) KStG is a change in shareholding. After such a change, the target company might belong to a group. In this case, it would normally be for the group to assist the target company in difficulty, which would then not be eligible for aid under the Rescue and Restructuring Guidelines.

(115) In addition, even for the beneficiaries eligible for aid under the Rescue and Restructuring Guidelines, other requirements of these Guidelines are not met.

(116) Under paragraph 25(a) of the Rescue and Restructuring Guidelines, rescue aid can only take the form of loans or loan guarantees. Hence, the tax advantage in question cannot be considered to be rescue aid.

([42]) Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 36; Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 43; and Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 53.

([43]) Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1). With effect from 1 January 2011, this Communication has been replaced by a new version (OJ C 6, 11.1.2011, p. 5). However, pursuant to Chapter 5 of the new version, this new version applies for unlawful aid only to aid granted after 1 January 2011. As Germany has suspended the application of the measure, no aid has been granted after that date.

([44]) OJ L 214, 9.8.2008, p. 3.

([45]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(117) In the case of restructuring aid, the Rescue and Restructuring Guidelines require the submission of a realistic restructuring plan to restore the viability of the company. The aid must be limited to the minimum necessary. In this context, the beneficiary has to make a contribution to the restructuring costs. Finally, to avoid undue distortions of competition, the Rescue and Restructuring Guidelines provide for compensatory measures.

(118) Not all of these conditions are fulfilled by §8c(1a) KStG. While the explanatory memorandum indicates that the target company has to provide a reorganisation plan with a positive business outlook, there is no indication that such a plan would meet the requirements of the Rescue and Restructuring Guidelines, nor that the amount of the aid is limited to the minimum necessary. The amount of aid depends on the losses that a company incurred in the past. Moreover, §8c(1a) KStG does not provide for a contribution by the beneficiary or compensatory measures.

(119) Finally, rescue and restructuring aid to large enterprises must be notified individually. It cannot be granted as part of a scheme. §8c(1a) KStG does not distinguish between large companies and SMEs.

(120) Even for SMEs, where rescue and restructuring aid can in principle take the form of a scheme, the Commission notes that the particular requirements for such a scheme set out in paragraph 82 of the Rescue and Restructuring Guidelines are not met, for the same reasons set out above in recital 117.

(121) Therefore, the Commission takes the view that §8c(1a) KStG is not compatible with the internal market as restructuring aid.

6.3. **Possible compatibility on the basis of the Regional Aid Guidelines** [46]

(122) §8c(1a) KStG must also be examined in the light of the Regional Aid Guidelines.

(123) Potential beneficiaries of regional aid must be located in a German region eligible for regional aid. Under §8c(1a) KStG, this is not necessarily the case, because the provision applies to companies located throughout Germany.

(124) Furthermore, the Regional Aid Guidelines exclude from their scope undertakings in difficulty within the meaning of the Rescue and Restructuring Guidelines (see paragraph 9). Therefore, even aid for undertakings located in eligible regions cannot be declared compatible on the basis of the Regional Aid Guidelines.

(125) The Commission therefore takes the view that the measure is not compatible with the internal market as regional aid.

6.4. **Possible compatibility on the basis of the Environmental Aid Guidelines** [47]

(126) Finally, §8c(1a) KStG must be examined in the light of the Environmental Aid Guidelines.

(127) The primary objective of the Environmental Aid Guidelines is to ensure that State aid measures will result in a higher level of environmental protection than would occur without the aid and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition, taking account of the polluter pays principle (hereafter 'PPP') established by Article 191 TFEU.

(128) This objective is not fulfilled by §8c(1a) KStG. The explanatory memorandum does not refer to any objective within the meaning of the Environmental Aid Guidelines.

(129) As paragraph 20 of the Rescue and Restructuring Guidelines states, a firm in difficulty, given that its very existence is in danger, cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Since all potential beneficiaries of §8c(1a) KStG are companies in difficulty within the meaning of paragraph 10(c) of the Rescue and Restructuring Guidelines, the Commission is of the opinion that §8c(1a) KStG is not compatible as environmental aid.

6.5. **Possible compatibility on the basis of Article 107(3) TFEU**

(130) The Commission notes that the notified measure falls within the scope of both the Temporary Framework and the Rescue and Restructuring Guidelines. Therefore, when exercising its discretion under Article 107(3)(b) and (c) TFEU, it is bound by these two texts, for the reasons set out above in recital 109 et seq.

(46) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

(47) Community guidelines on state aid for environmental protection (OJ C 82, 1.4.2008, p. 1).

(131) However, if the Commission is presented with compelling arguments for so doing, it can exercise its discretion again provided that it acts within the limits set out by the TFEU and the general principles of law, in particular the principle of equal treatment, as interpreted by the case-law of the Court ([48]). In this context, according to the Court's case-law, the Commission may declare State aid compatible with the internal market if the aid is to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU) or pursues an objective of common interest (Article 107(3)(c) TFEU) ([49]), is necessary to reach this objective ([50]), and does not adversely affect trading conditions to an extent contrary to the common interest.

(132) In this case, Germany has not presented any arguments that the aid is compatible with the internal market directly under Article 107(3)(b) or (c) TFEU.

(133) The Commission notes that, due to the design of the aid measure, the amount of aid depends on the losses which the beneficiary has recorded in the past. Therefore, there is no link between the amount of aid received by an undertaking and the objective pursued by the aid scheme, i.e. the removal of barriers to restructuring and support for undertakings in difficulty during the economic and financial crisis. The Commission therefore concludes that the aid scheme is not limited to what is necessary to achieve its objective. As a consequence, it distorts competition in the internal market to an extent contrary to the common interest.

(134) The Commission therefore concludes that the measure cannot be declared compatible based directly on Article 107(3)(b) or (c) TFEU.

7. **RECOVERY**

(135) Since the aid scheme has not been notified, it is unlawful aid.

(136) By virtue of the Commission's established decision-making practice under Article 107 of the Treaty must be recovered from the beneficiaries. This practice has been confirmed by Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([51]): 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

(137) Given that the measure in question constitutes unlawful and incompatible aid, it must be recovered in order to re-establish the situation that existed on the market before the aid was granted. Recovery is, therefore, to be effected from the date when the advantage accrued to the beneficiary, i.e. when the aid was made available to the beneficiary, and is to bear recovery interest until effective recovery.

(138) The Commission is of the opinion that the annual date for payment of corporate tax must be considered as the relevant date for determining the date when the aid was made available to the beneficiary.

(139) Germany must take all necessary measures to recover the aid from the beneficiaries. In order to establish the number of cases in which recovery must be effected, Germany must draw up a list of enterprises which have benefited from the measure in question since 1 January 2008. In this context the Commission notes that Germany ceased application of the measure on 30 April 2010. The German Federal Ministry of Finance ordered the tax authorities responsible for tax collection to cease applying the *Sanierungsklausel* until the Commission adopted a final decision in the case ([52]).

(140) The State aid to be recovered is to be calculated on the basis of the tax declarations of the companies concerned, i.e. the beneficiaries of §8c(1a) KStG. The aid amount is to be calculated as the difference between the tax which would have to be paid without the application of §8c(1a) KStG and the tax that was actually paid after application of §8c(1a) KStG.

(141) This is without prejudice to the possibility that, where the total amount of aid thus granted does not exceed a gross grant equivalent of EUR 500 000, and where all other conditions set out in section 4.2.2 of the Temporary Framework and of a Commission decision authorising a German aid scheme on that legal basis are met, in particular with regard to the company not being in difficulty on 1 July 2008, the aid may be deemed compatible on the basis of Article 107(3)(b) TFEU, as interpreted by the Temporary Framework, and the authorised German aid scheme. Where the total amount exceeds EUR 500 000, the excess must be recovered.

([48]) See in particular Case C-313/90 *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS)* v *Commission* [1993] ECR I-1125.

([49]) Case T-162/06 *Kronoply* v *Commission* [2009] ECR II-1; especially paragraphs 65, 66, 74, 75.

([50]) Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraphs 41-43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68-69.

([51]) OJ L 83, 27.3.1999, p. 1.

([52]) See footnote 15.

(142) The Commission draws the attention of Germany to the fact that the aid cannot be deemed compatible under *de minimis* rules ([53]), or under a block-exempted ([54]) aid scheme, or under any aid scheme approved on the basis of the Regional Aid Guidelines or the Research, Development, and Innovation Guidelines ([55]), because all these texts exclude the granting of State aid to undertakings in difficulty ([56]). For all other approved aid schemes, Germany must verify whether the decision approving the aid scheme excludes undertakings in difficulty from the scope. If not, the aid could be deemed compatible under these schemes, provided that Germany demonstrates that all the conditions of the relevant schemes were fulfilled when the aid was granted.

8. **CONCLUSIONS**

(143) On the basis of the foregoing, the Commission concludes that the scheme for the carry-forward of tax losses (§8c(1a) KStG, '*Sanierungsklausel*') constitutes State aid within the meaning of Article 107(1) TFEU which has been unlawfully implemented in breach of Article 108(3) TFEU. The scheme is incompatible with the internal market.

(144) The Commission is of the opinion that Germany must take all necessary measures to recover the aid from the beneficiaries of the *Sanierungsklausel*,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted on the basis of §8c(1a) of the Corporate Income Tax Act (*Körperschaftsteuergesetz*), unlawfully put into effect by Germany in breach of Article 108(3) TFEU, is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 is compatible with the internal market under Article 107(3)(b), as interpreted by the Temporary Framework, provided that the aid amount does not exceed EUR 500 000, the beneficiary was not an undertaking in difficulty on 1 July 2008 and all the other conditions set out in section 4.2.2 of the Temporary Framework are met.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by any aid scheme approved by the Commission on a legal basis other than the General Block Exemption Regulation, the Regional Aid Guidelines, the Research, Development and Innovation Guidelines, and which does not exclude undertakings in difficulty as potential beneficiaries, is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 4

1. Germany shall withdraw the scheme referred to in Article 1.

2. Germany shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.

3. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([57]).

5. Germany shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of notification of this Decision.

Article 5

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

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

Article 6

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

(a) The list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

([53]) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.
([54]) See footnote 44.
([55]) Community Framework for state aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).
([56]) See Article 1(6)(c) GBER; point 9 Regional Aid Guidelines; chapter 2.1 at the end, Research and Development and Innovation Guidelines.
([57]) OJ L 140, 30.4.2004, p. 1.

(b) The total amount (principal and interest) to be recovered from each beneficiary;

(c) A detailed description of the measures already taken or planned to comply with this Decision;

(d) Documentary evidence that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the recovery of the aid granted under the scheme referred to in Article 1 has been completed. Upon request by the Commission, Germany shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 26 January 2011.

For the Commission

Joaquín ALMUNIA

Vice-President