

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 19 September 2012

on the measures in favour of ELAN d.o.o. SA.26379 (C 13/10) (ex NN 17/10) implemented by Slovenia

(notified under document C(2012) 6345)

(Only the Slovenian text is authentic)

(Text with EEA relevance)

(2014/273/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 called on interested parties to submit their comments pursuant to the provision cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) On 10 July 2008, *Marker Völkl International GmbH* (hereinafter referred to as ‘complainant’), a German ski producer, filed a complaint alleging that Slovenia had granted state aid to the company *Elan d.o.o.* (hereinafter referred to as ‘*Elan*’; at the time of the complaint it was known as *Skimar d.o.o.*). The Commission sent several requests for information to Slovenia, to which Slovenia replied with letters dated 14 October 2008, 30 January 2010 and 22 February 2010. In November 2009, the Commission also sent a request for information to the complainant, to which it replied on 5 March 2010.
- (2) By letter dated 12 May 2010, the Commission informed Slovenia that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures. The Commission received no comments from interested third parties.
- (4) Following the opening Decision, Slovenia submitted further information by letters dated 9, 10 and 16 June 2010 (the latter with annexes dated 26 May, 28 May, 31 May, 2 June and 14 June 2010). On 16 August 2011, the Commission sent an information request to the Slovenian authorities, to which they replied by letter of

⁽¹⁾ OJ C 223, 18.8.2010, p. 8.

⁽²⁾ See footnote 1.

10 October 2011. Several annexes to that letter were submitted on 11 October 2011. Following a meeting between the Commission services and company's representatives, Slovenia submitted additional information by letters dated 6 March, 30 March, 13 April, 16 April, 23 April, 10 May, 15 May and 30 May 2012.

2. DESCRIPTION OF THE AID

2.1. THE BENEFICIARY

- (5) *Elan*, a limited liability company is active in producing skiing equipment and marine oriented crafts such as yachts. The company is located in Begunje na Gorenjskem, Slovenia, which is in its totality eligible for regional aid under Article 107(3)(a) of the TFEU ⁽³⁾. At present, *Elan* employs approximately 460 staff and has two main divisions: a winter sport division and a marine division. The company has only one subsidiary in Slovenia, *Elan Inventa d.o.o.* (sport equipment), as well as several trading companies in other countries.
- (6) Until June 2010, and when the measures under assessment took place, *Elan* was organised differently. It consisted of the parent company *Elan* which held shares in four subsidiaries:
- *Elan d.o.o.* (hereinafter referred to as '*Elan Winter sport*'), in which *Elan*'s winter sport activities were organised. *Elan Winter sport* held in turn the shares in several trading companies.
 - *Elan Marine d.o.o.* (hereinafter '*Elan Marine*'), in which *Elan*'s marine activities were organised. *Elan Marine* in turn held shares in several subsidiaries such as 100 % in *Elan PBO*, 100 % in *Elan Marine Charter* and 100 % in *Elan Yachting d.o.o.*
 - *Elan Inventa d.o.o.* (sport equipment division).
 - *Marine Nova d.o.o.* (non-trading company).
- (7) *Elan* is state owned. Currently, 66,4 % of its shares are held by *Posebna družba za podjetniško svetovanje, d.d.* (hereinafter referred to as '*PDP*'), a financial holding company owned by three state owned funds. Another 25 % of the shares in *Elan* are held by *Triglav Naložbe, finančna družba, d.d.* (hereinafter referred to as '*Triglav Naložbe*'), a financial company for a mainly state owned insurance company. The remaining 8,6 % are held by *Prvi pokojninski sklad*, which is a state owned pension fund (see Point 2.2 for a detailed description of *Elan*'s shareholders). When the measures under investigation were taken, *Elan* was also mainly state owned. Its shareholder structure was, however, slightly different (see also Point 2.2).
- (8) As regards the financial situation of *Elan*, following a difficult year in 2004, the company was profitable in 2005 and 2006 and turnover was growing. It was in 2007 when the company's situation started to worsen, which resulted in a declining turnover and net losses in the years 2007-2008. A more detailed assessment of *Elan*'s financial situation is provided in recitals (68) to (74).
- (9) At present, *Elan* is in the process of privatisation. The main shareholder *PDP* intends to sell its stake in the company and is currently negotiating with potential bidders.

2.2. THE SHAREHOLDERS OF THE BENEFICIARY AT PRESENT AND WHEN THE MEASURES WERE GRANTED

- (10) As the ownership structure as well as the identity of *Elan*'s owners and their corporate governance is relevant for the question of whether the measures in favour of *Elan* consist of state resources and are imputable to the State, in the following, a short description of each owner will be provided, followed by an overview of the shares in *Elan* held by each of them over time. It should be noted that *Elan*'s ownership structure changed between the time of the first capital injection in 2007 (Measure 1) and the second capital injection in 2008 (Measure 2) and that further changes have occurred since then. Details are provided below (see recitals (19) to (22)).

⁽³⁾ Guidelines on national regional aid for 2007-2013, OJ C 54, 4.3.2006, p. 13.

2.2.1. Description of Elan's shareholders

KAD

- (11) *Kapitalska družba pokojninskega in invalidskega zavarovanja, d.d.* (hereinafter referred to as 'KAD') is a joint stock company whose sole shareholder is Slovenia. KAD manages state pension funds and assets for Slovenia. It is also responsible for the privatisation of state owned assets. KAD is subject to the Slovenian Company Act ('ZGD-1, *Zakon o gospodarskih družbah*'). Accordingly, KAD has an assembly, a supervisory board and a management board. The Slovenian government appoints all 15 members of the assembly (of which 5 represent pensioners and disabled workers, 5 represent employers and insured persons and 5 represent the Slovenian government) and all 9 members of the supervisory board. Representatives of the government are invited to the assembly meetings.

KAD-PPS

- (12) *Prvi pokojninski sklad* is the First Pension Fund of the Republic of Slovenia, which means that it is 100 % state owned. KAD is managing this pension fund, and also controls the share that PPS holds in *Elan* (hereinafter referred to as 'KAD-PPS').

DSU

- (13) *Družba za svetovanje in upravljanje, d.o.o.* (hereinafter referred to as 'DSU') is a limited liability management and consultancy company that is 100 % state owned. It is, inter alia, responsible for the privatisation of state owned assets. DSU has a supervisory council, consisting of three members. Two are appointed by the Slovenian government and one is appointed by the company's employees. Until the appointment of the employees' representative, Slovenia also appoints the third member. The supervisory council appoints a company director, who manages DSU's business transactions.

Zavarovalnica Triglav

- (14) *Zavarovalnica Triglav, d.d.*, (hereinafter referred to as 'Zavarovalnica Triglav') is a company that offers all kinds of non-life and life, health and accident insurance. 67,7 % of its shares are held by companies who are in turn directly or indirectly majority owned by the State. At the time of granting, *Zavarovalnica Triglav*'s main shareholders were: *Zavod za pokojninsko in invalidsko zavarovanje* (hereinafter referred to as 'ZIPZ', the Pension and Disability Insurance Institute), 100 % state owned, holding a share of 34,5 % in *Zavarovalnica Triglav*; *Slovenska odškodninska družba, d.d.* (hereinafter referred to as 'SOD', the Slovenian indemnity incorporation), 100 % state owned, holding a share of 28,1 % in *Zavarovalnica Triglav*; *NLB, d.d.*, 50 % state owned, holding a 3,1 % share in *Zavarovalnica Triglav* and *HIT d.d.*, 100 % state owned, holding a 1,1 % share in *Zavarovalnica Triglav*. None of the other shareholders of *Zavarovalnica Triglav* had a share that was higher than 1,8 % in the company.
- (15) *Zavarovalnica Triglav* has a supervisory board consisting of 8 members and a management board. Five members of the supervisory board represent the interest of the shareholders and are elected by the general meeting of *Zavarovalnica Triglav*. The other three members are representing employees' interest.

Triglav Naložbe

- (16) *Triglav Naložbe* is a financial company. At the time of the second capital injection, 80 % of the shares of *Triglav Naložbe* were owned by *Zavarovalnica Triglav*. The latter is in turn majority state owned (see recital (14)). The remaining capital of *Triglav Naložbe* is very dispersed among individual investors, none holding a share higher than 0,67 %. *Triglav Naložbe* has a supervisory board and a management board. The supervisory board consists of three members and is appointed by the general meeting of *Triglav Naložbe*.

PDP

- (17) PDP is a financial holding company, which was established in June 2009. It is owned by three state owned funds, namely KAD, DSU and SOD and acts as a restructuring company on behalf of the Slovenian state. PDP may, under contract, take over the management of state owned enterprises in difficulty, exercise all voting rights, install a supervisory board and management board and carry out rehabilitation measures for the state ⁽⁴⁾. PDP holds shares in several Slovenian companies previously owned by para-state funds ⁽⁵⁾ and is searching strategic investors for some of them.

KD Kapital

- (18) KD Kapital, *finančna družba, d.o.o.* (hereinafter referred to as 'KD Kapital'), a company active in capital investment. KD Kapital belongs to Skupina KD group ⁽⁶⁾ and is in private ownership.

2.2.2. Shares held in Elan at different points in time

- (19) In 2007, when the first measure was granted, the following companies held a share in *Elan*: KAD (30,48 %), KAD-PPS (10,3 %), DSU (17,34 %), Triglav Naložbe (13,16 %), Zavarovalnica Triglav (11,89 %) and KD Kapital (16,83 %).
- (20) In April 2008, KD Kapital sold its share to KAD. Following this transaction, and at the time of the second capital injection, the following companies held a share in *Elan*: KAD (47,31 %), KAD-PPS (10,3 %), DSU (17,34 %), Triglav Naložbe (13,16 %) and Zavarovalnica Triglav (11,89 %).
- (21) In 2010, KAD and DSU vested their *Elan* shares in the financial holding company PDP. Today, PDP holds 66,4 % of the shares in *Elan*. KAD-PPS holds 8,6 % and Triglav Naložbe 25 %.
- (22) Table 1 provides an overview of the shares held by each respective shareholder at the time of Measure 1, Measure 2 and in May 2012:

Table 1

(in %)

Entity	Measure 1 (January 2007)	Measure 2 (August 2008)	May 2012
PDP (owned by KAD, DSU and SOD, which are in turn owned by the State)	0	0	66,4
KAD (100 % state owned)	30,48	47,31	0
KAD-PPS (100 % state owned)	10,30	10,30	8,6
DSU (100 % state owned)	17,34	17,34	0
Triglav Naložbe (80 % owned by Zavarovalnica Triglav)	13,16	13,16	25
Zavarovalnica Triglav (owned by ZIPZ and SOD, which are in turn owned by the State)	11,89	11,89	0
KD Kapital (private company)	16,83	0	0
Total state ownership	83,17	100	100

⁽⁴⁾ 'Structural Adjustments 2010 and 2011', Government of the Republic of Slovenia, October 2009, p. 12, at: http://www.svez.gov.si/fileadmin/svez.gov.si/pageuploads/docs/strukturne_prilagoditve/Structural_adjustments_SLO_EN.pdf

⁽⁵⁾ In December 2009 PDP held shares of 10 Slovenian companies previously owned by KAD, SOD and DSU; cf. 'Who we are' — PDP powerpoint presentation submitted by the Slovenian authorities.

⁽⁶⁾ <http://www.kd-group.com/en/index.php>.

2.3. DESCRIPTION OF THE MEASURES

2.3.1. The capital injection in 2007 ('Measure 1')

- (23) In 2006, *Elan* envisaged an ambitious investment programme for the group concerning investments into buildings, equipment and brand marketing, based on a strategic development plan for the period 2006-2010 (drawn up by *Elan's* supervisory board in December 2005). For the years 2006-2007 investments of EUR 20,2 million were planned. In order to finance those investments, *Elan* proposed a capital increase of EUR 20,2 million to its shareholders. In the meantime, in the course of 2006, *Elan* started to purchase new production equipment, which was also foreseen by the strategic development plan.
- (24) On 29 January 2007, *Elan* and *Elan's* shareholders signed a letter of intent, in which they agreed that the shareholders would inject EUR 10,225 million into *Elan* (about half of the EUR 20,2 million foreseen in the strategic development plan 2006-2010). Each shareholder agreed to participate in the capital increase in proportion to its share in *Elan*. The decision was taken on the basis of a company valuation from the independent consultancy [...] (*) and several other documents drawn up by *Elan* itself as well as KAD, *Elan's* majority shareholder. [...] calculation of the fair value of the company was made on the basis of the average of the calculation (for each division) of (i) the weighted average benchmarked price/sales ratio of recent deals done, (ii) the price/earnings ratios of applicable companies in 2005 and (iii) seven times the EBITDA value including 25 % of estimated cost-saving potential. From this average, the short-term interest-bearing debts and half of identified investments that could not be financed by the company's assumed cash-flow were deducted. KAD's flash estimate of *Elan's* value was elaborated on the basis of the discounted cash flow method, using business projections provided by *Elan* to its supervisory board.
- (25) Prior to this, in May 2006, *Elan* had informed its shareholders that, although it was putting all free cash flows in investments foreseen in the Strategic development plan 2006-2010, additional capital would be needed to realise the necessary investments (?). In the following, in November 2006, *Elan* prepared a more detailed analysis of the effects of a capital increase (°), according to which the investments would lead to a cumulative net profit for the winter sport division of EUR 15,4 million over the period 2006-2010, compared to cumulative net losses without the capital increase of EUR 4,8 million. Also the cumulative net profit of the marine division for the period 2006-2010 would be higher if the capital increase took place (EUR 14,9 million compared to EUR 8 million). At the same time, *Elan's* majority shareholder KAD estimated the value of the group to be EUR 22,8 million. The supervisory boards of the shareholders KAD, DSU, *Zavarovalnica Triglav* and *Triglav Naložbe* approved the capital injection already in December 2006 and January 2007 respectively.
- (26) Formally, the capital increase was confirmed in the shareholder assembly of 25 October 2007. The shareholder payments were carried out on 15 November 2007 in proportion to the respective shareholder's ownership share. The EUR 10,225 million were injected into *Elan*, which gave in turn a shareholder loan of EUR 5,8 million to *Elan Winter sport* and a shareholder loan of EUR 4,425 million to *Elan Marine*. Those shareholder loans were later converted into equity in *Elan Winter sport* and *Elan Marine*. As described above, *Elan Winter sport* and *Elan Marine* were merged into their parent company *Elan* in June 2010 (see recital (6)).
- (27) One of the reasons for the time lag between the letter of intent and the formal agreement of the shareholders was that *KD Kapital*, the only private shareholder at that time in *Elan*, which had a blocking minority, blocked the formal decision for the capital increase. The reason for *KD Kapital's* blocking was a dispute between KAD and *KD Kapital* over changes in the supervisory board of *Elan*. As explained by Slovenia, *KD Kapital* was also 50 % shareholder of one of *Elan's* competitors, *Seaway Group d.o.o.* and intended to install a *KD Kapital* representative in the supervisory board of *Elan*. KAD considered this not to be acceptable in light of *KD Kapital's* shareholding in *Seaway*. In order to solve this issue, in the beginning of October 2007, KAD offered *KD Kapital* a put option, under the condition that *KD Kapital* voted in favour of KAD's proposal related to the dispute over the supervisory board members.

(*) Business secret.

(?) A document done by the Management Board of *Elan*, dated 30 May 2006, on the capital increase of the companies in *Elan*.

(°) Letter from *Elan's* management board to KAD, dated 30 November 2006.

- (28) Following this offer, *KD Kapital* finally agreed to the capital increase, and as described above, the shareholders took the formal decision in October 2007.

2.3.2. The capital injection in 2008 ('Measure 2')

- (29) Despite the capital increase of November 2007, the bad winter season of 2007/2008 (affected by the previous 'green' winter of 2006/2007) led to further difficulties of the group. *Elan* was facing insolvency at the beginning of 2008.
- (30) When *SKB banka d.d.* refused to further finance *Elan* in the beginning of 2008, *KD Kapital* exercised its put option in March 2008, with effect as of April 2008. *KAD* purchased the shares of *KD Kapital* and thus increased its share in *Elan*. Since then, *Elan* has been an entirely state owned company (see recital (20)).
- (31) To cope with the difficult financial situation, *Elan's* shareholders appointed a new management board in April 2008. The management started talks with the banks to reach an agreement on rescheduling of the banks' claims against *Elan* and thus to avoid bankruptcy of the company. The banks were only willing to do so on condition that *Elan's* shareholders provided additional capital to the company.
- (32) Against this background, in March 2008, *Elan* asked its shareholders for additional new capital. Based on a long-term plan for *Elan* for the period 2008-2012, drawn up by *Elan* in June 2008 (hereinafter 'long-term plan 2008-2012'), *Elan* asked its shareholders more concretely for EUR 25 million in June/July 2008. *Elan's* shareholders considered the long-term plan 2008-2012 as inadequate to inject EUR 25 million. In fact, the shareholders were only willing to inject EUR 10 million, and made this capital increase conditional on a prior agreement between *Elan* and its banks to reschedule *Elan's* debts. The shareholders also asked for a supplemented long-term plan for *Elan* ⁽⁹⁾. Following this request, *Elan* prepared an additional Rehabilitation plan, dated 8 August 2008 (hereinafter 'Rehabilitation plan'). *Elan* was, however, not able to reach an agreement with its banks on the debt rescheduling. On the contrary, one of *Elan's* creditors, namely *SKB banka d.d.*, started court proceedings to enforce its claims and in August 2008, the Court of Ljubljana served *Elan* a court order to pay its outstanding debts. The enforcement of this order would have led to bankruptcy of the company.
- (33) In light of this, *Elan* called for an urgent meeting of the shareholders which took place on 28 August 2008. During this meeting, following a proposal from *KAD*, *Elan's* shareholders decided to inject EUR 10 million into *Elan*, although the condition that *Elan* reached an agreement with its banks on rescheduling the loans was not met.
- (34) The supervisory board of *KAD* approved the capital injection already before the shareholders' meeting in August 2008; the supervisory board of the other shareholders approved the decision to inject EUR 10 million in *Elan* the latest in early September 2008.
- (35) The shareholders' payments were carried out on 8 September 2008 in proportion to the respective shareholder's ownership share. As described in recital (6), *Elan's* winter sport and marine activities were organised in two subsidiaries at the time of granting, namely *Elan Winter sport* and *Elan Marine*. The EUR 10 million were injected into *Elan*, which then put EUR 5,924 million in *Elan Winter sport* and EUR 4,076 million in *Elan Marine*.

The long-term plan 2008-2012

- (36) The long-term plan 2008-2012, drawn up in June 2008 by *Elan*, described first the economic and financial situation of *Elan group*. It proposed several restructuring measures on the level of *Elan Winter sport* (adjustment of investments in affiliated companies, inventory adjustments and termination benefits) and on the level of *Elan Marine* (inventory adjustments, termination benefits, write down of marine moulds). In addition to these restructuring measures, the following actions were foreseen for *Elan Winter sport*:

- Increase of the productivity of the employees; reduction of workforce from 340 to 230 employees;
- Reduction of number of trademarks;

⁽⁹⁾ See Minutes of the 134th meeting of *KAD's* supervisory board, 4 July 2008, point 2 of the agenda, section 2.

- Improvements in product mix;
 - Reorganisation of the administration.
- (37) For *Elan Marine*, the long-term plan 2008-2012 foresaw the following actions:
- Investments in a new joint venture, called *Elan Yachts*, which should be active in sales and development of sailing boats;
 - Sales of the power and yachting programmes (*Elan PBO*) for EUR [9,5-11,2] million in order to reduce *Elan Marine's* debts.
- (38) The long-term plan 2008-2012 then provided forecasts for the group and its subsidiaries, based on the assumption that the above described restructuring measures and actions were implemented. According to these forecasts, *Elan Winter sport* would be profit making from 2010 onwards, and *Elan Marine* would be profit making from 2011 onwards. The plan concluded that *Elan* needed additional capital of EUR [23-26] million in order to meet its liquidity needs. Only if such capital was provided, *Elan* could deliver adequate returns to its shareholders.

The Rehabilitation plan

- (39) The Rehabilitation plan, drawn up in August 2008 by *Elan*, first presented the company structure of *Elan group* and the financial and economic situation of *Elan Winter sport* and *Elan Marine*, including a detailed analysis of liabilities, costs but also revenues. It then analysed the operations of *Elan Winter sport* and *Elan Marine* from January 2008-June 2008. Finally, the plan included a part on the rehabilitation of the company. According to the plan, the actions proposed in this part could only be realised if fresh capital was injected into *Elan* and the bank loans were rescheduled. The Rehabilitation plan did, however, not specify the amounts needed.
- (40) The Rehabilitation plan foresaw the following measures for *Elan Winter sport*:
- [...]
- (41) The following measures were foreseen for *Elan Marine*:
- [...]
- (42) The Rehabilitation plan then provided business projections for the years 2008-2012, according to which *Elan Winter sport* would be profit making as from 2010 and *Elan Marine* would be profit making as from 2011 onwards.

3. GROUNDS FOR INITIATING THE PROCEDURE

- (43) As described above in recitals (2)-(3), the Commission decided on 12 May 2010 to open a formal investigation procedure ('the opening decision'). In this opening decision, the Commission preliminarily considered that the two capital injections involved state aid in favour of *Elan Ski* and *Elan Marine*. It expressed doubts whether such state aid could be considered compatible with the Internal Market. As a preliminary point, the Commission examined whether the beneficiaries were companies in difficulty.

3.1. COMPANY IN DIFFICULTY

- (44) Point 10 of the Rescue and Restructuring Guidelines lays down certain circumstances under which a company can be presumed to be in difficulties, such as a significant decrease in capital. In the opening decision, it was considered that *Elan Ski* and *Elan Marine* did not meet the criteria of Point 10 of the Rescue and Restructuring Guidelines. However, according to Point 11 of the Guidelines, a company may still be considered to be in difficulty where the usual signs of a company being in difficulty are present. In light of increasing losses, decreasing turnover and the difficult financial situation of the *Elan* group overall, the Commission considered that *Elan Ski* and *Elan Marine* could be seen as companies in difficulty at least in the years 2007 and 2008.

3.2. EXISTENCE OF STATE AID

- (45) First, the Commission assessed whether the measures stem from state resources and whether they are imputable to the state. In light of the fact that KAD is 100 % owned by Slovenia, that Slovenia appoints all members of the assembly and the supervisory board, and that representatives of the Slovenian government take part in all assembly and supervisory board meetings, the Commission concluded preliminarily that the measures taken by

KAD stem from state resources and are imputable to the State. Concerning the measures granted by the other owners of *Elan*, which are KAD-PPS, DSU, *Triglav Naložbe* and *Triglav Insurance*, the Commission concluded that it had to be verified during the formal investigation procedure whether they also stemmed from state resources and were imputable to the State.

- (46) Secondly, the Commission examined whether the measures conferred an advantage to the beneficiaries. It was doubted that the measures would meet the market economy investor test. In the first measure, the only private shareholder in *Elan*, *KD Kapital*, did not want to participate. It appeared that the measure was not based on a business plan or other information on potential return on the investment in the future. At the time of the capital injection, the beneficiaries seemed to have been in financial difficulties. In the second measure, no private company participated. While it was true that a long-term plan and a Rehabilitation plan were set up before the shareholders decided on the capital injection, there were indications that the shareholders of *Elan* considered those plans as inadequate. When the second measure was granted, *Elan Ski* and *Elan Marine* were still facing financial difficulties.
- (47) Thirdly, the Commission considered that the measures taken by Slovenia were likely to distort competition and affect trade between the Member States, as there is indeed trade between Member States in skiing equipment and marine oriented crafts.

3.3. COMPATIBILITY OF THE AID

- (48) The Commission preliminarily assessed whether the measures were compatible under the Rescue and Restructuring Guidelines. In light of their difficulties, and in the absence of other strong companies in the group, *Elan Ski* and *Elan Marine* are in principle eligible for rescue and restructuring aid. As the measures granted took the form of a capital increase, they could not be considered as rescue aid. As regards their compatibility as restructuring aid, it was unclear whether all the respective conditions were met. In particular, it was unclear whether the aid was limited to the minimum necessary and there was no indication of own contribution and compensatory measures.
- (49) It was also preliminarily examined whether the measures could be compatible regional aid. While both beneficiaries are located in a region eligible for aid under Article 107(3)(a) TFEU, it was unclear, whether they were eligible for such aid, as both beneficiaries were in difficulty at the time of granting.

4. COMMENTS FROM SLOVENIA

- (50) Slovenia submitted its comments with letters dated 9, 10 and 16 June 2010. Additional information was sent on 10 October 2011 and by letters dated 6 March, 30 March, 13 April, 16 April, 23 April, 10 May, 15 May and 30 May 2012 (see recital (4)).
- (51) In summary, according to Slovenia the measures do not involve state aid, as they do not stem from state resources and are not imputable to the State. Even if they fulfilled these requirements, the measures would not give an advantage to the beneficiary, as Slovenia has acted in line with the market economy investor principle. Further, Slovenia puts forward that the measures did not affect trade nor distort competition given that, according to Slovenia, the winter sports hardgood market is highly consolidated with a trend of further consolidation, and that *Elan* was only a weak competitor to much larger players in that market.
- (52) Slovenia brings no arguments forward as regards potential compatibility of Measure 1 with the Internal market, if the measure involved state aid. In Slovenia's view, measure 2 could be considered compatible according to the Rescue and Restructuring Guidelines.

4.1. EXISTENCE OF STATE AID

4.1.1. State resources and imputability

- (53) Slovenia brings forward that it had no influence in the increase of share capital of *Elan*.

- (54) It recalls that in order to be considered state aid, measures must be granted directly or indirectly through state resources and that the measures must be imputable to the State. It agrees that if a Member State has a dominant influence over an undertaking, the condition of 'state resources' is fulfilled. However, it cannot be automatically presumed if a Member State is in a position to exercise dominant influence over an undertaking, that it actually exercised such influence in a particular case. In this context, Slovenia refers to the *Stardust Marine* judgment⁽¹⁰⁾ that set out a set of indicators to determine whether the State actually exercised such influence in a particular case. These indicators include the integration into the structures of the public administration, the nature of a company's activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking, the intensity of the supervision exercised by the public authorities over the management of the undertaking. Slovenia points out that appropriate weight shall be given to the fact whether an undertaking was established under private law.
- (55) In this context, Slovenia brings forward arguments for each entity involved in the capital injections, as follows:
- (56) KAD is a private law entity that operates on the market under competitive conditions. Although KAD is state controlled, it cannot be concluded on that basis alone that the recapitalisations under assessment are imputable to the State. State involvement in the recapitalisations has not been demonstrated for the following reasons: KAD's actions are regulated by the Slovenian Company Act ('ZGD-1, *Zakon o gospodarskih družbah*'); disposal of its assets is not restricted by law; KAD is financed exclusively from dividends, interest and other revenues generated by investments and business operations; and the recapitalisation of *Elan* was decided by the supervisory board, which is independent in its decision making. While it is true that KAD is entrusted by the State with managing pension funds and concluding privatisations of companies, the public interest lying in those tasks cannot influence measures taken by KAD in a way that those actions should be considered as imputable.
- (57) DSU is directly owned by the State, but it is not financed by the State and it aims at maximising the value of its investments. While it is true that DSU is entrusted by the State with managing pension funds and concluding privatisations of companies, the public interest involved in those tasks cannot influence measures taken by DSU in a way that those actions should be considered as imputable to the State.
- (58) *Zavarovalnica Triglav* is only indirectly owned by the State and its activities are exclusively market based. The State has no direct influence on its operations. It is true that the supervisory board members of *Zavarovalnica Triglav* are elected by its shareholders; they are, however elected as private individuals and none of them had any position in the Slovenian government or administration.
- (59) *Triglav Naložbe* is indirectly owned by the State via *Zavarovalnica Triglav*. Its purpose is to generate profit. The State has no direct influence on *Triglav Naložbe*'s operations and its supervisory board consists of independent private individuals. In addition, *Triglav Naložbe* financed the recapitalisation by way of a commercial loan.

4.1.2. Existence of advantage

Measure 1

- (60) According to Slovenia, Measure 1 did not give an advantage to *Elan* for the following reasons: In December 2005, *Elan* adopted a Strategic development plan 2006-2010, including detailed development plans for *Elan*'s subsidiaries at that time. The development plan 2006-2010 foresaw investments in both the winter sport and the marine division. In order to implement those investments, in May 2006, *Elan* proposed to its shareholders to increase the capital of *Elan* in the years 2006-2009 by EUR 20,2 million. The shareholders prudently assessed this proposal and *Elan* provided them with documents clearly showing that such a capital increase would be profitable for the shareholders. KAD, *Elan*'s majority shareholder made its own assessment of the proposed capital

⁽¹⁰⁾ Case C-482/99 French Republic/Commission (*Stardust Marine*) [2002] ECR I-4397.

increase in November 2006, concluding that the capital increase would be a sound investment. Triglav Naložbe also reviewed *Elan's* forecasts and agreed to the capital injection on this basis. In addition, *Elan's* shareholders required an independent valuation of the group, a task for which [...] was selected (see recital (24)). This valuation showed that investments were necessary, and that the investment could in any event be recovered by selling shares at a fair value to a strategic partner.

- (61) Based on the above mentioned considerations, *Elan* and its shareholders concluded a letter of intent in January 2007, agreeing that the shareholders would inject EUR 10,225 million in the company. Also KD Kapital, *Elan's* only private shareholder, entered into the letter of intent without any conditions. Slovenia considers that this decision was taken by the shareholders with a view to getting a reasonable return on their invested capital and that they hence acted in line with the market economy investor principle.
- (62) As regards the fact that the shareholder assembly only agreed formally to inject the capital in October 2007, Slovenia explains that the delay was due to a dispute between KD Kapital, the private minority shareholder in *Elan*, and KAD, the majority shareholder in *Elan*. KD Kapital was a 50 % shareholder in one of *Elan's* competitors named *Seaway group d.o.o.* KD Kapital intended to install a representative of its interests in the supervisory board of *Elan*, which the other shareholders did not want to accept in light of KD Kapital's shareholding in a competitor. The dispute was resolved when KAD offered KD Kapital a put option. Following this solution, all of *Elan's* shareholders, including KD Kapital, agreed formally to inject EUR 10,225 million in *Elan*.

Measure 2

- (63) According to Slovenia, in the beginning of 2008, *Elan* was close to insolvency. The supervisory board and the shareholders reacted immediately by appointing new members to the management board of *Elan*, who started negotiations with *Elan's* banks on debt rescheduling. The banks, however, asked for an additional capital injection by the shareholders. In light of this, *Elan*, together with the assistance of an external adviser, prepared a turnaround strategy in May 2008; in June 2008, the long-term plan 2008-2012 was set up by *Elan* and in August 2008, *Elan's* management adopted a Rehabilitation plan. On 11 July 2008, the shareholders agreed to increase the capital under the condition that the banks first agreed to a debt rescheduling in light of these documents. In addition, according to Slovenia, the shareholders took the value of the company into account, as determined by an equity valuation of *Elan* by an independent audit company ⁽¹⁾. According to that valuation, *Elan's* market value as at 31 December 2007 was EUR 38 059 000. In addition, the shareholders considered a flash estimate of the value of *Elan* dated 1 July 2008. On 28 August 2008, the shareholders decided finally to inject the capital without a prior agreement from the banks to a debt rescheduling. Slovenia argues that otherwise, the shareholders might have lost their entire investment in *Elan*. In light of the above, Slovenia considers that *Elan's* shareholders acted in line with the market economy investor principle.

4.1.3. Distortion of competition and effect on trade

- (64) According to Slovenia, the measures could not distort competition and they had no effect on trade either. First, *Elan* was a weak competitor for much larger players in the ski market at the time when the capital injections were granted. Second, also *Elan's* competitors needed action by their private shareholders to recover from losses in the years 2007-2008.

4.2. COMPATIBILITY

- (65) Slovenia only brings forward compatibility arguments as regards Measure 2. It argues that this Measure was compatible according to the Rescue and Restructuring Guidelines, as *Elan* prepared a viable restructuring plan, including improvements in the group mainly from internal measures.

⁽¹⁾ [...]

- (66) Indeed, Slovenia argues that following the capital increase in 2008, *Elan* duly exercised its plans and managed to reschedule its short term loans. In January 2009, redundancy plans were adopted and in October 2009, *Elan* sold its subsidiary *Elan Yachting d.o.o.* and *Elan Marine Charter d.o.o.* In April 2010, *Elan Brod d.o.o.*, located in Obrovac, Croatia, was sold. Overall, the proceeds from these divestitures amounted to EUR [3,1-3,6] million. In May 2010, *Elan* was able to get new financing by entering into a long-term loan agreement with its banks amounting to EUR [21,5-25,5] million. The new loan was used to reimburse old loans. Finally, on 1 June 2010, *Elan Winter sport* and *Elan Marine* were merged into the parent company *Elan*. Slovenia has also alleged a compensatory effect of the termination of its North American ski distribution joint venture with Dal Bello Sports. [...] the parties agreed on 14 December 2009 to terminate their joint venture agreement. The Canadian Distribution Agreement was terminated as of 1 January 2010, the US Distribution Agreement was subsequently terminated as of 1 January 2011.

5. ASSESSMENT

- (67) The Commission examines whether the beneficiary received state aid in the meaning of Article 107(1) of the TFEU (see below point 5.2), and if so, whether such aid might be compatible with the internal market (see below point 5.3). To do so, it is necessary to define since when the potential beneficiary has to be considered a company in difficulty (see below point 5.1).

5.1. COMPANY IN DIFFICULTY

- (68) According to point 10 of the R&R guidelines, a company is in difficulty if more than half of its capital has been lost over the 12 preceding months, or if it meets the criteria for being subject to collective insolvency proceedings under national law. As also concluded by the opening decision, neither the subsidiaries nor the group as a whole fulfilled point 10 of the R&R guidelines in 2007.
- (69) According to point 11 of the R&R guidelines, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.
- (70) In this context, it has to be noted that in the period 2003-2006 the turnover of the group grew from EUR 109,2 million to EUR 122,4 million. Moreover, with the exception of the year 2004, *Elan* group recorded net profits during this period. *Elan's* financial situation began to deteriorate in the course of the year 2007. The group's turnover decreased in 2007 by EUR 5 million to EUR 117,5 million and dropped to EUR 100 million in 2008. At the same time *Elan* group's result turned negative in 2007, dropping from EUR 0,6 million in 2006 to EUR – 8,4 million in 2007 and EUR – 12,7 million in 2008.

Table 2

Key financial indicators for *Elan* group

Figures in thousand EUR	2003	2004	2005	2006	2007	2008
Net sales revenue	109 165	103 262	109 216	122 404	117 455	99 995
Operating costs	114 280	108 310	113 244	127 689	132 919	117 197
Net profit/losses	3 480	– 9 430	3 996	596	– 8 432	– 12 695

- (71) This can partly be explained by the mild winter season of 2006-2007 (the 'green' winter) which hit sales of the winter sport division. In fact, sales of *Elan Ski* dropped from EUR 48,1 million in 2006 to EUR 40,8 million in 2007 and further declined to EUR 37,7 million in 2008. At the same time *Elan Ski's* result deteriorated from EUR – 0,5 million in 2006 to EUR – 6,7 million in 2007 and EUR – 13,0 million in 2008.

Table 3

Elan Ski

Figures in thousand EUR	2006	2007	2008
Net sales revenue	48 113	40 852	37 662
Net profit/losses	– 472	– 6 674	– 12 971

- (72) *Elan's* marine division increased its sales revenue considerably in 2007 from EUR 31,8 million to EUR 38,6 million, but recorded a slight loss of EUR 0,3 million. However, the situation deteriorated in 2008, when sales dropped by one third from EUR 38,6 million to EUR 25,9 million and *Elan Marine* suffered a net loss of EUR 10,2 million.

Table 4

Elan Marine

Figures in thousand EUR	2006	2007	2008
Net sales revenue	31 836	38 627	25 876
Net profit/losses	1 176	– 305	– 10 214

- (73) In light of the financial figures presented in tables 2 to 4, it is clear that *Elan* was not in difficulty at the beginning of the year 2007, when Measure 1 was granted (see recitals (78) to (85)).
- (74) However, as evidenced by the above financial information, in the course of 2007 *Elan's* financial situation began to deteriorate and became very serious in 2008. The company was suffering diminishing turnover and increasing losses and it was facing insolvency in the beginning of 2008 (see recitals (29)-(34) and recital (63)). It can be concluded that *Elan* has to be considered to have been a firm in difficulty under the rescue and restructuring guidelines at the time of granting of Measure 2. In fact, *Elan's* shareholders' agreement to go ahead with the capital injection was motivated by the fact that *Elan* would otherwise have had to go into bankruptcy (see recital (31) to (33)).

5.2. EXISTENCE OF STATE AID

- (75) Article 107(1) of the TFEU lays down that any aid granted by a Member State or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade among Member States is incompatible with the Internal Market.
- (76) The conditions laid down in Article 107(1) of the TFEU are cumulative and thus for a measure to be qualified as state aid all the conditions must be fulfilled simultaneously.

5.2.1. The capital injection in 2007 (Measure 1)

- (77) Slovenia mainly argues that Measure 1 was granted in line with the market economy investor principle and that there is hence no advantage for the beneficiary. In addition, it brings forward that in any event, the capital injection was not imputable to the State (see recitals (53)-(63)).

Date of granting

- (78) First, it has to be determined when exactly Measure 1 was granted to *Elan*. In principle, a state measure is in any event considered to be granted as soon as the Member State committed to it, i.e. once the Member State is legally

bound to provide the measure. As described above (see recital (24)), *Elan*'s shareholders and *Elan* signed a letter of intent on 29 January 2007, but the capital increase was only formally confirmed at *Elan*'s shareholder assembly in October 2007. It therefore has to be determined whether the letter of intent can already be considered binding upon the shareholders in a way that allows to conclude that Measure 1 can be considered to have been granted on the date when the letter of intent was signed.

- (79) In this context, the Commission notes that, according to a legal expertise provided by Slovenia ⁽¹²⁾ Slovenian law does not specifically regulate the nature of a letter of intent. Such a letter of intent could either be a mere non-binding record of ongoing negotiations, a pre-contractual agreement or an agreement. The legal nature of a letter of intent has to be established on a case by case basis, taking into account the wording of the letter of intent, the circumstances under which it was signed and the general rules of interpretation according to Slovenian law.
- (80) According to Article 15 of the Slovenian Code of Obligations ⁽¹³⁾, an agreement is binding when the parties agree on the main elements of the agreement. In particular, the parties to the agreement must be specified and each agreement must have a 'causa'.
- (81) In this context, the Commission notes that according to the wording of the letter of intent, the parties to the agreement were clearly specified; the total amount of the capital increase was already laid down in the letter of intent (EUR 10,225 million); the maximum nominal amount of the new capital issued and the minimum price per new capital share was set; each signatory shareholder agreed to participate proportionally to its shareholding at that time; the purpose of the capital injection was specified (mainly investments in *Elan Winter sport* and *Elan Marine*) and a control mechanism to monitor the use of the capital was laid down. In addition, it has to be considered that the letter of intent was not only made between *Elan*'s shareholders, but between the shareholders and *Elan*. The former should inject capital in *Elan*, whereas the latter should register the new shares and use the capital injection in the manner specified in the letter of intent. In light of this, the Commission considers that the parties agreed to all main elements necessary to enter a binding agreement.
- (82) Also the wording of the letter of intent indicates that the parties entered a binding agreement: the shareholders and *Elan* 'confirmed their intent to increase the capital'; the shareholders 'will support the capital injection'; the new shares 'will be paid in cash'.
- (83) Furthermore, immediately after the letter of intent was signed, *Elan* concluded a contract for the delivery of a new production line, which can also be seen as an indication that *Elan* expected the shareholders to inject the capital in the company.
- (84) Finally, the legal expertise submitted by Slovenia comes to the conclusion that the letter of intent had binding effects once it was signed, i.e. that the shareholders were obliged to adopt the decision to inject the capital and to pay in the capital after such a decision was taken. According to this expertise, the question whether the obligation to vote for the capital increase is enforceable has not yet been decided by the Slovenian courts; a party breaching such an agreement would however normally be liable for damages.
- (85) In light of the arguments presented above, the Commission concludes that the date of signing the letter of intent, which was 29 January 2007, can be considered the date of granting of Measure 1.

Selective advantage to the beneficiary

- (86) To be considered state aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.

⁽¹²⁾ Done by the law firm Jadek&Pensa, www.jadek-pensa.si/en, dated 16 April 2012.

⁽¹³⁾ 'Obligacijski zakonik', Official Gazette of Slovenia 83/2001 with amendments.

Beneficiary of the aid

- (87) Article 107(1) TFEU refers to the concept of undertaking in defining the beneficiary of the aid. As confirmed by the Union Courts, an undertaking for the purposes of that provision does not have to be a single legal entity, but may encompass a group of companies ⁽¹⁴⁾. The key criterion in determining whether there is an undertaking within the meaning of that provision is whether an 'economic unit' is involved. An economic unit may be composed of several legal persons. In the present case, *Elan* was the legal entity into which the capital was injected. At the time of granting, *Elan* had four subsidiaries, namely *Elan Winter sport*, *Elan Marine*, *Elan Inventa d.o.o.* and *Marine Nova d.o.o.* (see recital (6)). Following the capital injection, *Elan* provided shareholder loans to *Elan Winter sport* and *Elan Marine*. Those shareholder loans were at a later stage converted into equity in the subsidiaries. It has hence to be considered whether the group as such or only *Elan Winter sport* and *Elan Marine* respectively benefitted from the capital injection.
- (88) First, in terms of ownership relations, it is noted that *Elan* held 100 % of the shares in both subsidiaries, that is to say *Elan Winter sport* and *Elan Marine*. *Elan* therefore controls all the business activities of those subsidiaries.
- (89) Secondly, *Elan Winter sport* and *Elan Marine* undertook the main activities of *Elan* at the time of granting, which were the production of skis and snowboards as well as the production of yachts. The other subsidiaries were either not active on the market (*Marine Nova d.o.o.*) or were active to support *Elan's* main activities (*Elan Inventa d.o.o.*). In fact, when *Elan* was restructured, *Elan Winter sport* and *Elan Marine* were merged into the parent company *Elan*, another element that indicates that the group can be considered the beneficiary.
- (90) In light of the arguments set out above it is concluded that the entire *Elan* group must be regarded as beneficiary of the capital increase. As a next step, it has to be assessed whether the measure confers an advantage to the beneficiary.

Advantage

- (91) If a measure meets the requirements of the private market economy investor principle, the existence of an advantage can be ruled out. According to case law, a market investor would attempt to maximise the return on his assets in accordance with the circumstances and his interests, even in the case of an investment in an undertaking in which he already has a shareholding ⁽¹⁵⁾. In the case at hand, it has to be assessed whether the beneficiary's shareholders acted according to this principle, basing their investment decision *ex-ante* on information which allowed concluding that the transaction made economic sense.
- (92) In this context, the Commission takes note of the circumstances that led to the capital injection and the information on which the shareholders' decision was based. As described above, at the time of granting, *Elan* was not a company in difficulty within the meaning of the Rescue and Restructuring Guidelines (see recitals (68) to (73)). The decision to inject new capital into *Elan* was taken on the basis of a company evaluation from the independent consultancy [...] and several other documents drawn up by *Elan* itself as well as KAD, *Elan's* majority shareholder. *Elan's* detailed analysis of the effects of a capital increase indicated that the investments would lead to a cumulative net profit for the winter sport division of EUR 15,4 million over the period 2006-2010, compared to cumulative net losses without the capital increase of EUR 4,8 million. Also the cumulative net profit of the marine division for the period 2006-2010 would be higher if the capital increase took place (see recital (23) to (24)).
- (93) In light of the above, it is considered that *Elan's* shareholders acted in line with the market economy investor principle when injecting money in the company and that Measure 1 hence does not confer an advantage to the beneficiary. As the presence of state aid can already be ruled out on that basis, it is not assessed whether Measure 1 is imputable to the State. The Commission concludes that Measure 1 does not involve state aid.

⁽¹⁴⁾ See ECJ 323/82 *Intermills/Commission* [1984] ECR 3809, paras. 11 et seq.

⁽¹⁵⁾ Case T-228/99, *WestLB/Commission*, ECR 2003, II-435.

5.2.2. The capital injection in 2008 (Measure 2)

- (94) As for Measure 1, Slovenia mainly argues that Measure 2 was granted in line with the market economy investor principle and that there is hence no advantage for the beneficiary. In addition, it brings forward that in any event, the capital injection was not imputable to the State (see recitals (53)-(63)). Finally, it considers that the measure did not have any effect on trade and that there was no distortion of competition (see recital (64)).

State resources and imputability

- (95) In order to be considered aid in the sense of Article 107(1) of the TFEU, a measure must be granted directly or indirectly from state resources and it must be imputable to the State.
- (96) According to case law, resources of an undertaking are to be considered state resources if the State is capable, by exercising its dominant influence over such undertakings, to direct the use of their resources ⁽¹⁶⁾.
- (97) However, the ability of the State to control the entities involved in granting the measures does not justify automatically the presumption that the entities' actions are imputable to the State. The Court has further explained the notion of imputability in *Stardust Marine* ⁽¹⁷⁾. It provided the following indicators for establishing imputability: integration of the public 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; 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.
- (98) As described in recital (54), Slovenia refers to the *Stardust Marine* judgment and argues that its ownership of KAD and DSU does not automatically imply imputability of their actions to the State. As regards *Triglav Naložbe* and *Zavarovalnica Triglav*, Slovenia considers that those companies are not controlled by the State and that in any event, their actions are not imputable to the State either. In the context of imputability, Slovenia particularly points out that all shareholders of *Elan* are incorporated under private law, which in its view alone offers a satisfactory level of independence of those companies from the State.
- (99) As a preliminary remark, the Commission points out that the fact that a state owned company is incorporated under private law alone is not enough to exclude imputability of its actions to the State. No distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State to administer the aid. In addition, as described above, the Court has held that there are several indicators for imputability, of which the question of whether a company is subject to private law or public law is only one (see recital (97)). Therefore, it has to be examined whether there are other facts indicating that measure 2 is imputable to the State.
- (100) In this regard, the Commission notes that there are several indications that the state was actively involved in the shareholders' decision to inject additional capital in the beneficiary. Although Slovenia has dismissed media reports pointing out the State's role in having to save *Elan* as 'hearsay' or 'a result of an excessive simplification', such reports demonstrate the public perception of the governments industrial policy approach at the time. As further explained below, the perception that the Slovenian government pursued an active industrial policy approach at the time in question is indeed supported by the OECD's review of corporate governance in Slovenia, which also highlights that an action plan for corporate governance reform in Slovenia was only adopted by the

⁽¹⁶⁾ Case C-482/99 French Republic/Commission (*Stardust Marine*) [2002] ECR I-4397.

⁽¹⁷⁾ Case C-482/99 French Republic/Commission (*Stardust Marine*) [2002] ECR I-4397, paragraphs 50-59.

government. nearly one year after measure 2 was put into place, namely in mid-2009 ⁽¹⁸⁾. Thus, in June 2008 when Elan's precarious situation was apparent to the outside world the media reported about the potential State support to Elan. A German sports magazine wrote on 6 June 2008 that according to rumours the government intended to inject EUR 5,7 million into Elan to compensate for the past bad winter season ⁽¹⁹⁾. Also the Slovenian media discussed Elan's situation, pointing out the significance of State support to save jobs. For instance the biggest commercial (independent) television PopTV reported on their website on 26 June 2008 that the management and the supervisory board of Elan were looking for the solution to the company's financial difficulties to come from the State, pointing out that if the State didn't help with a financial injection, more than 700 jobs were in danger ⁽²⁰⁾.

- (101) As discussed in more detail below, the public authorities' involvement or the unlikelihood of their not being involved is most obvious in the case of Elan's biggest shareholder KAD (that controlled 57,61 % of Elan's shares at the time of the capital injection) and of DSU (then accounting for 17,34 % of Elan's shares). Even the independent consultancy [...] drew attention to the importance of political considerations for KAD's and DSU's decision making in its valuation report of 22 December 2006 ⁽²¹⁾. In the context of an analysis of a possible privatisation of Elan (at the time known as Skimar d.o.o.), [...] concluded that two of its owners, KAD and DSU, were 100 % government controlled and that consequently there was a probability that their decision to sell would be politically as well as economically motivated.
- (102) The Commission verifies on the level of each shareholder whether it was controlled by the State and whether the funds used for the capital injection can be considered state resources. In addition, the Commission determines whether the decision to inject capital into Elan is imputable to the State. In this context, the Commission pays particular attention to the composition of the supervisory board of each shareholder and whether the supervisory board had to agree to the capital injection into Elan in 2008. The Commission then examines additional elements indicating an involvement by the public authorities in the adoption of the measure or the unlikelihood of their not being involved

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- (103) The Commission notes that Slovenia held 100 % of the shares in KAD, the majority shareholder of Elan at the time of granting. The Slovenian government appointed all the members of the assembly of KAD as well as the supervisory board (see recital (11)). According to KAD's articles of association, the latter has to consent to the conclusion of a transaction whose value exceeds 1 % of the share capital of KAD. The capital injection under assessment was qualified as such a transaction, and in fact, KAD's supervisory board discussed and agreed to the capital injection into Elan in its 134th meeting on 10 July 2008 and its 135th meeting in August 2008 ⁽²²⁾.
- (104) As Slovenia owns KAD, it can be assumed that it is in a position to control the company and that in principle, KAD's resources can be considered state resources. Contrary to Slovenia's view, the fact that the funds used for the capital injection stem from dividends, interests and other revenues of KAD, does not change this conclusion. Using dividends, interests or other revenues, which could instead have been paid to the State as controlling shareholder of the company, is a decrease of state resources and can therefore be considered the use of state resources ⁽²³⁾.
- (105) Concerning the imputability of Measure 2, the Commission considers that KAD would not have injected the capital in the absence of the public authorities' influence on its decision making. The strong State influence

⁽¹⁸⁾ OECD review: Corporate Governance in Slovenia, p. 9, 28/3/2011, at: http://www.oecd.org/document/58/0,3746,en_2649_34813_47492282_1_1_1_1,00.html

⁽¹⁹⁾ 'Gerüchten zufolge will die Regierung für Verluste nach dem schlechten Winter Elan eine Finanzspritze von EUR 5,7 Mio Euro zukommen lassen.' Sport Artikel Zeitung 'SAZsport', dated 9 June 2008: 'Zweiter Abgang an der Spitze'.

⁽²⁰⁾ https://24ur.com/novice/gospodarstvo/kriticne-razmere-v-elanu_comment_p1_a19.html?&page=1&p_all_items=19

⁽²¹⁾ [...], A Valuation of the Skimar Group, 22 December 2006, p. 28.

⁽²²⁾ See the minutes of the meeting: '[...] grants its approval of the management board taking all necessary steps to protect and maximise the value of the investment of KAD in the company Skimar, d.o.o., including the recapitalisation of the company, proportionate with the participating interest of Kapitalska družba, d.d. and Prvi pokojninski sklad RS (First Pension Fund), which amounts in total to 57,606 % in a maximum amount of EUR 5 761 000,00.'

⁽²³⁾ In Case C-6/97 Italy/Commission [1999] ECR I-2981, recital (22), the General Advocate argued that 'the decisive criterion is not the form that the intervention takes, nor of course, its legal nature or the aim it pursues but the result to which it leads. Any intervention which gives rise to an economic advantage, accompanied by a correlative decrease in state resources ... is in principle state aid for the purposes of Article [107] of the Treaty'.

cannot only be derived from the fact that Slovenia was the sole shareholder of KAD at the time, that all members of KAD's supervisory board were appointed by Slovenia, and that the supervisory board actually had to agree to the transaction. An additional indicator of the State's close involvement in KAD's decision-making is the fact that representatives of the Slovenian government take part in all assembly and supervisory board meetings (see recital (45)).

- (106) The government's influence on the decision making of KAD (and of another state-controlled fund, the restitution fund SOD) for the purpose of pursuing industrial policy objectives is also highlighted in the OECD's review of Corporate Governance in Slovenia: 'The two funds have provided the Government with a strong mechanism to influence the boards and management of privatised firms and, ultimately, to play an active role in determining ownership changes. In part this appears (at least initially) to have been motivated by a desire to manage the extent to which foreign firms gained control over important domestic firms and industries. The extent of direct and indirect ownership has allowed past governments to exercise a very significant, and sometimes opaque, role in influencing the operation of large sectors of Slovenia's commercial enterprises and in the market for corporate control ⁽²⁴⁾.'
- (107) The Slovenian government's document 'Structural Adjustments 2010 and 2011' ⁽²⁵⁾ further highlights the role that KAD and the state-controlled restitution fund SOD had played in serving Slovenia's industrial policy purposes, for instance in providing assistance to *Elan*. Under Heading 2.1.1. 'Establishment of a public agency for governance of state-owned enterprises and the transformation of KAD and SOD' the document states: 'Restructuring means that KAD and SOD must be relieved of all strategic investments: ... — bad investments that have become strategic because the state wishes to provide assistance to them in overcoming their difficulties (Mura, *Elan*).' The characterisation that KAD's investment in *Elan* had become strategic 'because the state wishes to provide assistance' to *Elan* is in sharp contrast with Slovenia's assertion that KAD was independent in its decision making (see recital (56)). The government document goes on explaining that the transfer of bad strategic investments from the parastate directly to the state was a personnel-related task above all and that the PDP restructuring company, established by KAD and SOD, had been transferred directly to state ownership as the team could no longer be part of KAD and SOD ⁽²⁶⁾.
- (108) The Commission invited Slovenia to provide comments on the documents cited above. Slovenia affirmed that there was no government decision regarding *Elan*'s recapitalisation. Slovenia pointed out that the OECD review, which describes how KAD and SOD have provided the government with a strong mechanism to influence the boards and management of privatised firms, did not mention DSU, Zavarovalnica Triglav and Triglav Naložbe and that the Slovenian government's document did not mention any direct or indirect state influence with respect to the assets held by Zavarovalnica Triglav or Triglav Naložbe. Furthermore, Slovenia draws attention to a passage in the OECD review mentioning that 'the lack of central coordination has created difficulties for effective management of the Government's ownership interests'. It goes on explaining that KAD had always been under the responsibility of the Ministry of Finance, whereas the Ministry of Economy had been responsible for the manufacturing sector, to which *Elan* belongs. With regard to the Slovenian government's document referring to bad investments that had become strategic, Slovenia points out that Mura, the second example of such investments cited in the document besides *Elan*, had been left to bankruptcy procedures in October 2009.
- (109) The comments provided by Slovenia do not disprove the arguments set out above indicating the involvement by the public authorities in the adoption of the measure or the unlikelihood of their not being involved. The statement that the government was not involved in the recapitalisation decision is a mere affirmation. The fact that the OECD review does not specifically mention DSU, Zavarovalnica Triglav and Triglav Naložbe and that it speaks of a lack of central coordination does not alter the overall picture painted in the OECD review, namely that the Slovenian government was actively intervening in the economy and pursuing industrial policy purposes.

⁽²⁴⁾ OECD review: Corporate Governance in Slovenia, p. 9, 28/3/2011, at: http://www.oecd.org/document/58/0,3746,en_2649_34813_47492282_1_1_1_1,00.html

⁽²⁵⁾ 'Structural Adjustments 2010 and 2011', Government of the Republic of Slovenia, October 2009, p. 12, at: http://www.svrez.gov.si/fileadmin/svez.gov.si/pageuploads/docs/strukturne_prilagoditve/Structural_adjustments_SLO_EN.pdf

⁽²⁶⁾ 'Structural Adjustments 2010 and 2011', Government of the Republic of Slovenia, October 2009, p. 13, at: http://www.svrez.gov.si/fileadmin/svez.gov.si/pageuploads/docs/strukturne_prilagoditve/Structural_adjustments_SLO_EN.pdf

With regard to the companies not specifically mentioned in the OECD review and in the Slovenian government's document, Zavarovalnica Triglav and Triglav Naložbe, details of the control exercised by the State are provided below. At the same time it has to be kept in mind that these companies were minority shareholders that held only 25 % of *Elan* shares. Finally, with regard to the government's document, the fact that another company in difficulties considered a 'strategic investment' went into bankruptcy is irrelevant for the assessment of the present case.

- (110) In the light of the above, it is concluded that *KAD*'s capital injection in 2008 into *Elan* consists of state resources and is imputable to Slovenia.

K A D - P P S

- (111) As described in recital (12), *KAD* is managing *PPS* and controls its shareholdings. Therefore, the participation of *KAD-PPS* in the capital injection should be considered in the same light as *KAD*'s participation. In fact, the consent of the supervisory board of *KAD* to the capital injection in its 134th meeting on 10 July 2008 also included the consent to inject capital on the behalf of *PPS* ⁽²⁷⁾. The same is true for the decision taken during the 135th meeting of *KAD*'s supervisory board in August 2008.
- (112) Therefore, it is concluded that *KAD-PPS* capital injection into *Elan* in 2008 consists of state resources and is imputable to Slovenia.

D S U

- (113) The Commission notes that *DSU* was 100 % directly state owned at the time of granting. Its supervisory council consists of three members, two of which are appointed by the shareholder, i.e. Slovenia (see recital (13)). At the time of the capital injections, also the third member had been appointed by the State. According to the Articles of Association, the supervisory council adopts decisions by a majority of votes and it is supervising the management of *DSU*'s business. In fact, *DSU*'s supervisory council studied and approved the capital injection into *Elan* at an extraordinary session on 11 July 2008 and partially amended its decision at two extraordinary sessions on 26 August 2008 and 8 September 2008 ⁽²⁸⁾.
- (114) As Slovenia owns *DSU*, it can be assumed that it is in a position to control the company and that in principle, *DSU*'s resources can be considered state resources. Contrary to Slovenia's view, the fact that the funds used for the capital injection stem from dividends, interests and other revenues of *DSU*, does not change this conclusion, as explained in recital (104).
- (115) Concerning the imputability of Measure 2, it has to be taken into account that all three members of the supervisory council at the time of granting were appointed by Slovenia, the sole shareholder of *DSU*, and that the supervisory council actually had to agree to the transaction. As set out above, the influence of political considerations on *DSU*'s decision making is acknowledged in [...] valuation report of 22 December 2006 ⁽²⁹⁾. Also the fact that together with *KAD* in 2010 *DSU* transferred its *Elan* shares to the *PDP* holding company has to be seen in the light of the explanations provided above concerning the question of how the Slovenian government decided to deal with parastate investments that had become strategic because the state wished to provide assistance to them in overcoming their difficulties. In connection with the other over-arching circumstances speaking in favour of the public authorities' involvement in the adoption of the measure or the unlikelihood of their not being involved, the Commission considers that *DSU* would not have injected the capital in the absence of the public authorities' influence on its decision making.
- (116) Therefore, it is concluded that the *DSU* capital injection in 2008 into *Elan* consists of state resources and is imputable to Slovenia.

⁽²⁷⁾ See footnote 22.

⁽²⁸⁾ See minutes of the meeting of 8 September 2008: [...].

⁽²⁹⁾ [...], A Valuation of the Skimar Group, 22 December 2006, p. 28.

Zavarovalnica Triglav

- (117) *Zavarovalnica Triglav* is not directly owned by Slovenia. The Commission observes, however, that Slovenia indirectly owns two third of *Zavarovalnica Triglav* (see recital (14)). Its majority shareholders are ZIPZ, the Pension and Disability Insurance Institute and SOD, the Slovenian indemnity corporation. Both are 100 % state owned. None of the other shareholders has a share higher than 1,8 % in *Zavarovalnica Triglav*.
- (118) Five of the eight members of the supervisory board of *Zavarovalnica Triglav*, including its president and vice-president, represent the shareholders and are appointed by them. As described in recital (14), the majority shareholders of *Zavarovalnica Triglav* are 100 % state owned companies. Therefore, it is in principle the State who appoints these five members of the supervisory board and the supervisory board members represent the State's interest. The Commission notes that it was the management board of *Zavarovalnica Triglav* which voted for the capital increase in *Elan*'s general assembly on 28 August 2008, but it did so under the condition that the supervisory board would give its consent to the transaction. In fact, the supervisory board agreed to the capital injection on 4 September 2008 ⁽³⁰⁾.
- (119) As Slovenia owned indirectly two third of the shares in *Zavarovalnica Triglav*, it can be assumed that it is in a position to control the company and that in principle, *Zavarovalnica Triglav*'s resources can be considered state resources.
- (120) Attention has to be given to the fact that the State appoints the majority of the supervisory board members of *Zavarovalnica Triglav*, including the president and the vice-president, and that the supervisory board had to give its consent to the capital injection.
- (121) In connection with the other over-arching circumstances discussed above that clearly speak in favour of the public authorities' involvement in the adoption of the measure or the unlikelihood of their not being involved, the measure is considered imputable to Slovenia,

Triglav Naložbe

- (122) *Triglav Naložbe* is not directly owned by Slovenia. The Commission observes, however, that Slovenia indirectly owns the majority of *Triglav Naložbe* shares. At the time of granting the measure, *Zavarovalnica Triglav* owned effectively 80 % of the shares of *Triglav Naložbe*. *Zavarovalnica Triglav* is in turn indirectly majority owned by Slovenia (see recital (14)). Therefore, indirectly, Slovenia holds more than 51 % of the shares of *Triglav Naložbe*. None of the other shareholders has a share higher than 0,67 % in the company.
- (123) The three members of the supervisory board represent the shareholders interest and are elected by them. As the State indirectly is the majority shareholder in *Triglav Naložbe*, it has to be considered that the State can decide who is nominated into the supervisory board to represent Slovenia's interest. The supervisory board of *Triglav Naložbe* had to agree to the capital injection into *Elan*, and did so on its 7th extraordinary meeting on 3 September 2008 ⁽³¹⁾.
- (124) As Slovenia indirectly owned the majority of *Triglav Naložbe*, it can be assumed that it was in a position to control the company and that in principle, *Triglav Naložbe*'s resources can be considered state resources. Contrary to Slovenia's view, the fact that the funds used for the capital injection stem from a loan does not change this conclusion, as explained in recital (104).

⁽³⁰⁾ See minutes of the meeting dated 4 September 2008 'The supervisory board consents to the participation of *Zavarovalnica Triglav*, d.d., in the capital increase of Skimar, d.o.o., in the amount of EUR 1 200 000,0 [...]'.

⁽³¹⁾ See minutes of this meeting: 'the supervisory board studied the report on the investment in Skimar d.o.o. and the resolutions of the last general meeting on 28 August 2008 and supports the management board in its active participation in the recovery process of the company and therefore also the required recapitalisation with a total value of EUR 10 million, in proportionate shares [...]'.

- (125) Keeping in mind that the State appoints all the supervisory board members of *Triglav Naložbe* and that the supervisory board had to give its consent to the capital injection, in connection with the other over-arching circumstances discussed above that clearly speak in favour of the public authorities' involvement in the adoption of the measure or the unlikelihood of their not being involved, the measure is considered imputable to Slovenia

Conclusion

- (126) The composition of the supervisory boards of *Elan's* shareholders and the fact that the supervisory boards had to agree to the capital injection in 2008 already suggest that the measure in question is imputable to the State ⁽³²⁾.
- (127) Furthermore, the Commission has strong indications — as set out above — for the State's close involvement in the decision-making of *KAD — Elan's* by far most important shareholder that controlled 57,61 % of the capital at the time of the capital injection — and *DSU*. These indications derive from the OECD report, the report of [...], documents published by the Slovenian government, and press reports.
- (128) In addition, the parallel behaviour of *Elan's* five shareholders that were all controlled by the State gives an indication of the State's involvement in the shareholders' decision, as it seems unlikely that five private and independent operators would have agreed to inject capital in a company in difficulty at the same time and at the same conditions.
- (129) In light of the above it is concluded that Measure 2 consists of state resources and was imputable to Slovenia.

Selective advantage to the beneficiary

- (130) To be considered state aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.
- (131) It is considered that the entire *Elan* group must be regarded as beneficiary of the capital increase in 2008 for the same reasons as for Measure 1 (see recitals (87)-(90)). As a next step, it has to be assessed whether the measure confers an advantage to the beneficiary.
- (132) If a measure meets the requirements of the private market economy investor principle, the existence of an advantage can be ruled out. As described above, a market investor would attempt to maximise the return on its assets (see recital (91)).
- (133) In this context, the Commission first notes that *Elan* was facing difficulties in the meaning of the Rescue and Restructuring Guidelines when Measure 2 was granted (see recital (74)). In addition, according to Slovenia, *Elan* was facing insolvency in the beginning of 2008, and had a liquidity shortfall of EUR [12,6-15 million].
- (134) Slovenia argues that *Elan's* shareholders based their decision to inject additional capital on several documents drawn up by *Elan* and external advisers, showing that the decision was justified.
- (135) While it is true that *Elan* drew up a long-term plan 2008-2012 for the group, it has to be considered that this plan foresaw a capital increase of EUR 25 million as a basis for achieving adequate returns in the future and *Elan's* shareholders considered this long-term plan as inadequate for carrying out a capital injection of that amount. The Rehabilitation plan of August 2008 consisted mainly of forecasts and did not provide information on the planned capital increase. Both, the long-term plan 2008-2012 and the Rehabilitation plan were set up by

⁽³²⁾ Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 326, 23.12.2008, p. 1), recitals (184)-186, (226), (227); Commission Decision 17 June 2008 on Frankfurt-Hahn airport — Alleged State aid to the airport and the agreement with Ryanair, C 29/2008, (OJ C 12, 7.1.2009, p. 6), recitals (212)-(218).

Elan, without the involvement of an external adviser. Another document provided by Slovenia in relation to the second capital increase was a flash estimate of the value of *Elan*, prepared by KAD, dated July 2008. This document does, however, not support Slovenia's argument that *Elan*'s shareholders acted like prudent investors, as according to that estimate, if potential liabilities are taken into account *Elan* had a negative equity value amounting to EUR [29,5-34] million in July 2008. Moreover, the flash estimates points out that the projections in *Elan*'s long term plan 2008-2012 may be greatly overoptimistic in view of previous experiences, in which case the company's value would be even lower.

- (136) Slovenia also submitted an equity valuation of *Elan* following the discounted cash flow method. This equity valuation, prepared by [...], in June 2008, considered that *Elan*'s market value at 31 December 2007 had still been positive, amounting to EUR [35-40] million. However, as described above (see recitals (70) to (74)), *Elan*'s situation deteriorated drastically in the course of the year 2008. In the light of these developments the above equity valuation has to be considered outdated on 28 August 2008 when *Elan*'s shareholders decided on the capital injection and cannot be relied on to show that *Elan*'s shareholders acted like prudent market investors, in particular when considering the circumstances of the second capital injection.
- (137) As described in recital (32), the shareholders made any capital increase conditional on the prior agreement of the banks to reschedule *Elan*'s existing loans. Although such an agreement could not be reached prior to the capital increase, *Elan*'s shareholders went ahead with the capital injection as *Elan* would otherwise have had to go into bankruptcy.
- (138) If the banks had agreed to reschedule the loans prior to the capital increase, this could have been a sign that they believed in a return to viability of *Elan*. However, this was not the case, and on the contrary, one of the banks even asked for a court order to enforce outstanding debts against *Elan*. The bank's stance can be considered a sign that the market did not believe in *Elan*'s return to viability.
- (139) Moreover, it also has to be taken into account that already in 2007 the shareholders had injected EUR 10,225 million in *Elan*, without success. It should be clarified that, although the 2007 capital injection was based on a so-called strategic development plan under which *Elan* had originally asked for investments of EUR 20,2 million, the 2008 capital injection of EUR 10 million cannot be considered a second investment tranche pursuant to the original strategic development plan. The 2008 capital injection was necessary to avoid insolvency by covering *Elan*'s liquidity shortfall and losses incurred, the capital was not devoted to the purposes set out in the strategic development plan (see recital (23)).
- (140) Finally, the Commission notes that all shareholders at the time of granting the measure were state owned, i.e. that no private shareholder took part in the capital increase.
- (141) In light of the above, the Commission concludes that Measure 2 was not granted in conformity with the private market economy investor principle and conferred an advantage to *Elan*.

Distortion of competition and effect on trade

- (142) The Commission notes that the beneficiary is active on markets that are open to competition. Any state grant provided to such an undertaking might provide it with an advantage over other competitors not receiving such grants. Contrary to Slovenia's view it is not relevant in this context whether *Elan*'s competitors had a bigger market share than *Elan* or whether those competitors also received funds from their shareholders.
- (143) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid⁽³³⁾. Indeed, there is trade between Member States in skiing equipment and marine oriented crafts, which are the goods that the beneficiary manufactures and markets.

⁽³³⁾ See, in particular, Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para. 11; Case C-53/00 *Ferring* [2001] ECR I-9067, para. 21; Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44.

- (144) In light of the above, the Commission concludes that Measure 2 might distort competition and might have an effect on trade.

5.2.3. Conclusion on the existence of State aid

- (145) On account of the arguments above, the Commission concludes that Measure 2 involves state aid within the meaning of Article 107(1) of the TFEU to *Elan*. Slovenia did not respect the stand-still obligation under Article 108(3) of the TFEU.

5.3. COMPATIBILITY OF THE AID

- (146) Articles 107(2) and 107(3) of the TFEU provide for exemptions to the general rule that state aid is incompatible with the internal market as stated in Article 107(1) of the TFEU.
- (147) In this context, it must be noted that the burden of proof of the compatibility of aid with the Internal Market, by way of derogation from Article 107(1) TFEU is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied ⁽³⁴⁾.
- (148) The Commission assesses the compatibility of Measure 2 under those exceptions. Given that the measure in question was granted to a company in difficulty (see above point 5.1), the Commission first assesses the compatibility of the measure under the Rescue and Restructuring Guidelines. Second, it is considered whether the measure could be considered compatible on any other basis.

5.3.1. Rescue and Restructuring Guidelines

- (149) According to Point 33 of the Rescue and Restructuring Guidelines, only companies in difficulty are eligible for rescue and restructuring aid. *Elan* is eligible, as it can be considered to have been a company in difficulty at the time of the second capital injection (see recital (74)).
- (150) According to the Rescue and Restructuring Guidelines, a **rescue aid** has to meet certain requirements, which are not all fulfilled by the measure at stake:
- (a) First, the measure was not granted in the form of a loan or a guarantee, but as capital injection (Point 25(a) of the Rescue and Restructuring Guidelines).
 - (b) Secondly, the measure did not come to an end within a period of not more than six months after the disbursement of the first instalment (Point 25(a) Rescue and Restructuring Guidelines).
 - (c) Thirdly, Slovenia did not communicate within six months after the first implementation of the measure a restructuring plan or liquidation plan or proof that the guarantee had been terminated (Point 25(c) Rescue and Restructuring Guidelines).
- (151) Hence, the capital injections in question cannot be considered as rescue aid.
- (152) The measure does not meet all the requirements for **restructuring aid** set out in the Rescue and Restructuring Guidelines either, as no compensatory measures were provided that could have offset the adverse effect of the aid on trading conditions.
- (153) According to Points 38 to 42 of the Rescue and Restructuring Guidelines, restructuring must be accompanied by compensatory measures in proportion to the distortive effects of the aid and, in particular, to the size and the

⁽³⁴⁾ E.g. Case T-68/03, *Olympiaki Aeroporia Ypiresies AE v Commission* [2007] ECR II-02911, paras. 34-37.

relative importance of the beneficiary firm on its market. Point 40 of the Guidelines stipulates that compensatory measures should in particular take place in the market(s) where the firm will have a significant market position after restructuring. Slovenia claims that certain divestments carried out by *Elan* in 2009 and 2010 had a compensatory effect.

- (154) With regard to *Elan*'s winter sport division, Slovenia describes *Elan* as 'one of last stand-alone winter sports hard-good brands' and refers to it as 'only a week [sic] competitor to much larger players in the market ⁽³⁵⁾'. The latter characterisation is, however, not in line with the description that *Elan*'s current majority shareholder gives of the firm. *PDP* points out that in 2010 *Elan* sold 448 000 pairs of skis and 217 000 snowboards, that *Elan* represented 13 % of global ski production and that it was the 7th global ski brand with the market share of its brand accounting for approximately 8 % of the global market.
- (155) Slovenia does not propose any specific definition of the product or geographical market(s), in which *Elan*'s winter sport division is active. As detailed below, taking into account the information provided by Slovenia and keeping in mind considerations with respect to market definition from past merger practice ⁽³⁶⁾, it has to be concluded that *Elan* did indeed hold considerable market shares at least in some of the relevant markets concerned.
- (156) To assess the firm's relative importance in the markets in which it is active, the Commission has examined available evidence, including strategic documents drawn up by *Elan* itself. Besides accessories, *Elan* manufactures in particular alpine skis and snowboards. On the one hand these are sold as *Elan* branded products to retailers (hereinafter referred to as 'the retail market'); on the other hand *Elan* acts as a so-called original equipment manufacturer and supplies skis and snowboards to other (rival) manufacturers (hereinafter referred to as 'the OEM market'). It should be noted that in case No COMP/M.3765 — AMER SALOMON the Commission considered in December 2005 for the purposes of that decision, inter alia, separate product markets for different types of winter sports hard goods, incl. separate relevant product markets for alpine skis, for snowboards and for the OEM market for alpine skis. The retail markets for winter sports hard goods were considered national, whereas the OEM markets were considered at least EEA wide in scope ⁽³⁷⁾. In its *Development Plan Elan Ski OEM 2006-2010* the firm indicates its global market share of the 2005 OEM production of skis as 21 % and explains '[...] The firm's *Development Plan Elan Sportartikel 2006-2010* indicates that *Elan* considered itself the worldwide leading producer of snowboards with a production output of 268 000 in 2005, equalling a share of 16 %. The vast majority of this output concerns the OEM business, while 30 000 snowboards were sold in 2005 under the *Elan* brand. With regard to *Elan* brand skis the *Development Plan Market and brand focused penetration strategy Elan Brand 2006-2010* indicates a worldwide market share of 7,5 %, ranking *Elan* No 7 in terms of market share. However, the document highlights that the firm believed it could reach a position under the top 5 brands in the mid-term, explaining that [...].
- (157) As the winter sport division accounts for the by far biggest part of *Elan*'s revenue and given *Elan*'s strong position detailed above, at least in certain sectors of the winter sports business, compensatory measures should in particular have taken place in this area. Examining the elements indicated by Slovenia as compensatory measures taken in the winter sport division, the only divestment was the sale of a [17,5 %-20 %] share of the capital that *Elan* held in its distribution Joint Venture partner *Dal Bello Sports* (hereinafter referred to as '*Dal Bello*') in the US. *Elan*'s divestment was the consequence of the termination of the marketing and distribution Joint Venture with *Dal Bello* in North America. *Elan* argues that the termination of the cooperation led to a decrease of *Elan*'s sales in Canada and in the US and sees in this a 'compensatory effect'.
- (158) It should first be noted that neither the long-term plan 2008-2012 nor the Rehabilitation Plan mention the sale of the *Dal Bello* shares, and the sale can therefore not be seen as 'an integral part of the restructuring', as foreseen in Point 40 of the Rescue and Restructuring Guidelines. Indeed, closer examination of the transaction reveals that the marketing and distribution cooperation was terminated at *Dal Bello*'s initiative. Slovenia conceded that '*Elan*'s

⁽³⁵⁾ Letter of Jadek & Pensa on behalf of *Elan*, dated 2/12/2012.

⁽³⁶⁾ See case No COMP/M.3765 — AMER SALOMON, at: http://ec.europa.eu/competition/mergers/cases/decisions/m3765_20051012_20212_en.pdf

⁽³⁷⁾ See footnote 36.

problems in 2008 and Dal Bello's search for a more reliable partner in a long term led to discussion on termination of otherwise successful cooperation. Such discussions resulted in 14 December 2009 Joint Venture Termination Agreement ...' In the light of the above *Elan's* divestment can already for these reasons not be qualified as a compensatory measure.

- (159) Moreover, while the reduction of sales, leading to a decrease in the beneficiary's market share, may in other circumstances constitute a compensatory measure, the Commission notes that in the case at hand, the transaction concerned the retail market, which was previously considered national by the Commission ⁽³⁸⁾, and that *Elan's* sales of skis were in any case only reduced in the North American market, but not in the European market(s) and therefore cannot compensate the distortions created in the EEA. Besides, the Joint Venture was active in the marketing and distribution of skis, and not their manufacturing. *Elan's* core activity is, however, the manufacturing of skis and snowboards. Only divestitures in a beneficiary's main market can be considered as appropriate compensatory measures.
- (160) Slovenia has also argued that the reduction of employees active in the production of skis and the decrease of its marketing investments could be considered as compensatory measures.
- (161) However, as also evidenced by *Elan's* Long Term Plan and by its *Rehabilitation Plan*, these measures have to be seen as simple rationalisation measures aimed at cutting costs and increasing efficiency in order to regain financial viability. The measures were not taken in order to reduce *Elan's* market presence or to offset any distortions of competition resulting from the aid received by *Elan*.
- (162) In the marine sector, Slovenia argues that the following divestments had a compensatory effect: In 2009 *Elan* sold two companies involved in yacht chartering, *Elan Yachting d.o.o.* and *Elan Marine Charter d.o.o.* In 2010 *Elan Brod d.o.o.*, a company located in Croatia that was primarily involved in the production of motor boats, was sold. Slovenia asserts that the companies were not structurally loss making, that the charter activities carried out by *Elan Yachting d.o.o.* and *Elan Marine Charter d.o.o.* were supporting the penetration of *Elan's* yachts to *Elan's* main markets and that the withdrawal from the motor boat market segment substantially reduced *Elan's* market presence in the pleasure and sporting boat market.
- (163) The Commission recalls that, according to Point 40 of the Rescue and Restructuring Guidelines, the compensatory measures should take place in particular in the market(s) where the firm will have a significant market position after restructuring. Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability are not considered reduction of capacity for the purpose of the assessment of the compensatory measures.
- (164) It needs to be kept in mind that the marine business does not constitute *Elan's* main activity. The company generates a considerably higher share of its turnover in the winter sport division. According to the financial forecast for 2011, the total revenue of the marine division was expected to reach only EUR [20-24] million, compared to EUR [58-68] million in the winter sport division. Moreover, the winter sport division also received the bigger part (EUR 5,924 million) of the EUR 10 million capital injection into *Elan*. In the light of Point 40 of the Rescue and Restructuring Guidelines it appears doubtful, if divestments in the marine division could at all be considered appropriate compensatory measures since, as also further detailed below, the marine business is not the market where the firm has the most significant market position after restructuring.
- (165) In order to fully appreciate the arguments presented by Slovenia the Commission has nevertheless examined to which extent Slovenia could argue that appropriate compensatory measures were taken in the marine business. Before the restructuring *Elan's* maximum production capacity amounted to [280-330] sailing boats and [45-55] motor boats. Slovenia does not propose any specific definition of the marine product or geographic market(s), in

⁽³⁸⁾ See footnote 36.

which its relative importance could be measured. In its submissions it speaks of a reduction of *Elan's* presence in the 'pleasure and sporting boat market', at the same time referring to its withdrawal from the 'motor boat market segment'.

- (166) However, the analysis of available documents, including strategic documents drawn up by *Elan* itself, dealing with the competitive position of *Elan's* marine division provide further insights into the relative importance of the firm on the marine market. The *Development Plan Elan Marine Division 2006-2010* stated that the world market of all new boats was about EUR 25 billion, of which 80 % were power boats and 20 % sailing boats with the same ratio applying to Europe. *Elan* described the market as 'highly fragmented' and put the EU market share of its sail program at approximately [0-5] %, of its motor boat program at << 1 %. The Development Plan did, however, point to the existence of different market segments characterised by different competitive conditions, including entry barriers. *Elan's Long Term Plan of the Skimar Group 2008-2012* of June 2008 provided for a segmentation of the boat market by boat length and stated that competition was stiffest in the segment of small vessels (30 feet), whereas *Elan* manufactured and sold medium-category products of 30 to 50 feet in length and intended to develop new models [...]. The clearest statement on *Elan's* market share in the segment in which it sees itself competing comes from a presentation of *Elan's* current majority shareholder *PDP* stating: 'In 2010 *Elan*, in a segment of sailing boats between 32 and 60 ft (that represents 20 % of the nautical market) sold 122 boats, getting a 5,2 % market share.' It appears plausible that market segmentation uses criteria such as type of power (sail, motor) and size as a starting point. In the absence of an opposing view, for the purpose of this decision the Commission can accept *PDP's* assessment that *Elan* held a market share of > 5 % in the fragmented sailing boat market.
- (167) Based on the above, even if *Elan's* divestments in the marine division could be taken into account for the purpose of the Commission's compatibility assessment, within the marine sector any compensatory measures would have had to take place in the manufacturing of sailing boats, which was clearly the main activity of *Elan's* marine division and where, as discussed, the firm had a non-negligible share of the, according to *Elan*, 'highly fragmented market'. The divestment of the charter activities that were at most indirectly supporting *Elan's* sales of yachts, and the divestment of the motor boat production, a sector which *Elan* exited through the sale of *Elan Brod d.o.o.* altogether, are therefore not in line with Point 40 of the Rescue and Restructuring Guidelines. As far as motor boats are concerned, *Elan* only started producing such boats in the year 2002, intending to use the reputation gained in the sailing boat sector also for production of motor boats. However, sales peaked at 50 motor boats in 2006 and 2007 and then decreased to [25-29] boats in 2008 and only [7-9] boats in 2009.
- (168) Also Submissions from Slovenia highlight the fact that *Elan's* shareholders and the banks considered the divested activities to be non-core activities⁽³⁹⁾. It should also be noted that the sale of *Elan's* subsidiaries was not meant to offset any distortions of competition. All three subsidiaries were loss making at the time of the sale as well as in the years prior to the sale. Slovenia informed the Commission that the total (combined) net result of *Elan Yachting d.o.o.* and *Elan Marine Charter d.o.o.* was EUR – 157 000 in 2007, EUR – 100 000 in 2008 and EUR – 57 000 in 2009. Also *Elan Brod d.o.o.* recorded losses during the entire period, namely EUR – 58 000 in the year 2006, EUR – 436 000 in 2007, EUR – 1 million in 2008 and EUR – 1,5 million in 2009. In the light of these numbers Slovenia's statement that the companies were not structurally loss making appears to be a merely self-serving assertion. As set out above, pursuant to the Rescue and Restructuring Guidelines write-offs and closure of loss-making activities which would at any rate be necessary to restore viability are not considered reduction of capacity for the purpose of the assessment of the compensatory measures. The high losses recorded by the three marine subsidiaries sold and the severe continuous downward trend of *Elan Brod d.o.o.* however highlight that the divestments were indeed at any rate necessary to restore viability and can also for this reason not be considered to qualify as compensatory measures.
- (169) The Commission therefore concludes that *Elan's* divestments and its reduction of employees and of its marketing expenditure cannot be qualified as compensatory measures. Since no appropriate compensatory measures were implemented, even taking into account Point 56 of the Rescue and Restructuring Guidelines, which stipulates

⁽³⁹⁾ See submission from Slovenia, dated 10 October 2011, containing a letter from KAD, referring to the sell-off of companies in the marine division 'not considered as core business', or letter from the law firm Jadek & Pensa, acting on behalf of *Elan*, dated 26 April 2012, explaining that banks required the sale of non-core assets in Croatia for their entering into refinancing agreements.

that the conditions for authorising aid may be less stringent in assisted areas as regards the implementation of compensatory measures, the Commission has to conclude that the requirement of the Rescue and Restructuring Guidelines are not met with regard to the necessity to implement appropriate compensatory measures. As the requirements for compatible restructuring aid laid down in the Guidelines are cumulative, it is sufficient to exclude the applicability of the Guidelines if only one requirement is not met. The Commission does therefore not further assess whether the other requirements are met. In light of the above, it is concluded that Measure 2 cannot be considered compatible according to the Rescue and Restructuring Guidelines.

5.3.2. Compatibility on another basis

- (170) The exemptions in Article 107(2) of the TFEU do not apply in the present case because this measure does not have a social character, has not been awarded to individual consumers, is not designed to make good damage caused by natural disasters or exceptional occurrences and has not been awarded to the economy of certain areas of the Federal Republic of Germany affected by the division of that country.
- (171) Further exemptions are set out in Article 107(3) TFEU.
- (172) Article 107(3)(a) of the TFEU states that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be declared compatible with the internal market. *Elan* is located in a region eligible for aid under Article 107(3)(a) of the TFEU ⁽⁴⁰⁾. Compatibility of state aid to assisted areas is regulated by the Regional Aid Guidelines ⁽⁴¹⁾. Under the Regional Aid Guidelines, State aid can in principle only be granted to companies that are not in difficulty. *Elan* was however in difficulties at the time the measure was granted (see recital (74)). Therefore, Measure 2 cannot be considered as compatible regional aid.
- (173) In view of the above, the Commission concludes that the aid is not eligible for the derogation provided for in Article 107(3)(a) of the TFEU.
- (174) Article 107(3)(b) of the TFEU states that 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State' may be declared compatible with the internal market.
- (175) The Commission notes that the aid in question was not designed to promote the execution of an important project of common European interest nor has the Commission found any evidence that it was designed to remedy a serious disturbance in the Slovenian economy.
- (176) In view of the above, the Commission concludes that the aid does not qualify for the derogation set out in Article 107(3)(b) of the TFEU.
- (177) Article 107(3)(d) of the TFEU states that aid to promote culture and heritage conservation may be declared compatible with the TFEU where such aid does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest. This Article obviously does not apply to the current case.
- (178) Article 107(3)(c) of the TFEU provides for the authorisation of state aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has developed several guidelines and communications that explain how it will apply the derogation contained in this Article. Given that the measures in question

⁽⁴⁰⁾ Regional aid map of Slovenia approved by the Commission on 13 September 2006 and published in OJ C 256, 24.10.2006, p. 6.

⁽⁴¹⁾ OJ C 54, 4.3.2006, p. 13.

were granted to a company in difficulty, the Commission only assessed the compatibility of the measure under the Rescue and Restructuring Guidelines. None of the other guidelines and communications are applicable to the measure under assessment.

- (179) Therefore, the aid under assessment constitutes incompatible state aid.

6. RECOVERY

- (180) According to the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the state concerned must abolish or alter aid ⁽⁴²⁾ when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a state to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽⁴³⁾. In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽⁴⁴⁾.
- (181) Following the case-law, Article 14 of the Procedural Regulation laid down that '*where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.*'
- (182) Thus, given that the measure at hand is to be considered as unlawful and incompatible aid, the aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall hence cover the time from when the advantage occurred to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary until effective recovery and shall bear recovery interest until effective recovery.
- (183) The capital injection in 2008 needs to be recovered in its totality as the decisions of all five entities taking part in the operation are imputable to the State. The total amount of the capital injection was EUR 10 million, of which EUR 5,924 million were injected into *Elan Winter sport* and EUR 4,076 million into *Elan Marine*. Those two companies, were however, in June 2010 merged into their parent company *Elan*. The date from when the recovery interest has to be calculated is the date when the capital was actually put at the disposal of the beneficiary, which was 8 September 2008.

7. CONCLUSION

- (184) The capital injection in favour of *Elan* decided in January 2007 (Measure 1) does not involve state aid, as the shareholders decision was in line with the market economy investor principle.
- (185) The capital injection in favour of *Elan* decided in August 2008 (Measure 2) involves state aid. The state aid is not compatible with the internal market. It does not meet the requirements of the Rescue and Restructuring Guidelines. None of the provisions of Article 107(2) and (3) of the TFEU is met either. Therefore, the capital injection of EUR 10 million has to be recovered from *Elan* together with the recovery interests.

HAS ADOPTED THIS DECISION:

Article 1

The capital injection of January 2007 does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

⁽⁴²⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 00813, paragraph 13.

⁽⁴³⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽⁴⁴⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64-65.

Article 2

The state aid measure in favour of *Elan* in the form of a capital increase of EUR 10 million in 2008 was unlawfully put into effect by Slovenia in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market.

Article 3

1. Slovenia shall recover the aid referred to in Article 2 from the beneficiary *Elan*.
2. The sum to be recovered shall bear interest from the date on which it was put at the disposal of the beneficiary (8 September 2008) until its actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁴⁵⁾.
4. Slovenia shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of adoption of this Decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Slovenia shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Slovenia shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Slovenia shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 6

This Decision is addressed to the Republic of Slovenia.

Done at Brussels, 19 September 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽⁴⁵⁾ OJ L 140, 30.4.2004, p. 1.