

COMMISSION DECISION**of 20 March 2013****on State Aid No SA.23420 (11/C, ex NN40/10) implemented by Belgium for SA Ducroire/Delcredere NV***(notified under document C(2013) 1497)***(Only the Dutch and French texts are authentic)****(Text with EEA relevance)**

(2014/274/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 ⁽¹⁾,

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

Having called on interested parties to submit their comments pursuant to the above Articles ⁽²⁾,

Whereas:

I. PROCEDURE

- (1) On 5 June 2007, [the complainant] (*) filed a complaint with the European Commission concerning the initial capital injection of EUR 150 million granted to the company SA Ducroire/Delcredere NV (hereinafter: 'Ducroire/Delcredere') when it was established in September 2004 by the Office National du Ducroire (hereinafter: 'the ONDD').
- (2) By letter dated 7 December 2007, the Commission put detailed questions to the Belgian authorities. The Commission received the replies to these questions, which were accompanied by numerous documents and a business plan, on 12 February 2008.
- (3) A meeting between the complainant and the Commission took place on 9 September 2008.
- (4) The Commission sent the Belgian authorities a non-confidential version of the complaint on 4 December 2008.
- (5) A non-confidential version of Belgium's observations and specific questions were sent to the complainant on 12 and 17 December 2008. The complainant replied by letter dated 6 November 2009.
- (6) Additional questions were put to Belgium on 21 April 2010, to which Belgium replied on 23 July 2010.
- (7) On 23 February 2011, the Commission decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter: 'TFEU') ⁽³⁾ into the following possible aid measures: (i) the Belgian State's guarantee to the ONDD in respect of its marketable risks; (ii) one or more internal transfers of resources for the benefit of the insurance of marketable risks, and (iii) the capital provided by the ONDD for the benefit of the insurance of marketable risks by Ducroire/Delcredere. The Commission invited interested parties to submit their comments on the measures in question.

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

⁽²⁾ OJ C 163, 1.6.2011, p. 1.

^(*) Confidential information.

⁽³⁾ OJ C 163, 1.6.2011, p. 1.

- (8) Two meetings between the Belgian authorities, the ONDD, Ducroire/Delcredere and the Commission were held on 17 March 2011 and 28 April 2011 respectively.
- (9) On 4 May 2011, the Belgian authorities requested a four-week extension of the deadline for responding to the decision to open the formal investigation procedure (hereinafter: 'the opening decision'). On 5 May 2011, the Commission informed the Belgian authorities that it did not have any objections to the request for a deadline extension and asked for additional information relating to the meeting on 28 April 2011.
- (10) On 1 June 2011, the Belgian authorities submitted their response to the observations and questions set out by the Commission in the opening decision. The annexes to their response were received on 9 and 10 June 2011.
- (11) In the light of the response, on 27 July 2011 the Commission asked for further information.
- (12) In order to prepare their response to the Commission's questions, the Belgian authorities held two technical meetings with the Commission and the aid beneficiary on 26 September and 18 October 2011 respectively. On 14 November 2011, Belgium provided additional information concerning the subjects discussed at those meetings.
- (13) On 5 December 2011, the Belgian authorities sent their response to the questions from the Commission dated 27 July 2011.
- (14) On 23 April 2012, the Commission asked for a number of clarifications on the information provided, which the Belgian authorities supplied on 16 May 2012.
- (15) A meeting between the Belgian authorities, the ONDD, Ducroire/Delcredere and the Commission was held on 21 May 2012, following which the Belgian authorities provided further explanations by letter dated 31 May 2012. By letter dated 14 June 2012, the Belgian authorities reiterated their position concerning the capital allocation measure contested by the Commission.

II. DETAILED DESCRIPTION OF THE AID

II.1. THE BENEFICIARY AND ITS ACTIVITIES

- (16) The ONDD is an 'autonomous public institution' operating in the credit insurance market and guaranteed by the Belgian State.
- (17) Until 31 August 2013, all the insurance business transacted by the ONDD was for its own account, with the guarantee of the State. There were no separate accounts for short-term and long-term credit insurance, or for marketable and non-marketable risks. The Commission communication to the Member States pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance (hereinafter: 'the Communication on export-credit insurance')⁽⁴⁾ defines as 'marketable' commercial and political risks of less than two years' duration on debtors⁽⁵⁾ established in one of the EU Member States or in certain OECD member countries, namely Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland and the United States of America⁽⁶⁾.
- (18) On 1 September 2003, the ONDD set up a 'commercial' account which, according to the Belgian authorities, was not guaranteed by the State, and which, from that date, was used for all insurance business relating to short-term risks. At the time, capital of EUR [45-70] million was allocated to this commercial account, which allowed authorisation to be obtained from the national insurance regulator, the Office de Contrôle des Assurances (hereinafter: 'the OCA'). Within this commercial account, there were no separate accounts for marketable and non-marketable risks.

⁽⁴⁾ OJ C 281, 17.9.1997, p. 4. With effect from 1 January 2013, the Commission has been applying the new Communication to the Member States on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance, which was published on 19 December 2012 (OJ C 392, 19.12.2012, p. 1).

⁽⁵⁾ Whether public or non-public.

⁽⁶⁾ See point 2.5 of the Communication on export-credit insurance.

- (19) In May 2004 the ONDD decided to transfer its existing short-term credit insurance business to a subsidiary by setting up Ducroire/Delcredere. The Belgian authorities maintain that the decision to set up Ducroire/Delcredere was taken in order to comply with the Communication on export-credit insurance, which calls on the Member States to amend their export-credit insurance systems so that export-credit insurers no longer receive state support for risks defined as 'marketable'.
- (20) The decision to set up Ducroire/Delcredere and to allocate it EUR 150 million in capital was taken by the Board of Directors on 11 May 2004 on the basis of a business plan for 2005-07 drawn up by the ONDD, which envisaged two scenarios: scenario (A), termed 'realistic', based on the economic situation and assuming 3 % growth in sums insured, and scenario (B), termed 'dynamic', based on a proactive approach in terms of winning markets and assuming twice the rate of growth under the realistic scenario, i.e. 6 % ⁽⁷⁾.
- (21) Ducroire/Delcredere was set up on 23 September 2004, on which date the ONDD subscribed EUR 150 million to the company's capital, of which EUR 100 million was paid up immediately, while the remaining EUR 50 million was paid up in 2009.
- (22) On 1 January 2005, the ONDD transferred its portfolio of short-term risks to Ducroire/Delcredere, which began its activities on that date. The ONDD continues to manage the long-term risks.
- (23) Ducroire/Delcredere therefore manages all the marketable risks within the meaning of the Communication on export-credit insurance (which, by definition, are short term), and the non-marketable short-term risks, such as the risks of less than two years' duration on debtors established outside the OECD.
- (24) In 2007 Ducroire/Delcredere acquired 33 % of the capital in Komerční úvěrová pojišťovna EGAP (KUP) (the commercial arm of the Czech national agency for export-credit insurance) for EUR [12-14] million. This acquisition was made jointly with SACE BT, which had also acquired 33 % of KUP's capital. In 2009 Ducroire/Delcredere bought all of SACE BT's shareholding in the capital of KUP for EUR [0-20] million. Ducroire/Delcredere therefore acquired 66 % of the capital in KUP for a total of EUR [10-35] million. EUR 12 million of the latter amount was then written off as a loss on the shareholding (negative adjustment to the value of the investment).

II.2. THE COMPLAINT

- (25) On 5 June 2007, a complaint was made to the Commission. The complainant alleges that the ONDD made the capital allocation on terms that a market economy investor would have found unacceptable. First, Ducroire/Delcredere's profitability anticipated at the time of the capital contribution was said to be lower than would be expected by a private investor. Second, the capital allocated to Ducroire/Delcredere was said to exceed the capital required, both in terms of the prudential rules on minimum adequate own funds and in relation to the average solvency ratio (net premiums/own funds) of the other operators in the sector. According to the complainant, it was solely thanks to their 'over-capitalisation' in 2004 that Ducroire/Delcredere and SACE BT had been able, during the second half of 2006, to table a joint offer to buy 66 % of KUP's shares that was 'impossible to match'.

II.3. GROUNDS FOR INITIATING THE PROCEDURE

- (26) The investigation opened on 23 February 2011 concerns the following measures:
- (a) The Belgian State's alleged guarantee to the ONDD in relation to its marketable risks (hereinafter: 'Measure 1');
- (b) Possible internal transfers of resources (within the ONDD) from its insurance of non-marketable risks to its insurance of marketable risks (before the transfer of its insurance of short-term risks to Ducroire/Delcredere) (hereinafter: 'Measure 2');

⁽⁷⁾ See pages 60 and 69 of Annex 8 to the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011.

When the ONDD insured marketable risks, it had no separate management and accounts for (short-term) marketable and non-marketable risk insurance, contrary to the requirement in point 4.3 of the Communication on export-credit insurance. However, that point states that publicly supported export-credit insurers 'have to keep a separate administration and separate accounts for their insurance of marketable risks and non-marketable risks for the account or with the guarantee of the State, demonstrating that they do not enjoy State aid in their insurance of marketable risks'.

- (c) The capital allocation (EUR 150 million of subscribed capital) by the ONDD in 2004 to its subsidiary, Ducroire/Delcredere (hereinafter: 'Measure 3').
- (27) With regard to Measure 3, the opening decision came to the conclusion that the following parts of the capital allocation to Ducroire/Delcredere do not constitute aid ⁽⁸⁾:
- (a) the part of Ducroire/Delcredere's initial capital that can be regarded as supporting the insurance of non-marketable risks ⁽⁹⁾ does not constitute aid. Under the Communication on export-credit insurance, Member States are free to support export-credit insurance in the non-marketable risks sector. Since this activity is not supposed to be provided by market operators, state support is not likely to distort competition and cannot, therefore, constitute state aid within the meaning of Article 107(1) TFEU. The Commission therefore called on Belgium to clarify which part of Ducroire/Delcredere's capital supported its insurance of non-marketable risks.
- (b) the part of Ducroire/Delcredere's capital that was already supporting the insurance of marketable risks within the ONDD and which was simply transferred to Ducroire/Delcredere with the corresponding insurance business does not constitute aid. It was solely a change in the legal form of an existing economic activity with the associated capital ⁽¹⁰⁾.
- (28) The possible new aid in question (Measure 3) therefore concerns only that part of the capital allocated to Ducroire/Delcredere that does not support export-credit insurance of non-marketable risks and that exceeds the part of the capital that was already supporting the insurance of marketable risks within the ONDD on 31 December 2004 (just before the insurance of short-term risks was transferred to Ducroire/Delcredere).
- (29) For the purposes of this Decision, the following definitions apply:
- (a) '*additional capital*': the part of the capital allocated to Ducroire/Delcredere that exceeds the part of the capital that was already supporting the insurance of short-term risks (including marketable and non-marketable risks) within the ONDD on 31 December 2004 (just before the insurance of short-term risks was transferred to Ducroire/Delcredere);
- (b) '*supplementary capital*': the part of the additional capital, as defined above, that supports the credit insurance of marketable risks (i.e. the capital allocated to Ducroire/Delcredere that supports the credit insurance of marketable risks and that exceeds the part of the capital that was already supporting the insurance of short-term risks within the ONDD on 31 December 2004).
- (30) The additional capital therefore includes, inter alia, the supplementary capital (see the diagram in recital (141)).
- (31) In the opening decision, the Commission assumed that there was substantial additional and supplementary capital, given the disproportion between the capital of EUR 150 million granted to Ducroire/Delcredere when it was set up and the EUR [45-70] million allocated within the ONDD to the commercial account used, from 1 September 2003 to 31 December 2004, for the insurance of short-term risks, including marketable risks. The Commission therefore stated that there appeared to be additional and supplementary capital and that the expected profitability seemed insufficient.

⁽⁸⁾ See section 4.1.2.2.1 of the opening decision.

⁽⁹⁾ This excluded capital, relating to non-marketable risks, includes the capital of Ducroire/Delcredere which, when the insurance of short-term risks was transferred to Ducroire/Delcredere, supported the insurance of risks on debtors established in Romania and Bulgaria because those risks were non-marketable at the time, those countries having joined the European Union on 1 January 2007, i.e. after the insurance business had been transferred to Ducroire/Delcredere.

⁽¹⁰⁾ See the Commission Decision of 21 December 2005 in Case N 531/2005 'Measures relating to the creation and operation of the Banque Postale', paragraph 54 (OJ C 21, 28.1.2006, p. 2) available at: http://ec.europa.eu/eu_law/state_aids/comp-2005/n531-05.pdf.

- (32) The failure of the ONDD and Ducroire/Delcredere to comply with point 4.3 of the Communication on export-credit insurance (see recitals (17) and (19)), i.e. the failure to set up a separate administration and separate accounts for marketable and non-marketable risks, meant that it was impossible for the Commission to clearly determine the amount of 'supplementary capital' when it opened the formal investigation procedure. In its opening decision, the Commission therefore asked the Belgian authorities to comply with point 4.3 of the Communication on export-credit insurance and to notify to it the parts of the capital that supported, respectively, the insurance of short-term non-marketable risks and the insurance of marketable risks, before and after the transfer to Ducroire/Delcredere.

III. COMMENTS BY INTERESTED THIRD PARTIES

- (33) No comments by interested third parties were received with regard to the opening decision within the prescribed time limits.

IV. COMMENTS BY BELGIUM

On Measures 1 and 2: *State guarantee for marketable risks within the ONDD and internal transfers of resources for the benefit of the ONDD's marketable risks*

- (34) Belgium stated that the ONDD has always focused on non-marketable risks and that the predominance of these risks in its portfolio was a constant. After 1993⁽¹¹⁾ and before the accession of the ten new Member States of the European Union in May 2004, the insurance business relating to marketable risks within the ONDD was insignificant. At the end of 2003, the premiums relating to this insurance business accounted for only approximately [0-1 %] of the portfolio of short-term risks and the sums insured amounted to only some EUR [...] million (see Table 1 below). It was pointed out that the percentage of marketable risks covered at that time was very low because of the link between these risks and a non-marketable risk⁽¹²⁾.
- (35) It was not until 1 May 2004, when the ten new Member States joined the European Union, that the balance between short-term marketable and non-marketable risks in the ONDD's portfolio was changed, the proportion of marketable risks in the ONDD's portfolio shifting from [0-1 %] (in terms of premiums) in 2003 to [15-20 %] in 2004 (see Table 1 below). This change was the result of an automatic shift from the class of non-marketable risks to the class of short-term marketable risks on debtors established in the ten new Member States of the European Union.
- (36) With regard to Measure 1, the Belgian authorities also added that the guarantee by the Belgian State was terminated on 1 September 2003 in relation to marketable risks as these were transferred to the commercial account for which the ONDD had obtained authorisation from the OCA⁽¹³⁾, precisely because this account was not guaranteed by the State (insurance business guaranteed by the State is not regulated by the OCA).
- (37) With regard to the possible internal transfers of resources to marketable risks within the ONDD, the Belgian authorities argue that, given the insignificance of the insurance of marketable risks, any transfer of resources was inconceivable and would, in any event, be *de minimis*⁽¹⁴⁾.
- (38) The Belgian authorities conclude that the amounts at stake for Measure 1 and Measure 2 are, in any event, *de minimis*⁽¹⁵⁾.

⁽¹¹⁾ According to the Belgian authorities, the ONDD covered the risks on debtors in Zone 1 until 1993 [...], see footnote 24) and has since stopped offering this cover. Even before 1993, the ONDD never had a large portfolio of marketable risks.

⁽¹²⁾ See the example given on pages 13-14 of the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011.

⁽¹³⁾ The Banking, Finance and Insurance Commission (Commission bancaire, financière et des assurances — CBFA) was created by integrating the Insurance Inspectorate (Office de contrôle des assurances — OCA) into the Banking and Finance Commission (Commission bancaire et financière — CBF) on 1 January 2004.

⁽¹⁴⁾ Clarification by the Commission: the Belgian authorities are referring to the *de minimis* rule. Article 108(3) TFEU lays down the obligation to notify state aid to the Commission to enable it determine whether the aid is compatible with the internal market, having regard to the criteria in Article 107(1) TFEU. Under the *de minimis* rule, aid granted over a period of three years and below a certain threshold is exempt from the obligation to notify. When Measure 1 and Measure 2 applied, the threshold was set at EUR 100 000 by Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

⁽¹⁵⁾ See footnote 14.

Table 1

Trend in premiums and sums insured for short-term marketable and non-marketable risks (whole turnover exporters policies — short-term)

(EUR thousand) ⁽¹⁾

	2000	2001	2002	2003	2004	2005	2006
marketable risks	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>marketable since 2004 (10 new Member States)</i>					[...]	[...]	[...]
<i>marketable since 2007 (2 new Member States)</i>							
non-marketable risks	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>marketable since 2004 (10 new Member States)</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>marketable since 2007 (2 new Member States)</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Sums insured	[...]	[...]	[...]	[...]	[...]	[...]	[...]
marketable risks	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>marketable since 2004 (10 new Member States)</i>					[...]	[...]	[...]
<i>marketable since 2007 (2 new Member States)</i>							
non-marketable risks	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>marketable since 2004 (10 new Member States)</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>marketable since 2007 (2 new Member States)</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Premiums	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(%)							
	2000	2001	2002	2003	2004	2005	2006
marketable risks	[0-1 %]	[0-1 %]	[0-1 %]	[0-1 %]	[20-25 %]	[20-25 %]	[25-30 %]
<i>marketable since 2004 (10 new Member States)</i>					[20-25 %]	[15-20 %]	[15-20 %]
<i>marketable since 2007 (2 new Member States)</i>							
non-marketable risks	[99-100 %]	[99-100 %]	[99-100 %]	[99-100 %]	[75-80 %]	[75-80 %]	[70-75 %]
<i>marketable since 2004 (10 new Member States)</i>	[20-25 %]	[15-20 %]	[20-25 %]	[20-25 %]			
<i>marketable since 2007 (2 new Member States)</i>	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]
Sums insured	100,00 %	100,00 %	100,00 %	100,00 %	100,00 %	100,00 %	100,00 %

(EUR thousand) ⁽¹⁾

	2000	2001	2002	2003	2004	2005	2006
marketable risks	[0-1 %]	[0-1 %]	[0-1 %]	[0-1 %]	[15-20 %]	[15-20 %]	[15-20 %]
<i>marketable since 2004 (10 new Member States)</i>					<i>[15-20 %]</i>	<i>[10-15 %]</i>	<i>[10-15 %]</i>
<i>marketable since 2007 (2 new Member States)</i>							
non-marketable risks	[99-100 %]	[99-100 %]	[99-100 %]	[99-100 %]	[80-85 %]	[80-85 %]	[80-85 %]
<i>marketable since 2004 (10 new Member States)</i>	<i>[15-20 %]</i>	<i>[15-20 %]</i>	<i>[20-25 %]</i>	<i>[15-20 %]</i>			
<i>marketable since 2007 (2 new Member States)</i>	<i>[0-5 %]</i>	<i>[0-5 %]</i>	<i>[0-5 %]</i>	<i>[0-5 %]</i>	<i>[0-5 %]</i>	<i>[0-5 %]</i>	<i>[5-10 %]</i>
Premiums	100,00 %	100,00 %	100,00 %	100,00 %	100,00 %	100,00 %	100,00 %

⁽¹⁾ See page 7 of the reply by Belgium to the letter from the European Commission dated 7 December 2007, submitted by the Belgian authorities on 12 February 2008 (the Belgian authorities refer to it on page 14 of their submission dated 1 June 2011).

On Measure 3: Capital allocated to Ducroire/Delcredere by the ONDD

(39) In order to establish that the capital allocated to Ducroire/Delcredere by the ONDD was necessary and fulfilled the criterion of the private market economy investor, the Belgian authorities put forward the following arguments: (1) the transaction must be seen in its context, namely the transfer of an existing activity to a new subsidiary; (2) the capital injection is justified under the solvency rules; (3) the expected profitability of Ducroire/Delcredere's insurance of marketable risks was sufficient to convince a private market economy investor to make this investment.

1. *The transaction is a transfer of an existing activity* ⁽¹⁶⁾

(40) The Belgian authorities take the view that the capital injection must be seen in its context, which is that of a transfer of an existing activity. All the insurance business housed in Ducroire/Delcredere when it was established merely corresponded to a transfer of the ONDD's portfolio of short-term insurance business.

(41) To this end, the Belgian authorities state that all the balance-sheet items in the commercial account **relating to commercial activity** were transferred to Ducroire/Delcredere's opening balance sheet. On the asset side, only the claims directly related to insurance policies already in the portfolio were transferred (investments were not transferred). On the liabilities side, the only items transferred were those relating to the existing insurance portfolio and therefore excluded capital, reserves and equalisation and catastrophe provisions ⁽¹⁷⁾. The Belgian authorities stress that the EUR [45-70] million allocated to the commercial account was not transferred to Ducroire/Delcredere since the identification of the amount of capital had been subject to a specific assessment.

(42) The Belgian authorities maintain that the capital allocated to the commercial account is not a relevant comparator for assessing Ducroire/Delcredere's capital requirements. The capital requirement for the commercial account was estimated by the mechanical application of the rules set out in Directive 2002/13/EC of the European Parliament and of the Council of 5 March 2002 amending Council Directive 73/239/EEC as regards the solvency margin requirements for non-life insurance undertakings ⁽¹⁸⁾ (hereinafter: 'the Solvency I Directive') corresponding to the prudential rules in order to obtain OCA authorisation for the short-term insurance business since it was no longer guaranteed by the State, but this capital does not correspond to the economic capital required to cover the risk profile of this insurance business.

(43) According to the Belgian authorities, there is a difference between the attitude of a private investor looking to the profitability of a new investment and a parent company that is transferring its existing activities to a subsidiary. The Belgian authorities maintain that to judge otherwise could force a public undertaking to transfer or cease an economic activity if it was not profitable enough for a private market economy investor, which would breach the principle of the neutrality of public capital laid down in Article 345 TFEU.

2. *The methods used to justify the amount of capital in Ducroire/Delcredere*

(44) The Belgian authorities maintain that in 2004 two methods could be envisaged for determining the capital requirements of credit insurance companies: (a) the classical method for the insurance sector in general, laid down by the Solvency I Directive and based on the remuneration of risk (premium-based approach) and (b) the method based on risks assumed (exposure-based approach), for example the method of the Basel rules applied to the banking sector and the Standard & Poor's method for determining the capital requirement of a credit insurance company.

⁽¹⁶⁾ See the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011, pp. 22-24.

⁽¹⁷⁾ The details of the items transferred were submitted by the Belgian authorities on 14 February 2007 on page 3 of their note in response to the Commission letter dated 17 January 2007 in Case CP 8/2007 (SA.22302) and are set out in recital 70 of the opening decision.

⁽¹⁸⁾ OJ L 77, 20.3.2002, p. 17.

Prudential rules in force: Solvency I

- (45) In the case of Ducroire/Delcredere, the Belgian authorities take the view that the method laid down by the Solvency I Directive does not sufficiently reflect the overall financial profile of an insurer.
- (46) Under the Solvency I Directive, the solvency margin requirement is equal to the higher of two amounts, one based on the annual amount of premiums or contribution income, the other on the average claims burden for the past three financial years. However, the absolute minimum threshold is EUR 3 million for 2004 to 2006 and EUR 3,2 million for 2007 to 2009.
- (47) The application of these rules by the ONDD results in a minimum level of capital for Ducroire/Delcredere of approximately **EUR 3 to 3,3 million** ⁽¹⁹⁾ between 2005 and 2007, on the basis of the business plan (see Table 2 below).
- (48) Belgium argues that credit insurers' capital requirements depend more on exposure than on risk remuneration (premiums) and that the methodologies based on risks assumed (exposure-based approach) (such as Article 8 of the 1939 Law on the ONDD, the Standard & Poor's method, or the method of the Basel rules applied to the banking sector) are more appropriate than the Solvency I Directive, which is based on the remuneration of risk (premium-based approach).
- (49) The Belgian authorities maintain that the portfolio of risks insured by Ducroire/Delcredere is atypical in that, unlike most of its competitors, it covers for the most part non-marketable risks within the meaning of the Communication on export-credit insurance. The level of risk attached to such a portfolio is substantially higher than that associated with a portfolio composed exclusively or partially of marketable risks and, according to Belgium, justifies the use of more prudent rules.

Exposure-based approach: (i) Application to Ducroire/Delcredere of Article 8 of the 1939 Law on the ONDD

- (50) The Belgian authorities consider the application of Article 8 of the 1939 Law on the ONDD ⁽²⁰⁾ (hereinafter: 'the 1939 Law') to be appropriate in this case because it is based on the exposure-based approach. It is important to note that Article 8 of the 1939 Law is not relevant in regulatory terms for Ducroire/Delcredere because it applies only to the ONDD.
- (51) Furthermore, although Article 8 stipulates the maximum amount of commitments by the ONDD resulting from its insurance business for its own account and guaranteed by the State, as well as for its insurance business for the account of the State, the Belgian authorities take the view that Article 8 of the 1939 Law constitutes a minimum benchmark for Ducroire/Delcredere, which does not enjoy the guarantee of the State.
- (52) By applying Article 8(1) of the **1939 Law** ⁽²¹⁾, which states that commitments may not exceed 20 times the combined amount of the capital and the general reserve, the Belgian authorities estimate ⁽²²⁾ Ducroire/Delcredere's capital requirement at approximately **EUR 92 to 106 million** between 2005 and 2007, on the basis of the business plan (see Table 2 below).

Exposure-based approach: (ii) model developed by Standard & Poor's

- (53) In their observations, the Belgian authorities refer to the method developed by Standard & Poor's to determine the capital requirement of a credit insurer.

⁽¹⁹⁾ See the reply to the questionnaire from the European Commission dated 28 July 2011, submitted by the Belgian authorities on 5 December 2011, pp. 9-11 (the detailed calculations were submitted on 14 November 2011).

⁽²⁰⁾ Belgian Official Gazette, 4 October 1939.

⁽²¹⁾ In relation to the ONDD's business transacted for its own account with the guarantee of the State.

⁽²²⁾ See the reply to the questionnaire from the European Commission dated 28 July 2011 submitted by the Belgian authorities on 5 December 2011, p. 16.

- (54) In order to establish the level of capital ⁽²³⁾, Standard & Poor's uses a model based on risks assumed (exposure-based approach), accompanied by an assessment of the insurer's reinsurance. The capital required is determined by a methodology which compares gross claims with gross sums insured (the gross loss over gross exposure method) over (usually) a ten-year period. The highest ratio during this period is multiplied by a factor of 1,25 and applied to the projected sums insured and adjusted for reinsurance. The model is based on the assumption that the insurer's portfolio is reasonably well diversified geographically and by line of business.
- (55) Although the Belgian authorities refer to the Standard & Poor's method, they did not use it to determine the capital requirement for Ducroire/Delcredere.

Exposure-based approach: (iii) Application of the Basel I rules to credit insurers (Cooke ratio)

- (56) The Belgian authorities argue that the Basel rules are more suited to assessing the solvency of credit insurers than the current prudential rules, i.e. the Solvency I Directive. The nature of credit insurance and the precautionary principle justify use of the Basel rules. According to the Belgian authorities, credit insurance is similar to the credit business of banks at the level of counterparty risk (principally the risk of non-payment by the debtor). Furthermore, Ducroire/Delcredere's insurance business, unlike that of other private credit insurers, comprises essentially credit risks on debtors established in less developed or emerging countries (risks in Zone 2 ⁽²⁴⁾).
- (57) According to the Belgian authorities, therefore, the Cooke ratio under the Basel I prudential rules, which requires minimum capitalisation of 8 % of net commitments, is more appropriate for assessing the solvency of credit insurers.
- (58) The minutes of the meeting of the ONDD Board of Directors held on 20 April 2004 show that the ONDD used the Cooke ratio to determine Ducroire/Delcredere's capital requirement, while taking into account the need to provide the company with enough credibility in the eyes of its competitors.
- (59) The ratio used by the Belgian authorities in the calculations is not 8 %, as laid down by the Basel I rules, but 10 % in order to provide a safety buffer.
- (60) The capital thus determined by the ONDD for Ducroire/Delcredere and stated in the financial plans submitted to the regulator and in the information memo dated 20 April 2004 ⁽²⁵⁾, on the basis of which the Board of Directors agreed in principle to set up Ducroire/Delcredere with a subscribed capital of EUR 150 million, was approximately **EUR 68 to 74 million** for the end of 2006 (see Table 2 below). The underlying assumptions included solely cover of the risks located in Zone 2 and in the 10 countries that joined the European Union in May 2004.
- (61) However, in the strategy paper dated 28 September 2004 ⁽²⁶⁾, the capital estimated by the ONDD using the Cooke ratio (10 % of net commitments) between 2005 and 2007 was approximately **EUR 74 to 101 million**. Contrary to the financial projections in the information memo of April 2004, the financial projections of September 2004 included the cover of all short-term risks, thereby encompassing all of Zones 1 and 2. The conclusion in this paper was that paid-up capital of EUR 100 million was enough to carry on the business of short-term whole turnover export policies until 2007, but would have to be reviewed at the end of the period.

⁽²³⁾ See Annex B14 to the reply to the questionnaire from the European Commission dated 28 July 2011, submitted by the Belgian authorities on 5 December 2011.

⁽²⁴⁾ See the document submitted by the Belgian authorities on 1 June 2011 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', p. 10: 'Selon les catégories utilisées par l'ONDD, [...]'.

⁽²⁵⁾ See Annexes 8 (p. 70) and 13 to the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011.

⁽²⁶⁾ See page 28 of the strategy paper dated 28 September 2004 entitled 'Strategy guidelines for the ONDD and its subsidiary' (*Lignes directrices stratégiques pour l'ONDD et sa SA*) presented to the ONDD Board of Directors and set out in Annex 10 to the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011.

- (62) The Belgian authorities take the view that the application of the Cooke ratio is not an appropriate method for dividing the capital requirements between the marketable and the non-marketable insurance business because the method using the Cooke ratio, which is applied to the amount of commitments, results, they believe, in a certain linearity in that it does not take adequate account of the varied nature of the different underlying risks.

Application of the Solvency II Directive methodology with internal modelling for political risks

- (63) The Solvency II rules fall within the scope of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance⁽²⁷⁾ (hereinafter: 'the Solvency II Directive').
- (64) In 2011 the ONDD developed a **methodology** that it considers more appropriate for dividing the capital requirements between the marketable and the non-marketable insurance business. It consists of the standard formula under Solvency II⁽²⁸⁾, developed as part of Quantitative Impact Study 5 (QIS5), accompanied by internal modelling of the capital requirement to cover political risk and calibrated to meet a degree of solvency corresponding to an A rating and applied using the parameters for 2004.
- (65) The Belgian authorities argue that it can reasonably be supposed that a prudent private investor would have used this methodology in 2004.
- (66) The Solvency II standard formula QIS5 was applied by the ONDD for all risks except political risks. The Belgian authorities consider that political risk in credit insurance may be likened to catastrophe risk. They believe that catastrophe risk for credit insurance is currently poorly covered by the Solvency II standard formula QIS5. They take the view that it is therefore justified to use an internal model to estimate the capital requirement in relation to political risks.
- (67) Using this method, Ducroire/Delcredere's capital requirement is estimated⁽²⁹⁾ at approximately **EUR 80 to 99 million** between 2005 and 2007 and approximately EUR [125-150] million in 2009 on the basis of the business plan (see Table 2 below). The majority of this capital requirement arises from the cover of political risk.
- (68) Following a request by the Commission, the Belgian authorities estimated Ducroire/Delcredere's capital requirement by applying the Solvency II standard formula QIS5 for all types of risk (including political risk). In that case, Ducroire/Delcredere's capital requirement is said⁽³⁰⁾ to be **below EUR 23 to 25 million** between 2005 and 2007 and below EUR [25-50] million for 2009 (see Table 2 below).

⁽²⁷⁾ OJL 335, 17.12.2009, p. 1. The Solvency II Directive entered into force on 6 January 2010.

⁽²⁸⁾ Solvency II is a European regulatory reform of the insurance sector. Like Basel II, its objective is to better adapt the own funds required of insurance and reinsurance companies to the risks they are subject to in their business. After Solvency I, which provided for a solvency margin determined according to percentages of premiums and claims, insurance regulation moved to more complex rules that incorporate risk, either by applying a standard formula, or by taking account of an internal model. The standard formula approach is currently being designed and calibrated through Quantitative Impact Studies (hereinafter: 'QIS'). These consultations will enable the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) to test the proposed formulae and calibrations. Companies wishing to opt for an internal model must obtain validation from the supervisory authority before the solvency capital requirement (SCR) is actually determined using their internal model.

⁽²⁹⁾ See the reply to the questionnaire from the European Commission dated 28 July 2011, submitted by the Belgian authorities on 5 December 2011, p. 22.

⁽³⁰⁾ See the reply to the questionnaire from the European Commission dated 28 July 2011, submitted by the Belgian authorities on 5 December 2011, p. 22.

Table 2

Determination of Ducroire/Delcredere's capital by the ONDD/Belgian authorities for 2005, 2007 and 2009 under two growth scenarios and using different methods

(EUR million)

	Methodology	Scenario ⁽¹⁾	Period considered	Capital requirement for marketable risks	Capital requirement for non-marketable risks	Total
On the basis of the business plan	Solvency I in line with the comments in December 2011	A (3 %)	End 2005	3,0	3,0	3 ⁽²⁾
			End 2007	3,2	3,2	3,2 ⁽²⁾
		B (6 %)	End 2005	3,0	3,0	3,0 ⁽²⁾
			End 2007	3,2	3,2	3,3 ⁽²⁾
	Article 8 of 1939 Law in line with the comments in December 2011	A (3 %)	End 2005			92
			End 2007			97
			End 2009			[100-125]
		B (6 %)	End 2005			95
			End 2007			106
			End 2009			[100-125]
	Cooke ratio/Basel I (10 % of net commitments) in line with the minutes of the board meeting on 20.4.2004 and as submitted to the regulator	A (3 %)	End 2006			68,2
		B (6 %)	End 2006			74,3
	Cooke ratio/Basel I (10 % of net commitments) in line with the strategy paper dated 28.9.2004	A (3 %)	End 2005			73,5
			End 2007			92,2
		B (6 %)	End 2005			77,4
			End 2007			100,7
	Cooke ratio/Basel I (10 % of net commitments) in line with the comments in December 2011	A (3 %)	End 2009			[100-125]
		B (6 %)	End 2009			[125-150]
	Solvency II , standard method (from 2011) in line with the comments in December 2011, Annex B10	A (3 %)	End 2005	7,0	48,0	55,0
			End 2007	9,0	56,0	65,0
			End 2009	[10-20]	[65-80]	[75-100]
		B (6 %)	End 2005	8,0	51,0	59,0
			End 2007	10,0	64,0	74,0
			End 2009	[5-15]	[70-85]	[75-100]
Solvency II with internal modelling for political risks in line with the comments in December 2011	A (3 %)	End 2005	7,0	73,0	80,0	
		End 2007	9,0	81,0	90,0	
		End 2009	[5-15]	[110-135]	[125-150]	
	B (6 %)	End 2005	8,0	74,0	82,0	
		End 2007	10,0	89,0	99,0	
		End 2009	[5-15]	[120-135]	[125-150]	
Adjusted capital (QIS5 + internal model) (see recital 76), including accumulated profit ⁽³⁾	A (3 %)	End 2005	9,8	90,2	100,0	
		End 2007	10,8	91,7	102,5	
		End 2009	[5-15]	[130-145]	[135-160]	
	B (6 %)	End 2005	9,8	90,2	100	
		End 2007	11	92,3	103,3	
		End 2009	[10-20]	[140-155]	[150-175]	

(EUR million)

	Methodology	Scenario ⁽¹⁾	Period considered	Capital requirement for marketable risks	Capital requirement for non-marketable risks	Total
On the basis of actual figures	Allocated paid-up capital in line with the comments of 31 May 2012		End 2011	[40-80]	[70-110]	150,0

⁽¹⁾ In brackets: expected annual growth rate of the business under the scenario in question.

⁽²⁾ The capital requirements for marketable and non-marketable risks are not added to produce the total because there is an absolute minimum threshold of EUR 3 million for 2004 to 2006 and EUR 3,2 million for 2007 to 2009.

⁽³⁾ See the documents submitted by the Belgian authorities on 14 November 2011 (Excel files, 'Capital' sheet) The QIS5 plus internal modelling method was used solely to determine the capital allocated to marketable and non-marketable risks in 2005. For the years after 2005, the capital was determined in [...]. It should be noted that [...], which is why the results are identical for scenarios 1A and 1B for 2005. The Belgian authorities did not take into account the unpaid capital of EUR 50 million until 2009. It is these figures that were used in the calculations of the return on equity in the following section.

- (69) In its comments dated 16 and 31 May 2012, the ONDD pointed out that, following strategic decisions taken between 2007 et 2009 (for example, change in the reinsurance strategy, shift in the risk parameters of the portfolio of non-marketable risks) that were not included in its strategic plan from 2004, internal transfers of capital took place from the non-marketable to the marketable insurance business.

3. Principle of a private investor in a market economy

- (70) The Belgian authorities take the view that the initial capital injection by the ONDD when Ducroire/Delcredere was set up satisfies the criterion of the private investor in a market economy.

Profitability according to the projections of 2004

- (71) In the memo of April 2004, under scenario 1B, which assumed 6 % growth in business, the ONDD was anticipating a return on equity (ROE) of 1,3 % to 1,5 % for Ducroire/Delcredere's first three years of activity (2005, 2006 and 2007) by including the equalisation provisions, and of 2,2 % to 2,9 % for the same years by excluding the equalisation provisions.

Table 3

Financial projections of April 2004 (scope: Zone 1 '10 accession countries' + Zone 2)

(EUR thousand)

	Scenario 1A: growth 3 %			Scenario 1B: growth 6 %		
	Budget 2005	Budget 2006	Budget 2007	Budget 2005	Budget 2006	Budget 2007
Result from insurance business	- 527	- 536	- 543	47	389	763
Result from management business	1 643	1 692	1 742	1 749	1 885	2 029
Technical result	1 116	1 156	1 199	1 797	2 274	2 792

(EUR thousand)

	Scenario 1A: growth 3 %			Scenario 1B: growth 6 %		
	Budget 2005	Budget 2006	Budget 2007	Budget 2005	Budget 2006	Budget 2007
Transfer to equalisation provision	- 837	- 867	- 899	- 1 347	- 1 706	- 2 094
Technical result after equal. provision	279	289	300	449	569	698
Financial result	2 360	2 468	2 577	2 369	2 499	2 641
Tax	- 871	- 910	- 949	- 930	- 1 012	- 1 102
Result	1 768	1 847	1 927	1 888	2 055	2 237
Capital	150 000	150 000	150 000	150 000	150 000	150 000
Return on equity (result/capital)	1,2 %	1,2 %	1,3 %	1,3 %	1,4 %	1,5 %
Result + equal. provision	2 605	2 715	2 826	3 235	3 761	4 331
Return on equity before equal. provision (result + equal. provision)/capital	1,7 %	1,8 %	1,9 %	2,2 %	2,5 %	2,9 %
Cash flow	5 744	5 190	5 803	6 634	6 557	7 742
Capital required by the business	68 186			74 319		

Source: the ONDD: These are the financial projections set out in Annex 8, p. 70 (paper entitled 'Setting up a limited company' — *Création d'une société anonyme* — presented to the ONDD Board of Directors on 20 April 2004) to the observations by the Belgian authorities dated 1 June 2011.

- (72) In the paper presented to its Board of Directors on 28 September 2004 — after Ducroire/Delcredere was set up on 23 September 2004 — the ONDD anticipated, under the 'dynamic scenario — 6 % growth', an ROE of 1,3 % to 1,9 % for the three years 2005, 2006 and 2007 by including the equalisation provisions, and of 2,8 % to 4,3 % for the same years by excluding the equalisation provisions. The financial projections of September 2004 present slightly different results to those of April 2004 because the September 2004 projections are based on a more extensive business scope (all of Zone 1). Furthermore, certain assumptions were revised in September 2004.

Table 4

Financial projections — September 2004 (scope: all of Zone 1 and Zone 2)

(EUR thousand)

	Scenario 1A: growth 3 %			Scenario 1B: growth 6 %		
	Budget 2005	Budget 2006	Budget 2007	Budget 2005	Budget 2006	Budget 2007
Result from insurance business ⁽¹⁾	- 229	49	292	330	924	1 504
<i>non-marketable risks (Zone 2)</i>	378	688	970	918	1 537	2 148
<i>marketable risks (Zone 1 '10 accession countries')</i>	- 619	- 579	- 545	- 600	- 553	- 511
<i>other marketable risks (Zone 1 'other countries')</i>	13	- 12	3	31	43	109
Result from management business	1 662	1 734	1 805	1 768	1 924	2 086
Technical result	1 433	1 783	2 096	2 097	2 848	3 590

(EUR thousand)

	Scenario 1A: growth 3 %			Scenario 1B: growth 6 %		
	Budget 2005	Budget 2006	Budget 2007	Budget 2005	Budget 2006	Budget 2007
Transfer to equalisation provision	- 1 066	- 1 383	- 1 672	- 1 564	- 2 182	- 2 392
Technical result after equal. provision	367	400	425	533	667	1 197
Financial result	1 366	1 470	1 581	1 375	1 500	1 642
Tax	- 568	- 637	- 706	- 626	- 735	- 981
Result	1 165	1 233	1 300	1 282	1 432	1 858
Capital	100 000	100 000	100 000	100 000	100 000	100 000
Return on equity (result/capital)	1,2 %	1,2 %	1,3 %	1,3 %	1,4 %	1,9 %
Result + equal. provision	2 231	2 616	2 972	2 846	3 614	4 251
Return on equity before equal. provision (result + equal. provision/capital)	2,2 %	2,6 %	3,0 %	2,8 %	3,6 %	4,3 %
Cash flow	5 358	5 152	6 080	6 233	6 471	7 796
Capital required by the business	73 506	82 798	92 150	77 419	88 931	100 696

Source: the ONDD: These are the financial projections set out on page 28 and in Annex 9 to the paper entitled 'Strategic guidelines for the ONDD and its subsidiary' (*Lignes directrices stratégiques pour l'ONDD et sa SA*) presented to the ONDD Board of Directors on 28 September 2004, submitted by the Belgian authorities on 1 June 2011 in Annex 10 to their observations.

(1) The Commission has identified calculation errors in the financial projections. In particular, the sum of the results from the insurance business for the different business scopes differs from the total result from the insurance business for Ducroire/Delcredere. Errors in the sums were made in the calculation of the result from the insurance business for Ducroire/Delcredere as a whole. However, these differences do not have a material effect on the estimate of the ROE.

- (73) Unlike in the memo of April 2004, the ROE is calculated on the basis of EUR 100 million in paid-up capital, without taking into account the supplementary EUR 50 million invested but not paid up.
- (74) With regard to the ROE anticipated for the marketable risks insurance business, the Belgian authorities explained that the breakdown as set out in the strategy paper presented to the Board of Directors on 28 September 2004 ⁽³¹⁾ should not be taken into account when analysing the profitability of marketable and non-marketable risks insurance. They explained ⁽³²⁾ that these projections are absurd since the level of claims was grossly overestimated for the risks that became marketable in 2004, while no account was taken of the possibility for an insurer to adjust premiums in the event of a high claims experience actually being recorded. They point out that the ONDD Board of Directors did not base its decision concerning Ducroire/Delcredere's level of capitalisation on the division set out in Annex 9 to the strategy paper.

Profitability according to the projections drawn up ex post in 2011

- (75) The projections of 2004 did not, therefore, serve as the basis for the division of the projections for marketable and non-marketable risks submitted to the Commission in June 2011. The observations of June 2011 were, in turn, based on the actual figures before 2004 and on the performance of Ducroire/Delcredere's competitors at the time. Belgium takes the view that the approach used in the observations of June 2011 best reflects the reasoning that a private investor would have followed in 2004, while remaining consistent with the consolidated result.

⁽³¹⁾ See the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011, Annex 10.

⁽³²⁾ See the reply to the questionnaire from the European Commission dated 28 July 2011, submitted by the Belgian authorities on 5 December 2011, p. 33.

- (76) In their observations of June 2011, the Belgian authorities estimated the profitability of the marketable risk insurance business in relation to the capital allocated to this business using the Solvency II model (standard formula QIS5 and internal model), a method developed ex post at the Commission's request. It should be noted that the difference between the minimum amount of capital under this model, i.e. EUR 82 million, and the actual paid-up capital of EUR 100 million, was allocated to marketable and non-marketable risk insurance in proportion to their respective share of the minimum capital of EUR 82 million. As a result, the 'adjusted' capital estimated by the ONDD for the marketable risks is EUR 9,8 million for 2005 ⁽³³⁾ (see Table 5 below).
- (77) On the basis of the revised financial projections submitted by the Belgian authorities in 2011 and their estimates of the capital allocated to the marketable risk insurance business, as explained in recital 76, the profitability of the marketable risk insurance business for 2005-07, as determined by the Belgian authorities, is set out below:

Table 5

Financial projections recalculated in 2011 ⁽¹⁾*(EUR thousand)*

Financial projections	Scenario 1B: growth 6 % marketable risks			Scenario 1B: growth 6 % non-marketable risks		
	Budget 2005	Budget 2006	Budget 2007	Budget 2005	Budget 2006	Budget 2007
Result from insurance business	656	516	596	- 326	408	908
Result from management business	292	329	363	1 476	1 596	1 723
Technical result before provisions	948	845	959	1 150	2 004	2 631
Transfer to equalisation provision	- 328	- 347	- 368	- 1 236	- 1 835	- 2 024
Technical result after equal. provision	620	497	591	-86	170	607
Financial result	280	347	374	1 095	1 153	1 268
Tax	- 297	- 279	- 318	- 330	- 456	- 664
Profit after tax	603	566	646	679	866	1 212
Adjusted capital (QIS5 + internal model) ⁽²⁾	9 756	10 322	10 969	90 244	91 110	92 321
Adjusted capital + equal. provision	9 756	10 437	11 205	90 244	91 743	93 671
ROE (result/capital)	6,2 %	5,5 %	5,9 %	0,8 %	1,0 %	1,3 %
Result + equal. provision	823	799	893	1 511	2 068	2 519
ROE before equal. provision	8,4 %	7,7 %	8,0 %	1,7 %	2,3 %	2,7 %

⁽¹⁾ See the observations submitted by the Belgian authorities on 14 November 2011 (Excel files '201105 P&L et Bilan Business Plan Scenario 1B', sheets 'P&L_cessibles' and 'PL_non_cessibles').

⁽²⁾ The QIS 2005 plus internal modelling method was used solely to determine the capital allocated to marketable and non-marketable risks in 2005. The capital for 2006 and 2007 was determined on the basis of the capital for 2005 plus the forecast accumulated profit for the period.

⁽³³⁾ Belgium's calculation for the marketable risks is as follows: EUR 8 million + [(EUR 100 million — EUR 82 million) × (EUR 8 million / EUR 82 million)]. The same applies to the non-marketable risks.

- (78) The ROE is calculated by the Belgian authorities on the basis of EUR 100 million in paid-up capital, without taking into account the supplementary EUR 50 million invested but not paid up until 2009.
- (79) In response to the doubt raised in the opening decision about whether a private investor would require remuneration on the unpaid capital, given that he would lose it in the event of bankruptcy, the Belgian authorities observed that they maintained their position, i.e. that the EUR 50 million capital should not be taken into account in the calculation of profitability until it had actually been paid up. They believe that the only effect of bankruptcy (assuming that it would result in a call on the balance of the subscribed capital) would be to reduce the duration of such an investment. They further added that, until the capital was paid up in 2009, the ONDD was able to invest this capital of EUR 50 million freely on the market in order to benefit from a corresponding return.
- (80) Moreover, the Belgian authorities maintain that an investment rate of 2 % used in the 2004 projections and taken into account in the calculations set out in Table 5 is below what a private investor would probably have used. By using an investment rate of 3,5 %, the Belgian authorities established that the projected profitability of marketable risk insurance (ROE adjusted for the equalisation provision) would reach a level of approximately 9,7 % to 10,4 % between 2005 and 2007 (against approximately 7,7 % to 8,4 % with an investment rate of 2 %) ⁽³⁴⁾.

Use of the ROR ratio

- (81) The Belgian authorities consider that the most appropriate rate for assessing the expected profitability of the investment is the Economic Return on Revenue (hereinafter: 'ROR'), although this rate was not used in the ex ante financial projections (ONDD business plan). This rate is calculated by comparing technical income (before allocation to the equalisation reserve) with turnover (insurance premiums). The Belgian authorities consider ROR to be the most appropriate method because:
- (a) it is calculated before the equalisation provision, imposed by the Belgian prudential authorities, which is intended to balance out the results over time and to cover potential future losses resulting from future business;
- (b) it accurately reflects the profitability of credit insurance by isolating it from purely financial profitability. It therefore demonstrates the profitability connected with the 'core' of the credit insurance activity.
- (82) An ROR of 16,5 % and 18,5 % in 2005 and 2006 respectively showed Ducroire/Delcredere to be more profitable ⁽³⁵⁾ than the three biggest names in the credit insurance world, i.e. Coface, Euler Hermes and Atradius, whose ROR in 2005 and 2006 stood at 9,7 % and 10,9 %, 16,0 % and 16,9 %, and 9,3 % and 11,9 % respectively.

Determining the expected profitability

- (83) In response to a remark by the Commission that it was unlikely that a private investor would use ROR as the sole basis for assessing the profitability of a prospective investment, the Belgian authorities proposed two new methodologies to show that Ducroire/Delcredere was sufficiently profitable when it was capitalised: (a) the 'capital asset pricing model' (hereinafter: 'CAPM') ⁽³⁶⁾, by means of which the rate of return expected by the market for a given financial asset can be estimated on the basis of risk; and (b) benchmarking of the profitability of credit insurers.

⁽³⁴⁾ See the document submitted by the Belgian authorities on 5 December 2011, 'Reply to the questionnaire from the European Commission dated 28 July 2011', pp. 38 and 39.

⁽³⁵⁾ See the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011, p. 38.

⁽³⁶⁾ Capital asset pricing model (CAPM).

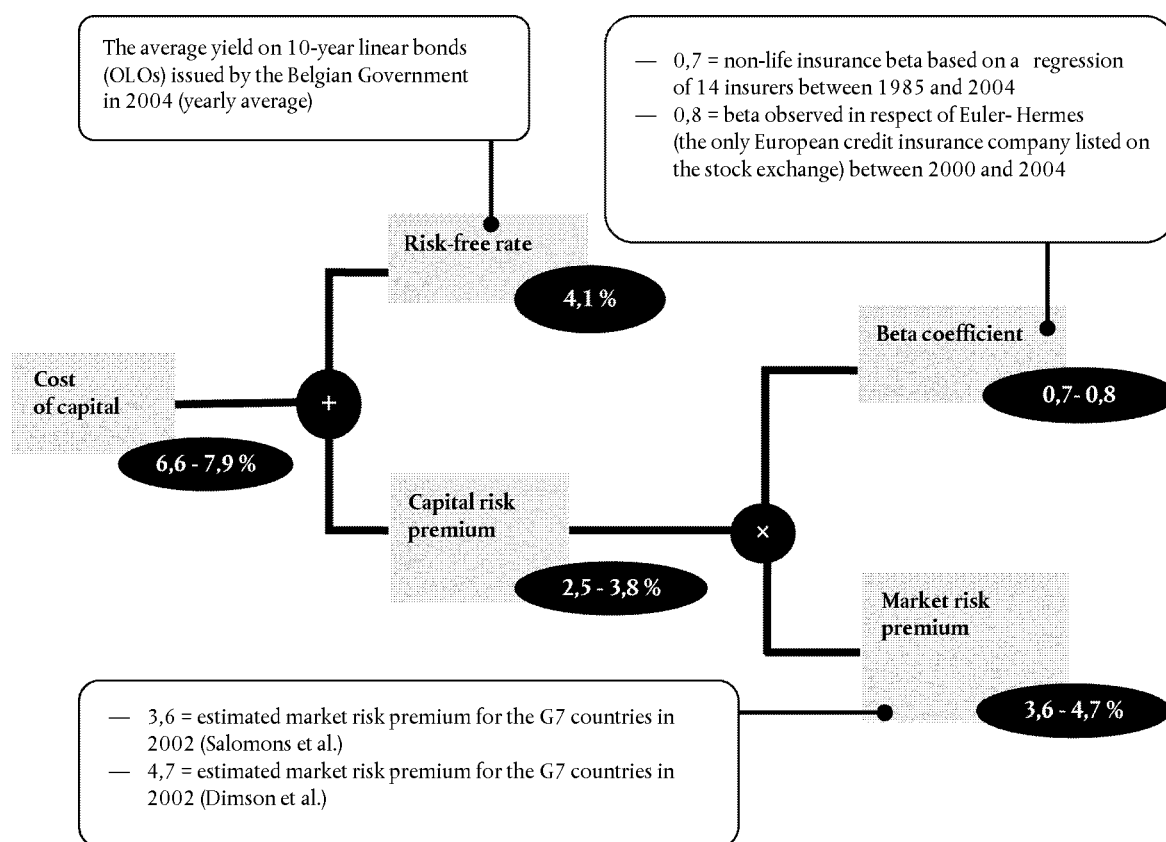
- (84) According to the CAPM model, the cost of capital is calculated using the following formula:

Cost of capital = risk-free rate + capital risk premium

Cost of capital = risk-free rate + beta coefficient of the assets* [market risk premium]

Where the beta coefficient of the assets represents the volatility of the profitability of the assets in question compared with that of the market.

- (85) Estimates by the Belgian authorities of the cost of the Ducroire/Delcredere capital are set out in the diagram below.



- (86) According to ONDD estimates based on the CAPM, a private investor in the Belgian non-life insurance sector would have demanded a minimum profitability of 7-8 % in 2004.

- (87) To achieve the historical profitability benchmark, the Belgian authorities drew up a sample of insurers by selecting those that met the following criteria: (a) European players, (b) whose main business is credit insurance, (c) who are active mainly in the marketable risk sector but are also active in the non-marketable risk sector, excluding companies subject to a state aid procedure or established after 2004 and subsidiaries of companies included in the sample. The sample comprises 11 insurers. According to the Belgian authorities, the average ROE for credit insurance companies active mainly in the marketable risk sector is 6-7,5 % depending on the period under consideration (i.e. including or excluding the crisis years). The average ROE for these 11 insurers in 2004 was 7,8 % compared with the 13,3 % average ROE of the three market reference players (see Table 6).

Table 6

Profitability benchmark for credit insurers submitted by Belgium

Methodology for defining the sample for benchmarking the marketable ROE		ROE ⁽²⁾ , 2000-09, percentage																	
		Compan- ies	Head Office	Estimat- ed share of market- able risk ⁽³⁾ %	Gross pre- miums EUR mill- ion, 2004	ROE											Averages		
Filter criteria	Sam- ple size					1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2001- 04	2003- 04	2001- 09
• Credit insurers who are members of ICISA and the Berne Union ⁽⁴⁾	115	Cesce	Spain	60	51 ⁽⁵⁾			2,3	5,2	7,3	6,0	3,5	8,3	2,3	- 24,0	10,4	4,1	4,5	1,8
		KUKE	Poland	60	7			- 9,0	0,5	1,9	5,5	7,9	4,9	5,3	8,1	- 14,6	- 0,3	3,7	1,2
• European credit insurers ⁽⁷⁾	47	COSEC	Portugal	90	37			1,5	1,7	- 5,1	8,1	7,3	2,2	6,0	- 9,0	1,8	1,5	1,5	1,6
		Prisma	Germany	100	36	0,0	4,8	6,8	4,7	5,6	9,3	12,9	17,1	9,5	15,9	7,6	6,6	7,5	9,9
• Companies whose main activity is credit insurance and who are active mainly in marketable risks ⁽¹⁾	19	Crédito y Caución	Spain	100	341	9,0	13,7	14,3	16,0	21,1	17,6	14,3	13,7	15,2	53,7	0,5	17,3	19,4	18,5
		Baez	Bulgaria	60	0,5						4,7	8,7	5,3	11,5	10,6	14,2	4,7	4,7	9,2
• Exclusion of companies that are subject to a state aid procedure (i.e. SACE and SACE BT)	16	Garant	Austria	50	4					- 7,3	- 5,6	0,6	1,3	3,2	-10,7	-7,3	-7,3	-3,1	
		Mehib	Hungary	90	6 ⁽⁵⁾				0,2	0,8	2,2	0,8	-2,3	0,4	5,7	8,2			

Methodology for defining the sample for benchmarking the marketable ROE		ROE ^(?) , 2000-09, percentage																		
		Compan- ies	Head Office	Estimat- ed share of market- able risk ⁽³⁾ %	Gross pre- miums EUR mil- lion, 2004	ROE											Averages			
1999	2000					2001	2002	2003	2004	2005	2006	2007	2008	2009	2001- 04	2003- 04	2001- 09			
Filter criteria	Sample size 11	• Exclusion of companies established after 2004 and/or a subsidiary of another company already on the list	Atradius	Nether-lands	90	1079			1,8	- 17,5	3,4	10,1	16,8	14,5	19,4	- 22,1	- 12,5	- 0,5	6,8	1,5
		Euler Hermes:	France	96	1567		13,7	13,2	16,7	14,5	18,4	17,7	17,3	21,8	4,5	1,3	15,7	16,4	13,9	
		COFACE	France	83	903	11,3	11,8	9,2	3,2	13,2	11,5	13,4	11,2	15,1	3,7	- 15,0	9,3	12,4	7,3	
		Average ⁽⁶⁾					11,0	5,0	3,4	7,0	7,8	8,9	8,4	9,8	4,6	-0,8	5,8	7,4	6,0	
		Average ⁽⁶⁾ of the 3 reference players						8,1	0,8	10,4	13,3	16,0	14,3	18,8	-4,6	-8,7	8,2	11,9	7,6	
Average ⁽⁶⁾ for players of a similar size						3,1	4,7	5,3	5,8	6,2	6,2	6,4	8,0	2,2	4,7	5,5	5,3			

⁽¹⁾ Only those players whose key activity is deemed to be in the marketable risk sector (i.e. is above 50 % in terms of premiums or total exposure according to the available information) were selected.

⁽²⁾ Adjusted for the equalisation provision.

⁽³⁾ On the basis of the geographical information communicated, e.g. exposure, premiums (varies from company to company).

⁽⁴⁾ International associations of credit insurers.

⁽⁵⁾ Net premiums.

⁽⁶⁾ Non-weighted average.

⁽⁷⁾ In 2004 or shortly thereafter.

- (88) According to the Belgian authorities, the expected profitability of the marketable risk business before the equalisation provision (ROE before equalisation provision), on the basis of the financial projections recalculated by the Belgian authorities in 2011 under scenario 1B (see Table 5), is in line with the profitability which a private investor would have expected to achieve in 2004 (Belgian authority estimates based on the cost of capital using the CAPM model and on the benchmarking of the profitability of credit insurers; see recitals (86) and (87) respectively).

Separation of accounts

- (89) Following the Commission's request expressed in its opening decision regarding compliance with point 4.3 of the Communication on export-credit insurance, which imposes a separate administration and separate accounts for the insurance of marketable risks and non-marketable risks, the Belgian authorities replied that such separation of accounts was not necessary. After 1 January 2005, short-term activities (marketable and non-marketable risks) were carried on within Ducroire/Delcredere as part of the transfer of an existing activity. According to the Belgian authorities, there is no need to draw up separate accounts since Ducroire/Delcredere no longer receives state aid, even for its activities in the non-marketable risk sector.

V. ASSESSMENT OF THE AID

V.1. EXISTENCE OF STATE AID

- (90) Article 107(1) of the TFEU provides that, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (91) The Commission's first step should be to assess the measures in question to determine whether they constitute state aid within the meaning of Article 107(1) of the TFEU. Consequently, in the sections below, it analyses the measures in relation to the different criteria which constitute aid.

V.1.1. Existence of an advantage

V.1.1.1 Existence of an advantage deriving from the state guarantee (Measure 1) and possible internal transfers of resources for the benefit of marketable risks within the ONDD (Measure 2)

- (92) According to points 3.1 and 3.2 of the Communication on export-credit insurance, state guarantees provided to export-credit insurance companies are likely to give the beneficiaries a financial advantage over their competitors. Therefore, the investigation launched on 23 February 2011 (see recital (26)) concerned in particular the Belgian state guarantee accorded to the ONDD for its activity relating to marketable risks.
- (93) From 1 September 2003, a 'commercial' account which, according to the Belgian authorities, was not guaranteed by the State was assigned to ONDD activities in the area of short-term risks, including marketable risks.
- (94) Since within the ONDD there were no separate accounts enabling a distinction to be made between the marketable and non-marketable risk insurance activities, the Belgian authorities were asked to provide details of the part of the state guarantee which could be considered to have been allocated, until 31 August 2003, to marketable risk activities. They were also asked to produce evidence that this guarantee did indeed expire on 31 August 2003 and not at the time when Ducroire/Delcredere was established, i.e. 1 January 2005.
- (95) The Belgian authorities affirmed that the ONDD stopped offering risk cover to debtors in 'Zone 1' ⁽³⁷⁾ in 1993. After 1993, the ONDD's business was focused exclusively on non-marketable risks. The ONDD provided cover for marketable risks on a purely exceptional basis.

⁽³⁷⁾ See footnote 21.

- (96) As set out in recital (34), Belgium explained that the amount of marketable risk business within the ONDD prior to May 2004 was insignificant. Moreover, the reason why the percentage of marketable risks covered at the time was so low was because of the link between these risks and a non-marketable risk. The example provided ⁽³⁸⁾ is as follows: *'An insured person X sold goods to an intermediary A located in zone 1, who sold the goods on to the final customer B, located in zone 2. In most cases, the goods were delivered direct to final customer B. The payment of the invoice of the insured party X by the intermediary A was linked, de facto, to the payment of the invoice of intermediary A by the final customer B. The insured parties could not usually obtain cover from another credit insurer because the operations in question were exposed to political risks in the country where the final customer B was located.'*
- (97) The Belgian authorities reaffirmed that cover for these risks were not available from other private credit insurers.
- (98) Regarding the elements set out in recitals (93) to (95), it is estimated that these risks, though theoretically classed as marketable (given the principal relation between the insured exporter X and the intermediary A), are to be considered in practice non-marketable in view of the market conditions at the time. Moreover, before May 2004, these risks were covered by the ONDD quite exceptionally since they represented less than [0-2 %] of the premiums (from 2000 to 2004) of the ONDD's short-term portfolio (see recital (34)).
- (99) The Belgian authorities also provided proof that the state guarantee granted to the ONDD for its marketable risk business expired on 1 September 2003. This guarantee expired the moment the marketable risks were transferred to the commercial account; the ONDD obtained authorisation from the OCA ⁽³⁹⁾ for this account precisely because it was not covered by the state guarantee. The Royal Decree defining the activities carried on by the ONDD for its own account without the state guarantee, published on 1 September 2003 (the date on which it entered into force), details the operations to be entered in this account. Following the entry into force of the Royal Decree ⁽⁴⁰⁾, any coverage of risks by an export policy of less than two years' duration is governed by Article 3(2) of the 1939 Law (business for the account of the ONDD without the state guarantee).
- (100) In conclusion, the doubts raised by the Commission in its opening decision concerning the existence of an advantage for the marketable risk insurance activity due to the state guarantee are dispelled. The state guarantee accorded to the ONDD until August 2003 for its activity relating to marketable risks is considered not to have conferred on this activity a competitive advantage over competitors since no actual marketable risk activity existed. Moreover, no attempt was made to develop an actual marketable risk activity on the strength of the state guarantee. The conclusion can also be drawn that the entire business relating to short-term risks ceased to benefit from the state guarantee from 1 September 2003.
- (101) There were no internal transfers of resources in favour of marketable risks within the ONDD, given that there was no actual business activity in this area. There was no attempt to develop an actual marketable risk activity on the basis of a transfer of resources from the non-marketable risk business (see recital (98)). In conclusion, there is no evidence to support the existence of transfers of resources to the marketable risk sector within the ONDD or of any advantage conferred on the ONDD as a result of such transfers.
- (102) In conclusion, Measure 1 and Measure 2 do not confer an advantage within the meaning of Article 107 of the TFEU. Consequently, they do not constitute state aid.
- (103) This being the case, an analysis of the other criteria which constitute aid (state resources, selectivity, distortion of competition) will not be carried out for Measures 1 and 2 in the sections below.

⁽³⁸⁾ See the 'Observations by Belgium on the Decision by the European Commission of 24 February 2011', submitted by the Belgian authorities on 1 June 2011, pp. 13-14.

⁽³⁹⁾ On the basis of Article 2(2)(d) of Council Directive 73/239/EEC (in force at the time), the ONDD did not need to be authorised by the OCA in so far as its operations were covered by the Belgian state guarantee. By proceeding to carry on, via the 'commercial' account, activities which were not guaranteed by the Belgian State, the ONDD no longer benefited from the exemption laid down in Article 2(2)(d) and needed to obtain authorisation from the OCA.

⁽⁴⁰⁾ See page 15 of the document submitted by the Belgian authorities on 1 June 2011.

V.1.1.2. *Existence of an advantage deriving from the allocation of capital to Ducroire/Delcredere (Measure 3)*

Scope of the assessment to determine whether the allocation of capital to Ducroire/Delcredere constitutes aid

(104) According to the opening decision (see recitals (27) and (28) of this Decision), the following two amounts must be deducted from the initial capital allocation to Ducroire/Delcredere as they do not constitute aid:

(a) the part of the capital supporting non-marketable risk insurance (first exclusion criterion);

(b) the part of the capital that was already supporting the insurance of marketable risks within the ONDD and which was simply transferred to Ducroire/Delcredere with the corresponding insurance business. This was solely a change in the legal form of a pre-existing economic activity together with the relevant capital. Based on the approach followed in the decision on the creation of the Banque Postale ⁽⁴¹⁾, such a transfer of capital does not confer a new advantage on the economic activity in question and cannot therefore be considered aid as such (second exclusion criterion).

(105) In line with the approach developed in the opening decision, the Commission ought to begin by applying these two exclusion criteria.

(106) However, Belgium advanced an argument based on the second exclusion criterion which, if it were correct, would make it possible to exclude immediately any categorisation of the whole of Measure 3 as aid. The Commission will therefore demonstrate in the first instance that this argument is invalid, before applying the two exclusion criteria set out in the opening decision.

Rejection of Belgium's claim that the total amount of EUR 150 million was linked to the business transferred in 2004

(107) In response to the opening decision, Belgium invoked to its advantage and expanded on the second exclusion criterion according to which the capital which, within the ONDD, already supported the existing marketable business just before its transfer to Ducroire/Delcredere on 1 January 2005 does not constitute aid. More precisely, Belgium considers that all of the initial capital of EUR 150 million allocated to Ducroire/Delcredere constituted the economic capital associated with the short-term insurance business (**marketable and non-marketable**) transferred. It considers that the creation of Ducroire/Delcredere with its initial capital of EUR 150 million was simply a change in the legal form of an existing business and of the relevant capital. This meant that none of initial capital allocation constituted aid. Consequently, Belgium maintains that there is no need to verify how this capital was used subsequently by Ducroire/Delcredere (i.e. whether it was used for marketable or non-marketable risks — first exclusion criterion) given that it could not constitute aid.

(108) In support of their assertion, the Belgian authorities emphasised that the Ducroire/Delcredere capital subscription of EUR 150 million was necessary from the beginning of 2005. The Belgian authorities justified this level of capitalisation on the basis of the 'current standards' developed within the framework of the adoption of the Solvency II Directive ⁽⁴²⁾ (the so-called 'standard' method in accordance with technical parameters such as those established in an impact study — 'QIS 5' for Belgium — dating from March 2011) for all the risks to which Ducroire/Delcredere was exposed, except for political risks for which internal modelling was used to determine the capital required to cover these risks. As indicated in the section 'Solvency II with internal modelling for political risks' of Table 2, EUR [125-150] million of capital was required to cover the expected level of activity in 2009.

⁽⁴¹⁾ See the Commission Decision of 21 December 2005 in Case N 531/2005 'Measures relating to the creation and operation of the Banque Postale' (OJ C 21, 28.1.2006, p. 2) available at: http://ec.europa.eu/eu_law/state_aids/comp-2005/n531-05.pdf.

⁽⁴²⁾ See footnote 28.

- (109) The Commission observes that the concept of ‘capital connected with transferred activities’ is defined in the Commission decision of 21 December 2005, ‘Measures relating to the creation and operation of the Banque Postale’⁽⁴³⁾. In that case, it was found that the transfer did not involve any new capital as only the own funds attached to the financial service activities of La Poste were transferred to the newly created legal entity, ‘La Banque Postale’. In other words, these were exclusively own funds which already existed and which had clearly been allocated previously to the assets, rights and obligations transferred. Thus, the analysis related to the capital which was already formally attached to the business activities transferred and not to a prospective estimation of the capital which it would have been appropriate to assign to the new entity to support its future development.
- (110) As explained previously, the activity relating to short-term (marketable and non-marketable) risks transferred to Ducroire/Delcredere had been managed within the ONDD through the commercial account since 1 September 2003. Capital of EUR [45-70] million had been assigned to this account. Moreover, as set out in recital (99), the ONDD obtained authorisation from the national insurance regulator (the OCA) specifically and solely for the commercial account (and the related capital of EUR [45-70] million). The rules and oversight of the OCA concerned, *inter alia*, compliance with the solvency rules (minimum guarantee fund, solvency margin to be constituted)⁽⁴⁴⁾. Accordingly, on the basis of the prudential rules in force at the time, these short-term activities assigned to the commercial account were sufficiently capitalised.
- (111) In this regard, the Commission observes that, according to the internal memo of 20 April 2004⁽⁴⁵⁾ on the basis of which the decision was taken to set up Ducroire/Delcredere and allocate to it a capital of EUR 150 million, the capital strictly allocated to the activity relating to short-term risks was the capital registered in the commercial account plus the profit for a period of 16 months (from 1 September 2003 to 31 December 2004) estimated at EUR [0-5] million. The memo states that ‘*of the company’s EUR 150 million capital, EUR [45-70] million originated from the transfer of own funds from the commercial account*’. The Commission concludes, therefore, that, when the decision was taken to set up Ducroire/Delcredere, the capital that could be considered to be formally allocated to short-term activities on 31 December 2004 amounted to only EUR [45-75] million (EUR [45-70] million plus the estimated profit of EUR [0-5] million). Therefore, only the transfer of this capital for an amount of EUR [45-75] million constituted the part of the capital already allocated to the short-term risk activity within the ONDD and simply transferred to Ducroire/Delcredere. This transfer cannot therefore constitute a new advantage for this activity and cannot therefore constitute aid.
- (112) The Commission therefore rejects Belgium’s assertion that all of the initial capital of an amount of EUR 150 million constitutes the capital which was simply transferred and which was already allocated within the ONDD to the activity transferred and therefore cannot be considered an advantage. The Commission considers that the difference between the EUR [45-75] million and the capital actually subscribed to the tune of EUR 150 million therefore constitutes additional capital representing a new advantage for this activity.
- (113) In the alternative, the Commission would observe that the internal memos of 2004 which underpinned the ONDD’s decision to grant Ducroire/Delcredere EUR 150 million of capital (greatly exceeding the EUR [45-75] million allocated to the commercial account) show that the ONDD considered different scenarios for the **growth** of business within the future Ducroire/Delcredere. The need for EUR 150 million of capital was therefore determined on the basis of hypotheses regarding the future growth of the activities of Ducroire/Delcredere. It can therefore be concluded that the approach of the Belgian authorities is akin to excluding from the scope of the analysis to determine the existence of an overall advantage the entirety of the capital which the new entity could be assumed to require in order to support its future development. This approach cannot be accepted. Only the capital from which the activities transferred within the existing legal entity already formally benefited (short-term insurance activities within the ONDD) does not constitute a new advantage since the activities in question already benefited therefrom. Conversely, any additional capital constitutes a new advantage since the activity in question did not benefit from this capital before the transfer. The decision to create Ducroire/Delcredere and allocate to it a capital of EUR 150 million cannot therefore be considered a simple change of legal form of an existing activity with a simple transfer of capital allocated to the activity transferred. Therefore, the Belgian authorities’ assertion that from 2004 it could be anticipated that Ducroire/Delcredere would need a capital of EUR 150 million in 2009 on the basis of the expected growth of its business is irrelevant. The Belgian authorities do not in any way demonstrate that this capital of EUR 150 million was already allocated to short-term activities within the ONDD before their transfer to Ducroire/Delcredere and that this capital of EUR 150 million does not therefore constitute a new advantage for these activities.

⁽⁴³⁾ See footnote 10.

⁽⁴⁴⁾ See Annex 4 to the observations of the Belgian authorities of 1 June 2011.

⁽⁴⁵⁾ See pages 62 and 70 of the said memo (submitted as Annex 8 to the observations of the Belgian authorities of 1 June 2011).

- (114) Purely in the alternative, even if the capital required to support the expected growth of the business was a pertinent criterion for the present analysis (which the Commission contests), the Commission would make the following observations:
- (a) First, the financial projections existing in 2004 covered only the period 2005-07. Accordingly, even if the capital required to support the growth of business was a relevant criterion for the present analysis (which the Commission contests), it cannot be accepted that it be based on the expected level of activity in 2009 since this level of activity had not even been estimated in 2004.
 - (b) Secondly, the methodology of the Solvency II Directive accompanied by internal modelling for political risks, proposed by Belgium to estimate the capital required, cannot be accepted. This method was absent from the 2004 internal memos which formed the basis for the decision taken by the ONDD Board of Directors on 20 April 2004 to establish Ducroire/Delcredere and endow it with a certain amount of capital since this method was non-existent at the time (it is not due to enter into force until 1 January 2014). It was applied by the ONDD for the first time in 2011 and is still being developed. Consequently, the internal modelling for political risks has not yet been validated by the Belgian insurance regulator, contrary to the requirements of the Solvency II Directive⁽⁴⁶⁾. The use of a methodology which did not exist in 2004, such as Solvency II, for which numerous calculation parameters and an implementation timetable have not yet been finalised (they are still at QIS stage) is inappropriate. To consider that the economic capital required by Ducroire/Delcredere when it was set up in 2005 to continue the activity pre-existing within the ONDD must be determined on the basis of the requirements of the Solvency II Directive which did not even exist at the time and for which the regulators would in any case have planned transitional arrangements, seems excessive. Moreover, to draw any other conclusion would be tantamount to contradicting the validation of the level of capital (solvency margin)⁽⁴⁷⁾ of the commercial account (EUR [45-70] million) by the regulator, who at the time had considered this capital sufficient in the light of the prudential rules in force.
- (115) The ONDD Board of Directors, meeting on 20 April 2004, used another method, i.e. the Cooke ratio, to determine Ducroire/Delcredere's capital requirement, while taking into account the need to provide Ducroire/Delcredere with sufficient credibility in the eyes of its competitors. The ratio used in the calculations is not 8 %, as prescribed by the Basel I rules, but 10 %. Hence, the calculations of capital requirements made in 2004 included a 2 % safety buffer. It should be noted that the capital thus determined for the end of 2004 amounted to EUR 66 million⁽⁴⁸⁾ and is therefore well below the EUR 150 million of subscribed capital.
- (116) As for using the Cooke ratio to determine the capital required, the Commission criticised, in its opening decision, the appropriateness of applying banking rules (such as the Cooke ratio) to credit insurers, given the many differences between the risks assumed by credit insurers and by banks (see recital (90) of the opening decision). In this regard, Belgium has not proved that the Basel rules (Cooke ratio) — which, in law, apply **exclusively** to the banking sector — would in practice be applied by credit insurance bodies or be recommended by rating agencies or insurance supervisory bodies.
- (117) Regarding the application of Article 8 of the 1939 Law on the ONDD, the Belgian authorities have confirmed that this law does not apply to Ducroire/Delcredere. Moreover, this article concerns only the ONDD's own-account activities guaranteed by the State and activities for the account of the State.
- (118) Although Belgium refers to the Standard & Poor's method, which existed at the time to determine the capital requirements of credit insurers, it should be noted that the Belgian authorities have not submitted any capital estimate using this method. Nor was the method used by the ONDD in 2004.

⁽⁴⁶⁾ The Solvency 2 QIS 5 report of the CBFA (March 2011) states on page 17 that very few participants have been capable of providing information on their use and the characteristics of internal models because these models are still at the development stage. Moreover, the CBFA decided not to draw any conclusions at this stage. This suggests that even private insurance companies still find it difficult to produce internal models for calculating the capital required to cover certain risks.

⁽⁴⁷⁾ See pages 11 and 13-16 of Annex 4 to the Belgian authorities' observations of 1 June 2011.

⁽⁴⁸⁾ Calculated according to the method used in 2004 on the basis of projected net commitments for the end of 2004. The data used to perform the calculation are provided on page 16 of Annex 13 to the observations of the Belgian authorities of 1 June 2011.

- (119) In conclusion, even supposing that the capital required to support the expected growth of Ducroire/Delcredere's business was a relevant criterion for the present analysis (a fact contested by the Commission), the Belgian authorities have not provided any fresh evidence to demonstrate conclusively that the capital requirement relating to short-term risks transferred to Ducroire/Delcredere had to be greater than the existing capital on the ONDD commercial account at the end of 2004.
- (120) In this section, the Commission has demonstrated that it was necessary to reject the Belgian authorities' assertion that the allocation of an initial capital of EUR 150 million to Ducroire/Delcredere in 2004 constituted only the transfer of the capital which had already been provided to support the activity relating to short-term risks within the ONDD. The Commission has in fact concluded that the capital which already supported the activity relating to short-term risks within the ONDD before the transfer of this activity to Ducroire/Delcredere amounted to EUR [45-75] million and that therefore additional capital of EUR [75-100] million was allocated to this activity.
- (121) It is now appropriate to examine the application of the two exclusion criteria described in the opening decision. The second exclusion criterion will be dealt with before the first.

Part of the capital already supporting the insurance of marketable risks within the ONDD and which was simply transferred to Ducroire/Delcredere with the corresponding insurance activities (second exclusion criterion detailed in the opening decision)

- (122) In recital (111), the Commission concluded that, within the ONDD, EUR [45-75] million of capital was allocated to the activity relating to short-term risks as at 31 December 2004. To apply the second exclusion criterion, it is necessary, therefore, to estimate, of the EUR [45-75] million allocated to the short-term risk business at the end of 2004, the part of the capital relating to marketable risks ⁽⁴⁹⁾. As described above, these marketable risks were composed exclusively of risks relating to debtors located in the ten States which acceded to the European Union in May 2004.
- (123) As also described above, the commercial account, which consisted of a capital of EUR [45-75] million at the end of 2004, did not contain separate accounts making it possible to identify precisely the capital supporting only the activity relating to marketable risks. It is therefore necessary to estimate the part of the EUR [45-75] million which can reasonably be regarded as supporting the activity relating to marketable risks.
- (124) According to the data submitted to the regulator in 2004, the amounts of net commitments were EUR 141,6 million for risks relating to the ten new Member States and EUR 661,4 million for all short-term export policies at the end of 2004 ⁽⁵⁰⁾. On the basis of a pro rata breakdown of the EUR [45-75] million based on net commitments, EUR [10-25] million can therefore be regarded as constituting the capital linked to risks relating to the ten new Member States before their transfer from the ONDD's commercial account to Ducroire/Delcredere.
- (125) The Commission notes that such a distribution of the capital in accordance with net commitments is in line with the approach followed by the ONDD itself in 2004 ⁽⁵¹⁾.

⁽⁴⁹⁾ As is explained in recital (140), an alternative approach would be to exclude the entire amount of EUR [45-75] million. However, in order to be able to calculate the part of the capital supporting the activity relating to marketable risks within the additional capital of EUR [75-100] million, it is necessary to break down the pre-existing capital between marketable and non-marketable risks. This is due to the fact that the separation of the capital supporting the activity relating to marketable and non-marketable risks is carried out on the entire capital (see Table 2 and recital (135)).

⁽⁵⁰⁾ The figures were obtained by multiplying commitments at the end of 2004 by the retention rate (or 100 % minus the reinsurance cession rate). The figures come from Annex 13 (*Financial Plan 2005, 2006 and 2007 submitted to the CBFA*) to the document submitted by the Belgian authorities on 1 June 2011 (*Observations by Belgium on the Decision by the European Commission of 24 February 2011*).

⁽⁵¹⁾ As previously indicated, the method used by the ONDD in 2004 to estimate the capital needs of Ducroire/Delcredere was based on the amount of net commitments multiplied by a certain percentage (Cooke ratio). When applying this method, the ONDD did not distinguish between net commitments relating to risks connected with debtors located in the ten countries which acceded to the Union in 2004 and net commitments relating to other non-marketable risks. Consequently, the application of the method for the pro rata calculation based on net commitments (after cession) is in line with the approach followed by the ONDD.

- (126) The Commission also observes that the Belgian authorities and the ONDD/Ducroire/Delcredere consistently maintained during the procedure that non-marketable risks required, for a given sum insured, more capital than marketable risks. Therefore, the amount of EUR [10-25] million represents more of a ceiling than a floor. The Commission considers, however, that it is reasonable to retain this figure as it is in line with the approach followed by the ONDD itself in 2004.
- (127) The Commission concludes from this that, of the initial capital amount of EUR 150 million, the amount of EUR [10-25] million can be considered not to constitute an advantage for the marketable risk business as it already supported this activity within the ONDD⁽⁵²⁾. What was involved in this case was simply a change in the legal form of the same economic activity and of the related capital. The transfer to Ducroire/Delcredere of this capital with the activity in question cannot therefore constitute aid.
- (128) By analogy, the same reasoning must be applied to the amount of the capital associated with risks relating to debtors located in Romania and Bulgaria. In 2007, non-marketable risks relating to debtors located in Romania and Bulgaria were recategorised as marketable risks owing to the accession of these States to the European Union. The capital which already supported these risks when they were not marketable cannot therefore constitute a fresh advantage merely on the ground that these risks became marketable subsequently. It is therefore appropriate to exclude this capital also from categorisation as state aid.
- (129) Therefore, the capital relating to non-marketable risks which became marketable is excluded from the analysis of the existence of an advantage. In their comments of 16 May 2012, the Belgian authorities estimated the capital associated with risks relating to debtors located in Romania and Bulgaria at EUR [0-2] million, based on the assumption that these risks were marketable in 2005. On the other hand, they did not provide an estimate of the capital associated with these risks on 31 December 2006. Since the risks in question were indeed not marketable in 2005, the Belgian authorities' estimate of the capital allocated to these risks is likely to be too low. The separate accounts recreated retrospectively by the ONDD as part of this procedure (comments of 16 May 2012), show that the capital allocated to non-marketable risks was EUR [0-5] million less in 2007 than in 2006. This decrease can be explained by the change in the categorisation of risks relating to Romania and Bulgaria (considered marketable risks from 2007), but also by other factors, such as the change in policy with regard to reinsurance. On the basis of all of the information available, it can reasonably be considered that the capital supporting risks relating to Bulgaria and Romania before they became marketable amounted to EUR [0-5] million.
- (130) In the light of the foregoing, the Commission concludes that an amount of EUR [10-25] million already supported marketable risks before 1 January 2005 and that the transfer of this capital with the activities in question cannot therefore constitute an advantage. Similarly, an amount of EUR [0-5] million already supported risks which became marketable on 1 January 2007 (Romania and Bulgaria) before they became marketable.

Part of the capital supporting the non-marketable risk activity (first exclusion criterion described in the opening decision)

- (131) As described above, EUR [45-75] million of capital was already supporting short-term risks before their transfer to the ONDD (see recital (120)). Of this EUR [45-75] million, it has been concluded above that one can reasonably estimate the share of marketable risks at EUR [10-25] million. Consequently, one can reasonably estimate the share of non-marketable risks at EUR [35-50] million (including EUR [0-5] million for risks relating to Bulgaria and Romania which became marketable in 2007).
- (132) For the same reasons as those set out in recital (127), since the transfer of the whole of the EUR [45-75] million (including the share of non-marketable risks estimated at EUR [35-50] million) does not constitute an advantage, the latter is excluded from the analysis of the existence of aid.
- (133) In conclusion, of the initial capital of EUR 150 million allocated to Ducroire/Delcredere, only EUR [75-100] million constitutes additional capital, that is to say fresh capital. Only the granting of this EUR [75-100] million could therefore constitute an advantage (see recital (120)).

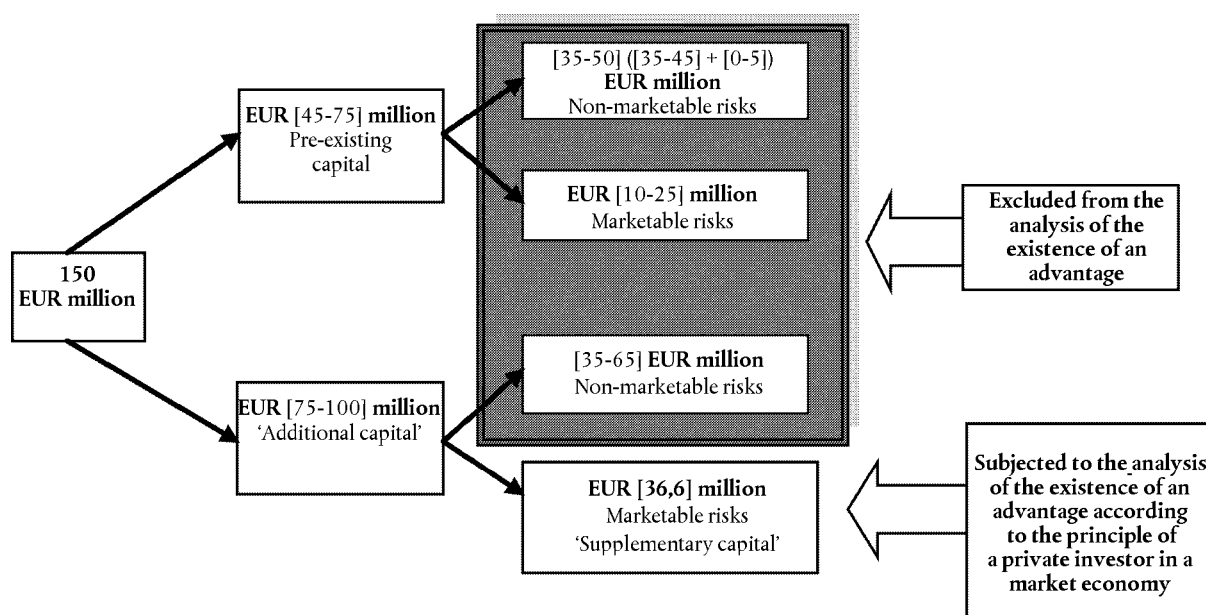
⁽⁵²⁾ As can be seen from Table 1 and recitals (96)-(98), this capital supported only risks relating to debtors established in the ten countries that acceded to the European Union on 1 May 2004 and other risks considered in practice to be non-marketable risks.

- (134) As was pointed out in recital (65) of the opening decision, Member States are free to support the non-marketable risk insurance business, since the Commission considers that there is no market for these risks. There can therefore be no distortion of competition vis-à-vis other insurers. However, the Commission notes that Ducroire/Delcredere did not keep separate accounts for marketable and non-marketable risk activities. **Formally, no capital was allocated to the non-marketable risk activity.** No part of the EUR 150 million of capital was earmarked for the financing of non-marketable risks. Accordingly, a purely formal approach could result in none of the additional capital of EUR [75-100] million being excluded. Such an approach would be all the more justified as the obligation to introduce separate accounts is expressly provided for in point 4.3 of the Communication on export-credit insurance which has been in force since 1998. However, it is clear that a large part of the activities of Ducroire/Delcredere concerns the insurance of non-marketable risks. Ducroire/Delcredere could not have insured these risks without adequate capital. Therefore, in addition to the EUR [45-75] million (including EUR [35-50] million for non-marketable risks), the Commission can agree to exclude also from categorisation as state aid that part of the capital which can reasonably be demonstrated to have been used to support the activity of insuring non-marketable risks.
- (135) In the opening decision, Belgium was invited to develop a method for determining the part of the capital of Ducroire/Delcredere which can be regarded as supporting the marketable risk activity and that supporting the non-marketable risk activity. Following this request from the Commission, the Belgian authorities submitted, for the period 2005-2011, a separate balance sheet and profit and loss account for the marketable risk and the non-marketable risk activity. The balance sheet for non-marketable risks at 31 December 2011 included EUR [70-110] million of capital and that for marketable risks EUR [40-80] million of capital. Although the separation of the accounts is based on certain hypotheses or data which are partially verifiable by means of retrospective reconstruction, the levels of capital for the marketable and the non-marketable risk activities at 31 December 2011 are considered by the Commission to be reasonable.
- (136) The Commission agrees, therefore, to exclude from categorisation as state aid EUR [70-110] million because it supports, de facto, an activity which, according to the Communication on export-credit insurance, is not subject to competition.
- (137) Thus, the capital supporting short-term non-marketable risks rose from EUR [35-50] million at the end of 2004 to EUR [70-110] million at the end of December 2011, i.e. an increase of EUR [35-60] million. Since the amount of EUR [35-50] million of capital linked to the non-marketable risk activity includes the EUR [0-5] million for risks relating to Romania and Bulgaria, recategorised as marketable in 2007, the gross increase in capital supporting non-marketable risks is EUR [35-65] million. In other words, of the additional capital of EUR [75-100] million, EUR [35-65] million supported, de facto, the non-marketable risk activity.

Conclusion on the application of the two exclusion criteria and on the amount of additional capital

- (138) An amount of EUR [70-110] million has been excluded from categorisation as aid because it has been possible to regard this amount as supporting the non-marketable risk activity as at 31 December 2011 (first exclusion criterion). An amount of EUR **[10-25]** million has also been excluded from categorisation as aid because it has been possible to regard it as not constituting an advantage given that it already supported marketable risks before those risks were transferred to Ducroire/Delcredere on 31 December 2004 (second exclusion criterion). Furthermore, an amount of EUR [0-5] million must also be excluded since it already supported risks relating to Bulgaria and Romania before they became marketable on 1 January 2007.
- (139) In conclusion, only EUR 36,6 million of the initial capital allocation of EUR 150 million might constitute an advantage and state aid within the meaning of Article 107(1) of the TFEU.
- (140) Another way of presenting the result of EUR 36,6 million is **to subtract, from the initial capital of EUR 150 million** granted to Ducroire/Delcredere, (1) the EUR [45-75] million in support already provided for short-term risks before their transfer to Ducroire/Delcredere (including the EUR [0-5] million for risks relating to debtors established in Romania and Bulgaria which became marketable on 1 January 2007); and (2) the additional EUR [35-65] million which supported, de facto, non-marketable risks. This leaves us with an amount of **EUR 36,6 million.**

(141) This analysis of the breakdown of the capital is presented in the following table:



(142) In the alternative, the Commission would make the following observations. The Belgian authorities assert that, with the exception of approximately EUR 7 to 13 million (see Table 2), the entire capital of EUR 150 million was implicitly allocated in 2004 to non-marketable risks. On the basis of this first assertion, Belgium maintains that it was only later (in 2007 and 2008) that a part of the capital initially allocated to non-marketable risks was transferred to marketable risks. Belgium maintains, therefore, that only these capital transfers could constitute aid and that the private investor test must be applied to these amounts *at the time of their internal transfer* and not at the time of the initial capital allocation in 2004. This reasoning cannot be accepted.

(143) When Ducroire/Delcredere was set up and in the years that followed, the EUR 150 million of capital was never formally allocated to the activity relating to marketable risks and to that relating to non-marketable risks respectively. This capital could be used freely to support the activity relating to marketable risks or that relating to non-marketable risks (in undefined proportions) depending on market opportunities and the strategic choices of Ducroire/Delcredere. The capital allocation between the activity of marketable risks and that of non-marketable risks was recreated only retroactively within the framework of the present procedure. The 2004 documents, as submitted by the Belgian authorities, did not show any allocation of capital between the different activities. The Commission cannot therefore agree to exclude from the analysis of the existence of aid a part of the EUR [75-100] million of additional capital of Ducroire/Delcredere on the sole basis that at that time this amount might have been used to support the non-marketable risk activity. As already indicated, only that part of the additional capital of EUR [75-100] million which can be shown to have actually supported the non-marketable risk activity can be excluded from the analysis of the existence of aid.

(144) Purely in the alternative, the Commission would observe that, even if one were to accept Belgium's argument that part of the initial capital of Ducroire/Delcredere was allocated to non-marketable risks and therefore could not come within the scope of Article 107(1) of the TFEU, this argument would apply to the amount of EUR 36,36 million only if Belgium managed to demonstrate that the capital allocated to non-marketable risks was higher than EUR [70-110] million. (To calculate the EUR 36,6 million, an amount of EUR [70-110] million supporting the activity relating to non-marketable risks has already been deducted from the EUR 150 million.) It is clear that such an amount was never allocated to non-marketable risks in 2004, as internal documents indicate that EUR 100 million of capital was sufficient to cover all short-term risks (both non-marketable and marketable) until 2007.

Application of the principle of a private investor in a market economy

- (145) According to settled case law, in order to establish that a measure grants an economic advantage, it is necessary to consider whether, in similar circumstances, a market economy investor of a size comparable to that of the undertaking concerned would have made a capital contribution of the same amount ⁽⁵³⁾, particularly in the light of the available information and foreseeable developments at the time of the investment.
- (146) In the present case, an analysis must be carried out as to whether the supplementary capital of EUR 36,6 million granted in 2004 would have been sufficiently profitable to convince a private market economy investor. However, the profitability of this supplementary capital cannot be examined separately from the capital as a whole as the supplementary capital results from an artificial division of the capital of EUR 150 million subscribed in 2004. It is impossible to identify any precise flow of income coming from this EUR 36,6 million. In other words, no profit from a specific activity was attributed to this EUR 36,6 million since separate accounts did not exist. The Commission therefore considers that, in order to apply the private investor test correctly, the expected profitability of the entire capital of EUR 150 million must be verified to see whether it was sufficient. If not, the conclusion will have to be drawn that the EUR 36,6 million constitutes an advantage.
- (147) Purely in the alternative, another possibility would be to apply a pro rata method to the overall profit generated, which would produce the same result.
- (148) Nor does the Commission consider that the profitability of the additional capital of EUR [75-100] million alone should be examined, excluding the EUR [45-75] million allocated to the short-term risk activity before its transfer to Ducroire/Delcredere. The ONDD could in fact have decided to terminate its short-term risk activity and recover the amount of capital allocated to this activity at the time, namely EUR [45-75] million ⁽⁵⁴⁾. This EUR [45-75] million cannot, therefore, be regarded as a sunk cost.
- (149) In the recitals that follow, the Commission will demonstrate that the expected profitability of the EUR 150 million was insufficient to convince a private investor to make such an investment. In the alternative, it will show that, even if one considers that the marketable risk activity benefited virtually from a capital of EUR [45-65] million (EUR 36,6 million plus EUR [10-25] million) and from the expected profits from this specific activity, the expected profitability of this activity was also insufficient.
- (150) The criterion of a private investor in a market economy must be applied *ex ante*. The appropriate time for assessing whether a private investor would have made such a contribution is the time when the capital contribution was made. When assessing the private investor criterion, developments subsequent to the capital contribution must not be taken into account. Moreover, compliance with the principle of a private investor in a market economy can be demonstrated by an *ex ante* business plan on the basis of which the decision to invest was made ⁽⁵⁵⁾. According to recent case law ⁽⁵⁶⁾, a Member State can only invoke objective and verifiable elements taken into account prior to or at the same time as the decision to make an investment. Thus elements may be

⁽⁵³⁾ Judgment in Case C 261/89 *Italy v Commission* [1991] ECR I-4437, paragraph 8; judgment in Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 21; judgment in Case C-42/93 *Spain v Commission* [1994] ECR I-4175, paragraph 13.

⁽⁵⁴⁾ Excluding the limited costs of terminating this activity, such as [...]. The potential scale of such costs is not such as to affect the Commission's conclusions.

⁽⁵⁵⁾ See the Commission Decision 2000/600/EC of 10 November 1999 conditionally approving the aid granted by Italy to the public banks *Banco di Sicilia* and *Sicilcassa* (OJ L 256, 10.10.2000, p. 21, recitals 58–61).

See the Commission decisions of 2005 on the recapitalisation of the German *Landesbanken*, for instance NN 71/2005, *HSH Nordbank* (OJ C 241, 6.10.2006, p. 12) and NN 72/2005, *Bayern LB* (OJ C 242, 7.10.2006, p. 18).

See also the decision in the Shetland Shellfish case (Commission Decision 2006/226/EC, OJ L 81, 18.3.2006, p. 36), in which the Commission rejected two reports produced by the Shetland Islands authorities containing a projected profit-and-loss account, a projected balance sheet and a projected cash-flow statement for 2000, 2001 and 2002. The United Kingdom contended that the studies were *ex ante* and that the assumptions on which they were based were 'conservative and prudent', but the Commission concluded that they would have been considered insufficient by a market economy investor despite the fact that relatively small amounts were involved.

⁽⁵⁶⁾ Judgment in Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraphs 82-86 and 105.

required that show that this decision is based on comparable economic assessments to those that a rational private investor in a comparable situation would have made before such an investment in order to determine its future profitability. However, it is not enough to rely on economic assessments made after the advantage was conferred, on a retrospective finding that the investment made was actually profitable or on subsequent justifications of the course of action actually chosen to conclude that a Member State had decided on the investment in the same way as a private shareholder in a market economy.

- (151) Since no private investors took part in the measure at issue and Ducroire/Delcredere is not listed on the stock exchange, the parameter whose validity must be assessed is the expected profitability of the investment as could be reckoned on from the available information and the developments that were foreseeable at the time (as featured, in principle, in the business plan drawn up by the ONDD in 2004). According to the case law of the Court of Justice⁽⁵⁷⁾ and the Commission's decision-making practice⁽⁵⁸⁾, the fact that a capital contribution is allegedly necessary for the undertaking to continue its operations or to ensure the adequate capitalisation of the business, in accordance with prudential rules or an estimation of the risks involved, is not sufficient grounds on which to consider that the market economy investor principle has been satisfied. A private investor operating under normal market conditions would make such a capital contribution only if the expected profitability was sufficient, at the time of the contribution, based on the available information and the developments that were foreseeable at that particular time⁽⁵⁹⁾. The Commission would therefore point out that Belgium's arguments to justify its assertion that a capital of EUR 150 million was 'necessary' for economic reasons and/or because of prudential rules cannot be relied on to demonstrate that this investment was sufficiently profitable for a market investor.
- (152) The Belgian authorities based their analysis of profitability on the business plan of 28 September 2004. Ducroire/Delcredere was in fact incorporated on 23 September 2004. However, it did not actually start operating until 1 January 2005, given that the short-term risk portfolio continued to belong to the ONDD until 31 December 2004, the date on which it was transferred. It can therefore be considered that, until shortly before that date, the ONDD could have gone back on its investment decision by not transferring the risks in question and by liquidating the newly created legal entity. It is therefore acceptable to take into account the ONDD's business plan of 28 September 2004 as requested by the Belgian authorities.
- (153) It emerges from the notes and minutes of 2004 that the ONDD's decision to endow Ducroire/Delcredere with a capital of EUR 150 million to Ducroire was essentially due to the ONDD's wish to endow its subsidiary with 'sufficient' initial capital to enable it to develop its business and [...] — '*a paid-up capital of EUR 100 million is sufficient to carry on the short-term exporters' global policies business until 2007 but this should be reviewed after that date*'⁽⁶⁰⁾, however it was not actually and precisely demonstrated that the expected future profitability was satisfactory from a private investor's point of view. In terms of expected profitability analysis, a positive result anticipated for all activities in the first three years seems to have been enough to convince the ONDD to make the investment.
- (154) According to the projections in scenario B of the business plan of 28 September 2004, the ONDD was counting on an ROC for all activities of 1,3 % to 1,9 % for 2005, 2006 and 2007 in line with the '6 % growth process' scenario in the business plan (the ROC before the equalisation provision was 2,8-4,3 %) (see Table 4). It must be explained that this profitability is based on a capital of EUR 100 million and does not take account of the EUR 50 million not paid up, which makes the profitability result more favourable than it is in reality. The expected profitability rate in the financial projections of 20 April 2004 was not higher (see Table 3).
- (155) In the light of the above, it seems that the expected profitability of the future Ducroire/Delcredere was insufficient to convince a private investor in a market economy to make such an investment. The expected profitability for

⁽⁵⁷⁾ See, for instance, the *West LB* judgment in Joined Cases T-228/99 and T-223/99, *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435, paragraph 255.

⁽⁵⁸⁾ See, for instance, the Commission Decision concerning the restructuring of *Dexia* (decision of 26 February 2010 in Case C 9/2009, OJ L 274, 19.10.2010, p. 54, recital 127) in which the Commission rejected the argument put forward by the Member States concerned whereby the principle of a private investor in a market economy should be applied less strictly since the authorities that had recapitalised *Dexia* were the bank's 'historical' shareholders.

⁽⁵⁹⁾ See the judgment in Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 76.

⁽⁶⁰⁾ See page 28 of the strategy paper of 28 September 2004, '*Strategic guidelines for the ONDD and its SA*', presented to the ONDD board of directors, in Annex 10 to the document submitted by the Belgian authorities on 1 June 2011: 'Observations by Belgium on the Decision by the European Commission of 24 February 2011'.

the first three years was less than the risk-free rate (long-term Belgian government bonds). The average rate for long-term Belgian government bonds in 2004 was 4,15 % ⁽⁶¹⁾. Even taking the equalisation provision into account, the expected profitability rate reached only the risk-free rate.

- (156) A private investor in a market economy would not accept such a low profitability during the first few years unless he could reasonably count on being compensated later by profits significantly higher than the average for the industry, so that the total return on investment (after applying an appropriate discount rate) would be sufficient ⁽⁶²⁾.
- (157) There was no serious study in 2004 that could lead one to consider that this low initial profitability would be compensated by an increased profitability in later years. The Commission would also point out that the financial projections available at the time showed that performance remained at the same level between 2005 and 2007, or at least that there was only sluggish growth (see Table 4), therefore there was nothing to indicate that results would improve rapidly in the years beyond 2007. In this connection, it must be noted that the conversion of Ducroire/Delcredere into a subsidiary cannot be regarded as being the same thing as a start-up since it was envisaged at the time that it would continue with the activities previously carried on by the parent company, and the assets and liabilities were simply transferred from the ONDD to Ducroire/Delcredere for this purpose. This conclusion is also based on the way in which financial projections were produced at the time. It emerges that the ONDD, making financial projections for the future Ducroire/Delcredere in 2004, based them on the past performance of the activity in question (short-term risks, including marketable risks) as carried on by the ONDD. Assumptions regarding premiums and costs were also based mainly on historical financial data from the previous five years, apart from a few adjustments linked to changes in market circumstances, such as a reduction applied to premiums for risks that became marketable in 2004 following the accession of ten new Member States to the European Union.
- (158) Moreover, it is clear from internal memos that it was envisaged that the entire paid-up capital of EUR 100 million should be absorbed mainly through the gradual growth until the end of 2007 (see recital (61)) of the activities performed by the ONDD in the past, in other words organic growth of existing activities (no expansion into other, more profitable activities was planned in 2004).
- (159) No plans were drawn up at the time for the use of the subscribed capital that had not been paid up (EUR 50 million), hence no projection was produced on the expected profitability of this capital. Moreover, neither the acquisition of KUP nor a broader acquisition strategy was taken into account when transferring the capital to Ducroire/Delcredere.
- (160) The projections for the period 2005-2014 were produced only *ex post*, after the Commission had launched the formal investigation procedure. The only *ex ante* financial projections produced by the ONDD were confined to a three-year period (the first three years of operation of the future Ducroire/Delcredere, namely 2005, 2006 and 2007), a relatively short period from the point of view of a private investor.
- (161) The Commission concludes that the expected profitability of the capital was insufficient, and that therefore the EUR 36,6 million constitutes an advantage for Ducroire/Delcredere's marketable risk activity.
- (162) In the alternative, the Commission will analyse the expected profitability of the marketable risk activity in the recitals that follow.
- (163) The Commission would point out that, according to Annex 9 to the strategy paper of 28 September 2004, the financial projections drawn up by the ONDD envisaged a **negative result for the marketable risk activity (in other words, for the marketable risk countries according to the Communication on export-credit**

⁽⁶¹⁾ Source: Eurostat.

⁽⁶²⁾ In its judgment in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission* [1999] ECR II-17, paragraphs 116 to 121, the Court of First Instance stated that, while it was true that a parent company could bear the losses of one of its subsidiaries, there should be sufficient probability of a return to profitability by the subsidiary. A private investor could not reasonably allow himself, after years of continuous losses, to contribute additional capital if this proved to be costlier than selling the subsidiary.

See also the *Banco di Sicilia* and *Sicilcassa* decision cited above, recitals 63 to 66.

insurance)⁽⁶³⁾ for the entire period projected from 2005 to 2007, so that the non-marketable risk activity was subsidising the marketable risk activity. It can be deduced, therefore, that the estimated profitability of marketable risks was lower than the estimation for all activities, which in itself was insufficient for a private investor. The Commission therefore concludes that, even if the expected profitability of the marketable risk activity is analysed separately on the basis of the financial projections existing in 2004⁽⁶⁴⁾, the conclusion would still be that the expected profitability was negative, and thus obviously insufficient to convince a private investor to proceed with such an investment.

- (164) The Belgian authorities point out, for the reasons stated in recital (74), that the September 2004 projections must not be taken into account when analysing the profitability of marketable and non-marketable activities because 'they produce absurd results'. The Belgian authorities say that the method developed in 2011 to separate marketable and non-marketable risks is a better reflection of the reasoning that a private investor might have followed when taking a decision in 2004. They seem to be saying, therefore, **retroactively**, that the 2004 projections for marketable risks⁽⁶⁵⁾ were based on wrong assumptions. In fact, the forecast claims experience was high but constant, whereas the forecast level of premiums (intended to remunerate the risks incurred) was very low. The result was a loss ratio of 94 %. The Commission cannot accept a retrospective modification of the projected profitability of a business activity (see recital (150)). In the alternative, the Commission would point out that this argument by the Belgian authorities is tantamount to confirming that no serious separate analysis had been carried out of the expected profitability of marketable risks and that, therefore, in order to correctly apply the private investor test, the profitability of the entire capital granted to Ducroire/Delcredere should be examined.
- (165) The Commission observes, purely in the alternative, that, even if account were taken of the projections for the result of the marketable risk activity as reviewed and submitted by the Belgian authorities in 2011⁽⁶⁶⁾ — which the Commission does not accept since they did not exist at the time of the investment — and if this result were divided by the capital relating to marketable risks as estimated by the Commission (in other words EUR [45-65] million), the estimated ROC for 2005-07 would still be below the risk-free rate.
- (166) Contrary to the ONDD's calculations of profitability, the estimation of expected profitability, as indicated in the previous recital, is based on the entire estimated capital for marketable risks, including **the non-paid-up part of the capital**. The Belgian authorities' argument (see recital (79)) whereby the part of the capital subscribed in 2004 but paid up in 2009 should not be taken into account in the estimated profitability calculations before 2009, cannot be accepted. While this capital was not paid up in 2004, it could in fact be called upon at any time since it had been subscribed when Ducroire/Delcredere was set up. A private investor in a market economy would demand remuneration for the risks incurred in relation to this investment, since he could lose part or all of his investment in the event of bankruptcy. Thus the calculations produced by the Belgian authorities cannot be accepted.
- (167) However, it must be recognised that this investor can invest the amount of the non-paid-up capital corresponding to his investment, so long as this capital is not called in, in risk-free investments that can be cashed-in in the short or medium term, thereby benefiting from the profitability rate applicable to this type of investment. As a result, such an investor would be able to rely on remuneration for a non-paid-up capital investment corresponding only to the risk premium of the company in which he is investing (in other words, the difference between the expected profitability rate of a capital investment in a similar undertaking and the profitability rate of risk-free investments that can be cashed-in in the short or medium term)⁽⁶⁷⁾.

⁽⁶³⁾ See footnote 24.

⁽⁶⁴⁾ The minutes of the meeting of the ONDD Board of Directors of 20 April 2004 state that the respective contributions of each sector of activity to the overall result had been requested by the Board (see p. 4 of Annex 9 to the submission of 1 June 2011).

⁽⁶⁵⁾ Specifically the risks relating to the ten accession countries.

⁽⁶⁶⁾ For marketable risks, the premium rate was revised upwards (from an initial 0,2 % to 0,3 % of sums insured), thus raising the company's income from insurance by one third. The projections concerning claims experience were, for their part, revised downwards.

⁽⁶⁷⁾ A similar division of remuneration can be found in other Commission decisions concerning state aid. See, for instance, the Commission decision of 11 February 2009 in Case NN 3/2009 'Modifications to the Public support measures to JSC Parex Banka', recitals 36-40, OJ C 147, 27.6.2009, p. 2. The risk premium depends on the investment risk.

- (168) Consequently, the expected profitability of a partly paid-up capital investment must be estimated by taking account of the entire capital subscribed, adjusting the result of the expected return rate for the capital that is not paid up. The Commission has simulated various scenarios, including the most favourable case for expected profitability, namely that which consists in accepting that, of the EUR [45-65] million supporting the marketable risk activity, only EUR [10-25] million was paid up in 2004 (in other words, the capital already supporting marketable risks in the ONDD), and regarding the remaining EUR 36,6 million as capital that was not paid-up, which therefore required only a risk premium. In carrying out this simulation, the income corresponding to the return on a risk-free medium-term investment of EUR 36,6 million was added to the expected profitability of marketable activities. More precisely, the part of the capital not paid up multiplied by the expected profitability rate at the time for risk-free medium-term liquid investments⁽⁶⁸⁾ was added to the provisional result for marketable activities⁽⁶⁹⁾. Next, this sum is divided by the average capital supporting the marketable risk activity. The result is the expected return on average equity (ROAE), which is estimated at approximately 4 % for the investment in 2005-07. The expected profitability calculated in this way is scarcely equal to the average rate for long-term Belgian government bonds in 2004 (see recital (155)).
- (169) Even using an investment rate of 3,5 %, as suggested by the Belgian authorities (see recital (80)), the expected profitability would not change significantly and would not achieve the estimated capital cost calculated by Belgium itself.
- (170) The estimated profitability (as referred to in recital (168)) takes account of contributions to the equalisation provision, contrary to what is advocated by the Belgian authorities. Since the constitution of this provision, required by the Belgian prudential authorities, is intended to ensure a balance in results over time and to cover future potential losses resulting from future activities, it is more appropriate to take account of it when calculating profitability. The Commission's approach is in line with the accounting approach, where such a provision is regarded as a cost that reduces profit. Even if the provision was not taken into account (as a cost when estimating profit), the expected profitability would not equal the capital cost estimated by the Belgian authorities themselves (in this Decision, the Commission does not comment on the validity of the Belgian authorities' estimate of the capital cost since the reasoning in this Decision is not based on that figure).
- (171) It seems, therefore, that, even when the elements put forward by the Belgian authorities are applied (elements which the Commission regards as wrong), the expected profitability of the marketable risk activity was insufficient to convince a private investor in a market economy to proceed with such an investment.
- (172) In the alternative, as regards the method *advocated* by the Belgian authorities in their reply to the Commission's request for information in December 2007, in order to estimate profitability or the ROC ratio, the Commission would point out that this ratio was not used in the ONDD's *ex ante* financial projections (business plan). Moreover, such a ratio highlights the technical income on turnover, does not take account of the capital invested and does not state the profitability in relation to it. Nor does it take account of the result of purely financial activities, which, however, forms part of the accounting profit that can be distributed to shareholders. A private equity investor (such as a shareholder) would not therefore have used this rate only (which does not indicate the return on equity or on invested amounts) in order to assess the profitability of the investment he was considering.
- (173) In conclusion, the EUR 36,6 million constitutes an advantage which the ONDD granted to Ducroire/Delcredere in the form of capital which it could not have obtained on the market on the same conditions.

V.1.2. Imputability and state resources

- (174) The granting of capital to Ducroire/Delcredere is a decision of the ONDD imputable to the Belgian State since the ONDD is an '*autonomous public institution*' under Belgian public law, incorporated by an Organic Law of 31 August 1939. The members of its Board of Directors are appointed (by decree decided by the Belgian Council

⁽⁶⁸⁾ After adjusting the financial result upwards because the estimated paid-up capital relating to marketable risks is slightly higher than that estimated by the Belgian authorities (EUR [10-25] million compared with EUR 9,8 million respectively).

⁽⁶⁹⁾ Allowing for the benefit of the doubt, it is considered that the profitability rate expected at the time for risk-free medium-term liquid investments corresponded to the average profitability rates in 2004, in the secondary market, of government bonds with four to six years remaining to maturity, in other words 3,5 %.
See: <http://www.nbb.be/belgostat/GlobalDispatcher?TARGET=/TreeviewLinker&rowID=2685&prop=treeview&action=open&Lang=F#2685>.

of Ministers) and can be dismissed by the King of the Belgians (who also sets their salaries and allowances) on a proposal, in most cases, from the supervising Federal Ministers and Regional Ministers from the three regions of Belgium ⁽⁷⁰⁾. Known as 'ministerial delegates', the members of the Board of Directors appointed on a proposal from the supervising ministers can, during the deliberations of the Board, suspend decisions they deem contrary to the interests of the State. In this case, the ministerial delegate who suspended the decision must report to the minister who entrusted him with his mandate as Board member. Lastly, the ONDD benefits from a Belgian State guarantee and can act on behalf of the Belgian State.

- (175) The Belgian State, represented on the Board of Directors of the ONDD and informed of the decisions taken by it, was therefore directly involved in the ONDD's allocation of capital to Ducroire/Delcredere. The Belgian authorities have not contested the imputability to the Belgian State of the capital allocation measure.
- (176) The allocation of capital to Ducroire/Delcredere by the ONDD, a public body whose conduct is imputable to the Belgian State, therefore constitutes a state resource within the meaning of Article 107 of the TFEU.

V.1.3. Selectivity

- (177) The capital allocation made in 2004 is selective inasmuch as it benefits Ducroire/Delcredere directly and exclusively.

V.1.4. Distortion of competition

- (178) Once the ONDD made the capital allocation in question without expecting sufficient profitability, Ducroire/Delcredere benefited from a competitive advantage compared with private credit insurance organisations whose shareholders expect a return on their investment of the same level as the return they could obtain from comparable investments.
- (179) In particular, Ducroire/Delcredere would have been unable to obtain such capital on the market since the return on the investment was insufficient. This means that without the capital provided by the State via the ONDD, Ducroire/Delcredere would have been unable to extend its activities on the market as it did.
- (180) In this respect, point 3.2 of the Communication on export-credit insurance states that the provision of capital by the State to certain undertakings, which constitutes state aid if the State is not acting in accordance with the market economy investor principle, distorts competition.
- (181) According to the case law of the Court of Justice, an improvement in the competitive position of an undertaking as a result of state aid generally constitutes proof that competition with other undertakings which have not received similar aid is being distorted ⁽⁷¹⁾.
- (182) The support given by the State to the ONDD in the form of a capital contribution for marketable risks distorts or threatens to distort competition.

V.1.5. Effect on trade between Member States

- (183) Ducroire/Delcredere is in competition with other European Union undertakings in the credit insurance market. The same applied to the ONDD as far as marketable risks were concerned before it transferred its credit insurance business for short-term risks, including marketable risks, to Ducroire/Delcredere.
- (184) Moreover, the ONDD and Ducroire/Delcredere operate in the other Member States, mainly as a result of the acquisition of KUP, the commercial arm of the Czech national export-credit insurance agency.

⁽⁷⁰⁾ Brussels-Capital Region, Flemish Region and Walloon Region.

⁽⁷¹⁾ Judgment of the Court of Justice in Case C-730/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12.

- (185) Point 3.2 of the Communication on export-credit insurance states that, when the State gives a guarantee or capital to an export credit insurance organisation, in relation to marketable risks, without behaving as a private investor would in a market economy, that guarantee or capital constitutes aid which distorts intra-Community trade.
- (186) According to settled case law, there is an effect on trade between Member States where the undertaking in receipt of aid carries on its activities in a sector which is open to competition and in which there is trade between Member States ⁽⁷²⁾.
- (187) The fact that, at the start of this procedure, a competitor from a Member State other than Belgium complained about the distortion of competition as a result of Ducroire/Delcredere's actions in a third Member State (the Czech Republic) simply confirms that Ducroire/Delcredere is active in a sector subject to trade between Member States.
- (188) Trade between Member States is therefore sufficiently affected by Measure 3.

V.2. THE ILLEGALITY OF THE POTENTIAL AID

- (189) In the light of the above, Measure 3 constitutes aid.
- (190) The Commission considers that this aid is new aid which was not notified to it beforehand and is, therefore, illegal.
- (191) The ONDD subscribed the capital in question in September 2004 and the short-term risk activity (including marketable risks) was transferred to Ducroire/Delcredere on 1 January 2005.
- (192) This measure:
- is therefore later than the date of 17 September 1998, after which Belgium is required not to grant new aid as a result of its acceptance of the Communication on export-credit insurance, and
 - does not qualify for the limitation period set out in Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty since it was adopted less than ten years ago.
- (193) The part of the capital granted by the ONDD to Ducroire/Delcredere (EUR 36,6 million) which was not notified to the Commission beforehand, thus constitutes illegal new aid from the beginning.

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

- (194) The Commission has verified the compatibility of Measure 3 in accordance with the provisions in the Communication on export-credit insurance applicable at the time. The new Communication to Member States concerning the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (hereinafter: 'the new Communication on export-credit insurance'), published on 19 December 2012, applies from 1 January 2013.
- (195) In principle, according to points 3.2 and 4.1 of the Communication on export-credit insurance, the exemptions set out in the Treaty provisions on state aid do not apply to aid granted for the insurance of marketable risks. This aid clearly distorts competition between insurers, but above all leads to *'variations in the insurance cover available for marketable risks in different Member States, thereby distorting competition between companies in Member States and having secondary effects on intra-Community trade regardless of whether intra-Community exports outside the*

⁽⁷²⁾ Judgment of the Court of Justice in Case C-102/87 *France v Commission* [1988] ECR I-4067, paragraph 19.

Community are concerned. The exceptions provided for in Article 92 of the Treaty do not apply to aid for the insurance of marketable risks. The distorting effects of such aid in the Community outweigh any possible national or Community interest in supporting exports' ⁽⁷³⁾. In other words, this aid is not in principle eligible for any of the exemptions set out in Article 107(3) of the TFEU, in particular that provided for in Article 107(3)(c), because it constitutes too great a distortion of competition in the internal market.

(196) Moreover, the aid in question does not meet the conditions of eligibility for one or more of the exemptions provided for in Article 107(3) of the TFEU. In particular, as stated in the opening decision, the aid in question cannot constitute rescue or restructuring aid according to the Community guidelines on state aid for rescuing and restructuring firms in difficulty ⁽⁷⁴⁾, essentially for the following reasons:

1) The Belgian authorities have not proved that Ducroire/Delcredere was eligible for such aid, for instance that it was in difficulty within the meaning of the guidelines on state aid for rescuing and restructuring firms in difficulty. It should also be noted that, according to point 12 of those guidelines, a newly created firm is not eligible for rescue or restructuring aid.

2) The aid was not confined to the minimum necessary. In particular, the capital allocation to Ducroire/Delcredere was sufficiently large to enable it to carry out acquisitions. The business plan presented in 2004 in the form of internal memos did not envisage an own contribution by the beneficiary.

3) The business plan for Ducroire/Delcredere did not contain any measures to limit distortions of competition.

(197) There is nothing in the provisions of the new Communication on export-credit insurance that would change the Commission's assessment.

(198) Consequently, the measure at issue cannot be declared compatible with the internal market pursuant to Article 107(3) of the TFEU.

V.4. THE OBLIGATION TO ESTABLISH AND MAINTAIN A SEPARATE ADMINISTRATION AND SEPARATE ACCOUNTS

(199) According to point 4.3 of the Communication on export-credit insurance, where a non-marketable risk activity receives state support, the company will have to keep a separate administration and separate accounts for its insurance of marketable risks and non-marketable risks so as to ensure that the capital allocated to the non-marketable risk activity does not benefit the marketable risk activity, thereby distorting competition.

(200) According to the Belgian authorities, Ducroire/Delcredere has been engaged in the short-term risk business since 1 January 2005, based on the transfer of an existing business with its existing capital (without an additional capital allocation). In the alternative, Belgium considers that the capital was granted on terms acceptable to a private investor. Since, according to the Belgian authorities, Ducroire/Delcredere does not receive state support — even for the non-marketable risk activity it operates — it is, according to those authorities, not necessary to establish separate accounts.

(201) In section V.1.1.2 it was concluded that the capital allocated to the transferred activity amounted to EUR [45-75] million and that there was therefore an additional capital of EUR [75-100] million, of which EUR [35-65] million de facto benefited the non-marketable risk activity. For this reason, this amount of EUR [35-65] million was excluded from classification as aid. The Belgian authorities' argument that the non-marketable risk activity does not receive state support must therefore be rejected since the existence of additional capital which partly benefited

⁽⁷³⁾ See the second and third sentences of the third paragraph of point 3.2. of the Communication on export-credit insurance. See also point 4.1 of the Communication on export-credit insurance which states that 'State aid of the types listed in paragraph 3.1. ... would therefore be ineligible for exemption under the State aid rules of the Treaty'.

⁽⁷⁴⁾ OJ C 244, 1.10.2004, p. 2.

the non-marketable risk activity has been proven. In addition, the 2004 financial projections for Ducroire/Delcredere's entire business envisaged an expected profitability lower than the risk-free rate at the time ⁽⁷⁵⁾. The expected profitability was therefore insufficient to satisfy the requirements of a private investor in a market economy. It can therefore be concluded that the non-marketable risk activity has continued to benefit from state support.

- (202) Since the non-marketable risk activity has received and is receiving state support, Ducroire/Delcredere should from its establishment have complied with point 4.3 of the Communication on export-credit insurance imposing a separate administration and separate accounts making it possible to distinguish between the activities relating to non-marketable risks and those relating to marketable risks, and this as long as it carries on its activity relating to marketable risks. This obligation is maintained in the provisions of the new Communication on export-credit insurance (see point 15 of the new Communication on export-credit insurance).
- (203) Ducroire/Delcredere was and therefore still is bound by this obligation. A separate administration and separate accounts for the non-marketable and the marketable risk activities must therefore be introduced immediately. Otherwise, the support amounting to EUR [35-65] million granted to the non-marketable risk activity would no longer escape from classification as aid. The conclusion of this Decision that this amount of EUR [35-65] million supports the non-marketable risk activity is based on certain assumptions that are in some cases impossible to verify in a context of retrospective reconstruction of separate accounts (there is no formal separation of accounts within Ducroire/Delcredere). The Commission will no longer accept such a retrospective reconstruction if it must again examine the use of Ducroire/Delcredere's capital in future. The purpose of the obligation to keep a separate administration and separate accounts is precisely to avoid having to resort to such retrospective reconstruction which is, by necessity, based on a number of assumptions that are partially unverifiable.
- (204) This Decision and in particular the calculation of the amount of EUR 36,6 million are based on separate accounts (balance sheet and profit and loss accounts) for marketable and non-marketable risks at 31 December 2011 as submitted by the Belgian authorities in May 2012. It would not be acceptable, therefore, if the introduction of a separate administration and separate accounts were to be based on assumptions and methods other than those used to determine the amounts submitted in the context of this procedure. In particular, it would not be acceptable to allocate less capital to the non-marketable risk activity (and thus more capital to the marketable risk activity) than that set out in the separate balance sheet at 31 December 2011 submitted by the Belgian authorities in May 2012.
- (205) In the alternative, the Commission would emphasise that the absence of separate accounts since the establishment of Ducroire/Delcredere has made the examination of Measure 3 considerably more complicated and forced the Commission to conduct its analysis on the basis of certain assumptions. Given that the obligation to keep separate accounts lay with Ducroire/Delcredere, it can hardly reproach the Commission for having made certain assumptions or having developed a complex approach as part of its analysis. In the absence of such a complex approach, the Commission could simply have considered that the entire EUR [75-100] million constituted an advantage within the meaning of Article 107(1) of the TFEU.

V.5. THE OBLIGATION THAT THE NON-MARKETABLE ACTIVITY SHOULD NOT CONTRIBUTE TO REPAYING THE AID

- (206) In this Decision, the Commission has excluded from qualification as aid that part of the capital which de facto benefits the non-marketable risk activity, even though this part of the capital constituted support that did not meet the requirements of a private investor. The amount of the incompatible aid therefore does not include the support for non-marketable activities. Following the logic of this Decision, the repayment of the incompatible aid should therefore be financed strictly by the marketable activity and the related capital, as this is the only way of restoring the competitive situation in the market for marketable risks that existed before the incompatible aid was granted. As indicated above, this recovery must be made on the basis of separate accounts in a manner consistent with the comments by the Belgian authorities of May 2012.

⁽⁷⁵⁾ Even if the non-marketable risk activity is considered in isolation, the profitability would still be well below the capital cost estimated by the Belgian authorities themselves.

VI. CONCLUSIONS

(207) The Commission finds that, of the three measures which were the subject of the formal investigation procedure, Measures 1 and 2 (the state guarantee and the potential internal transfers of resources to marketable risks within the ONDD) do not constitute state aid within the meaning of Article 107(1) of the TFEU. However, the analysis of Measure 3 makes it possible to conclude as to the existence of state aid within the meaning of Article 107(1) of the TFEU amounting to EUR 36,6 million. Since the ONDD (for the account of the Belgian State) illegally implemented Measure 3 in breach of Article 108(3) of the TFEU and since this aid is incompatible with the internal market, it must be recovered. The repayment of this aid must be financed by Ducroire/Delcredere's marketable risk activity,

HAS ADOPTED THIS DECISION:

Article 1

Since the guarantee granted by Belgium to the ONDD did not benefit the ONDD's marketable risk activity, it does not constitute aid.

Article 2

Any internal transfers of resources to the marketable risk activity within the ONDD, the existence of which has not been proved, do not constitute aid.

Article 3

The initial capital allocation granted by the ONDD to Ducroire/Delcredere amounting to EUR 113,4 million does not constitute aid.

Article 4

The initial capital allocation granted by the ONDD to Ducroire/Delcredere amounting to EUR 36,6 million, implemented on 23 September 2004 in breach of Article 108(3) of the Treaty on the Functioning of the European Union, constitutes illegal aid incompatible with the internal market within the meaning of that Treaty.

Article 5

1. Belgium, through the ONDD, shall recover from Ducroire/Delcredere the aid referred to in Article 4. Belgium shall provide detailed evidence — including certification issued by an independent firm auditing these accounts — that the repayment has been financed exclusively by Ducroire/Delcredere's marketable risk activity.
2. The sums to be recovered shall include the interest which has accrued between the date on which they were made available to Ducroire/Delcredere (1 January 2005) and the date on which they are actually recovered.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁷⁶⁾.
4. Recovery of the aid shall be immediate and effective.

Article 6

A separate administration and separate accounts must be introduced without delay for the non-marketable risk activity and the marketable risk activity, and maintained for as long as the non-marketable risk activity receives state support. The separation of the accounts must take account of the financial data furnished by the Belgian authorities in May 2012. In particular, the resulting breakdown of the capital must be done in the same way as in May 2012.

⁽⁷⁶⁾ OJ L 140, 30.4.2004, p. 1.

Article 7

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

- (a) the total amount (principal and interest) of the aid to be recovered from Ducroire/Delcredere;
- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) the documents proving that Ducroire/Delcredere has been served with formal notice to repay the aid.

2. Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 4 has been completed. It shall immediately submit, on simple request by the Commission, any information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information on the amounts of aid and interest already recovered from Ducroire/Delcredere.

Article 8

Belgium shall take the measures necessary to implement this Decision within four months following the date of its notification.

Article 9

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 20 March 2013.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

INFORMATION ON AMOUNTS RECEIVED, TO BE RECOVERED AND ALREADY RECOVERED

Identity of the beneficiary	Total amount of aid received under the scheme ⁽¹⁾	Total amount of aid to be recovered ⁽¹⁾ (Principal)	Total amount already repaid ⁽¹⁾	
			Principal	Interest

⁽¹⁾ Million national currency