

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 12 May 2009

on State aid which Germany proposes to grant towards the restructuring of WestLB AG (C 43/08
(ex N 390/08))

(notified under document C(2009) 3900)

(Only the German text is authentic)

(Text with EEA relevance)

(2009/971/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

(1) By Decision of 30 April 2008 ⁽²⁾ the Commission found that the risk shield provided to WestLB AG on 8 February 2008 by its owners, namely Westfälisch-Lippischer Sparkassen- und Giroverband, Rheinischer Sparkassen- und Giroverband, and — directly and indirectly, through NRW. BANK — the Land of North Rhine-Westphalia, Landschaftsverband Westfalen Lippe, and Landschaftsverband Rheinland (the owners), constituted State aid. But the Commission took the view that the aid was rescue aid

compatible with the common market, and authorised it in accordance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty (the rescue and restructuring guidelines) ⁽³⁾ for six months, or, in the event that a restructuring plan was submitted, until such time as a final decision was taken on the restructuring plan.

(2) On 8 August 2008 Germany notified to the Commission a restructuring aid measure with a restructuring plan for WestLB. The notification included a commitment to submit by 31 December 2008 'concrete steps' for a change in the ownership structure.

(3) By letter dated 1 October 2008, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure.

(4) The Commission decision to initiate the formal investigation procedure (the opening decision) was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission there invited any other interested parties to submit their comments on the measure. The Commission received no comments from other interested parties.

(5) On 24 November 2008 Germany submitted its comments on the initiation of the formal investigation procedure.

⁽¹⁾ OJ C 322, 17.12.2008, p. 16.

⁽²⁾ OJ C 189, 26.7.2008, p. 3.

⁽³⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁴⁾ See footnote 1.

- (6) On 16 December 2008 WestLB requested an extension of the deadline for the submission of concrete steps for a change in the ownership structure. The Commission approved the extension of the deadline until 31 March 2009.
- (7) On 27 February 2009 Germany submitted an interim report covering progress up to the end of February 2009.
- (8) From 6 to 8 April 2009, discussions on the restructuring took place between representatives of the Commission, Germany, the owners and WestLB.
- (9) On 17 April 2009 Germany submitted further information on the restructuring. On 30 April 2009 Germany submitted an amended restructuring plan.
- (10) On 12 May 2009 the Commission adopted a Decision. That Decision contained some minor errors, though they did not affect its substance or its reasoning. The present Decision is being adopted for the sake of correctness, and replaces the Decision of 12 May 2009 (C(2009) 3900).
- (14) WestLB is one of the German public banks which until 18 July 2005 still enjoyed the unlimited state guarantees known as *Anstaltslast* and *Gewährträgerhaftung*, which were abolished in accordance with a series of understandings between Germany and the Commission ⁽⁵⁾.
- (15) In 2002, following the abolition of *Anstaltslast* and *Gewährträgerhaftung*, the former WestLB was split up into NRW. BANK and WestLB. Between 2003 and 2005 WestLB was restructured; it received various capital injections between 2002 and 2005. In a Decision it adopted on 18 July 2007, the Commission found that these capital injections did not constitute State aid ⁽⁶⁾.

2.2. WestLB's financial difficulties

2. DESCRIPTION OF THE AID SCHEME

2.1. The beneficiary

- (11) The beneficiary is WestLB. WestLB is a European commercial bank based in North Rhine Westphalia. With total assets of EUR 286,5 billion at 31 December 2007, WestLB is a major German financial services provider. It is the central institution for the savings banks in North Rhine-Westphalia and Brandenburg, and as a commercial bank operating internationally it acts as their link to the global financial markets. Working in close partnership with the savings banks, WestLB offers the full range of products and services of a universal bank, focusing on lending, structured finance, capital market and private equity products, asset management, transaction services and real estate finance. On 30 December 2007 WestLB employed 6 147 staff.
- (12) WestLB is a public limited company (AG) with its head offices in Düsseldorf and Münster. WestLB emerged from the former Westdeutsche Landesbank Girozentrale, on 30 August 2002, after that organisation's public service activities had been integrated into Landesbank Nordrhein-Westfalen, a company governed by public law, which was established on 1 August 2002.
- (13) The current owners of WestLB are the savings banks' and giro associations Westfälisch-Lippischer Sparkassen- und Giroverband (25,03 %) and Rheinischer Sparkassen- und Giroverband (25,03 %) and — directly and indirectly, through NRW. BANK (the former Landesbank Nordrhein-Westfalen) — the *Land* of North Rhine Westphalia (37,74 %) and the regional associations of local authorities Landschaftsverband Westfalen Lippe (6,09 %) and Landschaftsverband Rheinland (6,09 %).
- (16) From the middle of 2007 the ongoing turmoil in the financial markets affected WestLB's structured portfolio investments, which included exposures to US subprime real estate loans. The mark-to-market valuations of the securities suffered, and WestLB was unable to refinance the structured portfolio by selling notes on the market. As a consequence WestLB had to consolidate the off-balance portfolios on its own balance sheet.
- (17) On 8 February 2008, the owners of WestLB reached agreement on the basic principles of an additional measure, which were set out in what was called the 'Eckpunktepapier' (key points paper) ⁽⁷⁾. The talks included the financial services regulator (*Bundesanstalt für Finanzdienstleistungsaufsicht* — 'BaFin') and the Deutsche Bundesbank. The owners agreed essentially on a structure to ring-fence substantial risks in the bank's structured portfolios, which were to be secured by a 'risk shield' of EUR 5 billion ⁽⁸⁾ (this figure included capital injections envisaged previously).

⁽⁵⁾ *Anstaltslast* conferred rights on the financial institution vis-à-vis its owners, whereas *Gewährträgerhaftung* conferred rights on the creditors of the financial institution vis-à-vis its owners. Under the first of these understandings, dated 17 July 2001, for a transitional period between 19 July 2001 and 18 July 2005 new liabilities could still be covered by *Gewährträgerhaftung* provided their maturity did not go beyond 31 December 2015; this was known as 'grandfathering'. See State aid case E 10/2000 (OJ C 146, 19.6.2002, p. 6, and OJ C 150, 22.6.2002, p. 7).

⁽⁶⁾ OJ C 4, 9.1.2008, p. 1. See also http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-19-2006-WLWL-en-18.07.2007.pdf

⁽⁷⁾ See press release of 8 February 2008, at: http://www.westlb.de/cms/sitecontent/westlb/westlb_de/en/wlb/ui/news/newscontainer/news_2008/S_P.standard.gid-N2FkNDZmMzU4OWFmYTYyMWM3N2Q2N2Q0YmU1NmI0OGU_.html

⁽⁸⁾ The measure might be considered to constitute asset relief (within the meaning of the Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1), but differs from an asset relief measure mainly because when an asset portfolio is transferred to Phoenix Light all WestLB owners pay the costs of the transaction according to their respective shareholdings. The effect of the measure is comparable to that of a capital injection by the existing shareholders. While it is true that WestLB is owned by the *Land* of North Rhine-Westphalia and state-owned entities, the owners nevertheless acted in their capacity as owners of the bank, and not as third parties independent of the owners. In addition, the transaction took place in March 2008. The Communication from the Commission on the treatment of impaired assets was approved only in February 2009, and does not apply here.

- (18) By this agreement the owners intended to protect WestLB against the volatility of the markets. Under the IFRS international accounting standards applied by WestLB, the bank has to use the mark-to-market method, which means that a major part of the assets held by the bank has regularly to be valued afresh. As a result of the subprime crisis, demand for structured investment portfolios collapsed. At the end of 2007, on a portfolio of around EUR 23 billion, the balance sheet had to show a mark-to-market loss of approximately EUR [1,5-2,5] billion (*).
- (19) The risk shield provides the legal basis for the transfer of impaired assets from WestLB to a special-purpose vehicle, Phoenix Light SF Ltd, so that WestLB will not have to incorporate the impact of market volatility related to these portfolios into its accounts. Once the assets have been transferred and the guarantee has been issued, the effects of this market volatility will have been completely removed from WestLB's accounts. The special-purpose vehicle is equivalent to a 'bad bank' which is set up for one institution and benefits from a state guarantee.
- (20) On 31 March 2008 the owners of WestLB approved the measures, subject to final approval by the regional parliament of North Rhine-Westphalia. The bank and the auditors were satisfied that the parliament would in all probability agree, and considered the decision sufficient for the transfer of the risk to the owners, which took place on 31 March 2008. The parliament did indeed subsequently approve the measure.

2.3. The measure

- (21) The restructuring plan provides that the risk shield granted to the special-purpose vehicle, Phoenix Light SF Ltd, will be prolonged and converted from a provisional into a permanent structure. However, the structure of the shield has not been altered.
- (22) The risk shield consists of:
- a guarantee issued by the owners of WestLB in line with their respective shareholdings covering claims up to an amount of EUR 2 billion held by WestLB against Phoenix Light, to which WestLB will transfer a structured securities portfolio with a nominal value of EUR 23 billion; and
 - a guarantee issued by the *Land* of North Rhine-Westphalia covering further claims held by WestLB against Phoenix Light up to an additional amount of EUR 3 billion.
- (23) The transaction was carried out as follows:
- Until 31 March 2008 WestLB held a EUR 23 billion portfolio consisting essentially of structured securities

and commercial paper, medium-term notes and income and capital notes issued by three investment vehicles called Greyhawk, Harrier, and Kestrel ⁽⁹⁾.

- With effect from 31 March 2008 WestLB sold the portfolio to Phoenix Light at its nominal value of EUR 23 billion. In order to pay the EUR 23 billion purchase price, Phoenix Light issued notes equal to the nominal value of the portfolio. The notes were issued in two tranches. The lower tranche consists of junior notes which have priority in the event of non-performance of the assets (i.e. they carry all the risks); these have a total nominal value of EUR 5 billion. The upper tranche consists of senior notes for a total amount of EUR 18 billion.
- The *Land* of North Rhine-Westphalia issued a guarantee for the junior notes. This has the effect that the junior notes are considered to be safe. As soon as they were covered by the guarantee, the notes were purchased by WestLB. There are two reasons for this. First, once the notes were covered by the guarantee, the auditors agreed they would not have to correct them downwards in WestLB's accounts, as they would have been obliged to do to the original portfolio investments. Second, WestLB could use the notes as collateral to raise the funds required in order to buy them.
- Phoenix Light is to pay the guarantors a commission of [0,2-0,1] % per annum on the guarantee of EUR 5 billion, and is to pay a return to the holder or holders of the senior and junior notes (for the duration of the interim structure, the holder was WestLB). These costs and all the administrative costs are to be borne out of the return on the paper transferred to Phoenix Light. The return paid by Phoenix Light on the senior and junior notes was calculated in such a way that WestLB was able to cover its refinancing costs.
- During the rescue period WestLB had to hold both the junior and the senior notes in order to ensure their reversibility. After approval by the Commission, the interim structure was changed into a permanent structure. In the permanent structure, WestLB will continue to hold the guaranteed junior notes until maturity. Phoenix Light will try to place the senior notes on the capital markets as soon as market conditions make such transactions possible once again. WestLB will consequently hold the senior notes in the permanent structure too, until such time as they can be placed on the markets. The senior notes now held by WestLB will then be redeemed by Phoenix Light and sold to third parties.

(*) Confidential information.

⁽⁹⁾ Breakdown of the EUR 23 billion portfolio by type of security: US and European collateralised debt obligations (CDOs), EUR [...] billion; commercial mortgages, EUR [...] billion; residential mortgages, EUR [...] billion; and other positions, EUR [...] billion. On 31 December 2007 80 % of the securities had S & P AAA ratings.

- (24) Vis-à-vis third parties, the *Land* of North Rhine-Westphalia has exclusive liability for the total amount of the guarantee of EUR 5 billion. On a first tranche of EUR 2 billion, the *Land* may claim compensation from the other four owners in proportion to their holdings. For the remainder of the guarantee, amounting to EUR 3 billion, the *Land* will bear sole liability, without regard to its proportionate holding. In return for bearing this liability, the *Land* has obtained from the other owners an adjustment of its shareholder rights and entitlement to compensation, which it can opt to receive either in cash or by way of an assignment of shares in WestLB.
- (25) It was agreed that changes would in any event be made to the consortium agreement, under which certain rights held by the savings banks' and giro associations would be ended or adjusted⁽¹⁰⁾. The detailed changes would be agreed between the owners of WestLB later.
- (26) Compensation is to be paid to the *Land* if the disproportionate EUR 3 billion component of the guarantee is called upon: in that event the *Land* will be entitled to demand the transfer to it of a corresponding number of WestLB shares currently held by the savings banks' associations and the regional associations. The compensation will be calculated on the basis of a share price of EUR 220, less a discount of EUR 20 per share. For the regional associations the share price will be EUR 220. Instead of a transfer of the shares, the parties may also agree on a cash payment.
- (27) In the Decision of 30 April 2008, the Commission found that the risk shield described constituted temporary rescue aid, and declared it compatible with the common market under the rescue and restructuring guidelines until 8 August 2008. At the same time the Commission requested that Germany submit a far-reaching and coherent restructuring plan. Germany sent a restructuring plan on 8 August 2008.

2.4. The restructuring plan

- (28) The notification consists of a 'key points agreement' (*Eckpunktevereinbarung*) between the owners of the bank, dated 8 August 2008, and a more detailed 'stand-alone' restructuring plan, which has been amended following discussion with the Commission. The restructuring plan can be summarised as follows.
- (29) A central element in the key points agreement and the restructuring plan is the intended change of ownership, which Germany and the owners undertook to put into definite terms, for example by producing a letter of intent, by 31 December 2008. But this step has not been taken. Downsizing, cost-cutting, de-risking and refocusing measures are to be taken in order to facilitate a sale. An unbundled WestLB will therefore be offered for sale, as a whole or in the form of independent business units, in an open, transparent and non-discriminatory tender procedure which will be launched before the end of August 2010 and which will be completed before the end of [June–October] 2011, enabling the sale to become effective on 1 January 2012.
- (30) The restructuring plan stipulates that there must be an open, transparent and non-discriminatory tender procedure open to any buyer, domestic or foreign. The sale must be adequately publicised in at least one international newspaper or periodical available throughout the Community in English. WestLB acts as a central institution for savings banks in North Rhine-Westphalia. WestLB itself is a commercial bank in the legal form of a public limited company. Therefore neither the current role of WestLB as a central institution for savings banks nor the name WestLB is to be invoked to prevent a complete sale of the bank to a private investor.
- (31) The primary objective of the tender procedure is a change of ownership of WestLB, i.e. the complete transfer of the voting rights. Full divestiture of one or several unbundled business areas is preferred to a simple transfer of the majority of the voting rights (50 % plus one share). Such a transfer of the majority of the voting rights to a new buyer will be admissible only if in the tender procedure no offer is made for the full divestiture of one or more segmented business areas. Although the priority is a transfer of the entirety of the voting rights, the Commission agreed in view of the unpredictable situation on the financial markets and the failure of efforts to change WestLB's ownership structure that there might be a need for alternative scenarios, such as a transfer of the majority of the voting rights or a consolidation of *Landesbanken* in Germany. The Commission does not oppose a restructuring of the banks on an aggregate level, and accepts that the restructuring plan may have to be implemented against the background of a restructuring of the *Landesbanken* in Germany. However, in order to monitor the correct implementation of the restructuring plan even if an alternative scenario for the change of ownership is chosen, the Commission considers it necessary that a trustee be appointed.
- (32) In order to facilitate the sale of WestLB, whether as a whole or in separate parts, the restructuring plan provides for cost-cutting and downsizing measures. The divestiture of shareholdings and the closure of locations are key elements. As regards cost-cutting and downsizing, all major shareholdings will be divested in order to finance the restructuring activities. The sale process will be organised in two tranches: The first tranche of holdings, comprising Weberbank, [...] and [...] will be sold by the end of [February–May] 2010⁽¹¹⁾, and the second tranche, comprising [...] and [...], will be sold by the end of [February–May] 2011⁽¹²⁾.

⁽¹⁰⁾ These are rights which were given to the savings banks' associations when they acquired major stakes in mid-2004.

⁽¹¹⁾ Provided this can be done at a price above book value; otherwise by the end of 2010.

⁽¹²⁾ If any of the subsidiaries is identical to one of the seven international locations which may be maintained, it is to be sold as part of the sale of WestLB by the end of 2011.

- (33) Of its eleven locations in Germany, WestLB will close five by [...] 2010 at the latest (Bielefeld, Münster, Dortmund, Cologne and Mainz) ⁽¹³⁾. By [...] 2010 at the latest ⁽¹⁴⁾ WestLB will reduce its locations outside Germany from over thirty to seven ⁽¹⁵⁾.
- (34) Finally, the restructuring plan sets out a programme of downsizing measures, as follows:
- By comparison with the year-end financial statement for 2007, the balance sheet total will be reduced by 25 % by the end of March 2010 and by 50 % by the end of March 2011 ⁽¹⁶⁾. In absolute figures, the balance sheet total will be reduced from EUR [200-280] billion net to EUR [150-250] billion net by 31 March 2010 and EUR [80-180] billion net by 31 March 2011.
 - By comparison with the year-end financial statement for 2007, the risk-weighted assets (RWA) will be reduced by 25 % by the end of March 2010 and by 50 % by the end of March 2011. In absolute figures, the risk-weighted assets will be reduced from EUR 104 billion to EUR 78 billion by 31 March 2010 and EUR 52 billion by 31 March 2011.
 - These target figures are to be achieved preferably by divesting or disposing of assets that have previously been grouped in the 'exit portfolio'.
- (35) In addition to cost-cutting and downsizing, the plan involves comprehensive refocusing and de-risking of all business. In particular, the following measures are to be taken:
- Core business will be divided into three separate areas, with organisational unbundling of all business processes,
 - There will be a phase-out of investment management, ending in full withdrawal,
 - In the field of structured finance, including international project finance (global origination), the volume of business will be considerably reduced and focused on identified sectors,
 - The international capital market business will be limited to customer-related trading activities.
- (36) Before the end of October 2009, with a view to the formation of three separate core business areas, WestLB will unbundle all business processes and set up the following units, which will abstain from external growth through mergers or acquisitions:
- transaction banking,
 - medium-sized companies and savings banks partnership (Verbund/Mittelstand),
 - capital markets, wholesale banking and structured financing.
- (37) Pending the sale of the investment management business, WestLB will cease trading for its own account and will no longer perform relative value and arbitrage transactions ⁽¹⁷⁾. Trading for clients' accounts is restricted to the locations in Düsseldorf, New York, London and Hong Kong.
- (38) Until WestLB's change of ownership, the business volume of capital market activities will be restricted as follows: in 2009, by 31 December 2009, to EUR [70-100] billion; in 2010, by 31 December 2010, to EUR [60-90] billion; and in 2011, by 31 December 2011, to EUR [50-80] billion.
- (39) Until WestLB's change of ownership, the risk-weighted assets to be allocated to capital markets business will be restricted as follows: by 31 December 2009, to EUR [10-25] billion; by 31 December 2010, to EUR [5-25] billion; and by 31 December 2011, to EUR [5-25] billion.
- (40) Pending the sale of WestLB, the volume of business in the field of wholesale banking and structured financing (forming part of the capital markets, wholesale banking and structured financing area) will be restricted as follows: in 2009, by 31 December 2009, to EUR [20-40] billion; in 2010, by 31 December 2010, to EUR [15-35] billion; and in 2011, by 31 December 2011, to EUR [10-30] billion.
- (41) In addition, pending the sale of WestLB, the risk-weighted assets corresponding to the volume of business in the field of wholesale banking and structured financing (forming part of the capital markets, wholesale banking and structured financing area) will be restricted as follows: by 31 December 2009, to EUR [30-60] billion; by 31 December 2010, to EUR [20-50] billion; and by 31 December 2011, to EUR [20-50] billion.

⁽¹³⁾ The following locations may be maintained: Düsseldorf, Berlin, Frankfurt, Hamburg, Munich and Stuttgart.

⁽¹⁴⁾ In order to give the owners an incentive to speed up the sale, a new owner may keep three additional WestLB locations provided that the sale is completed by the end of 2010.

⁽¹⁵⁾ The following locations may be maintained: London, New York, Hong Kong, Moscow, Sydney, Istanbul and São Paulo.

⁽¹⁶⁾ Excluding the market value of derivatives.

⁽¹⁷⁾ Trading activities for clients' accounts and generally accepted trading activities to manage the balance sheet total continue to be admissible.

- (42) All remaining activities, units and locations in the form of subsidiaries, branches or representation offices which cannot be sold before the end of December 2011 will be wound up by the owners. All the amendments made to the restructuring plan of 8 August 2008 were discussed with the Commission, accepted by Germany, and submitted to the Commission on 30 April 2009. But the amended restructuring plan is still subject to official confirmation by three out of WestLB's five owners. Although it has been accepted by Germany and by the owners, therefore, the restructuring plan cannot be considered binding. In the course of the proceedings the Commission has observed that the owners have been unable to comply with the original timetable for an authorised restructuring plan, and that decision-making has fallen behind schedule. The Commission consequently considers it necessary to attach conditions to its Decision.
- (43) Given the complexity of the proposed restructuring measures, and the tight deadlines for their implementation, the Commission considers that the implementation of the restructuring plan should be monitored by a trustee, who should keep the Commission informed of the steps taken. The appointment of a trustee is important especially because the Commission is prepared to accept some flexibility in the implementation schedule. In principle the divestiture of holdings has to be completed by [February–May] 2010. But it may be postponed if WestLB can show that a sale was possible only below book value. This Decision also provides for the possibility of a restricted sale or the consolidation of the *Landesbanken* in Germany, and thus for exemption from the tendering requirement. The trustee should monitor the implementation of the restructuring plan, report on decisions taken in the framework of the flexibility allowed during the implementation period, and facilitate communication with the Commission.

3. GERMANY'S COMMENTS ON THE OPENING DECISION

- (44) In response to the opening decision Germany submitted observations on the assessment of the aid.
- (45) Regarding the scale of the aid involved, Germany argues, contrary to the Commission's view, that for the calculation of the amount of aid the only relevant time is the time at which the risk shield was put in place and announced to the public, and not the later time at which the provisional structure was transformed into a permanent structure.
- (46) Concerning the nature of the risk shield, Germany argues that the conversion from a provisional structure to a permanent one is not relevant. The test applied by the Commission to assess the eligibility of the measure, i.e. its reversibility, is satisfied, despite the fact that the risk shield is not subject to a time-limit.
- (47) Germany argues that where a guarantee is given to a firm in difficulty the aid component will be equal to the amount effectively covered by the guarantee only if total loss is very likely. The calculation performed by WestLB which was presented to BaFin and the Bundesbank in December 2007 and January 2008 put the expected losses of the portfolio at a nominal EUR [...] million at the end of January 2008; the calculation performed by Morgan Stanley in February 2008 arrived at the significantly higher value of about EUR [...] billion; both of these are well below the nominal value of EUR 5 billion, and do not suggest that total loss was very likely. Furthermore the calculation performed by WestLB already takes account of a bad case scenario, as it is based upon an additional two-notch downgrading of the recent ratings of all instruments assessed, whereas the report provided by Morgan Stanley was too pessimistic, being based, among other differing assumptions, upon a four-notch downgrading.
- (48) Turning to the legal basis, Germany argues that the aid should be found compatible with the common market pursuant to Article 87(3)(b) of the EC Treaty, since at the time the aid was granted there was a serious disturbance in the economy, and the risk shield for WestLB, which according to Germany is of systemic importance, was also intended to remedy that disturbance. The measure was appropriate, necessary and proportionate.
- (49) Germany also contends that the aid is compatible with the common market under Article 87(3)(c), because the restructuring plan does not consist solely of incremental improvements, but provides for a considerable reduction of the business conducted by WestLB for its own account, an appreciable improvement in its risk profile, and a stabilisation of its earnings outlook.
- (50) Finally, Germany argues that the planned measures aimed at limiting the potential distortion of competition are not necessary in order to restore long-term viability, and that the overall cost of these measures as compared with the amount of aid received is considerably higher than in similar cases such as *Crédit Lyonnais II* ⁽¹⁸⁾, *Banco di Napoli*, *Crédit Foncier de France*, *Société Marseillaise de Crédit*, *BAWAG-PSK* ⁽¹⁹⁾, *Bankgesellschaft Berlin* ⁽²⁰⁾ or *IKB* ⁽²¹⁾.

⁽¹⁸⁾ Commission Decision of 20 May 1998 in case 1454/1998 (OJ L 221, 8.8.1998, p. 28).

⁽¹⁹⁾ Commission Decision of 27 June 2007 in case C 50/06 (OJ L 83, 26.3.2008, p. 7).

⁽²⁰⁾ Commission Decision of 18 February 2004 in case C 327/04 (OJ L 116, 4.5.2005, p. 1).

⁽²¹⁾ Commission Decision of 21 October 2008 in case C 50/10 (not yet published).

4. ASSESSMENT

4.1. Existence of aid

(51) The Commission must first assess whether the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty. That provision encompasses 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, in so far as it affects trade between Member States.

(52) The risk shield is a continuation of the rescue aid granted by the owners. As the Commission found in its Decision of 30 April 2008, the risk shield constitutes State aid. Germany does not dispute this.

4.2. The amount of aid

(53) The Commission does not agree with Germany that the amount of aid should be calculated on the basis of the expected losses.

(54) First, as regards methodology, the Commission would confirm that the risk shield was approved as rescue aid in view of its reversibility. The risk shield is now to be converted into a permanent arrangement, and the amount of aid may therefore need to be assessed afresh at the restructuring stage. A fresh evaluation of the expected losses was requested in the opening decision, but no such evaluation has been submitted, although more up-to-date figures exist and could have been provided by the beneficiary. The Morgan Stanley report, which arrives at the significantly higher value of about EUR [...] billion, shows the sensitivity of such calculations, depending on the assumptions made and the methodology adopted.

(55) The Commission would point out that in its Decision in *Sachsen LB* it found that that in assessing expected losses in the current unpredictable circumstances of the financial markets a market economy investor would have looked at least at a bad case scenario ⁽²²⁾. The Commission does not share the view that the differing assumptions in the Morgan Stanley report are overly pessimistic, nor that WestLB has already taken a bad case scenario into account, as there is a noticeable effect on the expected losses only if lower grades on the rating scale are chosen. This conclusion is in line with the reasoning in the *Bankgesellschaft Berlin* Decision ⁽²³⁾.

⁽²²⁾ Commission Decision of 4 June 2008 in case C 9/08 *Sachsen LB* (not yet published in the Official Journal: http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-9-2008-WLWL-en-04.06.2008.pdf).

⁽²³⁾ Commission Decision of 18 February 2004 in case C 28/02 (OJ L 116, 14.5.2005, p. 1, paragraph 140).

(56) Furthermore, the Commission considers that in the present case the effect and the character of the EUR 5 billion guarantee, which allows the bank to free its balance sheet from a EUR 23 billion portfolio, is similar to that of a capital injection. The amount of the aid is thus comparable to the capital that would have been required to achieve the same stabilisation of the portfolio ⁽²⁴⁾.

(57) According to the established practice of the Commission ⁽²⁵⁾, the consistent findings of the courts, and the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽²⁶⁾, the aid component in a guarantee to a company in difficulty may be as high as the amount effectively covered by the guarantee (here EUR 5 billion).

(58) In accordance with the Communication from the Commission on the treatment of impaired assets in the Community banking sector ⁽²⁷⁾ (paragraph 39), the amount of aid is equal to the difference between the transfer value of the assets (based on their real economic value) and the market price. For this reason the assets should be valued on the basis of their current market value whenever possible. According to the information supplied by the German authorities, the market for the assets in the portfolio has almost entirely dried up, so that it is not possible to establish a market price for purposes of the Communication on impaired assets, there being no market to refer to. It must be concluded, therefore, that the amount of aid is equal to the amount of the guarantee, i.e. EUR 5 billion.

(59) In addition, the commission to be paid, at [0,2–1,0] %, is significantly below the price a market investor would expect in line with the Communication on impaired assets ⁽²⁸⁾.

(60) The economic value of the aid is thus substantially higher than both Germany's assessment of the expected loss and the EUR [...] billion calculated by Morgan Stanley. In all likelihood, therefore, the aid is equal to the nominal value of EUR 5 billion.

⁽²⁴⁾ Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1).

⁽²⁵⁾ See Commission Decision of 21 October 2008 in case C 50/10 (not yet published).

⁽²⁶⁾ OJ C 155, 20.6.2008, p. 10.

⁽²⁷⁾ OJ C 72, 26.3.2009, p. 1.

⁽²⁸⁾ See Annex 4 point II of the Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1). If the commission paid is not in line with the Communication on impaired assets, there must be far-reaching restructuring (paragraph 41 of the Communication); WestLB is indeed undergoing such restructuring. Thus the commission to be paid need not be adjusted.

4.3. Legal basis for the assessment of the compatibility of the aid with the common market

- (61) In the opening decision the Commission stated that the legal basis for the assessment of the compatibility of the aid measure was Article 87(3)(c) of the EC Treaty. The Commission also considered whether the measure should be assessed on the basis of Article 87(3)(b). That provision states that aid may be considered to be compatible with the common market if it is intended to remedy a serious disturbance in the economy of a Member State. The Commission pointed out that at the time when the aid was granted to WestLB the crisis on the subprime market had not yet led to a serious disturbance in the German economy within the meaning of Article 87(3)(b). Nor had the Commission received evidence from the German authorities demonstrating that a failure to aid WestLB would have led to such serious disturbance.
- (62) In the meantime, the Commission has acknowledged in three Communications ⁽²⁹⁾ and in its approval of the German banks rescue package ⁽³⁰⁾ that there is a threat of a serious disturbance in the German economy, and that measures supporting banks are likely to remedy that disturbance. The legal basis for the assessment of the aid measure should accordingly be Article 87(3)(b) of the EC Treaty.
- (63) In the three Communications it has adopted in connection with the current financial crisis ⁽³¹⁾, the Commission has stated that aid granted to banks in the context of the crisis should be assessed in line with the rescue and restructuring guidelines, having regard to the particular features of a systemic crisis in the financial markets ⁽³²⁾. Under the

rescue and restructuring guidelines, State aid can be authorised only if it is accompanied by thorough-going restructuring to restore viability, by an adequate contribution to the cost of restructuring on the part of the beneficiary, and by measures to remedy the potential distortion of competition. The guidelines therefore offer the appropriate framework for dealing with the restructuring of WestLB in the context of the crisis. However, given the nature and scale of the present crisis, account will have to be taken of further specific factors related to the current market conditions. When applied to the restructuring of WestLB in the present crisis, therefore, the principles of the rescue and restructuring guidelines will have to be modulated. Special attention should be given to the rules set out in the rescue and restructuring guidelines regarding the contribution to be made by the beneficiary. Since external financing for WestLB [...], the 50 % target set in the rescue and restructuring guidelines appears very difficult to achieve, and the Commission accepts that during the systemic crisis in the financial markets it may not be appropriate to request a precise quantification of the beneficiary's own contribution. Furthermore, the design and implementation of measures to limit distortion of competition may also need to be reconsidered, in so far as WestLB may need more time for their implementation, owing to market circumstances.

- (64) As the Commission indicated in two of the Communications adopted in connection with the current financial crisis, the depth of restructuring required to return to viability is likely to be in direct proportion to the scope and volume of the aid provided to WestLB on the one hand and to the solidity of its business model on the other ⁽³³⁾.

4.4. Compatibility under Article 87(3)(b) of the EC Treaty

- ⁽²⁹⁾ Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8); Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2); and Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1).
- ⁽³⁰⁾ Commission Decision of 12 December 2008 in case N 625/08, *Retzungspaket für Finanzinstitute in Deutschland*.
- ⁽³¹⁾ Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8, paragraphs 10, 32 and 42); Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2, paragraph 44); and Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1, paragraphs 17, 58 and 59).
- ⁽³²⁾ Explicitly in Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8, paragraph 42).

- (65) In order to assess the compatibility of the aid with the common market under Article 87(3)(b) of the EC Treaty, the Commission has to determine whether it meets the following conditions for restructuring aid set out in the rescue and restructuring guidelines: (i) the aid must be based on a restructuring plan, which must demonstrate that the company is capable of restoring its long-term viability; (ii) the aid must be limited to the minimum necessary in time and amount, and the beneficiary must make a significant contribution to the costs of restructuring; and (iii) the aid must not distort competition to an extent contrary to the common interest; in these respects the Commission may impose conditions on the beneficiary.

- ⁽³³⁾ Communication from the Commission on the treatment of impaired assets in the Community banking sector, paragraph 52, and Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, paragraph 44.

4.4.1. Restoration of long-term viability

- (66) Paragraph 34 of the rescue and restructuring guidelines states that the grant of the aid must be conditional on implementation of the restructuring plan, which must be endorsed by the Commission in all cases of individual aid. The Commission must establish that the restructuring plan can be expected to restore the long-term viability of the firm within a reasonable timescale. The restructuring plan must be of limited duration and be based on realistic assumptions. It must describe the circumstances that led to the firm's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It must enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet. This means that it should enable the firm to cover all its costs, including depreciation and financial charges, and to achieve a return on its capital sufficient for it to compete in the marketplace on its own merits.
- (67) The Commission has based its assessment on information furnished by Germany, and in particular the restructuring plan together with far-reaching modifications to the plan submitted at the later stage of the investigation procedure after discussions with the Commission, which include the detailed scheduling of the sale of specific assets.
- (68) In its opening decision the Commission expressed doubts that the documents initially submitted by Germany could be considered a proper restructuring plan meeting the conditions in paragraphs 32–51 of the rescue and restructuring guidelines. In the opening decision the Commission also expressed the view that WestLB's difficult situation was in part due to the ownership structure of the bank and the different interests of the respective owners. The Commission therefore considers that the change of ownership, to be achieved by the end of 2011 by means of an open, transparent and non-discriminatory tender procedure, is an important step towards solving the difficulties and will facilitate the positive economic development of the bank.
- (69) WestLB or its owners accepted this point, and undertook to put the change of ownership into definite terms by 31 December 2008, for example by producing a letter of intent. At Germany's request the deadline was extended until 31 March 2009. An interim report submitted by Germany on 27 February 2009 reviewed progress achieved by the end of February 2009⁽³⁴⁾. The preferred strategy was to create a consolidated supra-regional group (referred to as 'Landesbank Mitte') by merging two *Landesbanken*, WestLB and Landesbank Hessen-Thüringen (Helaba). The integration of DeKaBank Deutsche Girozentrale was proposed as a complementary measure. Both options proved unsuccessful, for many reasons. One reason was the conflict of interests among the owners of WestLB. The interests of the savings banks and the *Land* are sometimes directly opposed, which confirms that the view of the matter that the Commission expressed in the opening decision was correct, and that a change of ownership is of the greatest importance if the long-term viability of WestLB is to be restored.
- (70) In view of the failure of the initial attempt at the privatisation of WestLB, the Commission has sought to establish with a sufficient degree of certainty that the restructuring plan submitted is capable of restoring the bank's viability.
- (71) Not only does the amended plan provide more detailed information about the planned measures, it also includes a range of important measures, such as a reduction of the balance sheet and the risk-weighted assets by almost 50 %, the sale of the bank as a whole or in separate units by means of an open tender procedure, the sale of nearly all subsidiaries, including Westdeutsche ImmobilienBank, and the closure of the majority of the bank's locations.
- (72) The sale of the bank has to be completed by 31 December 2011. The owners of WestLB have to launch an open, transparent and non-discriminatory tender procedure by 31 August 2010, and sign a contract with a buyer by [June–October] 2011, so that the sale can take effect by 1 January 2012. The main objective is a complete transfer of the voting rights. But because the situation on the financial markets is unpredictable, and attempts to change the ownership structure of WestLB have been unsuccessful, the Commission has agreed that there may be a need for alternative scenarios, such as a transfer of the majority of the voting rights. Although the consolidation of *Landesbanken* in Germany has been unsuccessful so far, the Commission does not oppose the aggregate restructuring of the banks and the implementation of the restructuring plan in the broader context of the restructuring of the whole *Landesbanken* sector in Germany. The implementation of the change of ownership is to be monitored by a trustee approved by the Commission and appointed by WestLB.
- (73) The sale of the bank will be facilitated by the prior unbundling of business activities and their grouping into three core business areas, which will be offered for sale in a tender procedure, both separately and as a whole, and by the prior downsizing of the balance sheet total and risk-weighted assets by 25 % by the end of March 2010 and by 50 % by the end of March 2011, by reference to the year-end financial statement for 2007.

⁽³⁴⁾ See Annex 2 (*Mitteilung der Bundesrepublik Deutschland an die Europäische Kommission: Zwischenbericht über den Fortschritt der Konsolidierungsverhandlungen*).

(74) Moreover, the investigation has confirmed that WestLB has redirected its activities. It has abandoned loss-making business such as investment management and proprietary trading, which gave rise to the crisis, and lays the emphasis once again on customer-driven business. The amended restructuring plan provides that the bank will again concentrate its activities on North Rhine-Westphalia and Germany, withdrawing from more than 20 locations and subsidiaries, and on transaction banking, the medium-sized companies and savings banks partnership, and wholesale banking, capital markets and structured financing. The refocus from risky activities to less volatile business like transaction banking and cooperation with savings banks, private-banking customers, and mid-size corporates will increase the sustainable part of WestLB's activities and therefore contribute to the restoration of the bank's viability. The Commission observes that under the amended restructuring plan, WestLB is to move a long way from its previous business model. The restructuring plan therefore constitutes a significant change in the business approach that proved unsustainable in the past.

(75) The Commission also notes the cost-cutting measures which are to be implemented by the end of 2010. In addition, WestLB has taken measures to improve its risk management, and has already reduced its risk exposure. The Commission has analysed the underlying assumptions of the restructuring plan and has no reason to doubt that they are realistic. The Commission therefore considers that the amended restructuring plan demonstrates the capacity of WestLB to restore its long-term viability.

4.4.2. Aid limited to the minimum necessary

(76) The Commission's doubts that the aid might not be limited to the minimum have been allayed. The Commission can now conclude that the aid is indeed limited to the minimum necessary, and that there will be a significant contribution on the part of the beneficiary. The Commission acknowledges that the 50 % target indicated in paragraph 44 of the rescue and restructuring guidelines has to be modulated when applied to the restructuring of WestLB in the present crisis.

(77) The Commission considers that the costs of restructuring are to be borne by the bank itself to the greatest extent possible in the circumstances, through the disposal of assets and subsidiaries. The effect of these divestments is twofold. On the one hand, the divestments reduce the volume of risk-weighted assets, thus freeing capital and increasing the capital ratios. On the other hand, the divestments generate liquidity which can be used to finance the restructuring or

to strengthen the liquidity base⁽³⁵⁾. Part of this expected inflow of funds has already been realised, and another part is to be realised in the near future. So, even leaving aside expected inflows of funds which can be realised only in 2011, and for the sake of precaution assuming that the projected proceeds may not materialise fully for all of these divestments, the Commission concludes that the beneficiary's own contribution can be considered significant.

(78) Despite the modulation of the 50 % target for the beneficiary's own contribution, the Commission will continue to require that the equity holders make as substantial a contribution as possible (i.e. that they will share the burden). This means that investors in hybrid capital must participate in the restructuring of the bank. The Commission considers that to adjust capital reserves in order to be able to pay a return on hybrid capital and to avoid participation in losses in cases where State aid has been granted is problematic, for two reasons. First, the State aid would not seem to be limited to the minimum necessary. The principle that State aid should be limited to the minimum necessary is a general principle of State aid policy. The adjustment of reserve funds to pay interest on hybrid capital directly removes regulatory capital from the bank, which increases the amount needed for recapitalisation and thus the amount of State aid. Second, it runs counter to the principle of burden sharing, and increases the moral hazard. The payment of a return, even though there is no legal obligation, protects the owners of hybrid capital from the consequences of losses and from full exposure to the risk they decided to take when investing in a type of instrument which is risky by nature and carries a higher remuneration precisely in view of the risk. Furthermore, hybrid instruments will participate in the losses. The Commission therefore requires that interest payments on such instruments be prohibited until the sale of WestLB, and that the instruments participate in the losses if in the absence of an adjustment of the reserves the bank shows a balance sheet loss. This applies with particular force to WestLB, because WestLB is going to be sold, and investor confidence in the current owners is not of major relevance⁽³⁶⁾.

(79) In sum, even if the 50 % target will probably not be achieved, the Commission is of the opinion that the contribution that WestLB has undertaken to make to the restructuring is as great as it can be.

⁽³⁵⁾ Depending on the book value of the assets and the maturity of debt. This reasoning has been followed in previous Commission decisions, such as the Decision of 20 December 2006 in case C 44/05 *Huta Stalowa Wola* (OJ L 112, 30.4.2007, p. 67, paragraph 71); the Decision of 10 July 2007 in case C 20/06 *Novoles Straža* (OJ L 29, 2.2.2008, p. 7), the Decision of 12 September 2007 in case C 54/06 *Bison Bial* (OJ L 46, 21.2.2008, p. 41); the Decision of 4 June 2008 in case C 9/08 *SachsenLB* (not yet published); and the Decision of 21 October 2008 in case C 10/08 (not yet published).

⁽³⁶⁾ This might be viewed differently in cases where hybrid capital is provided by the State in the context of a rescue.

4.4.3. *Avoidance of undue distortion of competition*

- (80) Paragraphs 35 to 39 of the rescue and restructuring guidelines state that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. This usually involves limiting or reducing the company's presence on the relevant product markets by selling production capacity or subsidiaries or reducing activities. The limitation or reduction should be in proportion to the distortive effects of the aid.
- (81) At the end of its investigation the Commission is satisfied that sufficient measures are indeed being taken in order to mitigate as far as possible any adverse effects of the aid on competition.
- (82) WestLB is withdrawing from investment management and considerably reducing its volume of business in the field of structured finance and capital markets, two of its most profitable business segments.
- (83) But the Commission finds that the withdrawal from investment management and about half of the total downsizing volume are necessary in order to restore viability. According to paragraph 40 of the rescue and restructuring guidelines, such measures do not qualify as measures limiting distortion of competition. While the exit from the investment management business cannot be accepted as a measure to mitigate distortion of competition, it nevertheless has an impact on the size of the bank and its activities.
- (84) Overall, the balance sheet total of WestLB will be reduced by 25 % by the end of March 2010 and by 50 % by the end of March 2011. At the same time, the volume of risk-weighted assets will be reduced by 25 % by the end of March 2010 and by 50 % by the end of March 2011.
- (85) The Commission considers that the reduction of the network of branches to five branches in Germany and seven locations outside of Germany, the abandonment of proprietary trading and the restrictions on trading for clients' accounts represent adequate measures to mitigate distortion of competition.
- (86) The restructuring plan also provides for cost-cutting and downsizing measures. Almost all holdings in subsidiaries are to be divested. The process of selling these holdings is to be organised in two tranches: the first tranche of shareholdings, comprising 16 subsidiaries, is to be sold by the end of [February–May] 2010 ⁽³⁷⁾, and the second tranche, comprising three subsidiaries, is to be sold by the end of [February–May] 2011.
- (87) In addition, business development in WestLB's core business areas — structured finance, wholesale banking, and capital markets — is to be limited in terms of new business and balance sheet volume (risk-weighted assets).
- (88) In sum, the Commission considers that the compensatory measures are in proportion to the distortive effects of the aid granted to WestLB and ensure that the adverse effects on trading conditions are minimised as far as possible.

5. CONCLUSION

- (89) The measure constitutes restructuring aid which can be considered to be compatible with the common market in accordance with Article 87(3)(b) of the EC Treaty provided the conditions imposed are complied with,

HAS ADOPTED THIS DECISION:

Article 1

The aid in the form of a guarantee of EUR 5 billion which Germany plans to grant to WestLB AG is compatible with the common market subject to the conditions set out in Article 2 and in the Annex.

Article 2

1. The restructuring plan for WestLB submitted by Germany on 8 August 2008, as last amended by Germany's communication of 30 April 2009, must be implemented, subject to all the conditions set out in the Annex and in accordance with the timetable announced.

2. If appropriate, for example in view of a continuation of the current crisis on financial markets, the Commission may, in response to a properly reasoned application on the part of Germany:

- (a) allow an extension of the deadlines laid down in the Annex, or
- (b) in exceptional circumstances, dispense with, amend or replace one or more of the conditions set out in the Annex.

If Germany wishes to request the extension of a deadline, it must submit a properly reasoned application to the Commission no later than two months before the expiry of that deadline.

Article 3

Germany shall inform the Commission within two months of notification of this Decision of the measures taken to comply with it.

⁽³⁷⁾ Provided this can be done at a price above book value; otherwise by [...] 2010.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Germany is requested to forward a copy of this Decision to the beneficiary of the aid without delay.

Done at Brussels, 12 May 2009.

For the Commission
Neelie KROES
Member of the Commission

ANNEX

WITH REGARD TO ARTICLE 2(1)

- 1.1. All measures that may be necessary for the implementation of the restructuring plan, and in particular any further aid, must comply with the notices issued by the Commission and with the practice established by the Commission in its decisions, having due regard to the special features of the case of WestLB. They may not evade them or deprive them of effect. This applies in particular in the event that the restructuring plan is implemented by divesting balance sheet items to a vehicle belonging to the owners of WestLB with a view to their liquidation, and to measures taken by the Special Financial Market Stabilisation Fund (*Sonderfonds Finanzmarktstabilisierung* — 'SoFFin') and measures aimed at ensuring the refinancing of WestLB. The Commission must be notified of any State aid to WestLB before it is put into effect.
- 2.1. WestLB's owners — Westfälisch-Lippische Sparkassen- und Giroverband, Rheinische Sparkassen- und Giroverband, and — directly and indirectly, through NRW.BANK — the Land of North Rhine-Westphalia, Landschaftsverband Westfalen Lippe, and Landschaftsverband Rheinland, are to sell WestLB, as a whole or in separate units, in accordance with the following conditions, by 31 December 2011.
- 2.2. The owners of WestLB are to initiate a tender procedure in accordance with paragraphs 6.1 to 6.7 below by 31 August 2010, and to conclude a contract of sale with the purchaser by 31 August 2011, so that the sale can take effect by 31 December 2011. For properly substantiated reasons the Commission may agree to a sale by private treaty or to a consolidation of *Landesbanken* before or during the tender procedure.
- 3.1. By reference to WestLB's audited balance sheet total for 31 December 2007 (EUR 287 billion), the balance sheet total is to be reduced by 25 % by 31 March 2010 and by 50 % by 31 March 2011, excluding the market value of derivatives (EUR [20–60] billion on 31 December 2007). In absolute figures, the net balance sheet total is thus to be reduced from EUR [200–280] billion to no more than EUR [150–250] billion by 31 March 2010, excluding the market value of derivatives, and to no more than EUR [80–180] billion by 31 March 2011, excluding the market value of derivatives.
- 3.2. By reference to WestLB's audited total risk-weighted assets on 31 December 2007 (EUR 104 billion), the total risk-weighted assets are to be reduced by 25 % overall by 31 March 2010 and by 50 % overall by 31 March 2011. Thus the risk-weighted assets are to be reduced to no more than EUR 78 billion by 31 March 2010 and to no more than EUR 52 billion by 31 March 2011. The Commission and the trustee are to take account here of circumstances in which the movement of the risk-weighted assets is unexpectedly affected by external factors (such as ratings or exchange rates) which are outside the control of WestLB and its owners.
- 3.3. The reduction of the balance sheet total and the risk-weighted assets stated in point 3.1 and 3.2 is based on the assumption that the exit portfolio is entirely removed from the balance sheet. If that proves impossible to achieve, assets (including risk-weighted assets) from other balance sheet headings must be reduced to a comparable extent in compensation.
- 4.1. WestLB's core business must be unbundled, and grouped in the following business areas, segmented transparently in operational and business terms, by 30 October 2009:
 - (a) transaction banking,
 - (b) medium-sized companies and savings banks partnership (*Verbund/Mittelstand*),
 - (c) capital markets, wholesale banking and structured financing.
- 4.2. The segmented business areas referred to in paragraph 4.1 are to be sold together or separately by 31 December 2011.
- 4.3. Pending the sale, none of the segmented business areas referred to in paragraph 4.1 may be expanded by mergers or acquisitions (no external growth).
- 4.4. The distribution of financial products to savings banks, which offers transaction banking and capital markets, wholesale banking and structured financing services to the members of the savings banks partnership, is to form part of the medium-sized companies and savings banks partnership area. [...] is not to form part of this area, but is to be sold separately by WestLB by 31 [February–May] 2010.

- 4.5. In the capital markets, wholesale banking and structured financing business area, the following restrictions are to apply to capital market business pending the sale:
- (a) The volume of capital market business is not to exceed EUR [70–100] billion in the 2009 balance sheet, by 31 December 2009, EUR [60–90] billion in 2010, by 31 December 2010, and EUR [50–80] billion in 2011, by 31 December 2011.
 - (b) The risk-weighted assets attributable to capital market business may not exceed EUR [10–25] billion on 31 December 2009, EUR [5–25] billion on 31 December 2010, and EUR [5–25] billion on 31 December 2011.
 - (c) WestLB is to cease trading for its own account. This includes relative value and arbitrage transactions. Trading activities for clients' accounts and generally accepted trading activities to manage the balance sheet total continue to be admissible.
 - (d) Operative capital market trading is restricted to the locations in Düsseldorf, New York, Hong Kong and London.
- 4.6. In the capital markets, wholesale banking and structured financing business area, the following restrictions are to apply to wholesale banking and structured financing business pending the sale:
- (a) New wholesale banking and structured financing business is not to exceed EUR [20–40] billion in the 2009 balance sheet, by 31 December 2009, EUR [15–35] billion in 2010, by 31 December 2010, and EUR [10–30] billion in 2011, by 31 December 2011.
 - (b) The risk-weighted assets attributable to wholesale banking and structured financing business may not exceed EUR [30–60] billion on 31 December 2009, EUR [20–50] billion on 31 December 2010, and EUR [20–50] billion on 31 December 2011.
 - (c) The following locations are to be closed as quickly as possible and no later than [...] 2010:
 - Münster,
 - Bielefeld,
 - Cologne,
 - Dortmund,
 - Mainz.
 - (d) The subsidiaries, branches and representation offices in the following locations are to be closed as quickly as possible and no later than [...] 2010:
 - Toronto,
 - Houston,
 - Mexico City,
 - Madrid,
 - Milan,
 - Paris,
 - Kiev,
 - Dubai,
 - Johannesburg,
 - Prague,
 - Shanghai,
 - Singapore,
 - Tokyo,
 - Mumbai,
 - Seoul,
 - Beijing.

- (e) If WestLB is sold as a whole or in separate units by 31 December 2010, the purchaser may maintain three further locations.
 - (f) Existing business that has not been fully run down at the time of the closure of the locations referred to in points 4.6(c) and (d) is to be transferred or wound up in some other appropriate fashion.
 - (g) The following locations may be maintained:
 - London,
 - New York,
 - Hong Kong,
 - Moscow,
 - Sydney,
 - Istanbul,
 - São Paulo,
 - Düsseldorf,
 - Berlin,
 - Frankfurt am Main,
 - Hamburg,
 - Munich,
 - Stuttgart.
 - (h) Pending the sale of WestLB, no subsidiary, branch or representation office may be established in any new location.
- 5.1. All of the following WestLB holdings are to be sold in their entirety as quickly as possible and no later than [February–May] 2010:
- Weberbank Actiengesellschaft, Berlin,
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...],
 - [...].
- 5.2. If by [February–May] 2010 WestLB's efforts to sell its holdings in [...] and [...] remain unsuccessful, they may be sold together with WestLB by the procedure referred to in point 6.1.
- 5.3. A sale of the holdings referred to in point 5.1 may be postponed, until no later than 31 December 2010, if WestLB shows that the price that would be obtained by the transaction is lower than the book value of the holding in the individual accounts drawn up by WestLB AG in accordance with the German Commercial Code, or would produce losses in the group accounts in accordance with the IFRS accounting standards.

- 5.4. [...] is to be sold in an open, transparent and non-discriminatory tender procedure in accordance with points 6.1 to 6,7, subject to the deadlines in points 5.1 and 5.3.
- 5.5. All of the following WestLB holdings are to be sold in their entirety as quickly as possible and no later than [February–May] 2011:
- [...],
 - [...],
 - [...].
- 5.6. The proceeds of the sale of WestLB's holdings are to be used entirely to finance the company's restructuring plan.
- 5.7. The existing business of holdings that have not been sold within the deadlines laid down in points 5.1 and 5.2 is to be transferred or allowed to expire after the relevant deadline upon the maturity of the underlying business. No new business is to be accepted.
- 5.8. Pending the sale, in the event of a loss WestLB is to make no payments on hybrid capital instruments. If WestLB's balance sheet, without adjustment of capital reserves, shows a loss, these instruments must also participate in the loss.
- 6.1. WestLB is to be sold, as a whole or in separate units, in an open, transparent and non-discriminatory tender procedure, subject to the deadlines in points 2.1 and 2.2.
- 6.2. The procedure must be open to any potential buyer, domestic or foreign. The conditions of sale may not contain any clause which unduly limits the number of potential bidders or which is tailored to a particular potential bidder.
- 6.3. The sale must be adequately publicised. This is to be done by advertising it in at least one international newspaper or periodical available throughout the Community in English. In so far as it is legally permissible, bidders are to be given direct access to all necessary information by due diligence procedures. Buyers are to be selected on economic criteria.
- 6.4. The buyer
- (a) must be a third party unconnected with the owners of WestLB; an 'unconnected' party here means any party who is not connected with any company belonging to the WestLB group within the meaning of Commission Regulation (EC) No 2790/1999 ⁽¹⁾;
 - (b) must be reasonably expected to be able to obtain all necessary authorisations from all relevant competition authorities and other authorities to acquire the holding in WestLB;
 - (c) on the basis of its financial resources and in particular its rating, must be able to ensure the solvency of the bank.
- 6.5. Full divestiture of segmented business areas is to be preferred to a simple transfer of the majority of the voting rights (50 % plus one share). Such a transfer of the majority of the voting rights is admissible only if in the tender procedure no offer is made for the full divestiture of one or more segmented business areas. The Commission must be informed of the award, and may enter an objection.
- 6.6. This is without prejudice to the possibility referred to in point 2.2 of a sale by private treaty or a consolidation of *Landesbanken* with the Commission's assent. The previous owners may thereby become minority shareholders if the controlling majority is lost.
- 6.7. Business areas and activities which are not sold are to be finally discontinued by 31 December 2011, or allowed to expire after that date upon the maturity of the underlying business.
- 7.1. Full and correct application of all conditions must be continuously and comprehensively monitored and audited in detail by a properly qualified trustee, preferably a chartered accountant (*Wirtschaftsprüfer*). Within three months of notification of this Decision, WestLB is to nominate a suitable independent trustee to the Commission. The trustee is to be appointed only with the assent of the Commission. The Commission may ask the trustee to provide explanations and clarifications. The costs of engaging the trustee's services are to be borne by WestLB.

⁽¹⁾ OJ L 336, 29.12.1999, p. 21.

- 7.2. During the implementation of this Decision the Commission is to have unlimited access to all information necessary for the monitoring of the implementation of this Decision. The Commission may ask WestLB to provide explanations and clarifications. Germany and WestLB are to cooperate fully with the Commission, and with the trustee acting for the Commission, in response to any request in connection with the monitoring of the implementation of this Decision.
- 7.3. Every year until 2011 inclusive, Germany is to send the Commission a progress report drawn up with the assistance of the trustee referred to in point 7.1. The report must contain a review of progress in the implementation of the restructuring plan and details of all sales and closures of subsidiaries, departments and locations in accordance with this Decision. The report is to show the date of sale or closure, the book value at 31 December 2007, the selling price, all profits or losses in connection with the sale or closure, and details of steps that have still to be taken to implement the restructuring plan. The report is to be sent each year within one month of the approval of WestLB's annual accounts by WestLB's supervisory board, but no later than 31 May.

WITH REGARD TO ARTICLE 2(2)

In applying the review clause in Article 2(2), the Commission is to have due regard to supply conditions and the situation on the capital markets.
