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(1) Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 29 June 2011

on State aid SA.14554 (C 7/04) implemented by Germany for the Gesellschaft für Weinabsatz (Wine Marketing Company)

(notified under document C(2011) 4426)

(Only the German text is authentic)

(2012/268/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) [1] thereof,

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

Whereas:

I. PROCEDURE

(1) Following a complaint received on 10 May 2001 the Commission sent a written inquiry to the Federal Republic of Germany on 9 November 2001. The measure was notified by letter of 5 March 2002, received on 8 March 2002, in response to this inquiry of the Commission. Since the measure had at that time already been implemented, it was listed among aid schemes not notified (aid NN 159/02).

(2) Germany sent additional information by letter dated 20 November 2002, received on 25 November 2002, by letter dated 28 April 2003, received on 2 May 2003, by letter dated 27 May 2003, received on 28 May 2003, and by fax dated 2 October 2003.

(3) By letter dated 19 February 2004, SG-Greffe (2004) D/200645, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

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

(5) The Commission received no comments from interested parties [4].

(6) Germany submitted comments to the Commission by letter of 18 March 2004, registered as received on 23 March 2004. Further comments were submitted by letter of 10 January 2006, registered on 10 January 2006, and by letter of 13 July 2007, registered on 16 July 2007.

(7) By letter dated 21 October 2008, SG-Greffe (2008) D/206430, the Commission informed Germany that it had decided to extend the procedure which had been initiated under Article 108(2) of the TFEU in respect of the aid.

(8) The Commission decision to extend the procedure was published in the *Official Journal of the European Union* [5]. The Commission called on interested parties to submit their comments on the aid.

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

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

[2] OJ C 69, 19.3.2004, p. 11 and OJ C 329, 24.12.2008, p. 18.

[3] OJ C 69, 19.3.2004, p. 11.

[4] The complainant sent reminding letters to the Commission, but did not submit additional formal comments.

[5] OJ C 329, 24.12.2008, p. 18.

(10) Germany submitted (after a request for delay extension of 17 November 2008, accepted by the Commission on 21 November 2008) comments to the Commission by letter of 23 December 2008, registered on 5 January 2009.

II. DETAILED DESCRIPTION OF THE AID

II.1. Title of the measure

(11) *Kredit an die Gesellschaft für Weinabsatz mit nachfolgendem Forderungsverzicht* [loan to the *Gesellschaft für Weinabsatz* (wine marketing company) and subsequent waiver of claims]

II.2. Legal basis

(12) The measure was implemented on the basis of a contractual agreement between the *Wiederaufbaukasse der rheinland-pfälzischen Weinbaugebiete* (reconstruction fund for the Rhineland-Palatinate winegrowing areas, WAK) and the *Gesellschaft für Weinabsatz Pfalz GmbH* (Palatinate wine marketing company, GfW).

II.3. Objective

(13) The objective was to grant a loan to GfW to purchase must from winegrowing enterprises and merchants. Secured assets were agreed as collateral. These assets were also subject to varying degrees of retention of title (*Eigentumsvorbehalt*) by the winegrowing enterprises and merchants (*Weinbaugetriebe und Kommissionäre*) in the form of simple, extended or prolonged retention of title. The waiver of claims took place when GfW got into financial difficulty due to a slump in market prices.

II.4. Public body

(14) WAK is a public-law corporation of the federal state of Rhineland-Palatinate registered in Mainz. It operates in the winegrowing sector in a similar manner as a bank. WAK's customary trade is the granting of loans for land reparcelling (*Flurbereinigung*). WAK is financed from contributions, fees, loans and grants (Article 8(1) of the *Weinbergsaufbaugesetz* [winegrowing enterprise development act]).

II.5. Beneficiaries

(15) Beneficiary of the measure was GfW, which was granted a loan by WAK on terms which were not in conformity with market conditions.

(16) GfW was a wholly-owned subsidiary of the *Bauern- und Winzerverband Rheinland-Pfalz Süd* (southern Rhineland-Palatinate farmers' and winegrowing enterprises' association). It was founded in 1984 for the purpose of marketing wine and its trade was the production and marketing of sparkling wine, grape juice, grape jelly, grape spirit and brandy. GfW also provided services for winegrowing enterprises in connection with distillation measures (*Destillationsmaßnahmen*). These distillation measures involved the measures covered by the common market organisation [6] and state-funded distillation normally carried out on the basis of Council decisions [7]. In connection to this GfW advised small wine producers and organised the transport of wine to the distilleries.

(17) Other possible beneficiaries are the winegrowing enterprises and merchants from whom, as a result of the loan, GfW was placed in a position to buy must and who did not waive any of their claims on GfW when WAK decided to do so at the time GfW got into financial difficulty.

II.6. Background of the aid

(18) In 1999, using a loan of EUR 15 302 696,25 from WAK and its own resources, GfW purchased 44 million litres of must. 60 % of this must had a minimum of 60 degree Oechsle and an average of 81 degree Oechsle. 40 % of the must was ordinary table wine must with a minimum of 44 degree Oechsle which was bought to take advantage of the beneficial conditions of preventive distillation. An average price of EUR 0,38 per litre was paid for all the must purchased. No finished wine was purchased. The purchase was carried out on the basis of simple, extended or prolonged retention of title (*einfache, erweiterte, verlängerte Eigentumsvorbehalte*) by the winegrowing enterprises and merchants. At the same time these secured assets were agreed as collateral for WAK.

(19) According to the information submitted by Germany, GfW's business plan was to take advantage of the distillation opportunities in accordance with Regulation (EEC) No 822/87 for 40 % of the must and process 60 % of the must into raw wine for the production of sparkling wine and to sell it to sparkling wine producers. In addition, GfW were planning to stock 20 % of the raw wine for nine months to one year in order to take advantage of EU subsidies for stocking of wine in accordance with Regulation (EEC) No 822/87, before it would be sold on the market for raw wine for the production of sparkling wine.

(20) On 11 November 1999 the winegrowing enterprises and merchants received a down payment of 80 % of the purchase price. A down payment of EUR 0,31 per litre was paid on average.

[6] Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (OJ L 84, 27.3.1987, p. 1), as of 1 August 2000 Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine (OJ L 179, 14.7.1999, p. 1).

[7] See, for example, Council Decision 2000/808/EC of 19 December 2000 on the granting of exceptional national aid by the authorities of the Federal Republic of Germany for the distillation of certain wine sector products (OJ L 328, 23.12.2000, p. 49).

(21) In 1999, GfW sent 40 % of its stocks to preventive distillation. In view of the fall in prices on the market for raw wine at the end of 1999 GfW decided not to sell any of the raw wine that year but to wait for the market to recover in 2000.

(22) In 2000, due to the comparatively large harvests and falling sales of sparkling wine the market in white wine slumped even further (average prices falling in some instances by as much as EUR 0,20). Much of the cask wine still in storage had to be sent for another round of distillation.

(23) As a result of an amendment of the common organisation of the market in wine adopted in 1999 and entered into force on 1 August 2000, preventive distillation in accordance with Regulation (EEC) No 822/87 was replaced by distillation to supply the potable alcohol market in accordance with Regulation (EC) No 1493/1999. The terms were considerably poorer, and only around half the previous price of EUR 0,50-0,55 per litre for preventive distillation could be achieved.

(24) Following on the slump in prices in 2000 it proved impossible for GfW to achieve the expected profits neither on the wine market nor in distillation to supply the potable alcohol market. As a result, the book value of GfW's stocks had to be reduced significantly and as a result, GfW's liabilities exceeded its assets.

(25) In view of the commercial problems described above, an interim statement of account was drawn up for the year until 31 October 2000 and examined by an auditor. On 31 October 2000 GfW's liabilities (EUR 15 670 155) exceeded its current assets (EUR 9 886 856) with EUR 5 783 299 and GfW had the liabilities as expressed in the table below. According to a report prepared by Wirtschaftsprüfungsgesellschaft Falk & Co. GmbH, GfW would very soon be facing insolvency proceedings due to its liabilities exceeding its assets (*Überschuldung*) if nothing was done to avoid this.

(26) *Table 1*

(EUR)

Liabilities to	Amount
WAK	10 150 959
Financial institutions	726 892
Suppliers	218 460
Winegrowing enterprises and merchants	4 355 581
Other	218 263
Total	*15 670 155*

(27) According to §19 of the German insolvency law (*Insolvenzordnung*) liabilities exceeding the assets of a company is cause for opening the insolvency proceedings. Because of this, the Executive board of GfW was under the obligation in accordance with § 64 GmbHG a.F. i. V. m. § 19 InsO, to within three weeks of entering into the state of its liabilities exceeding its assets (*Überschuldung*) to apply for the opening of the insolvency proceedings.

(28) As a result of the impending insolvency, GfW asked some creditors (WAK, the winegrowing enterprises and around 130 merchants involved in the purchase described in recital 18) to waive part of their outstanding claims to enable the company to continue trading. In the case of the winegrowing enterprises and merchants, the waiver was to cover 90 % of their outstanding claims, meaning they would only receive an additional 2 % of the agreed purchase price. The remaining deficit was to be eliminated by the necessary subordination of claims and waiver of claims by WAK.

(29) As principle creditor (see table 1) with a weaker security position, WAK had a considerable interest in avoiding the impending insolvency. It therefore tried to convince the winegrowing enterprises and merchants to agree to waive a part of their claims. WAK also signed a written agreement with GfW, dated 4 December 2000, where it agrees to subordinate a part of its outstanding claims — corresponding to GfW's deficit — in favour of the other creditors. The final amount of the subordination of claims was only to be specified once the waiver of claims declarations of the winegrowing enterprises and merchants had been received, so as to minimise the amount subordinated. It was also agreed that WAK would, if it would prove necessary at a later stage to avoid insolvency proceedings, waive the same amount of claims as it had subordinated.

(30) 1 700 out of the 2 700 winegrowing enterprises and merchants declared their willingness to waive 90 % of their remaining claims, corresponding to around 60 % of the outstanding claims of the group as a whole. However, the remaining winegrowing enterprises and merchants either specifically refused the offer or did not answer the request. It was clear that some of them decided not to waive their claims because of their stronger security position — some had prolonged retention of title and had already received down payment of 80 % of the agreed price. This meant that their returns in case of insolvency proceedings would be higher than the 2 % of the agreed purchase price which was on offer.

(31) In addition, a number of the winegrowing enterprises and merchants had handed in complaints against GfW and these complaints had been treated by the court who proposed settlements agreements. According to the settlement agreements GfW should pay 70 % of the remaining claims and 30 % should be waived. The

court also decided that GfW would have to carry 80 % of the court fees. Similar settlement agreements were proposed by other courts and, with this in mind, it was no longer possible for GfW to expect that the other winegrowing enterprises and merchants would agree to waiving 90 % of their remaining claims. In addition, several winegrowing enterprises and merchants now declared that they would demand 100 % repayment of the remaining 20 %.

(32) § 305a of the German insolvency law states that an out of court settlement (*außergerichtliche Einigung*) to avoid settlement of debts fails when one single creditor decides to proceed to enforcement after the out of court settlement negotiations have started.

(33) Therefore, contrary to its original intention, GfW could no longer ask the winegrowing enterprises and merchants to waive any of their claims. Instead, GfW signed an agreement with WAK dated 21 February 2001 stating that WAK agrees to fully cover GfW's deficit of year 2000 by waiving EUR 5 005 441,60 of its claims. On the remaining debt for the time period of 1 January 2001 to 31 December 2001, no interest would be charged. The agreement also stated that the winegrowing enterprises and merchants remaining claims would be settled in full. This way, the security of WAK's non-subordinated claims was guaranteed, the deficit situation was remedied, insolvency proceedings were avoided for the time being and GfW could continue trading.

(34) During the period of 1 November 2000 to 31 December 2000 GfW made repayments to WAK on the loan at a value of EUR 1 440 446,92. During the period of 2001-2005 GfW continued trading and made regular repayments on its loan to WAK, totalling EUR 3 728 969,40. In addition, during 2001, GfW made interest payments totalling EUR 149 757,16 to WAK.

(35) Due to a decline in turnover in GfW's regular fields of business as well as insufficient capitalisation, GfW had by 31 December 2004 decided to cease all activity and to liquidate GfW. All remaining stock of the remaining business areas was sold. All the proceeds were used to repay WAK. It was agreed with the buyer (a private person) that the value of all the stock remaining according to the inventory list on 31 December 2004 would be transferred to WAK at the end of 2005. The value would be the original purchase value of EUR 79 579,79.

(36) GfW was eventually dissolved as of 1 June 2005 and deleted from the trade registry during the course of 2006. There is neither a legal successor nor any legal entity from which the aid could be recovered.

(37) By 31 December 2005 EUR 9 897 154,65 of the loan had been repaid and EUR 793 994,99 in interest payments had been made. After winding-up GfW's remaining assets (EUR 87 079,79), WAK's remaining outstanding claims of around EUR 313 000 were declared irrecoverable and were written off. The part of the loan that was never repaid therefore totalled EUR 5 318 441,60 (the original waiver of claims of EUR 5 005 441,60 plus the outstanding claims after liquidation of EUR 313 000).

II.7. **Nature and intensity of the aid**

(38) WAK's EUR 15 302 696,25 loan to GfW was granted in several instalments in 1999 for a term of 12 to 18 months:

(EUR)

11.11.1999	5 936 061,62
25.11.1999	6 868 777,04
1.12.1999	585 429,72
13.12.1999	112 110,66
17.12.1999	1 800 317,21
Total	*15 302 696,25*

(39) The interest rates charged was as follows:

4th quarter 1999	3,28 %
1st quarter 2000	3,51 %
2nd quarter 2000	4,15 %
3rd quarter 2000	4,80 %
4th quarter 2000	5,15 %
2001	4,55 %-5,25 %

(40) On 11 November 1999 the suppliers received a down payment of 80 % of the agreed price. In addition, as a result of the prolonged retention of title awarded some of the suppliers, which would not come to an end on processing, blending or mixing, part of the stock was used to secure these suppliers' remaining claim of 20 %. The stocks were also agreed as collateral for WAK. However, due to the retention of title WAK had only a secondary claim on part of the stock as long as the claims with prolonged retention of title were not settled. The larger share of the risk of fluctuations in prices consequently lay with GfW and its creditors of which WAK was the main one.

(41) On the loan granted by WAK to GfW only limited interest was paid: from 11 November 1999 to 31 December 1999 (at a rate of 3,28 %), from 1 January 2000 to 31 December 2000 (3,51-5,15 %) and from 1 January 2001 to 31 December 2001 (4,55-5,25 %). No further interest was claimed after 31 December 2001.

(42) Considering the risk that WAK took when lending the money to GfW, a substantial risk premium should have been charged on top of the regular interest rate. As there was no such risk premium added to the interest rate an aid element was present at the time of granting of the loan. This aid element can be calculated as the difference between the interest rate charged and the market interest rate plus the risk premium which should have been charged.

(43) According to the Commission notice on the method for setting the reference and discount rates [8] as amended by Commission notice on technical adaptation to the method for setting the reference and discount rates [9], applicable for the period in question, the base reference rate for Germany lay between 5,23 % and 6,33 %. According to the notice, the reference rate determined is a floor rate which may be increased in situations involving particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan.

(44) According to Germany, interest rates charged by German banks during the same period for similar credits lay between 5,25 % and 6,50 % (VR-Bank Südliche Winstrasse e.G.) and 5,40 % and 6 % (Die Kreissparkasse Bad Dürkheim).

II.8. **Duration of measure**

(45) One-off measure.

II.9. **Reasons for initiating the formal investigation procedure**

(46) The Commission initiated the formal investigation procedure provided for under Article 108(2) of the TFEU because it suspected that the subordination and waiver of claims could constitute State aid in the meaning of Article 107 of the TFEU.

(47) In particular, the Commission had, based on the information available at the time of the initial opening of the formal investigation procedure, examined whether the subordination and waiver of claims were carried out pursuant to the private creditor test.

(48) The private creditor test assesses whether, under the same market conditions, a private creditor would have acted or has acted in the same way as the public creditor. As regards the case at hand, private creditors had claims on GfW totalling EUR 5,5 million on 31 October 2000, but none of them waived their claims. The report by an independent auditor did appear to show that it made economic sense for WAK to subordinate and waive a share of their claims, but did not explain why none of the other creditors were prepared to waive their own claims.

(49) In the opening of the formal investigation procedure the Commission concluded that at the time of the opening of procedure, it could not be excluded that WAK's subordination and waiver of claims (the loan to GfW and future interest payments on this loan) were not in accordance with the private creditor test as they seemed to be higher than absolutely necessary and excessively favoured not only GfW but also the other creditors (primarily the winegrowing enterprises and merchants) who had their claims refunded in full.

(50) The opening of the formal investigation procedure was then extended to include the granting of the loan. Specifically, doubt was expressed concerning whether the granting of the loan was done on market terms (no risk premium was charged) and with sufficient securities.

(51) In the extension of the formal investigation procedure, doubt regarding possible aid to the winegrowing enterprises and merchants was again raised. The information available at the time seemed to indicate that the price paid for the must was above the relevant market price, that the aim of the transaction was not to maximise profits but to support the wine and must market, and that the security position awarded the winegrowing enterprises and merchants under the sales contract were more advantageous than under normal circumstances.

(52) The doubt regarding the price was emphasised by documents provided by Germany after the first opening of procedure, which showed a fluctuation in the price per litre of table wine (not including VAT) in 1999 in the Pfalz-Rheinhessen region from a minimum EUR 0,26 (October/November) to EUR 0,30 (June to September), EUR 0,35 (April), and a maximum EUR 1,10 (February, June, November/December). The minimum market price that could be achieved for table wine at the time of granting the loan was therefore EUR 0,26 per litre.

(53) The average purchase price of EUR 0,38 per litre therefore seemed to be above the lowest market price of around EUR 0,26 per litre.

[8] OJ C 273, 9.9.1997, p. 3.
[9] OJ C 241, 26.8.1999, p. 9.

III. COMPLAINTS AND INFORMATION FROM THIRD PARTIES

(54) The Commission received information indicating that the above waiver of claims was financed through WAK funds. As the public authority funding WAK, the federal state of Rhineland-Palatinate was said to have examined a possible capital injection due to WAK's reduced capital base, but ultimately decided against it.

(55) The Commission received a complaint concerning the alleged State aid involved in the waiver of claims by WAK. The complainant stated that GfW was competing in selling wine distillates and, as a result of the waiver in favour of this company, competitors would have considerable problems selling their own products. The complainant submitted several news paper articles with information concerning the waiver of claim by WAK to the benefit of GfW.

(56) The same complainant also forwarded a letter he had received from the public prosecutor's office in Kaiserslautern (central economic crime office) as a response to a letter he had sent there. The letter from the public prosecutor's office in Kaiserslautern summarises the information received from the complainant in the form of news paper articles and statements and in the letter informs the complainant that, based on this information they had received, there are no grounds for opening criminal investigation proceedings (*strafrechtliches Ermittlungsverfahren einzuleiten*).

IV. COMMENTS FROM INTERESTED PARTIES

(57) The Commission did not receive any comments as part of the formal investigation procedures.

(58) The repeated letters from the complainant after the initial opening of procedure did not add any new facts or arguments.

V. COMMENTS FROM GERMANY

V.1. Aid element at time of granting of the loan

(59) Germany has provided comprehensive information on the conditions of the loan granted by WAK to GfW which has been included in the description of the measure in section II.

(60) In its comments, Germany agrees that the interest charged by WAK for the loan to GfW was lower than the market rate. Germany recognises that the difference between the market rate and the interest rate charged constitutes aid to GfW in the meaning of Article 107(1) of the TFEU.

(61) Germany also supplies proof of that GfW was liquidated and dissolved as of 1 June 2005. All remaining stock of the remaining business areas was sold. All the proceeds were used to repay WAK. It was agreed with the buyer (a private person) that the value of all the stock remaining according to the inventory list on 31 December 2004 would be transferred to WAK at the end of 2005. The value would be the original purchase value of EUR 79 579,79. GfW was deleted from the trade registry during the course of 2006 and there is neither a legal successor nor any legal entity from which the aid could be recovered. In accordance with settled case-law [10] recovery is according to Germany therefore not possible.

(62) Germany gives their assurances that GfW's granting of simple, extended or prolonged retention of title to the winegrowing enterprises and merchants in connection with the sale of must, was in accordance with common business practise. Germany also assures that to accept the secured assets as collateral despite the retention of title as WAK did for the loan to GfW is also according to common business practice.

(63) Further, Germany states that the purchase of must in autumn 1999 by GfW was carried out at the market price because 60 % of the must bought was quality must (minimum 60 degree Oechsle) and not ordinary table wine must as assumed in the opening of procedure. According to Germany the quality requirements for the production of sparkling wine are higher than the requirements for table wine (minimum 60 and 44 degree Oechsle respectively). The remaining 40 % of the must was ordinary table wine must and was bought to take advantage of the beneficial conditions of preventive distillation.

(64) In its comments, Germany emphasises that the marketing concept of GfW for 60 % of the stock involved the purchase of high quality must in large quantities and the subsequent processing into homogenous batches of raw wine for sparkling wine (Sektgrundwein), in compliance with the homogeneity and quality requirements of wineries. Raw wine for the production of sparkling wine requires a low level of SO2 and high levels of fruit acids. This could only be achieved if the must was purchased during the autumn sales period and through GfW's own preparation of the must into raw wine.

(65) Pursuant to the information provided by Germany, on the market for raw wine for sparkling wine, the basic price paid for one litre of must of 60 degrees Oechsle was EUR 0,312 per litre. For each additional degree Oechsle (up to a maximum of 80 degrees Oechsle) EUR 0,005 per litre was paid. The winegrowing enterprises and merchants were paid for their high quality must, 60 % of the must purchased, in accordance with this principle.

[10] ECJ, 21.3.1990, *Belgium* v *Commission (Tubemeuse)*, C-142/87, ECR I-959.

(66) In this context Germany points to the relevant market. In its opinion the market price for ordinary table wine cannot be taken as a benchmark for this 60 % of the stock because the relevant market for GfW is not the ordinary table wine market but the market for higher quality raw wine to be used in the production of sparkling wine. Germany also makes reference to the theory of demand substitution which points out that two products are not traded on the same market if one cannot be replaced by the other even if the price of one changes. In the case at hand, the specific requirements for must and raw wine for the production of sparkling wine makes it impossible to replace it with ordinary table wine must or table wine even if the price for table wine would decrease significantly. Therefore, a decrease in the price of table wine will not influence the price of must for the production of sparkling wine because they cannot be substituted for one another.

(67) According to the import statistics of the German wine-growers association (Deutsche Weinbauverband) for the years 1998-2001, imported white wine, which due to its high quality is suitable for the production of sparkling wine, had a market price of EUR 0,38 per litre, significantly higher than the EUR 0,26 per litre quoted to table wine. In its comments, Germany concludes that two separate markets exist, one for ordinary table wine and table wine must, and another for high quality raw wine and high quality must to be used for the production of sparkling wine.

(68) According to Germany it should therefore be concluded that the relevant market for the wine not being sent for distillation is the market for high quality raw wine for the production of sparkling wine, with much higher achievable prices (EUR 0,38 per litre) and not the ordinary table wine market price (EUR 0,26 per litre). Germany therefore reasons that the price paid for the must by GfW was in conformity with the market price of the relevant market and included a normal profit margin.

(69) In addition, GfW planned to participate in EU stocking and distillation programmes (GfW had already offered such services to winegrowers before). Under the stocking programme EUR 0,06 per litre was paid for 20 % of the stocks which should later be sold as raw wine for sparkling wine production. Under the distillation programme EUR 0,50-0,55 per litre was paid for the 40 % of the stock sent for distillation.

(70) In the opinion of Germany it was possible to make a profit from these activities when WAK granted the loan to GfW. On the one hand, GfW intended to use 40 % of the must purchases for preventive distillation in December 1999 at a distillation price considerably higher than the purchase price (EUR 0,50-0,55 per litre). On the other, it was predicted that sparkling wine producers would pay relatively good prices (between EUR 0,36 and EUR 0,41 per litre) for large lots of uniform, guaranteed quality raw wine. Germany reasons that GfW could have achieved an average sales revenue of EUR 0,44 to EUR 0,46 per litre, much above the average of EUR 0,38 per litre paid to the wine-growing enterprises and merchants.

(71) The planning was based on the following assumptions of target prices:

	Volume	Price/litre (EUR)
Distillation	40 %	0,50-0,55
EU subsidy for stocking of wine/must (1 year): EUR 0,06/l and subsequent sale as raw wine for sparkling wine	20 %	0,435
Sale as raw wine for sparkling wine	40 %	0,375

(72) Based on these assumptions an average sales price of 0,44 to 0,46 EUR /l was expected.

(73) The above sales forecast results in the following profit calculation:

	Price/litre (EUR)
Purchase price and processing	0.37-0,38
Income from sale as raw wine for sparkling wine, distillation, stocking subsidies	0,44-0,46
Expected profit	0,06-0,09

(74) Based on a total volume of some 44 million litres, a total profit between some EUR 2,64 million and some EUR 3,96 million was expected.

(75) Germany also makes reference to that the market price for table wine quoted by the European Commission in the opening decisions (EUR 0,26 per litre) is the lowest quote for November 1999 for table wine. The full quote for November 1999 is a market price for table wine between EUR 0,26 and EUR 0,56 per litre. In addition, this was the full spread for entire 1999. For 2000 the spread lay between EUR 0,20 and EUR 0,41 per litre. Germany also emphasises that 60 % of the must bought by GfW had an average degree of Oechsle of 81, much higher than the requirement for table wine of 44 and this was of course reflected in the price GfW paid for the must.

V.2. **Aid element at time of subordination of claims and waiver of claims**

(76) According to Germany, it was established that GfW was facing insolvency after an interim statement of accounts

was drawn up in November 2000. GfW then had an account deficit of some EUR 6 million which was confirmed when the annual accounts were drawing up for 2000. The reasons for the deficit was that the value of the stock still in GfW possession had fallen following a significant slump in market prices which meant that GfW would only be able to sell their stock at a lower price than first predicted.

(77) According to the information submitted by Germany, on 31 October 2000, WAK still had claims of some EUR 10 million towards GfW. As collateral WAK had GfW's secured assets, valued at EUR 5,7 million at the same moment in time. These were subject to retention of title (simple, extended or prolonged) by the winegrowing enterprises and merchants which according to Germany would give them priority in case of insolvency. So according to Germany, in case of insolvency procedure, GfW would need to settle the payment to the winegrowing enterprises and merchants, at a value of around EUR 3,5 million, before payments to any other creditor could be made.

(78) In order to remedy the deficit situation in time and avoid the opening of the insolvency proceedings in accordance with § 64 GmbHG a.F. i. V. m. § 19 InsO, immediate action was needed.

(79) Germany points out that, as principle creditor with a weaker security position, WAK had a considerable interest in avoiding the impending insolvency. It therefore tried to convince the winegrowing enterprises and merchants to waive part of their claims and also agreed to the following with GfW on 4 December 2000:

— a subordination of claims of the same amount as the deficit after the winegrowing enterprises and merchants had agreed to waive 90 % of their remaining claims,

— to, but only if necessary, waive the amount of claim they had agreed to subordinate.

(80) Despite a successful start to the negotiations with a majority of the winegrowing enterprises and merchants agreeing to waive their claims, GfW eventually failed due to concerted actions by some of the winegrowing enterprises and merchants and their lawyers. They were not willing to waive their claims because of their preferential security position as a result of their extended or prolonged retention of title and filled complaints. These complaints were treated by the court who proposed settlement agreements. According to the settlement agreements GfW should pay 70 % of the remaining claims and 30 % should be waived. The court also decided that GfW would have to carry 80 % of the court fees. Similar settlement agreements were proposed by other courts. With this in mind, it was no longer possible for GfW to expect that the winegrowing enterprises and merchants would agree to waiving 90 % of their remaining claims. In addition, several winegrowing enterprises and merchants now declared that they would demand 100 % repayment of the remaining 20 %. The fact that 1 700 out of 2 700 winegrowing enterprises and merchants had already indicated that they would be willing to waive a share of their claims was no longer of relevance as § 305a of the German insolvency law states that an out of court settlement (*außergerichtliche Einigung*) to avoid insolvency proceedings fails when one single creditor decides to proceed to enforcement after the out of court settlement negotiations have started.

(81) On 21 February 2001 WAK therefore agreed with GfW to cover the deficit of year 2000 by waiving EUR 5 005 441,60 of its claims, that no interest would be charged on the remaining debt for the time period of 1 January 2001 to 31 December 2001 and that the claims of the winegrowing enterprises and merchants would be settled in full. The security of the non-subordinated claims was guaranteed. GfW's deficit situation was remedied, insolvency proceedings were avoided and GfW could continue trading.

(82) Germany claims that the subordination and the waiver of claims are both in accordance with the private creditor test. To support this claim, Germany refers to relevant case-law.

(83) Waiving part of the claim can be required in order to increase the amount which is effectively recovered ([11]). A private creditor would act so as to minimise his losses. In case a claim was not sufficiently secured, agreement to postpone the repayment would increase the chances of repayment without losses as the debtor would have the chance to overcome the crisis and improve its situation ([12]). In the HAMSA judgment of the CFI, the court rejects the Commissions previous practice of requiring equal share of waivers of claims for private and public creditors in relation to their share of the debt. Instead the court established that the private creditor test can be applied also when the waivers relationship between the different creditors is asymmetric. The CFI emphasises that the creditor's status as the holder of a secured, preferential or ordinary claim, i.e. the rank of the securities of the different creditors, is decisive. The CFI established that a public creditor acts like a private creditor when he decides to waive a share

([11]) ECJ, 29.4.1999, *Spain* v *Commission*, C-342/96, ECR I-2459.
([12]) ECJ, 22.11.2007, *Spain* v *Lenzing*, C525/04, ECR I-9947.

of his claims, after extensive and reasonable evaluation of how much he might be able to recover, of the risk of liquidation and of the chance of the firm being restored to viability ([13]). Lastly, Germany refers to the Commission's decision in the Huta Cynku case, where the Commission decided that no advantage and thus no State aid exists where restructuring would yield better proceeds than liquidation ([14]).

(84) On these grounds Germany argues that taking into consideration WAK's position as the main creditor and its weaker security position compared to the winegrowing enterprises and merchants, both the subordination as well as the waiver of claim was in accordance with the private creditor test and do not constitute State aid. In an insolvency procedure WAK would have lost at least the same and most probably a significantly larger amount of their remaining claim.

(85) Only through avoiding the insolvency of GfW and settling the winegrowing enterprises and merchants remaining claims did WAK have full security rights to the remaining stock and could secure a higher repayment on its remaining claims than what would be realised in case of insolvency.

(86) From an *ex-ante* perspective, the behaviour of WAK was, according to Germany, correct, especially as they managed to secure a higher repayment by having converted their weak security position into a primary security right and avoided the impending insolvency of GfW. According to Germany, any private bank would have acted in the same way in the same situation.

(87) According to the German authorities, an *ex-ante* evaluation of GfW accounts would have estimated that by a continuation of GfW, WAK would have been able to realise repayments of EUR 5 112 918,81 million. On the other hand, if GfW had entered into insolvency proceedings, WAK would only have been able to realise a repayment of maximum EUR 2,4 million. This leaves a difference of minimum EUR 2,7 million.

(88) This is confirmed by a report from 3 February 2003, prepared by an independent auditor ([15]), commissioned by WAK and submitted by the German authorities. The report comes to the conclusion that it made economic sense for WAK to subordinate their claims, waive part of their claims to the abovementioned amount and to waive the future interest payments. The reasons for this conclusion were submitted by Germany and are as follows:

— If WAK had not subordinated and waived its claims and interest payments GfW would have had to apply for insolvency and GfW would have been wound up. WAK's claims would have had to be met from the sale of GfW's stocks.

— If the company had been wound up the value of GfW's stocks would have fallen. The actual proceeds from the sale of the stocks would have been only about 50 % to 70 % of the book value. Therefore, allowing for security rights, the proceeds would have amounted to between EUR 1,84 million and EUR 2,4 million.

— Insolvency proceedings are costly.

— The German Insolvency Law ('InsO') provides for a right to separation for products with retention of title; however, this is determined on the basis of the insolvency administrator's option to choose between performance of the contract and separation of assets (paragraph 103 InsO). Separation of assets is possible only if the insolvency administrator refuses to perform the contract, in which case the creditor can withdraw from the contract and demand the separation of the assets, and is entitled to compensation for non-performance of the contract. Down payments may be offset. In return, GfW can claim recovery of the payments already made, which may be offset against the compensation for non-performance of the contract.

— By contrast, after WAK subordinated part of its claims, it was legally possible for GfW to avoid insolvency proceedings and after waiving part of its claims and interest payments, WAK had outstanding claims of EUR 5,15 million which it could expect to recover as a result of the fact that GfW could continue trading.

— It is also pointed out that if insolvency proceedings had been opened the repayments on the loan of EUR 1 440 476,92 made by GfW to WAK in the period 1 November to 31 December 2000 could have been contested by GfW under the insolvency rules. This would have led to WAK being obliged to repay these funds.

([13]) CFI, 11.7.2002, *HAMSA* v *Commission*, T-152/99, ECR II-3049.
([14]) Commission decision, 25.9.2007, on State aid C 32/06 (ex N 179/06) implemented by Poland for Huta Cynku Miasteczko Śląskie SA, 2008/142/EC.
([15]) Wirtschaftsprüfungsgesellschaft Falk & Co. GmbH.

(89) Germany emphasises that an *ex-post* evaluation shows that the subordination and waiver of claims option made more economic sense as the repayments received by avoiding the insolvency of GfW was EUR 4 670 517,65, making it superior to the maximum EUR 2,4 million which could have been secured under the insolvency proceedings.

(90) Germany concludes that as the subordination and waiver of claims was in accordance with the private creditor test, there was no aid to the winegrowing enterprises and merchants at the time of subordination and waiver of claims by WAK.

VI. ASSESSMENT OF THE AID

VI.1. Common market organisation

(91) Until the entry into force of Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine [16], winegrowing and wine processing were covered by Regulation (EC) No 1493/1999. Article 71 of Regulation (EC) No 1493/1999 states that Articles 87, 88 and 89 of the Treaty (now Articles 107, 108 and 109 of the TFEU) shall apply to the production of and trade in the products covered by it. Before 31 July 2000, winegrowing and wine processing were covered by Regulation (EEC) No 822/87. Article 76 of Regulation (EEC) No 822/87 states that Articles 92, 93 and 94 of the Treaty (now Articles 107, 108 and 109 of the TFEU) shall apply to the production of and trade in the products listed in Article 1 of the Regulation. Therefore, the measures at hand have to be examined in the light of State aid rules.

VI.2. Existence of State aid within the meaning of Article 107(1) of the TFEU

(92) Pursuant to Article 107(1) of the TFEU, 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 is prohibited, insofar as it affects trade between Member States.

(93) WAK is a public-law corporation and is financed partly from funds of the federal state of Rhineland-Palatinate and partly from parafiscal charges. The measure is therefore financed from state resources.

(94) Aid to an undertaking appears to affect trade between Member States where that undertaking operates in a market open to intra-Union trade [17]. There is a substantial intra-Union trade in agricultural products. Therefore, the present aid is liable to affect trade between Member States [18].

(95) The Court has ruled that in order to determine whether a state measure constitutes aid within the meaning of Article 107(1) of the TFEU, it is also necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions [19] and/or whether the measure enabled the undertaking to avoid having to bear costs which it would normally have had to meet out of its own financial resources [20]. This would indeed be sufficient to indicate potential distortions of competition [21].

VI.2.1. *Existence of aid to the Gesellschaft für Weinabsatz (GfW)*

VI.2.1.a. The granting of loan by WAK

(96) The WAK loan of EUR 15 302 696,25 was granted in autumn 1999. GfW was charged an interest rate between 3,28 % and 5,25 % over the period of the loan. No risk premium was charged. The reference rate for Germany for this period lay between 5,23 % and 6,33 %.

(97) Germany agrees with the Commission's view that the granting of the loan was not done on market terms. Had the loan been granted on market terms, a higher base rate would have been charged and a risk premium would have been added considering the limited security that the collateral for the loan offered.

(98) It can be concluded that the loan granted to GfW contained a State aid element within the meaning of Article 107(1) of the TFEU as GfW received an economic advantage it would not have obtained under normal market conditions. The aid element is calculated as the difference between the interest charged and the reference rate plus an appropriate risk premium.

(99) *Possible passing on of aid to legal successors*

(16) OJ L 148, 6.6.2008, p. 1.

(17) See in particular the judgment of the ECJ, 13.7.1988, *France* v *Commission*, C-102/87, ECR 4067.

(18) Germany's intra-Community trade in wine amounted to 10 364 600 litres (imports) and 1 881 900 litres (exports) in 1999. No data are available for Rhineland-Palatinate. (*Source:* Federal Statistical Office.)

(19) ECJ, 11.7.1996, *SFEI and Others*, C-39/94, ECR I-3547, paragraph 60.

(20) ECJ, 14.2.1990, *France* v *Commission*, C-301/87, ECR I-307, paragraph 41.

(21) ECJ, 17.9.1980, *Philip Morris* v *Commission*, C-730/79, ECR 2671.

(100) According to Germany, GfW was liquidated and dissolved as of 1 June 2005. All remaining stock of the remaining business areas was sold. All the proceeds were used to repay WAK. It was agreed with the buyer (a private person) that the value of all the stock remaining according to the inventory list on 31 December 2004 would be transferred to WAK at the end of 2005. The value would be the original purchase value of EUR 79 579,79. GfW was deleted from the trade registry during the course of 2006 and there is neither a legal successor nor any legal entity from which the aid could be recovered. In accordance with settled case-law [22] recovery is according to Germany therefore not possible.

(101) As the remaining assets of GfW were sold off, the person who purchased them could possibly have benefited from the aid granted to GfW. However, as the person paid the original purchase price and the market had slumped over the passed years, it is clear that the price paid by the purchaser was at least the market prices. Therefore, the Commission concludes that no aid was passed on to the purchaser of GfW's remaining stock. At the same time, GfW ceased to exist and therefore there is no aid to be recovered.

VI.2.1.b. *The subordination and waiver of claims by WAK*

(102) The subordination of claims and the waiver of claims and interest payments were financed by WAK's own resources and a corresponding loan taken out by WAK and are therefore to be considered to be financed through State resources.

(103) To establish whether the subordination of claims and the waiver of claims and interest payments constitute State aid in the meaning of Article 107(1) of the TFEU to GfW it is necessary to establish whether GfW receives an economic advantage which it would not have obtained under normal market conditions and/or whether the measure enabled GfW to avoid having to bear costs which it would normally have had to meet out of its own financial resources. This assessment has to be done using the private creditor test. The private creditor test assesses whether, under the same market conditions, a private creditor would have acted or has acted in the same way as the public creditor.

(104) According to settled case-law, waiving part of the claim can be required in order to increase the amount which is effectively recovered. A private creditor would act so as to minimise his losses [23]. In case a claim was not sufficiently secured, agreement to postpone the repayment would increase the chances of repayment without losses as the debtor would have the chance to overcome the crisis and improve its situation [24].

(105) In the HAMSA [25] ruling of the CFI, the court rejects the Commissions previous practice of requiring equal share of waivers of claims for private and public creditors in relation to their share of the debt. Instead the court established that the private creditor test can be applied also when the waivers relationship between the different creditors is asymmetric. Paragraph 168 and 169 of the judgment reads:

'(168) *When a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation. If it turned out, for example, that in the event the firm was liquidated, the realisation value of its assets was only sufficient to cover mortgage and preferential claims, ordinary claims would have no value. In such a scenario, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice.*

(169) *It follows that, in the absence of knowledge about the factors which determine the respective values of the choices offered to creditors, the mere fact that there is an apparent lack of proportion between the amounts which the various creditors have written off is not in itself conclusive as to the reasons which led them to accept the debt remissions proposed.*'

(106) In addition, in the HAMSA [26] case the CFI established that, a public creditor acts like a private creditor when he decides to waive a share of his claims, after extensive and reasonable evaluation of how much he might be able to recover, of the risk of liquidation and of the chance of the firm being restored to viability. Lastly, in the Commission's decision in the Huta Cynku [27] case, the Commission decided that no advantage and thus no State aid exists where restructuring would yield better proceeds than liquidation.

[22] See footnote 10.
[23] See footnote 11.
[24] See footnote 12.
[25] See footnote 13.
[26] See footnote 13.
[27] See footnote 14.

(107) With reference to the case-law quoted above, when assessing whether a private creditor would have acted or has acted in the same way as WAK, it is necessary to examine the choices that WAK had when it was concluded that GfW was facing insolvency and what the economic implications connected to these choices would be. As a second step, it is also necessary to carry out the same examination for the winegrowing enterprises and merchants and then to evaluate whether the situation faced by WAK can be compared to and evaluated based on the actions of the winegrowing enterprises and merchants.

(108) When informed that GfW was facing insolvency, WAK had two choices. It could either allow for insolvency proceedings to be opened, or it could try to avoid this by reaching an agreement with GfW which would enable GfW to continue trading. Based on the information submitted by Germany and supported by a report from 3 February 2003 prepared by an independent auditor (see recital 88), the economic implications connected with these two decisions are according to Germany as follows. Ex-ante, in case of insolvency proceedings, WAK could expect to recover a maximum of about EUR 2,4 million of its claims. In the case WAK signed an agreement with GfW, waiving part of its claims and thereby enabling GfW to continue trading, WAK could *ex-ante* expect to recover some EUR 5,1 million of its claims. This leaves a difference of EUR 2,7 million in favour of enabling GfW to avoid insolvency proceedings. Whether the winegrowing enterprises and merchants were willing to do the same, only had a slight impact on the recovery calculations, but did not change the outcome on the comparison of the two alternatives.

(109) The estimate of a recovery rate in case of insolvency of EUR 2,4 million in the report is based on the German assumption that the claims of the winegrowing enterprises and merchants of EUR 4,4 million would have to be settled before those of WAK. However, according to the European Commission, the German insolvency law states that only the debt to those winegrowing enterprises and merchants with prolonged retention of title would have had to be settled before the debts of WAK. The other debts would be on an equal standing with the debt of WAK. The European Commission's own calculations show however that even in the case where the claims of WAK and the winegrowing enterprises and merchants would all have equal standing, WAK could expect to recover the maximum of EUR 4,7 million in case of insolvency (based on a maximum total repayment of EUR 6,8 million in case of insolvency and that WAK and the winegrowing enterprises received repayment in proportion to what they were owed — EUR 10 million and EUR 4,4 million respectively for WAK and the winegrowing enterprises and merchants). It can therefore be concluded that *ex ante* the more favourable option for WAK would be to enable GfW to avoid insolvency.

(110) The winegrowing enterprises and merchants on the other hand faced a very different calculation. Firstly, they had already received 80 % of the payment for their delivered goods. Secondly, according to the offer by GfW they would only receive 10 % of the 20 % still owed to them. In effect this meant that they would only receive an additional 2 % of the agreed purchase price if they signed the agreement. This is certainly less than what they could expect in insolvency proceeding, irrespectively of their security standing (simple, extended or prolonged retention of title). In average they could expect to receive 48 % of their remaining claims (EUR 2,1 million of the total EUR 4,4 million owed them). It is therefore no surprise that some of the winegrowing enterprises and merchants refused the offer by GfW. Thirdly, it must have been evident that it would be in WAK's interest to waive part of its claims and avoid insolvency even if the winegrowing enterprises and merchants did not do the same, which again would enable the winegrowing enterprises and merchants to get a larger share of their remaining claims back than the offered 10 %. Fourthly, several of them had already taken GfW to court and the court had rules in their favour, obliging GfW to settle 80 % of the remaining claims.

(111) It can be concluded that despite the fact that the winegrowing enterprises and merchants and WAK were all creditors to GfW, the choices and outcome of those choices for WAK and the winegrowing enterprises and merchants were so dissimilar that they are not comparable. The fact that the winegrowing enterprises and merchants chose not to waive their claims should not have a negative bearing when analysing whether WAK acted in accordance with the private creditor test.

(112) Weighing the different options for WAK against each other the Commission concludes that the partial subordination and waiver of claims of 4 December 2000 and of 21 February 2001 totalling of EUR 5 005 441,60 and waiver of interest payments as from 31 December 2000 was the most favourable option for WAK and is therefore in accordance with the private creditor test. The subordination and waiver of claims make out a debt deferral, which is more advantageous to the creditor compared to liquidation. In accordance with settled case-law ([28]), a public creditor will balance the advantage inherent in obtaining the offered sum under the restructuring plan and the sum they would be able to recover via the firm's liquidation. Hence, GfW did not

([28]) ECJ, 29.4.1999, *Spain* v *Commission*, C-342/96, ECR I-2459, paragraph 46; ECJ, 29.6.1999, *DMT*, C-256/97, ECR I-3913, paragraph 24; and CFI, 11.7.2002, *HAMSA* v *Commission*, T-152/99, ECR II-3049, paragraph 168.

receive any advantage it would not have received under normal market conditions and thus no State aid was awarded to GfW as a result of WAK's decision to subordinate and waive part of its claims.

(113) In the opening of procedures doubt was expressed as to whether WAK kept the subordination and waiver of claim to a strict minimum. However, according to the comments of Germany, WAK waived the share of its claims needed to cover GfW's deficit for 2000, which was necessary according to German insolvency law (see recital 25) in order to avoid insolvency proceedings and enable GfW to continue trading. In the first contract (signed on 4 December 2000) between GfW and WAK, in order to avoid GfW's insolvency, WAK agrees with GfW on a subordination of claims of the same amount as GfW's deficit after the winegrowing enterprises and merchants had agreed to waive 90 % of their remaining claims and to, if necessary, waive the amount of claim they had agreed to subordinate (see recitals 79 and 80). The reason for the waiver being larger than first expected was that despite WAK's and GfW's efforts to convince the winegrowing enterprises and merchants to contribute their part in helping GfW to avoid insolvency (see recitals 79 and 80 of the German comments), the winegrowing enterprises and merchants' decision to not waive any of their claims for the reasons mentioned in recital 110 above. As mentioned in recital 108, the decision by the winegrowing enterprises and merchants to not waive a share of their remaining claims only had a limited impact on WAKs economic assessment and did not change the outcome of this assessment: that it was economically preferential for WAK to enable GfW to avoid insolvency proceedings.

(114) The Commission therefore concludes that WAK's partial subordination and waiver of claims was the most favourable option for WAK and is therefore in according with the private creditor principle and are therefore not to be considered State aid within the meaning of Article 107(1) of the TFEU to GfW.

VI.2.2. *Existence of aid to winegrowing enterprises and merchants*

(115) In the opening and subsequent extension of the formal investigation procedure questions were raised regarding possible aid to the winegrowing enterprises and merchants. Firstly, the security position awarded the winegrowing enterprises and merchants by GfW at the time of purchase seemed relatively strong and doubts were raised whether the awarded security position was really in accordance with normal business practice. Secondly, the price paid for the purchased must was estimated to be above the market price. Thirdly, the winegrowing enterprises and merchants decision to not waive any of their claims when GfW was faced with insolvency was put into question together with WAK's decision to subordinate and then waive a share of its claims even though the winegrowing enterprises and merchants decided not to waive the 90 % of their remaining claims (20 % of value of stock).

VI.2.2.a. At the time of purchase of must — security position awarded

(116) In their comments, Germany has given their assurances that that simple, extended or prolonged retentions of title awarded to the different winegrowing enterprises and merchants in connection with the purchase of must, was indeed in accordance with normal business practise. This means that though it gave the winegrowing enterprises and merchants a relatively strong security position, especially those awarded prolonged retention of title, it was in accordance with normal business practise and was not stronger than had they made arrangements with a private purchaser.

(117) The Commission makes reference to the recommendations [29] registered by the Federation of German wineries and wine retailers, Trier, the Federation of German wine merchants, Mainz and the German Winegrowers' Association, Bonn (*Der Bundesverband der Deutschen Weinkellereien und des Weinfachhandels e.V., Trier, der Bundesverband der Deutschen Weinkommissionäre e.V., Mainz und der Deutsche Weinbauverband e.V., Bonn*) with the German competition authorities (*Bundeskartellamt*) in accordance with § 22 Abs. 3 Nr. 2 of the Act against Restraints of Competition (*des Gesetzes gegen Wettbewerbsbeschränkungen*) [30]. The first version of the recommendations was registered in 1990 and the current version in 2005. These recommendations make it clear that in cases where the full purchase price is not paid at the time of transfer of the merchandise the seller should retain the title of ownership until the full price has been paid. The security positions awarded the winegrowing enterprises and merchants in the case at hand gave varying degree of security. Only the ones with prolonged retention of title had the full security for

[29] http://www.doerr-weinkommission.de/fileadmin/user_upload/agb_doerr.pdf

[30] http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Konditionenempfehlungen0509.pdf

payment. This means that the security position for the winegrowing enterprises and merchants were in average not as strong as recommended in the recommendations mentioned above. The Commission therefore accepts, with reference to the recommendations and the actual security position awarded, Germany's assurances that it is normal business practice to award security positions as was done to the winegrowing enterprises and merchants in this case and that the security position awarded was not stronger than under a normal contract between two private actors and therefore do not constitute State aid in the meaning of Article 107(1) of the TFEU.

VI.2.2.b. At the time of purchase of must — the price paid for the purchased must

(118) In the opening of procedures, the price paid by GfW for the must bought was said to be above the market price. As market price the price for table wine was used and the price quoted as reference price was EUR 0,26 per litre. In their comments, Germany has supplied substantial information on the business strategy of GfW, which shows that the ordinary table wine market is not the relevant market and that the strategy of GfW was threefold. First, to buy table wine must with which to participate to the EU's distillation programme (40 % of the stock). Second, to buy high quality must with the intention to sell it on the market for high quality raw wine to be used for the production of sparkling wine (60 % of the stock). Third, to participate to the EU's stocking programme with 20 % of the stock before it was sold for production of sparkling wine. When analysing whether two products belong to the same market, the Commission makes use of the *Commission Notice on the definition of relevant market for the purposes of Community competition law* ([31]). According to point 7 of the note, 'a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

(119) The market for the must bought for taking advantage of the EU's distillation programme is of course that for ordinary table wine. However, the relevant price must be the price paid for wine sent for distillation.

(120) As all traditional intervention measures on agricultural markets, preventive distillation of wine according to Article 38 of Regulation (EEC) No 822/87 has as its main aim to remove over-supply from the wine market and thus the price of this voluntary distillation had to be high enough to give producers the incentive to send wine for distillation. The actual yearly price of the distillation measure was defined by the Council as 65 % of the so called guide price.

(121) The guide price itself was decided upon by the Council once a year and the price was expressly set to support the market. To do this it obviously had to be set at a high enough level. Council Regulation (EC) No 1676/1999 of 19 July 1999 fixing the guide price for wine for the 1999/2000 wine year ([32]) fixed the guide prices for the different categories of wine. The price for category AII (white table wine from vine varieties of the Sylvaner or Müller-Thurgau type) was set at EUR 82,81 per hectolitre and the one for AIII (white table wine from vine varieties of the Riesling type) at EUR 94,57 per hectolitre. According to Annex III of Commission Regulation (EC) No 1681/1999 of 26 July 1999 fixing the buying-in prices, aids and certain other amounts applicable for the 1999/2000 wine year to intervention measures in the wine sector ([33]), the exact amount paid for distillation depended on the degree of alcohol of the wine delivered because the price for preventive distillation (65 % of the guide price) was calculated by the Commission not per hectolitre but by degree of alcohol per hectolitre that year.

(122) The Commission's main role in relation to distillation of wine was to assess the actual market situation and accordingly fix the quantities admitted for preventive distillation each year in each Member State. Commission Regulation (EC) No 2367/1999 of 5 November 1999 introducing preventive distillation as provided for in Article 38 of Council Regulation (EEC) No 822/87 for the 1999/2000 wine year ([34]) allocated 148 000 hectolitres to the German market for the wine year 1999/2000. Commission Regulation (EC) No 546/2000 of 14 March 2000 amending Regulation (EC) No 2367/1999 introducing preventive distillation as provided for in Article 38 of Council Regulation (EEC) No 822/87 for the 1999/2000 wine year ([35]) increased this to 468 000 hectolitres. Regulation (EC) No 2367/1999 limited the quantity of wine sent for distillation to 40 % of the production. According to the Commission's records German producers distilled around 400 000 hectolitres under this scheme.

(123) According to Germany the price paid for the wine sent for distillation was EUR 0,50-0,55 per litre. Taking the calculation method above into consideration, the Commission finds the price quoted by Germany to be realistic.

(124) The Commission concludes that because of the EU's market intervention for a substantial share of the wine two separate markets were created. One where the reference price was that paid for wine sent to distillation, in this case EUR 0,50-0,55 per litre, and another where the reference price was that of the market. The EUR 0,26 per litre as quoted in the opening of procedure decision can therefore not be seen as the relevant reference price for the must bought to be sent for distillation.

([31]) OJ C 372, 9.12.1997, p. 5.

([32]) OJ L 199, 30.7.1999, p. 7.

([33]) OJ L 199, 30.7.1999, p. 15.

([34]) OJ L 283, 6.11.1999, p. 10.

([35]) OJ L 67, 15.3.2000, p. 7.

(125) In order to establish what was the relevant market for the must bought in order to turn it into raw wine for the production of sparkling wine it is first necessary to evaluate if separate markets exist for wine and if whether the must bought by GfW belongs to the same market as table wine or not. It will also be necessary to decide whether higher quality wine could achieve higher prices. The Commission in its statistics always refer to different prices depending on the quality of the wine. According to the Commission's in-house wine experts the price of wine is not the same for each batch and the wine statistics available only give average prices for different quality of wine. The actual price is influenced by several elements. The main elements are the quality, the aging, the reputation, the demand and the alcoholic degree/degrees of Oechsle. The degree of Oechsle indicates the ripeness and the level of sugar which is present in the grapes. It is important as it determines the final natural alcoholic degree of a wine. According to the Deutsches Weininstitute (German wine institute) the production of sect/sparkling wine requires a high degree of alcohol content in the raw wine ([36]).

(126) This supports Germany's claims that the degree of Oechsle in the must needs to be higher if the final product is to be sparkling wine than if it is to be table wine and that a premium had to be paid for the must with a higher degree of Oechsle. The Commission therefore accepts Germany's arguments that separate markets exist and that the price must indeed have been higher for must to be used for the production of sparkling wine rather than for must used for the production of table wine. As a result, the Commission also accepts that the price paid by GfW at the time of purchase cannot be compared to the price for table wine, EUR 0,26 per litre, as done in the opening of the procedure.

(127) Germany goes on to provide information regarding the achievable price on the relevant market, the market for high quality must to be used for the production of sparkling wine. Pursuant to this information, on the market of raw wine for sparkling wine, the basic price paid for one litre of must of 60 degrees Oechsle was EUR 0,312 per litre. For each additional degree Oechsle (up to a maximum of 80 degrees Oechsle) EUR 0,005 per litre was paid. The winegrowing enterprises and merchants were paid for their high quality must, 60 % of the must purchased, in accordance with this principle. Also, according to the import statistics of the German winegrowers association (Deutsche Weinbauverband) for the years 1998-2001, submitted by Germany, imported bulk white wine, which due to its high quality is suitable for the production of sparkling wine, had a market price of EUR 0,38 per litre.

(128) The Commission is willing to accept the arguments of Germany for a relevant market price of around EUR 0,38 per litre, based on the information from its in-house wine experts regarding how the price of wine is determined, the information from the Deutsches Weininstitute as stated above and the profit calculation in GfW's business plan.

(129) The business plan of GfW, submitted by Germany, shows that at the time of purchasing the must, GfW was expecting to be able to send 40 % of the stock for preventive distillation at a price of EUR 0,50-0,55 per litre, to sell 60 % of the stock at a price of EUR 0,375 per litre and for 20 % of the stock, they expected to get an additional EU subsidy for stocking of wine of EUR 0,06 per litre before selling it at EUR 0,375 per litre a year later. In total, they expected to sell the stock at an average price of EUR 0,44 to EUR 0,46 and to make a profit of between EUR 0,06 and EUR 0,09 per litre. This would leave a total profit of between some EUR 2,64 million and EUR 3,96 million.

(130) In 1999, GfW sent 40 % of its stocks to preventive distillation for which it received a price of EUR 0,50-0,55 per litre. In view of a fall in prices on the market in wine at the end of 1999 — which had not been expected by GfW considering the higher prices the year before — GfW decided not to sell its remaining stock that year but to store it and sell it in 2000, or if the prices on the market would remain low, to take advantage of a second round of preventive distillation. This decision was based on the assumption that preventive distillation would be continued. However, the new Regulation (EC) No 1493/1999 on the common organisation of the market in wine abolished preventive distillation. Instead it introduced the option of voluntary distillation to supply the potable alcohol market. The newly introduced crisis distillation measure can only be used in exceptional cases of market disturbance. Recital 35 of Regulation (EC) No 1493/1999 explicitly refers to the elimination of the distillation system as an artificial outlet for surplus production. The new Regulation entered into force on 31 July 2000.

(131) For GfW this meant that the distillation measures in the 2000/01 wine year were considerably less favourable than those in previous years. In distillation to supply the potable alcohol market only around half of the previously achieved average price of EUR 0,50-0,55 per litre could be achieved.

(132) In the view of Germany this development could not have been predicted when GfW decided to keep the wine in storage. The Commission, on the other hand, believes that this development was in fact foreseeable. The new common organisation of the market in wine explicitly set out to eliminate the distillation system. Thus it ought to have been clear to GfW, at the time it was decided to go for a second round of distillation, that distillation measures in the second part of 2000 and onwards would not provide any relief from the falling prices on the wine market.

([36]) http://www.deutscheweine.de/icc/Internet-EN/nav/0f2/0f207d71-9ffe-401e-76cd-461d7937aae2&sel_uCon=02a235d6-994d-7017-288b-5952196117f5&uTem=0e3307d7-19ff-e401-e76c-d461d7937aae

(133) However, the arguments around whether GfW should have known about the change in the Regulation are irrelevant. The business plan at the time of purchase, against which GfW's behaviour as a private investor should be judged, only included a first round of preventive distillation, which did take place and for which GfW received EUR 0,50-0,55 per litre. It did not include a second round of preventive distillation and therefore the expected profit from such distillation was not a part of the overall profit calculation at the time of purchase. It was not part of the business plan and though there is no doubt that GfW's decision to go for a second round of distillation when the market price fell was a bad one, it cannot be seen as State aid to the winegrowing enterprises and merchants at the time of purchase.

(134) Based on the above, the Commission concludes that GfW paid the market price for the must purchased in the autumn of 1999 and that therefore, no State aid in the meaning of Article 107(1) of the TFEU was awarded the winegrowing enterprises and merchants.

VI.2.2.c. At the time of subordination and waiver of claims by WAK

(135) In recital 114 it was concluded that the subordination and waiver of claims by WAK was done purely out of self interest and in accordance with the private creditor test and that there therefore was no State aid to GfW. The fact that the decision by WAK favoured the winegrowing enterprises and merchants has no relevance as this was not the intention, but just a consequence of WAK trying to maximise the recovery of its own funds.

(136) The Commission concludes that when subordinating and waiving its claims, WAK did not award any State aid in the meaning of Article 107(1) of the TFEU to the winegrowing enterprises and merchants.

VI.3. **Classification of the aid as illegal aid**

(137) Since the aid element contained in the loan by WAK in favour of GfW was granted and paid without prior notification to the Commission, it is illegal within the meaning of Article 1(f) 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 [37].

VI.4. **Exemptions provided for in Article 107 of the Treaty regarding the loan to GfW**

(138) It must therefore be examined whether one of the exemptions to the prohibition of State aid under Article 107(1) of the TFEU applies.

(139) From the current viewpoint, the exemptions provided for in Article 107(2) and (3)(a), (b) and (d) are not applicable, since the aid in question is neither:

— aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, nor

— aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor

— aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

(140) Article 107(3)(c) of the TFEU is therefore the only exemption which might possibly apply.

(141) At the time of the granting of the aid, aid to primary producers was evaluated directly under Article 107(3)(c) of the TFEU. In accordance with the praxis at the time, aid for investments, credit, the livestock sector, producer organisations, publicity and promotion, compensation for damages caused by diseases, insurance premiums and technical assistance could when fulfilling certain criteria be deemed compatible with the internal market. None of the mentioned forms of compatible aid can however be used to exempt the aid in question.

(142) In addition, concerned not to leave any avenue unexplored, the Commission has examined whether the guidelines for rescuing and restructuring firms in difficulty might not be applicable to the case in question. The first condition to be fulfilled by an undertaking if it is to benefit from rescuing or restructuring aid is that it should be considered as being in difficulty within the meaning of the guidelines on State aid for rescuing and restructuring firms in difficulty [38]. There is no indication from the information held by the Commission that the undertaking was in difficulty within the meaning of the abovementioned guidelines when the aid was granted. It is only a year later due to a slump in the market that GfW finds itself in difficulty.

[37] OJ L 83, 27.3.1999, p. 1.

[38] OJ C 288, 9.10.1999, p. 2.

(143) In any case, the Commission wishes to point out that it is up to the Member State concerned to fulfil the duty of cooperation it has towards the Commission by providing all the elements required for the Commission to be able to check that all the conditions of the derogation from which it is asking to benefit have been met [39]. In the case in question, Germany has not supplied sufficient information enabling the Commission to assess the data in the light of these guidelines, nor has the German authorities supplied sufficient documentation to enable the Commission to evaluate the aid in the light of the other forms of compatible aid mentioned in paragraph 126, and this in spite of the information provided by the Commission in point 44 of the decision to initiate the investigative procedure.

(144) Aid measures which compatibility is to be assessed directly under Article 107(3)(c) of the TFEU has to be done so restrictively. It must be clearly demonstrated that the positive effects of the aid measure outweigh the damaging effects the aid could have on competition and the proper functioning of the internal market. Unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector are not considered to fulfil these criteria and hence constitute operating aid which is incompatible with the internal market.

(145) For the above reasons, the aid granted to GfW as an element of the loan does not comply with any of the possible exemptions to Article 107(3). It therefore constitutes aid incompatible with the internal market.

(146) No other exceptions under Article 107(3)(c) of the TFEU are applicable.

VII. **CONCLUSIONS**

(147) For the above reasons, the Commission finds that the loan granted to GfW may not be considered to be compatible with the internal market. The Commission also finds that Germany implemented the measure unlawfully.

(148) For the above reasons, the Commission finds that the subsequent subordination of claims and waiver of claims and future interest payments does not constitute State aid in favour of GfW nor in favour of the winegrowing enterprises and merchants.

(149) For the above reasons, the Commission finds that the purchase of must was done at market prices and in accordance with common business practice and therefore does not constitute State aid to the winegrowing enterprises and merchants.

(150) Where illegally granted State aid is found to be incompatible with the internal market, the natural consequence is that the aid should be recovered in order — as far as possible — to restore the competitive position that existed before the aid was granted.

(151) As no legal successor to GfW exists, recovery is not possible in accordance with settled case-law [40],

HAS ADOPTED THIS DECISION:

Article 1

The State aid, amounting to the difference between the interest rate charged on the loan to GfW and the market interest rate plus the risk premium which should have been charged on the loan, unlawfully granted by Germany, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of *Gesellschaft für Weinabsatz Pfalz GmbH* is incompatible with the internal market.

Article 2

The subordination and waiver of claims by WAK does not constitute aid to GfW or the winegrowing enterprises and merchants within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

The purchase of must in 1999 by GfW does not constitute aid to the winegrowing enterprises and merchants within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 4

Germany shall not need to recover the aid referred to in Article 1 from the beneficiary as the beneficiary is insolvent and has been dissolved and deleted from the trade registry and there is no legal successor.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 June 2011.

For the Commission

Dacian CIOLOȘ

Member of the Commission

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[39] CFI, 15.6.2005, *Regione autonoma della Sardegna* v *Commission*, T-171/02, ECR II-2123, paragraph 129.

[40] ECJ, 2.7.2002, *Commission* v *Spain (Magefesa)*, C 499/99, ECR I-6031.

COMMISSION DECISION

of 29 June 2011

on the State aid No SA.32504 (2011/N) and C 11/10 (ex N 667/09) implemented by Ireland for Anglo Irish Bank and Irish Nationwide Building Society

(notified under document C(2011) 4432)

(Only the English text is authentic)

(Text with EEA relevance)

(2012/269/EU)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

1.1. Anglo Irish Bank

(1) By Decision of 14 January 2009, the Commission temporarily approved a recapitalisation of Anglo Irish Bank (hereinafter referred to as 'Anglo') [2]. That recapitalisation was not implemented as Ireland decided to nationalise Anglo instead. By Decision of 16 February 2009, the Commission concluded that the nationalisation did not involve State aid [3].

(2) By Decision of 26 June 2009, the Commission authorised emergency aid to Anglo in the form of a capital injection of EUR 4 billion (4 000 million) on the basis of Article 87(3)(b) of the Treaty establishing the European Community for a period of six months and the Commission took note of Ireland's commitment to notify a restructuring plan to the Commission by the end of November 2009 [4].

(3) On 30 November 2009, Ireland notified a restructuring plan to the Commission [5] (hereinafter referred to as 'the initial Anglo restructuring plan') prepared by Anglo. On 24 November and 18 December 2009, the Commission sent information requests to Ireland regarding the initial Anglo restructuring plan.

(4) On 17 February 2010, Ireland notified the Commission of its intention to inject additional capital of up to EUR 10,44 billion into Anglo (hereinafter referred to as 'the second recapitalisation').

(5) By Decision of 31 March 2010 [6], the Commission approved the second recapitalisation on a temporary basis until the final decision by it on Anglo's restructuring plan. The Commission also decided in that Decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaty') on the initial Anglo restructuring plan and the associated aid measures by Ireland (hereinafter referred to as 'the opening decision'). The opening decision was published in the *Official Journal of the European Union* on 7 August 2010. The Commission invited interested parties to submit their comments on the aid. No comments were submitted by third parties.

(6) On 31 May 2010, Ireland submitted a revised restructuring plan for Anglo Irish Bank (hereinafter referred to as 'the second Anglo restructuring plan').

(1) OJ C 214, 7.8.2010, p. 3.

(2) Commission Decision in Case N 9/09, Recapitalisation of Anglo Irish Bank by the Irish State (OJ C 177, 30.7.2009, p. 1).

(3) Commission Decision in Case N 61/09, Change of ownership of Anglo Irish Bank (OJ C 177, 30.7.2009, p. 2).

(4) Commission Decision in Case N 356/09, Recapitalisation of Anglo Irish Bank by the Irish State (OJ C 235, 30.9.2009, p. 3).

(5) According to recital 40 of the Commission Decision in Case N 356/09 (see footnote 4 of this Decision), the adoption of a restructuring plan is consistent with paragraph 28 of the Credit Institutions Financial Support (CIFS) Scheme (the Irish guarantee scheme for credit institutions) and paragraph 30 of the Commission's approval of the CIFS Scheme. See also Commission Decision in Case NN 48/08, Ireland — Guarantee Scheme for banks in Ireland (OJ C 312, 6.12.2008, p. 2). In the context of CIFS, the Minister for Finance has required a restructuring plan to be produced if a participating institution's solvency ratio falls below the minimum regulatory standards applicable to it on a material basis.

(6) Commission Decision in Case NN 12/10 and C 11/10 (ex N 667/09), Second rescue measure in favour of Anglo Irish Bank (OJ C 214, 7.8.2010, p. 3).

(7) On 2 June 2010, the Commission sent an information request to Ireland regarding the second Anglo restructuring plan. Those questions were discussed in a meeting on 24 June 2010 between Commission officials, the Irish authorities and representatives of Anglo. Moreover, the Irish authorities replied to those questions in writing on 9 and 12 July 2010.

(8) On 28 June 2010, Ireland notified the Commission of another capital injection of up to EUR 10 054 million in favour of Anglo (hereinafter referred to as 'the third recapitalisation') ([7]).

(9) By Decision of 10 August 2010 ([8]), the Commission approved the third recapitalisation on a temporary basis until the final decision by it on Anglo's final restructuring plan.

(10) On 31 August 2010, Ireland submitted a new proposal to the Commission on the restructuring of Anglo which set out a split and wind-down of the bank over 10 years.

(11) In light of a detailed assessment of the prospects of Anglo, the Irish Minister of Finance announced on 30 September 2010 that the resolution of Anglo would require in total a cumulated capital injection of EUR 29,3 billion under base projections, and an additional EUR 5 billion under a stress scenario.

(12) On 26 October 2010, Ireland submitted a work-out plan for Anglo (hereinafter referred to as 'the third Anglo restructuring plan'), explaining in detail how it would implement the work-out of the entity which had been presented for the first time in its submission of 31 August 2010.

(13) In the subsequent weeks, the Commission services requested some clarifications and sought additional information on 29 October 2010. The Irish authorities replied in a number of e-mail exchanges and conference calls.

(14) On 8 December 2010, Ireland notified to the Commission an additional recapitalisation of EUR 4 946 million (hereinafter referred to as 'the fourth recapitalisation') and State guarantees in respect of certain liabilities in favour of Anglo.

(15) By Decision of 21 December 2010 ([9]), the Commission approved the fourth recapitalisation and guarantees in respect of certain liabilities in favour of Anglo on a temporary basis until the approval of Anglo's final restructuring plan.

1.2. **Irish Nationwide Building Society**

(16) By Decision of 30 March 2010, the Commission temporarily approved a EUR 2,7 billion recapitalisation of Irish Nationwide Building Society (hereinafter referred to as 'INBS') for six months as of the date the recapitalisation was put into effect (22 December 2009), or, if Ireland submitted a restructuring plan before that date, until the Commission had adopted a final decision on INBS's restructuring plan (hereinafter referred to as 'the first INBS recapitalisation') ([10]).

(17) Furthermore, on 30 March 2010, the Irish Minister of Finance announced that, in the light of the reduction of INBS's balance sheet resulting from transfers to the National Asset Management Agency (hereinafter referred to as 'NAMA'), that institution did not have a future as an independent stand-alone entity.

(18) On 22 June 2010, Ireland notified a restructuring plan for INBS to the Commission (hereinafter referred to as 'the INBS restructuring plan'). That plan envisages the continued management of the society as a going concern in anticipation of a sale to a trade buyer.

(19) In the following weeks, Ireland informally informed the Commission that it was assessing other options for the future of INBS. In particular, Ireland was planning to test the market appetite for acquiring parts of INBS.

(20) On 30 September 2010, the Irish Minister of Finance made a public statement on the situation of the Irish banking sector and announced that INBS needed an additional recapitalisation of EUR 2,7 billion (leading to a total recapitalisation of EUR 5,4 billion). That capital injection (hereinafter referred to as 'the second INBS recapitalisation') was notified to the Commission on 12 October 2010.

([7]) Originally, the notification also covered an individual State guarantee on Anglo's short-term liabilities (after the expiry of the Irish Eligible Liabilities Guarantee scheme on 29 September 2010). However, on 4 August 2010 Ireland withdrew the notification of the individual State guarantee and only maintained the notification of the third recapitalisation.

([8]) Commission Decision in Case NN 35/10 (ex N 279/10), Ireland — Temporary approval of the third recapitalisation in favour of Anglo Irish Bank (OJ C 290, 27.10.2010, p. 4).

([9]) Commission Decision in Case SA.32057 (2010/NN), Ireland — Temporary approval of the fourth recapitalisation and guarantee in respect of certain liabilities in favour of Anglo Irish Bank (OJ C 76, 10.3.2011, p. 4).

([10]) Commission Decision in Case NN 11/10, Ireland — Rescue measures in favour of INBS (OJ C 143, 2.6.2010, p. 23).

(21) By Decision of 21 December 2010, the Commission temporarily approved the second INBS recapitalisation for a period of six months or, if Ireland submitted a restructuring plan before 31 January 2011, until the Commission had adopted a final decision on the restructuring plan of that bank [11].

1.3. **Joint procedure**

(22) On 28 November 2010, an agreement was reached between Ireland and the European Union, the European Central Bank (hereinafter referred to as 'ECB') and the International Monetary Fund on a Programme for Support for Ireland (hereinafter referred to as 'the Programme for Support'). As part of the Programme for Support, Ireland agreed to undertake certain bank recapitalisation and reorganisation measures under a Programme for the Recovery of the Banking System (hereinafter referred to as 'the Banking System Programme'). In the context of the Banking System Programme, the Memorandum of Economic and Financial Policies (hereinafter referred to as 'MEFP') sets out measures which are necessary to restore the viability of the financial sector in Ireland [12]. Point 10 of the MEFP states that: 'swift and decisive action will be taken to resolve the position of Anglo Irish Bank (Anglo) and Irish Nationwide Building Society (INBS) in a way that protects depositors and strengthens the banking system. To this end, by end-January 2011, we will submit to the European Commission a revised proposal developed in collaboration with IMF to resolve Anglo and INBS' [13].

(23) On 12 January 2011, Ireland provided information to the Commission regarding the planned sale of deposits by Anglo and INBS. Further information regarding the sales process was submitted on 2 February 2011 and 21 February 2011.

(24) On 16 January 2011, Ireland submitted information to the Commission regarding the contemplated resolution of the businesses of Anglo and INBS. On 31 January 2011, Ireland notified the Commission of a joint restructuring and work-out plan for Anglo and INBS (hereinafter referred to as 'the joint restructuring plan').

(25) On 5 April 2011, Ireland updated the joint restructuring plan by including the impact of the deposits and NAMA bond transfers which had taken place in the meantime and by replacing the forecast results and balance sheets of Anglo and INBS for 2010 by the actual ones, which had become known in the meantime. A further update was received on 21 April 2010.

2. **DESCRIPTION OF THE AID**

2.1. **The beneficiaries and their difficulties**

2.1.1. *Anglo Irish Bank*

(26) Measured by balance sheet size, Anglo is one of the largest banks operating in Ireland. As at 31 December 2010, it had a balance sheet size of EUR 72,2 billion [14] and a loan book of EUR […] (*) billion. In terms of its business model, Anglo was a 'monoline' bank specialising in commercial real estate lending in three core markets: Ireland, the United Kingdom and the United States. Since the beginning of the financial crisis, Anglo registered heavy losses mainly driven by impairment charges on its commercial loan book. Anglo was nationalised by Ireland on […] 2009.

(27) A detailed description of Anglo and its difficulties was provided in Sections 2.2 and 2.3 of the opening decision of 31 March 2010.

(28) Anglo's business model proved to be unsustainable and led to unprecedented financial difficulties and losses in the context of the global financial crisis. Anglo's business model was overly concentrated on commercial property lending and led to excessive exposures to that sector of the economy which was particularly hard-hit during the financial crisis: commercial property prices decreased peak-to-trough by more than 62 % in Ireland, 37 % in the United Kingdom and 45 % in the United States [15]. In addition, Anglo's lending was partly financed by wholesale funding, a source of funding which dried up as a result of the financial crisis.

(29) Risk management in Anglo was not sufficiently developed and allowed uncontrolled balance sheet growth combined with risky lending practices (such as high loan-to-value lending and interest-only lending), in particular during the years of the Irish property boom. Between 1984 and 2008, the Bank's balance sheet grew at a compound growth rate of approximately 30 % per year, reaching a balance sheet of EUR […] billion in 2008. The loans-to-deposit ratio (hereinafter referred to as 'LtD') increased from 100 % pre-1990 to an average of 217 % in the period from 2008 to 2009.

(30) Anglo benefited from four recapitalisations, an asset relief measure which allowed it to transfer around EUR 35 billion of impaired loans to the NAMA and State guarantees on most of its liabilities (see recital 66).

(11) Commission Decision in Case NN 50/10 (ex N 441/201) Ireland — Second emergency recapitalisation in favour of Irish Nationwide Building Society (OJ C 60, 25.2.2011, p. 6).

(12) The documents that make up the Programme for Support for Ireland can be found at the following website: http://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-12-01-financial-assistance-ireland_en.htm

(13) Point 10 of the MEFP of 28 November 2010.

(14) As compared to EUR 101 billion at the end of 2008.

(*) Confidential information.

(15) Figures quoted in the restructuring plans.

2.1.2. *INBS*

(31) A detailed description of INBS was provided in Section 2.1 of the Commission Decision of 30 March 2010 concerning the first recapitalisation of INBS. A short summary is therefore provided in this Section.

(32) INBS is a building society and had a balance sheet total of EUR 12,1 billion as at 31 December 2010. Before the financial crisis, it was the sixth-largest Irish financial institution in terms of balance sheet size. It offered traditional retail banking products to its members (namely, savings and mortgages). In the years preceding the financial crisis, INBS aggressively increased its activities in risky commercial property lending, which became its main activity. INBS was predominantly active in Ireland, where it had a branch network of 50 branch offices and 40 branch agents, and in the United Kingdom where it had no branch offices.

(33) INBS's loan book as at 31 December 2010 had a value of EUR 1,9 billion following the transfer of EUR 8,5 billion of loans to NAMA ([16]). Retail deposits amounted to EUR 3,9 billion as at 31 December 2010. INBS recorded a loss of EUR 3,3 billion in 2009.

(34) INBS's difficulties were caused by its overexposure to poorly underwritten Irish commercial property loans (approximately 80 % of INBS's total loan book). Consequently, when the financial crisis hit and property prices, especially commercial property prices, fell dramatically in both Ireland and the United Kingdom, INBS was highly exposed to losses in its loan book. Those losses have forced it to take significant impairments in 2009 and 2010.

(35) INBS benefited from two recapitalisations, an asset relief measure which enabled it to transfer around EUR 8,9 billion of impaired commercial property loans to NAMA and State guarantees on most of its liabilities (see recital 67).

(36) Prior to the first recapitalisation by Ireland, INBS was owned by its members. As a result of the first recapitalisation of INBS, the State has taken full control of the bank. The members have thus lost control of INBS and have lost all economic ownership rights.

([16]) INBS will in total transfer EUR 8,9 billion of loans to NAMA. To date, EUR 8,5 billion have been transferred, while EUR 400 million are awaiting transfer.

2.2. **The individual restructuring plans**

2.2.1. *The initial Anglo restructuring plan*

(37) The initial Anglo restructuring plan was notified to the Commission on 30 November 2009. A comprehensive description of the initial Anglo restructuring plan can be found in Section 2.4 of the opening decision, in which the Commission raised a number of doubts as to whether that plan complied with the conditions laid down in the Restructuring Communication ([17]). In particular, the Commission questioned whether the plan would lead to a restoration of the long-term viability of Anglo, would limit the restructuring costs to a minimum and would limit distortions of competition. Therefore, the Commission initiated the procedure laid down in Article 108(2) of the Treaty with regard to that plan. At the same time, the Commission requested the submission of a revised restructuring plan by 31 May 2010.

2.2.2. *The second Anglo restructuring plan*

(38) On 31 May 2010, Ireland submitted a revised restructuring plan which set out a significantly revised approach to restructuring Anglo.

(39) As requested in the opening decision, the second Anglo restructuring plan presented a number of possible restructuring scenarios: (i) liquidate 100 % of Anglo over 12 months; (ii) wind-down 100 % of Anglo over 10 years; (iii) wind-down 100 % of Anglo over 20 years; (iv) stabilise the whole of Anglo and keep it as a going concern; and (v) a split which included the wind-down of 80 % of Anglo through the creation of an asset management company while the remainder would continue to do business (a good bank).

(40) The split scenario, referred to in (v) of recital 39, was presented as the preferred option of the Irish authorities. In that scenario, the asset management company would hold 'lower quality assets' that would not be transferred to NAMA or the good bank (book of EUR 13,6 billion at split), and would be managed to maximise asset recovery values while minimising State funding. The asset management company would not conduct any new business and would be liquidated in 2020.

(41) The good bank would become a significantly smaller State-owned commercial bank which could deliver long-term viability with a sharply reduced balance sheet having a lower risk profile. It was envisaged to privatise the good bank within a five-year timeframe, providing a partial return to the State of its investment in Anglo.

([17]) Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ C 195, 19.8.2009, p. 9).

2.2.3. *The third Anglo restructuring plan*

(42) On 26 October 2010, elaborating on its submission of 31 August 2010, Ireland submitted a substantially revised proposal on the restructuring of Anglo. The third Anglo restructuring plan sets out the broad lines of a split of Anglo into two legally independent State-owned entities, namely a Funding Bank and a Recovery Bank, which would result in the wind-down of Anglo over a period of approximately 10 years. Further State aid would be needed in the form of capital injections, persistent Central Bank funding and a comprehensive structure of State guarantees over the lifetime of the two Banks. The plan forecast a capital requirement of EUR 29,3 billion in the base case and EUR 34 billion in stress case.

(43) Ireland indicated that the new approach to the restructuring of Anglo, which foresees that it would cease to operate as a lender, was triggered by deteriorating market circumstances. It argued that funding conditions for Anglo and sentiment towards the State (Sovereign) had worsened since the submission of the second Anglo restructuring plan, while the discounts on loans transferred to NAMA and the losses on the non-NAMA loan book were higher than expected.

2.2.4. *The INBS restructuring plan*

(44) The restructuring plan for INBS was submitted to the Commission on 22 June 2010. In line with what was requested in the first INBS recapitalisation decision, the INBS restructuring plan explored several options for the bank: (i) restructuring and continuation of the business with a view to selling it around 2013; (ii) immediate wind-down; or (iii) gradual wind-down to be completed by 2020. The sale required the lowest amount of State support in addition to EUR 2,7 billion already provided by the State at the time the plan was submitted.

(45) In the preparation for the sale, INBS was supposed to become a small savings and loan institution. It would transfer a significant portion of its existing commercial loan portfolio to NAMA and cease commercial lending, and provide only residential mortgage lending and savings accounts to its customers.

(46) The INBS restructuring plan did not envisage any particular measures aimed at limiting the distortion of competition created by the aid.

2.3. **The joint restructuring plan for Anglo and INBS**

2.3.1. *Description of the joint restructuring plan*

(47) On 31 January 2011, Ireland submitted to the Commission the joint restructuring and work-out plan for Anglo and INBS. The joint restructuring plan foresees the merger of Anglo and INBS, after the sales of their respective deposit books, into one single entity (hereinafter referred to as 'the merged entity') which will be licensed, fully regulated and 100 % State-owned. The joint opening balance sheet after the merger will amount to EUR [60-70] billion.

(48) The merged entity will: (i) work out the legacy commercial property loan book of Anglo over a period of 10 years through redemptions and sales; (ii) work out the retail mortgage book of INBS over a period of […] years […]; and (iii) rely […]. The merged bank will only hold a small amount of deposits and will not engage in any new lending or other activities.

(49) The merged entity will hold the various promissory notes which have been used to recapitalise both Anglo and INBS. All the promissory notes will be settled in accordance with their payment schedule ([18]). […]. The merged entity also have a small amount of subordinated debt, which will correspond to the amount which it does not manage to buy back in the framework of successive liability management exercises.

(50) The objective of the proposed joint restructuring plan is to avoid the risk of further losses from new lending, manage the work-out of the loan books efficiently and keep State aid requirements to a minimum. Working out the two loan books in one merged entity enables synergies with regard to capabilities, infrastructure and processes.

2.3.1.1. Deposits

(51) In conformity with the Programme for Support, Ireland committed to transfer, before the merger, the deposits (which are recorded on the liability side of the balance sheet) and NAMA bonds (which are recorded on the asset side of the balance sheet) of Anglo and INBS to viable institutions in an open process. Bids were invited on the package of NAMA bonds and deposits. The sale of circa EUR 12,2 billion of deposits and of circa EUR 15,9 billion of NAMA bonds of both entities was completed ([19]) on 24 February 2011.

(52) In contrast to previous versions of the Anglo restructuring plans, the merged entity will, in principle, not hold deposits to fund its assets but will instead exit the deposit market.

([18]) See point 35 of the Commission Decision in Case NN 12/10 and C 11/10 (ex N 667/09) (footnote 6 of this Decision).
([19]) http://www.ntma.ie/Publications/2011/NTMACompletesTransferAngloAndINBSDeposits.pdf

(53) However, in compliance with the commitments (see Section 2.2.5.1), the merged entity will be allowed to keep a small amount of corporate deposits which are held as guarantee for loans granted to several corporate institutions (legacy secured or deposits related to borrower accounts). The joint restructuring plan assumes that there will be a maximum amount of EUR 1 billion of deposits at the time of the merger.

2.3.1.2. Funding

(54) The joint restructuring plan is based on the following assumptions:

(i) […]

(ii) Existing wholesale funding of EUR […] billion to mature as per existing schedules (majority within four years), […].

2.3.1.3. Guarantees

(55) The merged entity requires a comprehensive set of State guarantees (see also recital 69), covering the following exposures:

(i) A State guarantee on deposits and bonds still outstanding. That guarantee would be needed for the entire duration of the joint restructuring plan and is currently provided under the Eligible Liabilities Guarantee Scheme (hereinafter referred to as 'the ELG scheme'). Once the ELG scheme expires, the guarantee would have to be provided on an ad hoc basis;

(ii) A State guarantee to the CBI on the unsecured part of the ELA to Anglo/INBS, which would allow the merged entity to access CBI/ELA funding as needed […];

(iii) A State guarantee on certain liabilities for its off-balance sheet transactions, services and transactional capabilities [….] ([20]).

(56) Under the joint restructuring plan, no payments will be made by the merged entity for the State guarantees, except for the guarantees on deposits (50 bps) for the duration of the ELG scheme and on already guaranteed bonds outstanding (for which a fee of 95 to 125 bps will be paid during the duration of the ELG scheme until they mature).

([20]) See Commission decision in Case SA.32057 (see footnote 9 of this Decision).

2.3.1.4. Capital

(57) In the base case, the joint restructuring plan assumes that no additional capital beyond that effectively injected to date, namely EUR 34,7 billion (EUR 29,3 billion for Anglo and EUR 5,4 billion for INBS) will be required ([21]). Those amounts correspond to the amounts already authorised under the four rescue decisions for Anglo and the two rescue decisions for INBS ([22]). The joint restructuring plan indicates that in a stress scenario (implying in particular higher impairments and losses on loans disposals), capital requirements would increase up to EUR 38 billion, meaning that an additional EUR 3,3 billion of capital […] over the period of the plan (namely 10 years). Besides the risk of higher impairments and losses on loans disposals, the joint restructuring plan also identifies several additional risks which could lead to the merged entity having recourse to […] EUR 3,3 billion capital in a stress case.

2.3.1.5. Main additional risks associated with the joint restructuring plan

(58) Firstly, the joint restructuring plan identifies a risk of an increase in the cost of funding and an exchange rate risk. […] ([23]). In total, the merged entity will need to access circa […] of Central Bank funding at the time of the merger. That funding need would gradually decrease to […]. If the reliance on Central Bank funding is not feasible to the extent and for the duration projected ([24]), the merged entity will have to rely on other sources of funding, if they exist, which could be more expensive.

(59) Furthermore, some of the merged entity's assets are fixed interest rate, long-term assets (typically, promissory notes) which are funded through very short-term funding […].

(60) […].

(61) In addition, the joint restructuring plan highlights the risks associated with the merged entity's difficulties in running its business on a going concern basis while being in resolution mode. […]. Finally, the merger process may lead to elevated operational risks, which in turn might require further capital.

(62) The probability of such risks materialising is difficult to assess. Those risks and uncertainties were not incorporated in the expected capital needs in the stress case scenario.

([21]) The Commission approved recapitalisations for Anglo totalling EUR 29,44 billion. Ireland has actually granted EUR 29,3 billion (namely EUR 0,14 billion less).

([22]) Commission Decisions in Cases N 356/09, C 11/10, NN 35/10 and SA.32057 for Anglo and Commission Decisions in Cases NN 11/10 and SA.31714 for INBS (see footnotes 4 and 6 and footnotes 8 to 11 of this Decision).

([23]) […]

([24]) […]The ECB has received a copy of the joint restructuring plan.

2.3.2. *The Commitments*

(63) Ireland has provided a number of commitments related to the merged entity in order to specifically limit the distortion of competition resulting from the State support received by Anglo and INBS. Those commitments are attached to this Decision in their entirety in Annex I. For the purposes of this Decision, the Commission has provided a non-exhaustive summary in recitals 63 to 66.

(i) Duration of the commitments. Unless otherwise specified, all commitments provided by Ireland will remain valid and applicable until the assets of the merged entity are fully worked out, including the promissory notes.

(ii) Ban to develop new activities and to enter new markets: The merged entity will not develop any new activities and will not enter new markets, that is to say that the merged entity will not carry out any activities other than those that are consistent with managing the work-out of the Anglo and INBS legacy loan book (including loan sales, where appropriate, to maximise recovery values). In particular, the merged entity will maintain and use its banking licence only as long as necessary for the work-out of the loan portfolios and will not use it to develop new activities. […].

(iii) Management of existing assets: The merged entity will manage existing commercial assets in a way that maximises Net Present Value (hereinafter referred to as 'NPV') of the assets in accordance with normal commercial practice. Specifically, if a client cannot respect the terms of his/her loan, the merged entity will only restructure the lending terms if such a restructuring would lead to enhancing the NPV of the loan (that is to say, if the NPV of the cash flows to be expected from the restructuring is higher than the present value of the cash flows which can be expected from liquidation). In summary, the merged entity will manage its commercial asset portfolio in the same way as a private asset manager would manage the work-out of a similar book.

As regards the merged entity's mortgage assets, the same obligations that apply to the commercial assets will apply *mutatis mutandis*.

(iv) Ban on acquisitions: The merged entity will not acquire or take participations in any other firm, except with the prior consent of the Commission.

(v) Ban on coupons and exercising calls on subordinated debt and hybrid capital instruments: The merged entity will not pay coupons or exercise calls on subordinated debt instruments and hybrid capital instruments, unless it is legally obliged to do so.

(vi) Cap on new lending: The merged entity's net commercial loan book will not exceed the forecasts in the joint restructuring plan by more than […] in any single year during the plan period. Concerning the mortgage loan book, the merged entity will limit further advances to contractually committed amounts and amounts arising as part of the restructuring of existing mortgage facilities. The aggregate total of further mortgage advances is capped at a maximum of […] for the period starting 1 January 2011 and ending 31 December 2012, and […] per annum thereafter.

(vii) In addition, the following lending commitments will also apply to the commercial loan book:

(a) Contractually committed but not yet paid-out amounts: The merged entity will be allowed to advance funds under contractually committed but not yet paid-out loan facilities. However, such payments will not exceed a cumulative amount of […] over the entire period of the joint restructuring plan with regard to the merged entity's loan book.

(b) Additional financing to existing borrowers: The merged entity may not provide additional financing which is not contractually committed at the time of the approval of the joint restructuring plan (in line with the commitment referred to in point (ii)).

As an exception to that prohibition, the merged entity may finance small additional amounts to existing regulatory groups if it complies with the commitment in point (iii)

— It is strictly necessary to preserve the value of the loan collateral (for example, to cover collateral maintenance, insurance, tax, security, insolvency or legal costs); or

— It is otherwise related to enhancing the expected recovery value of a loan or other asset on an NPV basis (for example, meeting essential investment working capital or liquidity needs of the underlying business)

— The merged entity may only provide such additional financing where:

— If the nominal exposure concerned is less than […], the additional financing will not exceed […] of the nominal exposure;

— If the nominal exposure concerned is between […] and […], the additional financing will not exceed […];

— If the nominal exposure concerned exceeds […], the additional financing will not exceed […] of the nominal exposure.

(c) New borrowers: The merged entity may lend to a new borrower (or a group of borrowers, also called 'a regulatory group') only where the following conditions are met:

— The proceeds are used to reduce the exposure of an existing borrower or regulatory group;

— The transaction overall does not increase the total net exposure to the merged entity;

— The new lending enhances expected recovery values (as measured by NPV) compared to other restructuring or foreclosure strategies; and

— There is no capitalisation of interest ('interest roll-up')

(viii) Specific lending commitments on the mortgage book. The merged entity will not be allowed to provide financing which it is not contractually committed to providing at the time of the approval of the joint restructuring plan. As an exception to that rule, the merged entity may, when the balance of the loan exceeds the value of the mortgaged property, facilitate its redemption through selling off the property by providing additional finance to a vendor enabling the repayment of the outstanding balance if the provision of financing is in line with the commitment in point (iii).

(ix) Further exceptions in the national interest. On an exceptional basis and in the national interest, Ireland may determine that further exceptions to the lending restrictions set out in points (vii) and (viii) may be required to enhance expected recovery values on a NPV basis. Such determinations will be subject to prior approval by the Commission.

(x) Deposits — transfer of Anglo and INBS deposits. Following the transfer of legacy Anglo and INBS deposits, the merged entity will be left with certain categories of deposits and accounts, not considered for the transfer. The overall amount of deposits from existing customers at the date of the merger will at no point in time exceed EUR […] billion. The merged entity will reduce its deposits at broadly the same rate as the overall net loan book is worked out. In addition, the deposit book of the merged entity will not exceed the forecasts of the joint restructuring plan by more than EUR 200 million at any time. The categories of deposits retained by the merged entity are listed in the following points (a) to (h):

(a) Deposits which at the time of transferring the legacy deposits of Anglo and INBS to viable institutions, are held by or on behalf of any subsidiary of Anglo or INBS, except the Isle of Man subsidiary of Anglo;

(b) Secured accounts (in favour of Anglo or INBS or any other person) and deposits related or connected to a regulatory group from Anglo or INBS or tracker bond accounts at the time of transfer of Anglo's and INBS's deposits to two other Irish banks [25];

(c) Deposits denominated in currencies other than euro, US dollar (USD) or pound sterling (GBP) at the time of transferring the deposits. They will not be replaced as they mature;

(d) Deposits held or booked at branches at Jersey, at Dusseldorf, Germany or at Vienna, Austria. They will not be replaced as they mature;

(e) Any account which has a negative balance;

(f) Internal control accounts;

[25] On 24 February 2011, Allied Irish Banks acquired EUR 8,6 billion of deposits from Anglo and Irish Life & Permanent plc acquired EUR 3,6 billion in deposits from INBS.

(g) Accounts where the account or the customer to whom the account relates has been the subject of notification of an investigation by any police, fraud or investigative authority; and

(h) All INBS accounts identified in the accounting records of the Transferor by branch '[…]'.

(xi) Monitoring Trustee: The merged entity will appoint a Monitoring Trustee, subject to the Commission's approval, who will verify adherence by the merged entity with the commitments set out in Annex I. The Monitoring Trustee will be nominated for a period of three years.

(64) Ireland will ensure that the merged entity complies with the commitments set out in Annex I. Ireland will submit regular reports on the measures taken to comply with those commitments. The first report will be submitted to the Commission not later than six months from the date of notification of this Decision and thereafter at six monthly intervals.

2.4. **The State measures assessed in this Decision**

(65) Both Anglo and INBS have received a substantial amount of State aid. After the merger, the merged entity will also benefit from several State measures. This Section presents those measures (see also Table 1).

(66) Over the course of the rescue period, Anglo received several State aid measures which have been approved by the Commission in the various decisions pertaining to this case [26], and which are referred to in points (a) to (v) of this recital and recitals 67, 68 and 69):

(a) A State guarantee under the CIFS scheme covering Anglo's deposits (retail, commercial, institutional and interbank), covered bonds, senior debt and dated subordinated debt for the period from 1 October 2008 to 30 September 2010 [27];

(b) A first recapitalisation of Anglo for an amount of EUR 4 billion [28];

(c) State guarantees under the ELG scheme covering deposits, senior unsecured certificates of deposit, senior unsecured commercial paper, senior unsecured bonds and notes [29];

(d) An asset relief measure in the form of the transfer of EUR 35 billion [30] of impaired commercial property loans to NAMA at an average discount of [50-70] % [31];

(e) A second recapitalisation for an amount of EUR 10,44 billion, of which EUR 10,3 billion was effectively granted by Ireland [32];

(f) A third recapitalisation for an amount of EUR 10 054 million (of which EUR 8 580 million was granted upon approval while the remainder (EUR 1 474 million) was injected together with the fourth capital injection), see measure (h) [33];

(g) A guarantee on Anglo's short-term liabilities following the reapplication of the ELG scheme to cover such securities, notably commercial paper, certificates of deposit, interbank deposits and corporate deposits with a maturity of less than three months (covered amount is around EUR […] billion as at 31 December 2010) [34];

(h) An additional recapitalisation of EUR 4 946 million was granted to cover further losses resulting from the accelerated transfer of impaired property development loans to NAMA and losses on the non-NAMA loan book until […]. The remaining balance of the third recapitalisation (measure (f)) amounting to EUR 1 474 million has already been injected together with EUR 4 946 billion [35];

(26) The Commission will, for the sake of clarity, when describing and assessing the measures, use the lettering employed in the description of the measures in recitals 66 to 69 in the remainder of this Decision.

(27) See Commission Decision in Case NN 48/08 (see footnote 5 of this Decision).

(28) Commission Decision in Case N 356/09 (see in footnote 4 of this Decision).

(29) See Commission Decision in Case N 349/09, Ireland — Credit Institutions Eligible Liability Guarantee Scheme (OJ C 72, 20.3.2010, p. 6), subsequently prolonged until 30 June 2010 by Commission's Decision in Case N 198/10, Ireland — Prolongation of the Eligible Liabilities Guarantee Scheme (OJ C 191, 15.7.2010, p. 1), extended until 31 December 2010 by Commission Decision in Case N 254/10, Ireland — Extension of the ELG scheme until 31 December 2010 (OJ C 238, 3.9.2010, p. 2) and again extended until 30 June 2011 by Commission Decision in Case N 487/10, Extension of the ELG scheme until June 2011, not yet published, and by Commission Decision in Case SA.33006, *Prolongation of the ELG scheme until December 2011*, not yet published.

(30) Of the EUR 35 billion loans that are to be transferred to NAMA, to date EUR 34 billion has been transferred, while EUR 1 billion is awaiting transfer.

(31) Commission Decision in Case N 725/09, Ireland — Establishment of a National Asset Management relief scheme for banks in Ireland — NAMA (OJ C 94, 14.4.2010, p. 10).

(32) Commission Decision in Case C 11/10 (see footnote 6 of this Decision).

(33) Commission Decision in Case NN 35/10 (see footnote 8 of this Decision).

(34) Commission Decision in Case N 347/10, Prolongation of the guarantee for certain short-term liabilities and interbank deposits (OJ C 37, 5.2.2011, p. 4).

(35) Commission Decision in Case SA.32057 (see footnote 9 of this Decision).

(i) A guarantee on certain off-balance sheet transactions covering an amount estimated at around EUR […] billion [36].

(67) INBS, during the rescue period, has received the following measures (j) to (o) that were approved by the Commission:

(j) A guarantee under the CIFS scheme covering INBS's deposits (retail, commercial, institutional and interbank), covered bonds, senior debt and dated subordinated debt from 1 October 2008 to 30 September 2010 [37];

(k) A first recapitalisation for an amount of EUR 2,7 billion [38];

(l) State Guarantees under the ELG scheme covering deposits, senior unsecured certificates of deposit, senior unsecured commercial paper, senior unsecured bonds and notes [39];

(m) An asset relief measure in the form of the transfer of EUR 8,9 billion [40] of impaired commercial property loans NAMA at an average discount of 64 % [41];

(n) A State guarantee on INBS's short-term liabilities following the reapplication of the ELG scheme to cover such securities, notably commercial paper, certificates of deposit, interbank deposits and corporate deposits with a maturity of less than three months (covered amount as at 31 December 2010 is approximately EUR […] million) [42];

(o) A second recapitalisation for an amount of EUR 2,7 billion [43].

(68) In addition to the State aid measures (a) to (o) referred to in recitals 66 and 67, Anglo and INBS have received prior to the merger further rescue measures (p) and (q):

(p) Anglo has received a State guarantee on a part of the ELA provided to Anglo by the CBI from March 2009 until the merger with INBS. That guarantee covers up to EUR […] billion of ELA [44];

(q) INBS also received a State guarantee on a part of the ELA granted to INBS by the CBI from 24 February 2011 until the merger with Anglo. That guarantee covers up to EUR […] billion.

(69) After the merger, the merged entity will be provided with the following measures (r) to (v):

(r) A State guarantee for the remaining customer deposits, for a maximum amount of EUR […] billion;

(s) A continuation of the State guarantee on off-balance sheet transactions covering an amount estimated at approximately EUR […] billion;

(t) A State guarantee on a part of the ELA provided by the CBI to the merged entity, essentially combining both guarantees on the ELA granted to Anglo and INBS separately. That guarantee is estimated at up to EUR […] billion at the commencement of merger, declining thereafter […];

(u) An additional recapitalisation, […] to cover additional losses in case of additional stress of EUR 3,3 billion;

(v) A State guarantee on the outstanding ELG-covered wholesale funding transferred from Anglo to the merged entity covering an amount of EUR […] billion [45].

2.4.1. *Rescue measures approved by the Commission*

(70) As regards the measures (a) to (o) referred to in recitals 66 and 67, they have already been assessed by the Commission in the context of the earlier decisions regarding Anglo and INBS and have been qualified as rescue aid. Further to the rescue measures, Ireland notified the Commission of additional measures that are intended to enable the resolution of Anglo and INBS, measures (p) to (v) referred to in recitals 68 and 69.

(36) See footnote 33.
(37) See footnote 26.
(38) Commission Decision in Case NN 11/10 (see footnote 10 of this Decision).
(39) See footnote 28.
(40) Of the EUR 8,9 billion to be transferred to NAMA, to date EUR 8,5 billion have been transferred, while EUR 400 million is awaiting transfer.
(41) See footnote 29.
(42) See footnote 32.
(43) Commission Decision in Case NN 50/10 (see footnote 11 of this Decision).
(44) It is important to note that the amount provided to Anglo under ELA covered by a State guarantee has fluctuated over time. The State guarantee which was implemented in September 2010 and initially covered an amount of EUR […] billion was increased to […] billion by December 2010. The State guarantee was furthermore increased up to EUR […] billion to deal with the funding needs of Anglo following the transfer of deposits to Allied Irish Banks in February 2011 and it is expected to decrease after that to around EUR […] billion before the merger with INBS.
(45) As deposits have now been transferred from Anglo and INBS (excluding the amount of up to EUR 1 billion), it refers to ELG debt funding, all of which related to Anglo.

(71) With regard to the measures already approved by the Commission (namely measures (a) to (o) referred to in recitals 66 and 67), it should be pointed out that the CIFS guarantee scheme is no longer in force since 30 September 2010 (measures (a) and (j) referred to in recitals 66 and 67) and has been replaced by the ELG scheme and the reapplication of the ELG scheme to short-term liabilities (measures (c), (g), (l) and (n) referred to in recitals 66 and 67). After the merger, those schemes will be replaced by individual State guarantees (measures (r) and (v) referred to in recital 69), once the ELG scheme is no longer in place, see recitals 77 and 81.

(72) As for measures (d) and (m) referred to in recitals 66 and 67, the transfer of […] loans to NAMA was completed in November 2010 at an average haircut of 62 % for Anglo and 64 % for INBS.

(73) Together with the fourth recapitalisation, Anglo also received a State guarantee on its off-balance sheet transactions (measure (i) referred to in recital 66). That guarantee, for which Anglo does not pay a fee, essentially provides comfort to Anglo's counterparties in derivatives transactions (mostly hedging contracts) and clearing arrangements.

2.4.2. *Further rescue measures*

(74) Anglo and INBS both have received further rescue measures prior to the merger and thus the effective restructuring (measures (p) and (q) referred to in recital 68). From March 2009 until the merger, Anglo has already received an ELA from the CBI which was partly State-guaranteed (measure (p)). The State guaranteed part of the ELA has fluctuated, from EUR […] billion in September 2010 to EUR […] billion in March 2011. Anglo pays the CBI an interest rate consisting of the ECB base rate (currently 125 basis points) plus […] basis points (hereafter 'bps') for the ELA but does not pay a fee for the guarantee.

(75) INBS also has received a State guarantee on part of the ELA provided by the CBI (measure (q) referred to in recital 68). In total, INBS received a State guarantee on its ELA of EUR […] billion from 24 February 2011 onwards until the merger with Anglo. INBS also pays the CBI an interest rate consisting of the ECB base rate (currently 125 bps) plus […] bps for the ELA, but does not pay a fee for the State guarantee.

2.4.3. *Measures for the merged entity*

(76) The merged entity […] from several State guarantees and a capital injection of EUR 3,3 billion in a stress case (measures (r) to (v) referred to in recital 69).

(77) The merged entity will benefit from a State guarantee on the deposits that will be transferred to it from both Anglo and INBS (measure (r) referred to in recital 69). The maximum amount of those deposits will be EUR 1,05 billion. They are made up in particular of deposits that are either secured or connected to a borrower account that is transferred to the merged entity, and they have therefore not been transferred out of Anglo and INBS. The merged entity will pay a flat fee of 50 bps for the duration of the ELG scheme and nothing thereafter.

(78) The merged entity will also benefit from a measure granted to Anglo before the merger, namely the continuation of the State guarantee on off-balance sheet transactions for an amount estimated at around EUR […] billion [46] (measure (s) referred to in recital 69). The merged entity will not pay a fee for that guarantee.

(79) In order to fund the resolution of Anglo and INBS, it is foreseen in the joint restructuring plan that the merged entity will benefit from a State guarantee on part of the ELA that it will receive (measure (t) referred to in recital 69). In total, the merged entity will have access to an ELA of up to EUR […] billion, at the commencement of the merger, declining thereafter […]. The merged entity will pay the CBI an interest rate of […] bps for euro currency funding and […] bps for foreign currency funding, but will pay no fee for the State guarantee.

(80) According to the joint restructuring plan, […] in case of a further deterioration of its financial position (stress case — measure (u) referred to in recital 69). In that case, […] up to EUR 3,3 billion of capital […]. That approach will ensure that the merged entity satisfies the relevant minimum regulatory capital requirements set by the Irish Financial Regulator (currently an 8 % total capital ratio).

(81) Finally, the merged entity will benefit from a State guarantee on the existing wholesale funding of around EUR 3 billion that will be transferred from Anglo to the merged entity (measure (v) referred to in recital 69). The merged entity will pay a fee of between 95 to 125 bps during the duration of the ELG and will pay no fee thereafter.

(46) This is an estimated gross maximum that would be required to be covered under the State guarantee; the net exposure at December 2010 was EUR […] million.

Table 1

Overview of the measures granted to Anglo, INBS and the merged entity (referred to in recitals 66 to 69)

Measures granted to Anglo, Recovery Bank and Funding Bank			
No	**Type of measure**	**Amount**	**Remuneration**
	Rescue measures approved		
	Anglo Irish Bank		
a	Guarantee under the CIFS scheme	Peak EUR […] billion at September 2008 (1)	flat fee 18,5 bps rising to 32 bps
b	First recapitalisation	EUR 4 billion	no remuneration
c	Guarantee under the ELG scheme	EUR […] billion (2)	ECB recommendation + 40 bps (3)
d	Asset relief measure — transfer of eligible loans to NAMA	EUR 35 billion transferred	n/a
e	Second recapitalisation	EUR 10,44 billion (4) (EUR 10,3 billion)	no remuneration
f	Third recapitalisation	EUR 10 054 million	no remuneration
g	Guarantee on short-term liabilities	c. EUR [...] billion at December 2010	160 bps as at December 2010 (3)
h	Fourth recapitalisation	EUR 4 946 million	no remuneration
i	Guarantee on certain off balance sheet liabilities	estimated gross max. EUR […] billion (5)	no fee
	Irish Nationwide Building Society		
j	Guarantee under the CIFS scheme	Peak EUR […] billion at October 2008 (1)	flat fee 18,5 bps rising to 25,6 bps
k	First recapitalisation	EUR 2,7 billion	Secured the rights to the net surplus assets of the Society
l	Guarantee under the ELG scheme	EUR […] billion (2)	ECB recommendation + 40 bps (3)
m	Asset relief measure — transfer of eligible loans to NAMA	EUR 8,9 billion transferred	n/a
n	Guarantee on short-term liabilities	c. EUR [...] million at December 2010	160 bps as at December 2010 (3)
o	Second recapitalisation	EUR 2,7 billion	no remuneration
	Further rescue measures		
	Anglo Irish Bank		
p	Guarantee on Emergency Liquidity Assistance	Peak guaranteed EUR […] billion up to 16 March 2011 (6)	,[…] no fee for guarantee
	Irish Nationwide Building Society		
q	Guarantee on Emergency Liquidity Assistance	Guaranteed EUR […] billion	[…], no fee for guarantee
	Restructuring measures		
	Merged entity		
r	Continuation of guarantee on remaining deposits	max. EUR […] billion	Guaranteed for the life of the workout, first under ELG and following its expiry on an ad hoc basis at 50 bps
s	Continuation of guarantee on off-balance sheet transactions	estimated at around EUR […] billion (5)	no fee
t	Continuation of guarantee on Emergency Liquidity Assistance or other similar facility	estimated at up to EUR […] billion	3
u	Recapitalisation in stress case	EUR 3,2 billion	no remuneration
v	Guarantee on outstanding ELG wholesale funding	around EUR […] billion	fee in line with ELG for its duration, no fee thereafter

(1) The CIFS Scheme expired on 30 September 2010.
(2) The figures quoted are as at 31 December 2010. (However, the peak ELG guarantee level was EUR […] billion as at April 2010 for Anglo and was EUR […] billion for INBS as at September 2010.)
(3) As per latest Commission decision on the scheme, remuneration may be adjusted in case of prolongation of the scheme beyond 30 June 2011.
(4) Amount effectively granted by the Irish authorities in brackets.
(5) This estimated figure of EUR […] billion is an estimated gross maximum that would be required to be covered under the State guarantee, the net exposure at December 2010 was EUR […] million.
(6) Figure of EUR […] billion was required due to transfer of Anglo/INBS deposits, this has reduced to EUR […] billion on 16 March 2011.

3. GROUNDS FOR INITIATING THE PROCEDURE

(82) The Commission opened the formal investigation procedure on the initial Anglo restructuring plan on 31 March 2010 with the adoption of the opinion decision. Since then, Ireland has fundamentally altered the restructuring plan for Anglo several times before submitting the joint restructuring plan for Anglo and INBS on 31 January 2011. Most of the doubts raised in the opening decision (see Section 4.3.1 of that Decision ([47])) were specific to the initial Anglo restructuring plan, which was based on the assumption that Anglo would be split into a good bank and a bad bank. Those doubts are therefore no longer relevant as Anglo will cease to undertake new activities and instead will be merged with INBS and focus on working out its loan book over time.

(83) For the sake of completeness however, a summary is provided in Section 3.1 of the doubts raised by the Commission in its opening decision.

3.1. The opening decision

(84) As regards the return to viability of the good bank (in the opening decision also referred to as 'NewCo') and the orderly wind-down of the bad bank (in the opening decision also referred to as 'Old Anglo'), the Commission expressed doubts, since at the time of that decision there was not enough information on the business plans of both entities. The Commission also doubted whether the estimation of the impairments on both the loans transferred to NAMA and the non-NAMA loans was sufficient. In addition, the macroeconomic assumptions provided in the initial Anglo restructuring plan seemed to be incomplete, thus leading to doubts as to their reasonableness. The Commission also expressed doubts with regard to certain new activities the good bank would be undertaking in areas where it did not have any previous experience. The Commission also doubted whether the funding and liquidity needs of the good bank could be met based on the plan.

(85) As regards burden-sharing and Anglo's own contribution, the Commission questioned whether the own contribution to the restructuring by Anglo itself was sufficient in view of the fact that the good bank was to expand into new activities, something which would require significant investment. In addition, the Commission pointed out that the Irish authorities had not explored in the initial Anglo restructuring plan whether Anglo could contribute to its restructuring by selling assets or through other means.

(86) Concerning the measures limiting distortion of competition caused by the massive State aid provided to Anglo, the Commission indicated that it doubted that the measures presented in the plan were sufficient to offset the distortive effects of the aid to Anglo.

4. COMMENTS FROM INTERESTED PARTIES

(87) The Commission did not receive any third party comments following the publication of the opening decision in the *Official Journal of the European Union*.

5. COMMENTS FROM IRELAND

(88) Ireland did not provide any comments on the opening decision, but instead submitted the second Anglo restructuring plan and then the third Anglo restructuring plan on 26 October 2010.

(89) The third restructuring plan is now replaced by the joint restructuring plan submitted on 31 January 2011 by Ireland.

6. ASSESSMENT

6.1. Existence of aid

(90) It must be assessed whether the measures contained in the joint restructuring plan constitute State aid. Article 107(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the internal market.

6.1.1. *Measures already temporarily approved*

(91) With regard to the measures already temporarily approved by the Commission as rescue aid in its earlier decisions pertaining to Anglo and INBS (namely measures (a) to (o) as set out in recitals 66 and 67), the Commission has already concluded that those measures constitute State aid in favour of Anglo and INBS. As a consequence, it is not necessary to reassess whether they constitute State aid in this Decision.

(92) The measures that have to be assessed in this Decision in order to determine whether they constitute State aid have already been described in recitals 68 and 69. The relevant measures are: for Anglo measure (p), for INBS measure (q) and for the merged entity measures (r) to (v). In that context, it should be noted that Ireland accepts that the measures represent State aid.

([47]) See footnote 4.

6.1.2. *State resources*

(93) Measures (p) to (v) referred to in recitals 68 and 69 are financed through State resources as the measures are made up of State guarantees and direct grants financed by the State and should therefore be considered to constitute State aid.

6.1.3. *Selectivity*

(94) It is also necessary to assess whether the measures referred to in recitals 66 to 69 confer a selective advantage on the beneficiary or beneficiaries of the State aid. The measures concerned are selective as they solely benefit Anglo, INBS and the merged entity.

6.1.4. *Advantage*

(95) The measures referred to in recitals 66 to 69 confer an advantage on the economic activity of both Anglo and INBS as carried on by them until the merger and their successor, the merged entity, thereafter.

(96) Anglo benefits from a State guarantee covering EUR […] billion of ELA it receives from the CBI (measure (p) referred to in recital 68), and which enables Anglo to fund its assets. That guarantee represents an advantage for Anglo as such a guarantee would not be available on the market and. […]. Furthermore, the State guarantee on the ELA is provided without Anglo having to pay a remuneration for it. That absence of remuneration presents a further advantage to Anglo as it avoids the costs associated with the guarantee.

(97) For the same reasons, the State guarantee on the ELA that INBS has received from 24 February 2011 onwards for an amount of EUR […] billion provides an advantage to INBS (measure (q) referred to in recital 68).

(98) As regards the measures in favour of the merged entity, that entity will benefit from a continuation of several State guarantees, namely on the remaining deposits (measure (r) referred to in recital 68), on off-balance sheet transactions (measure (s) referred to in recital 69), on the ELA (measure (t) referred to in recital 69) and on the existing wholesale funding (measure (v) referred to in recital 69). The merged entity only pays a fee for the guarantee […], the deposits and the wholesale funding for the duration of the ELG scheme (no fee will be paid thereafter), but does not pay a fee for the other guarantees. Those guarantees provide an advantage to the merged entity by helping to ensure that the merged entity does not default on its obligations. Indeed, without the necessary funding through the guaranteed ELA, the remaining deposits and the remaining wholesale funding and without the guarantee on its off-balance sheet liabilities, an orderly resolution is not possible. Furthermore, the fact that the merged entity does not have to pay a fee for several of those guarantees provides a further advantage to it as it avoids higher funding costs and thus more losses.

(99) Finally, […] EUR 3,3 billion in the stress case to cover further losses as a result of the work out of its loan book. […] The recapitalisation […] an advantage to the merged entity as it ensures that it fulfils its relevant regulatory capital requirements during the resolution period. […].

6.1.5. *Distortion of competition and effect on trade between Member State*

(100) It should be concluded that measures (p) to (v) referred to in recitals 66 and 67 are able to distort competition and affect trade between Member States.

(101) As indicated in Section 6.1.4, without the State support measures, both Anglo and INBS would have defaulted and completely exited the markets in which they were active. As a result of the very substantial amount of State support, they remained active on the deposit market (until the transfer of their deposits to Allied Irish Bank and Irish Life & Permanent in February 2011) and to a very limited degree on the commercial property lending market and residential mortgage market (servicing existing loans). Therefore, that State support distorted competition. In those markets, Anglo and INBS competed not only with Irish banks but also the foreign players active in Ireland. Anglo was also active (both for deposits and commercial lending) in the United Kingdom and thus has competed with domestic UK players and players from other Member States active on that market. It should be noted, however, that the activity of those two entities has been more and more limited over the last couple years, thus reducing the negative affect on competition and trade.

(102) As regards the merged entity, it will carry out some limited economic activities in a market where both Irish and foreign banks remain active. In particular, it will be allowed to retain a small amount of deposits and to provide some loans to its existing customers in order to increase the NPV of the loans in question in line with the commitments provided by Ireland (see Section 2.3.2). Without the State support measures, it would not be able to carry out those activities. It should be noted that as the balance sheet of the merged entity will be reduced as a result of its resolution, the distortion of competition and the affect on trade will be significantly reduced due to the very limited operations which the merged entity will continue to carry out on competitive markets.

6.1.6. *Application of the market investor principle*

(103) Finally, the market economy investor principle does not apply to the measures referred to in recitals 66 to 69 since they are part of a substantial package of rescue measures in favour of Anglo and INBS. In addition, even if it were applicable, those measures are not in line with normal market conduct. No market economy investor would implement all those measures in order to rescue Anglo and INBS and then merge them in order to work out the loan book as the chances that it would recoup its investments (total recapitalisations provided to Anglo and INBS together amount to EUR 34,7 billion in a base case) are negligible. No market economy operator placed in a similar situation as the State would have been able to provide the amount of capital and funding needed in order to facilitate the resolution of both Anglo and INBS. Taking into consideration the situation on the markets and the appetite for Irish assets and liabilities, it would not be possible for a market operator to obtain such financing.

6.1.7. *Identification of the beneficiary of the aid*

(104) Ireland intends to introduce new aid measures (measures (r) to (v) referred to in recital 69) in order to facilitate the resolution of Anglo and INBS. Those measures will enable the merger of Anglo and INBS into one legal entity. The main objective of the merged entity is to work out the loan books of Anglo and INBS with a view to maximise the return and reduce the cost for the Irish taxpayer.

(105) Under the joint restructuring plan, the merged entity will carry out only limited lending required by existing contractual obligations and then only to ensure that the NPV of the loan book is preserved, thus limiting the situations where it is in competition with other banks to the minimum. The merged entity will, according to Ireland, only realise its assets as they mature or by selling them on the market. The merged entity will use the proceeds of those sales to repay its debts as they become due and fund its ongoing operational costs as well as any retained historic liabilities. It should, therefore, be concluded that the merged entity will continue to carry out some limited economic activities following the merger and thus should be considered as a beneficiary of the State aid measures.

(106) With regard to Anglo and INBS, prior to the intended merger they have both been able to continue to operate aided by State guarantees on their liabilities, recapitalisations and an asset relief measure (measures (a) to (o) referred to in recitals 67 and 68). Anglo and INBS are therefore the beneficiaries of those measures.

6.1.8. *Conclusion*

(107) On the basis of the foregoing, it should be concluded that measures (a) to (v) referred to in recitals 68 and 69 constitute State aid.

6.2. **Amount of aid**

6.2.1. *Recapitalisations of Anglo and INBS*

(108) Both Anglo and INBS have received individual State aid in the form of several recapitalisations. Anglo received a total of EUR 29,3 billion through four capital injections [48]. INBS received a total of EUR 5,4 billion through two capital injections.

6.2.2. *Impaired asset measure for Anglo and INBS*

(109) Both Anglo and INBS have participated in NAMA (measures (d) and (m) referred to in recitals in 66 and 67). As regards the aid amount included in the impaired asset measure, namely the transfer of assets to NAMA, it should be noted that footnote 2 to paragraph 20(a) of the Impaired Assets Communication (hereinafter referred to as 'IAC') [49] defines the aid amount in an asset relief measure as the difference between the transfer value of the assets and the market price. However, it is very difficult to estimate the market value of the covered assets as most of them are loans which are not traded. Furthermore, the actual aid amount can only be determined after the valuation by Ireland of the assets transferred to it has been finalised in line with the Commission's Decision in Case N 725/09 [50] which will lead to final conclusions regarding the amount of aid involved. In that context, information on the amount of aid associated with the first and second tranches of loans transferred to NAMA has been made available to the Commission, while the information on the final tranches is still pending.

(110) Based on the information available for the first and second tranches transferred to NAMA, a number of conclusions may be made. Firstly, the first tranche of commercial property loans that Anglo transferred to

(48) The Commission observes that it actually approved recapitalisations for Anglo for an amount of EUR 29 440 million. EUR 140 million of the second recapitalisation approved on 31 March 2010 by the opining decision, however, was never granted and because of the structure of that particular recapitalisation may now no longer be granted. For that reason, it is more appropriate to use the EUR 29,3 billion figure of total recapitalisation, which reflects the amount Anglo has actually received before the merger with INBS.

(49) Communication from the Commission on the treatment of impaired assets in the Community Banking Sector (OJ C 72, 26.3.2009, p. 1).

(50) See footnote 29.

NAMA had a nominal value of EUR 9 251 million. That transfer contained an aid amount of EUR 870 million, which represents 9,4 % of the nominal loan balances transferred. Secondly, in the second tranche, Anglo transferred loans with a nominal value of EUR 6 747 million to NAMA. That transfer contained an aid amount of EUR 427 million and represents 6,3 % of the nominal loan balances transferred. Accordingly, the average percentage of aid to nominal loan balances for the two tranches is 7,9 %. When applying that average percentage to the still outstanding tranches (EUR 19 billion), the aid amount for those tranches would be approximately EUR 1,5 billion. In total, the State aid amount associated with the transfer of Anglo's commercial property and development loans and associated loans to NAMA may therefore be estimated at around EUR 2 797 million ([51]).

(111) INBS transferred loan balances with a nominal value of EUR 669 million in the first tranche. That transfer contained an aid amount of EUR 70 million, which represents 10,5 % of the nominal loan balances transferred. As part of the second tranche, INBS transferred loan balances with a nominal value of EUR 591 million. That transfer resulted in an aid amount of EUR 43,7 million which represents 7,4 % of the nominal loan balances transferred. Accordingly, the average percentage of aid to nominal loan balances for the two tranches is 9 %. When applying that average percentage to the still outstanding tranches (EUR 7,7 billion), the aid amount associated may therefore be estimated at approximately EUR 693 million. In total, the State aid amount associated with the transfer of INBS's commercial property and development loans and associated loans to NAMA may therefore be estimated at around EUR 806 million ([52]).

(112) Although the exact amount of State aid for the still outstanding tranches will be verified at a later stage, it is not necessary to know the exact aid amount contained in those last tranches in order to assess the joint restructuring plan's compatibility with the Treaty as: (i) the way the transfer price will be determined has already been agreed by the Commission in its Decision on NAMA ([53]); (ii) any potential change in the aid amount will not affect the Commission's assessment of the aid in this Decision given the large amounts already involved and the fact that Anglo and INBS will completely exit the market; and (iii) in particular, an increased aid would not increase the distortion of competition created by the resolution of the merged entity as it would not mean that the merged entity would carry out more competitive activities.

6.2.3. *Guarantees for Anglo and INBS*

(113) Anglo and INBS have also participated in the CIFS and ELG guarantee schemes (measures (a), (c), (g), (j), (l) and (n) referred to in recitals 66 and 67). The amount of the liabilities covered for each institution under both schemes has fluctuated over time. For instance, in the case of Anglo, the liabilities covered under the CIFS scheme peaked at EUR […] billion in September 2008, decreasing to EUR […] billion as at 30 June 2010, partly as a result of the introduction of the ELG. Furthermore, Anglo's liabilities covered by the ELG, decreased to EUR […] billion as at 31 March 2011 from a peak of EUR […] billion as at 30 June 2010 as a result of the transfer of its deposits to Allied Irish Banks. For INBS, the same trend can be observed.

(114) In addition, both Anglo and INBS have received State guarantees on short-term liabilities and ELA, while Anglo has also received a State guarantee […] on its off-balance sheet liabilities.

(115) It should be noted that, as regards companies in financial difficulty, if a bank is not able to raise sufficient non-guaranteed debt to cover all its funding needs, the aid element of such guarantees might go up to the level of their nominal value. That was manifestly the case when Anglo and INBS started to use the CIFS in 2008 and the ELG, the guarantee on short-term liabilities in 2010 and the guarantee on their ELA, while Anglo also received a State guarantee on its off-balance sheet liabilities. In that context, there was a significant overlap between the different guarantees, more specifically, the CIFS and ELG scheme, which could lead to double-counting. At the same time, the amounts covered by the various guarantees fluctuated over time (CIFS, ELG scheme and ELA). It should also be recalled that the participation of those two banks in State guarantee schemes is not taken into account for the calculation of the amount of aid relative to their risk weighted assets (hereafter 'RWA') in order to establish whether an in-depth restructuring is necessary. On the other hand, the aid element in the guarantees will be taken into account in the context of the restructuring. For those reasons, the Commission has not calculated the aid amount associated with those State guarantees.

6.2.4. *Aid measures for the merged entity*

(116) The merged entity […] a further EUR 3,3 billion of capital in case the stress scenario materialises.

([51]) EUR 870 million + EUR 427 million + EUR 1 500 million = EUR 2 797 million.

([52]) EUR 70 million + EUR 43,7 million + EUR 693 million = EUR 806,7 million.

([53]) Commission Decision in Case N 725/09, see footnote 30.

(117) The merged entity also benefits from State guarantees on its remaining deposits which stands at a maximum of EUR 1 billion, its off-balance sheet transactions which is estimated at a gross maximum amount of […], and a continuation of the State guarantee on the ELA or other similar facility it receives which is estimated at up to […] at commencement of the merger. For the calculation of the State aid amount, the Commission finds that as regards the guarantees provided to the merged entity, the reasoning in recital 115 applies.

6.2.5. *Conclusion as regards the amount of aid*

(118) On the basis of the foregoing, it should be concluded that Anglo has received State aid in the form of recapitalisations and an asset relief measures amounting to at least EUR 32 billion (43,9 % of RWA). INBS has received State aid in the form of recapitalisations and an asset relief measure amounting to at least EUR 6,2 billion (59 % of RWA). Those levels are substantially above the 2 % threshold as indicated in the Recapitalisation Communication [54] and the IAC.

(119) Finally, it should be concluded that the total State aid amount involved, when adding up the figures for the recapitalisations and asset relief measure in favour of Anglo and INBS, as well as the recapitalisation of the merged entity in a stress case, may be estimated to be at least EUR 41,5 billion [55].

6.3. **Compatibility of the aid**

(120) When assessing the compatibility of the joint restructuring plan for Anglo and INBS, it should be first assessed whether Article 107(3)(b) of the Treaty is applicable before assessing whether the joint restructuring plan fulfils the requirements of the Recapitalisation Communication and the Restructuring Communication.

6.3.1. *Legal basis for the compatibility assessment*

(121) Article 107(3)(b) of the Treaty permits the Commission to declare aid compatible with the internal market if it is intended 'to remedy a serious disturbance in the economy of a Member State'. In that regard, market conditions have been difficult worldwide since the last quarter of 2008. Ireland, in particular, has been severely hit by the financial crisis. The economic downturn combined with the fall in property prices and the exposure of the Irish banks to land and property development loans have lead to significant impairments for Irish banks. Irish banks have also been faced with persisting difficulties in obtaining funding and capital from the markets due to the uncertainty associated with the property market in Ireland. As a result, the Irish State (Sovereign) has also come under pressure, in the end leading to the Programme for Support.

(122) The Commission has acknowledged that the global financial crisis can create a serious disturbance in the economy of a Member State and that measures supporting banks are apt to remedy that disturbance; that view has been confirmed in the Banking Communication [56], the Recapitalisation Communication, the IAC and the Restructuring Communication. In respect of the Irish economy, it has been confirmed in the Commission's various decisions approving the measures undertaken by Ireland to combat the financial crisis [57].

(123) Given the specific circumstances in Ireland, combined with the improved but not yet stabilised situation on the financial markets, the Commission considers that the measures may be examined under Article 107(3)(b) of the Treaty.

6.3.2. *Compatibility assessment*

(124) Anglo, INBS and the merged entity have benefited and will benefit from several State aid measures whose compatibility has not previously been assessed by the Commission. They include the State guarantee on the ELA for both Anglo and INBS (measures (p) and (q) referred to in recital 68) and the State guarantees and recapitalisation in the stress case […] (measures (r) to (v) referred to in recital 69). Furthermore, Anglo and INBS have received measures that have been found compatible by the Commission as rescue aid (measures (a) to (o) referred to in recitals 66 and 67), but which now will have to be assessed to determine whether they are compatible as restructuring aid. It is necessary to assess the compatibility of those measures and the joint restructuring plan in the context of the Banking Communication, the Recapitalisation Communication and the Restructuring Communication.

(125) Although Anglo and INBS have benefited from asset relief measures while transferring assets to NAMA, Anglo's and INBS's resolution in itself does not give rise to a State aid in the form of an asset relief measure. All Anglo and INBS assets and liabilities will be merged into one entity exclusively for their work-out in its entirety. Accordingly, it is not necessary to assess the merger and resolution of the assets under the IAC.

[54] 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).

[55] 32 billion (Anglo) + 6,2 (INBS) + 3,3 (stress recap for the merged entity) = 41,5 billion

[56] 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).

[57] See amongst others Commission Decisions as referred to in footnotes 26 to 33.

6.3.3. *The application of the Banking and the Recapitalisation Communication to measures (p) to (v) referred to in recitals 68 and 69*

(126) In line with point 15 of the Banking Communication, in order for an aid or aid scheme to be compatible under Article 107(3)(b) of the Treaty it must comply with general criteria for compatibility under Article 107(3) of the Treaty, which imply compliance with the following conditions:

(i) Appropriateness: The aid has to be well-targeted in order to be able to effectively achieve the objective of remedying a serious disturbance in the economy. This would not be the case if the measure were not appropriate to remedy the disturbance;

(ii) Necessity: The aid measure must, in its amount and form, be necessary to achieve the objective. That requirement implies that it must be of the minimum amount necessary to reach the objective, and take the form most appropriate to remedy the disturbance;

(iii) Proportionality: The positive effects of the measure must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measure's objectives.

(127) Those general criteria apply both to recapitalisations and guarantees. The Recapitalisation Communication further elaborates on the three principles of the Banking Communication and states that recapitalisations can contribute to the restoration of financial stability. In particular the Recapitalisation Communication states in point 6 that recapitalisations may be an appropriate response to the problems of financial institutions facing insolvency.

(i) *Appropriateness of the Measures*

(128) The recapitalisation of the merged entity in the stress case (measure (u) referred to in recital 69) aims at ensuring that it has sufficient capital to comply with its regulatory capital requirements while it works out the Anglo and INBS loan books. A capital injection is the most efficient and straightforward measure to deal with the potential capital shortfall that could arise in the stress case as it directly improves the total capital ratio of the merged entity.

(129) […]

(130) The State guarantees provided to Anglo and INBS on the ELA they receive (measures (p) and (q) referred to in recital 68) and to the merged entity on its remaining deposits (measure (r) referred to in recital 69), its wholesale funding (measure (v) referred to in recital 69), the State guarantee on the ELA it receives (measure (t) referred to in recital 69) and the off-balance sheet liabilities (measure (s) referred to in recital 69) aim to ensure that the funding the merged entity receives is secure and that the merged entity will not default. That funding is needed in order to ensure that Anglo and INBS have sufficient funding to cover their assets, while the funding the merged entity receives will enable it to work out the Anglo and INBS loan books over time. […].

Conclusion

(131) The recapitalisation of the merged entity in a stress case is appropriate because it effectively meets its objective to ensure that the merged entity is in compliance with its regulatory capital requirements. The measure therefore effectively achieves the objective of preventing the default of the merged entity.

(132) The guarantee measures are appropriate since they ensure that Anglo and INBS pre-merger and the merged entity post-merger have sufficient funding to carry out their tasks, while it prevents a potential default of the merged entity.

(133) Furthermore, the different State aid measures ensure that financial stability in Ireland is maintained.

(ii) *Necessity — limitation of the aid to the minimum*

(134) According to the Banking Communication, the aid measure must, in its amount and form, be necessary to achieve the aid's objective. That requirement implies that the capital injection and the guarantees must be of the minimum amount necessary to reach the objective. In that context, it may be observed that the capital injection will only occur in the stress case and is limited to an amount of EUR 3,3 billion. The recapitalisation will ensure that the merged entity will fulfil the relevant regulatory capital requirements. As for the State guarantees, they will ensure that there will be funding available for the merged entity so as to meet its obligations as a going concern.

(135) As regards the remuneration that the merged entity has to pay for the recapitalisation, the State will receive no fixed remuneration on the recapitalisation. Anglo, INBS and the merged entity also do not pay a fee for the guarantee on the ELA, while the merged entity does not pay a fee on the guarantee on the off-balance sheet liabilities. The merged entity will also cease to pay a fee for the guarantee on wholesale funding and deposits once the ELG scheme has expired.

(136) As regards the recapitalisation, points 15 and 44 of the Recapitalisation Communication explain that in duly justified cases lower remuneration can be accepted in the short-term for distressed banks on the condition that the lack of remuneration will be reflected in the restructuring plan. The merged entity essentially is a resolution vehicle which will facilitate the orderly resolution of Anglo and INBS. It will not carry out any economic activities besides those necessary to work out the loan book. Ireland has provided the necessary commitments in that regard (see Section 2.3.2). Anglo and INBS will both disappear from the Irish lending and deposit markets. It may be concluded that restructuring in that form compensates for the lack of remuneration. Finally, Anglo and INBS have been fully nationalised and their respective shareholders have lost their rights and interests in both institutions. As a consequence, any potential proceeds realised on termination of the resolution of the merged entity will accrue to the State in full.

(137) The Banking Communication assumes in point 26 that, for guarantee schemes, an adequate fee should be paid. The fee should be set as close as possible to what could be considered the market price, however taking into account the potential difficulties for beneficiaries to bear the amounts that might properly be charged. As elaborated in recital 135, it should be noted that the merged entity will be charged with the resolution of Anglo and INBS. In view of those circumstances, it should be concluded that the fact that the merged entity does not pay a fee for the guarantee is justified.

Conclusion

(138) It should be concluded that the recapitalisation of the merged entity in a stress case and the State guarantees to Anglo, INBS and the merged entity are necessary in order to ensure the latter's capital adequacy and to ensure that sufficient funding is available, while also reducing the potential risk of default of the merged entity. As regards the remuneration of the aid measures in order to keep the aid to the minimum, it is justified that no remuneration is paid given the resolution of Anglo and INBS by the merged entity.

(iii) *Proportionality — measures limiting negative spill-over effects*

(139) The merged entity will ensure the resolution of Anglo and INBS and that as a result both institutions will exit the Irish deposit and lending markets. As established in recital 105, the merged entity will carry on some limited economic activities in order to work out the loan books of Anglo and INBS. The Commission notes positively that Ireland has provided the necessary commitments to ensure that the economic activities carried out by the merged entity will be limited to the minimum. The lending granted by the merged entity will be in the sole context of the management of the legacy loan books of Anglo and INBS (restructuring of loans, preservation of collateral value) and will be subject to strict restrictions. The merged entity will not collect any deposits nor engage in new activities. Consequently, the distortion of competition caused by the massive aid to Anglo, INBS and the merged entity will be limited.

Conclusion

(140) It should be concluded that that: (i) the recapitalisation of the merged entity in a stress case and the guarantees are appropriate to ensure the resolution of Anglo and INBS; (ii) Anglo and INBS will exit the Irish deposit and lending markets; (iii) the fact that the investment in Anglo, INBS and the merged entity will not provide any remuneration or positive return is justified under the circumstances of the case; and (iv) there are sufficient measures limiting the negative spill-over effects for other competitors.

6.3.4. *The application of the Restructuring Communication*

(141) The Restructuring Communication sets out the State aid rules applicable to the restructuring of financial institutions in the current financial crisis. According to the Restructuring Communication, in order to be compatible with Article 107(3)(b) of the Treaty, the restructuring of a financial institution in the context of the current financial crisis has to:

(i) lead to a restoration of the viability of the bank, or to the orderly winding-up of the bank;

(ii) include sufficient own contribution by the beneficiary (burden-sharing);

(iii) contain sufficient measures limiting the distortion of competition.

6.3.4.1. Orderly resolution of the merged entity

(142) The joint restructuring plan aims at the resolution of Anglo and INBS by the merged entity in an orderly fashion. Accordingly, it is not necessary to assess the viability of the merged entity.

(143) The joint restructuring plan presents an orderly resolution of Anglo and INBS based on State support. The legacy loan books of both banks will be worked out over a 10-year period. Ireland has estimated the capital injections necessary in […] in order to guarantee the merged entity against any risk of default. In addition, the merged entity will benefit from State guarantees to pursue operations necessary to work out Anglo and INBS assets.

(144) Consequently, the conditions to work out the assets of the merged entity in an orderly fashion are in place.

6.3.4.2. Own contribution/burden-sharing

(145) The Restructuring Communication indicates that an appropriate contribution by the beneficiary is necessary in order to limit the aid to a minimum and to address distortions of competition and moral hazard. To that end: (a) both the restructuring costs and the amount of aid should be limited; and (b) a significant own contribution is necessary.

(a) *Limitation of restructuring costs and of the amount of aid*

(146) The principles of the Restructuring Communication require that the aid amount is limited to the minimum and banks should first use their own resources to finance restructuring.

Anglo and INBS will exit the market

(147) Ireland has decided that Anglo and INBS should not pursue their activities in view of the massive losses suffered by both institutions and in view of the uncertainty that the continuation of their activities would convey to the market. In particular, the State would be at risk of having to continuously inject capital into Anglo and INBS as long as both banks are active in order to cover for losses and to ensure that both institutions fulfil the new capital requirements set by the Financial Regulator. By opting for the resolution of both banks, Ireland has put an end to market speculation on Anglo and INBS and has clarified the cost of the State support for them.

(148) That decision by Ireland, combined with the commitments outlined in Section 2.3.2, will ensure that the aid is not used to develop new activities, which would require capital and funding, and thus contributes to limit the amount of aid to the minimum. The merged entity will, in particular, not engage in new lending and will limit its activities to managing the legacy loan book of Anglo and INBS under strict restrictions.

The merged entity is the most appropriate resolution mechanism

(149) As part of the resolution of both Anglo and INBS, Ireland has decided to merge the two entities in order to manage only one resolution vehicle. That solution is likely to create synergies in terms of the loan books' work-out, human resources and funding management. Although limited, such synergies will facilitate the work-out of the assets. […] Merging the two entities in this specific case limits the capital that Ireland has to inject into those banks.

(150) More generally, merging the two banks will simplify the resolution structure, and has the potential to reduce the structural costs, albeit to a limited extent.

A liquidation would be more costly and would present more systemic risks

(151) Alternatively, Ireland could consider an immediate liquidation of Anglo and INBS. The Commission is, however, of the view that a liquidation would be more costly than an orderly resolution and would require more State aid. […].

(152) Concerning the commercial loans transferred to the merged entity from Anglo, the joint restructuring plan foresees impairments on the nominal value of […] ([58]). Considering the discount levels estimated by Anglo's market advisors in May 2010, the fire sale of non-NAMA loans from Anglo would imply substantially higher losses than an orderly work-out of the loan book ([…]) ([59]). Overall, the losses that would be incurred in case of an immediate liquidation of Anglo would imply greater losses to those that the loans would bear if they are worked out over a long period. It should be underlined that, as regards the Irish loans in particular, there has been no transaction of the size discussed here. Consequently, all the figures are estimations based on experts' judgment and in case of rapid sale it is far from certain that a buyer could be found for that enormous volume of assets, even at very low prices.

(153) In a liquidation process, the proceeds from the sale of assets would be distributed to repay senior bondholders, depositors and State-guaranteed ECB/CBI funding. […].

(154) In Anglo, approximately EUR […] billion of unsecured debt is not covered by the State guarantee ([60]). […]. The rest of the unsecured debt in Anglo (approximately EUR 3 billion) is guaranteed by the State and the relevant debt holders would be paid at par by the State. In total, in case of liquidation, the senior unsecured bond holders would thus contribute to the losses by a net amount of maximum […] billion. That amount is exceeded by the additional losses that would result from fire sales of Anglo assets.

([58]) That level of impairment is more conservative than that anticipated by […] in May 2010 () in the case of an orderly winding down of the loan book.

([59]) The Anglo legacy loan book has a book value of EUR […] billion; if the levels of discount estimated by […] for a liquidation were applied to the legacy loan book, it would result in a loss in excess of. […]. Considering the deterioration of the situation in Ireland since those estimations were made, the excess loss would likely be greater.

([60]) At 18 February 2011, Anglo had: (i) unsecured unguaranteed senior bonds worth EUR […] million; (ii) unsecured guaranteed senior bonds worth EUR […] million; and (iii) […] secured unguaranteed senior bonds.

(155) In addition, in case of liquidation, the subordinated debt holders would have to assume losses. However, since the subordinated debts have been bought back in the last years and the remaining outstanding subordinated debts are small, those losses would not compensate the additional State aid required to repay the other, more senior, debt holders [61].

(156) In conclusion, a rapid liquidation of the loan portfolio, assuming that it would be feasible — which is far from certain — would crystallise a cost for Ireland superior to the costs incurred by an envisaged 10-year work-out of the assets of Anglo and INBS, where the assets easier to sell will be sold first while the assets for which there is no market will be held for several years.

(157) Concerning INBS, similar considerations as those for Anglo apply with regard to the legacy commercial loan book of the bank (almost transferred to NAMA in full). The large majority of liabilities of INBS are also guaranteed by Ireland [62].

(158) Concerning the legacy mortgage book of INBS, in the INBS restructuring plan, Ireland indicated that, based on the quality of the book and market intelligence available on transactions involving similar assets of better quality in Ireland and the United Kingdom, […], it is reasonable to anticipate a high discount on any short-term transactions concerning the mortgage book of INBS.

(159) The joint restructuring plan foresees total losses on the INBS mortgage book of approximately […], based on impairments of […]. If the mortgage book were to be sold in 2011, […]. The benefit of an orderly resolution of INBS could be reduced if a higher than expected discount were offered for the mortgage book. However, it is likely that the discount […].

Conclusion

(160) It should be concluded that the orderly resolution of Anglo and INBS, via a merged entity, limits the restructuring costs and the amount of State aid to the minimum necessary.

(b) *Significant own contribution*

(161) The principles on the own contribution of the beneficiary bank in the restructuring phase require: (i) that the beneficiary bank should use to the extent possible its own resources to finance restructuring, for example, through the sale of assets; and (ii) that the costs associated with the restructuring are also adequately borne by those who invested in the bank by absorbing losses with available capital and by paying an adequate remuneration for State interventions. The objective of burden-sharing is twofold: to limit distortions of competition and to address moral hazard [63].

(i) *Own contribution of the institutions concerned*

(162) In the present resolution of Anglo and INBS, the own contribution of both institutions to their restructuring is maximised because all assets are identified for sale and the proceeds accrue in full to the financing of the resolution. However, the value of assets is so depreciated that the proceeds of their sale is dwarfed by the capital injected into both banks.

(163) In addition both banks have sold their deposits books.

(ii) *Burden-sharing by shareholders and subordinated creditors*

(164) As regards burden-sharing, the Restructuring Communication requires that the restructuring costs are not only borne by the State but also by the bank's past investors and former shareholders.

(165) In the particular case of Anglo, private shareholders have been fully 'wiped out' and the bank was fully nationalised.

(166) Concerning INBS, prior to the State recapitalisation INBS was owned by its members. In particular 'share members' (persons who have a deposit account in INBS) had a right to gains on any surplus of assets realised in case of its demutualisation (transformation of INBS into an ordinary bank), winding-down or dissolution. As a result of the first recapitalisation of INBS, the State has taken full control of INBS via the issuance of Special Investment Shares, following which the members have lost all rights to gains on surpluses of the assets realised to the benefit of the State (for instance, in case of a sale of INBS). As a result, the economic rights of the share members have been completely 'wiped out'.

[61] At 18 February 2011, Anglo subordinated liabilities amount to only EUR […] million.

[62] At 18 February 2011, INBS had unsecured unguaranteed senior bonds worth EUR […] million, no unsecured guaranteed senior bonds, and no secured unguaranteed senior bonds.

[63] See point 22 of the Restructuring Communication.

(167) Both shareholders of Anglo and members of INBS have thus contributed to the maximum extent possible by releasing to the State control and ownership of the institutions.

(168) Subordinated debt holders have also contributed to a significant extent to the restructuring by means of two Liability Management Exercises (hereinafter referred to as 'LMEs') in Anglo and one in INBS. The two LMEs in Anglo were conducted in August 2009 and December 2010 respectively, crystallized large losses for the bond holders, generated pre-tax profits of approximately EUR 3,5 billion and provided additional core tier one capital to the bank [64]. INBS conducted an LME in 2009, with bondholders exchanging their securities at a 42 % discount to par, thereby releasing EUR 112 million of core tier 1 equity for the institution.

(169) In total, the merged entity will hold EUR 500 million of subordinated liabilities (as at 31 December 2010), significantly less than the subordinated debt held by Anglo and INBS at 31 December 2008 (respectively EUR 5 billion and EUR 300 million), illustrating the massive losses taken by subordinated bond holders. Ireland has committed, in addition, that the merged entity will not pay coupons or exercise calls on subordinated debt instruments and hybrid capital instruments, unless it is legally obliged to do so.

(170) Given the extraordinarily high amount of State aid those two institutions have received compared to their size and the corresponding cost for the State, it is legitimate to assess whether burden-sharing by senior creditors could not be achieved. In that context, in Ireland senior bond holders have the same level of seniority as holders of deposit accounts. […]. As already indicated, liquidation of the banks would result in a substantially higher State aid requirement and eventual cost for the taxpayer. To date, the Commission has not received any detailed proposal on how to make the senior creditors participate […] in the burden-sharing without increasing the cost of the resolution for the State.

Conclusion

(171) Overall, it should be concluded that, in the current legal framework, the own contribution of Anglo and INBS to their orderly resolution respects the conditions laid down in the Restructuring Communication.

6.3.4.3. Measures limiting the distortion of competition

(172) The Restructuring Communication provides that the measures limiting distortion must be a function of the aid amount and of the presence of the aided institution on the markets after the restructuring.

(173) As described previously in Section 6.2.5, the amount received by Anglo, INBS and their successor, the merged entity, is extraordinarily large both in absolute amounts and when compared to the size and RWA of the institutions. It reflects the size of the failure of those institutions.

(174) At the same time, the distortion of competition is limited as the institutions will almost completely exit all the markets where they were present. The commercial activities of the merged entity will be limited to the maximum extent possible by the commitments provided Ireland as described in Section 2.3.2. It will work out the legacy loan book of Anglo and INBS, and will not enter into new activities. It will also stop the collection of deposits [65]. All commitments provided by Ireland will remain valid and applicable until the assets are fully worked out.

(175) The following recitals explain why those commitments by Ireland ensure that the distortions of competition are limited to the minimum.

No new activities

(176) The Commission notes positively that Ireland has committed that the merged entity will not develop new activities and will not enter into new markets. The merged entity will work out the legacy loan book of Anglo and INBS exclusively and will be liquidated once legacy assets are fully worked out.

(177) In addition, the merged entity will not be authorised to acquire or take participations in other firms, preventing it to use State resources to expand its activities.

[64] On 22 July 2009, Anglo launched a fixed price tender for several Tier 1, upper Tier 2 and lower Tier 2 securities. The purchase price was between 27 % and 55 % of the nominal value of the instruments. A total of EUR 2,5 billion securities were tendered (weighted average success rate of 77 %) and the transaction generated a pre tax profit of EUR 1,8 billion for the bank.
On 21 October 2010, Anglo launched a Liability Management Exercise for lower Tier 2 securities, offering 20 cents in the euro for an exchange into a new State Guaranteed Issue maturing in December 2011. Bond holders voted in majority to accept the exchange, which was at a rate (20 cents) below market value, and to insert a call in the relevant securities by which Anglo could buy back the relevant securities at a price of 1 cent (applicable to bond holders who did not accept the exchange at 20 cents). The transaction concerned Tier 2 instruments with a nominal value of EUR 1 890 million and generated a pre-tax profit of EUR 1 588 million. In addition, securities hold by US private placements which did not participate in the LME were purchased at a price of 25 cents, for a nominal value of USD 200 million, and generated a pre-tax profit of USD 150 million.

[65] In that respect, Anglo's wealth management department will either be sold in 2011 or wound down over a period of five years.

Managing existing lending activities

(178) The merged entity will not grant lending to new customers and will restrict its lending activities to the management of the legacy loan book of Anglo and INBS. As such, the merged entity will actively manage that loan book in a way that maximises the NPV of the assets, which is normal commercial practice for all going concern banks.

(179) With regard to the commercial loan book, active management may also imply limited additional lending to a borrower in order to finish or improve a property when it preserves or increases the NPV of the assets. However, such active management is restricted, in that the merged entity commercial loan book may not exceed the joint restructuring plan forecasts by more than […] in any single year during the plan period. Furthermore, that overall cap on the increase of the commercial loan book is complemented by several additional caps which apply to specific borrowers as described in Section 2.3.2.

(180) Ireland has furthermore committed that no additional mortgage residential property lending will be granted in relation to the INBS legacy mortgage portfolio (unless the bank is contractually obliged to do so). The mortgage book will be managed so as to maximise its NPV, and new lending will be strictly limited, with further residential mortgage advances capped at EUR 20 million for the period 2011 to 2012, and EUR 5 million per year thereafter. These caps (yearly average of EUR 10 million in 2011 and 2012, and EUR 5 million per year after) amount to less than 1 % of the nominal value of the mortgage book of the merged entity, therefore preventing it from expanding its activities in the mortgage market.

(181) Overall, the cap on the loan book and the commitments undertaken by Ireland will ensure that the legacy loan books of Anglo and INBS are managed in a prudent way aiming at maximising their return, and preventing the merged entity from engaging into genuinely new lending activities with new or existing customers. The commercial activities of the merged entity will thus be limited to the minimum necessary, and the commitments by Ireland will ensure that the activities of the merged entity will not raise significant concerns with regard to the distortion of competition.

Collecting deposits

(182) In conformity with the Programme for Support, the sale of circa EUR 12,2 billion of Anglo and INBS deposits and of circa EUR 15,9 billion of NAMA bonds of both entities was completed on 24 February 2011 (see Section 2.3.1.1).

(183) The merged entity has, however, retained up to EUR 1 billion of deposits at the date of the transfer of the deposits.

(184) In particular, some of those corporate deposits are held as guarantee for loans granted to several corporate institutions (income sweep accounts). Holding those deposits is part of the contractual lending arrangements between the institutions and some of their customers, and is as such part of the orderly work-out of the Anglo and INBS loan portfolios. However, the activities of the merged entity will be limited as it will not collect deposits from new customers and the deposits it will continue to hold will be progressively redeemed.

(185) The merged entity will decrease the deposits remaining in the merged entity at broadly the same rate as their related or connected assets are wound down (or, if there are no related or connected assets, at broadly the same rate as the overall net loan book is wound down). In addition, Ireland has committed that the deposit book of the merged entity will not exceed the forecasts of the joint restructuring plan by more than EUR 200 million at any moment.

(186) To conclude, the commercial activities of the merged entity in the deposit market is dramatically reduced and limited to the strict minimum necessary to work out the legacy loan books of Anglo and INBS in an orderly fashion. The commitments by Ireland will thus guarantee that the deposit activities of the merged entity do not lead to a significant distortion of competition in the Irish deposit market.

Conclusion

(187) It should be concluded that the extraordinarily large State aid amounts do not lead to undue distortion of competition as they are offset by a corresponding large reduction of market presence. The measures addressing distortion of competition fulfil the requirements of the Restructuring Communication because the merged entity will not enter into new activities and will stop the collection of deposits, while its lending activities will be limited to the normal management and work-out of the legacy loan book of Anglo and INBS. The merged entity will eventually fully disappear from the Irish lending and deposit markets, and therefore no longer distort competition. In addition, the merged entity will apply a ban on acquisitions.

6.3.4.4. Monitoring

(188) Point 46 of the Restructuring Communication indicates that, in order to verify that the restructuring plan is being implemented properly, detailed regular reports from the Member State are necessary. Accordingly, Ireland should provide the Commission with such reports every six months, starting from the date of notification of this Decision.

(189) In the case of the restructuring of Anglo and INBS, a monitoring trustee will also be nominated for a period of three years to monitor the application of the commitments undertaken by Ireland. The monitoring trustee will be in charge of monitoring all the commitments (see Annex II). In particular the monitoring trustee will monitor on a regular basis whether the merged entity manages the legacy loan books of Anglo and INBS in line with the terms of the commitments and will ensure that the management of the Anglo and INBS loan books does not result in distortion of competition in the market.

6.3.4.5. Conclusion

(190) It should be concluded that the joint restructuring plan of Anglo and INBS fulfils the requirements of the Restructuring Communication. The plan foresees an orderly work-out of Anglo and INBS assets. The own contribution of the banks is sufficient, while the burden-sharing is substantial and the State aid is limited to the minimum. The measures addressing distortion of competition are appropriate, and finally proper monitoring will be implemented.

7. **CONCLUSION**

(191) The measures (a) to (v) referred to in recitals 66 to 69 and listed of Table 1 are considered to be restructuring aid. Concerning the aid measures covered by the opening decision of 31 March 2010, the Commission finds, pursuant to Article 7(3) of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [66], that those measure are compatible with the internal market under Article 107(3)(b) TFEU. As regards the remaining measures covered by this Decision, the Commission, pursuant to Article 4(3) of the Regulation No 659/1999, raises no objections to those measures as they are compatible with the internal market under Article 107(3)(b),

HAS ADOPTED THIS DECISION:

Article 1

The following aid, which Ireland has implemented in favour of Anglo Irish Bank and Irish Nationwide Building Society or which it plans to implement in favour of the merged entity of those two banks, is compatible with the internal market, in light of the commitments by Ireland set out in Annex I:

(a) […] recapitalisations of Anglo Irish Bank in the amount of EUR 29,44 billion;

(b) Implemented recapitalisations of Irish Nationwide Building Society in the amount of EUR 5,4 billion;

(c) Implemented State guarantees for Anglo Irish Bank, including the Guarantee Scheme for Credit Institutions (CIFS), the Eligible Liabilities Guarantee Scheme (ELG), the Emergency Liquidity Assistance (ELA) and guarantees on short-term liabilities and off-balance sheet liabilities;

(d) Implemented State guarantees for Irish Nationwide Building Society, including CIFS, ELG, ELA and guarantees on short-term liabilities;

(e) Implemented asset relief measure for Anglo Irish Bank, namely transfers of eligible loans to the National Assets Management Agency (NAMA) of EUR 35 billion;

(f) Implemented asset relief measure for Irish Nationwide Building Society, namely transfers of eligible loans to NAMA of EUR 8,9 billion;

(g) […] recapitalisation of the merged entity of EUR 3,3 billion in a stress case;

(h) Planned guarantees for the merged entity on its wholesale funding, deposits and off-balance sheet liabilities.

Article 2

Ireland shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it. Furthermore, Ireland shall, from the date of notification of this Decision, submit detailed six-monthly reports on the measures taken to comply with it.

Article 3

This Decision is addressed to Ireland.

Done at Brussels, 29 June 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

[66] OJ L 83, 27.3.1999, p. 1.

ANNEX I

COMMITMENTS UNDERTAKEN BY IRELAND

State aid case C 11/10 — restructuring of Anglo Irish Bank and INBS (together 'the merged entity')

(1) *Duration of the commitments*. Unless otherwise specified, all commitments taken by the Irish authorities will remain valid and applicable until the assets of the merged entity are fully worked out, including the promissory notes.

Ban to develop new activities and to enter into new markets. The merged entity will not carry out activities other than those that are consistent with managing the work-out of the merged entity's legacy loan book (including loan sales where appropriate to maximise recovery values and minimise capital losses). The merged entity will not develop any new activities and will not enter new markets. The merged entity will conserve and use its banking licence only as long as necessary for the work-out of the loan portfolio and will not use it to develop new activities. The merged entity will be liquidated once the merged entity's assets are fully worked out.

(2) *Management of existing assets*. The merged entity will manage existing commercial assets in a way that maximises Net Present Value (NPV) of the assets in accordance with normal commercial practice and fiduciary duties. Specifically, if a client cannot respect the terms of his loan, the merged entity will only restructure the lending terms (deferral or partial waiver of repayments, conversion of (part of) the claim in capital, etc.) if such a restructuring would lead to enhancing the present value of the loan (i.e. if the present value of the cash flows to be expected from the restructuring is higher than the present value of the cash flows which can be expected from liquidation). In summary, the merged entity will manage its commercial asset portfolio in the same way as a private asset manager would manage the work-out of a similar book.

As regards the merged entity's mortgage assets, the obligations that apply to the commercial assets will apply mutatis mutandis. The merged entity, in particular, will be allowed to restructure its mortgage assets via the following variations to the terms of existing mortgages: (i) a change of deal (e.g. by offering a new fixed rate); (ii) transferring existing mortgages to new properties; and (iii) transferring equity (e.g. adding a borrower to the mortgage or removing one).

(3) *Ban on acquisitions*. Other than with the prior consent of the European Commission, the merged entity will not acquire or take participations in any other firm. That ban on acquisitions does not apply to capital participations acquired by the merged entity in the framework of the restructuring of an existing exposure to a regulatory group [1] in difficulty (for instance through a debt-for-equity swap), as long as any such restructuring complies with the principles laid down in commitment (3) above.

(4) *Ban on coupons and exercising calls on subordinated debt and hybrid capital instruments*. The merged entity will not pay coupons or exercise calls on subordinated debt instruments and hybrid capital instruments, unless it is legally obliged to do so.

(5) *Cap on new lending*. Consistent with the objective to work out the merged entity's post-NAMA loan book over a 10-year period and commitment (3) above, the merged entity's net commercial loan book will not exceed plan forecasts by more than […] in any single year during the plan period, excluding currency movements. That cap applies to the full commercial lending activity of the merged entity, including lending described under point (7).

In addition, the following lending commitment will apply to the mortgage loan book: The merged entity shall limit further advances to contractually committed amounts and amounts arising as part of the restructuring of existing mortgage facilities. The aggregate total of further residential mortgage advances is capped at a maximum of […] for the period starting 1 January 2011 and ending 31 December 2012, and […] per annum thereafter.

Specific lending commitments on the commercial book. The following specific lending commitments will also apply to the commercial loan book.

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[1] For the sake of clarity, a regulatory group can comprise a single borrower, or several customers to which the merged entity has provided a loan. If a regulatory group consists of several customers, multiple loans may be held which are cross-collateralised. When seeking to minimise capital losses or maximise recoveries, lending can be considered at the level of the regulatory group rather than of the individual borrower.

(a) *Contractually committed but not yet paid-out amounts*: The merged entity may advance funds under contractually committed but not yet paid-out loan facilities. However, such payments will not exceed a cumulative amount of EUR 1,4 billion over the entire plan period with regard to the merged entity's legacy loan book, consisting of EUR 1,1 billion of contractually committed, but undrawn facilities and EUR 0,3 billion of contractually committed off-balance-sheet guarantees (as of 30 June 2010 interim accounts). Revolving facilities will be counted on the basis of the overall limit amount rather than on individual draw downs.

(b) *Additional financing to existing regulatory groups*: The merged entity may not provide additional financing which is not contractually committed at the time of the approval of the restructuring plan (in line with commitment (2) above). As an exception to that prohibition, the merged entity may provided additional amounts to existing regulatory groups if it complies with the commitment in point (3) and

— It is strictly necessary to preserve the value of the loan collateral (e.g. to cover collateral maintenance, insurance, tax, security, insolvency or legal costs); *or*

— It is otherwise related to minimising capital losses and/or enhancing the expected recovery value of a loan or other asset on an NPV basis (e.g. meet essential investment working capital or liquidity needs of the underlying business/regulatory group).

— The additional financing is subject to the following limitation:

  — If the nominal exposure to the regulatory group concerned is below […], the additional financing will not exceed […] of the nominal exposure;

  — If the nominal exposure to the regulatory group concerned is between […] and […], the additional financing will not exceed […];

— If the nominal exposure to the regulatory group concerned exceeds EUR […] million, the additional financing will not exceed […] % of the nominal exposure.

(c) *New regulatory groups*

New lending to new regulatory groups: The merged entity may lend to a new regulatory group only where the following conditions are cumulatively met:

Proceeds are used to reduce the exposure of an existing regulatory group; *and*

The transaction overall does not increase the total net exposure to the merged entity; *and*

The new lending minimises the expected capital losses and/or enhances expected recovery values (as measured by NPV) compared to other restructuring or foreclosure strategies; *and*

There is no capitalisation of interest (interest roll-up).

(6) *Specific lending commitments on the mortgage book*. The following specific lending commitment will also apply to the restructuring of existing mortgage loans. When the balance of the loan exceeds the value of the property, the merged entity may facilitate the loan's redemption through selling off the property by the way of providing additional finance to a vendor enabling the repayment of the outstanding balance; and it complies with the commitment in point (3).

(7) On an exceptional basis and in the national interest, the Irish National Authorities may determine that exceptions to the above lending restrictions in points (7) and (8) are required to enhance expected recovery values on a Net Present Value basis. Such determinations will be subject to prior approval by the European Commission.

(8) *Transfer of legacy Anglo and INBS deposits*. Following the transfer of all legacy Anglo and INBS deposits (where deposits do not include intra-group deposits, interbank deposits, wholesale funding, debt-securities in issue or funding provided central banks and/or equivalent institutions), the merged entity will be left with the categories of deposits and accounts specified below ('excluded liabilities') which are permitted to remain in the merged entity, subject to any associated commitments:

Deposits which at the time of transfer of the deposits are held by or on behalf of any subsidiary of the Transferor (but not including Isle of Man Co.):

(a) Secured accounts (in favour of the Transferor or any other person) and deposits related or connected to a regulatory group from the Transferor or tracker bond accounts at the Transfer Time;

(b) Deposits denominated in currencies other than euro, United States Dollars or Sterling at the time of transfer of deposits. They will not be replaced as they mature;

(c) Deposits held or booked at branches at Jersey, at Dusseldorf, Germany or at Vienna, Austria. They will not be replaced as they mature;

(d) Any account which has a negative balance;

(e) Internal control accounts;

(f) Accounts where the account or the customer to whom the account relates has been the subject of notification of an investigation by any police, fraud or investigative authority;

(g) All INBS accounts identified in the accounting records of the Transferor by branch […].

(9) *Caps on deposits and excluded liabilities.* The merged entity will not collect deposits from new customers. The overall amount of deposits from existing customers at the date of the merger will at no point in time exceed EUR 1 billion, and will not consist of deposits other than those defined in point (10) above. The merged entity will wind-down deposits at broadly the same rate as their related or connected assets are wound down (or, if there are no related or connected assets, at broadly the same rate as the overall net loan book is wound down) excluding currency movements and contractual commitments to retain deposits. In addition, the deposit book of the merged entity will not exceed the forecasts of the restructuring plan by more than EUR 200 million at any moment.

(10) *Monitoring Trustee.* The merged entity will appoint a Monitoring Trustee, subject to European Commission's approval, who will verify the adherence to the above listed commitments.

The Monitoring Trustee will be nominated for a period of three years. The appointment rules of the Monitoring Trustee and its duties are listed in Annex II. The Monitoring Trustee will in particular need to prove that he has an experience in the area of loan restructuring and loan management to monitor commitments (3) and (6).

(11) *Enforcement and Reporting.* The Irish authorities will ensure that the merged entity complies with the above listed commitments. The Irish authorities will submit regular reports on the measures taken to comply with the commitments. The first report will be submitted to the Commission not later than six months after approval from the date of notification of the Decision and thereafter at six-monthly intervals.

ANNEX II

APPOINTMENT AND DUTIES OF THE MONITORING TRUSTEE

Anglo Irish Bank and INBS are commonly referred to 'the merged entity'.

I. **The Monitoring Trustee**

1. The Irish authorities commit that the merged entity will appoint a Monitoring Trustee for a period of three years.

2. The Monitoring Trustee shall be one or several natural or legal person(s) independent of the merged entity who will be approved by the Commission and appointed by the merged entity, and will have the duty to monitor whether the merged entity complies with its obligations towards the Commission and implements the restructuring and work-out plan.

3. The Monitoring Trustee must be independent of the merged entity and must possess the necessary qualifications to carry out its mandate, for example as an investment bank, consultant or auditor, and shall neither have nor become exposed to a conflict of interest. In particular the Monitoring Trustee must have an experience in the area of loan restructuring and loan management to monitor commitments (2) and (5). The Monitoring Trustee shall be remunerated by the merged entity, which does not impede the independent and effective fulfilment of its mandate.

II. **Appointment of the Monitoring Trustee**

Proposal by the Irish authorities

No later than four weeks after the date of delivery of the Decision approving the restructuring and work-out plan of the merged entity, the Irish authorities shall submit for the Commission's approval the names of two or more persons as Monitoring Trustees and shall indicate which of them is their first choice. The proposal must contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 3 and shall include:

the full terms of the proposed mandate together with all the provisions necessary to enable the Monitoring Trustee to carry out its duties in accordance with these commitments;

the outline of a work plan describing how the Monitoring Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

The Commission shall have the discretion to approve or reject the proposed Monitoring Trustees and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Irish authorities

4. If all the proposed Monitoring Trustees are rejected, the Irish authorities shall, within one week of being informed of the rejection, submit the names of at least two other persons or institutions, in accordance with the conditions and according to the procedure in paragraphs 1 and 5.

Monitoring Trustee nominated by the Commission

5. If all further proposed Monitoring Trustees are also rejected by the Commission, the Commission shall nominate a Monitoring Trustee(s), whom the merged entity shall appoint in accordance with a trustee mandate approved by the Commission.

III. **The duties of the Monitoring Trustee**

6. It shall be the duty of the Monitoring Trustee to ensure compliance with the conditions and obligations attached to the Decision and guarantee implementation of the restructuring and work-out plan.

Duties and obligations of the Monitoring Trustee

7. The Monitoring Trustee shall:

(i) propose to the Commission within four weeks of appointment a detailed work plan describing how it plans to monitor compliance with the commitments towards the Commission and implementation of the restructuring and work-out plan;

(ii) monitor compliance with all commitments taken by the Irish authorities on behalf of the merged entity and implementation of the restructuring and work-out plan;

(iii) propose measures, which the Monitoring Trustee considers necessary to ensure compliance by the Irish authorities with all commitments towards the Commission;

(iv) submit to the Commission, the merged entity and the Irish authorities within 30 days after the end of each quarter the draft of a written report in English. The report shall cover the Monitoring Trustee's fulfilment of its obligations under the Mandate, compliance with all commitments and the implementation of the restructuring and work-out plan. All recipients of the draft report shall be able to submit their observations within five working days. Within five working days of receipt of the comments, the Monitoring Trustee shall prepare a final report and submit it to the Commission, taking into account, if possible and at his sole discretion, the comments submitted. The Trustee will also send a copy of the final report to the Irish authorities and to the merged entity. Should the draft report or the final report contain any information that must not be disclosed to the merged entity or the Irish authorities, the merged entity or the Irish authorities shall only be provided with a non-confidential version of the draft report or the final report. The Monitoring Trustee shall submit no version of the report to the merged entity and/or the Irish authorities before submitting it to the Commission.

The Commission can give the Monitoring Trustee instructions or directions in order to ensure that the commitments towards the Commission are met and the restructuring and work out plan implemented.

The Irish authorities and the merged entity shall provide for all such cooperation, support and information which the Monitoring Trustee may reasonably require in order to perform its tasks. The Monitoring Trustee shall have unlimited access to the books, records, documents, managers and other staff members, to files, locations and technical information of the merged entity which are necessary in order to perform its tasks in accordance with the commitments.

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