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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.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 20 November 2013

concerning the State aid SA.16237 (C58/02) (ex N118/02) implemented by France in favour of SNCM

(notified under document C(2013) 7066)

(Only the French text is authentic)

(Text with EEA relevance)

(2014/882/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to those articles [2], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 18 February 2002, France notified the Commission of planned restructuring aid for Société Nationale Maritime Corse-Méditerranée (hereinafter: 'SNCM'), which notification was supplemented on 3 July 2002 [3]. The restructuring plan followed the notification by the French authorities on 20 December 2001 of a cash advance of EUR 22,5 million granted by Compagnie Générale Maritime et Financière (hereinafter: 'CGMF') [4] to SNCM as rescue aid. By decision of 17 July 2002 [5] (hereinafter: 'the 2002 decision'), the Commission authorised rescue aid in favour of SNCM under the preliminary examination procedure for aid laid down in Article 88(3) of the EC Treaty. The notified restructuring aid consisted in the recapitalisation of SNCM through CGMF to the tune of EUR 76 million.

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

(2) OJ C 303, 13.12.2006, p. 53.

(3) Registered under reference TREN A/61846.

(4) CGMF is a financial holding company wholly owned by the French State which acts on the latter's behalf for all operations concerning maritime transport, fitting out and leasing vessels in the Mediterranean.

(5) OJ C 148, 25.6.2003, p. 7.

(2) By letter of 19 August 2002, the Commission notified the French authorities of the decision to initiate the formal investigation procedure [6] pursuant to Article 88(2) of the EC Treaty and Article 6 of Council Regulation (EC) No 659/1999 [7].

(3) On 8 October 2002 [8], the French authorities communicated to the Commission their comments on the decision of 19 August 2002 [9].

(4) At the request of the French authorities, meetings were organised with the Commission on 24 October 2002, 3 December 2002 and 25 February 2003.

(5) In the context of initiating the procedure, the Commission received observations from two undertakings, namely Corsica Ferries France (hereinafter: 'CFF') on 8 January 2003 [10] and STIM d'Orbigny group STEF-TFE (hereinafter: 'STIM') on 7 January 2003, and from various French regional and local authorities on 18 December 2002 and 9 and 10 January 2003. It sent those observations to France for comment by letters of 13 and 16 January and 5 and 21 February 2003.

(6) The French authorities submitted their comments on the observations by CFF and STIM on 13 February [11] and 27 May 2003 [12].

(7) On 16 January 2003, the Commission sent a request for additional information, to which the French authorities replied on 21 February 2003.

(8) By letter of 10 February 2003 [13], the French authorities expanded their arguments seeking to demonstrate that the planned aid complied in every respect with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty [14] (hereinafter: 'the 1999 guidelines').

(9) At the Commission's request, on 25 February 2003 [15] the French authorities forwarded a copy of the shareholders' agreement binding SNCM and STIM.

(10) By Decision 2004/166/EC [16] (hereinafter: 'the 2003 decision'), the Commission approved, under certain conditions, the granting of restructuring aid to SNCM payable in two instalments, one of EUR 66 million and the other for a maximum amount of EUR 10 million, to be determined on the basis of the net proceeds resulting from asset sales made after the adoption of the 2003 decision. The payment of the first instalment was authorised by the 2003 decision.

(11) On 13 October 2003, CFF brought an action for annulment of the 2003 decision before the General Court of the European Communities (hereinafter: 'the General Court') (Case T-349/03).

(6) OJ C 308, 11.12.2002, p. 29.
(7) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1). Since the French authorities requested on 11 September 2002 that some factual errors in the decision of 19 August 2002 be corrected, on 27 November 2002 the Commission adopted a decision amending the decision of 19 August 2002 (published in OJ C 308, 11.12.2002, p. 29). Interested parties were invited to submit their observations on the planned aid from that date.
(8) On 11 September 2002, the French authorities requested an additional period in which to make their observations on the decision of 19 August 2002. That period was granted by the Commission on 17 September 2002.
(9) Registered under reference SG(2002) A/10050.
(10) Registered on 15 January 2003 under reference DG TREN A/10962.
(11) Registered under reference SG(2003) A/1691.
(12) Registered under reference TREN A/21531.
(13) Registered under reference SG(2003) A/1546.
(14) OJ C 288, 9.10.1999, p. 2.
(15) Registered under reference TREN A/21701.
(16) Commission Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM) (OJ L 61, 27.2.2004, p. 13).

(12) By Decision 2005/36/EC ([17]) (hereinafter: 'the 2004 decision'), the Commission decided that the amendments requested by France on 23 June 2004, namely swapping the vessel *Aliso* with the vessel *Asco* in the list of vessels which SNCM was authorised to use following the 2003 decision and the sale of the *Aliso* instead of the *Asco*, were not such as to call into question the compatibility with the internal market of the restructuring aid authorised by the 2003 decision.

(13) By decision of 16 March 2005 (hereinafter: 'the 2005 decision') ([18]), the Commission approved the payment of the second instalment of restructuring aid, in the amount of EUR 3,3 million, which brought the total amount of authorised restructuring aid to EUR 69,3 million.

(14) On 15 June 2005, in Case T-349/03 ([19]), the General Court annulled the 2003 decision on the ground that the minimal character of the aid had been incorrectly assessed.

(15) On 25 October 2005 ([20]), the French authorities sent the Commission information relating to the financial situation of the company since the notification of the planned restructuring aid on 18 February 2002.

(16) On 17 November 2005 ([21]), the French authorities provided information on the updating of the 2002 restructuring plan and the reconstitution of SNCM's own capital ([22]).

(17) On 15 March 2006, a briefing note on the market, the business plan (revenue part) and the projected income statement were submitted to the Commission by the French authorities ([23]). Other documents were delivered to the Commission on 28 March 2006 and 7 April 2006 ([24]). In the letter dated 7 April 2006, the French authorities also called on the Commission to classify part of the 2002 restructuring aid, in particular the amount of EUR 53,48 million, not as a measure taken under a restructuring plan but as non-aid in accordance with the *Altmark* ([25]) case-law or as an autonomous measure independent of the restructuring plan pursuant to Article 86(2) of the EC Treaty, on account of its being 'public service compensation'.

(18) On 21 April 2006, a planned merger, under which the undertakings Veolia Transport (hereinafter: 'VT') ([26]) and Butler Capital Partners (hereinafter: 'BCP') acquired joint control of SNCM ([27]), was notified to the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 ([28]). By decision dated 29 May 2006 ([29]), the Commission decided not to oppose the notified operation and to declare it compatible with the internal market.

(19) On 21 June 2006 ([30]), the French authorities sent the Commission the Order of 26 May 2006 of the Ministry of Economic Affairs, Finance and Industry approving financial transactions decided by *Société nationale des chemins de fer français* (hereinafter: 'SNCF') and Decree No 2006-606 of 26 May 2006 transferring SNCM to the private sector.

(20) Information concerning the public service delegation and aid having a social character relating to the operation of services to Corsica was sent to the Commission on 7 June 2006 ([31]).

([17]) Commission Decision 2005/36/EC of 8 September 2004 amending Decision 2004/166/EC on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM) (OJ L 19, 21.1.2005, p. 70).

([18]) OJ C 16, 21.1.2006, p. 20.

([19]) See the judgment of the General Court of 15 June 2005 in Case T-349/03 *Corsica Ferries France SAS* v *Commission* [2005] ECR II-2197.

([20]) Registered under reference TREN A/27546.

([21]) Registered under reference TREN A/30842.

([22]) Additional information was sent by post on 30 November 2005 (SG(2005) A/10782), 14 December 2005 (SG(2005) A/11122) and 30 December 2005 (TREN A/10016).

([23]) Registered under reference TREN A/16904.

([24]) Registered under reference TREN A/19105.

([25]) Case C-280/00 *Altmark Trans GmbH* v *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR 7747.

([26]) Veolia Transport was a wholly owned subsidiary of Veolia Environnement. It operated under the name of *Connex des services de transport de voyageurs pour le compte de collectivités publiques* (suburban, interurban and regional public transport systems) and, for that purpose, managed road and railway networks and, to a lesser extent, transport services by sea.

([27]) OJ C 103, 29.4.2006, p. 28.

([28]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

([29]) OJ C 148, 24.6.2006, p. 42.

([30]) Registered under reference TREN A/25295.

([31]) Registered under reference TREN A/24111.

(21) By letter dated 13 September 2006, the Commission notified the French authorities of its decision to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty and in Article 6 of Regulation (EC) No 659/1999 concerning the new measures implemented in favour of SNCM and the restructuring plan notified in 2002 ([32]) (hereinafter: 'the 2006 decision').

(22) On 16 November 2006, France sent the Commission its comments on the 2006 decision ([33]).

(23) On application by a number of interested parties to extend the time-limit for submitting comments by 1 month ([34]), the Commission decided to grant that additional period to all interested parties ([35]).

(24) The Commission received comments from CFF ([36]) and STIM ([37]) which were forwarded to the French authorities by letter dated 20 February 2007. A third party also sent comments which were also forwarded to the French authorities, and withdrawn by that party on 28 May 2008.

(25) The French authorities sent their observations on the comments by the interested third parties on 30 April 2007 ([38]).

(26) On 20 December 2007, CFF lodged a complaint against SNCM with the Commission which supplemented the information sent on 15 June 2007 and 30 November 2007. That complaint concerns Article 3 of the new public service delegation agreement signed in June 2007 between the Corsican regional authorities and the *Compagnie Méridionale de Navigation-SNCM* joint venture for 2007 to 2013. According to CFF, the application of that clause would mobilise new financial resources for SNCM in the region of EUR 10 million for 2007. Furthermore, it stated that the compensation paid to SNCM in respect of public service obligations is State aid which is, moreover, unlawful since it has not been notified to the Commission.

(27) The Commission informed the interested parties of its decision to extend the period for them to submit comments to 14 March 2008.

(28) On 26 March 2008, the Commission forwarded the comments by the interested third parties to France, which communicated its observations on 28 March, 10 April and 28 April 2008.

(29) By decision dated 8 July 2008, the Commission took the view that the new measures in 2006 did not constitute State aid within the meaning of Article 87(1) of the EC Treaty and that the measures notified in 2002 were aid compatible with the internal market.

(30) This decision was partially annulled on 11 September 2012 by the General Court ([39]), which found that the Commission's conclusions on the measures implemented in 2006 were vitiated by manifest errors of assessment. The General Court held that the Commission's analysis of the 2002 restructuring aid should be reviewed because the decision was based on the fact that the 2006 measures were free of aid.

(31) The only aid in respect of which the finding of compatibility was not annulled is the EUR 53,48 million as compensation for SNCM's public service obligations for the period 1991-2001. Consequently, this point will not be addressed in this decision.

([32]) See footnote 2.
([33]) Registered under reference TREN A/37907.
([34]) By the STEF-TFE group on 28 December 2007 (A/20313) and by Corsica Ferries on 27 December 2006 (A/20056).
([35]) Letters of 4 January 2007 (D 2007 300067) sent to the STEF-TFE group and (D 2007 30000689) to the Corsica Ferries group.
([36]) On 11 January, 16 January and 9 February 2007, registered under references TREN/A/21142, A/21669 and A/23798 respectively.
([37]) On 13 February 2007, registered under references TREN/A/24473 and TREN/A/23981.
([38]) Registered by the Commission as TREN/A/30979. The French authorities requested and obtained two further additional periods of 1 month for submitting their comments by letters dated 15 March 2007 and 19 April 2007, registered under references TREN/A/27002 and A/29928.
([39]) See the judgment of the General Court of 11 September 2012 in Case T-565/08 *Corsica Ferries France SAS* v *European Commission*, not yet reported (hereinafter: 'the judgment of 11 September 2012').

(32) The Commission must therefore adopt a new final decision. There is no need to examine facts subsequent to the date of adoption of the annulled decision. Following the annulment, the Commission is required, first, to evaluate whether certain of the measures in question are consistent with the behaviour of a private investor in a market economy and, second, as far as the measures examined constitute State aid, whether the compatibility conditions laid down by the guidelines are met. For each of these two re-examinations, in accordance with the case-law of the General Court ([40]), the Commission may take account only of the information that was available to it on the date of adoption of the annulled decision, i.e. 8 July 2008 ([41]).

(33) On 13 November 2012 a meeting took place between the Commission, the French authorities and representatives of SNCM.

(34) By letters dated 6 December 2012 and 5 February 2013, the French authorities made two separate requests for a decision to re-open the procedure, on the following grounds: by spelling out the criteria for the prudent investor in a market economy test, the General Court had handed down an innovative judgment that necessitated the re-opening of the adversarial procedure. By letters dated 15 January and 13 February 2013, the Commission rejected these requests, emphasising that the procedure could be re-opened at the precise point where the illegality had occurred and pointing out that the 2006 opening decision was not unlawful in any way. However, it also informed the French authorities that they were at liberty to submit any supplementary information for discussion or analysis or any document that they felt appropriate.

(35) The French authorities sent the Commission an information note on 16 May 2013.

(36) By letter dated 19 June 2013, SNCM also requested a decision to re-open the formal investigation procedure on grounds similar to those put forward by the French authorities. The Commission rejected this request by letter dated 10 July 2013. However, the Commission also informed SNCM that it was at liberty to submit any supplementary information for discussion or analysis or any document that it felt appropriate.

(37) On 27 August 2013, SNCM sent an information note and a new report on the sale of SNCM.

II. **DESCRIPTION**

2.1. THE RECIPIENT OF THE MEASURES COVERED BY THIS DECISION

(38) The recipient of the measures covered by this decision is SNCM, which has several subsidiaries in the maritime sector and operates the maritime transport of passengers, cars and lorries on routes between mainland France and Corsica, Italy (Sardinia) and the Maghreb (Algeria and Tunisia).

(39) SNCM is a limited liability company which came into being in 1969 with the merger of *Compagnie Générale Transatlantique* and *Compagnie de Navigation Mixte*, both established in 1850. At that time called *Compagnie Générale Transméditerranéenne*, it was renamed Société Nationale Maritime Corse-Méditerranée in 1976, after SNCF had acquired a stake in its capital. The company was chosen by the French Government to implement the principle of territorial continuity with Corsica, bringing maritime transport fares into line with SNCF rail transport fares on the basis of an agreement concluded on 31 March 1976 for a term of 25 years. The French Government had already entrusted *Compagnie Générale Transatlantique* with the operation of services to Corsica through an earlier agreement of 23 December 1948.

(40) At the time of the notification of the recapitalisation in 2002, 20 % of SNCM was held by SNCF and 80 % by CGMF. As a result of the sale of the equity capital in SNCM on 30 May 2006 (see recital 18 of this decision), BCP and VT hold 38 % and 28 % respectively of SNCM's capital, while CGMF retains 25 % (9 % of the capital is reserved to employees).

([40]) See the judgment of the General Court in Case T-301/01 *Alitalia* v *Commission* [2008] ECR II1753, in particular paragraphs 137 and 146.

([41]) See also the judgment of the Court of Justice of 5 June 2012 in Case C-124/10 P *Commission* v *EDF*, not yet reported, paragraphs 83-85 and 104-105, in relation to the information to be taken into account to determine whether a State has behaved like a prudent private investor in a market economy.

(41) In 2008, the main subsidiaries of SNCM were *Compagnie Méridionale de Navigation* ('CMN') [42], *Compagnie Générale de Tourisme et d'Hôtellerie* ('CGTH') [43], *Aliso Voyage* [44], *Sud-Cargos* [45], *Société Aubagnaise de Restauration et d'Approvisionnement* ('SARA') [46], *Ferrytour* [47] and *Les Comptoirs du Sud* [48].

(42) Following the disposal of the high-speed vessels *Aliso* in September 2004 and *Asco* [49] in May 2005, the SNCM fleet comprises 10 vessels (5 car ferries [50], 4 mixed vessels (freight and passenger) [51] and a high-speed vessel operating principally from Nice [52]), 7 of which it holds in its own name [53].

(43) For the sake of completeness, it should be noted that regular shipping services between the ports of mainland France and Corsica have since 1948 been operated as a public service. SNCM and CMN were the concession-holders between 1976 and 2001 under a framework agreement initially concluded for 25 years. In accordance with the Community rules in force [54] and following the European invitation to tender [55] organised by the Corsican regional authorities [56], SNCM and CMN jointly secured the public service delegation to operate services between Marseille and Corsica in exchange for financial compensation from 2002 to 2006.

(44) Since the public service delegation was to expire at the end of 2006, the public shipping service referred to above, which was the object of a new Europe-wide invitation to tender [57], was awarded to the SNCM-CMN joint venture from 1 May 2007 to 31 December 2013 for a subsidy of approximately EUR 100 million per annum.

(45) Similarly, obligations relating to the frequency of services are imposed on all operators providing services to the island from Toulon or Nice. On those routes, Corsican residents and other categories of passengers were entitled from 2002 to 2013 to social aid established pursuant to Commission decisions of 2 July 2002 [58] and 24 April 2007 [59].

2.2. COMPETITIVE ENVIRONMENT

(46) SNCM operates mainly in two separate markets, passenger traffic and freight traffic. It operates services to Corsica and the Maghreb from France and, to a lesser extent, services to Italy and Spain.

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[42] SNCM holds a direct non-majority shareholding of 45 % in CMN and an indirect non-majority shareholding of 24,1 % through *Compagnie Générale de Tourisme et d'Hôtellerie* (CGTH). The STEF-TFE group has had effective control since 1992 through its 49 % shareholding in *Compagnie Méridionale de Participations* (CMP). SNCM and CMN were partners in the public service delegation during the period 2001-2006 and jointly won the new public-service delegation contract for the period 2007-2012/13.

[43] CGTH is a holding company wholly owned by SNCM.

[44] Aliso Voyage is SNCM's own distribution channel. Comprising 17 agencies throughout France, the company manages maritime ticket sales, 49,9 % of which are in SNCM ticket outlets.

[45] At the time of the adoption of the 2003 decision, SNCM held, equally with the transport group Delmas, a shareholding in the French maritime freight shipping company Sud-Cargos, which specialises in services to Morocco. That shareholding was subsequently sold at the end of 2005 for EUR 3,3 million, as is apparent from the 2005 investment plan submitted by the French authorities on 28 March 2006.

[46] SNCM owns 100 % of that company, which carries out the victualling of SNCM's vessels.

[47] The Ferrytour partnership is a tour operator that is wholly owned by SNCM. It operates trips by sea to Corsica, Sardinia and Tunisia but also flights to many destinations. In addition to its main line of business, it also organises mini-cruises and offers business travel services.

[48] *Comptoirs du Sud*, a subsidiary set up in 1996 which is wholly owned by SNCM, manages all the shops on board its ships.

[49] See footnote 16.

[50] The *Napoléon Bonaparte* (capacity 2 150 passengers and 708 cars, power 43 MW, speed 23,8 knots), a large luxury car ferry; the new *Danielle Casanova*, delivered in May 2002 (capacity 2 204 passengers and 700 cars, power 37,8 MW, speed 23,8 knots), also a large luxury car ferry; the *Île de Beauté* (capacity 1 554 passengers and 520 cars, power 37,8 MW, speed 21,5 knots), put into service in 1979 and refitted in 1989/1990; the *Méditerranée* (capacity 2 254 passengers and 800 cars, power 35,8 MW, speed 24 knots) and the *Corse* (capacity 2 150 passengers and 600 cars, power 27,56 MW, speed 23,5 knots).

[51] The *Paglia Orba* (capacity 500 passengers, 2 000 linear metres for freight and 120 cars, power 19,7 MW, speed 19 knots); the *Monte d'Oro* (capacity 508 passengers, 1 615 metres for freight and 130 cars, power 14,8 MW, speed 19,5 knots); the *Monte Cinto* (capacity 111 passengers, 1 200 metres for freight, power 8,8 MW, speed 18 knots); since May 2003, the *Pascal Paoli* (capacity 594 passengers, 2 300 metres for freight and 130 cars, power 37,8 MW, speed 23 knots).

[52] The high-speed vessel *Liamone* (capacity 1 116 passengers and 250 cars, power 65 MW, speed 42 knots), which also operates crossings from Toulon.

[53] All are leased, except for the *Danielle Casanova*, the *Pascal Paoli* and the *Liamone*.

[54] Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7.).

[55] OJ S 2001/10 – 007-005.

[56] Licensing authority for public service obligations since 1991 on the basis of French Law No 91-428 of 13 May 1991.

[57] OJ 2006/S 100-107350.

[58] State aid N 781/2001 authorised by Commission Decision of 2 July 2002 (OJ C 186, 6.8.2002, p. 3).

[59] State aid N 13/2007 authorised by Commission Decision of 24 April 2007, published on the Commission's website: http://ec.europa.eu/community_law/state_aids/transports_2007.htm

2.2.1. **Services to Corsica**

2.2.1.1. *Passenger transport*

(47) The operation of passenger transport services to Corsica is a highly seasonal market. It is distinguished by seasonal peaks of passenger numbers which may be up to 10 times those of the slackest periods, which requires operators to provide a fleet which can absorb those peaks. Half of the turnover is generated in July and August. Furthermore, there is an imbalance in respect of the direction of the route, even in peak periods: in July, for example, departures from the mainland are full whereas the return is almost empty. As a result, the average annual passenger load factors of the vessels are relatively low.

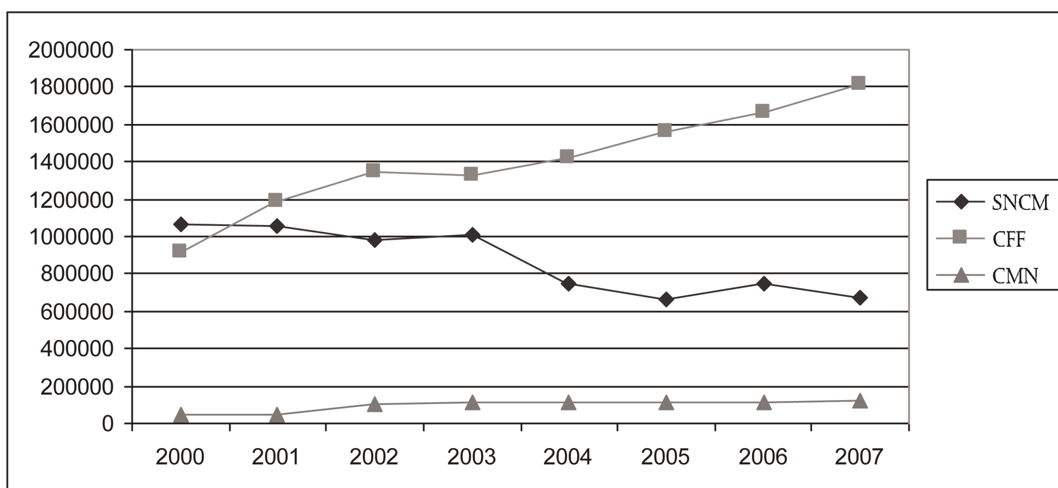
(48) SNCM is the incumbent operator linking Corsica to the French mainland. Broadly speaking, two thirds of its activities are carried on between Marseille and Corsica under a public service delegation; the other third of its activities comprises routes with other departure points or destinations (Nice-Corsica, Toulon-Corsica, international routes to Sardinia and the Maghreb).

(49) SNCM has always had a monopoly on its principal activity. Since 1996, however, it has faced competition which has grown very quickly. Today the dominant player in shipping services between the mainland and Corsica is CFF and its market share continues to grow. Although it has been present in that market only since 1996, CFF has seen its passenger traffic increase by 44 % a year between 2000 and 2005, and that growth continues. Thus, in 2008, nearly […] (*) % of passengers by sea between the mainland and Corsica took a CFF ferry, whereas only […] (*) % used an SNCM service, and CMN carried the remaining passengers, i.e. […] (*) %.

(50) The position attained by CFF in the relevant market since 2000 is also reflected in the number of passengers carried per season between Corsica and mainland France. The graph below shows that CFF's market share went from 45 % in 2000 to 70 % in 2007 and SNCM's share went from 53 % to 26 % during the same period, with a difference of more than a million passengers transported.

Graph

Number of passengers transported per season (May-September) between mainland France and Corsica: 2000 to 2007 seasons



Source: Observatoire régional des transports de la Corse.

(51) The other minor competitors to SNCM operating services to Corsica are *Compagnie Méridionale de Navigation* (CMN), Moby Lines, Happy Lines and TRIS.

(*) Confidential information.

(52) Since 2006, SNCM's capacity and its market shares for services to Corsica have decreased, with a reduction of 8 % in available seats (– 20 % for services from Nice and – 3 % for services from Marseille).

(53) However, the continued reduction in market shares demonstrates that the renewal of confidence on the part of passengers, which had been greatly damaged by the strikes and disruptions caused by the industrial disputes of 2004 and 2005, in particular at the time of the privatisation of the undertaking, is very slow.

(54) Passenger transport by sea between the mainland and Corsica has grown on average by 4 % a year since 1993; that growth should continue, with an increase of […] (*) % also forecast for 2008 (relevant at the time for the examination of the facts), then moderate growth over the coming years. None the less, new players do not appear to be seeking to enter that market. At the time of the call for tenders put out by the Office des Transports de Corse to award the public service delegation to operate services by sea to a number of Corsican ports from 2007 to 2013, no candidates other than CFF and SNCF-CMN came forward, even though part tendering on a given route was possible.

(55) CFF, SNCM's main competitor, greatly increased its passenger capacity from 500 000 to 4,5 million between 1999 and 2007 (including a 30 % increase between 2006 and 2007), which enabled it to increase its traffic (from 1,3 million in 2005 to 1,6 million in 2007) and its market share. For structural reasons, that policy none the less results in a lower passenger load factor for CFF than for SNCM, with a difference in the region of 10 percentage points in 2007. For SNCM, the average passenger load factor in 2007 was 48 %, which is normal having regard to the fact that the market is very seasonal (see above).

2.2.1.2. *Transport of freight*

(56) As regards freight traffic to Corsica, in 2005 SNCM held around 45 % of the Marseille-Toulon market to Corsica.

(57) SNCM and CMN have a de facto near-monopoly for (unaccompanied) general goods traffic. Under the public service delegation contract, the two firms operate frequent services from Marseille to all Corsican ports.

(58) For accompanied trailers loaded onto ferries, accounting for 24 % overall of general goods traffic measured in linear metres, there is competition among all the passenger transport operators. SNCM and CMN also have the main share of the market in this accompanied traffic. The other operators, in particular CFF, have a 10 % share, i.e. 2 % of the overall market.

(59) For accompanied automotive vehicles [60] loaded onto ferries (approximately 24 % of general goods traffic in 2003), SNCM and CMN also hold the majority of the relevant market. However, since 2002 CFF has been developing its services and holds approximately 15 % of the market.

2.2.2. **Services to the Maghreb**

(60) Tunisia and Algeria are an important market of approximately 5 million passengers, with air transport predominating. In that context, transport by sea represents about 15 % of traffic. While Algeria represents a significant maritime market of approximately 560 000 passengers, Tunisia is a smaller market in the region of 250 000 passengers.

(61) The French maritime transport market to the Maghreb saw steady growth of around 13 % between 2001 and 2005. Having regard to the prospects for growth in tourism in that region, maritime transport was expected (relevant at the time for the examination of the facts) to see an annual growth rate of around 4 % by 2010.

(62) In Algeria, SNCM is the second-largest operator in the market after *Entreprise Nationale de Transport Maritime de Voyageurs* (ENTMV), an Algerian public undertaking. SNCM's market share increased from 24 % in 2001 to 35 % in 2005.

[60] The driver accompanies the vehicle combination on the crossing. In some cases, a driver loads the vehicle before departure and another driver unloads it upon arrival. This is entered as accompanied transport as against roll-on roll-off transport operations in which the trailer travels without tractor.

(63) SNCM is the second-largest operator in the market to Tunisia after *Compagnie tunisienne de navigation* (CTN). Although SNCM has lost market share to CTN since 2001, going from 44 % to 39 % in 2004, an improvement was, however, recorded in 2005 (40 %).

2.3. DESCRIPTION OF THE MEASURES COVERED BY THIS DECISION

2.3.1. **The 2002 recapitalisation of SNCM**

(64) Following the Commission decision of 17 July 2002 to authorise rescue aid to SNCM ([61]), on 18 February 2002 the French authorities notified the Commission of planned restructuring aid to SNCM. That measure consisted in the recapitalisation of SNCM, through its parent company CGMF, to the tune of EUR 76 million, of which EUR 46 million was accounted for by restructuring costs ([62]). The objective of the capital increase was to increase SNCM's own capital from EUR 30 million to EUR 106 million.

(65) In accordance with the 1999 guidelines, the French authorities submitted to the Commission a restructuring plan ([63]) for SNCM concerning five points:

(i) a reduction in the number of crossings and the redeployment of its vessels between the different routes (a reduction in services to Corsica and an increase in services to the Maghreb). The restructuring plan provided for a reduction in the number of crossings from 4 138 (3 835 for SNCM and 303 for its subsidiary *Corsica Marittima*) to 3 410 in 2003 with the following route changes:

— changes to routes between Marseille and Corsica in accordance with the terms and conditions of the 2001-2006 public service contract,

— near-withdrawal of routes between Toulon and Corsica,

— reduction of services between Nice and Corsica,

— closure of the Livorno-Bastia line with dedicated equipment, actually closed in 2003,

— consolidation of services from Algeria and Tunisia by the vessels *Méditerranée*, *Ile de Beauté* and *Corse* and the withdrawal of the Genoa-Tunis service;

(ii) a reduction in its fleet by four vessels, which was to provide EUR 21 million of liquid assets;

(iii) the transfer of certain property assets;

(iv) a reduction in staff ([64]) of approximately 12 % which, combined with a sensible wage policy, was to make it possible to reduce crew costs from EUR 61,8 million in 2001 to EUR 54,8 million on average from 2003 to 2006 and shore costs from EUR 50,3 million in 2001 to EUR 45,8 million over the same period;

(v) the closure of two of its subsidiaries, *Compagnie Maritime Toulonnaise* and *Corsica Marittima*, whose residual activities would be taken over by SNCM.

(66) Following the observations made by the Commission in its decision of 19 August 2002, the French authorities, in their letter of 31 January 2003, set out the improvements made to the restructuring plan on the following points:

— commitments and clarifications concerning wage policy,

([61]) See footnote 5.
([62]) That amount broke down as follows: EUR 20,4 million for the restructuring plan itself, EUR 1,8 million for laying-up costs of ships to be sold, EUR 14,8 million for depreciation of the *Liamone* and EUR 9 million for the cost of redeploying activity to the Maghreb.
([63]) The plan was adopted on 17 December 2001 by the SNCM management board.
([64]) Staff numbers are reduced through natural wastage and early retirement on the basis of age criteria (early cessation of work), mobility leave and non-replacement of temporary contracts. However, for SNCM the reductions entail an estimated cost of EUR 20,4 million.

— a plan for reducing costs in intermediate purchases,

— a commitment that SNCM would not initiate a price war with its competitors operating services to Corsica.

(67) On the last point, the French authorities state that 'SNCM makes that commitment without reservations, because it takes the view that a price war of its own making would not be consistent either with its strategic positioning, its interest (because it would lead to a reduction in revenue), its usual practices or its expertise'.

(68) In their restructuring plan, the French authorities submitted to the Commission a detailed financial model for 2002 to 2007 on the basis of median hypotheses relating to a series of variables ([65]). The financial projections show, inter alia, a return to operating profit from 2003.

Table 1

Financial model for 2002-2007

EUR million	2000 Actual	2001 Actual	2002 Plan	2002 Actual	2003 Plan	2004 Plan	2005 Plan	2006 Plan	2007 Plan
Turnover	**204,9**	**204,1**	178	**205,8**	190,4	192,9	195,2	197,1	193,9
Operating subsidies	**85,4**	**86,7**	74,5	**77,7**	69,9	68,8	68,4	67	68,5
Operating result	**– 14,7**	**– 5,1**	1,2	**– 5,8**	6,8	10,6	10,7	8,1	9
Net result	**– 6,2**	**– 40,4**	23	**4,2**	12	14	1	3	3
Capital	**67,5**	**29,7**	119	**33,8**	124	134	145	160	169
Net financial debt (excl. leasing)	**135,8**	**134,5**	67,7	**144,8**	55,2	38,2	57,1	115,7	228,1
Financial ratios									
Operating result/ turnover+subsidies	**– 5 %**	**– 2 %**	0 %	**– 2 %**	3 %	4 %	4 %	3 %	3 %
Capital/balance-sheet debt	**50 %**	**22 %**	176 %	**23 %**	225 %	351 %	254 %	138 %	74 %

Figures for 2000, 2001 and 2002 taken from SNCM's annual reports for 2001 and 2002.

(69) According to the French authorities, the EUR 76 million capital contribution and the return to operating profitability, expected from 2003, should make it possible to raise the company's capital from its level of about EUR 30 million at the end of 2001 to EUR 120 million in the short term (2003) and then to EUR 160-170 million at the end of the period covered by the plan (2006-2007). That was to lead to a reduction in debt from EUR 145 million in 2002 to levels of EUR 40 million to EUR 55 million from 2003 to 2005. In the last years of the plan, an increase in debt was forecast by the company because of the replacement of one or two vessels (full ownership).

([65]) Such as traffic, projected growth of gross domestic product (1,5 %), the borrowing rate (5,5 %), the rate of return on financial products (4,5 %) and the short-term debt rate (5 %).

(70) The French authorities also provided a sensitivity analysis of expected results in relation to working hypotheses in respect of traffic on different routes. On that basis, the different simulations show that SNCM should have returned to profitability under the scenarios in question.

(71) Initially, the French authorities described two alternative methods which they rejected as being too costly.

(i) The first valuation method consisted in adding together the costs of all the restructuring measures. It led to a EUR 90,9 million financing requirement, based on the following:

— accumulated losses from 1991 to 2001, i.e. EUR 41,7 million (EUR 29 million — figure validated by Decision 2002/149/EC of 30 October 2001 (OJ L 50 of 21 February 2002, p. 66), EUR 6,1 million in respect of 2000 and EUR 6,6 million, before restructuring costs, in respect of 2001),

— the reduction in resources made up of excess tax depreciation between the same dates, i.e. EUR 24 million (the item falls from EUR 86 million to EUR 62 million on the balance sheet over the period, which reflects the extension of the depreciation period from 12 to 20 years, the lesser use of that resource and the use of leasing for the latest units delivered),

— capital gain on disposal generated during restructuring, i.e. EUR 21 million, deducted from the financing requirement, and

— cumulative effect of restructuring charges of EUR 46,2 million (see footnote 58).

(ii) The second method consisted in determining the amount of capital the banks would require for the entire fleet, given that for financing the purchase of a vessel banks in general require capital corresponding to 20 % to 25 % of the vessel's value. On the basis of a historical acquisition cost of EUR 843 million for the fleet, the French authorities calculated a capital requirement of between EUR 157 million and EUR 196 million. After deducting existing capital at the end of 2001, this method led to a recapitalisation requirement of EUR 101 million to EUR 140 million.

(72) The method finally chosen by the French authorities to determine the amount of the recapitalisation involves calculating the financing requirement on the basis of the average capital/debt ratio of five European shipping companies recorded in 2000. In spite of the differences in the balance sheets of those undertakings, the average calculated by the French authorities was 79 %. The French authorities submit that the financial projections for 2002 to 2007 give an average capital/debt ratio of 77 %, with capital to reach EUR 169 million in 2007. Such a level of own capital was to be obtained by means of a EUR 76 million recapitalisation and the success of the measures provided for in the restructuring plan.

2.3.2. **Measures subsequent to the 2002 recapitalisation**

2.3.2.1. *Preliminary remark*

(73) The recapitalisation and the restructuring plan of 2002 did not produce the expected results and, from 2004, the economic and financial situation of SNCM greatly deteriorated. Both internal factors (industrial disputes, insufficient and belated achievement of productivity objectives, loss of market share) and external factors (reduced appeal of Corsica as a destination, acquisition of market share by CFF, management errors by the State [66]), as well as the increased cost of fuel, contributed to this deterioration.

(74) Accordingly, SNCM's operating results were EUR – 32,6 million in 2004 and EUR – 25,8 million in 2005. The net result was EUR – 29,7 million in 2004 and EUR – 28,8 million in 2005.

(75) The deterioration in SNCM's economic and financial situation led the French authorities to sell assets over and above what was laid down in the 2002 restructuring plan and required by the 2003 decision and to initiate a procedure to seek private partners.

[66] See below.

Table 2

List of assets sold by SNCM since 2002

	Net proceeds	Date
Sales proposed in the 2002 notification (EUR thousand)	25 165	
the *Aliso* (instead of the *Asco*, in accordance with the Commission decision of 8.9.2004)	(315)	30.9.2004
the *Napoléon*	6 396	6.5.2002
the *Monte Rotondo*	591	31.7.2002
the *Liberté*	10 088	27.1.2003
All Schuman property	8 405	20.1.2003
Additional sales required by the Commission in its decision of 9.7.2003 (EUR thousand)	5 022	
SCI Espace Schuman	765,7	24.6.2003
Southern Trader	2 153	22.7.2003
Someca	1 423,9	30.4.2004
Amadeus	680	12.10.2004
CCM	— [1]	—
Additional sales occurring after the decision of July 2003 (EUR thousand)	12 600	
the *Asco*	7 100	24.5.2005
Sud-Cargos	4 300	15.9.2005
Sales of flats from SNCM's housing stock (formerly occupied by SNCM staff)	1 200	9.2003 to 2006
TOTAL (EUR thousand)	42 385	

[1] SNCM did not find a buyer for its shareholding in CCM.

2.3.2.2. *Measures subsequent to the 2002 recapitalisation*

(76) The process of selecting private partners took place from 26 January 2005 to the end of September 2005.

(77) On 26 January and 17 February 2005, the French Government announced that it was going to begin searching for a private partner to take a stake in SNCM's capital, with a view to strengthening the latter's financial structure and supporting it in the changes necessary for its growth.

(78) *Agence des Participations de l'État* ('APE') appointed an independent party to supervise the search process and instructed an advisory bank (HSBC) to contact potential buyers.

(79) In that context, 72 industrial and financial investors were contacted for the purpose of specifying the financial conditions of a proposal to support the company's industrial plan and preserve jobs and the efficient performance of the public service. Twenty-three of them submitted expressions of interest, 15 confidentiality agreements were signed and 15 information notes were sent. Six undertakings submitted offers in the first round on 5 April 2005 and three offers (Connex — now Veolia Transdev (VT), Caravelle and BCP) were received in the second round on 17 June 2005 as well as an expression of interest for a minority stake (Comanav). Three offers were received in the third round on 28 July 2005.

(80) On 14 September 2005, each undertaking was invited to submit its firm and final proposal before 15 September 2005. On that date, since Connex had withdrawn, the State received two firm proposals of capital contributions and the purchase of the entire capital from the BCP and Caravelle groups.

(81) On 27 September 2005, France published a press release stating that, on the basis of an in-depth examination of the two proposals, the one submitted by the BCP group was chosen because, while being the most acceptable from a financial point of view, it was the best able to defend the interests of the company, the public service and jobs. BCP's initial offer was for a negative price of EUR 113 million and was the lowest estimate of the negative price.

(82) That initial offer from the potential buyers provided expressly for the possibility of adjusting their initial proposal once audits had been carried out. The French authorities stated that the initial negative price was revised upwards following the audits presented on 16 December 2005 owing to objective elements influencing the regulatory and economic context in which SNCM operates which occurred after the proposal was submitted on 15 September 2005. The negative price was thus revised to EUR 200 million.

(83) The negotiations between the French authorities and the future buyers, i.e. BCP in association with the Connex group, now Veolia Transdev, a subsidiary of Veolia, made it possible to lower that figure to EUR 142,5 million, increased by the payment of a part of the expenditure relating to the mutual societies of SNCM's retired employees (EUR 15,5 million).

(84) Following this open, transparent and non-discriminatory selection procedure, an agreement was finally reached on 13 October 2005 between the State, BCP and VT in a very difficult company and financial context. VT is SNCM's industrial operator (28 % stake) whereas BCP is the main shareholder with a stake of 38 %. The State committed itself, in particular towards the employees, to retaining a 25 % ([67]) stake in the company. BCP and VT drew up a business plan for SNCM which was notified to the European Commission on 7 April 2006.

(a) *The content of the memorandum of understanding*

(85) The memorandum of understanding, under which 75 % of SNCM's capital is sold to private buyers, was signed on 16 May 2006 by the parties (BCP, VT and CGMF).

(86) Section II of the memorandum of understanding provides that CGMF undertakes to approve, subscribe to and fully pay up an increase in SNCM's capital for a total of EUR 142,5 million.

(87) In addition to the increase in capital, CGMF undertakes to make EUR 38,5 million available to SNCM, in the form of a current account advance. That advance, which will be paid by SNCM to a trustee (the bank CIC), is intended to finance the 'ex gratia' part of the cost, which is in addition to amounts payable under legislation and agreements in the event of a plan to reduce staff numbers implemented by the buyers. The payment of compensation over and above payments received in accordance with legislation and agreements is done on an individual and named basis corresponding to staff who have left the undertaking and whose employment contract was terminated.

([67]) SNCM's internal process relating to the implementation of the recapitalisation and privatisation operations began formally on 12 April 2006 and was completed on 31 May 2006. It must be stressed that on 27 November 2007, the employee share ownership scheme had not been implemented.

(88) That mechanism is laid down in Article II.2 of the sale agreement of 16 May 2006, which provides that that account is intended 'to finance the proportion of the cost of possible voluntary departures or termination of employment contracts … which is in addition to sums of all kinds which must be paid by the employer under legislation and agreements.' The task of the trustee is 'to release funds as soon as the employees in question who have not been redeployed internally within the SNCM group actually leave the company and to release the balance of the amount on deposit at the end of the trusteeship'. The operation of this account is the subject of a trusteeship agreement annexed to the memorandum of understanding. In order to enable the escrow account to be activated, SNCM must provide the Chairman of CGMF with a list of the names of staff whose employment contract has been terminated and for whom activation of the escrow account is requested together with a monthly statement of the net expenditure, which is the detailed breakdown of all the compensation and expenses paid to the staff in question. At the same time, SNCM informs the trustee of the 'additional actual monthly cost' per employee, which is the amount over and above the sums of all kinds which must be paid by the employer under legislation and agreements. The total amount of additional *ex gratia* measures by the State may not, under any circumstances, exceed EUR 38,5 million and in the event that these additional social measures do not reach this threshold in the 3 years following the sale, the balance will be repaid to the State.

(89) Section III of the memorandum of understanding provides that CGMF, following these transactions, is to sell to the private buyers its shares representing 75 % of the shares comprising the share capital of the undertaking and the escrow account intended to finance the part of the social plan over and above any obligations under agreements or legislation.

(90) Section III of the memorandum of understanding also provides for an additional capital increase of EUR 8,75 million by BCP/VT, made available to SNCM on the basis of its cash requirements. Paragraph III.2.7 of the memorandum of understanding provides that the value of CGMF's shares is to be equal, at all times, to their original nominal value increased by […] (*) % of their paid-up nominal value, multiplied by D/365, where D is the number of days since the date of sale, subject to deduction of any amounts paid (dividends, for example). These arrangements do not apply in the event of receivership or liquidation of the company by the court.

(91) The memorandum of understanding (Section III.5) includes a cancellation clause granting the right to sell SNCM, which may be exercised concurrently by the buyers should one of the following events occur because these scenarios would call into question the credibility of their business plan and the company's return to viability:

— the failure to award the public service delegation for services by sea to Corsica for the period commencing 1 January 2007 or its award on substantially worse terms,

— any negative decision by the European Commission or a judgment by the General Court or by the Court of Justice, such as a rejection of the transaction or the imposition of conditions having a substantial impact on the value of the company, within a deadline of 6 years from the date of acquisition by the partners of rights in respect of the company.

(92) Section VII of the memorandum of understanding provides that CGMF is to pay a part of SNCM's social security liabilities in terms of the costs of the mutual societies of its retired workers for an amount estimated at EUR 15,5 million from the date of the transfer of ownership of the undertaking.

(93) The detailed rules of governance of the undertaking are set out in Section IV of the memorandum of understanding. There will be a change in the way that SNCM is managed; it will be converted into a limited liability company with a board of directors and a supervisory board. The supervisory board will be made up of 10, then 14 members. It will be chaired provisionally by a representative of the State. If the public service delegation is entrusted to SNCM, the Chairman of the supervisory board will be replaced by a representative of BCP. The board of directors has the task of carrying out the operational management of SNCM.

(94) On 26 May 2006, the French Government confirmed the sale of SNCM as well as the measures referred to above.

(b) The measures

(95) In the light of the foregoing, the memorandum of understanding contains three types of state measures justifying an examination under the Union's State aid rules:

— the sale of 75 % of SNCM at a negative price of EUR 158 million (capital contribution of EUR 142,5 million and payment of the costs of the mutual societies for an amount of EUR 15,5 million),

— the current account advance by CGMF for the amount of EUR 38,5 million for staff laid off by SNCM,

— the capital increase of EUR 8,75 million to which CGMF subscribed jointly and concurrently with the capital contribution of EUR 26,25 million by VT and BCP,

— the sale cancellation clause ([68]).

2.4. SUBJECT MATTER OF THIS DECISION

(96) This final decision relates to the measures implemented by France in favour of SNCM since 18 February 2002, namely:

— the balance of the capital contribution by CGMF to SNCM for the amount of EUR 76 million in 2002, i.e. EUR 15,81 million,

— the negative price of EUR 158 million obtained by CGMF on the sale of SNCM,

— the current account advance by CGMF for the amount of EUR 38,5 million for staff laid off by SNCM,

— the capital increase of EUR 8,75 million subscribed by CGMF;

(97) This decision does not concern the compensation for SNCM's public service obligations for the period 1991-2001, which was confirmed as being compatible with the internal market by the judgment of the General Court of 11 September 2012 ([69]).

(98) Nor does this decision concern the examination of the financial compensation paid or to be paid to SNCM for public service obligations for the period 2007-2013, which is the subject of a separate procedure ([70]).

(99) Furthermore, it should be noted that the judgment of 11 November 2012 has been the subject of two appeals before the Court of Justice, lodged by SNCM and France respectively in Joined Cases C-533/12 P and C-536/12 P. This decision has been taken to comply with the judgment under appeal because the judgment annulled the decision of 8 July 2008. Under these conditions, if the examination of the appeals were to result in the partial or full annulment of the judgment of 11 November 2012 and reinstate certain parts of the decision of 8 July 2008, this decision would become null and void because of the appeal judgments, inasmuch as this decision concerns reinstated measures.

2.5. GROUNDS LEADING TO THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE IN 2002 AND ITS EXTENSION IN 2006

2.5.1. **Initiation of the 2002 formal investigation procedure**

(100) The Commission, in its decision to initiate the procedure of 19 August 2002, while acknowledging that SNCM was an undertaking in difficulty, expressed doubts as to the compatibility of the notified measure with the criteria laid down in point 3.2.2 of the 1999 guidelines in force at the time.

(101) The Commission expressed certain doubts regarding the restructuring plan, having regard to the absence of an analysis of the causes of the undertaking's losses. In particular, the Commission raised questions concerning the links between the losses and the public service obligations, the impact of SNCM's policy of buying vessels on its income statements and the measures planned to increase the undertaking's productivity.

([68]) That clause, which itself is of substantial value, will be analysed as part of the examination of the capital increase.
([69]) Case T 565/08 *Corsica Ferries France SAS* v *European Commission*, not yet reported.
([70]) Decision C(2013) 1926 final, 2 May 2013.

(102) Moreover, the Commission noted certain lacunae in the restructuring plan, in particular the absence of specific measures to reduce the amount of intermediate consumption and the absence of a reference to SNCM's future pricing policy.

(103) The Commission also raised questions regarding the relevance of the calculation method adopted by the French authorities to determine the amount of the recapitalisation and regarding some of the assumptions underlying the financial simulations.

2.5.2. **Extension of the 2006 formal investigation procedure**

(104) By its decision of 13 September 2006, the Commission decided to extend the 2002 formal investigation procedure to the measures planned in connection with the sale of SNCM to the private sector.

(105) In the event that this amount were categorised as State aid compatible with Article 86(2) of the EC Treaty, the Commission took the view that it had to be assessed in the light of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter: 'the 2004 guidelines') ([71]). In so far as the amount of restructuring aid is noticeably lower than that notified in 2002 and approved in 2003, the Commission expressed doubts as to whether it was appropriate to maintain all of the compensatory measures imposed on SNCM by the 2003 decision.

(106) The Commission also expressed doubts about whether the conditions imposed by the 2003 decision had been complied with, namely the principle of price leadership and the frequency of services to Corsica.

(107) As regards the negative price at which SNCM was sold, the Commission had doubts about whether the recapitalisation by the State prior to the sale of SNCM complied with the principle of the private investor in a market economy. In particular, the Commission expressed doubts as to the validity of the calculation of the liquidation costs which the State as shareholder would be required to pay in the event of SNCM being liquidated.

(108) The Commission questioned whether the financial measures could be justified under the 2004 guidelines.

(109) It also cast doubts on the second recapitalisation of EUR 8,75 million in relation to observance of the principles of concomitance of the private and public investment and the similarity of the subscription conditions within the meaning of the case-law.

(110) Finally, the Commission expressed doubts as to whether the additional social measures of EUR 38,5 million in aid to individuals could constitute an indirect advantage for the undertaking. It also highlighted the risk of conflict with the supplementary redundancy payments as part of the risks borne by a prudent investor.

III. **OBSERVATIONS BY THE FRENCH AUTHORITIES ON THE OPENING DECISION**

3.1. ON THE 2002 RECAPITALISATION

(111) The restructuring plan notified in 2002 consisted of a capital contribution of EUR 76 million, of which EUR 53,48 million was public service compensation. Allowing for the sale of shares carried out by SNCM ([72]), the amount of aid actually paid becomes EUR 69 292 400. The French authorities take the view that, if the amount of EUR 53,48 million is compatible aid, then the amount of aid to be regarded as restructuring aid under the notification in 2002 is EUR 15,81 million.

3.2. ON THE MEASURES SUBSEQUENT TO THE 2002 RECAPITALISATION

(112) France recalls, first, that the seriousness of the industrial action of 2004 to 2005 and the deterioration in the economic and financial situation of SNCM led the State as shareholder to launch a procedure for selecting private investors in January 2005 and to implement urgent measures (in particular the sale of the *Asco* and the shareholding in Sud Cargos ([73])).

([71]) OJ C 244, 1.10.2004, p. 2.
([72]) See Table 2.
([73]) In 2002 the French authorities had championed the strategic nature of SNCM's stake in Sud-Cargos. The development of goods traffic (container growth to the detriment of roll-on roll-off), the purchase of Delmas, another shareholder in Sud-Cargos, by CMA CGM and the economic difficulties of Sud-Cargos are equally factors which explain that the stake was no longer considered strategic and could be sold by SNCM in 2005.

3.2.1. **On the negative sale price of SNCM**

(113) Under the relevant Community case-law at the time, the French authorities call upon the Commission to take the view that the negative sale price of SNCM of EUR 158 million does not contain any measure which may be classified as aid within the meaning of Article 87(1) of the EC Treaty because the French State acted like a private investor in a market economy.

(114) First of all, France observes that the final price of EUR 158 million, which is lower than the negative price that the buyers initially asked for after their audit of SNCM, is the result of a negotiation of transfer of control conducted under an open, transparent and non-discriminatory competitive tendering procedure and, for that reason, does in fact constitute a market price.

(115) France takes the view that, because the search for a private partner for SNCM was conducted under an open, transparent and non-discriminatory competitive tendering procedure at the end of which the best bid was chosen, the sale price is a market price.

(116) According to the French authorities, the sale at the negative price of EUR 158 million took place under the most favourable conditions for the State in accordance with Community case-law at the time and the Commission's decision-making practice and therefore contains no aid element. France takes the view that that negative price is lower than the liquidation cost which the State would have had to bear in the event of the liquidation of the undertaking.

(117) That is, in France's view, the only conclusion which can be reached irrespective of whether the approach followed is that stemming from the case-law of the Court of Justice of the European Communities (hereinafter: 'the *Gröditzer* case-law' ([74])) or that based on the analysis of the actual costs of liquidating SNCM (the *ABX* decision ([75])).

(118) As regards the first method, based on the *Gröditzer* case-law, France argues that that judgment confirmed the Commission's assessment in its decision of 8 July 1999, to the effect that 'the cost of liquidation comprises only the liquidation value of the assets' ([76]).

(119) In that respect, the reports by CGMF ([77]) and Oddo-Hastings ([78]) estimate the liquidation value of the assets at a minimum of EUR 190,3 million on 30 September 2005 ([79]).

(120) Accordingly, given that the State as the owner and shareholder of a company is liable for its debts only up to the liquidation value of its assets (*Hytasa* case-law ([80])), France asserts that the liquidation value of the company's assets estimated to be at least EUR 190,3 million is considerably higher than the negative sale price of EUR 158 million.

(121) On the second method, France points out that it follows from the Commission decision on the State aid implemented by Belgium for ABX Logistics, in which the Commission examined a negative sale price having, as in this case, the character of a market price by comparing it to the costs which the State as shareholder would actually bear in the event of a voluntary liquidation or compulsory liquidation as assessed by an independent third party. According to France, the Commission recognises in particular in that decision the validity of a certain number of costs which can result from an action by creditors to make good a shortfall in assets (*action en comblement de passif*) or from the liquidation for other divisions of the group liquidating its subsidiary.

([74]) Case C-334/99 *Federal Republic of Germany* v *Commission* [2003] ECR I-1139.
([75]) Commission Decision of 7 December 2005 on the State aid implemented by Belgium for ABX Logistics (No C 53/2003 (ex NN 62/2003)) (OJ L 383, 28.12.2006, p. 21).
([76]) Commission Decision of 8 July 1999 on State aid granted by Germany to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH (OJ L 292, 13.11.1999, p. 27).
([77]) The report was sent to the Commission in March 2006 and was prepared by CGMF with the assistance of Ernst & Young, SNCM's statutory auditor (hereinafter: 'the CGMF report').
([78]) The report drawn up on 29 March 2006 by Oddo Corporate Finance and the law firm Paul Hastings ('Oddo-Hastings report') was sent to the Commission on 7 April 2006. It consists of a critical review, requested by the *Agence des Participations de l'État* (APE), of the CGMF reports and an approach based on the liquidation costs deemed acceptable at Community level.
([79]) Having regard to tangible fixed assets (EUR 161,9 million) and investments (EUR 32,7 million), accounts receivable (EUR 0,8 million), other debtors (EUR 9,4 million) and a cash deficit of EUR 14,5 million. France stated that a more realistic estimate, in the light of subsequent financial information, brings that value to EUR 330 million.
([80]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

(122) On the basis of the CGMF and Oddo-Hastings reports cited above, the French authorities submit that the actual costs which the French Republic would have to bear as shareholder amount to between EUR 312,1 million and EUR 361 million on 30 September 2005, broken down as follows:

— EUR **[70-80]** (*) million under the social plan under collective agreement, which covers all the costs associated with the termination of the employment contract and for which the undertaking is contractually liable,

— EUR **[30-40]** (*) million under the social plan not under collective agreement, which covers all the costs associated with the flanking measures to SNCM's statutory and regulatory redundancy obligations and the indirect costs of the social plan under collective agreement,

— Between EUR **[200-210]** (*) million and EUR **[250-260]** (*) million as payment of supplementary redundancy payments for which the State would be held liable by the court, in addition to the compensation paid under the social plan under collective agreement and the social plan not under collective agreement, following the *Aspocomp Group Oyj* judgment of 22 March 2005 of the Rouen Court of Appeal.

(123) That method takes account, in particular, of the risk that the French State would be required to make good a shortfall in assets if the court were to consider it to be the de facto manager of SNCM. The French authorities believe that the risk of an action to make good a shortfall in assets cannot be discounted, particularly in the light of a precedent set by the French Court of Cassation ([81]). Accordingly, in several letters to the Commission, the French authorities submitted that a situation in which a national court orders the State to make good a shortfall in the assets of the undertaking which it manages is a scenario which is more than plausible and that it had to be taken into account in calculating the actual cost of a possible liquidation of SNCM.

(124) On 30 September 2005, the residual value of SNCM's assets (EUR 190,3 million) was, after payment of preferential debts, EUR 36,5 million. Other cost elements taken into account under the action to make good a shortfall in assets against the State include, inter alia, the costs of termination of the principal operating contracts, the costs related to the cancellation of the lease purchasing conditions of vessels and the payment of unsecured debts, which would result in a shortfall in assets of EUR 134,4 million. The French authorities consider that the State would have been ordered to pay between 85 % and 100 % of that amount.

(125) Furthermore, the French authorities take the view that, because of SNCM's dependence on the State, and in the light of another French case ([82]), the liquidation of the undertaking might have led the court to order the payment of damages to employees. According to that case-law, the French authorities believe that it would be very likely that a court would set the amount of additional compensation on the basis of the compensation which would be paid under a social plan submitted prior to the liquidation.

(126) Under that approach, the analysis of actual costs which the State as shareholder would have had to pay shows that the cost to the State of the sale of SNCM at a negative price of EUR 158 million is lower than the actual cost which it would have had to bear in the event of the compulsory liquidation of the undertaking.

(127) In conclusion, the French authorities consider that this amount cannot be classified as State aid.

3.2.2. **On the joint capital contribution by the shareholders**

(128) France takes the view that, through that shareholding, it acted like a prudent investor because, first, it intervened concurrently as a minority shareholder alongside BCP and VT and, second, that shareholding enjoys a fixed capital return of […] (*) % per year, which protects the State from the risks associated with the implementation of the business plan. France argues that that rate of return is very satisfactory for a private investor ([83]). It points out, however, that no payment would be due in the event that SNCM is put into receivership or compulsory liquidation or that the buyers exercise the cancellation clause.

([81]) Judgment No 98-15129 of the Court of Cassation of 6 February 2001. That case concerns a public body, the BRGM (*Bureau de Recherches Géologiques et Minières)* ordered to pay the entirety of the shortfall in assets of its subsidiary, les Mines de Salsignes, on the ground that the de facto manager, the BRGM, in spite of being aware of the deterioration in activities and the warning signs given, acted wrongfully in allowing activities to continue.

([82]) Case *Aspocomp Group Oyj*; judgment of 22 March 2005 of the Rouen Court of Appeal.

([83]) By way of comparison, the rates of return on French government bonds (*Obligation Assimilable du Trésor — OAT*) with maturities of 30 years, 10 years, 5 years and 2 years were 3,95 %, 3,82 %, 3,75 % and 3,72 % respectively on 31 October 2006.

3.2.3. **On the additional social measures (aid to individuals)**

(129) France takes the view, relying on the Commission's practice in previous decisions, in particular the *SFP* (*Société française de production*) case [84], that this financing constitutes aid to individuals which does not benefit the undertaking. Accordingly, the implementation from public funds of additional social measures for persons laid off, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social policy of the Member States and is not State aid.

3.2.4. **On the lifting of the restrictions imposed by the annulled decision of 2003**

(130) The French authorities point out, on the one hand, that the conditions imposed by the 2003 decision were all implemented and complied with in the period from 2003 to 2006. On the other hand, the French authorities consider that those measures are no longer necessary to prevent a distortion of competition and that maintaining them would be contrary to the principle of proportionality, having regard to the limit on the amount of restructuring aid, henceforth reduced to EUR 15,81 million. In particular, the French authorities take the view that it is necessary to lift the conditions which might still apply, namely those relating to the prohibition on modernising SNCM's fleet, the observance of the principle of price leadership in tariff matters and the maintenance of frequency of services.

3.3. CONCLUSION

(131) If the Commission were, however, to classify all or part of the new measures as State aid, France would draw the Commission's attention to the fact that the new measures, by ensuring that SNCM becomes viable again, allow competition to be maintained in the relevant markets, in particular the market for services to Corsica. According to France, that aspect is one of the principles of the guidelines in the rescue of an undertaking in difficulty as noted, in the present case, by the Commission (recital 283 of its annulled decision) and by the General Court in its judgment of 15 June 2005 in Case T-349/03 (paragraph 117). In particular, the latter pointed out that the Commission could consider, in the exercise of its wide discretion, that the presence of an undertaking was necessary in order to prevent the emergence of a strengthened oligopolistic structure in the relevant markets.

(132) As regards the determination of any compensatory measures to be imposed on SNCM, France suggests that the Commission take into account the structure of the market. Accordingly, a reduction in SNCM's capacity would be such as to strengthen the position of CFF in the market for services to Corsica, which would be dominant from then on [85].

(133) According to the French authorities, the restructuring plan, as updated, complies with the compatibility criteria set out by the Commission in its 1999 and 2004 guidelines. The French authorities maintain that all of the measures laid down in the context of SNCM's privatisation should also serve to restore SNCM's long-term viability from the end of 2009 and are restricted to the minimum necessary for that return to viability.

IV. **COMMENTS BY INTERESTED PARTIES**

4.1. ON THE DECISION TO INITIATE THE 2002 FORMAL INVESTIGATION PROCEDURE

4.1.1. **Comments by Corsica Ferries (CFF)**

(134) Disputing, first, that SNCM is an undertaking in difficulty within the meaning of the guidelines [86], CFF raises the question whether SNCM can become profitable on the non-subsidised routes. Moreover, CFF notes that, contrary to what is stated in the restructuring plan [87], services are still operated to Livorno.

(135) On the subject of cost reduction, CFF regrets that it does not have access to particular parts of the restructuring plan at which its representatives have levelled criticism [88].

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(84) Commission Decision of 17 July 2002, *Société Française de Production*, C(2002) 2593 final (OJ C 71, 25.3.2003, p. 3).

(85) According to an independent market study submitted by France in that regard, CFF […] currently has almost 60 % of the passenger market whereas SNCM went from 82 % market share in 2000 to 33 % in 2005 and saw very strong growth in the freight market, where SNCM is still the main carrier owing to its shareholding in CMN.

(86) CFF points out that the public service delegation contract allocates a public grant to the company of some EUR 64,3 million on average a year, making a total of EUR 321,5 million over 5 years. It argues that Article 5 of the public service delegation contract guarantees SNCM cash flow of EUR 72,8 million. Moreover, Corsica Ferries stresses that of the EUR 40,6 million losses recorded by SNCM in 2001, EUR 15 million relate to depreciation on the high-speed vessel the *Liamone*.

(87) The decision to initiate the procedure indicated that one of the measures laid down in the restructuring plan was 'the closure of the Bastia-Livorno line with dedicated equipment'.

(88) CFF's criticism relates to the following points: no actual reduction in staff, no sale of SNCM's shareholdings for the restructuring effort, no account taken of gains on vessels.

(136) CFF is of the view that the calculation by the French authorities resulting in the amount of EUR 76 million is purely notional ([89]) while the own capital-to-debt ratio of 79 % decided upon by the French authorities seems exaggerated ([90]). With regard to SNCM's shareholdings, CFF notes that some of the subsidiaries are of no relevance to the shipping company's activities ([91]).

(137) CFF concludes that the planned aid circumvents the Cabotage Regulation and renders the invitation to tender for Marseille to Corsica services meaningless. CFF emphasises that the planned aid should not result in facilitating a more aggressive commercial offer on the part of SNCM. It suggests that restructuring aid should not be granted until 2007 and only if SNCM loses the next tender in 2006, which would be the only scenario that would genuinely put the public shipping company in difficulty.

4.1.2. **Comments by STIM**

(138) STIM, the main shareholder in CMN, argues that SNCM's shares in CMN should be analysed as purely financial assets. According to STIM, CMN and SNCM are independent and in competition with each other on routes other than those from Marseille, even though both are co-contractors under the public service delegation contract.

(139) The letter states that STIM would undertake 'to buy back all or part, and preferably all, of SNCM's shares in CMN', whose value it estimates at between EUR 15 million and EUR 17 million, if the Commission were to take the view, under the conditions it might impose in its final decision, that 'such a sale is necessary to ensure that the restructuring plan is properly balanced'.

4.1.3. **Comments by the representatives of the regional and local authorities**

(140) The mayor of the city of Marseille, the president of the general council of Bouches-du-Rhône and the president of the regional council of Provence-Alpes-Côte d'Azur highlighted the economic importance of SNCM's role in the regional economy.

(141) The president of the regional council of Provence-Alpes-Côte d'Azur added that the conditions for SNCM's restructuring plan to guarantee the undertaking's viability appear to be satisfied.

(142) The president of the executive council of the Assembly of Corsica submitted the deliberations of that assembly of 18 December 2002 during which it issued 'a favourable opinion' regarding SNCM's planned recapitalisation.

4.1.4. **Comments by the Corsica Transport Office**

(143) The Corsica Transport Office notes that the disappearance of SNCM 'would immediately lead to a major reduction in services' as it is currently the only company capable of meeting the requirements of the contract with regard to passenger transport. It notes, in addition, the importance of SNCM to the Corsican economy.

4.2. ON THE 2006 DECISION TO EXTEND THE PROCEDURE

4.2.1. **Comments by Corsica Ferries France (CFF)**

(144) CFF notes the scale of the amounts in question, their disproportionate nature in relation to SNCM's turnover and the fact that they were paid to SNCM before the Commission took a position on aid classification pursuant to Article 87(1) of the EC Treaty.

(145) CFF draws the Commission's attention to the fact that the French State's support for SNCM is of strategic importance to the development of CFF. These unauthorised measures enable SNCM to have a very aggressive tariff policy on the routes on which CFF has been present for 10 years and on which, for the first time since it was set up, it is losing market share.

([89]) It argues that EUR 76 million corresponds to the FRF 500 million which the company would lose from its territorial continuity grant for the new period 2002 to 2006.
([90]) Compared with the ratios which it itself found in a sample group of 10 shipping companies. Those ratios vary from 23,69 % (for Moby Lines), through 49,7 % for CMN, to 55,09 % (for Grimaldi).
([91]) CFF cites the 50 % stake in the shipping company Sud-Cargos, the 13 % stake in Amadeus, an undertaking specialised in air transport reservation systems, the stake in CMN and CGTH's property assets.

(146) In respect of the process of competitive tendering for the sale of the company, CFF takes the view that it was not fully transparent in so far as the undertaking selected, namely BCP, no longer has operational control of SNCM, having handed over to the VT group. Furthermore, since the financial conditions had changed to become much more favourable to the buyers, CFF raises the question of the principle of the equal treatment of investors which ought to have prevailed throughout the transaction.

(147) As regards the negative sale price of EUR 158 million, CFF is uncertain whether the criterion of the prudent investor in a market economy applies to the present case. First, CFF wonders whether the view can be taken that the transaction at issue was carried out by the State at the same time as a significant and concurrent action by private operators involved in comparable circumstances, while the State recapitalised the company before the joint recapitalisation by the shareholders and the new restructuring plan. Second, CFF considers that, in the face of SNCM's serious financial circumstances, a prudent investor would have acted sooner in order to prevent his investment depreciating ([92]).

(148) CFF takes the view that the reference to the *ABX Logistics* case is irrelevant. Besides the fact that the circumstances of that case cannot be applied to the present case, CFF notes a significant contribution by the aid beneficiary in that case, which clearly did not happen with SNCM. Furthermore, according to CFF, the Commission decision of 2006 did not take account of the costs relating to the risk of legal proceedings in a liquidation of the undertaking concerned. In that respect, CFF submits that the national case-law relied on by France to justify the costs relating to SNCM's liquidation does not apply to the present case. According to CFF, the Court of Cassation in the *Mines et produits chimiques de Salsignes* case does not refer at all to the direct liability of the State as shareholder in the event of the liquidation of an undertaking in which it is the shareholder, but rather the possibility of bringing an action for payment of payroll and social security debts against an industrial and commercial public company and the impossibility for the managers to escape their obligations by relying on action by the public authorities.

(149) As regards the inapplicability to the present case of the *Aspocomp* case-law established by the Rouen Court of Appeal, CFF submits that the subject-matter of that case, relating to an order that a parent company pay to the employees of a subsidiary social benefits for 'failure to comply with an agreement' ratified by the former, is very different from the facts of the SNCM case. There is therefore no definite risk that CGMF or the State will be ordered to make redundancy payments in the event of compulsory liquidation. Moreover, CFF doubts the estimated figure for the other social costs because they seem to differ, depending on the experts asked to determine them.

(150) CFF takes the view that the application of the Community case-law in *Gröditzer* and *Hytasa* to the present case necessarily leads to the conclusion that the State did not act like a private investor in so far as, in accordance with the above case-law, the capital contribution by the State was linked to the sale of 75 % of its stake in SNCM, reducing in proportion the prospects of profit in return.

(151) Finally, CFF considers that the comparison between the liquidation costs and the recapitalisation costs should take into account the value of the assets, which is transferred to the buyer in both cases. CFF submits that the value of the assets sold to the buyers varies between EUR 640 million and EUR 755 million ([93]), compared with the market value of the fleet used by SNCM, which CFF valued at between EUR 644 million and EUR 664 million in August 2006.

(152) As regards the classification of the measures subsequent to the 2002 recapitalisation as restructuring aid, CFF is of the opinion that, although SNCM fulfils the conditions of an undertaking in difficulty under the 2004 guidelines in the period preceding the first recapitalisation of EUR 142,5 million, that classification becomes very questionable for the period preceding the second capital increase of EUR 8,75 million because the undertaking's capital had been reconstituted.

([92]) In that regard, CFF notes that, in the second half of 2005, an emergency procedure was initiated before the Marseille Commercial Court and that voluntary liquidation could have been envisaged as early as autumn 2005 in respect of the losses estimated at EUR 30 million in 2005.

([93]) In that regard, CFF takes the view that the actual value of the vessels as stated by SNCM at the time it made its bid under the public service delegation ought to have been taken into account in the valuation of SNCM's assets made in the Oddo-Hastings and CGMF reports.

(153) As regards the viability of the undertaking, CFF emphasises that the sale of SNCM is only partial and is not irrevocable, in the light of the cancellation clauses negotiated with the buyers. Those factors are important elements of uncertainty as regards the will and the ability of the buyers to turn SNCM around and therefore secure the prospects of the undertaking's long-term viability. Furthermore, CFF states that, contrary to the requirements of the 2004 guidelines, the French authorities did not contemplate discontinuation of the activities which remained structurally loss-making even after the restructuring ([94]). In addition, CFF expresses its scepticism regarding the plan for reducing costs, despite SNCM's fleet becoming larger ([95]) and the planned reduction in staff, in particular in the light of the failure of the 2002 social plan.

(154) CFF doubts whether the new aid is limited to the minimum on account, first, of a lack of clarity as to what the social costs cover and, second, the content of the minutes of SNCM's meeting of 28 April 2006, according to which a part of that aid would be used to cover the operating losses of the company in 2006 and 2007. CFF also considers that the buyers of SNCM do not contribute substantially to the restructuring of the undertaking.

(155) In order to prevent undue distortions of competition, CFF considers it necessary to renew and specify the compensatory measures imposed on SNCM in 2003 and to add new measures relating to the reduction of SNCM's presence in the market ([96]). CFF considers, moreover, that a part of the measures imposed on SNCM by the 2003 decision were not complied with. SNCM acquired new vessels in breach of Article 2 of the Commission's 2003 decision. In addition, SNCM did not sell its shareholding in CCM, in breach of Article 3 of the Commission decision. Finally, SNCM has had an aggressive tariff policy since 2003, with prices lower than those applied by CFF in breach of Article 4 of the decision (tickets up to 30 % cheaper for identical or comparable services).

(156) Regarding the nature of the second recapitalisation of EUR 8,75 million, CFF takes the view that, in addition to the concurrence of public and private investment, the private action must be significant and carried out under comparable conditions in order that the State action is validated. In the present case, those two conditions are not satisfied. First, the buyers' shareholding, which is closely linked to the first capital increase of EUR 142,5 million, is not significant. Second, the buyers' action was not carried out under conditions comparable with those of the state action, in particular by virtue of the cancellation clauses and the expected profitability of CGMF's minority shareholding.

(157) As regards the social measures of EUR 38,5 million, CFF disputes the classification of that amount as aid to individuals. Although it true that this amount directly benefits SNCM's employees, CFF submits that the measure could give rise to indirect positive effects for SNCM, in particular in terms of the calming of industrial relations.

4.2.2. **Comments by STIM**

4.2.2.1. *On the measures subsequent to the 2002 recapitalisation*

(158) As regards the negative sale price of EUR 158 million, STIM takes the view that this price is not a market price resulting from an open and non-discriminatory competitive tendering procedure because the recapitalisation took place under different conditions from those which must normally guide a private investor. STIM considers that the revalued net book assets would allow, in the worst-case scenario, a liquidation without costs for the State, or even yield a gain on liquidation, that the sale price is derisory compared with the value of the undertaking (estimated at EUR 350 million by STIM) and that the aid is disproportionate to the undertaking's needs.

(159) STIM also draws the Commission's attention to the exorbitant nature of the cancellation clause in respect of the sale to the private sector.

(160) Finally, STIM disputes the justification for the negative sale price based on the assumption that liquidation would take place under socially difficult circumstances, which seems unrealistic.

([94]) According to CFF, France emphasises the essential nature of all of the services from Nice, the maintenance of the fleet at the current level and the alleged strategic nature of SNCM's shareholding in the CMN group.

([95]) On 1 January 2007, with the arrival of the *Superfast X*.

([96]) CFF proposes to restrict capacity available on each of the competitive markets (Nice, Tunisia and Algeria) to 2005 levels, to refrain from opening any new routes and to reconfigure the Marseille-Corsica route to cargo and passenger vessels in order to reduce costs.

(161) As regards the second recapitalisation of EUR 8,75 million, STIM considers that that capital contribution does not comply with the principle of the private investor in a market economy, having regard to the inadequacy of the guarantees on return on investment. STIM challenges the argument based on the concomitance of private and public investment in order to deny that the contribution is State aid. Such concomitance, if established, is only a pointer and cannot be, by itself, a classification criterion ([97]). STIM states, finally, that that contribution is a guarantee given to the buyers by the French Government that SNCM has indeed been awarded the public service delegation to operate services to Corsica.

(162) As regards the EUR 38,5 million of aid to individuals, STIM takes the view that this amount is in fact intended to provide SNCM with the resources to comply with certain essential aspects of the recovery plan submitted to the Commission which have not been implemented, in particular the reduction in staff.

4.2.2.2. *On compatibility with the 2004 guidelines*

(163) STIM takes the view that the aid received by SNCM is not limited to the minimum. The contribution by SNCM and the buyers to the restructuring plan is insufficient, given the conditions imposed in the 2004 guidelines, and it is not demonstrated that SNCM's situation was so exceptional that it justified a lower own contribution. Furthermore, STIM notes the disproportionate nature of the aid granted in 2006 in so far as it enabled SNCM to set up reserves to cover future losses. Finally, the fact that SNCM did not plan to dispose of the assets which were not essential to the survival of the undertaking is contrary to the requirements laid down by the 2004 guidelines.

(164) STIM considers that the amounts were paid in breach of the 'one time, last time' principle established by the 2004 guidelines. The deterioration in the undertaking's financial situation and the industrial disputes cannot be analysed as exceptional and unforeseeable circumstances for which the recipient company is not responsible.

(165) Consequently, STIM demands additional compensation of half of the aid provided, i.e. EUR 98,25 million, through the sale of an additional vessel and of SNCM's direct and indirect shareholdings in CMN. In that respect, STIM states that those shareholdings are not strategic within the meaning of the 2004 guidelines on restructuring aid as they are not 'essential to the firm's survival', nor are they inalienable assets.

(166) STIM also submits that the claimed synergies between SNCM and CMN do not exist because SNCM has no real role in the management and development of CMN. STIM stresses, finally, that the shareholders' agreement linking the two undertakings has not existed since 15 March 2006, when CMN gave notice that it was no longer bound by it, as held by the Paris Court of Appeal.

4.2.3. **Comments by SNCM**

(167) SNCM sent the Commission a file summarising its economic and competitive position, together with legal advice assessing the risk that, in the event of liquidation proceedings, the state intervention would be characterised by the courts as de facto management of the company for the period preceding privatisation.

(168) The law firm Baker & McKenzie, consulted by SNCM, came to the conclusion that, on the basis of the company's statutes, supplemented by correspondence, speeches and minutes of the boards, the State […] (*) decisions ([98]) […](*) bodies ([99]), […](*) company boards ([100]). The report also notes that […] (*) SNCM ([101]). Finally, the same report refers to the fact that […](*) SNCM.

(169) On that basis, SNCM's expert concludes that it is very likely that the Marseille Commercial Court would have characterised the French State as de facto manager.

(170) Moreover, according to the findings in, inter alia, the reports by the Court of Auditors, the mismanagement attributable to the French State, the de facto manager of SNCM, contributed to SNCM's established shortfall in assets. The report severely criticises, inter alia, the following acts of mismanagement: the choice […] (*) commercial. The loss caused by mismanagement amounted to […] (*).

([97]) Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia SpA* v *Commission* [2003] ECR I-4035.
([98]) Among the facts relied on by that report, it appears that SNCM's management board […](*) its power of prior authorisation.
([99]) On the basis of a report by the Court of Auditors, the report refers, for example, to the fact that the State decided […](*) could discuss it.
([100]) Among the facts relied on by that report, it appears that the State […](*) industrial project.
([101]) The State, for example, […](*) the directors of SNCM.

(171) In that context, according to SNCM's expert, there is no doubt that, under an action to make good a shortfall in assets, the State would be ordered to bear all or part of the shortfall, given the very heavy involvement of the State in the management of SNCM, its manifest acts of mismanagement and the scale of its financial resources.

(172) On the basis of the relevant case-law, SNCM's expert concludes that, if SNCM had been liquidated, the State would certainly have been ordered to pay all of SNCM's payroll and social security debts. That would have resulted in the State as shareholder being made liable for an estimated share of between 85 % and 100 % of the established shortfall in assets (i.e. between EUR 316,6 million and EUR 385,7 million). Consequently, by deciding to privatise SNCM while strengthening in advance its capital in the amount of EUR 158 million, the State acted like a prudent investor.

V. **OBSERVATIONS BY FRANCE ON THE COMMENTS BY THE INTERESTED PARTIES**

5.1. OBSERVATIONS BY FRANCE ON THE COMMENTS BY THE INTERESTED PARTIES CONCERNING THE DECISION TO INITIATE THE 2002 FORMAL INVESTIGATION PROCEDURE

5.1.1. **On the comments by CFF**

(173) The French authorities have indicated that some of the data submitted by CFF concerning SNCM's services were inaccurate.

(174) Contrary to what is maintained by CFF, the State is of the opinion that the restructuring plan was devised in such a way as to turn SNCM around as soon as possible and to create the right conditions to ensure its viability in the medium and long term. The French authorities note that a significant part of the cost reduction programme has already been implemented. The number of vessels has been reduced and the programme for the disposal of assets is going ahead in accordance with the industrial plan. Services have been reorganised and the action plan to reduce intermediate consumption is beginning to bear fruit. Finally, the employment component of the industrial plan is gradually being implemented. Furthermore, in 2001 SNCM earmarked EUR 21,3 million to finance restructuring measures, in particular the plan to safeguard jobs.

(175) With regard to determining the amount of aid, the French authorities confirm that an own capital/debt ratio of 0,79 is quite typical for the balance sheets of most shipping companies, except in special situations. According to the French authorities, the 0,497 ratio announced by CFF for CMN in 2001 is incorrect because it fails to take account of liquid assets on the balance sheet. With the appropriate correction, CMN's ratio is 0,557. According to the French authorities, that level is in any event still insufficient for CMN, as illustrated by the cash-flow problems it encountered in 2002. In fact CMN had to borrow up to EUR 8 million from STIM to finance a cash deficit not covered by its banks.

5.1.2. **On the comments by STIM**

(176) The French authorities maintain that SNCM's stake in CMN's capital cannot be construed as a purely financial asset, as STIM appears to allege. France's position is that SNCM's shareholdings in CMN are highly strategic in nature. In its opinion, the sale of those shareholdings would not only make no sense commercially but would also be a major strategic error.

5.1.3. **On the comments by the representatives of the regional and local authorities**

(177) Although France agrees with the overall content of the letter from the president of the Provence-Alpes-Côte d'Azur region, it would none the less note that, contrary to what is asserted in point 2 of that letter ([102]), supply on the route between mainland France and Corsica is not 'in excess of demand' and SNCM's fare policy complies with the commitments which it made not to start a price war and not to be a price leader.

5.2. ON THE COMMENTS BY THE INTERESTED PARTIES CONCERNING THE 2006 DECISION

(178) In general, France notes that many of the observations by STIM and CFF are identical to the comments submitted by those companies to the Commission in 2003. In particular, they note that CFF's comments were submitted to the General Court in the action for annulment of the Commission decision of 9 July 2003 and were, for the most part, rejected both by the Commission and the General Court.

([102]) In its letter of 9 January 2003, the regional council of Provence-Alpes-Côte d'Azur cited the market study which had been sent to the Commission in connection with the notification, of which it obviously had a copy, highlighting the following finding: 'Supply [on the route between Corsica and mainland France] is in excess of demand. The passenger load factor of vessels varies on average from 20 % in winter to 50 % in summer.'

5.2.1. **On the early implementation of the measures laid down in the first restructuring plan and its amendments**

(179) In response to the general remark concerning the early implementation by France of measures which may be classified as aid, the French authorities state that the implementation is justified by the specific features of the procedure, i.e. the annulment in 2005 of the Commission decision of 9 July 2003 authorising the aid, and not by an intention on the part of the French authorities to disregard their obligations under the EC Treaty. Indeed, France states that it has always kept the Commission informed of developments in the matter and of the different measures adopted since January 2005, in accordance with the principle of sincere cooperation between the Member States and the Commission.

(180) Concerning those recent measures, the French authorities consider that, since none of them constitutes aid, Article 88(3) EC is not, ultimately, applicable to them and, accordingly, there is no obligation to suspend their implementation.

5.2.2. **On the measures subsequent to the 2002 recapitalisation**

(181) As regards the sale process, France states that from the outset it provided for standard selection criteria based primarily on the price offered for the value of SNCM's shares and, secondarily, on other criteria (industrial plan, company plan and so on), including the amount which the candidates were prepared to invest in the company by way of a recapitalisation. France strongly contests the argument put forward by third parties that the process of offering for sale was not transparent and notes that, in the present case, the State went beyond its statutory and regulatory obligations, substantial and restrictive as they were, provided for in the event of the sale of public shareholdings. France notes that the development following BCP's offer to buy 100 % of SNCM's shares occurred in a very difficult financial and company context and that VT's joining BCP's offer did not change the commercial and financial terms of the transaction (except for capital ownership).

(182) As regards the negative price of EUR 158 million, the French authorities note that, having regard to SNCM's financial situation on 30 September 2005, the undertaking was sold at market price and that sale was economically more advantageous than liquidation of the undertaking. In that respect, the French authorities state that application of the private investor criterion in the event of sale of an undertaking close to liquidation must be regarded not as a search for 'profitability of public action' but as the prevention of higher losses which the shareholder would have to suffer through a more costly liquidation.

(183) In respect of the price paid, France contests the argument that SNCM was sold at a price which did not reflect its actual value. In particular, it refutes STIM's estimated value of the undertaking of nearly EUR 350 million, which takes into account only the balance-sheet items which increase the value using book equity (excess tax depreciation, residual gains on vessels, etc.) without taking account of liabilities which reduce it. That method of calculation of a purely accounting nature does not reflect the economic reality of a shipping company, such as SNCM, with assets of value on the balance sheet but also limited profitability and considerable off-balance-sheet liabilities.

(184) The French authorities also refute CFF's argument that they underestimated the market value of SNCM's fleet, which CFF assessed at between EUR 406,5 million and EUR 426,5 million. The French authorities argue that the vessels taken into account in CFF's calculation do not correspond to those held in SNCM's name on 30 September 2005. The absence of discounts applied to the market value of the vessels does not take account of the background against which a potential compulsory liquidation of those assets would have taken place and, finally, the date chosen to calculate that market value, August 2006, is not the date of the potential liquidation of SNCM to which reference must be made, that date being 30 September 2005. Moreover, France notes that, if the calculation proposed by CFF were to be accepted, the negative price would be three times lower than the liquidation value of the assets required by the *Gröditzer* case-law, which would therefore be more favourable than the scenarios presented to the Commission by the French authorities.

(185) In response to CFF's argument calling into question the application of the *Gröditzer* case-law by referring to the fact that the State's capital contribution to SNCM was linked to the sale of 75 % of its shareholding, reducing in proportion the prospects of profit in return, the French authorities note that the negative sale price of EUR 158 million does correspond to the sale of the entirety of SNCM's capital, followed by a new investment by the State of 25 %, giving a return of […] (*) % per year. Accordingly, France takes the view that the return on investment remains guaranteed by virtue of its 25 % shareholding in the company because that stake enjoys a guarantee of a very high return.

(186) France also contests the argument put forward by CFF on the non-applicability to the present case of the *ABX* approach, taking as a basis in particular the analysis of the actual liquidation costs of SNCM and the risk that the State could be held liable for the liabilities of the undertaking in an action to make good a shortfall in assets as provided for by French insolvency procedures and confirmed by national case-law (judgment of 22 March 2005 by the Rouen Court of Appeal). Although the French authorities consider that their conduct as manager of SNCM could not be described as 'mismanagement' in such an action, they insist that there is a very high risk that a national court would make an order against the State for the shortfall in SNCM's assets owing to flexible criteria for the existence of mismanagement within the meaning of Article L-651-2 of the Commercial Code and pursuant to the case-law cited above, which can be applied to the present case.

(187) In respect of the recapitalisation of EUR 8,75 million, France notes that, contrary to the contentions of CFF and STIM, the capital contribution does not constitute State aid on account of the concurrence of that investment, the similarity of its subscription conditions and the higher-than-average return obtained by the State via CGMF.

(188) In particular, the French authorities submit that the principle of equal treatment of investors is not called into question by the existence of the cancellation clauses since the latter were laid down in connection with the 100 % sale of SNCM and not with the EUR 35 million recapitalisation which followed it.

(189) Furthermore, France submits that its investment is much lower than that of the buyers, since it is only the amount of EUR 8,75 million which must be compared with the investment made by the buyers (EUR 26,25 million). The first recapitalisation of EUR 142,5 million should be examined only as part of the comparison with the liquidation price.

(190) Finally, France contests STIM's argument that that contribution is a guarantee given to the private buyers that SNCM has indeed been awarded the public service delegation to operate services to Corsica. The French authorities submit that the capital increase is prudent and independent of the undertaking's performance and that the award of the public service delegation to SNCM does not serve to improve the return expected on that investment.

(191) As regards the EUR 38,5 million of social measures, France repeats the argument that those measures are aid to individuals and that their payment by the State cannot be regarded as providing an indirect advantage to the undertaking since they are in addition to SNCM's statutory and contractual obligations. Moreover, France points out that those measures do not permit the departure of staff who, without the measures, would remain the responsibility of SNCM.

(192) Contrary to CFF's argument, the French authorities point out that the EUR 38,5 million does not correspond to the implementation of the staff reductions provided for in the 2003 social plan because those reductions have, despite the delay, already been implemented. The new social plan is therefore in addition to the first social measures of 2003.

5.2.3. **On compatibility with the guidelines**

(193) France considers that, in the light of the foregoing, the amount of aid to be assessed is EUR 15,81 million.

(194) Contrary to the contentions of CFF, the French authorities consider that, having regard to point 11 of the 2004 guidelines, the first recapitalisation, while enabling SNCM to reconstitute its capital, did not remove its status as an undertaking in difficulty in so far as that recapitalisation was intended to ensure the continuation of the company's activities.

(195) France refutes CFF's contentions that it should not have had to re-inject money into the undertaking, given that SNCM could have had recourse to bank credit. In that regard, the French authorities note that, on 24 August 2005, the banks had refused to grant new cash lines to SNCM and that the only conceivable alternatives were therefore privatisation or liquidation of the undertaking.

(196) France contests the arguments put forward by CFF and STIM concerning the failure of the 2002 restructuring plan which, despite some delay, was implemented and made it possible to achieve the objectives in 2005. The deterioration in SNCM's economic and financial situation owing to factors external to the undertaking itself then made it necessary to extend the plan notified in 2002 and to introduce new measures.

(197) France takes the view that SNCM has good prospects for recovery and that the measures contemplated by the new shareholders, in particular the implementation of the social plan, the reinstatement of routes and the renewal of certain vessels, will enable the undertaking to return to viability. In that regard, France observes that, on account of the revenues deriving from the public service delegation (approximately [50-70] (*) % of SNCM's turnover) and in view of the level of fixed costs and the difficulties in redeploying the 6 vessels used on the Marseille-Corsica route, the public service delegation constitutes an essential element of the undertaking's strategy and its viability.

(198) On the limitation of the aid to the minimum, France believes that it limited to the strict minimum the restructuring costs necessary to enable the restructuring to be carried out. To that effect, the French authorities note that, as the Commission recognised in its 2003 decision, the undertaking itself has contributed sufficiently to the restructuring plan from its own resources by virtue of the sale of assets for the amount of EUR 30,2 million. In addition, having regard to other sales made by SNCM for the amount of EUR 12,2 million, the total of the undertaking's own contribution comes to EUR 42,38 million. France considers that that amount is much higher than the amount of own contributions necessary to approve the restructuring aid, which finally amounts to EUR 15,81 million, since the other measures are not State aid.

5.2.4. **On the conditions imposed by the Commission decision of 2003 and the possible new compensatory measures**

(199) Contrary to the contentions of STIM and CFF, the French authorities state that they complied with all of the conditions imposed by the 2003 decision, to which they were bound until the end of 2006, in particular the maintenance of the fleet of 11 vessels and the application of fares lower than those of competitors.

(200) Indeed, France considers that, under the new final decision, the level of compensatory measures to be imposed on SNCM must be adapted because the amount of restructuring aid was henceforth EUR 15,81 million rather than EUR 69,3 million.

(201) In that respect, France contests STIM's observations concerning the possibility that the Commission may require SNCM to sell its shareholding in CMN as a compensatory measure. France contests STIM's argument that the definition of strategic assets was called into question in the 2004 guidelines in relation to the 1999 guidelines.

(202) As regards the measures referred to by CFF, intended to reduce SNCM's market presence, the French authorities recall that, as the Commission noted, moreover, in its 2003 decision (recital 87), there is no excess capacity in the markets concerned (France — Corsica & the Maghreb) and that a reconfiguration of services to Corsica under and outside the public service delegation would jeopardise the viability of the undertaking.

(203) As for the argument raised by CFF that the implementation of the measures described above in favour of SNCM involves a serious risk of eliminating its main competitor in the mainland France-Corsica market, namely CFF, the French authorities submit that, having regard to the current structure of the market in which CFF is market leader, the maintenance of a competitive structure depends on the authorisation of SNCM's restructuring plan and the presence of the latter in the relevant market.

VI. **ASSESSMENT OF THE MEASURES**

6.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TFEU

(204) Article 107(1) of the TFEU provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(205) The classification of a national measure as State aid within the meaning of Article 107(1) TFEU requires the following cumulative conditions to be fulfilled, namely: (1) the measure in question confers a selective economic advantage; (2) that advantage is financed via state resources; (3) that advantage distorts or threatens to distort competition and, finally, (4) that advantage has an effect on trade between Member States ([103]).

([103]) See, for example, the judgment of the Court of Justice in Case C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 129.

(206) The Commission notes that SNCM received state resources totalling EUR 274,54 million ([104]) via CGMF, which is wholly owned by the State.

(207) Since SNCM operates in the maritime transport sector, which is open to competition within Europe, the potential economic advantage that it has received is likely to distort competition and affect trade between Member States.

(208) The fact that the cabotage market to the Mediterranean islands was, until 1 January 1999, temporarily exempt from the application of Regulation (EEC) No 3577/92 does not exclude prima facie that the subsidies granted for operating cabotage routes to the Mediterranean islands under a public service delegation could affect trade between Member States and distort competition.

(209) In any event, even if subsidies granted for operating cabotage routes could not affect trade between Member States or distort competition before 1 January 1999, the situation changed after that date since, in accordance with Regulation (EC) No 3577/92, cabotage activities were from then on open to all operators in the European Union. In addition, it should be stressed that SNCM does not carry on only cabotage transport but also operates in the international maritime market, which was liberalised by Council Regulation (EEC) No 4055/86 ([105]).

(210) Accordingly, the Commission considers that in the present case the last three criteria of Article 107(1) TFEU cited in recital 205 of this decision are fulfilled. It must therefore examine in turn, in respect of each measure, the existence of a selective economic advantage, in accordance with the judgment of the General Court of 11 September 2012.

6.1.1. **Relevant period for the purposes of the assessment**

(211) In accordance with the case-law of the General Court ([106]), the Commission must, after the annulment of one of its decisions, base its new assessment only on the information that was available to it on the date of adoption of the annulled decision, in this case 8 July 2008.

(212) Any events subsequent to 8 July 2008 must not, therefore, be taken into account. Changes that may have taken place in the market or in the situation of the aid beneficiary must be excluded from the analysis. Nor will the Commission consider the period of implementation of the restructuring plan from July 2008 onward ([107]).

(213) Similarly, the Commission is not under an obligation to start the investigation of the case afresh or even to supplement it by resorting to new technical expertise ([108]). The annulment of an act concluding an administrative procedure which comprises several stages does not necessarily entail the annulment of the entire procedure. Where, as in this case, in spite of the fact that investigation measures have been taken allowing an exhaustive analysis to be made of the compatibility of the aid, the analysis carried out by the Commission is incomplete, thus making the decision unlawful, the procedure for replacing that decision can be resumed at that point by means of a fresh analysis of the investigation measures taken previously ([109]).

(214) Moreover, since the Commission is required to base its new analysis solely on information which was available to it in July 2008, information in respect of which both the French authorities and SNCM had already defined their position, it is unnecessary to consult them afresh ([110]). Finally, with the publication of the decision to open the procedure in the Official Journal, the third parties concerned were ensured the right to submit their comments ([111]) and there is no provision in Regulation (EC) No 659/1999 requiring that that opportunity be made available to them again where the original restructuring plan has been amended during the investigation procedure ([112]).

([104]) This amount corresponds to the additional capital contribution of EUR 15,81 million notified in 2002 and the amount of the public service delegation, i.e. EUR 53,48 million, and the three new measures implemented by the French authorities in 2006, namely the sale of 100 % of SNCM at the negative price of EUR 158 million, the capital increase of EUR 8,75 million subscribed by CGMF and the current account advance of EUR 38,5 million in favour of SNCM's employees.

([105]) Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

([106]) *Alitalia* v *Commission*, see footnote 40 above.

([107]) *Alitalia* v *Commission*, cited above, paragraph 137.

([108]) *Alitalia* v *Commission*, cited above, paragraphs 144 and 159.

([109]) *Alitalia* v *Commission*, cited above, paragraphs 99-101 and 142.

([110]) *Alitalia* v *Commission*, cited above, paragraph 174.

([111]) See footnote 29.

([112]) See footnote 110.

(215) This decision is therefore based, in the main, solely on the information available on 8 July 2008. However, in the alternative, the Commission will demonstrate that it would not change its conclusions if account were taken of the note by the French authorities dated 16 May 2013 in relation to the facts referred to before 8 July 2008 and of the information submitted by SNCM on 27 August 2013.

6.1.2. **The sale of SNCM at a negative price of EUR 158 million**

(216) In the present case, the Commission must examine whether the EUR 158 million capital contribution by the State prior to the sale of SNCM to private purchasers, that is, ultimately, the 'negative sale price' of the undertaking of exactly the same amount, does not contain elements of State aid.

(217) An open, transparent and non-discriminatory public selection procedure at the end of which the State disposes of the undertaking after a prior recapitalisation (for an amount greater than the sale price) does not necessarily exclude the presence of aid, liable to benefit both the privatised undertaking and the purchaser of that undertaking ([113]).

(218) In order to determine whether an undertaking has obtained an economic advantage from a capital contribution by the State, the Commission generally applies the principle of a 'private investor operating in a market economy' ('the private investor principle'), provided that the beneficiary is not liable for the reimbursement of other forms of State aid and that the contribution is subject to analysis with reference to the said principle. The private investor principle is an expression of the principle of equal treatment of public and private sectors, pursuant to Article 345 TFEU. According to that principle, capital made available to an undertaking by the State, directly or indirectly, in circumstances which reflect normal market conditions, cannot be classified as State aid ([114]).

(219) To that end, the Commission may assess, inter alia, whether the provider of the resources has acted like a private investor pursuing structural policy — whether general or sectoral — and guided by the longer-term prospects of positive returns on the capital invested. The validity of this approach has been acknowledged by the European Union Courts in a number of cases ([115]).

(220) According to settled case-law, when injections of capital are made by a public investor without any prospect of profitability, even in the long term, the provision of such capital constitutes State aid ([116]).

(221) The European Union Courts have also held that a private investor pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the long term could not reasonably allow itself, after years of continuous losses, to make a capital contribution which, in economic terms, proves not only costlier than selling the assets, but is, moreover, linked to the sale of the undertaking, which effectively removes any hope of profit, even in the longer term ([117]).

(222) Specifically, in its *Gröditzer* judgment, the Court of Justice held that, in order to establish whether the privatisation of an undertaking for a negative sale price involves elements of State aid: 'it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the sale of that undertaking or whether it would instead have chosen to wind it up' ([118]).

(223) In the light of the foregoing, in order to determine whether the measure in question constitutes aid, the Commission must 'assess whether the solution chosen by the State is, both in absolute terms and compared with any other solution, including that of non-intervention, the least costly, which would lead, if that were the case, to the conclusion that the State has acted like a private investor' ([119]).

([113]) Case C-334/99 *Commission* v *Germany* [2003] ECR I-1139, paragraph 142.
([114]) Commission Communication to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, point 11). While this Communication deals with the manufacturing sector, the principle can be applied in the same way to all other sectors.
([115]) See, in particular, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435.
([116]) Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH* v *Commission of the European Communities* [1999] ECR II-17, paragraph 116.
([117]) See footnote 80.
([118]) See footnote 113.
([119]) Commission Decision 98/204/EC of 30 July 1997 conditionally approving aid granted by France to the GAN group (OJ L 78, 16.3.1998, p. 1).

(224) In other words, the Commission must verify that the decision to make such a major capital contribution is indeed less costly than a liquidation.

6.1.2.1. *On assessing the costs of liquidation*

(a) On taking account of the impact of the additional redundancy payments

(225) When quantifying the cost to the shareholder of liquidation, the French authorities hold the view that, in this day and age, large groups of undertakings cannot disregard the social consequences of their decisions to close sites or wind up subsidiaries. Accordingly, they usually implement social plans which may include measures to retrain staff, help them find new jobs, redundancy payments, and possibly even local development measures, which go beyond the requirements of statutory provisions and collective agreements.

(226) In that respect, the French authorities consider that, on the basis of the 2005 social plan, itself based on the 2002 plan, the range should be from EUR [90 000-100 000] (*) to [120 000-130 000] per employee, i.e. a total amount of between EUR [200-210] (*) million and [250-260] (*) million. The French authorities point out that the lower limits of the abovementioned range take account of the fact that the costs of the reference social plan have been inflated due to the very large proportion of employees approaching retirement age, who leave under particularly advantageous conditions. Account is also taken of the context (liquidation of the undertaking and wholesale redundancies), which is in no way comparable to a cut in staff numbers allowing the company to stay in business, which is the premise for the reference social plan.

(227) Ultimately, the French authorities consider that, even when using the analysis grid established by the General Court in its judgment of 15 September 2012, the transfer of control of SNCM for the negative sale price of EUR 158 million did not include elements of State aid. They maintain that the Commission has all the information necessary to respond to the Court's criticisms.

(228) The Commission does not share this analysis.

(229) According to the General Court judgment ([120]), the making of additional redundancy payments may, in principle, constitute a legitimate and appropriate practice, depending on the circumstances of the case, the aim being to foster a calm social dialogue and preserve the brand image of a company or group of companies. In accordance with the principle of equal treatment of private and public sectors, the option of making additional redundancy payments is also open to the Member States in the event that a public undertaking goes into liquidation, even though their obligations cannot, in principle, exceed the strict minimum under statutory and contractual obligations. However, the Court states that '… the burden of those additional costs, because of legitimate concerns, cannot follow an exclusively social, even political, objective, as it would otherwise go beyond the framework of the private investor test … In the absence of any economic rationale, even in the long term, the assumption of the burden of costs which exceeds the strict statutory obligations and obligations under agreements must therefore be considered to be State aid within the meaning of Article 87(1) EC' ([121]).

(230) Regarding the argument put forward by the French authorities on protecting the State's brand image, the Court considers that '… the protection of the brand image of a Member State as a global investor in the market economy cannot constitute, other than under specific circumstances and without a particularly cogent reason, sufficient justification to demonstrate the long-term economic rationale of the assumption of additional costs such as additional redundancy payments' ([122]). There are no such specific circumstances in this case.

(231) The Commission notes that, following the launch of the procedure, the French authorities failed to define the economic activities of the French State, particularly at geographical and sectoral level. An assessment needs to be carried out of the long-term economic rationale of the measures in question, even though the French authorities eventually stated in their correspondence of 16 May 2013 that the State's actions should be compared to those of a diversified holding company, seeking to maximise its profits and protect its brand image as a global business, particularly as regards the management of its staff.

(232) Regarding the brand image of CGMF, the Commission notes that it had no assets other than SNCM in the maritime transport sector. This argument cannot therefore apply to it.

([120]) *Corsica Ferries France SAS* v *Commission*, cited in footnote 39, paragraphs 81 to 83.
([121]) Paragraph 84 of the abovementioned judgment.
([122]) Paragraph 85 of the abovementioned judgment.

(233) Regarding the brand image of the State as shareholder, the French authorities asserted that there was a high risk of social unrest in State-controlled undertakings, liable to affect not only those undertakings located in close proximity to SNCM's operations, but all sectors, and in particular the transport sector. The Commission holds the view that the French authorities failed to demonstrate that there was a bona fide risk of contagion to all public undertakings and that they also failed to demonstrate that the payment of the additional compensation helped prevent further strike action. Finally, the Commission considers that the State's assertion that the payment of the additional compensation was made on purely social grounds is not sufficient to rule out the presence of State aid.

(234) Furthermore, the Commission considers that the French authorities have not adduced sufficient objective and verifiable data capable of showing that the making of additional redundancy payments, in similar circumstances, is an established practice among private entrepreneurs. The Commission notes that the mere reference to a limited number of social plans is not enough to demonstrate the existence of a sufficiently established practice in cases comparable to the one at hand, that the redundancy schemes referred to by the French authorities relate to restructuring rather than liquidation plans, and that a large number of these concern sectors which, on the face of it, have nothing in common with transport infrastructure (e.g. the cosmetics industry (Yves Saint-Laurent Haute couture), the agri-food industry (Danone) and the electronics industry (Hewlett Packard)). Furthermore, the table prepared by the French authorities in the note of 16 May 2013, which sets out a list of social plans, details six plans launched after the privatisation of SNCM and which cannot, therefore, serve as grounds for taking into account the additional redundancy payments.

(235) SNCM produced a new list of five social plans in the note of 27 August 2013. The Commission considers that this list does not prove that the making of additional redundancy payments, in similar circumstances, is an established practice among private entrepreneurs. The Commission notes that, of the five plans in question, two concern SNCM, one of which is the subject of the present decision. These two plans cannot therefore be used to make objective comparisons for two reasons: first, SNCM's former practices in this area do not constitute a sufficient basis to justify the established nature of the practice and, second, the 2002 social plan relates to a period when SNCM was still under public control, while the comparison criterion set by the General Court was private undertakings operating in the same field. As such, the Commission notes that the Port of Marseille social plan cannot be taken into account because in 2004 the port was in public, not private hands. Moreover, as regards the last two social plans referred to, i.e. Air Lib and Eurostar, the Commission observes that these are restructuring, not liquidation plans. Lastly, the Commission observes that the average additional compensation of these two plans is more than 50 % below the average additional compensation paid by SNCM.

(236) Finally, the Commission notes that the French authorities have not established that the French State's actions were motivated by a reasonable probability of obtaining an indirect material profit, even in the long term, by avoiding increased social unrest within the undertaking, given that the latter would have folded in the event of liquidation. There is insufficient evidence to support the hypothesis that larger payouts were made to employees of other public undertakings. This standpoint is lent even more credence by the fact that, even from the point of view of a global investor as hypothesised by the French authorities, the granting of very high severance payments to employees of a company is likely to complicate any future restructuring of other companies belonging to the same investor. Furthermore, the French authorities have not quantified the significant nature of the potential social costs which they cite as justification for the granting of additional redundancy payments.

(237) The French authorities have also argued that a liquidation procedure would have been longer and potentially riskier for the State as shareholder than the sale of SNCM at a negative price. The Commission notes that the French authorities have failed to provide proof of this risk and have not explained why the length of the liquidation procedure would have been taken into account by a private shareholder. The *Frucona Kosice* ([123]) case referred to by the French authorities has no bearing on the present case because it concerns the private creditor test. The length of a liquidation procedure is relevant for analysing whether the State, as creditor of Frucona Kosice, maximised recovery of its debts by accepting immediate partial repayment or if it would have been better to wait for the outcome of the liquidation of the undertaking. The circumstances of the present case are different since the State is a shareholder in SNCM, not a private creditor. Given that, in the event of liquidation of SNCM, the assets would clearly not be sufficient to cover the liabilities, the State would be unable to recover its contribution. Consequently, the length of the liquidation procedure has no bearing on this case.

(238) The French authorities have therefore failed to justify the shouldering of the cost of these additional payments by the State acting as a private investor in the context of a liquidation.

([123]) Case C-73/11 P, *Frucona Kosice* v *European Commission*.

(239) At this stage in the analysis, the Commission must determine the value of the liquidation of SNCM excluding the additional redundancy payments.

(b) On the liquidation value of SNCM

(240) According to the revalued net asset method, an asset shortfall is determined when the economic value of the actual assets (generally higher than the net book value) does not cover the economic value of the actual debts.

(241) In order to determine an asset shortfall in the present case, the Commission, with the assistance of its expert ([124]), verified as explained above that on 30 September 2005 the value of SNCM's assets was insufficient to pay off preferential and non-preferential creditors.

(242) The Commission takes the view that the valuation of net assets is a method commonly used to value companies in the maritime transport sector. It considers, furthermore, that the method in question is particularly appropriate in SNCM's case since the reference shareholder's only alternative to the sale is to put the company into liquidation.

(243) As regards other valuation methods, in particular that of 'present value of operating free cash flows', the Commission considers that, since this method appraises the company as a going concern, which would not be the case if SNCM were to go into liquidation, it is inapplicable in the present case.

(244) The Commission chose 30 September 2005 as the reference date for the valuation of SNCM since that was the date on which the choice between the acceptance of the takeover bid or the liquidation of the company was actually made, the selection of BCP having been decided upon on 27 September 2005.

(i) On the value of SNCM's assets

(245) The Commission observes in particular that SNCM's shareholder, in collaboration with Ernst & Young, calculated the cost of liquidating the undertaking (see the abovementioned CGMF report) on 30 September 2005, and supplementary expert opinions were provided by Oddo Corporate Finance and the Paul Hastings law firm. The Commission notes that the Oddo-Hastings report referred to above valued SNCM's assets at EUR 190,3 million.

(246) As regards the valuation of the fleet held in its name ([125]), the gross market value of SNCM's vessels had been assessed at EUR 224 million on 30 September 2005 by the specialist broker BRS, while the Oddo report valued the fleet at EUR 150,7 million after discount ([126]), brokerage commission ([127]) and legal uncertainty ([128]).

Table 3

Scenarios for the valuation of SNCM's assets on 30 September 2005

	Value of asset Oddo report EUR million	Value of asset Commission expert EUR million
Intangible asset	—	—
Tangible assets		
Fleet held in own name	150,7	151,7

([124]) Following a call for tenders, the Commission contracted an independent expert, Moore Stephens, Chartered Accountants, which issued its final report on 25 January 2008.

([125]) The fleet comprises the following 7 vessels: *Corse, Ile de Beauté, Méditerranée, Napoléon Bonaparte, Paglia Orba, Monte d'Oro, Monte Cino*.

([126]) The said discount of EUR 52,2 million (i.e. an average of 25 to 30 % of the gross market value), is due, inter alia, to the specific nature of SNCM's vessels (which are tailored to the services provided by the undertaking), to the condition of the vessels and to the circumstances of the sale of the entire fleet (in particular the weakness of the seller's position). BRS's valuation is largely based on the hypothesis of a sale, under normal trade conditions, of vessels which are fully up-to-date, well-maintained and in good working order.

([127]) Estimated at EUR 4,6 million.

([128]) The legal uncertainty is due to the likelihood of the authorised liquidator being forced to dispose of the vessels very quickly and to a glut in the market because of limited absorption capacity.

	Value of asset Oddo report EUR million	Value of asset Commission expert EUR million
Buildings (1)	11,2	11,2
Investments (2)	32,7	38,3
Fixed assets	*194,6*	*201,2*
Inventories	—	—
Advances and payments on account	—	—
Accounts receivable	0,8	0,8
Other receivables (3)	9,4	9,4
Net cash	– 14,5	—
Prepayments and accrued income	—	—
Other assets	*– 4,3*	*10,20*
Total assets	190,3	211,4

Sources: Oddo-Hastings report, Commission expert's report.

(1) With regard to buildings (including SNCM's registered office), the French authorities point out that the liquidation value given is based on the valuation of a buildings expert carried out in November 2003 and subsequently raised by 20 % to take account of inflation.

(2) The investments concern mainly SNCM's equity securities in Sudcargos, Aliso, CGTH, CMN and Ferrytour.

(3) This item concerns mainly state receivables, including compensation for public service obligations in September 2005 and the reimbursement by Assedic of employers' social charges for the 2004 financial year.

(247) From the table above, it is clear to the Commission that the fleet of vessels constitutes the main element in the valuation of the undertaking. In that respect, the Commission expert, after carrying out a comparative analysis wherever possible, concluded that the discount applied to the gross market value of the vessels and the precautions for legal uncertainty were logical. On that basis, it concluded that there was no justification for rejecting the value of the fleet as estimated by the French Government.

(248) As regards the discount, the Commission is of the opinion that its level is consistent with the discounts observed in sales of vessels in the event of compulsory liquidation. The Commission expert referred, by way of example, to the *Régie des Transports Maritimes* (a state-owned Belgian company operating the Ostend-Ramsgate route) which sold two car ferries in 1997 with discounts estimated at 35 % to 45 %. More recently, Festival Cruises disposed of three cruise vessels at an average discount of 20 %. The discounts observed in similar cases are therefore of the same order of magnitude as the discounts applied by the French authorities in this case.

(249) As for the legal uncertainty, since no comparable transaction has taken place in the market, the Commission considers that the arguments justifying the application of legal uncertainty are warranted given the limited market for vessels of a certain type designed for a fairly specific use.

(250) The Commission also notes that its independent expert revised upwards the valuation of the investments, in particular that of SNCM's holding in CMN (from EUR 21,8 million to EUR 28 million). In that respect, in view of Stef-TFE's offer to buy out the holding for EUR 35,2 million, as revealed to the Commission during the present investigation, the Commission considers that the valuation of SNCM's holding in CMN at EUR 28 million is reasonable in the context of a company liquidation.

(251) The Commission expert did not raise any specific objections to the valuation of the other assets. It did not, however, accept the item 'net cash', because it was in deficit. The Commission considers therefore that this item should be reclassified under SNCM's liabilities.

(252) Taking account of the various adjustments, the Commission values SNCM's assets at EUR 211,4 million on 30 September 2005.

(ii) On the valuation of SNCM's liabilities

(253) The Commission notes that the French authorities quantify the amount owed as preferential debts at EUR 153,8 million and the amount owed as non-preferential debts at EUR 170,9 million (excluding additional redundancy payments).

(254) With particular regard to social liabilities, the French authorities assessed the cost of the social plan under collective agreement at EUR [70-80] (*) million. The costs relating to the said plan were determined on an individual basis taking into account the type of contract (permanent or fixed-term), the statutes and the collective agreements applicable (crew, office staff and ships' officers), seniority, rank and salary. This amount covered notice payments (EUR [20-30] (*) million), payments for leave taken with notice (EUR [0-10] (*) million), contractual redundancy payments (EUR [30-40] (*) million) and the Delalande contribution (EUR [0-10] million) ([129]).

(255) The cost of the social plan not under collective agreement is estimated by the French authorities at EUR [30-40] (*) million. This plan groups together all the flanking measures to with SNCM's statutory and regulatory redundancy obligations ([130]) and the indirect costs of the social plan under collective agreement ([131]).

(256) The cost of termination of the principal operating contracts concerns, essentially, the calling of the bank guarantee of EUR 7,4 million given to guarantee the proper performance by SNCM of its public service obligations, plus the penalty provided for by that agreement, equal to 2 % of the EUR 63 million baseline financial compensation for 2005, i.e. approximately EUR 1,2 million in the event of default by the delegatee.

(257) Regarding the net liabilities related to the sale of the leased vessels ([132]), the French authorities underline that, on the basis of certain assumptions ([133]), the net sale proceeds were valued, by the specialist broker BRS, at EUR 144,8 million on 30 September 2005 after discount, brokerage commission and financial cost of portage. Since the savings on tax and bank debts amount to EUR 193,5 million, the outstanding balance of bank debts relating to the leased vessels amounts to EUR 48,7 million.

Table 4

Scenarios for valuation of the liabilities of SNCM on 30 September 2005

	Value of liabilities Oddo report EUR million	Value of liabilities Commission expert EUR million
Senior debt including:		
Social and tax debts	[20-30]*	[20-30]*
Financial debts guaranteed by assets (1)	15,9	15,9
Cost of social plan under collective agreement	[70-80]*	[70-80]*
Cost of retired employees' mutual societies (2)	10,2	10,2

([129]) At issue is an obligation introduced by Article L.321-13 of the Employment Code, which obliges employers to provide severance pay to employees over 50 who are made redundant.

([130]) Cost of job creation measures (EUR [0-10] (*) million), cost of redeployment agreements (EUR[10-20] (*) million), cost of the deployment support and assistance unit known as 'mobility' (EUR[0-10] (*) million).

([131]) Cost of laying off staff under SNCM contract on secondment to affiliated companies and staff of liquidated subsidiaries (EUR [0-5] (*) million) and cost of legal proceedings relating to the breach of employment contracts and applications for reclassification of employment contracts (EUR [0-10] (*) million).

([132]) On 30 September 2005, SNCM operated three leased vessels: the NGV *Liamone* (held by the EIG Véronique Bail), the *Danielle Casanova* (EIG Joliette Bail) and the *Pascal Paoli* (EIG Castellane Bail).

([133]) The assumptions underpinning that valuation are the following: SNCM brings an end to its lease-purchasing agreements on 30 September 2005, which means that the vessels are returned to their respective original owners (EIGs) and no rent is paid; the purchase options cannot be exercised; the disposal of the vessels is made by the EIGs' bank creditors on 30 September 2005; the net proceeds of the sale of the vessels is allocated first to the reimbursement of bank and tax debts.

	Value of liabilities Oddo report EUR million	Value of liabilities Commission expert EUR million
Cost of liquidation procedure	4,7	4,7
Interim operating losses (3)	26,5	26,5
Payments to senior creditors	*153,8*	*153,8*
Unsecured debts (4)	69,7	84,2
Cost of social plan not under collective agreement	[30-40]*	[30-40]*
Cost of termination of principal operating contracts	[10-20]*	[10-20]*
Additional cost related to disposal of leased vessels	48,7	48,7
Payments to unsecured creditors	*170,9*	*181,1*

Sources: Oddo-Hastings report, Commission expert's report.

(1) The *Napoléon Bonaparte* and *Paglia Orba* vessels serve as guarantee for the amount of the shipping loans which were used to finance them.

(2) This item stems from the practice whereby SNCM undertakes to assume liability for part of the costs of the complementary mutual benefits scheme for its retired employees.

(3) Up to the completion of the liquidation. The interim losses take as underlying basis the payment of salaries for a single month. They also include the cost of decommissioning vessels held in its name, not deducted from the value of the assets. That cost corresponds to the cost of immobilising vessels in dock pending their sale.

(4) The unsecured debts are broken down as follows: provisions for risk and charges (EUR 3,3 million), apportioned debts/shareholdings (EUR 0,1 million), trade suppliers (EUR 28,6 million), general representation (EUR 23 million), group and associated debts (EUR 7,8 million), liabilities adjustment account (EUR 6,9 million).

(258) The Commission notes that social liabilities account for the major part of SNCM's liabilities. As regards the preferential social liabilities, i.e. the cost of the social plan, the Commission expert verified the formulae for calculating all the components of the plan on the basis of surveys and did not find any anomalies or errors. In the light of that verification, the Commission considers reasonable the sum of EUR [70-80] (*) million proposed by the French authorities for the social plan under collective agreement.

(259) Regarding the interim operating losses, the Commission views the estimate as prudent in the light of the legislation, in particular Article L.622-10 of the French Commercial Code (Code du commerce) and Article 119-2 of Decree No 85-1388 of 27 December 1985 pursuant to which SNCM may be obliged by the relevant commercial court to continue its operations for a term of 2 months, renewable at the request of the prosecuting authority on account of its public service obligations.

(260) The Commission expert did not raise any particular objections in respect of the unsecured debts. However, it increased the initial amount of EUR 14,5 million under 'net cash' to EUR 69,7 million. The Commission considers that the corrected figure is commensurate with the changes made to the valuation of SNCM's assets.

(261) As for the cost of the social plan not covered by collective agreement (and excluding additional redundancy payments), the Commission expert considers that the estimated cost of the legal proceedings should be reduced to EUR [0-5] (*) million instead of the EUR [0-10] (*) million quoted by the French authorities. On that point, although the Commission is convinced that trade union organisations would call for the fixed-term contracts to be reclassified as permanent contracts [134], it still believes that the figure should be based only on employees with a fixed-term contract, whose situation is evidently precarious (there are 150 such contracts). Based on a gross monthly salary of EUR [2 000-2 500] (*) with an allowance of 9 months' salary for the first [100-120] (*) fixed-term contracts and 6 months for the next [50-70] (*) contracts, the total amount is EUR [0-10] (*) million.

(134) In view of the heavy and repeated use by SNCM of fixed-term contracts.

(262) Regarding the net liabilities related to the disposal of the leased vessels, the Commission considers that the assumptions underpinning that calculation are justified mainly because of the EIGs' excessive regard for contractual formalities, which restricts any substitution of SNCM by third parties and makes tax relief subject to the operation of vessels under the French flag. Furthermore, there are no grounds for applying legal uncertainty to vessels operated under leasing agreements because those vessels were disposed of by the EIGs' creditor banks. Against this background, the Commission takes the view that it is reasonable to take into account the financial costs of porterage between 30 September 2005 and the date of actual disposal of the vessel.

(263) In the light of the foregoing, the Commission considers that on 30 September 2005 SNCM's preferential liabilities were EUR 153,8 million and its non-preferential liabilities EUR 181,1 million.

(iii) On the finding of a shortfall in assets

(264) In the light of the foregoing, the Commission considers that on 30 September 2005 the value of SNCM's assets (i.e. EUR 211,4 million) was insufficient to pay off preferential creditors (EUR 153,8 million) and non-preferential creditors (EUR 181,1 million), i.e. a total of EUR 334,9 million. Consequently, the asset shortfall amounts to some EUR 123,5 million.

(c) On taking account of action to make good the asset shortfall

(265) The Commission also examined the French authorities' argument that the State, as majority shareholder, could be called upon to make good the asset shortfall in the event of liquidation of the undertaking (see below). One of the interested parties (CFF) contested the application of the national case-law referred to by the French authorities in this particular case. CFF holds the view that, regarding the case-law of the Rouen Court of Appeal in the *Aspocom Group Oyj* case, the court ordered the Finnish parent company to pay compensation to the employees of its liquidated French subsidiary because this compensation had been provided for by a social plan on the basis of a company-level agreement approved by the parent company. In the end, it was not paid out.

(266) The French authorities consider that the total actual costs which the State would have had to bear as shareholder, through CGMF, amounted to between EUR 312,1 and EUR 361 million on 30 September 2005. This estimate takes account, in particular, of the risk of the State being called upon to make up the asset shortfall if the court were to consider it to be de facto manager of SNCM, and of the risk of the State being ordered to make additional redundancy payments to staff laid off. The French authorities consider that those risks must be taken into account when calculating the actual cost of the possible liquidation of SNCM.

(267) What is at issue here is the estimated total costs which France, as shareholder, would probably have had to bear in the event of compulsory liquidation of SNCM in order to determine whether, in view of the risk of being ordered to bear these costs and given the amounts involved, a well-informed private investor would have preferred to sell its subsidiary directly at a negative price of EUR 158 million rather than run the said risk.

(268) Under French law, the authorised liquidator of a company in compulsory liquidation has the power to launch an action for damages against the former managers of the company, known as an 'action en comblement de passif' (action to make good an asset shortfall) in the event of cancellation of a recovery plan or receivership or compulsory liquidation ([135]).

(269) The reason for the bringing of an action 'en comblement de passif' against the former directors of the insolvent company is the need to build up the company's assets, which is one of the tasks entrusted to the authorised liquidator.

(270) In several letters to the Commission, the French authorities maintained that a situation in which the State is ordered by a national court to make good the liabilities of the undertaking which it manages is a highly plausible scenario and that it must be taken into account when calculating the actual cost of a possible liquidation of SNCM.

([135]) Law No 85-98 of 25 January 1985 on receivership and the compulsory liquidation of undertakings codified in the Commercial Code in Articles L-621 et seq.; Law No 2005-845 of 26 July 2005 concerning the safeguarding, receivership and liquidation of undertakings, codified in Articles 620-1 to 670-8 of the Commercial Code.

(271) In its correspondence of 28 February 2008, SNCM provided the Baker & McKenzie Report evaluating the consequences of an action 'en comblement de passif' against the French State. That report concludes that a commercial court hearing the case would very probably hold that the State was liable and would order it to pay SNCM's social debts in their entirety.

(272) The relevant legislation provides that the social debts of the company in liquidation may be made chargeable to its former de jure or de facto managers, subject to the cumulative fulfilment of four conditions.

(i) Acknowledgement of the State as de jure or de facto manager of the undertaking in compulsory liquidation

(273) The Baker & McKenzie report submitted by SNCM provided the Commission with an analysis leading to the conclusion that […] (*). In essence, the aforementioned expert report aims to show, in accordance with relevant case-law ([136]), that the State had repeatedly committed […] (*). In particular, according to the report, the State took […] (*) decisions. Moreover, it would appear that the management organs […] (*) the undertaking. Finally, the State […] (*).

(274) The Commission notes that the French authorities, in their correspondence of 28 March 2008, did not express any reservations […] (*). In their letter of 20 November 2006, the French authorities themselves state that the court […] (*) the undertaking.

(275) However, the Commission takes the view that the statement made by the French authorities on 20 November 2006 in connection with a State aid procedure cannot in itself suffice to establish to the requisite legal standard that a court would have considered the national authorities to be de facto managers of the undertaking benefiting from the measures in question, or, especially, the degree of probability of such an eventuality.

(276) In particular, as regards the decisions at issue, it is far from established that the final decision taken by the State deviates notably from the practice followed in the management by the State of its holdings. Even the Baker & McKenzie report highlights the existence of a recurring controversy surrounding the desirable level of intervention by the State in the management of its shareholdings and mentions the extensive role, in general, of […] (*).

(277) The examples of domestic case-law put forward by the State and by SNCM are not directly applicable to the circumstances at hand. The main cases cited concern local authorities, and the *BRGM* judgment of 6 February 2001 relates to a public industrial and commercial establishment.

(278) In any event, it is far from established that the State acting as public authority would be considered to be de facto manager.

(ii) The existence of one or more acts of mismanagement by the French State as de facto manager of the undertaking in compulsory liquidation

(279) In the present case, the Commission notes that SNCM's expert report referred, on the basis of a non-exhaustive list of factual elements, to a series of factors to show that the State, […] (*), committed acts of mismanagement.

(280) In particular, it is reported that the French State made errors relating to investments linked […] (*) SNCM. The State also allegedly committed numerous acts of mismanagement with regard to capacity […] (*) SNCM.

(281) In their letter of 30 April 2007, the French authorities portrayed the risk of an order for damages against the State as very high, having regard to the criteria for categorising mismanagement as provided for in Article L. 651-2 of the Commercial Code.

(282) Again, the Commission considers that this statement of 30 April 2007, made in connection with a State aid procedure, cannot in itself suffice to establish to the requisite legal standard that a court would have considered that the national authorities committed the alleged errors, or, especially, the degree of probability of such an eventuality. This is all the more so since the French authorities deny the very existence of acts of mismanagement, which are, however, *a sine qua non* for the bringing of an action 'en comblement de passif'.

([136]) French case-law requires the de facto manager to have taken regular positive action of a managerial nature.

(283) More fundamentally, SNCM, like the French authorities, relies to a large extent on very old management decisions. Thus the Baker & McKenzie report focuses on […] (*) carried out up until 2000. It does not hesitate to refer to Court of Auditors reports for the financial years 1993-99. It was around the mid-1990s that the main acts of mismanagement allegedly took place. SNCM's creditors were informed of these management practices when they extended credit. There was, therefore, at least implicit acceptance of the risk associated with this type of management. There is nothing to indicate that the State's liability for making good the asset shortfall can reasonably be incurred in such a situation.

(284) Furthermore, these alleged acts of mismanagement can be explained by political choices made by the public authorities and there is nothing to indicate either that these political choices can be classed as mismanagement within the meaning of the case-law on making good a shortfall in assets.

(285) Finally, the Baker & McKenzie report lacks credibility, particularly when it maintains that SNCM's situation was attributable to external communication errors committed by the State with regard to that situation. All that emerges from this report is that the State mentioned a situation which was already public knowledge. The State's conduct therefore has nothing in common with an act of mismanagement.

(iii) The finding of a shortfall in assets

(286) In this case, the Commission remarks that the Oddo-Hastings report points up an asset shortfall of EUR 134,4 million at 30 September 2005, calculated as the difference between the value of SNCM's assets (EUR 190,3 million) and the value of the undertaking's liabilities (preferential and non-preferential debts valued respectively at EUR 153,8 million and EUR 170,9 million).

(287) The Commission previously estimated the shortfall in SNCM's assets at EUR 123,5 million at 30 September 2005 (see recital 264).

(iv) The existence of a causal link between the mismanagement and the established shortfall in assets

(288) According to the French authorities, the manager of a legal person may be declared liable, on the basis of Article L.624-3 of the Commercial Code, even if his act of mismanagement is only one of the causes of the shortfall in assets, and may be ordered to bear in whole or in part the social debts, even if his mismanagement is the cause of only a part of them ([137]). According to the French authorities, the French State would be called upon to bear a proportion estimated at between 85 % and 100 % of the established shortfall in assets, i.e. between EUR 114,3 million and EUR 134,4 million.

(289) There is no sound basis for this analysis. In so far as the alleged acts of mismanagement are based on decisions taken in the mid-1990s which immediately generated additional costs for SNCM, it is very difficult to attribute the problem to an asset shortfall in 2005, particularly since a lot of things happened between the two dates.

(290) Furthermore, if there seems to be no automatic link between the amount of compensation granted to make good the asset shortfall and the amount of the increase in liabilities caused by the manager's mismanagement (if this were to be established), this also means that the courts may decide to set the amount to be paid by the manager at a much lower level than the established asset shortfall ([138]).

(291) Contrary to what the French authorities (and SNCM) seem to believe, there is nothing to indicate that the decisions at issue here would be considered by the courts looking into the matter to be serious enough to warrant placing the burden of a major part of the asset shortfall on the shoulders of the public authorities. According to the allegations under investigation, the decisions were taken for protectionist purposes in a political context (what is more, 10 years earlier for the most part) or were more recent decisions taken to spare employees from having to make productivity gains or as part of efforts to improve industrial relations.

([137]) Judgment of the Court of Cassation, 30 November 1993, No 91-20.554, Bull.civ. IV, n°440, p. 319.
([138]) See pages 46 to 48 of the Baker & McKenzie report.

(v) Possible payment of the additional redundancy payments in the event of SNCM's compulsory liquidation

(292) According to the French authorities, in addition to the asset shortfall, and in the light of the relevant case-law ([139]), a court would definitely be compelled to order the French State to make the additional redundancy payments (between EUR [200-210] (*) million and EUR [250-260] (*) million). The French authorities consider the actual costs to be paid by the French State as shareholder as falling somewhere in the region of EUR 212,1 million to EUR 361 million.

(293) The French authorities point out that, in recent judgments, the French courts have ordered the de facto or de jure manager to defray, as well as the asset shortfall, additional redundancy payments calculated on the basis of a social plan drawn up by the undertaking before it was put into liquidation.

(294) The French authorities state in particular that, in the *Aspocomp* case, the French company Aspocomp SAS, a 99 % subsidiary of the Finnish company Aspocomp Group Oyj, signed a company-level agreement on 18 January 2002 describing the conditions for indemnification of a social plan relating to 210 employees out of a total of 550. That agreement described, in particular, the amount of compensation and additional payments as well as assistance in the case of voluntary redundancy. Following a change in group strategy, the parent company Aspocomp Group Oyj decided on 21 February 2002 to stop financing its subsidiary Aspocomp SAS, thereby forcing the latter into voluntary liquidation. That decision prevented the subsidiary from fulfilling its obligations under the company-level agreement and forced it to lay off all of its remaining employees.

(295) In these circumstances, the judgment of the Rouen Court of Appeal confirmed the judgment of the Evreux labour court and ordered Aspocomp Group Oyj, which had 99 % control of its subsidiary, to pay (i) the employees affected by the company-level agreement the entire compensation and additional payments provided for in that agreement, as well as damages for dismissal without due and just cause and (ii) the employees laid off under the voluntary liquidation of Aspocomp equivalent payments given that, by not honouring the commitments made, the parent company had acted unfairly and with a culpable lack of concern.

(296) Although France also referred, in support of its theory, to a judgment of the commercial division of the Court of Cassation ([140]) handed down on 19 April 2005, the Commission does not see any decisive element in that judgment with any bearing on the present dispute. The only relevant observation made by the Court of Cassation is that an appeal court did not set out adequate grounds in law to settle confusion over ownership between a parent company and its subsidiary. At all events, the Commission notes that the facts in *Aspocomp* are not comparable to those in the case under examination. In the present case, CGMF did not fail to honour its commitments to make additional redundancy payments.

(297) It is to be noted that both SNCM and the French authorities seem to attribute importance to the fact that a social plan […] (*). It is extremely doubtful that […] (*) can be considered mismanagement such as to incur the liability of the State towards the employees […] (*). Even in the unlikely event that […] (*) the State was liable towards the employees and had entitled them to compensation payable by the State ([141]), the granting of such an entitlement would itself constitute an advantage accorded to SNCM, and hence State aid, for reasons similar to those set out below concerning aid to individuals totalling EUR 38,5 million, as this measure was capable of improving somewhat industrial relations in the undertaking.

(vi) Conclusion on taking account of action to make good the asset shortfall

(298) It has not been established to the requisite legal standard that the French authorities would, with a sufficient degree of probability, have been ordered by a national court to pay damages to make good the asset shortfall, and still less that the monies to be paid would have exceeded the negative price at which SNCM was 'sold'.

([139]) See, inter alia, two judgments of the Rouen Court of Appeal of 22 March 2005 – judgment No RG 04/02549 *Aspocomp Group Oyj* and judgment No RG 01/02667 -04/02675.

([140]) Cass. com., 19 April 2005, Métaleurop.

([141]) Or that it had undertaken, in this instance, to provide compensation in the event of future job losses.

(299) Account should also be taken of the fact that the State's actions, assuming that it was indeed guilty of mismanagement, were intended to protect national industries and services, including SNCM and its employees, notably by avoiding imposing a situation on them which could have provoked social unrest. In reality, even if public bodies, including the State, can be considered in certain circumstances to be de facto managers of an undertaking, there is nothing to indicate that the measure to make good the shortfall can be used to gain insight into the State's policy decisions, particularly in such circumstances. This is a far cry from the circumstances of the *Aspocomp* case, which was in no way concerned with such matters.

(300) The Commission considers in any event that the French authorities cannot now avail themselves of political choices made in the past to justify public intervention intended to remedy the effects of those earlier choices. On the contrary, both cases of intervention, i.e. the interference of the past and the more recent public intervention, should be regarded as cumulative distortions of competition. Accepting the State's liability for making good the asset shortfall would be tantamount to allowing the State to admit to mismanagement of the undertaking so as to be able to make a financial contribution without its being classed as state aid, thereby engendering a fresh distortion of competition. The State would effectively be 'using' its own mismanagement as justification for granting an additional financial contribution in contradiction with the general principle of 'nemo auditur propriam turpitudinem allegans' ([142]).

(301) It would also be totally contrived to portray the State simultaneously as saint and sinner, i.e. as a 'bad manager' (assuming this were proven to be the case) stepping in to bail out the undertaking which it has mismanaged. Management errors do not constitute normal behaviour on the part of the prudent private investor in a market economy. Accordingly, bail-out mechanisms to set right such errors are not normal behaviour either.

(302) Accepting the theory advanced by the French authorities and by SNCM would pave the way for the State to award guarantees to undertakings by knowingly 'making management errors'. This is hardly acceptable in terms of aid discipline.

(303) In this case, the conduct that would incur the liability of the State according to the theory expounded by SNCM and the French authorities would in fact only apply to the State's actions as a public authority, not as a shareholder. Given that a prudent private investor would not have taken decisions based on these political and public considerations, the risk of having to make good an asset shortfall resulting from such decisions does not come into play for a 'prudent private investor in a market economy' test ([143]).

(304) The French authorities point out that in its *ABX* decision of 7 December 2005 the Commission was willing to take account of the fact that 'in certain exceptional cases, some national legislation provides for the possibility of third parties to bring proceedings against the shareholders of a liquidated company, in particular if these shareholders may be considered [deleted in the text] and/or as being guilty of mismanagement.' ([144]).

(305) However, the Commission underlines that the concept of aid must be assessed objectively and notes that the decision to open proceedings in the same case stipulated that 'even in the unlikely event that all of these conditions required by national law to hold them accountable … were fulfilled, this would still not rule out the presence of state aid in the measures for the benefit of the subsidiary.' ([145]).

(306) In the present case, the Commission considers that the French authorities have not adequately dispelled its doubts surrounding the assertion that SNCM's shareholder was at risk, with a sufficient degree of certainty, of being held to account.

(307) In these circumstances, and having refused to take into account the additional redundancy payments (see recitals 225 et seq.), the Commission concludes that liquidating SNCM would have cost the State nothing. The Commission considers that the State, as shareholder, cannot be obliged to bear the costs of the liquidation because shareholders' exposure is linked to their capital contribution to the undertaking.

([142]) Decision 98/204/EC, point 3.3.
([143]) See, for example, the judgment of the Court of Justice in Case C-334/99 *Germany* v *Commission* ('*Gröditzer*') [2003] ECR I-1139, paragraphs 133-141 and the judgment of the General Court in Joined Cases T-268/08 and T-281/08 *Land Burgenland et al* v *Commission*, not yet reported, paragraphs 152-159.
([144]) Recital 208 of the decision.
([145]) OJ C 142, 11.6.2005, p. 2, paragraph 63.

6.1.2.2. *Conclusion*

(308) The Commission considers that a private investor would have favoured the less costly solution, i.e. the liquidation of SNCM. It concludes, therefore, that the negative price of EUR 158 million constitutes State aid.

6.1.3. **EUR 8,75 million capital contribution by CGMF**

(309) In their observations following the decision to open the procedure, the French authorities note that the recapitalisation by the State to the tune of EUR 8,75 million occurred concurrently with capital injections by private investors and that the State took a minority stake while the majority of the funds were provided by the market. Furthermore, they consider that the rate of return on the State's contribution, i.e. […] (*) % per annum, constitutes adequate long-term profitability for capital invested by a private investor. In their note of 16 May 2013, they also state that the risks connected with the cancellation clause are offset by the repurchase option available to the private shareholders.

(310) The State's contribution must now be compared with that of the private investors, i.e. EUR 26,25 million. The State's contribution amounts to EUR 158 million (see section 6.1.2) plus an additional EUR 38,5 million in individual aid and EUR 15,81 million paid under the 2002 plan (see sections 6.1.4 and 6.1.5).

(311) All of the 2006 measures are set out in the memorandum of understanding in which each of the parties (CGMF, BCP and VT) agreed to the EUR 158 million capital contribution, the EUR 38,5 million current account advance and the EUR 8,75 million capital increase. These three measures constitute a single operation aimed at privatising SNCM. As the General Court itself observes in paragraph 125 of the judgment of 11 September 2012, 'That capital contribution [of EUR 8,75 million] takes place in the context of a global sale agreement, resulting from a single set of negotiations, in which the purchasers' capital constitutes the counterpart to significant commitments, in various forms, made by the French State'. The three measures in question are therefore to be considered a package and this capital injection into SNCM by the State must be compared with the contribution by private investors for the purposes of assessing the significance of the intervention.

(312) In the light of the foregoing, the Commission concludes that the private shareholder contribution, i.e. 10,6 % of the total, cannot be considered significant.

(313) As already established in recital 311, the three measures in question constitute a single privatisation operation. The Commission therefore considers that the public and private capital contributions are to be deemed concurrent.

(314) Regarding the criterion of contributions made under comparable conditions, the Commission notes, firstly, that the interested parties CCF and STIM have called into question the significant nature of the private intervention, and in particular the existence of comparable conditions between the public investment and the private investors, given the presence of a cancellation clause.

(315) The Commission considers that the circumstances of this capital increase alone demonstrate that the risks run by the private and public investors are not identical. The existence of the cancellation clause and the conditions attached thereto suffice to show that the respective outcome for the private investors and the public investor in terms of risk is not the same should the conditions set out in the clause be fulfilled. In accordance with the memorandum of understanding, private investors have the option of withdrawing and recovering their investment in the event of a negative decision by the Commission, the General Court or the Court of Justice, or of non-renewal of the public service delegation. This latter part of the cancellation clause is all the more penalising for the State as it concerns SNCM's core activity. SNCM is the incumbent operator linking Corsica to the French mainland. Broadly speaking, two thirds of its activities are carried on between Marseille and Corsica under the public service delegation. Private investors are therefore protected by the cancellation clause against the commercial risk in respect of the majority of SNCM's activities. This risk is actually borne by the State alone.

(316) Invoking the aforementioned cancellation clause would generate an obligation to reimburse all of the capital contributions of the buyers by SNCM for the benefit of these private investors. This would leave CGMF once more holding 100 % of SNCM's capital, at a time when the risk of liquidation and hence of the loss of a significant portion of the public investment will have increased substantially.

(317) As for the promise to purchase by the private shareholders, this cannot be invoked by CGMF in the event of the receivership or liquidation of SNCM. This confirms that, in the event of difficulties, this option cannot be invoked, and the risks are borne essentially by CGMF and hence the State. The Commission considers, therefore, that this promise to purchase cannot be regarded as the counterpart to the cancellation clause.

(318) Furthermore, the Commission cannot accept the French authorities' argument that the memorandum of understanding contained a series of guarantees intended to protect the State's investment. The obligations imposed on the buyers do not constitute additional risks or constraints placed on the buyers that would leave them in a situation comparable to that of CGMF. They are solely intended to ensure that, during the period in which the cancellation clause may be invoked by the private buyers, the latter do not make any legal modification to SNCM and carry out only those actions which are necessary in order to implement the business plan and the social pact.

(319) Furthermore, as underlined by the General Court in its judgment of 11 September 2012, an analysis of the expected return is not in itself enough to enable the conclusion to be drawn that the investment was made by the State on market conditions, given the fact that the risks are not shared equitably between the public and the private shareholders.

(320) Even if the condition of 'investments made on equal terms' ('pari passu') is not fulfilled, the measure can still be compliant with the principle of the private investor in a market economy. In such cases, it has to be shown that the State acted in the same way as a prudent private investor in a similar situation, for example by carrying out *ex ante* analyses of the profitability of the investment. However the French authorities have not provided proof of any such *ex ante* analysis. They only considered in their observations *ex post* that the fixed rate of return of […] (*) % would be adequate for a private investor, by comparing it with the rates of return on an OAT (*Obligation Assimilable du Trésor*) issued by the State, and on which the return at the time was between 3,72 % and 3,95 %. They did not, however, provide any analyses to show that the rate of 10 % would have been acceptable for a private investor, given the risks borne by the State, e.g. the risks relating to the termination clause and those linked to the situation of the undertaking.

(321) Above all, the rate of […] (*) % applies only to the capital contribution of EUR 8,75 million, but any analysis should have taken into account the total state contribution accepted in the memorandum. Given that there is no return associated with the negative sale price of EUR 158 million or with the current account advance of EUR 38,5 million, the rate of return on the State's entire investment in SNCM at the time of privatisation in 2006 would have been significantly lower than the rate of return on an OAT. Given the risks involved, this rate would not have been accepted by a private investor in a market economy.

(322) In the light of the foregoing, the Commission considers that the criteria laid down by case-law to exclude outright the aid nature of the measure in question are not fulfilled. The Commission considers, therefore, that the State's capital contribution of EUR 8,75 million confers an economic advantage on SNCM inasmuch as that contribution was made in parallel with a contribution of private capital under conditions which are not comparable within the meaning of Union case law. Consequently, the measure in question constitutes State aid within the meaning of Article 107(1) TFEU.

6.1.4. **Measures involving aid to individuals (EUR 38,5 million)**

(323) The French authorities consider that this funding constitutes aid to individuals which does not benefit the undertaking and therefore is not State aid. The interested parties CCF and STIM contested the categorisation of this measure as aid to individuals because they consider that the measure could generate indirect positive effects for SNCM.

(324) The Commission considers that the fact that the direct beneficiaries of the aid to individuals are employees is not sufficient to demonstrate the absence of aid for the benefit of their employer. The General Court held that: 'the fact that the direct beneficiaries of the aid to individuals are employees is not sufficient to demonstrate that no aid had been provided to their employer.' ([146]).

([146]) Paragraph 137 of the judgment of 11 September 2012.

(325) As also indicated by the General Court in paragraph 138 of the judgment of 11 September 2012, 'In order to examine whether that aid to individuals constitutes aid within the meaning of Article 87(1) EC, it is therefore necessary to determine whether SNCM obtains an indirect economic advantage which enables it to avoid having to bear costs which would normally have had to be met out of its own financial resources and therefore prevents market forces from having their normal effect.'

(326) Furthermore, the Commission notes that, according to the memorandum of understanding, this measure is a commitment by the State towards the private partners to finance 'the proportion of the cost of possible voluntary departures or breach of employment contracts (whatever their nature) which is in addition to sums of all kinds which must be paid by the employer …' As the General Court states in paragraph 145 of the judgment of 11 September 2012, the inclusion of this aid to individuals in the sale agreement tends to show that it creates an advantage. The parties had recourse to it because they could derive a certain advantage from it.

(327) This aid is therefore liable to confer an economic advantage on SNCM by releasing it from the obligation to bear all the costs connected with the potential future departure of certain employees. If an undertaking is relieved of these costs by the State, it effectively receives an advantage. The Commission stresses that these supplementary social measures are intended to facilitate the implementation of the redundancy plans necessary to attain the objectives of the undertaking, and that they are not a statutory requirement. In this case, the frequency of industrial action within SNCM shows that the implementation of a social plan in the undertaking as much as guarantees the outbreak of strikes and other industrial action. There is absolutely no doubt that these additional social measures constitute an advantage for SNCM.

(328) The Commission considers, therefore, that this measure constitutes aid within the meaning of Article 107(1) TFEU.

6.1.5. **The balance of EUR 15,81 million awarded as restructuring aid in 2002**

(329) The 2006 measures increase substantially the EUR 69,29 million in restructuring aid examined under the 2002 plan and can be regarded as a modification to the restructuring plan and its cost. When privatisation was envisaged, the restructuring plan was still under way. However, the intended aim of restoring viability had not been achieved by SNCM. The General Court highlighted that '[i]n that regard, it must be noted that the 2006 Decision is explicit on the fact that, as there are elements of aid for restructuring in the 2006 Plan, those elements ought to be analysed in conjunction with the aid for restructuring in the 2002 Plan …' ([147]). The General Court underlines that this analysis was carried out 'on a sound basis'. The sum of EUR 69,29 million comprises the EUR 66 million granted in 2002 as the first instalment of the restructuring plan and the EUR 3,29 million in aid granted in 2005 as the second instalment.

(330) Of this amount of aid granted under the 2002 restructuring plan, EUR 53,4 million concerns in reality the public service delegation. Since the General Court judgment of 11 September 2012 confirmed the legality of this aid, the Commission must examine jointly the compatibility of the restructuring aid proper, i.e. the EUR 15,81 million granted during the 2002 restructuring operation, and the compatibility of all of the 2006 measures in the light of the 2004 guidelines.

6.2. EXAMINATION OF THE COMPATIBILITY OF THE RESTRUCTURING AID PAID IN 2002 AND 2006

6.2.1. **Guidelines to consider**

(331) The Commission notes that the 2002 restructuring plan was examined under the 1999 guidelines. It also notes that the new 2006 measures integrating the 2002 plan post-date the entry into force of the new 2004 guidelines and were implemented before the Commission had authorised them.

(332) In accordance with the transitional rules provided for by the 2004 guidelines ([148]), it is these guidelines which apply to the aid, inasmuch as it is illegal aid part of which was awarded after they entered into force.

(333) Consequently, since the 2006 measures constitute aid, they are to be regarded as an integral part of the restructuring operations launched in 2002 and should be analysed alongside these. The compatibility of all of this aid will, therefore, be analysed under the 2004 guidelines.

([147]) Paragraph 150 of the judgment of 11 September 2012.
([148]) Paragraphs 102 to 104 of the 2004 guidelines.

6.2.2. '**A firm in difficulty**'

(334) In order to be eligible for restructuring aid, the firm must qualify as a firm in difficulty within the meaning of the guidelines.

(335) In the present case, the Commission points out that fulfilment of this condition was ascertained in its decision of 17 July 2002 on rescue aid for SNCM ([149]) and in its decision of 19 August 2002 initiating the formal investigation procedure in respect of the recapitalisation plan on the basis of SNCM's annual accounts for 2001.

(336) For the purposes of this decision, the Commission verified that SNCM satisfied the said condition by examining the company's annual accounts for 2002. The company's capital (excluding regulated provisions) ([150]) was still negative: EUR – 26,5 million in 2002 compared with EUR – 30,7 million in 2001. That level reflects the disappearance of more than half of the company's registered capital, more than a quarter of which disappeared during the 12 months following the notification, thus satisfying the condition set out in point 10(a) of the Guidelines.

(337) As well as that trend in the share capital, the Commission notes, inter alia, that:

— between 2001 and 2002, pre-tax losses increased from EUR – 5,1 million in 2001 to EUR – 5,8 million in 2002, with net losses in 2002 reduced only through the sale of a number of vessels,

— SNCM's cash flow dropped from EUR 39,2 million at the end of 2001 to EUR 35,7 million at the end of 2002,

— net financial debt, excluding leasing, increased from EUR 135,8 million in 2000 to EUR 144,8 million in 2002,

— financial charges (interest and similar charges) increased from EUR 7 million in 2000 to EUR 9,503 million in 2002.

(338) Moreover, the French authorities confirmed to the Commission that the banks were now refusing to lend money to the company because of its indebtedness, even though SNCM had offered to put up its newest vessels, free from mortgages and other encumbrances, as security.

(339) The public service delegation agreement did nothing to change that analysis. While the agreement, in conjunction with the success of the restructuring plan, undoubtedly enabled SNCM to achieve positive operating results, the fact remains that its acute lack of capital, its growing indebtedness and the cost of operational measures under the restructuring plan can be expected — within a certain time-frame — to cause the company to fold.

(340) Since the restructuring period spanned the years 2002-2006, it must be verified whether SNCM fulfilled the said condition during that period and in particular at the time when the decision was taken to inject fresh public funds.

(341) The 2003 decision observed that SNCM fulfilled this criterion during the 2001 and 2002 financial years ([151]).

(342) It must now be verified whether SNCM continued to meet the condition in the 2003-05 financial years, i.e. the last complete accounting years prior to the implementation of the new measures in 2006 relating to the privatisation of SNCM.

([149]) See footnote 5.
([150]) Regulated provisions are costs entered in the accounts in accordance with French tax rules.
([151]) Paragraphs 209 to 297.

(343) As already indicated in recitals 73 et seq., SNCM's situation deteriorated significantly in 2004 and 2005. The company's profits before tax stood at EUR – 32,6 million in 2004 and EUR – 25,8 million in 2005. Net profit was EUR – 29,7 million in 2004 and EUR – 28,8 million in 2005. Shareholders' equity in 2005 (EUR – 1,7 million) dropped by 25,5 million compared with 2004. This drop saw more than half of the firm's share capital wiped out, with more than a quarter of that capital lost over the preceding 12 months, thereby meeting the criteria set out in point 10(a) of the 2004 guidelines.

(344) In the light of the foregoing, the Commission considers that SNCM can be considered a firm in difficulty within the meaning of the 2004 guidelines.

6.2.2.1. *Own contribution*

(345) Pursuant to point 43 of the guidelines, 'The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Such assessment will take account of any rescue aid granted beforehand. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.'

(346) Point 44 of the guidelines stipulates that 'The Commission will normally consider the following contributions to the restructuring to be appropriate: at least 25 % in the case of small enterprises, at least 40 %, for medium-sized enterprises and at least 50 % for large firms. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a lower contribution.'

(347) Point 7 of the guidelines also specifies that 'it is appropriate to reaffirm with greater clarity the principle that [the substantial contribution from the beneficiary to the restructuring] must be real and free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition …'

(348) The case-law also emphasises that the own contribution must indicate that the markets believe in the feasibility of a return to viability ([152]). The Commission stresses that this requirement is particularly relevant in respect of SNCM because of the latter's situation since 2002. The Commission points out that the initial restructuring measures of 2002 did not achieve the desired results. Some of them were either not complied with or not attained (see recital 351). Since SNCM was not able to fully implement these initial restructuring measures, from 2004 its economic and financial situation continued to deteriorate (see recitals 73 to 75).

(349) The restructuring costs amounted to EUR 46 million in 2002. As for the 2006 measures, the Commission considers that the amount of the restructuring costs corresponded to the amount of the aid ([153]), i.e. EUR 202,5 million, plus the EUR 26,25 million capital contribution from the private partners, giving a grand total of EUR 274,8 million. The own contribution is made up of 42,385 million in net asset sales and the EUR 26,25 million capital increase by the private partners, giving a total own contribution of EUR 68,635 million. Consequently, taking into account the new measures of 2006, the own contribution accounted for 25 % while the guidelines stipulate that it must be at least 50 %. The Commission notes that the French authorities did not invoke exceptional circumstances and cases of particular hardship, in which case the Commission is at liberty to accept a lower contribution. In any event, the Commission considers that there were no exceptional circumstances in this particular case which would warrant a decrease in the level of own contribution required by the 2004 guidelines.

(350) The Commission considers, therefore, that SNCM's own contribution to the restructuring effort is still insufficient with regard to the provisions of the guidelines.

([152]) See the judgment of the General Court of 7 December 2010 in Case T-11/07 *Frucona Košica* v *Commission*, not yet reported, paragraphs 244 and 245.

([153]) The 2006 measures dealt with the privatisation of SNCM.

6.2.2.2. *Return to long-term viability*

(351) In its decision to open the procedure, the Commission expressed doubts about the long-term viability of SNCM, in particular in the light of the following:

— SNCM did not plan to discontinue all of its loss-making activities,

— the success of the restructuring plan was closely linked to the award of the public service delegation between Marseille and Corsica from 1 January 2007 to 31 December 2012,

— the forecast reductions in crew numbers set out in the 2002 plan were not adhered to and the 10 % increase in productivity was not achieved,

— the reduction of 400 full-time equivalent jobs and the productivity measures provided for in the 2006 plan were inadequate owing to the slippages from the 2002 plan.

(352) The French authorities replied that the change in shareholders and the implementation of the three measures set out in the privatisation plan would enable SNCM to develop its activity on a sound basis and that the loss-making nature of certain parts of its business were therefore not irremediable.

(353) The Commission notes that the measures provided for in the 2002 restructuring plan could not be brought to fruition and that this led to a marked deterioration in the company's results in 2004 and 2005. In 2006, the EUR 20 million increase in turnover and the EUR 9 million increase in public service compensation were not enough to restore operating profit because the increase in fuel prices and operating costs was far higher than expected. The Commission expert noted that the implementation of the business plan of the buyers was seriously impeded by a number of incidents [154] and concluded that the cumulated losses were likely to be far bigger than initially envisaged for 2007.

(354) Consequently, the Commission considers that the responses of the French authorities have not dispelled all its doubts. Linking the restoration of viability to the award of the public service delegation from 2007 to 2013 and to the implementation of the three measures set out in the privatisation plan, which had not been confirmed as legal and compatible with the internal market, seems risky. The credibility of a long-term plan to restore the viability of an undertaking presupposes, at the very least, that the underlying assumptions are realistic. In this case, however, the success of the plan depends almost exclusively on the occurrence of two hypothetical events over which SNCM has no control. Furthermore, given SNCM's financial situation at the time, the Commission has doubts concerning its ability to finance the necessary refurbishment of some of its ferries. This refurbishment is, however, presented by the French authorities as a factor in enabling them to achieve their objectives of restored viability.

(355) The Commission considers, therefore, that the condition of restoring long-term viability required by the guidelines is not fulfilled.

6.2.2.3. *Avoidance of undue distortion of competition (compensatory measures)*

(356) The annulled decision of 2008 mentioned four compensatory measures:

— the closure of the Corsica Marittima subsidiary (82 000 passengers in 2000) which was responsible for services between Italy and Corsica, and thus the withdrawal of the SNCM group from the market covering that route,

— the virtual withdrawal by SNCM of services between Toulon and Corsica — a market which accounted for as many as 460 000 passengers in 2002,

([154]) See Stephens report, study on the restructuring of the SNCM shipping company, p. 85, paragraph 3: implementation of the public service delegation in July 2007 instead of January; numerous disputes with CFF.

— the limitation of the total number of available seats and the number of round trips operated by SNCM each year from 2003, specifically on services between Nice and Corsica,

— the sale of four vessels.

(357) The Commission would like to point out that these measures had been proposed by the French authorities in connection with the EUR 15,81 million in aid, i.e. the restructuring aid granted in 2002.

(358) Following the annulment of the 2008 decision by the judgment of 11 September 2012, the aid total now amounts to over EUR 210 million. The Commission considers that its doubts have not been allayed for the following reasons:

(359) Concerning the sale of the four vessels as part of the restructuring measures in 2002, the Commission notes that these sales were partially offset by the delivery of the *Danielle Casanova* in June 2002, and the *Paglia Orba* and *Pascal Paoli* mixed freight and passenger vessels in 2003.

(360) Concerning the closure of Corsica Marittima, point 40 of the guidelines states, inter alia, that 'Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measures'. Consequently, the closure of Corsica Marittima, which had been making a loss since its inception in 1990, cannot be treated as a compensatory measure, but rather as a measure to help restore long-term viability.

(361) The same reasoning applies in respect of the route between Corsica and Nice. The Commission notes that SNCM has a minority market share, with Corsica Ferries holding 70 % of the market ([155]). According to the Stephens report, there is high demand for the service departing Nice, particularly during the summer period. There is also demand for this service outside the summer season. However, the route was making net losses between 2004 and 2007. Consequently, this measure cannot be regarded as a compensatory measure, but rather as a measure to help restore long-term viability.

(362) The Commission also notes that passenger traffic has increased considerably between Corsica and the port of Toulon, shooting up from less than 200 000 passengers per annum in 1999 to almost 1 million in 2007 ([156]). Consequently, SNCM's virtual withdrawal from this route could be regarded as a compensatory measure. The Commission notes, however, that the Toulon-Corsica route is the least significant for SNCM in terms of passenger numbers.

(363) None the less, even if this measure were to be classified as a compensatory measure, the Commission considers that it would be far from sufficient. Point 40 of the guidelines states that '[t]he measures must be in proportion to the distortive effects of the aid …' As already set out in recitals 341 and 342, the Commission notes that these measures had been proposed by the French authorities in connection with the amount of EUR 15,81 million in aid, an amount corresponding to the restructuring aid granted in 2002. With the total amount of aid now standing at some EUR 218 million, the Commission is of the opinion that the measures proposed are insufficient compared with the distortion of competition caused by the granting of this aid.

(364) Consequently, the Commission concludes that its doubts concerning the classification of these measures, either as compensatory measures or as measures required to restore viability, have not been allayed. In any event, the measures proposed are still far from sufficient.

(365) The French authorities have highlighted the risk of a monopoly for CFF if SNCM were to disappear. The Commission considers that the French authorities have not demonstrated sufficiently the existence and significance of this risk. The transport of passengers and freight between mainland France and Corsica is an open and competitive market for all operators present in the Mediterranean. This market is also characterised by the absence of entry barriers. In any event, the position of Corsica Ferries is not such as to justify competition being distorted by the contested measures.

([155]) See Stephens report, study on the restructuring of the SNCM shipping company, p. 96.

([156]) See French Competition Authority (Autorité de la Concurrence), Opinion No 12-A-05 of 17 February 2012, paragraphs 124 and 125.

(366) In the light of the foregoing, the Commission concludes that the measures proposed do not fulfil the criteria set out in points 38 to 42 of the guidelines.

VII. **CONCLUSION**

7.1. INCOMPATIBILITY AND RECOVERY OF THE CAPITAL CONTRIBUTION NOTIFIED BY THE FRENCH AUTHORITIES IN 2002 AND OF THE THREE NEW MEASURES IMPLEMENTED BY THE FRENCH AUTHORITIES IN 2006

(367) The capital contribution of EUR 15,81 million notified by the French authorities in 2002 and the three new measures implemented by the French authorities in 2006, i.e. the sale of 75 % of SNCM at the negative price of EUR 158 million, the capital increase of EUR 8,75 million subscribed by CGMF and the cash advance of EUR 38,5 million in favour of SNCM's employees, constitute aid within the meaning of Article 107(1) TFEU. This aid is incompatible with the internal market.

(368) The Commission points out that, in accordance with Article 14(1) of Regulation (EC) No 659/1999, all unlawful aid that is incompatible with the internal market must be recovered from the beneficiary.

(369) For the purposes of such recovery, the French authorities must also add to the aid amount the recovery interest payable from the date on which the aid concerned was made available to the company until it has been effectively recovered ([157]), in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([158]).

7.2. INCOMPATIBILITY AND RECOVERY OF THE RESCUE AID

(370) If the measures notified as restructuring aid do not satisfy the compatibility conditions provided for by the guidelines, the consequences of this incompatibility should be drawn in respect of the rescue aid awarded by the French authorities to SNCM forming the subject matter of the Commission Decision of 17 July 2002, and recovery instigated.

(371) On 19 November 2002, the French authorities transmitted to the Commission a copy of the cash advance agreements between SNCM and CGMF and proof of repayment of CGMF's advance to SNCM through two bank transfers of 13 May and 14 June 2002,

HAS ADOPTED THIS DECISION:

Article 1

The capital contribution of EUR 15,81 million and the three new measures implemented by the French authorities in 2006, i.e. the sale of 75 % of SNCM at the negative price of EUR 158 million, the capital increase of EUR 8,75 million subscribed by CGMF and the cash advance of EUR 38,5 million in favour of SNCM's employees, implemented by France for the benefit of SNCM in breach of Article 108(3) TFEU, constitute State aid which is unlawful and incompatible with the internal market.

Article 2

1. France shall recover the aid referred to in Article 1 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiary until that of their recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ([159]) amending Regulation (EC) No 794/2004.

([157]) See Article 14(2) of Regulation (EC) No 659/99.
([158]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).
([159]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 3

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

2. France shall ensure that this Decision is implemented within 4 months following the date of its notification.

Article 4

1. Within 2 months of notification of this Decision, France shall communicate the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) the documents proving that the beneficiary has been ordered to repay the aid.

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

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 20 November 2013.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

INFORMATION ABOUT THE AMOUNTS OF AID RECEIVED, TO BE RECOVERED AND ALREADY RECOVERED

Identity of the beneficiary	Total amount of aid received under the scheme (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) Million of national currency.

COMMISSION DECISION

of 11 February 2014

on the measure SA.35388 (13/C) (ex 13/NN and ex 12/N) — Poland — Setting up the Gdynia-Kosakowo Airport

(notified under document C(2014) 759)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2014/883/EU)

THE EUROPEAN COMMISSION,

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

Having 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 provision(s) cited above [1],

Whereas:

1. PROCEDURE

(1) By letter dated 7 September 2012 Poland notified to the Commission, for reasons of legal certainty, the planned financing of the conversion of a military airport into a civil aviation airport near Gdynia in the north of Poland. The measure was registered under the State aid case number SA.35388.

(2) By letters dated 7 November 2012 and 6 February 2013, the Commission requested further information on the notified measure. On 7 December 2012 and 15 March 2013, Poland submitted additional information. A meeting between the Commission and Poland took place on 17 April 2013. During this meeting, Poland confirmed that the notified financing was already irrevocably granted.

(3) By letter dated 15 May 2013, the Commission informed Poland that it will transfer the case in a not notified case register (NN case), because the major part of the financing notified to the Commission was already irrevocable granted. By letter dated 16 May 2013, Poland submitted further information.

(4) By letter dated 10 July 2013, the Commission informed Poland of its decision to initiate the procedure provided for in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) [2] (hereinafter: 'opening decision') in respect to the financing granted to Port Lotniczy Gdynia-Kosakowo sp. z o. o. (hereinafter: Gdynia-Kosakowo Airport Ltd) by the city of Gdynia (hereinafter: 'Gdynia') and the municipality of Kosakowo (hereinafter: 'Kosakowo'). Poland provided its comments on the opening decision on 6 August 2013.

(5) The Commission's 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 measure in question within one month of the publication date.

(6) The Commission did not receive any comments from interested parties. Poland was informed about this by letter dated 9 October 2013.

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[1] OJ C 243, 23.8.2013, p. 25.

[2] With effect from 1 December 2009, Articles 87, and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of Articles 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 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

[3] See footnote 1.

(7) By letter dated 30 October 2013, the Commission requested further information. Poland provided additional information by letters dated 4 November 2013 and 15 November 2013. A meeting between the Commission and Poland took place on 26 November 2013. Poland provided further information by letters of 3 December 2013 and 2 January 2014.

2. DESCRIPTION OF THE MEASURES AND GROUNDS FOR INITIATING THE PROCEDURE

2.1. BACKGROUND TO THE INVESTIGATION

(8) The case concerns the financing of a new civil aviation airport located in the Pomeranian Region (Pomorskie Voivodship), on the border of Gdynia and Kosakowo, 25 kilometres away from Gdansk airport [4]. The new airport is owned and will be operated by Gdynia-Kosakowo Airport Ltd (hereinafter also 'the airport manager' or 'Gdynia airport'). The airport manager is fully publicly owned by Gdynia and Kosakowo.

(9) The objective of the investment project is to create a second airport for the Pomeranian Region based on the infrastructure of the military airport located in Kosakowo [5]. The new airport should serve mainly general aviation traffic (e. g. private jets, gliders/light-sport aircrafts), low cost carriers (hereinafter: 'LCC') and charters. At the time of notification it was expected that the airport would start its activities at the beginning of 2014. Based on a PricewaterhouseCoopers' (hereinafter: 'PWC') report of 2012, the passenger traffic during the first years of operations was expected to be as follows: around […] in 2014, […] in 2017, […] in 2020 and at around […] in 2028.

(10) The origin of the project can be dated back to April 2005 when various regional authorities, the Ministry of National Defence, the Ministry of Transport and Gdansk airport [6] signed a letter of intent to create a new airport for the Pomeranian Region based on the infrastructure of the existing military airport located in Kosakowo. In July 2007, the local authorities of Gdynia and Kosakowo founded a company called 'Gdynia-Kosakowo Airport Ltd'. In December 2009, Gdynia and Kosakowo obtained an agreement from the Ministry of Transport that Gdynia-Kosakowo Airport Ltd would be further responsible for the new airport. Based on this agreement, Poland handed over, by the agreement of 9 September 2010, for a period of 30 years the land of 254 hectare, on which the military airport is located, to Kosakowo, which then leased it for the same period to Gdynia-Kosakowo Airport Ltd.

The investment project

(11) Because the existing Gdynia-Kosakowo (Gdynia-Oksywie) airfield was initially used exclusively for military purposes, the airport manager of the new airport is to be able to use the existing infrastructure (such as a runway of 2 500 meters, taxiways, an apron, navigation equipment etc.). The total investment costs, which are linked to the conversion project, are estimated at PLN 164,9 million (EUR 41,2 million [7]) in nominal terms and PLN 148,4 (EUR 37,1 million) in real terms. The table below provides an overview of the gradual development of the airport, which is divided into four phases. According to Poland, the total investment costs include also

(4) The distance by car between Gdynia and Gdansk airport is between 26-29 kilometres depending on the chosen route, source: Google maps, Bing maps. The Gdansk airport is owned and operated by the Gdansk Lech Walesa Airport Ltd, a company set up by public entities. The funding capital of the company is broken down as follows: city of Gdansk (32 %), Pomeranian Region (32 %), 'Polish airports' State Enterprise (31 %), city of Sopot (3 %), and city of Gdynia (2 %). Gdansk Lech Walesa airport (hereinafter: 'Gdansk airport') is the third largest airport in Poland. In 2012, it served 2,9 million passengers (2,7 million in regular traffic and 0,2 million in charters),
The following eight airlines operate regular routes from Gdansk airport (January 2014): Wizzair (22 destinations), Ryanair (7 destinations), Eurolot (4 destinations), Lot (2 destinations), Lufthansa (2 destinations), SAS (2 destinations), Air Berlin (1 destination), Norwegian (1 destination). After the opening of a new terminal in May 2012 Gdansk airport has an annual capacity of 5 million passengers. According to the information provided by Poland, the enlargement of the terminal (scheduled in 2013-2015) will result in an increase of the capacity to 7 million passengers. The investments at Gdansk airport were also financed though State aid (see the 2008 Commission decision in State aid case N 153/08; EUR 1,7 million; OJ C 46, 25.2.2009, p. 7 and the 2009 Commission decision in State aid case N 472/08, as the result around EUR 33 million granted to Gdansk Airport by the Polish authorities; OJ C 79, 2.4.2009, p. 2).

(5) The existing military airport is located on the border of the city of Gdynia and the municipality (gmina) of Kosakowo and is called the 'Gdynia-Oksywie' airfield.

(6) The agreement was signed by the authorities of the Pomeranian Region, the cities of Gdansk, Gdynia and Sopot, the municipality of Kosakowo together with representatives of the Polish government (the voivod of Pomerania Region, Ministry of National Defence, Ministry of Transport) and Gdansk airport.

(7) The exchange rate used in this decision is 1 EUR equals 4 PLN corresponding to the 2010 annual average based on weekly exchange rates. Source: Eurostat.

investments with regard to tasks falling within public policy remit [8], which amount to around PLN […] million (EUR […] million) in total (for all four phases).

Table 1

Total nominal investment costs of Gdynia-Kosakowo airport in 2007–2030

The investment project		
	Costs in PLN	Costs in EUR
Phase I: 2007 - 2011	[…]	[…]
Preparatory works (e. g. cleaning of the side, removal of old buildings and trees) and feasibility studies, planning		
Phase II: 2012 - 2013	[…]	[…]
— Terminal (to be ready in June 2013 and initially used for GA) — Building for the airport administration and the fire brigade — Renovation of the apron, — Energy infrastructure, navigation lights and airport fence — Airport maintenance and security equipment — Adjustment of the navigation equipment — Access roads, petrol station and car park		
Phase III: 2014 - 2019	[…]	[…]
— Investments necessary to serve bigger airplanes (e. g. Boeing 737 or Airbus A320), such as taxiway extension, apron and airport equipment — Other passenger service oriented investments (e. g. car park extension)		
Phase IV: 2020 - 2030	[…]	[…]
— Expansion of the Terminal — Extension of the aiport administration and fire brigade building — Extension of aprons, taxiways and car parks		
Total investment costs	164,90	41,02

Source: information provided by Poland.

The financing of the investment project

(12) The investment project is being financed through capital injections by the public shareholders (i.e. Gdynia and Kosakowo). The capital injections are intended to cover both the investment costs and the operating costs of the airport at the beginning of its operation (i.e. until 2019, including). The public shareholders expect that as from 2020 the airport manager will be profitable and able to finance all its activities from its revenues.

(13) Until the time of notifying the project to the Commission (i.e. 7 September 2012), the public shareholders of Gdynia airport had agreed to contribute to the investment project and the losses of the airport in the first years of its operation, about PLN 207,48 million [9] (around EUR 51,87 million) in total. Gdynia would provide cash contributions amounting to PLN 142,48 million (around EUR 35,62 million) in years 2007-2019. Kosakowo provided a cash contribution of PLN 0,1 million (EUR 25 000) when the company was founded. In years 2011 – 2040 Kosakowo would contribute also with non-cash contributions amounting to PLN 64,9 million (around EUR 16,2 million) by converting a part of the annual land rent (being a liability of Gdynia airport towards Kosakowo) into shares of the airport (see Table 2 below).

[8] According to Poland the investments falling within public policy remit include: building and equipment for fire brigade, customs, airport security guards, police and border guards, airport fence with video surveillance etc.

[9] In nominal terms.

Table 2

Financing of the investment project through capital increases

	PLN Million	EUR Million
Before 18 June 2012		
Cash capital injections of Gdynia	60,73	15,18
Cash capital injection of Kosakowo	0,10	0,03
Dept to equity swap of Kosakowo	3,98	1,00
Total contributions before 18 June 2012	**64,81**	**16,20**
Foreseen after 18 June 2012		
Cash capital injections of Gdynia:	**81,75**	**20,44**
of which:		
in 2013	29,90	7,48
in 2015	[…]	[…]
in 2016	[…]	[…]
in 2017	[…]	[…]
in 2018	[…]	[…]
in 2019	[…]	[…]
Dept to equity swap of Kosakowo:	**60,92**	**15,23**
of which:		
in 2013-2039 (27*PLN […])	[…]	[…]
in 2040	[…]	[…]
Total contributions foreseen after 18 June 2012	**142,67**	**35,67**
Total foreseen capital of Gdynia-Kosakowo Airport Ltd	**207,48**	**51,87**

Source: based on information provided by Poland.

2.2. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE AND THE INITIAL ASSESSMENT

(14) The opening decision, raised the following questions:

— First, whether the public funding of the investment project is in line with the Market Economy Investor Principle (hereinafter: MEIP), in particular with regard to (i) the application of the MEIP in time, the methodology to apply the MEIP and (ii) whether the MEIP analysis carried out by the Polish authorities leading to a positive Net Present Value (hereinafter: 'NPV') [10] is based on realistic and reliable assumptions;

[10] Net Present Value indicates whether the income from a given project exceeds the (opportunity) costs of capital. The project is considered as an economically profitable investment when it generates a positive NPV. Investments producing lower income as the (opportunity) costs of capital are not economically profitable. The (opportunity) costs of capital are reflected in the discount rate.

— Second, whether operating and investment aid to Gdynia airport can be found compatible.

Application of the MEIP

(15) As regards the first question, the Commission expressed doubts as to whether the MEIP study conducted in 2012, i.e. after the irrevocable decision to finance the conversion of the airport was taken by the public shareholders, can be used in order to assess the existence of State aid. Consequently, the Commission had doubts whether the counterfactual scenario, defined as discontinuing the investment as of 2012, was appropriate.

(16) Given the fact that Gdynia airport is to pursue a similar business model (with the focus on LCC, charters and general aviation) as the existing Gdansk airport which still has spare capacity and further expansion plans and which is located only 25 kilometers away, the Commission expressed doubts whether the forecasted revenue of Gdynia airport was based on realistic assumptions, in particular with regard to the level of airport charges and the level of expected passenger traffic. In particular, the Commission noted that the business plan for Gdynia airport foresaw higher passenger charges than applied, after the deduction of discounts/rebates, at Gdansk airport and other comparable regional airports in Poland.

(17) The Commission also expressed doubts whether the business plan took into account all planned incentives (such as marketing support, rebates, or any other route development incentives etc.) envisaged to be granted directly by Gdynia airport or by its shareholders or other regional authorities to attract airlines to establish new routes from the airport.

(18) Since the growth rate of an undertaking is generally not higher than that of the economy in which it operates (i.e. in terms of GDP growth), the Commission expressed doubts whether the growth rate of the turnover used for the calculation of the Terminal Value ([11]), equal to […], is appropriate. This doubt directly affects the assessment of the profitability of the investment project since the equity value of the new airport turns only positive because of the Terminal Value of the project as of 2040 (indeed, the cumulative discounted cash flow is negative over the projection period of 2010-2040).

(19) Consequently, the Commission considered that the public funding of the investment project provides a selective economic advantage to the airport manager of Gdynia airport. The public funding is also granted from state resources and is imputable to the State. Moreover, it distorts or threatens to distort competition and trade between Member States. As all the cumulative criteria for notion of aid were met, the Commission considered that the public funding constituted State aid within the meaning of Article 107(1) of the TFEU.

Compatibility of the aid

(20) As regards the second question, the Commission expressed doubts whether both the investment and the operating aid to Gdynia airport could be found compatible with the internal market.

(21) As to the investment aid, the Commission had doubts whether all of the compatibility criteria for the investment aid to airports, set out in the 2005 Aviation Guidelines ([12]), were satisfied. In particular, the Commission had doubts whether the investment at stake meets a clearly defined objective of common interest, the infrastructure is necessary and proportional and has satisfactory medium-term prospects for use. Moreover, the Commission had doubts whether the impact on the development of trade is not contrary to the common interest.

(22) As to the operating aid in the form of financing operating losses of Gdynia-Kosakowo Airport Ltd during its first years of operation, the Commission expressed doubts whether such aid could qualify for the derogation set out in article 107(3)(a) of the TFEU. In particular, the Commission expressed doubts whether the operating aid at stake could be considered compatible under the Guidelines on national regional aid for 2007-2013 ([13]) (hereinafter: 'RAG').

([11]) The terminal value is the present value of all subsequent cash flows generated under the stable growth rate forever (i. e. the equity value of the airport operator in the last year of the submitted business plan).
([12]) Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).
([13]) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

3. **COMMENTS FROM POLAND**

3.1. APPLICATION OF THE MEIP AND THE EXISTENCE OF AID

(23) Poland maintains its position that the public funding of the investments into Gdynia airport is in line with the MEIP, and thus does not constitute State aid. In this connection, Poland refers to the MEIP studies conducted for the investment in years 2010 – 2012. Poland states that all MEIP studies resulted in a positive Net Present Value as well as in an Internal Rate of Return ([14]) (hereinafter: 'IRR') higher than the costs of capital.

3.1.1. **The decision making process and the methodological correctness of MEIP study**

(24) Poland clarifies that discussions and works on the conversion of the military airport in Gdynia/Kosakowo into a civil aviation airport commenced already in 2005, at that point in time together with other partners (such as Gdansk airport). Poland clarifies further that in 2007, Gdynia and Kosakowo established the company, Gdynia-Kosakowo Airport Ltd, which is being responsible for the investment from that point in time.

(25) During the proceedings, Poland submitted three MEIP studies that were undertaken by PWC. The first MEIP study was performed in July 2010 (dated 16 July 2010, hereafter: the '2010 MEIP study'). Two further updates by PWC were undertaken in May 2011 (dated 13 May 2011, hereinafter: '2011 MEIP update' or '2011 MEIP study') and in July 2012 (dated 13 July 2012, hereinafter, the later study will be referred to as the '2012 MEIP update' or '2012 MEIP study'). These updates incorporate new projections for passenger traffic, modifications of the scope of the project, modifications in the investment figures as well as changes in the methodology and the basic inputs into the NPV calculations (such as the beta and the discount rate). In November 2013, Poland further submitted that new sources of revenue would enhance the NPV of the project (i.e. the sale of fuel and providing navigation services). At the time of adopting the opening decision, Poland had only submitted the 2012 MEIP update.

(26) Poland also clarifies the time schedule of the investment project of Gdynia and Kosakowo in Gdynia airport. In this respect Poland stresses that the investment process can be divided into two project stages:

(i) *First stage (2007-2009) related to the preparatory works and feasibility studies to set up the new airport (this relates to Phase I as described in Table 1)*

(27) Poland clarifies that during the first stage, the company established by Gdynia and Kosakowo was realising preparatory tasks (e.g. preparation of a master plan for the investment, documents necessary to obtain the status of an airport operator, a report on the environmental impact of the investment, project documentations, etc.).

(28) Poland is of the opinion that in the first stage there were not important capital investments and the public funding granted to the airport manager was in line with the de minimis aid rules ([15]). Poland states that until 26 June 2009, the total capital injections into the company amounted to PLN 1, 691 million (about EUR 423 000).

(ii) *Second stage (from 2010 onwards) concerned the actual conversion of the airport (this relates to Phase II to IV as described in Table 1)*

(29) Poland clarifies further that the first, preparatory phase was finalised in 2010 when both the Master Plan ([16]) as well as the first 2010 MEIP Study for Gdynia airport were finalised. Poland points out that since the 2010 MEIP study showed that the investment of the two local authorities would be carried out at market terms (i.e. it would not represent State aid), the shareholders increased the company's share capital to PLN 6,05 million (around EUR 1,5 million).

([14]) IRR measures the return/profit that the investor achieves on its invested capital.
([15]) At that time the Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid applied (OJ L 379, 28.12.2006, p. 5).
([16]) The Master plan of the investment project has identified the different measures, which were necessary for the conversion of the airport.

(30) The 2010 MEIP study calculated an NPV of the investment project in question based on the Free Cash Flow to the Firm methodology ('FCFF') ([17]). This NPV calculation is predicated on the fact that all the capital injections foreseen in the investment plan would be undertaken to implement the investment project ([18]). This valuation methodology calculates, during a projection period, the cash flow available to all holders of capital in the firm (stockholders as well as bond holders). The cash flow projections are then discounted by the weighted average cost of capital ('WACC') ([19]) to provide the Discounted Cash Flow (DCF) of the firm during the projection period. Then, a terminal value is calculated using the perpetuity growth method (which assumes a stable growth path based on the FCFF of the last projection period). The NPV is based on the sum of the DCF for the projection period and the terminal value. In this case, the 2010 MEIP study provided cash flow estimates for the period 2010-2040 using a WACC of […] % ([20]). With these inputs, the analysis finds a DCF of minus PLN […] million (EUR […] million) for the period 2010-2040 and a (discounted) terminal value of about PLN […] million (EUR […] million) ([21]). Hence, the NPV of the overall project is estimated at PLN […] million (or EUR […] million).

(31) Figure 1 depicts the expected cumulative discounted cash flow for the projection period of 2010-2040 as calculated in the 2010 MEIP study.

Figure 1

Cumulative (real) DCF (in PLN)

[…]

(32) Poland explains that on 29 July 2010, the equity (own capital) of the company was increased to PLN 6,052 million (around EUR 1,5 million). Poland explains further that at the same time, despite the MEIP study showing that the investment does not constitute State aid, the shareholders started to prepare a notification to the Commission that was to be submitted for reasons of legal certainty only.

(33) Poland clarifies further that in May 2011, a new MEIP study was conducted. Poland informs that this MEIP study was an update of the 2010 MEIP study that was conducted due to progressive preparations and more precise data available on the investment plan, its agenda and financing. Poland clarifies that during the period between the preparation of the 2010 MEIP study and the 2011 MEIP study:

— The shareholders signed, on 11 March 2011, an agreement that set up the financing conditions for the investment, concerning the start-up of a civil aviation airport. In this shareholder agreement Gdynia committed to inject in total PLN 59 million between 2011 and 2013. At the same time, Kosakowo committed to provide non-cash contributions by means of a debt-to-equity swap (as described in Table 2) in years 2011 to 2040.

— Also on 11 March 2011, the land lease contract was concluded by the company responsible for setting up Gdynia airport and Kosakowo (it allowed to precise the scope of property leased, the conditions for payment of the rent, tax issues, etc.)

— The investment costs included in the investment plan were specified and updated.

(34) Poland explains that the 2011 MEIP study resulted also in a positive NPV. Poland explains further that the public shareholders of the airport manager conducted on this basis the subsequent capital injections. Poland points out that in July 2011 the equity (own capital) of the company was increased to PLN 33,801 million (EUR 8,45 million) and in April 2013 to PLN 64,810 million (EUR 16,20 million).

([17]) The FCFF evaluates in each year the EBIT of the firm to which depreciation and amortization are added (as these are non-cash expenses), less investment needs, changes in working capital and taxes (See Table 5 of the 2010 MEIP Study).

([18]) The FCFF calculations are based on the expected cash flows (in and out of the company) for the projection period of 2010-2040. These cash flows are based on a business plan and its underlying assumptions about traffic, charges, operating costs and capital expenditures. Hence, in the FCFF calculation, all the capital expenditures foreseen to convert the airport are taken into account.

([19]) The weighted average cost of capital is the rate that a company is expected to pay on average to all its security holders to finance its assets.

([20]) This is based on a risk-free rate of […] %, a credit risk premium of […] %, a corporate tax rate of 19 %, a beta of […], a market rate premium of […] % and a capital structure of […] % debt and […] % equity (See Section 4.4 at page 21 of the 2010 MEIP Study). The Commission notes that the calculations submitted by Poland seem to indicate that a WACC with a downward term structure was used for the MEIP analysis.

([21]) The terminal value was based on a stable growth assumption of […] %.

(35) In the 2011 MEIP study, the DCF was calculated on the basis of the DCF for the projection period of 2011-2040. The updated DCF was equal to PLN (-[…]) million (EUR – […] million), suggesting larger losses while the terminal value was decreased to PLN […] million (around EUR […] million). Hence, the NPV was reduced to PLN […] million (or less than EUR […] million). The WACC was reduced to […] % ([22]) and the stable growth rate for the terminal value calculation was decreased from […] % to […] %.

(36) Poland informs that in view of a new macroeconomic situation (the financial crisis and the economic slowdown) the project was re-assessed in 2012, this resulted in a new MEIP study (i.e. the 2012 MEIP study). Poland explains that in comparison with the previous MEIP studies, the assumptions for the 2012 MEIP study were modified as follows:

— The forecasted passenger traffic for Gdynia airport was reduced;

— The scope of the investment was reduced, what led to the reduction of the investment costs by PLN […] million (EUR […] million);

— The idea of building a main terminal (together with related development of road infrastructure and car park) was abandoned, instead it was decided to expand the capacity of the general aviation terminal by […] in the second investment phase;

— After market verifications, the investment costs related to the security area had to be increased by PLN […] million (EUR […] million),

— The reduction of the scope of investment resulted in a shorter payback period for the investment (in nominal terms, by […] years from […] years to […] years).

(37) Poland also clarifies that in comparison to the previous MEIP studies the methodology of the 2012 MEIP study was also modified:

— To better reflect the structure of financing and the cost of debt servicing, the Free Cash Flow to the Firm (hereinafter: 'FCFF') discounted cash flow method was replaced by the Free Cash Flow to Equity (hereinafter: 'FCFE') method ([23]).

— Following the financial (securities) market changes, risk free interest rate and the Beta factor were updated. Moreover, companies from outside Europe were eliminated from the comparative analyses. This resulted in a new discount rate.

— The discount rate for calculating the NPV was set up based on the analysis of comparable companies, covering both airport companies and companies providing airport services (financial of which results are strongly correlated with the performance of airport companies) ([24]).

— It was assumed that the project would be financed first by shareholders' resources and then from external sources (working capital loans) as well as from operating revenues.

([22]) The risk-free rate was increased to […] % and the beta was increased to […]. The capital structure was modified to a higher share of debt ([…] %) and a lower share of equity ([…] %).

([23]) FCFE = FCFF + credits and loans taken – credits and loans repaid – interests on credits and loans. In comparison to the FCFF, FCFE are discounted with the return of equity rate that is always higher than WACC. As the result, NPV shows what part of the return generated by the investment is available to the shareholders (equity investors). The NPV calculated on the basis of the FCFE thus does not reflect the overall return on investment, i. e. return for the shareholders and return for the creditors.

([24]) To reflect difference in a typical financing structure between airport and airport services companies, the return on equity for the latter had been levered before calculating averages.

(38) In the 2012 MEIP study, the DCF was calculated on the basis of the DCF for the projection period of 2012-2030 (i.e. compared with the previous study, the projection period was reduced by 10 years). The updated DCF was equal to PLN (-[…] million) (around EUR (-[…]) million) while the terminal value was significantly increased to PLN […] million (EUR […] million). The capitalised value of investments already made (PLN […] million) was further deducted. Hence, the 2012 update of the NPV was equal to PLN […] million (or EUR […] million). In order to calculate the NPV, the cost of equity of […] % was used ([25]) and the stable growth rate for the terminal value calculation was further decreased from […] % to […] %.

(39) Poland points out that the results of the 2012 MEIP study remained still positive and let to further capital injections by the shareholders. Poland clarified that by April 2013, the capital of the company had been increased to PLN 91,310 million (EUR 22,8 million) and did not change further in 2013, as summarised in the Table 3.

Table 3

Overview of the capital increases by Gdynia and Kosakowo into the airport manager of Gdynia airport

Date of decision on entry in the National Court Register	Date of resolution on capital increase	Name of shareholder	Subject-matter of the resolution	Value of shares (PLN million)	Share capital (PLN million)	Cumulative share in the total capital increases done up to the end of 2013
28.8.2007	23.7.2007	Gdynia	creation of new shares	0,030	0,030	0,03 %
28.8.2007	23.7.2007	Kosakowo	creation of new shares	0,020	0,050	0,05 %
4.3.2008	6.12.2007	Gdynia	creation of new shares	0,120	0,170	0,19 %
4.3.2008	6.12.2007	Kosakowo	creation of new shares	0,080	0,250	0,27 %
11.9.2008	21.7.2008	Gdynia	creation of new shares	0,500	0,750	0,82 %
28.7.2009	26.6.2009	Gdynia	404 shares owned by Gdynia Municipality were cancelled without consideration to the share-holder	– 0,404	0,346	0,38 %
28.7.2009	26.6.2009	Gdynia	creation of new shares	1,345	1,691	1,85 %
8.12.2010	29.7.2010	Gdynia	creation of new shares	4,361	6,052	6,63 %
8.7.2011	7.6.2011	Gdynia	creation of new shares	25,970	32,022	35,07 %
1.9.2011	26.7.2011	Kosakowo	creation of new shares	1,779	33,801	37,02 %
25.4.2012	5.4.2012	Gdynia	creation of new shares	28,809	62,610	68,57 %
25.4.2012	5.4.2012	Kosakowo	creation of new shares	2,200	64,810	70,98 %
27.5.2013	8.4.2013	Gdynia	creation of new shares	4,269	69,079	75,65 %
27.5.2013	8.4.2013	Kosakowo	creation of new shares	2,200	71,279	78,06 %
17.6.2013	25.4.2013	Gdynia	creation of new shares	20,031	91,310	100,00 %

Source: information provided by Poland.

([25]) The risk-free rate was reduced to […] % and the beta was reduced to […].

(40) Poland summarises that while local authorities took preliminary steps to set up Gdynia airport as early as 2005, the project took its shape only with the preparation of the Master plan and the first MEIP study, i.e. in 2010. Poland clarifies further that the project was then substantially revised from its original assumptions as a result of changes in external circumstances. Poland argues that the final decision of public shareholders on the implementation and final shape of the project was made in 2012. Poland also stresses that each of the three versions of the MEIP study confirmed the project's viability and demonstrated that a market economy investor would had carried out the project.

(41) On the counterfactual scenario, Poland argues that according to the national law, Kosakowo could use the land, on which Gdynia airport is located only to set up a new civil aviation airport. In this respect, Poland clarifies that with this restriction, the land of airport was leased to Kosakowo for a period of 30 years. Poland clarifies further that the rental agreement obliges Kosakowo to lease the land only to an entity responsible for setting up and/or operating a civil aviation airport. According to Poland, the land could have been taken over by the State, if Kosakowo had not leased the land to set up a civil aviation airport within 6 months, or the land was used for other purposes, or the airport had not started its activities within 3 years. The scenario where the land of Gdynia airport is used/leased for other than aviation purposes was not possible and therefore could not be used to establish a counterfactual scenario.

3.1.2. **Reliability of the key assumptions for the 2012 MEIP**

Traffic projections and revenue forecast

(42) Poland explains that the planned airport charges were based on publicly available tariffs of other airports in such a manner so as not to disrupt the existing market while ensuring an appropriate level of the project's profitability based on the projected passenger traffic volume. According to Poland, the charges do not differ significantly from standard tariffs charged by small airports. In particular two newly opened regional airports, the Modlin airport and the Lublin airport have standard airport charges that are similar to those projected in the MEIP study for Gdynia airport.

(43) In reply to the Commission's comment that the charges foreseen for Gdynia airport (PLN 25 (EUR 5,25) in the first 2 years and then PLN 40 (EUR 10) per departing passenger) are higher than applied, discounted charges at Gdansk airport (PLN 24 (EUR 5) per departing passenger by an aircraft of LCC type if an international route is served at least 2 times per week; for a domestic route the charge would be PLN 12,5 (EUR 3,1)), Poland notes that the level of charges in the business plan is averaged for the whole forecast period (2014-2030) and takes into account the fact that in the long-period term charges at Gdansk airport will have to increase following improved standard of service at that airport.

(44) Moreover, Poland points out that due to the project's profit margin, revised (slightly higher) air traffic forecast and possible sharing of some operational costs with the military, Gdynia airport should be able to maintain reduced passenger charges over a longer period (the reduced charges could be applied until the end of 2021) while maintaining a positive NPV for the public shareholders.

(45) Poland also argues that the updated (in March 2013) traffic forecast for the Pomeranian Region foresees higher traffic than that applied in the 2012 MEIP study. According to the latest figures, the traffic at Gdynia airport in 2030 would be 1 149 978 instead of 1 083 746. For the whole Pomeranian Region the increase for 2030 is foreseen from 7,8 to 9 million passengers.

(46) In the view of Poland, these figures confirm that it is viable for Gdansk airport and Gdynia airport to coexist and operate jointly on the Pomeranian market. Even if Gdansk airport is expanded to reach the planned capacity of 7 million passengers, the development of the aviation market in the Pomeranian Region leaves, according to Poland, room for an additional small regional airport (with a capacity of 1 million) whose offer of services would be complementary to that of Gdansk airport.

Table 4

Comparison of 2012 MEIP study's traffic projections and the updated traffic projections (March 2013) for Gdynia airport

Year	Commercial traffic		Commercial traffic		General aviation	
	Passengers (in thousands)		Aircraft operations		Aircraft operations	
	2012 MEIP study forecast	Updated forecast	2012 MEIP study forecast	Updated forecast	2012 MEIP study forecast	Updated forecast
	Total	**Total**	**Total**	**Total**	**Total**	**Total**
2009	[…]	[…]	[…]	[…]	[…]	[…]
2010	[…]	[…]	[…]	[…]	[…]	[…]
2011	[…]	[…]	[…]	[…]	[…]	[…]
2012	[…]	[…]	[…]	[…]	[…]	[…]
2013	[…]	[…]	[…]	[…]	[…]	[…]
2014	[…]	[…]	[…]	[…]	[…]	[…]
2015	[…]	[…]	[…]	[…]	[…]	[…]
2016	[…]	[…]	[…]	[…]	[…]	[…]
2017	[…]	[…]	[…]	[…]	[…]	[…]
2018	[…]	[…]	[…]	[…]	[…]	[…]
2019	[…]	[…]	[…]	[…]	[…]	[…]
2020	[…]	[…]	[…]	[…]	[…]	[…]
2021	[…]	[…]	[…]	[…]	[…]	[…]
2022	[…]	[…]	[…]	[…]	[…]	[…]
2023	[…]	[…]	[…]	[…]	[…]	[…]
2024	[…]	[…]	[…]	[…]	[…]	[…]
2025	[…]	[…]	[…]	[…]	[…]	[…]
2026	[…]	[…]	[…]	[…]	[…]	[…]
2027	[…]	[…]	[…]	[…]	[…]	[…]
2028	[…]	[…]	[…]	[…]	[…]	[…]
2029	[…]	[…]	[…]	[…]	[…]	[…]
2030	1 083 746	1 149 978	[…]	[…]	[…]	[…]

Source: information provided by Poland.

Operating costs (incentives to the airlines, costs related to the military operations of the airport)

(47) Poland explains that the MEIP study takes into account the airport's marketing and promotional measures in estimating:

(i) operating costs, such costs being estimated on the basis of available financial statements of all major Polish airports,

(ii) other costs by type, which are projected for Gdynia Airport at a conservatively high level, also taking into account the corresponding costs in other airports.

(48) Poland also clarifies that the MEIP study assumed that entire operating cost would be borne by the investor and does not take into account any sharing of operating costs with the military user of the airport. Poland states that it is assumed that the operating costs of shared infrastructure will be shared […] to the number of civil and military flight operations. Poland clarifies further that the costs of renovation and repairs will be […]. Poland stresses that the adoption of rules on shared use of the airport (not yet formally agreed with the military user of the airport) will lead to a minimum reduction of […] in costs related to third party services and payroll. According to Poland, inclusion of this factor in the MEIP studies would result in a higher projected profitability of the project.

Long term growth rate

(49) Poland explains that the growth rate of […] % adopted in the MEIP study refers to the terminal value in nominal terms.

(50) Poland clarifies further that the growth rate of […] % is equal to Poland's inflation target as set by the Monetary Policy Council (a decision-making body of the National Bank of Poland). Poland points out that according to the latest forecast by the International Monetary Fund of July 2013, Poland's GDP will grow at the rate of 2,2 % in 2014, 3 % in 2015, 3,3 % in 2017 and 3,8 % in 2018.

The November 2013 update

(51) In November 2013, Poland informed that the airport manager had just received the administrative decisions from the Customs Office and the Energy Regulatory Office allowing it to directly sale fuels to aircrafts. The sale of fuels by the airport manager would be a source of additional revenues improving the financial result of the business plan.

(52) According to Poland, all MEIP studies conducted until now foresaw that the sale of fuel would be provided via an external operator. The sale of fuel by the airport manager would increase company's profit margin on this activity from PLN […] (EUR […]) per litre (in case the fuel is sold by an external operator) to PLN […] (EUR […]) per litre (in case of selling the fuel directly by the airport manager).

(53) In the view of Poland, these additional revenues would improve the 2012 MEI update result. Poland points out that the NPV for the project is thus expected to increase from PLN […] million (EUR […] million) to PLN […] million (EUR […] million). Poland in addition clarifies that the IRR would increase from […] % to […] %.

(54) Poland argues that the additional revenues would alternatively allow reducing the airport charges for airlines in long-term.

(55) Poland confirmed that the sale of fuel on its own was not included in the conducted MEIP studies due to a prudential approach. At the time when these studies were conducted, the airport operator did not have the required permissions and it was not guaranteed that it would be in the position to obtain any of them.

(56) In addition, Poland informed that the company intends to provide the navigation services to airlines (instead of the Polish Air Navigation Services Agency). Poland points out that this would allow reducing the terminal fee paid by airlines (paid now to the Agency) and in this way the attractiveness of Gdynia airport to airlines would increase. Consequently, the airport manager could offer more competitive airport charges to airlines than the neighbouring airports.

3.2. COMPATIBILITY ASSESSMENT

3.2.1. **Investment aid**

(57) According to Poland, all of the compatibility criteria for the investment aid to airports, set out in the 2005 Aviation Guidelines, are satisfied.

Meeting a clearly defined objective of common interest

(58) Poland argues that setting up Gdynia airport, as an element of the Pomeranian Region's transport system, optimizes the use of available infrastructure and will have a positive impact on regional development, notably through an increase in airport jobs, income from the chain of supplies for the aviation market, and tourism development.

(59) Poland refers to the 'Regional transport development strategy in the Pomeranian Region for 2007–2020', that being based on air traffic forecasts for the region, recognized a need to build a hub of closely collaborating airports that would serve the needs of the Tricity area's population ([26]).

(60) According to Poland, the main arguments for the construction of a hub of airports in the Tricity area are: increasing air traffic in Poland, the exhaustion of Gdansk Airport's capacity for adaptation and stretching the agglomeration over a distance of nearly 60 km (including the cities of Tczew and Wejherowo this distance increases to over 100 km). Poland argues that while, following the expansion of its terminal; Gdansk Airport has currently a capacity of ca. 5 million passengers, some air traffic forecasts project that the potential passenger traffic in that airport will exceed 6 million passengers in 2035. Poland has submitted in its comments on the one hand that in view of the environmental restrictions and the residential developments in the neighbourhood of Gdansk airport, its further expansion prospects are limited. On the other hand, in the submission of 6 December 2012 Poland argued that there are no restrictions regarding the expansion of Gdansk airport and to this effect it referred to the Master plan of Gdansk aiport.

(61) Poland states that the safety of aircraft operations further justifies the construction of a hub of airports in the Tricity area with Gdynia airport serving as a back-up, emergency airport (landing in Gdynia airport is possible in ca. 80 % of cases when cloud base and visibility do not allow landing in Gdansk airport).

(62) Lastly, Poland argues that the development of Gdynia airport corresponds to the objectives of national and regional strategic documents concerning the development of aviation infrastructure in Poland. Poland clarifies that the development of Gdynia airport has an expected positive impact on the development of the Pomeranian Region and the use of existing military infrastructure, and is complementary to Gdansk Airport.

Necessity and proportionality of infrastructure

(63) Poland argues that the infrastructure is necessary and proportionate to the objective set because of its small scale of the airport's operations (1,55 % share in the Polish aviation market in 2030), forecasts for passenger traffic volumes that exceed Gdansk airport's expansion capacity, the attractiveness of the region for tourism and the projected high rate of development for the Pomeranian Region.

(64) Poland emphasizes the strategic role of the military airport of Gdynia in the region and notes that the use of the existing infrastructure minimizes investment costs and maximizes the positive impact on the regional development.

(65) Poland also points out that the costs have been minimized and the effectiveness of the investment has been increased through the implementation of technical solutions such as, for example, the construction of the general aviation terminal for both general aviation and passenger traffic, the placement of the majority of airport services (border guards, customs offices, the police, fire brigade, management) in a single building and the adaptation of other existing buildings to optimise their use. Moreover, operating costs of the infrastructure will be shared with the army.

([26]) The Tricity is an urban area consisting of three major cities in the Pomeranian Region (i.e. Gdansk, Gdynia, Sopot). Three airports are currently located in the Tricity area: the Lech Wałęsa Airport in Gdansk, the military airport in Pruszcz Gdanski and the military airport on the boarder of Gdynia and Kosakowo (Gdynia-Oksywie).

Satisfactory medium-term prospects for use

(66) Poland points out that given the GDP growth in the Pomeranian Region that is expected to be higher than the average growth for Poland and the EU, the region's touristic attractiveness, its status as a hub of foreign investments and increasing air traffic forecasts, the medium-term prospects for use for Gdynia airport are satisfactory.

(67) Poland stresses that the planned collaboration with Gdansk airport and the complementarity of services offered by the two airports (as such, Gdynia airport will be dedicated mainly to general aviation traffic) further strengthen the medium and long-term prospects for Gdynia airport.

(68) Poland further explains that the airport has also plans to develop specialised aviation-related activities within the airport zone, such as for example a production of simple service components, refitting of parts in aircrafts or the production of other components/products for which deliveries are handled in the 'just in time' model.

(69) Poland points out that a letter of intent, signed by a commercial bank that expresses the bank's willingness to open talks on financing the investment into Gdynia airport is another proof of the project's attractiveness.

Impact on the development of trade contrary to the common interest

(70) Since Gdynia airport is to be an airport with a small market share (and would serve less than 1 million passengers per annum), Poland considers that the impact on trade of the project is not contrary to the common interest. In the light of projected growth in air traffic, Poland foresees that the airports of Gdansk and Gdynia will form a collaborating aviation hub serving the Pomeranian Tricity area offering complementary services.

(71) Poland stresses that Gdynia airport will not be a competitor for Gdansk airport as it will focus on the provision of services for general aviation sector (maintenance, repair and overhaul services, a flight academy), and collaboration with Gdynia seaport.

(72) Poland further argues that charter and low-cost traffic at Gdynia airport will not be at the cost of Gdansk airport, but will result from an overall increase in wealth and mobility of the population. Poland points out that taking into account the rate at which Gdansk airport is growing and the nature of the aircraft operations it handles, there is a risk that Gdansk airport will soon have to limit the number of flights or, in the long-term. Poland states that these conclusions are presented in the environmental impact assessment report on the project 'Expansion of the Lech Walesa Gdansk Airport'.

(73) Poland clarifies that the investment into Gdynia airport may limit financial and social costs that will have to be borne if the operation at Gdansk airport would be restricted. Poland points out that taking over a part of air traffic from Gdansk airport by Gdynia airport will result in a better use of the capacity of both airports.

Necessity of aid and incentive effect

(74) Poland argues that the company would not have carried out the project without public financing. Poland notes that the aid was limited to a minimum and costs of the project were reduced and optimised through the use of existing military infrastructure.

(75) In the view of Poland, the capital injections into Gdynia airport are necessary and limited to a minimum, as evidenced by:

(i) the project's internal rate of return of […] % that is only slightly higher than the discount rate (cost of equity), equal to […] % (based on the 2012 MEIP Study);

(ii) the necessity to use a working capital loan to finance the airport's operations as otherwise the Company might lose liquidity according to financial projections;

(iii) the fact that the total financing from the equity capital is lower than total capital expenditure (financing from the equity capital accounts for less than […] of total cash costs in the forecasted period, including total capital expenditure).

(76) Poland further clarifies the proportionality of the aid measure by comparing its public financing (ca. PLN 148 in real terms) with that of a greenfield investment (Lublin-Świdnik Airport, ca. PLN 420 million net construction costs) and an investment based on a military airport (Warsaw-Modlin Airport, ca. PLN 454 million construction cost to date).

3.2.2. **Operating aid**

(77) Poland argues that the compatibility criteria for operating aid that can be applied in a region covered by Article 107(3)(a) of the TFEU, included in the Regional Aid Guidelines, are met by the project. In view of Poland, the operating aid for the project:

(i) is allocated to finance a part of predetermined expenditure;

(ii) is limited to a necessary minimum and granted on a transitory basis (the aid for operating costs is granted to the extent and for the period necessary to put an airport into operation, i.e. until the end of 2018);

(iii) is degressive and decreases from […] % of capital expenditure in 2013 to […] % in 2018;

(iv) is designed to meet the project's goals of regional development and alleviation of existing limitations. Taking into account the size of the aid in relation to its beneficial effects on the development of the Pomeranian Region, in view of Poland, it must be stated to be proportional.

(78) Furthermore, Poland stresses that the aid is intended for a small airport with up to 1 million passengers per annum and, as such, poses a minimum risk to the distortion of competition and the exertion of an effect contrary to the common interest, particularly in the context of planned collaboration between, and complementarity of, Gdynia and Gdansk airports.

(79) Poland also points out that the currently negotiated cooperation with, and participation in the airport's operating costs by the military user of the airport will reduce company's losses and operating costs.

4. **OBSERVATIONS FROM THIRD PARTIES**

(80) The Commission has not received observations from interested parties following the publication of its decision to initiate the procedure provided for in Article 108(2) of the TFEU in respect to the financing granted to Gdynia-Kosakowo Airport Ltd by Gdynia and Kosakowo.

5. **ASSESSMENT**

5.1. EXISTENCE OF STATE AID

(81) By virtue of 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.*'

(82) The criteria provided for in Article 107(1) of the TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) of the TFEU all of the following conditions need to be fulfilled. Namely, the financial support should:

(i) be granted by the State or through State resources;

(ii) favour certain undertakings or the production of certain goods;

(iii) distort or threaten to distort competition; and

(iv) affect trade between Member States.

5.1.1. **Economic activity and notion of undertaking**

(83) According to settled case law, the Commission must first establish whether the Gdynia-Kosakowo Airport Ltd is an undertaking within the meaning of Article 107(1) of the TFEU. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ([27]). Any activity consisting in offering goods or services on a given market is an economic activity ([28]).

(84) In its 'Leipzig-Halle airport' judgment the Court of Justice confirmed that the operation of an airport for commercial purpose and the construction of the airport infrastructure constitute an economic activity ([29]). Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the TFEU, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport operator ([30]).

(85) In this regard the Commission notes that the infrastructure which is the subject of the present decision is to be operated on a commercial basis by the airport manager, Gdynia-Kosakowo Airport Ltd Since the airport manager will charge users for the use of this infrastructure, the latter is commercially exploitable. It follows that the entity exploiting this infrastructure constitutes an undertaking for the purposes of Article 107(1) of the TFEU.

(86) However, not all the activities of an airport manager are necessarily of an economic nature ([31]).

(87) The Court of Justice ([32]) has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include for example security, air traffic control, police, customs, etc. The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities ([33]).

(88) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid ([34]). At an airport, activities such as air traffic control, police,

([27]) Case C-35/96 Commission v Italy [1998] ECR I-3851; C-41/90 Höfner and Elser [1991] ECR I-1979; Case C-244/94 Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013; Case C-55/96 Job Centre [1997] ECR I-7119.

([28]) Case 118/85 Commission v Italy [1987] ECR 2599; Case 35/96 Commission v Italy [1998] ECR I-3851.

([29]) Joint Cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/Commission and T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt c/Commission [2011] ECR II-01311, confirmed by the ECJ, Case C-288/11 P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, [2012], not yet published in the ECR; see also Case T-128/89 Aéroports de Paris v Commission [2000] ECR II-3929, confirmed by the ECJ, Case C-82/01P, ECR 2002 Page I-9297, and Case T-196/04 Ryanair v Commission [2008] ECR II-3643.

([30]) Cases C-159/91 and C-160/91, Poucet v AGV and Pistre v Cancave [1993] ECR I-637.

([31]) Case C-364/92 SAT Fluggesellschaft v Eurocontrol [1994] ECR I-43.

([32]) Commission Decision N 309/2002 of 19 March 2003 on Aviation security — compensation for costs incurred following the attacks of 11 September 2001.

([33]) Case C-343/95 Cali & Figli v Servizi ecologici porto di Genova [1997] ECR I-1547; Commission Decision N 309/2002 of 19 March 2003; Commission Decision N 438/02 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.

([34]) See footnote 32.

customs, fire fighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are considered in general to be of a non-economic nature ([35]).

(89) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity, must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities ([36]). Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non-economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport managers or airlines are required to bear the cost of the provision of some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.

(90) Even though the activities set out in recital 88 may be considered of a non-economic nature, the Commission observes that according to the Polish law ([37]) airports managers are obliged to finance the facilities and equipment necessary to perform these activities from their own resources.

(91) Therefore, the Commission considers that the public funding provided to the airport manager of Gdynia airport in relation to the above mentioned facilities and equipment relieves it from bearing costs that are inherent to its economic activity (see section 5.1.3). As a consequence, the Commission concludes that in calculating the profitability of the investment at stake it should also include the capital allocated to those facilities and equipment. In doing so the Commission follows the approach correctly followed by Poland in the MEIP studies.

5.1.2. **State resources and imputability to the State**

(92) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it ([38]). Resources of local authorities are for the application of Article 107 of the TFEU State resources ([39]). In the present case, the capital injections into Gdynia-Kosakowo Airport Ltd are provided directly from the budgets of the two municipalities, Gdynia and Kosakowo. The Commission therefore considers that the resources of the two municipalities involved are State resources.

(93) Thus, the Commission considers that they are financed through State resources and are also imputable to the State.

5.1.3. **Economic advantage**

(94) The Commission observes that Poland argues on the one hand that the capital injections are in line with the MEIP, on the other hand it considers that the aid is compatible, because without the public funding the investment would not have been undertaken by the operator of the airport.

(95) In the present case in order to determine whether the measure at stake grants Gdynia-Kosakowo Airport Ltd an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public shareholders of the airport manager to a market economy investor who is guided by prospects of profitability in the long-term ([40]).

([35]) See, in particular, Case C-364/92 SAT/Eurocontrol [1994] ECR I-43, paragraph 30 and Case C-113/07 P Selex Sistemi Integrati v Commission [2009] ECR I-2207, paragraph 71.
([36]) See i.a. Case C-172/03 Wolfgang Heiser v Finanzamt Innsbruck [2005] ECR I-01627, paragraph 36, and case-law cited.
([37]) The Aviation Law Act (Ustawa z dnia 3 lipca 2002 r. – Prawo lotnicze (Dz.U. 2002 r. Nr 130 poz. 1112 as amended), see among others articles 74 and 84.
([38]) Case C-482/99 *France v Commission* [2002] ECR I-4397.
([39]) Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08, Nord-Pas-de-Calais [2011] ECR II-01999, paragraph 108.
([40]) Case C-305/89 Italy v Commission (*'ALFA Romeo'*) [1991] ECR I-1603; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871.

(96) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEIP study is whether 'in similar circumstances a private shareholder, having regard to the foresee ability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ([41]).

(97) Poland argues that the measures at stake do not grant an economic advantage to the airport manager of Gdynia airport, because they are in line with the MEIP. As described in section 3.1, in order to support this, Poland submitted three MEIP studies that have been undertaken by PWC ([42]). In November 2013, Poland further submitted that new sources of revenue would enhance the NPV of the project (i.e. the sale of fuel, navigation services). At the time of the opening decision, Poland had only submitted the 2012 MEIP update.

(98) Even though according to the 2011 shareholder agreement Gdynia and Kosakowo committed to provide cash and non-cash contributions to finance the investment project until 2040, Poland argues that only the 2012 MEIP update and the later information on the additional revenue streams are relevant for the assessment of the market conformity of the capital injections.

(99) In Stardust Marine the Court stated that, '*[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation*' ([43]).

(100) Furthermore, the Court declared in the EDF case that, '*[…] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen*' ([44]).

(101) In order to be able to apply the MEIP the Commission has to place itself at the time when each decision to finance the conversion of the former military airport into a civil aviation airport was taken. The Commission must also base its assessment on the information and assumptions, which were at the disposal of the public shareholders at the time, when the decision regarding the financial arrangements of the investment project was taken.

(102) The Commission considers that in order to determine whether the municipalities of Gdynia and Kosakowo acted as a private investor, the first relevant analysis is the 2010 MEIP study. Indeed, the assessment of whether State intervention is in line with market conditions should be carried out on the basis of an *ex-ante* analysis, considering information and data available at the time the investment was decided upon.

(103) The Commission observes that up to 2010, studies and preparatory works for the investment project in question were carried out. These included the Master Plan of the investment project, the environmental report, the design documentation of the general aviation terminal, the design documentation of the administration building and the fire brigade building, specialist aviation documents and other studies. By the end of 2010, these studies were carried out for a total of PLN […] million (EUR […]) ([45]). That shows that the investors took the decision to develop the Gdynia airport before 2010. Gdynia and Kosakowo took several preliminary measures in order to implement the project (see recital 10 above) and specific studies were commissioned with that purpose.

([41]) Case 40/85 Belgium v Commission [1986] ECR I-2321.

([42]) Whilst the Commission had requested from the Polish authorities to submit the underlying Excel spreadsheets used for the calculations with the formulas, the Polish authorities only submitted the Excel spreadsheets without formulas.

([43]) See footnote 38.

([44]) Case C-124/10P European Commission v Électricité de France (EDF) [2012], not yet published in ECR, paragraph 85.

([45]) See Section 4.7.5 of the 2012 MEIP Study. According to comments of Poland, until 26 June 2009, the total capital injections into Gdynia airport amounted to PLN 1,691 million (about EUR 423 000). Only PLN […] million (about EUR […]) were used to finance different studies undertaken in the preparation of the project.

(104) Moreover, as argued by Poland in 2010 the public shareholders of the airport manager had finalised the preparations for the investment project at stake. In the same year, the public shareholders increased the company's share capital to PLN 6,05 million (around EUR 1,5 million) in view of implementing that investment project. The main investments in fixed assets (such as the construction of the general aviation terminal) were expected to start in 2011, but effectively started in 2012. The Commission believes that any private investor would have assessed at that moment the expected profitability of the project. In case the investment plan would not show an acceptable rate of return or if it were based on doubtful assumptions a private investor would not have started implementing the plan and would not have spent any further money on it, on top of those already spent for the preparatory works mentioned in the recital above.

(a) Capital Injections

(105) With respect to capital injections, the Commission notes that the first important capital injection of PLN 4,4 million was decided on 29 July 2010 (almost quadrupling the existing capital of PLN 1,7 million), right after the 2010 MEIP study of 16 July 2010 was finalized. In addition, the agreement on the further capital injections (until 2040) to finance the conversion project (mentioned above in recital 33) was signed in March 2011 (even before the finalization of the second MEIP study of 13 May 2011). Moreover, at the same time also the operational agreement with the military user of the airport (7 March 2011) and the rental agreement for the land of the company (11 March 2011 (mentioned above in recital 33)) were concluded.

(106) The Commission also underlines that Poland confirmed that the capital injection decided on 29 July 2010 was based on the economic assessment of the project contained in the 2010 MEIP study. It is therefore clear that at this stage the public shareholders had resolved to engage in the investment project in question to be realised over 30 years. Even though it is possible for a private investor to adjust its investment plan in the course of its implementation in the light of changing circumstances, it is clear that any private investor would have assessed the merits of the investment project at hand already in 2010 before starting to put substantial resources in it.

(107) By the time the first update of the MEIP was conducted in 2011, the public shareholders had already injected PLN 6,05 million into the company (see Table 3). The company had already leased the land of the airport from Kosakowo (the rental agreement between Gdynia-Kosakowo Airport Ltd and Kosakowo was signed on 11 March 2011) and also had signed the operational agreement with the military user of the airport (7 March 2011). In addition, on 11 March 2011, the shareholders signed an agreement on the increases of share capital of the company until 2040 ([46]). And by the time the second update of the MEIP study was finalised in July 2012, the public shareholders had injected a total of PLN 64,810 million (i.e. about 70 % of all capital injected). The Commission stresses that it is undisputed that the 2011 and 2012 MEIP studies represent adjustments to the initial investment plan, on the basis of which the initial decision to embark in the project to convert the military airport was taken. Hence, even though the bigger capital injections were implemented further to the first MEIP study of 2010, those injections cannot be seen in isolation.

(b) Capital Expenditures

(108) In the 2012 MEIP study, the investments in fixed assets are divided into 4 phases. The first phase of the investment project concerned the design work but also the site clearing (tree and shrub clearing, demolishment of certain hangars and ground levelling). These costs were incurred in 2011 for a total of PLN […] million (EUR […]). The second phase of the project, involving the construction of the general aviation terminal, the administration building and the fire brigade building started in 2012 already. The second phase of the project is the most important in terms of capital expenditures with more than […] % of nominal capital expenditures (hereinafter: 'capex') spent in 2012-2013. According to the information submitted by Poland, the capital expenditures in 2012 amount to PLN […] million (of which more than half had already been spent by the time the updated 2012 study was undertaken). The graph below (Figure 2) shows the (nominal) capex by investment phase as presented in the 2012 MEIP study.

([46]) The agreement of 11 March 2011, foresees cash contributions of Gdynia in years 2011–2013, amounting in total to PLN 59,048 million (EUR 14,8 million) and non-cash contribution of Kosakowo (swap of annual rental fees into shares) in years 2011-2040.

Figure 2

Capex by Phase (2012 MEIP study)

[…]

(109) In view of the recitals 103 and 108, the Commission considers that neither the 2011 MEIP nor the 2012 MEIP study updates were conducted at the time and on the basis of the information at the disposal of the public shareholders when the main decision to finance the conversion project was taken. Furthermore, the Commission cannot retroactively take into account the expected additional sources of revenues, based on the information provided in November 2013, in order to justify the decisions taken by the public shareholders in 2010 and 2011.

(110) Hence, in the light of the foregoing, the Commission considers that in order to assess whether Gdynia and Kosakowo adopted the conduct of a private investor operating in a market economy, it must base first of all its assessment on the 2010 MEIP study and disregard any further developments and information that were not at the disposal of those public shareholders at the time when they took their decision to realise the investment project in question.

(111) On the other hand, the 2011 MEIP study and the 2012 MEIP study assessed only the amendments to the initial decision to embark in the investment project that was taken in 2010 on the basis of the 2010 MEIP study. Indeed, the 2012 MEIP study recognizes that a number of investments (such as the general aviation terminal, administration building, electricity power system) were already in '*advanced stages of implementation*'. The two subsequent studies show that the shareholders were following market developments and were accordingly adapting the scope of the project (either upwards or downwards depending on the investment item). However, those changes were only marginal relative to the overall decision to convert the military base into a civil aviation airport. The graph below (Figure 3) shows the capital expenditures as presented in the 2010, 2011 and 2012 MEIP studies (expressed in 2010 real terms). As can be seen, while the timing and extent of the investments were updated both in 2011 and 2012, these changes were not substantial regarding the overall size of the project. In 2010, the real capex was estimated at about PLN […] million and this figure was […] to about PLN […] million in both 2011 and 2012 (i.e. […] % over an investment period of almost 20 years).

(112) In substance, in the present case the Commission has to assess a series of investment decisions taken over a short period of time, which is not characterised by the occurrence of unforeseeable events, by the same public shareholders, for the implementation of essentially the same investment project. Therefore, the 2011 and the 2012 MEIP update cannot transform an investment decision that did not comply with the MEIP at the moment it was taken, into a reasonable investment decision. At best they could demonstrate that the Polish authorities behaved as a private investor, only if they would show that, by investing additional funds, the project was expected to yield a return capable of adequately remunerating the capitals already invested and to be invested (or that would appropriately remunerate those capitals even when taking into account the risk of having to repay any illegal aid received in the past).

Figure 3

Capex (in 1 000 PLN) as projected in MEIP studies of 2010, 2011 and 2012 (in 2010 real terms)

[…]

The application of the MEIP on the basis of the 2010 MEIP study

(113) The 2010 MEIP study, provided by Poland, is based on a business plan projecting the future cash flows for the equity investors for the period 2010–2040. At the time when the MEIP study was conducted, Poland expected that the airport would start serving general aviation traffic in 2011, charter flights in 2013 and LCCs in 2015. This would result in a steady increase in the number of passenger served from […] passengers in 2013 up to almost […] million in 2024 and 1,753 million in 2040 as shown in Table 5 below).

Table 5

Traffic projections for Gdynia airport used in the 2010 MEIP study (in thousands)

Expected passenger development (2010 MEIT)										
Year	2013	2014	2015	2016	2020	2024	2028	2032	2036	2040
No of passengers	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 752 835

(114) According to the 2010 MEIP study, the company would be profitable at EBITDA level as from 2018. The annual discounted cash flow would become positive as of 2020 as illustrated in the graph below (Figure 4). However, on a cumulative basis (i.e. in each year the cash flows of the previous years), the total DCF over the entire period 2010-2040 is expected to be negative (as illustrated in Figure 1). In other words, the positive cash flows expected to be generated as of 2018 are not high enough to compensate for the highly negative cash flows of the early investment periods.

Figure 4

DCF in 1 000 PLN (2010 MEIP study)

[…]

Source: Based on the 2010 MEIP study.

(115) After 2040, it was expected that the airport manager would grow forever at a stable growth rate of the free cash flow of […] %. Under this assumption, Poland calculated the terminal value of the airport operator in 2040. The discounted Terminal Value amounts to PLN […] million.

(116) The 2010 MEIP study results in a positive equity value ([47]) of PLN […] million (that is, around EUR […] million). The IRR for the investment project equals to […] % and it is higher than the assumed cost of capital of the airport manager ([…] %).

(117) The Commission notes that key value drivers of the future cash flows of the manager of Gdynia airport are the expected revenues, which will be determined by the number of passengers and the level of airport charges paid by the airlines. The revenues from LCC and charter flights (passenger, landing, parking fees) account, in the 2010 MEIP study for [80 - 90] % of all revenues in 2040 and on the average for [80 - 90] % of all revenues in the whole assessed period 2010 to 2040. The Commission notes that this mere fact contradicts the statements by Poland that the activities of Gdynia airport would be complementary to those of Gdansk airport given that Gdynia would focus on general aviation activities. In fact, as shown by the figures presented above, the main source of revenues in most of the projection years comes from LCC and charter flights. However, as it will be further explained below, also the vast majority of Gdansk airport revenues come from LCC and charter flights (see recital 121).

(118) In the context of passenger's and air carriers' demand, the Commission observes that Gdynia airport would have the same catchment area as Gdansk airport, located only around 25 kilometres from Gdynia airport. Gdansk airport was extended in 2012 to serve up to 5 million passengers and a further extension to serve up to 7 million passengers is foreseen for 2015. This extension schedule was publicly known already in 2010, i.e. at the time of preparation the 2010 MEIP study ([48]). Moreover, the public funding for the extension of Gdansk to the capacity of 5 million passengers was also notified to the Commission on 24 September 2008 under the State aid case no N472/08 and was approved by the Commission on 5 February 2009 ([49]).

(119) Poland informed the Commission that the Master Plan for Gdansk airport prepared in 2010 ([50]) foresees the extension of the runway, aprons and other airport infrastructure that would allow serving more than 10 million passengers per annum at Gdansk airport in the future.

([47]) This equity value includes the net present value of the cash flows in 2012-2040 plus the discounted Terminal Value of the airport operator as calculated as of 2040.
([48]) For example see Commission decision No C(2009) 4445 of 3 June 2009, granting Community financial aid in the field of trans-European transport networks.
([49]) See footnote 4.
([50]) The Master plan was ordered in February 2010 and delivered in November 2010.

(120) The Commission further observes that in 2010 Gdansk airport served 2,2 million passengers (i.e. used 45 % of its capacity, including the capacity under construction). According to the forecasts provided for Gdansk airport only 50 to 60 % of the available capacity will be used by 2020 ([51]). These forecasts do not take into account the start of operations of Gdynia airport (i.e. it is assumed that the whole demand in the catchment area will be served by Gdansk airport). The Commission notes that even under the assumption of a dynamic increase in passenger traffic, the Gdansk airport will be able to meet the demand in the region over a long period of time, i.e. at least until 2030.

(121) As indicated above, the 2010 MEIP study for Gdynia airport foresees that the main part of the revenue ([80 - 90] % on the average for the whole period 2012–2040) would be generated by LCC's and charter airlines. In this context, the Commission notes that also Gdansk airport serves mainly LCC and charter traffic. In 2010, passengers of LCC and charter flights accounted for 72 % of all passengers served in Gdansk airport ([52]).

(122) In view of the close proximity of another established and uncongested airport pursuing the same business model with significant spare capacity in the long run, the Commission considers that the ability of the airport manager at Gdynia airport to attract traffic and passengers will essentially depend on the level of airport charges, which it will offer to airlines, notably in comparison with those of its closest competitors.

(123) In this context, the Commission observes that the 2010 MEIP study foresees that the passenger fee for charter and LCC flights would amount to PLN 25/PAX (EUR 6,25) until 2014 and PLN 40/PAX (EUR 10) as of 2015 (and up until 2040). The landing fee for the same group of flights was set up at PLN 25/tonne (EUR 6,25) for the whole period (the average MTOW (maximum take-off weight) was presumed at 70 tonnes) while the parking fee was estimated at PLN 4 (EUR 1,0) per 24 h/tonne (the average MTOW amounts to 70 tonnes). According to the 2010 MEIP study, the prices were set at levels comparable to those in other regional airports at the time of the 2010 MEIP study was conducted. The prices for Gdynia airport were also set under the presumption that there will be no competition with Gdansk airport.

(124) The Commission further notes that according to the schedule of tariffs that has been applied by Gdansk airport as from 31 December 2008, the standard passenger fee amounts to PLN 48/PAX (EUR 12,0), the standard landing fee for aircraft above 2 tonnes (i.e. including all charter and LCC aircraft) to PLN 25/tonne (EUR 6,25) and the parking fee to PLN 4,5/24 h/tonne (EUR 1,25).

(125) The Commission, however, notes that the schedule of tariffs applied at Gdansk airport foresees also different discounts and rebates focused, among others, on LCC operations. Gdansk airport applies a reduced passenger fee amounting to PLN 24/PAX (EUR 6) to all new connections (starting as from 1 January 2004) and all increases in frequency carried out with an aircraft of MTOW between 50 and 100 tonnes (e.g. Airbus A320 and Boeing 737 and other aircraft used by LCCs). Also the landing fee applied for such connections is reduced by 50 % (i.e. to PLN 12,5/tonne). The parking fee is reduced by 100 %, if the frequency of a connection is at least 6 times/week. In addition, the standard passenger fee is first reduced by PLN 23 for all passengers departing with a regular domestic connection, and then an appropriate discount is applied. The Commission considers that taking into account the discounts and rebates applied at Gdansk airport the airport charges foreseen at Gdynia airport were set on average at a level, which is significantly higher than applied at the neighbouring well established airport.

([51]) The passenger traffic (in 1 000 passengers per annum) of Gdansk airport:

Actual Passengers

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
Passengers	466	672	1 256	1 715	1 954	1 911	2 232	2 463	2 906

Expected passenger development

Year	2013	2014	2015	2016	2017	2018	2019	2020	
Passengers	3 153	3 311	3 477	3 616	3 760	3 911	4 067	4 230	

([52]) LCCs 64,5 %, charters 7,5 %. Together, it was 70 % both in 2009 and 2011.

(126) By applying the airport charges in question, Gdynia airport, being a new entrant, will not be able to attract significant traffic, when a well-established airport with spare capacity in the same catchment area applies lower net charges on new connections and increased frequencies on existing routes. The Commission also notes that the schedule of airport charges for Gdansk airport foresees applying the discounted charges until 31 December 2028. Since airport charges are the main source of revenues for the airport manager contemplated in the 2010 MEIP study (based on the business plan of the airport operator at that point in time), the Commission considers that this analysis shows that the 2010 MEIP study is not sufficiently solid and credible to demonstrate that the investment project in question would have been pursued by a private investor.

(127) The Commission also considers that taking into account that both Gdynia airport and Gdansk airport would mainly focus on low-cost and charter carriers, the fact that the Gdansk does not use its full capacity, the fact that its actual charges are lower than those assumed in the Gdynia business plan and the close proximity of the two airports, the presumption of a lack of price competition between both airports is not correct.

(128) The Commission also notes that at the time of the preparation of the 2010 MEIP study the net charges (standard charges after applicable discounts), applied at Bydgoszcz (located 196 kilometres and 2 hours 19 minutes travelling time by car from Gdynia airport) and Szczecin airport (located 296 kilometres and 4 hours 24 minutes travelling time by car from Gdynia airport), the second and the third closest Polish regional airports, were significantly lower ([53]).

(129) In view of the foregoing, the Commission considers that taking into account the close proximity of another uncongested airport pursuing the same business model, the airport charges foreseen in the 2010 MEIP study, which are set at the higher level than applied in Gdansk and at other regional airports located in its proximity, are not realistic. Furthermore, the Commission considers that taking into account the competitive situation of Gdynia airport the traffic forecasts included in the 2010 MEIP study are based on unrealistic assumptions.

(130) Furthermore, it is worth noting that no sensitivity analysis was undertaken in the 2010 MEIP Study, nor any assessment of the likely probabilities of outcome (such as a worst-case, best-case and base-case scenario). Therefore, the Commission concludes that the scenario presented in the 2010 MEIP Study appears to rely on overly optimistic assumptions regarding the development of passenger traffic and the level of charges.

(131) The Commission notes that reducing the annual revenues from passenger charges linked to the LCC and charter traffic by a mere […] % (over the projection period of 2010-2040) results in a negative equity value for the public stakeholders. Such a reduction from revenues could result from either lower charges and/or lower traffic than initially projected. In this respect, it is worth noting that the airport charges foreseen in the business plan used for the 2010 MEIP study are already […] % higher than those of Gdansk airport ([54]). In this context, it is highly unlikely that Gdynia airport would be able to attract traffic without providing any significant rebate to the PLN 40 (EUR 10) charges foreseen in the business plan. Hence, the high sensitivity of the NPV result to a seemingly marginal reduction in airport charges (relative to realistic assumptions) casts significant doubts as to the credibility of the initial business plan.

(132) Whilst the 2010 MEIP study was based on traffic projections available at that time and any *ex-post* information should be not used to assess directly the MEIP study, the Commission still notes the extent to which such

([53]) Bydgoszcz Airport: Standard departing passenger fee is equal to PLN 30 (EUR 7,5); standard landing fee is PLN 45/tonne (EUR 11,25) for first 2 tonnes of MTOW, PLN 40/tonnes (EUR 10) between 2 and 15 tonnes of MTOW, PLN 35/tonne (EUR 8,75) between 15 and 40 t MTOW, PLN 30 (EUR 7,5) between 40 and 60 t MTOW, PLN 25 (EUR 6,25) between 60 and 80 t MTOW and PLN 20 (EUR 5) for tonnes above 80 t MTOW; standard parking fee PLN 8/tonne/24 h (EUR 2; no fee for first 4 hours). Discounts: passenger fee from 5 % (if an air carrier has 100-300 passengers departing from Bydgoszcz Airport per month) to 50 % (if an air carrier has more than 8 000 passengers departing from Bydgoszcz per month Airport); landing fee – 50 % discount in first 12 months of a connection, 50 % if landing between 14,00 and 20,00; For landing and parking fees: 10 % if a carrier has 4-10 operations in a month, 15 % if 11-30 operations in a month, 20 % if more than 31 operations in a month by a carrier. Szczecin airport: standard departing passenger fee is equal to PLN 35 (EUR 8,75); standard landing fee is PLN 70/tonne (EUR 17,5); standard parking fee PLN 8/tonne/24 h (EUR 2; no fee for first 2 hours). Discounts: from 20 % (if more than 800 departing passenger seats offered weekly by a given air carrier) to 90 % (if more than 1 300 seats offered)

([54]) Calculation for passenger charges for LCCs.

projections were over-optimistic. Indeed, comparing the traffic projections in 2010 and 2012 shows significant differences. Not only was the start of the project delayed, but in addition and over the 'positive EBITDA' period, traffic projections were reduced by […] to […] % in each year. Such a significant correction after just two years and without any significant alteration of circumstances constitutes a useful sense check of the initial assumptions. It further illustrates that the sensitivity checks performed by the Commission (which are marginal in comparison) are particularly informative of the unrealistic nature of the assumptions underpinning the conclusion that the project was worthwhile.

Table 6

Comparison of passenger traffic forecasts used in 2010 MEIP study and 2012 MEIP study update

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total pax in 2010 MEIP Study	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total pax in 2012 MEIP Study	—	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Difference (%)		– 53	– 69	– 55	– 38	– 36	– 29	– 27	– 25
	2022	2023	2024	2025	2026	2027	2028	2029	2030
Total pax in 2010 MEIP Study	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 343 234
Total pax in 2012 MEIP Study	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	1 083 746
Difference (%)	– 23	– 21	– 19	– 17	– 17	– 18	– 18	– 19	– 19

(133) Further sensitivity tests suggest that the project would become unprofitable if the overall revenues were reduced by a mere […] % on an annual basis over the whole projection period, or if revenues were lower by […] % and operating expenses higher by […] %. Hence, the profitability of the investment is highly sensitive to marginal changes in the basic assumptions. The Commission considers such changes to be marginal in comparison with modifications implemented in the subsequent MEIP studies.

(134) The sensitivity checks undertaken by the Commission seem all the more reasonable, because less than a year after the 2010 MEIP study, the Polish authorities received an updated analysis which led to the conclusion that the NPV of the project would be significantly reduced and amount to just PLN […] million (about EUR […]). Hence, in May 2011, the NPV of the project was reduced by […] % relative to the initial project.

(135) The Commission further observes that the positive results of the 2010 MEIP study also largely depend on the terminal value of the investment at the end of the business plan's period (i.e. in 2040). Indeed, the discounted cash flow of the company for the period 2010-2040 is negative and amounts to PLN (-[…] million). The terminal value discounted to 30 June 2010 amounts to PLN […] million.

(136) The terminal value was calculated under the assumptions that the annual growth rate for the investment's cash flow after 2040 would […] amount to […] %. According to standard practice the growth rate of the undertaking should not be higher than that of the economy in which it operates (i.e. in terms of GDP growth). Indeed, the terminal value is calculated at the time when the firm is expected to reach maturity and when the high growth period of the firm is thus over. Given that the economy is expected to be composed of both high and stable growth firms, the growth rate of mature firms is thus expected to be *lower* than the average growth rate of the overall economy. Poland did not indicate in its comments on which basis it selected the long-term growth rate of […] %, but it did clarify that the long-term growth rate is a nominal growth rate. Based on information available from the IMF, the Commission has found that the forecasts for real GDP growth in Poland available in early 2010

indicated that the nominal growth rate of the Polish economy would range from 5,6 % in 2011 to 6,6 % in 2015. With an inflation rate around 2,5 %, the real GDP growth could be expected to be equal to 4 %. Hence, the choice of a […] % nominal growth rate for the Gdynia airport could at first sight be deemed to be in line with the information available at the time and the standard practice of choosing a growth rate lower than the growth of the economy. Still, by choosing a long-term growth rate above inflation (which was estimated at 2,5 % in April 2010), the business plan assumes that the airport would continue to grow every year beyond 2040.

Table 7

Data and forecasts on GDP and inflation available from the IMF in April 2010

	2009	2010	2011	2012	2013	2014	2015
% growth GDP (constant prices)	1,70	2,70	3,20	3,90	4,00	4,00	4,00
% growth GDP (current prices)	5,50	4,40	5,60	6,20	6,60	6,50	6,60
% inflation	4,20	3,50	2,30	2,40	2,50	2,50	2,50

Source: International Monetary Fund, World Economic Outlook Database, April 2010 (downloaded from http://www.imf.org/external/data.htm)

(137) Moreover, the Commission notes that in this case, in view of the particularly long projection period and the distant date at which the terminal value was calculated, the task of determining the most appropriate growth rate is further compounded and the uncertainty is further enhanced. Indeed, forecasts for GDP growth rarely go beyond a five-year horizon while in this case, the model had to predict a reasonable growth rate for the airport after thirty years of operations. This fact indicates that a prudent investor would have undertaken several sensitivity tests.

(138) In this respect, it is worth noting that in subsequent updates of the original business plan, the stable growth rate was reduced from […] % to […] %. Though Poland has not provided any clear explanation as to the reduction. The terminal value is a function of the assumed perpetual stable growth rate but also of the projected returns expected during the period of stable growth. The Commission undertook some sensitivity tests further confirming that the conclusion of the 2010 MEIP study is highly sensitive to minor and realistic modifications in the basic assumptions. First, the stable growth rate at which the 2010 business plan yields a negative NPV is around […] %. However, if revenues are assumed to be merely […] % lower than projected, the stable growth rate at which the project becomes unprofitable is […] %.

(139) The stable growth rate model used to calculate the terminal value in this case also requires making assumptions about the date at which the firm will grow at a stable rate which it can sustain forever. In the 2010 MEIP study, this date was set in 2040 and the projection period was therefore taken as 30 years (2010-2040). In the 2012 MEIP update, the projection period was reduced to 18 years (2012-2030) and the terminal value was therefore calculated in 2030. If the same time horizon is applied to the 2010 MEIP study, the NPV becomes negative.

(140) The Commission also notes that the 2012 MEIP study specifically mentions that a prudent investor would have taken into consideration the fact that the project entails a particularly long time-horizon before reaching profitability (See Section 4.10.1.2 of the 2012 MEIP Study in which it is concluded that *'The positive result of the net present value proves that the investment in the Gdynia-Kosakowo Airport can be an interesting business for potential investors. However, before any decisions are made, investors will have to consider also the long-term investment horizon typical of infrastructure investment projects'*).

(141) The Commission notes that in 2010, when the first MEIP study was conducted, the business plan and the NPV calculations took into account all capital expenditures, including those relating to the public remit obligations (such as fire brigade, security, customs, etc.). The Commission notes that this approach appears correct given that such expenses are intrinsically linked to the construction and operation of the airport (and hence are incremental to the project).

(142) Nevertheless, the Commission has also assessed the profitability of the project on the basis of the 2010 MEIP study without the capital expenditures for tasks falling within public policy remit.

(143) The information submitted by Poland does not allow identifying precisely which elements of the capital expenditures and of operating expenses relate to public remit expenses. The Commission notes that in the 2012 MEIP update Poland has disaggregated the investments falling within public policy remit; however this was not the case for the 2010 MEIP study. Nevertheless, the Commission re-calculated the NPV excluding a number of identifiable capital expenditures that are clearly related to public remit activities. In particular, the Commission recalculated the NPV excluding the following capital expenses: 'Car fire fighting and equipment', 'Airport fence and monitoring' and 'Equipment for airport security guard' amounting to PLN […] million (nominally in total)

(144) In the 2010 MEIP study, the consequence of removing public remit expenses is that the discounted cash flow increases to about PLN (-[…]) million (or in other words, the expected discounted loss over the period 2010-2040 is reduced by PLN […] million from PLN (-[…]) million to PLN (-[…]) million). Given that the terminal value is not altered (and equal to PLN […] million), the NPV of the project increases from PLN […] million to PLN […] million (i.e. it increases from EUR […] million to about EUR […] million).

(145) Further sensitivity tests were undertaken and indicate that the NPV becomes negative if the following alterations are implemented: a reduction in total revenues by […] %, a reduction in revenues from airport charges by […] % or a reduction in total revenues by […] % associated with costs that are higher by […] % (all on an annual basis). In view of the highly unrealistic assumptions regarding airport charges ([…] % higher than Gdansk airport ([55])) and the overly optimistic traffic projections (reviewed projections of […] % to […] % lower than initially foreseen), such sensitivity tests suggest that slightly more realistic assumptions lead to a conclusion that the project would not be profitable.

(146) Once the identifiable public remit expenses in the 2010 MEIP study are excluded, sensitivity tests suggest that the NPV would become negative if the expected revenues from LCC airport charges (without any reduction of the airport charges for charters) were to be reduced by […] % on an annual basis whilst keeping charter revenues, all other revenues, operating costs and capital expenditures as forecasted in the business plan (considering that LCC revenues start being generated in 2017 and progressively increase over time).

(147) Furthermore, it is worth reminding that the project is only profitable due to the terminal value (i.e. the value of the airport as of 2040 assuming a […] % perpetual annual growth of cash flow). Up to 2040, the project generates negative cash flow.

(148) Therefore, even the assessment of the profitability of the project on the basis of the 2010 MEIP study without the capital expenditures for tasks falling within public policy remit does not lead to conclusive evidence that a private investor would have carried out the investment in question.

Summary and Conclusion

(149) The conversion project of Gdynia airport entails significant investments and a long-period of negative cash flows. Indeed, the business plan shows that over the projection period of 2010-2040, the cumulative discounted cash flow is negative (and equal to minus PLN […] million or minus EUR […] million). According to the business plan, the project only becomes positive due to the discounted terminal value of PLN […] million calculated as of 2040 and forever, assuming that the airport will grow annually and forever thereafter at a nominal growth rate of […] %). Despite the inherent and significant uncertainties related to a project of such long-term nature, the business plan contains no sensitivity analysis and this is not in line with the type of analysis that a prudent investor would have undertaken for such a project.

(150) Further, the Commission's analysis concluded that the business plan relies on a series of optimistic and unrealistic assumptions in view of the proximity of the airport to the Gdansk airport which has the same business model, spare capacity and expansion plans. Several sensitivity tests indicated that the NPV of the project becomes negative with minor and realistic modifications to the underlying assumptions.

([55]) See footnote 54.

(151) In view of the foregoing, the Commission considers that on the basis of the 2010 MEIP study a private investor would not have taken the decision embark in the investment project in question. Therefore the decision of Gdynia and Kosakowo municipalities confers an economic advantage to the airport manager, which it would not have obtained under normal market conditions.

The application of the MEIP on the basis of the 2011 MEIP study and 2012 MEIP update

(152) As regards the MEIP studies carried out in 2011 and 2012 (and the funds that according to Poland were injected into the airport manager following those studies), the Commission considers that those capital injections had been already committed in the shareholder agreement signed on 11 March 2011 (see recital (33) further above), i.e. before the 2011 and the 2012 MEIP studies were carried out. Therefore, when the 2011 and 2012 MEIP studies were carried out, the investment decisions of the shareholders were already taken, even though they have been executed at a later point in time. Moreover, the Commission considers that the capital injections executed after the 2011 and 2012 MEIP studies have been carried out cannot be regarded as autonomous investment decisions taken in isolation, since they concern the same investment project, which the public shareholders started to execute at the latest in 2010, and they merely reflect adjustments or amendments to the initial project.

(153) Therefore, as already mentioned, the Commission considers that those study could demonstrate that Poland behaved as a private investors only if they would show that by investing additional funds, the project would yield a return capable of adequately remunerating the capitals already invested and to be invested (or that would appropriately remunerate those capitals even when taking into account the risk of having to repay any illegal aid received in the past).

(154) However, far from showing the above, those studies do not appear reliable for the reasons that will be explained below.

The application of the MEIP on the basis of the 2011 MEIP update

(155) The first update of the MEIP study was conducted in May 2011. Even though the capital injections executed after this MEIP study was carried out were committed before May 2011 (see recital 33 further above), the Commission has also assessed whether on the basis of the information contained in this economic study the capital injections would appear to reflect the behavior of a private investor operating in a market economy. In the 2011 MEIP study, the revenues from the project were kept constant but the capital expenditures were increased (see Figure 3 showing the cumulative investment expenditures expressed in real 2010 terms). This study takes also into account the previous capital injections and the already carried out capital expenditures. The WACC was slightly reduced (from […] % down to […] %) and the long-term growth rate was reduced from […] % to […] %. Those updates led to the NPV being significantly reduced to PLN […] million (about EUR […]). This was due to a higher loss (the discounted cash flow over the period 2011-2030 would be equal to PLN (-[…] million) and the terminal value would be slightly decreased to PLN […] million.

(156) Consequently, the Commission concludes that also on the basis of the 2011 MEIP update the decision of Gdynia and Kosakowo municipalities to finance the conversion of Gdynia-Kosakowo (Gdynia-Oksywie) airfield into a civil aviation airport is not in line with the MEIP, and therefore it confers an economic advantage that the airport manager would not have obtained under normal market conditions.

The application of the MEIP on the basis of the 2012 MEIP update

(157) Poland considers that the Commission should assess the compliance with the MEIP on the basis of the 2012 MEIP study. In order to reply to that argument, even though the capital injections executed after this MEIP study was carried out, were committed before (see recital 33 further above), the Commission has also assessed whether on the basis of the information contained in this economic study the capital injections would appear to reflect the behavior of a private investor operating in a market economy.

(158) The Commission notes that the 2012 MEIP update takes into account the previous capital injections and the already carried out capital expenditures. The 2012 MEIP update shows that the financing provided to Gdynia-Kosakowo Airport Ltd results in a positive equity value of PLN […] million (around EUR […] million) for its shareholders. In addition, the IRR of the investment project amounting to […] % is higher than the assumed cost of capital of the airport manager ([…] %).

(159) The 2012 MEIP study compares the equity value of the company with further investments, where the new airport becomes operational (the 'basic scenario'), and the equity value of the company without further investments (the 'counterfactual scenario'), where the investment project would be discontinued as of June 2012 ([56]).

(160) In this context, the Commission has already concluded that the capital injections carried after 2010 cannot be considered in isolation from the initial investment decision that was taken in 2010. The correct counterfactual scenario in 2010 would have been not to start implementing the project. According to Poland the lease agreement allowed Kosakowo only to use the land for a civil aviation airport. The Commission notes that a private investor would not have had entered into such agreement in the first place if the plans to develop a new civil airport in the area would not show a realistic possibility to obtain a positive return from such an investment. Therefore, the counterfactual scenario defined in the 2012 MEIP update is distorted by a previous decision, which itself did not reflect the behaviour of a private investor. In other words, the correct counterfactual in 2010 as well as in 2012 would be that of not implementing the project of developing the civil airport in question, as all the capital injections and MEIP studies carried out by Poland concern the implementation of the same investment project.

(161) In any case, the Commission observes that the basic scenario of the 2012 MEIP update provided by Poland is based on a business plan projecting the future cash flows for the equity investors for the period 2012–2030 (i. e. a period of a high growth) ([57]). The projected future cash flows are based on the assumption that the airport will start its activities in 2013. At the time when the 2012 MEIP update was conducted, Poland expected that the airport would serve around […] passengers in 2014 and progressively extend its activities up to […] passengers in 2020 and around […] million in 2028 (see passenger development forecast in Table 8 below).

Table 8

Traffic projections for Gdynia airport (in thousands)

Erwarteter Anstieg der Fluggastzahlen										
Jahr	2013	2014	2015	2017	2018	2019	2020	2023	2026	2030
Insgesamt	(…)	(…)	(…)	(…)	(…)	(…)	(…)	(…)	(…)	1 083,7

(162) According to the 2012 MEIP update it is expected that after 2030 the airport operator will grow endlessly at a stable growth rate of […]. Under this assumption, Poland calculated the terminal value of the airport operator in 2030.

(163) The Commission notes that like in the 2010 MEIP study the key value drivers of the future cash flows of the manager of Gdynia airport are the expected aeronautical revenues, which will be determined by the number of passengers and level of airport charges paid by airlines.

(164) With regard to the expected passenger development, Poland argues that the demand for air passenger services will increase over time together with the expected increase of Poland's GDP and the region's development. Poland is therefore of the opinion that the traffic projections are conservative and the actual traffic might be higher than the foreseen. According to Poland, the traffic forecast for the region updated in March 2013 foresees higher traffic than that applied in the 2012 MEIP update.

(165) Poland argues that the business plan foresees that less than […] % of the passenger traffic in the region will be served by Gdynia airport. Moreover, according to Poland the aviation market development in the Pomeranian Region leaves a room for an additional small airport with services complementary to that of Gdansk airport.

(166) With regard to passenger demand, the Commission considers that the arguments presented in recitals 118 and 129 concerning Gdynia's competition for airlines and passengers with Gdansk airport are also valid for the assessment of the 2012 MEIP update.

([56]) As the MEIP study was carried out in June 2012, the analysis is based on this date.

([57]) A commonly used way to evaluate equity investment decisions is considering the equity value of the company. Equity value is the value of a company available to its owners or shareholders. The equity value is calculated by summing all future cash flows available for equity investors discounted at the appropriate return. The discount rate generally used is the cost of equity that reflects the risk of the cash flows.

(167) The Commission observes in particular that the level of airport charges foreseen in the 2012 MEIP update was set at the same level as in the 2010 MEIP study. According to Poland, the charges used in the 2012 MEIP updated do not differ significantly from the standard tariffs charged by other small airports in Poland. Poland clarifies that the level of charges in the business plan is averaged for the whole business plan period (i.e. 2014 – 2040) and assumes that the long-term charges applied at Gdansk airport will have to increase following improved standard of services at that airport.

(168) Since Gdansk, Bydgoszcz and Szczecin airports applied the same tariffs in 2012 as in 2010 (including the same discounts), the Commission assessment of the level of charges in the 2012 MEIP study for Gdynia airport is the same as for the 2010 MEIP studies (see recitals 122 to 129).

(169) The Commission considers that a market economy investor guided by the prospect of profitability would not base any investment decision in the project in question on a level of charges that is significantly higher than the net charges applied in other Polish regional airports ([58]), especially at Gdansk airport.

(170) The Commission also notes that the stress test conducted by Poland shows that the equity value turns negative, if the passenger charge is reduced to PLN […]. In this context, the Commission notes that a reduced airport charge, which would be comparable with the level of airport charges paid at other Polish regional airports (e.g. Gdansk, Bydgoszcz, Szczecin, Lublin) would result in a negative equity value.

(171) The Commission further considers that a market economy investor would not set its charges at a higher level under the assumptions that the charges at Gdansk airport would increase in the long-term. In this respect, the Commission observes that the schedule of charges applied at Gdansk airport foresees the application of discounts until 2028 (i.e. only two years shorter than the period covered in the business plan for the 2012 MEIP update). On this basis, even if the airport charges at Gdansk airport would increase after 2028, the Commission considers that the forecasted airport charges averaged over the period of the business plan (i. e. until 2030) are still above the average level of airport charges at the competing airport.

(172) Poland confirmed that the 2012 MEIP update takes into account operating costs, which are related to the military operation at the airport. These costs are expected to be compensated by the State. Poland also confirmed that the share of costs (both operating and investment costs) between Gdynia airport and the military user has not yet been formally agreed.

(173) The Commission considers that a market economy investor would base its assessment only on results foreseeable at the time it takes the investment decision. Therefore, the Commission considers that any possible cost reduction due to the sharing of costs with the military user of the airport (and the impact on the airport's overall costs and revenues) should not be taken into account when assessing the compliance of the investment with the MEIP. Indeed, the 2012 MEIP study does not quantify the costs reductions that the airport manager could obtain in this connection.

(174) As is the case for the 2010 MEIP study, the overall DCF for the project over the period 2012-2030 is negative as shown in the Figure 5. The airport would only start generating positive cash flows as of 2020, but given the long investment period, in discounted terms, the cumulative cash flow would remain negative over the projection period.

([58]) In addition to Gdansk, Bydgoszcz and Szczecin, the Commission analysed also airport charges at Lublin airport, a regional airport opened in December 2012. The standard departing passenger fee at Lublin airport is equal to PLN 34 (EUR 8,5); standard landing fee is PLN 36/tonne; standard parking fee is PLN is 15/tonne/24 h (no fee for first 4 hours). Discounts: if an air carrier opens an operational base in Lublin Airport, departing passenger fee is between PLN 4,21 (EUR 1,05) and PLN 5,76 (EUR 1,44) in the first five seasons (2,5 year); for parking and landing fees the discount is 99 %. After 5 seasons the discounts for new routes apply. Discount for new routes: for passenger, landing and parking fees discounts from 95 % in the first year of a connection to 25 % - 65 % in the fifth year (depending on the number of passengers). After the fifth year a discount equal to 60 % if an air carrier serves more than 250 000 departing passengers from Lublin Airport.

Figure 5

Cumulative (real) DCF (in PLN) 2012 MEIP update

[…]

(175) Consequently, the Commission concludes that also on the basis of the 2012 MEIP update the decision of Gdynia and Kosakowo municipalities to finance the conversion of Gdynia airfield into a civil aviation airport is not in line with the MEIP, and therefore it confers an economic advantage that the airport manager would not have obtained under normal market conditions.

The November 2013 update

(176) The Commission further considers that modifications of the investment plan aiming at generating additional revenue from the sale of fuel by the airport (without an external operator) and offering navigation services should not be taken into account when assessing the compliance of the investment with the MEIP. Poland confirmed that these possible additional sources of revenue were neither included in the 2010 MEIP study, nor in the 2011 MEIP study and also not in the 2012 MEIP update prepared for Gdynia airport, because at the time of these studies were prepared the public shareholders and also the company could not be sure of obtaining all necessary permissions and concessions to provide such services. As at the time of the MEIP studies were conducted it was not likely that the necessary permissions and concession would be obtained, the Commission notes these developments cannot be taking into account retrospectively.

Conclusion

(177) The Commission considers that the public funding provided by Gdynia and Kosakowo municipalities to the airport manager is not in line with MEIP. Therefore, the Commission considers that the measure at stake provides an economic advantage to Gdynia-Kosakowo Airport Ltd that it would not have obtained under normal market conditions.

5.1.4. **Selectivity**

(178) Article 107(1) TFEU requires that a measure, in order to be defined as State aid, favours '*certain undertakings or the production of certain goods*'. In the case at stake, the Commission notes that the capital injections concern the Gdynia-Kosakowo Airport Ltd only. Thus they are selective by definition within the meaning of Article 107(1) of the TFEU.

5.1.5. **Distortion of competition and effect on trade**

(179) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid ([59]). The economic advantage granted by the present measure to the airport operator strengthens its economic position, as the airport operator will be able to set up its business without bearing the inherent investment and operating costs.

(180) As assessed in section 5.1.1, the operation of an airport is an economic activity. Competition takes place on the one hand between airports to attract airlines and the corresponding air traffic (passengers and freight) and on the other hand between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, the Commission underlines that notably in respect to LCCs also airports that are not located in the same catchment areas and in different Member States can be in competition with each other to attract those airlines. The Commission notes that Gdynia airport will serve around […] 000 passengers until 2020 and up to 1 million passengers in 2030.

(181) As mentioned in paragraph 40 of the 2005 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the TFEU. In view of the forecasted traffic at Gdynia airport and its proximity to Gdansk airport (only around 25 kilometers away) the Commission considers that competition and trade between Member States are capable of being affected.

([59]) Case T-214/95 Het Vlaamse Gewest v Commission [1998] ECR II-717.

(182) On the basis of the arguments presented in recitals 179 to 181, the economic advantage which the manager of Gdynia airport receives strengthens its position vis-à-vis its competitors on the Union market of providers of airport services. Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between the Member States.

5.1.6. **Conclusion**

(183) In view of the arguments presented in the recitals 83 to 182, the Commission considers that the capital injections granted to Gdynia-Kosakowo Airport Ltd constitutes State aid within the meaning of Article 107(1) of the TFEU. As the financing was already put at the disposal of Gdynia-Kosakowo Airport Ltd the Commission also considers that Poland has not respected the prohibition of Article 108(3) of the TFEU ([60]).

5.2. COMPATIBILITY OF THE AID

(184) The Commission has examined whether the aid at issue can be found compatible with the internal market. As described above the aid consist in financing investment costs for the realisation of Gdynia airport and operating losses during the first years of the operation of that airport (i.e. until 2019, including, according to both the 2010 MEIP study and the 2012 MEIP study).

(185) Article 107(3) of the TFEU provides for certain exemptions to the general rule set out in Article 107(1) of the TFEU that State aid is not compatible with the internal market. The aid in question can only be assessed on the basis of Article 107(3)(c) of the TFEU, which stipulates that: '*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*', may be considered to be compatible with the internal market. In this regard, the 2005 Aviation Guidelines provide a framework for assessing whether aid to airport operators may be declared compatible pursuant to Article 107(3)(c) of the TFEU. They mention a number of criteria, which the Commission has to take into account.

5.2.1. **Investment aid**

(186) State aid for financing airport infrastructure is compatible with Article 107(3)(c) of the TFEU, if it complies with the conditions laid down in paragraph 61 of the 2005 Aviation Guidelines:

(i) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.);

(ii) the infrastructure is necessary and proportional to the objective which has been set;

(iii) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;

(iv) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner; and

(v) the development of trade is not affected to an extent contrary to the Union interest.

(187) In addition State aid to airports, as any other State aid measure, should have an incentive effect and should be necessary and proportional in relation to the aimed legitimate objective in order to be compatible.

(188) Poland is of the opinion that the public financing of the conversion project at Gdynia airfield complies with all criteria for investment aid under the 2005 Aviation Guidelines.

([60]) Case T 109/01 Fleuren Compost v Commission [2004] ECR II-127.

(i) *Construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)*

(189) The Commission notes that the Pomeranian Region is already efficiently served by Gdansk airport, which is located only around 25 kilometres away from the planned new airport.

(190) The Gdansk airport is located next to the Tricity ring road, this road is a part of S6 express road that bypasses the cities of Gdynia, Sopot and Gdansk, and ensures easy access to the airport to the large majority of Pomerania Region's inhabitants. Even for Gdynia's inhabitants, the construction of a new airport would as such not lead to a substantial improvement in their connectivity, because both airports (Gdynia and Gdansk) can be reached from the centre of Gdynia in the same time of approximately 20-25 minutes by car.

(191) The Commission also observes that the Tricity Metropolitan Rail link, which is co-financed with the Union structural funds and is under construction, will provide a direct rail connection from Gdansk airport both to Gdansk and Gdynia citizens from the centres of their cities in a similar time of around 25 minutes. The Tricity Metropolitan Rail will also provide direct or indirect rail connection to Gdansk airport to the citizens of other parts of the Pomeranian Region.

(192) The Commission further observes that the current capacity of Gdansk airport is 5 million passengers per annum while the actual passenger traffic in 2010 to 2013 was as follows: 2010 – 2,2 million, 2011 – 2,5 million, 2012 – 2,9 million, 2013 – 2,8 million. The Commission also notes that Gdansk airport is being expanded now to the capacity of 7 million passengers per annum. This investment is to be finalised in 2015.

(193) In addition, according to the traffic forecast for the Pomeranian Region, provided by Poland and used to prepare the 2012 MEIP update, the total demand in the region will […] passengers per annum […].

Table 9

Traffic projections for the Pomeranian Region (in millions)

2013	2015	2017	2019	2020	2023	2026	2027	2028	2030
2,8	[…]	[…]	[…]	[…]	[…]	[…]	[…]		7,7

(194) The Commission further observes that according to the information provided by Poland, the Master Plan for Gdansk airport foresees further expansions of the airport to serve more than 10 million passengers per annum. Therefore, the concrete decision to expand the capacity of the Gdansk airport above 7 million can be taken in the future depending on the traffic developments.

(195) According to Poland, the updated forecast (prepared in March 2013) shows that demand in the catchment area is expected to be higher than the traffic projections in 2012. According to the modified projections the demand in the catchment area amounts to around 9 million passengers in 2030. However, even this forecast shows that Gdansk airport alone would be sufficient, without a further investment, to serve the demand in the region at least until 2025 (on the basis of the adjusted traffic forecasts as described in recital 45).

(196) Furthermore, according to the information provided by Poland the current capacity of the runway in Gdansk airport is 40-44 operations per hour and the current use is on average 4,7 operations per hour.

(197) On the basis of information provided by Poland (see recitals 192–196 above) the Commission observes that Gdansk airport will be only used at around 50–60 % of its capacity in the coming years. Consequently, even in the event of a dynamic passenger growth in the Pomeranian Region, Gdansk airport will be able to meet the demand of airlines and passenger during a long period of time.

(198) The Commission further observes that Gdansk airport offers more than 40 national and international destinations (both point to point connections and connections to hubs: Frankfurt, Munich, Warsaw and Copenhagen).

(199) As mentioned in recital 60, Poland argues on the one hand that for land planning and environmental consideration the extension of the capacity of Gdansk airport is limited. On the other hand, Poland argues that there are no limitations to the capacity extensions at Gdansk airport. The Commission considers that the arguments regarding the capacity expansion restrictions are contradictory and in any case they are not substantiated and therefore, the Commission cannot base its assessment on them.

(200) In view of the spare capacity of Gdansk airport that will not be fully used in the long-term, and the plan to further expand capacity at that airport if necessary in the long term, the Commission considers that the creation of another airports in the Pomeranian region would not contribute to the region's development. The Commission further observes that with Gdansk airport the Pomeranian Region is already well connected and the new airport will not increase the connectivity of this region.

(201) The Commission also notes that the business model of Gdynia airport suggests that it would compete for passengers with Gdansk airport in the LCC, charter and also general aviation markets. Moreover, the creation of a new airport to serve as a back-up, emergency airport cannot justify the scale of investment at Gdynia airport.

(202) In the light of the above, the Commission considers that the investment at Gdynia airport will lead to a mere duplication of infrastructures in the region, which does not meet a clearly defined objective of common interest.

(ii) *The infrastructure is necessary and proportional to the objective which has been set*

(203) As stated in recitals 189 to 202, the Commission considers that the catchment area of Gdynia airport is and will be efficiently served by Gdansk airport. In addition, both airports would pursue a similar business model and focus mainly on LCC's and charters.

(204) In absence of a clearly defined objective of common interest the Commission considers that the infrastructure cannot be considered to be necessary and proportional to an objective of common interest (see also recital 202 above).

(iii) *The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure*

(205) As stated in point (i), Gdynia airport is located only around 25 kilometres away from the existing Gdansk airport and both airport have the same catchment area and a similar business model.

(206) The capacity of Gdansk airport is currently used at less than 60 %. Taking into account the investments currently being carried out, Gdansk airport is sufficient to serve, depending on the forecasts used, the demand in the region at least until 2025–2028 and further expansions of Gdansk airport are feasible.

(207) The Commission also notes that the business plan for Gdynia airport shows that the airport would generate about [80–90] % of revenue from serving low-cost and charter carriers. It means that it would focus on markets that are a core business of Gdansk airport.

(208) In this context, the Commission also observes that Poland did not provide any proofs of a possible collaboration between both airports.

(209) Also plans to generate revenues from other aviation and non–aviation activities (production and services) would not alone be sufficient to cover the high operational costs related to running Gdynia airport.

(210) Consequently, the Commission considers that Gdynia airport does not have satisfactory medium-term prospects for use.

(iv) *All potential users of the infrastructure have access to it in an equal and non-discriminatory manner*

(211) Poland confirmed that all potential users will have access to the airport infrastructure on an equal and non-discriminatory basis without any commercially unjustified discrimination.

(v) *The development of trade is not affected to an extent contrary to the common interest*

(212) The Commission notes that Poland did not provided any proofs that Gdynia and Gdansk airport would form a collaborative aviation hub. Rather, it would seem logical that the two airports would have to compete for essentially attracting the same passengers.

(213) The Commission further notes that the business plan of Gdynia airport (around [80 - 90] % of revenue generated by low-cost and charter flights) and the scale of investments (e.g. a terminal with the capacity of 0,5 million passengers per annum that is to be expanded in the future) do not confirm the view that Gdynia airport would focus on general aviation traffic and would provide only or mainly services to the general aviation sector.

(214) Taking into account the above and the fact that both airports would focus first on LCC and charters, the Commission considers that the aid is directed to an airport, which would be in direct competition with another airport in the same catchment area without there being a demand for airport service that could not be served by the existing airport.

(215) Therefore, the Commission considers that the aid in question would affect trade to an extent contrary to the common interest. The absence of a common interest objective that the aid is intended to achieve, strengthen that conclusion.

(vi) *Necessity of aid and incentive effect*

(216) Based on the data provided by Poland the Commission considers that the investment costs can be lower than for the construction of other comparable regional airports in Poland. This is mainly due to usage of existing infrastructure of the military airport. Moreover, Poland argues that without the aid the investment would not be undertaken by the airport manager.

(217) The Commission further observes that due to long period necessary to reach the break-even point for such type of investment the public financing could be necessary to change the behaviour of the beneficiary in such a way that it entered the investment. Moreover, since the expected profitability of the investment project cannot be established (see recital 177) and a market economy investor would not pursue such project, it is indeed likely that the aid changes the behaviour of the airport manager.

(218) However, in absence of a clearly defined objective of common interest, the Commission concludes that the aid cannot be considered to be necessary and proportional to that objective.

(219) Consequently, the Commission considers that the investment aid of Gdynia and Kosakowo in favour of Gdynia-Kosakowo Airport Ltd does not comply with the requirements of the 2005 Aviation Guidelines and cannot be found compatible with the internal market.

5.2.2. **Operating aid**

(220) The Commission is of the view that the financing of operating losses of Gdynia-Kosakowo Airport Ltd constitutes operating aid, reducing the airport operator's current expenditure. According to the case law of the Court, such operating aid is in principle incompatible with the internal market. According to the 2005 Aviation Guidelines, operating aid granted to airports can only be declared compatible under exceptional circumstances and strict conditions in underprivileged regions.

(221) The Commission notes that Gdynia airport is located in an underprivileged region covered by the derogation set out in Article 107(3)(a) of the TFEU, and thus, the Commission has to assess whether the operating aid at stake can be considered compatible under the RAG.

(222) According to paragraph 76 of the RAG, the operating aid in regions eligible under the derogation in Article 107(3)(a) of the TFEU may be granted provided that following cumulative criteria are met: (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate.

(223) Poland is of the opinion that the operating aid is compatible with the paragraph 76 of the RAG (see recitals 77–79).

(224) Since the Pomeranian Region is already served by Gdansk airport and the new airport will not increase the connectivity of this region, the Commission cannot conclude that the aid would contribute to regional development.

(225) The Commission considers that in absence of that, it cannot be concluded that the operating aid is proportional to the handicaps it seeks to alleviate, as the Pomeranian Region does not appear to suffer from any connectivity handicap.

(226) Moreover, the Commission considers the assessed operating aid is allocated to a part of predetermined expenditure. However in the view of the Commission's assessment of the business plan for Gdynia airport and it's assessment of the level of foreseen revenues and costs, presented in section 5.1.3, it cannot be concluded that the aid would be limited to a necessary minimum, granted on a transitional basis and be degressive. In particular, with regard to the uncertainties regarding the expected profitability of the airport operator (see section on the existence of aid) the transitional nature and degressivity of the aid cannot be ensured.

(227) In any case, the Commission considers that granting operating aid in order to ensure the operation of an investment project that benefits of incompatible investment aid is inherently incompatible with the internal market.

(228) Therefore, the Commission considers that the operating aid in favour of Gdynia-Kosakowo airport Ltd granted by Gdynia and Kosakowo does not comply with the criteria set out in the RAG.

5.2.3. **Conclusion on comptibility**

(229) Consequently, the Commission concludes that the State aid granted to Gdynia-Kosakowo Airport Ltd is incompatible with the internal market.

(230) The Commission has not identified any other compatibility clause that could potentially be relevant for declaring the present aid compatible with the Treaty. Likewise Poland has invoked neither any compatibility clause nor provided any substantial arguments that would allow the Commission to declare the present aid compatible.

(231) The investment and operating aid which Poland has granted or intends to grant in favour of Gdynia-Kosakowo Airport Ltd are incompatible with the internal market. Poland has unlawfully implemented the aid in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

6. **RECOVERY**

(232) In accordance with the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ([61]) when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([62]). In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([63]).

([61]) Case C-70/72 *Commission v Germany*, paragraph 13.
([62]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, paragraph 75.
([63]) Case C-75/97 *Belgium v Commission*, paragraphs 64-65.

(233) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 ([64]) laid down that *'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'*

(234) Therefore, the State aid mentioned above must be reimbursed to the Polish authorities, insofar as it has been paid out,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid, unlawfully put into effect by Poland between 28 August 2007 and 17 June 2013 in breach of Article 108(3) of the Treaty on the Functioning of the European Union in favour of Port Lotniczy Gdynia-Kosakowo sp. z o.o. by means of capital injections amounting to PLN 91 714 000 PLN is incompatible with the internal market.

2. The State aid which Poland is planning to implement for Port Lotniczy Gdynia-Kosakowo sp. z o.o. after 17 June 2013 for the conversion of the military airport of Gdynia-Kosakowo into a civil aviation airport is incompatible with the internal market. The State aid may accordingly not be implemented.

Article 2

1. Poland shall recover the aid referred to in Article 1(1) from the beneficiary.

2. The sums to be recovered shall bear interest from the dates listed in the second subparagraph until their actual recovery.

The dates on which the sums to be recovered were put at the disposal of the beneficiary are the following:

(a) 28 August 2007 for the amount of 50 000 PLN;

(b) 4 March 2008 for the amount of 200 000 PLN;

(c) 11 September 2008 for the amount of 500 000 PLN;

(d) 28 July 2009 for the amount of 1 345 000 PLN;

(e) 8 December 2010 for the amount of 4 361 000 PLN;

(f) 8 July 2011 for the amount of 25 970 000 PLN;

(g) 1 September 2011 for the amount of 1 779 000 PLN;

(h) 25 April 2012 for the amount of 31 009 000 PLN;

(i) 27 May 2013 for the amount of 6 469 000 PLN;

(j) 17 June 2013 for the amount of 20 031 000 PLN.

([64]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([65]).

4. Poland shall cancel all outstanding payments of the aid referred to in Article 1(2) with effect from the date of notification of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1(1) shall be immediate and effective.

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

Article 4

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

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Poland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1(1) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Republic of Poland.

Done at Brussels, 11 February 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

([65]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

ANNEX

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) Million of national currency.

COMMISSION DECISION

of 11 March 2014

on State aid SA.34445 (12/C) implemented by Denmark for the transfer of property-related assets from FIH to the FSC

(notified under document C(2014) 1280)

(Only the English text is authentic)

(Text with EEA relevance)

(2014/884/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on Member States and other interested parties to submit their comments pursuant to those provisions [1],

Whereas:

1. **PROCEDURE**

(1) On 30 June 2009, Denmark injected DKK 1,9 billion as Tier 1 hybrid capital into FIH Erhvervsbank A/S including its subsidiaries ('FIH') under the Danish Act on State-Funded Capital Injections [2].

(2) On 6 March 2012 Denmark notified a package of measures in favour of FIH. By decision of 29 June 2012 ('the Rescue and Opening Decision') [3] the Commission approved those measures [4] on a temporary basis finding that them compatible with the internal market.

(3) At the same time the Commission initiated the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('the Treaty') because of doubts with regard to the appropriateness of the measures, the limitation of the aid to the minimum necessary and the own contribution of the bank, in particular in view of the potentially low remuneration of the impaired asset measures granted in favour of FIH.

(4) On 2 July 2012 FIH paid back the capital of DKK 1,9 billion it had received in 2009 under the Danish Act on State-Funded Capital Injections [5].

(5) In line with the Rescue and Opening Decision Denmark submitted a restructuring plan on 4 January 2013 [6] which it subsequently modified. On 24 June 2013 Denmark submitted the final update of that plan ('the restructuring plan').

(6) On 3 February 2014 Denmark submitted a term sheet setting out the terms for the restructuring of FIH, which Denmark has committed to implement (the 'commitments').

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[1] OJ C 359, 21.11.2012, p. 1.
[2] 'Act on State-Funded Capital Injections' (lov om statsligt kapitalindskud) means the Act Number 67 of 3 February 2009 and executive orders issued under it. The Act was approved by Commission Decision of 3 February 2009 (OJ C 50, 3.3.2009, p. 4).
[3] Commission Decision of 29 June 2012 in case SA.34445 (2012/C) (ex 2012/N) (OJ C 359, 21.11.2012, p. 1).
[4] Those aid measures are described in detail in recitals 10 to 23 of the Rescue and Opening Decision.
[5] See recital 1.
[6] The plan was subject to subsequent amendments.

(7) The Danish authorities provided additional information during the period between 30 June 2012 and 3 February 2014.

(8) For reasons of urgency, Denmark accepts that exceptionally this Decision be adopted in the English language [7].

2. **DESCRIPTION**

2.1. THE BENEFICIARY

(9) FIH is a limited liability company regulated by the Danish banking legislation and supervised by the Danish Financial Supervisory Authority ('FSA'). It was founded in 1958 and has its headquarters in Copenhagen, Denmark. It is wholly owned by FIH Holding A/S ('FIH Holding').

(10) The FIH Group consists of FIH Holding and FIH Erhvervsbank, together with the latter's wholly-owned subsidiaries. Those subsidiaries are FIH Partners A/S (covering the business segment corporate finance), FIH Kapital Bank A/S ('FIH Kapital Bank') [8], FIH Realkredit A/S, which is a mortgage credit institution, and FIH Leasing and Finans A/S. FIH's activities consist of three segments: banking [9], markets [10] and corporate finance [11].

(11) As of 31 December 2012, FIH Holding was owned by the Danish Labour Market Supplementary Pension Fund which held 48,8 % of the shares of FIH Holding, by PF I A/S [12] which held 48,8 % of the shares, and by the Executive Board and executive employees who held 2,3 % of the shares, with FIH Holding itself holding 0,1 % of the shares.

(12) At the end of 2011 FIH Group had a balance sheet of DKK 84,16 billion (EUR 11,28 billion) and its total capital ratio [13] was 17,8 % which increased to 21,2 % by 31 December 2012. On 31 December 2012 FIH had a balance sheet of DKK 60,76 billion (EUR 8,1 billion) [14] and risk weighted assets ('RWA') of DKK 29,84 billion (EUR 3,98 billion).

(13) FIH is a focused niche bank specialising in medium-term financing as well as risk management advisory and corporate finance services for Danish enterprises with a balance sheet exceeding DKK 10 million (EUR 1,34 million). Originally FIH's banking activities covered three segments: Property Finance, Acquisition Finance and Corporate Banking.

(14) FIH constituted Denmark's sixth-largest bank by working capital [15] at the time of the Rescue and Opening Decision, servicing more than 2 000 banking customers at group level. The market share of FIH in bank and mortgage lending at that time was estimated at 1,7 %. It had a market share in SME/corporate lending of 2,5 %. In June 2012 FIH had a market share of 2,1 % of the total market for lending to corporates (both banks and mortgage banks).

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[7] Language waiver dated 10 December 2013.
[8] It merged with FIH Erhvervsbank A/S as continuing company on 23 August 2013.
[9] Originally banking consisted of: (1) corporate banking, which is responsible for FIH's lending activities, in particular to small and medium-sized enterprises; (2) acquisition finance, providing structured financing for mergers and acquisitions in the Scandinavian market; and (3) property finance, providing capital and advisory services to property investors. Property finance is no longer a business area in FIH, as explained in recital 40.
[10] The markets segment provides financial advisory services for large and medium-sized companies relating, for example, to risk management, liability management and capital structure. The markets segment is also responsible for handling trading and customer-oriented activities in the interest rate, foreign exchange and securities markets.
[11] The corporate finance segment provides financial advisory services on mergers and acquisitions, privatisations and capital injections, etc.
[12] PF I A/S is the holding company for for the ownership of FIH Holding of PFA Pension's, Folksam Ömsesidig Livsförsäkring/Folksam Ömsesidig Sakförsäkring's and C.P. Dyvig & Co A/S.
[13] The restructuring plan uses the term 'Solvency Ratio'. However, the term 'solvency ratio' in financial reporting means the ratio of a company's profits after tax and depreciations to its total liabilities. It therefore measures the ability of a company to meet its debts. It quantifies the size of a company's income after tax, not counting non-cash depreciation expenses, in contrast to its total debt obligations. It also provides an assessment of the likelihood of a company to continue congregating its debt obligations. Therefore, where the restructuring plan uses that term the present decision refers to the 'Total Capital Ratio', that is to say, the ratio of the bank's total capital to its total risk weighted assets.
[14] Exchange rate of 31 December 2012: EUR 1 = DKK 7,4610 (ECB).
[15] Working capital is defined as the sum of deposits, issued bonds, subordinated debt and equity.

(15) FIH Group has performed weakly in recent years. On 25 June 2009, it applied to the Danish Recapitalisation Scheme ([16]) and on 30 June 2009 it received a State-funded Tier 1 hybrid capital injection of DKK 1,9 billion in the form of a loan note. The coupon of that note amounted to 11,46 % per annum. Over the entire year 2009 FIH Group reported a pre-tax loss of DKK 148 million (EUR 19,9 million).

(16) Though FIH Group had a pre-tax profit of DKK 316 million (EUR 42,5 million) in 2010, that profit was mainly driven by non-recurring positive market value adjustments, including unrealised gains on an indirect holding. In 2011 FIH Group reported a pre-tax loss of DKK 1,27 billion (EUR 170 million) due to impairment charges on loans and negative market value adjustments. On 31 December 2012 it had a pre-tax loss of DKK 47 million (EUR 6,4 million). For the end of 2013 a pre-tax profit of DKK 95 million (EUR 12,8 million) has been budgeted. In 2013 the third quarter net profit for continuing operations before taxation was DKK 23,2 million (EUR 3,09 million). For total operations after taxation FIH recorded a loss of DKK 20,1 million (EUR 2,71 million) in 2012.

(17) In 2009 and in 2010 Moody's downgraded FIH's rating from A2 to Baa3. In 2010 the owners of FIH (the Icelandic Financial Supervisory Authority and the Central Bank of Iceland) ([17]) agreed to sell their shares in FIH to the current owners. That new ownership was expected to bring about significant improvement to the credit rating of FIH, as the prior ownership by Kaupthing Bank hf had been one of the main concerns for Moody's regarding FIH. However, mainly due to circumstances specific to FIH such as the refinancing of government-guaranteed bond issues, credit quality and exposure to the property sector, in 2011 Moody's downgraded FIH further to B1 with negative outlook.

(18) The rating downgrade in 2011 was in line with the market prices at that time for FIH bonds that did not benefit from a government guarantee: FIH's 2-4 year debt was priced at spreads of 600-700 basis points ('bps') over the equivalent maturity EURIBOR-linked swap.

2.2. THE EVENTS TRIGGERING THE AID MEASURES

(19) In 2011 and 2012 FIH anticipated difficulties with regard to debt that would mature in 2012 and 2013. The resulting funding challenge was mainly caused by a decline in FIH's credit rating and changed capital market conditions ([18]). In July 2009 FIH had already obtained liquidity assistance in the form of a government guarantee totalling DKK 50 billion (EUR 6,31 billion), which it had wholly utilised. It had also obtained a Tier 1 hybrid capital injection of DKK 1,9 billion (EUR 255 million) from the State under the Danish Guarantee Scheme. As of 31 December 2011 FIH held government-guaranteed bonds amounting to DKK 41,7 billion (EUR 5,56 billion), which constituted 49,94 % of the balance sheet of the bank.

(20) With those State-guaranteed bonds maturing in 2012 and 2013, FIH was about to face a funding problem. The FSA estimated, in the second half of 2011, that there was a relatively high risk that FIH would be unable to comply with liquidity requirements in the following 12-18 months as a result of its expected inability to obtain funding from the open markets.

(21) In order to address those emerging liquidity problems FIH was to carry out a substantial reduction of its balance sheet.

2.3. THE AID MEASURES

(22) To solve the liquidity problems that FIH was then expected to face, in July 2012 Denmark proposed a complex impaired asset measure to transfer problematic property finance assets of FIH to a new subsidiary of FIH Holding ('Newco'). At the same time, Denmark committed to provide funding and recapitalisation to Newco whenever needed.

([16]) See footnote 2.
([17]) In 2010, FIH Group was put up for sale by its previous owner, Icelandic Kaupthing Bank hf, which went into winding-down proceedings in 2008.
([18]) See recital 17.

(23) The 'measures' [19] consisted of two phases of a share purchase agreement [20] and several side agreements under which assets of FIH Group amounting to approximately DKK 17,1 billion (EUR 2,3 billion or 28 % of total assets of FIH at the time of the transfer) were transferred to Newco. Newco [21] was then purchased by the Danish Financial Stability Company ('FSC') [22], after which it would be wound up in an orderly manner under the approved Danish winding-up scheme [23], in accordance with the scheme's principles [24]. The winding-up process is expected to last until 31 December 2016 but it could take until 31 December 2019. The FSC was able to finance almost the entire capital amount of DKK 2 billion for the purchase of Newco through an early redemption of the DKK 1,9 billion Tier 1 hybrid capital loan note which had been granted to FIH [25] by the State in 2009. The FSA approved the repayment by FIH of the State capital injection on 2 July 2012, based on a solvency and liquidity analysis that included the asset transfer measure [26].

(24) In phase 1 there was a demerger of the assets and liabilities of FIH Erhvervsbank and FIH Kapital Bank into Newco, the new subsidiary owned by FIH Holding. The assets transferred to Newco were real estate loans and securities amounting to DKK 15,2 billion (EUR 2,1 billion) and derivatives of DKK 1,6 billion (EUR 215 million). The initial liabilities of Newco consisted of two loans (Loan One and Loan Two) with a remaining equity part of DKK 2 billion.

(25) Loan One was a loss-absorbing loan from FIH to Newco of DKK 1,65 billion (EUR 221 million). That loan will only be repaid by Newco to FIH if the winding-up process of the assets transferred to Newco generates proceeds in excess of the FSC's purchase price of DKK 2 billion (EUR 268 million). As for remuneration for Loan One, Newco is to pay the five-year Danish Government Bond rate plus 1,15 % [27].

(26) Loan Two was a loan from FIH Erhvervsbank to Newco of approximately DKK 13,45 billion (EUR 1,8 billion). As remuneration for Loan Two, Newco is to pay FIH the DKK CIBOR three-month rate plus 1,12 %. The maturity of Loan Two matches the maturity of loans which had previously been issued by FIH under the State guarantee. Loan Two and those matching loans thus fully matured in mid-2013 and it was contractually agreed that, as Newco repaid loans to FIH, FIH would repay outstanding loans that were guaranteed by the government. As the notional amount of Loan Two has been repaid by Newco to FIH, the FSC has provided funding to Newco in the amounts that were necessary to refinance Newco's assets.

(27) In phase 2, which was executed immediately after the completion of phase 1, the FSC bought all the shares in Newco from FIH Holding. The price initially paid [28] by the FSC to FIH Holding for Newco was the equity capital (net worth) as of 1 January 2012, which amounted to DKK 2 billion.

(28) FIH Holding could then use the cash proceeds as immediate liquidity to pay back some of the government-guaranteed debt. At the same time, the asset transfer led to a replacement of real estate loans by loans to a government-sponsored entity, thus reducing FIH's RWA by about DKK 10 billion [29].

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[19] See footnote 4. The measures are further described in recitals 22-30 of this Decision.
[20] Closing Memorandum between FIH and the FSC, dated 2 July 2012.
[21] Newco has, since its acquisition by the FSC, been renamed 'FS Property Finance A/S' but continues to be located at the same address as FIH's head office.
[22] The FSC is the Danish State-owned vehicle which takes care of the different measures entailing the use of State resources for financial institutions in the context of the financial crisis.
[23] See Decision N 407/10 of 30 September 2010 (OJ C 312, 17.11.2010, p. 7); Decision SA.31938 (N 537/10) of 7 December 2010 (OJ C 117, 15.4.2011, p. 1); Decision SA.33001 (11/N) — Part A of 28 June 2011 (OJ C 237, 13.8.2011, p. 1); Decision SA.33001 (11/N) — Part B of 1 August 2011 (OJ C 271, 14.9.2011, p. 1); Decision SA.33757 (11/N) of 9 December 2011 (OJ C 22, 27.1.2012, p. 2); and Decision SA.34227(12/N) of 17 February 2012 (OJ C 128, 3.5.2012, p. 1) as well as Decision SA.33639 (11/N) – Rescue Aid for Max Bank of 6 October 2011 (OJ C 343, 23.11.2011, p. 10).
[24] The objective of the scheme is to preserve value in failing banks by means of a controlled winding-up on a going concern basis instead of those banks being subject to bankruptcy proceedings. Under the original scheme, equity holders and subordinated bond holders of the failing bank are fully wiped out. Assets and remaining liabilities are transferred to the FSC as the State's winding-up company. Sellable assets are sold to investors, and the remaining assets are put in run-off. The revenues generated by the sale and run-off of assets are used to compensate creditors (senior bond holders and depositors).
[25] See recitals 1 and 4.
[26] Confirmed by a letter from the FSA dated 18 April 2013, submitted to the Commission by electronic mail on 29 April 2013.
[27] Contractually, Newco is to pay the two-, three-, or five-year Danish Government effective Bond rate plus 1,15 % depending on which maturity is chosen by FIH. However, it has de facto become the five-year rate.
[28] The purchase price consists of a fixed amount of DKK 2 billon and a variable amount, depending on the terminal realisation value of Newco, which is decribed in recital 30.
[29] Confirmed by a letter of the Danish supervisory authority FSA, dated 18 April 2009, see also footnote 26.

(29) In addition to the share purchase agreement, the measures include several side agreements between FIH Holding and the FSC:

(a) on 1 July 2012 ([30]) FIH Holding gave an unlimited loss guarantee to the FSC guaranteeing that when resolving Newco the FSC would fully recover all its funding and the capital it had provided to Newco. Remuneration for that guarantee is included in the variable purchase price of the share purchase agreement;

(b) on 1 July 2012 the FSC committed to provide funding to Newco once Loan Two had matured (in mid-2013). The FSC receives interest from Newco equivalent to the EU Base rate plus 100 bps. To implement that commitment, the FSC has provided Newco with a DKK 13 billion (EUR 1,64 billion) loan facility for which it will not receive any facility fee;

(c) the FSC has committed to fund and recapitalise Newco if it is necessary to do so prior to the final winding-up process.

(30) At Newco's resolution, the FSC is contractually entitled to recover at least its initial DKK 2 billion investment net of costs incurred by FIH and the FSC in the transaction. If the winding-up process generates proceeds of less than the purchase price of DKK 2 billion, FIH will cover the difference by Loan One, the loss-absorbing loan, and by the guarantee respectively. If the proceeds of the winding-up process exceed DKK 1,5 billion, an additional 25 % of any excess amount will be paid to the FSC in addition to the DKK 2 billion minimal amount it is to receive. Any additional excess amount will be paid to FIH Holding. In practice, if the final proceeds are below DKK 1,5 billion, the FSC will obtain DKK 2 billion. if, for example, the final proceeds are DKK 1,9 billion, the FSC will receive DKK 2,1 billion.

2.4. THE FORMAL INVESTIGATION PROCEDURE

(31) In the Rescue and Opening Decision, the Commission raised doubts with regard to the proportionality of the measures, their limitation to the minimum necessary, whether there was an adequate own contribution by FIH Group and whether there was a sufficient limitation of the distortion of competition.

(32) Those concerns originated from the high intricacy of the measures which appeared to be unnecessarily complicated to fix the future liquidity challenges of FIH. In particular it was unclear to which extent the various side agreements and the interconnectedness in the remuneration formula were necessary, appropriate and well-targeted for the purposes of the 2008 Banking Communication ([31]).

(33) Further, at the time of the Rescue and Opening Decision FIH intended to aggressively enter the internet retail deposit market by pursuing a 'price leadership' role. That entry into the internet retail deposit market was a core component of FIH's strategy to address its funding problems.

(34) Furthermore, the suggested remuneration to be paid to the FSC for the transferred assets and liabilities appeared very unlikely to be in line with the remuneration level referred to in point 21 of the Impaired Asset Communication ([32]) according to which banks should bear the losses associated with impaired assets to the maximum extent. Point 21 requires a correct remuneration of the State for any asset relief measures to ensure equivalent shareholder responsibility and burden-sharing irrespective of the specific model chosen.

([30]) An agreement in principle, outlining many of the details of the share purchase agreement and its side agreements was signed on 1 March 2012, with the final closing documents signed on 1 July 2012.

([31]) Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8).

([32]) Communication from the Commission on the Treatment of Impaired Assets in the Community Banking Sector (OJ C 72, 26.3.2009, p. 1).

3. **RESTRUCTURING**

3.1. THE RESTRUCTURING PLAN

(35) On 24 June 2013 Denmark presented a final updated version of the restructuring plan for FIH Group for the period 2012 to 2016. The plan includes a best case and a worst case scenario [33] with the aim of demonstrating FIH's ability to restore its long-term viability, sufficient burden-sharing and adequate measures to address distortion of competition measures.

(36) The restructuring plan is based on assumptions in respect of the evolution of gross domestic product ('GDP') growth as projected by the International Monetary Fund ('IMF'), and the evolution of short- and mid-term interest rates changes as based on the Danish Ministry of Business and Growth's estimate of developments in short-term interest rates until 2014. The plan assumes a moderate recovery of GDP growth in 2013 and thereafter.

(37) In the best case [34] FIH is expected to continuously improve its results until 2016. The pre-tax return on normalised equity [35] on group level is budgeted to be 10,3 % on 31 December 2013 and 11,2 % [36] on 31 December 2016.

(38) The worst case scenario [37] is based on less favourable market assumptions. They include among others worsening market conditions for funding to banks both in terms of volume and price; lower demand for loans and advisory services; unfavourable movement in foreign exchange rates, interest rates, etc.; and impairment charges remaining above historical levels through the business cycle. According to FIH's estimations those developments together would lead to a pre-tax return on normalised equity on group level of 0,9 % on 31 December 2013 and 2,0 % on 31 December 2016.

(39) In both cases there is a relatively low level of return on equity which is mainly due to the dividend ban and the ban on coupon payments foreseen in Denmark's commitments made in the context of the State aid investigation. As a result of those commitments, FIH Group would retain profits until the end of the restructuring period and the settlement of the measures.

(40) Originally FIH's banking activities covered three segments: Property Finance, Acquisition Finance and Corporate Banking. The business segment Property Finance has been discontinued as part of FIH's restructuring, as loans within Property Finance were sold to the FSC in 2012. In addition, the loans in its Acquisition Finance business unit will be phased out. Thus, Corporate Banking will be the only business unit to be continued. As of March 2013 the number of full-time employees was down to 214.

(41) According to the restructuring plan the balance sheet was to decrease to DKK 27,68 billion (EUR 3,74 billion) by 31 December 2013. On 31 December 2016 FIH projects a total capital ratio of 19,6 %.

(42) The statutory liquidity ratio [38] which on 31 December 2012 was 214 %, is expected to be 239,7 % on 31 December 2013.

(43) Over the restructuring period the total capital ratio is expected to amount to 19,6 % and the statutory liquidity ratio to 175 % and thus significantly exceed the regulatory requirements.

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[33] With various sub-scenarios.

[34] Sub-scenario with lower impairment charges.

[35] Calculated on the basis of the amount of equity corresponding to a core capital ratio of 16 %, given the risk positions of the bank. Assuming no effects on the profit/loss.

[36] It is worth mentioning that assuming a net cost increase in 2013 of DKK 310,25 million through a payment in accordance with the Impaired Asset Communication + interest and DKK 61,7 million of administration fee refunds (see further in recital 117 ff.), the net profit and loss figure for the bank is likely to be negative in 2013 in both scenarios. FIH has largely offset that effect through a liquidity management exercise in December 2013. The effect in 2016 would be negligible, as the figures are quoted as 'normalised' return on equity.

[37] Sub-scenario with high impairment charges.

[38] The Statutory Liquidity Ratio is defined as current statutory liquidity position in per cent of the statutory liquidity requirement. A ratio of 100 % is required to fulfil the statutory requirement, and a ratio of 214 % is thus more than double the statutory requirement.

(44) The pre-tax return on so-called normalised equity ([39]) according to the best case scenario ([40]) of the restructuring plan is budgeted to be 9 % on 31 December 2013 and 10,1 % on 31 December 2016. Those figures are 0,9 % and 4,7 % respectively in the worst case scenario ([41]).

(45) The situation of the bank has significantly improved since mid-2011 when the FSA anticipated that FIH would face major liquidity needs that it would be unable to meet. FIH repaid the remaining outstanding government-guaranteed bonds and the refinancing challenge was thus solved by 13 June 2013. In addition, FIH redeemed the government's Tier 1 hybrid capital on 2 July 2013.

(46) At present, FIH has no problems in meeting either its regulatory solvency or its liquidity requirements.

3.2. ACTIONS TAKEN BY DENMARK TO ADDRESS THE CONCERNS RAISED BY THE COMMISSION

(47) In order to address the concerns raised by the Commission in the context of the Rescue and Opening Decision, Denmark and FIH Group have taken a series of actions.

(48) FIH has made a 'one-off' payment to the FSC of DKK 310,25 million (EUR 39,12 million) with a value date of 4 December 2013 ([42]).

(49) FIH paid, with value date 18 December 2013, an amount of DKK 61,7 million to Newco as partial repayment of fees received under the administration agreement for 2012, and retroactively reduced the management fees for administration and hedging for 2013 charged to Newco to 0,05 % of the outstanding loan portfolio.

(50) FIH reduced its total assets from DKK 109,3 billion (EUR 14,67 billion) on 31 December 2010 to DKK 60,80 billion (EUR 8,16 billion) by 31 December 2012, corresponding to a decrease of 44 %.

(51) FIH further reduced its loan book from DKK 58,0 billion (EUR 7,79 billion) on 31 December 2010 to DKK 16,2 billion (EUR 2,17 billion) by 31 December 2012, that is to say, by DKK 41,8 billion in total corresponding to a decrease of 72 %.

(52) In addition, FIH significantly reduced the risk lines in Markets ([43]).

(53) FIH reduced the number of its full-time employees from 356 at 31 December 2010 to 214 by 31 March 2013, which corresponds to a reduction of 41 %.

(54) In addition, FIH has reduced its geographical presence as two of its four regional offices have been closed.

3.3. COMMITMENTS PROPOSED BY DENMARK

(55) In view of the concerns raised by the Commission in the Rescue and Opening Decision and to ensure compatibility with the Impaired Assets Communication, in particular with regard to the proper remuneration of the asset transfer measures, Denmark has provided additional commitments which are set out in recitals 55 to 62.

([39]) See footnote 35.
([40]) Best case assumes a lower average funding cost and higher income from Markets and Corporate Finance activities.
([41]) Worst case assumes significant negative developments at macroeconomic level with both lower credit demand and historically high impairment charges (although assumed to decline over the restructuring period).
([42]) With effect from 4 December 2013, FIH transferred an amount of DKK 310,25 million to the FSC (the amount had been deposited on 30 September 2013). In addition, FIH transferred an amount of DKK 6 575 342.
([43]) For example, reduction of the Value at Risk from DKK 50 million (EUR 6,71 million) on 31 December 2011 to DKK 35 million (EUR 4,7 million) on 22 April 2013.

(56) FIH will make an annual payment of DKK 12,1 million (EUR 1,61 million) to the FSC from 30 September 2014 until final settlement of the transaction with an ACT/ACT ([44]) pro rata temporis payment for the last period at settlement date (this can be up to 31 December 2019).

(57) FIH will reduce the management fees it makes to the FSC or make a lump sum payment to the FSC, with a present value of the reduction or of the payment equivalent to DKK 143,2 million (EUR 19,09 million).

(58) In order to attain that outcome, FIH has paid an amount of DKK 61,7 million to Newco as a partial repayment of fees received by FIH from Newco under the administration agreement for 2012. FIH has also reduced the management fees for administration and hedging charged to Newco to 0,05 % on the outstanding loan portfolio for the year 2013.

(59) In addition FIH will reduce the management fees for administration and hedging charged to Newco to 0,05 % per annum of the outstanding loan portfolio, from 1 January 2014.

(60) FIH will pay an additional annual fee to the FSC of DKK 47,2 million (EUR 6,29 million) in the event that the FSA changes its regulatory stance as regards capital requirements at holding level so that FIH's regulatory lending capacity would remain unrestricted by the capital position of FIH Holding.

(61) The commitments also provide for a withdrawal of FIH from certain business lines (property finance, private equity, private wealth management) as well as for a set of behavioural restrictions including a price leadership ban for deposits, a ban on commercially aggressive practices and a ban on acquisitions, as well as for the liquidation of FIH Realkredit A/S which was the mortgage bank of FIH Group. FIH Realkredit A/S was liquidated in 2013.

(62) A full list of commitments ([45]) is set out in the Annex.

4. **POSITION OF THE DANISH AUTHORITIES**

(63) When it notified the measures to the Commission, Denmark's initial position ([46]) was that the transfer of equity to Newco involved State aid to Newco, but that any such aid would be compatible with the internal market pursuant to Article 107(3)(b) of the Treaty.

(64) In the same submission Denmark claimed that the FIH Group had not received any State aid as the FSC would pay the market price for Newco. While not quantitatively substantiating that claim, whether by making reference to relevant market data or explaining the reasoning behind transaction costs, Denmark emphasised that:

(a) procedures were in place to establish the market price of the transfer;

(b) initial funding and guarantees were provided by FIH Group;

(c) FIH Group has to pay all transaction and winding-up costs; and

(d) FIH Group made additional commitments in connection with the transfer, in particular the obligation to submit a business plan.

([44]) Referring to the interest payment day count convention as the actual number of days in the last period (from the last payment date to the next) divided by the actual number of days between two consecutive 30 Septembers.

([45]) Comprised in the so-called 'Term sheet'.

([46]) SANI notification 6783 dated 2 March 2012, FIH Note to the Commission — final, Section 3.

(65) Against that background Denmark concluded that FIH would not receive an advantage. In the event that the Commission were to take a different view on that matter, Denmark submitted that any aid to FIH could be declared compatible with the internal market as the arrangement amounted to a restructuring of FIH in compliance with the Restructuring Communication ([47]).

(66) Denmark followed up its initial submission with a presentation on 20 March 2012 ([48]) in which it pointed out that FIH had not requested the measures and that at the time FIH had concluded those measures it had had deleveraging alternatives which supported the claim that the transaction was negotiated on market terms. It also claimed that an initial write down on the book value of the assets of DKK 1,4 billion and a further risk adjustment discount of DKK 1,3 billion corresponded to a market price. Moreover, any earn-out losses would be corrected through the variable share purchase agreement formula, so that an effective *ex post* adjustment mechanism would ensure pricing in line with market conditions. Denmark did not elaborate on the amount of the proposed discount and risk adjustment or the reasons why they would lead to a market price.

(67) In subsequent correspondence with the Commission ([49]), Denmark asserted that that maximum loss to which the FSC was exposed was DKK 1,05 billion, that is to say, the difference between on the one hand the loss-absorbing loan of DKK 1,65 billion and on the other the sum of the book value write down and the FSC's preliminary risk adjustment amount which totals DKK 2,7 billion. It also claimed that the State enjoys a considerable reduction of its risk related to FIH State-guaranteed loans and a repayment by FIH of a previous capital injection of DKK 1,9 billion.

(68) By a memorandum submitted on 23 April 2012 ([50]), Denmark informed the Commission that it would 'not for the moment supply the Commission with further arguments regarding the use of the Market Economy Investor Principle.' At the same time, it provided some explanations as regards the valuation methodologies used by the FSC's legal advisor.

(69) Subsequently, on 16 May 2012, Denmark asserted that FIH Holding and the FSC had negotiated the transaction terms based on normal commercial considerations regarding the sharing of risk and profit and asserted that the transaction had been made on market terms. That statement was certified by the FSC's accountancy firm, KPMG ([51]).

(70) On 7 June 2012, Denmark submitted a KPMG report assessing the measures by considering all contributing elements at the same time. KPMG saw 'no reason to conclude that the terms of the agreement would not correspond to the risks for the FSC', citing the high level of collateral, the potential use of covered bonds, the loss-absorbing loan and a 25 % earn-out for the FSC.

(71) On 11 September 2012, in its reply to the opening of proceedings, Denmark did not directly contest the Commission's view that the measures constituted State aid, but it referred to its line of argument of 29 March 2012 ([52]), arguing that any transfer above market value would be compensated by the loss-absorbing loan and the price-adjustment guarantee granted by FIH Holding. Moreover, Denmark cited margin increases on renewals and a higher than anticipated redemption rate as examples to support that view, but without explicitly reiterating that the market economy operator principle ('MEOP') ([53]) should apply.

(72) Instead, Denmark argued that the measures are compatible, giving arguments to show that they are appropriate, that the aid is limited to the minimum necessary and that distortion of competition is limited ([54]).

([47]) 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).
([48]) The Transfer of Assets from FIH to the FSC, submitted by Denmark to the Commission on 20 March 2012.
([49]) Eletronic mail by Denmark to the Commission on 29 March 2012.
([50]) 'Answers to Questionnaire of 4 April 2012 regarding FSC's purchase of shares from FIH Holding', submitted by Denmark to the Commission on 23 April 2012.
([51]) 'Statement — FIH Erhvervsbank', undated, submitted to the Commission on 16 May 2012.
([52]) See footnote 49 and recital 67.
([53]) Market economy investor principle (MEIP) is a term equivalent to market economy operator principle (MEOP) for the purposes of this Decision. The term MEOP was adopted to cover the situation of investors and other market actors, such as lenders, creditors, etc.
([54]) Submission of 11 September 2012, Sections 2, 3 and 4.

(73) The Danish authorities also recalled their position in the note of 23 April 2012 that the measures were the result of negotiations between FIH and the FSC ([55]) and argued that some of the guidance in the Banking Communication ([56]) had necessitated a degree of complexity in the measures ([57]), disputing that complexity might render them inappropriate.

(74) When the Commission informed Denmark about the expert assessment as regards the market value and real economic value of the measures, Denmark contested the results and submitted a number of questions and clarifications between 7 February and 11 September 2013.

(75) Denmark commented that the aid was limited to the minimum necessary ([58]), because it assumed the transfer value would not exceed the real economic value, but added that only a final valuation by the Commission could establish that fact.

(76) Aside from the valuation aspects, Denmark noted the positive effects of the transfer on the regulatory position of FIH, in line with the goal of restoration of long-term viability contained in the restructuring plan.

(77) Denmark also argued that FIH's deposit acquisition strategy is independent of the State aid measure and does not convey the intention of a 'price leadership' role, but is an essential part of its funding strategy. Nevertheless, to alleviate the Commission's concerns, Denmark has provided a commitment that FIH will adhere to a price leadership ban.

5. **ASSESSMENT**

5.1. EXISTENCE OF STATE AID

(78) According to Article 107(1) of the Treaty, State aid is 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, in so far as it affects trade between Member States.

(79) The Commission considers that the measures in favour of FIH described in Section 2.3 should be considered together as a package. The measures are part of a single transaction as their elements are interdependent (chronologically and in terms of structure) and have been designed altogether in order to address FIH's funding problem.

5.1.1. **State resources**

(80) The measures described in Section 2.3 involve State resources as they are directly financed by the FSC, which is a State-owned company (through the Danish Ministry of Business Affairs) responsible for providing different kinds of measures to Danish banks in the context of the financial crisis ([59]). First, the FSC is providing DKK 2 billion in cash for the Newco share purchase agreement. Second, the FSC has committed to fund Newco's assets while FIH repays its State-guaranteed loans. That commitment can exceed DKK 13 billion. Third, the FSC is foregoing an amount of interest in order to pay for a guarantee from FIH Holding.

5.1.2. **Existence of an advantage**

(81) The measures described in Section 2.3 provide an advantage as they result in an asset relief for FIH, thus improving the group's capital ratios, while at the same time enabling the bank to better address its funding problems.

(82) The Danish authorities have argued that the measures respect the MEOP and hence do not constitute State aid to FIH Group.

([55]) Submission of 11 September 2012, p. 5.
([56]) See footnote 31.
([57]) Submission of 11 September 2012, Section 2, page 5.
([58]) Submission of 11 September 2012, p. 6.
([59]) The FSC's activities are governed by the Act on Financial Stability and the Financial Business Act and executive orders issued in pursuance thereof. In addition, the FSC is subject to special provisions regarding State-owned companies. Other measures previously provided by the FSC were found imputable to the Danish State in the Commission Decision NN 51/08 of 10 October 2008 ('Guarantee scheme for banks in Denmark') (OJ C 273, 28.10.2008, p. 2).

(83) The Commission will therefore assess whether the measures in favour of FIH Group fulfil the MEOP test. That test examines whether a market operator would have taken part in a given operation on the same terms and conditions as the public investor at the time when the decision to make public resources available was taken. There is no State aid when public funds are granted in circumstances and on terms which correspond to market conditions.

(84) In that respect in the particular case of FIH Group the Commission considers that it is relevant to examine: (i) whether initially there had been a private investor willing to finance the measures on the same terms and conditions as the Member State; (ii) if so, what was the return on investment it demanded in comparison with the return for the State; and (iii) in the absence of private interest, what the expected return ([60]) and the distribution of the potential returns from the measures for the State would be, in comparison to those a market investor would expect if he was to undertake the measures under normal market economy conditions. If the State accepts those conditions or better, the measures can be considered to be carried out on market terms. In particular, it is important to check whether the transaction in its entirety generates positive cash flow, because no private operator, aiming at maximising of its profit, would enter a loss-making operation.

(85) The most straightforward evidence showing that a transaction is in line with the MEOP is that the terms of the deal would not only be acceptable to a hypothetical market economy operator, but that there is actually such an operator participating in the same investment on the same terms as the State. The presence of other investors provides a benchmark for the Commission to make its assessment of the applicability of the MEOP.

(86) At the time Denmark granted the measures, there was no market participant prepared to grant similar measures to FIH as those which were granted by entities under the control of the State. In particular, neither the consortium of owners nor any third party expressed any intention to invest in FIH. The Commission has no grounds to conclude that under those circumstances a market economy operator would be willing to participate in the measures. The absence of private interest is an indication of the financial difficulties and weak position of the bank.

(87) In the absence of an operator investing on the same terms as the State, a measure can still be still free of aid, if in similar circumstances a private operator would have granted the same funding, asking a return at least as high as the return the State received. That assessment should, in principle, be based on a business plan taking into account available information and foreseeable developments at the time when the public funding was granted and it should not rely on any analysis based on a later situation.

(88) Furthermore, one of the situations in which it is hardest to apply the MEOP is where a company is already a beneficiary of State aid. In this case, FIH had already received a recapitalisation on 30 June 2009, which it repaid on 2 July 2012. The hybrid instruments used for the recapitalisation were remunerated at […] (*) %. FIH also participated in the Danish guarantee scheme. Whilst those facts do not exclude the application of the MEOP in this case per se, they are indicative of the difficulties faced by FIH and would affect the willingness of private investors to invest in the measures. The previous aid already distorts the economic circumstances, creating a perception of continued State support. In its evaluation, the Commission has taken the replacement of such advantages by new ones into consideration.

(89) The FSA was of the view that FIH was in a precarious position as there was significant risk that FIH would not be able to meet its statutory requirements as regards liquidity when its government-guaranteed debt expired. That situation could, accordingly, have led to a withdrawal of FIH's banking licence ([61]). The position of the FSA therefore supports the Commission's assessment that a market operator would have been unlikely to invest in FIH. While it can be argued that the FSA's report was not in the public domain, a market operator would have had access to the maturity profile of FIH's government-guaranteed debt and thus been able to derive the same conclusion.

(90) In the absence of an actual private investor, to further check the applicability of the MEOP the Commission has to assess whether the overall return of the measures in favour of FIH is equal to or higher than the expected return that a hypothetical private investor would demand in order to make that investment. The expected return of the

([60]) The expected return of the measures is calculated based on the future stream of cash flows, discounted to derive the net present value. See recitals 91 and 92.

(*) Confidential information.

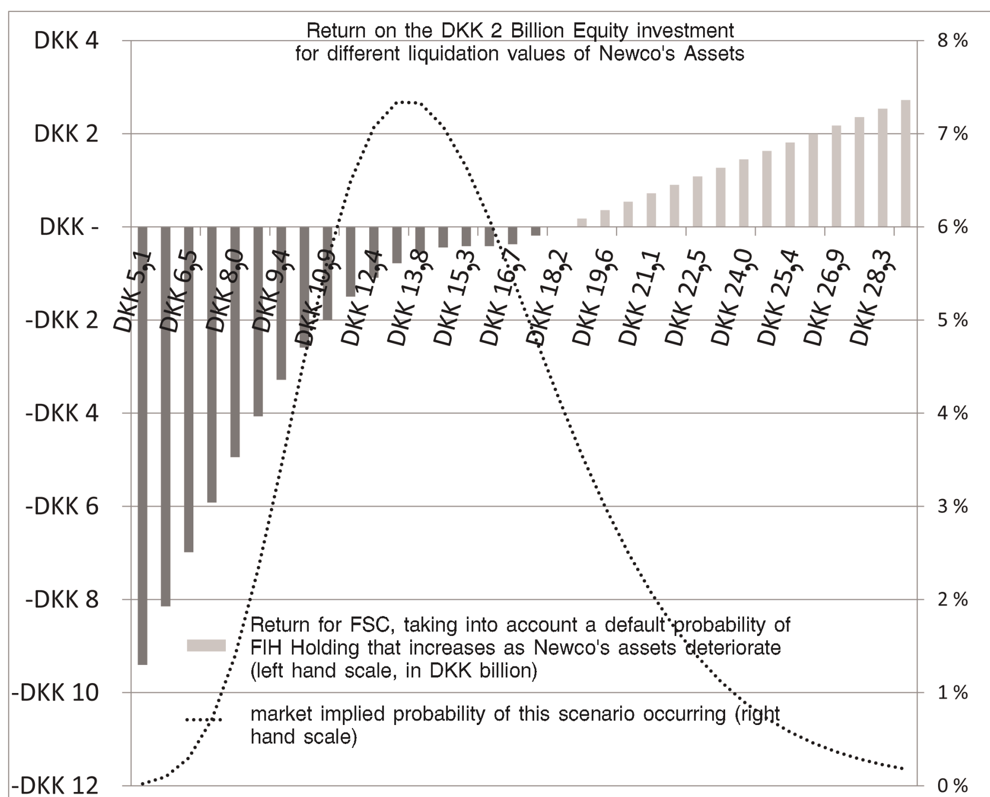
([61]) Note by the FSA on FIH Erhvervsbank A/S dated 16 May 2012, submitted to the Commission.

measures depends on the future stream of revenue from cash flows, which has to be discounted to the present day to derive its net present value ('NPV') using an appropriate rate of discount.

(91) Relying on expert advice, the Commission estimated the market value of Newco's assets and modelled the expected return for the FSC for entire distribution of liquidation values of Newco's equity. In so doing, it has taken into account all elements of the share purchase agreement, such as the net liquidation value, revenues and costs incurred by the FSC and FIH Group and the purchase price adjustment, which included the loss-absorbing loan. The use of a distribution model is necessary to calculate the NPV of both the benefits stemming from a 25 % equity upside participation and the negative effects from the combination of large asset losses in Newco and a default of FIH Holding if such a scenario were to materialise (62).

Graph 1

Net Present Value of the measure for the FSC



(92) Graph 1 shows, for different liquidation values of Newco's assets (from DKK 5,1 billion to DKK 28,3 billion), the NPV of the share purchase agreement. Each of the scenarios occurs with a probability indicated by the dotted line against the right-hand scale (0,1 % to 7,5 %). In the most likely scenarios, the return is slightly negative.

(62) That phenomenon is known in financial markets as 'wrong way risk'. Following expert advice, the Commission assumed an average implied cumulative loss expectation of 16 %. However, it was distributed linearly across the negative returns, so that a 91 % loss expectation was applied in the extreme case that the asset portfolio were to devalue to a mere DKK 5,1 billion, and no loss expectation if the assets were to have a positive return.

(93) As can be seen from Graph 1, the overall probability-weighted average NPV of the share purchase agreement operation is also negative. The expert calculation shows it amounts to DKK 726 million. As a result, the share purchase agreement generates a loss instead of a profit. A market economy operator would have required an equity remuneration of at least 10 % ([63]) per annum on a similar DKK 2 billion investment, which would have generated about DKK 1,33 billion over the seven-year existence period of Newco. The Commission therefore concludes that no market economy operator would have been willing to invest on terms and conditions equivalent to those of the share purchase agreement. As a result the measures are not in line with the MEOP ([64]).

(94) It should be noted that in the calculation set out in recitals 91-93, the Commission took into account correspondence from Denmark dated 7 February and 11 March 2013, as well as subsequent correspondence ([65]) in which Denmark submitted previously undisclosed elements such as specific interpretations of the components of the variable purchase price, the reference date of the submitted loan exposure tapes that were earmarked for transfer from FIH to Newco, the evolution of the credit quality of the portfolio between December 2011 and September 2012 and a more granular analysis of the 'uncommitted credit lines' in the portfolio.

(95) Furthermore, the quantifications contained in Denmark's arguments ([66]) do not withstand scrutiny. First, the *ex ante* write-down amounts and risk provisions are not substantiated by an independent valuation report ([67]). Moreover, when considering the possibility of FIH Group not being able to honour *ex post* guarantees, there is no reason why the losses of Newco could not exceed DKK 2,7 billion, in which case the FSC (and hence the Danish government) would be contractually required to recapitalise Newco prior to its final liquidation. The Commission therefore concludes that the claim that any investment losses would be limited to DKK 1,05 billion is not substantiated.

(96) The fact that the terms of the measures were negotiated between the FSC and FIH Holding does not necessarily mean that the measures were executed on market terms. If Denmark intended to grant a substantial amount of additional aid to a bank facing grave liquidity difficulties, that fact alone would not exclude negotiations between the authorities and that bank on specific points of the transaction. Because of the bilateral aspect of the negotiation which took place, it lacked features such as those of an open non-discriminatory tender procedure or of a comparison to similar market transactions. Therefore, the conformity of the measures with market conditions does not follow automatically from the fact that negotiations occurred.

(97) As regards the KPMG report of 7 June 2012, the Commission agrees that due to the complexity of the measures their terms and conditions should be assessed in their entirety, because there are no individual provisions that can be allocated to the remuneration of each individual element. However, the analysis contained in that KPMG report overlooked the possibility of more extreme downside scenarios under which FIH Holding might not be able to honour its commitments. Moreover, the analysis failed to address a remuneration on the DKK 2,0 billion of capital invested. As indicated in recital 95, there cannot be conformity with market behaviour given that there is no

([63]) In evidence, the Commission notes that in a crisis situation recapitalisation market remuneration levels can easily exceed 15 % (J.P. Morgan, European Credit Research, 27 October 2008 and Merrill Lynch data on euro denominated Tier 1 debt for investment grade institutions). FIH itself could only obtain a recapitalisation from the Danish government in 2009, and had to pay an 11,45 % coupon to do so. Finally, in the beginning of March 2012, at the time of the signing of share purchase agreement, FIH's senior unsecured debt such as ISIN XS0259416757, with an annual coupon of 4,91 % and a 2021 maturity, was quoted in the market at 67 % of par value, implying a yield of more than 10,50 %. It is therefore logical to assume that equity, having a much more junior credit position, would require a much higher return for a market investor.

([64]) The lack of compliance with market behaviour is established without even taking into account other elements that are part of the closing agreement, such as the cost Newco is paying for its original funding and the loss-absorbing loan, as well as the administration fees paid to FIH for asset management and hedging, which are counted towards the total aid amount in Section 5.2

([65]) Summarised in two notes submitted by Denmark on 24 June 2013 and further clarifying notes on 29 August and 11 September 2013.

([66]) See recitals 66 and 67.

([67]) The submitted one-page summary document 'Brev vedr FIH nedskrivning' mentions a valuation team working on behalf of the FSC — and hence not independent — which concludes that a write-off of DKK 3,2 billion would be necessary under International Financial Reporting Standards rules. In addition, the risk adjustment of DKK 1,3 billion is justified by a 10 % collateral haircut, which itself is not explained. The non-independence of the valuation team is confirmed by the submission of Denmark of 11 March 2013, where the valuation exercise done by the FSC is described in greater detail.

annual remuneration on the capital and given a mere 25 % participation of any equity upside over a seven-year investment period, both on a standalone basis and as a parameter in the entire remuneration model ([68]).

(98) In that context, the Commission notes that under a previous Tier 1 hybrid recapitalisation ([69]) FIH had to pay an annual coupon of […] % per annum. Furthermore, in the beginning of March 2012 FIH's senior debt was quoted on the market with an implied yield exceeding 10 %. Therefore, the Commission's reasoning that a remuneration for capital should be at least 10 % is justified. A market operator would probably require a remuneration in excess of that level, in view of the particular risks related to the concentration and the inferior quality ([70]) of the real estate portfolio of Newco in addition to the junior credit rank of an equity investment. Therefore, a remuneration of 6,5 %, as put forward by Denmark ([71]) is clearly insufficient. It should also be noted that the transaction generates a negative expected return.

(99) The Commission concludes that the measures in favour of FIH are not in line with the MEOP.

5.1.3. **Selectivity**

(100) The use of the measures only concern FIH Group and Newco. The measure is therefore selective.

5.1.4. **Distortion of competition and effect on trade between Member States**

(101) The measures helped FIH strengthen its capital and liquidity position compared to that of its competitors who will not benefit from similar measures. The measure therefore enabled FIH to improve its market position. The measure can therefore lead to a distortion of competition.

(102) Given the integration of the banking market at European level, the advantage provided to FIH is felt by competitors both in Denmark (where banks from other Member States operate) and in other Member States. The measures must therefore be regarded as potentially affecting trade between Member States.

5.2. AMOUNT OF AID

(103) The total aid amount of the measures ([72]) is calculated to be approximately DKK 2,25 billion (approximately EUR 300 million). To quantify the amount of aid, the Commission has considered:

(a) a benefit related to the share purchase agreement formula (DKK 0,73 billion) ([73]);

(b) a foregone equity investment remuneration (DKK 1,33 billion) ([74]);

(c) excess interest payments by Newco on Loan One, the loss-absorbing loan, and the initial funding (DKK 0,33 billion); and

(d) excess administration fees (DKK 0,14 billion).

(104) As a mitigating factor, the Commission considered the early cancellation of government guarantees amounting to DKK 0,28 billion should be deducted from the total aid amount.

(105) As indicated in Section 5.1, the Commission took a holistic approach in valuing all interest and other cash flows, fees and guarantees given, taking into consideration:

([68]) A straightforward equity investment would entail a 100 % participation in the equity returns. The Commission is of the view that lowering that equity return to 25 % is insufficient compensation for FIH Holding guaranteeing to make good on equity losses, because of FIH's and FIH Holding's weak credit stance. In addition, the Commission wants to exercise care in valuing the contribution of the equity upside participation, as the majority of the underlying assets in Newco are real estate loans, whose return is limited to interest and principal, so that liquidation values of Newco's assets in excess of DKK 25 billion, as described in the model in recital 91 not only have a low probability of occurring, but might even be totally excluded. For that reason, adjusting the participation percentage to a higher figure (for example, 50 %) would underestimate the State aid amount in the model used.

([69]) See footnote 5.

([70]) The submission by Denmark of 2 April 2013 highlights that, with reference date June 2012, about 25 % of the assets are in default and another 25 % have a 'low' rating. The expert report (Advisory Services Related to Case FIH- 20 December 2012) further qualifies that statement by indicating that only 6,3 % of the portfolio has an FIH credit quality rating of 7 or higher, corresponding to 'Investment Grade'. Therefore, with more than 90 % of the portfolio being sub-investment grade and 25 % in actual default, the Commission believes an equity investment in such a portfolio to be risky and commanding a high remuneration.

([71]) Submitted in its notes of 11 March 2013 and reiterated in Annex 1 of its summary note of 24 June 2013.

([72]) Comprised in the share purchase agreement of 1 March 2012 and the following closing agreements of 2 July 2012.

([73]) See recital 97.

([74]) See footnote 73.

(a) Denmark's concern that the Commission would pay insufficient attention to at the economic reality of all aspects of the measures, such as the loss-absorbing loan; and

(b) the fact that not all elements of the transaction could be linked to a specific item in the remuneration formula.

(106) In line with the Impaired Asset Communication, the Commission has relied on external experts for valuation advice ([75]).

5.3. COMPATIBILITY

5.3.1. **Legal basis for the compatibility of the aid**

(107) Article 107(3)(b) of the Treaty provides that State aid may be considered to be compatible with the internal market where it is intended to 'remedy a serious disturbance in the economy of a Member State'. Given the present circumstances and also the circumstances in the financial markets at the time of the Rescue and Opening Decision, the Commission considers that the measures may be examined under that provision.

(108) The Commission accepts that the financial crisis has created exceptional circumstances in which the bankruptcy of one bank may undermine trust in the financial system at large, both at national and international level. That may be the case even for a small bank which is not in immediate difficulty but under tightened supervision by the financial regulator, such as FIH. The 2-4 year debt of that bank was priced at spreads of 600-700 bps over EURIBOR at the time of the Rescue and Opening Decision. That pricing level is a clear indication of imminent distress. In such cases, early intervention to avoid the institution concerned becoming unstable can be necessary to avoid threats to financial stability. It is particularly so in the case of a small economy such as Denmark where counterparts may tend not to distinguish between individual banks, thus extending the lack of confidence generated by the failure of one bank to the whole sector. Therefore, the legal basis for the compatibility assessment of all the measures covered by this Decision is Article 107(3)(b) of the Treaty.

(109) As regards specifically the compatibility of the transfer of assets to the FSC, the Commission will assess the measures with regard to the Impaired Assets Communication.

(110) The Commission will then assess the compatibility of the restructuring measures with regard to the Restructuring Communication.

5.3.2. **Compatibility of the measures with the Impaired Assets Communication**

(111) The Impaired Assets Communication lays down the principles regarding the valuation and transfer of impaired assets and compatibility of measures with the Treaty. It has to be assessed whether the aid has been limited to the minimum and there is sufficient own contribution of the bank and its shareholders.

(112) According to point 21 of the Impaired Assets Communication banks should bear the losses associated with impaired assets to the maximum extent. Point 21 requires a correct remuneration of the State for the asset relief measure, whatever its form, so as to ensure equivalent shareholder responsibility and burden-sharing irrespective of the exact model chosen.

(113) In their original form, the measures provided for remuneration equal to the funding cost of the Danish government plus a mere 100 bps for the liquidity. No remuneration for the equity investment was foreseen, apart from a partial (25 %) upside in case the net resolution yields an excess through the price adjustment mechanism. Moreover, in a negative scenario where the asset portfolio of Newco would deteriorate significantly, compensation to the FSC would be provided by FIH Holding which, under those circumstances, would probably not have the capacity to honour its obligations. It seemed therefore unlikely, as stated in recitals 66 to 73 of the Rescue and Opening Decision, that the remuneration and own contribution would be sufficient to make the aid compatible with the internal market according to the guidance in the Impaired Assets Communication.

([75]) Final Report — Advisory Services Related to Case FIH — Phase II — Case SA.34445 Denmark, 19 September 2013.

(114) In line with point 39 of the Impaired Assets Communication, the Commission has therefore thoroughly analysed the market value of the measures. Aided by an external expert, it estimated a probabilistic distribution of outcomes for the Newco asset portfolio and calculated the effect on the likely terminal liquidation asset values through the share purchase agreement.

(115) In its assessment, the Commission found advantages through foregone equity remuneration and potential losses linked to the credit quality of FIH Holding, excess interests for the loss-absorbing loan, excess spreads on funding to Newco by FIH and excess fees for administration and derivative hedging. The Commission also found mitigating factors such as the early cancellation of government guarantees. In total, the measures contained a State aid element of about DKK 2,25 billion.

(116) Taking into consideration points 40 and 41 of the Impaired Assets Communication, the difference between transfer value and real economic value was assessed by performing the same calculation as for the market value assessment with two adaptations. First, the distribution of outcomes was based on real economic values of the asset portfolio, instead of the market values. Second, the required remuneration for equity was based on the effective net capital relief of the measures. Following a statement by the FSA, the Commission assessed the gross capital relief effect of the measures to be DKK 375 million ([76]), and the equivalent transfer value to be DKK 254 million above the real economic value ([77]), which needed to be remunerated and clawed back. In addition, DKK 143,2 million in excess fees needed to be recovered.

(117) An up-front payment of DKK 254 million (with value date 1 March 2012) has reduced the net capital relief effect from DKK 375 million to DKK 121 million. Therefore, a one-off premium of DKK 310,25 million ([78]) with value date 30 September 2013 plus an annual payment of DKK 12,1 million (corresponding to an annual remuneration of 10 % of the capital relief), in addition to the recovery of the excess administration fees ([79]) would bring the measures in line with the Impaired Assets Communication.

(118) Denmark has ensured that FIH paid those amounts ([80]) in addition to honouring all agreements under the closing documents of the measures.

(119) Denmark commits that FIH will pay no dividends until the final settlement of the Newco accounts under the share purchase agreement, so as to mitigate the credit risk faced by FIH Holding for the FSC.

(120) In conclusion, the measures in their entirety are proportionate, limited to the minimum and provide sufficient own contribution by FIH. Moreover, due to the payment of DKK 310,25 million plus interest ([81]) to the FSC as well as the additional commitments as regards remuneration and fees ([82]), the measures provide for an appropriate remuneration in accordance with the Impaired Assets Communication.

([76]) The Commission accepted that, although the FSA indicated that the capital relief to FIH Erhvervsbank A/S amounted to DKK 847 million (the equivalent of DKK 10,5 billion of RWAs), the unlimited loss guarantee given by FIH Holding significantly reduced the overall effect for the lending risk weight capacity of the group. In order to mitigate concerns by the Commission, Denmark added a commitment to increase the remuneration by FIH to the FSC, should the FSA change its regulatory view regarding capital requirements at holding level such that FIH's lending capacity would no longer be restricted by FIH Holding's capital position.

([77]) The Commission's analysis was validated by an expert report which took into consideration all elements submitted by Denmark in its correspondence up to and including the summary note of 24 June 2013, as well as the clarifications of 29 August 2013.

([78]) DKK 310,25 million is calculated as DKK 254 million + 1,5 * DKK 37,5 million. The capital relief of the measure is DKK 375 million, which according to the Impaired Assets Communication has to be remunerated at 10 % per annum. In addition, the transfer value of the portfolio is deemed to be DKK 254 million, the real economic value, which needs to be clawed back according to paragraph (41) of the Impaired Assets Commuication. However, by paying a clawback of DKK 254 million, the net capital relief effect would be reduced to DKK 121 million. Therefore, in order to make the remuneration compatible, FIH has to remunerate the capital relief effect of DKK 375 million at a rate of 10 % per annum, until the 'transfer delta' between transfer value and real economic value has been settled. Since this only happens 1,5 years after implementing the measures, the required payment is DKK 254 million + 1,5 * DKK 37,5 million and then annual payment of DKK 12,1 million, which is 10 % of the remaining net capital relief.

([79]) The excess administration fees are estimated at DKK 143,2 million over the lifetime of the measures. Denmark mitigates this by paying back DKK 61,7 million to Newco as an excess earned thus far and by reducing the future administration fee to 0,05 % of the outstanding notional, which is in line with market practice.

([80]) See recital 48.

([81]) In fact, the clawback payments were only made with value date 4 December 2013, so that an additional accrued interest payment covering the period 1 October 2013–4 December 2013 was due. Denmark has confirmed that FIH has made an additional payment of DKK 6,575 million on top of the DKK 310,25 million to cover that amount.

([82]) See footnote 78.

5.3.3. **Compatibility of the aid with the Restructuring Communication and the 2011 Prolongation Communication** [83]

(121) According to the Restructuring Communication, in order to be compatible with the internal market under Article 107(3)(b) of the Treaty, the restructuring of a financial institution in the context of the current financial crisis must: (i) lead to a restoration of the viability of the bank, or to the orderly winding-up thereof; (ii) ensure that the aid is limited to the minimum necessary and include sufficient own contribution by the beneficiary (burden-sharing); and (iii) contain sufficient measures limiting the distortion of competition.

(i) *Viability*

(122) According to the Restructuring Communication a Member State needs to provide a comprehensive restructuring plan which demonstrates how the long-term viability of the beneficiary will be restored without State aid within a reasonable period of time and within a maximum of five years. Long-term viability is achieved when a bank is able to compete in the marketplace for capital on its own merits in compliance with the relevant regulatory requirements. For a bank to do so, it must be able to cover all its costs and provide an appropriate return on equity, taking into account the risk profile of the bank. The return to viability should mainly derive from internal measures and be based on a credible restructuring plan.

(123) The restructuring plan submitted by Denmark in respect of FIH covering the period up to 31 December 2016 shows a return to viability at the end of that restructuring period. The bank is expected to remain profitable and improve its yearly results in particular during the period 2013-2016, with an adequate return on equity on newly generated business. In a worst case scenario, the bank would still generate profits, with net profit improving from DKK 51 million (EUR 6,8 million) in 2013 to DKK 122 million (EUR 16,27 million) in 2016.

(124) According to the restructuring plan, by 31 December 2016 the total capital ratio of FIH will be as high as 19,6 % and the statutory liquidity ratio then is expected to be 160 %. All those ratios exceed significantly the regulatory minimum requirements. The group therefore appears well capitalised and endowed with a comfortable liquidity position.

(125) Following the measures, in particular the transfer of loans, FIH was a position not only to redeem the government-guaranteed bonds in 2013 in due time but also to repay on 2 July 2013 the hybrid capital it had received from the government.

(126) The measures have improved the liquidity profile of FIH which was able to obtain a statutory liquidity ratio of 214 % as of 31 December 2012 and was expected to obtain a ratio of 239,7 % as of 31 December 2013 [84] thus exceeding the regulatory liquidity requirements significantly.

(127) In particular, the funding gap which previously threatened FIH has been closed through a hive-off of assets, with the help of the DKK 13 billion funding facility provided by the FSC to Newco. In addition, the FSC has committed to recapitalise Newco over the lifetime of the measures, if necessary [85]. As a result, any immediate recapitalisation issues for FIH have been pre-empted.

(128) In summary, with both profitability and liquidity assured, and a sufficient capital base FIH seems to be in a good position to attain long-term viability on a stand-alone basis.

(129) Although in the worst case scenario the pre-tax return on normalised equity is budgeted to be only 0,9 % at 31 December 2013 and 2,0 % [86] at 31 December 2016, the best case projects a return on normalised equity of 10,3 % and 11,2 % for 2013 and 2016 respectively.

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[83] Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 356, 6.12.2011, p. 7).

[84] See recital 37 ff.

[85] This could be the case if the asset value were to deteriorate further. If that were to occur Newco might have negative equity after which, in line with standard commercial law, it could be obliged to file for bankruptcy. Such an outcome is prevented by the recapitalisation clause which means that Newco will receive a new capital injection from the FSC if need be and which the FSC will only get back from FIH Holding at the final settlement of the transaction (between 31 December 2016 and 31 December 2019).

[86] See recital 38.

(130) The Commission does not usually use the concept of 'normalised equity' because it regularly leads to a higher return on equity than if the calculations were based on the actual equity. In this case, however, Denmark has given a commitment that FIH Holding and FIH will retain accumulated earnings to a high level, so as to better guarantee an appropriate payment to the FSC. In particular if Newco realises significantly lower proceeds than planned by FIH, FIH (via the loss-absorbing loan) and FIH Holding (via the guarantee given to the FSC) will bear costs to ensure the remuneration of the FIH at a level commensurate with the State aid rules. The accumulation of retained earnings nevertheless increases equity to a relatively high level (DKK 8,4 billion in the best case, DKK 7,3 billion in the worst case) which reduces the return on equity ratio. FIH is not in a position to counteract that process unless it produces losses (which is neither foreseen nor desirable). The concept of 'normalised equity' is therefore preferable in the current case to allow the Commission to assess properly the profitability of the bank, setting aside the results of the accumulation of retained earnings.

(131) Further, FIH will exit the relatively risky business area of acquisition finance which leads to a risk reduction of its business activities and puts its business model on a more solid foundation. Moreover, with a total capital ratio of 20,8 % ([87]) at the end of the restructuring period FIH seems overcapitalised ([88]) in view of its business model and thus much less exposed to market risks which might jeopardise its existence as a going-concern than before.

(132) The Commission therefore considers that the restructuring plan is apt to restore FIH's long-term viability.

(ii) *Burden-sharing*

(133) FIH has committed not to pay any dividends during the restructuring phase and to repay a previous State recapitalisation of DKK 1,9 billion. Further, FIH will not make any coupon payments to investors in hybrid instruments or any instrument for which financial institutions have discretion to pay coupons or to call, regardless of their regulatory classification, including subordinated debt instruments, if no legal obligation to make payments exists.

(134) In addition, as explained in Section 5.4.1, the remuneration of the impaired asset measures is set at an appropriate level.

(135) The Commission therefore considers that the restructuring plan sufficiently addresses the burden-sharing requirement.

(iii) *Distortion of competition*

(136) The restructuring plan provides for FIH to withdraw from certain business lines (property finance, private equity and private wealth management). In particular, DKK 15,4 billion of property finance assets (25 % of the 2012 balance sheet) have been hived off to Newco.

(137) The amended term sheet also provides for a price leadership ban for deposits if the market share of FIH exceeds 5 %. That commitment allows FIH to further improve its funding position by raising deposits on the market while at the same time establishing a threshold preventing excessive practices. In addition, there will be a ban on commercial aggressive practices safeguarding competitors from excessive market behaviour. It should be noted that no market participant commented on FIH's policy concerning deposit pricing after the Commission opened proceedings on that question.

(138) Further, FIH will divest its investments in private equity funds and other equity investments and will no longer have a mortgage institute in its company structure after 31 December 2014. Thus, those business areas will also be left to competitors and the presence of FIH on the market reduced accordingly.

([87]) The ratio will be 19,6 % after the 'one-off' payment of DKK 310,25 million.

([88]) The overcapitalisation is solely due to the fact that FIH has to retain its profits over the restructuring period and thus is not to pay any dividends over the whole period in order to preserve a high capital buffer. That course of action is a precaution to ensure the correct and complete remuneration of the impaired asset measures as FIH and FIH Holding have guaranteed the final payment to the State.

(139) Moreover, FIH Realkredit ([89]) will be liquidated and all business activities in the business field Acquisition Finance will be ceased. According to the 2012 year-end figures, FIH Realkredit still held assets of around DKK 300 million (EUR 40,3 million) so was of limited importance to the overall FIH Group.

(140) In addition, FIH has already reduced its total assets from DKK 109,3 billion (EUR 14,67 billion) on 31 December 2010 to DKK 60,80 billion (EUR 8,16 billion) by 31 December 2012, corresponding to a decrease of 44 %.

(141) Altogether, those commitments lead to a sufficient mitigation of distortion of competition because business opportunities which could potentially be profitable for FIH will be abandoned and left to its competitors.

5.4. CONCLUSION AND CLOSURE OF THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

(142) The Commission expressed doubts in its Rescue and Opening Decision as to whether the measures at stake are well-targeted as required by the 2008 Banking Communication ([90]). In particular at that stage, it was unclear whether investors would consider FIH as fully relieved from its worst assets, and whether they would be ready to provide funding under bearable conditions. FIH's restructuring plan demonstrates that the bank has a sufficient capital buffer even under a stress scenario and that it is likely to remain viable under unfavourable macroeconomic developments.

(143) In the Rescue and Opening Decision the Commission also raised doubts as to whether the measures were limited to the minimum and envisaged sufficient own contribution ([91]), in particular in view of the complexity of the measures.

(144) Following a detailed assessment of the elements and their links the Commission considers that that the remuneration FIH will pay for the measures serves as a sufficient own contribution and is in line with the Impaired Assets Communication. The Commission welcomes the 'one-off' payment (of DKK 310,25 million) to the FSC and the commitments made in that respect. The Commission notes further that the measures have improved the liquidity profile of the bank which, under all scenarios, remains liquid and viable according to the restructuring plan.

(145) In the Rescue and Opening Decision the Commission expressed further doubts in relation to whether the requirement that distortion of competition be limited had been met. FIH is now subject to a coupon ban, a dividend ban, a price leadership ban (including for deposits) and a ban on commercial aggressive practices and is subject to divestment commitments.

(146) Overall, the Commissions notes that the restructuring plan presented by Denmark adequately addresses the issues of viability, burden-sharing and distortion of competition, and hence it is in line with the requirements of the Restructuring Communication and Impaired Assets Communication.

(147) Based on the assessment above the Commission finds that the measures are well-targeted, limited to the minimum and provide for limited distortion of competition. Therefore the Commission's doubts related to the compatibility of the measures, initially raised in the Rescue and Opening Decision, have been allayed.

Conclusion

(148) Based on the notification and in view of the commitments presented by Denmark it is concluded that the aid measures are compatible with the internal market. The appropriateness of the measures as well as the viability of the bank and own contributions together with the measures to mitigate distortion of competition appear sufficient. Consequently, the measures should be approved pursuant to Article 107(3)(b) of the Treaty and the opened proceedings should be closed,

([89]) See recital 10.
([90]) See Section 2.1 of the Rescue and Opening Decision.
([91]) See Section 2.2 of the Rescue and Opening Decision.

HAS ADOPTED THIS DECISION:

Article 1

The asset transfer from FIH Group to the Danish Financial Stability Company, together with the side agreements, constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

This State aid is compatible with the internal market, in the light of the restructuring plan and the commitments set out in the Annex.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 11 March 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

TERM SHEET (CASE SA.34445) DENMARK — RESTRUCTURING PLAN OF FIH

1. **Background**

The Kingdom of Denmark undertakes to ensure that the Restructuring Plan for FIH submitted on 24 June 2013 is correctly and fully implemented. This document (the 'Term Sheet') sets out the terms (the 'Commitments') for the restructuring of FIH Erhvervsbank A/S including subsidiaries ('FIH'), which the Kingdom of Denmark has committed to implement.

2. **Definitions**

In this document, unless the context requires otherwise, the singular shall include the plural (and vice versa) and the capitalised terms used herein have the following meanings:

Term	Meaning
Commitments	mean the undertakings related to the restructuring of FIH set out in this Term Sheet
Decision	means the decision of the European Commission on the restructuring of FIH in the context of which these Commitments are undertaken and to which this Term Sheet is attached
Restructuring Period	is the time period specified in clause 3.2
Restructuring Plan	means the plan submitted by FIH to the European Commission, via the Kingdom of Denmark, on 24 June 2013, as amended and supplemented by written communications
FIH or FIH Group	FIH Erhvervsbank A/S including subsidiaries
FIH Holding	FIH Holding A/S
FIH Holding Group	FIH Holding A/S including direct and indirect subsidiaries
FS Property Finance A/S	The wholly owned subsidiary of the Financial Stability Company FSC, also referred to in the decision as 'Newco'.
Acquisition Finance	The separate and dedicated business unit with employees solely focusing on financing solutions in connection with mergers and acquisitions, and which was marketed specifically towards existing and potential clients.

3. **General**

3.1. The Kingdom of Denmark undertakes to ensure that the Commitments are fully observed during the implementation of the Restructuring Plan.

3.2. The Restructuring Period shall end on 31 December 2016. The Commitments apply during the Restructuring Period, unless otherwise indicated.

4. **Structural measures**

4.1. Acquisition Finance

FIH will cease all business activities in the business field Acquisition Finance by 30 June 2014. The existing portfolio will be placed in run off by 30 June 2014.

4.2. Closure of the Property Finance business

FIH has withdrawn from the business area of investment properties [1] and closed that business area by 31 December 2013. There will be no re-entry into that business area which means in particular that no new lending (capital) to finance investment in investment properties in Denmark, Sweden, Germany or any other country will take place [2].

4.3. Divestiture of the Private Equity business

FIH will divest its investments in private equity funds and other equity investments to the extent permitted by law as early as possible and in any case not later than 31 December 2016. If a divestment by that date is not possible, the investments will be put in run-off which means in particular that no funding or renewals of investments may take place any more [3]. Further, from the date of the Decision, no new private equity or other investments will be made *(with the exceptions stated in footnote 3)*.

4.4. Mortgage Bank

FIH shall not have a mortgage institute in its company structure by end of 2014, and shall not act as a mortgage bank thereafter.

5. **Behavioural measures and corporate governance**

5.1. Ban on acquisitions: FIH shall not acquire any stake in any undertaking. This applies both to undertakings which have the legal form of a company and packages of assets which form a business.

Activities not comprised by the acquisition ban: This ban does not apply to acquisitions that must be made in exceptional circumstances to maintain financial stability or in the interests of effective competition, provided they have been approved beforehand by the Commission. This does neither apply to acquisitions that take place in the ordinary course of the banking business in the management of existing claims towards ailing firms and to disposal and restructuring within FIH Holding Group.

Exemptions not requiring the Commission's prior approval: FIH may acquire stakes in undertakings provided that the purchase price paid by FIH for any acquisition is less than 0,01 % of the balance sheet size of FIH at the date of the Commission decision and that the cumulative purchase prices paid by FIH for all such acquisitions over the whole restructuring period is less than 0,025 % of the balance sheet size of FIH at the date of the Commission decision.

5.2. Ban on commercial aggressive practices: FIH shall avoid engaging in aggressive commercial practices throughout the duration of the Restructuring Plan.

5.3. Deposits: FIH will not offer more favourable prices for deposit products (notably but not exclusively for retail deposits in FIH Direct Bank) than the two best-priced competitors in a given market.

The restriction does not apply if FIH's share of the total deposit market is less than 5 % [4].

5.4. Advertising: FIH must not use the granting of the aid measures or any advantages arising therefrom for advertising purposes. Further, its overall annual advertising expenses will be below EUR 1 million.

5.5. Ban on coupon payments: FIH will refrain during the Restructuring Period from making any payments on capital instruments, unless those payments stem from a legal obligation, and not call or buy back those instruments without prior approval of the Commission. Coupons on capital instruments held by the state may be paid, unless such payments would trigger coupon payments to other investors that otherwise would not be mandatory. This commitment not to pay coupons during the Restructuring Period does not apply for newly issued instruments (meaning instruments issued after the Commission's final approval of the restructuring plan), provided any payment of coupons on such newly issued instruments will not create a legal obligation to make any coupon payments on FIH's securities existing at the moment of the adoption of the Commission's Restructuring Decision.

[1] Defined as loans granted in the context of financing shops, offices, blocks of flats, warehouses, showrooms, factories or similar premises if granted to a company that does not reside at the premises for their primary business activity or to a company that is specialised in developing real estate.

[2] Does not apply in the following instances: (a) FIH Holding/FIH/other current or future entities in the FIH Holding Group buys back FSPF A/S (alternatively the loan portfolio of FSPF A/S, or part thereof); (b) if FIH is contractually/legally obliged to provide such loan, or if a loan is made in connection with a restructuring/refinancing/recapitalisation/work-out solution for debtors in FIH or FSPF; or (c) non-lending advisory services.

[3] Does not apply in the ordinary course of the banking business (e.g. if FIH obtains a shareholding through a restructuring or similar of debtors) or if FIH is legally obliged to make such investment.

[4] FIH's share of the market is derived from the Danish Central Bank's MFI-statistics (www.statistikbanken.dk/DNMIN). It is based on the total amount of deposits from Danish residents in the Danish MFI sector relative to deposits from Danish residents in FIH.

5.6. Ban on dividend payments: All dividends paid to FIH Holding will be retained until settlement of the share purchase agreement respectively the end of the Restructuring Period, whichever is longer. Thus, FIH Holding shall not distribute funds to its shareholders by way of dividends or otherwise until the final settlement of the purchase price agreement. To retain earnings in the FIH Holding group, FIH shall not pay dividends to other entities than FIH Holding.

5.7. Restrictions on FIH Holding related to ownership: FIH Holding shall not pledge its shareholding in FIH. Related party transactions shall be at arm's length. No decision affecting the creditworthiness or liquidity of FIH Holding compromising its capability of paying a negative variable purchase price if required shall be taken.

FIH Holding is only allowed to conduct business as holding company for FIH and any shareholder loans shall not be repaid.

5.8. Buy Back of Hybrid Capital Instruments or other Capital Instruments: With regard to the buy-back of hybrid capital instruments or other capital instruments existing in FIH on 2 March 2012, FIH will respect the rules concerning Tier 1 and Tier 2 capital transactions as set out in the MEMO/09/441 of 8 October 2008 ([5]). In any case FIH will consult the Commission before making announcements to the market concerning Tier 1 and Tier 2 capital transactions.

6. **Capital relief**

FIH will remunerate the measure in line with the IAC. Specifically, in addition to making a one off payment of DKK 310,25 million + 37,5 million * N/365, where N is the number of days between 30 September 2013 and the final payment date, which, according to the Danish authorities has already occurred with value date 4 December 2013, FIH will:

— each year, from 2014 to 2020 or the year following the final settlement of the purchase price agreement, whichever is earlier, pay a fee of DKK 12,1 million per annum with value date 30 September (or, if 30 September of the respective date is not a business day, on the following business day). The final fee is to be paid on the settlement date of the purchase price agreement, and reduced pro rata temporis (on an actual over actual basis) for the period between the penultimate fee payment (30 September) and the settlement of the purchase price agreement as well as for the first period, from 4 December 2013 to 30 September 2014,

— reduce the management fees for administration and hedging charged to FS Property Finance A/S to 0,05 % per annum of the outstanding loan portfolio, retroactively effective from 1 January 2013,

— pay an annual fee of DKK 47,2 million to FSC if the FSA changes its regulatory view regarding capital requirements at holding level such that FIH's lending capacity would no longer be restricted by FIH Holding's capital position. Value dates and time limitations similar to the first indent above apply ([6]).

7. **Reporting**

7.1. The Kingdom of Denmark shall ensure that the full and correct implementation of the Restructuring Plan and the full and correct implementation of all Commitments within this Term Sheet are continuously monitored.

7.2. The Kingdom of Denmark will report semi-annually to the Commission on the evolution of the Restructuring Plan and the above mentioned commitments until the end of the Restructuring Period.

7.3. Within three months of the final settlement of the transaction the Kingdom of Denmark will provide a report made by an external certified accountant on the accurateness of the settlement of the transaction.

([5]) http://europa.eu/rapid/press-release_MEMO-09-441_en.htm

([6]) It is worth mentioning that: (i) FIH has already made a one-off payment of 310,25 million DKK + 37,5 million * N/365, where N is the number of days between 30 September 2013 and the final payment date, which, according to the Danish authorities has already occurred with value date 4 December 2013; and (ii) payed an amount of 61,7 million DKK to the FS Property Finance A/S as partial repayment of fees received under the administration agreement for 2012, which according to the Danish authorities has already occurred with value date 18 December 2013.

COMMISSION DECISION

of 29 April 2014

on the State aid SA.34825 (2012/C), SA.34825 (2014/NN), SA.36006 (2013/NN), SA.34488 (2012/C) (ex 2012/NN), SA.31155 (2013/C) (2013/NN) (ex 2010/N) implemented by Greece for the Eurobank Group related to: Recapitalisation and Restructuring of Eurobank Ergasias S.A.; Restructuring aid to Proton bank through creation and capitalisation of Nea Proton and additional recapitalisation of New Proton Bank by the Hellenic Financial Stability Fund; Resolution of Hellenic Postbank through the creation of a bridge bank

(notified under document C(2014) 2933)

(Only the English text is authentic)

(Text with EEA relevance)

(2014/885/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on Member States and other interested parties to submit their comments pursuant to those provisions [1],

Whereas:

1. PROCEDURE

1.1. PROCEDURES RELATED TO THE EUROBANK GROUP [2] ('THE BANK' [3])

(1) By decision of 19 November 2008 the Commission approved a scheme entitled 'Support Measures for the Credit Institutions in Greece' (the 'Greek Banks Support Scheme') designed to ensure the stability of the Greek financial system. The Greek Banks Support Scheme allows for aid to be granted under its three constituent measures, a recapitalisation measure, a guarantee measure and a government bond loan measure [4]. In May 2009, EFG Eurobank Ergasias S.A. [5] was recapitalised by Greece under the recapitalisation measure.

(2) Recital 14 of the decision of 19 November 2008 recorded that a restructuring plan would be notified to the Commission in respect of the beneficiaries of the recapitalisation measure.

(3) On 2 August 2010, the Greek authorities submitted a restructuring plan in respect of the Eurobank Group to the Commission. The Commission registered that plan and its subsequent updates as well as additional information submitted by the Greek authorities as Case SA.30342 (PN 26/2010) and then Case SA.32789 (2011/PN).

(1) Commission Decision of 27 July 2012 on State aid No SA.34825 (2012/C) (ex 2012/NN) — Recapitalisation of EFG Eurobank by the Hellenic Financial Stability Fund (OJ C 359, 21.11.2012, p. 31), Commission Decision of 26 July 2012 on State aid No SA.34488 (2012/C) (ex 2012/NN) — Aid to Nea Proton Bank through creation and capitalisation of Nea Proton Bank, and initiation of the formal investigation (OJ C 357, 20.11.2012, p. 26), Commission Decision of 6 May 2013 on State aid No SA.31155 (2013/C) (ex 2013/NN) (ex 2010/N) — State aid to Hellenic Postbank S.A. through the creation and the capitalisation of the bridge bank New Hellenic Postbank S.A. (OJ C 190, 29.6.2013, p. 70).

(2) Eurobank Ergasias S.A and all its subsidiaries (Greek and non-Greek subsidiaries and branches, both banking and non-banking).

(3) 'The Bank' refers to the Eurobank Group.

(4) Commission decision of 19 November 2008 on State aid N 560/08 '*Support Measures for the Credit Institutions in Greece*' (OJ C 125, 5.6.2009, p. 6). It was attributed the number SA.26678 (N 560/08). That scheme was subsequently prolonged and amended as described in footnote 6.

(5) The annual General Meeting of 29 June 2012 decided to change the corporate name of EFG Eurobank Ergasias S.A. to Eurobank Ergasias S.A.

(4) The Bank has repeatedly benefited from State guarantees on debt instruments and government bond loans under the Greek Banks Support Scheme ([6]). It also benefited from State-guaranteed emergency liquidity assistance ('State-guaranteed ELA').

(5) On 20 April 2012, the Hellenic Financial Stability Fund ('HFSF') provided the Bank with a letter committing to participate in a planned share capital increase of the Bank. On 28 May 2012, the HFSF granted a bridge recapitalisation of EUR 3 970 million to the Bank ('first bridge recapitalisation').

(6) In May 2012, the Greek authorities notified to the Commission the commitment letter that had been provided by the HFSF to the Bank. The Commission registered it as a non-notified aid (Case SA.34825 (2012/NN)) as the measure had already been implemented.

(7) On 27 July 2012 the Commission opened a formal investigation procedure regarding the first bridge recapitalisation ('the Eurobank Opening Decision') ([7]).

(8) In December 2012, the HFSF granted a second bridge recapitalisation of EUR 1 341 million to the Bank ('second bridge recapitalisation'). On 21 December 2012, the HFSF also provided the Bank with a commitment letter for its participation in a share capital increase of the Bank and in convertible capital instruments to be issued, for a total amount up to EUR 528 million ([8]). The Greek authorities notified those measures to the Commission on 27 December 2012.

(9) In May 2013, the HFSF participated in the Bank's share capital increase which had been agreed in December 2012. It converted the first and second bridge recapitalisations into equity and injected a further EUR 528 million of capital into the Bank (the 'Spring 2013 recapitalisation').

(10) On 19 December 2013, the Greek authorities submitted information to the Commission regarding the terms of the Spring 2013 recapitalisation.

([6]) On 2 September 2009, Greece notified a number of amendments to the support measures and a prolongation until 31 December 2009 that were approved on 18 September 2009 (See Commission decision of 18 September 2009 on State aid N 504/09 '*Prolongation and amendment of the Support Measures for the Credit Institutions in Greece*' (OJ C 264, 6.11.2009, p. 3)). On 25 January 2010, the Commission approved a second prolongation of the support measures until 30 June 2010 (See Commission decision of 25 January 2010 on State aid N 690/09 '*Prolongation of the Support Measures for the Credit Institutions in Greece*' (OJ C 57, 9.3.2010, p. 4)). On 30 June 2010, the Commission approved a number of amendments to the support measures and an extension until 31 December 2010 (See Commission decision of 30 June 2010 on State aid N 260/10 '*Extension of the Support Measures for the Credit Institutions in Greece*' (OJ C 238, 3.9.2010, p. 1)). On 21 December 2010 the Commission approved a prolongation of the support measures until 30 June 2011 (See Commission decision of 21 December 2010 on State aid SA 31998 (2010/N) '*Fourth extension of the Support measures for the credit Institutions in Greece*' (OJ C 53, 19.2.2011, p. 1)). On 4 April 2011 the Commission approved an amendment (See Commission decision of 4 April 2011 on State aid SA.32767 (11/N) '*Amendment to the Support Measures for the Credit Institutions in Greece*' (OJ C 164, 2.6.2011, p. 5)). On 27 June 2011 the Commission approved a prolongation of the support measures until 31 December 2011 (See Commission decision of 27 June 2011 on State aid SA.33153 (11/N) '*Fifth prolongation of the Support measures for the credit Institutions in Greece*' (OJ C 274, 17.9.2011, p. 3)). On 6 February 2012, the Commission approved a prolongation of the support measures until 30 June 2012 (See Commission decision of 6 February 2012 on State aid SA.34149 (2011/N) '*Sixth prolongation of the Support Measures for the Credit Institutions in Greece*' (OJ C 101, 4.4.2012, p. 1)). On 6 July 2012, the Commission approved a prolongation of the support measures until 31 December 2012 (See Commission decision of 6 July 2012 on State aid case SA.35002 (2012/N) - Greece '*Prolongation of the Support Scheme for Credit Institutions in Greece*' (OJ C 77, 15.3.2013, p. 12)). On 22 January 2013, the Commission approved a prolongation of the Guarantee Scheme and the Bond Loan Scheme until 30 June 2013 (See Commission decision of 22 January 2013 on State aid case SA.35999 (12/N) - Greece '*Prolongation of the Guarantee Scheme and the Bond Loan Scheme for Credit Institutions in Greece*' (OJ C 162, 7.6.2013, p. 3)). On 25 July 2013, the Commission approved a prolongation of the Guarantee Scheme and the Bond Loan Scheme until 31 December 2013 (See Commission decision of 25 July 2013 on State aid case SA.36956 (2013/N) - Greece '*Prolongation of the Guarantee Scheme and the Bond Loan Scheme for Credit Institutions in Greece*', not yet published. On 14 January 2014, the Commission approved a prolongation of the Guarantee Scheme and the Bond Loan Scheme until 30 June 2014 (See Commission decision of 14 January 2014 on State aid case SA.37958 (2013/N) - Greece '*Prolongation of the Guarantee Scheme and the Bond Loan Scheme for Credit Institutions in Greece*', not yet published.

([7]) See Commission decision of 27 July 2012 on State aid SA.34825 (2012/C), 'Recapitalisation of EFG Eurobank by the Hellenic Financial Stability Fund' (OJ C 359, 21.11.2012, p. 31).

([8]) HFSF press release, 24 December 2012, available online at: http://www.hfsf.gr/files/press_release_20121224_en.pdf

(11) On 31 March 2014, the HFSF provided the Bank with a commitment letter for its participation in a planned share capital increase of the Bank.

(12) On 16 April 2014 the Greek authorities submitted a final restructuring plan for the Bank ('the restructuring plan') to the Commission. They also notified the Commission of the HFSF's commitment to fully underwrite the Bank's upcoming recapitalisation. On the same date they provided information on the State-guaranteed ELA. They indicated that they wanted to continue providing the Bank with such liquidity support, as well as State guarantees on debt instruments and government bond loans under the Greek Banks Support Scheme ([9]).

(13) The Commission had numerous meetings, teleconferences and electronic mail exchanges with representatives of the Greek authorities and the Bank.

(14) Greece accepts that exceptionally the present decision is adopted in the English language only.

1.2. PROCEDURE RELATED TO THE ACQUIRED BUSINESSES

1.2.1. **Procedure related to Nea Proton Bank**

(15) On 26 July 2012, the Commission adopted a decision regarding State aid SA.34488 (2012/C), 'Aid to Nea Proton Bank through creation and capitalisation of Nea Proton Bank' ([10]) ('Nea Proton Opening Decision'). By that decision the Commission opened a formal investigation procedure regarding: (i) the financing by the Resolution Scheme of the Hellenic Deposit and Investment Guarantee Fund ('HDIGF') and the HFSF of the EUR 1 121,6 million funding gap between the assets and liabilities of Proton Bank which had been transferred to Nea Proton Bank; (ii) an injection of initial share capital of EUR 250 million by the HFSF into Nea Proton Bank; and (iii) an injection of additional share capital of EUR 300 million by the HFSF into Nea Proton Bank which was anticipated at the time the Nea Proton Opening Decision was adopted. The Commission invited Greece to submit comments and provide all such information as might help it to assess the aid measures. Section 1 of the Nea Proton Opening Decision described in detail the procedure regarding Proton Bank, including the resolution of Proton Bank, the creation of Nea Proton Bank, the financing of the funding gap and the initial share capital injected by the HFSF into Nea Proton Bank.

(16) On 1 August 2012, the HFSF subscribed additional share capital in Nea Proton Bank, an increase which amounted to EUR 230 million.

(17) On 5 September 2012, Greece submitted comments on the Nea Proton Opening Decision which had been prepared by the Bank of Greece and the HFSF.

(18) On 31 December 2012, the HFSF subscribed further share capital in Nea Proton Bank which amounted to EUR 35 million.

(19) In May 2013, the HFSF launched the process for the sale of Nea Proton Bank.

(20) On 12 July 2013, the Greek authorities informed the Commission of the Bank's intention to acquire Nea Proton Bank. The Commission replied on 15 July 2013.

(21) On 15 July 2013, the Bank signed a binding agreement with the HFSF to acquire 100 % of the shares and voting rights of Nea Proton Bank for a purchase price of EUR 1 and the HFSF committed to recapitalise Nea Proton Bank prior to its sale with EUR 395 million in cash.

(22) On 29 July 2013, the Greek authorities notified the Commission of that capital injection of EUR 395 million into Nea Proton Bank.

([9]) The notification was registered under number SA.34825 (2014/NN).
([10]) OJ C 357, 20.11.2012, p. 26.

1.2.2. **Procedure related to New TT Bank**

(23) On 6 May 2013, the Commission adopted a decision regarding State aid SA.31155 (2013/C), 'State aid to TT Hellenic Postbank S.A. through the creation and the capitalisation of the bridge bank *New TT Hellenic Postbank S.A.*' ('New TT Opening Decision') ([11]). In that decision the Commission opened the formal investigation procedure regarding: (i) a EUR 500 million capital injection by the HFSF into New TT Hellenic Postbank S.A. ('New TT Bank'); (ii) a EUR 4,1 billion ([12]) financing of the funding gap ([13]) resulting from the transfer of Hellenic Postbank S.A. ('TT Bank') activities to New TT Bank; (iii) a EUR 224,96 million capital injection by Greece in the form of preference shares under the Greek Banks Support Scheme into TT Bank; and (iv) a EUR 0,68 billion intervention by the HDIGF in favour of the assets of T Bank S.A. ('T Bank') which had been transferred to TT Bank. The Commission invited Greece to submit comments and provide all such information as might help it to assess the restructuring aid. Section 1 of the New TT Opening Decision describes in detail the procedures regarding the resolution of T Bank by sale to TT Bank and the resolution of TT Bank by the creation of New TT Bank.

(24) In June 2013, the HFSF launched the process for the sale of New TT Bank.

(25) On 15 July 2013, the Greek authorities informed the Commission of the HFSF's decision to sell New TT Bank to the Bank and the reasons for that decision.

(26) On 15 July 2013, the Bank signed a binding agreement with the HFSF to acquire 100 % of the shares and voting rights of New TT Bank.

(27) On 19 July 2013, Greece submitted comments on the New TT Opening Decision.

2. **DESCRIPTION**

2.1. THE BANK AND ITS DIFFICULTIES

2.1.1. **General context of the Greek banking sector**

(28) Greece's real gross domestic product ('GDP') fell by 20 % from 2008 to 2012, as shown in Table 1. As a result, Greek banks have faced a rapidly raising default rate on loans to Greek households and companies ([14]). Those developments have adversely affected the performance of the assets of Greek banks and given rise to capital needs.

Table 1

Real GDP Growth in Greece, 2008-2013

Greece	2008	2009	2010	2011	2012	2013
Real GDP growth, %	– 0,2	– 3,1	– 4,9	– 7,1	– 6,4	– 4 (estimate)

Source: Eurostat, available online at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tec00115

(29) In addition, in February 2012, Greece implemented a private sector bond exchange known as Private Sector Involvement ('the PSI programme'). Greek banks were involved in the PSI programme, in the course of which the Greek government offered existing private bondholders new securities (including new Greek government bonds

([11]) OJ C 190, 29.6.2013, p. 70.

([12]) The funding gap was reassessed later and according to the decision 11/1/21.5.2013 of the Resolution Measures Committee of the Bank of Greece, it was finalized at EUR 3 732,6 million.

([13]) The funding gap refers to the difference between the value of the assets transferred to the new bank and the nominal value of the liabilities transferred to it.

([14]) European Commission — Directorate-General Economic and Financial Affairs. *The Second Economic Adjustment Programme for Greece — March 2012*, p. 17, available online at: http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf

('GGBs'), GDP-linked securities and PSI payment notes issued by the European Financial Stability Fund ('EFSF')) in exchange for existing GGBs, with a nominal discount of 53,5 % and longer maturities ([15]). The Greek authorities announced the results of that exchange of bonds on 9 March 2012 ([16]). The exchange resulted in significant losses for the bondholders (estimated by the Bank of Greece at 78 % of the face amount of old GGBs on average for the Greek banks) and capital needs which were retroactively booked in the Greek banks' 2011 financial statements.

Table 2

Total PSI losses of the main Greek banks (EUR million)

Banks	Face amount of GGBs	Face amount of state related loans	Total face amount	PSI loss of GGBs	PSI loss of PSI-Verlust der PSI-Verlust der	Total gross PSI loss	Total gross PSI loss/Core Tier 1 ([1]) (%)	Total gross PSI loss/Total assets (%)
NBG	13 748	1 001	14 749	10 985	751	11 735	161,0	11,0
Eurobank	7 001	335	7 336	5 517	264	5 781	164,5	7,5
Alpha	3 898	2 145	6 043	3 087	1 699	4 786	105,7	8,1
Piraeus	7 063	280	7 343	5 686	225	5 911	226,0	12,0
Postbank (TT Bank)	4 197	175	4 372	3 306	138	3 444	618,3	24,8
Nea Proton Bank	934	0	934	216	0	216	378,8	12,6

Source: Bank of Greece, *Report on the Recapitalisation and the Restructuring of the Greek Banking Sector*, December 2012, p. 14.
([1]) The Core Tier One ratio of a bank is one of the regulatory capital ratios monitored by the supervisor in the framework of the Capital Requirement Directive.

(30) Since the Greek banks faced substantial capital shortfalls as a result of the PSI programme and the continuing recession, the Memorandum of Economic and Financial Policies ('MEFP') of the Second Adjustment Programme for Greece between the Greek government, the European Union, the International Monetary Fund ('IMF') and the European Central Bank ('ECB') dated 11 March 2012 made funds available for the recapitalisation of those banks. The Greek authorities estimated the total bank recapitalisation needs and resolution costs to be financed under that programme at EUR 50 billion ([17]). That amount was calculated on the basis of a stress test performed by the Bank of Greece for the period starting December 2011 and ending December 2014 ('the stress test of 2012'), which relied on the loan losses forecast performed by Blackrock ([18]). The funds for the recapitalisation of the Greek banks are available through the HFSF. Table 3 summarises the calculation of capital needs for the main Greek banks as they result from the stress test of 2012.

Table 3

Stress test of 2012: Capital needs of the main Greek banks (EUR million)

Banks	Reference Core Tier 1 (Dec 2011)	Total gross PSI loss (Dec 2011)	Provisions related to PSI (June 2011)	Gross Cumulative Loss Projections for credit risk	Loan loss reserves (Dec 2011)	Internal capital generation	Target Core Tier 1 (Dec 2014)	Capital needs
NBG	7 287	− 11 735	1 646	− 8 366	5 390	4 681	8 657	9 756

([15]) See section II 'The restructuring of the Greek Sovereign Debt' of the *Report on the Recapitalisation and Restructuring of the Greek Banking Sector*, Bank of Greece, December 2012, available online at: http://www.bankofgreece.gr/BogEkdoseis/Report_on_the_recapitalisation_and_restructuring.pdf
([16]) Press release of Ministry of Finance of 9 March 2012, available online at: http://www.pdma.gr/attachments/article/80/9%20MARCH%202012%20-%20RESULTS.pdf
([17]) See footnote 14, p. 106.
([18]) See footnote 15.

Banks	Reference Core Tier 1 (Dec 2011)	Total gross PSI loss (Dec 2011)	Provisions related to PSI (June 2011)	Gross Cumulative Loss Projections for credit risk	Loan loss reserves (Dec 2011)	Internal capital generation	Target Core Tier 1 (Dec 2014)	Capital needs
Eurobank	3 515	– 5 781	830	– 8 226	3 514	2 904	2 595	5 839
Alpha	4 526	– 4 786	673	– 8 493	3 115	2 428	2 033	4 571
Piraeus	2 615	– 5 911	1 005	– 6 281	2 565	1 080	2 408	7 335
Postbank (TT Bank)	557	– 3 444	566	– 1 482	1 284	– 315	903	3 737
Nea Proton Bank	57	– 216	48	– 482	368	34	115	305

Source: Bank of Greece, *Report on the Recapitalisation and the Restructuring of the Greek Banking Sector*, December 2012, p. 8.

(31) According to the MEFP of March 2012, 'banks submitting viable capital raising plans will be given the opportunity to apply for and receive public support in a manner that preserves private sector incentives to inject capital and thus minimises the burden for taxpayers' ([19]). The Bank of Greece found only the four largest banks (Eurobank, National Bank of Greece, Piraeus Bank and Alpha Bank) to be viable ([20]). They received a first recapitalisation by the HFSF in May 2012.

(32) Domestic deposits in the banks in Greece decreased by 37 % in total between the end of 2009 and June 2012 due to recession and political uncertainty. Those banks had to pay higher interest rates to try to retain deposits. The costs of deposits increased, reducing the net interest margin of the banks. As Greek banks were shut out from wholesale funding markets, they became entirely dependent on Eurosystem ([21]) financing, a growing portion of which was in the form of emergency liquidity assistance ('ELA') granted by the Bank of Greece. The amounts those banks obtained were particularly large in the second half of 2012.

(33) After elections were held in June 2012, the stock of deposits began to increase again. Total Eurosystem funding of Greek banks has decreased since 31 December 2012.

(34) On 3 December 2012, Greece launched a buy-back programme on the new GGBs received in the framework of the PSI programme, at prices ranging from 30,2 % to 40,1 % of their nominal value ([22]). The Greek banks participated in that buy-back programme which crystallised further losses on their balance sheet, since the accounting loss (that is, the difference between market value and nominal value) booked at the time of the PSI programme became definitive and irreversible ([23]).

(35) In December 2012, the four largest Greek banks received a second recapitalisation from the HFSF.

(36) In autumn 2013, the Bank of Greece launched a new stress test exercise to assess the robustness of the Greek banks' capital position under both a baseline and an adverse scenario.

(37) In July 2013, the Bank of Greece commissioned an advisor to carry out a diagnostic study on the loan portfolios of all Greek banks. That advisor carried out credit loss projections ('CLPs') on all domestic loan books of the Greek banks as well as on loans carrying Greek risk in foreign branches and subsidiaries over a three-and-a-half-year and a loan-lifetime horizon. The analysis provided CLPs under two macroeconomic scenarios; a baseline and an adverse one. The CLPs for foreign loan portfolios were estimated by the Bank of Greece using some input from the advisor.

([19]) See footnote 14, p. 104.
([20]) See footnote 15.
([21]) The European Central Bank and the national central banks together constitute the Eurosystem, the central banking system of the euro area.
([22]) Press release of Ministry of Finance of 3 December 2012, available online at: http://www.pdma.gr/attachments/article/248/Press%20Release%20-%20December%2003.pdf. That buy back of its own debt at a price deeply below par generated a significant debt reduction for Greece.
([23]) In the absence of such a buy back, the market value of those bonds could have increased depending on the evolution of market parameters such as interest rates and the probability of default of Greece.

(38) Based on the advisor's assessment of the CLPs, the Bank of Greece conducted the capital needs assessment with the technical support of a second advisor.

(39) The key components of the capital needs assessment under the stress test of 2013 were (i) the CLPs ([24]) on banks' loan portfolios on a consolidated basis for Greek risk and foreign risk, net of existing loan reserves, and (ii) the estimated operating profitability of banks for the period from June 2013 to December 2016, based on a conservative adjustment of restructuring plans which had been submitted to the Bank of Greece during the fourth quarter of 2013. Table 4 summarises the calculation of capital needs for the main Greek banks on a consolidated basis on the baseline scenario for that stress test of 2013.

Table 4

Stress test of 2013: Capital needs of the Greek banks on a consolidated basis in the baseline scenario (EUR million)

Banks	Reference Core Tier 1 (June 2013) (1)	Loan Loss reserves (June 2013) (2)	CLPs for Greek risk (3)	CLPs for foreign risk ([1]) (4)	Internal Capital Generation (5)	Stress test Core Tier 1 ratio (December 2016) (6)	Capital needs (7)=(6)– (1)– (2)– (3)– (4)– (5)
NBG ([2])	4 821	8 134	– 8 745	– 3 100	1 451	4 743	2 183
Eurobank ([3])	2 228	7 000	– 9 519	– 1 628	2 106	3 133	2 945
Alpha	7 380	10 416	– 14 720	– 2 936	4 047	4 450	262
Piraeus	8 294	12 362	– 16 132	– 2 342	2 658	5 265	425
Attica	225	403	– 888	0	106	243	397
Panellinia	61	66	– 237	0	– 26	31	169

Source: Bank of Greece, *2013 Stress Test of the Greek Banking Sector, March 2014, p. 42.*

([1]) The impact of the foreign risk CLPs was calculated after foreign tax and taking into account the commitments proposed by Greece at that time to the Commission regarding divestments.

([2]) NBG loan loss reserves as of June 2013 pro-forma of the provisions of FBB and Probank.

([3]) Eurobank loan loss reserves as of June 2013 pro-forma of the provisions of New Hellenic Postbank and New Proton Bank, which were acquired by the Bank in August 2013.

(40) On 6 March 2013, the Bank of Greece announced the results of the stress test of 2013 and requested the banks to submit their capital raising plans by mid-April 2014 to cover the capital needs under the baseline scenario.

2.1.2. **The economic activities of the Bank**

(41) The Bank provides universal banking services mainly in Greece and in Eastern and South-Eastern Europe (Cyprus, Romania, Bulgaria, Serbia, and Ukraine). It offers a full range of banking and financial products and services to households and businesses. It is active in retail, corporate and private banking, asset management, insurance, treasury, capital markets and other services. The Bank is incorporated in Greece and its shares are listed on the Athens Stock Exchange. On 31 December 2012, the Bank employed a total of 17 427 people, approximately half of whom were employed in Eastern and South-Eastern Europe with the other half employed in Greece ([25]).

(42) The Bank participated in the PSI programme, exchanging GGBs and State-related loans with a face value of EUR 7 336 million. Its total PSI-related charge amounted to around EUR 5 781 million before tax and was entirely booked in its 2011 accounts ([26]). During the buy-back programme of December 2012, the Bank sold the new GGBs it had received in the framework of the PSI at a deep discount to nominal value. That sale crystallised its losses on the new GGBs.

([24]) Included the expected loss from the new loan production in Greece over the period from June 2013 to December 2016.

([25]) http://www.eurobank.gr/online/home/generic.aspx?id=323&mid=347&lang=en

([26]) See Table 2.

(43) The key figures of the Bank in December 2010, December 2011, December 2012 and December 2013 (consolidated data) are presented in Table 5.

Table 5

Eurobank key figures, 2010, 2011, 2012 and 2013

Profit and loss (EUR million)	2010	2011	2012	2013 (includes New TT Bank and Nea Proton Bank from the date of their acquisition)
Net Interest Income	2 103	2 965	1 461	1 294
Total Operating Income	2 730	2 226	1 755	1 587
Total Operating Expenses	– 1 280	– 1 123	– 1 052	– 1 071
Pre Provision Income	1 450	1 103	703	516
Credit Risk Losses	– 1 273	– 1 328	– 1 655	– 1 920
PSI losses		– 6 012	– 363	
Other Losses		– 737	– 373	– 522
Net Profit/Loss	84	– 5 496	– 1 440	– 1 157
Selective Volume figures (EUR million)	31 December 2010	31 December 2011	31 December 2012	31 December 2013 (includes New TT Bank and Nea Proton Bank)
Total Loans and Advances to Customers	53 412	48 094	43 171	45 610
Total Deposits	41 173	32 459	30 752	41 535
Total Assets	87 188	76 822	67 653	77 586
Total Equity ([1])	6 094	875	– 685	4 523

Sources: 2013: Financial results2013 – Consolidated financial statements, p. 3 and p. 4: http://www.eurobank.gr/Uploads/pdf/EN%20Consol%20AR%202013.pdf; 2012 and 2011: Financial results2012 – Consolidated financial statements, p. 3 and p. 4: http://www.eurobank.gr/Uploads/pdf/Annual%20Report%202012.pdf; 2010: EFG Eurobank-Press Release, Full Year 2011 Results, pp. 5 and 6: http://www.eurobank.gr/Uploads/pdf/Annual%20Report%20AQ2011.pdf

([1]) Those amounts of equity include, for 2010, 2011 and 2012, EUR 950 million of preference shares granted by Greece in 2009; those amounts do not include the two bridge recapitalisations received by the Bank in 2012, for an amount of EUR 5 311 million. The equity figure for 31 December 2013 includes the May 2013 recapitalisation (during which the two bridge recapitalisations were converted into ordinary shares).

(44) Table 5 illustrates that, apart from the huge losses it booked in 2011 due to the PSI programme (EUR 5 781 million ([27])), the Bank suffered from declining income (due, among other reasons, to the higher costs of deposits)

([27]) See Table 2.

and from high and rising impairment losses on its loan portfolios in Greece and abroad. The liquidity position of the Bank was badly hit by deposit outflows and its loan-to-deposit ratio reached 148 % at 31 December 2011, while 42 % of its balance sheet was funded by the Eurosystem at that date.

(45) Under the stress test of 2013, the results of which were announced on 6 March 2014, the Bank of Greece estimated the capital needs of the Bank at EUR 2 945 million for the baseline scenario. That amount was net of mitigating measures, that is to say, it already assumed that the Bank would carry out mitigating measures in the form of divestments, which were assumed to contribute to the reduction of capital needs.

(46) To cover the identified need for EUR 2 945 million of capital, the Bank proposed enhanced mitigating measures, which will, however, in total generate only slightly more than assumed by the Bank of Greece when calculating the capital needs. Those mitigating measures include the sale of additional assets (sale of […] (*), sale of […] % of the insurance subsidiary and the reduction of the participation in the real estate activities to 20 % by […]) [28].

(47) Since those enhanced mitigating measures are able to cover only a very small part of the identified capital needs, the extraordinary general meeting of shareholders decided on 12 April 2014 to proceed with a capital increase of EUR 2 864 million. It takes the form of a non-pre-emptive equity offering (that is to say, a capital increase with cancellation of pre-emption rights) to international investors and a public offering in Greece. If the demand from private investors is insufficient to cover the entire capital increase, the HFSF will cover the gap by subscribing the remaining new shares, subject to prior conversion of the existing subordinated capital instruments of the Bank into shares.

2.2. THE BANK'S ACQUISITIONS OF GREEK BANKING ACTIVITIES

(48) On 15 July 2013, the Bank signed two binding agreements with the HFSF to acquire 100 % of the shares and voting rights of Nea Proton Bank and New TT Bank.

2.2.1. **Acquisition of Nea Proton Bank**

Resolution of Proton Bank and Nea Proton Bank

(49) On 9 October 2011, the Bank of Greece proceeded with the resolution of Proton Bank. The license of Proton Bank was recalled by the Bank of Greece which put it into liquidation [29].

(50) On a proposal from the Bank of Greece and following the decision of the Minister of Finance [30], Nea Proton Bank was created as an interim credit institution and all the deposits (retail, bank and government), the branch network and selected assets (loans and securities portfolios) of Proton Bank were transferred to it. Equity claims, subordinated debt, and high-risk loans remained with Proton Bank. HFSF injected initial share capital of EUR 250 million [31] into Nea Proton Bank and was its only shareholder. The size of the opening balance sheet of Nea Proton Bank was approximately EUR 3 billion.

(51) At the end of 2011, Nea Proton Bank's risk weighted assets ('RWA' [32]) amounted to EUR 1,2 billion.

Acquisition of Nea Proton Bank by the Bank

(52) The Greek law on bank resolution requires that the HFSF must dispose of its shares in an interim credit institution within two years from the date of the Ministerial decision establishing that interim credit institution [33]. In line with that obligation and pursuant to the MEFP, the HFSF proceeded with the sale of its shares in Nea Proton Bank. The financial advisor of the HFSF contacted a wide range of potential investors (including Greek banks, foreign banks and financial sponsors) but only two parties, the Bank and a US hedge fund, submitted final offers. Only the offer made by the Bank was considered to be compliant with the process letter of the HFSF and was therefore valid.

(*) Confidential information.

[28] The initial capital raising plan was less ambitious as, for example, the Bank had planned to retain a significant presence in […], and had only committed to a disposal of […] % of the insurance subsidiary.

[29] Decision 20/3/9.10.2011 of the Credit and Insurance Committee of the Bank of Greece.

[30] Decision 9250/9/EC.10.2011 of the Minister of Finance, establishing the interim credit institution by the name of 'Nea Proton Bank S.A.' (Greek Government Gazette FEK B' 2246/2011).

[31] The initial share capital was paid pursuant to the Ministerial decision of 9 October 2011 in two instalments; EUR 220 million on 9 October 2011 and EUR 30 million on 3 February 2012. See HFSF, *Annual Financial report for the period from 1.1.2012 to 31.12.2012*, August 2013, available online at: http://www.hfsf.gr/files/hfsf_annual_report_2012_en.pdf

[32] The *risk weighted assets* is a regulatory aggregate which measures the risk exposure of a financial institution, and which is used by supervisors to monitor the capital adequacy of financial institutions.

[33] See Article 63E, paragraph 9, of Law 3601/2007.

(53) At 31 May 2013, Nea Proton Bank's RWA were EUR 811 million and its regulatory capital was EUR – 203 million. At the same date, Nea Proton Bank needed a total recapitalisation of EUR 276 million to reach a 9 % Core Tier One capital ratio. The Bank paid cash consideration of EUR 1 in exchange for 100 % of the shares and voting rights of Nea Proton Bank. The Bank requested the HFSF to recapitalise Nea Proton Bank by EUR 395 million which, apart from the EUR 276 million needed to bring the capital adequacy ratio of Nea Proton Bank back to 9 %, would allow for an additional EUR 119 million of provisions to deal with additional loan loss provisions and expected pre-tax losses until 2016. Under the terms of the sale, the HFSF committed to cover the capital needs of Nea Proton Bank prior to the completion of the transaction by contributing EUR 395 million in cash.

2.2.2. **Acquisition of New TT Bank**

Resolution of TT Bank and New TT Bank

(54) On 18 January 2013, the Greek authorities proceeded with the resolution of TT Bank. The license of TT Bank was recalled by the Bank of Greece which put it into liquidation [34].

(55) On a proposal from the Bank of Greece and following the decision of the Minister of Finance [35], New TT Bank was created as an interim credit institution and EUR 10,8 billion of assets (in the form of cash, T-bills, performing loans, retail deposits, central funding and GGBs [36]) were transferred to New TT Bank. A total amount of EUR 1,2 billion of net assets remained in TT Bank: 'in the form of' equity claims, non-performing loans, tax assets and liabilities of TT, and levies and duties of any kind. HFSF injected initial share capital of EUR 500 million into New TT Bank and was its only shareholder. The size of the opening balance sheet of New TT Bank after the capital injection was approximately EUR 15,1 billion.

Acquisition of New TT Bank by the Bank

(56) As part of the MEFP commitments, the HFSF proceeded with the sale of its shares in New TT Bank. In that way, it also fulfilled its obligation to dispose of its shares in that interim credit institution within two years of the latter's creation. Its financial advisor contacted a wide range of potential investors, including Greek banks, foreign banks and financial sponsors. Only the four largest Greek banks submitted final offers, of which the Bank's offer was preferred.

(57) The Bank agreed to pay a total of EUR 681 million in the form of newly issued ordinary shares to purchase New TT Bank. According to the Subscription Agreement, the initial consideration paid by the Bank was subject to further adjustments based on a Net Asset Value evaluation [37].

(58) Consequently, the Bank's extraordinary general meeting of shareholders of 26 August 2013 approved the increase of the Bank's share capital by EUR 425 625 000, by issuing 1 418 750 000 new ordinary shares [38] with a nominal value of EUR 0,3 each and an offer price of EUR 0,48 each. The capital increase was subscribed entirely by the HFSF by way of contribution in kind. That contribution in kind took the form of all the shares of New TT Bank owned by the HFSF, with a total value of EUR 681 million. Following that transaction, the shareholding of HFSF in the Bank increased from 93,5 % to 95,2 %.

2.3. AID MEASURES

(59) The Bank benefited from capital support measures A, B1, B2, B3, B4 and C and liquidity support measures L1 and L2. Proton Bank and Nea Proton bank benefited from following measures: Pr1, Pr2 Pr3, NP1, NP2 and NP3. T Bank, TT bank and New TT bank benefited from measures T, TT, NTT1 and NTT2.

[34] Decision 7/3/18.1.2013 of the Resolution Measures Committee of the Bank of Greece.
[35] Decision No 2124/B95/18.1.2013 of the Minister of Finance, establishing the interim credit institution by the name of 'New TT Hellenic Postbank S.A.'(Greek Government Gazette, FEK B' 74/2013).
[36] Annex 1, Article 1 ιγ (13) of the 2124/B95/2013 Ministerial decision.
[37] Deloitte performed an assessment of the Net Asset Value of New TT Bank, as at 30 August 2013, and on 15 November 2013, HFSF disbursed to the Bank the amount of EUR 54,9 million in cash, as indicated in the Report of the Hellenic Financial Stability Fund's Activities for the period July — December 2013, p. 2, available online at: http://www.hfsf.gr/files/HFSF_activities_Jul_2013_Dec_2013_en.pdf
[38] The final number of shares received by the HFSF was determined based on the volume-weighted average price of the Bank's shares on the Athens Stock Exchange over the ten working days prior to the date of the extraordinary general meeting (with a minimum of 1 418 750 000 shares). See footnote 31.

2.3.1. **Aid measures granted to the Bank under the Greek Banks Support Scheme**

(60) The Bank has obtained several forms of aid under the Greek Banks Support Scheme, under the recapitalisation measure, the guarantee measure and the government bond loan measure.

2.3.1.1. *State liquidity support granted under the guarantee measure and the government bond loan measure (measure L1)*

(61) The Bank has benefited and continues to benefit from aid under the guarantee measure and the government bond loan measure. That aid will be described in this Decision as 'measure L1'. As of 30 November 2013 ([39]), the guarantees granted to the Bank amounted to around EUR 13,9 billion. At that date, there was no outstanding loan of government bonds to the Bank. As of 15 April 2011, the Bank had received loans of government bonds amounting to EUR 1 737 million and benefited from EUR 13,6 billion of State guarantees granted under the Greek Banks Support Scheme.

(62) In the restructuring plan for the Bank submitted by the Greek authorities to the Commission on 16 March 2014 the Greek authorities signalled their intention to continue granting guarantees and lending government bonds under the scheme during the restructuring period.

2.3.1.2. *State recapitalisation granted under the recapitalisation measure of the Greek Banks Support scheme (measure A)*

(63) In May 2009, the Bank received a capital injection of EUR 950 million ([40]) (measure A) under the recapitalisation measure of the Greek Banks Support scheme. That capital injection was equivalent to around 2 % of the RWA the Bank had at that time.

(64) The recapitalisation took the form of preference shares subscribed by Greece which had a coupon of 10 % and a maturity of five years. In 2010 the duration of the preference shares was extended while their remuneration was increased. From this point forward, if the preference shares are not redeemed within five years from their issue and no decision has been taken by the general meeting of shareholders as to the redemption of those shares, the Greek Minister of Finance will increase the coupon by 2 % per year on a cumulative basis (that is to say, a coupon of 12 % for year six, 14 % for year seven, etc…).

2.3.2. **State-guaranteed ELA (measure L2)**

(65) ELA is an exceptional measure enabling a solvent financial institution, facing temporary liquidity problems, to receive Eurosystem funding without such operation being part of the single monetary policy. The interest rate paid by such financial institution for ELA is […] basis points higher than the interest it pays for regular Central Bank refinancing.

(66) The Bank of Greece is responsible for the ELA programme, which means that any cost of, and the risks arising from, the provision of ELA are incurred by the Bank of Greece ([41]). Greece granted to the Bank of Greece a State guarantee which applies to the total amount of ELA granted by the Bank of Greece. The adoption of Article 50, paragraph 7 of law 3943/2011, which amended Article 65, paragraph 1 of law 2362/1995, allowed the Minister of Finance to grant guarantees on behalf of the State to the Bank of Greece in order to safeguard the Bank of Greece's claims against the credit institutions. The banks benefiting from ELA have to pay a guarantee fee to the State amounting to […] basis points.

(67) As of 31 December 2011, the Bank had benefited from EUR 14,95 billion of State-guaranteed ELA ([42]), while as of 31 December 2012, the Bank had benefited from EUR 12 billion of State-guaranteed ELA.

2.3.3. **Aid measures granted to the Bank through the HFSF**

(68) Since 2012, the Bank has benefited from several capital support measures granted by the HFSF. Table 6 provides an overview of those aid measures.

([39]) According to the report on the operation of the guarantee and the bond loan measures submitted by the Ministry of Finance on 13 December 2013.

([40]) EUR 950 million is the amount net of expenses. The amount was EUR 950,125 million. See *Annual Financial Report for the year ended 31 December 2009* of Eurobank, p. 6, available online at: http://www.eurobank.gr/Uploads/pdf/REPORTSITE%202009Final1.pdf

([41]) According to the letter of the Bank of Greece of 7 November 2011, 'Guarantees apply on the total amount of Emergency Liquidity Assistance (ELA)'.

([42]) Information provided by Bank of Greece on 7 April 2014.

Table 6

Capital support measures granted to the Bank through the HFSF

	1st bridge recap- italisation — May 2012 (EUR million)	2nd bridge recap- italisation — Dec 2012 (EUR million)	Commitment letter — Dec 2012 (EUR million)	Spring 2013 recap- italisation — May 2013 (EUR million)	Recapitalisation commitment — April 2014 (EUR million)
Measure	B1	B2	B3	B4	C
Amount (EUR million)	3 970	1 341	528	5 839	2 864

2.3.3.1. *The first bridge recapitalisation (measure B1)*

(69) Recitals 15 to 32 of the Eurobank Opening Decision give a detailed description of the first bridge recapitalisation of May 2012 (measure B1). The background and main features of that measure are set out in this section.

(70) On 20 April 2012, the HFSF provided a letter to the Bank committing to participate in a planned share capital increase of the Bank for an amount of up to EUR 4,2 billion.

(71) Under measure B1, the HFSF transferred EUR 3,97 billion of EFSF bonds to the Bank on 28 May 2012, in line with the provisions for bridge recapitalisations laid down in the law 3864/2010 establishing the HFSF ('HFSF Law'). The EFSF bonds transferred to the Bank were EFSF floating notes with maturities of six and 10 years and an issue date of 19 April 2012. The Commission has already established in recital 48 of the Eurobank Opening Decision that '*The bridge recapitalisation finalised on 28 May 2012 is the implementation of the obligation undertaken in the commitment letter and thus a continuation of the same aid*'. Both the amounts provided in the commitment letter and in the first bridge recapitalisation were calculated by the Bank of Greece to ensure the Bank reached a total capital ratio of 8 % as of 31 December 2011, the date of retroactive booking of the bridge recapitalisation in the Bank's records. As can be seen from Table 3, measure B1 only covered a limited part of the total capital needs identified by the stress test of 2012. The Bank was supposed to raise the capital through a future capital increase and the bridge recapitalisation was intended only to preserve the Bank's eligibility for ECB financing until that capital increase had taken place.

(72) For the period between the date of the first bridge recapitalisation and the date of the conversion of the first bridge recapitalisation into ordinary shares and other convertible financial instruments, the pre-subscription agreement between the Bank and the HFSF stipulated that the Bank had to pay the HFSH a 1 % annual fee on the nominal value of the EFSF notes and that any coupon payments and accrued interest to the EFSF notes for that period would count as an additional capital contribution by the HFSF ([43]).

2.3.3.2. *The second bridge recapitalisation (measure B2)*

(73) The Bank booked further losses in the autumn of 2012. Its capital therefore again fell below the minimum capital requirements for it to remain eligible for ECB refinancing.

(74) A second bridge recapitalisation became necessary as a result. On 21 December 2012, the HFSF implemented a second bridge recapitalisation of EUR 1 341 million (measure B2), which was again paid by transferring EFSF bonds to the Bank.

2.3.3.3. *The commitment letter of 21 December 2012 (measure B3)*

(75) In addition to the second bridge recapitalisation, on 21 December 2012 the HFSF provided the Bank with a commitment letter for its participation in the share capital increase of the Bank and in the convertible instruments to be issued, for a total amount up to EUR 528 million (measure B3).

(76) The total of the two bridge recapitalisations (measures B1 and B2) and of the additional amount committed in December 2012 (measure B3) meant that the HFSF had committed the total capital needs identified under the stress test of 2012 (EUR 5 839 million ([44])).

([43]) The pre-subscription agreement provided that: 'The Effective Risk payable to the Bank shall include the EFSF bonds and any coupon payments and accrued interest to the EFSF bonds for the period from the issuance of the bonds until the conversion of the Advance into share capital and other convertible financial instruments as prescribed herein'.

([44]) See Table 3.

2.3.3.4. *The Spring 2013 recapitalisation (measure B4)*

(77) On 30 April 2013, the general meeting of shareholders approved an increase in the share capital of the Bank for an amount of EUR 5 839 million ('the Spring 2013 recapitalisation'). The Bank therefore issued 3 789 317 357 new shares with a nominal value of EUR 0,30 at a price of EUR 1,54 per share.

(78) On the same date the general meeting of shareholders also decided that the full amount of capital would be provided by the HFSF and would be paid in kind, in the form of EFSF bonds.

(79) As a result, the HFSF injected a total of EUR 5 839 million into the Bank in the form of ordinary shares in May 2013 (measure B4). That amount is equal to the sum of measures B1, B2 and B3.

(80) By means of the Spring 2013 recapitalisation the first and second bridge recapitalisations (measures B1 and B2) were converted into a permanent recapitalisation, and the commitment to grant additional capital aid (measure B3) was implemented.

(81) The price of new shares was set at 50 % of the volume-weighted average stock price over the 50 trading days preceding the determination of the offer price. As a result of a reverse stock split decided by the general meeting of shareholders on 30 April 2012 ([45]), the price of new shares was set at EUR 1,54 per share.

(82) Immediately after the Spring 2013 recapitalisation, the HFSF became the major shareholder of the Bank with a stake of 98,56 %. However, after the Bank completed another liability management exercise, that stake decreased to 93,55 % in June 2013 (see section 2.4.5). In August 2013, the Bank issued new shares to the HFSF in order to purchase New TT Bank as a result of which the HFSF stake increased to 95,23 % ([46]).

2.3.3.5. *The 2014 recapitalisation commitment (measure C)*

(83) On 6 March 2014, the Bank of Greece reported the results of a stress test exercise carried out in the second half of 2013. The Bank of Greece indicated that in the baseline scenario the capital needs of the Bank for the period 2014-2016 would reach EUR 2 945 million.

(84) On 31 March 2014 the HFSF sent a letter to the Bank indicating that it had the intention and ability to backstop any share capital increase implemented under the HFSF law 3864/2010 as amended on 30 March 2014 required to comply with capital needs identified during the stress test. The HFSF law provides that if, at the end of the subscription period, there is insufficient demand of private investors at a price determined by the General Council of the HFSF based on two independent valuations, the HFSF would subscribe any remaining shares, subject to prior conversion of the existing subordinated capital instrument of the Bank into shares as stated in Article 6a.

(85) On 12 April 2014 the extraordinary meeting of shareholders approved a share capital increase amounting to EUR 2 864 million under the HFSF law and indicated that the offer price could not be lower than the nominal price of EUR 0,30 per share and the minimum price to be set by the HFSF ([47]).

(86) In line with the HFSF Law, the HFSF appointed two independent advisors to determine the value of the Bank. On 10 April 2014, the two advisors concluded their work by each providing a range for the value of the Bank. The two ranges overlap to a significant extent. Based on those valuations, the General Council of the HFSF determined on 14 April 2014 the price that corresponds to the minimum price at which the Bank's new shares may be offered to investors and the price at which it will back stop the equity offering if required ([48]). On 15 April 2014 it approved the offer made by a consortium of investors to subscribe EUR 1,3 billion of new shares at a price of EUR 0,30 per share ('cornerstone investor' ([49]) ([50])).

([45]) Announcement of Eurobank of 30 April 2013 on Resolutions of the Bank's Extraordinary Shareholders General Meeting of 30.4.2013, available online at: http://www.eurobank.gr/Uploads/pdf/ΑΠΟΦΑΣΕΙΣ%20ΕΓΣ%2030 %204 %202013_ENG(FINAL).pdf

([46]) See recital 57.

([47]) http://www.eurobank.gr/Uploads/pdf/EGM_12042014_RESOLUTIONSVOTING_RESULTS_ENG(FINAL).pdf

([48]) http://www.eurobank.gr/Uploads/pdf/Press_Release_Capital_increase_ENG_(04042014)_FINAL.pdf

([49]) http://www.hfsf.gr/files/press_release_20140415_en.pdf

([50]) http://www.eurobank.gr/Uploads/pdf/Press_Release_Commitment_Letter_ENG.pdf

(87) On 24 April 2014 Eurobank announced the beginning of the book building at a price ranging from EUR 0,30 to EUR 0,33 ([51]). If there is sufficient demand to cover the entire EUR 2 864 million at a price higher than EUR 0,30, the cornerstone investor will have to adjust its price to the higher price or to cancel its orders, in which case it will receive a compensation fee. If there is sufficient demand from private investors (including demand from the cornerstone investor) to cover the entire EUR 2 864 million at a price of EUR 0,30, the cornerstone investor will receive priority allocation. If there is insufficient demand (including demand from the cornerstone investor) at a price of EUR 0,30, subordinated debt will be converted into new shares. As foreseen under the HFSF law, any unsubscribed shares after the conversion of subordinated debt will be subscribed by the HFSF at the same price, namely EUR 0,30 per share.

2.3.4. **Aid measures to the acquired businesses**

2.3.4.1. *Aid measures to Proton Bank and Nea Proton Bank*

(88) Since 2008, Proton Bank and Nea Proton Bank have benefited from several aid measures. Table 7 provides an overview of those aid measures.

Table 7

Overview of the capital support measures to Proton and Nea Proton Bank

Aid beneficiary	Measure	Nature of aid	Entity which granted the aid	Date of disbursement	Amount (in EUR million)
Proton Bank' s activities	Pr1	Capital under recapitalisation measure: Greek State's preference shares	State	May 2009	80
	Pr2	Lending of Greek government securities under Greek bond loan measure	State	April 2009	78
	Pr3	State guarantee for issued bonds under the Greek guarantee measure	State	July 2010	149,4
Nea Proton Bank's activities	NP1 Funding gap from PB to NPB	Financing of funding gap from PB to NPB (part 1)	HDIGF	9.10.2011	862
		After the finalisation of the calculation of the funding gap, financing of the balance of the funding gap from PB to NPB (part 2)	HFSF	14.5.2012	259,6
		Total amount of NP1			**1 121,6**
	NP2 Share capital injections to NPB in 2011 and 2012	Initial share capital	HFSF	9.10.2011	220
		Initial share capital	HFSF	3.2.2012	30
		Total initial capital			*250*
		Additional share capital	HFSF	1.8.2012	230
		Additional share capital	HFSF	31.12.2012	35
		Total additional capital			*265*
		Total amount of NP2			**515**
	NP3 Recapitalisation prior its sale to Eurobank	Share capital	HFSF	28.8.2013	395

([51]) http://www.eurobank.gr/Uploads/pdf/PRICE_RANGE_ENG_FINAL.pdf

2.3.4.1.1. Aid measures to Proton Bank

(i) State recapitalisation received by Proton Bank (measure Pr1)

(89) In May 2009, Greece injected EUR 80 million into Proton Bank, which was equivalent to around 4,6 % of its RWA at that time. That capital injection was made under the recapitalisation measure which is part of the Greek Banks Support Scheme. The recapitalisation took the form of preference shares.

(ii) State liquidity support received by Proton Bank (measures Pr2 and Pr3)

(90) Proton Bank has also benefited from aid measures under the guarantee and government bond loan measures which are part of the Greek Banks Support Scheme. In April 2009 Proton Bank received Greek government securities amounting to EUR 78 million (measure Pr2) and in July 2010 it received a State guarantee for issued bonds with a nominal value of EUR 149,4 million (measure Pr3). The State-guaranteed bonds were transferred to Nea Proton Bank on the resolution day but they were cancelled on 5 January 2012. The Greek government securities matured in December 2011 and were not renewed.

2.3.4.1.2. Aid measures to Nea Proton Bank

(i) Coverage of Nea Proton Bank's funding gap of EUR 1 121,6 million (measure NP1)

(91) In the context of the resolution of Proton Bank, the Greek authorities identified a funding gap in Nea Proton Bank In line with a decision of 9 October 2011 of the Bank of Greece, the Resolution Scheme of the HDIGF paid EUR 862 million to Nea Proton Bank in December 2011. After the Bank of Greece finalised the calculation of the funding gap on 19 January 2012 at EUR 1 121,6 million, in line with a decision of the Bank of Greece of 9 April 2012 [52] the HFSF [53] paid the remaining amount of EUR 259,6 million on 14 May 2012. The Resolution Scheme of the HDIGF and the HFSF thereby closed that funding gap.

(ii) Capital injections by the HFSF into Nea Proton Bank in 2011 and 2012 (measure NP2)

(92) The HFSF provided State aid to Nea Proton Bank in the form of the initial share capital (common shares) of EUR 250 million, paid out in two tranches on 9 October 2011 and 3 February 2012.

(93) According to the updated restructuring plan of Nea Proton Bank submitted on 16 July 2012, which was the latest version of the plan which had been notified to the Commission at the time of the Nea Proton Opening Decision, Nea Proton Bank needed additional capital of EUR 300 million. That additional capital was required in part because Nea Proton Bank had suffered losses as a result of the PSI programme (impairment losses for 2011 amounted to EUR 146,5 million in relation to the GGBs and additional impairments of EUR 22 million were incorporated in the results of the first quarter of 2012). Additional capital was also needed by Nea Proton Bank because the provision charges from 2011 until 2016 had risen from the levels assumed when Nea Proton Bank was established.

(94) According to the updated restructuring plan of Nea Proton Bank submitted on 16 July 2012, those anticipated capital needs were to take the form of an expected capital injection of EUR 285 million in 2012 and an expected capital injection of EUR 15 million in 2014. In fact, the HFSF ultimately injected EUR 230 million into Nea Proton Bank on 1 August 2012 and EUR 35 million on 31 December 2012.

(iii) Capital injection by the HFSF into Nea Proton Bank before the sale to Eurobank (measure NP3)

(95) Under the sale contract of 15 July 2013, the HFSF had already committed to inject the amount of EUR 395 million into Nea Proton Bank [54]. The HFSF paid out the amount of EUR 395 million on 28 August 2013.

2.3.4.2. *Aid measures to New TT Bank*

(96) T Bank, TT Bank and New TT Bank have benefited from several aid measures since 2008. Table 8 provides an overview of those aid measures.

[52] Decision 2/3/9.4.2012 of the Resolution Measures Committee of the Bank of Greece.

[53] The remaining amount was paid by the HFSF, as according to Article 9(12) of Law 4051/2012, as applicable, the latter substituted the HDIGF in its role covering the funding gap as of 29 February 2012.

[54] See recital 53.

Table 8

Overview of the aid measures to T Bank and TT bank

Aid beneficiary	Measure	Description	Entity which granted the aid	Date	State aid amount (in EUR million)
T Bank's activities transferred to TT Bank ([1])	T	Financing of funding gap from T Bank to TT Bank (part 1)	HDIGF	December 2011	450
		After the finalisation of the calculation of the funding gap, financing of the balance of the funding gap from T Bank to TT Bank (part 2)	HFSF	14.2.2013	227
		Total amount of T			**677**
TT Bank	TT Capital injection	Capital under recapitalisation measure: Greek State's preference shares	State	May 2009	224,96
New TT Bank (bridge bank)	NTT1 Funding gap from TT to NTT	Financing of funding gap from TT Bank to New TT Bank (part 1)	HFSF	29.1.2013	2 730,8
		After the finalisation of the calculation of the funding gap, financing of the balance of the funding gap from TT Bank to New TT Bank (part 2)	HFSF	14.6.2013	1 001,7
		Total amount of NTT1			**3 732,6**
	NTT2 Initial share capital injection	Initial share capital of New TT Bank	HFSF	29.1.2013	500

([1]) The measure was assessed as State aid benefiting the activities of T Bank that had been transferred to TT Bank, in Commission Decision of 16 May 2012 on State aid case SA.34115 (12/NN) — Greece, 'Resolution of T bank' ('T Bank Decision' (OJ 284, 20.9.2012, p. 6), and the New TT Opening Decision.

2.3.4.2.1. Aid measure to T Bank

Intervention by the Resolution Scheme of the HDIGF in favour of T Bank of EUR 677 million (measure T)

(97) The Resolution Scheme of the HDIGF and the HFSF financed the funding gap resulting from the transfer of activities from T Bank to TT Bank, representing the difference between the fair value of the assets transferred from T Bank to TT Bank and the fair value of the transferred liabilities. In line with a decision of the Bank of Greece of 17 December 2011, the Resolution Scheme of the HDIGF paid the amount of EUR 450 million ([55]), which corresponded to around two-thirds of the estimated funding gap. After the finalisation of the calculation of the funding gap at approximately EUR 677 million, in line with a decision of the Bank of Greece of 9 April 2012 ([56]), on 14 February 2013 the HFSF ([57]) paid the balance of EUR 227 million ([58]) to New TT Bank.

([55]) The initial funding gap was estimated at EUR 700 million, according to the Decision 26/2/17.12.2011 of the Credit and Insurance Committee of the Bank of Greece.

([56]) Decision 2/1/9.4.2012 of the Resolution Measures Committee of the Bank of Greece.

([57]) See footnote 53.

([58]) As regards the amount of EUR 227 million paid by the HFSF to New TT Bank, the decision of the Resolution Measures Committee of the Bank of Greece of 3 May 2012 provided that in line with Article 9(12) of Law 4051/2012, HFSF was obliged to pay instead of the HDIGF not only the new but also the pending HDIGF liabilities not fulfilled until the enactment of Law 4051/2012 on 29 February 2012. Therefore, the HFSF filed an application for the annulment of the relevant decision of the Bank of Greece to the Council of State. For that reason, New TT Bank has committed to the HFSF by letter of 11 February 2013 that if the Court decides in favour of the HFSF, New TT Bank will return the amount of EUR 227 million to the HFSF. See footnote 31, pp. 6 and 48.

2.3.4.2.2. Aid measure to TT Bank

State recapitalisation received by TT Bank (measure TT)

(98) In May 2009, TT Bank received a capital injection of EUR 224,96 million, equivalent to around 2,9 % of its RWA at that time, from Greece TT Bank received the capital injection under the recapitalisation measure which is part of the Greek Banks Support Scheme. The capital injection took the form of preference shares.

2.3.4.2.3. Aid measures to New TT Bank

(i) Coverage of the funding gap of New TT Bank of EUR 3 732,6 million (measure NTT1)

(99) The HFSF financed the funding gap in New TT Bank, representing the difference between the value of the assets transferred from TT Bank to New TT Bank and the nominal value of the transferred liabilities. In line with a Bank of Greece decision of 18 January 2013, the HFSF paid on 29 January 2013 the amount of EUR 2 730,8 million [59], which corresponded to around two-thirds of the estimated funding gap. After the Bank of Greece finalised the calculation of the funding gap at EUR 3 732,6 million [60], in line with a Bank of Greece decision of 21 May 2013 the HFSF paid on 14 June 2013 the remaining amount of EUR 1 001,7 million to New TT Bank.

(ii) Capital injections by the HFSF into New TT Bank (measure NTT2)

(100) The HFSF constituted the sole shareholder of New TT Bank and provided it with State aid in the form of the initial share capital (common shares) of EUR 500 million.

2.4. THE RESTRUCTURING PLAN AND THE NEW BUSINESS MODEL

(101) On 16 April 2014 Greece submitted the restructuring plan of the Bank, which explains how the Bank, as a combined entity resulting from the acquisition of Nea Proton Bank and New TT Bank, intends to restore its long-term viability.

2.4.1. **Domestic operations**

(102) Through the restructuring plan, the Bank will focus on its core banking activities in Greece. While its international operations accounted for around 26 % of loans in 2010 [61], that share had already fallen to 20 % at the end of 2012 and will further decrease to […] % by the end of 2018 [62].

(103) The key priority of the Bank is to bring its Greek banking operations back to profitability and viability by the end of the restructuring period (31 December 2018). To that end, the restructuring plan includes a number of measures aimed at improving the Bank's operational efficiency and net interest margin, as well as measures enhancing its capital position and balance sheet structure.

(104) As regards operational efficiency, the Bank had already started a vast programme of rationalisation well before the acquisitions of New TT Bank and Nea Proton Bank. Since 2010 the Bank has reduced its physical footprint in Greece. On a stand-alone basis (excluding the acquisitions of New TT Bank and Nea Proton Bank), it has reduced its branches from 564 in June 2008 to […] in 2014 and also reduced its Greek workforce (from 10 142 in 2008 to 9 037 in 2012) [63].

(105) Until the end of the restructuring plan, the Bank plans to further decrease both the number of branches, from 645 pro-forma at 31 December 2012 to […] at 31 December 2018, and the number of employees, from 12 430 to […] on a pro-forma basis, that is to say taking into account Nea Proton Bank and New TT Bank [64].

[59] The initial funding gap was estimated at approximately EUR 4 096 million, according to the Decision 7/1/18.1.2013 of the Resolution Measures Committee of the Bank of Greece.
[60] Decision 11/1/21.5.2013 of the Resolution Measures Committee of the Bank of Greece.
[61] EFG Eurobank, Annual report 2010, p. 9, available online at: http://www.eurobank.gr/Uploads/pdf/Eurobank%20FIN%20AR%202010%20en.pdf
[62] Restructuring plan p. 50, based on net loans.
[63] Restructuring plan, pp. 62-63.
[64] Restructuring plan p. 64 (2012 figures on a pro-forma basis).

(106) The increased efficiency in terms of branches and personnel will help to bring down the total cost of the combined Greek banking activities by […] % from EUR 913 million on an annual basis in 2013 [65] to EUR […] million in 2018 [66]. As a result, the expected cost-to-income ratio of the Bank's Greek banking activities will fall below […] % at the end of the restructuring period, down from 60 % in 2012.

(107) The restructuring plan also describes how the Bank will improve its funding costs, which is key to the restoration of viability. The Bank expects to be able to pay lower interest rates on its deposits on the back of the more stable environment and in particular the foreseen stabilisation and recovery of the Greek economy, which is expected to grow again from 2014 onwards. Spreads on deposits (average of time deposits, sight deposits and savings rates) are expected to decrease in Greece from 223 basis points in 2012 to […] basis points in 2018 [67]. That decrease in spreads would be mainly achieved by paying much lower rates on time deposits. Similarly, the Bank's reliance on the emergency liquidity assistance and wider Eurosystem funding will decrease from 42,9 % of its total assets at group level in 2012 to […] % in 2018 [68].

(108) The restructuring plan anticipates that the Bank will also strengthen its balance sheet. Its net loan-to-deposit ratio in Greece will decrease to […] % in 2018 (down from 160 % in 2012 and 115 % in 2013) [69], while its capital adequacy will improve with a Core Tier One ratio of […] % at group level in 2018 [70] (instead of negative equity prior to the first bridge recapitalisation).

(109) Another strategic priority of the Bank is the management of non-performing loans. In addition to enhanced credit processes regarding both the origination of loans and the restructuration of non-performing loans, the restructuring plan focusses on the handling of impaired exposures, with the creation of a new remedial unit. That unit will be dedicated to the restructuring of impaired exposures. It will benefit from the expertise of 30 to 50 remedial relationship managers [71]. The rate of non-performing loans will reach […] % at Group level in 2015 ([…] % in 2015 for the Greek domestic market [72]) and then start to decrease, with an expected rate of […] % at the end of the restructuring period [73] (30 % in Greece before debt write-offs). The loan impairments of the Bank in Greece will decrease from EUR 1 652 million in 2013 to EUR […] million in 2018 [74], due to the recovery of the Greek economy.

(110) The improvement of operational efficiency, the reduction of the net interest margin, and the decreasing cost of risk will enable the Bank to be profitable in Greece from 2015 onwards. The Bank anticipates that, at consolidated level, its losses will amount to EUR […] million in 2014 and EUR […] million in 2015, while its profits will amount to EUR […] million, EUR […] million, and EUR […] million in 2016, 2017 and 2018 respectively [75]. Its consolidated return on equity will reach […] % in 2018 [76]. That level of profitability will be mainly driven by the Greek market (with a return on equity of […] % at the end of the restructuring period) while […] and […] will report lower levels of profitability (at […] % and […] % respectively).

2.4.2. **International banking activities**

(111) The Bank has already started to deleverage and restructure its international network. It has already sold subsidiaries in Turkey (Eurobank Tefken) and Poland (EFG Poland). The commercial gap, that is to say the difference between the outstanding amount of deposits and the outstanding amount of loans for a given subsidiary, of the remaining international network has fallen from EUR 1,7 billion in 2010 to EUR 0,8 billion, while operating costs were reduced by 9 % between 2010 and 2012 [77].

[65] Bank's submission dated 10 September 2013.
[66] Restructuring plan p. 64.
[67] Restructuring plan, p. 61.
[68] Financial projections annexed to the restructuring plan, notified to the Commission on 16 April 2014.
[69] Restructuring plan, p. 76.
[70] See footnote 69.
[71] Restructuring plan, p. 62.
[72] Restructuring plan, p. 51.
[73] See footnote 68.
[74] See footnote 72.
[75] The net result of the Greek activities will turn positive in 2015 with EUR 20 million, EUR 304 million, EUR 471 million and EUR 554 million of profits respectively in 2015, 2016, 2017 and 2018.
[76] See footnote 68.
[77] Figures submitted by the Bank on 9 May 2013.

(112) The Bank will continue to restructure and deleverage its international network. In particular, the Bank has committed to reduce the size of its portfolio of international assets to EUR 8,77 billion by 30 June 2017. The Bank has also committed to further downsize that portfolio to EUR 3,5 billion should the HFSF need to inject more than one billion euros in the upcoming share capital increase.

(113) One option explored by the Bank in the restructuring plan to comply with that target is to sell its activities in […] ([78]).

(114) Those divestments represent […] % of the Bank's foreign assets as of 31 December 2012. Foreign assets would therefore amount to EUR […] billion as of 31 December 2018, with an international network focussed on […] and […].

(115) The restructuring plan highlights the need to reduce the reliance of the foreign subsidiaries on their Greek mother company as regards their funding needs and to continue safeguarding the capital position of the Bank.

(116) To that end, the Bank is planning to implement a significant cost reduction programme in the international network, […]. In […] for instance, […] branches will be closed while the workforce will decrease by […] employees from 31 December 2012 until the sale of the subsidiary in […] ([79]).

(117) The Bank will reduce its total funding to the foreign subsidiaries from EUR 2 billion in 2012 to […] in 2018 ([80]), while the return on equity will reach […] % and […] % in […] and […] respectively.

2.4.3. **Non-banking activities: sale of insurance business and real estate activities**

(118) The Bank has reduced its ownership in its real estate subsidiary Eurobank Properties below 35 % by means of a share capital increase, with a positive impact on the Core Tier One ratio of the Bank ([81]). The Bank will fully divest that subsidiary by 31 December 2018.

(119) The Bank also plans to sell its insurance subsidiaries by […].

2.4.4. **Private capital raising and contribution by existing shareholders and subordinated creditors**

(120) The Bank succeeded in raising capital on the market and thereby reduced the State aid which was needed by the Bank.

(121) The shareholders were heavily diluted by the Spring 2013 recapitalisation, since the HFSF received 98,56 % of the Bank's shares, leaving the pre-existing shareholders with only a 1,44 % shareholding. Therefore, the HFSF took full control over the Bank in June 2013. No dividend has been paid in cash since 2008.

(122) In February 2012 the Bank offered to buy back hybrid instruments from private investors at a price between 40 % and 50 % of their nominal value. That buy-back price was determined on the basis of the market value of the instruments and contained a premium of not more than ten percentage points, which was added to encourage investors to participate in the buy-back. The offer was accepted for almost 50 % of the instruments' total nominal value which, after taking the costs of the transaction into consideration, left the Bank with a profit of EUR 248 million ([82]).

(123) In May 2013 the Bank announced another liability management exercise. The Bank offered debt holders the opportunity to convert their lower tier one and lower tier two securities, with an outstanding amount of EUR 662 million, into ordinary shares, at par. The conversion price was set so as to equal the subscription

([78]) The Bank has not committed to implement that particular divestment programme, and remain free, as described in the Annex, to choose a different strategy to comply with the overall target.
([79]) See footnote 68.
([80]) See footnote 68.
([81]) Announcement of Eurobank of 19 June 2013, available online at: http://www.eurobank.gr/Uploads/pdf/EuproVeryFinalEnglish_190613.pdf
([82]) Announcement of the results of the invitations to tender existing tier one and lower tier II securities, 20 February 2013, available online at: http://www.eurobank.gr/Uploads/pdf/Harper%20-%20Final%20Results%20Press%20Release%20_Eng.pdf

price paid by the HFSF in the Spring 2013 recapitalisation ([83]). The acceptance rate was 48 %. Since the lower tier one and lower tier two bond holders converted their securities into lower subordinated instruments with no cash consideration, the capital raised reached EUR 317 million.

(124) As a result of the two buy backs, the stock of subordinated and hybrid debt decreased from EUR 1 045 million at 31 December 2011 to EUR 283 million at 31 December 2013 ([84]).

2.5. COMMITMENTS OF THE GREEK AUTHORITIES

(125) Greece gave a commitment that the Bank and its affiliates will implement the restructuring plan submitted on 16 April 2014 and gave further commitments regarding the implementation of the restructuring plan ('the Commitments'). The Commitments, listed in the Annex, are summarised in this section.

(126) First Greece has given a commitment that the Bank will restructure its commercial operations in Greece, setting a maximum number of branches and employees as well as a maximum amount of total costs to be complied with at 31 December 2017 ([85]).

(127) Greece has also given a commitment that the Bank will reduce the cost of deposits collected in Greece and will comply with a maximum ratio of net loans to deposits by 31 December 2017 ([86]).

(128) Regarding the Bank's foreign subsidiaries, Greece has given a commitment that the Bank will not provide additional capital support unless predefined conditions are met. Greece has also given a commitment that the Bank will significantly deleverage its international assets by 30 June 2018 ([87]).

(129) Greece has given a commitment that the Bank will divest its insurance activities, its real estate subsidiary and a number of securities and will reduce the size of its private equity portfolio. In addition, the Bank will not purchase non-investment grade securities, with limited exceptions ([88]).

(130) Greece gave a number of commitments related to the corporate governance of the Bank. It committed to limit the remuneration of the Bank's employees and managers, to make the Bank comply with Greek laws on corporate governance and set up an efficient and adequate organisational structure ([89]).

(131) Greece has also given a commitment that the Bank will enhance its credit policy, in order to prevent any discrimination at any stage of the credit process and to ensure decisions on granting and restructuring loans aim at maximising the profitability of the Bank. Greece has given a commitment that the Bank will improve the monitoring of credit risk as well as the restructuring of loans ([90]).

(132) A number of commitments deal with the operations of the Bank with connected borrowers. Those commitments aim at ensuring that the Bank does not deviate from prudent banking practices when granting or restructuring loans to its employees, managers and shareholders, as well as to public entities, political parties and media companies ([91]).

(133) Finally Greece has given a commitment to impose further restrictions for the Bank, such as a coupon and dividend ban, an acquisition ban and an advertising ban ([92]).

(134) Those commitments will be monitored until 31 December 2018 by a monitoring trustee.

([83]) Liability Management Exercise, available online at: http://www.eurobank.gr/Uploads/pdf/Press%20Release_Offer%20Results_ENGLISH.pdf and Report of the Hellenic Financial Stability Fund for the period January — June 2013, available online at: http://www.hfsf.gr/files/HFSF_activities_Jan_2013_Jun_2013_en.pdf
([84]) See consolidated financial statements for 2011 and 2013.
([85]) See Commitments in the Annex, chapter II.
([86]) See footnote 85.
([87]) See footnote 85.
([88]) See footnote 85.
([89]) See Commitments in the Annex, chapter III, section A.
([90]) See footnote 89.
([91]) See footnote 89.
([92]) See Commitments in the Annex, chapter III, section C.

(135) Separately, in the framework of the current capital increase of the Bank, since the HFSF is backstopping the capital increase, Greece gave a commitment that it would implement the measures provided for in Article 6a of the HFSF Law as amended on 30 March 2014, a provision which aims at allocating the residual amount of the capital shortfall of a credit institution to the holders of its capital instruments and other subordinated liabilities, as may be necessary, prior to any injection of capital by the HFSF.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURES

3.1. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE REGARDING THE FIRST BRIDGE RECAPITALISATION

(136) On 27 July 2012, the Commission opened the formal investigation procedure in order to verify whether the conditions of the 2008 Banking Communication ([93]) were met regarding the appropriateness, necessity and proportionality of the first bridge recapitalisation provided by the HFSF in favour of the Bank (measure B1).

(137) Regarding the appropriateness of the measure, given the fact that the aid came after prior recapitalisation and liquidity aid and given the protracted rescue period, the Commission expressed doubts as to whether all actions possible had been taken by the Bank to avoid a need for aid in the future ([94]). In addition, the Commission was not clear who would control the Bank once the first bridge recapitalisation was replaced by a permanent recapitalisation ([95]) as the Bank might come under the control either of the State or of minority private owners. The Commission noted that it would wish to ensure that the quality of the Bank's management and notably its lending process should not deteriorate in either case.

(138) Regarding the necessity of the first bridge recapitalisation, in recital 66 of the Eurobank Opening Decision the Commission questioned whether all the measures possible had been taken to avoid that the Bank again would need aid in the future. Moreover, since the duration of the bridge recapitalisation period was uncertain the Commission could not conclude whether it was sufficient and complied with the remuneration and burden-sharing principles under State aid rules. Furthermore, as the terms of the conversion of the first bridge recapitalisation into a permanent recapitalisation were not known at the time the Eurobank Opening Decision was adopted, the Commission could not assess them.

(139) Regarding the proportionality of the measure, the Commission expressed doubts as to whether the safeguards (advertisement ban, coupon and dividend ban, call option ban and buy-back ban as described in recital 71 of the Eurobank Opening Decision) were sufficient in relation to the first bridge recapitalisation. Furthermore, in recital 72 of the Eurobank Opening Decision the Commission stated that distortions of competition could be caused by the lack of rules preventing the HFSF from coordinating all the four largest Greek banks (namely, the Bank, Alpha Bank, NBG and Piraeus) and the absence of adequate safeguards to avoid them sharing commercially sensitive information. The Commission, therefore, proposed the appointment of a monitoring trustee who would be physically present in the Bank.

3.2. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE REGARDING NEA PROTON BANK

(140) On 26 July 2012, the Commission opened the formal investigation procedure in order to verify whether the EUR 1 122 million intervention by the Resolution Scheme of the HDIGF (measure NP1), as well as the EUR 250 million capital injection by the HFSF and the capital injections by the HFSF amounting to a total of EUR 300 million (measure NP2), in favour of Nea Proton Bank complied with the general criteria for compatibility and the requirements of the 2008 Banking Communication, the Recapitalisation Communication ([96]) and the Restructuring Communication ([97]) (restoration of long-term viability, burden-sharing and limitation of the aid to the minimum necessary, and limitation of distortions of competition).

([93]) 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).
([94]) Recital 59 of the Eurobank Opening Decision.
([95]) Recital 63 of the Eurobank Opening Decision.
([96]) 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).
([97]) 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).

(141) Regarding the appropriateness of the measures, the Commission stated that those measures were appropriate as rescue aid.

(142) Regarding the necessity of the measures, the Commission noted that the intervention of the Resolution Scheme of the HDIGF was necessary in both its amount and form, while the capital injections by the HFSF were necessary only in their form. However, as regards the amount of capital injections by the HFSF, in recital 59 of the Nea Proton Opening Decision the Commission expressed doubts as to whether Nea Proton Bank would be able to restore its long-term viability on a stand-alone basis and whether a stand-alone restructuring was the cheapest option available. Furthermore, in recitals 60 and 61 of the Nea Proton Opening Decision the Commission stated that the inability of Nea Proton Bank to sufficiently remunerate the recapitalisation by the HFSF created doubts as to whether it was a fundamentally sound bank and therefore triggered the need for in-depth restructuring.

(143) As regards the proportionality of the measures, the Commission considered that they were proportionate as rescue aid.

(144) Regarding the restoration of long-term viability of Nea Proton Bank, in recital 65 of the Nea Proton Opening Decision the Commission expressed doubts as to whether that bank could be made viable on a stand-alone basis.

(145) The Commission doubted that the restructuring proposed was sufficient compared to the depth of the restructuring required given the absence of sufficient remuneration.

3.3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE REGARDING NEW TT BANK

(146) On 6 May 2013, the Commission opened the formal investigation procedure in order to verify whether the EUR 4,1 billion financing of the funding gap to the transferred activities from TT Bank to New TT Bank (measure NTT1), the EUR 500 million capital injection by the HFSF into New TT Bank (measure NTT2),the EUR 224,96 million capital injection in the form of preference shares under the Greek Banks Support Scheme to TT Bank (measure TT) and the EUR 0,68 billion intervention by the Resolution Scheme of the HDIGF in favour of T Bank's assets which were transferred to TT Bank (measure T) complied with the general criteria for compatibility and the requirements of the 2008 Banking Communication, the Recapitalisation Communication and the Restructuring Communication (restoration of long-term viability, burden-sharing and limitation of the aid to the minimum necessary, and limitation of distortions of competition).

(147) The Commission considered that both measures NTT2 and NTT1 were appropriate and necessary in their form as rescue aid. As regards the necessity of measure NTT2 in terms of its amount, the Commission, doubting the long-term viability of New TT Bank on a stand-alone basis, considered that restructuring on a stand-alone basis might not be the only and the cheapest option available [98]. As regards the remuneration of both measures, the Commission stated that the coverage of the funding gap was a definitive cost without offsetting future revenues which triggered a need for in-depth restructuring [99].

(148) Regarding the proportionality of both measures, the Commission considered that measures NTT2 and NTT1 were proportionate as rescue aid in the short-term but in recital 79 of the New TT Opening Decision required measures to be introduced rapidly that would limit negative spill-over effects.

(149) Regarding the compatibility of measure T, the Commission had already temporarily approved it as rescue aid on 16 May 2012 in its Decision on the resolution of T Bank ('T Bank Decision') [100] but could not give a definitive approval of the aid to T Bank's activities which were transferred to TT Bank. The Commission prolonged in the New TT Opening Decision [101] the authorisation of the measure as rescue aid until such time as it would take a final decision on an updated version of the restructuring plan for TT Bank.

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[98] Recital 73 of the New TT Opening Decision.

[99] Recitals 75 and 77 of the New TT Opening Decision.

[100] Commission decision of 16 May 2012 on State aid SA.34115 (12/NN) 'Resolution of T Bank' (OJ C 284, 20.9.2012, p. 6).

[101] Recital 83 of the New TT Opening Decision.

(150) Regarding the compatibility of those measures with the Restructuring Communication, the Commission doubted whether New TT Bank would restore its long-term viability on a stand-alone basis. That scepticism was based on the limited number of the proposed measures to be taken by New TT Bank to generate profits in the future, the uncertainty of the voluntary retirement scheme as regards the timing and the acceptance rate by the employees, the absence of further measures to reduce personnel costs, the lack of measures for rationalisation of the branch network after the acquisition of T Bank and a concomitant failure to exploit potential synergies ([102]).

(151) In recitals 90 and 91 of the New TT Opening Decision the Commission raised concerns about whether the ambitious decrease in interest margins on existing deposits and increase in loan margins on new loan production could be implemented without New TT Bank losing a significant amount of customers and without making risky lending. Moreover, the Commission doubted whether New TT Bank would double its corporate loan book as planned and whether, given the lack of expertise, it could achieve the planned strong growth rate of the net interest income.

(152) Therefore, in recital 95 of the New TT Opening Decision the Commission took the view that the reintegration of TT Bank into a larger viable financial company would increase the viability prospects of the New TT Bank, as it would allow for rationalisation of costs, repricing of deposits and new loans, and the offer of a wider range of products.

(153) As New TT Bank harboured the economic activities previously carried out within TT Bank, including those of T Bank, the Commission opened a formal investigation procedure regarding whether measures T and TT offered a long-term solution for the viability of New TT Bank and invited interested parties to submit comments.

(154) Regarding burden-sharing, the Commission considered that restructuring on a stand-alone basis inflated the restructuring costs and therefore it doubted that State aid was limited to the minimum. Moreover, the Commission noted that, despite the fact that sufficient burden-sharing of shareholders and subordinated debt holders was achieved, which was probably the maximum feasible, the absence of remuneration triggered the need for in-depth restructuring, both in terms of viability measures and in terms of measures to limit distortions of competition. The Commission also observed that the fact that a large part of the losses incurred stemmed from the waiver of debt in favour of the State justified a lower remuneration ([103]).

(155) Regarding distortions of competition, the Commission noted that the huge amount of aid received by TT Bank and transferred activities of T Bank and the lack of remuneration called for a deep restructuring and reduction of the market presence of New TT Bank. Moreover, while the losses stemmed mainly from the holding of GGBs, the Commission observed that TT Bank had held more GGBs than other Greek banks in proportion to its size and considered that it reflected inappropriate risk taking ([104]). Lastly, it noted that, although New TT Bank remained on the market almost as TT Bank had been before, the distortions of competition would be limited given the former's relatively small size and the absence of foreign activities. However, the Commission doubted whether sufficient measures had been taken to limit undue distortions of competition and took the view that a price leadership ban and other behavioural measures might be necessary ([105]).

4. COMMENTS FROM INTERESTED PARTIES ON THE FORMAL INVESTIGATION PROCEDURE REGARDING THE FIRST BRIDGE RECAPITALISATION

COMMENTS FROM A GREEK BANK

(156) On 3 January 2013, the Commission received comments submitted by a Greek bank on the Eurobank Opening Decision. That Greek bank commented that the recapitalisation of Greek banks by the HFSF constituted, in principle, a welcome step towards a healthier and more viable banking system and expressed no objection to the recapitalisation of Eurobank.

(157) However, while expressing its entire support for the principle of the recapitalisation of Greek banks by the HFSF, that Greek bank explained that, in order to minimise distortions of competitions and to avoid discrimination, it expected that recapitalisation by the HFSF to be open to all banks operating in Greece under similar conditions.

([102]) Recitals 88 and 89 of the New TT Opening Decision.
([103]) Recital 103 of the New TT Opening Decision.
([104]) Recital 104 of the New TT Opening Decision.
([105]) Recital 107 of the New TT Opening Decision.

5. **COMMENTS FROM GREECE ON THE FORMAL INVESTIGATION PROCEDURES**

5.1. COMMENTS FROM GREECE ON THE FORMAL INVESTIGATION PROCEDURE REGARDING THE FIRST BRIDGE RECAPITALISATION

(158) On 5 September 2012, Greece submitted comments which had been prepared by the Bank of Greece and the HFSF on the Eurobank Opening Decision.

5.1.1. **Comments prepared by the Bank of Greece**

(159) Regarding the appropriateness of the first bridge recapitalisation, the Bank of Greece noted that the amount of EUR 18 billion of capital with which the HFSF recapitalised the four largest Greek banks in May 2012 was less than the final amount which was needed in order for those banks to gradually reach and maintain a Core Tier One capital ratio set at 10 % by June 2012 and a Core Tier One capital ratio set at 7 % under a three-year adverse stress scenario. It also noted that the first bridge recapitalisation was temporary, given that the recapitalisation process would be concluded with share capital increases by those four banks.

(160) The Bank of Greece also observed that the recapitalisation of the largest Greek banks is part of the longer term restructuring of the Greek banking sector. It noted that where a bank remains in private hands, the management will most probably remain the same, while if a bank becomes State-owned (that is to say, owned by the HFSF), the HFSF may appoint new management which, in any case, will be assessed by the Bank of Greece. The Bank of Greece noted that it assesses the corporate governance framework, the adequacy of management and the risk profile of every bank on an ongoing basis in order to ensure that excessive risks are not taken. It also pointed out that the HFSF had already appointed representatives in the Board of Directors of the recapitalised banks.

(161) Regarding the necessity of the first bridge recapitalisation, the Bank of Greece observed that the Bank's recapitalisation was limited so as to ensure that the then applicable minimum capital requirements (8 %) were met. It also stated that the protracted period of time prior to the recapitalisations was due to the sharp deterioration of the operating environment in Greece and the impact of the PSI programme, to the complexity of the whole project and to the need to maximise private investors' participation in the share capital increases.

(162) Regarding the proportionality of the first bridge recapitalisation, the Bank of Greece pointed out that the full implementation of the restructuring plan to be submitted to the Commission is safeguarded by the fact that the suspension of the voting rights of the HFSF will be lifted if, inter alia, the restructuring plan is substantively violated. The Bank of Greece also observed that the Bank's difficulties were not due either to an underestimation of risks by the Bank's management or to commercially aggressive actions.

5.1.2. **Comments prepared by the HFSF**

(163) Regarding the appropriateness of the first bridge recapitalisation, to address the issue of potential State interference if the State provides high amounts of State aid through the HFSF and the HFSF has full voting rights, the HFSF stated that the HFSF-funded banks are not considered to be public entities or under State control and that they would not be controlled by the State after they have been permanently recapitalised by the HFSF. The HFSF pointed out that it is a fully independent private-law legal entity with autonomy of decision. It is not subject to government control, pursuant to Article 16C, paragraph 2 of the HFSF Law, according to which the credit institutions to which the HFSF has provided capital support are not part of the broader public sector. It also referred to the governing structure of the HFSF.

(164) As regards the intervention of the HFSF in the Bank's management, the HFSF noted that it would respect the Bank's autonomy and not interfere with its day-to-day management given that its role is limited to that laid down in the HFSF Law. It stated that there would not be any State interference or coordination and that the decisions of the Bank regarding the lending process (inter alia on collateral, pricing and solvency of borrowers) would be taken on the basis of commercial criteria.

(165) The HFSF pointed out that the HFSF Law and the pre-subscription agreement set appropriate safeguards in order to prevent existing private shareholders from excessive risk-taking. It pointed to elements such as (i) the appointment of HFSF representatives as independent non-executive members of the Board of Directors of the Bank and their presence at committees, (ii) the HFSF carrying out due diligence in the Bank and (iii) the fact that, after the final recapitalisation, its voting rights would be restricted only for as long as the Bank complied with the terms of the restructuring plan.

(166) Regarding the necessity of the first bridge recapitalisation and specifically regarding the level of the remuneration of aid, the HFSF stated that the remuneration had been agreed with the representatives of the Commission, the ECB and the IMF. That agreed level took into account that the first bridge recapitalisation would be converted into a permanent recapitalisation before 30 September 2012, a deadline which was set in March 2012 in the MEFP between the Commission, the ECB and the IMF and Greece.

(167) Regarding the proportionality of the first bridge recapitalisation, the HFSF noted that the measures it adopted, such as those described in recital 165 of the present decision, are sufficient safeguards in view of the large amounts of aid received and the protracted rescue period. Moreover, the HFSF stated that there are appropriate measures in place in order to ensure that banks in which the HFSF participates do not share commercially sensitive information between them. Such measures include the appointment of different HFSF representatives to those banks, the mandates addressed to those representatives which specifically safeguard against the flow of information from one representative to another and clear internal instructions to those officers not to transmit commercially sensitive information of the banks. Moreover, the HFSF stated that it does not exercise its rights in relation to the banks in a manner which may prevent, restrict, distort or significantly lessen or impede effective competition. Lastly, the HFSF pointed out that the members of its Board of Directors and its employees are subject to strict confidentiality rules and fiduciary duties and are bound by provisions concerning professional secrecy with regards to its affairs.

5.2. COMMENTS FROM GREECE ON THE FORMAL INVESTIGATION PROCEDURE REGARDING NEA PROTON BANK

(168) On 5 September 2012, Greece submitted comments which had been prepared by the Bank of Greece and the HFSF on the Nea Proton Opening Decision.

5.2.1. **Comments prepared by the Bank of Greece**

(169) The Bank of Greece observed that Nea Proton Bank, as an interim credit institution owned by the HFSF, could not provide a longer term business plan on a stand-alone basis. Moreover, the Bank of Greece noted that it is closely following the implementation of the business plan prepared by the HFSF for Nea Proton Bank and submitted to the Commission in order to ensure that Nea Proton Bank could be sold within the period laid down by law.

(170) Regarding the profitability growth rate, the Bank of Greece pointed out that the biggest part of the growth was anticipated to occur during 2013 (when net interest income was expected to rise to EUR 55,3 million, compared to EUR 22,7 million for 2012), would stem mainly from the reduction of total interest expenses and would be the result of two factors: a roll-over of term deposits that used to bear high yields at better terms and a reduction by 30 % of the total outstanding amount of deposits during the first half of 2012. Moreover, the Bank of Greece stressed the fact that from 2013 onwards net interest income figures would move quite smoothly and would raise no doubts about the ability of Nea Proton Bank to meet the target.

5.2.2. **Comments prepared by the HFSF**

(171) Regarding the necessity of the measures in favour of Nea Proton Bank, the HFSF noted that the Bank of Greece is the pertinent authority to decide on any resolution measure and that the HFSF injected the minimum capital required for regulatory purposes.

(172) Regarding the restoration of long-term viability of Nea Proton Bank, the HFSF referred to the resolution framework under which the HFSF had to sell Nea Proton Bank within two years and agreed with the Commission that Nea Proton Bank could be a part of larger and viable entity. Although the restructuring plan for Nea Proton Bank was

based on a 'stand-alone basis' model, the HFSF explained that its objective was to facilitate the sale of that bank by improving its attractiveness to investors and its financial results. The HFSF commented that the capital injections not only allowed Nea Proton Bank to respect the minimum capital adequacy ratio but also improved its financial position and its attractiveness for any future merger with other small banks. The HFSF also noted that the additional capital injection had been needed to cover impairment losses related to the PSI programme and the increased provision charges for loans.

(173) The HFSF observed that Nea Proton Bank had improved its cost of funding and the loyalty of deposits. Nea Proton Bank's reliance on the Eurosystem fell during 2012 and it had improved its liquidity position. The additional capital injection had helped to reduce interest rates on deposits and to improve interest rate margins. Nea Proton Bank had already re-priced some of its loan portfolio, using risk-based pricing with interest rates well above the cost of funding. Moreover, the planned growth rate of the net interest income would occur with a conservative expansion in the corporate market segment and by enhancing portfolio quality.

(174) The HFSF observed that in 2012 Nea Proton Bank had significantly reduced its operating costs, that its two only subsidiaries would cease operations, that its participation in insurance brokers was being greatly reduced and that its proprietary trading activities would end.

(175) Finally, the HFSF noted that distortions of competition would be limited given the small share of Nea Proton Bank in total banking assets in Greece and the fact that it was not considering aggressive deposit-taking.

5.3. COMMENTS FROM GREECE ON THE FORMAL INVESTIGATION PROCEDURE REGARDING NEW TT BANK

(176) On 19 July 2013, the Ministry of Finance submitted comments on the New TT Opening Decision.

(177) Regarding the necessity of measure NTT1, the Ministry of Finance added that the exact value of the assets and liabilities that were transferred to New TT Bank was defined based on the external auditors' report in accordance with Article 63E, paragraph 6, of Law 3601/2007.

(178) Regarding the necessity of measure NTT2, the Ministry of Finance commented that the Second Adjustment Programme for Greece (second Review-May 2013) required the sale of New TT Bank to a third party by 15 July 2013.

(179) Regarding the remuneration of measures NTT1 and NTT2, the Ministry of Finance noted that the HFSF, which fills the funding gap until 31 December 2013 instead of the HDIGF, obtains a preferential claim ahead of other unsecured creditors in case of the liquidation of the assets that remained in the ownership of TT Bank and that only the claims of employees to receive 50 % of their compensation rank before the HFSF's claim. Therefore, it observed that the product of the liquidation of those assets will benefit the HFSF mainly and so reduce the cost borne by the State.

(180) Regarding the restoration of long-term viability of New TT Bank, the Ministry of Finance observed that, as an interim credit institution, New TT Bank had to be sold within two years of its establishment, in accordance with Article 63E of Law 3601/2007. The sale of New TT Bank would, in line with the MEFP of May 2013, be completed by 15 July 2013, thus ensuring the long-term viability of its activities.

6. ASSESSMENT OF AID RELATED TO THE ACQUIRED BUSINESSES

6.1. ASSESSMENT OF AID RELATED TO NEA PROTON BANK

6.1.1. Existence and the amount of aid

(181) The Commission has to establish the existence of State aid within the meaning of Article 107(1) of the Treaty. According to that provision, State aid is 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, in so far as it affects trade between Member States.

6.1.1.1. *Existence of aid in the measures granted under the Greek Banks Support Scheme (measures Pr1, Pr2 and Pr3)*

(182) The EUR 80 million capital injection by the Greek State into Proton Bank in May 2009 (measure Pr1), the Greek government securities amounting to EUR 78 million obtained by Proton Bank in April 2009 (Measure Pr2) and the State guarantee given to Proton Bank for issued bonds with a nominal value of EUR 149,4 million in July 2010 (Measure Pr3) were granted under the Greek Banks Support Scheme ([106]). In the Decision approving that scheme, the Commission concluded that measures granted under that scheme would constitute State aid.

(183) As concluded in recital 38 of the Nea Proton Opening Decision, Nea Proton Bank harbours the economic activities of Proton Bank. Measures Pr1, Pr2 and Pr3 have benefited Nea Proton Bank, as they contributed to the stabilisation and the continuance of the economic activities which were transferred to it and would otherwise no longer exist. Therefore, the Commission considers that they have benefited the economic activities transferred to Nea Proton Bank.

6.1.1.2. *Existence of aid in the coverage of the funding gap of Nea Proton Bank (measure NP1)*

(184) In recitals 31 to 37 of the Nea Proton Opening Decision the Commission has already established that measure NP1, the intervention by the Resolution Scheme of the HDIGF and the HFSF to cover the funding gap, constitutes State aid within the meaning of Article 107(1) of the Treaty. In recital 38 of the same decision the Commission considered Nea Proton Bank to be the economic beneficiary of that measure as Nea Proton Bank harbours the economic activity of Proton Bank which continues to exist because of the aid received.

6.1.1.3. *Existence of aid in the initial share capital injection by the HFSF and additional share capital injection by the HFSF in 2012 (measure NP2)*

(185) In recitals 41 to 43 of the Nea Proton Opening Decision the Commission has already established that the capital injection by the HFSF of EUR 250 million and the additional capital injections anticipated at the time of that Decision, amounting to a total of EUR 300 million, were State aid within the meaning of Article 107(1) of the Treaty. As mentioned in recital 93 of the present Decision, out of the possible additional EUR 300 million in capital, HFSF eventually contributed an additional EUR 265 million in 2012, which brings the total recapitalisation aid in 2011 and 2012 to EUR 515 million (measure NP2).

6.1.1.4. *Existence of aid in capital injection from the HFSF into Nea Proton Bank prior to its sale to the Bank (NP3)*

(186) The Commission considers the capital injection by the HFSF into Nea Proton Bank prior to its sale to the Bank, amounting to EUR 395 million, to be State aid within the meaning of Article 107(1) of the Treaty.

(187) The capital injection was provided by the HFSF, which is an entity set up and financed by Greece to support banks, and so was made by using State resources. Furthermore, the measure is selective in nature, since the capital injection only benefits Nea Proton Bank.

(188) Moreover, the intervention provides Nea Proton Bank with a clear advantage since it enables its banking activities to remain alive. Without the capital injection, Nea Proton Bank, which had deeply negative capital, would have gone bankrupt. In such circumstances, it would not have been possible to sell Nea Proton Bank and integrate it into a larger entity. Furthermore, that recapitalisation does not comply with the market investor principle. On the contrary, the EUR 395 million recapitalisation allowed the sale of Nea Proton Bank to take place for a price of one euro. A private investor would have chosen not to proceed with the recapitalisation and to let Nea Proton Bank go bankrupt, therefore saving EUR 395 million.

(189) Nea Proton Bank competes with other banks, including subsidiaries of foreign banks, which are active in Greece or potentially interested in entering the Greek market. Hence, the capital injection has an effect on trade between Member States and potentially distorts competition.

(190) The Commission therefore concludes that the capital injection of EUR 395 million into Nea Proton Bank constitutes State aid within the meaning of Article 107(1) of the Treaty.

([106]) See footnotes 4 and 6.

Beneficiary of measure NP3

(191) As already explained in recital 188, the Commission regards Nea Proton Bank as being the beneficiary of the capital injection of EUR 395 million into Nea Proton Bank, as the aid allowed the continuation of its economic activities within the Bank.

(192) As to whether the sale of Nea Proton Bank entails State aid to the Bank, in line with point 49 of the 2008 Banking Communication the Commission needs to assess whether certain requirements are met. It needs to examine in particular whether: (i) the sale process was open and non-discriminatory; (ii) the sale took place on market terms; and (iii) the financial institution or the government maximised the sale price for the assets and liabilities involved.

(193) The Bank acquired the shares in Nea Proton Bank because it submitted the only valid bid in the framework of a non-discriminatory tender procedure open to other banks and financial institutions. A financial advisor of the HFSF contacted a wide number of banks, financial institutions and sponsors and only four expressed their interest in acquiring Nea Proton Bank, of which only two, the Bank and a hedge fund ([107]), submitted final offers. The Bank's offer was the only one which complied with the process letter of the HFSF.

(194) Because the financial advisor contacted a wide number of banks and had set in advance the requirements and the time frame that offers should meet in order to be valid, the Commission considers that the tender was open and non-discriminatory. The Commission therefore concludes that the tender procedure allows it to exclude the presence of aid to the buyer.

(195) The Bank paid consideration of one euro and the HFSF gave a commitment to recapitalise Nea Proton Bank prior to its sale. That negative price (that is to say, taking into account the recapitalisation of Nea Proton Bank just before the sale) does not preclude that the sale price reflects the market value of the business ([108]) since the net equity of Nea Proton Bank was clearly negative and it was expected to continue registering losses. The Commission has no reason to believe that the offer made and the price paid did not reflect the market price of the business. As a result, in line with point 49 of the 2008 Banking Communication, point 20 of the Restructuring Communication and its own decisional practice ([109]), the Commission concludes that the sale price was the market price and that aid to the Bank can be excluded.

6.1.1.5. *Conclusion on the existence and total amount of aid received*

(196) On the basis of recitals 182 to 190, the Commission considers that measures Pr1, Pr2 and Pr3, NP1, NP2 and NP3 all fulfil the conditions laid down in Article 107(1) of the Treaty and constitute State aid. Regarding measures Pr1, Pr2 and Pr3, the Commission concludes that, as they contributed to the continued existence of the activities of Proton Bank which were later transferred to Nea Proton Bank, they may be considered to also benefit Nea Proton Bank which harbours those activities. As already stated in recital 184, the beneficiary of measure NP1 is Nea Proton Bank, which harbours the transferred activities of Proton Bank. Moreover, Nea Proton Bank is also the beneficiary of measures NP2 and NP3.

(197) Therefore, the Commission concludes that the activities of Nea Proton Bank have received State aid in form of capital support of EUR 2 111,6 million (measures Pr1, NP1, NP2 and NP3), in addition to State guarantees of EUR 149,4 million (measure Pr3) and Greek government securities of EUR 78 million (measure Pr2), as summarised in Table 9.

([107]) The offer of the hedge fund did not comply with the process letter of the HFSF. The offer of the hedge fund was conditional upon the completion of due diligence, for which it requested additional time, a request that was not compatible with the MEFP deadline. Moreover, it requested substantial representations and warranties and the hedge fund inserted a EUR 25 million cap on the amount of additional capital it was prepared to inject should the need arise and do so only for one year.

([108]) See also recital 82 of Commission Decision of 28 November 2012 on State aid SA.34053 (2012/N) — Recapitalisation and Restructuring of Banco de Valencia S.A. — Spain (OJ C 75, 14.3.2013, p. 1).

([109]) See Commission decision of 25 January 2010 on State aid case NN 19/09 — Restructuring aid to Dunfermline Building Society (OJ C 101, 20.4.2010, p. 7), recital 47; Commission decision of 25 October 2010 on State aid case N 560/09 — Aid for the liquidation of Fionia Bank (OJ C 76, 26.3.2011, p. 3), recital 55; Commission decision of 8 November 2010 on State aid case N 392/10 — Restructuring of CajaSur (OJ C 357, 30.12.2010, p. 12), recital 52.

Table 9

Overview of the total aid received by Proton Bank and Nea Proton Bank

Aid beneficiary	Measure	Nature of aid	Amount of aid (in EUR million)
Proton Bank's activities	Pr1	Recapitalisation	80
Nea Proton Bank's activities	NP1	Financing of funding gap from PB to NPB	1 121,6
	NP2	Recapitalisation	515
	NP3	Recapitalisation	395
Total capital aid granted			**2 111,6**
Aid beneficiary	Measure	Nature of aid	
Proton Bank's activities	Pr2	Bond Loan	78
	Pr3	Guarantee	149,4
Total liquidity aid granted			**227,4**

6.1.2. **Legal basis of the compatibility assessment**

(198) Article 107(3)(b) of the Treaty empowers the Commission to find that aid is compatible with the internal market if it is intended 'to remedy a serious disturbance in the economy of a Member State'.

(199) 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 may remedy that disturbance. This has been confirmed in the 2008 Banking Communication, the Recapitalisation Communication and the Restructuring Communication. The Commission still considers that requirements for State aid to be approved pursuant to Article 107(3)(b) of the Treaty are fulfilled in view of the reappearance of stress in financial markets. The Commission confirmed that view by adopting the 2011 Prolongation Communication ([110]) and the 2013 Banking Communication ([111]).

(200) In respect to the Greek economy, in its decisions approving and prolonging the Greek Banks Support Scheme as well as in its approvals of State aid measures granted by Greece to individual banks ([112]), the Commission has acknowledged that there is a threat of serious disturbance in the Greek economy and that State support of banks is suitable to remedy that disturbance. Therefore, the legal basis for the assessment of the aid measures should be Article 107(3)(b) of the Treaty

(201) In order for an aid to be compatible under Article 107(3)(b) of the Treaty it must comply with the general criteria for compatibility:

(a) 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; it would not be the case if the measure were not appropriate to remedy the disturbance;

([110]) Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 356, 6.12.2011, p. 7).
([111]) Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).
([112]) See footnotes 9 and 11.

(b) necessity: the aid measure must, in both its amount and form, be necessary to achieve the objective; therefore it must be of the minimum amount necessary to achieve the objective, and take the form most appropriate to remedy the disturbance.

(c) 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 achieve the measure's objectives.

(202) During the financial crisis, the Commission has developed compatibility criteria for different types of aid measures. Principles for assessing aid measures were first laid down in the 2008 Banking Communication.

(203) The Recapitalisation Communication ([113]) sets out further guidance on the level of remuneration required for State capital injections.

(204) Finally, the Commission has explained in the Restructuring Communication ([114]) how it will assess restructuring plans. In its assessment of the restructuring plan of the Bank under the Restructuring Communication, the Commission will take into account all the measures listed in Table 7.

6.1.3. **Compatibility assessment of the aid measures under the 2008 Banking Communication and Recapitalisation Communication**

6.1.3.1. *Compatibility of measures Pr1, Pr2 and Pr3 with the 2008 Banking Communication*

(205) Measures Pr1, Pr2 and Pr3 were granted under the Greek Banks Support Scheme. The measures included under that scheme have already been assessed as compatible with the internal market in the Commission's decision of 19 November 2008.

6.1.3.2. *Compatibility of measures NP1 and NP2 with the 2008 Banking Communication and Recapitalisation Communication*

(206) The Commission approved measures NP1 and NP2 as rescue aid in the Nea Proton Opening Decision. However, as mentioned in recital 142, the Commission raised concerns regarding the necessity of the amount of measure NP2, as to whether Nea Proton Bank would be able to restore its long-term viability on a stand-alone basis, and therefore queried that the stand-alone option would the cheapest option available. Those concerns have been addressed by the sale of Nea Proton Bank to the Bank on 15 July 2013. Since Nea Proton Bank was sold in an open, transparent and non-discriminatory process to the Bank, the consideration paid by the Bank is considered as the market price. As a result, the amount of the equity injected by the State prior to the sale was necessary for the success of the sale. The integration of Nea Proton Bank into the Bank's activities will solve the long-term viability issues of Nea Proton Bank, in the light of the restructuring plan submitted by the Bank to the Commission.

6.1.3.3. *Compatibility of measure NP3 with the 2008 Banking Communication and Recapitalisation Communication*

6.1.3.3.1. Appropriateness

(207) As regards the appropriateness of measure NP3, the capital injection by the HFSF of EUR 395 million into Nea Proton Bank before its sale to the Bank, the Commission considers that the measure is appropriate because it helped to keep Nea Proton Bank's activities alive. Those activities would not have been able to continue without the aid by the HFSF, as Nea Proton Bank had a negative equity at the time of its sale to the Bank and continued to register losses. No bank would have bought Nea Proton Bank without a prior recapitalisation. The measure therefore ensures that financial stability in Greece is maintained. On that basis, the Commission finds that the measure is appropriate as rescue aid.

6.1.3.3.2. Necessity

(208) According to the 2008 Banking Communication, the aid measure must, in its amount and form, be necessary to achieve the objective of the measure. It implies that a capital injection must be of the minimum amount necessary to reach that objective.

([113]) See footnote 96.
([114]) See footnote 97.

(209) As the Bank of Greece stated in its letter of 19 July 2013, if Nea Proton Bank had been liquidated it could have caused contagion, sparking a new systemic crisis and undermining the confidence that had recently been restored in the banking system following the completion of the recapitalisation process. The Commission considers that those financial stability elements support the necessity of measure NP3.

(210) As regards the scale of the intervention, the figure of EUR 395 million was determined by an open and non-discriminatory tender process. The Bank had completed a due diligence of Nea Proton Bank. The Bank's offer, which required the recapitalisation of EUR 395 million prior to it purchasing Nea Proton Bank, was calculated so as to meet the minimum capital adequacy ratio of 9 % and to allow for provisions of an additional EUR 119 million due to expected additional loan losses and expected pre-tax losses until 2016. The Commission concludes that the aid of EUR 395 million was necessary.

(211) As regards the remuneration of the aid, given that the sale price is set at one euro, the HFSF will not recover any money. Its contribution is similar to a grant. As indicated in point 44 of the Recapitalisation Communication, an insufficiently remunerated recapitalisation can only be accepted in the case of distressed banks which cannot pay any remuneration. The Commission considers that to be the case for Nea Proton Bank. The absence of remuneration triggers the need for in-depth restructuring, in line with the Recapitalisation Communication.

(212) In conclusion, the measure is necessary as rescue aid in both its amount and form to achieve the objective of limiting the disturbance in the Greek banking system and the economy as a whole.

6.1.3.3.3. Proportionality

(213) The Commission notes that following the merger by absorption of Nea Proton Bank with the Bank, the economic activities of Nea Proton Bank have been transferred to the Bank. The fact that the aid rescues those economic activities could, in theory, create distortions of competition. However, the Commission notes the small size of Nea Proton Bank and the sale process, in which competitors had the opportunity to bid for Nea Proton Bank. Moreover, immediately after their transfer, the economic activities of Nea Proton Bank will be fully integrated within the Bank and will cease to exist as a separate economic activity or competitor. The Commission therefore concludes that the aid does not create undue distortions of competition.

6.1.3.3.4. Conclusion on the compliance of measure NP3 with the 2008 Banking Communication and the Recapitalisation Communication.

(214) The Commission thus concludes that measure NP3 is appropriate, necessary and, in the light of the deep restructuring foreseen for the Bank in which the economic activities of Nea Proton Bank are now contained, are proportionate to the intended objective.

6.1.4. **Compatibility of the aid measures with the Restructuring Communication**

(215) In recitals 60, 61, 78 and 79 of the Nea Proton Opening Decision regarding measures NP1 and NP2 the Commission noted that Nea Proton Bank would probably not be able to remunerate the State aid it received and underlined that the absence of remuneration triggered the need for in-depth restructuring. In recital 211 the Commission noted as regards the remuneration of measure NP3 that, given that the sale price of Nea Proton is set at one euro, the HFSF will not recover any of the EUR 395 million injected just before the sale (measure NP3). Moreover, Greece will not recover anything from the preference shares issued to it in May 2009, since the equity claims related to them were left in the liquidated Proton Bank. The Commission therefore concludes that the absence of remuneration triggers the need for in-depth restructuring, both in terms of viability measures and in terms of measures to limit distortions of competition.

6.1.4.1. *Long-term viability of Nea Proton Bank's activity through sale*

(216) Point 21 of the Restructuring Communication provides that where the credit institution in difficulty cannot credibly return to long term-viability, its orderly liquidation or its auctioning off should be considered. Member States may therefore encourage the exit of non-viable players while allowing for the exit process to take place within an appropriate time frame that preserves financial stability.

(217) In the Nea Proton Opening Decision, the Commission raised serious doubts as to whether Nea Proton Bank could restore its long-term viability on a stand-alone basis and pointed out the synergies that could be achieved by its integration into a large financial entity.

(218) In that respect, point 17 of the Restructuring Communication clarifies that the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable and capable of absorbing the transfer of the ailing bank and may help to restore market confidence. Moreover, in line with the MEFP, further consolidation of the banking sector had to be achieved and the HFSF had to sell Nea Proton Bank by 15 July 2013.

(219) As stated in section 7.5.2, on the basis of its restructuring plan, the Bank can be considered as a viable entity. Therefore, the fact that the activities of Nea Proton Bank have been transferred to the Bank allows their long-term viability to be restored. Moreover, the fact that Nea Proton Bank is fully integrated within the Bank and disappears as a stand-alone competitor constitutes in-depth restructuring as required by the insufficient remuneration of the State aid.

6.1.4.2. *Own contribution and burden-sharing*

(220) In the Nea Proton Opening Decision, the Commission expressed doubts as to whether the restructuring costs were limited to the minimum. Those doubts derived from the observation that Nea Proton Bank could not return to long-term viability on a stand-alone basis without incurring high costs. The integration of Nea Proton Bank into the Bank, a larger entity with IT infrastructure and risk management structure in place, addresses those concerns. The sale to the Bank contributes to limiting the restructuring costs to the minimum.

(221) Concerning the contribution of shareholders and subordinated debt holders to the restructuring costs, the Commission has already established in recital 77 of the Nea Proton Opening Decision that the shareholders and subordinated debt holders were not transferred to Nea Proton Bank but remained in Proton Bank, that is to say, the entity in liquidation. Hence, the Commission considered that sufficient burden-sharing of shareholders and subordinated debt holders was achieved.

6.1.4.3. *Measures to limit distortions of competition*

(222) Regarding measures to limit distortions of competition, point 30 of the Restructuring Communication provides that '*the Commission takes as a starting point for its assessment of the need for such measures, the size, scale and scope of the activities that the bank in question would have upon implementation of a credible restructuring plan. The nature and form of such measures will depend on two criteria: first, the amount of the aid and the conditions and circumstances under which it was granted and, second, the characteristics of the market or markets on which the beneficiary bank will operate.*'

(223) Regarding the amount of aid received, the Commission notes the amount of the total aid received in the form of capital of EUR 2 111,6 million (Pr1, NP1, NP2, NP3), in addition to State liquidity support of EUR 149,4 million (Pr3) and Greek government securities of EUR 78 million (Pr2). Measure Pr1 corresponded to 4,6 % of Proton Bank's RWA at that time. Measure NP1, the financing of the funding gap from the transfer of activities from Proton Bank to Nea Proton Bank, corresponded to around 36 % of the RWA of Proton Bank at the end of 2010 or 84 % of the RWA of Nea Proton Bank at the time of its creation. The initial share capital injection by the HFSF into Nea Proton Bank, which was part of measure NP2, corresponded to around 18,8 % of the latter's RWA at the time of its creation. The additional share capital injections, which were part of measure NP2, corresponded to around 34,2 % of the RWA of Nea Proton Bank (based on the data of 31 December 2012 ([115])). As stated in recital 80 of the New Proton Opening Decision, measures NP1 and NP2 represented more than 50 % of Proton Bank's RWA or more than 130 % of Nea Proton Bank's RWA. The share capital injection, prior to the sale to the Bank, that is to say, measure NP3, corresponded to around 48,7 % of the RWA of Nea Proton Bank (based on data of 31 May 2013). Such amounts of aid in combination with the absence of remuneration call for a deep reduction of the market presence of the beneficiary.

([115]) Annual financial report for the extended period from 9 October 2011 to 31 December 2012, according to which the RWA amounted to EUR 775,62 million on 31 December 2012.

(224) Regarding the market on which Nea Proton Bank operated, in recital 82 of the Nea Proton Opening Decision the Commission pointed out that Proton Bank was a very small bank (approximately 1 % market share of Greek banks' total assets) and consequently the assets and liabilities of Proton Bank which were transferred into Nea Proton Bank were relatively small compared to the size of the Greek banking system. Therefore, it concluded that, despite the exceptionally large aid amount, the distortions of competition caused by the aid to Nea Proton Bank could be considered to be limited.

(225) Moreover, the activities of Nea Proton Bank were offered to competitors through an open auction. Following its sale, Nea Proton Bank ceased to exist as a stand-alone competitor as it was fully integrated within the Bank.

(226) The Commission concludes that given the small size of Nea Proton Bank the open sale process, and the fact that Nea Proton Bank will not continue to exist as a stand-alone competitor, there are no undue distortions of competition, despite the very large amount of aid and the absence of remuneration.

6.1.4.4. *Conclusion on the compatibility with the Restructuring Communication*

(227) On the basis of the analysis in recitals 216 to 226 above, the Commission concludes that the sale of Nea Proton Bank and its integration into the Bank ensure Nea Proton Bank's long-term viability, that the aid is limited to the minimum necessary and that there is no undue distortion of competition.

(228) All the aid measures listed in Table 7 should therefore be declared compatible with the internal market.

6.2. ASSESSMENT OF AID RELATED TO NEW TT BANK

6.2.1. **Existence and the amount of aid**

(229) The Commission has to assess whether the measures constitute State aid within the meaning of Article 107(1) of the Treaty.

6.2.1.1. *Existence of aid in the coverage of the funding gap of the transferred assets and liabilities of T Bank (measure T)*

(230) In recitals 26 to 32 of the T Bank Decision, the Commission has already established that measure T, the intervention by the Resolution Scheme of the HDIGF and the HFSF to cover the funding gap of the assets and liabilities transferred to TT Bank, constitutes State aid within the meaning of Article 107(1) of the Treaty. In recital 33 of that Decision the Commission considered the economic activities of T Bank which were transferred to TT Bank to be the beneficiary of State aid as they continued to exist because of the aid received.

6.2.1.2. *Existence of aid in the recapitalisation granted under the recapitalisation measure to TT Bank (measure TT)*

(231) The EUR 224,96 million capital injection by the Greek State into TT Bank (measure TT) was granted under the recapitalisation measure forming part of the Greek Banks Support Scheme ([116]). In the Decision approving that scheme, the Commission concluded that the measures granted under that scheme would constitute State aid. Measure TT therefore constituted aid to TT Bank.

(232) As the Commission observed in recital 98 of the New TT Opening Decision, New TT Bank harbours the economic activities previously carried out within TT Bank, including T Bank.

6.2.1.3. *Existence of aid in the financing of the funding gap of New TT Bank (measure NTT1)*

(233) In recitals 53 to 57 of the New TT Opening Decision, the Commission has already established that measure NTT1, the intervention by the HFSF to cover the funding gap of New TT Bank, constitutes State aid within the meaning of Article 107(1) of the Treaty. In recital 54 of that Decision the Commission considered New TT Bank to be the economic beneficiary as New TT Bank harbours the economic activities of TT Bank which continue to exist because of the aid received.

([116]) See footnote 4.

6.2.1.4. *Existence of aid in the initial share capital injection (measure NTT2)*

(234) In recitals 49 to 52 of the New TT Opening Decision, the Commission has already established that measure NTT2, the initial share capital injection by the HFSF amounting to EUR 500 million in favour of New TT Bank, constitutes State aid to New TT Bank within the meaning of Article 107(1) of the Treaty.

6.2.1.5. *Existence of aid to the Bank as the acquirer of New TT Bank*

(235) The Bank acquired the shares in New TT Bank in the framework of an open and non-discriminatory tender process. According to information received from the Greek authorities on 15 July 2013, a financial advisor contacted a large number of foreign and Greek banks and investors and only the four largest Greek banks submitted final offers. The fact that the financial advisor contacted a large number of banks allows the Commission to conclude that the tender process was open and non-discriminatory. The Bank's offer was considered to be the best one considering the amount and type of consideration offered.

(236) More precisely, the Bank agreed to pay the HFSF a total of EUR 681 million in the form of newly issued ordinary shares. The second-highest offer was a cash offer of EUR 500 million. It was therefore 26,58 % lower than the offer of the Bank. According to the letter from the Bank of Greece of 8 July 2013, any cash offer by a domestic bank could not be considered to the extent that it still relied on Eurosystem funding and particularly not if it was receiving emergency liquidity assistance. The second-highest offer therefore did not comply with the requirements of the Bank of Greece.

(237) It should also be noted that under the sale contract the HFSF received 1 418,75 million new ordinary shares of the Bank at the offer price of EUR 0,48 each ([117]). The shareholding of the HFSF in the Bank increased from 93,55 % to 95,23 %.

(238) Therefore, the Commission concludes that the acquisition does not constitute aid to the buyer.

6.2.1.6. *Conclusion on the existence of aid*

(239) On the basis of the foregoing, the Commission considers that measures T, TT, NTT1 and NTT2 all constitute State aid. Regarding measure T, the Commission concludes that the aid benefited the activities of T Bank as they were transferred to TT Bank and later to New TT Bank. Regarding measure TT, the Commission concludes that it benefited the activities of TT Bank which were transferred to New TT Bank. The beneficiary of measures NTT1 and NTT2 is New TT Bank.

(240) Therefore, the Commission concludes that the economic activities of T Bank, as they were harboured in TT Bank and later in New TT Bank, have benefited from recapitalisation aid amounting to EUR 677 million while the activities carried out by TT Bank harboured in New TT Bank have benefited from State aid in the form of capital support of EUR 4 457,96 million (measures TT, NTT1 and NTT2).

Table 10

Overview of the total aid received by T Bank, TT Bank and New TT Bank

Aid beneficiary	Measure	Description	Amount of aid (in EUR million)
T-Bank's activities	T	Financing of funding gap from T to TT	677
TT Bank's activities	TT	Recapitalisation	224,96
New TT Bank's activities	NTT1	Financing of funding gap from TT Bank to New TT Bank	3 732,6
	NTT2	Initial share capital	500

([117]) The number of shares was determined based on the volume weighted average price of the Bank's share on the Athens Stock Exchange over the ten working day period to the date of the Extraordinary General meeting of Shareholders (with a minimum of 1 418,75 million shares). See footnote 31, pp. 14 and 56. Since the volume-weighted average market price during that period was higher than EUR 0,48, the HFSF received the minimum number of shares, that is 1 418,75 million at the offer price of EUR 0,48 each. EUR 0,48 × 1 418,75 million = EUR 681 million, that is to say, the consideration paid by the Bank to the HFSF.

6.2.2. **Legal basis of the compatibility assessment**

(241) Article 107(3)(b) of the Treaty empowers the Commission to find that aid is compatible with the internal market if it is intended 'to remedy a serious disturbance in the economy of a Member State'.

(242) As explained in recitals 199 and 200, the legal basis for the assessment of aid measures to Greek banks should, at present, be Article 107(3)(b) of the Treaty.

(243) As explained in recital 201, in order for an aid to be compatible under Article 107(3)(b) of the Treaty it must comply with the general criteria for compatibility: appropriateness, necessity and proportionality.

(244) Principles for assessing aid measures were first laid down in the 2008 Banking Communication.

(245) The Recapitalisation Communication ([118]) sets out further guidance on the level of remuneration required for State capital injections.

(246) Finally, the Commission has explained in the Restructuring Communication ([119]) how it will assess restructuring plans. In its assessment of the restructuring plan of the Bank under the Restructuring Communication, the Commission will take into account all the measures listed in Table 8.

6.2.3. **Compatibility of the aid measures with the 2008 Banking Communication and the Recapitalisation Communication**

6.2.3.1. *Compatibility of measure T with the 2008 Banking Communication and the Recapitalisation Communication*

(247) Regarding measure T, in its T Bank Decision the Commission found that the intervention fulfils the requirements of Article 107(3)(b) of the Treaty and decided it was compatible with the internal market for reasons of financial stability for a period of six months as from the date of adoption of that Decision. The Greek authorities did not submit an updated restructuring plan for TT Bank which took into account the integration of T Bank's activities into TT Bank before the end of that six-month period. However, in recital 83 of the New TT Opening Decision the Commission considered that omission was understandable as a decision had been taken in the meanwhile that TT Bank would be resolved. As the Greek authorities submitted a restructuring plan for New TT Bank in January 2013 and an updated one in March 2013, both of which deal with the activities transferred from T Bank to TT Bank, the Commission, in its New TT Opening Decision, approved measure T provisionally as rescue aid until a final decision was taken on measures T, TT, NTT1 and NTT2.

6.2.3.2. *Compatibility of measure TT with the 2008 Banking Communication*

(248) In its Decision of 19 November 2008 ([120]) the Commission has already concluded that measure TT, which was granted in May 2009 under the recapitalisation measure which is part of the Greek Banks Support Scheme, is compatible rescue aid under the 2008 Banking Communication. The decision of 19 November 2008 did not refer to the Recapitalisation Communication, which had not been adopted at that time.

6.2.3.3. *Compatibility of measures NTT1 and NTT2 with the 2008 Banking Communication and the Recapitalisation Communication*

(249) The Commission has already temporarily approved measures NTT1 and NTT2 as rescue aid in the New TT Opening Decision.

6.2.4. **Compatibility of aid measures T, TT, NTT1 and NTT2 with the Restructuring Communication**

6.2.4.1. *Lack of appropriate remuneration of the aid: to be taken into account in the assessment under the Restructuring Communication*

(250) In recital 45 of the T Bank Decision, the Commission noted that the HDIGF and the HFSF will probably not recover any money and that the financing of the funding gap from T Bank to TT Bank is therefore similar to a grant. Moreover, as concluded in recital 101 of the New TT Opening Decision, the HFSF could expect to recover

([118]) See footnote 96.
([119]) See footnote 97.
([120]) See footnote 2.

only part of its initial share capital injection of EUR 500 million (measure NTT2). Moreover, the Commission observed that there will be no remuneration for the HFSF covering the funding gap from TT Bank to New TT Bank (measure NTT1) and there is a very small likelihood that the HFSF will recover much of the EUR 3,7 billion. Finally, the Commission notes that the State will most probably not recover any amount in respect of measure TT since its equity claims, related to the preference shares issued in May 2009, remained in TT Bank, which was put into liquidation.

(251) As indicated in recitals 77 and 102 of the New TT Opening Decision, the absence of remuneration triggers the need for in-depth restructuring, both in terms of viability measures and in terms of measures to limit distortions of competition.

6.2.4.2. *Long-term viability of New TT Bank's activity through sale*

(252) Point 21 of the Restructuring Communication provides that where the credit institution in difficulty cannot credibly return to long term-viability, its orderly liquidation or its auctioning off should be considered.

(253) In section 3.2.4.1 of the New TT Opening Decision, the Commission raised serious doubts as to whether New TT Bank could restore its long-term viability on a stand-alone basis and whether New TT Bank could achieve the planned growth of income. Moreover, it pointed out that New TT Bank had taken only a limited number of measures to generate profits and that there was a lack of measures on the part of New TT Bank to reduce personnel costs and to rationalise the branch network. It also referred to the synergies that could be achieved by the integration of New TT Bank into a large financial entity.

(254) In that respect, point 17 of the Restructuring Communication clarifies that the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable and capable of absorbing the transfer of the ailing bank and may help to restore market confidence. Moreover, in line with the MEFP, the sale of the New TT Bank was a priority action, taking into consideration the public interest and financial stability, as well as the protection of the HFSF's assets.

(255) As stated in section 7.5.2, on the basis of its restructuring plan, the Bank can be considered as a viable entity. Therefore, the fact that the activities of New TT Bank are now placed within the Bank allows their long-term viability to be restored. New TT Bank ceases to exist as an autonomous competitor. The operational merger between New TT Bank and the Bank was completed by 14 April 2014. The 'Hellenic Postbank'-branded branch network will be reduced (the Bank intends to keep the brand 'Hellenic Postbank' for certain branches, while the 'T-bank' brand will not be kept and the 'T-bank' branch network will be nearly entirely closed) in combination with the full operational integration of back office and other headquarter functions within the Bank. The Commission concludes that the restructuring plan ensures that an in-depth restructuring as required by the insufficient remuneration will be achieved.

6.2.4.3. *Own contribution and burden-sharing*

(256) The Commission's concerns expressed in recital 99 of the New TT Opening Decision, as to whether the restructuring costs were inflated given the restructuring of New TT Bank on a stand-alone basis, were addressed by the Voluntary Exit Scheme ([121]), which was implemented by New TT Bank on a stand-alone basis in July 2013, and by the sale of New TT Bank to the Bank. More precisely, the rationalisation of the branch network, the full integration of T Bank and the full operational integration of New TT Bank into the Bank limit the restructuring costs to the minimum.

(257) Concerning burden-sharing of shareholders and subordinated debt holders, the Commission has already established, in recital 100 of the New TT Opening Decision, that the shareholders and subordinated debt holders were not transferred to New TT Bank but have remained in TT Bank, that is to say, the entity in liquidation. Hence, the Commission considered that sufficient burden-sharing of shareholders and subordinated debt holders was achieved.

(258) Therefore, the Commission considers that the restructuring costs are limited to the minimum and that sufficient burden-sharing has been achieved. However, as already concluded in recital 251, the absence of remuneration triggered the need for in-depth restructuring, both in terms of viability measures and in terms of measures to limit distortions of competition.

([121]) HFSF, Report of the Hellenic Financial Stability Fund for the period January — June 2013: 'One of the prerequisites regarding the targeted operational cost reduction in NHPB after its establishment was a headcount reduction via a Voluntary Retirement Scheme (VRS). (…) 605 employees accepted the exit packages offered and the total cost of the scheme amounted to circa EUR 35,7 million', available online at: http://www.hfsf.gr/files/HFSF_activities_Jan_2013_Jun_2013_en.pdf

6.2.4.4. *Measures to limit distortions of competition*

(259) Regarding measures to limit distortions of competition, point 30 of the Restructuring Communication provides that '*the Commission takes as a starting point for its assessment of the need for such measures, the size, scale and scope of the activities that the bank in question would have upon implementation of a credible restructuring plan. The nature and form of such measures will depend on two criteria: first, the amount of the aid and the conditions and circumstances under which it was granted and, second, the characteristics of the market or markets on which the beneficiary bank will operate.*'

(260) Regarding the amount of aid received, the Commission recalls that, in recital 104 of the New TT Opening Decision, it noted that New TT Bank has received EUR 4,6 billion of aid (measures NTT1 and NTT2), which represents more than 70 % of the RWA of TT Bank and more than 90 % of the RWA of New TT Bank. Further the Commission noted that TT Bank (which is the legal entity which previously performed the activities which were harboured in New TT Bank) had previously received aid under the Greek Banks Support Scheme ([122]) TT Bank received a first capital injection of EUR 224,96 million in the form of preference shares (measure TT), which was equivalent to 2,9 % of its RWA at that time. Furthermore, on the resolution of T Bank, the activities of T Bank that were transferred to TT Bank received a resolution aid of approximately EUR 678 million (measure T), which was equivalent to 37,7 % of the RWA of T Bank as at the merger reference date (31 March 2011). Such amounts of aid in combination with the absence of remuneration call for a deep restructuring.

(261) On the other hand, in recital 104 of the New TT Opening Decision, the Commission pointed out the circumstances under which the aid was granted. More precisely, a significant part of the losses which TT Bank has incurred in recent years do not seem to stem from risk-taking activities but from the holding of GGBs. The Commission also observed that the high loan losses on lending to households and corporations stem mainly from the exceptionally deep and long recession and not from risky lending. The aid therefore seems to create few distortions of competition. However, the Commission observed that, proportionally to its size, TT Bank had held far more GGBs than the other banks in Greece, a factor that reflects some inappropriate risk-taking.

(262) As already noted, New TT Bank ceases to exist as an autonomous competitor that determines its policy on a stand-alone basis. The restructuring plan of the Bank is based on the assumption of the full integration of New TT Bank, even if the Bank will continue to use the brand 'Hellenic Postbank' for some branches and products.

(263) Regarding the market on which New TT Bank operated, in recital 106 of the New TT Opening Decision, the Commission pointed out that TT Bank was a medium-sized bank in Greece (approximately 6 % in terms of deposits) and that the assets and liabilities of TT Bank that were transferred into New TT Bank were relatively small compared to the size of the Greek banking system. Therefore, it concluded that, despite the exceptionally large aid amount, the distortions of competition caused by the aid to New TT Bank could be considered to be rather limited.

(264) The planned downsizing of the 'Hellenic Postbank'-branded branch network, with a reduction of approximately 50 branches ([123]) out of 196, further confirms the assessment in recital 263 that the distortions of competition caused by the aid to New TT Bank could be considered to be rather limited.

(265) Moreover, the activities of New TT Bank were offered to competitors through an open and non-discriminatory auction.

(266) A significant part of aid measures NTT1 and NTT2 was needed because of a waiver of debt in favour of the State (in the form of the PSI programme) and because of the exceptionally long recession rather than as a consequence of inappropriate lending practices. Additionally, the size of the activities of New TT Bank was small, the sale process was open, transparent and non-discriminatory, and New TT Bank will not continue to exist as an autonomous competitor. Therefore the Commission concludes that, despite the large amount of aid and the absence of appropriate remuneration for the State aid granted, there is no undue distortion of competition.

([122]) See footnote 4.
([123]) Eurobank, 'Proposed combination of the New Hellenic Postbank with Eurobank', 16 May 2013.

6.2.4.5. *Conclusion on the compatibility of aid measures T, TT, NTT1 and NTT2 with the Restructuring Communication.*

(267) The Commission concludes that the sale of New TT Bank to the Bank and the associated restructuring ensure New TT Bank's long-term viability, the limitation of aid to the minimum necessary and the absence of undue distortions of competition.

(268) All the aid measures listed in Table 8 should be declared compatible with the internal market.

7. **ASSESSMENT OF AID GRANTED TO THE BANK**

7.1. EXISTENCE AND THE AMOUNT OF AID

(269) The Commission has to establish the existence of State aid within the meaning of Article 107(1) of the Treaty.

7.1.1. **Existence of aid in the measures granted under the Greek Banks Support Scheme**

7.1.1.1. *State liquidity support granted under the guarantee and the government bond loan measures (measure L1)*

(270) The Commission has already established in the decisions approving and prolonging the Greek Banks Support Scheme ([124]) that liquidity support granted under the scheme constitutes aid. The outstanding amount of guarantees as of 15 April 2011 was EUR 13 600 million, and reached EUR 13 932 million as of 30 November 2013. Future liquidity support granted under that scheme would also constitute aid.

7.1.1.2. *State recapitalisation granted under the Recapitalisation Scheme (measure A)*

(271) The Commission has already established in the Decision of 19 November 2008 on the Greek Banks Support Scheme that recapitalisations to be granted under the recapitalisation measure included under that scheme will constitute aid. The Bank has received EUR 950 million by means of preference shares, which represents 2 % of the Bank's RWA ([125]).

(272) In 2010 Greece introduced several changes to the technical parameters of those preference shares. Given that the changes increase the remuneration of the State, with an automatic increase of the coupon by 2 % each year if the preference shares are not redeemed within five years, the Commission concludes that the modifications of the technical parameters do not provide any advantage to the Bank and hence do not involve additional State aid.

7.1.2. **Existence of aid in the State-guaranteed ELA (measure L2)**

(273) The Commission clarified in point 51 of the 2008 Banking Communication that the provision of central banks' funds to financial institutions does not constitute aid if four cumulative conditions are met regarding the solvency of the financial institution, the collateralisation of the facility, the interest rate charged to the financial institution, and the absence of counter-guarantee from the State. Since the State-guaranteed ELA to the Bank does not comply with those four cumulative conditions, notably because it is State guaranteed and it is granted in conjunction with other support measures, it constitutes aid.

(274) The State-guaranteed ELA meets the conditions laid down in Article 107(1) of the Treaty. First, because this measure includes a State guarantee in favour of the Bank of Greece, any loss will be borne by the State. The measure therefore involves State resources. ELA enables banks to get funding at a time when they have no access to the wholesale funding market and to the regular Eurosystem refinancing operations. The State-guaranteed ELA to the Bank therefore grants an advantage to it. Since ELA is limited to the banking sector the measure is selective. And since the State-guaranteed ELA allows the Bank to continue operating on the market and avoids it defaulting and having to exit the market, it distorts competition. Since the Bank is active in other Member States and since financial institutions from other Member States operate or would potentially be interested in operating in Greece, the advantage granted to the Bank affects trade between Member States.

([124]) See footnotes 4 and 6.
([125]) See Eurobank Opening decision, recital 36.

(275) The State-guaranteed ELA (measure L2) constitutes State aid. The amount of State-guaranteed ELA has varied over time. At 31 December 2012 it amounted to around EUR 12 billion.

7.1.3. **Existence of aid in the measures granted through the HFSF**

7.1.3.1. *First bridge recapitalisation (measure B1)*

(276) In section 5.1 of the Eurobank Opening Decision, the Commission has already concluded that the first bridge recapitalisation constitutes State aid. The capital received amounted to EUR 3 970 million.

7.1.3.2. *Second bridge recapitalisation (measure B2)*

(277) Measure B2 was implemented with HFSF resources, which, as explained in recital 47 of the Eurobank Opening Decision, involve State resources.

(278) As regards the existence of an advantage, measure B2 increased the Bank's capital ratio to a level that allowed it to continue to function on the market and to access Euro-system funding. Furthermore, the remuneration of measure B2 consists of the accrued interests on EFSF notes and an additional 1 % fee. Because that remuneration is manifestly lower than the remuneration of similar capital instruments in the market, the Bank would have certainly been unable to raise that capital on such terms in the market. Therefore, measure B2 granted an advantage to the Bank from State resources. As the measure was made available only to the Bank, it is selective in nature.

(279) As a result of measure B2, the position of the Bank was strengthened since the Bank was provided with the financial resources necessary to continue to comply with the capital requirements, thus leading to competition distortions. Since the Bank is active in other European banking markets and since financial institutions from other Member States operate in Greece, notably in the insurance market, measure B2 is also likely to affect trade between Member States.

(280) The Commission considers that measure B2 constitutes State aid. It was notified as aid by the national authorities. The capital received amounted to EUR 1 341 million.

7.1.3.3. *Commitment letter (measure B3)*

(281) By measure B3, the HFSF committed to provide the additional capital necessary to complete the recapitalisation of the Bank up to the amount requested by the Bank of Greece in the framework of the stress test of 2012. The HFSF receives its resources from the State. The Commission therefore concludes that the letter commits State resources. The circumstances in which the HFSF can grant support to financial institutions are precisely defined and limited by law. Accordingly the use of those State resources is imputable to the State. The HFSF gave a commitment to provide up to EUR 528 million of additional capital.

(282) The commitment letter granted an advantage to the Bank because it reassured depositors that the Bank would be able to raise the entire amount of capital it had to raise, that is to say, the HFSF would provide the capital should the Bank fail to raise it on the market. That commitment also facilitates the raising of private capital from the market, since investors are reassured that, if the Bank cannot find part of the capital from the market, the HFSF will provide it. No private investor would have accepted to commit before the terms of the recapitalisation were known, and at that time the Bank had no access to capital market.

(283) Since the Bank is active in other European banking markets and since financial institutions from other Member States operate in Greece, notably in the insurance market, measure B3 is also likely to affect trade between Member States and to distort competition.

(284) Measure B3 therefore constitutes aid and was notified as State aid by the Greek authorities on 27 December 2012.

7.1.3.4. *The Spring 2013 recapitalisation (measure B4)*

(285) The Spring 2013 recapitalisation (measure B4) is the conversion of the first and second bridge recapitalisations (measures B1 and B2) and of the commitment letter (measure B3) into a permanent recapitalisation of EUR 5 839 million in ordinary shares. Since measure B4 is the conversion of aid already granted, it still involves State resources but it does not increase the nominal amount of aid. However, it increases the advantage to the Bank (and therefore the distortions of competition) since it is a permanent recapitalisation and not a temporary recapitalisation as in the case of measures B1 and B2. Compared to measure B3, which is only a commitment and not an actual recapitalisation, measure B4 increased the capital adequacy of the Bank and is therefore more advantageous.

(286) The Commission notes that such support was not granted to all banks operating in Greece. As regards distortions of competition and effect on trade, the Commission notes for instance that the aid enabled the Bank to pursue its operations in other Member States, such as Romania or Bulgaria. A liquidation of the Bank would have led to the termination of its activities abroad, through the liquidation of those activities or the sale of the businesses. In addition, the insurance activities of the Bank in Greece compete with the activities of subsidiaries of insurance companies from other Member States. Therefore, the measure distorts competition and affects trade between Member States. Measure B4 therefore constitutes State aid.

7.1.3.5. *Conclusion on measures B1, B2, B3 and B4*

(287) Measures B1, B2, B3 and B4 constitute State aid within the meaning of Article 107(1) of the Treaty. The amount of State aid included in measures B1, B2, B3 and B4 is EUR 5 839 million, which was also the amount of State support actually paid out by HFSF to the Bank.

(288) Point 31 of the Restructuring Communication indicates that, besides the absolute amount of aid, the Commission has to take into account the aid '*in relation to the bank's risk-weighted assets*'. Measures B1, B2, B3 and B4 have been granted over the course of a one-year period, from April 2012 until May 2013. During that period, the RWA of the Bank changed. The question therefore arises as to which level of RWA should be used, that is to say, that which existed at the beginning of the period or that which existed at the end of the period. Measures B1, B2, B3 and B4 aim at covering a capital need identified by the Bank of Greece in March 2012 (the stress test of 2012). In other words, the capital needs those measures covered already existed in March 2012. The Commission therefore considers that the aid amount included in measures B1, B2, B3 and B4 should be compared to the RWA of the Bank at 31 March 2012. It is also recalled that the Bank of Greece, after March 2012 and until the Spring 2013 recapitalisation, did not take into account acquisitions made by Greek banks to adjust — upwards or downwards — their capital needs. That factor further demonstrates that measures B1, B2, B3 and B4 were aid measures related to the perimeter of the Bank as it existed at 31 March 2012.

(289) The first and second bridge recapitalisations and the commitment letter altogether amounted to EUR 5 839 million. That amount represents 13,8 % of the RWA of the Bank at 31 March 2012.

7.1.3.6. *The 2014 recapitalisation commitment (measure C)*

(290) On 31 March 2014 the Bank received a commitment letter from the HFSF, by which the HFSF gave a commitment to participate in the share capital increase of the Bank for an amount of up to EUR 2 864 million (measure C). For the reasons explained in recital 277, that measure involves the use of State resources. That measure constitutes an advantage to the Bank since it ensures that the Bank it will find the capital it needs, which will reassure depositors and facilitate it in raising capital from private investors.

(291) If private investors do not subscribe to the entire amount of the capital increase, the HFSF has to actually inject capital into the Bank in application of the commitment letter. Such a capital injection would, compared to the commitment letter, constitute a larger advantage in favour of the Bank. Unlike a mere commitment letter, the actual injection of capital increases the capital adequacy of the Bank.

(292) Neither the commitment letter nor its potential implementation in the form of an actual capital injection complies with the market economy investor principle. Even if the HFSF were to purchase the new shares at the same price as private investors, the circumstances of the participation of the HFSF are very different from those of the private

investors who will subscribe to new shares. The HFSF has committed to subscribe the entire share capital increase if needed, before any private investor has formally committed to buy shares. Private investors who buy new shares will be certain that in any event the Bank will raise the entire amount of capital needed, since the HFSF will act as a backstop and purchase any shares not subscribed by private investors. Secondly, the HFSF will participate only if there is insufficient demand from private investors at the floor of the announced price range. As such, the HFSF will provide capital which the Bank cannot find on the market at the same price per share. In consequence, the HFSF provides capital for an amount or at a price which the market is not ready to provide.

(293) Because it was only granted to the Bank, measure C is selective. The position of the Bank was strengthened since the Bank was provided with the financial resources necessary to continue to comply with the regulatory capital requirements set by the Bank of Greece. It therefore provides an advantage which distorts competition. Since the Bank is active in other European banking markets and since financial institutions from other Member States operate in Greece, notably in the insurance market, measure C is also likely to affect trade between Member States.

(294) The 2014 recapitalisation commitment constitutes State aid within meaning of Article 107(1) of the Treaty. The amount of aid included in that measure is EUR 2 864 million, which represents 7,5 % of the RWA of the Bank at 31 December 2013 ([126]).

(295) If the HFSF actually injects further capital in the Bank in implementation of that commitment, it will increase the advantage to the Bank and the distortions of competition but will not increase the nominal amount of aid ([127]).

7.1.4. **Conclusion on the existence and total amount of aid received**

(296) Measures A, B1, B2, B3, B4 and C constitute State aid within the meaning of Article 107(1) of the Treaty.

Table 11

Overview of the total aid received by the Bank

Ref.	Measure	Type of measure	Amount of aid	Aid/RWA
A	Preference Shares	Capital support	EUR 950 million	2 %
B1 B2 B3 B4	First bridge recapitalisation Second bridge recapitalisation Commitment letter Spring 2013 recapitalisation	Capital support	EUR 5 839 million	13,8 %
C	2014 recapitalisation commitment	Commitment to provide capital support	EUR 2 864 million	7,5 %
Total capital aid granted to the Bank			**EUR 9 653 million**	**15,8 %**
Total capital paid out to the Bank			**EUR 6 789 million [could go to EUR 9 653 million if the HFSF has to provide the entire amount of the capital increase of April 2014]**	**23,7 %**
Ref.	Measure	Type of measure	Nominal amount of aid	
L1	Liquidity support	Guarantee	EUR 13 932 million	*As of 30 November 2013*
L2	State-guaranteed ELA	Funding and Guarantee	EUR 12 000 million	*As of 31 December 2012*
Total liquidity aid granted to the Bank			**EUR 25 932 million**	

([126]) http://www.eurobank.gr/Uploads/pdf/Pillar_3_2013_Final%20Values_2_310313.pdf

([127]) See recital 285 of the present decision in respect of measure B3.

7.2. LEGAL BASIS FOR THE COMPATIBILITY ASSESSMENT

(297) As concluded in recital 200, the legal basis for the assessment of the aid measures should be Article 107(3)(b) of the Treaty ([128]).

(298) During the financial crisis, the Commission has developed compatibility criteria for different types of aid measures. Principles for assessing aid measures were first laid down in the 2008 Banking Communication.

(299) Guidance for recapitalisation measures can be found in the Recapitalisation Communication and the 2011 Prolongation Communication.

(300) The Restructuring Communication defines the approach adopted by the Commission as regards the assessment of restructuring plans, in particular the need to return to viability, to ensure a proper contribution from the beneficiary and to limit distortions of competition.

(301) That framework was complemented by the 2013 Banking Communication, which applies to aid measures notified after 1 August 2013.

7.2.1. **Legal basis of the compatibility assessment of the liquidity support to the Bank (measure L1)**

(302) The liquidity support already received by the Bank has been definitively approved through the successive decisions authorising the measures under the Greek Banks Support Scheme and the Scheme's amendments and prolongations ([129]). Any future liquidity support for the Bank will have to be granted under a scheme duly approved by the Commission. The terms of such aid will have to be authorised by the Commission before it is granted and therefore do not have to be further assessed in this decision.

7.2.2. **Legal basis of the compatibility assessment of the preference shares (measure A)**

(303) The recapitalisation granted in 2009 in the form of preference shares (measure A), was granted under the recapitalisation measure approved in 2008 as part of the Greek Banks Support Scheme under the 2008 Banking Communication. It therefore does not have to be reassessed under the 2008 Banking Communication and has only to be assessed under the Restructuring Communication.

7.2.3. **Legal basis of the compatibility assessment of the State-guaranteed ELA (measure L2)**

(304) The compatibility of the State-guaranteed ELA (measure L2) should be first assessed on the basis of the 2008 Banking Communication and the 2011 Prolongation Communication. Any State-guaranteed ELA granted after 1 August 2013 falls under the 2013 Banking Communication.

7.2.4. **Legal basis of the compatibility assessment of the HFSF recapitalisations (measures B1, B2, B3, and B4)**

(305) The compatibility of the HFSF recapitalisations (measures B1, B2, B3 and B4), in particular as regards remuneration, should first be assessed on the basis of the 2008 Banking Communication, the Recapitalisation Communication and the 2011 Prolongation Communication. In the Eurobank Opening Decision the Commission expressed doubts as to the compatibility of measure B1 with those Communications. Since they were implemented before 1 August 2013, those measures do not fall under the 2013 Banking Communication. The compatibility of the HFSF recapitalisations (measures B1, B2, B3 and B4) should also be assessed on the basis of the Restructuring Communication.

7.2.5. **Legal basis of the compatibility assessment of the 2014 recapitalisation commitment (measure C)**

(306) The compatibility of the 2014 recapitalisation commitment (measure C) should be assessed on the basis of the 2013 Banking Communication, which sets out new requirements as regards the contribution of subordinated creditors and the remuneration of managers, and of the Recapitalisation Communication and the 2011 Prolongation Communication. The compatibility of measure C should also be assessed on the basis of the Restructuring Communication.

([128]) It is also noted that Greece granted the aid to the bank under the Greek Banks Support Scheme which has been authorised by the Commission on the basis of Article 107(3)(b) of the Treaty as well as through the HFSF whose creation has also been approved by Commission decision.

([129]) See footnotes 3 and 4.

7.3. COMPLIANCE OF MEASURE L2 WITH THE 2008 BANKING COMMUNICATION, THE 2011 PROLONGATION COMMUNICATION AND THE 2013 BANKING COMMUNICATION

(307) In order for an aid to be compatible under Article 107(3)(b) of the Treaty it must comply with the general criteria for compatibility: appropriateness, necessity and proportionality.

(308) Because Greek banks were shut out from wholesale markets and became entirely dependent on central bank financing, as indicated in recital 32, and since the Bank could not borrow a sufficient amount of funds through the regular refinancing operations, the Bank needed State-guaranteed ELA to obtain sufficient liquidity thereby preventing it from defaulting. The Commission considers measure L2 to be an appropriate mechanism to remedy a serious disturbance, which would have been caused by the default of the Bank.

(309) Since the State-guaranteed ELA entails a relatively high cost of funding for the Bank, the Bank has a sufficient incentive to avoid relying on that source of funding for developing its activities. The Bank had to pay an interest rate of […] bps higher than regular refinancing operations with the Eurosystem. In addition, the Bank had to pay a guarantee fee of […] bps to the State. As a result, the total cost of State-guaranteed ELA for the Bank is much higher than the normal costs of ECB refinancing. In particular, the difference between the former and the latter is higher than the level of the guarantee fee requested by the 2011 Prolongation Communication. As a result, the total remuneration charged by the State can be considered as sufficient. As regards the amount of the State-guaranteed ELA, it is regularly reviewed by the Bank of Greece and the ECB based on the actual needs of the Bank. They closely monitor its use and ensure it is limited to the minimum necessary. Therefore measure L2 does not provide the Bank with excess liquidity which could be used to finance activities distorting competition. It is limited to the minimum amount necessary.

(310) Such close scrutiny of the use of the State-guaranteed ELA and regular verification that its use is limited to the minimum also ensures that this liquidity is proportional and does not lead to undue distortion of competition. The Commission also notes that Greece has committed to implement a number of measures aiming at reducing negative spill-over effects, as analysed in section 7.6, which further ensures that the reliance on liquidity support will end as soon as possible and that such aid is proportional.

(311) Measure L2 therefore complies with the 2008 Banking Communication and the 2011 Prolongation Communication. As the 2013 Banking Communication has not introduced further requirements as regards guarantees, measure L2 also complies with the 2013 Banking Communication.

7.4. COMPLIANCE OF MEASURES B1, B2, B3 AND B4 WITH THE 2008 BANKING COMMUNICATION, THE RECAPITALISATION COMMUNICATION AND THE 2011 PROLONGATION COMMUNICATION

(312) As indicated in recital 201, in order for an aid to be compatible under Article 107(3)(b) of the Treaty it must comply with the general criteria for compatibility ([130]): appropriateness, necessity and proportionality.

(313) The Recapitalisation Communication and the 2011 Prolongation Communication set out further guidance on the level of remuneration required for State capital injections.

7.4.1. **Appropriateness of the measures**

(314) The Commission considers the HFSF recapitalisations (measures B1, B2, B3, and B4), to be appropriate because they prevent the bankruptcy of the Bank. Without them, its activities could not have continued as the Bank had a negative equity at the end of 2012 ([131]).

(315) In that respect, the Commission noted in the Eurobank Opening Decision that the Bank is one of the largest banking institutions in Greece, both in terms of lending and collection of deposits. As such, the Bank is a systemically important bank for Greece. Consequently, a default of the Bank would have created a serious

([130]) See recital 41 of Commission Decision of 10 October 2008 in Case NN 51/08 Guarantee scheme for banks in Denmark (OJ C 273, 28.10.2008, p. 1).
([131]) http://www.eurobank.gr/Uploads/pdf/Eurobank%20FY2012%20Results%20Press%20Release.pdf

disturbance in the Greek economy. Under the then prevailing circumstances, financial institutions in Greece had difficulties in accessing funding. That lack of funding limited their ability to provide loans to the Greek economy. In that context, the disturbance to the economy would have been aggravated by the default of the Bank. Moreover, measures B1, B2, B3, and B4 came about mainly because of the PSI programme, a highly extraordinary and unpredictable event, and not as a result of mismanagement or excessive risk-taking by the Bank. The measures thereby deal principally with the results of the PSI programme and contribute to maintaining financial stability in Greece.

(316) In the Eurobank Opening Decision, the Commission expressed doubts as to whether all steps possible had been taken immediately to avoid the Bank needing aid again in the future. As indicated in recitals 130 to 132 of the present Decision Greece has given a commitment to implement a number of actions related to the corporate governance and commercial operations of the Bank. As described in recitals 102 to 104 and in recital 111, the Bank has also comprehensively restructured its activities, with many cost reductions and divestments already implemented. Therefore the Commission's doubts have been allayed.

(317) In the Eurobank Opening Decision, the Commission also expressed doubts as to whether sufficient safeguards existed in case the Bank came under State control, or in case private shareholders retained control while the majority of the ownership would be held by the State. The Commission notes that commitments described in recitals 131 and 132 ensure the credit operations of the Bank will be run on a commercial basis and daily business will be protected from State interference. The relationship framework agreed between the HFSF and the Bank also ensures that interests of the State as main shareholder are protected against excessive risk-taking by the management of the Bank.

(318) Measures B1, B2, B3 and B4 thereby ensure that financial stability in Greece is maintained. Significant actions have been taken to minimise future losses and to ensure that the activities of the Bank are not jeopardised by inappropriate governance. On that basis, the Commission finds that measures B1, B2, B3 and B4 are appropriate.

7.4.2. **Necessity — limitation of the aid to the minimum**

(319) According to the 2008 Banking Communication, the aid measure must, in its amount and form, be necessary to achieve the objective. It means that the capital injection must be of the minimum amount necessary to achieve the objective.

(320) The amount of capital support was calculated by the Bank of Greece in the framework of a stress test so as to ensure that Core Tier One capital remained above a certain level over the period 2012-2014, as reflected in Table 3. It therefore does not provide the Bank with excess capital. As explained in recital 316, actions have been taken to reduce the risk that the Bank might need additional aid in the future.

(321) As regards the remuneration of the first and second bridge recapitalisations (measures B1 and B2), the Commission recalls that they were granted in May 2012 and December 2012, and paid in kind in the form of EFSF notes. The HFSF has received as remuneration, from the date of disbursement of those EFSF notes to the date of the Spring 2013 recapitalisation, the accrued interests on the EFSF notes plus a 1 % fee ([132]). As underlined in the Eurobank Opening Decision, that remuneration is lower than the 7 % to 9 % range as defined in the Recapitalisation Communication. However, the period of low remuneration was limited to one year for measure B1 and five months for measure B2 (that is to say, until the conversion of the bridge recapitalisation into a standard recapitalisation in ordinary shares, namely measure B4). While the first and second bridge recapitalisations did not trigger the dilution of existing shareholders, the Spring 2013 recapitalisation, which was the conversion of the first and second bridge recapitalisations, heavily diluted those shareholders, as their stake in the Bank's equity fell to 1,4 %. The abnormal situation which prevailed from the date of the first bridge recapitalisation was then terminated. The doubts raised in the Eurobank Opening Decision have therefore been allayed.

([132]) See recital 72: the accrued interests count as additional contribution by the HFSF and therefore reduced the payment which HFSF had to make to the Bank to pay the Spring 2013 recapitalisation.

(322) Furthermore, given the atypical source of the Bank's difficulties, where losses come mainly from a debt waiver in favour of the State (the PSI programme and the debt buy-back, which provide a significant advantage to the State, that is to say, a debt reduction) and from the consequences of a protracted recession in its domestic market, the Commission can accept such a temporary deviation from the standard remuneration requirements set in the Recapitalisation Communication ([133]).

(323) Measure B3 was a commitment to provide capital. That commitment made in December 2012 was implemented in an actual injection of capital in May- June 2013, a mere five months later. For that reason and for the reasons set out in recital 322, it is acceptable that no remuneration was paid for that commitment.

(324) As regards measure B4, according to point 8 of the 2011 Prolongation Communication capital injections should be subscribed at a sufficient discount to the share price adjusted for the dilution effect to give a reasonable assurance of an adequate remuneration for the State. While that recapitalisation did not provide for a significant discount to the share price as adjusted for the dilution effect, it was, in fact, impossible to achieve a significant discount to the theoretical ex-right price ([134]). Prior to the Spring 2013 recapitalisation, the capital of the Bank was negative and its market capitalisation was only a couple of hundred millions of euros. In such circumstances, the question arises whether the existing shareholders should have been fully wiped out. The Commission notes that the issue price was set at a 50 % discount to the average market price over the fifty days preceding the determination of the issue price. The Commission also notes that the dilution of the pre-existing shareholders has been huge, since after that recapitalisation they held only 1,4 % of the shareholding of the Bank. Therefore, applying a further discount on the market price would only have had a negligible impact on the remuneration of the HFSF. In view of the specific situation of the Greek banks explained in recital 322, and given the fact that the need for aid stems from a waiver of debt in favour of the State, the Commission considers the issue price to be sufficiently low.

(325) In conclusion, measures B1, B2, B3 and B4 are necessary as rescue aid in both their amount and form.

7.4.3. **Proportionality — measures limiting negative spill-over effects**

(326) The Bank has received a very large amount of State aid. That situation may therefore lead to serious distortions of competition. However, Greece has given a commitment to implement a number of measures aiming at reducing negative spill-over effects. In particular, the commitments provide that the Bank's operations will continue to be run on a commercial basis, as explained in recitals 131 and 132. Greece has also committed to an acquisition ban, as well as to a number of divestments abroad and in non-banking activities in Greece, as set out in recital 133. Limits to distortions of competition will be further assessed in section 7.6.

(327) A monitoring trustee has also been appointed in the Bank to monitor the correct implementation of commitments on corporate governance and commercial operations. It will avoid any detrimental change in the Bank's commercial practice and thereby reduce the potential negative spill-over effects.

(328) Finally a new comprehensive restructuring plan was submitted on 16 April 2014 to the Commission. That restructuring plan will be assessed in section 7.6.

(329) To conclude, the doubts raised in the Eurobank Opening Decision have been allayed. Measures B1, B2, B3 and B4 are proportionate in the light of point 15 of the 2008 Banking Communication.

7.4.4. **Conclusion on the compliance of the HFSF recapitalisations with the 2008 Banking Communication, Recapitalisation Communication and the 2011 Prolongation Communication**

(330) The Commission thus concludes that the HFSF recapitalisations (measures B1, B2, B3 and B4) are appropriate, necessary and proportionate, in the light of point 15 of the 2008 Banking Communication, of the Recapitalisation Communication and the 2011 Prolongation Communication.

([133]) See also section 7.6.1.

([134]) The theoretical ex-right price ('TERP') is a generally accepted market methodology for quantifying the dilution effect of share capital increase.

7.5. COMPLIANCE WITH THE RESTRUCTURING COMMUNICATION OF THE PURCHASES OF NEW TT BANK AND NEA PROTON BANK BY THE BANK

(331) Points 23 and 40 of the Restructuring Communication explain that acquisitions of undertakings by aided banks are normally contrary to the obligations to limit the restructuring costs and to limit distortions of competition. In addition, they may endanger or complicate the restoration of viability. The Commission must therefore assess whether the acquisitions made by the Bank can be reconciled with the Restructuring Communication.

7.5.1. **Compliance of the acquisition of New TT Bank with the Restructuring Communication**

7.5.1.1. *Effect of the acquisition of New TT Bank on the long-term viability of the Bank*

(332) In terms of operating profitability, the acquisitions made by the Bank will enhance the Bank's return to long-term viability as merging two banks in the same geographical market gives the opportunity to realise meaningful synergies, for instance in the form of personnel reduction, branch closures and reduced overhead costs. The Bank will acquire the customers and depositors, while significantly reducing the distribution costs. It will close most of the 'T-Bank'-branded branches and some of the 'Hellenic Postbank'-branded branches, in addition to rationalising headquarters functions.

(333) In terms of liquidity positions, the transaction also has a favourable impact on the Bank's loan-to-deposit ratio, bringing it down significantly from an excessive level, since New TT Bank had significantly more deposits than loans. In particular, the Bank of Greece noted in its letter to the HFSF dated 8 July 2013 that the Bank had been under much pressure for the two years preceding the transaction. The Bank of Greece observed that the Bank had lost market shares in Greece, and that it was relying significantly on Eurosystem funding and emergency liquidity assistance. In its letter the Bank of Greece referred to the large funding gap, to the consolidated loan-to-deposit ratio of 132 % and to the deteriorated perception of the Bank by customers. In that letter the Bank of Greece indicated that the acquisition of New TT Bank by the Bank would lead to '*a substantial increase of deposits of* [the Bank], *thereby improving its overall funding profile, depositors' perception and its ability to attract new deposits at more attractive terms than currently*'.

(334) The acquisition therefore contributes to repairing the liquidity position of the Bank, which is essential to the restoration of long-term viability. The Commission acknowledged the positive impact of the acquisition in a letter from its services to the HFSF dated 8 July 2013. In that letter the Commission indicated that the draft restructuring plan of the Bank, which had been submitted by Greece prior to the acquisition of New TT Bank, did not meet the requirement of restoration of long-term viability, due to the vulnerability of the Bank's balance sheet at the end of the restructuring period. In the same letter the Commission indicated that the '*acquisition of the deposit-rich* [New TT Bank] *would be a key contributor to the repair of the balance sheet of* [the Bank] *and thereby the restoration of its long term viability*'. That assessment was justified in view of the impact of such an acquisition on the liquidity position of the Bank: '*Based on end 2012 figures, the acquisition would make* [the] *loan-to-deposit ratio drop immediately from 155 % to 123 %, such that it should be possible to meet* [the Commission's] *requirement* [at] *end 2017*'.

(335) The Commission therefore considers that the acquisition is positive for the restoration of the long-term viability of the Bank.

7.5.1.2. *Effect of the acquisition on the aid amount needed by the Bank*

(336) In line with point 23 of the Restructuring Communication, restructuring aid should not be used for the acquisition of other companies but merely to cover restructuring costs which are necessary to restore the viability of the Bank.

(337) The Bank paid the purchase price in new shares, so that the acquisition was not financed through State aid. As a result, the capital need created by the payment of the purchase price was immediately covered by the issuance of new shares so that the payment of the purchase price did not create a net increase of the capital needs of the Bank. Moreover, the HFSF was the 100 % owner of New TT Bank, which implies that all the new shares issued by the Bank were given to the HFSF, that is to say, to the State.

(338) The acquisition as such will not trigger additional State aid as New TT Bank complied with its regulatory capital requirements. In addition, that interim credit institution had been created only a few months before it was acquired. Since the assets of a failing bank are assessed and valued at fair value before they are transferred to an interim credit institution, it can be assumed that the loan book of New TT Bank did not contain losses that were hidden or were not adequately provisioned.

(339) In conclusion, in the specific circumstances of this case the acquisition of New TT Bank exceptionally does not contravene the principle that aid should be the minimum necessary.

7.5.1.3. *Distortive effect of the acquisition on competition*

(340) In line with points 39 and 40 of the Restructuring Communication, State aid should not be used to the detriment of non-aided companies for the acquisition of competing businesses. Point 41 of the Restructuring Communication also states that acquisitions may be authorised if they are part of a consolidation process necessary to restore financial stability or to ensure effective competition, that the acquisition process should be fair and that the acquisition should ensure the conditions of effective competition in the relevant market.

(341) New TT Bank was not a viable bank on a stand-alone basis. The consolidation of that bank was requested under the MEFP dated 15 May 2013. The transaction can therefore be considered to be part of a consolidation process which is necessary to restore financial stability of the kind described in point 41 of the Restructuring Communication.

(342) No non-aided bidder submitted a valid bid for acquiring New TT Bank, and the sale process was open, transparent and non-discriminatory. There was therefore no-crowding out of a non-aided bidder by the Bank. Since that acquisition was authorised by the Hellenic Competition Authority ([135]), the Commission assumes that the outcome of the sale process ensures the conditions of effective competition in Greece.

(343) Against that background, it can be concluded that the acquisition of New TT Bank is compatible with section 4 of the Restructuring Communication.

7.5.1.4. *Conclusion on the acquisition of New TT Bank*

(344) The Commission concludes that, in the light of the unique situation of Greek banks ([136]) and the specificities of the acquisition of New TT Bank, that acquisition is compatible with the requirements laid down in the Restructuring Communication.

7.5.2. **Compliance of the acquisition of Nea Proton Bank with the Restructuring Communication**

7.5.2.1. *Effect of the acquisition of Nea Proton Bank on the long-term viability of the Bank*

(345) In terms of operating profitability, the acquisition of Nea Proton Bank should enhance the return to long-term viability of the Bank as merging two companies in the same geographical market gives the opportunity to realise meaningful synergies, for instance in the form of personnel reduction, branch closures and reduced overhead costs.

(346) The acquisition of Nea Proton Bank allows the Bank to benefit from synergies. The Bank will acquire the customers and depositors while closing most of the branches and rationalising the information system as well as headquarter functions. The transaction also reduced the Bank's loan-to-deposit ratio, since Nea Proton Bank had a lower loan-to-deposit ratio. As at the end of June 2013, the Bank's ratio of net loans to deposits was around 135,79 % while Nea Proton Bank's ratio of net loans to deposits was around 52,68 %.

(347) In conclusion, the acquisition had a positive effect on the viability of the Bank.

7.5.2.2. *Effect of the acquisition of Nea Proton Bank on the amount of aid needed by the Bank*

(348) In line with point 23 of the Restructuring Communication, restructuring aid should not be used for the acquisition of other companies but merely to cover restructuring costs which are necessary to restore viability.

([135]) Decision 584/VII/2013 of Hellenic Competition Authority, not yet published.
([136]) See also section 7.6.1.

(349) The Bank paid a symbolic price to purchase Nea Proton Bank (one euro), while the acquired entity had been adequately recapitalised prior to the sale. That recapitalisation included provisions for future loan losses and operating losses ([137]). As a consequence, the acquisition for one euro of an adequately capitalised bank has not increased the capital needs of the Bank.

(350) In conclusion, the acquisition of Nea Proton Bank does not contravene the principle that aid should be limited to the minimum necessary

7.5.2.3. *Distortive effect of the acquisition of Nea Proton Bank on competition*

(351) In line with points 39 and 40 of the Restructuring Communication, State aid should not be used to the detriment of non-aided companies for the acquisition of competing businesses.

(352) Nea Proton Bank was not a viable bank on a stand-alone basis. The consolidation of that bank was requested under the MEFP dated 15 May 2013. The acquisition can therefore be considered to be part of a consolidation process which is necessary to restore financial stability of the kind described in point 41 of the Restructuring Communication.

(353) The Commission also observes that no non-aided bidder submitted a valid bid for acquiring Nea Proton Bank, and that the sale process was open, transparent and non-discriminatory. There was therefore no-crowding out of a non-aided bidder by the Bank. Since that acquisition was authorised by the Hellenic Competition Authority ([138]), the Commission assumes that the outcome of the sale process ensures the conditions of effective competition in Greece.

(354) Against that background, it can be concluded that the acquisition of New Proton Bank is compatible with section 4 of the Restructuring Communication.

7.5.2.4. *Conclusion on the acquisition of Nea Proton Bank*

(355) The Commission concludes that, in the light of the specificities of the acquisition of Nea Proton Bank, that acquisition is reconcilable with the requirements laid down in the Restructuring Communication.

7.6. COMPLIANCE OF MEASURES A, B1, B2, B3, B4 AND C WITH THE RESTRUCTURING COMMUNICATION AND OF MEASURE C WITH THE 2013 BANKING COMMUNICATION

7.6.1. **Sources of difficulties and consequences on the assessment under the Restructuring Communication**

(356) As indicated in sections 2.1.1 and 2.1.2, the difficulties faced by the Bank come mainly from the Greek sovereign crisis and the deep recession in Greece and southern Europe. As regards the former factor, the Greek government lost access to financial markets and finally had to negotiate an agreement with its domestic and international creditors, the PSI programme, which resulted in a haircut of the claims held against the State by 53,3 %. In addition, 31,5 % of the claims was exchanged for new GGBs with lower interest rates and longer maturities. Those new GGBs were bought back by the State from the Greek banks in December 2012 at a price between 30,2 % and 40,1 % of their nominal value, thereby crystalising a further loss for the Greek banks. Beside the impact on its capital position of the PSI programme and the debt buy-back, the Bank also observed huge deposit outflows between 2010 and mid-2012, due to the risk that Greece would exit the euro area as a consequence of an unsustainable public debt and the economic recession.

(357) Measures B1, B2, B3 and B4 amount to EUR 5 839 million, which is approximately the amount of the loss booked following the PSI programme (EUR 5 781 million). In such a case, and if the difficulties do not come primarily from excessive risk-taking behaviour, point 14 of the 2011 Prolongation Communication provides that the Commission will lighten its requirements.

([137]) See recital 53.
([138]) Decision 578/VII/2013 of Hellenic Competition Authority, available online at: http://www.epant.gr/img/x2/apofaseis/apofaseis715_1_1391497451.pdf

(358) The Commission acknowledges that part of the capital needs stem from regular exposure of a financial institution to the sovereign risk of its domestic country. That fact was also pointed out in recitals 58 and 69 of the Eurobank Opening Decision. As a consequence there is less need for the Bank to address moral hazard issues in its restructuring plan than for other aided financial institutions which had accumulated excessive risks. As the aid measures are less distortive, the measures taken to limit distortions of competition should therefore be proportionately softened. Since the PSI programme and the debt buy-back constitute a debt waiver in favour of the State, the remuneration of the State when recapitalising banks can be lower.

(359) However since the Greek economy has contracted by about 25 % since 2008, the Bank has to adapt its organisation, cost structure and its commercial network to that new environment, in order to restore profitability. Therefore, notwithstanding the absence of moral hazard issue, the Bank must restructure its operations in Greece to secure its long-term viability.

(360) The Commission also observes that the Bank's exposure to the Greek sovereign risk was larger than that of some other banks in Greece. As a result, not all the losses on GGBs (the loss on the PSI programme) can be attributed to the regular exposure of a financial institution to the sovereign risk of its domestic country.

(361) The second source of losses for the Bank is the losses on its loans to Greek households and corporations. The Commission considers that those losses are mainly due to the exceptionally deep and protracted GDP contraction of approximately 25 % over five years, and are not due to risky lending practices by the Bank. As a result, the aid granted to cover those losses does not create moral hazard, which is the case when aid shelters a bank from the consequences of past risky behaviours. The aid is therefore less distortive ([139]).

(362) However, part of the capital needs and loan losses of the Bank come from some international subsidiaries (Romania, Bulgaria, Poland and Ukraine). For instance in 2012, the Bank booked losses in Romania, Bulgaria and Ukraine, while those subsidiaries benefited from intragroup funding amounting to EUR 1,8 billion.

(363) The stress tests performed in 2012 to determine the capital needs of the Bank also indicated that part of the capital needs stemmed from losses on foreign loans. Credit loss projections on those loans amounted to EUR 1 228 million in the base scenario and EUR 1 622 million in the adverse scenario.

(364) In conclusion, point 14 of the 2011 Prolongation Communication covers a significant part of the losses and the resulting need for aid, which allows the Commission to lighten its requirements. Part of the need for aid stems from Greek loan losses due to the exceptionally deep and long recession and not from risky lending. Aid granted in such circumstances does not create moral hazard and is therefore less distortive.

(365) Finally, part of the need for aid comes from the Bank's own risk taking, especially as regards its foreign subsidiaries and its higher holding of GGBs.

7.6.2. **Viability**

(366) A restructuring plan must ensure that the financial institution is able to restore its long-term viability by the end of the restructuring period (section 2 of the Restructuring Communication). In the case at hand, the restructuring period is defined as the period between the date of the adoption of this Decision and 31 December 2018.

(367) In line with points 9 to 11 of the Restructuring Communication, Greece submitted a comprehensive and detailed restructuring plan which provides complete information on the Bank's business model. The plan also identifies the causes of the difficulties faced by the Bank, as well as the measures taken to tackle all viability issues which it faced. In particular, the restructuring plan describes the strategy chosen to preserve the Bank's operational efficiency and to tackle the high level of non-performing loans, low operational efficiency, its vulnerable liquidity and capital positions, and its foreign businesses, which relied on their parent company for their funding and capital.

([139]) See point 28 of the Restructuring Communication and see recital 320 of Commission Decision 2011/823/EU of 5 April 2011 on the measures C 11/09 (ex NN 53b/08, NN 2/10 and N 19/10) implemented by the Dutch State for ABN AMRO Group NV (created following the merger between Fortis Bank Nederland and ABN AMRO N) (OJ L 333, 15.12.2011, p. 1).

7.6.2.1. *Greek banking activities*

(368) As regards liquidity and the Bank's reliance on Eurosystem funding, the restructuring plan foresees a limited growth of the balance sheet in Greece while the deposit base should grow again. The reliance on ELA, which has already fallen, will continue to decrease which will also help the Bank to reduce the cost of its funding.

(369) The loan-to-deposit ratio commitment described in recital 127 ensures that the Bank's balance sheet structure will be sustainable by the end of the restructuring period. The sale of securities and of other non-core activities will also strengthen the liquidity position of the Bank and ensure it does not rely on wholesale markets. Due to the still stressed liquidity position of the Bank, the Commission can accept the request of the Greek authorities to be authorised to provide liquidity to the Bank under the guarantee and government bond loan measures of the Greek Banks Support Scheme.

(370) To decrease its funding costs, the Bank has also given a commitment to continue reducing the interest rates it pays on deposits, as described in recital 127. The Commission observes that such a decrease of the cost of deposits will be a key contribution to improving the pre-provisioning profitability of the Bank.

(371) Since the start of the crisis the Bank has significantly rationalised its commercial network in Greece, through a reduction in the number of branches and employees. By 2018, the total costs of the Bank will have decreased by a further […] % compared to 2013 ([140]). To achieve that target the Bank has committed to reduce its branches and employees in Greece to a maximum of […] and […] respectively as of 31 December 2017, with maximum total costs in Greece of EUR 800 million. The expected cost-to-income ratio will be less than […] % at the end of the restructuring period. The Commission considers that the restructuring plan preserves the efficiency of the Bank in the new market environment.

(372) One other key area is the management of non-performing loans, since they amounted to 29,4 % of the portfolio at 31 December 2013 ([141]). The Bank plans to establish a dedicated department to deal with the management of non-performing loans. It has also given a commitment to comply with high standards as regards its credit policy in order to maximise the value for the Bank at each stage of the credit process, as described in recitals 131 and 132.

7.6.2.2. *Corporate governance*

(373) Another point of attention is the governance of the Bank given that the HFSF owned 95,23 % of the Bank's shares at 31 December 2013. In the light of the track record of State-owned banks in Greece, a specific relationship framework was agreed between the Bank and the HFSF in 2013. That agreement protects the day-to-day business of the Bank from excessive interference from its main shareholder, while ensuring the HFSF can monitor the implementation of the restructuring plan and prevent excessive risk-taking by the Bank's management through appropriate consultation procedures. The Bank has also committed to monitor closely its exposure to connected borrowers.

(374) The HFSF law, as amended in 2014, provides that the shares subscribed by the HFSF in the Spring 2013 recapitalisation will become non-voting if at least 50 % of the 2014 capital increase is subscribed by private investors. As regards the restoration of the long-term viability of the Bank, the Commission would not take a negative view of the control granted to private shareholders if they invest a significant amount of own money in the Bank. The Commission observes that the limitation of the HFSF voting rights will not apply to votes related to the articles of association of the Bank or to corporate actions or other strategic decisions. The Commission notes positively the fact that the HFSF will automatically regain its full voting rights if the Bank does not implement its restructuring plan. Those provisions ensure that, while the HFSF will not intervene in the daily operations of the Bank, it can preserve its interests as shareholder and as an authority in charge of ensuring the correct implementation of the restructuring plan.

([140]) See recital 106.
([141]) 2013 Full year results, p. 3: http://www.eurobank.gr/Uploads/pdf/Eurobank_4Q2013_Financial_Results.pdf

7.6.2.3. *International activities*

(375) Some of the Bank's international activities have drained its capital, liquidity and profitability in the past, as explained in recitals 362 and 363.

(376) The restructuring plan foresees a shift in the business model of the Bank towards that of being a bank which is more focussed on […]. The Bank has already sold its non-profitable subsidiary in Poland, EFG Poland. It has also started to rationalise the other subsidiaries, to strengthen the loan underwriting process and to reduce the subsidiaries' funding gap. It is planning to divest the […] subsidiary […] ([142]). It will also further restructure the operations of the […] and […] subsidiaries before their potential sale at a later stage, as mentioned in recital 116.

(377) The overall profitability of the foreign operations will be restored from […] onwards. At the same date, the funding granted to the foreign subsidiaries will have been reduced by […] compared to the level as of 31 December 2012.

(378) Therefore the Commission believes that the Bank will have sufficiently restructured and reduced those foreign subsidiaries in size to avoid it being exposed to additional capital needs and liquidity shortages in the future. The commitment described in recital 128 to refrain from injecting large amounts of capital into the Bank's international subsidiaries also ensures that foreign subsidiaries will not represent a threat for capital or liquidity.

7.6.2.4. *Conclusion on viability*

(379) The base case scenario as described in section 2.4 shows that at the end of the restructuring period the Bank will be able to realise a return which allows it to cover all its costs and provide an appropriate return on equity taking into account its risk profile. In fact, the return on equity of the Bank will amount to […] % in 2018 according to the base scenario. At the same time, the Bank's capital position is projected to remain at a satisfactory level, since the capital adequacy ratio will not fall below […] % from 2014 onwards.

(380) Finally, the Commission also takes note of the adverse scenario described in the restructuring plan of the Bank as submitted by the Greek authorities. That adverse scenario is based on a set of assumptions agreed with the HFSF. It takes into account a longer and deeper recession, as well as a more severe deflation of real estate prices ([143]). The restructuring plan shows that the Bank is able to withstand a reasonable amount of stress as, in the adverse scenario, the Bank remains profitable at the end of the restructuring period, with a return on equity of […] % and a Core Tier One ratio of […] % in 2018.

(381) The 2013 stress tests performed by the Bank of Greece confirm that the amount of additional capital which will be raised in 2014, namely EUR 2 864 million, is sufficient to cope with the baseline scenario in the restructuring period. The Bank will also submit a contingent capital plan to the Bank of Greece with measures to be implemented if the economic environment should deteriorate further. The Commission recalls that in the assessment of the capital needs under the baseline scenario, the Bank of Greece already introduced several adjustments which resulted in an increase of the estimated capital needs compared to the capital needs estimated by the Bank in its own baseline scenario. The baseline capital needs estimated by the Bank of Greece can therefore be considered as a kind of stress test. To conclude that the Bank is viable, the Commission does not require that the Bank has enough capital upfront to cover the stressed scenario capital needs estimated by the Bank of Greece, as the latter estimated level represents a high level of stress.

(382) In addition, it is positive that the Bank will not make additional investments in non-investment grade paper, which will help to preserve its capital and liquidity position.

(383) The Commission can therefore conclude that the Bank has taken sufficient measures to address the viability issues for the Greek domestic banking activities and the foreign activities.

([142]) The […] subsidiary has been loss-making since 2009, with a small market share (less than […] % on loans and deposits), a high cost/income ratio and a significant funding gap.

([143]) The financial projections reported in the restructuring plan differ from the outcome of the stress test performed by the Bank of Greece, since the latter was not based on the same set of assumptions and factored in additional adjustments made by the Bank of Greece.

7.6.3. **Own contribution and burden-sharing**

7.6.3.1. *Assessment of the compliance of measures A, B1, B2, B3 and B4 with the Restructuring Communication*

(384) As stated in the Restructuring Communication, banks and their stakeholders need to contribute to the restructuring as much as possible in order to ensure that aid is limited to the minimum necessary. Thus banks should use their own resources to finance the restructuring, for instance by selling assets, while the stakeholders should absorb the losses of the bank where possible. The commitments made by the Bank should ensure that own resources are used and that original shareholders and private investors, holding hybrid capital of the Bank, contribute to the restructuring.

7.6.3.1.1. Own contribution by the Bank: divestments and cost cutting

(385) The Bank has divested significant businesses in order to enhance its capital adequacy. The sale of its large Polish and Turkish subsidiaries has improved its capital position by about EUR 750 million. Those sales have also improved the liquidity position of the Bank. The share capital increase of Eurobank Properties enabled the Bank to increase its capital by EUR 200 million.

(386) The restructuring plan provides for the sale of further assets in […] and […]. In particular, the Bank has given a commitment that it will reduce the size of its foreign assets to EUR 8,77 billion. Considering the deleveraging and divestments already implemented and following the implementation of this additional downsizing, the Bank will have significantly reduced its geographical footprint in […]

(387) In addition, the Bank has given a commitment that it will further reduce the size of its foreign activities if it needs a capital injection from the HFSF of more than EUR 1 billion. In such a scenario, the Bank would reduce its portfolio of international assets to no more than EUR 3,5 billion. If the capital injection under measure C is less than EUR 1 billion, private investors will have injected at least EUR 1,5 billion, that is to say more than the HFSF. That larger participation from private investors would significantly reduce the amount of aid needed, thereby enhancing the burden-sharing.

(388) The Bank has also given a commitment that it will sell its large and profitable insurance subsidiary.

(389) In order to limit its capital needs, the Bank has given a commitment that it will not use capital to support or increase the size of its foreign subsidiaries, as described in recital 128. Additionally, the commitments provide that the Bank will not make further acquisitions.

(390) The Bank has also engaged in a far-reaching cost reduction programme, as indicated in section 2.4.2. Its costs will further decrease until 2018. […]

(391) Greece has in particular committed that until […] the Bank will not pay to any employee or manager a total annual remuneration (wage, pension contribution, bonus) higher than […]. Additionally, if HFSF has to subscribe to any share of the Bank, Greece has committed to apply a salary cap in line with the 2013 Banking Communication [144].

7.6.3.1.2. Burden-sharing by historical shareholders and new capital raised on the market

(392) The existing shareholders of the Bank were heavily diluted by the Spring 2013 recapitalisation (measure B4). Indeed, the stake held by existing shareholders had been reduced from 100 % prior to the Spring 2013 recapitalisation to only 1,44 %. The Commission also notes that the Bank has paid no cash dividend since 2008. Finally the Commission takes a favourable view of the fact that the HFSF will inject additional capital only if the Bank fails to raise it from the market at a price deemed reasonable and established on the basis of two independent valuators.

(144) See footnote 85.

7.6.3.1.3. Burden-sharing by subordinated debt holders

(393) The Bank's subordinated debt holders have contributed to paying for the restructuring costs of the Bank. The Bank performed several liability management exercises in order to generate capital. The total amount of liabilities exchanged amounted to EUR 748 million, with a capital gain of EUR 565 million, as described in recitals 122 and 123.

(394) The still outstanding instruments are subject to the coupon ban described in recital 133. Therefore, the Commission considers that an adequate burden-sharing from the bank's private hybrid investors is ensured and the requirements of the Restructuring Communication in that respect are met.

(395) In conclusion, considering the elements developed in section 7.6.1, the Commission considers sufficient own contribution and burden-sharing measures have been implemented by Greece to limit the amount of aid measures A, B1, B2, B3 and B4 to the minimum necessary.

7.6.3.2. *Assessment of the compliance of measure C with the 2013 Banking Communication*

(396) The 2013 Banking Communication complements the Restructuring Communication and calls for enhanced burden-sharing and for banks obtaining capital support to undertake additional measures to limit the aid to the minimum. Point 29 of the 2013 Banking Communication requires the Member State to demonstrate that all measures to limit such aid to the minimum have been exploited to the maximum extent. To that end, the Member State must present a capital raising plan, ensure adequate burden-sharing by the shareholders and subordinated creditors, and prevent the outflow of funds prior to the restructuring decision. According to the 2013 Banking Communication, the capital raising plan should include right issues, voluntary liability management exercises, capital accretive divestments, deleveraging measures, earning retention and other measures such as, for example, strict costs and remuneration policies.

(397) Point 47 of the 2013 Banking Communication provides that once capital shortfalls are identified, a bank must prevent outflows of funds through a number of measures which aim at ensuring the same outcome as regular dividend and coupon bans, acquisition bans, price leadership bans or advertising bans. The Commission notes that such bans are already complied with by the Bank as they are included in the list of commitments submitted by Greece, as described in recital 133, and that the Bank has not paid any cash dividend since 2008.

(398) The 2014 recapitalisation commitment (measure C) provides a cushion to absorb future losses as determined by the stress test exercise performed by the Bank of Greece in 2013 and disclosed on 6 March 2014. The results of the stress test show that the Bank needs EUR 2 945 million of additional capital to cover its future losses in a stress scenario. Measure C only covers the capital need which will remain insofar as (i) it cannot be covered through further divestments or capital enhancement measures (the Commission considers that the Bank has analysed all potential divestments and committed to all those which can reduce the capital needs in the framework of the capital plan submitted to the Bank of Greece) and (ii) it is not covered by private investors in the framework of the share capital increase which will take place in April 2014. Therefore it does not provide the Bank with any excess capital.

(399) As explained in recitals 385 to 395, the Bank has already taken actions before the stress test to limit the amount of capital needed to the minimum. If, in the framework of the current capital raising exercise, the Bank manages to raise most of the capital needed from private investors and the additional aid paid out by the HFSF remains below EUR 1 billion, no further own contribution by the Bank will be necessary. However, if the aid paid out under measure C is above that level, it would be appropriate for the Bank to divest more activities.

(400) As regards burden-sharing, the 2013 Banking Communication provides that adequate burden-sharing entails contributions by shareholders, hybrid capital holders and subordinated debt holders before aid in the form of capital support is granted. The Commission notes that Greece has amended its national legislative framework to ensure that subordinated creditors will contribute to the costs of restructuring of the Bank before any additional capital is injected into the Bank. The Commission also notes that Greece has given a commitment that it will

implement the measures provided for in Article 6a of the HFSF law as amended in 2014, which provide for the allocation of the capital shortfall to the holders of its capital instruments and other subordinated liabilities as may be necessary. While such burden-sharing will only take place after the date of the 2014 recapitalisation commitment (measure C), on the basis of point 45 of the 2013 Banking Communication the Commission considers disproportionate results would follow if mandatory conversion of subordinated debt and hybrid capital had to occur already at the moment of the commitment. If the Bank were to raise sufficient private capital to cover all of its capital need as determined by the stress test performed by the Bank of Greece, the conversion of subordinated debt holders would be disproportionate. The commitment by Greece to bail-in subordinated creditors before any capital support is actually paid out to the Bank is therefore sufficient to ensure proper burden-sharing.

(401) Moreover, in order to ensure that the owners of the Bank participate to the maximum extent in the reconstitution of an adequate capital basis over the restructuring period, Greece gave a commitment that, until the end of the restructuring period, the Bank will retain dividends and not pay any coupons which it is not under law obliged to pay. Thereby, in line with point 26 of the Restructuring Communication and point 47 of the 2013 Banking Communication the Bank will not use State aid to make payments on own funds if there are insufficient profits to make such payments.

(402) The Bank has also committed that until 31 December 2017 the Bank will not pay to any employee or manager a total annual remuneration (wage, pension contribution, bonus) higher than the total annual remuneration of the Governor of the Bank of Greece (not taking into account any voluntary partial waiver of remuneration by the Governor). Additionally, in case HFSF has to subscribe to any share of the Bank, Greece has committed to apply a salary cap in line with the 2013 Banking Communication ([145]).

(403) The Commission has to assess whether that commitment covering two scenarios fulfils the requirements laid down in the 2013 Banking Communication.

(404) In the first scenario where the HFSF does not actually inject new capital into the Bank, the aid enshrined in measure C will be limited to a mere underwriting commitment of a capital increase, and the HFSF will not disburse a single euro since all the new shares will have been subscribed by private investors. The 2013 Banking Communication provides that the remuneration limitation can end when the aid has been repaid. However, the aid included in such an underwriting commitment in relation to a prospective capital increase cannot be repaid where the commitment in question is never put into effect (since no money was ever disbursed by the State to the Bank). In such circumstances, the Commission can accept that the remuneration limitation applies for a fixed period of time. The Commission considers that the commitment made by Greece, which lasts until 31 December 2017 (i.e. for three years and eight months, ending one year before the end of the restructuring plan) is a correct application of the last paragraph of point 38 of the 2013 Banking Communication. Because the annual remuneration of the Governor of the Bank of Greece is lower than the cap set in the second paragraph of point 38 of the 2013 Banking Communication, and because that commitment will apply to the entire group, the Commission then considers that the commitment proposed by Greece for the case where no share is subscribed by the HFSF in the framework of the planned capital increase is in line with point 38 of the 2013 Banking Communication.

(405) In the second scenario where the HFSF would have to subscribe any share of the bank, Greece committed to amend the commitment to put it in line with the 2013 Banking Communication. The Commission notes that, if the HFSF would subscribe any share, to remain in line with the 2013 Banking Communication, the duration of the remuneration cap would be amended, to last until the earlier of the end of the restructuring plan — 31 December 2018 — or a transaction equivalent to the repayment of the aid. Since ordinary shares cannot be repaid by the Bank, the Commission accepts that a sale of the shares on the secondary market at a profit could be considered equivalent to a repayment of the aid.

(406) In conclusion, in both scenarios, the commitment on limitation of remuneration issued by Greece complies with the requirements of the 2013 Banking Communication.

(407) As regards the remuneration of the State, the 2011 Prolongation Communication requires that new shares are issued at a discount to market price, after adjustment for dilution. The Commission observes that the purpose of that requirement is to ensure that the State receives a sufficient remuneration for its shareholding in the Bank and that the historical shareholders are correspondingly diluted. In the case of measure C, the State is already the main shareholder of the Bank, holding more than 90 % of the shares. Therefore an excessive discount to market price

([145]) See footnote 85.

would decrease the remuneration of the State on measure B4, and may entail aid to the investors if the discount underestimates the value of the Bank. In order to avoid such a situation, the subscription price cannot be lower than a floor price determined on the basis of two appraisals from independent valuators. Therefore the detailed arrangements of the price determination protect the HFSF from an excessive dilution by the new investors, while ensuring the HFSF subscribes new shares at a price which reflects the value of the Bank. In those circumstances, the Commission can accept that the new shares may be issued at a lower discount to current market price than that envisaged by the 2011 Prolongation Communication and it considers the floor price to be acceptable.

(408) If the shares were issued at a higher price, it would have risked discouraging private investors from participating in the share capital increase and consequently would have limited private capital raising.

(409) Therefore, the Commission considers the level of own contribution and burden-sharing to be appropriate for measure C.

7.6.3.3. *Conclusion on own contribution and burden-sharing*

(410) The Commission observes that, in comparison with the total State recapitalisation received, the own contribution and burden-sharing in the form of sale of assets is much lower than the levels the Commission would usually consider as sufficient. However, in view of the elements developed in section 7.6.1, under which the Commission can accept a lower own contribution and burden-sharing, the restructuring plan can be considered as providing for sufficient own contribution and burden-sharing measures.

(411) The restructuring plan also complies with the requirements of the 2013 Banking Communication as regards measure C.

7.6.4. **Measures to limit distortions of competition**

(412) The Restructuring Communication requires a restructuring plan to propose measures limiting distortions of competition and ensuring a competitive banking sector. Moreover, those measures should also address moral hazard issues and ensure that State aid is not used to fund anti-competitive behaviour.

(413) Point 31 of the Restructuring Communication states that when assessing the amount of aid and the resulting competition distortions, the Commission has to take into account both the absolute and relative amount of the State aid received as well as the degree of burden-sharing and the position of the financial institution on the market after the restructuring. In that respect, the Commission recalls that the Bank has received capital from the State equivalent to 16 % of its RWA (excluding measure C). With measure C, the Bank gets a commitment to inject an additional EUR 2 864 billion, bringing the total capital aid to 23,7 % of the Bank's RWA. Apart from capital support, the Bank has also received liquidity support. The Bank has obtained liquidity guarantees that amounted to EUR 13 600 million as of 15 April 2011 and to EUR 13 932 million as of 30 November 2013, representing 17 % of the Bank's balance sheet at the same date. The Bank also benefited from State-guaranteed ELA for an amount of EUR 12 billion as of 31 December 2012, which represented 18 % of the balance sheet of the Bank on that date. The need to implement measures to limit potential distortions of competition is thus justified in view of that relatively large amount of aid. In additional, the market share of the Bank in Greece is large, with market shares of 17 % for loans and 12 % for deposits at 31 December 2012. The acquisitions of New TT Bank and Nea Proton Bank increased the market shares of the Bank to 20,7 % for loans and 18,8 % for deposits in September 2013 ([146]).

(414) The Commission recalls that the difficulties of the Bank come mainly from external shocks such as the Greek sovereign crisis and the protracted recession which has disrupted the Greek economy since 2008, as was noted in recital 69 of the Eurobank Opening Decision. The need to address moral hazard issues is reduced as the Bank does not seem to have taken excessive risks. As discussed in section 7.6.1, the distortive effect of the aid measures is lower in the light of those factors and so is the need for measures to limit distortions of completion. For those reasons, the Commission can exceptionally accept that, in spite of the high aid amount, the restructuring plan does not envisage any downsizing of the balance sheet and loans in Greece.

(415) However, the Commission notes that the State recapitalisations enabled the Bank to continue its banking activities in foreign markets and its insurance activities in Greece.

([146]) Restructuring plan, p. 14.

(416) In that respect, the Commission notes, in addition to the deleveraging and restructuring already implemented, the Bank's commitment to sell its insurance activities by […] as well as its commitment to reduce the size of its international assets by 31 December 2018, which will probably entail further divestments in […] and […], and its commitment not to use aid to fund the growth of those businesses. The Commission finds it proportionate that the reduction of foreign assets be deeper if, under measure C, the HFSF pays the Bank additional capital aid of more than EUR 1 billion. As indicated in recital 295, such a payment would make the aid more distortive than a mere commitment to participate in the capital increase. However, if the additional capital injected is less than EUR 1 billion, it would entail a larger participation of at least EUR 1,5 billion from private investors. Additionally, the larger private participation would constitute additional burden-sharing, as explained in recital 388. Point 31 of the Restructuring Communication states that both the price paid for assistance obtained from the State and the degree of burden-sharing will be taken into account when assessing burden-sharing measures. Therefore additional distortions of competition will remain limited if the HFSF injects less than EUR 1 billion.

(417) Greece has also committed to an acquisition ban, ensuring that the Bank will not use the State aid received to acquire any new business. That ban contributes to ensuring that the aid is strictly used to support the restoration of the viability of the Greek banking activities and not to grow, for instance, in foreign markets.

(418) The commitment to decrease the interest paid on Greek deposits from unsustainably high levels also ensures that the aid will not be used to finance unsustainable deposit collection strategies which distort competition on the Greek market. Similarly, the commitment to implement strict guidelines as regards the pricing of new loans, based on a proper credit risk assessment, will prevent the Bank from distorting competition on the Greek market with inappropriate pricing strategies on loans to customers.

(419) Taking into account the specific situation described in section 7.6.1 and the measures provided for in the restructuring plan, the Commission considers there are sufficient safeguards to limit distortions of competition.

7.7. MONITORING

(420) Pursuant to section 5 of the Restructuring Communication, regular reports are required to allow the Commission to verify that the restructuring plan is being implemented properly. As stated in the commitments ([147]), Greece will ensure that the Monitoring Trustee, which has already been appointed by the Bank with the approval of the Commission, will monitor the commitments undertaken by Greece on the restructuring of activities in Greece and abroad and on corporate governance and commercial operations. The Commission therefore finds that proper monitoring of the implementation of the restructuring plan is ensured.

8. **CONCLUSION**

(421) The Commission finds that Greece has unlawfully implemented aid measures SA.34825 (2012/C), SA.34825 (2014/N), SA.36006 (2013/NN), SA.34488 (2012/C, ex 2012/NN) SA.31155 (2013/C) (2013/NN) in breach of Article 108(3) of the Treaty on the Functioning of the European Union, since they were implemented before their formal notification. However the Commission finds that the restructuring plan when taken together with the commitments in the Annexes ensures the restoration of long-term viability of the Bank, is sufficient with respect to burden-sharing and own contribution, and is appropriate and proportional to offset the competition distorting effects of the aid measures examined in this Decision. The restructuring plan and commitments submitted fulfil the criteria of the Restructuring Communication and the aid measures can therefore be considered compatible with the internal market,

HAS ADOPTED THIS DECISION:

Article 1

1. The following measures implemented or planned by Greece constitute State aid within the meaning of Article 107(1) of the Treaty:

(a) the emergency liquidity assistance provided to Eurobank Ergasias SA. ('Eurobank') by the Bank of Greece and guaranteed by Hellenic Republic (measure L2);

([147]) See recital 134.

(b) the second bridge recapitalisation of EUR 1 341 million granted by the Hellenic Financial Stability Fund ('HFSF') to Eurobank in December 2012 (measure B2);

(c) the commitment letter of EUR 528 million granted by the HFSF to Eurobank on 21 December 2012 (measure B3);

(d) the recapitalisation of EUR 5 839 million granted by the HFSF to Eurobank in May 2013 (measure B4);

(e) the recapitalisation commitment of EUR 2 864 million granted by the HFSF following the EUR 2 864 million share capital increase approved by the extraordinary meeting of shareholders on 12 April 2014 under the HFSL law 3864/2010 as amended (measure C);

(f) the capital injection of EUR 395 million granted by the HFSF to Nea Proton Bank on 28 August 2013 (measure NP3).

2. In the light of the restructuring plan relating to the Eurobank Group (Eurobank Ergasias S.A and all its subsidiaries (Greek and non-Greek subsidiaries and branches, both banking and non-banking).submitted on 16 April 2014 and the commitments provided by Greece on 16 April 2014, the following State aid is compatible with the internal market:

(a) the capital injection of EUR 950 million granted by Greece to Eurobank in May 2009 under the Recapitalisation Scheme (measure A);

(b) the emergency liquidity assistance provided to Eurobank by the Bank of Greece and guaranteed by Greece since July 2011, for an amount of EUR 12 billion as of 31 December 2012 (measure L2);

(c) the first bridge recapitalisation of EUR 3 970 million granted by the HFSF to Eurobank in May 2012 (measure B1);

(d) the second bridge recapitalisation of EUR 1 341 million granted by the HFSF to Eurobank in December 2012 (measure B2);

(e) the commitment letter of EUR 528 million granted by the HFSF to Eurobank on 21 December 2012 (measure B3);

(f) the recapitalisation of EUR 5 839 million granted by the HFSF to Eurobank in May 2013 (measure B4);

(g) the recapitalisation commitment of EUR 2 864 million granted by the HFSF to Eurobank following the EUR 2 864 million share capital increase approved by the extraordinary meeting of shareholders on 12 April 2014 under the HFSL law 3864/2010 as amended (measure C);

(h) the capital injection of EUR 80 million granted by Greece to Proton Bank in May 2009 (measure Pr1);

(i) the financing of the total funding gap of EUR 1 121,6 million by the Hellenic Deposit and Investment Guarantee Fund (HDIGF) and the HFSF to the activities transferred from Proton Bank to Nea Proton Bank, in October 2011 and May 2012 (measure NP1);

(j) the total capital injection of EUR 515 million granted by the HFSF to Nea Proton Bank in October 2011, February 2012, August 2012 and December 2012 (measure NP2);

(k) the capital injection of EUR 395 million granted by the HFSF to Nea Proton Bank on 28 August 2013 (measure NP3);

(l) the financing of the total funding gap of EUR 677 million by the HDIGF and the HFSF to activities which were transferred from T Bank to Hellenic Postbank ('TT Bank'), in December 2011 and February 2013 (measure T);

(m) the capital injection of EUR 224,96 million granted by Greece to TT Bank in May 2009 (measure TT);

(n) the financing of the total funding gap of EUR 3 732,6 million by the HFSF to the activities transferred from TT Bank to New Hellenic Postbank ('New TT Bank'), in January and June 2013 (measure NTT1);

(o) The capital injection of EUR 500 million granted by the HFSF to New TT Bank on 29 January 2013 (measure NTT2).

Article 2

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 29 April 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

EUROBANK — COMMITMENTS BY THE HELLENIC REPUBLIC

The Hellenic Republic shall ensure that **the Bank** is implementing the restructuring plan submitted on 16 April 2014. The restructuring plan is based on macroeconomic assumptions as provided by the European Commission (the 'Commission') in Appendix as well as regulatory assumptions.

The Hellenic Republic hereby provides the following Commitments (the '**Commitments**') which are integral part of the restructuring plan. The Commitments include the commitments regarding to the implementation of the restructuring plan (the '**Restructuring Commitments**') and the **Commitments on Corporate Governance and Commercial Operations.**

The Commitments shall take effect upon the date of adoption of the Commission's decision approving the restructuring plan (the 'Decision').

The restructuring period shall end on 31 December 2018. The Commitments apply throughout the restructuring period unless the individual Commitment states otherwise.

This text shall be interpreted in the light of the Decision in the general framework of Union law, and by reference to Council Regulation (EC) No 659/99.

CHAPTER I

DEFINITIONS

For the purpose of the Commitments, the following terms shall mean:

(1) **Bank:** Eurobank Ergasias S.A. and all its subsidiaries. Therefore, it includes the entire Eurobank Group with all its Greek and non-Greek subsidiaries and branches, both banking and non-banking.

(2) **Capital accretive bid in the banking sector:** a bid which results in an increase in the regulatory capital ratio of the Bank, taking into account all relevant elements, in particular the profit/loss booked on the transaction and the reduction of RWA resulting from the sale (if necessary corrected for the increase of RWA resulting from remaining financing links).

(3) **Capital accretive bid in the insurance sector:** a bid which results in an increase in the regulatory capital ratio of the Bank. Any bid above the book value of the insurance activity in the account of the Bank is automatically assumed to be capital accretive.

(4) **Closing:** the date of transfer of the legal title of the Divestment Business to the Purchaser.

(5) **Divestment Business:** all the businesses and assets that the Bank commits to sell.

(6) **Effective Date:** the date of adoption of the Decision.

(7) **End of restructuring period:** 31 December 2018.

(8) **Foreign assets or non-Greek assets:** assets related to the activities of customers outside Greece, independently of the country where the assets are booked. For instance, assets booked in Luxembourg but related to the activities of customers in Greece are not included in the scope of this definition. Conversely, assets booked in Luxembourg or Greece but related to the activities of customers in other SEE countries are considered as foreign assets and are included in the scope of this definition.

(9) **Foreign businesses:** foreign banking and non-banking subsidiaries and branches of the Bank.

(10) **Foreign subsidiaries:** all banking and non-banking subsidiaries of the Bank outside Greece.

(11) **Greek banking activities:** the Bank's Greek banking activities independently from where the assets are booked.

(12) **Greek non-banking activities:** the Bank's Greek non-banking activities independently from where the assets are booked.

(13) **Greek subsidiaries:** all Greek banking and non-banking subsidiaries of the Bank.

(14) **Monitoring Trustee:** one or more natural or legal person(s), independent from the Bank, approved by the Commission and appointed by the Bank; the Monitoring Trustee has the duty to monitor the Bank's compliance with the Commitments.

(15) **Purchaser:** one or more natural or legal person(s) to acquire, in whole or in part, the Divestment Business.

(16) **Sale:** the sale of 100 % of the shareholding held by the Bank, unless the individual Commitment states otherwise.

For the purpose of the Commitments, the singular of those terms shall include the plural (and vice versa), unless the Commitments provide otherwise.

CHAPTER II

RESTRUCTURING COMMITMENTS

(1) **Number of branches in Greece:** The number of branches in Greece shall amount to […] at the maximum on 31 December 2017.

(2) **Number of employees in Greece:** The number of Full Time Equivalents (the 'FTEs') in Greece (Greek banking and non-banking activities) shall amount to […] at the maximum on 31 December 2017.

(3) **Total costs in Greece:** The total costs in Greece (Greek banking and non-banking activities) shall amount to EUR 800 million at the maximum on 31 December 2017.

(4) **Costs of deposits in Greece:** In order to restore its pre-provisioning profitability on the Greek market, the Bank shall decrease the cost of funding through the decrease of cost of deposits collected in Greece (including savings, sight and term deposits, and other similar products offered to customers and which costs are borne by the Bank) […].

(5) **Ratio net loans to deposits in Greece:** For the Greek banking activities, the ratio net loans to deposits shall amount at the maximum to 115 % on 31 December 2017. […]

(6) **Support to foreign subsidiaries:** For each foreign subsidiary, cumulatively from the Effective Date until 30 June 2018, the Bank shall not provide additional equity or subordinated capital for an amount larger than the higher of (i) […] % of the RWA of that subsidiary on 31 December 2012 or (ii) EUR […] million. If the Bank intends to inject equity or subordinated debt to the foreign subsidiary for an amount higher than the defined threshold, it must request the Greek Authorities to seek a Commission decision to amend the restructuring plan.

[…]

(a) […]

(b) […].

(c) […]

(d) […]

(e) […]

[…]

(7) **Deleverage of non-Greek assets by 30 June 2018:** The total size of the portfolio of foreign assets shall be reduced to a maximum amount of EUR 8,77 billion by 30 June 2018.

(7.1) If the Bank receives an additional aid larger than EUR 1 billion and lower than the notified aid amount, then the total size of the portfolio of foreign assets shall be reduced to a maximum amount of EUR 3,5 billion by 30 June 2018. If the sale of foreign businesses is used to reach that target, the closing of each sale shall not be later than 31 December 2018.

(7.2) […]

(7.3) […]

(8) **Sale of insurance activities:** The sale of the insurance activities (life and non-life) shall be completed (i.e. closed) by […]. […]

The Bank and its advisers shall invite potential buyers to submit a bid for a minimum 80 % shareholding and the Bank shall indicate its willingness to enter into a bank assurance partnership agreement, offering its distribution network, and to retain up to 20 % minority stake.

(9) **Sale of Real Estate subsidiary:** The Bank shall reduce its participation to 20 % in Eurobank Properties REIC by 31 December 2016. […]

(10) **Sale of equity investments, subordinated bonds and hybrid bonds:** The book value of the Bank's (excluding the regulated insurance subsidiaries) portfolio of securities defined as follows, shall be lower than EUR 35 million by 31 December 2015. […]

(11) For any sale, the Hellenic Republic commits that:

(a) The Purchaser shall be independent of and unconnected to the Bank;

(b) For the purpose of acquiring the Divestment Business, the Purchaser shall not be financed directly or indirectly by the Bank;

(c) The Bank shall, for a period of 5 years after the closing of the sale, not acquire direct or indirect influence over the whole or part of the Divestment Business without a pre-approval from the Commission.

(12) **Investment policy:** Until 31 December 2017, the Bank shall not purchase non-investment grade securities.

[…]

(13) **Salary cap:** Until […], the Bank will not pay to any employee or manager a total annual remuneration (wage, pension contribution, bonus) higher than […]. In case of a capital injection from HFSF, the remuneration cap will be re-evaluated according to the European Banking Communication of 1 August 2013.

CHAPTER III

COMMITMENTS ON CORPORATE GOVERNANCE AND COMMERCIAL OPERATIONS — PROLONGATION AND AMENDMENTS

(1) The Bank shall continue to implement the Commitments on Corporate Governance and Commercial Operations, as submitted by the Hellenic Republic on 20 November 2012, with the subsequent amendments provided in Chapter III of the Commitments, until 30 June 2018. Regarding Eurobank Properties REIC, the Commitments provided in Chapter III, Section A (4) (i.e. compliance with the HFSF Relationship Framework), Section C (paragraph (27)) (Dividend, Coupon, Repurchase, Call and Buy Back ban), Section C (paragraph (28)) (Acquisition ban), as well as Chapter IV (Monitoring Trustee), shall cease to apply to the subsidiary from the moment the shareholding of the Bank in Eurobank Properties REIC is reduced below […] %.

(2) In case an individual Commitment does not apply at the Bank's level, the Bank shall not use the subsidiaries or activities not covered by that individual Commitment to circumvent the Commitment.

Section A

Setting up an efficient and adequate internal organisation

(3) The Bank, excluding its foreign subsidiaries, shall abide at all times with the totality of the provisions of law 3016/2002 on Corporate Governance and law 2190/1920 on the Sociétés Anonymes and especially the provisions in connection to the functions of corporate bodies such as the shareholders' meeting and Board of Directors in order to secure a clear distribution of responsibilities and transparency. The powers of the shareholders' meeting shall be restricted to the tasks of a general meeting in line with company law, in particular as regards rights related to information. More extensive powers, which would allow improper influence on management, shall be rescinded. Responsibility for day-to-day operational management shall clearly rest with the executive Directors of the Bank.

(4) The Bank, excluding its foreign subsidiaries, shall comply at all times with the Hellenic Financial Stability Fund (the 'HFSF') Relationship Framework.

(5) The Bank shall abide by the provisions of Governor's Act 2577/9.3.2006, as in force, in order to maintain, on an individual and a group basis, an effective organisational structure and an adequate Internal Control System including the three key pillars, namely the Internal Audit, Risk Management and Compliance functions and best international corporate governance practices.

(6) The Bank shall have an efficient organisational structure, so as to ensure that the Internal Audit and the Risk Management departments are fully independent from commercial networks and report directly to the Board of Directors. An Audit Committee and a Risk Committee — created within the Board of Directors — shall assess all issues raised by those respective departments. An adequate Internal Audit Charter and Risk Management Charter shall specify the roles, responsibilities and resources of those departments. Those charters shall comply with international standards and secure a full independence to the departments. A Credit Policy shall provide guidance and instructions regarding the granting of loans, including the pricing of loans and the restructuring of loans.

(7) The Bank shall make public to the competent authorities the list of shareholders holding at least 1 % of ordinary shares.

Section B

Commercial practices and risk monitoring

General principles

(8) The Credit Policy shall specify that all customers shall be treated fairly through non-discriminatory procedures other than those related to credit risk and ability to pay. The Credit Policy defines the thresholds above which the granting of loans must be approved by higher levels of management. Similar thresholds shall be defined regarding the restructuring of loans and the handling of claims and litigations. The Credit Policy shall centralise in selected centres the decision-making process at national level, and provide clear safeguards to ensure a consistent implementation of its instructions within all the Greek banking activities.

(9) For all the Greek banking activities, the Bank shall fully incorporate the Credit Policy rules in their loan origination and loan refinancing workflow and disbursement systems.

Specific provisions

(10) The specific provisions listed in paragraphs (8) to (18) of Chapter III of the Commitments shall apply to the Greek banking activities, unless explicitly stated otherwise

(11) The Credit Policy shall require that the pricing of loans and mortgages to comply with strict guidelines. Those guidelines shall include the obligation to respect strictly the credit policy's standard tables of interest rate bands (ranges) depending on the maturity of the loan, the credit risk assessment of the customer, the expected recoverability of pledged collateral (including the time frame to a potential liquidation), the overall relationship with the Bank (e.g. level and stability of deposits, fee structure and other cross-sales activities) and the funding cost of the Bank. Specific loan asset classes are generated (e.g. commercial loan, mortgage, secured/unsecured, etc.) and their pricing framework is tabulated to an appropriate Credit Policy table that shall be updated on a regular basis by the Credit Committee. Any exception must be duly authorised by the Credit Committee, or at lower level of authority when allowed by the Credit Policy. Tailor-made transactions such as syndicated loans or project finance shall respect the same principles, with due account being taken of the fact that they may not fit in standardised credit policy tables. Infringements of that pricing policy shall be reported to the Monitoring Trustee.

(12) The Risk Management Department shall be responsible for the assessment of credit risk and the valuation of collateral. When assessing the loan quality, the Risk Management Department shall act independently, providing its written opinion so as to ensure that criteria used in the assessment are applied consistently over time and among customers and in respect of the Bank's credit policy.

(13) Regarding loans to individuals and legal entities, for all the Greek banking activities, on the basis of the best international practices, the Bank shall apply strict individual and aggregated limits governing the maximum loan amount that can be granted to a single credit risk (if at all allowed under Greek and EU law). Those limits shall take into account the maturity of the loan and the quality of any collateral/security provided and shall be set against key benchmarks including against capital.

(14) Granting loans [1] to enable borrowers to purchase shares or hybrid instruments of the Bank and other banks [2] shall be prohibited, whoever are those borrowers [3]. This provision shall apply and shall be monitored at the Bank's level.

(15) All loan requests by non-connected borrowers greater than [[…] % of the Bank's RWA] or any loan which keeps the exposure to one group (defined as a group of connected borrowers that represent a single credit risk) higher than [[…] % of the Bank's RWA] shall be reported to the Monitoring Trustee, which may, if the conditions do not appear to be set at arm's-length or if no sufficient information has been provided to the Monitoring Trustee, postpone the granting of the credit line or the loan by […] working days. In emergency cases, that period may be reduced to […] working days provided sufficient information has been provided to the Monitoring Trustee. That period will enable the Monitoring Trustee to report the case to the Commission and the HFSF before any definitive decision is taken by the Bank.

(16) The Credit Policy shall give clear instructions on the restructuring of loans. It clearly defines which loans are eligible, under which circumstances, and indicates the terms and conditions that can be proposed to eligible customers. For all the Greek banking activities, the Bank shall ensure that all restructurings aim at enhancing the future recoveries by the Bank, thus safeguarding the interest of the Bank. In no case the restructuring policy will jeopardise the future profitability of the Bank. For that purpose, the Bank's Risk Management Department shall be responsible for developing and deploying adequate restructuring effectiveness reporting mechanisms, for performing in-depth analyses of internal and/or external best practices, reporting its findings at least on a quarterly basis to the Credit Committee and the Board Risk Committee, suggesting actionable improvements to the processes and policies involved and oversee and reporting on their implementation to the Credit Committee and the Board Risk Committee.

(17) For all the Greek banking activities, the Bank shall enact a claim and litigation policy aiming at maximising recovery and preventing any discrimination or preferential treatment in the management of litigations. The Bank shall ensure that all necessary actions are taken to maximise the recoveries for the Bank and protect its financial position in the long-term. Any breach in the implementation of that policy shall be reported to the Monitoring Trustee.

(1) For the purpose of that Commitment, the term 'loans' shall be interpreted *largo sensu*, as any kind of financing, e.g. credit facility, guarantee, etc.
(2) For clarification, 'other banks' refer to any bank — financial institution in the world.
(3) For clarification, all borrowers, including the Bank's private banking clients are covered by that Commitment.

(18) The Bank shall monitor credit risk through a well-developed set of alerts and reports, which enable the Risk Management Department to: (i) identify early signals of loan impairment and default events; (ii) assess recoverability of the loan portfolio (including but not limited to alternative repayment sources such as co-debtors and guarantors as well as collateral pledged or available but not pledged); (iii) assess the overall exposure of the Bank on an individual customer or on a portfolio basis; and (iv) propose corrective and improvement actions to the Board of Directors as necessary. The Monitoring Trustee shall be given access to that information.

Provisions applying to connected borrowers

(19) All the provisions applying on connected borrowers shall apply at the Bank's level.

(20) Within the Credit Policy, a specific section shall be devoted to the rules governing relations with connected borrowers. Connected borrowers include employees, shareholders, directors, managers, as well as their spouses, children and siblings and any legal entity directly or indirectly controlled by key-employees (i.e. employees involved in the decision-making process of the Credit Policy), shareholders, directors or managers or their spouses, children and siblings. By extension, any public institution or government-controlled organisation, any public company or government agency shall be considered as a connected borrower. Political parties shall also be treated as connected borrowers in the Credit Policy. Particular focus shall be on decisions regarding any restructuring and write downs of loans to current or former employees, directors, shareholders, managers and their relatives as well as policies followed in the appropriateness, valuation, registration of liens and foreclosure of loan collateral. The definition of connected borrowers has been further specified in a separate document.

(21) The Risk Management Department shall be responsible for the mapping of all connected groups of borrowers that represent a single credit risk with a view to properly monitoring credit risk concentration.

(22) Regarding loans to individuals and legal entities, the Bank, on the basis of the best international practices, applies strict individual and aggregated limits governing the maximum loan amount that can be granted to a single credit risk which relates to connected borrowers (if at all allowed under Greek and EU law).

(23) The Bank shall monitor separately its exposure to connected borrowers including the public sector entities and political parties. The new production of loans ([4]) to connected borrowers (annual % of Y-1 stock ([5])) shall be no higher than the new production of the total loan portfolio in Greece (annual % of Y-1 stock). That Commitment shall be complied with separately for each type of connected borrower (employees, shareholder, managers, public entities, political party). The credit assessment of the connected borrowers, as well as the pricing conditions and possible restructuring offered to them, shall not be more advantageous compared to conditions offered to similar but unconnected borrowers, in order to secure a level-playing field in the Greek economy. That obligation does not apply to existing general schemes benefiting employees, offering them subsidised loans. The Bank shall report every month about the evolution of that exposure, the amount of the new production and the recent requests greater than [[…] % of the Bank's RWA] to be addressed at the Credit committee.

(24) The credit criteria applied to employees/managers/shareholders shall be no less strict than those applied to other, non-connected borrowers. If the total credit exposure to a single employee/manager/shareholder exceeds an amount equal to a [[…]] fixed salary for secured loans and an amount equal to a [[…]] fixed salary for unsecured loans, the exposure shall be reported promptly to the Monitoring Trustee who may intervene and postpone the granting of the loan pursuant to the procedure described in paragraph (25) of Chapter III of the Commitments.

(25) All loan requests by connected borrowers greater than [[…] % of the Bank's RWA] or any loan which keeps the exposure to one group (defined as a group of connected borrowers that represent a single credit risk) higher than [[…] % of the Bank's RWA] shall be reported to the Monitoring Trustee, which may, if the conditions do not appear to be set at arm's-length or if no sufficient information has been provided to the Monitoring Trustee, postpone the granting of the credit line or the loan by […] working days. In emergency cases, that period may be reduced to […] working days provided sufficient information has been provided to the Monitoring Trustee. That period will enable the Monitoring Trustee to report the case to the Commission and the HFSF before any definitive decision is taken by the Bank.

([4]) For clarification, the new production of loans covers also the rolling over of loans and the restructuring of existing loans.
([5]) For clarification, 'annual % of Y-1 stock' refers to the new production as a percentage of the stock at the end of the previous year. The amount of RWA is the one at the end of the year.

(26) The restructuring of loans involving connected borrowers shall comply with the same requirements as for non-connected borrowers. Furthermore, established frameworks and policies to deal with troubled assets shall be assessed and improved, if necessary. However, it is expected that restructured loans of connected borrowers shall be reported separately, at least per loan asset class and connected borrower type.

Section C

Other restrictions

(27) **Dividend, Coupon, Repurchase, Call and Buy Back ban:** Unless the Commission otherwise agrees to an exemption, the Hellenic Republic commits that:

(a) The Bank shall not pay any coupons on hybrid capital instruments (or any other instruments for which the coupon payment is discretionary) or dividends on own funds instruments and subordinated debt instruments other than where there is a legal obligation to do so. The Bank shall not release reserves to put itself in such a position. In case of doubt as to whether, for the purpose of the present Commitment, a legal obligation exists, the Bank shall submit the proposed coupon or dividend payment to the Commission for approval;

(b) The Bank shall not repurchase any of its own shares or exercise a call option in respect of those own funds instruments and subordinated debt instruments;

(c) The Bank shall not buy back hybrid capital instruments.

(28) **Acquisition ban:** The Hellenic Republic commits that the Bank shall not acquire any stake in any undertaking, be it an asset or share transfer. That ban on acquisitions covers both undertaking which have the legal form of a company and any package of assets which forms a business ([6]).

(i) **Exemption requiring Commission's prior approval:** Notwithstanding that prohibition, the Bank may, after obtaining the Commission's approval, and, where appropriate, on a proposal of the HFSF, acquire businesses and undertakings if it is in exceptional circumstances necessary to restore financial stability or to ensure effective competition.

(ii) **Exemption not requiring Commission's prior approval:** The Bank may acquire stakes in undertakings provided that:

(a) The purchase price paid by the Bank for any acquisition is less than [[…] %] of the balance sheet size ([7]) of the Bank at the Effective Date of the Commitments ([8]); and

(b) The cumulative purchase prices paid by the Bank for all such acquisitions starting with the Effective Date of the Commitments until the end of the restructuring period, is less than [[…] %] of the balance sheet size of the Bank at the Effective Date of the Commitments.

(iii) **Activities not falling under the acquisition ban:** The acquisition ban shall not cover acquisitions that take place in the ordinary course of the banking business in the management of existing claims towards ailing firms.

(29) **Advertising ban:** The Hellenic Republic commits that the Bank shall refrain from advertising referring to state support and from employing any aggressive commercial strategies which would not take place without the support of the Hellenic Republic.

([6]) For clarification, for the purpose of that Commitment, the Bank's Private Equity/Venture Capital business shall be excluded from the scope of that Commitment. In that respect, the Bank shall make a formal request to the Commission, which shall include a business plan for that entity.

([7]) For clarification, for the purpose of that Commitment, the size of the balance sheet is equal to the Bank's total assets.

([8]) For clarification, in case the Commission's approval to lift the acquisition ban is obtained according to point i., paragraph (28), Chapter III of the Commitments, the balance sheet of the Bank at the Effective Date of the Commitments shall be calculated to include also the assets of the acquired entities or the acquired assets at the date of acquisition.

CHAPTER IV

MONITORING TRUSTEE

(1) The Hellenic Republic commits that the Bank shall amend and extend the mandate of the Monitoring Trustee approved by the Commission and appointed by the Bank on 22 February 2013 until the end of the restructuring period. The Bank shall also broaden the scope of that mandate to incorporate the monitoring of (i) the restructuring plan and (ii) all Commitments set out in this catalogue.

(2) Four weeks after the Effective Date of the Commitments, the Hellenic Republic shall submit to the Commission the full terms of the amended mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under those Commitments.

(3) Additional provisions on the Monitoring Trustee are specified in a separate document.

Appendix

MACROECONOMIC PROJECTIONS FOR GREEK DOMESTIC OPERATIONS

% annual growth (unless otherwise stated)	2012	2013	2014	2015	2016	2017	Cumulative growth rate 2013-2017
Real GDP	– 6,4	– 4,2	0,6	2,9	3,7	3,5	6,4
Nominal loan growth Greece	– 6,4	– 4,2	0,6	2,9	3,7	3,5	6,4
GDP deflator	– 0,8	– 1,1	– 0,4	0,4	1,1	1,3	1,3
Property prices	– 11,7	– 10	– 5	0	2	3,5	
Nominal household disposable income	– 8,8	– 9,5	– 0,3	– 0,4	2,6	3,6	– 4,5
Private Sector deposits	– 7	1,3	1	3,4	5	5	16,6
Unemployment (%)	24,2	27	26	24	21	18,6	
ECB refinancing rate (%)	0,75	0,5	0,5	1	1,5	1,75	
NPL formation peak			2H2014				
Euribor 3 months (average, %)		0,24	0,43	0,75	1,25	1,80	
Access to capital markets — repos		YES-No Cap					
Access to capital market — covered/senior unsecured		YES — up to EUR 500 million each	YES — up to EUR 1 billion each	YES-No Cap			

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