Official Journal of the European Union

L 269

English edition

Legislation

Volume 58

15 October 2015

Contents

[1] Text with EEA relevance

EN

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

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

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1824

of 23 July 2014

on the measures taken by Germany with regard to Airport Niederrhein (Weeze) und Flughafen Niederrhein GmbH — SA.19880 and SA.32576 (ex NN/2011, ex CP/2011)

(notified under document C(2014) 5084)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ([2]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) Between 2003 and 2006, the Commission received several complaints alleging that regional authorities had granted illegal State aid to Niederrhein-Weeze airport (hereinafter 'the airport').

(2) By letters dated 13 October 2005, 2 March 2007, 3 August 2007, 19 October 2010 and 1 April 2011 The Commission requested information from Germany in relation to those complaints.

(3) Germany replied to the Commission's requests for information by letters dated on 21 December 2005, 2 February 2006, 14 June 2007, 18 October 2007, 11 November 2010 and 30 May 2011. However, the reply of Germany of 30 May 2011 was incomplete as it did not address questions referring to issues that related to periods prior to July 2009. Germany indicated that they were refusing to reply to such issues on the ground that those issues had previously been the subject of an investigation which the Commission had allegedly closed July 2009.

([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 provisionsare, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEUshould 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' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughoutthis Decision.

([2]) OJ C 279, 14.9.2012, p. 1.

(4) On 24 August 2011 the Commission issued a reminder to Germany in accordance with to Article 10(3) of Council Regulation (EC) No 659/1999 ([3]) (hereinafter: 'Procedural Regulation') to Germany giving them the possibility to provide information until 19 September 2011. The Commission added that it would consider issuing an information injunction absent a reply within that deadline.

(5) By email dated 13 September 2011 Germany requested an extension of the deadline until 19 October 2011. The Commission agreed to the extension requested.

(6) Germany submitted their reply on 19 October 2011. However, it remained incomplete as Germany maintained their refusal to reply to issues concerning periods prior to July 2009.

(7) By letter dated 25 January 2012, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') with respect to the aforementioned illegal aid ('the opening decision').

(8) By email dated 1 February 2012 Germany requested an extension of the deadline within which to submit their comments on the opening decision. This extension was granted by the Commission services by e-mail dated 10 February 2012.

(9) Germany submitted its observations to the Commission on 13 March 2012 and supplemented them with further documents on 4 March 2013.

(10) A corrigendum of the opening decision was adopted on 13 July 2012.

(11) The opening decision was published in the *Official Journal of the European Union* on 14 September 2012 ([4]). The Commission invited interested parties to submit their comments on the measures in question within one month of the date of publication.

(12) The Commission received comments from Düsseldorf airport, the district of Kleve, FN GmbH, and several other interested parties, notably companies, whose operations depend on the existence of the Niederrhein-Weeze airport. On 18 April 2013, 3 May 2013 and 19 June 2014, the Commission transmitted these comments on to Germany. By letter dated 19 August 2013 and 3 July 2014, Germany sent its observations on the comments of the interested parties.

(13) By letters dated 18 April 2013, 29 October 2013, 17 March 2014 and 16 May 2014 the Commission requested further information. Germany responded by letters dated 19 August 2013, 17 December 2013, 15 January 2014, 16 April 2014, 8 May 2014 and 25 May 2014.

(14) By letter of 18 June 2014, Germany has accepted that the present Decision is adopted in English. Therefore, only the English version is authentic.

2. GENERAL CONTEXT

2.1. General presentation of the airport

(15) The airport is located in Germany in the Land Nordrhein-Westfalen in the *Landkreis* (administrative district) Kleve between the municipalities of Weeze and Kevelaer adjacent to the German-Dutch Border. To the south, the next largest city is Duisburg, about 60 km away. To the north, the city of Nijmegen (Netherlands) is some 50 km away.

([3]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1), as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 204, 31.7.2013, p. 15).

([4]) OJ C 279, 14.9.2012, p. 1.

(16) The ten closest airports are:

— Düsseldorf (distance of 51 minutes travelling time by road or 76 km),

— Eindhoven, NL (1 hour 12 minutes or 88 km),

— Maastricht, NL (1 hour 14 minutes or 98 km),

— Köln-Bonn (1 hour 23 minutes or 133 km),

— Dortmund (1 Hour 25 minutes or 120 km),

— Liege, BE (1 hour 41 minutes or 152 km),

— Antwerp, BE (1 hour 54 minutes or 153 km),

— Rotterdam, NL (1 hour 44 minutes or 172 km),

— Münster-Osnabrück (1 hour 46 minutes or 175 km), and

— Brussels, BE (2 hour 10 minutes or 200 km).

(17) Between 1954 and 1999, the airport was used by the United Kingdom's Royal Air Force as military airport. Following its conversion into a civilian airport, passenger flights commenced in 2003.

(18) The airport has a runway of 2 440 metres. Its terminal has capacity for 3,5 million passengers. The passenger numbers have evolved as follows:

Table 1

Traffic at Niederrhein-Weeze airport between 2003 and 2012

Year	Number of Passengers (Total)	Index of growth
2003	207 992	100
2004	796 745	383
2005	591 744	285
2006	585 403	281
2007	848 852	408
2008	1 524 955	733
2009	2 403 115	1 155
2010	2 896 999	1 392

Year	Number of Passengers (Total)	Index of growth
2011	2 421 720	1 164
2012	2 200 000	1 058

Source: Germany's observations to the opening decision for the years 2003-2011, and http://unternehmen.airport-weeze.com/de/historie.html for 2012.

(19) The airport is currently served by Ryanair and Transavia ([5]). The airlines cover over 50 international destinations. All passenger volume at the airport is currently generated by Low Cost Carriers (hereinafter 'LCCs'). Ryanair's passenger share of total passengers at the airport amounts to [80-99] (*) %. Ryanair has been present at the airport since its opening and has, in the intervening period, made the airport one of its German base by stationing there nine aircraft permanently (as from Summer 2013).

(20) Until 2010, more than 50 % of the airport's passengers came from the Netherlands, the rest stemming mainly from the surrounding German and partially Belgian regions. According to the latest public information ([6]), the share of Dutch passengers dropped to around 40 %.

2.2. **Development of the airport**

2.2.1. *Development of the Ownership of the airport*

(21) The airfield was founded 1954 by the Royal Air Force for military purposes. In the early 1990s, the Royal Air Force announced its intention to withdraw from the airfield by 1999. The ownership of the airport was due to be transferred to the German Federal Government. In view of the expected loss of some 400 civilian jobs, the district of Kleve and the municipality of Weeze in 1993 planned to create a civilian airport (*Euroregionales Zentrum für Luftverkehr, Logistik und Gewerbe, 'EuZZLG'*) on the former military airfield. To that end, they established a company, Flughafen Niederrhein GmbH (hereinafter 'FN GmbH'), to manage the conversion of the former military airfield for subsequent civilian use.

(22) FN GmbH was registered in 1993 as a private limited liability company, with an equity capital of DM 50 000 (= 25 564 EUR).The founding shareholders were the district of Kleve (52 %), the municipality of Weeze (48 %).

(23) From the outset, the municipality and the district of Kleve envisaged that the airport would be operated by a private company. In furtherance of that objective, four steps were identified:

(a) Finding the private investor who should be responsible for the preparation and the operation of the airport;

(b) Obtaining the necessary permit for the conversion of the military airfield into a civilian airport;

(c) Concluding a treaty with the Netherlands concerning the use of its air space;

(d) Purchase of the area from the Federal Government.

(24) The Royal Air Force transferred the ownership of the airport on 30 November 1999 to the German Federal Government.

(25) On 16 December 1999, the district of Kleve and the municipality of Weeze incorporated a further company, *Entwicklungs- und Erschließungsgesellschaft Laarbruch GmbH* ('EEL GmbH'). 52 % of the shares in EEL GmbH are held by the district of Kleve and 48 % by the municipality of Weeze.

([5]) In addition to Ryanair and Transavia, the airport was previously served by Air Berlin, Wizz Air, XL Airways, Sky Airlines, Corendon Airlines and Bulgaria Air as well as the charter companies Tailwind and SolidExecutive (see Recital 11 of the opening decision).
(*) Business secret.
([6]) *Source:* http://unternehmen.airport-weeze.com/de/kurzportrait.html

(26) The then tasks of EEL GmbH were different from the tasks of FN GmbH. While FN GmbH had been created to manage the conversion of the former military airport, EEL GmbH was entrusted in particular with the administration of the facilities between the closure of the military airport in 1999 and its purchase by a private investor.

(27) In this regard, EEL GmbH had to tear down the infrastructures and facilities of the former military airport estate for a subsequent commercial use.

(28) Following the authorisation by the Land Nordrhein-Westfalen on 23 August 2000 of the military airfield conversion plan submitted by the district of Kleve and the municipality of Weeze and the granting of a license to operate a civilian airport to FN GmbH by the Bezirksregierung Düsseldorf on 20 June 2001 ([7]), the privatisation of the airport operation and real estate took place in two steps:

(a) *Step 1*: On 1 July 2001, the district of Kleve and the municipality Weeze withdrew from FN GmbH selling 99,261 % of the shares in the company for EUR [0,5-3] million by the district of Kleve and the municipality Weeze to a private investor, Airport Niederrhein Holding GmbH, ('ANH GmbH'). ANH GmbH is a 100 % subsidiary of the Dutch company Airport Network B.V. Until 31 December 2011, the district of Kleve and the municipality of Weeze held respectively 0,0459 % and 0,0279 % of the shares. At the time of the sale of FN GmbH from the public authorities to ANH GmbH, FN GmbH had practically no physical assets […].

(b) *Step 2*: On 14 March 2002, the German Federal Government sold the real estate on which the airport was built for EUR [5-15] million to FN GmbH. Prior to selling this estate to FN GmbH, the Federal Government had contacted other potential purchasers on an informal basis. Only one other investor had signalled an interest, offering a price of EUR […] million and an additional EUR […] million, if certain profit targets would be achieved by 2009.

(29) The German Federal Government established the sales price of the real estate on which the airport was built in accordance with Article 63(3) of the *Bundeshaushaltsordnung and the Wertermittlungsverordnung*. This provision oblige the federal government to sell property at their current value, i.e. their market price as established by an independent expert following the rules laid down in the *Wertermittlungsverordnung*. In the case at hand, the estate was valued by an independent expert at EUR [11-20] million while the buildings on the estate were valued at EUR [4-10] million based on the proposed development and utilisation concept of the estate. From these values, the expert deducted EUR [4-10] million representing the cost of the demolition of the barracks forming part of the conversion works, and a further EUR [2-5] million representing costs of adopting measures required by applicable environmental and planning legislation. As from 2001, the first construction measures were implemented (demolition of bunkers, infrastructure for clarification plants, etc.) in order to prepare the airport for civil use

2.2.2. *The economic development of EEL GmbH and FN GmbH*

(30) Immediately after its establishment in 1999, EEL GmbH took over the management of the airport real estate through a leasing contract. The first development measures and the first construction measures were carried out between 2000 and 2001.

(31) After the Bezirksregierung Düsseldorf granted the FN GmbH the licence to operate a civilian airport under German aviation law and upon completion of the purchase of FN GmbH by the private investor group ANH on 1 July 2001, the ANH group reimbursed EEL GmbH the costs that the latter has incurred to manage the airport infrastructure, including some conversion work.

(32) In the course of 2002, EEL GmbH handed over the management of the airport infrastructure to FN GmbH. In 2002, FN GmbH made a loss of EUR 0,3 million. As of 2003, EEL GmbH no longer carries out tasks relating to the management of the airport real estate. Nevertheless, the district of Kleve and the municipality of Weeze did not liquidate the EEL GmbH in 2003.

([7]) Stakeholders introduced more than 1 000 complaints against the granting of the operating license to FN GmbH before the start of operations, which could accordingly only start on 1 May 2003. In 2006, the operating license was again legally challenged creating legal uncertainty for the airport operations. It took until the 1 February 2007 to settle the issue, when the Bundesverwaltungsgericht allowed flight operations at the airport. Full legal compliance was achieved with an amendment to the operating licence issued by the regional authorities on 1 May 2009.

(33) FN GmbH initially accumulated financial losses before making profits, as illustrated in the following table:

Table 2

Annual results and EBITDA 2003-2011

(in thousand EUR)

Year	2003	2004	2005	2006	2007	2008	2009	2010
Annual profit	– 6 960	– 8 336	– 7 914	– 4 822	663	707	426	34
EBITDA	– 4 805	– 4 718	– 4 399	– 1 172	4 372	5 508	6 108	6 286

Source: Germany

3. DESCRIPTION OF THE MEASURES UNDER ASSESSMENT AND THEIR CONTEXT

3.1. Measure 1: Loans from EEL GmbH to FN GmbH

(34) At the beginning of 2003, FN GmbH encountered financial difficulties which endangered the commencement of commercial flights (expected on 1 May 2003) and thus the entire airport conversion and development project. The public owners of EEL GmbH therefore decided to continue the activities of their company. On 11 April 2003, EEL GmbH granted a first loan ('Loan 1') of EUR [11-20] million, at an interest rate of [1-5] % above the base rate to FN GmbH. According to Germany the base rate of interest applied to this loan was the ordinary rate provided for in Article 247 of the German Civil Code (*Bürgerliches Gesetzbuch or* 'BGB'), which on the relevant date was 1,97 % ([8]). The maturity of the loan was set until 30 June 2005. As collateral, a charge was place over the land and the buildings of the airport (*Grundschuld*) in favour of EEL GmbH for the amount of the loan, namely EUR [11-20] million. In addition to that figure, [15-23] % interest was to be added annually, should the collateral be used in case of non-payment. Additionally, […] provided a personal guarantee for the loan (*selbstschuldnerische Bürgschaft*) for a maximum amount of EUR [5-15] million. Germany did not provide details as regards the value of this personal guarantee. This personal guarantee was replaced on 8 June 2003 by a personal guarantee provided by the […] for the amount of EUR [5-15] million. In addition, FN GmbH's private shareholders pledged both their shares of ANH GmbH's shares in FN GmbH's capital (assessed to EUR [20-30] million) and Airport Network BV's shares in ANH GmbH's capital. Germany did not provide full details as regards the value of the collateral provided.

(35) According to Germany, with this loan, the public owners of EEL GmbH wanted to provide FN GmbH with bridge financing to cover operational liquidity shortages in order to enable it to complete the acquisition and installation of assets necessary for the timely start of airport operations.

(36) In 2003, airport operations began and FN GmbH incurred a loss of EUR 7 million. Only one year after the airport started its commercial flight operations, that is in 2004, the most important airline for the airport, Dutch company V-Bird, ceased its operations due to insolvency. In view of the resulting on-going financial problems of FN GmbH, EEL GmbH continued to grant loans to FN GmbH in the course of 2004:

(a) On 17 June 2004, EEL GmbH granted FN GmbH a second loan ('Loan 2') amounting to EUR [2-5] million with the same maturity date as the first loan granted in 2003 (i.e. until 30 June 2005). The interest rate was

([8]) The basic rate of interest changes on 1 January and 1 July each year by the percentage points by which the reference rate has risen or fallen since the lastchange in the basic rate of interest. The reference rate is the rate of interest for the most recent main refinancing operation of the European Central Bank before the first calendar day of the relevant six-month period. The Deutsche Bundesbank announces the effective basic rate of interest in the Federal Gazette without undue delay after 1 January and 1 July.

set at [1-5] % above the applicable base rate. According to Germany, the base rate of interest applied to this loan was the one set out in Article 247 BGB on that date, i.e. 1,14 %. As collateral, a charge was placed on the land and buildings of the airport (*Grundschuld*) in favour of EEL GmbH covering the amount of the loan of EUR [2-5] million. In addition [15-23] % interest was to be added annually, should the collateral be used in the event of non-payment. Additionally a pledge on the shares of Airport Network BV's in ANH GmbH's capital and a pledge on ANH GmbH's shares in FN GmbH's capital was established. Germany did not provide full details as regards the value of the collateral provided.

(b) One month later, on 28 July 2004, EEL GmbH granted FN GmbH a third loan ('Loan 3') amounting to EUR [2-5] million. The maturity of the third loan was set for 31 December 2007 and an interest rate of [3-8] % above the applicable base rate was established. According to Germany, the base rate of interest applied to this loan was the one set out in Article 247 BGB on that date, i.e. 1,13 %. As collateral, a charge was placed on the land and buildings of the airport (*Grundschuld*) in favour of EEL GmbH covering the amount of the loan of EUR [2-5] million. In addition, [15-23] % interest was to be added annually, should the collateral be used in the event of non-payment ([9]). Additionally a pledge on the shares of Airport Network BV's in ANH GmbH's capital and ANH GmbH's shares in FN GmbH's capital was established. Furthermore a pledge of the enterprise of FN GmbH was also established. Germany did not provide full details as regards the value of the collateral provided.

(37) Overall, in 2004 alone FN GmbH received EUR [4-10] million in loan granted by EEL GmbH (in addition to the second series of measures under investigation granted directly by the district of Kleve — see section 3.2). According to Germany, these loans were granted for the purpose of the development and conversion of the former, military used airport, not for operating expenses.

(38) At the end of 2004, FN GmbH had again incurred losses, this time amounting to EUR 8,3 million. Once again, FN GmbH appeared to be in need of further liquidity. Repayment of Loan I and Loan 2 (together amounting to EUR [10-20] million) granted by EEL GmbH would have been due on 30 June 2005. At that time, FN GmbH had reimbursed interests from previous loans partially. According to Germany, the losses incurred by FN GmbH between 2002 and 2006 were however borne by its private owners.

(39) In that context, on 1 July 2005, EEL GmbH granted a fourth loan ('Loan 4') to FN GmbH, this time amounting to EUR [4-10] million with a maturity date of 31 December 2010. Paragraph 1, point 2 of the loan agreement stipulated that the loan was earmarked for investments only. In addition, paragraph 2 required FN GmbH (and EEL GmbH if it requested to) to check that invoices were strictly linked to the completion of the airport and that EEL GmbH (and not FN GmbH) paid the invoices from the loan. In addition, Loan 1, Loan 2 and Loan 3 amounting in total to EUR [15-30] million (without interest) were rolled over ('Extension 1'). The maturity of these loans was harmonised and extended to 31 December 2010. A fixed interest rate of [1-5] % was set for all these loans applicable as of 1 July 2005. Thus the interest rate for Loan 1, Loan 2 and Loan 3 was lowered. As collateral, a charge was placed on the land and buildings of the airport (*Grundschuld*) in favour of EEL GmbH for the amount of the fourth loan (EUR [4-10] million) additionally to the extension of the previous pledges for Loan 1, Loan 2 and Loan 3 (on top of which was to be added [15-23] % interest per annum, should the collateral be used in case of non-payment). Additionally, to secure all claims of EEL GmbH from all loans a personal guarantee was provided by […] on 1 July 2005. (*selbstschuldnerische Bürgschafte*) for a maximum amount of EUR [20-30] million (plus interest and compounded interest). This guarantee extended the previous guarantee provided by […] on 8 June 2003 in relation to Loan 1. Finally, a pledge on the shares of Airport Network BV's in ANH GmbH's capital and a pledge of ANH GmbH's shares in FN GmbH's capital was established. Germany did not provide full details as regards the value of the collateral provided.

(40) Moreover, EEL GmbH and FN GmbH agreed that FN GmbH would have to pay interest on the date of the maturity, i.e. 31 December 2010 at the latest and that in case FN GmbH would break even and become profitable before that date, FN GmbH would be obliged to start paying interest as of the date at which it ceased making a loss. As regards the interest rates applicable for the first three loans until their harmonisation with the loan agreement of 1 July 2005, the rollover contract (*Darlehensverlängerungsvertrag*) of 29 November 2010 mentions in § 5 (5.4.) that each of the four loans bears [15-23] % yearly interest in case of non-payment ([10]).

([9]) The [1-3] -million EURO difference between the loan amount and the land charge stems from the fact that FN GmbH and EEL GmbH concluded on 14 July 2004 a bridging credit agreement that was accompanied bya EUR [1-3] million EURO worth land charge. This bridging contract was eventually replaced by the 3rdloan agreement of 27 July 2004, but the land charge was not annulled and remain valid, so that the 3rd loanagreement only required a collateral of EUR [1-5] million.

([10]) None of the contracts include a specific provision related to late interests since the latter are legally provided for in article 288 BGB and therefore applicable to all loan agreements.

(41) Germany stated that EEL GmbH agreed to step down in its creditor's rank (*Rangrücktritterklärung*) as regards the access to the land charges collateral between March 2009 and 31 December 2010 in order to enable FN GmbH to receive a short term loan from [bank] (see Recital 73).

(42) FN GmbH became profitable in 2007. Nevertheless and contrary to prior contractual agreements, FN GmbH did not commence to reimburse either the loans or the interest. Calculated as of 31 December 2010, the maturity date contractually agreed by the parties, FN GmbH owed EEL GmbH EUR [20-30] million in loans plus EUR [7-10] million in interests, i.e. a total of EUR [24-40] million. EEL GmbH agreed for a second time to rollover all four loans and the cumulated interest payments (second extension). On 29 November 2010, FN GmbH and EEL GmbH signed a fifth loan agreement thus prolonging the maturity of all loans until 31 December 2016.

(43) The interest rate for this second extension of the loans was set at [1-5] % p.a. Germany stated that the interest rate for the loan agreement of 29 November 2010 was established by adding […] basis points to the reference rate of 1,24 % ([11]). EEL GmbH and FN GmbH agreed that the interests due until 31 December 2010 were added to the loan principal thus increasing it to EUR [24-40] million. Additionally, FN GmbH was obliged to pay interest on a quarterly basis and that the first interest payment would be due by the end of the first quarter of 2011.

(44) The following table summarises the main features of the five loan agreements under assessment:

Table 3

Overview of public support measures from EEL GmbH in favour of FN GmbH

Volume (in Million EUR)	Date of loan agreement	Interest rate	Maturity/roll over of loan	Collateral	Way of financing (EEL)
[11-20]	11.4.2003	[1-5] % above base rate (1,97 %)	First maturity: 30.6.2005, rolled over for the first time to 31.12.2010, rolled over for the second time to 31.12.2016	— Charge on land and buildings (*Grundschulden*) — Personal guarantee of […] (*selbstschuldnerische Bürgschaft*) — Pledge of ANH GmbH shares and FN GmbH shares	Loan granted by the district of Kleve: (EUR [5-15] Million at [1-5] %); EUR [2-5] Million loan granted from [bank], (public guarantor: municipality of Weeze). The EUR [2-5] Million loan is converted on 30.6.2005, and [bank] takes over as new creditor.
[2-5]	17.6.2004	[1-5] % above base rate (1,14 %)	First maturity 30.6.2005, rolled over for the first time to 31.12.2010, rolled over for the second time to 31.12.2016	— Charge on land and buildings (*Grundschulden*) — ANH GmbH shares and FN GmbH shares	Loan to EEL GmbH granted by the district of Kleve ('*Kassenkredite*')
[2-5]	28.7.2004	[3-8] % above base rate (1,13 %)	First maturity 31.12.2007, rolled over for the first time to 31.12.2010, rolled over for the second time to 31.12.2016	— Charge on land and buildings (*Grundschulden*) — Pledge on ANH GmbH shares and FN GmbH shares — Pledge of the enterprise of FN GmbH	Loan to EEL GmbH granted by the district of Kleve ('*Kassenkredite*'). The district of Kleve and municipality Weeze inject EUR [0,4-1] million of capital into EEL GmbH.

([11]) http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

Volume (in Million EUR)	Date of loan agreement	Interest rate	Maturity/roll over of loan	Collateral	Way of financing (EEL)
[4-10]	1.7.2005	[1-5] %	First maturity 31.12.2010, rolled over to 31.12.2016	— Charge on land and buildings (*Grundschulden*) — Personal guarantee […] (*selbstschuldnerische Bürgschaft*) Pledge on ANH GmbH shares and FN GmbH shares	The district of Kleve and municipality Weeze inject EUR [0,4-1] million of capital into EEL GmbH.
[24-40] (= [20-30] (sum of all four loans) plus accumulated interest of (= [4-10])	29.11.2010	[1-5] %	31.12.2016	— Charge on land and buildings (*Grundschulden*) — Personal guarantee by […] (*selbstschuldnerische Bürgschaft*) — Pledge on ANH GmbH shares and FN GmbH shares	Prolongation of all previous loans to EEL granted by the district of Kleve ('*Kassenkredite*') and the loan granted by [bank] possibly with a continued public guarantee of the municipality of Weeze.

(45) FN GmbH was at the end of the first quarter 2011 again not in a position to pay the first interest payment as agreed in the prolongation of the loan agreements (*Darlehensverlängerungsvetrag*) of 29 November 2010. The district of Kleve accepted the offer of the shareholder of FN GmbH to receive shares of FN GmbH by in March 2011 in a debt-to-equity swap for the continued deferral of the payments of interest and principal ([12]). However, this debt-to-equity swap was legally signed only at the end of 2012. The district of Kleve currently owns 1,88 % of FN GmbH's share capital ([13]).

3.2. **Measure 2: Support from the Land Nordrhein Westfalen**

(46) On 15 October 2002, FN GmbH was granted public support of EUR 3,525 million by the Land Nordrhein Westfalen for the financing of 50 % of the following costs: handling apron, fueling area, widening of taxiways and rehabilitation of existing apron areas, precision approach lighting system, edge lighting, start and runway lighting.

(47) The legal basis for this support was the Land Nordrhein-Westfalen's Ministry for Transport, Energy and spatial planning's decree concerning public support for construction and renovation measures (infrastructure investments) for airports in Nordrhein-Westfalen (*Richtlinien über die Gewährung von Zuwendungen für Ausbau- und Erneuerungsmaßnahmen auf Flugplätzen RdErl. — MBl.NRW.1993 S. 617) ('the 1993 Decree')*. These guidelines were subsequently replaced by the Guidelines with reference *(VA 5 — 10 — 60/195- v. 25 November 2002)* ([14]), which were in force between 1 January 2003 and 1 January 2008.

(48) According to the 1993 Decree provided for the granting of financial support to cover investment costs for certain types of airport infrastructure such as runways, taxiways, aprons, protection strips, air traffic control infrastructure (tower, radar, optical alert systems), navigation lights, optical landing support devices, high rise buildings (terminals, hangars etc.), parking facilities, fencing, infrastructure for flight safety, supply and disposal, noise protection, fire protection, winter and rescue services as well as investment costs for compensational measures for landscape conservation and environmental protection. By means of the 1993 Decree, the Land Nordrhein-Westfalen provided support up to 40 % of the eligible costs for the above mentioned airport

([12]) Following the agreement of 31 March 2011, the shares were passed on to EEL GmbH on 31 December 2011. They were eventually handed over to the district of Kleve.

([13]) The present decision does not cover this debt-to-equity swap or any other measure that may have been granted by Germany in favour of FN GmbH as of 2011.

([14]) https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=1&gld_nr=9&ugl_nr=96&bes_id=1284&val=1284&ver=7&sg=&aufgehoben=N&menu=1

infrastructure types. International airports and regional airports could receive support of up to 65 % of the eligible costs. For parking facilities, fencing and flight safety infrastructure, up to 80 % of the eligible costs could be granted as support upon application from the airport.

3.3. **Measure 3: Support granted from the district of Kleve directly to FN GmbH concerning the acquisition of the airport real estate**

(49) As described in Recital 28, the German Federal Government sold the airport estate on 14 March 2002 for EUR [5-15] million to FN GmbH. On the same day, the district of Kleve entered into an agreement with FN GmbH with regard to the provision of bridge financing of part of the acquisition costs of the airport real estate. The bridge financing was granted by means of an interest free loan, totally collateralised with the airport estate properties (therefore worth EUR [5-15] million on the date of the granting of the loan). It was agreed that an amount of EUR [4-10] million of the EUR [5-15] million would be pre-financed by the district of Kleve. Airport Network B.V., the parent company of ANH GmbH, had to reimburse a first tranche amounting to EUR [2-5] million of this interest free loan to the district of Kleve by 30 December 2003 (which it did). The second tranche of EUR [2-5] million was payable five years after the start date of the flight operations at the airport, at the latest on 31 December 2007, unless a job creation clause of the agreement (350 jobs) between the district of Kleve and the FN GmbH was fulfilled.

(50) On 8 July 2004, the district of Kleve decided that FN GmbH would not have to reimburse the second tranche of EUR [2-5] million since more than 350 jobs had been already created.

3.4. **Measure 4: Public support to EEL GmbH**

(51) In order to be able to grant loans to FN GmbH, EEL GmbH itself required refinancing. EEL GmbH has refinanced itself through obtaining loans of:

(a) EUR [5-15] million and EUR [2-5] million at an interest rate of [1-5] % per annum set to mature on 30 June 2005. These two loans were granted by the district of Kleve on 11 April 2003 and 16 June 2004 respectively.

(b) EUR [1-5 million] at an interest rate of [2-5] % per annum set to mature on 30 December 2007. This loan were granted by the district of Kleve on 28 July 2004 ([15]).

(52) In July 2005, EEL GmbH's capital structure was transformed by its shareholders who decided a EUR [5-15] million capital injection and a EUR [1-4] million debt-to-equity swap, which reduced the first loan debt to EUR [3-13] million. EEL GmbH reimbursed the second loan amounting to EUR [2-5] million. Finally, the remaining loan contracts of EUR [3-13] million and EUR [2-5] million were extended until 31 December 2010. The interest rate was then set to [3-8] % on 1 July 2005 and [3-8] % as of 1 November 2005. On 29 November 2010, these two loans were again extended until 31 December 2016, at an interest rate of [3-8] %.

(53) The district of Kleve further injected capital into EEL GmbH in 2006 (EUR [1-5] million) and in 2007 (EUR: [2-6] million). These amounts have been booked as a capital reserve in the society and are due for repayment together with the loan repayments at the end of 2016. Altogether, the two public shareholders have granted EEL GmbH EUR [24-40] million ([15-25] million in capital injections including the debt-to-equity swap measure and EUR [10-20] million in loans).

(54) In parallel, EEL GmbH received on 2 May 2003 a loan of EUR [2-5] million from the privately owned [bank]. The loan was set to mature on 30 June 2005 with an interest rate of [1-5] %. The municipality of Weeze provided a 100 % public guarantee for this loan in favour of EEL GmbH and the [bank], respectively. On 30 June 2005, this loan was converted and the publicly owned [bank] (a subsidiary of [bank]) replaced [bank]as creditor. The maturity was extended a first time until 30 December 2010 with the interest rate set to [1-5] %, and a second time in 2010 until 31 December 2016 with an interest rate of [1-5] %.

([15]) This implies that, when EEL GmbH rolled over the loans granted to FN GmbH, its own loans granted by the district of Kleve and the loan granted by the [bank] to EEL GmbH in the amount of EUR [1-5] millionwere rolled over accordingly.

4. GROUNDS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

4.1. Measure 1: Loans granted by EEL GmbH to FN GmbH

(55) In the opening decision, the Commission expressed doubts as to whether the loans provided by EEL GmbH to FN GmbH had been granted and rolled over at market terms. The Commission noted first that Germany had not provided a credit history or a rating of the loan recipient. Moreover, the Commission could not exclude that FN GmbH was a company in financial difficulty. The Commission also pointed out that Germany had not provided any explanation regarding the interest rates applied to the individual loans or the collateral received. The Commission also noted the absence of explanations as to why the publicly owned loan grantor had repeatedly agreed to roll over the loans, always extending their maturity and why the reimbursement of the loan principal and the interests due had so far never been enforced.

(56) On the basis of such considerations the Commission took the preliminary view that in granting and rolling over the loans to FN GmbH, EEL GmbH did not act as a market economy investor or a market creditor. Given that FN GmbH appeared to have been a company in difficulty throughout the entire period, which was unable to obtain funding from commercial banks at least until the end of 2010, the Commission took the preliminary view that the entire amount of the loans, plus the outstanding interest, should be qualified as State aid.

(57) Since these measures were put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted illegal State aid.

(58) Finally, the Commission raised doubts as to the compatibility of the agreements at issue with the internal market, should they qualify as State aid, notably in view of the rules laid down in the Rescue and Restructuring Guidelines ([16]).

4.2. Measure 2: Support from Land Nordrhein-Westfalen to FN GmbH

(59) In the opening decision, the Commission noted that the support provided by the Nordrhein-Westfalen Land to FN GmbH was a selective measure since not all airports in the Land were eligible for such support. Given that the support came from public funds and provided an advantage to the airport by granting investment support, it could not be excluded that the support constituted State aid.

(60) Since these measures had been put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted unlawful State aid.

(61) Finally, the Commission raised doubts as to the compatibility of the measure at issue with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Rescue and Restructuring Guidelines ([17]).

4.3. Measure 3: Direct support from the district of Kleve to FN GmbH

(62) As regards the direct support from the district of Kleve to FN GmbH, the Commission took the preliminary view that no market investor would have provided such a grant without any remuneration. Furthermore, the Commission expressed doubts as to the willingness of a market economy investor to waive part of the repayment of an outstanding grant on the basis of job creation considerations in the region.

(63) Since these measures were put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted illegal State aid.

(64) Finally, the Commission raised doubts as to the compatibility of the measure at issue with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Rescue and Restructuring Guidelines ([17]).

([16]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).
([17]) See footnote 16.

4.4. **Measure 4: Capital injections and loans to the benefit to EEL GmbH**

(65) In the opening decision, the Commission expressed doubts as to whether the financing provided to EEL GmbH by its public shareholders were granted and rolled over at market terms.

(66) Since these measures were put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted illegal State aid.

(67) Finally, the Commission raised doubts as to the compatibility of the measures at issue with the internal market, should they qualify as State aid.

5. **COMMENTS FROM GERMANY**

5.1. **General comments**

5.1.1. *Project Background*

(68) Germany recalls the background of the project as described in section 2.1 and 2.2 above. The cornerstone of the '*Euroregionales Zentrum für Luftverkehr, Logistik und Gewerbe*' was the development of a privately-owned and run civilian airport on the former military airfield.

(69) Germany argues that the development of the traffic growth was hampered by external factors. First, the bankruptcy of V-bird in October 2004, which located its main operations base in Niederrhein-Weeze, caused a significant traffic loss, which could not be fully compensated by Ryanair and Hapagfly's additional flights until 2008, when the traffic reached its 2004 level. Second, a series of legal actions brought before national Courts repeatedly created legal uncertainty for airlines ([18]) and implied unforeseeable extra-costs for FN GmbH. Before it could get the final operating licence in 2009, FN GmbH could not implement its strategy due to the ongoing litigations, and opted to settlement actions outside court. The successful outcome, however, required FN GmbH to pay compensations to the parties to these proceedings amounting to EUR [5-10] million. Third, airport traffic was penalised in 2010 by air traffic disruption caused by the eruption of Iceland's Eyjafjallajokull volcano. Fourth, Germany notes that in September 2010, it introduced a passenger tax, which undermined the competitiveness of Niederrhein-Weeze vis-à-vis other European airports not subject to that tax. According to Germany, this translated in Ryanair reducing its operations from Niederrhein-Weeze, which witnessed a passenger volume decrease in both 2011 and 2012.

(70) Germany claims that despite these adverse events beyond the control of FN GmbH, EEL GmbH or their shareholders, the success of the project is demonstrated by the steadily increasing traffic over the period under investigation (see Recital 18), which matched or even exceeded the traffic forecast by the various expert studies (except in 2011). In addition, Germany points out that FN GmbH could also increase non-aviation revenues and improve its profitability over time.

5.1.2. *The logic of private financing of the airport*

(71) Germany points out that Niederrhein-Weeze is a 'success story' airport, since it is now not only the third largest airport in Nordrhein-Westfalen, but also a unique example of a privatised infrastructure sold at market price. Germany adds that the investments into the airport was always maintained at a very high level. In the period 2002 to 2011, FN GmbH's overall investments amounted to EUR [60-90] million, of which EUR [20-30] million was applied to the development of commercial buildings, EUR [10-20] million in flight and apron facilities and EUR [5-10] million to start-up and expansion projects. Germany claims that since its privatisation FN GmbH could continuously rely on private resources to finance these significant investments, namely: (i) shareholder' loans and capital injections, (ii) commercial banks' loans and (iii) FN GmbH's own operational profits.

(72) As regards the majority shareholder's support, Germany considers that ANH GmbH and its own shareholders have repeatedly supported their subsidiary FN GmbH to cover its initial operating losses as well as its investments

([18]) See footnote 7.

into the airport infrastructure. This support took the form of capital injections and loans, for which the majority shareholder accepted to step down in its creditor's rank (*Rangrücktritterklärung*). By doing so, the majority shareholder turned debt receivables into equity that could no longer be part of the insolvency mass. However, Germany notes that the sole private shareholders could not have sustained the whole financial burden for such a costly investment, and needed additional sources of funding, which only public authorities could provide on market terms. This external support was already taken into account in the 2003 business plan (see Recital 95).

(73) As regards *commercial banks'* loans, Germany claims that FN GmbH could obtain credit from commercial banks very rapidly thanks to its commercial success. According to Germany, access to banks would proved the sustainability of a business model relying on private financing. In the first half of 2009, FN GmbH could sign a loan agreement for an investment loan amounting to EUR [0-10] million with [bank]. The interest rate of this loan was [2-6] %, but subject to the subordination of the EEL GmbH's claims linked to the loans that the latter had granted to FN GmbH (hence the need for EEL GmbH to step down in its creditor's rank). The loan maturity was set at 31 December 2010. According to Germany, the collateralisation conditions and the interest rates of the contracts were therefore comparatively favourable for FN GmbH. FN GmbH has reimbursed the [bank] loan entirely on its due date. Germany adds that [bank] offered FN GmbH two credit facilities (EUR [8-15] million and EUR [1-5] million) at an indicative interest rate of [1-5] % ([19]) and that a lease financing for about EUR [0-3] million could be signed with [bank].

(74) As regards *self-financing*, Germany points out that FN GmbH could progressively fund its own investments through the positive operative cash flows. The first positive EBITDA (earnings before interest, taxes, depreciation and amortization was observed in 2006 and the first net profit in 2007, namely only a few years after the operations started. In addition, Germany reproaches the Commission with presenting FN GmbH's turnover and cost figures in the opening decision in an erroneous and misleading manner. Germany accordingly provided the following information as regards the compared evolution of turnover and costs over the period 2003-2010:

Table 4

Revenues and Costs of FN GmbH during the period 2003-2010

(in thousand EUR)

Year	2003	2004	2005	2006	2007	2008	2009	2010
Turnover (*Umsatz*)	2 225	7 968	7 364	7 136	8 281	13 338	19 900	23 759
Other operation revenues (*Sonstigebetriebliche Erträge*)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— including the tax-related land transaction (*Grundstückstransaktion*)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Purchases (*Materialaufwand*)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Staff Costs (*Personalaufwand*)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Other operational costs (*Sonstiger betrieblicher Aufwand)*	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

([19]) However, this offer has never materialised.

(75) Germany argues that the Commission would have omitted in particular to take into account all public remit related costs (costs of non-economic activities) which are not imputable to the day-to-day operations of the airport, artificially lowering the operational profit. Germany considers that the following table reflects FN GmbH's true operational profitability:

Table 5

FN GmbH adjusted cost structure (cleared from public-remit related costs)

(in thousand EUR)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010
Profit according to Annual report	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Public remit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
a) Security and Safety, out of which:	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Fire protection (staff)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Amortisation of investment costs (Fire protection)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Amortisation cost (videosurveillance)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Patrolling	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Security staff	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
b) Protection passengers and aircrafts	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Control devices (persons and items)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Flight Security DFS TTC	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
— Amortisation (Control Tower)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Adjusted annual profit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Adjusted EBITDA	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

5.1.3. *Notion of aid — Airport construction seen as a non-economic activity*

(76) Germany considered that the construction of an airport is not an economic activity that private investors would be ready to undertake on their own and that there is no such an example in Europe (see next section). According to Germany, private investors would be much more interested to operate an airport infrastructure, which already exists, because the risks are reduced and manageable.

(77) Germany suggested that the construction of airport infrastructure should no longer be part of the scope of State aid control in order to remedy the lack of private investment in that area. Germany argues that the construction of such an infrastructure constitutes a tool, by which the State can steer economic development and structure land planning through transport policy.

(78) In addition, Germany considers that public support in the case at hand was mostly targeted at public remit activities, which fall out of the scope of Commission State aid control. Out of the [20-30] million [20-30] would have been invested into fire protection and security systems. Germany added that the outstanding EUR [2-5] million had been completely used for the financing of other activities in 2011.

5.1.4. *Notion of aid — Non-existence of a hypothetical reference investor*

(79) Germany is of the opinion that there is no market for the financing of privately owned regional airport infrastructure in Europe. According to Germany there are only few fully privatised airports in Europe. Glasgow-Prestwick or Luton are examples of such airports. Although no State aid investigation had been opened concerning such fully private airports, Germany doubted the absence of public support to those airports. Germany underlined that even in the example of Lübeck-Blankensee airport, the public municipality of Lübeck regained ownership of the platform in 2009. This scarcity of private ownership would pertain to the high level of fixed costs necessarily incurred for the construction of an airport infrastructure, acknowledged by the Commission in the draft 2014 Aviation guidelines, which were in preparation when the formal investigation procedure ([20]). In addition, Germany noted that the legal uncertainties created by the mandatory certification process of the airport, the concomitant delivery of the *Aéroports de Paris* judgment and the signing of an international treaty between Germany and the Netherlands deterred private investors from entering into this type of project. According to Germany, the Commission's initial assessment in the opening decision wrongly overlooked the fact that commercial banks were unsurprisingly adverse to financing the construction of private airports, and that there was no functioning market in that area.

(80) Germany takes the view that the Commission's preliminary assessment did not rely on clear criteria to assess the market conformity of the measures under scrutiny. According to Germany, the Commission should on the contrary have relied upon established case law ([21]) in the context of universal postal services, which would confirm that the creation and maintenance of a network are not in line with a purely commercial approach. Germany also suggests relying on existing Commission practise, where the Commission has allegedly approved similar support measures. To support these views, Germany used the example of the financing of Kassel-Calden airport infrastructure.

(81) Germany concluded that, in light of the successful development of the airport, any private investor would have invested in the Niederrhein-Weeze airport as Germany did.

5.1.5. *FN GmbH does not qualify as a company in difficulty*

(82) Germany refutes the Commission's preliminary conclusion that FN GmbH may qualify as a company in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the Rescue and Restructuring Guidelines') ([22]).

(83) Germany bases that claim on five grounds. First, FN GmbH would have already achieved gains after a very short start-up phase (first positive EBITDA in 2006 — excluding public remit expenses — and first net profit in 2007). Germany notes that in its assessment of financing measures in favour of regional airports, the Commission had never qualified a loss-making beneficiary as a company in difficulty during the start-up phase. According to Germany, should the Commission persist in that line of reasoning, it would not be possible for any airport infrastructure to be financed any longer.

(84) Second, Germany argues that no 'hard' criteria for a firm in difficulty were fulfilled at any time. Germany disputes the comments made in the opening decision as regards negative equity and adds that the majority shareholder kept the company financially afloat — through a loan, new capital injection and the agreement to

([20]) See Recital 38 for more developments on the final 2014 Aviation guidelines.
([21]) See joint cases *Chronopost v Ufex and Others*, C-83/01 P, C-93/01 P and C-94/01, EU:C:2003:388, paragraph 37.
([22]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

step down in its creditor's rank (*Rangrücktritterklärung*). In addition, Germany contests the Commission's interpretation of the General Court's judgments in cases T-102/07 and T-120/07 *Freistaat Sachsen/Commission* insofar it implies automaticity between the existence of negative equity and qualification as a company in difficulty. According to Germany, the negative equity criterion is only one of several criteria identified by the General Court to determine whether a firm is in difficulty.

(85) Third, Germany states that FN GmbH exhibits no symptoms suggesting that the company is in difficulty, since FN GmbH's business development has been positive since its inception. In particular, the fact that FN GmbH's interest charges increase would not reveal financial difficulties such as over-indebtedness, but would rather reflect the main shareholder's repeated investment into FN GmbH.

(86) Fourth, Germany argues that FN GmbH could solve its financial difficulties thanks to its own operational profits, loans from commercial banks as well as loans and funds received from its majority shareholder.

(87) Finally Germany claims that FN GmbH cannot be deemed a company in difficulty under the Rescue and Restructuring Guidelines, which exclude companies created less than three years after their creation (like FN GmbH GmbH) from that qualification.

5.1.6. *Distortion of competition*

(88) Germany argues that in the opening decision, the Commission failed to demonstrate the effects of the support measures on competition on the relevant market, which it failed to define.

(89) After making these general comments, Germany took position on the various measures under assessment:

5.2. **Measure 1: EEL GmbH's support to FN GmbH**

5.2.1. *EEL GmbH control over FN GmbH*

(90) Germany claimed that all payments funded from the loans granted by EEL GmbH to FN GmbH were strictly controlled by EEL GmbH, which supervised their direct transfer to the creditors on behalf (*treuhänderisch*) of FN GmbH.

(91) According to Germany, by doing so, EEL GmbH could ensure that its resources would be exclusively allocated to investments, and not to day-to-day operations.

(92) Germany notes in addition, that as shareholders of EEL GmbH, the district of Kleve and the municipality of Weeze have been granted several exclusive rights in FN GmbH's founding act (*Geschäftsvertrag*) such as the power to appoint FN GmbH's CEO (used in 2004) and several veto rights regarding individual management measures, as well as the modifications or the sale of FN GmbH' capital. These rights will be valid until FN GmbH has repaid all its debts to these two shareholders.

5.2.2. Ex ante *assessment of the market conditions and the investments needed*

(93) Germany argued that throughout the period under investigation, all investments decisions had been underpinned by market studies the conclusions of which pointed systematically to the necessity of the investment.

(94) In that regard, Germany mentions first a 1998 study (carried out by […]) according to which the Niederrhein-Weeze project appeared to be economically sound and sustainable. Germany mentioned additional studies produced shortly afterwards, which recommended the specialisation of the new airport infrastructure to the LCC segment, which was then identified as the most promising growth source in the late 1990s. The construction of an infrastructure explicitly designed for LCC traffic, the geographical situation of the airport (catching around 35 million inhabitants), the saturation of the nearby Amsterdam and Dusseldorf airports were then depicted as competitive advantages.

(95) Germany further refers to further business plans which relied upon the expected growth of LCC traffic, the saturation of the neighbouring airport platforms, the signing of agreements with Ryanair, to predict the financial success of the airport. Given the need to enforce environmental protection rules, FN GmbH simultaneously commissioned an air traffic forecast from […] ('the […] study'), which anticipated for 2010 a traffic of 2,88 million passengers, and for 2020 a traffic ranging between 3,1 and 4,85 million passengers. Germany observes that the traffic records show that the business plan was perfectly respected until 2010, despite the adverse events described above.

(96) Germany further explains that in 2009, in view of the enlarged scope of Ryanair activities at the airport, FN GmbH commissioned another business plan covering the year 2009-2020 ('the 2009 business plan'). This business plan was transmitted to [bank], which could take this expert's study into consideration when making the decision to grant a commercial loan to FN GmbH.

(97) In light of those elements, Germany contested the Commission's preliminary views that FN GmbH's business model was unsustainable and that the privatisation process was conducted on political considerations and not on pure commercial terms.

5.2.3. *Market-conformity of EEL GmbH's loans to FN GmbH*

(98) Germany stated that the opening decision uses an incorrect legal basis to assess the market conformity of the interest rates of the loans granted by EEL GmbH. According to Germany, the Commission used the 2008 Communication from the Commission on the revision of the method for setting the reference and discount rates ('the 2008 Reference Rate communication') ([23]) in its assessment. Germany argues that since most measures under scrutiny were granted between 2003 and 2005, the Commission should have applied its 1997 notice on the method for setting the reference and discount rates ('the 1997 Reference Rate communication') ([24]).

(99) Moreover, irrespective of which of the two communications would be applicable *ratione temporis*, Germany questioned the applicability of any Commission reference rate to this case on the grounds that there is allegedly no functioning financial market for the construction of airport infrastructure.

(100) Germany added that the loans granted by the public authorities were totally market compliant on the following grounds:

(a) all loans agreements provided for the repayment of the principal accrued with market conform and/or legally applicable interests;

(b) all loans granted to FN GmbH were completely and constantly secured by (i) charges on land of prime rank (*Grundschuld auf sämtliche Grundstücke*), (ii) Airport Network BV's shares in ANH GmbH's capital and (iii) ANH GmbH's shares in FN's capital;

(c) the interest rates of the loans granted to FN GmbH, ranging from [1-8] %, were at all times market-compliant taking into account the significant initial contribution of private capital injections (around [20-50] %) in the overall project financing and the high level of collateralisation;

(d) these interest rates are equivalent to the interests granted for 10-year maturity loans that are 80 % collateralised with estate properties.

(101) As regards the private investor test, Germany referred to the case-law in the *Italian Republic v Commission* case ([25]) where the Court stated that 'In order to determine whether such measures are in the nature of State aid, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount'. Germany argued that a private investor in lieu of EEL would have taken into account the obligation of legal compliance and accepted that the profitability of the investment could be delayed given the compliance costs, as already recognised by the

([23]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).
([24]) Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).
([25]) *Italian Republic/Commission of the European Communities*. C-305/89 EU:C:1991:142, paragraph 19

Commission in the previous individual aid case *Einzelbeihilfe für Wasserwerke* ([26]). Germany also added that a private investor may also take into account the strategic nature/objective of the business model to adapt its profitability projections. According to point 3.2 (v) of the Commission Communication on Public authorities' holdings in company capital of 14 September 1984 ([27]), 'the strategic nature of the investment in terms of markets or supplies is such that acquisition of a shareholding could be regarded as the normal behaviour of a provider of capital, although profitability is delayed'. Germany concluded that this provision rules out the presence of an economic advantage involving State aid.

5.3. **Measure 2: Land NordRhein Westfalen's support measure to FN GmbH**

(102) According to Germany, the support measure granted by a decision of Land Nordrhein Westfalen to FN GmbH on 15 October 2002 for an amount of EUR 3,525 million actually constitutes no aid or at least existing aid within the meaning of the Procedural Regulation. Germany argued that that the measure has been adopted on the basis of the 1993 Decree. According to Germany, the decree had been adopted before the Commission notice on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aids in the aviation sector ('the 1994 Aviation Guidelines') ([28]).

(103) Germany added that the financing of airport infrastructures only constituted State aid and became subject to the Commission's scrutiny at a later stage, following: (a) the Commission's adoption of its Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ('the 2005 Aviation Guidelines') in 2005 and (b) the adoption of landmark judgments in that sector by the General Court and the Court of Justice of the European Union ([29]).

(104) Germany also argued in this respect that the Commission used an incorrect legal basis in the opening decision to preliminary assess Measure 2. Indeed, the opening decision ([30]) was based on the new version of the 1993 Decree, which entered into force on 1 January 2003, after the granting of the measure.

(105) Finally, Germany considers that, since the 1993 Decree, on the basis of which the aid measure under scrutiny has been adopted, has been repealed, there is no need for the Commission to make use of the provisions of the Procedural Regulation related to existing aid.

5.4. **Measure 3: Direct support from the district of Kleve to FN GmbH**

(106) Germany considers that the granting of the bridge financing was necessary to accompany the private investment into the airport at the startup phase. As regards the waiving of FN GmbH's obligation to repay the second loan tranche, Germany holds that the district of Kleve deliberately took that decision since FN GmbH had fulfilled its legal obligation to create at least 350 jobs.

5.5. **Measure 4: public refinancing of EEL GmbH**

(107) Germany contests that the refinancing of EEL GmbH constitutes an operation involving the State, since it is merely a capital injection undertaken by EEL GmbH's shareholders. Germany points out that the refinancing of the EEL GmbH was carried out by the public owners and private banks.

(108) Germany claims that the opening decision counts the alleged State aid twice (FN GmbH's refinancing by EEL GmbH, and EEL GmbH's refinancing by its public shareholders) although they form only one single measure. Germany recalls that the Commission had renounced to proceed to a double assessment in the similar *Leipzig/Halle* case ([31]).

([26]) Commission Decision of 15.6.2011, N 322/10–, paragraph 49. http://ec.europa.eu/competition/state_aid/cases/237041/237041_1243261_83_3.pdf

([27]) http://ec.europa.eu/competition/state_aid/legislation/transparency_extract_en.pdf

([28]) Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

([29]) In particular, 12 December 2000, *Aéroports de Paris* v Commission T-128/98, ECR II-3929 EU:T:2000:290, 17 December 2008, *Ryanair/Commission*, T-196/04, EU:T:2008:585, as well as 24 March 2011, *Freistaat Sachsen and Land Sachsen- Anhalt/Commission a.o.*, T-443/08, EU:T:2011:117.

([30]) Recital 42.

([31]) SA.30743 — *Finanzierung von Infrastrukturprojekten am Flughafen Leipzig/Halle* (OJ C 284, 28.9.2011, p. 6).

(109) Germany denies that EEL GmbH was involved in any economic activity and argues that EEL GmbH should be instead considered as a temporary Special Purpose Vehicle ('SPV') set up to manage and develop the airport infrastructure. Germany takes the view that EEL GmbH was set up to be more efficient in the project management than its two separate shareholders (the district of Kleve and the municipality of Weeze) and to channel start-up support provided by the latter in a more transparent way. According to Germany, no private investor would have carried out the same activities as those of EEL GmbH.

(110) Finally, Germany added that EEL GmbH was making a profit margin thanks to the difference between the interest rates of the loans received from its shareholders and those granted to FN GmbH.

5.6. **Compatibility assessment**

(111) Germany doubts that the Commission thoroughly assessed the compatibility of the support measures in the opening decision. It adds that, in view of the issue relating to legitimate expectations explained below, the Commission should neither proceed further with the investigation nor consider any recovery of the support measure. Finally, Germany notes that the Commission had already cleared the support measures granted to the Kassel-Calden airport, which are similar to those granted to Niederrhein-Weeze airport. Germany infers from this that the Commission should declare the latter compatible with the internal market.

5.7. **Legitimate expectations**

(112) In its comments on the opening decision, Germany reiterated previous arguments as regards legitimate expectations. According to Germany, the Commission would have informed it in July 2009 ([32]) that it had no intention to investigate the case further, and, by doing so, would have created legitimate expecations. Germany concluded that the Commission was then bound by the principle of good administration and should have closed the preliminary investigation. To support its views, Germany claimed that the Court of Justice of the European Union had established in the *Salzgitter case* ([33]) that a delay by the Commission in exercising its supervisory powers and ordering recovery of State aid did not render a recovery decision unlawful, except in exceptional cases (like this one) where the Commission would have manifestly failed to act and would have clearly breached its duty of diligence.

(113) Germany argued that the Commission's formal investigation overlooked other Commission acts such as the 2005 Konver II Decision (granting 14,9 million ECU for the conversion of former military airports in Nordrhein Westfalen) and the action plan for airport capacity, efficiency and safety in Europe ([34]), which would explicitly call for the creation of new airport infrastructure.

6. **COMMENTS FROM INTERESTED PARTIES**

6.1. **Flughafen Düsseldorf GmbH**

(114) Flughafen Düsseldorf Gmbh ('Flughafen Düsseldorf'), the operator of Düsseldorf airport, took the view that the four measures under scrutiny have affected competition in the Single market and should be declared incompatible. According to Flughafen Düsseldorf, the traffic at Niederrhein-Weeze was multiplied by ten in less than 10 years only because the airport's cost structure had been artificially lowered by public support. Because of the start of flight operations at Niederrhein-Weeze, Ryanair has abusively used the brand 'Düsseldorf' in its marketing campaigns, which have misled and diverted potential customers to Niederrhein-Weeze at the expense of Flughafen Düsseldorf.

6.2. **Niederrheinische Industrie — und Handelskammer Duisburg Wesel Kleve zu Duisburg**

(115) The Niederrheinische Industrie— und Handelskammer Duisburg Wesel Kleve zu Duisburg ('the Niederrheinische IHK'), the local chamber of commerce and industry, points that the closure of the military airport led to a loss of 400 jobs and around EUR 100 million of revenues per year for the disctrict whereas conversely, the business

([32]) See Recital 54 of the opening decision.
([33]) *Salzgitter/Commission*, C-408/04, EU:C:2008:236, paragraph 106.
([34]) COM(2006) 819.

development of Niederrhein-Weeze airport has been extremely positive and created over 1 200 jobs in the region. The Niederrheinische IHK further notes that the airport has grown according to the 2003 business plan and has turned into the third largest regional airport in the Land. The recent decrease in passengers traffic would be largely imputable to the introduction of the air passenger tax in Germany.

6.3. **Erlebe-Fernreisen and Atlasreisen**

(116) Erlebe-Fernreisen GmbH ('Erlebe-Fernreisen') and Atlasreisen Partnerunternehmen ('Atlasreisen'), two local travel agencies, expresses support to Niederrhein-Weeze airport's position in the procedure. Erlebe-Fernreisen takes the view that the renovation of the military airport and the cooperation with the management of Niederrhein-Weeze airport boosted the company's growth. Atlasreisen recalls the airport's ability to go through the difficult certification process and the introduction of the air passenger tax in Germany.

6.4. **Agello**

(117) Agello Service GmbH ('Agello'), an airport services provider, considers that the positive business development of Niederrhein-Weeze airport has turned it into the third largest regional airport in the Land and considers it to be a successful European project. In its view, the recent decrease in passengers traffic is largely imputable to the introduction of the air passenger tax in Germany.

6.5. **Pro:niederrhein**

(118) Pro:niederrhein, a group of local citizens supporting the Niederrhein-Weeze airport considers that the measures under assessment are not illegal and that the airport is important for the region, as highlighted by a petition signed by over 20 000 persons in 2006.

6.6. **Tower Company and STI**

(119) The Tower Company GmbH ('Tower Company'), the airport service provider in charge of flight security, and STI Security Training International GmbH ('STI'), the passenger control service provider, considers that the public remit activities it carries out could not be relocated in case of closure of the airport. It invites the Commission to take employment into consideration in its assessment.

6.7. **Serve2fly and I-Punkt**

(120) Serve2fly Heico Losch Airport Service GmbH ('Serve2fly'), the airport ground handling provider, and I-Punkt GmbH ('I-Punkt'), a local construction company, consider that the business development of Niederrhein-Weeze airport has been extremely positive and created over 1 000 jobs in this less developped part of the Nordrhein Westfalen region. Serve2fly argues that the views put across in the opening decision go against the Commission's own guidelines by preventing local airports from competing on the market. Serve2fly recalls the external adverse events that the airport had to cope with and invite the Commission to take them into account.

6.8. **Gaetan Data**

(121) Gaetan Data GmbH ('Gaetan Data'), a local training company argues that the airport constitutes a unique resource in terms of airport training, and considers that the Commission should clear the case rapidly.

6.9. **Van Boekel, RAS and SOV**

(122) Van Boekel GmbH ('Van Boekel'), a local company active, inter alia, in road construction works and landscape design, Rheinland Air Service Werft & Handel GmbH ('RAS'), the aircraft refuelling service provider, and Schilling Omnibusverkehr GmbH ('SOV'), the bus transport company serving Niederrhein-Weeze from Cologne and Düsseldorf, argue that the airport is now a profitable private airport with a truly European dimension.

6.10. **NRN Energie**

(123) NRN Energie GmbH ('NRN Energie') states that the airport was financed by a private investor, contrary to Eindhoven airport, which could rely on the additional financing of military operations by the Netherlands. As regards public involvement, NRN Energie considers that the public loans have been granted on market terms. NRN Energie shared Germany's concerns on the breach of legitimate expections.

6.11. **KPP**

(124) KPP Steuerberatungsgesellschaft mbH ('KPP'), a tax advisory services firm, refers to FN GmbH's significant return on capital ([10-20] %) in 2010. KPP argues that the loans received by FN GmbH should be considered as quasi equity for a significant part, and in any case, have been completely collateralised.

6.12. **The district of Kleve**

(125) The district of Kleve supports all the comments made by Germany, in particular those related to the breach of legitimate expectations. It also emphasises the growing demand for regional aiports in Nordrhein Westfalen, one of the most densely populated areas in Europe, which cannot be fully met by the nearby and nearly saturated Düsseldorf airport. The district of Kleve adds that the financing of Niederrhein-Weeze airport strictly adhered to the 2005 Aviation Guidelines, as the latter qualified as a category D airport (until 2007 included).

6.13. **FN GmbH**

(126) FN GmbH supports all the comments made by Germany on the opening decision, to which it contributed. FN GmbH stresses that the measures under scrutiny do not constitute State aid, notably the loans granted by EEL GmbH, which were granted on market terms. According to FN GmbH, despite a very significant level of investment into the airport infrastructure (EUR [50-100] million), FN GmbH has been able to maintain a high equity ratio (above [20-50] %) and to limit the share of the financing measures under scrutinity to less than [20-50] % in the overall financing. FN GmbH adds that both traffic records and operational profits have been on the rise since the start of operations in 2003 so that FN GmbH make yearly profits since 2007. FN GmbH further notes that the operational revenues keep increasing and largely exceed the operational costs, which remain stable. According to FN GmbH, this solid operational performance would be even better, if all costs related to public remit expenses were deducted from the profit and loss accounts.

(127) FN GmbH stresses that it is not a company in difficulty and that all loans have been granted on market terms. FN GmbH claims that, for this class of credit, the interests rates set out in the loans granted by EEL GmbH are higher than the Bundesbank' rates for new collateralised credits or the Pfandbriefindex ([35]) rates (plus a usual margin of 80 to 120 basis points).

6.14. **Other third parties**

(128) Five individuals, doubt that:

(a) the information provided by Germany reflected the real amounts granted to EEL GmbH and FN GmbH;

(b) the airport was able to survive without public loans;

(c) there was no functioning financial market that could finance projects such as the Niederrhein-Weeze airport project;

(d) FN GmbH would be in a position to repay all loans and interests on the repayment dates in 2016; the third parties concerned argue in that regard that Germany would have been forced to accept the debt-to-equity swap contemplated in 2011, which would constitute illegal aid as well as an operation that no private investor would have undertaken;

([35]) The index provides the interest rates of mostly triple-A rated German bank debenture.

(e) the interest charged by Germany to FN GmbH corresponds to market realities;

(f) FN GmbH has created 350 jobs (which was a pre-condition imposed by Germany on FN GmbH to waive the repayment of the second tranche of EUR [2-5] million in 2004);

(g) the real value of the collaterals provided by Airport Network B.V for the loans granted to FN GmbH is high ([36]);

(h) an investor would have taken the risk to grant loans to an airport that had not obtained its operating licence from the onset.

7. **COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS**

(129) Germany did not consider that the elements provided by Mr Kleinschnittger may be validly used in the procedure since it discloses confidential information from the deliberations of the district of Kleve assembly, which has been illegally collected and transmitted to the Commission.

(130) As regards the comments made by some individuals, Germany referred to its submissions of 18 March 2013 and 19 August 2013 summarised in Section 5.

8. **ASSESSMENT OF THE MEASURES**

(131) In accordance with Article 107(1) of the TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the internal market.

(132) The criteria laid down in Article 107(1) of the TFEU are cumulative. Therefore, for a measure to constitute State aid within the meaning of Article 107(1) of the TFEU, each of the four following conditions need to be fulfilled. The financial support must:

— be granted by the State or through state resources;

— favour certain undertakings or the production of certain goods;

— distort or threaten to distort competition; and

— affect trade between Member States.

(133) In the present case, Germany has argued that EEL GmbH and its shareholders consistently acted as prudent market economy operators guided by profitability goals, and that the measures under assessment did not confer any economic advantage that the company would not have obtained under normal market conditions. If this is indeed the case, the measures implemented by Germany would not constitute State aid.

8.1. **Legitimate expectations**

(134) Contrary to what Germany argues, the Commission has not created any legitimate expectations as regards the closure of the preliminary investigation. First, the argument that the Commission would have stayed inactive is irrelevant. In Joined Cases *Demesa and Territorio Histórico de Álava v Commission* ([37]), the Court confirmed that that any apparent failure to act is irrelevant when an aid measure has not been notified to it. Since Germany failed to notify the aid (see Recital 247), Germany cannot invoke legitimate expectation. The Commission notes that the reference to the *Salzgitter* case law is irrelevant since this judgment concerns only the recovery period in case of an aid declared incompatible by a Commission decision and not the preliminary investigation period covered by Germany's comments. Finally, the Commission notes that, since it has never informed Germany of the closure of the case at hand, it is entitled to proceed to its formal investigation.

([36]) The third parties concerned justified their doubts on this point by claiming that Airport Network B.V was continuously loss-making.
([37]) *Demesa and Territorio Histórico de Álava v Commission*, joined Cases C-183/02 P and C-187/02 P, ECR, EU:C:2004:701, paragraph 52.

8.2. **Company in difficulty**

(135) In the opening decision, the Commission found that it could not be excluded that FN GmbH was a company in financial difficulty. However, in view of the information provided by Germany, the Commission is of the opinion that the FN GmbH's financial situation has improved overtime:

(a) the company was able to generate positive cash-flows less than 5 years after the start of operations (see table 5) and made a profit until the end of 2010, year of the last measure under scrutiny,

(b) the company always benefited from its private shareholders' support (see Recital 72) and could eventually access commercial bank credit (see Recital 73),

(c) FN GmbH's management never envisaged to file for bankruptcy during that period.

(136) Therefore the Commission takes the view that the company was never in the situation described in paragraph 9 of the Rescue and Restructuring Guidelines where the company would have been 'unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term'. The Commission concludes that FN GmbH should not qualify as a company in difficulty.

8.3. **Existence of Aid Concerning the Loans Granted to FN GmbH (Measure 1)**

8.3.1. *Notion of Undertaking and Economic Activity*

(137) Until recently, the development of airports was often determined by purely territorial considerations or, in some cases, military requirements. The operation of airports was organised as part of the administration rather than like a commercial undertaking. Competition between airports and airport operators was also limited and developed gradually.

(138) That situation has however changed in recent years. Although those land-use planning considerations and administrative structures may still persist in some cases, the majority of airports have been incorporated under commercial law in order to allow their operation on market terms in an increasingly competitive environment. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital. In recent years, private-equity firms and investment and pension funds have shown a great interest in acquiring airports, as illustrated in the case at hand.

(139) As noted in paragraph 44 of the Commission Guidelines on State aid to airports and airlines ('the 2014 Aviation Guidelines') ([38]), the gradual development of market forces in the airport sector does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered as an economic activity. However, the Union Courts have recognised the evolution in the nature of airport activities. In '*Leipzig/Halle airport*' ([39]), the General Court held that, from the date on which the judgment in 'Aéroports de Paris' was rendered, the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from the date of the judgment in '*Aéroports de Paris*' (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.

(140) With regard to the present case, the various loans granted to FN GmbH by EEL GmbH, subject to the formal investigation procedure, to finance the construction of Niederrhein-Weeze airport, were granted as of 2003, that is after the *Aéroports de Paris* judgment. As a result, the Commission concludes that it is entitled to examine all loans granted to FN GmbH by EEL GmbH.

([38]) Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([39]) 24 March 2011, *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission*, Joined Cases T-443/08 and T-455/08, ECR,, EU:T:2011:117, in particular paragraphs 93 and 94; confirmed by *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, Case C-288/11 P, EU:C:2012:821.

8.3.2. *State resources and imputability to the State*

(141) The concept of State aid applies to any advantage, granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.

(142) In the present case, the grantor of the aid EEL GmbH is entirely owned by public bodies, i.e. by the district of Kleve on one part and by the municipality of Weeze on the other part. For this reason, it is a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC ([40]) on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings.

(143) The predominant influence of the district of Kleve and the municipality of Weeze at this time is clearly apparent in the shareholding structure since the district of Kleve (52 %) and the municipality of Weeze (48 %) are the sole shareholders of EEL GmbH. Moreover, the management board of EEL GmbH consists of two representatives of public bodies, namely the mayor of the municipality of Weeze and the Landrat of the district of Kleve.

(144) The decisive influence of the public authorities on EEL GmbH is also financial because of the above mentioned fact that during the years 2004-2005, EEL GmbH has received from its shareholders various subsidies ('liquidity benefits' and capital injections). Thus, there has been a direct financial support to EEL GmbH granted by the public administration.

(145) Therefore, the Commission considers that EEL GmbH is a public undertaking and that its resources must be regarded as State resources.

(146) However, the Court has also ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot automatically be presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the loans in question, to be imputable to the State. The Court indicated that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators.

(147) Such indicators may include the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the scope of the measure, its content or the conditions which it contains.

(148) It must first be noted that significant investment projects affecting an airport are of interest to local authorities, which are often involved to some degree in such projects. This is because an airport can play a fundamental role in several policies: transport policy, regional or national economic development policy or town and country planning policy. In the case at issue, the airport is actually operated by a private company. Nevertheless, the decision to convert the former military airport into a civil airport and to sell it to a private investor was a political decision. Moreover, the district of Kleve and the municipality of Weeze played a fundamental role in this conversion.

(149) The Commission notes that EEL GmbH was founded by the two regional public bodies in order to prepare the airport real estate for further commercial use as civilian airport and to manage the real estate until the takeover by a private investor, as laid down in Article 2 of its founding act (*Gesellschaftsvertrag*) ([41]) of 16 December 1999. As explained in Recital 32, this activity ceased until the company's activity was revived in April 2003. Ever since, the nature of EEL GmbH's activities is limited to channelling new investments into the Niederrhein-Weeze airport, which is still consistent with its original mission.

([40]) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

([41]) 'The purpose of the company is the development and opening up of the former NATO airfield Weeze-Laarbruch in regard to the necessary technical and infrastructural facilities and the maintenance andrefurbishment of the site in preparation for a subsequent commercial use.'

(150) Moreover, between 1999 and 2001, the airport was operated by the district of Kleve and the municipality of Weeze (through the then publicly owned FN GmbH) and EEL GmbH was especially created in order to assure the future functioning of the civilian airport.

(151) It follows from the above that EEL GmbH ought to be regarded as a vehicle set up already defined at Recital 109 by the district of Kleve and the municipality of Weeze to achieve their public policy objectives vis-à-vis the Niederrhein-Weeze airport and in particular, its conversion from a military into a civil use, which the measures at issue were intended to finance and accompany. Those are strong indication that the measures at issue are imputable to the district of Kleve and the municipality of Weeze.

(152) Moreover, the decision to grant loans and extensions of these loans to FN GmbH via EEL GmbH was taken by the shareholders of EEL GmbH, which represent the public authorities. The Commission also notes that the two public shareholders have determined the scope, the content and the conditions for each of loans granted by EEL GmbH in favour of FN GmbH, as highlighted in the minutes of EEL GmbH's general assembly.

(153) Besides, all the loans granted from EEL GmbH to the airport operating company FN GmbH were refinanced by the district of Kleve ([42]). This is a further indication that the decisions to grant loans and rollovers to FN GmbH originated in fact from the public authorities.

(154) Furthermore, EEL GmbH has no board of directors. Both managing directors are representatives of the public shareholders. One managing director of the company is the Landrat, that is the head of the district of Kleve and the other managing director is the mayor of the municipality of Weeze. Moreover, EEL GmbH has no permanent staff and is managed by a single public official from the district of Kleve. It is apparent from these elements that any decision taken by EEL GmbH is in fact adopted by representatives from the public shareholders, who run it on a day-to-day basis in addition to sitting in its governing bodies. This confirms that the measures at issue are imputable to the public shareholders.

(155) In addition, despite having the legal form of a private company, EEL GmbH is subject to public accounting rules ([43]).

(156) Finally, it is planned to dissolve EEL GmbH once FN GmbH has repaid all loans and interests due to it. Therefore, as argued by Germany, EEL GmbH should be seen as a vehicle created by its two public shareholders, the sole function of which is to pool resources to be channelled out to FN GmbH for investments purposes. This also confirms that the measures can be imputed to these public shareholders.

(157) Therefore, the Commission takes the view that the decisions by EEL GmbH to grant the loans and repayment deadline extensions that form Measure 1 to FN GmbH constitute a transfer of State resources and are imputable to the State.

8.3.3. *Selective economic advantage — Market economy investor/creditor principle*

(158) In order to verify whether an undertaking has benefited from an economic advantage induced by granting of a loan at privileged terms, the Commission applies the criterion of the 'market economy operator principle'. According to this principle, capital put at the disposal of a company by the State, directly or indirectly, in circumstances, which correspond to the normal conditions of the market, should not be qualified as State aid ([44]).

(159) Therefore, the Commission has to assess first whether the conditions of the four loans and the two loan extensions provided by EEL GmbH to FN GmbH confer an economic advantage to the latter, which would not have obtained under normal market conditions. In the present case, Germany explained, concerning the four loans that loan commitments in favour of FN GmbH from commercial banks were very unlikely at that time (2003-2005), as explained above.

([42]) The Municipality of Weeze's sole financial support consisted in the initial capital injection at the creation of EEL GmbH, but it backed up all decisions taken by EEL GmbH and the district of Kleve.

([43]) By virtue of paragraph 53 of the Haushaltsgrundsätzegesetz (HGrG), which sets out the budgetary and accounting principles of public entities in Germany.

([44]) Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/CEE to public undertakings in themanufacturing sector (OJ C 307, 13.11.1993, p. 3, paragraph 11). This communication deals with themanufacturing sector, but is applicable to the other economic sectors. Cf. also Case T-16/96 *Cityflyer*, [1998] ECR II-757, paragraph 51.

(160) The determination of the aid element of the measures refers to the concept of State aid and, as the Court of Justice has consistently held, 'the concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which the Commission takes its decision'. In order to assess whether loans from public sources have been granted on market terms or whether they entail an advantage for the lender, the Commission can, in the absence of a comparable market rate, base itself on the reference rate proxies. Consequently, the Commission considers that the appropriate method for determining the aid element is the method stated in the Communication from the Commission on the revision of the method for setting the reference and discount rates ('the 2008 Reference Rate Communication') ([45]), which entered into force on 1 July 2008. The Commission proposes to examine the measures at issue in the light of that communication ([46]).

(161) According to the 2008 Reference Rate communication, the interest rate margin of a loan is dependent on the level of collateralisation and the credit rating of the borrower. Consequently, in order to determine the appropriate market conform interest rate, the Commission needs to take into account the credit rating of FN GmbH and the value of the collateral with which the loan was secured.

The credit rating of FN GmbH

(162) During the period when the first four loans were granted FN GmbH has not been rated by a credit rating agency and a bank internal rating was also not available. For that reason Germany have commissioned the consultant company […] ('the Consultant') to estimate a rating of FN GmbH for each of the years in which loans 1 to 4 were granted. The Consultant provided an estimation of the one-year probability of default (PD) and the rating. These estimations were then verified and confirmed by the audit company […].

(163) The estimations of the Consultant are made on the basis of the Solvability Regulation of 2006 ([47]) which implements the rules of Basel II in Germany. According to the Solvability Regulation the banks are supposed to calculate the one-year probability of default in the frame of the so called Internal Ratings Based Approach (IRBA). However, some types of financing, called *Spezialfinanzierungen*, are excluded from the obligation to calculate a PD. For such types of financing the Solvability Regulation foresees a simple risk weighing instead. The Consultant based its estimation of the PD and the rating on this simplified method of assessment. According to that method, the following five factors are assessed: financial strength of the Borrower; political and legal environment; characteristics of the business; strength of the owner; collateralisation.

(164) The PD for each of the loans is assessed to be between [0,5-3] % and [1-5] %. According to the Consultant this PD corresponds to a rating of […]. It has to be noted that this rating evaluation includes an estimation of the level of collateral and hence the loss given default (LGD) associated with each of the loans. This means that the rating provided by the Consultant already includes a potential notch up for the provision of collateral and represents the issue rating (as opposed to an issuer rating). However the report of the Consultant does not include information about the value of the provided collateral for the loans in question and does not provide information about the actual level of LGD associated with each loan.

(165) If only the first four factors, which the Consultant assessed, are taken into consideration (and the last one 'Collateralisation' is excluded) then the estimations of the Consultant should provide a rating close to the issuer rating. For example the average of the scores of the first four factors is [1-5] which could be interpreted as close to a rating of […]. This issuer rating applies to loans 1, 2 and 3. For Loan 4 the issuer rating estimated according to this approach is […].

(166) The Commission notes that the report made by the Consultant leaves some doubts as regards the quality of the rating assessment. Furthermore, this rating estimation has to be taken with some caution given the fact that the Consultant has no credit relation with the Borrower. However, the rating estimation is fairly low on the rating scale used by credit rating agencies and does not appear inconsistent with the credit rating estimation made by [bank] for a later period.

([45]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

([46]) The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate. Despite the fact that the Commission reference rate is only a proxy, the Commission is not in the possession of other conclusive data to determine the interest rate that theborrower could obtain on the market.

([47]) Solvabilitätsverordnung — SolvV of 14 December 2006, published on 20 December 2006 in the German Bundesgesetzblatt (Part I Nr. 61, p. 2926).

(167) In addition, Germany provided the estimation of the one-year probability of default (PD) of FN GmbH used by [bank] for 2009 and 2010. [bank] has provided a two-year loan of EUR [4-10] million to FN GmbH in 2009. [bank] estimated the one-year PD to be [1-5] % in 2009 as well as in 2010. According to estimations of the average probabilities of default published by rating agencies ([48]), a one-year PD of [1-5] % corresponds to a rating between […] and […].

Collateral and Loss Given Default (LGD) ([49])

(168) The first loan is secured by the following collateral at the time when the loan was granted (11 April 2003):

(a) Charge on the land and the buildings of the airport (about 6,2 million sq.m.). FN GmbH bought the land from the German state in 2002 for the price of EUR [5-20] M. A report of an independent evaluator made in September 2002 indicates that the market value of the land is about EUR [5-20] M. The book value of the long-term assets of the Airport at the end of 2002 (including the investments in the land and the buildings) was about EUR [5-20] M. At the time Loan 1 was granted a priority mortgage in favour of […] for the amount of EUR [1-6] M existed on the land.

(b) Personal guarantee of Mr […]; Germany did not provide information about the value of the personal property of the guarantor.

(c) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH; Germany did not provide information on the value of these shares.

(d) Pledge of the shares of ANH GmbH in FN GmbH; Germany did not provide information on the value of these shares.

(169) If the book value of the long-term assets of the Airport is taken into account (EUR [5-20] M) and the priority claim of […] is subtracted (EUR [1-6] M) about EUR [5-15] M are left to cover the claims of the Lender (EUR [5-15] M). The LGD is thus estimated to be about […] % ([50]). This is most probably a conservative estimation of the LGD as some additional value could be also attributed to the personal guarantee and the pledge of shares for which the information is missing.

(170) The second loan is secured by the following collateral at the time when the loan was granted (17 June 2004).

(a) Pledge on the land and the buildings of the airport. The book value of the long-term assets of the Airport at the end of 2003 (including the investments in the land and the buildings) was about EUR [20-40] million. At the time Loan 2 was granted a priority mortgage in favour of […] for the amount of EUR [1-6] million and a priority mortgage in favour of EEL GmbH for the first loan of EUR [11-20] M (see Loan 1 above) existed.

(b) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH. Germany did not provide information on the value of these shares.

(c) Pledge of the shares of ANH GmbH in FN GmbH. Germany did not provide information on the value of these shares.

(171) If the book value of the long-term assets of the airport is taken into account (EUR [20-40] million) and the two priority claims of […] and EEL GmbH are subtracted (EUR [1-6] M and EUR [11-20] M) about EUR [10-25] M are left to cover the claims of EEL GmbH from Loan 2 (EUR [1-5] million). The estimated recovery rate in this case is close to […] %. The LGD is thus estimated to be […].

([48]) See Standard and Poor's '2012 Annual Global Corporate Default Study and Rating Transitions', 18 March 2013, p. 29, and Moody's 'Corporate Default and Recovery Rates 1920-2010', 28 February 2011, p. 31.

([49]) The level of collaterals can be measured as the Loss Given Default (LGD), which is the expected loss in percentage of the debtor's exposure taking into account recoverable amounts from collateral and thebankruptcy assets; as a consequence the LGD is inversely proportional to the validity of collaterals.

([50]) LGD = 1 – recovery rate = 1 – EUR […] M/EUR […] M = […] %

(172) The third loan is secured by the following collateral at the time when the loan was granted (28 July 2004).

(a) Pledge on the land and the buildings of the airport. The book value of the long-term assets of the Airport at the end of 2003 (including the investments in the land and the buildings) was about EUR [20-40] M. At the time Loan 3 was granted a priority mortgage in favour of […] for the amount of EUR [1-6] M and a priority mortgage in favour of the Lender for the first and the second loans of the total amount of EUR [10-20] M existed on the land.

(b) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH. Germany did not provide information on the value of these shares.

(c) Pledge of the shares of ANH GmbH in FN GmbH. Germany did not provide information on the value of these shares.

(d) Pledge of the enterprise of FN GmbH. There is no information about the value of this collateral.

(173) If the book value of the long-term assets of the Airport is taken into account (EUR [20-40] M) and the two priority claims of […] and EEL GmbH are subtracted (EUR [1-6] M and EUR [10-20] M) about EUR [10-20] M are left to cover the claims of the Lender from Loan 3 (EUR [2-5] M). The recovery rate in this case is about […] %. The LGD is thus estimated to be […].

(174) At the time when Loan 4 was granted (1 July 2005) all previous loans together with the unpaid and still due interest of about EUR [0,5-3] M were extended with the same maturity (31 December 2010). The total loan amount summed up to EUR [20-30] M plus EUR [0,5-3] M for unpaid interest. The collateral agreed to secure these claims of EEL GmbH was the following:

(a) Pledge on the land and buildings of the airport. The book value of the long-term assets of the Airport at the end of 2004 (including the investments in the land and the buildings) was about EUR [20-40] M. At the time Loan 4 was granted a priority claim in favour of the Lender for the first, second and third loans existed for the total amount of EUR [10-25] M. No priority claim existed anymore on the loan granted by […] ([51]).

(b) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH; Germany did not provide information on the value of these shares.

(c) Pledge of the shares of ANH GmbH in FN GmbH; Germany did not provide information on the value of these shares.

(d) Additionally to secure all claims of EEL GmbH from all loans […] provided a personal guarantee on 1 July 2005. This guarantee extended a previous guarantee provided by […] in relation to the first loan on 8 June 2003. Germany provided an estimation of the value of the personal wealth of […] excluding the value of his shares in Airport Niederrhein Holding GmbH and FN GmbH in order to avoid a double counting of collateral. At the end of 2004 the value of the personal wealth of the guarantor was estimated to be around EUR [20-40] million ([52]).

(175) The book value of the long-term assets of the airport (EUR [20-40] million) and the personal guarantee of […] (EUR [20-40] million) cover more than 100 % of the total loan amount and due interest (EUR [20-30] million plus EUR [0,5-3] million). The recovery rate is hence […] % and the LGD is […].

(176) On 29 November 2010 all granted loans at the total amount of EUR [20-30] million plus accumulated and due interest of EUR [5-10] million were extended for additional 6 years until 31 December 2016. The amount due was secured by the following collateral:

(a) Pledge on the land and buildings of the airport. The book value of the long-term assets of the airport at the end of 2009 (including the investments in the land and the buildings) is unknown to the Commission. The latest known book value of the long-term assets is EUR [20-40] million the end of 2005. Germany reported the book value of the land and buildings at the end of 2010 to be EUR [30-70] million ([53]). As this value was

([51]) See p. 22 and 23 of Loan Agreement from 1 July 2005.
([52]) See p. 2 of Annex 2 to Germany's letter of 23 May 2014.
([53]) The increase in the value from 2005 to 2010 is due mainly to […].

reported in the books shortly after the second loan extension, it may be accepted as the value of available collateral. A first rang mortgage on the land and buildings existed at that time to secure the claims of [bank] for EUR [0,5-3] million;

(b) Pledge of the shares of Airport Network B.V. in Airport Niederrhein Holding (ANH) GmbH; Germany did not provide information about the value of these shares at the time of the second extension;

(c) Pledge of the shares of ANH GmbH in FN GmbH; Germany did not provide information about the value of these shares at the time of the second extension;

(d) Pledge of shares of FN GmbH in FN Gewerbe GmbH and FN Grundbesitzgesellschaft; Germany did not provide information about the value of these shares at the time of the second extension;

(e) Personal guarantee provided by […] with an estimated value of about EUR [30-70] million ([54]).

(177) The book value of the long-term assets of the airport (EUR [30-70] million) and the personal guarantee with an estimated value of about EUR [30-70] million minus the first rang pledge to [bank] (EUR [0,5-3]) cover about […] % of the total loan amount and due interest (EUR [20-30] million plus EUR [5-10] million) which means an LGD of […].

(178) The table below summarises the information on rating and collateral for each of the loans:

Table 6

Rating and collateral for each of the loans

Loan	Date	Amount in million EUR (Loan + due interest)	Issuer Rating	Collateral value (land and buildings and personal guarantee)	Priority claim […]	Priority claim [bank]	Recovery rate	LGD
Loan 1	11.4.2003	[11-20]	[…]	[5-20]	[1-6]	[…]	[…]	[…]
Loan 2	17.6.2004	[2-5]	[…]	[20-40]	[1-6]	[…]	[…]	[…]
Loan 3	28.7.2004	[2-5]	[…]	[20-40]	[1-6]	[…]	[…]	[…]
Loan 4 and extension 1	1.7.2005	[20-33]	[…]	[40-100]	[…]	[…]	[…]	[…]
Extension 2	29.11.2010	[24-40]	[…]	[70-120]	[…]	[1-3]	[…]	[…]

(179) According to the 2008 RRC the benchmark interest rates are determined by adding an appropriate risk premium to the 1-year base rate. The appropriate risk premiums are set out in the grid in the 2008 RRC and take into account the rating of the borrower and the level of collateralisation of the loan. For example the second loan extension was granted with high collateralisation and the rating of FN GmbH is between […] and […]. In order to be conservative the Commission considers a rating of […]. Consequently, FN GmbH is in the rating group of '([…])' ([55]) in the grid determined in the 2008 Reference Rate Communication. The risk margin, which corresponds to this rating group and to high collateralisation, is […] bps. The applicable base rate at the time when the loan extension was granted (on 29 November 2010) is 1,24 % ([56]).

([54]) See p. 2 of Annex 2 to Mitteilung vom 23.5.2014.
([55]) This group comprises of the ratings of […].
([56]) A list of the applicable base rates is published by the Commission on the following website: http://ec.europa.eu/competition/state_aid/legislation/base_rates_eu27_en.pdf

(180) The following table summarises the information about the actual loan rates and the benchmark reference rates applicable at the moment of granting the loans according to the 2008 Reference Rate Communication:

Table 7

Benchmark interest rates vs interests rate charged

Loan	Date	Duration	Issuer Rating	LGD	Base rate 1-year EURIBOR (3 month averages) (%)	risk margin RRC	Total bench-mark interest rate	Interest rate charged
Loan 1	11.4.2003	[…]	[…]	[…]	2,50	[…]	[1-6]	[3-7]
Loan 2	17.6.2004	[…]	[…]	[…]	2,30	[…]	[1-6]	[3-7]
Loan 3	28.7.2004	[…]	[…]	[…]	2,35	[…]	[1-6]	[6-9]
Loan 4 and extension 1	1.7.2005	[…]	[…]	[…]	2,20	[…]	[1-6]	[1-5]
Extension 2	29.11.2010	[…]	[…]	[…]	2,20	[…]	[1-6]	[1-5]

(181) According to the above estimations, loans 1, 2 and 3 are granted at rates well above the applicable benchmark rates. Therefore, the Commission considers that FN GmbH has not received any economic advantage through those measures.

(182) As regards Extension 2, the above data also suggest that it was granted on market terms, since the interest rate of this extension is higher than the estimated benchmark interest rate. However, various elements cast doubts on the absence of State aid in Extension 2, such as the fact that the beneficiary had not yet repaid previous loans, the existence of aid in Loan 4 and Extension 1 and the short duration of the period between the granting of Extension 2 and the preliminary agreement concluded by public authorities and FN GmbH on the debt-to-equity swap referred to in Recital 45. In any event, the Commission considers that, for the very same reasons set out in Section 9.4 concerning the compatibility of the aid involved in Extension 1 with the internal market, if Extension 2 qualifies as State aid, such aid can be considered as compatible with the internal market.

(183) Loan 4 and Extension 1 are granted at a rate below the benchmark rate with a difference of […] bps. Therefore, the Commission takes the view that as regards Loan 4 and extension 1, FN GmbH has received an economic advantage that it would have not received under normal market conditions ([57]).

8.3.4. *Selectivity*

(184) For the case at hand, the Commission notes that Measure 1 (Loan 4, Extension 1 and possibly Extension 2) is an individual aid measure, which was only granted to FN GmbH, and is not a general measure.

(185) Therefore, the advantage conferred on FN GmbH by Measure 1 (Loan 4, Extension 1 and possibly Extension 2) is selective.

([57]) The difference of […] bps in the interest rates represents roughly an advantage of about EUR […] for the duration of Loan 4 and Extension 1.

8.3.5. *Distortion of competition and effect on trade*

(186) According to the case law of the Court of Justice of the European Union, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings ([58]). In general, when an advantage granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in a given Union market, trade between Member States must be regarded as being affected by that advantage ([59]).

(187) Airport managers compete at European level to attract airlines so that they open new routes from their airports, or add new frequencies on such routes. When choosing the airports from which they open routes, or where they add new frequencies on existing routes, airlines compare airports, on the basis of factors such as the type of airport services provided and the clients concerned, the population or economic activity, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services ([60]). By providing FN GmbH with financing under more favourable terms than normal market conditions, Germany has thus allowed it to compete more aggressively against other airport managers to attract airlines than it could have done should it have paid a cost of capital in line with normal market conditions.

(188) Therefore, Measure 1 (Loan 4 and Extension 1 and possibly 2) had the potential to distort competition and affect intra-EU trade.

8.3.6. *Conclusion*

(189) The comparison of the actual loan rates with the benchmark rates derived from the 2008 Reference Rate communication shows that all loans and loan extensions apart from Loan 4 and Extension 1 are granted at rates above the benchmark rates.

(190) The Commission can therefore conclude that loans 1, 2, 3 were granted in line with market conditions, while Loan 4 and Extension 1 were not. The Commission leaves open whether Extension 2 has been granted in line with market conditions.

(191) As the cumulative criteria pursuant to Article 107(1) of the TFEU are fulfilled, the Commission considers that Loan 4, Extension 1, and possibly Extension 2 in Measure 1 involve State aid within the meaning of Article 107(1) of the TFEU.

8.4. **Existence of aid concerning the support received by the Land Nordrhein-Westfalen (Measure 2)**

8.4.1. *Notion of Undertaking and Economic Activity*

(192) The same reasoning as for the aid nature of Measure 1 applies (see section 8.3.1 further above), although Germany argued that it constitutes existing aid (see Recital 102). In the *Leipzig Halle* judgment, the Court of Justice confirmed that the construction of the airport infrastructure should also fall under State aid rules as of 2000, that is before the date of granting of measure 2 on 15 October 2002. The Commission takes the view that the measure therefore constituted aid at the time it was put into effect. Contrary to what Germany has claimed, the fact that the measure was adopted under the 1993 Decree does not affect that assessment. The 1993 Decree only provided a legal basis to allow possible support measures to regional airports that the Land Nordrhein Westfalen may contemplate as from 1993. But it did not provide for an irrevocable commitment vis-à-vis FN GmbH to grant Measure 2 or create any legal entitlement by itself for the beneficiary (as explicitly stipulated in Article 1 of the 1993 Decree). Measure 2 constitutes in fact an individual application of the scheme established by the 1993 Decree.

(193) As a result, the Commission concludes that it is entitled to examine Measure 2 put into question under State aid rules since at the time when it was granted, it was clear that FN GmbH was engaged in an economic activity.

([58]) *Italy* v *Commission*, C-99/02, ECR, EU:C:2004:207, paragraph 65.
([59]) *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* ('*Altmark*' judgment), EU:C:2003:415, ECR
([60]) 2014 Aviation Guidelines, paragraph 43.

8.4.2. *State resources and imputability to the State*

(194) As mentioned at paragraph 111 of the opening decision, public support was paid directly from the budget of the Nordrhein-Westfalen Land as a direct grant in favour of FN GmbH. Thus, the funding provided by the Land Nordrhein-Westfalen was financed through State resources and is imputable to the State.

8.4.3. *Economic Advantage*

(195) In order to evaluate whether a State measure constitutes aid, it has to be determined whether the beneficiary undertaking receives an economic advantage that it would not have received under normal market conditions.

(196) In the case under investigation, the Land of Nordrhein-Westfalen has granted public funds in form of a direct grant to support infrastructure investments at the airport. These funds were received by FN GmbH as airport manager to finance investments at the airport. The Commission notes that no market investor would provide such a grant without any remuneration and without any possibility of a return.

(197) Therefore, the investment grant reduces the investment costs that the airport operator would normally have to bear, without any remuneration, and therefore confer an economic advantage on FN GmbH.

8.4.4. *Selectivity*

(198) For the case at hand, the Commission notes that Measure 2 is an individual application of a scheme on the basis of which advantages were not only granted to the Niederrhein-Weeze Airport, but also to several other airports located in the Land Nordrhein-Westfalen. However, the scheme in question is not a general measure for all airports in Nordrhein-Westfalen, as the larger airports Düsseldorf and Köln/Bonn are not eligible for this support measure from the Land. In any event, had all airports in Nordrhein-Westfalen would been eligible, such a sectorial measure would have to have been regarded as selective, as it only benefitted a certain sector in a certain region.

(199) Therefore, the advantage conferred on FN GmbH by Measure 2 is selective.

8.4.5. *Distortion of competition and effect on trade*

(200) According to the case law of the Court of Justice of the European Union, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings ([61]). In general, when an advantage granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in a given Union market, trade between Member States must be regarded as being affected by that advantage ([62]).

(201) Airport managers compete at European level to attract airlines so that they open new routes from their airports, or add new frequencies on such routes. When choosing the airports from which they open routes, or where they add new frequencies on existing routes, airlines compare airports, on the basis of factors such as the type of airport services provided and the clients concerned, the population or economic activity, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services ([63]). By providing FN GmbH with financing under more favourable terms than normal market conditions, Germany has thus allowed it to compete more aggressively against other airport managers to attract airlines than it could have done should it have paid a cost of capital in line with normal market conditions.

(202) Therefore, Measure 2 had the potential to distort competition and affect intra-EU trade.

8.4.6. *Conclusion*

(203) Measure 2 constitutes State aid to FN GmbH within the meaning of Article 107(1) TFEU.

([61]) *Italy* v *Commission*, EU:C:2004:207, paragraph 65.
([62]) 'Altmark' judgment, EU:C:2003:415
([63]) 2014 Aviation Guidelines, paragraph 43.

8.5. **Existence of aid concerning the support received from the district of Kleve (Measure 3)**

8.5.1. *Notion of Undertaking and Economic Activity*

(204) The same reasoning as for the aid nature of the loans provided by the publicly owned EEL GmbH applies (see section 8.3.1 further above) applies. Indeed, the various measures constituting Measure 3 were granted on 14 March 2002, that is, after the judgment in *Aéroports de Paris* was delivered. According to paragraph 1, point 4 of the loan agreement, the date of granting of the measure is the date, when the beneficiary concluded the purchase of the airport infrastructure with the German federal government, that is 14 March 2002.

(205) As a result, the Commission concludes that it is entitled to examine Measure 3 and to assess its compatibility with State aid rules since at the time when it was granted, it was clear that FN GmbH was engaged in an economic activity.

8.5.2. *State resources and imputability to the State*

(206) The support was granted directly from the budget of the district of Kleve to FN GmbH. Thus, Measure 3 was financed through State resources and is imputable to the State.

8.5.3. *Economic Advantage*

(207) In order to evaluate whether a State measure constitutes aid, it has to be determined whether the beneficiary undertaking receives an economic advantage that it would have not received under normal market conditions. In this respect, the Commission must analyse whether the district of Kleve has acted as a market economy investor in waiving one tranche of the bridge financing previously granted to FN GmbH.

(208) The conduct of an investor in a market economy is guided by prospects of profitability ([64]). The market investor test will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private undertaking, can be expected within a reasonable period.

(209) In the case at issue, the district of Kleve has granted a zero-interest loan granted to FN GmbH of EUR [4-10] million and waived the obligation of FN GmbH to repay a tranche, amounting to EUR [2-5] million, without receiving any further remuneration. This last decision was in fact the implementation of the clause laid down in paragraph 4, point 1 of the loan agreement itself, whereby the tranche in question would not be repaid if the objective of creation of 350 jobs would be reached. Thus, the Commission notes that no market investor would have granted a zero-interest loan and waived the repayment of a significant part thereof without any remuneration.

(210) Furthermore, the assessment of the market economy investor should leave aside any positive repercussions on the economy of the region in which the airport is located, including in terms of job creation, since the Commission assesses whether the given measure constitutes aid by considering whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ([65]). In the case at issue, the only counterpart to the waiver of the repayment obligation was a certain level of job creation. However, job creation should be disregarded in the context of the market economy operator principle. In other words, no market economy investor would have agreed to waive the repayment of EUR [2-5] million on the basis of job creation considerations in the region.

([64]) 12 December 2000, *Alitalia v Commission*, T-296/97, ECR, EU:T:2000:289, paragraph 84; *Italy v Commission*, C-305/89, ECR, EU:C:1991:142, paragraph 20.
([65]) See 2005 Aviation Guidelines, number 46.

(211) Therefore, the interest-free nature of the loan and the waiver granted by the district of Kleve reduce the costs that the airport operator would normally have to bear and therefore confers an advantage to FN GmbH that it would not obtain under normal market conditions.

8.5.4. *Selectivity*

(212) The advantage in question was granted only to FN GmbH. As the public funding was directed at a single undertaking, it is selective within the meaning of Article 107(1) TFEU.

8.5.5. *Distortion of competition and effect on trade*

(213) The same reasoning as for the distortion of competition and effect on trade as elaborated above (see section 8.4.5) applies.

8.5.6. *Conclusion*

(214) For the reasons set out above the Commission takes the view that the public funds provided by the district of Kleve and granted to FN GmbH with regard to the agreement concerning the bridge financing of part of the acquisition costs for the airport real estate involve State aid within the meaning of Article 107(1) TFEU.

8.6. **Existence of aid concerning the support received by EEL GmbH from the district of Kleve and the municipality of Weeze (Measure 4)**

8.6.1. *Notion of Undertaking and Economic Activity*

(215) Germany argues that EEL GmbH is a vehicle, whose object is to facilitate the channelling of funds to FN GmbH in an efficient and economic manner.

(216) As has been laid out in Recital 25, EEL GmbH was founded by the district of Kleve and the municipality of Weeze to manage the airport real estate prior to its privatisation. Thereafter, EEL GmbH engaged in granting loans to FN GmbH. The granting of loans to third parties is by itself an economic activity. Therefore, when the various measures forming Measure 4 were granted to EEL GmbH, the latter was engaged in an economic activity.

(217) With reference to Article 101 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. EEL GmbH is only acting as a vehicle of public authorities, and does not, as such, carry economic activities: its only purpose is to pool the resources of two public authorities in view to financing the development of the airports.

(218) As the cumulative criteria pursuant to Article 107(1) of the TFEU are not fulfilled, the Commission considers that Measure 4 does not contain any State aid within the meaning of Article 107(1) of the TFEU.

(219) Even if EEL GmbH had to be regarded as an undertaking subject to the EU competition law throughout the period during which the measures forming Measure 4 were granted (which is not), the Commission assessment would lead to the same conclusion that Measure 4 does not constitute State aid as demonstrated in the sections below.

8.6.2. *State resources and imputability to the State*

(220) EEL GmbH has received all the capital, liquidity benefits and capital injections included in the scope of Measure 4 from its shareholders, which financed these measures through their respective budgets. Measure 4 also includes a 100 % guarantee granted by the municipality of Weeze, which exposed the budget of the municipality. Therefore, the all the measures constituting Measure 4 were financed through budget resources of two local authorities, which in addition, decided to grant these various measures.

(221) Therefore, Measure 4 is financed through State resources and is imputable to the State.

8.6.3. *Economic Advantage*

(222) In order to evaluate whether a State measure constitutes aid, it has to be determined whether the beneficiary undertaking receives an economic advantage that it would not have received under normal market conditions.

(223) In this respect, the Commission must analyse whether the district of Kleve and the municipality of Weeze acted as prudent market economy operators guided by profitability prospects ([66]) would have done in the same circumstances in providing EEL GmbH with the capital measures, guarantees, loans and loan repayment deadline extensions that constitute Measure 4.

(224) It is first important to recall, as concluded in section 8.3.2, that EEL GmbH constitutes an SPV created by its two public shareholders with a view to managing the real estate of the Niederrhein-Weeze airport, and used exclusively as of 2003 to provide financing to the same airport. This is confirmed by the fact that in their (written) General Meeting of 10 and 11 April 2003 these two public shareholders have strictly circumscribed EEL GmbH's new financing activity to investments into Niederrhein-Weeze airport. This objective is line with the purpose of EEL GmbH laid down in Article 2 of its Founding Act (*Gesellschaftsvertrag*) of 16 December 1999 ([67]). Moreover, as already explained in Recital 153, EEL GmbH has no board of directors. Both managing directors are representatives of the public bodies. One managing director of the company is the Landrat, that is the head of the district of Kleve and the other managing director is the mayor of the municipality of Weeze. Moreover, EEL GmbH has no permanent staff and is managed by a single public official from the district of Kleve. It results from these elements that any decision taken by EEL GmbH is in fact taken by representatives from the public shareholders, who run it on a day-to-day basis in addition to sitting in its governing bodies. This confirms that the measures at issue are imputable to the public shareholders.

(225) In applying the market economy operator principle to Measure 4, it is necessary to give due consideration to the fact that the beneficiary of these financing measures is an SPV created and owned by the entities from which Measure 4 originates, and exclusively used for a well-defined objective pursued by these same entities. Moreover, in this context, it is necessary to give due consideration to the very objective in view of which the Special Purpose Objective is used and maintained in operation.

(226) SPVs are commonly created and used by private undertakings in a variety of circumstances. A possible situation where SPVs are used is cases where two independent undertakings set up a joint venture in order to develop a specific project or perform a specific activity or function (for instance research and development, production, distribution) ([68]) to the benefit of each undertaking. The SPV is therefore a legal structure to which both undertakings allocate the resources (funding, staff, assets …) that are necessary for the implementation of their joint project, function or activity and through which they implement this joint project or perform this joint function or activity. In certain situations, for instance when the SPV only has a production or research and development function, it receives funding on the part of its parent companies without by itself generating profit which can be redistributed to shareholders, for example in the form of dividends. Instead of generating such profit, it contributes to the performance of operations that its parent companies consider necessary in view of their objectives.

([66]) See footnote 65.
([67]) See footnote 49.
([68]) See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1, paragraph 95).

(227) Therefore, it is clear that when two independent private undertakings create and use a SPV in view of a well-defined objective, and provide it with funding, they do not necessarily provide this funding with a view to obtaining a financial return in the form of dividends or payment of interests, as an investor or a bank would do. Instead, they provide this funding with a view to achieve the objective for which the SPV is used.

(228) In view of these considerations, the behaviour of the district of Kleve and the municipality of Weeze towards EEL GmbH ought to be analysed taking account of the fact that these two public authorities are the sole shareholders of EEL GmbH and taking account of the exclusive objective assigned to EEL GmbH as of 2003, namely, the granting to FN GmbH of the various loans and repayment deadline extensions constituting Measure 1. It should be recalled in this respect that the various measures forming Measure 1 are, as indicated in section 8.3.2, clearly imputable to the district of Kleve and the municipality of Weeze. In other words, the two public authorities designed and decided to implement Measure 1 and decided to use EEL GmbH for that purpose.

(229) Therefore, when applying of the Market Economy Operator Principle to Measure 4, the fact that the district of Kleve and the municipality of Weeze decided to implement Measure 1 and to use EEL GmbH for that purpose ought to be taken as a starting point. The relevant question that the Commission must address is the following: if two hypothetical market economy operators had decided to implement measures such as those forming part of Measure 1, would they have used an SPV such as EEL GmbH and provide it with similar funding as that stemming from Measure 4 in order to achieve this objective?

(230) Against this backdrop, the fact that certain loans may have been provided to EEL GmbH by its shareholders at rates lower than normal market rates, that a guarantee was provided free of charge, or that capital was injected with no clear prospects of financial return would not necessarily lead to the conclusion that the district of Kleve and the municipality of Weeze did not act vis-à-vis EEL GmbH as market economy operators would have done. The relevant question is rather whether the financing provided to EEL GmbH under Measure 4 is reasonable, from a market economy operator perspective, in light of the objective pursued by EEL GmbH's shareholders, namely, the implementation of Measure 1.

(231) Two prudent market economy operators pursuing the same objective as EEL GmbH's public shareholders would have had essentially two options: create a Special Purpose Vehicle similar to EEL GmbH (option 1) or grant loans directly to FN GmbH without a dedicated body (option 2). A rational market economy operator would not have considered any other option, like the use of private financial intermediaries, which would have charged a fee for the provision of such a service. This option would have increased the cost of channelling funds to FN GmbH due to these fees.

(232) The Commission notes that, when making the Decision to finance EEL GmbH themselves instead of using financial intermediaries, the public shareholders limited their financial exposure to what was strictly necessary to fund FN GmbH under Measure 1:

(a) the level of funding directly provided by public shareholders to EEL GmbH until 2010 (EUR [20-40] million ([69])) was proportionate to the amounts borrowed by FN GmbH from EEL GmbH (EUR [20-40] million ([70]));

(b) the conditions of the funding of EEL GmbH (date, amount and maturity) have been aligned to the funding of FN GmbH by EEL GmbH:

Volume (in Million EUR)	Date of loan agreement granted by EEL GmbH to FN GmbH	Date of public measures granted by Germany to EEL GmbH	Volume (in Million EUR)
[11-20]	11.4.2003	11.4.2003	[5-15] (+ [2-5] received from a bank loan on 2 May 2003)
[2-5]	17.6.2004	16.6.2004	[2-5]

([69]) See Recital 53.
([70]) See Table 3.

Volume (in Million EUR)	Date of loan agreement granted by EEL GmbH to FN GmbH	Date of public measures granted by Germany to EEL GmbH	Volume (in Million EUR)
[2-5]	28.7.2004	28.7.2004	[2-5]
Loan roll over to 31.12.2010 (+ 6,5)	1.7.2005	1.7.2005	Loan roll over to 31.12.2010 and debt restructuring
Loan roll over to 31.12.2016	29.11.2010	29.11.2010	Loan roll over to 31.12.2016

(c) EEL GmbH does not have any material assets in its balance sheet other than its claims vis-à-vis FN GmbH. The (small) profits derived from the financing activities to FN GmbH only appear in EEL GmbH's accounts, but they do not correspond to any cash or liquidity since FN GmbH has not repaid its debt to EEL GmbH.

(d) Indeed, given EEL GmbH's strategy to fund FN GmbH, these interests are only intended to allow EEL GmbH to break even and to pay the interests of the rolled over loans granted by the public shareholders and [bank], as evidenced by the minutes of EEL GmbH's general assemblies.

(e) EEL GmbH's is therefore unable to reimburse its two shareholders and the [bank],as long as FN GmbH has not repaid the loans and interests due to EEL GmbH. This means that EEL GmbH cannot engage into any other economic activities as claimed by Germany.

(233) The Commission takes the view that the choice of option 1 made by the two shareholders was therefore consistent with the latters' stated objective to dedicate EEL GmbH' resources to the sole financing of FN GmbH.

(234) In addition, the Commission considers that under option 1 the administration and management costs of a SPV like EEL GmbH is reduced to the strict minimum (no immobilisation of assets other than the claims vis-à-vis FN GmbH, no permanent staff and management, almost no operating costs, no financial costs other than the reimbursement of the loan granted by the [bank]). This is all the more so since when the two public shareholders decided to implement Measure 1, EEL GmbH was already existing, as a dormant structure, and did not have to be created *ex nihilo*. The choice of an SPV also facilitates the management of the financial transactions with third parties (like FN GmbH or a private bank) while minimising the transaction costs between the two shareholders. On the contrary, the choice of option 2 would induce the duplication of the mechanisms put in place to support FN GmbH, which would increase the administration and legal costs of channelling funds to FN GmbH (e.g. duplication of legal contracts) and possibly affect the quality of the supervision and coordination of the project.

(235) Therefore, it would have been rational for two prudent market economy operators guided by medium to long-term profitability prospects and acting in lieu of EEL GmbH's public shareholders, to choose option 1 rather than option 2. The Commission takes the view that the market investor test is satisfied and that there is no economic advantage conferred to EEL GmbH.

8.6.4. *Distortion of competition and effect on trade*

(236) As of 2003, the activity of EEL GmbH was strictly limited to the provision of funding to FN GmbH. EEL GmbH could not engage in any other activity. For instance, it could not grant loans to any other entity.

(237) Therefore, the only activity for which Measure 4 might have affected the competitive dynamics would be the provision of funding to FN GmbH. Such competitive effect would have existed if, absent Measure 4, providers of funding other than EEL GmbH, such as banks or other investors, would have had a greater opportunity to provide funding to FN GmbH with a view to making a profit.

(238) However, as indicated in section 8.5.3, the clear intention of the district of Kleve and the municipality of Weeze was to implement Measure 1 themselves in order to provide FN GmbH with funding. Indeed, the only rationale for Measure 4 is the implementation of Measure 1.

(239) Absent Measure 4, EEL GmbH would have been unable to implement Measure 1 itself. However, the absence of Measure 4 would simply mean that the district of Kleve and the municipality of Weeze would have decided to implement Measure 1 without using EEL GmbH, for instance, through a direct legal relationship between themselves and FN GmbH. Therefore, absent Measure 4, banks or other investors would not have enjoyed a greater opportunity to provide funding to FN GmbH with a view to making a profit because the necessary funding would have been provided by the district of Kleve and the municipality of Weeze in any event.

(240) Therefore, assuming that Measure 4 would involve an economic advantage in favour of EEL GmbH (*quod non*), this advantage would have no effect on competition and trade, and would therefore not constitute State aid within the meaning of Article 107(1) TFEU.

8.6.5. *Conclusion*

(241) For the reasons set out above, Measure 4 does not involve State aid to EEL GmbH within the meaning of Article 107(1) TFEU.

8.7. **New aid v. existing aid**

(242) The situations in which a measure constitutes existing aid are exhaustively enumerated in Article 1 of Regulation (EC) No 659/1999 ([71]).

(243) It is undisputed that the challenged measures were not put into effect before Germany's accession to the EU (paragraph (b)(i) of said Article), are not deemed to have been authorised due to the Commission's failure to take a decision within the prescribed procedural deadlines (paragraph (b)(iii)) and cannot be considered existing aid because of the expiry of the limitation period (paragraph (b)(iv)). They did not become aid due to the evolution of the common market and without having been altered by the Member State (paragraph (b)(v), first sentence) ([72]).

(244) This assessment is notably valid for measure 2, although Germany argued that it constitutes existing aid (see Recital 102). In the *Leipzig Halle* judgment, the Court of Justice of the European Union confirmed that the construction of the airport infrastructure should also fall under State aid rules as of 2000 ([73]), that is before the date of granting of measure 2 on 15 October 2002 (see Recital 46). The Commission takes the view that the measure therefore constituted aid at the time it was put into effect. Contrary to what Germany has claimed, the fact that the measure was adopted under the 1993 decree does not affect that assessment. The 1993 decree only provided a legal basis to allow possible support measures to regional airports that the Land Nordrhein Westfalen may contemplate as from 1993, but it does not create by itself any legal entitlement for those airports, as explicitly stipulated in Article 1 of the 1993 Decree.

(245) The granting date of Measure 2 is therefore 15 October 2002, that is, after the *Aéroports de Paris* judgment. Therefore, Measure 2 already constituted State aid when it was granted, as shown in section 8.4.6 and did not become State aid subsequently because of the evolution of the common market. Moreover, Measure 2 was granted less than 10 years before the Commission opened the formal investigation procedure on it and thus did not become existing aid following the expiry of the limitation period. Consequently, Measure 2 does not qualify as existing aid.

([71]) Article 1(b)(v), second sentence, of Regulation (EC) No 659/1999 reads: 'Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'.

([72]) 'The aid is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market andwithout having been altered by the Member State. Where certain measures become aid following theliberalisation of an activity by Community law, such measures shall not be considered as existing aid afterthe date fixed for liberalisation'.

([73]) Recitals 38 and 39.

8.8. **Lawfulness of the aid**

(246) Pursuant to Article 108(3)TFEU, Member States must notify any plans to grant or alter aid, and may not put the proposed measures into effect until the notification procedure has resulted in a final decision.

(247) Since Germany failed to notify all public measures under scrutiny, Measure 1, 2 and 3 constitute unlawful aid.

9. **COMPATIBILITY**

9.1. **Applicability of the 2014 and 2005 Aviation Guidelines**

(248) The measures in question should be assessed upon the basis of Article 107(3)(c) 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.

(249) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) TFEU.

(250) According to the 2014 Aviation guidelines, the Commission considers that the provisions of its notice on the determination of the applicable rules for the assessment of unlawful State Aid should not apply to pending cases of illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period ([74]).

(251) As regards investment aid to airports, the Commission, in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, apply to unlawful investment aid to airports the rules in force at the time when the aid was granted. Accordingly, it will apply the principles set out in the 2005 Aviation guidelines in the case of unlawful investment aid to airports granted before 4 April 2014 ([75]).

(252) The Commission has already concluded that Measure 2 and 3 constituted unlawful State aid granted before 4 April 2014, whereas Measure 1 and 4 did not qualify as State aid.

(253) In view of the provisions of the 2014 Guidelines referred to in Recital 250 and 251, the Commission is then under the obligation to determine whether the measures in question constitute illegal operating aid or investment aid.

9.2. **Investment aid vs Operating aid**

9.2.1. *Measure 1*

(254) As concluded in section 8.3.6, FN GmbH has benefited from State aid contained in Loan 4 and Extension 1 and possibly Extension 2 that form part of Measure 1. The Commission will assess the nature of each submeasure separately.

(255) The Commission notes that Loan 4 has been granted in view to financing investments made by FN GmbH: as mentioned in Recital 39, paragraph 1 point 2 of the loan agreement signed on 1 July 2005 specified that the loan is earmarked for investments only. The Commission observes that EEL GmbH has put in place control mechanisms laid down in paragraph 2 of the loan agreement, which required that FN GmbH (and EEL GmbH on its own request) checked that invoices were strictly linked to the completion of the airport and that EEL GmbH

([74]) Recital 172 of the 2014 Aviation Guidelines.
([75]) Recital 173 of the 2014 Aviation Guidelines.

(and not FN GmbH) paid the invoices from the loan. These control mechanisms have proven effective since Germany could demonstrate that the installments disbursed from that loan helped exclusively cover investments costs. Therefore the Commission takes the view that Loan 4 constitutes unlawful investment aid granted before 4 April 2014 and its compatibility has to be assessed under the 2005 Aviation Guidelines.

(256) As regards Extension 1, the Commission notes that it constitutes a roll over of loans 1, 2 and 3. As such, this extension is not targeted to the financing of new investments, which Germany failed to demonstrate. The Commission rather considers that this extension was only granted to relieve FN GmbH from its short-term obligation to reimburse all accumulated loans and interests. By doing so, EEL GmbH and its public shareholders wanted to ensure that FN GmbH would not run short of liquidities, which could have caused the aid beneficiary to cut its investments or turn into a company in difficulty. For these reasons, the Commission takes the view that Extension 1 constitutes unlawful operating aid granted before 4 April 2014 and its compatibility has to be assessed under the 2014 Aviation Guidelines.

(257) Similar considerations apply to Extension 2, if it would have to be considered as State aid.

9.2.2. *Measure 2*

(258) FN GmbH has benefited from Measure 2 to compensate the costs of acquisition and installation of fixed capital assets described in Recital 46. According to point 25 of the 2014 Aviation Guidelines, 'investment aid' means aid to finance fixed capital assets, specifically, to cover the capital costs funding gap'. Therefore, all costs supported under Measure 2 constitute investment costs. Measure 2 thus constitutes unlawful investment aid granted before 4 April 2014 and its compatibility has to be assessed under the 2005 Aviation Guidelines.

9.2.3. *Measure 3*

(259) As described in Section 3.3, Measure 3 under scrutiny has been granted to provide FN GmbH with a bridge financing of part of the acquisition costs of the airport real estate (615 ha and about 650 buildings of various types to reconfigure into a civil airport). As stipulated in point 3 of the preamble and in paragraph 1 of the loan agreement of 14 March 2002, the bridge financing was granted by means of an interest free loan explicitly earmarked to the financing of investment expenditures necessary to the completion of the EuZZLG (see Recital 21).

(260) Therefore, this bridge financing constitutes unlawful investment State aid granted before 4 April 2014 and its compatibility has to be assessed under the 2005 Aviation Guidelines.

9.2.4. *Conclusion*

(261) As explained above, the Commission considers that Loan 4 of Measure 1, Measure 2 and Measure 3 constitute investment State aid, while Extension 1 and possibly 2 of Measure 1 have to be regarded as operating aid.

9.3. **Compatibility of investment aid measures**

(262) According to paragraph 61 of the 2005 Guidelines, the Commission must examine whether

(a) the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.),

(b) the infrastructure is necessary and proportional to the objective which has been set,

(c) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure,

(d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner,

(e) the development of trade is not affected to an extent contrary to the Community interest.

(263) In addition to the requirement to satisfy specific compatibility criteria specified in the 2005 Aviation Guidelines, State aid to airports, as any other State aid measure, should be necessary and proportional in relation to the aimed legitimate objective in order to be cleared as compatible aid ([76]).

9.3.1. *Construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.)*

(264) The investment aid measures under assessment aimed at financing the conversion of the former British military base of Weeze into a civilian airport, and to substantially develop the airport. These measures provided a significant contribution to the regional development and the creation of new jobs in an area economically hit by the closure of the British military base. As pointed out by Germany, the closure of the British military had led to around 6 300 people leaving the area, triggering the loss of 400 civilian jobs directly linked to the operation of the military base, and the loss of around EUR 102 million in revenues for about 80 companies. In addition, the departure of British troops left 1 600 residential units empty, that is more than 30 % of the total housing stock for the community Weeze alone.

(265) The Commission notes that according to Germany the creation and the development of the civil airport have led to the creation of more than 1 200 jobs in the district of Kleeve area and to the clustering of service companies on the premises of the airport business park.

(266) As pointed out by Germany, the contribution of this project to regional economic development — and thus to economic cohesion, an important objective of the Union — has to some extent already been acknowledged by the Commission. The Commission has indeed granted structural funds to Nordrhein-Westfalen under the Konver II — program, which explicitly provided for the financing of the reconversion of former military facilities in Kleve.

(267) The investment aid measures at issue also contributed to the improvement of the accessibility of the area. Indeed, the closest airports to Niederrhein-Weeze airport are Düsseldorf (located 76 km from the airport, 51 minutes travelling time by car) and Eindhoven, NL (88 km, 1 hour 12 minutes traveling time by car) ([77]).

(268) Traffic at Düsseldorf and Eindhoven airports has continuously increased since 2003: the traffic at Düsseldorf grew from 14,3 million passengers in 2003 to approximately 21 million in 2013, while the traffic at Eindhoven airport grew from 0,4 million in 2003 to 3,4 million in 2013. Their constant growth has only been affected during that period by own congestion problems and capacity constraints (in particular the insufficient number of available slots in Düsseldorf). The capacity of Düsseldorf airport reached its 22 million passengers capacity limit in 2013, while Eindhoven airport could only serve 2,5 million passengers in 2012. Despite the traffic growth at Niederrhein-Weeze airport, the Commission observes that extension work have been completed or started since 2012 in view to expanding the capacity of the two airports ([78]).

(269) Therefore, the Commission concludes that the investment in Niederrhein-Weeze does not constitute a duplication of existing non-profitable infrastructure. On the contrary, Niederrhein-Weeze airport has played an important role in decongesting Düsseldorf without limiting the plans to expand Düsseldorf and Eindhoven's airports. Without the project at issue there was a risk that the region would be underserved.

(270) The Commission can therefore conclude that the construction and operation of the infrastructure meets a clearly defined objective of common interest, namely regional economic development and improvement of the accessibility of the region.

([76]) See for instance Case SA.34586 (12/N) — *Greece — Chania Airport Modernisation*, paragraph 49.

([77]) While formally distant from Niederrhein-Weeze by less than 100 km (98km), the Maastricht airport can only be reached by a 1 hour 14 min journey by car. The Commission is of the opinion that this airport should notbe considered included in the catchment area of Niederrhein-Weeze Airport.

([78]) After the 2012-2013 extension, Eindhoven airport's capacity has been increased to 5 million passengers; extension work in Düsseldorf airport is expected to commence in Summer 2014.

9.3.2. *The infrastructure is necessary and proportional to the objective which has been set*

(271) According to Germany the planned modernisation of Niederrhein-Weeze airport was necessary to complete the conversion of a former military airbase into a civil aviation airport. The construction and modernisation of taxiways and aprons needed to be carried out to start civil flights operations.

(272) As argued by Germany, the infrastructure project has been undertaken only to the extent it was necessary to attain the goals set: while the infrastructure was built for a maximum passenger traffic of 3,5 million passenger, traffic statistics displayed in Table 1 show that the traffic steadily increased until 2010 to reach a record 2,9 million passengers, before going down to 2,2 million in 2012. This means that the expected traffic demand largely met the actual demand and that the project is not disproportionately large or elaborate.

(273) The Commission can therefore conclude that the infrastructure in question is necessary and proportional to the objectives, which have been set.

9.3.3. *The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure*

(274) As previously explained, Niederrhein-Weeze airport has reached in 2010 a number of passengers (2,9 million passengers) close to its capacity limit (3,5 million passengers. This traffic has been reached within 6 years of operations only, which is much faster than other German airports devoted to the same LCC strategy (like Cassel or Hahn) The significant growth of Niederrhein-Weeze airport results from the important role of the airport in decongesting Düsseldorf and Eindhoven airports and the density of the population in the catchment area (more than 35 million inhabitants).

(275) On the basis of the above mentioned figures for passenger numbers, in the medium- term, the development project for Niederrhein-Weeze airport offered good perspectives for use, especially in relation to initial military infrastructure at the airport, which the initial investment works has helped convert into a civil platform.

9.3.4. *All potential users of the infrastructure have access to it in an equal and non- discriminatory manner*

(276) The Commission observes that the civil infrastructures in place has always been open to all potential users in a non-discriminatory manner.

9.3.5. *The development of trade is not affected to an extent contrary to the interest of the EU*

(277) At the time of the granting of the aid on 15 October 2002, Niederrhein-Weeze airport served less than 1 million passengers per annum, which qualified it according to the 2005 Aviation Guidelines as a small regional airport (category D) ([79]).

(278) Niederrhein-Weeze airport's catchment area is the Western regions of Germany and the Eastern regions of the Netherlands. As previously explained, Niederrhein-Weeze airport has not significantly harmed competition in this catchment area, that is Düsseldorf and Eindhoven airports, which were hit by severe congestion problems and slot shortages (see Recital 268).

(279) In addition, Niederrhein-Weeze airport is neither served by a train connection nor by a connection to the motorway system, contrary to its two competitors.

(280) Furthermore, the Commission notes that the business travel segment occupies a significant 40 % market share at Düsseldorf airport, while it only represents only 7 % at Niederrhein-Weeze.

(281) As regards Eindhoven airport, the Commission observes that this facility serves both civil and military flight operations and that the financing of the infrastructure costs is accordingly shared between the civil airport managers and the Dutch military. In 2010 and 2011, Eindhoven airport paid around EUR 1 million annually to compensate the Dutch military mostly for the cost of the infrastructure maintenance, security, air control, but it did not incur the initial investment costs that Niederrhein-Weeze had to (partially) bear.

([79]) See paragraph 15 thereof.

(282) In addition, the aid intensity of the overall project (see section on the necessity and proportionality of the aid further below) is limited to its funding gap. The shareholders of the airport operator will finance more than 50 % of the investment costs.

(283) On the basis of the above, the Commission can therefore conclude, that the development of trade is not affected to an extent contrary to the common interest.

9.3.6. *Necessity and proportionality of the aid*

(284) The Commission must establish, whether the State aid granted to FN GmbH has changed the behaviour of the beneficiary undertaking in such a way that it engages in activity that contributes to the achievement of a public-interest objective that (i) it would not carry out without the aid, or (ii) it would carry out in a restricted or different manner. In addition, the aid is considered to be proportionate, only if the same result could not be reached with less aid and less distortion. This means that the amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place.

(285) According to Germany, the aid was necessary because the development of the airport would have been jeopardised given the tight financial situation of FN GmbH at the time of the granting of the aid. Germany also adds that, if the project had been undertaken directly by public authorities, these authorities would have had to cover the construction costs as well as the initial operating losses. The Commission shares this view and notes that the public support was granted in a period when FN GmbH' private shareholders realised very significant investments into the infrastructure in the start-up phase of the project (EUR [20-60] million in 2002-2003), while bearing the initial operational losses of the airport. It is doubtful that local authorities with limited financial resources like the district of Kleve and the commune of Weeze could have borne the financial burden of such a large scale project on their own, while they could reach the same result with a limited involvement by backing up a private initiative. In view of the risky nature of the project, which constitutes one of the very few cases of private airports in Europe, a limited public support seems therefore well justified at its start-up phase.

(286) According to Germany, without the aid, the investment could not have been carried out to the same extent absent measure 1, 2 and 3. As rightly argued by Germany, only a limited number of investments could have been carried out, such as the widening of the runway. It would have been necessary to delay certain investments substantially, thereby causing the airport to face serious operational difficulties or preventing them from meeting the expected demand of airlines and passengers in the catchment area. Therefore, it may be concluded that aid measures 1, 2 and 3 have an incentive effect, as they enabled the beneficiary to carry out the investment.

(287) With regard to the assessment of the proportionality of Measure 2, the level of public funding actually granted to the airport amounted to EUR [2-5] million. As explained in Recital 46, this support measure corresponds to the financing of 50 % of the eligible costs under the 1993 Decree. The remaining amount (EUR [2-5] million) has been financed by FN GmbH. Consequently, the aid intensity amounts to 50 %.

(288) As the 2005 Aviation Guidelines leave open the issue of aid intensities, the maximum permissible aid amount has to be limited to what is strictly necessary. The Commission notes that the investments supported by Measure 2 were funded under *pari passu* terms. Therefore, the aid intensity of 50 % seems justified in the case at issue.

(289) As regards the proportionality of Loan 4 of Measure 1 and measure 3, the Commission notes that the granting of a low or free interest loan constitutes a less distortive measure than a direct grant. In addition, since the public authorities have completely collateralised the loans, their financial involvement was very limited. As regards the proportionality of waiving the reimbursement obligation of half of the bridge financing, the Commission concurs with Germany that the condition of creation of 350 jobs constitutes an incentive for the private owners of the airport to complete the construction and development of the airport infrastructure. The Commission notes that this incentive was effective since 445 jobs were created at the time of the waiver (in 2004), well before the contractual deadline expired (at the end of 2007).

9.3.7. *Conclusion on Measure 1 (Loan 4), 2 and 3*

(290) In view of the above assessment the Commission concludes that Measure 1 (Loan 4), 2 and 3 are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.

9.4. **Compatibility of the operating aid measure**

(291) Section 5.1.2 of the 2014 Aviation Guidelines set out the criteria that the Commission will apply in assessing the compatibility of operating aid with the internal market pursuant to Article 107(3)(c) TFEU. Notably, pursuant to paragraph 172 of the 2014 Aviation Guidelines, the Commission will apply these criteria to all cases concerning operating aid to the airport, including pending notifications and unlawful non-notified aid cases, even if the aid was granted before 4 April 2014, i.e. before of the entry into force of the 2014 Aviation Guidelines. The compatibility criteria for operating aid, which may be granted for a transitional period of 10 years starting from the date of the publication of the 2014 Aviation Guidelines, are:

(a) Contribution to a well-defined objective of common interest: this condition is fulfilled, inter alia, if the aid increases the mobility of EU citizens and connectivity of the regions or facilitates regional development ([80]);

(b) Need for State intervention: the aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver ([81]);

(c) Existence of incentive effect: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced ([82]);

(d) Proportionality of the aid amount (aid limited to the minimum necessary): in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place ([83]);

(e) Avoidance of undue negative effects on competition and trade ([84]).

(292) Considering that the operating aid constituted by Extension 1 and possibly Extension 2 of Measure 1 was granted, in its entirety, before the entry into force of the 2014 Aviation Guidelines, these compatibility criteria are applied in light of the considerations set out in paragraph 137 of the 2014 Aviation Guidelines (i.e. some conditions do not apply).

9.4.1. *The operating aid contributes to a clearly defined objective of common interest*

(293) The operating aid under assessment had the objective of maintaining the appropriate level of operation of Niederrhein-Weeze airport.

(294) According to point 113 of the 2014 Aviation Guidelines operating aid to airports will be considered to contribute to the achievement of an objective of common interest if it increases the mobility of Union citizens and the connectivity of the regions, combats air traffic congestion at major Union hub airports or facilitates regional development.

(295) As concluded in Recital 270, the construction and operation of the Niederrhein-Weeze meets a clearly defined objectives of common interest, namely regional economic development and improvement of the accessibility of the region.

9.4.2. *Need for State intervention*

(296) According to point 116 et seq. of the 2014 Aviation Guidelines operating aid to airports will be considered necessary if it brings about a material improvement that the market itself cannot deliver. The guidelines further recognise that the need for public funding to finance operating costs will normally be proportionately greater for smaller airports due to high fixed costs and that airports with annual passenger traffic between 200 000 and 700 000 passengers may not be able to cover their operating costs to a substantial extent;

([80]) Paragraphs 137 and 113 of the 2014 Aviation Guidelines.
([81]) Paragraphs 137 and 116 of the 2014 Aviation Guidelines.
([82]) Paragraphs 137 and 124 of the 2014 Aviation Guidelines.
([83]) Paragraphs 137 and 125 of the 2014 Aviation Guidelines.
([84]) Paragraphs 137 and 131 of the 2014 Aviation Guidelines.

(297) Since the start of operations of the new terminal in 2003 the annual passenger number of Niederrhein-Weeze airport has reached 207 992 in 2003, 796 745 in 2004 and 591 744 in 2005 (See Table 1). The Commission observes that the passenger traffic has displayed huge variations in this start-up phase, notably a significant decrease of 34 % from 2004 to 2005. The Commission therefore considers that over these 3 years, the passengers traffic has on average remained between 200 000 and 700 000. At the same time, the Commission also notes that FN GmbH was always loss-making (See Table 5), and could not even cover its operational costs (the adjusted EBITDA is negative in 2004 and 2005), which the 2014 Aviation Guidelines identify as typical for airports of this size.

(298) Therefore the Commission considers that the operating aid to the Niederrhein-Weeze Airport is necessary.

9.4.3. *Appropriateness of State aid as a policy instrument*

(299) According to point 120 of the 2014 Aviation Guidelines operating aid should be an appropriate policy instrument to achieve the intended objective or resolve the problem to be addressed. Since Niederrhein-Weeze airport is loss-making at operating level the only appropriate instrument is operating aid that enables the airport to continue operation ensuring connectivity of the Niederrhein area. Other instruments such as investment aid or regulatory measures do not seem appropriate to address the financial problems of the Niederrhein-Weeze airport at the operating level. Therefore the Commission considers that the operating aid granted to the Niederrhein-Weeze airport is an appropriate instrument.

9.4.4. *Existence of incentive effect and proportionality of the aid amount (aid limited to the minimum necessary)*

(300) According to point 124 of the 2014 Aviation Guidelines the operating aid has an incentive effect if it is likely that in the absence of the operating aid and taking into account the possible presence of the investment aid and the level of traffic, the level of the economic activity of the airport would be significantly reduced.

(301) The Niederrhein-Weeze Airport received investment aid to construct a new terminal and to implement new safety and security requirements. This enabled the airport to satisfy the connectivity and transport needs of the Niederrhein region, which expressed in passenger numbers increased over the last years. Despite rather increasing passenger numbers the airport is not able to cover their operating costs. Without the operating State aid the airport could not maintain the current level of traffic and investment and its economic activity would have to be reduced. At the same time the aid did not exceed the amount required to cover operating losses, hence the aid amount is limited to the minimum necessary.

(302) Therefore the Commission considers that the operating aid to the Niederrhein-Weeze Airport has an incentive effect and is proportionate.

9.4.5. *Avoidance of undue negative effects on competition and trade*

(303) According to point 131 of the 2014 Aviation Guidelines when assessing the compatibility of operating aid to the airport, the Commission will take into account the distortions of competition and the effects on trade. An indication of potential competition distortions or effect on trade may be the fact that the airport is located in the same catchment area as another airport with spare capacity.

(304) As demonstrated in Recital 276 et seq. above, the Commission already concluded that the development of trade is not affected to an extent contrary to the common interest.

9.5. **Conclusion on the compatibility of the aid measures**

(305) All the measures that are subject to this investigation and qualify as State aid are compatible with the internal market pursuant to Article 107(3)(c) of the Treaty. This conclusion is entirely without prejudice to the assessment of any other State aid measures that the public authorities may have granted to FN GmbH, that the Commission might conduct in the future.

10. **LANGUAGE**

(306) By letter of 18 June 2014, Germany has accepted that the present Decision is adopted in English. Therefore, only the English version is authentic,

HAS ADOPTED THIS DECISION:

Article 1

The loans granted by EEL GmbH to FN GmbH on 11 April 2004, 17 June 2004 and 28 July 2004, and the support measures granted by the District of Kleve and the Commune of Weeze to EEL GmbH do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

1. The loan granted by EEL GmbH to FN GmbH on 1 July 2005 as well as the roll-over on 1 July 2005 of all existing loans granted by EEL GmbH to FN GmbH, the support measure granted by the Land Nordrhein-Westfalen to FN GmbH and the support measure granted from the district of Kleve directly to FN GmbH concerning the acquisition of the real estate of the Niederrhein-Weeze airport constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union compatible with the internal market under Article 107(3)(c) of the Treaty on the Functioning of the European Union.

2. The roll-over of all existing loans granted by EEL GmbH to FN GmbH on 29 November 2010, if it constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, is compatible with the internal market compatible with the internal market under Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 July 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION (EU) 2015/1825

of 31 July 2014

on non-notified State aid SA.34791 (2013/C) (ex 2012/NN) — Belgium — Rescue aid for Val Saint-Lambert SA

(notified under document C(2014) 5402)

(Only the French text is authentic)

(Text with EEA relevance)

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 those Articles ([1]),

Whereas:

1. PROCEDURE

(1) On 11 May 2012, Belgium pre-notified the Commission of rescue aid for Val Saint-Lambert SA (hereinafter 'VSL') in the form of a soft loan of EUR 1 million. Noting that part of the rescue aid, EUR 400 000, had already been granted on 3 April 2012, the Commission registered this case in the register of non-notified aid. The aid remained non-notified and was not subsequently notified.

(2) On 3 October 2012, the Belgian authorities notified restructuring aid for VSL, consisting of an extension of the EUR 1 million loan by 10 years.

(3) By letter dated 1 February 2013, the Commission informed Belgium of its decision to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') with regard to both of these aid measures and other measures granted to VSL.

(4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]) (hereinafter 'the opening decision'). The Commission invited interested parties to submit their comments on the aid and measures at issue.

(5) The Commission has not received any comments from third parties in this regard.

(6) Belgium sent its comments on the opening decision on 21 March 2013.

(7) By letter dated 14 November 2013, the Belgian authorities informed the Commission that they wished to withdraw the notification of the restructuring aid. That measure is consequently not considered in this Decision.

(8) By letters dated 17 October and 14 November 2013 and an email dated 10 December 2013, the Commission requested further information from the Belgian authorities. The Belgian authorities responded by letter dated 12 December 2013 and by email dated 11 December 2013. They requested an extension of the deadline for replying to the request for information dated 14 November 2013. This extension was granted by letter dated 19 December 2013. The Belgian authorities' response was finally received on 6 January 2014. The Commission

([1]) State aid SA.34791 20../C (ex 2012/NN) — Belgium — Rescue aid for Val Saint-Lambert— and State aid SA.35528 20../C (ex 2012/N) — Belgium — Restructuring aid for Val Saint-Lambert — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 213, 26.7.2013, p. 38).

([2]) Cf. footnote 1.

sent a further request for information on 7 February 2014. The Belgian authorities and the lawyer representing the Société Wallonne de Gestion et de Participations (hereinafter 'Sogepa') replied on 25 and 27 February 2014 respectively. A further request for information was sent to the Belgian authorities on 11 April 2014. By letter dated 30 April 2014, the Commission extended the deadline granted to the Belgian authorities to 23 May 2014. Their response was, in fact, received by the Commission on that date.

(9) By letter dated 18 June 2014, the Belgian authorities authorised the Commission to adopt and notify this decision solely in French.

2. DESCRIPTION OF THE MEASURES AND AID IN QUESTION

2.1. The beneficiary

(10) VSL produces high-end or luxury crystal items. It is based at Seraing, in Wallonia, where it employs 52 people and has an annual turnover of around EUR 2 million. Its products are highly reputable but the company's history has been marked by a number of bankruptcies. In particular, in 2002, Cristallerie du Val Saint-Lambert SA went bankrupt and its activities were taken over by La cristallerie du Val Saint-Lambert SA (hereinafter 'CVSL'), which was established on 19 December 2002. Liège Commercial Court then declared CVSL bankrupt on 11 August 2008. The business was taken over by two private shareholders: Châteaux Finances Corporation (hereinafter 'CFC'), a holding company for several property and wine and gastronomy firms, and Société de Promotion d'Espaces Commerciaux et Industriels (hereinafter 'SPECI'), a property management and development company.

(11) Initially, CFC and SPECI held 70 % and 30 % of VSL respectively. In March 2011, CFC and the Walloon Region made a capital injection that SPECI did not participate in. VSL is now owned by CFC (76 %), the Walloon Region (17 %) and SPECI (7 %).

(12) VSL has again been in bankruptcy proceedings since 14 October 2013.

(13) VSL benefits from the use of an exclusive licence for the VSL trade marks, designs and sketches. This licence was granted to it in January 2009 by the Walloon Region, the current owner of the trade marks. Previously, the VSL trade marks were held (until October 2005) by the Compagnie financière du Val (hereinafter 'CFV'), and prior to that the Société de Gestion des marques du Val Saint-Lambert, a company wholly owned by Sogepa (which in turn is wholly owned by the Walloon Region).

(14) By means of an agreement dated 5 October 2005, CFV sold these trade marks to Interagora SA, the parent company of CVSL, for EUR [500 000-800 000] (*). On 11 August 2008, Interagora SA, which had become Val Saint-Lambert International SA (hereinafter 'VSLI'), went bankrupt and a balance of EUR 280 000 remained due to CFV. The Walloon Region then used its right of first refusal to buy the trade marks for EUR [700 000-1 000 000] in 2008.

2.2. Description of the measures and aid

2.2.1. *Measure 1: rescue aid of EUR 1 million on 3 April 2012*

(15) The rescue aid for VSL consisted of a soft loan of EUR 1 million, granted on 3 April 2012 by the Walloon Region, represented by Sogepa (Sogepa acts on behalf of the Region for all measures where there is intervention by Sogepa), for a 6-month period at a rate of 3,07 % (base rate of 2,07 plus 100 basis points). The rate then increased by 100 basis points to 4,07 %, by way of compensation for Sogepa's costs. Part of the EUR 1 million loan, namely EUR 400 000, was granted on the same day that the credit agreement was concluded (3 April 2012), without any notification to the Commission within the meaning of Article 108(3) TFEU. The balance of the loan, EUR 600 000, was granted on a later date never made known to the Commission. The Commission, however, considers that the entire loan, namely EUR 1 million, was granted as this is recorded in the statement of claim lodged with Liège Commercial Court in the context of VSL's bankruptcy, which was decided by that court on 14 October 2013.

(*) Business secret.

2.2.2. *Measure 2: restructuring aid*

(16) On 3 October 2012, the Belgian authorities notified restructuring aid. This consisted in extending the EUR 1 million loan (i.e. Measure 1) by 10 years. However, by letter dated 14 November 2013, the Belgian authorities informed the Commission that they were withdrawing the notification concerning the restructuring aid. The Belgian authorities confirmed by letter dated 12 December 2013 that this aid was not implemented. The restructuring aid is consequently not examined in this Decision.

2.2.3. *Measures 3 to 8*

(17) Prior to the rescue aid noted above (Measure 1), the Walloon Region, represented by Sogepa and other public bodies held by the Region and acting on its behalf, such as CFV, intervened six times on behalf of VSL between 2008 and 2011, in the following forms: a guarantee of EUR 150 000 (Measure 3), the use and sale of the Val Saint-Lambert trade marks (Measure 4), a loan of EUR 1,5 million (Measure 5), a capital injection of EUR 1,5 million (Measure 6), *de minimis* aid (Measure 7) and the funding of decontamination work in the context of the Cristal Park project (Measure 8).

Measure 3: Guarantee of EUR 150 000, September 2008

(18) CVSL, which operated the crystal works before VSL, was declared bankrupt on 11 August 2008 by Liège Commercial Court. In order to ensure the continuity of the business despite the bankruptcy, and in order to find someone to take over the company, the Walloon Region authorised Sogepa (by decision dated 28 August 2008) to issue a guarantee of EUR 150 000 for an ING loan of EUR 300 000 to CVSL's insolvency administrators. This unremunerated guarantee was granted to CVSL's insolvency administrators on 24 September 2008.

Measure 4: Sale and use of the Val Saint-Lambert trade marks, January 2009

(19) As noted above, CFV owned the VSL trade marks until October 2005.

(20) By agreement dated 5 October 2005, CFV sold these trade marks to Interagora SA for EUR [500 000-800 000]. The EUR 700 000 was to be paid in one instalment of EUR [100 000-500 000] and 10 annual payments of EUR [10 000-50 000]. Article 7 of the agreement gave the Walloon Region a right of first refusal should Interagora SA or its successors envisage selling the trade marks, designs and models in question before 5 October 2010.

(21) On 11 August 2008, Interagora SA, which had become VSLI, was declared bankrupt and a balance of EUR 280 000 remained due to CFV.

(22) On 1 October 2008, CVSL's insolvency administrators signed a Memorandum of Understanding with CFC and SPECI (the buyers of CVSL's business), which also included the purchase of the Val Saint-Lambert trade marks from VSLI for EUR [700 000-1 000 000]. The Walloon Region then exercised its right of first refusal (Article 7 of the agreement of 5 October 2005) at the same price and informed the insolvency administrators on 7 November 2008. It then entered the following conditions in the agreement dated 29 January 2009, concluded between CFV and VSL:

— it granted an exclusive, unlimited and global licence to VSL to use the intellectual rights relating exclusively to the trade marks, logos and lettering 'Val Saint-Lambert', of which the Walloon Region remained the owner. The licence was granted in return for remuneration equivalent to 1,5 % of earnings before interest, taxes, depreciation and amortisation (Ebitda) for the first 5 financial years and 5 % as from the sixth financial year. The licence was to be revoked in the event of VSL's insolvency, liquidation or reorganisation or if the agreement was terminated through VSL's fault,

— it granted VSL an option to purchase the intellectual rights. VSL would be able to exercise this option from the fourth year following the signing of the agreement until the last day of the fifth year, for EUR [700 000-1 000 000] (price proposed by the buyers in the context of the Memorandum of Understanding on the takeover dated 1 October). VSL would also be able to exercise this option at the same price of EUR 800 000, indexed to the Belgian consumer price index, between the sixth and 10th years. As from the 11th year, the Walloon Region would be able to require that VSL buy the intellectual rights for the same indexed price of EUR [700 000-1 000 000],

— should the purchase option be exercised, VSL would have to pay all amounts outstanding to CFV (and noted in recital 21).

(23) In their comments, the Belgian authorities informed the Commission that, following the judicial reorganisation ([3]) begun on 28 February 2012, the balance outstanding was no longer EUR 280 000 but EUR 61 250 following the reduction of EUR 43 750 decided in the context of the judicial reorganisation and following the reimbursement of EUR 105 000 made before the reorganisation.

Measure 5: Loan of EUR 1,5 million, August 2009

(24) On 31 August 2009, the Walloon Region — represented by Sogepa — granted a loan of EUR 1,5 million to VSL at a rate of 4,7 % for a 7-year period with a view to enabling the company to purchase new furnaces. The loan was guaranteed by a first-priority mortgage on VSL's buildings, which, according to the Belgian authorities, were of a higher value than the loan.

Measure 6: Capital injection of EUR 1,5 million, March 2011

(25) On 17 March 2011, the Walloon Region decided to make a capital injection of EUR 1,5 million into VSL to enable a new furnace to be purchased. Between 25 May 2009 and 29 March 2011, CFC (the majority shareholder in VSL) contributed a debt-to-equity swap of EUR 5,2 million to the company.

Measure 7: Prior *de minimis* aid

(26) Between February 2010 and November 2012, VSL received EUR 197 503 through different *de minimis* aid measures. On 25 March 2011, Sogepa transferred aid of EUR 97 785 for an Interim Manager. However, on 25 September 2012, Sogepa requested repayment of this aid with interest when it realised that the ceiling of EUR 200 000 laid down by Commission Regulation (EC) No 1998/2006 ([4]) had been exceeded.

Measure 8: Decontamination of VSL's buildings in the context of the Cristal Park project and VSL's use of some of SPAQuE's buildings free of charge

(27) The Cristal Park project provided for the use of public funds to decontaminate buildings belonging to VSL.

(28) By letter dated 20 August 2012, SPAQuE (Société Publique d'Aide à la Qualité de l'Environnement) made a conditional offer to VSL to purchase the buildings for EUR 2 040 000, minus the cost of decontaminating them, which had still to be assessed. The price had been assessed at EUR 2 040 000 on 29 March 2012 by independent experts Cushman & Wakefield, who had specified that they were not able to estimate the rehabilitation costs themselves. By letter dated 5 September 2012, VSL informed SPAQuE that the consultancy firm Geolys had estimated the decontamination cost as being EUR 219 470 in August 2012. In the same letter, VSL also informed SPAQuE that it was willing to sell the buildings for EUR 2 040 000 minus EUR 220 000. On 13 December 2012, the buildings in question were sold to SPAQuE for EUR 2 040 000 minus the decontamination costs, evaluated at EUR 220 000, or a total of EUR 1 820 000. Meanwhile, a note dated 1 December 2011 sent by the Belgian authorities, had, however, evaluated the decontamination costs at several million euros.

(29) Prior to the sale on 13 December 2012, during a local council meeting on 10 September 2012, Seraing local council approved two draft option agreements, the first between SPAQuE and the town of Seraing and the second between the town of Seraing and SPECI. These drafts set out the conditions agreed between these three bodies for the future transfer of the buildings sold to SPAQuE following their decontamination.

(30) Only the sale dated 13 December 2012 has gone through to date. The transactions provided for in the draft agreements approved by Seraing's local council and mentioned in the previous paragraphs ((28) and (29)) were not implemented. The decontamination work has not commenced.

([3]) A judicial reorganisation is aimed at maintaining the continuity of all or part of an enterprise in difficulty or its activities, under the control of a judge. It preceded the declaration of bankruptcy on 14 October 2013.

([4]) 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 (OJ L 379, 28.12.2006, p. 5).

(31) Moreover, an agreement for the temporary provision of part of the Val Saint-Lambert crystal works site was signed between SPAQuE and VSL on 11 December 2012. Under this agreement, SPAQuE made a number of buildings now belonging to it available to VSL free of charge for a limited period (cf. recital 27). In return, VSL agreed to work with SPAQuE to provide all useful and necessary information regarding the renovation and rehabilitation works to be conducted on the site.

2.3. **Grounds for initiating the formal investigation procedure**

(32) The Commission considered that all the measures under investigation constituted State aid within the meaning of Article 107(1) of the TFEU. The Commission doubted whether Measures 1 (rescue aid), 3 (unremunerated guarantee) and 4 (use and sale of the trade marks) complied with the market-economy investor principle. As regards Measure 5 (loan of EUR 1,5 million), the Commission had concerns as to whether interest rate on the loan involved aid. The Commission also queried the *pari passu* nature of Measure 6 (capital injection) and its compliance with the market-economy investor principle. With regard to Measure 7, which groups together *de minimis* aid measures, the Commission was not sure that each of them met the conditions stated in the Regulation cited above ([5]). Finally, with regard to Measure 8 (sale of buildings and provision of some buildings free of charge), the Commission was not sure whether the sale price of the plots sold to SPAQuE by VSL involved aid, given the uncertainty surrounding the assessment of the decontamination costs. The Commission also had doubts about the aid present in SPAQuE's provision of buildings to VSL free of charge. With regard to Measure 3, the Commission also raised doubts about whether or not there was economic continuity between CVSL and VSL. Finally, the Commission had doubts regarding the compatibility of all these measures with the internal market and, more specifically, the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([6]) (hereinafter 'the Rescue and Restructuring Guidelines') (Measures 1, 2 and 3).

3. **COMMENTS BY BELGIUM ON THE OPENING DECISION**

3.1. **On the classification of VSL as an undertaking in difficulty**

(33) The Belgian authorities are not contesting VSL's classification as an undertaking in difficulty after 8 February 2012, the date on which the request for a judicial reorganisation was filed (which, as will be seen, is significant when analysing several of the measures in question). Nonetheless, they consider that, prior to that time, VSL could not be described as an undertaking in difficulty because, according to them, VSL was a newly created company and was benefiting from the unconditional support of its majority shareholder, CFC, in accordance with paragraphs 10 and 11 of the Rescue and Restructuring Guidelines and the Commission's decision-making practice ([7]).

3.2. **The rescue aid (Measure 1)**

(34) In the opening decision, the Commission considered that this loan, granted without any collateral to an undertaking in difficulty, could constitute aid since VSL would not have been able to obtain a loan under such conditions from a private bank.

(35) In their comments, the Belgian authorities do not contest the fact that the soft loan of EUR 1 million, granted by the Walloon Region on 3 April 2012, constituted aid. Nonetheless, they took the view that this measure constituted rescue aid in accordance with point 13 of the Rescue and Restructuring Guidelines because VSL's difficulties were intrinsic and not the result of an arbitrary allocation of costs within the group and were too serious to be resolved by the group itself. They explain that CFC, given the range of its different activities and holdings, was unable to devote all of its resources to VSL. CFC's liquidity had significantly declined since the end of the 2011 financial year and stood at only EUR 130 000 on 19 October 2012. The Belgian authorities also point out that, given the frequency with which CFC had advanced funds to VSL (EUR 9,5 million since VSL was set up) and the persistence of VSL's disappointing financial results, CFC was no longer able to resolve VSL's problems using the group's resources.

([5]) Cf. footnote 4.
([6]) OJ C 244, 1.10.2004, p. 2.
([7]) Decision of 8 February 2010, N541/2009 — Sweden — State guarantee in favour of Saab Automobile AB.

(36) Moreover, with regard to the 'one time, last time' principle, under which Measure 1 is allegedly incompatible with points 72 et seq. of the Rescue and Restructuring Guidelines because Measures 3, 5, 6 and 7 constitute rescue or restructuring aid, the Belgian authorities considered in contrast that:

— Measure 3 (guarantee of EUR 150 000) was granted to CVSL's insolvency administrators in September 2008 and not to VSL. The Belgian authorities consider, moreover, that there was no economic continuity between VSL and CVSL,

— Measure 5 (loan of EUR 1,5 million) contained no element of aid given the interest rate applied and the quality of the collateral,

— Measure 6 (capital injection of EUR 1,5 million) contained no element of aid because it took place at the same time as a capital contribution of EUR 5,2 million from CFC in the form of a debt-to-equity swap,

— The *de minimis* aid measures were not granted to an undertaking in difficulty and must not be considered under the principle of 'one time, last time'. Moreover, they were clearly lower than the advances granted by CFC since 2009.

3.3. **The restructuring aid (Measure 2)**

(37) Following withdrawal of the notification of this measure and the fact that it was not implemented by the Belgian authorities, the measure is not examined in this Decision and hence the Belgian authorities' comments in this regard cease to be relevant.

3.4. **The guarantee of EUR 150 000 (Measure 3)**

(38) In the opening decision, the Commission highlighted the fact that the EUR 150 000 guarantee had been granted without remuneration to an undertaking in difficulty, given that CVSL was insolvent at that time. It therefore seems to have given CVSL an advantage since no private operator would have granted this guarantee without remuneration.

(39) The Belgian authorities did not comment on whether or not this measure could be classified as aid.

(40) Moreover, they pointed out that the guarantee was granted to the insolvency administrators and not to the insolvent CVSL. They maintain, however, that there was no economic continuity between CVSL and VSL. They consider that they have sufficiently demonstrated the break in economic continuity between CVSL and VSL. They stress that the volume of assets transferred to VSL was greater than that held by CVSL and totally separate, with the result that any continuity must be ruled out.

(41) The Belgian authorities also point out that the new shareholders in VSL always intended to base the takeover of CVSL on a large-scale property development and tourist centre, Cristal Park. According to them, the economic logic of the takeover thus represented a clean break with CVSL's operation of the crystal works, which was based solely on the manufacture of crystal products.

3.5. **The use and sale of the Val Saint-Lambert trade marks (Measure 4)**

(42) In the opening decision, the Commission noted that the mechanism for obtaining remuneration for the concession granted to VSL, based on VSL's future Ebitda, seemed to confer an economic advantage. In fact, the Walloon Region was assigning a valuable asset without any guarantee of remuneration, since VSL's Ebitda could be negative, as it had been in the previous years, and without expecting any profit over the term of the concession other than indexing for inflation, which, moreover, would not come into play until the sixth year. A private operator would probably have opted for a form of remuneration that included at least a fixed and certain basis. Moreover, the opening decision considered the possibility of aid being present in the conditions for assigning the trade mark.

(43) The Belgian authorities consider that it is unfounded for the Commission to refer to the bad results of VSL's predecessors in order to criticise the way in which the Walloon Region calculated the remuneration it was to receive in return for granting the licence for the trade marks.

(44) On the contrary, they feel that the way in which remuneration for use of the trade marks was calculated (on the basis of Ebitda) was not devoid of commercial logic. This choice was justified, in their opinion, because Ebitda is one of the accounting indicators that enable the Walloon authorities to measure commercial success in terms of the sale of products for which it holds the trade mark.

(45) The Belgian authorities have not commented on the conditions for the future sale of the VSL trade marks.

3.6. **The loan of EUR 1,5 million (Measure 5)**

(46) In the opening decision, the Commission had doubts about the quality of the collateral. It emerged from documents submitted to the Commission that the mortgage related, at least in part, to VSL buildings requiring rehabilitation. So the real value of these plots of land was not known and was possibly negative. It therefore seemed that the interest rate on the loan, set at 4,7 %, was too low. In fact, depending on the quality of the collateral, it would be appropriate to add between 400 and 1 000 basis points to the base rate of 1,778 %.

(47) The Belgian authorities consider that the value of the collateral was excellent as it covered the entire loan. Their assessment was based on an expert report produced by the Marengo consultancy in January and February 2009.

3.7. **The capital injection of EUR 1,5 million (Measure 6)**

(48) In the opening decision, the Commission noted that the capital injection had not been agreed on the basis of a business plan but on the basis of a simple financial projection. This gave no explanation as to how the company intended to ensure its recovery and no explanation regarding the remuneration it intended to grant to the provider of the capital, namely the Walloon Region. Moreover, the Walloon Region and CFC did not seem to be in the same situation or running the same risks. The Walloon Region was not a VSL shareholder prior to this measure and had no relevant economic interest. In contrast, CFC was a shareholder in VSL and had an interest in seeing the company recover or, at least, limit its losses.

(49) The Belgian authorities take the view that VSL was not in difficulty at the time this measure was granted in so far as the majority shareholder had given its unconditional support and financial backing to its subsidiary.

(50) They criticise the Commission for relying on the *ex post* profitability of an investment in order to assess whether or not it involves State aid; this practice is not in line with European case law.

(51) They maintain that the capital injection was of less significance and was provided concurrently with that of CFC's shareholders. Moreover, even though the Walloon Region was not a VSL shareholder, it had an economic advantage associated with the capital injection because, according to the Belgian authorities, it was in the interest of the Walloon Region to support the business so that it would recover and subsequently repay the loan.

3.8. **The *de minimis* aid (Measure 7)**

(52) In the opening decision, the Commission considered that VSL seemed to have been in difficulty since 2009 and was thus not able to benefit from this kind of aid.

(53) According to the Belgian authorities, VSL could not be classified as an undertaking in difficulty because it was a company set up less than 3 years previously which enjoyed the full confidence of its majority shareholder up to the time of the judicial reorganisation. Consequently, these measures fall within the scope of the *de minimis* Regulation and cannot be considered as aid.

3.9. **Decontamination of VSL's buildings in the context of the Cristal Park project and VSL's use of some of SPAQuE's buildings free of charge (Measure 8)**

(54) In the opening decision, the Commission considered that SPAQuE had made a commitment to purchase buildings without being aware of the cost of their rehabilitation.

(55) The Belgian authorities explain that, in the matter of decontamination costs, Walloon legislation limits the extent of a property owner's obligations in the case of historical pollution and on the basis of the designated use of the locations of polluted buildings in local development plans. The Belgian authorities further maintain that, although VSL had an obligation to deal with the pollution, it could only be required to rehabilitate the site to bring it into line with its current designated land use, i.e. industrial use. Consequently, an estimate must be made of the cost of decontaminating a site in order to bring it into line with the designated use of the land at the time of sale, in this case industrial use. The Belgian authorities consider that this cost assessment was presented in the Geolys report. These costs were then deducted from the sale price.

(56) The Belgian authorities go on to explain that, following the purchase of the buildings by SPAQuE, the decontamination work was to be undertaken by a public authority, SPAQuE, with the aid of public funds. In accordance with the Guidelines on State aid for environmental protection, remediation works conducted by a public authority on one or more plots of land belonging to it do not constitute State aid.

(57) With regard to the free provision of buildings to VSL, the Belgian authorities consider that this relates to buildings belonging to SPECI, a private limited company.

4. **COMMENTS BY THIRD PARTIES ON THE OPENING DECISION**

(58) The Commission has not received any comments.

5. **ASSESSMENT OF THE AID**

5.1. **Assessment of the presence of aid within the meaning of Article 107(1) of the TFEU**

(59) Article 107(1) of the TFEU stipulates that any aid granted by a Member State or using State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings shall, insofar as it affects trade between Member States, be incompatible with the internal market.

(60) It emerges from this provision that, to be recognised as State aid, the measures under investigation must (i) have a state origin, i.e. involve state resources and be attributable to the State, (ii) give an economic advantage to their beneficiary, (iii) be selective, and (iv) be likely to distort competition and affect trade between Member States.

(61) Belgium has not challenged the classification of the rescue aid (Measure 1) as aid. The Commission took note of this in its opening decision. Belgium withdrew its notification of Measure 2 following the initiation of the official investigation procedure. That measure is therefore not analysed in this Decision. Belgium contests the classification as aid, however, for Measures 3 to 6, 7 and 8 since these measures offered no economic advantage to their beneficiary or were *de minimis*.

5.1.1. *Presence of state resources*

Measures 1, 3, 5 and 6

(62) Measure 1 (the loan of EUR 1 million), Measure 3 (the guarantee of EUR 150 000), Measure 5 (the loan of EUR 1,5 million) and Measure 6 (the capital injection of EUR 1,5 million) were granted by Sogepa on behalf of the Walloon Region. Since Sogepa is an entirely public company, its resources may be considered state resources within the meaning of Article 107(1) of the TFEU ([8]).

([8]) See judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 38.

Measure 4

(63) The Commission observes that the agreement granting VSL an exclusive and unlimited right to use the Val Saint-Lambert trade marks and arranging their sale was concluded between VSL and the Walloon Region. This measure, along with the conditions for the future sale of trade marks, involves the presence of public resources.

Measure 7

(64) According to the information provided by the Belgian authorities, the aid they described as *de minimis* was also granted by an authority or public company, although Belgium has not specified for each occasion whether it related to the Walloon Region or Sogepa. Whatever the case, these are public resources and, moreover, the Belgian authorities do not contest the state origin of these measures.

Measure 8

(65) The Commission notes that SPAQuE is a public company, a subsidiary of Société Régionale d'Investissement de Wallonne (SRIW) and that the funds intended for decontamination of VSL's buildings had already been granted to it by the Walloon government ([9]). SPAQuE's purchase of VSL's plots of land and the provision of some of them free of charge involves the presence of public resources.

5.1.2. *Criterion of imputability*

(66) In order to judge imputability, the Court of Justice bases itself on 'a set of indicators arising from the circumstances of the case and the context in which that measure was taken' ([10]).

(67) Two public bodies of the Walloon Region, acting on its behalf, Sogepa and SPAQuE, granted the measures listed in section 2.2 above.

(68) Sogepa, the Société Wallonne de Gestion et de Participations, is a company with public share capital, which is wholly owned by the Walloon Region. It implements decisions taken by the Walloon Government relating to intervention in commercial companies and managing those interventions. It was formed following the merger in 1999 of the Société Wallonne pour la Sidérurgie (SWS) and the Société pour la gestion de participations de la Région wallonne dans des sociétés commerciales (SOWAGEP).

(69) Sogepa acts at the request of the Walloon Government. Article 3(1) of its statutes states that 'The object of the company is to carry out all tasks entrusted to it by the Walloon Government, …. In this context, it implements decisions to intervene in commercial companies taken by the Walloon Government and manages the holdings, obligations, advances or interests that the Walloon Region may have in such companies.'

(70) Established in 1991, SPAQuE specialises in landfill rehabilitation and brownfield decontamination. It is responsible for producing a list of polluted sites in the Walloon Region. SPAQuE is a subsidiary of the Société Régionale d'investissement de la Wallonie (SRIW), in which the Walloon Region has a 98,66 % shareholding, and its objective is to contribute to the development of the Walloon economy by providing financial support to Walloon undertakings or undertakings established in the Walloon Region which are operating industrial or service projects that create value added.

(71) Under the management contract signed in July 2007 between the Walloon Government and SPAQuE for the 2008-2012 period and renewed in October 2012 for a further 6 months, SPAQuE implements the activities carried out in the context of delegated tasks entrusted to it by the Walloon Region. In this context, it acts on instruction from the Region. The Region establishes, in particular, the list of priority sites and specific rehabilitation mandates.

(72) In the light of this information, the Commission considers that the Walloon Region takes decisions that are then implemented by Sogepa. The Region, through its delegated tasks, is capable of directly influencing the actions undertaken by SPAQuE.

([9]) By decision of 27 April 2012 of the Minister responsible for Land Planning.
([10]) Case C-482/99 *France* v *Commission*, cited above.

(73) Consequently, the Commission concludes at this stage of the procedure that the measures under investigation involve state resources and are attributable to the State.

5.1.3. *Criterion of selectivity*

(74) The condition with regard to selectivity is easily met. The Commission noted in the opening decision that the measures under investigation were all granted in favour of just one company, VSL or CVSL's insolvency administrators for Measure 3 (the guarantee of EUR 150 000).

5.1.4. *Presence of an economic advantage*

(75) It is now necessary to examine the criterion of economic advantage, both for the rescue aid and for the other measures under investigation, in the light of the comments made by the Belgian authorities in relation to the opening decision.

Measure 1: Rescue aid of EUR 1 million

(76) The rescue aid granted in the form of a EUR 1 million loan at an interest rate of 3,07 % plus 100 basis points, by way of remuneration for Sogepa, gives VSL an economic advantage. The loan was granted without any collateral to an undertaking in difficulty, which 2 months earlier had submitted a request for judicial reorganisation (cf. section 5.2.1). As recognised by the Belgian authorities, VSL — being an undertaking in difficulty — would never have been able to obtain a loan from a private bank. Consequently, this measure conferred an advantage on VSL of EUR 1 million (value of the loan).

Measure 3: Guarantee of EUR 150 000

(77) The Commission's doubts concerned whether or not this public intervention complied with the market-economy investor principle.

(78) In their comments, the Belgian authorities did not address the issue of economic advantage and discussed only whether or not there was economic continuity between CVSL and VSL.

(79) According to information finally obtained by the Commission, the guarantee related to a EUR 300 000 loan granted by ING to CVSL's insolvency administrators. The guarantee was for EUR 150 000, without remuneration. The loan was intended to enable CVSL to continue its activity until the company's eventual recovery.

(80) The Commission notes that the Belgian authorities informed it that no guarantee agreement was drawn up or signed by the interested parties at the time it was granted. Consequently, the only evidence it has is a letter from Sogepa dated 24 September 2008 and sent to ING in which Sogepa confirms its guarantee to cover any eventual losses resulting from the continuation of activities, up to a maximum of EUR 150 000. The Commission therefore notes that Sogepa granted an unremunerated guarantee to the insolvency administrators of a bankrupt company. Moreover, the Belgian authorities stated that ING made the granting of the loan conditional on obtaining the guarantee. Consequently, in the light of these factors, the Commission takes the view that, without public intervention, the loan as a whole would not have been granted. Moreover, the Commission notes that the Walloon Region had no direct legal or commercial link with CVSL. The Region was not a shareholder in CVSL, either directly or indirectly through Sogepa. Consequently, the Region had no commercial interest in granting this unremunerated guarantee to CVSL.

(81) The Commission concludes that the granting of this unremunerated guarantee conferred an advantage on CVSL. The advantage corresponds to the premium that a private company would have required to grant the guarantee under similar circumstances, and which Sogepa waived.

(82) The Belgian authorities pointed out that the loan of EUR 300 000 was fully repaid on 28 July 2009 by the insolvency administrators out of available funds and by calling in the guarantee to the tune of EUR 150 000.

(83) Consequently, the amount of aid corresponds to the difference between the interest rate on the loan that CVSL's insolvency administrators would have paid on the market in the absence of the public guarantee and the interest rate actually paid with the guarantee.

(84) This approach satisfies point 4.2 of the Commission's Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([11]): 'For an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid. Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account.'

(85) This amount must be calculated as follows:

Amount of aid = (14,59 % – 10,75 %) × 300 000 × 343/365 = EUR 10 825,64

(86) The 14,59 % is obtained as follows: 4,59 % (Belgium's base rate in August 2008 ([12])) to which must be added 1 000 basis points due to CVSL's situation (a company with a CCC rating and low collateralisation ([13])). 10,75 % represents the ING interest rate and 343 days is the period for which the loan was granted until it was repaid.

Measure 4: Sale and use of the Val Saint-Lambert trade marks

(87) The Commission's doubts related to whether or not the conditions governing the sale and the remuneration of VSL's use of the trade marks (remuneration equivalent to 1,5 % of Ebitda for the first 5 financial years and 5 % as from the sixth financial year) complied with the market-economy investor principle ([14]).

(88) The agreement of 29 January 2009 between Compagnie financière du Val, owned by the Walloon Region, and VSL provides for the granting of an exclusive licence to use the trade marks and lays down the conditions for VSL to buy back the trade marks (cf. recitals 19 et seq.).

(89) The Commission notes that the exclusive licence for the use of the trade marks was subject to conditions that would not have been required by a private operator. In fact, the Walloon Region required the following quid pro quo from VSL: 'This licence for use may be cancelled at any moment, automatically and without notice by the Walloon Region, should VSL (or its successors) be unable to demonstrate production on the Val Saint-Lambert site at Seraing of high added-value crystal products now in activity at a minimum 60 % of the full-time equivalent employment, excluding temporary lay-offs, existing on the day of CVSL's bankruptcy …'. The Commission notes that, in return for granting the exclusive licence, the Region imposed on VSL an obligation to retain production at the Seraing site and to maintain a previously determined level of employment. These conditions had an impact on the remuneration of the licence and on the price of the future sale of the trade marks.

(90) The Commission considers that the political conditions (retaining activity at Seraing and maintaining a certain level of employment) reduced the remuneration for the use of the licence and the sale price. Consequently, the remuneration of 1,5 % of Ebitda over the first 5 financial years and 5 % as from the sixth financial year cannot be considered as remuneration in line with a market price. Nor can the price of EUR [700 000-1 000 000] proposed by the buyers in October 2008 in the context of the takeover process be considered to be a market price due to the presence of the above conditions, which a market-economy investor would not have imposed and which may have discouraged some investors from making a bid.

(91) The amount of aid resulting from the use of the trade marks corresponds to the difference between the remuneration that a private investor would have proposed without the political conditions imposed by the Walloon Region and the remuneration actually granted. In the context of the recovery procedure, the Belgian

([11]) OJ C 155, 20.6.2008, p. 10.
([12]) http://ec.europa.eu/competition/state_aid/legislation/base_rates_eu27_en.pdf.
([13]) Communication from the Commission on the revision of the method for setting the reference and discount rates, (OJ C 14, 19.1.2008, p. 6).
([14]) Cf. paragraphs 21 to 23.

authorities must appoint an independent expert, qualified to make this kind of assessment, selected by means of an open and transparent process and appointed in agreement with the Commission. The expert will produce a study enabling the remuneration to be determined in accordance with generally used and accepted methods of managing intellectual property assets.

(92) The measure relating to the sale was never implemented due to VSL's bankruptcy. The sale of the trade marks did not take place and the Walloon Region still owns them. Consequently, the Commission considers that it is not appropriate to order recovery of this measure since it was never implemented.

Measure 5: Loan of EUR 1,5 million

(93) The Commissions' doubts related to the value of the loan's collateral and the interest rate. The Commission considered that, since the actual value of the plots of land was used as collateral, the value could be lower or even negative as the plots of land or some of them had to be decontaminated.

(94) The Commission notes from documents provided to it that the mortgage related in part to VSL buildings that needed to be rehabilitated and decontaminated if they were to be sold. The Belgian authorities replied that, on the date the expert report was produced, there was no legal obligation incumbent upon the owner of the buildings in question. Consequently, the value of the buildings should not take into account the possible costs of decontamination.

(95) In their comments on the opening decision, the Belgian authorities produced an appraisal, conducted in January and February 2009 by the Marengo firm of consultants, which assessed the market value of the immoveable assets covered by the mortgage at EUR 3 137 000. Under a voluntary public sale, these assets were worth EUR 2 871 000 and EUR 1 915 000 under a distressed sale. The Belgian authorities concluded that the value of the collateral was excellent as it covered the entire loan in question.

(96) Moreover, the Board of Directors' management report annexed to the annual financial statements for the year ending 31 December 2009 points out that the Marengo report valuing VSL's immoveable assets during 2009 indicated that the established values were accurate only if the land and buildings were decontaminated, which was not yet the case. The report continues by noting that VSL had received an offer to buy all the land and buildings 'as they are' for EUR 2 000 000 from the company responsible for developing the Cristal Park project. In order to better reflect the actual situation, the Board of Directors thus decided to include in the balance sheet only the value corresponding to the purchase offer, which was midway between a distressed sale and a voluntary sale for the decontaminated land and buildings.

(97) The Commission therefore considers that, by virtue of the presence of an appraisal conducted by an independent expert and a purchase offer, the collateral may be classified as high.

(98) Moreover, Belgium has not been able to provide the Commission with an accounting statement for the company as at 31 August 2009, the date when the loan was granted, due to a computer crash that occurred during the summer of 2009. In the absence of information on the company's financial situation as at 31 August 2009, the Commission has used that at 31 December 2009. On that date, VSL had a loss of EUR 2 million with an initial share capital of EUR 2 million. The company also had significant stock of EUR 3 million and EUR 5,759 million in debt. VSL's Ebitda was negative. Consequently, in the absence of any other information from Belgium, the Commission concludes that VSL was in a difficult financial situation, despite regular contributions from its majority shareholder. The Commission considers that, in the light of the accounting information referred to above, VSL's rating at the time the loan was granted was CCC, in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates (hereinafter 'Communication on reference rates') ([15]).

(99) The Commission notes that the Belgian authorities set the interest rate on the loan granted on 31 August 2009 at 4,7 %. The Communication on reference rates provides for the addition of 400 basis points to the rate of 1,77 % ([16]), which was valid in Belgium at the time the loan was granted for a company with a CCC rating and a high level of collateral, resulting in a rate of 5,77 % (1,77 % + 400 basis points).

([15]) OJ C 14, 19.1.2008, p. 6.
([16]) http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

(100) The Commission notes that the interest rate on the loan granted on 31 August 2009, set at 4,7 % by the Walloon Region (represented by Sogepa) for a period of 7 years, was below the threshold of 5,77 % set by the Communication and concludes that this involves an element of aid to the benefit of VSL.

(101) The aid corresponds to 1,07 %, i.e. the difference between the two interest rates (5,77 % – 4,7 %), or EUR 16 050 per year.

Measure 6: Capital injection of EUR 1,5 million

(102) The Commission's doubts related to the alleged *pari passu* nature of the measure and, ultimately, to the compliance of this measure with the principle of the market-economy investor due, on the one hand, to the company's economic and financial situation at the time the capital injection took place and, on the other, the very scant nature of the documents produced by the Belgian authorities to justify the validity of this measure.

(103) In their comments, the Belgian authorities consider that the Commission cannot rely on the *ex post* profitability of an investment to classify a measure as State aid. They also consider that, even though the Region was not a shareholder, as a significant creditor it had an interest in supporting VSL's activity (cf. Measure 4).

(104) The Commission notes that the Walloon Region was contributing new cash while CFC was contributing a debt that it held in relation to its own subsidiary. Contrary to the Belgian authorities' claim, the Region's intervention on 17 March 2011 did not take place at the same time as that of the shareholder CFC. The latter's contribution of EUR 5,2 million comprised several advances made between 25 May 2009 and 29 March 2011. Moreover, the Walloon Region and CFC were not in the same situation and not running the same risks. The Walloon Region was not a VSL shareholder prior to this measure. In contrast, CFC was a shareholder in VSL and had an interest in seeing the company recover or, at least, limit its losses. Consequently, the Commission considers that the capital injection cannot be considered *pari passu*.

(105) The fact that the Walloon Region had provided a loan 2 years previously is insufficient to establish that the capital injection was prudent. Moreover, the fact that the Walloon Region had, on the one hand, a debt of an initial amount of EUR 280 000, albeit clearly lower at the time of the capital injection, since the Belgian authorities pointed out that this debt was repaid by VSL at a rate of EUR 35 000 per year as from 5 October 2008 and, on the other, had granted a loan of EUR 1,5 million in 2009, does not establish the prudence of an additional investment of EUR 1,5 million in a company whose financial situation was continuing to deteriorate (cf. section 5.2.1).

(106) The Commission notes, moreover, that the capital injection was not decided on the basis of a business plan, but on the basis of a simple one-page financial projection. This projection gives no explanation as to how the company intended to recover nor on the remuneration it intended to grant to the provider of the capital, namely the Walloon Region. The 2008-2009 financial year had already demonstrated that the company was in a difficult economic and financial situation (cf. Measure 4). A mere increase in turnover cannot in and of itself justify a capital injection of EUR 1,5 million without taking into account other criteria such as Ebitda or the company's level of indebtedness.

(107) Consequently, the capital injection cannot be considered to be the behaviour of a market-economy investor. Instead, the entire capital injection of EUR 1,5 million must be considered to be aid.

Measure 7: Prior *de minimis* aid

(108) Measure 7 groups together benefits granted to VSL totalling EUR 197 503,04. The Commission takes the view that these must be considered as not meeting all the conditions set out in Article 107(1) of the Treaty and therefore as not constituting aid, following the entry into force of Commission Regulation (EU) No 1407/2013 ([17]). Article 7 provides that the Regulation applies to aid granted before its entry into force if the aid meets all the conditions laid down in the Regulation.

([17]) Commission Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

(109) The beneficiary is not a company whose sector of activity falls within the exceptions set out in the first article. In accordance with Article 3(1) of the above Regulation, the Belgian authorities have confirmed that the total amount of the measures granted by the Region did not exceed EUR 200 000 over a period of 3 financial years. The monitoring provided for in Article 6 of the Regulation was conducted by Sogepa. The Commission therefore concludes that the measures in question meet the conditions under the Regulation. Moreover, given their form (grants), the measures in question may be considered as transparent within the meaning of Article 4 of the Regulation. Finally, in contrast with the previous Regulation, the current Regulation does not exclude *de minimis* aid for undertakings in difficulty.

(110) Consequently, the measures in question are considered as not meeting all the conditions under Article 107(1) of the Treaty and do not, therefore, constitute aid.

Measure 8: Decontamination of VSL's buildings in the context of the Cristal Park project and VSL's use of some of SPAQuE's buildings free of charge

(111) The Commission queried whether the sale price of the land and buildings purchased by SPAQuE, EUR 2 040 000, was a market price given the uncertainties regarding the appraisal of the clean-up costs attributable to VSL. The Commission also queried the provision of some of SPAQuE's buildings to VSL free of charge.

(112) The Commission has noted the following sequence of events:

— April 2011: Antea Group produced a document entitled '*Investigations des caractérisations de mise en priorité, dossier technique, cahier technique n°6: interprétation des résultats*' which describes and locates the soil pollution in detail.

— December 2011: drafting of the 2011 note with the aim of 'finding solutions to the clean-up of the plots of land and some buildings currently owned by Val Saint-Lambert (VSL SA)'. The clean-up and decontamination works were evaluated at +/– EUR 7,5 million.

— August 2012: report by the approved expert, Geolys, dated 23 August 2012, consisting of a one-page letter stating the following: 'This evaluation is based solely on Antea's preliminary study (March 2011) and on the following assumptions: …'. The clean-up costs were assessed at EUR 219 740.

— December 2012: purchase by SPAQuE of the buildings for EUR 2 040 000 (valued by independent consultants Cushman & Wakefield) minus the decontamination costs estimated at EUR 220 000, i.e. EUR 1 820 000. At the same time, SPAQuE granted the town of Seraing, by means of an agreement already drafted but not yet signed, a purchase option on the same buildings for EUR 2 090 000. Seraing undertook, in a second agreement, already drafted but not yet signed, to transfer this purchase option to SPECI.

— January 2014: the Belgian authorities informed the Commission that the decontamination and clean-up works had not yet commenced and that SPAQuE was still working on completing the categorisation study of the site's pollution.

(113) The Commission is therefore faced with the existence of two documents that give two differing evaluations of the decontamination costs.

(114) The Belgian authorities gave the following reasons for disregarding the note of December 2011. They consider, first of all, that the note does not relate to the clean-up and decontamination costs that would be necessary to secure the site for its current industrial use, but rather to the development of a commercial theme village focusing on household goods, decoration and leisure in line with a planned use of the site. According to them, the note is merely an internal note that was not produced by an authorised expert and it relates partly to plots of land that were not sold to SPAQuE. The Belgian authorities clarify, finally, that the note is based on a scoping study that consisted solely in verifying the possible presence of pollution and providing a description of it. The note also specifies that the categorisation study ([18]) was ongoing.

([18]) According to the Belgian authorities, the categorisation study describes and locates the soil pollution in detail in order to enable the administration to rule on the need for and methods of clean-up.

(115) The Belgian authorities further maintain that the buildings mentioned in the note of December 2011 are not identifiable and then explain that their total area of +/– 67 000 m² is greater than the total area (50 299 m²) of the buildings noted in the contract of sale dated 13 December 2012. According to them, this difference of 17 000 m² justifies lower clean-up costs. The Belgian authorities also pointed out that the core of the former industrial site, namely the buildings numbered 18, 19, 22 and 22A, were excluded from the sale to SPAQuE and therefore remain the property of VSL. They further claim that these are the buildings that housed the polluting industrial activity.

(116) The Commission notes, first, that the sale price was estimated by an independent firm of consultants in May 2012. This estimate gives a sale price of EUR 2 090 000. The report also states that the decontamination costs were at that time being assessed by a specialist consultant commissioned by the current site owner. The decontamination costs were therefore also estimated by an independent specialist firm, Geolys.

(117) In their reply dated 23 May 2014, the Belgian authorities confirmed that the lands and buildings evaluated in the Geolys report were indeed those included in the sale of 13 December 2012. Moreover, the Belgian authorities pointed out that, in the case of historical pollution and on the basis of the designated use of the polluted land and buildings in local development plans, the applicable Walloon legislation limits the extent of the obligations of an owner of a polluted plot of land or building. Only the costs of decontaminating the site to bring it into line with its designated use at the time of the sale, i.e. industrial use, must therefore be taken into account and deducted from the value of the land and buildings. The Commission notes that Geolys' letter explicitly states that the costs have been estimated for an industrial designation of the site.

(118) In the light of the above, the Commission concludes that the price at which VSL's buildings were sold to SPAQuE (corresponding to the sale price evaluated by an expert minus the decontamination costs estimated by Geolys) is a market price and does not involve elements of aid.

(119) The Belgian authorities justify SPAQuE's provision of certain buildings free of charge by noting VSL's commitment to work with SPAQuE to provide all useful and necessary information regarding the renovation and decontamination works to be conducted on the site.

(120) First, the Commission notes that the Belgian authorities stated in their comments that the buildings belonged to SPECI. However, the agreement to provide the buildings free of charge was signed between SPAQuE and VSL; SPECI was not a party to this agreement. Moreover, the Belgian authorities have not provided proof that SPECI was the owner of these buildings.

(121) Furthermore, the Commission notes that this justification is not backed up by any evidence assessing whether or not the amount of rent which SPAQuE voluntarily waived was equivalent to VSL's commitment. The Belgian authorities have, in fact, provided no details on the methods or effectiveness of the implementation of this commitment.

(122) Consequently, the Commission considers that the free provision of the plots of land referred to in the agreement for the temporary provision of a part of the Val Saint-Lambert crystal works site signed on 11 December 2012 did confer an advantage on VSL.

(123) The amount of aid corresponds to the amount of rent that VSL would have had to pay under market rental conditions. This amount will have to be calculated on the basis of the cadastral income (index-linked) established by the competent Belgian authorities (*Administration du Cadastre, de l'Enregistrement et des Domaines* — ACED) for each building rented and for the duration of the rental period. In fact, the cadastral income (index-linked) is determined in such a way as to reflect the average net income that a property would provide its owner in a year, taking account of the rental market, and the Commission therefore considers it a reasonable basis on which to estimate the rental value of the assets in question. In the context of the recovery procedure, the Belgian authorities may, on the basis of an opinion of an independent and authorised expert to be approved by the Commission, provide proof that corrections to this amount are necessary in order to take into account the specific features of the assets in question.

5.1.5. *Effect on competition and trade between Member States*

(124) With regard to conditions relating to the effect on competition and trade between Member States, the Commission observes that the European Union has numerous producers of crystal and crystal items, and that these items are used as functional accessories or, more usually, as decorative or luxury objects. According to the information provided by Belgium, the following companies, for example, have a range of products that is at least in part similar to that of VSL: Baccarat (France), Saint-Louis (France), Lalique (France), Daum (France), Arc International (France), Montbronn (France) and the Bohemian Glassworks (Czech Republic). The Commission notes that the goods produced by these companies and other market players are traded between Member States.

(125) In relation more specifically to Measure 3 (guarantee of EUR 150 000) and Measure 5 (loan of EUR 1,5 million), even though the amount of aid cannot be calculated precisely due to the absence of certain information, it is below the threshold for *de minimis* aid. However, the Commission considers that this measure cannot be classified as *de minimis* aid and that it does affect competition and trade between Member States. The measures granted in 2008 and 2009 cannot be classified as *de minimis* aid because, under the previous Regulation in force until 31 December 2013 ([19]), this type of aid could not be granted to firms in difficulty. CVSL was in bankruptcy proceedings at the time the guarantee was granted. Moreover, the new Regulation that came into effect on 1 January 2014 ([20]), like the previous Regulation applies only to aid measures which are transparent. The guarantee in question cannot, however, be considered as such. Article 4(6)(a) of the Regulation states that: 'Aid comprised in guarantees shall be treated as transparent *de minimis* aid if the beneficiary is not subject to collective insolvency proceedings …'. As already stated above, CVSL was in bankruptcy proceedings at the time the guarantee was granted. With regard to the loan, Article 4(3)(a) and (b) states that 'Aid comprised in loans shall be considered as transparent de minimis aid if the beneficiary is not subject to collective insolvency proceedings … and if the loan is secured by collateral covering at least 50 % of the loan and the loan amounts to either EUR 1 000 000 … over five years or EUR 500 000 … over 10 years'. The latter condition was not met by the loan in this case.

(126) Moreover, the Commission considers that the notion of State aid does not require the distortion of competition or the effect on trade to be significant or actual. The fact that the amount of aid is low or that the beneficiary company is of modest size does not, in itself, rule out a distortion of competition or a threat of distortion of competition provided, however, that the probability of such distortion is not purely hypothetical. In this case, given the nature of the market described in recital 124 above, this probability is not hypothetical. According to the Belgian authorities, there are some 40 active crystal works in and outside Europe. Val Saint-Lambert is active on the crystal market in the area of tableware or decoration. From the moment a consumer has a choice between several similar products, a VSL decanter or a decanter from another factory for example, of different brands, any aid received by one of the producers present in this segment leads to a distortion of competition among the others.

(127) The Commission concludes that all the measures under investigation, with the exception of Measure 7, constitute aid that is likely to affect competition and trade between Member States.

Conclusion with regard to the presence of aid within the meaning of Article 107(1) of the TFEU

(128) The Commission concludes that all the measures under investigation, with the exception of Measure 7 and the sale of VSL's buildings to SPAQuE (part of Measure 8), constitute aid within the meaning of Article 107(1) of the TFEU.

5.2. **Compatibility of the aid with the internal market**

(129) The prohibition on State aid laid down in Article 107(1) TFEU is neither absolute nor unconditional. In particular, paragraphs 2 and 3 of Article 107 of the TFEU constitute legal bases enabling some aid measures to be considered compatible with the internal market. In this case, the measures under investigation must be analysed to establish whether they could be considered compatible on the basis of Article 107(3) TFEU, in application of the criteria indicated in the Rescue and Restructuring Guidelines. To this end, the periods during which CVSL and VSL can be considered undertakings in difficulty should first be determined.

([19]) Regulation (EC) No 1998/2006.
([20]) Regulation (EU) No 1407/2013.

(130) Moreover, for Measure 3, granted in September 2008, it is also necessary to establish whether there was economic continuity between the bankrupt CVSL and the activities sold to the buyers, who established VSL, in order to ascertain whether VSL benefited from advantages related to the granting of this measure. The conclusions of this analysis have consequences for the analysis of the compatibility of Measures 3 and 1.

5.2.1. *Eligibility of VSL and CVSL under the Guidelines*

(131) The periods during which CVSL and VSL could be considered undertakings in difficulty must be determined.

(132) In their comments, the Belgian authorities do not contest that CVSL was an undertaking in difficulty when the guarantee was granted in September 2008 (Measure 3) but, according to them, this intervention benefited CVSL and not VSL.

(133) Moreover, they consider that VSL can be classified as an undertaking in difficulty only after 8 February 2012, the date on which the request for judicial reorganisation was filed. Prior to this, VSL could not be classified as an undertaking in difficulty, according to them, because it was a newly created company and was benefiting from the unconditional support of its majority shareholder, namely CFC, in accordance with points 10 and 11 of the Rescue and Restructuring Guidelines and the Commission's decision-making practice.

(134) The Commission notes that at the time that Measure 3 was granted, CVSL had been bankrupt since the judgment on 11 August 2008.

(135) With regard to Measures 5, 6 and 8, the Belgian authorities refer to the Saab decision ([21]) to justify that VSL was not in difficulty. In particular, they produced a schedule of accounts listing the financial flows between VSL and its majority shareholder CFC in order to demonstrate that CFC's behaviour can, in fact, be likened to that of General Motors, which continued to support its subsidiary Saab with capital injections and liquidity in order to cover its losses, leading the Commission to rule out the possibility that Saab was an undertaking in difficulty within the meaning of the Guidelines (cf. recital 59 of the Decision).

(136) Since 25 May 2009, in addition to the capital transferred at the time of the takeover, CFC has injected more than EUR 8 million into the company, demonstrating that VSL could not be considered — in the initial period following the liquidation of CVSL's assets — an undertaking in difficulty on the basis of points 12 and 13 of the Rescue and Restructuring Guidelines. In fact, during this period, VSL's majority shareholder was able to support it through regular contributions, thus demonstrating that VSL's difficulties could be covered by its majority shareholder. Consequently, from January 2009 to February 2012, the Commission considers that VSL did not meet the criteria of an undertaking in difficulty within the meaning of the Guidelines.

(137) However, VSL had been undergoing a further judicial reorganisation since February 2012. Moreover, the Belgian authorities demonstrated that CFC was no longer able to support its subsidiary as it had done until that point. The opening decision noted that CFC's liquidity was EUR 1,26 million and, consequently, granting VSL an equivalent amount (the minimum necessary for its rescue) would have taken up nearly all of its funds. Consequently, VSL must be considered an undertaking in difficulty within the meaning of point 10(c) of the Rescue and Restructuring Guidelines from the time that the rescue aid (Measure 1) was granted in April 2012.

(138) To sum up, the Commission considers that CVSL was in difficulty from 11 August 2008 (when it was declared bankrupt) until the end of November 2008 (when VSL was set up). VSL had to be considered an undertaking in difficulty from 9 February 2012 (date of the judicial reorganisation procedure) until the judgment on 14 October 2013 (date bankruptcy was declared).

(139) Consequently, CSL and VSL were enterprises in difficulty when Measures 1 and 3 were granted. An analysis of their compatibility must therefore be conducted on the basis of the Guidelines.

([21]) State aid N 541/09 — Sweden — State guarantee in favour of Saab Automobile AB, 8 February 2010.

5.2.2. *Compatibility of the aid (Measures 1 and 3)*

Measure 1: rescue aid on 3 April 2012

(140) Belgium considers that this aid is compatible on the basis of the Rescue and Restructuring Guidelines. The Commission considers, however, that the 'one time, last time' principle laid down in points 72 et seq. of the Guidelines has not been complied with. VSL received incompatible rescue aid in September 2008 (cf. recital 141). It could not, therefore, receive further rescue aid before 2018. Moreover, the Belgian authorities confirmed that the EUR 1 million loan was covered by a statement of claim to the insolvency administrators on 5 November 2013, to the benefit of Sogepa. This claim was recorded in VSL's liabilities and has not been repaid to date. Consequently, the loan was not repaid within 6 months of its being granted, in accordance with point 25(a) of the Guidelines. The Commission therefore considers that the rescue aid dated 3 April 2012, which corresponds to the amount of the loan, i.e. EUR 1 million, is incompatible with the common market.

Measure 3: the guarantee of EUR 150 000

(141) The Commission considered in section 5.2.1 that CVSL was an undertaking in difficulty at the time the guarantee was granted. The element of aid resulting from the free granting of the guarantee could thus be declared compatible only if it meets the conditions set out in the Rescue and Restructuring Guidelines. And yet, as has been seen, the guarantee was granted without remuneration. Point 25(a) of the Guidelines states that liquidity support in the form of loan guarantees must be granted at 'an interest rate at least comparable to those observed for loans to healthy firms …'. Moreover, the Belgian authorities, despite a specific request for information on this point, have not provided details on whether the obligation to end the guarantee after 6 months (point 25(a) of the Guidelines) was met. In the light of the above, the Commission considers that the aid resulting from the free granting of the guarantee cannot be considered rescue aid compatible with the common market, nor can it be declared compatible on other bases.

(142) Consequently, Measure 3 is incompatible rescue aid granted in 2008 prior to CVSL's takeover and it is therefore necessary to establish whether there was economic continuity between the bankrupt CVSL and the activities transferred to the buyers who established VSL, in order to determine whether VSL benefited from advantages relating to the granting of this measure.

5.2.3. *Assessment of the presence of economic continuity between CVSL and VSL*

(143) In the opening decision, the Commission queried whether or not economic continuity had been established between CVSL and VSL, in other words, whether the advantages resulting from the granting of the guarantee of EUR 150 000 in September 2008 had been passed on to the buyers of CVSL who established VSL. The conclusions of this analysis depend both on identifying the company which would have to repay any incompatible unlawful aid, and on an analysis of the compatibility of Measure 1, in particular with regard to the 'one time, last time' principle.

(144) In this regard, the Belgian authorities consider that this measure benefited CVSL and not VSL and that there was a break in economic continuity between CVSL and the buyers.

(145) According to case law, the recovery obligation may be extended to a new company to which the beneficiary company has transferred its assets where that transfer permits the conclusion that there is an economic continuity between the two companies ([22]). Extension of the repayment obligation to another entity cannot be ruled out, provided it is established that this entity is effectively benefiting from the aid in question, due to an economic continuity between the two.

(146) According to the judgment of the Court of Justice of 8 May 2003 in Joined Cases C-328/99 and C-399/00 *Italy* v *Commission* ([23]), the economic continuity between the original company and new structures is assessed by means of a number of factors: in particular the purpose of the sale (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the new company, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the formal investigation procedure or the final decision) and, lastly, the economic logic of the transaction.

([22]) Judgment of 28 March 2012, *Ryanair Ltd* v *European Commission*, T-123/09, EU:T:2012:164, paragraph 155.
([23]) ECR I-4035.

Assessment of the criterion of the purpose of the sale (assets and liabilities, continuity of the workforce, bundled assets)

(147) By way of introduction, the Belgian authorities pointed out that CVSL's assets had been distributed among several companies (the parent company VSLI, VSLI SARL in France and CVSL). To facilitate the takeover, on 23 October 2008 the insolvency administrators concluded a transaction agreement to transfer assets shared between these different companies into the hands of the failed company.

(148) According to the Memorandum of Understanding of 1 October 2008 and the takeover agreement of 31 August 2009, VSL took over all the assets belonging to CVSL, excluding current assets: the buildings in which CVSL's workshops were housed and the storage areas, the land on which they were built, CVSL's equipment and stock-in-trade i.e. production tools, moulds, patents and possible sub-brands that belonged to CVSL on that date, orders under way, and stock, including that sold to Val Saint-Lambert International SARL, a company incorporated under French law, which the insolvency administrators had undertaken to make available to the buyers.

(149) Part of the assets that belonged to VSLI was also sold, i.e. the trade marks, designs and models and other intellectual property (the items referred to in the agreement signed on 5 October 2005 and including plans, moulds, designs, sketches, …, the built and non-built immovable assets owned by VSLI at Seraing, stocks of VSL products, the business premises at Seraing (showroom), the stocks at sales outlets in Seraing and Brussels (Sablon).

(150) Full ownership of the leased production tools (cutting machine, furnace and furnace nose) was also transferred to VSL.

(151) Releasing CVSL from all responsibility, VSL undertook to continue all the work and employment contracts signed by VSL that were current on 30 September 2008. VSL also undertook to continue the individual, collective and social agreements that had been concluded, merely reserving the right to jointly renegotiate some of their terms should the new circumstances so require.

(152) Finally, VSL also took over a liability of EUR 280 000 resulting from CFV's sale of CVSL's intellectual rights. In accordance with the agreement of 29 January 2009 between Compagnie financière du Val SL and VSL, VSL replaced Interagora SA and took over the commitments it had made to CFV in an agreement dated 5 October 2005. Through this agreement, CFV had transferred to Interagora SA all the trade marks, designs and models relating directly or indirectly to CVSL. EUR 280 000 of the agreed price remained unpaid.

(153) The takeover of CVSL's assets was approved by Liège Commercial Court on 20 October 2009.

(154) In the light of these facts, the Commission has come to the following conclusion with regard to the purpose of the sale: the takeover related to almost all of CVSL's assets (including orders commenced), all work and employment contracts signed by the bankrupt company and in effect on 30 September 2008, and the use of trade marks and intellectual rights.

(155) Consequently, the Commission notes that the scope of the activities taken over was the same as that of CVSL and that the scope of the takeover went even beyond CVSL to include the assets of VSLI which were necessary to continue crystal production.

Assessment of the sale price

(156) In order to establish whether there was economic continuity following the sale of CVSL's assets, it must also be considered whether the sale was conducted at a market price. This condition applies both to tangible and intangible assets.

(157) The Belgian authorities pointed out that, under Belgian bankruptcy laws, the determining factor when liquidating assets is that of the creditors' interest. Article 75(3) of the Bankruptcy Law enables the creditors or the bankrupt party to oppose the disposal of certain assets if they feel that the planned disposal might harm them. The Belgian authorities pointed out that the granting of the public guarantee of EUR 150 000 was in fact motivated by a desire to maintain continuity of activity and make the most of the steps taken to sell assets.

(158) The Commission notes that the sale of CVSL's assets took place via an open call for bids, managed by the insolvency administrators. Thirty-six bids were received by the insolvency administrators, who selected 12 at the end of an initial phase. A data room of information on CVSL was organised. The publicity apparently focused on all the assets, without any bundled assets having been defined in advance.

(159) The Commission notes that this procedure would *a priori* enable the sale price of each of CVSL's assets to be maximised.

(160) However, two factors lead the Commission to consider that this procedure alone was insufficient to guarantee that the price offered by the buyers for the assets was the market price.

(161) The sale of CVSL's assets was conditional on taking over all the work contracts. This shows that the sale was not unconditional and this obligation may have lowered the sale price.

(162) Finally, the exclusive licence for use of the trade marks was also subject to conditions that would not have been required by a private operator. In exchange, the Walloon Region required compensation from VSL, as recorded in the novation agreement dated 29 January 2009 between the Walloon Region (represented by CFV) and VSL: 'This licence for use may be cancelled at any moment, automatically and without notice by the Walloon Region should VSL (or its successors) be unable to demonstrate production on the Val Saint-Lambert site at Seraing of high added-value crystal products now in activity at a minimum 60 % of the full-time equivalent employment, excluding temporary lay-offs, existing on the day of CVSL's bankruptcy …'. The Commission notes that, in return for granting the exclusive licence, the Walloon Region imposed on VSL an obligation to maintain production at the Seraing site and to maintain a previously determined level of employment. These political conditions may have lowered the sale price and discouraged other potential purchasers, thus affecting competition under the call for bids, with the result that the best financial bid was not in line with the actual market value ([24]).

(163) Given these facts, the Commission considers that the criterion of the sale price is not met.

Assessment of the criterion of the transaction's economic logic

(164) The criterion of the transaction's *economic* logic is intended to verify whether the buyer of the assets is using the transferred assets in the same way as the vendor, in order to continue the same economic activity.

(165) The Belgian authorities consider that the logic followed by VSL was radically different from that of its predecessors, in particular because it was based on the Cristal Park property development project when it took over the crystal works' activities.

(166) In this case, the Commission observes that the Belgian authorities have not demonstrated the existence of a direct relationship between CVSL's takeover and the Cristal Park project since October 2008. The oldest of the documents relating to the Cristal Park project sent by the Belgian authorities dates back to December 2011.

(167) In any event, the Commission notes that the buyers bought the trade mark in order to continue to use it along with all the assets and means of production. The object of the company referred to in VSL's act of incorporation dated 20 November 2008 is, in fact, very similar to that of CVSL. VSL's object was indeed to continue the activity of the CVSL crystal works using the same human and production resources. Moreover, the guarantee itself was granted with a view to ensuring the continuity of the activity.

(168) Consequently, for the reasons noted above, the Commission concludes that there was economic continuity between CVSL and VSL. The takeover of all the means of production (at a price subject to conditions, which did not correspond to the actual market value), of employment contracts and of the exclusive and unlimited use of trade marks with a view to continuing to produce crystal items forms a decisive factor in establishing economic continuity. The advantage resulting from the granting of the guarantee to CVLS when it was bankrupt continued after the takeover and VSL retained the benefit of this advantage.

([24]) See, by analogy, Commission Decision 2008/717/EC of 27 February 2008 on State aid C-46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova (formerly Daewoo Romania) (OJ L 239, 6.9.2008, p. 12).

5.2.4. *Compatibility of Measures 4 (sale and use of the trade marks), 5 (loan of EUR 1,5 million), 6 (capital injection of EUR 1,5 million) and 8 (SPAQuE's provision of certain buildings to VSL)*

(169) Belgium provided no justification for the compatibility of these measures in its comments on the opening decision and the Commission has no information with which to conclude that any of the exceptions laid down in Article 107(2) and (3) might apply. Consequently, the Commission considers that these aid measures are incompatible with the common market.

5.3. **Recovery**

(170) The Commission points out that, in in accordance with Article 14(1) of Council Regulation (EC) No 659/1999 ([25]), all unlawful aid that is incompatible with the internal market must be recovered from the beneficiary.

(171) In this case, it is clear from the above considerations that the following measures involve aid, that this aid is unlawful and incompatible and, in so far as the aid was made available to VSL, it must be recovered:

Measure 1: soft loan of EUR 1 million granted to VSL on 3 April 2012 by the Walloon Region, represented by the Société Wallonne de Gestion et de Participations (hereinafter 'Sogepa').

The entire loan constitutes aid. EUR 400 000 was granted the same day that the agreement was concluded. The remaining EUR 600 000 was granted at a later date not specified by the Belgian authorities.

Measure 2: restructuring aid consisting of an extension of the EUR 1 million loan.

This measure was not implemented and so recovery is not necessary.

Measure 3: guarantee of EUR 150 000 granted by Sogepa on 24 September 2008 to CVSL's insolvency administrators.

This guarantee involves aid because it was not remunerated at the market price. The aid element must be calculated using the method set out in this Decision.

Measure 4: sale and use of the Val Saint-Lambert trade marks agreed on 29 January 2009 between CFV and VSL.

This sale of the trade marks did not take place and so recovery is not necessary. The element of aid concerning the use of the trade mark must be calculated in accordance with generally used and accepted methods of managing intellectual property assets.

Measure 5: loan of EUR 1,5 million granted by Sogepa to VSL on 31 August 2009.

This loan involves aid to VSL, corresponding to the difference between the market rate and the rate at which the loan was granted, i.e. 1,07 % (5,77 % – 4,7 %), or EUR 16 050 per year. This aid was provided unlawfully and must therefore be repaid.

Measure 6: capital injection of EUR 1,5 million by the Walloon Region into VSL decided on 17 March 2011.

The entire capital injection constitutes aid since it cannot be deemed equivalent to the behaviour of a private investor. This aid was provided unlawfully and must therefore be repaid.

Measure 8: relating to the provision of part of the 'Cristalleries du Val Saint-Lambert' site free of charge

The agreement for the temporary provision of a part of the Val Saint-Lambert crystalworks site, concluded on 11 December 2012 between SPAQuE and VSL, confers an advantage on VSL that consists of the amount of rental income that SPAQuE willingly waived. The precise amount of this aid must be calculated in accordance with recital 123.

([25]) 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).

(172) For the purposes of recovery, the Belgian authorities must also add to the amount of the aid the recovery interest due from the date on which the aid in question was first made available to the company until the aid is recovered, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([26]).

6. **CONCLUSION**

(173) The Commission finds that Belgium unlawfully implemented a set of measures in breach of Article 108(3) of the Treaty on the Functioning of the European Union. These measure are the following: the rescue aid of EUR 1 million (Measure 1), the guarantee of EUR 150 000 (Measure 3), the sale and use of the Val Saint-Lambert trade marks (Measure 4), the loan of EUR 1,5 million (Measure 5), the capital injection of EUR 1,5 million (Measure 6) and SPAQuE's provision of certain buildings to VSL free of charge (part of Measure 8).

(174) By letter dated 18 June 2014, the Belgian authorities authorised the Commission to adopt and notify this Decision in French only,

HAS ADOPTED THIS DECISION:

Article 1

The following measures: the rescue aid of EUR 1 million (Measure 1), the guarantee of EUR 150 000 (Measure 3), the sale and use of the Val Saint-Lambert trade marks (Measure 4), the loan of EUR 1,5 million (Measure 5), the capital injection of EUR 1,5 million (Measure 6) and SPAQuE's provision of certain buildings to VSL free of charge (a part of Measure 8) involve elements of aid that have been unlawfully implemented by Belgium, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, and are incompatible with the internal market.

In accordance with Article 8(2) of Regulation (EC) No 659/1999, Belgium withdrew its notification concerning Measure 2 (restructuring aid) following the decision to initiate the formal investigation procedure.

Article 2

1. Belgium 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 made available to the beneficiary until the date of their actual 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 ([27]) amending Regulation (EC) No 794/2004.

Article 3

1. The recovery of the aid referred to Article 1 shall be immediate and effective.

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

Article 4

1. Within 2 months following notification of this Decision, Belgium shall submit 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.

([26]) 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).

([27]) 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).

2. Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the aid referred to in Article 1 has been fully recovered. At the Commission's request, it shall immediately submit all information on the measures already adopted 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 Kingdom of Belgium.

Done at Brussels, 31 July 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

Information on the amounts of aid received, to be recovered and already recovered

(in millions of national currency)

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

COMMISSION DECISION (EU) 2015/1826

of 15 October 2014

on the State aid SA.33797 — (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ

(notified under document C(2014) 7359)

(Only the Slovak text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having regard to the decisions by which the Commission initiated the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ([1]),

Having called on interested parties to submit their comments pursuant to the provisions cited above, and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By e-mail of 13 October 2011 the Commission received a complaint ([2]) alleging that Slovakia had granted unlawful aid to a company called Novácké chemické závody, a.s. v konkurze ('NCHZ').

(2) The Commission forwarded the complaint to Slovakia on 17 October 2011 together with a request for information. The Slovak authorities requested a Slovak version of the documents, which was sent to them by e-mail on 16 January 2012.

(3) The Slovak authorities submitted the requested information by letter dated 17 February 2012. Further requests for information were sent by the Commission on 22 March 2012 and 21 June 2012. Slovakia responded on 23 April 2012 and 11 September 2012.

(4) The complainant sent further information on its complaint on 14 June 2012. At the request of the complainant, a meeting between the Commission and the complainant was held on 24 January 2013. Additional information was submitted by the complainant by e-mails of 8 and 22 March 2013.

(5) By letter dated 2 July 2013 the Commission informed Slovakia that it had decided to open the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

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

(7) Slovakia provided comments on the decision to open the procedure on 3 September 2013 and on 2 and 30 December 2013. At the request of the Slovak authorities a meeting between Slovakia and the Commission was held on 7 October 2013 and 17 February 2014.

(8) The Commission received two comments from interested parties (both on 12 November 2013). It forwarded them to Slovakia on 2 December 2014, together with a set of additional questions. Slovakia was given the opportunity to react; its comments were received by letter dated 14 January 2014.

([1]) Commission Decision C(2013) 3555 final of 2 July 2013 (OJ C 297, 12.10.2013, p. 85).
([2]) The complainant asked for its identity not to be disclosed.
([3]) See footnote 1.

(9) The Commission asked Slovakia further questions on 2 May 2014, to which Slovakia replied on 14 and 30 May 2014. The Commission also sent an additional request for clarification by e-mail to one of the interested third parties on 20 March 2014, to which the third party eventually replied on 6 May 2014.

2. BACKGROUND TO AND DESCRIPTION OF THE MEASURES

2.1. **Beneficiary**

(10) NCHZ (whose activities are now pursued by the company Fortischem, a.s.) was a chemical producer with three divisions. The company's main activities were the production of calcium carbide and technical gases, the production of polyvinylchloride (PVC) and its processing products and — to an increasing extent — basic and special low tonnage chemicals.

(11) NCHZ operated a chemical plant (founded in 1940) located in the Trenčín region in western Slovakia, which is a region eligible for assistance under Article 107(3)(a) TFEU. The company was privately owned ([4]).

2.2. **Bankruptcy proceedings of NCHZ**

(12) NCHZ entered bankruptcy proceedings on 8 October 2009, claiming that it was unable to sustain its operations due to a fine of EUR 19,6 million imposed by the Commission for its participation in a calcium carbide cartel ([5]). The Commission notes, however, that the fine was not the only major liability of NCHZ and that NCHZ filed for bankruptcy before the cartel fine became due.

2.2.1. *Strategically Important Companies Act*

(13) One month after NCHZ entered into bankruptcy proceedings, Slovakia adopted Act No 493 of 5 November 2009 on certain measures regarding strategically important companies, giving a pre-emption right to the State to buy strategic companies out of bankruptcy proceedings and requiring the bankruptcy administrator to ensure continued operation of the strategic company during the proceedings. The Government declared NCHZ to be a strategic company under that Act on 2 December 2009, i.e. one day after the Act entered into force. The Act expired on 31 December 2010. NCHZ was the only company to which the Act was applied.

2.2.2. *Decision to continue operation in bankruptcy*

(14) In January 2011, on the basis of a decision of the creditors' committee and the secured creditors, the bankruptcy administrator of the company was instructed to continue the operation of NCHZ in bankruptcy even after the Act expired. This decision was based on an economic report analysing the situation of the company and concluding that the outcome of the bankruptcy proceedings would be more favourable to the creditors if the company continued operating. The decision to continue the operation was also approved by the Trenčín Court in February 2011.

(15) There were two relevant creditors' bodies involved in deciding whether to continue operation of NCHZ: the Creditors' Committee, consisting of 5 entities ([6]), four of which were privately owned. The one public entity in the Committee was the Slovak National Property Fund (Fond národného majetku Slovenskej Republiky). In addition, NCHZ had six secured creditors. Of these six secured creditors, four were public entities — the National Property Fund, the Environmental Fund (Environmentálny fond), the Slovak Guarantee and Development Bank (Slovenská záručná a rozvojová banka, a. s.) and the Town of Nováky.

2.2.3. *Sale of the NCHZ business*

(16) During the bankruptcy proceeding, there were two open tenders organised by the administrator for the sale of the business of NCHZ. The first one was unsuccessful since only one bidder participated in the final stage, offering EUR 2 million. The administrator refused that bid and the tender was cancelled by a decision of the

([4]) The owner of the company was Disor Holdings Limited, a company with no declared business activity registered in Cyprus whose ultimate owners are not publicly known.

([5]) The fine was imposed by Commission Decision of 22 July 2009 in Case COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries (OJ C 301, 11.12.2009, p. 18).

([6]) According to the applicable rules, members of the creditors' committee are non-secured creditors elected at the meeting of all creditors where the votes of each creditor correspond to the amount of its claims.

Trenčín Court. The business was sold following a second tender organised in 2011. In that tender, two bidders qualified for the final stage, one offering EUR 2 046 000 and the other EUR 2 200 000. The bidder with the highest bid was selected. The winning bidder was a Czech company called Via Chem Slovakia. The sale contract with Via Chem Slovakia was concluded on 16 January 2012 and the sale was closed on 31 July 2012. NCHZ received […] (*), which was included in the proceeds of the sale. In addition, Via Chem Slovakia agreed to take over private commitments of the NCHZ business incurred during the bankruptcy proceedings, totalling EUR [10-13] million.

(17) According to the conditions of the second tender potential bidders had two options: they could submit a bid either undertaking the 'Commitments of the Transferee' specified in Article 1.7 of the tender conditions or without undertaking those commitments. The commitments included the conditions that:

— during a period of five years after the acquisition of the NCHZ business, production would be maintained at a level of at least 75 % of 2010 production;

— an investment of at least EUR 11 million would be made in environmental rule compliance measures necessary for the continuation of chemical production; and

— the purchaser would not resell or transfer the NCHZ business during a period of five years in a way that could jeopardise the continuation of its operations.

(18) The rules of the tender stipulated that, if the highest bid were from a bidder not undertaking the commitments, the highest bidder who did take them over would have the possibility to match the highest bid. According to the information provided by the Slovak Republic, none of the participants in the second tender submitted a bid undertaking the commitments. Therefore, the business of NCHZ was sold to a bidder who did not undertake the commitments.

(19) On 1 August 2012, one day after the conclusion of the transaction between NCHZ in bankruptcy and Via Chem Slovakia, the main business of NCHZ — the chemical division — was sold by Via Chem Slovakia to Fortischem for EUR […]. Fortischem also took over all commitments and contracts related to the chemical division. Most of NCHZ's 1 412 employees were also transferred to Fortischem. Slovakia claims that less than 60 % of the original property of NCHZ was transferred, since no immovable assets were included in the transfer. However, on the basis of the contract, Fortischem is allowed to use the immovable property originally belonging to the transferred business but left in the ownership of Via Chem Slovakia.

(20) Even though all the assets of NCHZ were sold during the bankruptcy proceedings, the proceedings have not yet been finalised (one reason being on-going court cases with respect to certain claims). In 2012, part of the claims of the public creditors, of around EUR 4,0 million, was repaid from the proceeds of the sale of NCHZ's business. However, there are still proceeds from the asset sale that have not yet been distributed.

2.3. **Description of the measures**

(21) The measures under assessment are the non-payment of liabilities towards various state entities in the course of NCHZ's bankruptcy proceedings.

(22) NCHZ's outstanding liabilities towards public entities or state-owned companies incurred during the bankruptcy proceedings totalled EUR 13 353 877,46 on 1 August 2012, the date of the sale of NCHZ's business. These liabilities represent only the liabilities incurred during the bankruptcy proceedings (they are not the total liabilities due to the State). Such liabilities are defined in Section 87 of the Slovak Bankruptcy Act ([7]) as 'claims against the estate'. Claims against the estate include claims arising after bankruptcy is declared in respect of the administration and liquidation of assets in bankruptcy and claims arising after bankruptcy is declared in respect of taxes, charges, duties, health insurance premiums, social insurance premiums, and wages or salaries of employees of the bankrupt company. Any liabilities incurred from the continued operation of the company during the bankruptcy proceedings that cannot be paid from the revenue from such continued operation are also treated as claims against the estate.

(*) Confidential information.

([7]) Zákon č. 7/2005 Z.z. z 9. decembra 2004 o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov [Act No 7/2005 of 9 December 2004 on Bankruptcy and Restructuring and Amending Certain Acts].

(23) NCHZ's public liabilities that arose during the bankruptcy proceedings are set out in Table 1 below.

Table 1

NCHZ liabilities towards the State or state-owned companies arising during the bankruptcy proceedings (position as at 1 August 2012)

Public authorities/State-owned company	Amount of liability in EUR
Social Insurance Institute	[…]
Všeobecná zdravotná poisťovňa (Health insurance company owned by the State)	[…]
State water management undertaking (Slovenský vodohospodársky podnik, š.p.)	[…]
City of Nováky (fee for waste, real estate tax)	[…]
Environmental Fund	[…]
RTVS, s.r.o.	[…]
Several municipalities (fee for waste, real estate tax)	[…]
Common health insurance company (Spoločná zdravotná poisťovna)	[…]
Motor vehicle tax authority (Daň z motorových vozidiel)	[…]
TOTAL	**13 353 877,46**

(24) Under Section 88(5) of the Slovak Bankruptcy Act, liabilities arising as a result of operation of the business are settled by the administrator from the proceeds of that operation in the order in which they fall due.

(25) From the information available to the Commission it appears that at least certain state institutions (e.g. the Social Insurance Company) did try to enforce receivables under the bankruptcy proceedings. However, the continued operation of NCHZ did not bring in sufficient revenue to cover all operating costs including the social security contributions and other state receivables generated during the bankruptcy proceedings. NCHZ's revenue was used primarily to cover costs directly related to the operation of the business (supply of raw materials, energy etc.) in order to maintain its commercial activity, while the liabilities vis-à-vis the State were not paid and continued to grow during the continued operation of NCHZ in bankruptcy.

(26) The continued operation of NCHZ, which was the principal cause of these accumulated liabilities, was based on two different measures during the bankruptcy proceedings: on the Act — between December 2009 and December 2010 — and on the decision of the creditors as of January 2011.

2.3.1. *Operation under the Act*

(27) From the entry into force of the Act on 1 December 2009 and the Government Decision of 2 December 2009 until the expiry of the Act on 31 December 2010, NCHZ benefited from the status of a 'strategic company'. Under the Act, a bankruptcy administrator was obliged to: (i) ensure the continued operation of a strategic company, even if its revenue did not fully cover its operating costs including taxes and social security contributions; and (ii) prevent the unjustified collective dismissal of employees.

(28) The Act was to apply to commercial companies of strategic importance that were subject to bankruptcy proceedings. The purpose of the Act was to maintain in operation undertakings that were in bankruptcy but had been declared by the Slovak Government to be strategically important. In addition, the Act gave the Slovak Government a pre-emption right to purchase strategic companies that had gone into bankruptcy.

(29) In order for a company to fall within the scope of the Act, all of the following requirements had to be met:

— the company had to be a commercial company whose assets were the subject of declared bankruptcy proceedings;

— the company had to be important for protecting health, national security or the proper functioning of the economy;

— the company had to have more than 500 employees, or in a significant way supply energy, gas, heat or products of the refinery industry to the public, other industries and nationwide transportation, or operate waterworks, a public wastewater treatment plant, a public sewer or a public water supply;

— the company had to be declared as being of strategic importance by the Slovak Government.

(30) NCHZ was the only company to benefit from the Act. The Act was adopted on 5 November 2009 and took effect on 1 December 2009. On 2 December 2009 the Slovak Government proclaimed NCHZ a strategic company by decision No 534/2009.

(31) In deciding that NCHZ was of strategic importance, the Slovak Government pointed to the fact that the company's bankruptcy could lead to a loss of more than 1 700 direct jobs, and endanger a further 5 000 jobs with NCHZ's suppliers in Slovakia. It also stated that stopping production at NCHZ would negatively affect the performance and competitiveness of the chemical industry in Slovakia and thus significantly worsen the position of the whole Slovak economy ([8]).

2.3.2. *Operation under the decision of the creditors' committee*

(32) After the Act expired on 31 December 2010, the bankruptcy administrator, who was bound by the instructions of the creditors' committee, decided to continue the operations of NCHZ in line with the provisions of the Slovak Bankruptcy Act.

(33) Under the Slovak Bankruptcy Act, the creditors of all unsecured receivables registered in the bankruptcy proceedings must elect a creditors' committee in order to exercise their rights in the course of the bankruptcy. The committee has the power to issue instructions to the bankruptcy administrator in the circumstances explicitly provided for in the Slovak Bankruptcy Act, including where the costs of the operation of the bankrupt business exceed the revenue from its operations and its continued operation thus leads to a further accumulation of liabilities. In such a situation the administrator must seek instructions regarding the extent to which the continued operation of the company is to be pursued (Article 88 of the Slovak Bankruptcy Act). Such instructions have to be voted on by the creditors' committee together with the secured creditors and then approved and made binding by a bankruptcy court.

(34) In the case of NCHZ's bankruptcy proceedings the committee consisted of five entities, four of which were privately owned ([9]). The public member of the committee was the National Property Fund (Fond národného majetku). In addition, according to the information available to the Commission, NCHZ had six secured creditors. Four of these secured creditors were state-owned/public undertakings: the National Property Fund, the Environmental Fund (Environmentálny fond), the Slovak Guarantee and Development Bank (Slovenská záručná a rozvojová banka, a.s.) and the Town of Nováky.

([8]) Explanatory memorandum to Government Decision No 534/2009 of 2 December 2009 proclaiming NCHZ a strategic company.

([9]) The private members of the creditors' committee were INVEST — KREDIT, s.r.o. (owned by DISOR HOLDINGS LIMITED, the sole shareholder of NCHZ); Novácká Energetika, a.s. (originally a subsidiary of NCHZ, the majority shareholder since January 2011 being STUPEFY HOLDINGS LIMITED); M-ENERGO, s.r.o. (majority shareholder STUPEFY HOLDINGS LIMITED) and DAK KIABA, s.r.o.

(35) As required under the Slovak Bankruptcy Act the administrator informed both the unsecured and secured creditors (at their joint meeting on 26 January 2011) that the costs of operating the NCHZ business were higher than the revenue from operation. The administrator also provided the creditors with an economic analysis dated 23 December 2010, identifying several possible scenarios and comparing costs and revenue from the point of view of NCHZ's creditors. The analysis concluded that it was in the interests of the creditors to continue the operation of NCHZ and to sell the business as a going concern. The administrator's analysis was supplemented by an NCHZ management presentation entitled 'NCHZ Nováky — Restructuring Feasibility Study', which also argued that the best solution for the creditors would be to sell NCHZ off as a company in operation. Taking account of these studies, all creditors in the creditors' committee and all the secured creditors agreed on 26 January 2011 with continuing the operation of the company. That decision was approved and thus made binding for the administrator by the Trenčín Court in a ruling of 23 February 2011.

(36) Following the approval by the creditors and by the Trenčín Court, the NCHZ business continued operation without any interruption until its sale as a going concern to Via Chem Slovakia in July 2012.

2.3.3. *The Commission decision to open the formal investigation procedure*

(37) The opening decision of 2 July 2013 found that NCHZ had not fully paid social security contributions for its employees or any other liabilities towards various state entities during the bankruptcy proceedings. The amount of public debt for the period 2009-2011 totalled EUR 12,1 million. In view of the financial difficulties of NCHZ in the lead-up to filing for bankruptcy, by allowing continued operation of NCHZ the State ran a real risk that NCHZ would accumulate public liabilities it would not then be in a position to honour. The non-paid debt could thus have been avoided or at least significantly reduced by discontinuing the operations of NCHZ during the bankruptcy proceedings.

(38) There were also strong indications that the creditors' decision to continue operating NCHZ after the expiry of the Act was attributable to the State and provided the company with an undue, selective, economic advantage.

(39) The Commission thus concluded on a preliminary basis that by being allowed to continue its operations and market activities without having to pay social security contributions and other public liabilities during a significant period of time, NCHZ had been awarded an advantage vis-à-vis its competitors that it would not have received under normal market conditions.

(40) The Commission also doubted whether the tender through which NCHZ was sold was unconditional since some of the bidders had the possibility of raising their bids at a later stage, when all the bids had already been submitted. The Commission therefore doubted whether the price paid for the company's assets by the successful bidder represented a market price that ensured maximisation of revenue to satisfy the creditors, including the State. Moreover, there were strong indications that the economic continuity between NCHZ and the new entity had not been interrupted. This would mean that any incompatible state aid granted to NCHZ could be recovered from the new owner of the company's business.

(41) The Commission therefore decided to open the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

3. **COMMENTS FROM INTERESTED PARTIES**

(42) Two third parties commented on the opening decision: the complainant and another interested third party that wished to remain anonymous. Both of these interested parties endorsed the facts and the reasoning set out by the Commission in the decision to open the formal investigation procedure.

(43) The third parties stressed the evident temporal link between the economic difficulties of NCHZ and the introduction of the Strategic Companies Act, which was adopted in an accelerated legislative procedure. In addition, only one day after the entry into force of the Act, the Slovak Government adopted the decision declaring NCHZ a strategic company within the meaning of the Act. Both interested parties claimed that the State could have prevented the foreseeable risk of non-paid public liabilities accumulating by not granting NCHZ strategic company status.

(44) In addition, NCHZ had possibly benefited from the advantage of having the status of a firm unable to exit the market by law and thus remained a reliable business partner, whereas other companies in the same situation as NCHZ, i.e. in bankruptcy proceedings, would most likely have had deteriorating business relations with their suppliers and customers owing to the possibility of their market exit.

(45) As regards the operation of NCHZ following the decision of the creditors' committee, one of the interested parties argues that the state–owned member of the creditor's committee could and should have tried to reach a different outcome — by convincing the other committee members or at least by voting against the continued operation of NCHZ. The same reasoning applies to the State as one of the secured creditors, which according to the interested parties had the right to veto the decision approving the continued operation of NCHZ. The interested parties take the view that this failure to act meant that the decision of the creditors' committee and the secured creditors could be attributed to the State.

(46) In any event, the interested parties also argued that the decision of the Trenčín Court to allow the maintenance of NCHZ's operation was also attributable to the State.

(47) Both of the interested parties alleged that the continued operation of NCHZ distorted competition, particularly in the calcium carbide market. and that NCHZ had a very aggressive pricing policy during that period.

(48) As regards the sale of NCHZ, one of the interested parties claimed that the tender commitments made the outcome of the tender uncertain and that this was the reason why it had not participated in the tender, although the acquisition of NCHZ's business might have been interesting.

(49) Finally, the interested parties stated that Fortischem's overall operation and presence on the market was basically identical with the former NCHZ business. The only observable change was the change in name and owner.

4. **COMMENTS FROM SLOVAKIA**

Existence of an economic advantage to NCHZ

(50) Slovakia claimed that the administrator of the bankruptcy proceedings of NCHZ was obliged to continue the operation of the company on the basis of the Act until 31 December 2010. As regards the nature of that Act, Slovakia claimed that it constituted a general measure applicable to all companies fulfilling the conditions.

(51) Slovakia argued that, even though no decision was taken by the creditors or the court during the first period, it was likely that in the absence of the Act the creditors would in any case have decided to continue NCHZ's operation. Slovakia referred to the preliminary analysis and public statements by the administrator of October 2009 (i.e. before the entry into force of the Act) indicating a preference for the continued operation of NCHZ. The Act did not, therefore, have any material effect, since NCHZ would have continued operating — even without the Act being adopted — solely on the basis of the standard bankruptcy rules.

(52) Subsequently, after the Act expired in December 2010, the administrator requested instructions regarding the continued operation of the company from the creditors' committee. The committee agreed and this decision was confirmed by the Trenčín Court ([10]). Slovakia submitted the economic analysis that had been prepared as the basis for the creditors' committee to take its decision. The company continued to operate until it was sold in 2012.

(53) Slovakia also provided a hypothetical analysis by the administrator based on the methodology used for the analysis in the second period (continued operation based on the decision of creditors and the court), which shows that if liquidation had been considered at the beginning of the first period (continued operation on the basis of the Act), the outcome of the analysis would have been the same. Despite a lower level of current liabilities totalling EUR 8,5 million, the proceeds from liquidation would not have been bigger than the costs and current liabilities.

([10]) Obchodný vestník [Commercial Gazette] No 37B, 23 February 2011.

(54) In view of the above, Slovakia argued that the behaviour of the State throughout the bankruptcy proceedings was in line with the market economy creditor principle. Therefore, it provided no economic advantage to NCHZ and did not constitute state aid.

Recovery of Slovakia's claims from NCHZ in bankruptcy

(55) Slovakia claimed that, when administering and recovering claims against NCHZ, the main creditor, the Social Insurance Company (Sociálna poisťovňa), had acted in line with Social Insurance Act No 461/2003, as amended, and in line with the Slovak Bankruptcy Act. Sociálna poisťovňa exhausted all available remedies under the law. It did not accept the non-payment of premiums and duly entered its claim with the administrator.

(56) The Social Insurance Company had no record of any claims against NCHZ arising before the declaration of bankruptcy that would have needed to be entered in the bankruptcy proceedings in accordance with Section 28 of the Slovak Bankruptcy Act ([11]). It could not therefore become a member of the creditors' bodies deciding on the continued operation of NCHZ.

(57) Therefore, the only available means for ensuring the payment of its claims was to register them in the ongoing bankruptcy proceedings as claims against the estate. So this is what the Social Insurance Company (through its Prievidza branch) did on an ongoing basis, in accordance with Sections 87 and 88 of the Slovak Bankruptcy Act (for details see Table 2).

(58) Under Section 87(3) of the Slovak Bankruptcy Act, claims against the estate are to be satisfied by the administrator from the proceeds of the liquidation of the assets of the estate in question by payment due date. The administrator is liable to creditors with a claim against the estate for losses sustained by them when their claim against the estate has not been properly and promptly satisfied in accordance with this provision, unless he can prove that he acted with due professional diligence. On 24 August 2011 a meeting of the representatives of the Social Insurance Company and NCHZ was held at the Prievidza branch. At the meeting the administrator informed the Social Insurance Company's representatives that he was not able to meet claims against the estate because he had to prioritise the continuing operation of the business so that the company could be sold at the best possible price.

(59) Under Section 47(1) of the Slovak Bankruptcy Act, a declaration of bankruptcy suspends all judicial and other proceedings concerning the assets that are subject to the bankruptcy proceedings and belong to the bankrupt party. The time limits established or laid down in these proceedings do not expire during the period of suspension.

(60) Under Section 47 of the Slovak Bankruptcy Act, the Social Insurance Company may not assert a claim by means of a decision under the Social Insurance Act nor subsequently recover a claim by initiating enforcement proceedings (see Section 48 of the Slovak Bankruptcy Act). Table 2 below shows an overview of claims registered by the Social Insurance Company in the period from September 2009 to January 2012.

(61) However, on 15 November 2011 the Social Insurance Company — Prievidza branch made a complaint against persons authorised to act on behalf of NCHZ to the District Public Prosecutor in Prievidza, alleging that during the period from June 2011 to September 2011 they had committed the criminal offence of failing to levy and pay insurance contributions in accordance with Sections 277 and 278 of Act No 300/2005 ('the Criminal Code'), as amended. On 7 February 2012 the investigator at the District Police Directorate in Prievidza suspended the criminal proceedings because it was not possible to establish facts allowing a criminal prosecution of the persons concerned.

Table 2

Claims registered in the bankruptcy proceedings (in EUR thousand) ([1]) **by the Social Insurance Company between September 2009 and January 2012**

Description of claim	Date of registration with the bankruptcy administrator	Amount in EUR thousand
Social security insurance and pension insurance	11.10.2010	[…]
Social security insurance and pension insurance	24.6.2011	[…]

([11]) The Social Insurance Company was not a secured creditor because the liabilities towards it were incurred only after the beginning of the bankruptcy proceedings.

Description of claim	Date of registration with the bankruptcy administrator	Amount in EUR thousand
Social security insurance and pension insurance	December 2011	[…]
Guarantee insurance	11.10.2010	[…]
Guarantee insurance	24.6.2011	[…]
Guarantee insurance	18.1.2012	[…]
Total amount of claims registered up to 31 January 2012		[…]

([1]) All figures are rounded.

Sale of NCHZ

(62) As regards the sale of NCHZ, Slovakia argued that the sale was carried out in an open, transparent and unconditional manner and that through the tender the highest bidder was duly selected. As regards the type of sale, Slovakia argued that this case should be considered a specific case of an asset deal where all assets are transferred together with their rights and certain liabilities attached to them.

(63) Slovakia further argued that in this particular case the conditions attached to the second tender were not likely to influence the possibility of obtaining the highest possible price because neither of the two bidders who participated in the second tender were going to undertake the liabilities. Additionally, the price finally obtained (EUR 2,2 million) was very close to the price of the first tender, which was cancelled (EUR 2 million). The first tender did not include any commitments.

(64) Given that NCHZ was, in Slovakia's view, sold in a sufficiently open, transparent and unconditional tender, a market price was obtained for NCHZ's assets. In Slovakia's view there is no economic continuity link between NCHZ, Via Chem Slovakia and now Fortischem. Slovakia argued that in the transaction between Via Chem Slovakia and Fortischem less than 60 % of the business was transferred, in particular because no immovables were included in the sale. Finally, Slovakia claimed that the Commission did not have any evidence demonstrating that NCHZ was sold as a going concern for the purpose of avoiding the recovery of state aid.

(65) Slovakia confirmed that all non-monetary commitments relating to contracts with employees had also been transferred to the new buyer — Via Chem Slovakia. Slovakia also clarified that no appraisal report had been produced evaluating the total assets or the company as a going concern. Further, Slovakia confirmed that all liabilities towards the State incurred during the bankruptcy proceedings stayed with NCHZ and would be settled from the proceeds of the sale.

5. **ASSESSMENT OF THE MEASURE**

5.1. **Existence of state aid**

(66) By virtue of Article 107(1) 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.

(67) In order to conclude whether state aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of state resources, imputability to the State, selective advantage, potential distortion of competition and effect on intra-EU trade) are met in the case at hand. This should be assessed in particular in relation to the non-payment of social security contributions and other liabilities vis-à-vis the State during the continued operation of NCHZ in bankruptcy: (i) by virtue of the application of the Act following the decision of the Government declaring NCHZ to be a strategic company within the meaning of the Act (see point 5.2) and (ii) by continued operation under the decision of the creditors' committee with the agreement of the public creditors (see point 5.3).

(68) The assessment will have to be carried out keeping in mind that, in view of the financial difficulties of NCHZ in the lead-up to the filing for bankruptcy, by declaring NCHZ a strategic company the Government ran a real risk of NCHZ accumulating public liabilities which it would not then be in a position to honour. There existed a substantial risk that the continued operation of NCHZ during the bankruptcy proceedings would not yield sufficient revenue to cover all operating costs including the social security contributions and other state receivables and that the mounting liabilities vis-à-vis the State would not be duly paid. As this scenario did in fact materialise during 2010, this risk of further mounting non-paid liabilities vis-à-vis the State was even clearer at the beginning of 2011 when, after expiry of the Act, the creditors' committee decided to continue NCHZ's operation. In fact, the creditors of NCHZ were specifically alerted to this issue by the administrator.

(69) The continued operation of the company in bankruptcy led to mounting debt to the State. The amount of the unpaid debt that accumulated over the period of the bankruptcy proceedings (2009-2012) totals more than EUR 13,3 million.

(70) It should also be noted that the accumulated public liabilities are unlikely to be fully recovered from the proceeds of the sale of the business of NCHZ (EUR 2,2 million sales price and […] return of […]). Indeed, so far only around EUR 4,0 million of claims by public entities have been repaid from the proceeds of the sale.

5.2. **Application of the Act to NCHZ**

(71) For 13 months (from the entry into force of the Act on 1 December 2009 until its expiry on 31 December 2010), the application of the Act to NCHZ provided the basis for the continued operation of NCHZ despite the fact that the costs of operating the business were consistently higher than the revenue obtained from it, thereby resulting in mounting debt.

(72) In line with Section 5(a) of the Act, the bankruptcy administrator was obliged to secure the operation of a company declared by the Government as being strategically important. In his reply to a request for information the administrator stated that the continuation of the operation of the bankrupt company was a necessary consequence of compliance with his obligations stemming directly from the Act. Thus, NCHZ was able to continue operating and to maintain its business relationships despite being in a situation in which the administrator would have been obliged to consider the possibility of stopping operations and winding up the business (because it was not able to pay all of its debts).

5.2.1. *Transfer of state resources and imputability*

(73) As indicated above, Slovakia adopted the Act and declared NCHZ to be a strategic company on the basis of that Act. Therefore, the administrator was obliged by application of the Act to continue the operation of NCHZ during the bankruptcy proceedings.

(74) By virtue of that declaration, the operation of the company was maintained even though there was a clear risk (which indeed materialised) that the revenue would not be sufficient to cover the costs of the operation of the business during bankruptcy, including the social security contributions and other liabilities vis-à-vis the State.

(75) Consequently, this foreseeable risk of accumulation of non-paid liabilities towards the State could have been prevented by the State, by exercising its discretion under the Act and not granting NCHZ the status of strategic company, which obliged the administrator to continue operation of NCHZ's business during the bankruptcy proceedings.

(76) Moreover, the continuation of operations and the accumulation of additional liabilities as a consequence of the application of the Act made it more difficult for the existing public creditors of NCHZ to recover their existing claims.

(77) Therefore, the Commission concludes that declaring NCHZ to be a strategic company led to a transfer of state resources within the meaning of Article 107(1) TFEU. This transfer occurred in the form of foregone revenue from social security contributions and other public claims not honoured by NCHZ during the period when the Act applied to it. The Commission also notes that the decision to declare NCHZ a strategic company was adopted by the Government and is therefore clearly attributable to the Slovak State.

5.2.2. *Economic advantage*

(78) The application of the Act to NCHZ provided it with an economic advantage, as it protected the company from the normal course of bankruptcy proceedings under the standard bankruptcy legislation. For almost 13 months, NCHZ continued its operations exclusively by virtue of the application of the Act. The bankruptcy administrator had to ensure the operation of the undertaking even if its revenue did not fully cover its operating costs including taxes or social security contributions. The application of the Act thus deprived the administrator and the creditors of their discretion to decide whether the continued operation of the company was economically advantageous.

(79) Due to the loss-making character of the continued operations, NCHZ was not able to fully pay its liabilities, including social security and health insurance contributions for its employees and other liabilities towards various state entities during the bankruptcy proceedings.

(80) The application of the Act to NCHZ required the administrator to: (i) ensure the operation of NCHZ and (ii) prevent an unjustified collective dismissal of employees. On that basis, the administrator himself stated that on the basis of the application of the Act he was obliged to continue operating NCHZ in full, without any possibility of analysing alternatives and choosing the one most advantageous for the creditors of the company in bankruptcy.

(81) While the Act was in force, no creditors' meeting deciding on the economic future of NCHZ could take place and no analysis was made to assess whether the continued operation of NCHZ was at that stage in the creditors' interest. Only when the Act was about to expire did the administrator commission a comprehensive economic analysis and call a meeting of the company's creditors to decide whether to continue operating NCHZ or not.

(82) In addition, the application of the Act to NCHZ was based, not on considerations which the company's creditors would have taken into account, but on other public policy considerations. The explanatory memorandum to the Government Decision of 2 December 2009 declaring NCHZ a strategic company under the Act mentions the threat of 1 700 jobs being lost directly at NCHZ and an additional 5 000 jobs being lost at NCHZ's suppliers if the company closed down. It also states that stopping production at NCHZ would negatively affect the performance and competitiveness of the whole chemical industry in Slovakia and thus significantly worsen the position of the whole Slovak economy. The application of the Act to NCHZ by the Government was, therefore, evidently not justified on the basis of the market economy creditor principle. Slovakia maintains that, although no decision was taken either by the creditors or the court during the first period, it is likely that the creditors would have decided to continue operating NCHZ even if the Act had not been applied to it. Slovakia refers to a preliminary analysis of 26 October 2009 and public statements made by the administrator in October 2009 (i.e. before the Act entered into force) indicating that the continued operation of NCHZ was his preferred option.

(83) However, the preliminary analysis by the administrator is rather sketchy, does not contain any analysis of alternative options (sale of assets or liquidation) and cannot therefore be considered a solid basis that the creditors would have used for deciding on the continued operation of NCHZ. Furthermore, in December 2009 the court replaced the original administrator of NCHZ with a new one, who might have reached a different conclusion on the basis of a more in-depth assessment. However, any further assessment of the issue was suspended by the entry into force of the Act and thus the creditors and the court were given no opportunity to discuss and decide on the matter from the point of view of their economic interests.

(84) Although the creditors and the court decided to continue operating NCHZ after the Act expired, this decision was taken in a different economic situation and was based on a significantly more complex and solid economic assessment produced in December 2010 in view of the expiry of the Act. That analysis primarily had to take into account that following the first period NCHZ had outstanding liabilities (both public and private) from its previous continued operation totalling EUR 16 million and these had priority over any pre-bankruptcy liabilities. Therefore, the situation for the creditors was not the same as at the beginning of the bankruptcy proceedings when a large part of those liabilities had not yet been incurred.

(85) In addition, the uncertainty automatically entailed in decision-making under the standard bankruptcy rules was removed by the application of the Act to NCHZ, which guaranteed that at least until the Act expired at the end of 2010 NCHZ would be fully operational. This sent a strong signal to the company's suppliers and customers,

who were assured that they could keep trading with NCHZ, because the company would, owing to its strategic company status under the Act, remain fully operational. Since security of supply is an important element for customers in the chemical sector, the application of the Act provided a significant advantage to NCHZ as compared with the standard bankruptcy procedure. It gave NCHZ's customers significantly more assurance that, despite any further losses and irrespective of the views and interests of its creditors, NCHZ would continue operating at least until the Act expired. NCHZ thus received privileged treatment compared with its competitors in a similar situation.

(86) The risk of customers switching to other suppliers as a result of bankruptcy is not just a hypothetical one. In fact, even with the shield provided by the application of the Act, some customers were lost in 2009 and 2010, as indicated in the administrator's economic analysis produced after the Act expired. Without the application of the Act the risk that even more sales would be lost owing to the uncertainties created by the bankruptcy proceedings would have been significantly higher. This would also have increased the risk that the creditors might view the continued operation of NCHZ as no longer making economic sense.

(87) Slovakia provided a hypothetical analysis by the administrator based on the methodology used for the analysis in the second period which shows that, if liquidation had been considered at the beginning of the first period, the outcome of the analysis would not have been different from the outcome of the analysis in the second period. Regardless of the lower level of current liabilities totalling EUR 8,5 million, the proceeds from liquidation would not have been greater than the costs and the current liabilities. However, this analysis is very brief and hypothetical and was produced by the administrator only after the event ([12]), as it was not drawn up and submitted until March 2014.

(88) Slovakia has not demonstrated that the continued operation of NCHZ would really have been approved at the beginning of the bankruptcy period on the basis of a proper in-depth analysis and discussion by all the stakeholders, even if the Act had not been applied to NCHZ. In fact, if the Act had not been applied to NCHZ, the company would have faced additional negative consequences (such as customers switching to safer suppliers), which would have significantly increased the risk of the creditors opting to discontinue operation at that stage.

(89) The application of the Act thus provided NCHZ with a selective economic advantage, as it protected the company from the normal course of the bankruptcy proceedings under the standard bankruptcy legislation. It deprived the administrator, the creditors and the court of the possibility of discontinuing operation of NCHZ or making significant staff cuts (see recital 27), either at the beginning of the bankruptcy proceedings or later on (i.e. in the course of 2010) in view of developments in NCHZ's economic situation. It also provided NCHZ and third parties (such as customers and suppliers) with a certainty of continued operation, which under standard bankruptcy rules is never guaranteed.

(90) In the light of the above, the Commission takes the view that the application of the Act provided NCHZ with an undue economic advantage.

5.2.3. *Selectivity of the measure*

(91) The decision to apply the Act to NCHZ, thereby guaranteeing its continued operation, is an individual measure adopted by the Government specifically concerning NCHZ and is therefore, by definition, selective.

(92) The Slovak authorities argue that the Act was a general measure applicable to all companies fulfilling the criteria laid down in it. Leaving aside the fact that the relevant measure is not the Act itself but its application to NCHZ by the Government's decision, the Commission notes that in accordance with the established case-law of the EU courts the fact that the Act was a general measure does not exclude the possibility of it conferring a selective advantage on a particular entity.

(93) First, even though the Act was a general legislative measure the circumstances of the case suggest that it was in fact aimed specifically at NCHZ (some press articles even dubbed the Act 'lex NCHZ'). The Act was adopted one month after the company was declared bankrupt and NCHZ was the only company to which the Act was applied.

([12]) Judgment of 5 June 2012, *Commission* v *EDF*, C-124/10, ECLI:EU:C:2012:318, paragraphs 83-85 and 105; judgment of 16 May 2002, *France* v *Commission*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; judgment of 30 April 1998, *City Flyer Express Ltd* v *Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76.

(94) Second, for the Act to be applied to a given company, a decision by the Government declaring the company to be 'strategic' was required, as the Act did not apply automatically to every company fulfilling the conditions set out in Section 1(2) of the Act. In addition, in view of the general wording of those conditions, the Government had significant discretion regarding which companies it considered strategic ([13]).

(95) Therefore, the Commission considers that the measure allowing the accumulation of NCHZ's unpaid debts to the State constitutes a selective measure within the meaning of Article 107(1) TFEU.

5.2.4. *Distortion of competition and effect on trade between Member States*

(96) The continued operation of NCHZ by virtue of the application of the Act had the effect of reducing costs that NCHZ would otherwise have had to bear. The operation of NCHZ did not yield sufficient revenue to cover all operating costs, including social security contributions and other state receivables incurred during the bankruptcy proceedings. Despite its inability to cover all its liabilities, and in particular those vis-à-vis the State (which remained unpaid for the 13 months that the Act was in force), NCHZ remained active on the market offering its products in competition with other European chemical producers.

(97) Moreover, as described above, the application of the Act provided NCHZ with economic advantages not enjoyed by other companies in a similar situation. In particular, it was likely to significantly reduce the risks of losing customers and suppliers during the bankruptcy proceedings. The fact that the company was obliged, under the Act, to continue operations encouraged the business partners of NCHZ to maintain their relationship with the company. The security of supply for NCHZ customers, particularly important in the chemical industry, was ensured through the continued operation of the business as provided for by the Act. If the Act had not applied, NCHZ's customers would have been more likely to search for alternative sources of supply for fear of a sudden discontinuation of operations owing to the deteriorating financial and economic situation of the bankrupt company.

(98) Reducing a single company's costs amounts to operating aid and thus distorts competition as NCHZ's competitors had to bear those costs or the consequences of inability to pay. Furthermore, the measures may have distorted competition by artificially retaining NCHZ on the calcium carbide market and other markets where it was active.

(99) Since there is only a limited number of producers of calcium carbide in the EU and the products are traded Europe-wide, the measure in question also clearly affects trade between Member States.

5.2.5. *Conclusion on the presence of state aid*

(100) In the light of the above, the Commission concludes that the declaration of NCHZ as a strategic company under the Act constituted a selective advantage in favour of that company, was imputable to the State and entailed the use of state resources to distort competition in a market open to trade between Member States. The measure therefore constitutes state aid within the meaning of Article 107(1) TFEU.

(101) The amount of the aid corresponds to the unpaid liabilities due to the State and state entities accumulated during the period when the Act applied to NCHZ. On the basis of the information provided by Slovakia, the unpaid debt at the beginning of the period stood at EUR 735 817,44 ([14]). When the Act expired, the outstanding liabilities stood at EUR 5 519 241,54 ([15]). Therefore, the aid amount is EUR 4 783 424,10.

([13]) In this respect, see in particular Case T-152/99, *Hijos de Andrés Molina, SA (HAMSA)* v *Commission*, ECLI:EU:T:2002:188, paragraph 157.

([14]) This amount corresponds to the outstanding debts due to public creditors on 31 December 2009. The Slovak authorities claim that there is no precise information on the amounts on the exact date when NCHZ was declared to be a strategic company. Therefore, the figure is the most precise available estimate (and a rather conservative one) of the amount of outstanding liabilities at the beginning of the application of the Act.

([15]) This amount corresponds to the outstanding debts due to public creditors on 31 December 2010. The Slovak authorities claim that there is no precise information of the amounts on the exact date when NCHZ ceased to be a strategic company under the Act. Therefore, the figure is the most precise available estimate (and a rather conservative one) of the amount of outstanding liabilities at the end of the application of the Act.

5.3. **Continued operation under the decision of the creditors' committee**

(102) After the Act expired, the administrator was no longer legally obliged to continue the operation of the company. He informed the creditors (both secured and unsecured) that NCHZ's losses had been mounting continuously since it was declared bankrupt and that the costs of operating the business were higher than the proceeds from its operation. Despite being aware of the poor condition of the company, all creditors on the creditors' committee and the secured creditors agreed in January 2011 that NCHZ should continue to operate. This decision was subsequently confirmed by the bankruptcy court in accordance with the Slovak Bankruptcy Act and thus became binding for the administrator.

5.3.1. *Imputability and economic advantage*

(103) The continuation of NCHZ's operations after the expiry of the Act was based on a decision of the creditors' committee (representative body of non-secured creditors), whose members were mainly private companies. The formal investigation procedure revealed that no member of the creditor's committee or the secured creditors had a veto right under the Slovak Bankruptcy Act. In fact, the voting in these bodies took place by majority. Therefore, no state entity could have enforced its interests in stopping further accumulation of the debts.

(104) It can therefore be concluded that the continuation of NCHZ's operations was based on a decision determined by the private creditors, as the public creditors were not in a position to veto NCHZ's continued operation. For this reason, the decision to continue operating NCHZ after the Act expired cannot be considered imputable to the State.

(105) This also shows that the decision of the various public creditors to actively support the continuation of NCHZ's operation in the second period was taken at the same time and under the same conditions (*pari passu*) as the decisions of the comparable private creditors, which means that the public creditors acted in line with the market economy creditor principle.

(106) In addition, for the sake of completeness, the Commission verified the economic analysis produced by the administrator, which was available to the creditors and the court at the relevant point in time. The analysis identifies several possible scenarios and compares the costs and revenue from the point of view of NCHZ's creditors. In particular, the analysis indicates that discontinuing the operation of NCHZ would lead to significant costs totalling more than EUR 48 million. The bulk of the costs related to the closure and environmental clean-up of the chemical production sites (around EUR 37,3 million) and staff costs (EUR 10,5 million if all legal obligations were fulfilled). At the same time, the expected revenue from the sale of individual assets was in the region of EUR 47-52 million (without taking into account additional costs of dismantling and removing the equipment).

(107) As the outstanding (public and private) liabilities incurred from operating during the bankruptcy proceedings (EUR 16 million at that time) had preferential treatment, none of the pre-bankruptcy claims would be satisfied. However, the analysis considers that the sale of the undertaking with continued operation was likely to bring higher revenue, since some of the technological equipment would be irreparably damaged if operation were discontinued. The analysis also states that, despite the failure of the first tender, there were several interested buyers. Overall, the analysis concludes that it was in the interests of the creditors to continue operating NCHZ and sell the business as a going concern.

(108) The economic analysis by the administrator was also accompanied by an analysis produced by the management of NCHZ. That analysis considered the expected real value of the company's assets in the event of discontinued operation to amount to only EUR 15,5 million, making the discontinuation of NCHZ's operation even less attractive for the creditors. Furthermore, the study argued that the company could be successfully sold following certain restructuring measures to be adopted; since the Act made laying off staff rather difficult, the staff cuts were implemented by NCHZ only after the Act ceased to apply at the beginning of the second period. Overall, the study also concluded that the creditors would be best off if NCHZ were sold as a going concern.

(109) The proposal for continued operation based on those documents was subsequently accepted by all creditors, both public and private. The Commission notes that the debts owed to at least some of the private creditors had also been increasing during the bankruptcy period, amounting in the end to EUR 11,5 million.

(110) In addition, the in-depth investigation showed that only two of the four public creditors represented in the creditor bodies (the National Property Fund, the Environmental Fund, the Slovak Guarantee and Development Bank and the Town of Nováky) were directly concerned by the threat of further accumulation of the debts owed to them by NCHZ during its continued operation. These were the Environmental Fund, whose additional claims during the second period were only EUR [100-500] thousand, and the Town of Nováky, whose additional outstanding claims during the second period came to EUR [300-800] thousand. The main public creditors to whom the amounts owed mounted up during the bankruptcy proceedings, in particular the public health and social security insurance companies, were not represented on any of the creditor bodies deciding on the continuation of NCHZ's operation. Therefore, they had no possibility of directly influencing the decision-making and thus could not prevent NCHZ's continued operation. Those public creditors did all they could to recover the debts by registering their claims with the bankruptcy administrator and using all the enforcement mechanisms available under the Bankruptcy Act.

(111) In view of the above, the Commission considers that the behaviour of the different state entities was in line with the private creditor test.

(112) Therefore, the Commission concludes that NCHZ did not benefit from an advantage over its competitors that it would not have received under normal market conditions in the second period when the Act was no longer applicable and NCHZ continued its operation on the basis of the decision of the creditors' committee.

5.3.2. *Conclusion on the presence of state aid*

(113) Since at least two of the cumulative conditions for defining state aid (imputability to the State and existence of an economic advantage) are not fulfilled, the Commission concludes that the continued operation of NCHZ under the decision of the creditors' committee does not constitute state aid within the meaning of Article 107(1) TFEU.

5.4. **Unlawful aid**

(114) The Commission notes that, since the application of the Act to NCHZ constitutes state aid, it was granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Thus, the Commission notes that the aid granted to NCHZ constitutes unlawful state aid.

5.5. **Compatibility of the measures with the internal market**

(115) Since the measure identified above constitutes state aid within the meaning of Article 107(1) TFEU, its compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

(116) According to the case-law of the Court of Justice, it is up to the Member State to cite possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ([16]). The Slovak authorities consider that the measures do not constitute state aid and have not cited any possible grounds on which to assess compatibility.

(117) The Commission has none the less assessed whether any of the grounds laid down in the TFEU would be applicable *prima facie* to the measures under assessment.

(118) Since NCHZ was the subject of bankruptcy proceedings at the time when the measures were granted, it was clearly a firm in difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ('the R&R Guidelines') ([17]).

(119) Therefore, any assessment of the compatibility of state aid with the internal market should in principle be made on the basis of the criteria set out in those guidelines.

(120) The Commission notes that the conditions for rescue aid laid down in point 3.1 of the R&R Guidelines do not seem to be met: in particular, the measures do not consist of liquidity support in the form of loan guarantees or loans and they were not accompanied by a commitment from Slovakia to communicate to the Commission a restructuring plan or a liquidation plan and so on.

([16]) Case C-364/90, *Italy* v *Commission*, ECLI:EU:C:1993:157, paragraph 20.
([17]) OJ C 244, 1.10.2004, p. 2.

(121) In relation to restructuring aid as defined in point 3.2 of the R&R Guidelines, the Commission observes that Slovakia did not notify any of the measures identified above as restructuring aid and that it has failed to demonstrate that any of the necessary elements for them to be considered as such are present (restructuring plan, own contribution, compensatory measures and so on).

(122) Point 34 of the R&R Guidelines requires the granting of the aid to be conditional on implementation of a restructuring plan, which must be endorsed by the Commission in all cases of individual aid. The aid in the case at hand had been granted without a credible restructuring plan satisfying the conditions laid down in the R&R Guidelines. This circumstance would in itself be sufficient to exclude compatibility of the measures with the internal market.

(123) In addition, the Commission observes that Slovakia has not brought to the attention of the Commission any facts that would ensure compliance with the necessary requirements for finding restructuring aid compatible: restoration of the long-term viability of NCHZ, acceptable levels of own contribution, adequate compensatory measures, and so on.

(124) The Commission concludes that the measure identified above is not compatible on the basis of the R&R Guidelines and thus constitutes state aid which is incompatible with the internal market.

5.6. **Recovery of the aid**

(125) According to the Treaty and the Court's established case-law, the Commission should normally decide that the Member State concerned must abolish aid illegally granted when such aid has been found to be incompatible with the internal market ([18]). The Court has also consistently held that the obligation on a Member State to abolish aid declared incompatible with the internal market is designed to re-establish the previously existing situation ([19]).

(126) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([20]).

(127) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary …' ([21]).

(128) Thus, given that none of the measures in question were notified to the Commission, in violation of Article 108 of the Treaty, but are to be considered unlawful and incompatible aid, the amounts granted must be recovered in order to re-establish the situation that existed on the market before they were granted. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery. Recovery will take into account the amounts of outstanding debts constituting state aid which have been demonstrated to have been already repaid from the proceeds of the sale of NCHZ's assets.

(129) In view of the sale of the business of NCHZ to Via Chem Slovakia and Fortischem, the Commission will examine possible economic continuity between these companies in order to analyse whether the recovery of aid should be extended to them or not.

5.7. **Economic continuity of NCHZ through the sale of the business**

(130) As indicated, in the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is required to recover the incompatible aid. The recovery obligation may be extended to a new company to which the company in question has transferred or sold part of its assets, where that transfer or sale structure leads to the conclusion that there is economic continuity between the two companies ([22]).

([18]) See Case C-70/72, *Commission* v *Germany*, ECLI:EU:C:1973:87, paragraph 13.
([19]) See Joined Cases C-278/92, C-279/92 and C-280/92, *Spain* v *Commission* ECLI:EU:C:1994:325, paragraph 75.
([20]) See Case C-75/97, *Belgium* v *Commission*, ECLI:EU:C:1999:311, paragraphs 64 and 65.
([21]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).
([22]) Judgment of the General Court of 28 March 2012, *Ryanair Ltd* v *European Commission*; Case T-123/09, paragraph 155.

(131) As regards the purpose of the transaction, the Commission notes that, although it does not have direct evidence that the intention of the transaction was to evade the effects of a potential recovery decision, it was however clear to the Slovak authorities that the Commission had been preliminarily investigating a complaint against NCHZ since 17 October 2011 (see recital 2) and that there was the existing claim for the payment of the cartel fine of EUR 19,6 million imposed on NCHZ by a decision of 22 July 2009 (see recital 12).

(132) According to the Court decision in *Italy and SIM 2* v *Commission* ([23]), on which the Commission based its decisions concerning the companies Olympic Airlines, Alitalia and SERNAM ([24]), the assessment of economic continuity between the aid beneficiary and the undertaking to which its assets were transferred is established based on a set of indicators. The following factors may be taken into consideration: the sale price corresponding to a market price or not, the scope of the sold assets (assets and liabilities, maintenance of workforce, the assets as a whole), the identity of the buyer(s), the timing of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and the economic logic of the operation. This set of indicators was confirmed by the Court in its decision of 28 March 2012 in *Ryanair* v *Commission*, which confirmed the Alitalia decision ([25]).

(133) In view of the sale of the NCHZ business to Via Chem Slovakia, and subsequently to Fortischem, the Commission will thus analyse, on the basis of the above listed criteria, whether there is an economic continuity between NCHZ and the business ultimately acquired and currently operated by Fortischem.

(134) The Commission considers that it is not appropriate to analyse separately the economic continuity of the two transactions leading to the acquisition of NCHZ's business activities by Fortischem, i.e. first the sale to Via Chem Slovakia and then the sale to Fortischem. Via Chem Slovakia sold the business to Fortischem in the second transaction on 1 August 2012, i.e. only one day after closing the first transaction. Therefore, Via Chem Slovakia never actually managed and operated the NCHZ business activities it acquired.

(135) The Commission acknowledges that the scope of the two transactions is not exactly the same, since Via Chem Slovakia retained ownership of certain immovable assets (buildings and land). However, it is evident from the information provided that all the economic activities of NCHZ acquired by Via Chem Slovakia were immediately transferred to Fortischem. With the sole exception of the immovable assets, Fortischem took over from Via Chem Slovakia all assets and rights related to chemical production (production machines and equipment, contracts etc.) as well as commitments related to chemical production (including all employment contracts). The immovable assets that were not sold to Fortischem but were necessary for the continuation of the NCHZ economic activities were made available to Fortischem on the basis of a lease contract. Therefore, the Commission will directly analyse whether there is economic continuity between NCHZ and its business activities acquired by Fortischem. The specific features of the two transactions will be taken into account to the extent that they are relevant to this assessment.

5.7.1. *Selling price*

(136) In its decision to open the formal investigation procedure the Commission expressed doubts as to whether the price of EUR 2,2 million paid for the company's assets by Via Chem Slovakia, the successful bidder, represented a market price.

(137) The tender came with conditions attached that appear likely to have lowered the value of the assets. According to the tender conditions potential bidders could choose whether to make their bid with or without undertaking the 'Commitments of the Transferee' (for details see recitals 17 and 18).

(138) The rules of the tender stipulated that, if the highest bid came from a bidder that chose not to undertake the commitments, the highest bidder making those commitments would have the chance to match the highest bid. The Commission considers that this possibility for one bidder to raise his bid after all the bids have been submitted is likely to discourage potential participants and/or have a negative impact on the bids that are made.

([23]) Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA* v *Commission of the European Communities*, Joined Cases C-328/99 and C-399/00.

([24]) Commission Decision of 17 September 2008, State aid N 321/08, N 322/08 and N 323/08– Greece — Vente de certains actifs d'Olympic Airlines/Olympic Airways Services; Commission decision of 12 November 2008 State aid N 510/2008 — Italy — Sale of assets of Alitalia; Commission decision of 4 April 2012 SA.34547 — France — Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire.

([25]) Judgment of the General Court of 28 March 2012 in Case T-123/09, *Ryanair Ltd* v *Commission*.

(139) In fact, one of the elements that ensure that the highest price is achieved in a tender is the uncertainty as regards the prices offered by the other bidders. If a bidder submitting a bid with commitments knows that his bid need only be the highest among the bids with commitments and that he will be able to match his bid to that of the highest bidder not undertaking the commitments, he may well put in a lower bid than if no opportunity to match is provided for in the tender conditions.

(140) Furthermore, this condition could discourage bidders who do not wish to bid with commitments because they know that, even if their bid is the highest, it may be rejected because another buyer who is prepared to undertake the commitments can increase its bid. If this occurs, the bidder without commitments is not given the opportunity to re-bid and offer a higher purchase price.

(141) In view of the above, the tender conditions seem to give preference to bidders undertaking the commitments, since if two bidders offer the same price, one with commitments and one without, the bid with the commitments is preferred over the other one. This would appear to be an indication that the price that would be achieved in the absence of the commitments could potentially be higher than the price offered by the winning bidder. It can reasonably be presumed that the obligation to fulfil the commitments has financial implications for the buyer which it takes into account when submitting its bid. In the absence of the commitments, the price offered by that buyer would thus likely be higher.

(142) Slovakia argues that even a bidder offering to accept commitments could not be sure that there would be no other bidder offering commitments with a potentially higher bid. However, this does not undermine the fact that bidders without commitments were in general treated less favourably than bidders with commitments, and that potential bidders not willing to undertake the commitments could thereby have been discouraged from participating.

(143) Slovakia also argues that, in view of the total volume of the commitments, which exceeded EUR 11 million, it was highly unlikely that any bidder would submit a bid undertaking these commitments. It claims that, in particular in view of the price of only EUR 2 million offered during the first tender, no rational participant in the tender would have undertaken commitments with such financial implications. The commitments in fact include investments of at least EUR 11 million. However, the investment is earmarked to finance measures ensuring compliance with the applicable environmental rules necessary for the continuation of chemical production. Any bidder wishing to continue chemical production would need to make such an investment and this amount would thus need to be taken into account also by bidders not undertaking the commitments. While the other two commitments (referred to in recital 17) did have a potential effect on price, a buyer planning to maintain or even expand NCHZ's activities would not find those commitments excessively burdensome, considering the advantage granted in the tender to bidders with commitments. Therefore, the possibility of a bid undertaking commitments cannot be discounted as 'extremely improbable' and this possibility was therefore liable to influence the price offered in the tender.

(144) Although ultimately no bids with commitments were received, the conditions did not allow for the inclusion of the highest possible number of bidders bidding against each other with their best offers, which is a prerequisite for sale at the highest possible market price.

(145) In addition, the sale was organised as a sale of the whole business as a going concern, i.e. with all the assets bundled together and no bidder could buy any asset separately. This excluded the possibility of maximising the final price through bidding for partial areas of NCHZ's activities (while at the same time avoiding or limiting potential difficulties stemming from the possible discontinuation of operations). The Commission observes that the documents submitted by the Slovak authorities indicate that there were potential bidders who were interested in acquiring only some parts of NCHZ's business (for example, bluO Epsilon Limited was interested in acquiring only the carbide production facilities). Therefore, it cannot be excluded that a sale of partial areas of NCHZ's business would not have led to a higher total sales price.

(146) As regards the sale from Via Chem Slovakia to Fortischem, it was a transaction between two private parties where no tender was organised. The price was simply negotiated between the two private parties without any possibility for other parties to offer a higher price. Therefore, the doubts as to whether the price paid by Via Chem Slovakia corresponded to a market price also relate to the price paid by Fortischem.

(147) In view of the above, it appears likely that NCHZ's assets were not sold in a manner that ensured the maximisation of revenue for the transferred business.

(148) In view of the above, the Commission concludes that the price paid by Via Chem Slovakia for NCHZ's business was probably not a true market price, as the conditions of the tender as well as the fact that bidders had to bid for all assets bundled together had an impact on the price.

5.7.2. *Scope of the transaction*

(149) In order to avoid economic continuity, the assets and other elements of the business transferred need to represent only a part of the previous company or its activities. The larger the part of the original business that is transferred to a new entity, the higher the likelihood that the economic activity related to these assets continues to benefit from the incompatible aid.

(150) Although Slovakia claims that the sale was an 'asset deal', the terms of the sale actually indicate that the company was sold as a going concern. As indicated in recital 19 above, all assets and at least part of the transferable commitments were sold to the new owner.

(151) The sale of NCHZ to Via Chem Slovakia was approved by the Slovak Competition Authority on 19 July 2012. From this decision it is clear that the entire business of NCHZ, as a going concern, was the object of the notified merger and thus of the sale ([26]).

(152) The scope of activity of the business acquired by Fortischem remains the same as the previous scope of NCHZ's activities. This is demonstrated by a comparison of the production programme of NCHZ at the very beginning of the bankruptcy proceedings ([27]) with the current production programme according to the website of Fortischem ([28]). In both cases, the main areas of activity of NCHZ and Fortischem respectively consist of inorganic (electrolytic) chemicals, including calcium carbide, organic chemicals, polymers and PVC processing products. All 14 key products from these production areas, representing 99 % of NCHZ's revenue in 2008 ([29]), are also produced by Fortischem. The revenue generated by the above products sold by Fortischem totalled EUR 161,3 million in 2013 ([30]). This revenue is comparable to NCHZ's revenue of around EUR 150-160 million during the bankruptcy proceedings ([31]). Therefore, both the production programme and the revenue of the transferred business remained the same as those of NCHZ. More than 95 % of NCHZ's 1 412 employees were also transferred to Fortischem. The employees were not made redundant and then rehired by Fortischem, instead their employment contracts were simply transferred to Fortischem.

(153) Slovakia argues that less than 60 % of the business was transferred, in particular because no immovable property was included. However, as explained above (see recital 134), Fortischem leases the immovable property (land and buildings) necessary for the chemical production from Via Chem Slovakia. Apart from the immovable property, all other assets, rights and obligations related to the transferred business were taken over by Fortischem. Fortischem thus runs the business of NCHZ and continues with the same product portfolio.

(154) In addition, Fortischem also kept the existing NCHZ management. For example, the CEO of NCHZ before the transfer of the business has become the Chairman of the Board of Directors of Fortischem.

(155) At the time of the acquisition of the NCHZ business, Fortischem also publicly announced in the press that it did not plan any major changes as regards staff or production and that it would keep the existing management ([32]).

([26]) See in particular recitals 25 – 29 of the merger approval decision (Decision No 2012/FH/3/1/032) available at http://www.antimon.gov.sk/2012fh31032/.
([27]) See the presentation of the bankruptcy administrator of 26 October 2009 'Novácké chemické závody, a.s. — Prezentácia správcu', slides 4 and 5.
([28]) See www.fortischem.sk.
([29]) See slide 5 of the presentation of the bankruptcy administrator of 26 October 2009 'Novácké chemické závody, a.s. — Prezentácia správcu'.
([30]) See 2013 Annual Report of Energochemica Group, of which Fortischem is the largest member, http://www.energochemica.eu/data/files/Vyrocka_ECH_2013.pdf.
([31]) See, for example, the economic analysis produced by the administrator in December 2010, page 3 (see recital 106).
([32]) See, for example, the article '*Novácku chemičku bude prevádzkovať spoločnosť Fortischem*' [NCHZ to be operated by Fortischem] of 2 August 2012, published on Webnoviny: http://www.webnoviny.sk/ekonomika/novacku-chemicku-bude-prevadzkovat-s/526742-clanok.html

(156) Therefore, as regards the scope of the transaction, Fortischem effectively took over all the economic activities of NCHZ, together with all the associated assets, rights and obligations. The fact that part of the assets are used on the basis of a lease contract rather than direct ownership does not change the fact that Fortischem simply continues with the economic activities of NCHZ in the same scope as before the transaction.

(157) In addition, the two interested parties that submitted comments also claim that Fortischem continues to behave in the same way as NCHZ did, offering the same portfolio of products on the same geographic markets and that the only visible change is the change of name.

(158) Therefore, Fortischem continues the business of NCHZ without any major changes in commercial, staff or production policy.

5.7.3. *Identity of the owners*

(159) Where the owners of an acquiring company are the same as those of the selling company, this would be a strong indication of economic continuity.

(160) In this case, the Commission was not able to collect any evidence that would confirm the claims of the complainant that there are links between the original and the new final owners of the NCHZ business. While the direct owners are different, it is not possible to verify from independent and reliable sources who the ultimate owners are behind some of the Cyprus-based direct or indirect parent companies.

(161) However, the Slovak authorities submitted sworn statements by Energochemica, the current parent company of Fortischem, declaring that the owners of Fortischem are not in any way related to the former owners of NCHZ.

(162) In the absence of any evidence to the contrary, the Commission presumes that there are no links between the original and the new owners of the NCHZ business transferred to Fortischem.

5.7.4. *Timing of the sale*

(163) The sale took place after the Commission had opened the preliminary investigation into the complaint and forwarded the complaint for comments to the State. Therefore, at least the Slovak State was aware that there was a possibility that the measures in question could constitute illegal and incompatible aid which would need to be recovered.

5.7.5. *Economic logic of the operation*

(164) The purpose of the economic logic criterion is to verify whether the acquirer of the assets uses them in the same way as the seller or whether, on the contrary, it integrates the assets into its own commercial strategy and thus realises synergies justifying its interest in acquiring these assets.

(165) The acquisition by Fortischem involved the whole chemical division of NCHZ, i.e. the main part of NCHZ's business as a going concern, together with more than 95 % of the employees and related rights and obligations. As demonstrated above, the production portfolio and the scope of activities of Fortischem are identical to those of NCHZ.

(166) Fortischem also publicly announced in the press that it did not plan any major changes to the way the NCHZ business operated and to its scope of activities ([33]). Even though Fortischem forms part of a larger group of companies, in the Energochemica group, there do not seem to be any major synergy effects with other members of the group. Even though some of them are also active in the chemical industry, their area of activity is different (light stabilisers, phenolic resins, detergents etc.), and consequently there does not seem to be any major connection with the activities of Fortischem.

(167) Therefore, there was no change in the commercial strategy and Fortischem simply uses the assets in the same way as the seller.

([33]) See footnote 31.

5.7.6. *Conclusion on economic continuity between NCHZ and the economic activities acquired and operated by Fortischem*

(168) Overall, it appears that the only changes concern the name of the company and the legal entity to which it belongs. Article 1.2 of the tender conditions stipulates that NCHZ is intended to be sold in its entirety as a set of tangible and intangible assets together with its staff. Article 3.1 of the sales agreement between Via Chem Slovakia and NCHZ dated 16 January 2012 states that 'the going concern being transferred according to this Agreement includes all immovable assets, movable assets, other rights and property values that: (i) serve the operation of the going concern or, owing to their nature, are meant to serve such purpose, and (ii) as of the decisive date belong to the Seller'. Furthermore, the acquirer continues with the production portfolio and commercial policy of NCHZ. Finally, the price paid for the NCHZ business probably does not constitute a market price.

(169) Therefore, the Commission concludes that there is economic continuity between NCHZ and Fortischem.

(170) As a consequence of the above, the Commission is of the view that the advantage granted by Slovakia to NCHZ constitutes unlawful and incompatible state aid, and that the recovery of this incompatible state aid granted to NCHZ is to be extended also to the new owner of the business. With its continuous operational presence in the market, Fortischem continues to benefit from the state aid that was received for NCHZ's economic activities and continues to distort the market.

6. **CONCLUSION**

(171) The Commission concludes that the decision of the Slovak Government to declare NCHZ a strategic company under the Act, thereby sheltering it from the normal application of bankruptcy law, constituted state aid within the meaning of Article 107(1) of the Treaty.

(172) The Commission also finds that such aid was unlawfully granted in breach of the notification and standstill obligation provided for by Article 108(3) of the Treaty on the Functioning of the European Union.

(173) Finally, the Commission concludes that such aid is incompatible with the internal market, because the relevant conditions of the 2004 Rescue and Restructuring Guidelines were not met and no other compatibility grounds were identified.

(174) This aid has to be recovered from NCHZ and the recovery order should also be extended to Fortischem, which has an economic continuity link with NCHZ,

HAS ADOPTED THIS DECISION:

Article 1

The state aid of EUR 4 783 424,10 provided to NCHZ by declaring it a strategic company in line with the Strategically Important Companies Act, thereby sheltering it from the normal application of bankruptcy law, was unlawfully put into effect by Slovakia in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market.

Article 2

The decision to allow continued operation of NCHZ after the expiry of the Act on the basis of the decision of the creditors' committee did not constitute state aid within the meaning of Article 107(1) TFEU.

Article 3

1. Slovakia shall recover the incompatible aid referred to in Article 1 from NCHZ.

2. In view of the economic continuity between NCHZ and Fortischem, the obligation to repay the aid should also be extended to Fortischem.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of NCHZ until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulations (EC) No 794/2004 ([34]) and (EC) No 271/2008 ([35]) amending Regulation (EC) No 794/2004.

Article 4

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

2. Slovakia shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Slovakia shall submit the following information:

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

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

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

2. Slovakia 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 has been completed. It shall immediately submit, at the request of the Commission, information on the measures already taken and planned to be taken to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the Slovak Republic.

Done at Brussels, 15 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

([34]) 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).
([35]) 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).

COMMISSION DECISION (EU) 2015/1827

of 23 March 2015

on State aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited

(notified under document C(2015) 66)

(Only the Greek text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having called on interested parties to submit their comments pursuant to Article 6 of 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 [1] and having regards to the comments received from Greece and the Piraeus Container Terminal SA,

Whereas:

1. PROCEDURE

(1) By letter of 30 April 2009, the Prefect of Piraeus lodged a complaint with the Commission alleging that the Greek state granted unlawful State aid to the new concession holder of a part of the Port of Piraeus, the Piraeus Container Terminal SA ('PCT'), a subsidiary of special purpose of COSCO Pacific Limited ('COSCO'). The alleged aid was granted in the form of tax exemptions and favourable provisions inserted in the concession agreement after the tender.

(2) On 7 May 2009 the Federation of Greek Port workers sent a letter [2] informing the Commission on the alleged tax advantages that the Greek state granted to PCT. By letter of 31 August 2009, the Federation of Greek Port workers confirmed that its initial letter should be treated as a complaint and alleged that aid was granted in the form of tax advantages but also in the form of favourable provisions inserted in the concession agreement.

(3) By letter of 23 September 2009 [3], the International Dockworkers Council filed a complaint with a detailed description of the measures that allegedly constitute State aid.

(4) By letter of 14 October 2009 the Commission requested information from Greece on the alleged State aid measures. By letter of 12 November 2009 the Greek authorities asked for an extension of the deadline for replying, to which the Commission agreed in its letter of 18 November 2009. The Commission sent a reminder concerning this request on 3 February 2010 and on 23 February 2010 the Greek authorities responded to this request for information.

(5) On 5 May 2010 the Commission services met the representatives of the Greek authorities to discuss additional clarifications.

(6) The Commission requested additional information from the Greek authorities by letter dated 27 October 2010. The Greek authorities asked for an extension of the deadline by letter dated 18 November 2011, which the Commission accepted by letter of 2 December 2011. The Greek authorities responded to this request for information on 8 February 2011.

---

[1] OJ L 83, 27.3.1999, p. 1.
[2] Registered by the Commission on 13 May 2009.
[3] Registered by the Commission the same day.

(7) By letter dated 11 July 2012 ([4]), the Commission informed Greece that it had decided that the differences between the concession agreement and the contract notice, as well as the fiscal measure related to the exemption from corporate income tax for goods, works and services provided to PCT outside Greece did not constitute State aid. It also decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of all the other alleged State aid measures.

(8) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 5 October 2012 ([5]). The Commission invited interested parties to submit their comments on the measures.

(9) The Commission received comments from the beneficiary on 5 November 2012. These comments were forwarded to Greece on 14 January 2013, which was given the opportunity to react. Its comments and additional information were received by letters dated 2 November 2012, 27 March 2013 and 10 July 2013. On 13 September 2013 a meeting took place between the Commission services and the Greek authorities accompanied by the beneficiary. On 23 October 2013 the Greek authorities submitted additional information. The Commission sent a reminder for information that was still missing on 17 January 2014. The Greek authorities replied on 4 February 2014 and another meeting took place on 10 February 2014. Following this meeting, the Greek authorities provided additional information on 10 March 2014 and another meeting took place on 12 March 2014. Following that meeting the Greek authorities submitted supplementary information on 31 March 2014, 16 April 2014 and 28 April 2014. Additional meetings with the Greek authorities and the beneficiary took place on 19 May 2014 and 8 December 2014.

2. DESCRIPTION OF THE BENEFICIARY AND THE ALLEGED AID MEASURES

2.1. The Port of Piraeus

(10) The Port of Piraeus is divided into two areas: the commercial port and the passenger port. The commercial port has 3 terminals; the container terminal, the cargo terminal and the automobile terminal.

(11) The container terminal has two piers. Piraeus Port Authority ('PPA') decided to expand the infrastructure of the container terminal with the extension of Pier I, the upgrade of equipment of Pier II and the construction of Pier III.

2.2. The Piraeus Port Authority SA

(12) The company, Piraeus Port Authority SA was established by law 2688/1999, through conversion of a body governed by public law, Piraeus Port Authority created in 1930, into a public utility company.

(13) On 13 February 2002 a 40-year concession agreement was signed between the Greek state and PPA. This agreement was ratified by law 3654/2008. According to this agreement, PPA has the exclusive right of use and exploitation of land, building and infrastructure of the port land zone of the Port of Piraeus ([6]). In particular, the concession agreement provides for the right of PPA to subcontract the operation of part of the port to a third party against payment ([7]).

2.3. The concession agreement between PPA and PCT and the investment project

(14) With the purpose of conceding Piers II and III, PPA conducted a European public tender ([8]) for port management services. In this tender PPA received two applications from COSCO and from a consortium of companies consisting of Hutchinson Port Holdings Ltd, Hutchinson Ports Investments SARL., Alapis Joint Stock Company SA and Lyd SA

([4]) Commission decision of 11 July 2012 C(2012) 4217 final, in Case SA. 28876 (C (12/C) (ex CP 202/09) — Greece — Container Terminal Port of Piraeus & Cosco Pacific Limited (OJ C 301, 5.10.2012, p. 55).
([5]) See footnote 4.
([6]) See Article 1.1 of the concession agreement concerning its scope, and Section 3 on the right of use and exploitation.
([7]) See Article 3.1(iii) of the concession agreement.
([8]) Published in the Official Journal. Reference 2008/S 20-026332 from 30 January 2008, amended with Reference 2008/S 54-072476 from 18 March 2008, extending the deadline for submission of tenders until 19 May 2008.

(15) The call for tenders provided for appeal procedures. However, no appeal was submitted to the judicial authorities concerning the tendering procedure or the final result by any of the participants. In addition, the procedure and the draft agreement were checked and approved by the Greek Court of Auditors.

(16) In November 2008 PPA signed with PCT a concession agreement through which PPA conceded to PCT the exploitation and exclusive use to of the so-called 'New Container Terminal (NCT)', comprising of the existing Pier II, to be upgraded, the new Pier III, to be constructed, and the area adjacent thereto, as well as the use of the adjacent berthing manoeuvre sea area, which allows the safe mooring and service of ships.

(17) According to the concession agreement PCT has the obligation to upgrade the existing Pier II, construct the new Pier III and provide the whole range of port services related to the operation of the container terminal. Furthermore, the concession holder will finance entirely at its own expenses all upgrades of Pier II as well as the construction and operation of Pier III. Therefore, the tender as well as the concession agreement foresaw that the concession holder will not receive any public money for its investments.

(18) In addition, it is foreseen that the concession holder assumes all (commercial) risks in respect of the upgrades and construction of the necessary infrastructure. It also undertakes a number of obligations in respect of ensuring a guaranteed capacity of the New Container Terminal.

(19) The concession agreement between PPA and PCT was ratified by Law 3755/2009 ('the Law'). Article 1 of the Law incorporates the concession agreement as it was signed, while Article 2 sets out specific tax exemptions for PCT and Article 3 provides for the possibility that PCTs investments related to the concession agreement benefit a specific protective regime of foreign investments set out in legislative decree 2687/1953.

3. **GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(20) The Commission decided in its decision of 11 July 2012 ([9]) that the differences between the concession agreement and the contract notice, as well as two fiscal measures ([10]) do not constitute State aid. In the same decision, the Commission expressed its doubts and opened the formal investigation procedure as regards other alleged State aid measures:

1. Exemption from income tax on interest accrued until the date of the commencement of operation of Pier III ([11]);

2. Right to VAT credit refund irrespective of the stage of completion of the contract object; definition of the notion of 'investment good' for the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request ([12]);

3. Loss carry-forward without any temporal limitation ([13]);

4. Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III ([14]);

5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the project ([15]);

([9]) See footnote 4.
([10]) (i) Exemption from corporate income tax for goods, works and services provided to PCT outside Greece by companies or joint ventures installed outside Greece, on the condition that there is a bilateral fiscal agreement of avoidance of double taxation between Greece and the countries of registration; (ii) refund of VAT within a period of 60 days from the period of the submission of the relevant application and interest rate applicable for computation of interests in case the State does not refund VAT credit within 60 days from the submission of the relevant application.
([11]) Article 2(1) of the Law.
([12]) Article 2(3) and (4) of the Law.
([13]) Article 2(5) of the Law.
([14]) Article 2(6) of the Law.
([15]) Article 2(8) of the Law.

6. Exemption from taxes, stamp duties, contributions and any rights in favour of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom ([16]);

7. Exemption from stamp duties for any compensation paid by PPA to PCT under the concession contract, which is outside the scope of the VAT code ([17]);

8. Protection under the special protective regime for foreign investments ([18]).

9. Exemption from the general rules of forced expropriation.

(21) In particular, the Commission took the view that the measures in question confer a selective advantage to PCT, as they constitute a derogation to the normally applicable taxation rules that cannot be justified by the economic policy considerations the Greek authorities invoked. In particular the Commission considered that the objective of fostering the investments undertaken by big infrastructure projects is an economic policy consideration that is extrinsic to the taxation system at stake and cannot justify the differentiated treatment in favour of PCT.

(22) Furthermore, the Commission considered that the fact that some of those or similar tax exemptions were included in previous public contracts on which the Commission adopted positive decisions is not relevant for demonstrating that these measures are justified by the logic of the Greek fiscal system.

(23) Moreover, the Commission raised doubts as regards the compatibility of the measures at stake with Article 107(3)(a) and 107(3)(c) TFEU, argued by the Greek authorities. In particular the Commission raised doubts concerning the application of Article 107(3)(a) TFEU, as the conditions of compatibility of this Article have been developed by the Commission in its Guidelines on national regional aid for 2007-2013 and the Greek authorities provided no relevant argumentation as regards the conformity of the measures with the conditions of these Guidelines. Concerning the applicability of Article 107(3)(c), the Commission expressed its doubts as regards the necessity and proportionality of the measures.

4. **COMMENTS FROM INTERESTED PARTIES AND GREECE**

(24) Greece and the beneficiary submitted joint comments in this case. The Commission received no comments from any other third party after the opening of the formal investigation procedure.

4.1. **As regards the existence of State aid**

Absence of an advantage

(25) The Greek authorities and PCT argue that an exemption from a generally applicable tax rule does not necessarily confer an advantage which is selective, and that the Commission does not make a difference between the existence of selectivity and that of an advantage. Thus even when a selective measure is identified, it cannot be said that it automatically confers an advantage and vice versa. The application of the same general rule to different situations could give rise to discrimination or to a disadvantage for certain persons which are subject to this rule. The exemption may aim at ensuring that objectively different situations are treated differently and thus neither discrimination nor inadvertent disadvantages arise.

(26) Moreover they argue that in the same way as undertakings entrusted with the performance of services of general economic interest, the undertakings entrusted with long-term concessions to create and operate public infrastructure through private funds assume contractual obligations to invest significant sums of money for infrastructure that will be returned to the state at the end of the concession period. Thus the tax measures in

([16]) Article 2(9) of the Law.
([17]) Article 2(10) of the Law.
([18]) Article 3 of the Law.

question are meant to compensate for the 'structural disadvantages' these companies have. For this they refer to the Combus judgment ([19]), where the General Court stated that removing a 'structural disadvantage' does not amount to the grant of an 'advantage' caught by Article 107(1) TFEU.

Absence of selectivity and/or justification by the logic of the tax system

i. ***Concerning the 'system of reference' of the measures under examination***

(27) According to the Greek authorities and PCT, the correct system of reference is the general regime applied to public infrastructure projects in Greece, including Private Public Partnerships. This scheme applies to all undertakings engaging in big infrastructure projects and public/private partnerships and does not differentiate between them. The fiscal provisions of Law 3755/2009 represent the individual application of this general scheme.

(28) As these projects have special characteristics ([20]) that distinguish them from other projects, the undertakings responsible for public infrastructure projects are objectively in a clearly different legal and factual situation when compared with other undertakings engaged in other types of activity. Thus the generally applicable tax rules cannot be considered as the valid 'system of reference'. The correct system of reference is the one that has taken into account these characteristics also recognised by EU legislation ([21]) which calls for special treatment ([22]).

(29) Thus the mechanism set up by Greece to ensure the appropriate treatment of the particular characteristics of public infrastructure projects, which distinguish them from other activities, is the introduction of certain fiscal provisions clarifying the rules applying in certain areas of taxation, the application of which (i) could otherwise lead to discrimination against public infrastructure projects, (ii) is characterised by lack of clarity and consistency with the general principles of the tax system; or (iii) is outweighed by the above mandatory requirement in terms of ensuring the most efficient use/allocation of public resources.

(30) Furthermore, they indicate that the legislative technique used in introducing a tax measure does not determine the general nature of a measure. By making reference to the Gibraltar judgment ([23]), they argue that the introduction by a Member State of an exemption to generally applicable rules does not automatically give rise to selectivity and an advantage. Merely following a 'derogation-based' approach would be a formalistic methodology that would be easy to circumvent.

ii. ***Objective of the measure concerned***

(31) The Greek authorities and PCT argue that in the light of the Adria-Wien case-law, the objective of the measure under which the provisions in favour of PCT have to be assessed consists in the promotion of the successful implementation of public infrastructure projects. They refute the Commission's assessment in the opening decision as to the 'irrelevance' and 'invalidity' of this type of objective.

([19]) Case T-157/01, *Danske Busvogmaend* v *Commission* [2004] ECR I-917.

([20]) (i) Long-term nature of the contracts; (ii) need for very significant upfront investment, which practice means reduced or no revenue during the initial period; (iii) need to secure external funding; (iv) uncertain nature of financial returns; (v) general public interest in the creation of new public infrastructure; (vi) strong and public interest in the successful and profitable completion of the project.

([21]) Regulation (EU) No 670/2012 of the European Parliament and of the Council of 11 July 2012 amending both Decision No 1639/2006/EC establishing a Competitiveness and Innovation Framework Programme (2007-2013) and Regulation (EC) No 680/2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks (OJ L 204, 31.7.2012, p. 1) and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

([22]) In particular they mention that the PSO Regulation (EC) No 1370/2007 recognises that were justified by the need to ensure the tax benefit or full capital amortisation in relation to exceptional infrastructure, rolling stock or vehicular investment, a public service contract may have a longer duration than is normally allowed.

([23]) Joined cases C-106/09 P and C-107/09 P, *Commission* (C-106/09) *and Kingdom of Spain* (C-107/09 P) v *Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland* [2011] ECLI:EU:C:2011:732, paragraphs 90-92.

(32) They also refer to the objective pursued by environmental levies, in order to argue that the Commission's conclusion in the opening decision has as a consequence that any tax measure with a specific objective other than the collection of tax revenue could never be justified by the nature of the general tax system. Member States are free within the limits of compliance with EU law to pursue the policy they deem appropriate through their tax systems.

(33) Moreover, they argue that the Commission was wrong to conclude that the said objective of the tax system is 'irrelevant' ([24]), as the Court in the Azores case ([25]) did not state that the objective is without importance. Under the selectivity analysis the aim is not to determine whether or not the 'objective' of the measure under examination 'alone' is 'valid' or 'relevant'. The 'objective' of the measure consists in 'the basis' upon which the comparison of the 'legal and factual situation' of companies can be made.

(34) They argue that the Commission does not explain why the policy 'objective' is not 'valid' or 'relevant' for the purposes of the selectivity assessment. For this they refer to the Adria-Wien ([26]), Regione Sardegna ([27]) and British Aggregates ([28]) judgments arguing that the Court did not pronounce itself against these objectives, but simply assessed whether the measures at stake were selective.

iii. ***PCT's legal and factual situation in light of the objective of the measure concerned***

(35) The Greek authorities and PCT argue that in light of the objective of the successful implementation of public infrastructure projects PCT and the other undertakings assuming big infrastructure projects are in a different legal and factual situation than other undertakings. On this basis, they argue that the Commission has overlooked in its opening decision the circumstances/particular characteristics of these projects. The tax treatment accorded to PCT and others in comparable situation cannot give a competitive advantage over other undertakings which do not receive such treatment, since the two types of undertakings do not compete in respect of the performance of the public infrastructure projects concerned.

(36) All the undertakings which are implementing such projects are equally subject to this scheme and no one is to be excluded, and there are no limitations set as regards the region or sector of application, budget or time limits. Thus there is no de facto selectivity.

(37) Moreover, the Greek authorities have not retained any discretionary power as to how to apply these fiscal provisions that have been systematically introduced in all public infrastructure projects for several years.

iv. ***Logic of the tax system***

(38) The Greek authorities and PCT argue that the fiscal provisions in question and the scheme of which they are part are consistent with the basic or guiding principles governing the relevant Greek tax rules, since they (a) are intended to pursue a public policy objective consistent with the basic principles of the general tax system, in particular the principle of proportionality, the economy and the revenue raising objective of the tax system and key policies of Greece regarding the creation of public infrastructure; (b) aim to ensure that objectively different situations are treated differently, thus applying the principles of equality and proportionality and ensuring that the results intended by the tax system are not distorted; (c) are applied upon the basis of objective criteria; (d) are designed specifically as the legislative mechanism addressing key financial concerns arising in the implementation of public infrastructure projects, which risk jeopardising the private sector participation ([29]).

([24]) Recital 115 of the opening Commission decision.
([25]) Case C-88/03, *Portugal* v *Commission*, [2006] ECR I-7115, paragraph 81.
([26]) Case C-143/99, Adria-Wien Pipeline, [2001] ECR I-8384.
([27]) Case C-169/08, *Presidente del Consiglio del Ministri* v *Regione Sardegna*, [2009] ECR I-10821.
([28]) Case T-210/02 RENV, *British Aggregates Association* v *European Commission*, [2012].
([29]) See for example the General Court's analysis in this respect in Case T-210/02 RENV, *British Aggregates Association* v *European Commission*, [2012], paragraphs 83-91.

(39) Moreover by providing legal certainty through these provisions, and thus by safeguarding the ability of the taxpayer to pay tax, private sector investment in public infrastructure and thus the extension of the tax base and the collection of increased tax revenue is promoted. Thus the relevant measures are justified by the logic of the system.

Absence of an assessment regarding the conditions relevant to distortion of competition and effect on trade

(40) The Greek authorities and PCT argue that the Commission failed to identify the services and geographic markets which are relevant to the competitive assessment, did not analyse the conditions of competition in the relevant markets and did not establish that the competing EU ports mentioned in the opening decision are actual or potential competitors of the Port of Piraeus and PCT.

(41) They further argue that the Commission failed to examine the relevant market in which PCT's container terminal operates as well the competitive conditions in the relevant market. Such examination would demonstrate that the fiscal provisions at stake do not have an adverse effect on competition and trade in the EU.

(42) Concerning the competitive conditions in the market, they argue that on the basis of the WAM judgement ([30]) the mere fact that there is container cargo traded between EU Member States and that there are various ports which compete with each other on the provision of container port facility services does not automatically mean that any aid given to a port operator meets the criterion on effect on trade and/or distortion of competition set out in Article 107(1) TFEU. Thus they argue that the Commission did not analyse the effect of the fiscal provisions on competition and trade in the relevant markets.

(43) PCT provided more detailed comments as regards the above argumentation.

Definition of the relevant market

(44) Concerning the definition of the relevant market, PCT refers to Commission decisions in the area of mergers ([31]) in order to argue that there are two distinct relevant markets for container terminal port services; hinterland traffic and transhipment traffic.

(45) It also argues that concerning the hinterland traffic, the Commission in its opening decision appears to consider that the geographic scope of the market encompasses 'Greece and Eastern Mediterranean', without explaining why it defines it differently than the Hellenic Competition Commission, which ruled that the geographic scope of the market for stevedoring services as regards hinterland traffic is limited to central and southern Greece ([32]).

(46) Moreover, PCT argues that both from a supply and demand side perspective, the central and southern part of Greece constitute a geographic market which is distinct from the northern part of Greece, due to: (a) the capability of PCT's container port terminal to handle a far greater volume of traffic than the Thessaloniki port and any other Greek port, and under more competitive terms given its greater technical capacity; (b) the concentration of industry, commerce and the population principally in the wider Athens area and generally the central/southern part of the country; (c) the topography of Greece which dictates the additional cost of transporting container traffic between the Thessaloniki port in the northern part of Greece and the central and southern parts of the country and vice versa.

([30]) Joined cases T-304/04 and T-316/04, *Italy and WAM SpA* v *Commission*, [2006] ECR II-64.

([31]) Cases COMP/M.5398 — Hutchinson/Evergreen, COMP/M.5450 — Kuhne/HGV/TIU/Hapag-Lloyd, COMP/JV.55 — Hutchinson/RCPM/ECT, COMP/JV.56 — Hutchinson/ECT, COMP/M.3863 — TUI/CP Ships, COMP/M.5398 — Hutchinson/Evergreen, COMP/M.3576 — ECT/PONL/Euromax, COMP/M.3973 — CMA CGM/Delmas, COMP/M.3829 Maersk/PONL, COMP/M.1674 — Maersk/ECT, IV/M.831 — P&O/Royal Nedlloyd.

([32]) Case 409/V/2009, Decision of 23 January 2009, p. 22.

(47) Concerning the transhipment container services, PCT refers to the Maersk/ECT and Hutchinson/Evergreen Commission decisions where the Commission identified, as relevant geographic market for the transhipment container services, the Eastern Mediterranean and Black Sea area. It also considers that the Commission in its opening decision considers the geographic scope of the market as encompassing 'Greece and the Eastern Mediterranean'.

Competitive conditions in the relevant market

(48) As regards transhipment traffic, PCT argues the PCT container terminal does not compete with EU ports on the provision of stevedoring services for deep-sea container transhipment traffic in the Eastern Mediterranean, other than PPA's Pier I container terminal. Moreover it argues that the Commission did not explain why it considers that there are various ports in EU Member States ([33]) in this market that compete with PCT's container terminal port. According to PCT the Commission's statement that '… the port of Thessaloniki, the port of Constanza in Romania, the port of Koper in Slovenia and a number of ports in Italy may be considered as direct competitors' contradicts the Commission's findings in case C 21/09 ([34]). The ports of Italy and the port of Koper in Slovenia are not located in the eastern Mediterranean segment of the market that the Commission identified according to PCT, but rather in the central Mediterranean one. Moreover, transhipment traffic destined for the hinterland covered by these ports ('catchment area') is not handled presently through Piraeus port ([35]).

(49) From a supply-side perspective, PCT argues that these ports could be considered to some extent as substitutes for PCT's container port terminal, as they could service some of the types of container ship that the PCT container port could service, but not all, due to the fact that they have a smaller sea depth and crane capacity ([36]). From a demand-side perspective, these ports cannot be considered as substitutes for the Piraeus port, as: (a) Piraeus offers the shortest and cheapest ([37]) deviation from the Suez/Gibraltar axis which represents the principal deep-sea container shipping lines in the Mediterranean Sea ([38]); (b) Piraeus offers the lowest bunker oil prices at a worldwide level; (c) Constanza in particular would involve additional costs of pilots in the Dardanelles and Bosphorus.

(50) In view of the above, PCT argues that the ports mentioned in the opening decision cannot be considered as actual or potential substitutes for the PCT container port as regards the provision of stevedoring services for transhipment traffic in the eastern Mediterranean.

(51) In addition PCT refers to the Commission decision relevant to investments in the port of Piraeus, where the Commission considered that the competition between specific ports and the Port of Piraeus is insignificant ([39]). Moreover, it argues that the Commission failed to analyse the effect of the fiscal provisions on competition and trade in the relevant markets. Moreover the assessment of this effect would require an examination of the equivalent tax systems applying within the relevant markets as other ports may benefit from similar or equivalent fiscal provisions.

([33]) Port of Thessaloniki, port of Constanza in Romania, port of Koper in Slovenia and a number of ports in Italy (cf. footnote 173 of the opening decision).

([34]) Commission decision of 18 December 2009 on Case C 21/09 (ex N 105/08, N 168/08 and N 169/08) — Greece — Public financing of infrastructure and equipment at the Port of Piraeus (OJ C 402, 29.12.2012, p. 25).

([35]) Due to: the distance of Piraeus from these areas; the lack of modern railway link and services; the additional significant cost which would be involved; and the arrangements of the major deep-sea container shipping lines which serve the central Mediterranean area through container port terminals in Malta (e.g. Maersk), Taranto (e.g. Evergreen), Venice (e.g. MSC) and Gioia Tauro (e.g. MSC)

([36]) For example Koper offers a sea depth of approximately 9 metres as opposed to 15-19 metres offered by Piraeus (which normally requires well above 12 metres for the ships it services). 13 500 TEU container ships call on Piraeus container port every week which could not be serviced by any of these ports.

([37]) The additional journey and significant cost involved in carrying transhipment traffic to any of the other ports would make these ports unattractive for this type of traffic.

([38]) The two-way distance of Piraeus from this shipping line is for a normal deep-sea vessel only approximately 16 hours' sailing time, as opposed to 44 for Thessaloniki, 120 hours for Koper and several days for Constanza (due to the need to travel through the Dardanelles and Bosphorus and the traffic congestion problems there).

([39]) According to paragraph 117 of the Commission decision: 'The only EU ports which form part of the Eastern Mediterranean Sea market are the ones situated on the Black Sea (such as Constanza in Romania, Varna in Bulgaria). However, due to the special situation of the straits connecting the Black Sea with the Aegean Sea, the Black Sea ports are not the main competitors of the Port of Piraeus. Similarly, even though it cannot be fully excluded that other EU ports, such as the Adriatic ports of Italy and Slovenia, may also be in competition with the Port of Piraeus, the competition between them and the Port of Piraeus is insignificant'.

(52) It also argues that PCT only faces competition in the markets concerned from PPA, which operates the Pier I container terminal at the Piraeus port. However as regards PPA, the Commission has recognised that the concession to PCT will increase competition for stevedoring services for container traffic in the port of Piraeus ([40]).

(53) As far as the potential competitors that may result from the privatisation of PPA and other Greek ports, PCT argues that the Greek port operators that are not entrusted with a similar concession are not in a similar position, thus no competitive advantage nor a distortion of competition arise from the fiscal provisions at stake.

(54) It also argues that the Commission does not refer to any evidence that other port operators would be interested in undertaking a major investment to establish a major container port terminal in Greece. According to PCT it is highly unlikely that such competition would arise, since no other existing port in Greece would combine Piraeus's characteristics ([41]).

(55) Finally as regards competition from PPA, it argues that the Commission's view is inaccurate, as PCT already faces competition from PPA's Pier I container terminal and the effect of the concession is the opening of the market to competition and not a distortion of competition. In this respect it also argues that PPA benefits from certain legislative provisions of fiscal nature, in the light of which the adoption of some of the fiscal provisions as stake was seen as a necessary mechanism for ensuring that PCT was not put in a competitive disadvantage.

4.2. **On the comparison of the alleged State aid measures with similar provisions in other contracts of big infrastructure projects** ([42])

(56) The Greek authorities and PCT indicate that similar provisions to those of Article 2 and 3 of the Law were included in the Greek laws that ratified several individual public infrastructure projects as well as Law 3389/2005 concerning Public Private Partnerships. As the Commission examined those laws under Article 107(1) TFEU and decided that they did not give rise to State aid, a conclusion that the fiscal provisions in favour of PCT constitute a selective measure and confer an undue advantage falling within the scope of Article 107(1) TFEU would jeopardise legal certainty and would be contrary to the Commission's practice and previous statements concerning the application of such provisions to public infrastructure projects in Greece.

(57) Concerning the Athens International airport case ([43]), where the Commission considered that the fiscal provisions applied in respect of airport services that were not liberalised at the time, they argue that the same conclusion can also be drawn for port infrastructure services in the current case. Moreover the Greek authorities retain their argumentation that the Commission examined the said provisions in that case.

(58) Concerning the Athens Ring Road case ([44]) and the Rio Antirrio Motorway Bridge case, according to them the Commission examined carefully the public and private sector financial contributions to the costs of the project as well as the fiscal provisions concerned. The Commission then concluded that the amount of the public sector contribution (in the form of grants and state guarantees) was determined as 'market price' (i.e. the lowest amount of the public sector contribution required) through an open, non-discriminatory and competitive tender. In the Athens Ring Road decision the Commission concluded that the fiscal provisions constituted a clarification of the applicable tax regime, the absence of which could risk jeopardising the success of the project and did not consider them as part of the remuneration of the concessionaire. Any financial value that might be associated with the application of the fiscal provisions adopted could not have been considered as part of the public sector

([40]) Paragraphs 114 and 115 of Commission decision in Case C 21/09 mentioned in footnote 4.

([41]) (i) Its location amidst Greece's biggest urban area of more than 5 million people, the biggest industrial/commercial area with the best rail and road links available in the country; (ii) extensive berthing space, storage facilities, and a large anchorage; (iii) the biggest sea depth; (iv) the closest distance to the Suez/Gibraltar axis; (v) one of the most competitive bunker oil markets worldwide; (vi) extensive ship repair facilities and the broad range of services required by ship operators.

([42]) Commission decisions in Cases N 508/07 Ionia Odos, N 45/08 — Motorway Elefsina-Korinthos-Patras-Pirgos-Tsakona, N 566/07 Korinthos-Tripoli-Kalamata Motorway and Lefktro-Sparti Branch, N 565/07 Central Greece Motorway, N 633/07 Maliakos-Kleidi section of Patras-Athens-Thessaloniki-Evzona Motorway concession contract, N 134/07 Thessaloniki Submerged Tunnel concession contract, N 462/99 Attiki Odos, NN 143/97 Rio Antirrio Motorway Bridge, NN 27/96 Spata International Airport.

([43]) Commission decision in Case NN 27/96 Spata International Airport.

([44]) Commission decisions in Cases N 462/99 Attiki Odos and NN 143/97 Rio Antirrio Motorway Bridge.

contribution, since it could have been determined with accuracy only upon the expiry of the concession period. These provisions were only the necessary clarifications so that private investors would not be discouraged in particular as regards this type of non-viable construction projects of high risk. Thus PCT cannot be distinguished from the concessionaires in these cases, as these provisions were in all cases a 'clarification' and not a 'remuneration' as the Commission considered in its opening decision.

(59) Moreover, the case-law ([45]) the Commission mentions in its opening decision as regards the fact that its silence of the Commission on specific measures does not mean that they have been approved ([46]), cannot be applied in notified cases as the ones invoked by the Greek authorities and PCT.

(60) Concerning the subsequent State aid decisions on the rest of the infrastructure projects, the Commission did not need to refer in detail to the fiscal provisions in question because it did not change its position expressed in Rio Antirrio Motorway bridge and Athens Ring Road cases ([47]).

(61) They argue that the issue that arises is whether in the light of the Commission's approval in the above past decisions, the fiscal provisions at stake can be considered as consistent with State aid rules and not whether these provisions are concerned by the Commission's past assessment, as indicated in the opening decision. Moreover, had these provisions been included in the tender documents of this concession, the Commission would have concluded the same as in the past Commission decisions.

(62) They also argue that the distinction made by the Commission in its opening decision between the current case and the previous cases is based upon a technicality, i.e. the adoption of the fiscal provisions in Law 3755/2009 as opposed to including them in the concession contract. Furthermore it indicates that: (i) the bidders of the tender were aware of the application of these fiscal provisions as the standard framework used by Greece for public infrastructure projects and in respect of PPPs in Greece; (ii) PCT contacts in respect of the Piraeus and Thessaloniki container port concessions were carried out at the level of Greece's Prime Minister and Minister of Shipping who were promoting these project to investors at international level and were offering the full package of measures that Greece has in place for public infrastructure projects financed by private sector resources; (iii) PCT was aware that the Commission had examined and has raised no objections of all such previous projects; (iv) PCT requested from the Greek government and PPA during the tender procedure that these provisions be included in the concession contract; (v) PCT raised this issue again with the Greek Prime Minister and Minister for shipping and once again received reassurances that such legislation would be introduced; (vi) in the light of these reassurances and throughout the tender and the preparation of its offer, PCT took into account that the concession contract would be operated on the same basis as all other public infrastructure concessions and that therefore, lenders would be familiar with the concession terms.

(63) Therefore, the tender process for the award of the concession contract to PCT cannot be distinguished from the past cases, as the standard fiscal framework for big infrastructure projects was known to all bidders. They indicate further that there was no particular reason for keeping record of such exchanges in the context of the tender process since PPA does not have the power to adopt such provisions and at any case their application was a matter of established practice in Greece in line with the Commission's precedent.

(64) Thus, if the Commission relies on a technicality as the sole reason for distinguishing PCT from all undertakings carrying out public infrastructure in Greece, this formality would be contrary to the principle of legal certainty and legitimate expectations.

(65) Concerning the Commission's statement that 'the evidence provided by the Greek authorities reinforces the finding that the bidders did not take the specific advantages into account …' ([48]), PCT argues that it is not aware of the evidence mentioned and that the adoption of these provisions through the law ratifying the concession contract does not amount to any evidence.

([45]) Joined Cases T-427/04 *France* v *Commission* and T-17/05 *France Telecom* v *Commission*, ECR [2009] II-0435, paragraphs 264-266, C-474-09 P to C-476/09 P, Territorio Historico de Vizcaya, ECLI:EU:C:2011:522, paragraph 70.

([46]) See recital 221 of the opening decision.

([47]) In the same line of reasoning, the Commission also approved a scheme on broadband infrastructure in rural areas (SA. 32866 (11/N) that had as legal basis Law 3389/2005 concerning PPPs that contains fiscal provisions similar to those of Law 3755/2009.

([48]) See recitals 225 and 226 of the opening decision.

4.3. **On the compatibility of the alleged State aid measures**

(66) The Greek authorities and PCT argue that in case the Commission concludes that the fiscal provisions at stake give rise to State aid, such aid should be considered compatible with the internal market on the basis of Article 107(3)(a) and 107(3)(c), in view of the importance of the relevant investments, infrastructure and services for the economic development of Greece and, in particular, for the development and modernisation of the sea container transport sector.

(67) The investment project at stake aims at developing Piraeus Port as modern sea container terminal in the Mediterranean Sea, with more capacity and storage space, enhancing its performance in handling sea container traffic more efficiently. The performance data relevant to the operation of Pier II ([49]) already demonstrate the accomplishment of this objective. Moreover, the project aims at the Commission's objective of common interest in relation to EU transport policy, as this has been analysed in different EU regulations and communications.

(68) The acquisition of equipment and the construction of Pier III are considered as initial investment under the relevant EU regional aid rules concerning the application of Article 107(3)(a) TFEU. They correspond to EUR […] (*) million and have created around 900 direct and indirect full-time jobs that will remain for the 35 year concession period. Given the high investment amount, any possible aid amount would be well below the maximum aid ceiling of 30 % which was applicable for the region of Attiki up to end of 2010 or the maximum aid amounts approved by the Commission in decisions relevant to port infrastructure ([50]). Thus the aid measures consist of the minimum necessary and appropriate measures for the support of such a big infrastructure project. PCT's own contribution to the project is well within the thresholds set out in the regional aid rules. Moreover any possible aid would be compatible with the common market on the basis of Article 107(3)(a) TFEU on the same grounds as the aid to PPA approved by the Commission in case C 21/09 ([51]).

(69) In particular the aid can be considered necessary in light of the need for public funding for the development of port infrastructure during the financial crisis, in accordance with EU policy in this respect ([52]), as well as to ensure the clarity, flexibility and predictability of the applicable tax system to concessions as this one. As regards the necessity of the aid measures, they argue that the fiscal provisions ensured compliance with the private sector project finance arrangements and avoidance of default of the company to pay its loans and potential liabilities. Without these fiscal provisions, the project finance arrangements that PCT could have achieved would be materially more onerous, something that might have potentially jeopardised its bid or the implementation of the concession contract (market failure). In practice the fiscal provisions were necessary to ensure access of the concessionaire to the necessary funding from private sector funders ([53]). Finally a cash grant instead of these measures would have been inappropriate and unnecessary incentive given the difficulty in calculating in advance with accuracy the funding requirements arising from this market failure.

(70) Moreover they argue that the measures have a clear incentive effect, as the commencement and implementation of the concession agreement and any investment works occurred after the adoption of these fiscal provisions. In light of the economic crisis and the lack of financial credit prevailing in Greece and worldwide in 2008/2009, PCT had an incentive to proceed with the implementation of the concession only after the adoption of the law.

([49]) In 2012: (a) the traffic in the Pier II has increased by 76,5 % as compared to 2011 (2,108 million TEU in 2012 as compared to 1,188 million TEU in 2011); (b) the capacity was 700 000 TEU higher than what was foreseen in the concession contract; (c) the revenues increased by 43 % as compared to 2011 (from EUR 72,87 million to EUR 104,3 million). In 2012 PCT, Trainose and Hewlett Packard signed an agreement due to which Hewlett Packard would channel its products through Greece to other neighbouring countries.

(*) Covered by the obligation of professional secrecy.

([50]) Commission decisions in Cases C 39/09 — Latvia — Ventspills Free Port Authority (50 % aid intensity), SA. 30742 Construction of Infrastructure for the Ferry Terminal in Klaipeda (65 % aid intensity), SA 34940 (2012/N) Port of Augusta (68,87 % aid intensity), N 649/01 Freight facilities grant (94 % aid intensity), C 21/09 Public financing of infrastructure and equipment at the port of Piraeus.

([51]) See footnote 34.

([52]) Regulation (EU) No 670/2012.

([53]) For this they refer to the fact that the China Development Bank, one of PCT's creditors, waited for the adoption of the ratification law in order to sign its loan to PCT. Furthermore, they refer to an e-mail the […] sent to PCT in January 2009 expressing its main concerns about the funding of the said concession agreement. According to this email the concession agreement did not provide protection against general or discriminatory change in law and they argue that this concerned the fiscal framework of the concession agreement.

Otherwise it could have abandoned the concession at the cost of just losing its bank letter of guarantee of EUR 5 million. The incentive effect was also proven by the by the fact that PCT had undertaken the risk of the entire funding of the project.

(71) They argue further that the estimates they provided ([54]) show that the fiscal provisions provide an amount between EUR […] million and EUR […] million ([55]) for the whole concession period, i.e. […] % to […] % of the total investment costs of EUR […] million, much lower than the aid amounts approved by the Commission in cases relevant to investments for ports.

(72) Moreover they argue that the *ex ante* quantifications of the specific advantages were not necessary for their approval or for the implementation of the investment. According to them, this *ex ante* approach for the purposes of the assessment of Article 107 TFEU of any alleged benefit which might be said to arise from any of the fiscal provisions is appropriate in line with settled case-law ([56]).

(73) They also refer to certain Commission decisions ([57]) where the Commission approved non-notified State aid, by establishing the incentive effect and the necessary and proportionate character of such aid, in cases in which the aid had not been quantified upon an *ex ante* basis and/or could not be quantified even at the time of the adoption of the Commission's final decision. Thus the calculation ([58]) of the financial benefit was not necessary for establishing incentive effect and proportionality.

(74) Finally they have indicated that none of the measures under examination have been applied in practice.

5. ASSESSMENT OF THE STATE AID CHARACTER OF THE MEASURES

(75) Article 107(1) TFEU defines State aid as 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. Therefore, in order to determine whether the measures at stake constitute State aid within the meaning of Article 107(1) TFEU, all the following conditions have to be met. Namely, the measure has to: (a) be granted through state resources, (b) confer an

([54]) The estimates provided were based on a study produced by PricewaterhouseCoopers Business Solutions SA These estimates consisted in a comparison of the assumptions of Cosco's business plan at the time of the publication of the ratification law (March 2009) and the generally applicable provisions. From the result of this comparison they deducted the amount corresponding to the additional funding needs PCT would have in the absence of the fiscal measures. The amount deriving from these calculations was in the end calculated in discounted values (with the use of an annual discount rate of 9,0 %, i.e. the discount rate used by PPA in discounting the minimum guaranteed concession fees offered by PCT during the tender, but also an annual discount rate of 4,47 % of March 2009, i.e. reference rate provided in the Commission communication). Finally these calculations do not include the measures in Articles 2.3, 2.5, 2.9, 2.10 and Article 3 of the Law.

([55]) In the worst case scenario.

([56]) For example, Case C-143/99 *Adria-Wien Pipeline GmbH and Wieterdorfer & Peggauer Zementwerke GmbH* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365, paragraph 41; Case T-335/08 *BNP Paribas and Banca Nazionale del Lavoro SpA (BNL)* v *Commission* [2010] ECR II-3323, paragraph 204; and Cases T-425/04, T-444/04, T-450/04 and T-456/04, *France, France Télécom, Bouyges SA, Bouyges Télécom SA and AFORS Télécom* v *Commission* [2010] ECR II-2009, paragraph 216.

([57]) Commission Decision in Case SA.21918 — France — Regulated electricity tariffs in France (OJ C 398, 22.12.2012, p. 10), Commission Decision 98/353/EC of 16 September 1997 on State aid for Gemeinnützige Abfallverwertung GmbH (OJ L 159, 3.6.1998, p. 58), Commission Decision C(2007) 134 of 24 January 2007 in State aid Case NN 67/05 — Lithuania — reduction of a profit tax rate for UAB 'Bite GSM', Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in Terra Mítica SA, a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), Commission Decision of 14 April 2010 in State aid Case NN 30/09 — Ireland — Hotel capital allowances for the Ritz-Carlton Hotel, Powerscourt, Co. Wicklow, Commission Decision 2003/590/EC of 5 March 2003 on the State aid which the United Kingdom is planning to grant to CDC Group plc (OJ L 199, 7.8.2003, p. 28), Commission Decision 2009/476/EC of 28 January 2009 on State aid implemented by Luxembourg in the form of the creation of a compensation fund for the organisation of the electricity market (C 43/02 (ex NN 75/01)) (OJ L 159, 20.6.2009, p. 11), Commission Decision 98/212/EC of 16 April 1997 on the aid granted by Italy to Enirisorse SpA (OJ L 80, 18.3.1998, p. 32), Commission Decision of 1 March 2007 in State aid NN4/07 — 'Delitissue Sp. z o.o.' under document C(2007) 769.

([58]) According to PCT's calculations, the impact of the adoption of the fiscal provisions on the real internal rate of return ('IRR') taken into account in PCT's Model Business Plan of March 2009 has been estimated at […] basis points (i.e. […] %) reflecting an increase in this IRR calculated in the absence of the fiscal provisions concerned of approximately […] % (i.e. from […] % to […] %).

economic advantage to an undertaking; (c) be selective; (d) distort or threaten to distort competition and affect trade between Member States.

5.1. **Notion of undertaking**

(76) Based on Article 107(1) TFEU, State aid rules only apply where the recipient of an aid is an 'undertaking'. According to settled case-law, an undertaking is an entity engaging in an economic activity regardless of its legal status and the way in which it is financed ([59]). In addition, any activity consisting in offering goods and/or services in a given market is an economic activity ([60]).

(77) The Commission has already considered that the construction and operation of some types of infrastructure can be considered as an economic activity ([61]). Moreover according to settled case-law ([62]), the provision of infrastructure facilities to third parties against remuneration constitutes an economic activity.

(78) As PCT has upgraded the existing Pier II, constructed the new Pier III and provides the whole range of port services related to the operation of the container terminal, it can be considered as an undertaking for the purposes of State aid rules. Thus PCT is subject to State aid rules.

5.2. **State resources**

(79) According to Article 107(1) TFEU, an alleged State aid measure should be granted by a Member State or through state resources. The measure is decided by the state and imputable to the state. By allowing PCT to enjoy a specific tax treatment, the Greek state foregoes state resources that it would have obtained if it had not enacted the alleged advantageous fiscal provisions. Hence the measures at issue involve a loss of state resources and they can be considered as granted through state resources.

5.3. **Existence of a selective advantage**

(80) According to constant case-law, in order to determine whether a state measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions, i.e. in the absence of state intervention ([63]).

(81) Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the state intervention ([64]). To assess this, the financial situation of the undertaking following the measure should be compared with the financial situation if the measure had not been introduced. The notion of aid encompasses

([59]) Joined Cases C-180/98 to C-184/98, Pavlov and others, [2000] ECR I-6451.
([60]) Cases 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, Joined Cases C-180/98 to C-184/98, Rec. 2000, p. I 6451.
([61]) Decisions of the Commission in the following State aid Cases: N 44/10 — Public financing of port infrastructure in Krievu Sala (OJ C 215, 21.7.2011, p. 21, paragraphs 60-68); C 39/09 — Public financing of port infrastructure in Ventspils Port (OJ C 62, 20.3.2010, p. 7, paragraphs 53-58), N 60/06 — Port of Rotterdam (OJ C 196, 24.8.2007, p. 1, paragraphs 42-52); N 520/03 Flemish ports (OJ C 176, 16.7.2005, p. 12, paragraphs 34-54).
([62]) See, inter alia, judgment of 24 October 2002, Case C-82/01P Aéroport de Paris, ECR 2002, I-9297, as well as judgment of 24 March 2011 in Joined Cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/Commission and Case T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, [2011] II-1311.
([63]) Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 60; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41.
([64]) Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13.

not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect ([65]). With regard to tax, the Court of Justice has made clear that a measure by which the public authorities grant certain undertakings a tax exemption which places the recipient in a more favourable position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU. Likewise, a measure allowing certain undertakings a tax reduction or to postpone a payment of tax normally due can amount to State aid ([66]).

(82) The measures under examination consist in exemptions or postponements of payments of the normal taxes or charges PCT would have to pay in the absence of the relevant provisions or in differentiated treatment allowing PCT to ensure a better cash flow during the first years of the construction phase (see hereafter the description of normal system of taxes or systems of reference). Thus through these measures the financial situation of PCT is improved as compared to its situation without the measures. Therefore they confer an advantage to PCT.

(83) The existence of an advantage can be ruled out in the case where the undertaking in question provides services of general economic interest in compliance with the criteria established in the Altmark case-law ([67]) or when the state's intervention has taken place in line with normal market conditions ([68]). However these two case scenarios are not applicable in the current case.

(84) Concerning the 'structural disadvantage' invoked by the beneficiary and the Greek authorities, the Commission first notes that in accordance with the Court's case-law, the existence of a structural disadvantage is not relevant for excluding the existence of an advantage and thus of State aid ([69]). In addition, the Combus case is not applicable in any case in the case under examination. In that case, Combus had indeed a structural disadvantage as compared to its private sector competitors and the measure in that case indeed ruled out the existence of an advantage. This was due to the fact that most of Combus's drivers had the status of officials which meant higher personnel costs than if it had employed drivers on a contract basis, as all the other bus operators. However, PCT does not have a structural disadvantage compared to its competitors, as the fact that it undertook to invest in a big public infrastructure project does not by itself constitute a structural disadvantage, but a private investor decision that was taken by its parent company Cosco within the context of its normal business activity. Thus the findings in the Combus case-law are not applicable in this case.

(85) In particular as regards the measure relevant to the exemption from taxes, contributions and any rights in favour of the state or third parties on the contracts between the creditors, and in particular its mother company Cosco, of the loan agreements under which are transferred the obligations and rights resulting therefrom ([70]), the Commission considers that this provision is equivalent to the granting of an insurance contract that the state grants to PCT's creditors for free. In essence, PCT's creditors, and in particular Cosco, may enjoy the immunity from the payment of any tax, contribution and any right in favour of the state or third parties that the Geek state may decide to impose in the future, without having to pay any compensation to the state for such immunity. Thus due to this measure Cosco is found in a more advantageous position than creditors of other investors, as it does not have to pay a premium to the state for such immunity.

(86) Given the nature of this measure that is foreseen to apply in case the state adopts generally applicable rules imposing indirect taxes for this type of transactions, in essence it foresees tax immunity in favour of PCT's creditors, in particular Cosco, as compared to the companies in the same legal and factual situation as other creditors of companies conducting investments. In case the state adopts generally applicable rules imposing indirect taxes on the transfer of loan obligations conducted by companies, the creditors of all other investors will have to pay such indirect taxes in the case of transfer of such loan rights. On the contrary in the case of PCT the

([65]) Cases C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, paragraph 38; C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34.
([66]) Case C-222/04 Cassa di Risparmio di Firenze and others, [2006] ECR I-289, paragraph 132.
([67]) Case C-280/00 Altmark Trans [2003] ECR I-7747.
([68]) Case C-39/94 SFEI and others [1996] ECR I-3547, paragraphs 60-61.
([69]) See Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere', Hotel Cipriani Srl and Società Italiana per il gas SpA (Italgas)* v *Commission*, [2011] I-4727, paragraphs 92 and 94 to 96, and Order of the President of the General Court in Case T-172/14 R *Stahlwerk Bous* v *Commission*, paragraphs 59 and 60.
([70]) Article 2(9) of the Law.

transfer of any right deriving from any loan financing its investment between its creditors and in particular Cosco, will not be subject to any such tax, without the state being compensated for the grant of such immunity. Thus the advantage in question is selective as it only concerns PCT's creditors, in particular Cosco, that transfer rights and/or obligations deriving from the loans relevant to the funding of the concession contract and PCT.

(87) To fall within the scope of Article 107(1) TFEU, a state measure must 'favour certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable legal and factual situation ([71]). Hence, in principle, for fiscal measures, the Commission has to assess the material selectivity of the measure by means of a three-step analysis.

(88) First it is necessary to identify the common or 'normal' regime under the tax system applicable ('system of reference'). Secondly, it has to be assessed whether the measure constitutes a derogation from that system of reference insofar as it differentiates between economic operators, who in light of the objective intrinsic to the system, are in a comparable legal and factual situation ([72]).

(89) If such derogation is established, i.e. if the measure in question is prima facie selective, in a third stage, it has to be examined whether the derogatory measure results from the nature or the general scheme of the tax system of which it forms part and could hence be justified. In this context, according to the Court's case-law, the Member State has to show whether the differentiation derives directly from the basic or guiding principles of that system ([73]).

(90) The Greek authorities and PCT have provided extended argumentation in order to argue that for all the fiscal measures the correct system of reference is the general scheme applied for big public infrastructure projects in Greece with the objective of facilitating their access to finance in view of the high risks these projects entail, and that it follows from the Gibraltar judgement ([74]) that the introduction by a Member State of an exemption to generally applicable rules does not automatically give rise to selectivity and an advantage.

(91) The Commission will first analyse whether such argumentation can be accepted as regards all the elements of the selectivity analysis, i.e. system of reference, objective of the system, comparison of comparable legal and factual situation in light of this objective and justification on the basis of this objective. Then it will proceed to the selectivity analysis of each measure separately.

i. ***Concerning the 'system of reference' and its objective***

(92) The reference system constitutes the framework against which the selectivity of a measure is assessed. It defines the boundaries for examining whether certain undertakings benefit from a derogation from the normal rules which together form that reference system and are therefore treated in an advantageous way compared to other undertakings subject to the general rules of the system.

(93) When establishing this reference taxation framework, its scope has to be determined in a consistent manner in order to avoid that objectives that are extrinsic to the system are taken as a basis for its definition. If the definition of the reference system was established in the light of the policy objective that Member States pursue in each case which is extrinsic to the logic of the taxation system, then all fiscal measures Member States put in place in order to promote certain sectors, activities or type of undertakings would in practice escape from the application of Article 107(1) TFEU ([75]).

([71]) Cases C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, paragraph 41; C-308/01 GIL Insurance and Others [2004] ECR I-4777, paragraph 68; C-172/03 Heiser [2005] ECR I-1627, paragraph 40.
([72]) See, Cases C-143/99 Adria-Wien, paragraph 41, Case C-308/01 GIL Insurance [2004] ECR I-4777, paragraph 68, C-172/03, Heiser [2005] ECR I-1627, paragraph 40, C-88/03, *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54, T-233/04, *Netherlands* v *Commission*, paragraph 86.
([73]) See, for instance, Case C-279/08P, *Commission* v *Netherlands* (NOx) [2011] ECR I-7671, paragraph 62.
([74]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* [2011] ECR I-11113.
([75]) See Joined Cases T-92/00 and T-103/00, *Territorio Histórico de Álava — Diputación Foral de Álava, Ramondín, SA and Ramondín Cápsulas* v *Commission*, [2002] II-1385, paragraph 51.

(94) In the present case, the objective of facilitating companies engaged in big infrastructure projects by providing legal certainty and additional cash flow during the phase of construction, invoked by the Greek authorities and PCT, is a policy objective which is external to tax considerations and cannot be used for the purposes of the selectivity analysis. The characteristics of big public infrastructure projects are extrinsic to the tax system and cannot serve as a basis to determine the applicable system of reference. In any case, the fact that the Greek state adopts a specific law each time it wishes to allow a specific fiscal treatment to a specific company, cannot be considered as a general framework that the administration applies without discretion.

ii. ***PCT's legal and factual situation in light of the objective of the measure concerned***

(95) Once the reference system has been established, the next step of the analysis consists of examining whether a given measure differentiates between undertakings in derogation from that system. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in light of the intrinsic objective of the system of reference. However, for this purpose, external policy objectives cannot be relied upon to analyse the differentiated treatment of undertakings under a certain tax regime.

(96) As regards the 'horizontal' character of the argued scheme that is applicable to all undertakings implementing big infrastructure projects, it is settled case-law ([76]) that the fact that the number of undertakings able to claim entitlement under a measure is very large, or that they belong to different sectors of activity, is not sufficient to call into question the selective nature of that measure and, therefore, to rule out its classification as State aid ([77]). Therefore the fact that companies undertaking big infrastructure projects may benefit from several fiscal exemptions, is not sufficient to exclude the selective character of the measures in question. On the contrary, the criteria according to which these companies get access to such exemptions may entail de facto selectivity ([78]).

(97) Therefore PCT's comparable legal and factual situation has to be examined each time in the light of the objective of the relevant tax system applicable and not on the basis of external policy objectives.

iii. ***Justification by the logic of the tax system***

(98) A measure which derogates from the reference system, which is thus prima facie selective, may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic or basic guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([79]). On the contrary external policy objectives which are not inherent in the system cannot be relied upon for that purpose ([80]). Consequently tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements of Article 107(1) TFEU.

(99) In that respect, the European Court has established that even if a policy objective constitutes one of the essential objectives of the European Union, the need to take that objective into account does not justify the exclusion of selective measures from classification as aid ([81]). The successful implementation of the big infrastructure projects and the legal certainty for the implementation of these projects cannot be considered as an intrinsic objective of the tax system. Moreover, the Greek authorities and PCT have not proven how this objective is consistent with

([76]) See Case C-279/08 P, *Commission* v *Kingdom of the Netherlands*, [2011], I-7671, paragraph 50.
([77]) Cases C-75/97 *Belgium* v *Commission* [1999] ECR I 3671, paragraph 32; Case C-143/99 Adria Wien Pipeline and Wietersdorfer & Peggauer Zementwerke [2011] ECR I 8365, paragraph 48; Case C- 409/00 *Spain* v *Commission* [2003] ECR I 1487, paragraph 48.
([78]) Joined Cases T-92/00 and T-103/00 *Ramondin SA and Ramondín Cápsulas SA* v *Commission* [2002] ECR II-1385, paragraph 39: in this judgment the Court ruled that applying a tax measure only to investments exceeding a certain threshold meant that the measure was de facto reserved for undertakings with significant financial resources.
([79]) See for example Joined Cases C-78/08 to C-80/08 Paint Graphos and others [2011] ECR I-7611, paragraph 69.
([80]) See Joined Cases C-78/08 to C-80/08 Paint Graphos and others [2011] ECR I-7611, paragraphs 69 and 70; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 81; Case C-279/08 P, *Commission* v *Netherlands* (NOx) [2011] ECR I-7671; Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515.
([81]) See, inter alia, Cases C-279/08P *Commission* v *Kingdom of Netherlands* [2011] I-07671, paragraph 75, C-487/06 P, *British Aggregates* v *Commission* [2008] I-10505, paragraph 92; C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 21; C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23; C-75/97 *Belgium* v *Commission*, paragraph 25.

the principle of equality and proportionality of the general tax system, and in particular its revenue raising objective. The latter objective is hard to reconcile with the granting of tax reductions ([82]). Nor can the key financial concerns of the companies implementing big infrastructure projects be considered as objectives that can justify a differentiated treatment for these specific companies and in particular for PCT.

(100) Therefore if the fiscal measures that will be examined below constitute selective measures, they cannot be considered as justified by the public policy objective put forward by the Greek authorities and the beneficiary.

5.3.1. *Exemption from income tax imposed on interest accrued until the date of the commencement ([83]) of operation of Pier III ([84])*

System of reference

(101) Under the Greek income tax system, in principle all profits of SA, companies of limited responsibility and private capital companies established in Greece, that are generated in Greece and abroad, including those in the form of interest, are taxed ([85]) at the applicable rate in the financial year concerned and the remaining amount of profits after tax may be either distributed to shareholders, accumulated as reserves or incorporated/converted into equity capital through a capital increase. Once the amount of profits after tax is distributed to shareholders or incorporated/converted into equity capital, it is taxed again at the applicable rate in the financial year concerned ([86]).

(102) Consequently, the system of reference for the taxation of interests accrued until the date of the commencement of operation of Pier III is the Greek corporate income tax system, in particular the taxation of companies on profits including those resulting from accrued interests.

Derogation from the system of reference

(103) The 'accrued interests' ([87]) constitute a part of PCT's gross taxable income and would normally be subject to taxation. However, PCT is exempted from income tax on accrued interest until the commencement of the operation of Pier III ([88]), a treatment that deviates from the system of reference, mainly the income tax on revenues under the Greek income tax code ('GITC'). PCT may be considered as being in a comparable legal and factual situation with all S.A that are taxed on their profits under the generally applicable framework. Therefore it can be concluded that it has been granted a selective advantage.

(104) According to the Greek authorities and PCT, Article 99 of the GITC foresees that income exempt from taxation is subject to corporate income tax at the time of its distribution or capitalisation. On this basis they argue that the provision at stake only allows a tax deferral to PCT, in the sense that once PCT will capitalise or distribute its profits, PCT will be liable to pay corporate income tax on its' profits as well as withholding tax on shareholders' dividends.

([82]) See in this respect Joined Cases T-92/00 and T-103/00 *Ramondin SA and Ramondín Cápsulas SA* v *Commission* [2002] ECR II-1385, paragraph 62.
([83]) Or until 31 October 2015 at the latest.
([84]) Article 2, paragraph 1 of Law 3755/2009.
([85]) Articles 99(1)(a) first indent in combination with Articles 12(1), 105(1)(b) and 109(1) of the Greek income tax code; this corporate income tax amounted to 25 % in financial year 2010, 24 % in financial year 2011, 20 % in financial year 2012, 22 % in financial year 2013, 26 % in financial year 2014 onwards.
([86]) A withholding tax is applicable at that time, according to Article 99(1)(a) of the GITC.
([87]) According to the Greek authorities, the term 'accrued interest' is used to describe the accounting method used to calculate the accumulation of interest, whereby interest accrues depending on cash flow dates and the amounts involved. In other words, 'accrued interest' is the interest on a specific amount over a specific period of time (irrespective of whether the said interest is owing or due). According to the Greek authorities PCT normally expects to collect such interest in cash deposits with credit institutions.
([88]) The tax exemption on accrued interests will apply for a period of time that may vary, depending on early or later completion of the works, but that has a definite end. According to Article 12 of the concession contract, the commencement of the operation of Pier III should be effected 48 months after the date of commencement of the construction and in any case not later than 31 October 2015.

(105) The Commission notes that Article 99(1)(a), third indent of the GITC states that for companies that are exempted from corporate income tax according to specific legislation (in this case the provision under examination), only the profits that are capitalised or distributed are taxed, after the corresponding corporate income tax is deducted from their value. Therefore this means that through this provision, PCT is not liable to pay income tax from interest accrued until its related income is capitalised or distributed or at the latest until the commencement of operation of Pier III. Thus the tax deferral only refers to the profits that may be distributed or capitalised. Due to this provision, PCT may use its' profits that derive from interest accrued until the commencement of operation of Pier III, in order to accumulate reserves without having to pay corporate income tax in this respect. Moreover as according to the Greek authorities there is no obligation under the Greek legislation to convert reserves into share capitals or to distribute profits, PCT may due to this provision enjoy a full tax exemption of its profits deriving from accrued interests generated in Greece and abroad ([89]). In any event, a tax deferral constitutes a selective advantage to PCT.

(106) The Greek authorities and PCT indicate that PCT has to maintain significant cash deposits in order to finance the investments required during the construction phase and the period prior to the commencement of Pier III and that this exemption aims at facilitating these investments in public infrastructure. In this sense they consider that PCT is in a legal and factual comparable situation to all companies undertaking big investments in public infrastructure.

(107) However, the fact that the measure is available to all companies realising investments in public infrastructures does not mean that the measure is not selective. On the contrary, it is established that only a certain category of companies, those investing in public infrastructures, can benefit from the measure. Other companies which are not active in this sector of activity cannot benefit from the same measure. Moreover, as already analysed above ([90]) the policy objective of facilitating companies engaged in big infrastructure projects during the phase of construction cannot be considered as an objective inherent to a fiscal regime on the basis of which the comparable legal and factual situation of companies can be determined.

Justification by the logic of the tax system

(108) The Greek authorities and PCT indicate that the tax exemption on accrued interests is based directly on a general provision of the GITC ([91]) that includes amongst certain types of tax exempted income, 'incomes exempted by virtue of a contract ratified by law'. They argue that as the Greek legislator consistently uses this general exemption in order to introduce tax exemptions applying specifically to all large public infrastructure projects undertaken in Greece, the provision under examination does not introduce a special tax exemption. On the contrary, it forms part of a general scheme based upon the general tax system that aims at facilitating and supporting the implementation of large public infrastructure or investment projects. This provision has been applied consistently for all public infrastructure projects in order to ensure that companies undertaking such projects are not subject to discrimination or 'structural disadvantage'.

(109) It derives from the EU courts case-law that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria ([92]).

(110) In view of this case-law, it can be concluded that the alleged 'general' provision allows full discretion to the legislator to exempt any income from taxation, in practical terms after the state has negotiated and concluded any kind of contract with any taxable person. Therefore in practice this 'general' provision allows for exemptions which are not within the logic of the general taxation system, but within the logic of favouring the specific

([89]) In case no treaty on avoidance of double taxation is applicable.
([90]) See recitals 95 to 97.
([91]) i.e. Article 103(1)(m).
([92]) Case C-241/94, *France* v *Commission* (Kimberly Clark) [1996], ECR I-4451. See also recital 21 of the Fiscal Notice.

company with which a contract may be negotiated and concluded each time. Therefore, the alleged 'general' provision of the GITC cannot be considered as forming part of the logic of the income tax system.

(111) As regards the justification of the measure as inherent with the public policy objective of facilitation of public infrastructure projects, the Commission considers that these arguments might not be taken into consideration when assessing the notion of aid.

(112) Therefore the Commission concludes that the measure constitutes a selective advantage in favour of PCT which is equal to the income tax which PCT would normally have to pay on the accrued interests until the commencement of operations of Pier III.

5.3.2. *Refund of VAT credit balance irrespective of the stage of completion of the contract object — 'single investment good' — VAT refund within 60 days from application; interests due to delay* ([93])

System of reference

(113) According to the Greek VAT tax system, a taxable person is entitled to deduct input VAT that is directly linked to the realisation of acts that are taxable ([94]) or that are not taxable but give right to deduction. The deduction is granted for the part of goods and services that are indeed used for the realisation of acts that are subject to the tax. Furthermore, VAT credit resulting from the deduction of input VAT and output VAT in a given tax period is not refunded but is carried forward to the next tax period ([95]). A refund is allowed if the company is not able to offset its VAT credit against output VAT over a 3-year period and upon completion of this period ([96]).

(114) The VAT credit may be refunded and not carried forward to the next tax period only under the exceptions set out in Article 34 of the VAT Code. One of these exceptions concerns VAT that has been paid on 'investment goods', as they are defined in the VAT Code ([97]), i.e. 'tangible goods, owned by the company and put by it on continuous exploitation, as well as the buildings and other kind of constructions that are constructed by the taxable company on estate property that does not belong to it, but of which it has the use on the basis of any legal relation, for a period of at least 9 years… Reparation and maintenance costs are not included in the value of the investment good'.

(115) According to Article 5 of Ministerial Decision 1073/2004/EC ([98]), in the foreseen exceptional cases ([99]), VAT credit may be refunded as follows: (a) for the first VAT refund application, within 2 months from the application date; (b) for the subsequent VAT refund applications above EUR 6 000: (i) 90 % refunded within 1 month from the application date; and (ii) the remaining 10 % within 2 months from the application date; (c) for subsequent VAT refund applications of less than EUR 6 000, the entire VAT amount within 1 month from the application date.

(116) As the Greek authorities and PCT rightly point out, for the construction of immovable property, the refund of VAT credit is made after the commencement of the works and up to the amount that corresponds to the expenditure related to the works which have been performed and invoiced during each period for which VAT can be claimed ([100]).

(117) In particular as regards investment goods, the right to deduct VAT is decided definitely at the time the investment goods are put in use. Moreover, in order to avoid abuses in the VAT refund mechanism, if within 5 years from the realisation of the expenditure for the acquisition or the construction of an investment good, this good is not put in use, then the input VAT that has been deducted has to be returned to the State, as it is considered as not having been used for taxable acts ([101]).

([93]) Article 2, paragraphs 2 and 3 of Law 3755/2009.
([94]) Article 30(1) of the VAT Code.
([95]) Article 32(3) of the VAT Code.
([96]) As there is a 3-year time limit for carrying forward a VAT credit balance.
([97]) Article 33(4) of the VAT Code.
([98]) As this Decision stood at the time the ratification law was adopted.
([99]) Including the case when an investment good is concerned.
([100]) Article 2(7) of Ministerial Decision 1073/2004/EC.
([101]) Article 33(3) of the VAT Code. This 5-year restriction is not applicable to public utility companies.

(118) Finally according to the generally applicable framework, the interest computation on tax or unduly paid amounts refund starts 6 months after the first day of the month following the fiscal declaration of the taxable person ([102]). Nevertheless, the Greek administrative courts have considered that this provision is not in conformity with the constitutional principle of equality of taxpayers ([103]). Therefore they have set aside this provision by considering that the interest should be computed from the day the taxable person has filed an appeal against the tax authority's decision not to refund the claimed VAT credit ([104]).

(119) The Commission considers that these provisions constitute the system of reference on VAT credit refund in Greece.

Derogation from the system of reference

— Concerning the VAT credit refund irrespective of the stage of completion of the contract object

(120) According to Article 2, paragraph 3 of Law 3755/2009, PCT is entitled to VAT credit refund regardless of the degree of completion of the construction project or individual structures or parts thereof. Moreover according to the same Article PCT does not lose its VAT credit refund right, in case it has not made use of the investment good within 5 years from the realisation of the related expenditure, although this would be the case according to the generally applicable rules.

(121) The Greek authorities and PCT argue that as all companies have the right to VAT refund once the relevant expenditure is performed and invoiced, the provision as regards PCT does not grant any additional advantage to it, as in any case PCT would be entitled to VAT refund after the commencement of the works and not only when these works would be completed.

(122) On the basis of the additional information and explanations provided, the Commission has come to the conclusion that indeed PCT would have at any case the right to VAT refund after the commencement of the works on the project and up to the amount corresponding to the invoices issued. However, this right is definitely decided once the investment good is put in use. Given that PCT has the right to VAT refund irrespective of the completion of the investment project and at the same time does not lose this right in case it does not put the investment good in use within 5 years, as it should under the normally applicable rules, it enjoys a selective advantage.

(123) This advantage consists in the VAT refund that PCT is entitled to keep if 5 years after the realisation of the expenditure related with this refund, the project did not start, while other companies would have to pay back to the Greek state the VAT refunded in case of non-commencement of the project within 5 years (from the realisation of the related expenditure). It is recalled that, under the generally applicable rules, in such cases, the relevant acts (concerned by this expenditure) would not be considered any more as taxable acts (see recital 117 above). This means that, in similar circumstances, other companies would normally be prevented from using the VAT credit linked with these expenses to offset VAT due in a subsequent period. Therefore, the advantage that PCT enjoys from this provision is equal to the full amount of the VAT refund that it is allowed to keep (under this provision) if 5 years after the realisation of the related expenditure, the project did not start.

(124) The Greek authorities and PCT argue that this deviation is also applicable to public utility companies, as they are the ones who most of the times construct infrastructure projects that may take more time to be completed than this 5-year period generally applicable. According to them, the same line of reasoning stands also for PCT, who

([102]) Article 38(2) of Law 1473/1984.

([103]) Judgments 1948/1992, 3035/1992, 1274/2002, 1207/2012, 1501/2012 of the Conseil d'Etat, as well as 222/2009, 223/2009 and 2141/2009 of the Administrative Court of Athens and 4793/2013 of the Administrative Court of Thessaloniki. This interpretation was based on the Article 21 of Regulatory Decree 26-6/10-7/1944 (code of the state court's proceedings) according to which 'the legally normal interest and the interest on late payments … starts from the moment the legal action is notified to the state'.

([104]) According to the Code of fiscal legal procedure the taxable person may file an appeal within 20 days following the day the act is notified to it.

would construct a big infrastructure project that may need more time than 5 years. This is also why this provision has been inserted in all the other concession contracts related to big infrastructure projects. Therefore they consider that this deviation from the generally applicable rules is not an exception but a different application of the rules to different situations that are not comparable.

(125) The Commission considers that this deviation constitutes a selective advantage, as it allows PCT the flexibility to get access to VAT credit refund independently of when it will put in use the investment good, i.e. for an indefinite period of time. In this way, even if it never put in use the investment good, its right to VAT credit refund would never be decided definitely and adjusted accordingly, which in practice means that if it didn't complete the project, it would not be obliged to return the VAT credit that it received during the whole construction period. The fact that public utility companies might benefit from the same advantage does not mean that this advantage is not selective. Public utility companies constitute a category of companies which can benefit from the measure. Consequently, such a measure is selective.

— Concerning the definition of investment good

(126) Article 2, paragraph 3 of Law 3755/2009 foresees that for the purposes of the VAT code, the construction project of the concession agreement and any supply of goods, works, services and ancillary works related to the construction shall be considered as 'single investment good'. This provision states in essence that for the purposes of the concession agreement, the notion of 'investment good' foreseen in the VAT code shall include all activities related to the object of the concession agreement, i.e. not only the 'tangible goods' ([105]) constructed but also all provision of goods, works and services that are related or ancillary to the concession agreement object.

(127) The Greek authorities and PCT argue that in light of Articles 34 and 33(4) of the VAT code relevant to the 'investment good', the provision under examination merely consists in a clarification of the generally applicable rules in order to avoid mistaken application of the VAT credit refund rules by the tax authorities in view of the particularities and the high amounts involved in big infrastructure projects. According to them, in light of the specific characteristics of the concession agreement, the measure under examination has as a purpose to treat each element of the investment costs as a single business unit for the VAT purposes. As all expenditure related to the investment project is integrated in the investment good from an accounting point of view at any case, this provision only clarifies what is already applicable. As PCT has undertaken considerable investments that would include separate actions and stages and types of expenditure on goods and services, if each of these costs were treated separately, PCT would be treated differently for the purposes of the VAT regime from any undertaking investing in order to engage in an economic activity.

(128) To support their argumentation, the Greek authorities and PCT refer to the INZO case-law ([106]), according to which the economic activities in the sense of the VAT directive '… may consist in several consecutive transactions and preparatory acts …' ([107]) that allow the relevant VAT credit refund during the construction period. Moreover they indicate that in the same line of reasoning the law on PPPs was amended in 2011 ([108]) in order to foresee that PPPs are eligible to claim the refund of VAT credit each year upon the submission of their annual VAT return, without having to carry forward the credit balance to the next accounting period.

(129) Finally they argue that even if the investment was not considered as falling within the scope of the definition of 'investment good', PCT would be entitled to claim the refund: (i) upon an annual basis if it could establish that it would not be able to offset its VAT credit against output VAT over a three year period and (ii) upon the completion of three years.

(130) The Commission notes that the provision under examination includes a specific definition of the notion of 'investment good' which is broader for PCT than for other companies that are in the same legal and factual

([105]) As per the definition provided in Article 33(4) of the VAT Code.
([106]) Case C-110/94, Intercommunale voor Zeewaterontzilting (INZO), [1997] ECR — I 870.
([107]) Paragraph 15 of judgment in Case C-110/94.
([108]) See Article 29(3) of Law 3389/2005 as it was amended by Article 18(2) of Law 4013/2011.

situation. In practice this definition has as a consequence that PCT has the right to be refunded for VAT credit in respect of all works, services and goods related to the construction object, although according to the generally applicable rules this possibility would only exist for tangible goods and not for services, works, repair and maintenance costs. As according to the generally applicable rules PCT would be entitled to a VAT credit refund upon an annual basis by establishing that it would not be able to offset its VAT credit against output VAT over a three-year period and upon the completion of three years, the broader definition of the single investment good for the purposes of the concession contract in practice results in granting to PCT additional cash in advance from VAT credit that would normally be refunded later ([109]).

(131) Indeed, thanks to this provision, PCT can get a tax refund not only for tangible goods but also for expenses relating to services, works, repair & maintenance, while other companies could for such expenses only offset input against output VAT or wait for 3 years to get a refund. Therefore, the advantage that PCT enjoys thanks to this provision is equal to the interests accrued on VAT refunded for all expenses other than for tangible goods (relating to the investment good), from the moment the refund was put at the disposal of PCT up to the moment PCT would have been entitled to such refund, namely 3 years later or up to the moment where PCT would have been able to offset its VAT credit (concerning these expenses) against output VAT.

(132) The fact that the tax authorities could possibly apply differently the VAT credit refund rules in the absence of this definition, demonstrates that this definition entails a selective advantage for PCT that is not applicable to all companies. Moreover the fact that the law on PPPs that is mainly applicable for infrastructure projects, was amended in order to foresee the right of PPPs to claim the refund and avoid VAT credit carrying forward to the next year, also proves that according to the generally applicable rules every expenditure related to an infrastructure project will not be treated as a 'single investment good' for the purposes of the application of VAT credit refund rules. The letter of the Ministry of Mercantile Marine to the Ministry of Economic Affairs ([110]) requesting specific VAT credit refund arrangements ([111]) for PCT and the successful bidder of the Port of Thessaloniki at the time, demonstrates that the generally applicable rules related to refund would not be the same. Finally the fact that after the 2013 Ministerial Decision there is no differentiation in the refund rules irrespective of the definition of investment good, also demonstrates that this definition constituted a selective advantage in favour of PCT at the time it was granted.

(133) Moreover the Commission notes that the INZO case-law mentioned refers to the right to deduct VAT for transactions subject to VAT that are related to the economic activity of the taxable person and not to the right for a refund.

— Concerning the computation of interests from the first day after the expiry of the 60-day deadline

(134) The provision under examination grants also PCT the right to interests from VAT credit against the state arising automatically once the 60-day deadline expires, without having to follow the procedural or temporal requirements set out by the general applicable framework related to the VAT credit refund, i.e. at an earlier stage than for other companies and without having to go through the administrative courts' procedure. Therefore it entails an additional selective advantage for PCT.

(135) This advantage consists in the interests which PCT can request (under this provision) from the Greek state once 60 days have passed from the moment it filed the relevant fiscal declaration (to request the VAT refund), while other companies in a similar situation would not be entitled to interests at the same point in time.

([109]) It also entails the legal certainty that all type of PCT's expenditure will be treated in the same way, although this would not be the case under the generally applicable rules.

([110]) This letter is dated 31 October 2008 and was submitted by the Greek authorities in the course of the procedure before the opening of the formal investigation procedure as Annex 2 of the submission dated 1 February 2011. It was registered by the Commission on 8 February 2011 with number 2011/013591.

([111]) In particular they requested 90 % VAT credit refund within 1 month from the application date and the remaining 10 % within a year. This refund corresponds in essence to the refund applicable to investment goods.

(136) The Greek authorities retain their argumentation that is supported by PCT by referring to the EU case-law on VAT ([112]) which states that the refund of VAT credit balance constitutes the refund of resources of the taxable person and not state resources. They argue further that the 60-day time limit derives to the principle of neutrality and equality deriving from the EU VAT case-law ([113]). Where the state delays in refunding VAT credit balance beyond what it has established as a 'reasonable period of time', it should be required to pay arrears interest by way of compensating the taxpayer claiming such refund. Thus the payment of this type of arrears interest on VAT credit balance does not constitute state resources.

(137) The Commission considers that the computation of interests in respect of the delay in the payment of the VAT refund implies state resources, as regards the additional interests the state will have to pay to PCT due to this provision. In practice due to this provision the state will pay interests automatically from the next day after the 60-day period and not from the date PCT would file an appeal in this respect, as it would be the case according to the applicable rules. As only PCT gets this right automatically although this is possible in general only after the filing of an appeal, the provision entails a selective advantage for PCT.

(138) The Greek authorities and PCT argue that this provision merely ensures that the state does not obtain a financial benefit at the expense of PCT. In the case of concession agreements of this type a big delay in VAT credit refund would be a considerable expense and thus a serious structural disadvantage for PCT. Moreover the possible payment of smaller amounts of arrear interests to other undertakings does not reduce the cost that PCT should normally bear in its business activity. Thus PCT does not have any competitive advantage and is not treated differently than other companies.

(139) The Commission does not consider that PCT is in a different situation than other companies which would justify a different treatment. As already mentioned the fact that PCT realises a large investment does not constitute an argument regarding the notion of selectivity. Moreover, the automatic payment of interest to PCT reduces the normal costs of the company and gives PCT an advantage compared to other companies.

Justification by the logic of the tax system

(140) The Greek authorities and PCT argue that even if there was an element of selectivity in the provisions relevant to VAT credit refund, this would be justified by the basic or guiding principles which are inherent in the VAT system, as this has been confirmed by the EU and Greek courts.

(141) The Commission notes that in this case the measures in favour of PCT indicate that PCT was granted a favourable treatment as regards VAT refund as compared to other companies that conduct investments and deduct VAT and this cannot be considered as justified by the principle of neutrality or even more of equality of the VAT tax system.

(142) In particular as regards the VAT credit refund irrespective of the stage of completion of the contract object, even if it could potentially be accepted that a deviation would be possible due to a longer construction period, that can be anticipated in bigger projects, an indefinite duration of this deviation cannot be considered as respecting the principle of equality or of neutrality of the VAT system. In particular, as PCT under the terms of the concession contract was under the obligation to complete Pier II until 30 April 2014 and Pier III until 31 October 2015 at the latest, the said flexibility for an unlimited period of time cannot explain in which terms the comparable and legal factual situation of PCT is different from that of other undertakings that make investments and get a VAT credit refund. In light of the principles of the VAT system, according to which it has to be ensured that

([112]) Cases T-68/03, *Olympic Airways* v *Commission*, [2007] ECT II-2911, paragraph 361, C-25/07 *Alicja Sosnowska* v *Dyrektor Izby Skarbowej* [2008] ECR I-5129.

([113]) The obligation to refund VAT arises at the moment input VAT is paid and that the right to deduct VAT '… is exercisable immediately … while the Member States have a certain freedom of manoeuvre in determining the conditions for the refund of excess VAT, those conditions cannot undermine the principle of neutrality of the VAT tax system by making the taxable person bear the burden of the VAT in whole or in part'. This implies that the refund is made within a reasonable period of time. Case C-25/07 Alicjia Sosnowska, [2008] ECR I-5129, paragraphs 15-16.

companies do not benefit from an undue advantage from the VAT system in place, such specific treatment cannot be considered as justified by the logic of the system.

(143) As regards the broad definition of the notion of investment good, the Commission notes that the VAT directive allows Member States discretion to decide whether the companies may get VAT credit refunds or whether they will carry the VAT credit forward to the next year, as well as how they will define the 'investment good' for VAT purposes. Thus the Greek state had the discretion to determine the rules applicable in this respect and specify in which cases a refund could be claimed and on which basis. However, the broad definition of the notion of investment good that allowed PCT a facilitated and earlier refund of VAT credit cannot be considered as justified by the logic of the tax system, as this would be contrary to the equality principle that should be applied to all companies that conduct investments and not only to PCT.

(144) Concerning the computation of interests after the 60-month deadline, the Commission considers that it cannot be justified by the logic of the Greek VAT system either. The general VAT neutrality principle may justify the imposition on interests in case of delay of the VAT refund, to oblige the state not to shift the burden of the VAT system to the taxpayer. The Greek provisions in this respect have been interpreted by the Greek Courts so that the taxpayer of any kind does not suffer the consequences of a possible inaction of the state. This interpretation was made independently of the amounts that the state has to return to the taxpayer. Thus the advantage that PCT derives from the provision under examination that is supposed to put additional pressure to the Greek state in case it does not refund VAT in time cannot be considered as justified in view of the high expenditure of its investment.

(145) Consequently, the Commission considers that the abovementioned measures concerning the conditions of refund of VAT provide a selective advantage in favour of PCT.

5.3.3. *Loss carry-forward without temporal limitation — Income tax (Article 2(5) of Law 3755/2009)*

System of reference

(146) According to the general applicable framework ([114]), for the purposes of calculating the income tax, the losses of one year for commercial activities and activities of a liberal profession may be carried forward for up to a maximum period of 5 years. The GITC does not foresee any exception in respect of this rule.

Derogation from the system of reference

(147) According to Article 2 paragraph 5 of Law 3755/2009, PCT may carry forward its losses without any limitation in time. This measure grants a clear selective advantage to PCT as it deviates from the generally applicable rule that has no exceptions under the GITC. Due to this provision PCT will be able to carry forward its losses to any time it will be more appropriate for its interests, mainly once the balance between its investment costs and its taxable income will change, i.e. when it will have high profits, in order to avoid paying taxes that it would normally pay in the absence of the benefit of this exception.

(148) Therefore, this provision provides to PCT an advantage which is equal to the difference between the income tax that it actually pays and the corporate tax that it would have paid in the absence of the possibility to carry forward its losses more than 5 years after these losses occurred.

([114]) Article 105(11) in combination with Article 4(3) GITC.

(149) The Greek authorities and PCT also argue that the right to carry forward losses for the duration of the concession in this case has been considered appropriate as an application of the income-expenses matching principle. According to the Greek authorities and PCT one of the basic principles of the GITC in this respect and has been applied as such in the general scheme of which Article 2(5) forms part, which they consider should be taken as the system of reference.

(150) Moreover they argue that in long term concessions to construct and operate public infrastructure, there is a marked imbalance between the initial period of construction of the infrastructure and the subsequent stages of operation of the infrastructure where the infrastructure is expected to be profitable so as to cover initial losses. As the investments required up-front lead to significant losses over more than 5 years and they can only be offset at the later part of the concession period, the 5-year limitation would deprive the concessionaire of the benefit of the tax loss carry-forward rule. In this respect, undertakings responsible for big infrastructure projects would be in a different situation from ordinary undertakings.

(151) The Commission considers that this derogation from the general rule cannot be considered as inherent in the logic of the Greek tax system. As the 5-year rule for fiscal loss carry-forward is general and without any differentiations, the loss carry-forward without any temporal limitation cannot be considered as justified for public infrastructure projects. The 10-year limitation that is now applicable for PPPs reinforces the conclusion that the indefinite period foreseen specially for PCT constitutes a clear selective advantage for it. Finally the Commission considers that all undertakings that conduct investments that may take several years are in the same legal and factual situation as PCT and the other concessioners in Greece, in light of the objectives of the General Income Tax Code. As the Greek tax system does not allow differentiations depending on the duration of the investments of undertakings but sets out this general 5-year rule for all, PCT cannot be considered as being different than other companies as regards this rule. As mentioned in point 107, a measure applicable to all undertakings responsible for big infrastructure projects is selective because it only applies to a limited category of undertakings.

Justification by the logic of the tax system

(152) The Greek authorities and PCT argue that: (a) the 'objective pursued' for this measure should be the one pursued by the derogating provision; (b) this provision aims at applying the income-expenses matching general principle of the tax system to the particular characteristics of the concessions; (c) the application of this principle to these projects does not amount to a removal of the risk borne by the concessionaire but aims at ensuring equal treatment and removal of the 'structural disadvantage' of these projects; (d) this provision has been consistently applied to all big public infrastructure projects in Greece; (e) the possibility to carry forward losses over the duration of the concession is the appropriate mechanism in addressing the particular characteristics of such concessions and the objective difference between the concessionaire and other commercial undertakings.

(153) The Commission notes that the objective of the tax system has to be established at the level of the system of reference and not at the level of the exception measure ([115]). If the measure itself constituted the reference system, then any fiscal measure would escape the classification of State aid no matter how exceptional it would be. The objective of the corporate income tax system is to generate revenue for the state budget and it would be jeopardised if specific companies were allowed to reduce their tax base when they see fit according to their financial interests. In addition the high investment amounts involved in big infrastructure projects does not mean that companies undertaking them are in a structural disadvantage that has to be corrected by the income tax system. All companies conducting investments have losses during the first years of the construction of their investment and they may not have revenues within the period of 5 years foreseen by the GITC. Such justification would not derive at any case from the principles of the Greek income tax system. Moreover the fact that a similar provision has been applied for certain big infrastructure projects in Greece does not mean that the measure may be justified for PCT. Finally the alleged specific characteristics of big concessions cannot be accepted as a valid objective of the generally applicable rules relevant to fiscal loss carry-forward, as explained above in recitals 98 to 100. Thus the Greek authorities and PCT have failed to prove that in light of the principles of the Greek income tax system the differentiation in favour of PCT can be justified.

([115]) Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM)* v *Commission*, [2000] II-03207, paragraph 53.

(154) Consequently, the Commission considers that the selective measure under examination cannot be justified by the logic of the Greek tax system of reference described above.

5.3.4. *Choice among three depreciation methods*

System of reference

(155) The GITC foresees that for the depreciation of assets the general rule is the 'fixed straight line method' of depreciation ([116]) ([117]). According to Article 1 paragraph 2 of presidential decree 299/2003 ([118]) companies are obliged to depreciate their fixed assets every year with the depreciation rates set out in this decree, independently if they make profits or losses during the depreciation period. Consequently if the depreciation is conducted with rates that are higher than the ones foreseen in the presidential decree, they are not taken into account for tax purposes.

(156) Especially in respect of concession contracts, reserves for recovery of assets that will return to the state or third parties ([119]) after a certain period of time on the basis of a contract are deductible from gross revenues ([120]). According to Ministerial Decision 100/2005 ([121]), reserves for recovery of assets that will be returned to the state or to third parties without compensation, are formed every year and for as many years as the work concession lasts. This reserve is deducted from gross revenue and is not formed out of the profits of the company. The company is not entitled to calculate the depreciations on the basis of presidential decree 299/2003, which is generally applicable, due to this specific provision, but also due to the fact that the work constructed by the company for exploitation does not belong to the company but to the state or the third party. The deduction at stake is calculated independently of the existence of profits.

(157) Finally costs related to improvements and supplements on leased immovable property are depreciated in equal tranches over the period of the leasing, provided that the applicable depreciation rate is not lower than the rate set out in Presidential Decree 299/2003 ([122]).

(158) Thus the general system of reference as regards this measure consists in the straight line depreciation method which is generally applicable, for the whole concession period, which is the time period determined for contracts under which the depreciated asset will be returned to the state or a third party.

(159) The Greek authorities and PCT argue that the provisions related to depreciation allow flexibility to choose between alternative depreciation methods and depreciation rates, in order to allow appropriate treatment of different circumstances. At that prospect, they refer to the possibility of industrial, mining, quarry and mixed enterprises of this kind to decide on the use of the straight line or the declining depreciation method. According to them, the choice of the depreciation method, as well as the choice of the depreciation rates, is at the discretion

([116]) With the fixed straight line method, depreciation is calculated on the basis of a fixed rate on the initial acquisition value or of the readjusted acquisition value plus the value of improvements or additional parts.

([117]) At the time the provision under examination was adopted, Article 31.1(f) of the GITC foresaw an exception to this rule, relevant to the depreciation of new machinery and mechanical or technical equipment of industrial, mining, quarry and mixed enterprises of this kind. In these cases the companies could also use the declining balance depreciation method. This provision has been modified and now it only foresees the general fixed straight line method for all cases.

([118]) Presidential Decree 299/2003 relevant to the 'Definition of highest and lowest depreciation rates'. This decree sets out the range between the highest and the lowest depreciation rate per category of fixed assets. Taxable companies may choose any depreciation rate within this range. Once a company has chosen a depreciation rate within this range, it is obliged to complete the depreciation by applying the same rate on all assets of the same category which have been acquired by the company during the same fiscal period. For assets of the same category acquired in different fiscal periods, companies are entitled to use a different depreciation rate, but in any case it is mandatory to complete the depreciation procedure with the initial depreciation rate applied to all assets of the same category acquired in the same fiscal period.

([119]) This kind of 'reserves' does not constitute real asset of the company but depreciations of the fixed assets that will be returned to the state or to third parties.

([120]) Article 31.1(g) GITC.

([121]) YA 100/2005 (YA 1003821/10037/B0012 (OJ B 80 of 2005): Deductible costs from gross revenues of companies on the basis of administrative solutions and the case-law.

([122]) Article 31.1(l) of the GITC.

of the taxpayers. In line with these two methods and reflecting the principle of flexibility in this regard, they refer to the possibility of PPPs to choose between the straight line method applying for the whole life-period of the project and the 10 year straight line method with an option to select a longer depreciation period within one month from the completion of the project ([123]). Finally they reiterate the argumentation provided before the opening decision, by indicating that the flexibility of this system is also shown by the fact that other companies awarded concessions of big public infrastructure projects in Greece have the choice between different depreciation methods.

(160) The Commission notes that the possibility for industrial, mining, quarry and mixed enterprises of this kind, to choose between two types of depreciation method would not apply to PCT because this possibility did not cover contracts through which the asset is returned to the state or a third party at the end of the contract.

(161) Moreover the fact that other companies might have benefitted from similar advantages does not mean that such advantages may constitute a system of reference. In particular, the fact that other companies awarded concessions of big public infrastructure projects in Greece have the choice between different depreciation methods only shows that the possibility is limited to a category of companies, those conducting big public infrastructure projects.

(162) Thus the Commission considers that the system of reference for this measure is the one determined above in recitals 155 to 156.

Derogation from the system of reference

(163) Article 2(6) of the Law under examination, provides to PCT the choice between 3 different methods of depreciation:

a. Fixed straight line method during the whole concession period.

b. Depreciation of the works' construction costs within 10 years from the moment of the completion of the works by yearly equal amounts ([124]). In case PCT wishes to depreciate such costs within a longer period, it may do so, but then it would have to notify this to the tax authority within one month from the end of the fiscal year during which the work has been completed.

c. Depreciation of any amount up to 100 % of its construction costs within 5 years from the commencement of the commercial exploitation of the work ([125]). For all the subsequent years, it may depreciate up to 50 % of the non-depreciated construction costs of completed works irrespective of the time of completion. In case PCT wishes to use this method, it has to declare its intention to the competent tax authority at any time within 6 years after the commencement of the concession.

(164) PCT has been given the possibility to choose between the standard straight line generally applicable depreciation method and two other depreciation methods that are available to some of the big infrastructure projects in Greece. The provision allows PCT the right to choose depreciation methods that can entail an advantage as compared to the general system. If for instance PCT chooses one of the two accelerated depreciation methods, it will be able to reduce its taxable base to a larger extent and at an earlier stage than what it would do under the application of the standard straight line method. Moreover, the discretion granted to it to choose the third

([123]) Article 105(12) of the GITC as amended by Law 4013/2011. This method is the one foreseen in paragraph 5 Article 97 of Law 1892/1990 for the construction of parking spaces.

([124]) Method set out by Law 1914/1990 for BOT projects. According to Article 9(8) of Law 2052/1992, works that are executed with total or partial funding provided by thirds, the depreciation of the construction costs and of the interests on loans and credits during the construction period, that are considered as construction costs, is conducted according to the same method.

([125]) Method of depreciation for airport constructing companies set out by Article 26(8) of Law 2093/1992.

depreciation method within 6 years from the commencement of the concession, in practice means that PCT may choose the way and the level up to which it will reduce its taxable base at a later stage, when it will be in a position to calculate more precisely its taxable revenues. Thus depending on its revenues at that time it may benefit from the advantage to lower its taxable profits and pay less taxes than what it would pay if it depreciated all its assets according to the generally applicable rules.

(165) The Greek authorities and PCT argue that the choice of the depreciation method cannot constitute an advantage since the benefit of the tax allowance remains the full depreciation costs and only the number of years during which it will be spread will be different.

(166) The Commission notes in this respect that the full depreciation of an asset at a shorter or longer period of time may lead to a differentiation of the company's financial result and taxable situation at a certain period of time and thus lead to a benefit. If for instance a company depreciates the total value of an asset in 10 years' time instead of 35 years' time, then it will be able to reduce its taxable base at an earlier stage. The value of the depreciated costs that will be taken into account in the first case will be higher than the value of the same depreciated costs in a longer time period. Thus the Commission considers that indeed the tax allowance remains the full depreciation cost but the way this depreciation cost is used for taxation purposes may result in an additional advantage for PCT that other companies do not dispose of.

(167) The Greek authorities and PCT mentioned that the flexibility inherent to the depreciation rules in Greece should encompass an entire range of options in order to allow appropriate treatment of different circumstances of public infrastructure projects, whilst ensuring full depreciation of the costs of the assets.

(168) However, the generally applicable rule of the fixed straight line method for concession contracts, i.e. for companies that are in the same legal and factual situation, is clearly foreseen in the law and the 'flexibility' related to the range of depreciation rates is not generally applicable to costs of concession contracts, but to other types of investment costs.

(169) The Greek authorities also argue that the Commission in its opening decision misinterpreted the additional flexibility awarded to PCT that does not automatically and necessarily involve an advantage. The workings of each depreciation method available and in particular the range of depreciation rates in each method in conjunction with the particular set of circumstances ([126]) mean that in principle it cannot be excluded that a similar outcome can derive through any of the alternative methods. Moreover the sole fact that an undertaking has more alternatives than another one does not automatically mean that an advantage arises. The existence of a competitive advantage or not could only be established upon the basis of an assessment of competitive conditions and the different outcomes that could arise in specific circumstances from the application of the alternative depreciation methods available to each competitor.

(170) The Commission considers that its reasoning in the opening decision ([127]) in this respect is in essence confirmed by the argumentation above. As each depreciation method involves different parameters that need to be examined in order to choose the most advantageous one, due to this provision, PCT has the freedom to make its calculations and choose between the different depreciation methods the one that suits more to its interests. In particular the fact that it can still within 6 years from the commencement of the project decide to change the depreciation method applicable, its margin of liberty is greater than the one of a normal operator ([128]). Furthermore, as PCT may pick and choose the depreciation method it sees fit, by contrast to other undertakings that can only apply the normal depreciation rules for concessions, it certainly enjoys a selective advantage as compared to these companies. It is irrelevant in this respect to examine the competitive conditions and the different outcomes that could derive for the different competitors in the specific circumstances, as this is not the objective against which the comparable legal and factual situation of PCT has to be compared.

([126]) e.g. asset value, profitability, business plan.
([127]) See recital 165 of the opening decision.
([128]) It is even greater than the one foreseen for instance for PPP's (this is without prejudice to the view the Commission may take on fiscal provisions relevant to PPPs).

(171) Moreover the Greek authorities retain their initial argumentation as regards depreciation rules applicable to PPA and the Port of Thessaloniki ([129]), the two other major ports of Greece, and insist on their opinion that the provision at stake ensures that PCT is not treated less favourably than those other two port operators.

(172) The Commission notes that in any case the fact that specific depreciation rates could have been applicable at the time for PPA and the Thessaloniki Port does not mean that PCT could be entitled to enjoy a specific treatment, nor that such specific treatment was justified. So the Commission considers that the provision under examination entails a selective advantage for PCT.

(173) This advantage consists in the possibility for PCT to choose between 3 depreciation methods and is equal to the difference between the income tax that PCT would have to pay if the fixed straight line method was applied and the income tax that it eventually paid by applying a different depreciation method.

Justification by the logic of the tax system

(174) The Greek authorities and PCT argue that: (a) the choice of alternative depreciation methods is part of the general scheme applied to all undertaking entrusted with public infrastructure projects in all sectors of the economy; (b) there is no discrimination as concessionaires of big infrastructure projects are in a different legal and factual situation than other activities; (c) the provision is consistent with its objective and available to all such companies; (d) the considerations that are relevant are the objective pursued, the mechanism chosen and the principle of flexibility in the general asset depreciation system; (e) in the absence of this provision there would be legal uncertainty as there are types of assets for which no depreciation rates are available; (f) the essence of the provision is to allow greater flexibility to depreciate assets that are not covered by standard rates, due to the particularities of public infrastructure concessions; (g) as this mechanism systematically applies to all public infrastructure concessions in all sectors, it is consistent with the relevant flexibility principle of the depreciation system; (h) this mechanism is appropriate and proportionate as it applies the flexibility principle and there is no more suitable alternative to ensure such flexibility in depreciation given that the circumstances each undertaking faces at the time it selects its depreciation method cannot be known in advance; (i) PCT has no special discretion other than that justified under the general principle of flexibility.

(175) First of all the Commission reminds that, according to standard case-law, the Member State should provide the justification of selective measures ([130]). The argumentation provided by the Greek authorities and the beneficiary does not establish how a measure that allows discretion to the beneficiary can be considered as justified by the logic of the tax system. Thus it retains its preliminary conclusions in the opening decision that this measure cannot be justified by the nature and general scheme of the system.

(176) Moreover it notes that the flexibility allowing full discretion to the beneficiary to depreciate its assets, cannot be considered as a principle underlying the fiscal system that may justify the measure. In essence this would end up in considering that the measure itself is the general system and its mechanics would be the objective against which the measure can be justified. If this reasoning was applicable then any discretionary fiscal measure could escape the classification as State aid. Furthermore all the argumentation put forward as regards the fact that similar rules apply for other public infrastructure concession contracts in Greece cannot be considered as justifying the measure ([131]). Therefore this measure constitutes a selective advantage that cannot be justified by the logic or general scheme of the system.

([129]) The provision under examination helped to eliminate a gap in the general Greek tax system regarding the depreciation of assets used in the operation of a container port terminal, such as those that will be used by PCT for the purposes of the concession agreement. Article 34 of Law 2937/2001 lays down specific depreciation rates that PPA and the Thessaloniki Port shall use under the fixed straight line depreciation method, for the specific types of port asset that they use. The Greek authorities argue that these rates are not applicable to PCT. According to the Greek authorities, if PCT opted to apply the straight line method and was allowed to use these depreciation rates, the period of depreciation would exceed the concession period. On the other hand, if PCT were obliged to apply the straight line method with different depreciation rates than the ones applied for PPA and the Thessaloniki Port, it would be disadvantaged compared to these operators (recital 166 of the opening decision).

([130]) See Case *Portugal* v *Commission*, paragraph 81 in footnote 80.

([131]) See in this respect the Commission's assessment in recitals 98 to 100 above.

5.3.5. *Exemption from stamp duties on the loan agreements and any ancillary agreement for the financing of the investment project (Article 2(8))*

System of reference

(177) According to the generally applicable legislation, stamp duties are imposed on the written form of several acts of civil and commercial law, therefore including loan, credit and ancillary agreements. According to the presidential decree on stamp duties ([132]), stamp duties are collected in relation to a specific document setting out a transaction in writing. The stamp duty is related to the act itself; therefore it is up to the parties to agree on the party liable to pay it. However, in practice this means that for loan, credit and ancillary agreements, the borrower is mainly liable to pay the relevant stamp duties, as the creditor has the power to impose such payment. The introduction of the VAT as a general expenditure tax by law 1642/1986 in the Greek legal order had as a consequence the replacement of several stamp duties and turnover taxes by VAT ([133]).

(178) According to Article 16 of law 1676/1986 and Article 36 of law 3220/2004 are exempted from stamp duties the loan and credit agreements, as well as their ancillary agreements that are provided by Greek and foreign banks in Greece or that have a link to Greece, i.e. they are concluded and/or executed in Greece, they create obligations which are executable in Greece, they involve collaterals in Greece (territoriality principle) ([134]). Thus according to the existing stamp duty code, loans that are given by undertakings other than banks are subject to stamp duty ([135]) unless they do not have a link with Greece or are issued as bond loans. Loans transferred between undertakings other than banks are also subject to stamp duty ([136]), if the principal loan was initially subject to stamp duty.

(179) The Commission notes that the stamp duty legislation includes several exemptions in particular after the introduction of the VAT system and/or the replacement of stamp duty by other charges or taxes. However, the general applicable framework for this measure remains the Greek stamp duty system, as it stood at the time the provision under examination was adopted. The existence of exemptions to this system does not mean that the stamp duty system does not exist, but that each exemption ([137]) has to be assessed on its merits.

Derogation from the system of reference

(180) As according to the generally applicable framework, loan, credit and ancillary agreements with companies other than banks that are contracted and executed in Greece or have a link with Greece ([138]) are subject to stamp duties, PCT would normally have to pay stamp duties for this kind of act. However, on the basis of the provision under examination, PCT has been alleviated from stamp duties it would normally have to pay for this type of act. PCT has been alleviated from stamp duties it would normally have to pay for loans with any kind of companies other than banks, and in particular from its parent company Cosco ([139]).

([132]) Presidential decree of 28 July 1931, OJ A 239 1931, as modified especially by Law 2873/2000.
([133]) However, the introduction of the VAT did not affect the stamp duty imposed on loan agreements.
([134]) Under settled case-law, a loan entered into outside of Greece through a private deed is subject to stamp duty in Greece where the loan is executed in Greece. 'Execution in Greece' occurs where the delivery of the loan amount by the foreign lender to the borrower, who is located in Greece, occurs in Greece. 'Delivery of the loan amount in Greece' occurs where the lender effectively puts the loan amount in the account of the borrower in a Greek bank (Opinion 964/1955 of the Legal Council of the Greek state, Court of First Instance of Thessaloniki 2123/1963, Tax Court of First Instance 2163/1967, Administrative Court of First Instance 6043/2001, Council of State 2996/1991 and 984/1992). Further, judgment 3639/2013 of the Conseil d'Etat ruled that '… a loan agreement concluded through a private deed abroad, is subject to stamp duty, so far as it provides for obligations which should be executed in Greece, and such is the obligation of the borrower flowing from the said agreement to transfer in Greece, through his order to the foreign bank, the agreed loan amount which was deposited by the lender abroad on [the borrower's] name.'.
([135]) At the rate of 2,4 %.
([136]) Again at the rate of 2,4 %.
([137]) The Commission's assessment in this case is without prejudice to the position it may take outside this procedure on the exemptions.
([138]) As described in footnote 134 above.
([139]) The Greek authorities and PCT refer to two loans of EUR 54,8 million and EUR […] million that PCT concluded with its parent company, Cosco, in order to start its investments in the port of Piraeus.

(181) In this way, PCT would enjoy a selective advantage in comparison to other undertakings in a comparable legal and factual situation. This advantage is equal to the stamp duty that PCT would normally have to pay under the generally applicable rules.

(182) The Greek authorities and PCT do not question that these loan transactions are exempted from the payment of stamp duty that would normally be due. However, they argue that this exemption provides PCT with greater flexibility regarding the funding required for the performance of its concession obligations without any additional cost, in case such flexibility is deemed necessary in exceptional circumstances. They also refer to the fact that PPA also benefitted from this exemption in the context of its concession to manage the Piraeus port. Thus this measure should be considered as part of a general measure inherent in the Greek tax system, which aims at facilitating the funding of big infrastructure projects.

(183) However, as already stated above for the other measures, facilitating the funding of big infrastructure constitutes an element to take into account when assessing the possible compatibility of State aid but not the existence of State aid.

(184) Moreover the Greek authorities and the beneficiary argue that the two subordinated loans of EUR […] million and EUR 54,8 million that Cosco granted to PCT in order to start its investments in the port of Piraeus were not subject to stamp duty according to the generally applicable rules, as: (a) they were executed outside Greece; (b) they were paid into a bank account of PCT opened with a bank outside Greece; (c) they were repaid by PCT through a money transfer from its bank account outside Greece. For this they provided a report of the regular tax audit of PCT's fiscal year confirming this exemption.

(185) The Commission first notes that the fact that PCT did not pay stamp duty in the transactions above does not prove that according to the generally applicable rules it would not pay either. The report of the tax audit provided makes specific reference to the provision under examination. Moreover the transactions at stake are perfectly identical to a similar transaction on which the Administrative Court of Appeals in Athens considered ([140]) that the territoriality principle of the stamp duty code ([141]) was violated. In particular in that case the loan agreement was entered into by a company based in Greece as the borrower and a foreign company based outside Greece as the lender. The loan was signed outside Greece. The lender deposited the loan amount in a bank account of the borrower outside Greece, and following the deposit the foreign bank was under the obligation to transfer the loan amount to the bank account of the borrower in Greece the same day. The Administrative Court of Appeals considered that this loan had the same legal results as if it was signed in Greece and as if the loan amount was transferred directly in Greece without the intermediation of the foreign bank and therefore it was subject to stamp duty.

(186) The same case scenario applies also to the loans that Cosco granted to PCT. In particular, the loan agreement was signed outside Greece, the loan amounts were deposited in PCT's account in HSBC of Luxembourg on 21 April 2009 and on 22 April 2009 they were transferred to the account of PCT in HSBC in Piraeus. According to the submissions of the Greek authorities PCT used EUR 50 million plus VAT as letter of guarantee that PCT had to provide to PPA for the entry into force of the loan agreement ([142]). Thus the factual circumstances of the loan agreement involved in the case above, are equivalent to the ones of the loan agreements between Cosco and PCT. In particular although the loan was signed outside Greece and deposited in a bank account outside Greece, it was then transferred to PCT's account in Greece so that it uses it for the purposes of the concession agreement in Greece. Thus, according to the territoriality principle enshrined in Article 8 of the Stamp Duty Code as interpreted by the Greek Courts, the loan agreements in question should have been subject to the payment of stamp duty according to the generally applicable rules. Thus the Commission considers that PCT has already benefited from a concrete financial advantage due to this provision that does not constitute the application of the generally applicable rules but a derogation to them.

(187) The Greek authorities and the beneficiary argue that this Court decision is not applicable in the case of PCT as the factual circumstances of this case differ from those of PCT's loan agreements. They argue that PCT could have used these loan amounts outside Greece for its purposes. Moreover they argue that this decision has been

([140]) Decision 617/2006 on the interpretation of Article 8 of the Stamp Duty Code.
([141]) Article 8 of the Stamp Duty Code. See case-law on this in footnote 134 above.
([142]) In accordance with Article 3.1 of the concession contract.

appealed in front of the Greek Supreme Administrative Court and the Greek administration applies an interpretative circular ([143]) according to which such a transaction would not be subject to stamp duty. This circular is of general validity and binding for the Public Administration. Thus the non-payment of stamp duties in these two transactions does not constitute a deviation from the generally applicable rules.

(188) The Commission notes that an interpretative circular on the application of the Stamp Duty Code cannot be considered as of higher validity than Court decisions. The fact that the decision of the Administrative Court of Appeals of Athens has been appealed does not mean either that this decision is not applicable. Moreover the interpretation of the principle of territoriality as described above ([144]) by the Greek courts is in the same line as the said decision. The Commission further notes that the facts relevant to PCT's loan agreements are the same and therefore it can be concluded that under the normally applicable rules as interpreted by the Greek courts, PCT would have to pay the relevant stamp duty. Given this interpretation the provision under examination clearly grants a selective advantage to PCT.

Justification by the logic of the tax system

(189) The Greek authorities argue that this exemption is consistent with the general scheme of the progressive phasing out of stamp duty where the legislator decides that the exemption from stamp duty is an appropriate mechanism for ensuring that objectively different situations are treated differently for tax purposes. To this effect, this exemption applies to all undertakings implementing public infrastructure projects. As a mechanism addressing their particular characteristics it is also proportionate as it does not risk jeopardising stamp duty revenue, given that several other alternative types of transactions, also exempt from stamp duty, can in any event be used by such undertakings.

(190) The Commission notes that the progressive phasing out of stamp duty cannot apply as principle of the stamp duty system that justifies this measure, as such phasing out could only be envisaged as regards all loan agreements and not just the ones of PCT. As regards the particular characteristics of public infrastructure projects, the Commission refers back to its analysis in recitals 98 to 100 of this Decision. Thus the Commission concludes that the Greek authorities and PCT failed to prove that this selective measure is justified by the logic of the tax system.

5.3.6. *Exemption from stamp duties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom (Article 2(9))*

(191) According to the existing stamp duty code, loans transferred between undertakings other than banks are subject to stamp duty ([145]), if the principal loan was initially subject to stamp duty.

(192) The Commission considers that the provision of Article 2(9) above entails a direct advantage in favour of PCT's creditors, among which, is its parent company Cosco. This advantage is equal to the amount of stamp duty that PCT's creditors would normally have to pay, under the generally applicable rules, in case of transfer of a loan relevant to the concession agreement contracted with PCT. This provision also involves an indirect advantage in favour of PCT to the extent that it could make it easier for PCT to get a loan.

(193) According to the Greek authorities, Cosco has given two loans to PCT in 2009 which according to the Greek authorities and PCT were paid out in 2011. Due to the provision under examination, Cosco who is the parent company of PCT could benefit from an exemption from stamp duty in case it transferred these loans to other

([143]) Interpretative circular 1027/1990.
([144]) See footnote 134.
([145]) Again at the rate of 2,4 %.

undertakings. According to the Greek authorities and PCT these loans have already been paid out by PCT. On this basis, the Commission has no reason to believe that such a transfer took place. However this provision may entail a selective advantage for Cosco or other creditors of PCT.

(194) The argumentation provided by the Greek authorities and PCT as regards this stamp duty exemption is the same as regards the stamp duty exemption for loans in favour of PCT. On this basis, the Commission concludes that its reasoning developed under that exemption is also valid for this measure. Thus this measure is selective and cannot be considered as justified by the nature or the general scheme of the system.

5.3.7. *Exemption from stamp duties for any compensation paid by PPA to PCT under the concession agreement, which is outside the scope of the VAT code (Article 2(10))*

System of reference

(195) Concerning this measure, the system of reference is the stamp duty regime applicable to acts of civil or commercial law in Greece. The rules governing this regime are already mentioned in recitals 177 and 179 of this Decision. According to stamp duty rules, stamp duties are imposed in relation to the legal documents to which they are attached and not the specific taxable persons that sign these documents. According to Ministerial Circular 44/1987 ([146]) which interprets the stamp duty provisions after the changes introduced with the VAT regime, contracts, legal acts or transactions subject to VAT are not subject to stamp duty.

(196) Moreover pursuant to the generally applicable law as interpreted and enforced by the competent Greek tax authorities, the payment of compensation falls outside the scope of VAT and is therefore subject to stamp duty ([147]).

(197) According to the same circular, the activation of an ancillary agreement (collateral, guarantee, mortgage, penal clause and every other type of security) related to a contract that is subject to VAT and thus exempted from stamp duty, is not subject to proportional stamp duty. However, when the main contract is subject to VAT or is subject to a fixed (and not proportional stamp duty) the activation of an ancillary agreement to this contract is subject to a fixed stamp duty.

(198) Finally the payment of other types of compensation, as for instance for damages or international breach of contract, is subject to stamp duty.

(199) The Greek authorities indicated that according to the provisions of the Greek Stamp Duty Code, compensation paid in Greece due to damages is subject to stamp duty at a 3,6 % rate. The payment of compensation pursuant to an indemnity clause included in a contract is subject to stamp duty at a 2,4 % rate.

Derogation from the system of reference

(200) Article 2(10) of the ratification law foresaw that any type of compensation that PPA would pay to PCT by virtue of the concession agreement that is outside the scope of the VAT code, is exempted from stamp duty.

([146]) Article 3 of Ministerial circular 44/1987: Implementation of the provisions of imposition of stamp duties to various contracts and acts.

([147]) Under Article 57(1)(b) of Law 1642/1986, transactions that are subject to VAT under Article 2 of the same Law, as well as their ancillary agreements, are exempt from stamp duty. Under Article 2 of the Greek VAT Code (Law 2859/2000 replacing Law 1642/1986 that introduced VAT in the Greek legal order), VAT applies to the supply of goods and services where such supply is effected for the payment of consideration. According to the prevailing interpretation of these provisions, the payment of compensation does not fall within the meaning of the provision of services against remuneration and thus falls outside the scope of VAT and instead is subject to stamp duty.

(201) Given that according to the generally applicable framework the stamp duty is imposed on the legal documents and not specifically on the parties of the transaction and given that PPA was exempted from stamp duty by law ([148]) at the time of the adoption of the ratification law, each time a compensation payment on behalf of PPA in relation to the concession contract would be outside the scope of the VAT code and would be subject to stamp duty, PCT would be obliged to pay it under the generally applicable rules. In particular due to this provision, PCT would be exempted from the payment of a fixed stamp duty in the case of the activation of a penalty clause of the concession contract, as well as in case PPA would pay compensation due to damages related to the concession contract or breach of the concession contract. Moreover as the Greek authorities and the beneficiary indicate, given that PPA was exempted at that time from the payment of stamp duty in respect of transactions concerning the implementation of works on its behalf by third parties, due to this provision, PCT would also be exempted from the payment of stamp duty arising from its arrangements with PPA subject to stamp duty. Thus the exemption at stake has the effect of exempting PCT from the obligation to pay stamp duties in such cases, clearly entailing a selective advantage for PCT.

(202) The Greek authorities and PCT argue that where the payment of compensation has a causal link with a contract which falls within the scope of the VAT regime pursuant to an indemnity clause ('penal clause') contained therein, it is exempt from stamp duty. This is because such an indemnity clause is considered as ancillary agreement exempt from stamp duty where the principal agreement falls within the scope of VAT. As the concession contract is subject to VAT any payment under a penal clause provided for in the concession contract is exempt from stamp duty according to the generally applicable rules.

(203) The Commission notes that indeed according to the generally applicable framework no proportional stamp duty is imposed on the activation of a penalty clause of a contract subject to VAT. However in such cases a fixed stamp duty is imposed according to the same circular invoked by the Greek authorities. Therefore in case PPA would have to pay compensation due to the activation of a penalty clause of the concession contract, due to the provision under examination, PCT would not pay the fixed stamp duty that would be applicable. Therefore the provision entailed a selective advantage in favour of PCT.

(204) The Greek authorities and PCT also indicate that the payment of other types of compensation, i.e. for damages or international breach of contract, is subject to stamp duty. In this sense, Article 2(10) introduces an exemption concerning these other types of compensation. However according to them this exemption is part of the general scheme which aims at addressing objectively different characteristics/particularities of public infrastructure concessions. Thus no genuine differentiation and no selectivity arise in this respect.

(205) The Commission notes that the Greek authorities and PCT confirm its finding that in the cases where PPA would pay compensation to PCT due to damages related to the concession contract and/or any breach of it, PCT due to the provision under examination, would not pay the stamp duty it should normally pay. Therefore, this provision provides to PCT an advantage which is equal to the stamp duty that it would have to pay in such circumstances and from which it is relieved. As regards the argumentation relevant to the general scheme specific to public infrastructure projects, the Commission refers to its analysis in recitals 92 to 97 and 107 above. In particular, the Commission considers that a measure applicable to companies in charge of public infrastructure projects only applies to a category of undertakings and consequently is selective.

Justification by the logic of the tax system

(206) The Greek authorities and PCT argue that this exemption is consistent with the general scheme of the progressive phasing out of stamp duty with the principle of equality, as it represents the mechanism for ensuring that the particular characteristics of public infrastructure projects are treated accordingly for tax purposes. The Commission cannot accept that these 'objectives' justify the measure in question and refers to each analysis in recitals 189 to190 above relevant to the stamp duty exemption of PCT's loans.

([148]) Pursuant to Article 2 of Law 2688/1999, in conjunction with Article 362 of Law 1559/1950. The Commission's position in this Decision is without prejudice to any position it may take in the future regarding this provision.

(207) Moreover the Greek authorities and PCT argue that this exemption is consistent with the principle of equality. In particular in its absence and given that PPA was exempted at the time of the adoption of the ratification law, from the payment of stamp duty in respect of transactions concerning the implementation of works on its behalf by other persons, PCT would be obliged to pay stamp duty whenever this would arise from its arrangements with PPA.

(208) However, as already pointed out in the opening decision ([149]) the fact that PPA may be exempted from stamp duties does not mean that such exemption in favour of PCT is justified by the nature of the tax system.

(209) The Commission notes that Law 4152/2013 abolished this provision. Thus the selective advantage in favour of PCT would only refer to the past.

5.3.8. *Following PCT's application, protection provided for in Legislative Decree 2687/1953 for the investment of the concession contract (Article 3)*

Description of the legislative decree and the measures that it may involve

a. Procedure

(210) Legislative Decree 2687/1953 allows the Greek administration to grant a specific favourable regime to any company that imports foreign capital in order to make 'productive investments'. In order for the company to benefit from this regime, it has to apply to the Ministry of National Economy. Following the company's application, a specific committee issues an opinion after assessing:

— whether the investment is 'productive', i.e. if it aims at the development of the national production or if it contributes to the economic development of the country,

— whether it concerns foreign capital, including any nature of capital, i.e. foreign currency, machinery and materials, inventions, technical methods, as well as trademarks,

— the 'usefulness' of the import of foreign capital; on this specific point the decree does not include any definition or criteria that have to be fulfilled, thus granting a discretion to the national administration.

(211) Following this opinion the responsible Minister, depending on the importance of the investment, proposes an irrevocable presidential decree or adopts a ministerial decision approving the import of foreign capital under specific conditions decided therein and granting an irrevocable favourable regime ([150]).

b. Privileges that may be granted

(212) The presidential decree/ministerial decision that may be adopted for a specific company grants the following fiscal 'facilities' ([151]):

— a freeze on the tax rate applied on profits for a period not exceeding 10 years or application of a lower tax rate ([152]),

— reduction or exemption from custom duties or charges on imports of machinery etc., for a period not exceeding 10 years,

— lower tax rate or exemption from any tax imposed by local authorities or port authorities for a period not exceeding 10 years,

([149]) See recitals 188 and 203 of the opening decision.
([150]) This specific regime may only be modified in case the company, to which it is allowed, agrees.
([151]) Articles 8 and 11 of the Legislative Decree.
([152]) An adjustment may also be foreseen in case of reduction of the normally applicable limitations.

— reduction or exemption from any charges and royalties of any kind in connection with the registration of mortgages or the creation of a pledge as security for the imported capital or for the conclusion of any contract related thereto,

— prohibition of export restrictions or taxes,

— prohibition of the retroactive imposition of tax,

— exemption from forced expropriation in favour of the State of assets of the beneficiary company,

— prohibition of the requisition of assets of the undertakings under protection,

— recruitment of foreign nationals as technical and administrative personnel and permission for exporting the mount of their remuneration in foreign exchange,

— permission for the repatriation of loans or share capital (up to 10 % of the annual imported capital); a cumulative export of profits (up to 12 % without tax, of the imported and repatriated annual capital); export of interests (up to 10 % annually) ([153]).

(213) According to the legislative decree, the assets of companies that are created or significantly increased ([154]) with foreign capital under this decree are exempted from any forced expropriation in favour of the state, as well as from any requisition of their assets ([155]). Finally, there is a specific provision establishing the principle of no retroactive imposition of tax for all companies covered by the legislative decree ([156]).

System of reference

(214) As the protection provided under Legislative Decree 2687/1953 may vary depending on the measures that are decided each time in respect of each specific undertaking that falls within such 'protection', and the exemptions that can be granted to PCT due to this decree have been determined in this decree indicatively, the general system of reference may include the different tax measures from which the beneficiary will benefit once the administration will adopt the specific regime PCT will request.

(215) The Greek authorities and PCT argue that as this decree has been set up as a law of superior validity attached to it by the Constitution, it cannot be considered as a 'special' measure which can be compared with the 'general' legislative framework. When this decree was adopted and given its superior legislative validity, the majority of the national legislative framework which the Commission uses as the 'system of reference' did not even exist. Thus the 'system of reference' which needs to be taken into account in this respect is the Greek Constitution and Legislative Decree 2687/1953 itself as a general measure. Moreover the Commission was already aware of its existence since Greece's accession.

(216) The Greek authorities and PCT also argue that the special protective regime for foreign investments is a general measure that applies to all foreign investments that satisfy objective criteria for its application. They also argue that rationale for the decree was the need to: (a) recognise that foreign investments in the circumstances applying to Greece faced particular risks and challenges and thus required particular treatment, in order to achieve the objective of attracting such investments; and (b) provide appropriate treatment in this regard.

([153]) This measure is not foreseen in the presidential decree, but the Greek authorities mentioned it in the list of measures that have been provided in the past through this special regime.

([154]) According to Article 9 paragraph 2 of the presidential decree, this increase is meant as exceeding half of the amount corresponding to the total assets of those companies or above 1 million US dollars.

([155]) Unless requisition is aimed at covering the needs of the armed forces in times of war and only for as long as the conflict lasts and subject to fair compensation.

([156]) The Decree also foresees other privileges/conditions for the companies covered: (i) specific conditions for the repatriation of loans or share capital permission for the repatriation of loans or share capital (up to 10 % of the imported capital annually); a cumulative remittance of profits (up to 12 %, net of tax, on the imported and non-repatriated capital annually); and a remittance of interest (up to 10 % annually) and permission for the transfer out of Greece of foreign exchange needed for lease payments concerning machinery or other forms of capital leased from abroad); (ii) the recruitment of foreign nationals as technical and administrative personnel and permission for exporting the amount of their remuneration in foreign exchange; and permission to keep company accounts with entries in a foreign currency.

(217) Moreover the Greek authorities and PCT argue that the reply of Commissioner Tajani ([157]) as regards this decree only excluded the new measures in the area of customs tariffs and not State aid measures. According to them, it is clear that the application of this decree to date has not given rise to new unlawful State aid, since it was in force when Greece entered the EU and continued applying it without amendment and so far as the Commission has not taken any step to put into question the lawfulness of this decree under EU law.

(218) The Commission notes that the legislative decree in question cannot be considered as a valid system of reference. Although it is true that this decree existed before the accession of Greece in the EU, this does not mean that this decree is of a superior validity than the Treaty of the Functioning of the European Union and thus the provisions of this Treaty relevant to State aid. When Greece joined the EU it had to adhere to the *acquis communautaire* and in particular it should respect the rules of the Treaty on State aid. Thus in case Greece makes use of this decree by granting specific advantages to specific companies, it should first notify them to the Commission for assessment under State aid rules and possible approval under the rules of the Treaty ([158]).

(219) Moreover, this decree allows a wide margin of discretion ([159]) to the administration to establish the conditions, as well as the advantages that will be granted to the specific undertakings that will make use of it. The specific treatment of foreign investments in Greece with the purpose of promoting them entails already selective elements. At the same time it aims at a public policy objective and not a taxation objective. A valid system of reference for the purposes of the selectivity analysis can only be based on taxation principles. Public policy objectives are extrinsic objectives to a tax system as already indicated in recitals 92 to 94 of this Decision and thus they cannot be considered as the purposes of a system of reference for the purposes of the selectivity assessment.

Derogation from the system of reference

(220) Article 3 of Law 3755/2009 allows PCT to apply for the protective regime foreseen under the described legislative decree. This provision has as a consequence that several selective advantages may be granted to PCT upon its request by the Greek administration. These advantages mainly consist in taxes that PCT would have to pay under normal rules and from which it could be exempted thanks to this provision. In addition, the exemption from other legal constraints (forced expropriation, requisition of assets, permission to recruit foreign staff and exporting their remuneration in foreign exchange, permission to repatriate loans or share capital) could in the future also favour PCT. The fact that these advantages have, according to the Greek authorities, not actually been granted to PCT yet, does not take away the fact that the provision under examination gives the right to PCT to request and obtain the privileged framework set out in the decree.

(221) As regards the measure in favour of PCT the Greek authorities do not provide additional argumentation than the one initially provided. Thus the Commission's conclusion as regards the selective character of this measure remains the same ([160]).

(222) As already indicated above ([161]) the fact that a measure may have an economic policy objective does not mean that it is not selective, but that it may be considered compatible with the internal market, if certain conditions are complied with ([162]).

([157]) See recital 213 of the opening decision.
([158]) The Commission's assessment in this case is without prejudice of any action it may take as regards this presidential decree.
([159]) Article 3(2) of the Decree refers indicatively to some of the privileges and exemptions that can be granted through its use. Article 5(3) of Legislative Decree 4256/1962, which interprets the decree of 1953, establishes that the administration has the full discretion to regulate any other issue that is related to the investment in any way it sees fit for the accomplishment of the purpose of the presidential decree, i.e. the attraction of foreign capital, as long as these issues do not run counter its provisions. Therefore, it can be concluded that the administration has full discretion in the establishment of new conditions, as well as a 'facilities' that may render such investments more attractive for companies.
([160]) See recitals 209 to 216 of the opening decision.
([161]) See recitals 92 to 97 of this Decision.
([162]) Case C-487/06 P, British Aggregates [2008] ECR I-10515, paragraph 92.

(223) Moreover, independently of the nature of the regime provided under the legislative decree ([163]), its individual application may take the feature of a selective advantage ([164]), given that every decision of the Greek administration may depart from the general tax rules to the benefit of PCT. According to the Fiscal Notice ([165]), such finding leads to a presumption of State aid and must be analysed in detail. On this basis the Commission considers that the provision in question entails a selective advantage in favour of PCT that will be implemented in case PCT decides to make use of it.

Justification by the logic of the tax system

(224) The Greek authorities argue that the specific regime under this decree aimed at attracting foreign capital and facilitating the reconstruction of the country following the Second World War and the civil war in the 1940s. Given its importance for Greece's economic development, Article 107 of the Greek Constitution expressly recognises that it prevails over ordinary laws. Indeed this was done in order to ensure that investors of foreign capital are protected against the constant modifications of Greek tax law that are not favourable for foreign investments. However the same purpose of this protective regime which is the development of the Greek economy cannot justify the selective character of the measure, but can only be taken into account within the compatibility assessment.

(225) The Commission also notes that since this protective regime that could be granted to PCT upon its request, would be granted on a discretionary basis, it cannot be justified by the nature or general scheme of the tax system ([166]).

(226) Therefore the provision at stake entails a selective advantage in favour of PCT that cannot be justified by the nature or the general scheme of the system.

Existing aid

(227) The Greek authorities and PCT argue that in case the Commission considers that the application of this decree constitutes aid, it would be existing aid.

(228) The Commission notes that the provision in favour of PCT was adopted in 2009 and not before the accession of Greece to the EU. This provision gives the right to PCT to apply and obtain this specific regime. Once PCT applies, a presidential decree or a ministerial decision has to be adopted that will determine the specific advantages that PCT will enjoy. Thus a specific application of the decree upon PCT's request will have as a consequence that the concrete implementation of the measures will take effect at the moment the granting act will be adopted. In conclusion the measure in favour of PCT constitutes new aid.

5.3.9. *Exemption from the general rules of forced expropriation*

(229) The complaints received in this case referred to an exemption provided to PCT as regards the rules of forced expropriation. The law having ratified the concession contract did not refer to any such exemption. The Greek authorities and PCT indicate that no such exemption was granted and the Commission has no reason to believe that this is not the case. Therefore the Commission considers that this type of advantage was not granted to PCT.

([163]) This Decision is without prejudice to the position the Commission may take as regards this Legislative Decree.
([164]) See recitals 21 and 22 of the Commission notice on fiscal aid.
([165]) Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).
([166]) See recitals 24 and 27 of the Commission Fiscal Notice.

5.4. **Comparison of the abovementioned State aid measures with similar provisions in other contracts of big infrastructure projects**

(230) The main argumentation submitted in respect of the justification of the above fiscal measures refers to the necessity to support big public infrastructure projects by ensuring a clear, flexible and stable fiscal regime to companies that implement them in Greece. To support their argumentation, the Greek authorities and PCT refer to a number of Commission decisions that considered that no State aid was involved in the financing of big infrastructure concession contracts that include similar fiscal exemptions.

(231) The Commission has examined the argumentation provided and has come to the following conclusions.

(232) First of all, according to a well-established case-law ([167]), this type of argument is irrelevant for the assessment of the legality of a Commission Decision. Every case should be assessed on the basis of Article 107(1) FTEU, taking into account its own merits. In any event as mentioned in point 107 of the present Decision, the existence of similar measures in other contracts of big infrastructure projects only means that these measures are applicable to a category of companies and consequently are selective.

(233) In any event, all the decisions, to which the Greek authorities and PCT refer, dealt with different situations.

(234) The Commission considers further that the Athens International airport case ([168]) conclusion is not applicable in the current case. In that case, the activities benefiting from aid either were not economic or were not liberalised at the time, and therefore no State aid was involved. On the contrary in the current case, the Greek state has itself opened the provision of port infrastructure services to competition by tendering out the part of the port that is the object of the concession contract. Thus the 'non liberalisation' reasoning of this old decision is not applicable in this case.

(235) Concerning the Athens Ring Road and Rio Antirrio Motorway Bridge cases, the Commission notes that even if a summary of the fiscal provisions applicable in those concessions was included in the description of the State measures in respect of those projects, the Commission did not expressly pronounce itself on these specific provisions, but only assessed whether the state's support for the project was the minimum necessary, as well as whether the tender procedure that took place had as a result the market price. Most of the other decisions ([169]) do not even refer to the tax exemptions in favour of the concessioners (let alone the fact that they are justified by the logic of the fiscal system) and merely assess whether or not the tender procedure was sufficiently open, non-discriminatory and based on the lowest price. The fact that the Commission received the relevant concession contracts that referred to several tax exemptions during the notification does not mean that the Commission examined them from the State aid viewpoint or has pronounced itself on those specific measures. According to the Court's case-law, the Commission should clearly and expressly take a position on measures in order for the beneficiaries to consider that these measures do not entail State aid. The silence of the Commission does not mean that these measures were approved ([170]).

(236) In the same line of reasoning, the fact that in the broadband development decision ([171]), the Commission mentioned as legal basis the Public Private Partnership law that includes similar provisions, does not mean either that the Commission assessed implicitly these provisions. Finally the Thessaloniki Submerged Tunnel case ([172])

([167]) See for instance Judgement of the General Court in Case T-445/05, *Assogestioni et Fineco Asset Management/Commission*, para 145, and quoted case-law.
([168]) See Commission decision in Case NN 27/96 Spata International Airport.
([169]) See Commission decisions in cases N 508/07 Ionia Odos, N 45/08 — Motorway Elefsina-Korinthos-Patras-Pirgos-Tsakona, N 566/07 Korinthos-Tripoli-Kalamata Motorway and Lefktro-Sparti Branch, N 565/07 Central Greece Motorway, N 633/07 Maliakos-Kleidi section of Patras-Athens-Thessaloniki-Evzona Motorway concession contract, N 134/07 Thessaloniki Submerged Tunnel concession contract.
([170]) Joined Cases T-427/04 *France* v *Commission* and T-17/05 *France Telecom* v *Commission*, ECR [2009] II-0435, paragraphs 264-266, C-474-09 P to C-476/09 P, *Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya, Territorio Histórico de Álava — Diputación Foral de Álava, and Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa* v *European Commission*, [2011] I-113, paragraph 70.
([171]) SA. 32866 (11/N) — Greece — Broadband development in Greek rural areas.
([172]) See Commission decision in Case N 134/07 Thessaloniki Submerged Tunnel concession contract.

does not seem relevant as the tax measures were not included in the assessment either and at any case the successful bidder refrained from taking advantage of the option, included in the tender documents, to benefit from operational subsidies.

(237) Moreover the Greek authorities and PCT argue that the Commission has maintained its position as regards its relevant assessment in these cases following the issuing in December 2013 of its State aid decisions concerning the amendments to four of such projects ([173]). The Commission notes in this respect that these decisions do not even refer to any fiscal provisions, as their object is different, let alone an assessment on behalf of the Commission.

(238) In view of the above it cannot be considered that the Commission 'approved' similar provisions in the past and that such 'approval' could be invoked by the beneficiary in order to exclude the existence of State aid ([174]).

(239) Hence, the Commission concludes that the measures examined above (with the exception of measure in 5.3.9) are selective advantages which are not justified by the nature and general scheme of the tax system.

5.5. **Distortion of competition and effect on trade**

(240) The measures above that constitute selective advantages, may constitute State aid if they distort or threaten to distort competition and in so far as they affect trade between Member States. According to settled case-law, a selective advantage granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ([175]). A distortion of competition within the meaning of Article 107 TFEU is thus assumed inasmuch as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([176]).

(241) As the Greek state has tendered out at international level the concession that Cosco undertook, it has opened up the port market services to competition. As different undertakings from several Member States may compete for the adjudication of port concessions, the grant of the specific fiscal advantages to PCT that were not available to all possible candidates at the time of the tender can be considered as at least potentially distorting competition.

(242) Already when PCT took over the concession agreement, the Port of Piraeus had substantial capacity (1,6 M TEUs) and was considered as potentially competing with other EU ports ([177]). For example, the Port of Thessaloniki, the Port of Constanza in Romania, the Port of Koper in Slovenia and a number of ports in Italy may be considered as direct or at least potential competitors of PCT. According to the concession agreement, Piers II and III of the Container Terminal that are exploited by PCT are foreseen to reach a very important capacity (up to 3,7 M TEUs) up to 2015. This new capacity, the creation of which has been facilitated by the measures at stake, has the potential to affect both competition and trade between Member States, as different ports in several Member States may also have the same clients as PCT and are at least potentially in competition with it.

([173]) See Decision C(2013) 9253 final — State aid SA.36894 concerning the reset of the Ionia Odos S.A. project; Decision C(2013) 9275 final — State aid SA.36877 concerning the reset of the Aegean Motorway S.A. project; Decision C(2013) 9253 final — State aid SA.36878 concerning the Olympia Odos S.A. project; and Decision C(2013) 9274 final — State aid SA.36893 concerning the Central Motorway (E65) project.

([174]) In any case, the Commission further understands that the tax exemptions in favour of PCT were only introduced in the law that ratified the concession agreement and not in the concession agreement itself, because PPA has no competence to grant tax exemptions. Contrary to the cases invoked by the Greek authorities and PCT, the concessioner in this case was supposed to undertake exclusively and solely the investment project, without any state or public support of any kind.

([175]) Case 730/79 Philip Morris [1980], ECR 267, paragraph 11, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta Mauro and others* v *Commission*, [2000] ECR II-2325, paragraph 80.

([176]) Joined Cases T-298/97, T-312/97, etc. Alzetta [2000] ECR II-2325, paragraphs 141 to 147, Case C-280/00, Altmark Trans [2003] ECR I-7747.

([177]) See Commission decision of 18 December 2009 on Case C 21/09 (ex N 105/08, N 168/08 and N 169/08 — Greece — Public financing of infrastructure and equipment at the Port of Piraeus (OJ C 402, 29.12.2012, p. 25, paragraphs 90 and 91).

(243) Moreover, the Commission notes that transhipment container terminals, like the one of the beneficiary, are much more exposed to competition, including from third countries (in the Mediterranean area). As an example, due to this investment, Cosco has concentrated its Mediterranean shipping operations in Piraeus instead of Italian and Spanish transhipment ports that it was using before. PCT competes with other EU ports and will increase its position in the market in the next years.

(244) As the fiscal measures at stake secured additional cash flow to PCT, in particular at the first stages of the construction project, they helped Cosco to expand its activities in the EU market of port services and potentially strengthened its competitive position in this market.

(245) It results from the considerations above that the measures at stake are likely to affect trade between Member States and distort or threaten competition. According to the Court's standard case-law, it is sufficient to establish that the aid in question is likely to affect trade between Member States and threatens to distort competition ([178]). In view of the above analysis, the Commission does not consider it necessary to further define the exact range of the services or geographic market in question or analyse in detail its structure and the ensuing competitive relationships ([179]).

(246) As regards the argument presented by PCT that the assessment of the effect of the fiscal measures on competition and trade would require an examination of the equivalent tax systems applying within the relevant markets, the Commission notes that according to settled case-law ([180]) the fact that a Member State seeks to approximate by unilateral measures the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid.

Conclusion

(247) In view of the above the Commission concludes that all the tax advantages granted to PCT constitute State aid within the meaning of Article 107(1) TFEU with the exception of the alleged exemption from the general rules of forced expropriation.

6. **ASSESSMENT OF COMPATIBILITY OF THE MEASURES**

(248) The Greek authorities and PCT argue that the aid measures should be considered compatible with the internal market on the basis of Article 107(3)(a) and 107(3)(c) TFEU, as well as the EU regional aid rules.

6.1. **Applicability of Regional aid guidelines 2007-2013** ([181]) **('RAG')**

(249) The Commission notes that the legal right of PCT to make use of the aid measures was conferred on it upon publication in the Official Journal of the law including the measures, i.e. on 30 March 2009 ([182]). Thus the Commission will assess the measures on the basis of RAG 2007-2013 that were applicable in March 2009.

(250) The Commission notes that the aid measures under assessment consist in uncapped fiscal advantages that cannot be considered as investment aid but as operating aid under regional aid rules. RAG 2007-2013 may exceptionally and in very limited cases allow operating aid ([183]) in regions eligible under the derogation in Article 107(3)(a)

([178]) See Joined Cases T-298/97, T-312/97, etc. Alzetta [2000] ECR II-2325 paragraph 95, and Case 730/97 Philip Morris [1980] ECR 267, paragraphs 9 to 12.
([179]) See among others Joined Cases Alzetta, paragraph 95.
([180]) See Case C-372/97, *Italy* v *Commission* [2004] ECR I-3679, paragraph 67 and the case-law mentioned therein.
([181]) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).
([182]) See Article 8 of Law 3755/2009 that determines the start of validity of this Law.
([183]) See Chapter 5 of the RAG 2007-2013 and Commission decision of 13 February 2008 in Case C 7/08 (ex N 655/07) — Germany — Guarantee scheme of the Land of Saxony for working capital loans.

TFEU. The Port of Piraeus is situated in the region of Attiki that in March 2009 was a region eligible for regional aid under Article 107(3)(a) TFEU, as a 'statistical effect' region ([184]). Thus it has to be examined whether the aid measures comply with the conditions of operating aid set out in the RAG. Operating aid under the RAG 2007-2013 may be allowed provided that it is justified in terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. Moreover operating aid should in principle be granted in respect of a predefined set of eligible expenditure or costs ([185]) and limited to a certain proportion to these costs. It also has to be temporary and reduced over time and should be phased out when the regions concerned achieve real convergence with the wealthier areas of the EU.

(251) The Commission notes that given the nature of the aid and the handicaps it seeks to alleviate, in principle ad hoc aid, could not tackle such handicaps, as it is highly unlikely that granting operating aid to one undertaking would tackle the handicaps in a holistic way. Moreover, the justification put forward by the Greek authorities and PCT for the aid measures, i.e. the development and the modernisation of the sea container terminal transport sector, through the creation of legal certainty of the fiscal regime applicable to the investment project, cannot be considered as handicaps related to the region concerned that would need to be alleviated. Moreover, even if the Commission accepted such justification as pertinent in this case, there is no predefined eligible expenditure related to such handicaps and consequently aid amount. Moreover the aid measures are not digressive in time and were not meant to be phased out when the region of Attiki would become a 'c' region on 1 January 2011 ([186]). Therefore the aid measures cannot be considered compatible on the basis of the RAG 2007-2013.

6.2. **Direct application of Article 107(3)(c) TFEU**

Objective of common interest

(252) In its communication entitled *Sustainable Future for Transport: Towards an integrated, technology-led and user-friendly system* ([187]), the Commission underlined that the development of ports and intermodal terminals is key to achieving an integrating and intelligent logistic system in the EU. In the communication on *Strategic Goals and Recommendations for the Maritime Transport Policy until 2018* ([188]), the Commission underlines that providing new port infrastructures, as well as improving the use of the existing capacities, is essential to ensuring that EU ports can cope efficiently with their gateway function.

(253) According to Regulation (EU) No 1315/2013 of the European Parliament and of the Council ([189]), the TEN-T could be best developed through a dual-layer approach, consisting of a comprehensive network and a core network. The comprehensive network constitutes the basic layer of the new TEN-T. It consists of all existing and planned infrastructure meeting the requirements of the TEN-T Regulation. The core network should constitute the backbone of the development of a sustainable multimodal transport network, should stimulate the development of the entire comprehensive network and be in place by 2030 at the latest. The port of Piraeus is one of the seaports included in the EU core network.

(254) Within this context, the port of Piraeus is one of the biggest and most significant in the Mediterranean Sea and its operation is key to the development of Greece's economy and important for the development of the EU transport policy objectives. The investment that PCT undertook has developed a part of the Piraeus port to a modern sea container terminal by enhancing its efficiency, storage capacity, ability to service new generation freight ships and interconnectivity. Under the concession agreement it is expected that the capacity will increase from at least 300 000 TEU during the first year of the concession period to at least 3 700 000 TEUs after the eight years of the concession period. Thus it can be considered that investment in port facilities featured with elements of State aid can contribute to an objective of common interest.

([184]) See Commission decision of 31 August 2006 in Case N 408/06 — Greece — Regional aid map 2007-2013 (OJ C 286, 23.11.2006, p. 5).
([185]) For example replacement investment, transport costs or labour costs.
([186]) See footnote 184.
([187]) COM(2009) 279/4, paragraph 46.
([188]) COM(2009), 8.
([189]) Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p. 1).

Necessity and incentive effect

(255) According to the Commission case practice in this field, the necessity of the aid is established if it can be proven that the amount of the inflow of net revenues generated by the investment project is not sufficient to remunerate the investment costs of the investor. In essence if these revenues are not sufficient the project would not have been undertaken by a private investor without public support and State aid would be considered necessary.

(256) The Greek authorities and the beneficiary argue that the aid measures were necessary because without them the project finance arrangements that PCT would have achieved would have been much more onerous and might have potentially jeopardised the implementation of the project.

(257) The Commission has consistently considered that port infrastructure projects require considerable capital investments that can only be recovered in the very long term and their economic viability may not always be ensured without public support. However, in this case, PPA, the awarding authority that conducted the tender procedure for the selection of the concessionaire of the Port of Piraeus, had already estimated that the project's economic viability would be ensured, something that is proven by the fact that according to the tender documents the selected beneficiary was meant to undertake the whole investment on its own expenses. In addition, PCT undertook the extension of Pier II and the construction of Pier III, by assuming on its own all the investment costs that this project would entail. When it submitted its bid that was accepted by PPA, it had estimated that its investment in the Port of Piraeus would be profitable for it without the need of any public support, as otherwise it would not have submitted the bid or it would have submitted it with a reservation as regards the profitability of the project in the absence of a specific fiscal treatment. Moreover, the fact that Cosco aimed at turning the port of Piraeus into the first container terminal in the Mediterranean Sea demonstrates the potential of this port, as well as the profitability of the investment project that was never questioned ([190]). Therefore it cannot be considered that the measures under examination were necessary to ensure the economic viability of the investment project.

(258) The fact that the China Development Bank waited for the adoption of the ratification law does not demonstrate the necessity of the aid measures. Given that the concession contract had to be ratified by law in line with the Greek legislative practice, any bank would have waited for the adoption of the ratification law, without this being specifically related to the grant of the measures under examination. Moreover the protection requested by the European Investment Bank against general or discriminatory change in law, does not prove either the necessity of the aid.

(259) PCT only started the construction works after the ratification of the concession contract by law. But this is also related to the fact that all public contracts of this nature have to be ratified by law. Any company in the position of PCT would have waited for the ratification of the contract in any case. In addition, Cosco had committed to implement the project already at the time it submitted its bid and this took place before the adoption of the granting act, i.e. the ratification law. Once the submission of the offer was made, Cosco knew that it was legally bound to implement the investment, if it was selected by PPA as a successful bidder.

(260) Moreover, the beneficiary never invoked the existence of a funding gap that needed to be covered by the measures under examination. The fact that PCT only quantified the amount of the aid after the opening of the formal investigation procedure by the Commission, i.e. almost 5 years after the signature of the concession contract, demonstrates that the amount of aid was not taken into consideration by PCT in its initial business plan, and in particular when Cosco decided to undertake the investment. As regards the Commission decisions invoked by the beneficiary, where the Commission approved non-notified aid in cases where the aid had not been quantified in advance, the Commission notes that the cases mentioned are not applicable in the current case, as they do not concern funding of port infrastructure, where a specific funding gap has to be determined even for an *ex post* analysis of compatibility. Consequently, this aid cannot be considered necessary for the implementation of the project, as PCT would in any case undertake it.

([190]) Furthermore, the economic viability and profitability of the investment project has already been confirmed by the fact that PCT's investments in the port of Piraeus have already very positive financial results.

(261) In any case, as already explained above, the measures under examination consist in uncapped fiscal advantages that constitute operating aid which is normally prohibited. Such aid can only be accepted in exceptional specifically determined conditions. In the context of the compatibility analysis of the funding of port infrastructure project on the basis of Article 107(3)(c), this type of aid cannot be considered as compatible.

(262) The beneficiary argues that the market failure in this case consists in the need to ensure stability, legal certainty and flexibility as regards the fiscal framework of the implementation of the concession contract. In this respect, the Commission notes that in accordance with its constant practice, the need to ensure stability, legal certainty and flexibility cannot be considered as a market failure, or as a valid basis of compatibility of aid measures. Moreover and most importantly, the absence of such a 'framework' did not deter Cosco from undertaking to invest in the Port of Piraeus. Thus the Commission considers that the objective to ensure stability, legal certainty and flexibility cannot prove the necessity or the incentive effect of the aid measures under examination.

(263) In view of the above the Commission considers that the aid measures granted to PCT were not necessary, as it has not been proven that Cosco would have abandoned the implementation of the project in their absence. Thus the aid measures constitute operating aid, relieving PCT from costs that it would normally have to bear and cannot be declared compatible. In view of this conclusion, the Commission does not consider it necessary to examine further the other conditions of Article 107(3)(c), on proportionality and distortion of competition, in order to conclude that the aid measures are incompatible.

7. **RECOVERY OF THE AID**

According to established case-law, aid regarded by the Commission as being incompatible with the common market has to be recovered in order to re-establish the previously existing situation ([191]). As the measures above constitute unlawful and incompatible State aid, the Commission should order the recovery of unlawfully granted aid that is incompatible with the internal market, unless the beneficiary can have legitimate expectations or rely on a general principle of EU law ([192]).

Quantification

(264) The quantification of the aid provided by the Greek authorities and the beneficiary was based on the hypothetical assumptions of PCT's business plan in 2009. Thus they cannot serve as a basis for the exact quantification of the aid amounts.

(265) In the absence of appropriate information on behalf of the Greek authorities, the present decision does not establish the exact amount of aid received by PCT for each one of the measures. However, the Commission considers that the following methodology should be followed by the Member State in order to determine the amount of incompatible State aid to be recovered from PCT:

— Exemption from income tax on interest accrued until the date of the commencement of operation of Pier III

(266) This measure involves aid to PCT that is equal to the income tax which PCT would normally have to pay on the accrued interests until the commencement of operations of Pier III and from which PCT was exempted based on Article 2(1) of the Law.

(267) The Greek authorities indicated that PCT did not benefit from this provision in practice, as it included in its taxable income the amount of interest accrued on cash deposits (and thus this income was subject to income tax). They should therefore provide evidence that this is indeed the case.

([191]) See for instance Case C-348/93, *Commission* v *Italy*, [1995] I-00673, paragraph 26, and the case-law mentioned therein.
([192]) See for instance Joined Cases T-239/04 and T-323/04, *Italy and Brandt Italia SpA* v *Commission*, [2007] II-3265, paragraphs 153-154 and the case-law mentioned therein.

(268) In case PCT made use of this provision, the Greek authorities should first provide the following dates:

— the date since when PCT was exempted from income tax on interest accrued,

— the date when the operation of Pier III started.

(269) The Greek authorities should take as basis the relevant deposits of PCT in the Greek banks each year (following the date of exemption from income tax on interest accrued), the relevant interests that derived each year and apply to them the income tax rate applicable each year.

— Right to VAT credit refund irrespective of the date of completion of the construction work or of its parts

(270) This measure involves aid to PCT that is equal to the full amount of the VAT refund that PCT is allowed to keep (under this provision) if 5 years after the realisation of the related expenditure, the project did not start.

(271) The Greek authorities have indicated that PCT has already put in use the investment project within 5 years from the start of the project, so the 5 year exemption period did not result to a specific amount to be recovered.

(272) However, the Greek authorities have not submitted any proof demonstrating that the construction of the project has been completed and that the investment was put in use. Therefore, the Greek authorities should provide proof demonstrating the project's completion of construction. In addition, they should also provide the list of invoices related to this construction and the dates when PCT received VAT refunds for these invoices.

(273) In case the construction of the project is not complete, the fifth anniversary from the date of refund of VAT for each invoice related to this construction would be the date of granting aid. The aid in each case would be the amount of VAT refunded.

— Broad definition of investment good => direct right to 90 % VAT credit refund without audit

(274) This measure involves aid to PCT that is equal to the interests accrued on VAT refunded for all expenses other than for tangible goods (relating to the investment good), from the moment the refund was put at the disposal of PCT up to the moment PCT would have been entitled to such refund, namely 3 years later or up to the moment where PCT would have been able to offset its VAT input (concerning these expenses) against output VAT.

(275) The Greek authorities should make a distinction between the VAT relevant to tangible assets that fall within the scope of the notion of investment good and the VAT input related to other works and services. This VAT input will have then to be calculated. On the basis of the amount deriving from this calculation the Greek authorities will have to calculate the interest that the State should ask for the advance cash payment before the period of 3 years, up to which PCT could in any case be refunded. These interests must be calculated for the period from the moment the refund was put at the disposal of PCT up to the moment PCT would have been entitled to such refund, namely 3 years later. If it can be proven that it could be refunded before the 3-year period, the relevant interest will be calculated up to the moment where PCT would have been able to offset its VAT input (concerning these expenses) against output VAT.

— Right to arrear interests without temporal or procedural requirements in case the State does not refund VAT

(276) This measure involves aid to PCT that is equal to the interests which PCT can request (under this provision) from the Greek state once 60 days have passed from the moment it filed the relevant fiscal declaration (to request the VAT refund), while other companies in a similar situation would not be entitled to interests.

(277) PCT indicated that it did not make use of this provision. However, if this is not the case and such interests have indeed been paid by the State, then the Greek authorities should indicate the exact interests paid together with the dates when these payments took place. These dates would be the granting dates and the corresponding interests paid would be the aid amounts granted on these dates.

— Loss carry-forward without temporal limitation

(278) The aid in this case would be the additional corporate tax that PCT would have to pay if no loss carry-forward had taken place beyond the temporal limitation of five years. In other words, the aid is equal to the difference between the income tax that PCT actually paid and the income tax that it would have paid in the absence of the possibility to carry forward its losses more than 5 years after these losses occurred.

(279) The granting date in this case would be the date when the tax would have been due. The Greek authorities should submit data demonstrating the fiscal losses PCT had each year and whether they were carried forward for a period of more than 5 years. If this is the case, then they will have to calculate the impact of these losses on its taxable base and consequently the corresponding income tax that PCT did not pay due to this carry-forward.

— Choice among three depreciation methods

(280) PCT indicated that it made use of the fixed straight line method. The Greek authorities should provide proof that only the fixed straight line method has been used and not provide any possibility to change to the other depreciation methods. If any other depreciation method has been used, the aid would be the difference between the corporate tax PCT would have to pay while using the fixed straight line depreciation method and the corporate tax while using any of the other two methods. The granting date of the aid would be the date when the additional tax would have been due.

— Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the work

(281) The Greek authorities should indicate whether PCT has contracted other loan agreements than the ones mentioned with Cosco. As regards these agreements, the aid granted to PCT would be equal to the corresponding stamp duties applicable for these loans. The dates of granting the aid amounts would be the dates when these stamp duties were due.

— Exemption in favour of PCT's creditors from taxes, stamp duties, contributions and any rights in favour of the State or third parties that they would normally have to pay on contracts transferring the obligations and rights resulting from PCT's loan agreements

(282) This measure involves aid to PCT's creditors, in particular Cosco which is equal to the amount of stamp duty that Cosco would normally have to pay, under the generally applicable rules, in case of transfer of a loan contracted with PCT to a third party.

(283) According to the Greek authorities, Cosco has given two loans to PCT in 2009 which were paid out in 2011. On this basis, the Commission has no reason to believe that such a transfer took place.

(284) The Greek authorities should clarify if this provision has been used. If it is the case then they will have to determine the stamp duty that would be due for such legal acts.

— Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code

(285) This measure provides to PCT an advantage which is equal to the stamp duty that it would have to pay in such circumstances and from which it is relieved. The Greek authorities should indicate if this provision has been used. If it has been used then they will have to identify the aid amounts granted to PCT and their corresponding granting dates in the same way as described for the measures above.

— Following PCT's request, preferential regime for foreign investments

(286) The Greek authorities have indicated that this regime has not been used. Nevertheless, as mentioned in recital 220, PCT has a right to request and to obtain this preferential regime.

Timing action

(287) Within two months following the notification of this Decision to the Republic of Greece, Greece must inform the Commission of the measures planned or taken:

i. indication of the measures that indeed may fall under the *de minimis* regulation and submission of the relevant documentation proving this;

ii. indication of the measures that have been recovered or of the recovery planning put in place.

(288) Within four months following the notification of this Decision to the Republic of Greece, Greece must inform the Commission that it has implemented the recovery.

(289) In principle this will be the final deadline for recovery.

(290) In the cases where PCT received an advantage not exceeding thresholds specified in the Commission Regulation (EC) No 1407/2013 ([193]), such advantage is not considered State aid if all the conditions set by this Regulation are fulfilled, and is not subject to recovery.

(291) The sums to be recovered should bear interest from the date on which they were put at the disposal of PCT until their actual recovery. The interest should be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([194]) and to Commission Regulation (EC) No 271/2008 ([195]) amending Regulation (EC) No 794/2004.

8. **CONCLUSION**

(292) The Commission finds that Greece has unlawfully implemented the following aid measures in breach of Article 108(3) of the Treaty of the Functioning of the European Union:

1. Exemption from income tax on interest accrued until the date of the commencement of operation of Pier III;

2. Right to VAT credit refund irrespective of the stage of completion of the contract object; definition of the notion of 'investment good' for the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request;

([193]) Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

([194]) 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).

([195]) 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).

3. Loss carry-forward without any temporal limitation;

4. Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III;

5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the project;

6. Exemption from taxes, stamp duties, contributions and any rights in favour of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom;

7. Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code;

8. Protection under the special protective regime for foreign investments.

(293) The Greek authorities did not exempt PCT from rules concerning forced expropriation and therefore they granted no aid to PCT in this context.

(294) All the aid measures identified above are incompatible with the Treaty and will have to be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The following State aid measures in favour of Piraeus Container Terminal SA and its creditor, Cosco, unlawfully put into effect by Greece in breach of Article 108(3) of the Treaty on the Functioning of the European Union, are incompatible with the internal market:

1. Exemption from income tax on interest accrued until the date of the commencement of operation of Pier III;

2. Right to VAT credit refund irrespective of the stage of completion of the contract object; definition of the notion of 'investment good' for the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request;

3. Loss carry-forward without any temporal limitation;

4. Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III;

5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the project;

6. Exemption from taxes, stamp duties, contributions and any rights in favour of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom;

7. Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code;

8. Protection under the special protective regime for foreign investments

Article 2

The Greek authorities did not grant State aid by exempting Piraeus Container Terminal SA from rules concerning forced expropriation.

Article 3

1. Greece shall recover the incompatible aid granted referred to in Article 1 from PCT and its parent company Cosco.

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

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

4. Greece shall abolish all provisions that allow the continuation of the measures referred to in Article 1 with effect from the date of adoption of this Decision.

5. Greece shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

Article 4

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

2. Greece shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Greece shall submit the following information:

(a) the total amount (principal and recovery interest) to be recovered from PCT and its parent company Cosco;

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

(c) documents demonstrating that PCT and its parent company Cosco have been ordered to repay the aid.

2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted 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 recovery interest already recovered from the beneficiary.

Article 6

This Decision is addressed to Greece.

Done at Brussels, 23 March 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

ISSN 1977-0677 (electronic edition)
ISSN 1725-2555 (paper edition)

Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

EN