II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 20 October 2004**

**on State Aid implemented by Germany for Landesbank Berlin — Girozentrale**

*(notified under document number C(2004) 3924)*

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(2006/736/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on the Member State and other interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

### I. PROCEDURE

(1) The subject of these proceedings is the transfer, by the *Land* of Berlin, of Wohnungsbau-Kreditanstalt Berlin, with its assets, to Landesbank Berlin — Girozentrale. There are a further six cases in which proceedings have been initiated against Germany in connection with transfers of assets to Landesbanks, and in particular to Westdeutsche Landesbank — Girozentrale ('WestLB').

(2) By letter of 12 January 1993, the Commission asked Germany for information on the circumstances and reasons which had given rise to a capital increase in WestLB through the incorporation of the housing organisation Wohnungsbauförderanstalt ('WfA') and on similar increases in the own funds of the Landesbanks of other *Länder*. Germany replied in March and September 1993, providing a description of the transfer of Wohnungsbau-Kreditanstalt Berlin to Landesbank Berlin — Girozentrale. The Commission requested further information in November and December 1993, which Germany provided in March 1994. Berlin was explicitly mentioned in the first of the two requests.

(3) By letters of 31 May and 21 December 1994, the Bundesverband deutscher Banken e.V. ('BdB'), an association representing private banks established in Germany, informed the Commission that, as at the close of 31 December 1992, Wohnungsbau Kreditanstalt Berlin ('WBK') had been transferred, with its assets, to Landesbank Berlin — Girozentrale ('LBB'), while the tasks previously assigned to WBK had been transferred to the recently set-up Investitionsbank Berlin ('IBB'), which was operating as a division of LBB. This increased the own funds at LBB's disposal, and, in the BdB's view, distorted competition in LBB's favour since the parties had not agreed any remuneration which might be in line with the principle of the market-economy investor. In its second letter, the BdB accordingly lodged a formal complaint and called on the Commission to initiate proceedings against Germany under Article 93(2) of the EC Treaty (now Article 88(2)). The complaint also related to similar transfers of assets to Westdeutsche Landesbank, Norddeutsche Landesbank, Landesbank Schleswig-Holstein, Hamburger Landesbank and Bayerische Landesbank. In February and March 1995 and December 1996 several banks associated themselves individually with the complaint lodged by the BdB.

[1] OJ C 239, 4.10.2002, p. 12.

(4) The Commission first examined the transfer of assets to WestLB. In Decision 2000/392/EC finally adopted in 1999 ([2]), it found that the difference between the remuneration paid and the normal market remuneration constituted state aid which was incompatible with the common market, and ordered its recovery. This decision was annulled by the Court of First Instance of the European Communities in a judgment handed down on 6 March 2003 ([3]) for not giving sufficient reasons as regards two of the factors used to calculate the appropriate remuneration, but it was confirmed in all other respects. At the same time as the decision in the present proceedings, and having been informed of an understanding between the complainant and all seven Landesbanks concerned, the Commission is adopting a new decision taking account of the Court's criticisms.

(5) On 1 September 1999 the Commission sent Germany a request for information on the transfers of assets to the other Landesbanks, including LBB.

(6) By letter of 8 December 1999, Germany submitted information on the transfer of WBK to Landesbank Berlin, which it supplemented by letter of 22 January 2001. Representatives of Germany and the Commission also discussed the question of the transfer and possible recovery of any aid in connection with the examination of restructuring aid to Bankgesellschaft Berlin ('BGB'), to which Landesbank Berlin has belonged since 1994.

(7) By letter of 2 July 2002, the Commission informed Germany of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(8) After having requested, and been granted, an extension of the deadline, Germany submitted its comments and provided additional information by letter of 9 September 2002. Further questions were discussed at meetings with representatives of Germany on 27 September 2002.

(9) The Commission decision to initiate the procedure was published on 4 October 2002 in the Official Journal of the European Communities ([4]). The Commission called on interested parties to submit comments. It received comments from a competitor and from the BdB, which it forwarded to Germany for its opinion in November 2002. Germany replied by letter of 16 December 2002.

(10) At the Commission's request, Germany sent further details about the potential aid by letters of 22 and 27 January, 28 February and 19 August 2003.

(11) By decision of 18 February 2004, the Commission approved the restructuring aid for Bankgesellschaft Berlin AG, to which LBB belongs. The decision also covered an agreement concluded on 23 December 2002 by the *Land* of Berlin and the BGB on the treatment of any claims to repayment brought by the *Land* of Berlin and arising out of the state aid case at issue here; this agreement was regarded as restructuring aid ([5]).

(12) By letter of 7 April 2004 the Commission asked Germany for further information on all the Landesbank cases, which Germany sent on 1, 2 and 28 June respectively.

(13) On 31 August 2004 Investitionsbank Berlin (formerly WBK) was hived off from LBB's assets. Germany sent the Commission detailed documentation on the related legal and other provisions on 25 August 2004.

(14) On 27 September 2004 Germany submitted the draft of an understanding between the complainant (the BdB), the *Land* of Berlin and Landesbank Berlin, the signed version of which reached the Commission on 8 October 2004. This understanding covers the appropriate remuneration for the assets transferred to LBB on 1 January 1993. Similar understandings reached in five other cases involving transfers of assets to Landesbanks were also submitted to the Commission.

## II. DETAILED DESCRIPTION OF THE MEASURES

### 1. *LANDESBANK BERLIN — GIROZENTRALE ('LBB')*

(15) LBB was set up in 1990 and, at the same time, the West Berlin Savings Bank (Sparkasse der Stadt Berlin West) was transferred to it by way of universal succession. Shortly afterwards, the East Berlin Savings Bank (Sparkasse der Stadt Berlin) was also transferred to LBB. Since then, the savings bank business in the city of Berlin has been conducted by a separate, legally dependent division of LBB called 'Berliner Sparkasse'.

(16) LBB is a public-law institution (*Anstalt des öffentlichen Rechts*) for which the *Land* of Berlin bears institutional and guarantor liability. At the time of the transfer of WBK at the end of 1992, LBB was solely owned by the *Land* of Berlin and had a balance-sheet total of some DEM 85 billion and just under 7 000 employees. LBB is an all-purpose bank with business in personal and corporate banking (retail banking), real-estate financing and lending to the public sector. It also conducts business abroad. In 1992 its main line of business was the Berliner Sparkasse's retail business.

([2]) OJ L 150, 23.6.2000, p. 1.
([3]) Joined Cases T-228/99 and T-233/99 [2003] ECR II-435.
([4]) OJ C 239, 4.10.2002, p. 12.
([5]) Paragraphs 32 *et seq.* and 141 of the Commission decision on restructuring aid for Bankgesellschaft Berlin AG (not yet published in the Official Journal).

(17) Since 1994 LBB has belonged to the BGB group, a group of institutions set up in that year by merging a number of credit institutions previously owned by the *Land* of Berlin. BGB is the holding company, with an atypical silent partnership which since 1994 has given it about 75 % of the assets and the profits of LBB, with the exception of the central *Land* promotion institution, IBB. In 1998 the *Land*, as LBB's guarantor, made over its claim to a share of LBB's profits to BGB; this made BGB the 100 % beneficial owner. The BGB group had a balance-sheet total of just under €190 billion in 2001, some €175 billion in 2002 and some €153 billion in 2003. LBB's balance-sheet total was some €87 billion in 2001, some €85 billion in 2002 and some €93 billion in 2003. The *Land* of Berlin currently holds about 81 % of the shares in BGB. Other shareholders are Norddeutsche Landesbank with around 11 % and Gothaer Finanzholding AG (Parion insurance group) with around 2 %. Some 6 % of the shares are dispersed among small shareholders.

(18) In 2001 BGB found itself in serious difficulty, mainly as a result of high-risk real-estate transactions in the past; its own funds and core capital ratios were insufficient, which meant that supervisory measures might have to be taken by the Federal Banking Supervisory Authority (Bundesaufsichtsamt für das Kreditwesen — 'BAKred', now 'BAFin') ([6]). In August 2001 it received a capital injection of €2 billion, of which some €1,8 billion came from the *Land* of Berlin and was initially authorised by the Commission as short-term rescue aid. After new risks were identified, BGB received further assistance from the *Land* of Berlin, which, together with the capital investment, was notified to the Commission as restructuring aid and examined in detail by it ([7]).

(19) On 18 February 2004 the Commission closed its investigation and approved aid with a total financial value of some €9,7 billion. Besides the capital injection and the extensive guarantees in the form of a 'risk shield', the decision also covered an agreement concluded on 23 December 2002 by the *Land* of Berlin and the BGB on the treatment of any claims to repayment brought by the *Land* of Berlin and arising out of the present state aid investigation ('repayment agreement') ([8]).

(20) This agreement governs the undertaking given by the *Land* of Berlin that, in the event of a Commission decision requiring repayment in the present case, it would provide as a contribution to LBB's capital a reorganisation grant to the value necessary to prevent the threatened repayment requirement from forcing LBB or the BGB group, or both, to fall below the minimum capital ratios specified in the agreement ([9]). This measure was considered necessary in 2002 in view of the considerable risk represented by possible repayment to the restoration of the BGB group's profitability. It was not possible in the BGB decision to determine the precise financial value of the measure as the present proceedings had not yet been completed. For the purpose of assessing the restructuring aid under the competition rules, and in particular the appropriateness of the compensatory measures proposed by Germany to reduce the group's market presence, the theoretical ceiling for this measure was set at €1,8 billion.

(21) To sum up, the repayment agreement was taken into account as additional aid to the BGB group in setting Germany's compensatory measures, although its scope was restricted to a situation where the Commission ordered repayment and where this resulted in the bank's capital ratios falling below the levels set in the agreement.

2. *TRANSFER OF WBK TO LBB*

(22) The restructuring of the *Land* of Berlin's banking holdings, which culminated in the setting up of the BGB group in 1994, began in 1990 with the setting up of LBB; the savings banks, first of West Berlin and then of East Berlin, were then transferred to LBB. In 1992 IBB was set up by, among others, the *Land* as a public-law institution within LBB which was independent in organisational and economic terms but had no authority to act in its own right; it was to act as the central promotion institution of the *Land*. WBK had until then been an independent public-law institution, with the *Land* of Berlin bearing institutional and guarantor liability for it. It had been assigned a task in the public interest, namely the provision and maintenance of housing. WBK was now to be transferred with its tasks to IBB, which was given broader promotion-related assignments, e.g. in the fields of infrastructure and environmental protection. The transaction took place on 31 December 1992: WBK was transferred to LBB, with all its assets, by way of universal succession.

(23) This increased LBB's nominal capital by the former nominal capital of the WBK worth DEM 187,5 million. This amount was thereafter no longer attributed to IBB's assets. WBK's revenue reserves stood at DEM 1 905 800 million on 31 December 1992. These revenue reserves were and are shown as a special-purpose reserve for IBB.

(24) BAKred set LBB's liable equity capital as at 31 December 1992 at DEM 3 127 714 million, which corresponded to an increase of DEM 1 902 714 million. BAKred took account of the DEM 187,5 million increase in nominal capital and of WBK's revenue reserves without the net

([6]) Since 1 May 2002 following the merger of the banking, insurance and stock market regulators: Bundesanstalt für Finanzdienstleistungsaufsicht (BAFin).

([7]) OJ C 141, 14.6.2002, p. 2.

([8]) Paragraphs 32 *et seq*. and 141 of the Commission decision on restructuring aid for Bankgesellschaft Berlin AG (not yet published in the Official Journal).

([9]) Paragraphs 32 *et seq*. and 141 of the Commission decision on restructuring aid for Bankgesellschaft Berlin AG (not yet published in the Official Journal).

profit for 1992. In the years that followed, IBB's liable equity capital in the form of the special-purpose reserve continued to grow.

3. *CAPITAL REQUIREMENTS UNDER THE OWN FUNDS AND SOLVENCY DIRECTIVES*

(25) The German Banking Act (Kreditwesengesetz, or KWG) was amended for the fourth time in 1993 in line with Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions ([10]) (the 'Solvency Directive') and Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions ([11]) (the 'Own Funds Directive'), which require banks to have a level of own funds equal to 8 % of their risk-adjusted assets. At least 4 percentage points of that amount must consist of what is termed core capital, or 'tier 1' capital, meaning capital items which are at the credit institution's disposal without restriction and immediately in order to cover risks or losses as soon as they arise. The core capital is of decisive importance because additional capital, or 'tier 2' capital, is accepted as underpinning for risk-bearing transactions only up to the amount of the available core capital. Under the fourth KWG Amending Act, German banks had to adapt their own funds to the new requirements by 30 June 1993.

4. *EFFECTS OF THE TRANSFER ON LBB'S CAPITAL BASE*

(26) According to Germany, the new rules were not the reason for WBK's transfer to LBB as the latter clearly met the new capital requirements even without WBK's revenue reserves. However, in the early 1990s a surge in growth was expected as a result of unification especially in Berlin, which would open up the potential for business expansion in the financial sector too. If banks wanted to increase their business volume significantly, a larger capital base was needed, especially in the light of the new solvency rules. The transfer of WBK gave LBB a considerably stronger capital base for its commercial, competitive lending business, allowing it to extend its operations significantly.

(27) LBB paid or pays 0,25 % ([12]) on average for calling on IBB's special-purpose reserve, but only on the amount actually used. Payment is made not to the *Land* of Berlin, but to IBB. Account should be taken of the fact that the part of IBB's special-purpose reserve which could be used as liable equity capital was far higher than the amount actually used. Recourse was had to it for the first time in 1995.

III. **GROUNDS FOR INITIATING THE PROCEDURE**

(28) The starting point for the investigation was the principle of the market-economy investor. According to this principle, the fact that undertakings are publicly owned and receive funding from the public authorities does not in itself constitute state aid. The provision of public money confers an advantage only if own funds are made available to such an undertaking on terms which it would not have obtained under normal market conditions.

(29) The Commission took the view that the investigation in this case therefore had to examine whether the resources had been made available by the *Land* of Berlin on terms which a private investor — an 'investor operating in a market economy' — would also have found acceptable in providing funds to a private company. Such a market investor would not be prepared to provide funds in particular if a normal return could not be expected within a reasonable time from the capital invested.

(30) In the Commission's view, a rate of 0,25 % on average payable on the sums actually used could hardly be regarded as appropriate remuneration for the *Land*, when even the long-term risk-free rate (for 10-year Federal bonds) was a good 7 % in 1992. The Commission also noted that the remuneration was not paid directly to the *Land*, but to IBB, which is a division of LBB even though, as a dependent public-law institution and central promotional institution for the *Land*, it operates as an organisationally and financially separate unit within LBB. Moreover, the sums used, as far as the Commission knew, lay well below the amounts of the special-purpose reserve available to LBB for use as liable equity capital. However, the increased equity base allowed LBB to expand its lending capacity and thus its business.

(31) The Commission established in its preliminary assessment that the data regarding the amount of IBB's capital available for covering liabilities, the amount used and the remuneration paid were incomplete or even unavailable and took as

([10]) OJ L 386, 30.12.1989, p. 14; replaced by Directive 2000/12/EC of the European Parliament and of the Council (OJ L 126, 26.5.2000, p. 1).

([11]) OJ L 124, 5.5.1989, p. 16; replaced by Directive 2000/12/EC.

([12]) 0,25 % before tax and 0,11 % after tax according to a remark in the relevant table submitted for the period 1995-98; however, there is no indication as to which taxes are concerned.

an initial, provisional amount for the transferred and usable funds a figure of 'approximately DEM 2 billion'.

(32) However, the Commission acknowledged that the special-purpose reserve did not provide LBB with any liquidity because, under the Act of 25 November 1992 setting up IBB, WBK's revenue reserve, which now became a special-purpose reserve earmarked for IBB, was to be used in the first place to finance IBB's promotional work, notwithstanding its function as own funds within the meaning of the Banking Act, and LBB could not use the funds transferred directly for its banking business. In order to be able actually to expand its business, LBB therefore had to refinance the additional volume of credit in full on the capital markets, meaning that the *Land* could not expect the same return as a provider of liquid capital could.

(33) As regards the calculation of a remuneration in conformity with the market-economy investor principle, the Commission stated that, at this stage, it intended to apply the methodology set out in Decision 2000/392/EC, while taking into account the specific circumstances of the case in question.

(34) According to this methodology, the appropriate remuneration for the capital usable to underpin the bank's commercial business is calculated starting from the market remuneration for liquid ordinary capital investment. A premium or a discount is then applied, in order to take account of the particularities of the measure concerned (before investor taxes). So as to take into account the liquidity cost arising from the lack of liquidity of the capital investment in question, the net refinancing costs (total refinancing costs minus applicable taxes, in particular corporation tax) are deducted from this rate.

(35) Germany had stated that in the years both before and after the transfer LBB was a high-return institution, with a return on equity stated to be 5,37 % in 1991, 13,5 % in 1992 and 30,83 % in 1993. The Commission commented that the basis for this calculation had not been clarified. Without further information, it was unable to assess this argument regarding the absence of any aid element in the measure. The German authorities had also argued that the *Land* of Berlin had secured proper remuneration for the function of IBB's capital as liable own funds for supervisory purposes on the basis of the *Land*'s sale to BGB of its silent partnership in 1994 and of its claim to profits in 1998, excluding IBB in both cases. However, further details had not been given.

(36) The Commission summed up by stating that it lacked important information for a proper and sufficiently detailed assessment of the capital injection and the remuneration paid. In its decision initiating the formal investigation procedure, it therefore asked Germany to provide this information, including a full statement of all the resources transferred, the amount recognised as liable equity capital for LBB, the take-up and remuneration, the basis on which the remuneration was determined, the basis for the calculation of LBB's return on equity, updated figures and all the factors which, in Germany's opinion, ensured a normal market return.

(37) However, on the basis of the information available, the Commission expressed serious doubts about whether the *Land* of Berlin had received a normal market remuneration or rate of interest for the transfer of some DEM 2 billion, almost all of which appeared to be available to LBB as a liable capital base and which placed it at an advantage over its competitors. The Commission drew the provisional conclusion that it was likely that competition was being, or might be, distorted and that, in view of the increasing integration in the financial services sector, trade between Member States was being affected. The measure therefore probably constituted state aid within the meaning of Article 87(1) of the EC Treaty. Since none of the exemption clauses contained in Article 87(2) and (3) of the EC Treaty were applicable to this case, the Commission supposed that, if aid were present, there was reason to doubt that it was compatible with the common market.

(38) Since neither Germany nor any other legal or natural person had indicated that LBB provided services of general economic interest within the meaning of Article 86(2) of the EC Treaty, the Commission was unable to conclude that the aid could be approved under that provision. In the absence of any change in this situation, it assumed that this point would not be relevant for a final decision on an assessment of the measure at issue.

(39) The Commission also explained that, in making its preliminary assessment and in accordance with Article 1 (b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [13], it had assumed that, inasmuch as it constituted state aid, the measure was new and not existing aid. In this connection, it also referred to Article 15(2) of the above Regulation, pointing out that the limitation period had been interrupted by the actions described in the decision initiating the procedure, such as the Commission's letters dated 12 January, 10 November and 13 December 1993 and 1 September 1999, the decision initiating the procedure in this case, as well as the decision initiating the procedure and Decision 2000/392/EC closing the procedure in *WestLB*. Since the potential aid had not been notified and had been effective since its implementation, the Commission also found that the decision to initiate the procedure added nothing to the suspensory effect of the third sentence of Article 88(3) of the EC Treaty with regard to Germany's obligation to refrain from putting the measure into effect until such time as the Commission has reached a final decision.

[13] OJ L 83, 27.3.1999, as amended by the 2003 Act of Accession.

## IV. COMMENTS FROM GERMANY

(40) In its comments, Germany began by outlining the reasons for the transfer of the former WBK (later IBB), stating that the *Land*'s objectives at the time were geared towards establishing a 'strong banking group' in the interests not only of the merged credit institutions but also of the *Land* as owner and of its banking sector. It again stressed that for LBB, unlike in the WestLB case, satisfying the capital ratios under the new solvency rules played no role in the transfer, as demonstrated by the fact that LBB did not have recourse to IBB's (formerly WBK's) liable equity capital until late 1995.

(41) Germany confirmed that DEM 1,902714 million of LBB's liable equity capital determined by the banking regulator as at 31 December 1992 corresponded to the increase brought about by the transferred funds. DEM 187,5 million of that amount corresponded to the increase in LBB's nominal capital ([14]) and some DEM 1,715214 million corresponded to WBK's revenue reserves, without the net profit for the year of DEM 190,586 million. As at the close of 31 December 1992, so with effect on 1 January 1993, all WBK's responsibilities were transferred to IBB, which was itself transferred to LBB. The transferred capital and special-purpose reserve were available to LBB for use as liable core capital as at the close of 31 December 1992 or on 1 January 1993.

(42) According to Germany, in the years which followed, IBB's special-purpose reserve continued to grow. However, it was not fully available to LBB since part of it was needed each year to underpin IBB's promotional activities. Germany submitted precise data for each year from 1993 to 2003 (which can be found in the table at paragraph 142).

(43) With IBB's hive-off from LBB on 1 September 2004, the special-purpose reserve was transferred back to the *Land* of Berlin, and €1,1 billion of it was transferred to two silent partnerships held by the *Land* in LBB.

(44) IBB's nominal capital of DEM 187,5 million incorporated at the time remained in the nominal capital of LBB. LBB was in turn sold to BGB in 1994 (75,01 % of the shares) and 1998 (24,99 % of the shares).

(45) Germany also completed the other data. It again stated that only part of the special-purpose reserve had actually been used to cover liabilities. The amount taken up in this way, starting in December 1995, had varied between about DEM 212 million in 1995 and over DEM […] (*) billion in recent years. The remuneration paid to IBB for the amounts used as of December 1995 (between a good DEM 1 million for 1995/96 and DEM […] million in 2001) was calculated monthly on the basis of an interest rate which ranged over the period from 0,2 % (1998) to 0,35 % (1996). The precise figures provided by Germany can be found in the table at paragraph 149.

(46) As the basis for determining the remuneration for any use made of IBB's special-purpose reserve, Germany provided a management board resolution dating from June 1993. This resolution states that '… remuneration should be paid to Investitionsbank Berlin for this capital charge (take-up) in an amount equivalent to the cost of raising subordinated liable capital'. This resolution was given practical effect in 1995, when the remuneration was equated to a subordination premium. The reason given was that LBB could have raised alternative subordinated capital on the market which would have been fully available not only in its guarantee function but also in an earnings function.

(47) However, since the IBB special-purpose reserve performed only a guarantee function, the difference between the interest rate for ordinary outside capital, which does not perform that function, and capital which also performs a guarantee function was set as the 'price' for the utilisation function. This premium was calculated in basis points by comparison with LIBOR (London Interbank Offered Rate) on the basis of specific terms or external market data for subordinated loans. The bases for the calculation and statistical data were attached.

(48) Germany justifies the decision to require remuneration only for the part of the IBB special-purpose reserve actually taken up *inter alia* on the grounds that the reserve was available primarily to IBB and that, if it were insufficient, it was first LBB which was obliged to reduce its risk assets or raise subordinated capital on the market. As owner of IBB, the *Land* of Berlin was entitled to withdraw parts of the special-purpose reserve at any time.

(49) Germany also commented in this connection that the liquidity of the special-purpose reserve was tied up in IBB's existing business and was not available to LBB for financing purposes. IBB had to underpin its lending itself with own funds and, in so doing, to have recourse to the special-purpose reserve. Germany stated that, in the light of these specific factors, WBK's assets could not be equated with freely available financial assets and that, therefore, only the guarantee function and thus the business expansion function were at issue.

(50) Whether the remuneration was paid to the *Land* or to IBB was immaterial here since the *Land* as guarantor would, in any event, profit from both IBB and LBB, either through LBB's increase in value and distribution of profits or through inflows into IBB's special-purpose reserve, on which the *Land* had a claim.

([14]) This amount was no longer attributed to assets.

(*) Confidential information, hereinafter […].

(51) Besides these comments on the direct remuneration, Germany also argued that it was not a factor, or not the only factor, in an investment decision and that 'in accordance with the case law, … an investor who does not hold or seek to hold a significant share in the relevant company but who is interested in a rapid return on his investment must be distinguished from investors geared to the long term, such as holding companies'. The latter were interested in long-term return expectations and would also take account of strategic considerations.

(52) As sole owner of LBB, the *Land* assumed at the time of the investment that it would benefit fully and directly from the increase in LBB's value brought about by WBK's transfer. Taking the assessment criterion applied by the Commission in Decision 2000/392/EC ([15]) as a basis, 'a financial measure must be considered unacceptable to a market-economy investor if the financial position of the company is such that a normal return (in dividends and capital gains) cannot be expected within a reasonable period of time'. At issue, therefore, were the return expectations at the time of the investment decision.

(53) Germany initially indicated that LBB's return-on-equity ratio was 13,5 % in 1992 and 30,83 % in 1993. These figures, submitted back in 1999, related to the ratio 'earnings before (income) tax/equity capital shown in the balance sheet at the start of the same year'. However, in supplying these figures, Germany had not included IBB's special-purpose reserve in LBB's equity capital from 1993 onwards. At the Commission's request, this was corrected with the sending of data series covering a longer period. For the period 1985-1992 these figures gave an average return on equity of about 13 %.

(54) Germany stated that these figures would fall within the range of values obtained by private German banks in the same period, but it did not initially provide data produced by a similar method for other banks. It subsequently submitted its own calculations based on the published profit and loss statements of 35 German banks ([16]). Taking 'earnings before tax as a percentage of equity capital shown in the balance sheet at the start of the same year', this gave an average return-on-equity ratio for these banks of around 11 % in 1992 and just under 13 % for the period from 1988 to 1992.

(55) Germany also stated that, from a business point of view, earning capacity was a decisive factor in an investment decision and that, in the case of banks, it could best be derived from profit from ordinary business or from operating result as a percentage of equity capital shown in the balance sheet since extraordinary earnings and expenditure would then be excluded. In the years 1990-92 LBB faced extraordinary circumstances, in particular the integration of the East Berlin Savings Bank and the related setting up of its own pension scheme, at the same time as it had to pay a compensation fee for withdrawing from the Federal and *Länder* Pension Institution and to make provision for the general banking risks of the former East Berlin Savings Bank.

(56) As regards obtaining methodologically comparable return-on-equity ratios for other banks in the same period, Germany stated that banks were required only as of 1993 to enter extraordinary result and profit from ordinary business separately in the profit and loss account, and that this cannot be compared with the pre-1993 method, when extraordinary income and expenditure were included, together with other items, under 'other income and expenditure' and therefore could not be identified precisely. For the period pre-1993, Germany submitted its own calculations. In the course of the proceedings Germany also made corrections and additions to the method for calculating LBB's return on equity, in order to render the figures for LBB comparable with the Bundesbank's official survey of German banks. According to Germany, this did not change the basic assessment that LBB's return on equity was in line with the average for the sector.

(57) In Germany's view, all the data showed that, at the time of the capital injection, LBB had a high earning capacity. The *Land* of Berlin was the sole owner and would alone benefit from the bank's commercial success, whether in the form of dividends or an increase in value. In this respect, the *Land* would not have to share the expected increase in return with other shareholders and the almost 'intra-group' investment was sound conduct from the point of view of an investor operating in a market economy. The question of whether and how large a remuneration was paid by LBB for the capital injection was therefore irrelevant to an assessment of the transfer's market-economy status.

(58) According to Germany, the Commission expressly laid down this assessment criterion in Decision 2000/392/EC: 'Therefore, one way of ensuring an adequate return on the capital provided would have been to increase the *Land*'s participation in WestLB accordingly, provided that the bank's overall profitability corresponds to the normal rate of return that a market-economy investor would expect

([15]) Paragraph 162 of the Decision, see footnote 2.

([16]) Profit and loss statements published in the Hoppenstedt company database; the 35 banks selected include 4 large private banks, 5 other private banks, 17 public-sector institutions, 2 cooperative banks and 7 mortgage-lending institutions.

from his investment. This would have avoided the discussion of whether the 0,6 % rate of remuneration is appropriate. However, this course was not adopted by the *Land* ([17]).'

(59) In this connection, Germany also stated that LBB's increase in value as a result of WBK's assets benefited the *Land* after LBB's incorporation into BGB. The transfer, undertaken in three stages in 1994 and 1998, of 100 % of the beneficial ownership in LBB to BGB was carried out on the basis of expert reports by various chartered accountants and one investment bank on the value of the *Land*'s silent partnership in LBB and on whether the quid pro quo — the BGB shares transferred, including in relation to other shareholders — equated to an acceptable market price. Germany provided relevant extracts from these reports and the related correspondence with the accountants. According to these documents, the value of LBB was set at some DEM 3,5 billion in 1993 (excluding IBB itself, but taking account of LBB's higher core capital ratio as a result of the special-purpose reserve) and, by a further expert, at just under DEM 6 billion at 31 December 1997.

(60) Germany also suggested, in the alternative, that the method used by the Commission in Decision 2000/392/EC was faulty in that it assumed comparability with liquid ordinary capital investment. This approach failed to take account of the particularities of the transaction at issue in these proceedings. It was proper to use comparable equity instruments as a basis for calculating even the starting amount. While this might be difficult, as the Commission had explained in the WestLB case, the difficulties would not be overcome by using a completely unsuitable equity capital instrument, almost as a 'way around' the problem.

(61) It was also mistaken to use average return as a benchmark. Only a return below the range available to investors for assessment purposes was no longer acceptable to a private investor. Lastly, it was erroneous to deduct only net refinancing costs instead of total refinancing costs. Any tax savings by the company were immaterial from the investor's point of view. A further consideration showed that this approach was unacceptable since with non-liquid provision of capital the earnings function of the capital was still available to the investor and could be re-invested by him to obtain at least the risk-free rate of interest, and he would thus achieve 'double' earnings.

(62) Germany also argued that the limitation period had expired (pursuant to Article 15(1) of Regulation (EC) No 659/1999) and that the Commission therefore had no power to order recovery of any aid. The basic resolution on WBK's transfer had been adopted on 16 June 1992, i.e. more than ten years before the decision initiating the investigation procedure was served on 4 July 2002. The resolution expressed the basic intention to merge the *Land*'s bank holdings and WBK into one holding company (later BGB), provided that WBK's promotional activities could continue and that the assumption of sovereign tasks and the tax exemption were guaranteed. The resolution had been in the public domain since then, and the Commission had been informed of its date in 1999.

(63) In a number of decisions, the Commission had already taken the declaration of intent by the relevant body, even subject to conditions, as marking the point at which the aid was implemented. This was also the position adopted by the Commission in the decision on rescue aid for BGB ([18]), even though the resolution concerned, adopted on 22 May 2002, had still required the approval of Parliament and of the Commission.

(64) Moreover, in Germany's view, the limitation period had not been interrupted pursuant to the second sentence of Article 15(2) of Regulation (EC) No 659/1999, which states that only action taken by the Commission can interrupt the period. The first such Commission action was the letter regarding the initiation of the procedure dated 4 July 2002, and not the requests for information, which were not measures taken by the Commission or the relevant Commission Member. Account should moreover be taken of the fact that the limitation period existed in the interests of legal certainty, not only in relations between the Commission and the Member States but also for the recipients of state aid. As Germany was asked for the first time in the decision initiating the procedure to forward a copy of the letter to the aid recipient, which it did on 9 July 2002, the limitation period was interrupted only as of that date. Since the measure subject to state aid monitoring was the resolution of 16 June 1992, it constituted, if it were aid at all, existing aid pursuant to Article 15(3) of Regulation (EC) No 659/1999.

## V. COMMENTS FROM OTHER INTERESTED PARTIES

(65) After the decision initiating the procedure had been published in the Official Journal ([19]), the Commission received comments from the Berliner Volksbank ('BV') and the Bundesverband deutscher Banken ('BdB') in October and November respectively.

(66) The BV took the view that the transfer of WBK was aid because the capital had been made available on terms which a market-economy investor would not have accepted. Payments were made by LBB to IBB, which was itself managed as a division of LBB; moreover, the agreed interest rate of 0,25 % lay well below the normal market rates, as illustrated by Decisions 2000/392/EC (WestLB), 95/547/EC ([20]) and 98/490/EC ([21]) (Crédit Lyonnais), where a likely return on capital of at least 12 % was taken as a basis. This

([17]) Paragraph 182 of the Decision, see footnote 2.

([18]) NN 53/2001; Commission decision of 25 July 2001.

([19]) See footnote 1.

([20]) OJ L 308, 21.12.1995, p. 92.

([21]) OJ L 221, 8.8.1998, p. 28.

aid led to a serious distortion of Community-wide competition, but with particularly serious consequences in Berlin, where BGB, including LBB (and Berliner Bank and Berliner Sparkasse), led the market in personal and corporate retail banking. By comparison, BV was a small competitor with market shares of 5-7 % and was thus particularly affected by the negative impact of the aid. It closed its statement by calling on the Commission to order recovery of the aid.

(67) The BdB began by stating that the proceedings at issue formed part of a series of investigations by the Commission involving the transfer of *Land* housing promotion institutions to the Landesbanks, which carried on competitive business. In LBB's case too, contrary to the statements by Germany, the higher own funds requirements under the Solvency Directive were decisive. Evidence that this was the case were the timing of the transfer and the comments by the relevant Member of the *Land* Government at the time, who referred to the European own funds requirements, which were expected to become stricter. In this respect, there was no relevant difference in state aid terms between the transfer of WBK to LBB at issue here and the transfer of WfA to WestLB, which meant that the method used by the Commission in Decision 2000/392/EC could be applied here.

(68) The BdB went on to comment that it was not only the special-purpose reserve which was at issue here but also the transfer of WBK's capital of DEM 187,5 million, which was assigned to LBB's subscribed capital; this constituted a financial advantage as it influenced the rating and the terms for raising external capital. However, of much greater significance was the increase in core capital recognised for supervisory purposes as a result of the transfer. As this had been available in full as liable capital, despite the special-purpose reserve's being used primarily for promotional activities, its purpose was not the issue. The key factor was the economic advantage of the business expansion function, especially since the core capital had powerful leverage (lending capacity increased by 12,5 times for 100 % risk-weighted assets such as lending to companies and by 25 times for 50 % risk-weighted assets such as loans to public authorities). If additional capital were raised, with a core capital of (hypothetically) €1 billion and a risk weighting of 50 %, loans amounting to as much as €50 billion could be given.

(69) For the calculation of what constituted a normal market remuneration, the BdB referred to the tried-and-tested method applied by the Commission in Decision 2000/392/EC and the benchmark of 12 % for a normal market return, to which, in a second stage, premiums and discounts had been applied to take account of the particularities of the transaction. In any event, neither the 0,25 % paid to IBB nor the sale to BGB of the silent partnership and the claims to profits in 1994 and 1998 could be regarded as normal market remuneration.

(70) For one thing, it was not appropriate for payment to be made only on the amount taken up and, for another, IBB belonged to LBB, with the result that LBB had almost paid itself, rather than the *Land*. Moreover, Germany's argument that the guarantee function of the special-purpose reserve had been properly remunerated by the establishment of an atypical silent partnership holding in LBB for BGB in 1994 was not convincing, since important data on values were not available and, in principle, it was erroneous to confine the assessment to the aid donor's point of view. Of relevance to the state aid assessment was the transfer of WBK to LBB on 31 December 1992, the advantages conferred thereby on LBB and the resulting distortions of competition, and not whether the aid debt had been discharged subsequently. Moreover, the transfer of LBB to BGB was an internal transaction since BGB was also majority-owned by the *Land*. The same applied to the transfer to BGB of the remaining claims to 24,99 % of profits in 1998. In any event there had been no complete abolishment of the aid element since 1998.

(71) Subsequently, and a long time after the period for submitting comments laid down in Regulation (EC) No 659/1999 had expired, the BdB supplemented these remarks, stating in particular that the sales value calculated for LBB and for the silent partnership in LBB for the purpose of setting up BGB had not included IBB, with the result that the guarantee function of IBB's special-purpose reserve could not, in the BdB's view, have been taken into account in the sales value of the silent partnership in LBB.

(72) On the limitation period of ten years pursuant to Article 15 (1) of Regulation (EC) No 659/1999, the BdB stated that it had begun only with the Act establishing IBB on 31 December 1992 and could have come to an end at the earliest on 31 December 2002. However, the period had been interrupted pursuant to Article 15(2) of Regulation (EC) No 659/1999 by action taken by the Commission. This provision was broad in scope and covered any action taken by the Commission in connection with its investigations, including requests for information. A basis for the further interpretation of this provision was Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition ([22]), pursuant to which interruption is linked to 'action taken … for the purpose of the preliminary investigation or

([22]) OJ L 319, 29.11.1974, p. 1. Regulation as amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

proceedings in respect of an infringement'. For the rest, Germany had itself asked the Commission to wait for clarification of the issues in *WestLB* and, for that reason alone, could not invoke the limitation period.

## VI. GERMANY'S RESPONSE TO THE COMMENTS OF OTHER INTERESTED PARTIES

(73) In its comments dated 16 December 2002, Germany essentially referred to its own comments on the decision initiating the procedure and its argument that no state aid was involved in this case. Otherwise, it restricted itself to a brief response to the individual points made in the two sets of comments.

(74) Regarding the BV's and the BdB's classification of WBK's transfer as aid, Germany stated that it was not enough to look only at the monthly remuneration. Rather, reference values such as — depending on the capital injection — return (on a loan), including collateralisation, dividends or capital growth should be considered. However, in the relevant period (1992/93) LBB was an institution with high earning capacity, and the transfer of WBK's assets to LBB's liable equity capital was therefore a sound business decision. WestLB and LBB, contrary to what was claimed by the BdB and the BV, were therefore in no way comparable with one another. Apart from this, it was inappropriate for the BdB to speak of the method used in *WestLB* as tried and tested in view of the (at the time) pending court proceedings in that case.

(75) Contrary to what was argued by the BdB, it was undisputed and clearly stated in the decision initiating the procedure that, besides the use of the special-purpose reserve's guarantee function by LBB, the transfer of WBK also increased LBB's equity capital shown in the balance sheet by DEM 187,5 million and that this amount had been recognised as liable equity capital for supervisory purposes. The question of the extent to which equity capital shown in the balance sheet conferred a financial advantage did not arise here, unlike in *WestLB*, since it was not necessary to distinguish between recognised and unrecognised parts of the capital. No aid was involved in the increase in equity capital shown in the balance sheet or the transferred reserves (see paragraphs 40 to 64).

(76) Moreover, it was erroneous to assume that, with a hypothetical core capital of €1 billion, loans totalling €50 billion could be made. Whereas it was undisputed that IBB's special-purpose reserve performed a guarantee function and a business expansion function on account of its recognition for supervisory purposes, the advantage was confined to the amount actually taken up by LBB. The hypothetical leverage of 1:50 was also groundless.

(77) In applying the principle of the market-economy investor, the analysis should be geared to an investor in a comparable situation. In the case at issue, the *Land* as investor decided to tie the special-purpose reserve's liquidity into IBB's operations and not to make it available to LBB in its financing capacity. The *Land*'s objective with respect to this capital was its own return (see paragraphs 40 to 64). Moreover, only the *Land* continued to have a claim on IBB's special assets, even after LBB's transfer to BGB. It was therefore also wrong to claim that the remuneration which LBB paid to IBB was paid to itself. Moreover, it was usual for a market-economy investor to assign remuneration claims to third parties, especially when the third party was a company or an asset wholly owned by that investor.

(78) Lastly, with respect to the BV's comments on its market share relative to that of BGB, Germany stated that BV had a larger market share in Berlin than it had indicated. It was the second-largest credit institution and its market shares had to be 60-70 % of those of BGB; as regards deposits by private customers alone, it had some 1/3 of BGB's market share.

## VII. UNDERSTANDING BETWEEN THE BDB, THE LAND OF BERLIN AND LBB

(79) On 7 October 2004, Germany informed the Commission of the outcome of an understanding between the complainant (the BdB), the *Land* of Berlin and LBB. Notwithstanding their remaining fundamental legal positions, the parties had agreed on what they themselves regarded as suitable parameters for determining an appropriate remuneration for WBK's assets. The parties asked the Commission to take account of this understanding in its decision.

(80) First, the parties determined, on the basis of the approach detailed in Decision 2000/392/EC, a minimum remuneration for WBK's special-purpose reserve of 10,19 %. As the *Land* of Berlin was the sole owner, no further premium, such as to allow for the lack of voting rights, was agreed. A discount of 3,62 % was then applied on account of the capital's lack of liquidity (on the basis of the risk-free interest rate taken as gross refinancing costs, with some 50 % in corporation tax plus a solidarity surcharge deducted to determine net refinancing costs). This produced an appropriate remuneration of 6,57 %.

(81) The understanding makes no mention of any remuneration for the part of WBK's assets not available for LBB's competitive business.

(82) For IBB's nominal capital of DEM 187,5 million transferred to LBB's nominal capital no discount on the basis of refinancing costs was calculated as this capital constituted liquid funds. As the nominal capital had been transferred to

BGB in two stages in 1994 and 1998, the parties agreed that remuneration should be paid for it only up to these two points in time (proportionally in each case).

(83) The parties were unable to agree on whether any increase in LBB's value as a result of the transfer should be taken into account. In the Landesbank's view, an increase in value had been achieved by the transfer of LBB in 1994 and 1998.

## VIII. ASSESSMENT OF THE MEASURES

### 1. *ON THE GENERAL QUESTION OF THE LIMITATION PERIOD*

(84) Germany stated that the relevant date with respect to any limitation period applicable to recovery was 16 June 1992 when the Berlin *Land* Government adopted a resolution establishing a Berlin bank holding company. However, this resolution, which is in the Commission's possession, laid down only that 'Berlin's bank holdings will be restructured'. It provided for the 'establishment of the Berliner Banken-Holding AG, which would bring together under its roof the Landesbank Berlin-Girozentrale, Berliner Bank AG and the … Berliner Pfandbrief-Bank'. It did not bring about a transfer of assets.

(85) The measure at issue, namely the transfer of WBK's assets to LBB, was completed only at the close of 31 December 1992. The economic effect of the measure, i.e. the increase in LBB's equity capital and the resulting increase in its lending capacity, therefore kicked in only on 1 January 1993. In the present case, no state aid can have been granted before that date.

(86) Even if the date on which the measure was awarded were none the less fixed as 16 June 1992, several months before the date of the transfer, it cannot be assumed, as argued by Germany, that the Commission's powers to recover the aid are subject to the limitation period laid down in Article 15(1) of Regulation (EC) No 659/1999. Germany takes the view that the decision of 4 July 2002 initiating the procedure was the first Commission action to interrupt the limitation period, among other reasons because in that decision Germany was asked for the first time to forward a copy of the letter to the aid recipient.

(87) The Commission rejects this view. Article 15(2) of Regulation (EC) No 659/1999 refers to 'any action' taken by the Commission and not merely to a formal decision initiating the procedure. In the present case, the various steps taken by the Commission, in particular its various requests for information referring to LBB, and at any rate its request of September 1999, suffice to interrupt the limitation period. It is not necessary for LBB to have been aware of the steps taken by the Commission. In its judgment of 10 April 2003 in Case T-366/00 *Scott SA v Commission* ([23]), the Court of First Instance ruled that the mere fact that the aid recipient was not aware of the existence of the Commission's requests for information does not have the effect of depriving them of legal effect vis-à-vis the aid recipient. The Commission is not obliged to warn potentially interested persons, including the beneficiary of the aid, of the measures which it is taking in respect of unlawful aid before it initiates the administrative procedure. The Court accordingly found that the relevant requests for information constituted, under Article 15 of Regulation (EC) No 659/1999, a measure interrupting the limitation period before that period expired, even though the aid recipient was not at the time aware of the existence of such correspondence ([24]). Moreover, it seems unlikely that LBB was unaware of the Commission's request for information when Germany replied to it in December 1999.

(88) In conclusion, the Commission has the power in this case to order recovery of any aid.

### 2. *STATE AID WITHIN THE MEANING OF ARTICLE 87(1) OF THE EC TREATY*

(89) Article 87(1) of the EC Treaty states that, save as otherwise provided in that Treaty, any aid granted by a Member State or through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market, insofar as it affects trade between Member States.

#### 2a. STATE RESOURCES

(90) The transfer was decided on by the *Land* of Berlin in order to increase LBB's capital by transferring to it the public-service institutions WBK/IBB, whose guarantor and owner the *Land* was. The transfer increased LBB's liable equity capital recognised for supervisory purposes by letter of 24 February 1993 by some DEM 1,9 billion. DEM 187,5 million of that amount corresponded to an increase in LBB's nominal capital by the nominal capital of the former WBK ([25]) and some DEM 1,715 billion to WBK's revenue reserves (without the net profit for 1992 of just under DEM 200 million), which from that point on were shown as a special-purpose reserve belonging to IBB and continued to grow each year.

(91) The transfer of some DEM 1,9 billion and its recognition as core capital for supervisory purposes significantly increased LBB's lending capacity and thus its scope for expanding its competitive business. With a risk weighting of 100 % for all claims (e.g. from loans to non-banks) and without any further raising of additional capital, the business expansion potential theoretically lies at 12,5 times the additional liable equity capital (in this case just under DEM 24 billion). It is not possible to give a precise figure for this potential in

([23]) [2003] ECR II-1763.

([24]) Ibid paragraph 60.

([25]) This amount has since no longer been attributed to IBB's assets.

individual cases, as it depends on customer structure, strategic planning and unforeseeable external influences. However, the question of whether and how a credit institution employs new own funds is not a matter for this investigation.

(92) Irrespective of the fact that IBB still needed part of the funds to underpin its promotion activities, the transferred assets were recognised by the supervisory authority and could thus be used by LBB, which was competing with other credit institutions, to cover its liabilities. There is therefore no doubt that this case involves the transfer to LBB of state resources which were such as to give it an economic advantage over its competitors to the extent that the resources concerned were not obtained on market terms.

2b. FAVOURING OF A PARTICULAR UNDERTAKING

(93) In order to verify whether the transfer of state resources to a publicly-owned undertaking favours the latter and is therefore liable to constitute state aid within the meaning of Article 87(1) of the EC Treaty, the Commission applies the 'market-economy investor principle'. The Court of First Instance has accepted and developed this principle in a number of cases, most recently in its judgment of 6 March 2003 regarding a similar transfer to WestLB ([26]).

(1) ***Market-economy investor principle***

(94) According to the market-economy investor principle, no state aid is involved where funds are made available on 'terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market-economy conditions' ([27]). In contrast, the undertaking is being favoured within the meaning of Article 87(1) of the EC Treaty if the proposed remuneration arrangement and/or the financial position of the undertaking is such that a normal return on investment cannot be expected within a reasonable period of time.

(2) ***Article 295 of the EC Treaty***

(95) Article 295 of the EC Treaty lays down that the system of property ownership in the various Member States must not be affected. However, this cannot justify any infringement of the Treaty's competition rules.

(96) Germany claims that, because of the constraints imposed by the special purpose assigned to the WBK assets, the only possible profitable use of these resources was to transfer them to a similar public-law institution. Consequently, the transfer represented the commercially most sensible use of those assets. Germany therefore argues that any remuneration for the transfer, i.e. any additional return on WBK's capital, is sufficient to justify the transfer in the light of the market-economy investor principle.

(97) This line of argument cannot be accepted. It may be true that WBK's transfer to LBB, which subsequently allowed LBB to use part of WBK's capital for underpinning its competitive business, was the commercially most sensible use. However, as soon as public funds and other assets are used for commercial, competitive activities, the normal market rules must be applied. This means that the State, once it decides to assign public-purpose assets to a commercial use, must demand a remuneration in line with normal market conditions.

(3) ***Ownership structure***

(98) The key question, as formulated by the Court of First Instance in its judgment in *WestLB* with reference to the previous case law, is whether, in similar circumstances, a private investor operating in normal conditions of a market economy and of a comparable size to that of the bodies operating in the public sector could have been prompted to make the capital contribution in question ([28]). Lastly, as the Court also points out with reference to other case law, 'the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time' ([29]). This makes it clear that the assessment must focus on the time of the investment and on the expectations which an investor might reasonably, i.e. on the basis of the available information, have had at that time. These expectations essentially relate to the likely return.

(99) The *Land* of Berlin was the sole shareholder of LBB (and of WBK). Even if this circumstance should make it possible to depart from an approach which takes account only of the fixed, agreed rate of remuneration (on average 0,25 % on the part of the special-purpose reserve used by LBB as of December 1995), in the present case ownership by the *Land* of Berlin cannot be used to justify the low direct remuneration.

(100) To cite the *Land*'s ownership as justification, there would have to be an adequate business plan, expert valuation or assessment of the likely return from the investment at issue. None was produced at the time. The Commission therefore has no means of verifying the *Land*'s statements.

([26]) See footnote 3.

([27]) Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, point 11). While this communication deals explicitly with the manufacturing sector, the principle can undoubtedly be applied in the same way to all other sectors. As regards financial services, this has been confirmed by a number of Commission decisions, e.g. Crédit Lyonnais (OJ L 221, 8.8.1998, p. 28) and GAN (OJ L 78, 16.3.1998, p. 1).

([28]) Paragraph 245 of the judgment, see footnote 3.

([29]) Paragraph 246 of the judgment, see footnote 3.

(101) The Commission accordingly takes the view that, in this case, the appropriate return must be established on the basis of the direct market return.

(4) ***Remuneration and elements of remuneration***

**Capital basis for calculating the remuneration**

(102) In principle, remuneration is payable on the entire value of the transferred assets. This approach was applied in Decision 2000/392/EC and upheld by the Court of First Instance. As BAKred directly recognised the full amount as core capital, the funds were available to LBB to cover liabilities from 1 January 1993 onwards, except for the amount required each year for the promotion-related business itself. The capital needed to underpin the promotion-related business and which LBB could not use has to be deducted from the amounts which grew each year from then on.

(103) The values for the WBK/IBB special-purpose reserve and for the capital needed for IBB's promotion-related business varied, or continually increased, as of early 1993. They are shown in the table at paragraph 142.

(104) The nominal capital of WBK/IBB worth DEM 187,5 million and transferred to LBB's nominal capital was liquid capital. 75,01 % of LBB's shares were sold to BGB in 1994, and the remaining 24,99 % in 1998 at a price of DEM 1,5 billion. The nominal capital was therefore attributed to BGB as of 1998.

(105) There are therefore three bases for calculating an appropriate remuneration: first, the liquid capital of DEM 187,5 million for 1993, with a value of DEM 46,9 million (corresponding to 24,99 % of shares) for the years 1994 to 1997; second, the special-purpose reserve and third, the funds needed for the promotion-related business. As the same minimum return applies to the first two elements, they can initially be considered together in what follows.

**Appropriate remuneration for the nominal capital and the special-purpose reserve**

(106) Investments of differing economic quality require differing returns. In analysing an investment's acceptability to an investor acting under normal market conditions, it is important therefore to bear in mind the special economic nature of the financial measure in question and the value of the capital provided for LBB.

**Comparison with other equity instruments**

(107) In establishing an appropriate remuneration, it is important to determine to which other equity instruments the transfer of WBK's assets may be compared since market remuneration differs from one instrument to another. For the purposes of their understanding, the BdB, the *Land* and LBB assume that it can be compared to a share capital investment.

(108) The Commission likewise takes the view that the transfer most closely resembles a share capital investment. For the nominal capital, this can undisputedly be assumed to be the case and does not require any further discussion here. However, it also applies to the special-purpose reserve, which was equally recognised by BAKred as core capital.

(109) In this connection, it should be noted that the relatively broad range of innovative equity instruments now available to credit institutions in several countries did not exist in Germany back in 1993 when it was decided to transfer WBK to LBB. Some of these instruments have been developed in the meantime, while others already existed but were not accepted in Germany. It would therefore be inappropriate to compare the special-purpose reserve to such innovative instruments, most of which have developed in the meantime and some of which are available only in other countries.

(110) The Commission also takes the view that it is not appropriate to compare the special-purpose reserve recognised as core capital to a silent partnership contribution when determining the appropriate remuneration, precisely because the transfer did not take the form of a silent partnership contribution but of a special-purpose reserve. BAKred too recognised the transfer as a reserve and not as a silent partnership contribution pursuant to Section 10 of the German Banking Act. The fact that the German supervisory authority treated the capital made available as a reserve suggests that it resembles share capital rather than a silent partnership.

(111) Moreover, the risk that the transferred capital might at least partially be lost in the event of insolvency or liquidation is no less than the risk associated with a share capital investment since WBK's assets make up a considerable part of LBB's equity capital and LBB used it extensively for many years to cover risk-bearing assets.

**Liquidity costs of the special-purpose reserve**

(112) A 'normal' capital injection into a bank supplies it both with liquidity and with an own funds base which it requires for supervisory reasons to expand its activities. In order to use the capital in full, i.e. to expand its 100 % risk-adjusted assets by a factor of 12,5 (i.e. 100 divided by a solvency ratio of 8), the bank must refinance itself on the financial markets 11,5 times over. Put simply, the difference between 12,5 times the interest received and 11,5 times the interest paid minus other costs of the bank (e.g. administration) gives the profit on the equity ([30]).

([30]) Of course, in reality the situation is much more complex because of off-balance-sheet items, different risk weightings of assets or zero-risk items, etc. However, the principal reasoning holds.

(113) Apart from the nominal capital of DEM 187,5 million, the transfer of WBK's assets did not provide LBB with initial liquidity. LBB therefore faced additional funding costs equal to the amount of the capital if it was to raise the necessary funds on the financial markets to take full advantage of the business opened up by the additional capital, i.e. to expand risk-adjusted assets by 12,5 times the capital amount (or to maintain existing assets at that level) ([31]).

(114) Because of these extra costs, which do not arise in the case of other forms of injected equity capital, the appropriate remuneration must be reduced accordingly. A market-economy investor could not expect to be remunerated in the same way as for a cash injection.

(115) The Commission does not believe that the entire refinancing interest rate has to be taken into account. Refinancing costs constitute operating expenses and therefore reduce taxable income. This means that the bank's net result is not reduced by the amount of additional interest expenses incurred. These expenses are offset in part by reduced corporation tax. Only the net costs should be taken into account as an additional burden on LBB because of the special nature of the capital transferred. Overall, the Commission accepts that LBB incurs additional 'liquidity costs' to the extent of 'refinancing costs minus corporation tax'.

(116) In the negotiations on their understanding, the parties, as in the Hamburgische Landesbank case, in which the transfer took place at the same point in time, took as a basis the long-term risk-free rate of 7,23 %. They also agreed to assume a flat 50 % tax rate ([32]). This produces a net refinancing rate of 3,62 % and thus a corresponding liquidity discount. This discount applies only to the special-purpose reserve.

**Determination of a likely minimum remuneration for the special-purpose reserve and the nominal capital**

(117) A market-economy investor bases his return expectations on historical average returns, which generally also give him an idea of what the company's future performance is likely to be, as well as on the conclusions he draws from an analysis of the company's business model for the period of the investment, the strategy and quality of its management and the prospects for the economic sector concerned. Companies in need of capital have to convince potential investors that, over the long term, they will be able to earn at least the average rate of return that can be expected of companies with a comparable level of risk and operating in the same economic sector. If a company cannot fulfil these expectations of an at least average return, the investor will refrain from investing in it and will consider investing in another company which offers better prospects for the same risk.

(118) There are various methods of determining an appropriate minimum return. They range from differing variants of the financing approach to the Capital Asset Pricing Model (CAPM) method. For the purposes of describing the various approaches, it is helpful to distinguish between two components, namely the risk-free return and a project-specific risk premium: the appropriate minimum return for a high-risk investment = the risk-free base rate + a risk premium for the high-risk investment. The appropriate minimum return on a high-risk investment can therefore be described as the sum of the risk-free rate of return and the additional risk premium for assuming the specific investment risk.

(119) Accordingly, the basis for any return determination is the existence of a default-risk-free form of investment with an assumed risk-free return. The expected return on fixed-rate securities issued by state issuers (or an index based on such securities) is usually taken to determine the risk-free base rate since such securities represent a form of investment with comparatively little risk. The various methods differ, however, when it comes to determining the risk premium:

— *Financing approach*: an investor's expected return on capital represents, from the point of view of the bank using the capital, future financing costs. Under this approach, the historic capital costs incurred by comparable banks are first of all determined. The arithmetic average of the historical capital costs is then compared with the future expected equity capital costs and hence with the investor's expected return requirement.

— *Financing approach with Compound Annual Growth Rate*: at the heart of this approach stands the use of the geometric rather than the arithmetic mean value.

— *CAPM*: the CAPM is the best-known and most frequently tested model of modern financial economics, by which the return expected by an investor can be determined using the following formula: expected return = risk-free interest rate + (market risk premium x beta). The beta factor is used to quantify the risk of a company relative to the overall risk of all companies. The risk premium for the specific investment is obtained by multiplying the risk premium of the market by the beta factor.

([31]) The situation does not change if one takes into account the possibility of raising additional own funds up to the same amount of original own funds (a factor of 25 instead of 12,5 for original own funds).

([32]) According to documents provided by the German Government, the corporation tax rate was 46 % in 1992, plus a solidarity surcharge of 3,75 %, i.e. 49,75 % in total. The overall tax rate fell to 46 % in 1993 and stood at 49,5 % from 1994 to 2000. From 2001 the overall tax rate was 30 %.

(120) The CAPM is the predominant method of calculating investment returns in the case of large listed companies. However, since LBB is not a listed company, it is not possible directly to infer its beta value. The CAPM can be used only on the basis of an estimate of the beta factor.

(121) Germany generally takes a critical view of the use of the CAPM. In the end, the parties none the less used it as a basis in their understanding, obtaining an appropriate rate of remuneration for the transfer of the nominal capital and the special-purpose reserve to LBB of 10,19 %.

(122) Using the CAPM, the parties applied a risk-free base rate of 7,23 % at 31 December 1992 for LBB, on the assumption that WBK's assets were to be made available to LBB on a permanent basis. The parties thus decided not to use a risk-free rate obtaining on the market on a given reference date for a fixed investment period at the time of the transfer (e.g. 10-year return on government bonds) since such an approach would disregard the reinvestment risk, i.e. the risk that it would not be possible to invest again at the level of the risk-free rate once the investment period had expired. In the view of the parties, a total return index was the best way of taking the investment risk into account. They opted, therefore, for the REX10 Performance Index of Deutsche Börse AG, which tracks the performance of an investment in 10-year Federal bonds. The index series used in the present case contains the relevant year-end levels of the REX10 Performance Index after 1970. The parties then calculated the rate of return per annum, which reflects the trend tracked by the REX10 Performance Index in the period 1970 to 1992 and, in this way, arrived at the risk-free base rate of 7,23 % (at 31 December 1992).

(123) Since the contribution was to be made available to LBB on a permanent basis, the method of determining the risk-free base rate seems appropriate in this specific case. Moreover, the REX10 Performance Index is a generally recognised data source. The risk-free base rate calculated by the parties thus appears appropriate here.

(124) The beta factor of 0,74 was estimated on the basis of a KPMG report, of which the Commission has a copy, on adjusted beta factors for all listed credit institutions in Germany. In the light of the report and of LBB's business profile, this beta factor may be regarded as appropriate.

(125) The Commission also regards the market-risk premium of 4,0 % as acceptable. The so-called general long-term market-risk premium, i.e. the difference between the long-term average return on a normal share portfolio and the return on government bonds, was applied on several occasions in the proceedings leading to Decision 2000/392/EC. The expert reports relating to that case applied margins of around 3 % to 5 %, depending on the method used, the reference period and the underlying data. For example, one report commissioned by the BdB calculated alternative figures of 3,16 % and 5 %, while another, commissioned by WestLB in the same case, arrived at calculations of 4,5 % and 5 %, and Lehman Brothers, which was also working for WestLB, calculated a rate of 4 %. Against this background, the Commission here sees no reason to depart from the market-risk premium used in the understanding. On the basis of the CAPM, the Commission has no doubt that the minimum remuneration determined by the parties can be regarded as appropriate.

(126) Accordingly, it sets the minimum remuneration at 10,19 % per annum (after corporation tax and before investor tax).

**No return premium on account of the 100 % ownership**

(127) It must be examined whether there are grounds for adjusting the minimum remuneration calculated. Based on the approach used in the other Landesbank cases, the following three particularities of the transaction may justify such a premium: first, the non-issuance of new shares in the company with the associated voting rights; second, the exceptional volume of the asset transfer; and third, the lack of fungibility of the assets.

(128) As in the other proceedings, the Commission does not consider a premium to be justified in relation to the last two aspects. Nor is it possible to apply a premium in relation to the failure to issue new shares with voting rights given that the *Land* of Berlin owned 100 % of the voting shares.

**No reduction in the remuneration to take account of the agreement of a fixed amount**

(129) In the case of shares, the remuneration depends directly on the performance of the company and is expressed mainly in the form of dividends and a share in the increased value of the company (e.g. expressed in share price increases). The *Land* receives a fixed remuneration the level of which should reflect these two aspects of remuneration for 'normal' equity injections. It could be argued that the fact that the *Land* receives a fixed remuneration instead of one directly linked to LBB's performance constitutes an advantage which justifies a reduction in the rate of the remuneration. Whether such a fixed rate actually constitutes an advantage as compared with a variable, profit-linked rate depends on the company's performance in the future. If the performance declines, a fixed rate benefits the investor, but if it improves it places him at a disadvantage. However, actual performance cannot be used retrospectively to assess the investment decision. Taking all these factors into consideration, the Commission believes that the rate of remuneration should not be reduced for this reason.

**Overall remuneration for the nominal capital and the special-purpose reserve**

(130) In view of all of the above observations, the Commission comes to the conclusion that a normal market minimum remuneration for the capital and the special-purpose reserve would have been 10,19 % per annum. On account of the lack of liquidity in the special-purpose reserve, 3,62 % should be deducted from this figure for net refinancing costs.

**Appropriate remuneration for the amounts needed for the promotion-related business**

(131) The amounts needed for the promotion-related business were also of material value to LBB and their economic function may be compared to that of a guarantee. A market-economy investor would demand an appropriate remuneration in return for exposing himself to a risk of this sort. This question is not addressed in the understanding between the BdB, the *Land* and LBB.

(132) In *WestLB* ([33]), Germany considered a rate of 0,3 % per annum before tax to be an appropriate starting rate. Since WestLB and LBB are fundamentally comparable and for want of any other points of reference, the Commission assumes that this rate corresponds to the remuneration which LBB would have had to pay on the market in the early 1990s for a bank guarantee in its favour.

(133) However, the grounds cited for increasing the starting rate in Decision 2000/392/EC do not apply here. In that Decision, a premium of a further 0,3 % per annum was added to the above-mentioned rate of 0,3 % per annum (before tax) because first, bank guarantees are normally associated with certain transactions and limited in time (which was not the case in *WestLB*) and second, the amount of DEM 3,4 billion made available to WestLB exceeded what was normally covered by such bank guarantees.

(134) An increase in the rate of 0,3 % to take account of the particularly extensive scope of the 'guarantee' seems unnecessary for an annual amount of some DEM 170 to 350 million. Raising the rate on account of the fact that WBK's assets were in principle available to LBB without restriction is also of doubtful value for the same reasons as those for which no premium was applied to the remuneration for the capital available for competitive business since the *Land* was entitled to withdraw the assets from LBB and indeed did so at the end of August 2004.

(135) The guarantee premium counts as an operating expense for LBB and therefore reduces taxable profit. The remuneration for WBK's assets is paid out of profits after tax. The rate of 0,3 % must therefore be adjusted for the tax rate. As in relation to the refinancing costs, the Commission, here in LBB's favour, assumes a uniform overall tax rate of 50 %. Consequently, it sets a rate of 0,15 % per annum after tax.

([33]) Paragraph 221, see footnote 2.

(5) ***Aid element***

(136) The Commission accordingly regards 10,19 % per annum after tax as an appropriate market remuneration for the nominal capital, 6,57 % per annum after tax for the part of the special-purpose reserve which could be used by LBB to underpin its commercial activities and 0,15 % after tax for the amounts needed for the promotion-related business but still shown as equity capital in the balance sheet.

(137) On the basis of the above assessment criteria and remunerations for the various types of capital transferred, the amounts shown in the table at paragraph 142 should be paid as appropriate remuneration for the individual elements and years.

(138) Against these amounts should be set the elements of remuneration agreed at the time of the investment, which, in the Commission's view, consist only of the agreed remuneration in varying amounts (see table at paragraph 142) on the take-up of the special-purpose reserve. Other elements, such as the increases in value put forward by Germany, or the dividend payout of DEM 238 million in 1993, cannot be offset against the appropriate remuneration.

(139) Germany argued that the increases in value achieved by the sales in 1994 and 1998 and the dividend payout of DEM 238 million should be deducted from the remuneration owed. However, payments made or increases in value achieved after the investment cannot be taken into account when applying the principle of the market-economy investor, who, on the basis of the information available to him at the time of the investment, either expects an appropriate return or agrees a direct remuneration. Dividends or increases in value which cannot be calculated in advance are not relevant. Nor is it relevant whether proceeds derive from an increase in value achieved through a sale. Lastly, it is not clear why the dividend payout of DEM 238 million should have been made on the basis of the transferred special-purpose reserve; at most, proportional account could be taken of the payment based on the ratio of the special-purpose reserve to the rest of LBB's own funds.

(140) Germany also claimed that one reason for the transfer was the potential synergies to be achieved, rather than an increase in equity capital for LBB. Since these synergies neither reduce the usability of the transferred capital for LBB nor increase LBB's costs from the transfer, they should also not influence the level of remuneration for the equity provided which a market-economy investor can demand from the bank. Even if there were an actual benefit accruing to the *Land* as a result of synergies, any competitor would have been forced by competition to pay to the *Land* on top

of the appropriate consideration for the equity provided, a 'remuneration' in the form of such benefits for the financial instrument. The Commission therefore takes the view that any synergy effects do not constitute remuneration paid by LBB for the transfer of WBK.

(141) The difference between the agreed remuneration of about 0,25 % per annum and the appropriate remuneration of 6,57 % per annum (for the part of IBB's special-purpose reserve which can be used for competitive business) or 10,19 % per annum (for WBK's nominal capital) and 0,15 % per annum (on the part of the capital which is equivalent to a bank guarantee) accordingly constitutes state aid within the meaning of Article 87(1) of the EC Treaty.

(142) The aid element is therefore made up as follows:

| | Values (DEM million at year end) | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 (1) | Total | Total € |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. | IBB special-purpose reserve | 1 715,-2 | 2 005,-8 | 2 105,-8 | 2 206,-0 | 2 306,-0 | 2 356,-0 | 2 406,-0 | 2 456,-5 | 2 600,-0 | 2 623,-8 | 2 625,-4 | 2 625,-4 | | |
| | Amount used for promotion business | 168,7 | 180,1 | 273,2 | 323,8 | 346,4 | 233,6 | […] | […] | […] | […] | […] | […] | | |
| | Special-purpose reserve remaining | 1 546,-5 | 1 825,-7 | 1 832,-6 | 1 882,-2 | 1 959,-6 | 2 122,-4 | […] | […] | […] | […] | […] | […] | | |
| | Interest rate | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | 6,57 % | | |
| | Remuneration payable | 101,6 | 119,9 | 120,4 | 123,7 | 128,7 | 139,4 | […] | […] | […] | […] | […] | […] | […] | […] |
| 2. | WBK's nominal capital | 187,5 | 46,9 | 46,9 | 46,9 | 46,9 | | | | | | | | | |
| | Interest rate | 10,19% | 10,19% | 10,19% | 10,19% | 10,19% | | | | | | | | | |
| | Remuneration payable | 19,1 | 4,8 | 4,8 | 4,8 | 4,8 | | | | | | | | 38,2 | 19,5 |
| | Guarantee fee | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | 0,15 % | | |
| | Remuneration payable | 0,253 | 0,270 | 0,410 | 0,486 | 0,520 | 0,350 | […] | […] | […] | […] | […] | […] | […] | […] |
| 3. | Remuneration already paid | 0,0 | 0,0 | 0,0 | 1,2 | 3,4 | 3,6 | […] | […] | […] | […] | […] | […] | […] | […] |
| 4. | Remuneration still owed | 121,0 | 125,0 | 125,6 | 127,7 | 130,6 | 136,2 | […] | […] | […] | […] | […] | […] | 1 584,-5 | 810,14 |

(1) 1.1.-31.8.2004. Afterwards €1,1 billion of IBB's special-purpose reserve converted into silent partnership contribution by Land to LBB with normal market remuneration
Since 1.1.1999 DEM converted to euro at 1,95583. Figures in DEM must be converted to euro accordingly.

(143) With IBB's hive-off from LBB on 1 September 2004, the special-purpose reserve was transferred back to the *Land* of Berlin, and €1,1 billion of it was transferred to two silent partnerships held by the *Land* in LBB. This brought the advantage at issue to an end as at 1 September 2004.

2c. DISTORTION OF COMPETITION AND EFFECT ON TRADE BETWEEN MEMBER STATES

(144) As a result of the liberalisation of financial services and the integration of financial markets, banking within the Community has become increasingly sensitive to distortions of competition. This development is intensifying in the wake of economic and monetary union, which is dismantling the remaining obstacles to competition in the financial services markets.

(145) Landesbank Berlin carries on regional and international banking business. It defines itself as an all-purpose commercial bank, central bank for the savings banks and the bank of the *Land* and its municipalities. Despite its name, tradition and legally stipulated tasks, LBB is much more than a mere local or regional bank.

(146) These facts clearly show that LBB offers its banking services in competition with other European banks outside Germany and, since banks from other European countries are active in Germany, inside Germany.

(147) It should also be recalled that there is a very close link between the equity of a credit institution and its banking activities. Only on the basis of sufficient accepted equity capital can a bank operate and expand its commercial operations. As the state measure provided LBB with such equity capital for solvency purposes, it directly influenced the bank's business possibilities.

(148) It is clear, therefore, that aid given to LBB distorts competition and affects trade between Member States.

3. *COMPATIBILITY OF THE MEASURE WITH THE EC TREATY*

(149) On the basis of all these considerations, it can be stated that the transfer of WBK's capital is caught by all the criteria laid down in Article 87(1) of the EC Treaty and therefore that it involves state aid within the meaning of that Article. On this basis, an assessment must be made as to whether that aid can be considered compatible with the common market. It should be pointed out that Germany did not invoke any exemption clause with regard to possible state aid elements in connection with the transfer of assets.

(150) None of the exemption clauses of Article 87(2) of the EC Treaty are applicable. The aid does not have a social character and is not granted to individual consumers. Nor does it make good the damage caused by natural disasters or exceptional occurrences or compensate for the economic disadvantages caused by the division of Germany.

(151) Given that the aid has no regional objective — it is designed neither to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment nor to facilitate the development of certain economic areas — neither Article 87(3)(a) nor (c) of the EC Treaty, as regards the latter's regional aspect, is applicable. Nor does the aid promote the execution of an important project of common European interest. The aid is not aimed either at promoting culture or heritage conservation.

(152) Since the economic survival of LBB was not at stake when the measure took place, there is no need to consider whether the collapse of a single large credit institution like LBB could lead to a general banking crisis in Germany, which might possibly justify aid to remedy a serious disturbance in the German economy under Article 87(3)(b) of the EC Treaty.

(153) Under Article 87(3)(c) of the EC Treaty, aid may be found compatible with the common market if it facilitates the development of certain economic activities. This might, in principle, also apply to restructuring aid in the banking sector. However, in the case at hand the conditions for the application of this exemption clause are not met. LBB is not described as an undertaking in difficulty whose viability must be restored with the support of state aid.

(154) Article 86(2) of the EC Treaty, which allows exemptions from the Treaty's state aid rules under certain conditions, is in principle also applicable to the financial services sector. This has been confirmed by the Commission in its report on Services of general economic interest in the banking sector ([34]).

(155) Germany has not argued that any advantage conferred on LBB by the transfer of WBK's assets was merely compensation for the costs incurred by LBB in the performance of its public-service tasks. In the Commission's view, it is clear that the transfer was carried out in order to enable LBB to meet the new capital requirements, and not to compensate it for public-service tasks.

(156) Since no exemption from the principle of the ban on state aid pursuant to Article 87(1) of the EC Treaty applies, the aid in question cannot be found compatible with the Treaty.

([34]) This report was presented to the Ecofin Council on 23 November 1998 but has not been published. It can be obtained from the Competition Directorate-General of the Commission and can also be found on the Commission's website.

4. *NO EXISTING AID*

(157) The transfer of WBK's assets cannot be regarded as being covered by the existing state aid scheme for 'institutional liability' (*Anstaltslast*) and 'guarantor liability' (*Gewährträgerhaftung*).

(158) First, *Gewährträgerhaftung* is a default guarantee offered to creditors in the event that the bank's assets are no longer sufficient to satisfy their claims, and this is not the case here. The capital injection is not intended to satisfy LBB's creditors and the bank's assets have not been exhausted.

(159) Nor does *Anstaltslast* apply. *Anstaltslast* requires the guarantor to provide LBB with the resources it needs to function properly for as long as the former decides to maintain it in existence. However, at the time of the capital injection, LBB was far from being in a situation where it was no longer able to operate properly. The capital injection was not needed in order to keep LBB in business. The conscious economic calculation by the *Land* as joint owner also enabled LBB to seize future opportunities in its competitive business. The 'necessity requirement' for *Anstaltslast* does not apply to such a normal economic decision by the *Land*. In the absence of another applicable existing state aid scheme pursuant to Articles 87(1) and 88 (1) of the EC Treaty, the capital injection must be classed as new aid within the meaning of Articles 87(1) and 88(3) of the EC Treaty.

5. *CONCLUSION*

(160) The aid resulting from the transfer of WBK/IBB on 1 January 1993 cannot be found compatible with the common market under either Article 87(2) or (3) of the EC Treaty or under any other provision of that Treaty. The aid is therefore declared incompatible with the common market and must be discontinued. The aid element must be recovered by Germany,

HAS ADOPTED THIS DECISION:

*Article 1*

The state aid amounting to €810,14 million which Germany implemented for Landesbank Berlin — Girozentrale from 1 January 1993 to 31 August 2004 is incompatible with the common market.

*Article 2*

Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.

*Article 3*

Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of this Decision.

The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery.

Interest shall be calculated in accordance with the provisions of Chapter V of Commission Regulation (EC) No 794/2004 ([35]).

*Article 4*

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it, using the questionnaire attached in the Annex to this Decision.

*Article 5*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 October 2004.

*For the Commission*

Mario MONTI

*Member of the Commission*

([35]) OJ L 140, 30.4.2004, p. 1.

*ANNEX*

**INFORMATION REGARDING THE IMPLEMENTATION OF THE COMMISSION DECISION**

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details regarding the amount of unlawful state aid that has been put at the disposal of the recipient:

| Date(s) of payment (°) | Amount of aid (*) | Currency | Identity of recipient |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

(°) Date or dates on which the aid or individual instalments of aid were put at the disposal of the recipient (if the measure consists of several instalments and reimbursements, use separate rows).
(*) Amount of aid put at the disposal of the recipient, in gross grant equivalent.

*Comments:*

1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. **Recovery measures planned or already taken**

2.1. Please describe in detail what measures have been taken and what measures are planned to bring about the immediate and effective recovery of the aid. Please also explain what alternative measures exist in national law to bring about recovery. Where relevant, please indicate the legal basis for the measures taken or planned.

2.2. By what date will the recovery of the aid be completed?

3. **Recovery already effected**

3.1. Please provide the following details of aid that has been recovered from the recipient:

| Date(s) (°) | Amount of aid repaid | Currency | Identity of recipient |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

(°) Date or dates on which the aid was repaid.

3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.