COMMISSION DECISION

of 20 October 2004

implemented by Germany for Hamburgische Landesbank — Girozentrale, now HSH Nordbank AG

(notified under document number C(2004) 3928)

(Only the German text is authentic)

(Text with EEA relevance)

(2006/740/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 procedure concerns the transfer of shares in Hamburgische Wohnungsbaukreditanstalt ('WK') to Hamburgische Landesbank — Girozentrale ('HLB') by the *Land* of Hamburg ('FHH'). 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 concerning the circumstances of, and reasons for, a capital increase in WestLB resulting from the incorporation of *Wohnungsbauförderanstalt* ('WfA') and similar increases in the own funds of the Landesbanks of other *Länder*. Germany replied in March and September 1993 and, in response to further Commission requests dated 10 November and 13 December 1993, provided additional information in March 1994. In addition to information concerning WfA's transfer to WestLB, the German replies referred to similar transfers in Lower Saxony, Berlin and Schleswig-Holstein.

(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 among other things that, with effect from 1 January 1986 and 1 January 1993, FHH had transferred shares in WK to HLB directly or indirectly. This increased the own funds at HLB's disposal and, in the BdB's view, distorted competition in its favour since the parties had not agreed remuneration consistent with the market-economy investor principle.

(4) In its second letter, the BdB accordingly lodged a formal complaint and requested the Commission to initiate proceedings under Article 93(2) of the EC Treaty (now Article 88(2)) against Germany. The complaint also related to similar transfers of assets to Westdeutsche Landesbank in North Rhine-Westphalia, Norddeutsche Landesbank in Lower Saxony, Landesbank Schleswig-Holstein ('LSH') in Schleswig-Holstein, Landesbank Berlin in Berlin and Bayerische Landesbank in Bavaria. In February and March 1995 and December 1996 several banks associated themselves individually with the complaint lodged by their association.

(5) The Commission investigated first the transfer of shares to WestLB. By Decision 2000/392/EC, [2] it finally found that the difference between the remuneration paid and the normal market return constituted state aid incompatible with the common market and ordered recovery of the aid. This decision was annulled by the Court of First Instance of the European Communities on 6 March 2003 as insufficient reasons had been given for two of the factors used to calculate the appropriate remuneration, but it was confirmed in all other respects. [3] Alongside the present Decision, the Commission is adopting a new decision on WestLB which takes account of the Court's criticisms.

(6) On 1 September 1999 the Commission sent Germany a request for information on the transfers of assets to the other Landesbanks, including HLB. By letter of 8 December 1999, Germany submitted information on the transfer of WK to HLB which it supplemented by letter of 22 January 2001.

[1] OJ C 81, 4.4.2003, p. 24.

[2] OJ L 150, 23.6.2000, p. 1.

[3] Joined Cases T-228/99 and T-233/99 [2003] ECR II-435.

(7) By letter of 13 November 2002, the Commission informed Germany of its decision to initiate on account of the aid the procedure laid down in Article 88(2) of the EC Treaty.

(8) After requesting, and being granted, extensions of the deadline, Germany submitted its comments and provided additional information by letters of 14 April and 15 May 2003. Further questions were discussed at meetings with representatives of the German authorities on 26 June 2003. Following a renewed Commission request, Germany provided additional information on 29 August 2003.

(9) The Commission decision to initiate the procedure was published on 4 April 2003 in the *Official Journal of the European Union* ([4]) .The Commission called on interested parties to submit comments. It received comments from the BdB, which it forwarded to Germany for its opinion. Germany replied by letter of 30 October 2003.

(10) By letter of 7 April 2004, the Commission requested further information from Germany on all the Landesbank transfers, receiving replies on 1, 2 and 28 June 2004. On 1 October 2004 Germany provided updated figures and additional information.

(11) Following the merger between HLB and Landesbank Schleswig-Holstein-Girozentrale ('LSH') creating HSH Nordbank AG ('HSH') on 2 June 2003, the WK shares received by HLB were transferred back to FHH.

(12) On 19 July 2004 the complainant BdB, the *Land* of North Rhine-Westphalia and WestLB notified a provisional understanding concerning the appropriate remuneration for the transferred assets. In their view, this remuneration should form the basis of the Commission Decision. The definitive version of the understanding reached the Commission on 13 October 2004. On 29 September 2004 BdB, FHH and HSH Nordbank, which resulted from the merger of HLB and Landesbank Schleswig-Holstein in 2003, also reached a provisional understanding on the appropriate remuneration for the special-purpose assets transferred. Several letters were subsequently sent to the Commission by these interested parties and by Germany. The definitive version of the understanding on the transfer of the special-purpose assets to HLB reached the Commission on 14 October 2004.

II. DETAILED DESCRIPTION OF THE MEASURES

HAMBURGISCHE LANDESBANK — GIROZENTRALE ('HLB')

(13) At the time of the transfer, HLB was a public-law institution that had been set up by decree in 1938. This decree was replaced in 1993 by the Hamburgische Landesbank — Girozentrale Act, which was amended in 1997 in connection with the partial sale to 'LSH'. ([5]) Up to that point, FHH had been the sole shareholder in HLB as well as its sponsor and guarantor. In 1997 LSH, alongside FHH, became a shareholder in HLB. Each had a 49,5 % shareholding in HLB. In addition, HLB-Beteiligungsgesellschaft mbH ('HLB-BG'), which is controlled by FHH and the holding company Hamburger Gesellschaft für Beteiligungsverwaltung mbH ('HGV'), owns a de facto share of 1 % via an atypical silent partnership.

(14) On 2 June 2003 (for tax and balance-sheet purposes, 1 January 2003) HLB and LSH merged to form HSH. The owners are FHH with over 35 %, the *Land* of Schleswig-Holstein with just under 20 %, WestLB with just under 27 % and the Sparkassen- und Giroverband Schleswig-Holstein with over 18 %. With a balance-sheet total of some EUR 180 billion and some 4 500 employees in all, HSH is today one of the larger credit institutions in Germany.

(15) When the two transfers took place, HLB had a balance-sheet total of DEM 36,5 billion (1986) and just under DEM 60 billion (1992). In 2002, the year preceding the merger creating HSH, HLB had a group balance-sheet total of just under EUR 93 billion and an own-funds ratio of 11 %. That same year it had 2 700 employees at group level.

(16) As a state-owned bank, HLB took charge of FHH's banking business and that of its public and private legal persons. As a commercial bank, HLB was active especially in the areas of shipping and real estate finance, corporate and private customer business and international capital market business. In the field of shipping finance, HSH describes itself as the world leader.

TRANSFER OF WK SHARES TO HLB

(17) Under Article 1 of the Act amending the sponsorship of the Hamburgische Wohnungsbaukreditanstalt of 1 July 1986, FHH transferred 24 % of WK's equity and special capital to HLB with effect from 1 January 1986. According to the relevant contract of 10 July 1986 concluded between FHH and HLB, this was done as a means of increasing the latter's capital.

(18) In accordance with the Act increasing the capital of Hamburgische Landesbank — Girozentrale of 22 December 1992, FHH transferred with effect from 1 January 1993 a

([4]) See footnote 1.

([5]) LSH is an independent public-law institution. In 1998 it had a balance-sheet total of €100 billion and some 2 000 employees. Since 1994 it has been owned by WestLB (39,9 %), the *Land* of Schleswig-Holstein (25,05 %), the Sparkassen- und Giroverband für Schleswig-Holstein (25,05 %) and Landesbank Baden-Württemberg (10 %).

further 38 % of its shares in WK to HGV and the remaining shares (a further 38 %) directly to HLB. The FHH holding HGV in turn acquired an interest in HLB in the form of a typical silent partnership contribution with 19,86 % of the shares transferred to it. Consequently, according to the information supplied by Germany, FHH transferred 81,86% of its shares in WK to HLB, some directly, some indirectly.

(19) The transfer contract of 22 December 1992 also provided for a call option whereby FHH could at any time demand that the Landesbank transfer the WK shares transferred directly to it either to FHH itself or to a third-party designated by it. This option also included the right to receive back the shares transferred in 1986 (cf. a so-called 'side letter' of 22 December 1992). In the event of such a reassignment, payment would be based on the value of the WK shares as determined by an expert valuation for the financial year prior to the reassignment. In an addendum adopted on 21 April 1997 to the contract of 22 December 1992, it was laid down that, in the event of a reassignment, any increase in undisclosed reserves brought about by a readjustment of the WK aid scheme would accrue not to HLB but to FHH.

CAPITAL REQUIREMENTS UNDER THE OWN FUNDS AND SOLVENCY DIRECTIVES

(20) The German Banking Act (*Kreditwesengesetz* — KWG) has been amended in line with Council Directive 89/647/EEC on a solvency ratio for credit institutions ([6]) (the 'Solvency Directive') and Council Directive 89/299/EEC on the own funds of credit institutions ([7]) (the 'Own Funds Directive'), which require banks to have own funds equivalent to 8 % of their risk-adjusted assets. At least 4 percentage points of this amount must consist of what is termed core capital, or 'tier I' capital, meaning items of capital which are at the credit institution's disposal without restriction and immediately to cover risks or losses as soon as they arise. In determining the total own funds available to a bank for supervisory purposes, the core capital is of decisive importance because additional capital, or 'tier II' capital, is accepted as underpinning for risk-bearing transactions only up to the amount of the available core capital.

(21) German banks had to adapt their own funds to the new requirements of the Solvency Directive and the Own Funds Directive by 30 June 1993 ([8]). Even before the Solvency Directive was transposed into German law, many Landesbanks had relatively weak own-funds positions. They now had to strengthen their own-funds base as a matter of urgency in order to avoid restrictions on their business expansion and indeed to maintain their current level of activities. However, because the budgetary situation was tight, public shareholders were unable to provide any fresh capital, but neither were they prepared to privatise and to raise additional capital on the capital markets. The public banks thus decided to undertake asset and capital transfers: in the case of WestLB, the assets of the WfA and, in the case of HLB, the aforementioned WK shares, which were transferred to HLB's capital reserves and silent partnership reserve.

EFFECTS OF THE TRANSFER ON LBB'S CAPITAL BASE

(22) The reason for the transfers was indicated as being capital requirements and/or a need to improve capital resources for the purpose of expanding HLB's business. The transfer of WK shares presented the advantage of allowing this to happen without the need for an additional capital contribution from FHH's budget.

(23) Back in the 1980s, business expansion had given rise to a steadily growing need for capital. According to the available information, the bank therefore regularly transferred part of its balance-sheet profit to its interest-bearing share capital. However, since this was clearly insufficient, FHH decided as early as 1986 to contribute 24 % of its WK shares (DEM 212,16 million) to HLB. At the beginning of the 1990s, a further increase in HLB's equity capital was urgently required in view of the fourth amendment to the German Banking Act ('KWG') since HLB would have otherwise failed to comply with the new capital requirements laid down.

(24) Since FHH also did not have adequate liquid budgetary funds available at the time, it opted for a contribution of non-monetary capital and, on 1 January 1993, transferred the 57,68 % of WK shares (DEM 959,362 million) directly and via HGV to HLB.

(25) The total stated value of the transfers was DEM 1 171,552 million. Of this amount, DEM 212,16 million corresponded to the contribution to the open reserves in 1986 (24 % of the WK shares), DEM 659,362 million to the contribution to the open reserves in 1993 (38 % of the WK shares) and DEM 300 million to HGV's silent partnership reserve of the same year. This calculation was based on WK valuation reports by two auditing firms in 1986 and 1993. The total amount of DEM 1 171,522 million was incorporated into the balance sheet for 1993 and subsequent financial years.

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

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

([8]) Under the Solvency Directive, credit institutions must have own funds equivalent to at least 8 % of their risk-adjusted assets, whereas the previous German legislation required a ratio of 5,6 %; however, this ratio was based on a narrower definition of own funds than that which has applied since the entry into force of the Own Funds Directive.

(26) The Federal Banking Supervisory Authority (*Bundesaufsichtsamt für das Kreditwesen* or 'BAKred') recognised the capital amount of DEM 212,16million for 1986. With regard to the overall capital valuation after the further transfers in 1993, BAKred did not initially approve the relevant application from HLB because it took the view that, for WK to be recognised as a valuable holding, HLB would have to be entitled to sell it off. After a amendment to the WK Act in 1997 under which a decision on dissolution could be taken by shareholders at the request of a single shareholder (including HLB), the problem was settled and the full value was recognised as HLB's liable capital.

(27) According to Germany, HLB expanded its business significantly following the two transfers; in the period 1986-99 its balance-sheet total rose from DEM 36,5 billion to over DEM 145 billion.

REMUNERATION FOR THE OWN FUNDS TRANSFERRED

(28) According to the available information, FHH received no remuneration for the shares transferred on 1 January 1986 (24 % or DEM 212,16 million). Likewise, no remuneration was agreed for the shares transferred directly to HLB on 1 January 1993 (38 % or DEM 659,362 million); however, HGV received DEM [...] (*) million each year from HLB for the contribution.

(29) It was agreed that, in return for its contribution, HGV would receive [...] of profits, subject to a ceiling of 10 % each year. According to the information supplied, a sum of DEM [...] million had been paid by HLB since this understanding of 23 December 1992 (effective as of 1 January 1993).

(30) No further remuneration was agreed. Germany has nevertheless stated that, up to 1997, FHH, as HLB's sole shareholder, received the maximum annual dividend of 6 % laid down in the latter's statutes. ([9]) In addition, HLB has regularly converted reserves which it had generated itself into interest-bearing share capital (according to Germany, comparable to the issue of free shares), and this, according to the data submitted, resulted in an effective after-tax return of more than [...] % (and a corresponding inflow) on the capital actually paid in by the shareholder; HLB is thus the Landesbank with the highest effective yield.

III. GROUNDS FOR INITIATING THE PROCEDURE

(31) In its decision of 13 November 2002 to initiate the procedure, the Commission explained that the provision of resources by FHH to HLB had to be investigated in the light of the market-economy investor principle. According to this principle, no aid elements are present even in the case of resources provided by a state investor where such funds are provided on terms on which a private investor operating under normal market economy conditions would be willing to provide funds to a private company ([10]).

(32) For a credit institution, the economic benefit of a broader capital base created by the transfers of WK shares in question resides in the resulting greater capacity to lend and the opportunity to expand business. If this broader capital base is provided by the public investor on terms that are more advantageous than normal market conditions, the company concerned is favoured by state resources.

(33) As a result, the Commission conducted a preliminary assessment as to whether FHH had provided the funds in question on normal market conditions. Under normal market conditions, a remuneration corresponding to its value, its function and the risk incurred is expected for the contribution of capital.

(34) On the basis of the information available to it at the time, the Commission doubted whether the remuneration received by FHH and its holding company HGV, which amounted to DEM [...] million [...], or some [less than 3 %] of the total funds transferred, had been paid under normal market conditions. Since, at the time of the two transfers, even the return on outstanding ten-year Federal securities, i. e. risk-free assets, ranged from over 6 % to 7 %, the provision of capital can hardly be regarded as having taken place under normal market conditions. Even if the special features of the transaction, such as the transferred resources' lack of liquidity, were taken into consideration, the remuneration received by FHH and HGV can hardly be regarded as a normal market remuneration.

(35) Germany, it is true, had stated that, at the time of the transfer, HLB was an economically sound company whose value as a going concern had increased year on year. Proceeds were either distributed to FHH in the form of dividends or channelled into HLB's capital stock as revenue reserves, which, it is claimed, increased their value and benefited FHH as the only shareholder at the time. On the basis of a report drawn up at the time of the sale of shares (49 %) to LSH, an earning capacity value of DEM [...] million had been calculated for HLB as at [...]. According to internal calculations, this had still amounted to DEM [...] million as at 31 December 1985 and at DEM [...] million as at

(*) Confidential information: indicated below by [...] or by a range in [].

([9]) The redrafted HLB Act, applicable since 1997, no longer provides for a maximum dividend; according to the data provided, distributed dividends have more than doubled since, amounting to some 21 % in 1999.

([10]) OJ C 307, 13.11.1993, p. 3, point 11.

31 December 1992, representing an annual average rise in value of [...] % between 1986 and 1992 and of [...] % between 1993 and 1996 which FHH, the only shareholder until 1997, had been able to use entirely for its own benefit and which had been able to be realised on a pro rata basis on the occasion of the sale to LSH. Since, however, no other information or calculations, e.g. relating to the increases in dividends and value attributable to the contribution of WK shares, were available, the Commission was unable to carry out an assessment.

(36) On the basis of the available information, the Commission thus had serious misgivings as to whether the conditions on which FHH had transferred the funds that were apparently available to HLB in full as liable capital were normal market conditions. It therefore concluded that HLB was probably favoured by state resources.

(37) As regards the calculation of remuneration, the Commission stated that, as things stood and given the special circumstances of the present case, it intended to apply the method used in the WestLB Decision of 8 July 1999.

(38) Since HLB is active at the regional, national and international level and since there is strong competition between financial institutions of different Member States as a result of the growing integration in the financial services sector in the Community, it was assumed that the existence of state aid was distorting this competition and affecting trade between Member States. Accordingly, the Commission came to the provisional conclusion that the measures in question probably constituted aid within the meaning of Article 87(1) of the EC Treaty, giving rise to misgivings regarding their compatibility with the common market since none of the exemption clauses in Article 87(2) and (3) or in Article 86(2) of the EC Treaty appear to be applicable in the present situation.

(39) As part of its provisional 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 [11], the Commission also assumed that, if there were aid, the measure constituted new aid and not existing aid and referred here to Article 15(2) of that Regulation. In its view, the decision to initiate the procedure was a further Commission measure that interrupted the limitation period within the meaning of Article 15(2) and, as such, confirmed previous measures, including the Commission's requests for information dated 12 January, 10 November and 13 December 1993 and 1 September 1999 as well as the decisions to initiate the procedure in the WestLB case [12] and in the case of Landesbank Berlin [13].

[11] OJ L 83, 27.3.1999, p. 1, as amended by the 2003 Acts of Accession.
[12] OJ C 140, 5.5.1998, p. 9.
[13] OJ C 239, 4.10.2002, p. 12.

IV. COMMENTS FROM GERMANY

(40) In its comments, Germany repeated first of all the view that the transfer on 1 January 1986 of 24 % of WK's capital (value transferred to the reserves: DEM 212,16 million) to HLB could not be recovered as unlawful aid in accordance with Article 15(2) of Regulation (EC) No 659/1999 since the ten-year period applicable to the transfer had expired on 1 January 1996.

(41) This transfer ('1986 transfer') was to be seen as a legally and economically independent process separate from the 1993 transfers. In so far as Germany had previously spoken of a 'single intention to invest', as the Commission had noted in its decision to initiate the procedure, this applied solely to the 1993 transfers. The 'side letter' of 22 December 1992, which was referred to in Germany's letter of December 1999, also referred to — and was only concerned with — the 1986 transfer solely to the extent that the reassignment right to reassign the shares given to FHH in 1986 and 1993 was concerned. In addition, Germany's statement that the direct remuneration of DEM [...] million each year corresponded to around [less than 3 %] of the total amount of all the transfers, was intended merely as an illustration. However, in its view, this in no way altered the fact that *de facto* and *de jure* the 1986 transfer was a quite separate process.

(42) If, however, the 1986 transfer was to be viewed separately from the 1993 transfers, action by the Commission within the meaning of Article 15(2) of Regulation (EC) No 659/1999 could interrupt the limitation period only if it were taken before 1 January 1996. However, the Commission's requests for information that preceded the one dated 1 September 1999 were of a general nature, had not even mentioned HLB and so did not meet the conditions for them to be regarded materially as action interrupting the limitation period within the meaning of Article 15(2). Germany also mentioned in this respect the judgment by the Court of First Instance of 10 April 2003 in Case T-369/00 *Département du Loiret* v *Commission* [14] (hereinafter '*Scott*'). The Court ruled that a Commission letter requesting information regarding a possible aid element was a measure interrupting the limitation period within the meaning of Article 15(2) of Regulation (EC) No 659/1999. However, the letter in question had been a request for information that was concerned expressly and materially with a plot of land that the firm Scott S.A. had sold on preferential conditions. In that letter the Commission had referred expressly to the fact that the lawfulness of the aid in question was being examined and that the aid might have to be repaid. According to Germany, the Court had thus laid down the minimum requirements that a request for information must meet in order to be regarded as action interrupting the limitation period.

[14] [2003] ECR II-1789.

(43) In the present case, the Commission, with its requests for information of 12 January, 10 November and 13 December 1993, which were mentioned by it in the decision to initiate the procedure and were addressed to Germany, fell far short of these requirements. These letters had referred simply to Westdeutsche Landesbank and to a general request regarding possible similar transfers to other Landesbanks. HLB and FHH had not been mentioned in any of those letters. According to Germany, the triggering of the limitation period prevented further examination of the 1986 transfer.

(44) As for the economic assessment of the capital transfer, Germany confirmed first of all that the total value of the WK shares transferred in 1986 and 1993 (DEM 1 171,522 million) had been made available to HLB as equity capital. At no time had the transferred capital been assigned to a special purpose or made subject to any other restriction as to its use.

(45) It should be borne in mind here that the capital transferred in 1986 was recognised from then on by BAKred as liable capital. However, the total amount, i.e. including the 1993 transfer of around DEM 959 million (of which 38 % was directly transferred WK shares which were assigned to HLB's open reserves with a value of DEM 659,362 million, and 19,86 % was WK shares transferred indirectly via HGV, which were transferred to HLB as a silent partnership contribution amounting to DEM 300 million), was recognised by BAKred as liable capital only in 1997. This was because the WK Act was amended only on 25 June 1997 and because HLB as shareholder was granted the right to dissolve or liquidate WK.

(46) Germany stated that the transferred funds had, therefore, been made available to HLB in full as liability cover only retrospectively on 1 January 1997. Even so, as Germany later explained, HLB had before that date used part of the capital reserve as liability cover, viz. DEM 183 million in 1993, more than DEM 436 million in 1994, DEM 255 million in 1995 and DEM 208 million in 1996 (figures rounded; see also the table in paragraph 183). The remaining amount of the capital reserve had not been used and had not been recognised as liable core capital. It was only after 1 January 1997 and until the divestment of WK at the time of the merger with LSH to form HSH on 2 June 2003 that the amount of DEM 659,4 million had been available. The silent partnership contribution of DEM 300 million had also been available in full as liable core capital until that date. Prior to 1997 these funds had not been used and had not been recognised as core capital.

(47) As regards the remuneration, the maximum fixed amount of DEM [...] million [...], corresponding to [not more than 10 %], was paid throughout on the silent partnership contribution. No remuneration was paid on the capital reserve of some DEM 659 million.

(48) Germany nevertheless repeated the view that it was not only the agreed, direct remuneration for the silent partnership contribution that should be taken into account as a remuneration component. For one thing, the dividend payments to the sole shareholder FHH had to be taken into consideration since the profits earned by HLB were necessarily also attributable to the funds transferred by FHH. And so, as the sole shareholder until 1997, FHH had received the highest dividend of 6 % laid down in the statutes and from 1997 onwards had received varying, but increasing dividends on its share of the share capital. These dividend payments rose from EUR [...] million in 1985 to EUR [...] million in 1996, when FHH had still been the only shareholder. As they were then payable only on 50,5 % of FHH's shares, they amounted to EUR [...] million in 1997 and to EUR [...] million in 2001.

(49) Moreover, the reserves that HLB had itself built up were regularly converted into equity capital, which rose from EUR 228,3 million in 1985 to EUR 250,9 million in 1997 and has remained unchanged since. The revenue reserves had also risen steadily, from EUR 93,1 million in 1985 to EUR 321,8 million in 2001. All of these facts indicated a substantial increase in revenue.

(50) Account must also be taken of the increases in value that has been produced by the transferred capital and were attributable solely to FHH. There was an increase in value of between some [...] % and [...] % that was attributable solely to the transfer of WK shares. Germany provided more detailed calculations based on the capitalised value method. Between 1985 and 1992 the value of HLB had risen by DEM [...] million, or just under DEM [...] million a year, giving a return of [...] % in terms of the WK shares transferred in 1986. Between 1992 and 1995 the company's value had risen by DEM [...] million a year, giving an annual yield of [...] % in terms of the WK shares transferred on 1 January 1993. This again demonstrated that, all factors being taken into consideration, FHH had received appropriate returns.

(51) Lastly, FHH could have expected appropriate returns at the time of the two investments. At the end of 1985 and at the end of 1992 HLB had been a profitable company with equity returns (before tax), given here as examples, of over 19 % in 1985, 8 %-9 % in 1989 and 1990 and over 12 % in 1992. For purposes of comparison, Germany communicated capital returns it had itself calculated for five private German banks which showed that in the years 1980-92 HLB had not or had in only a few years lagged behind the relevant annual average of the other five institutions by some 1 %-6 % (before tax) and 1 %-4 % (after tax). In other words, HLB 'does not lag behind' the other private banks.

(52) For the rest, Germany took the view that the transfers were to be compared to a non-monetary capital contribution because of the lack of liquidity of the funds made available. For a calculation of return, what mattered therefore was the difference between a non-monetary contribution and a cash contribution, which consisted in the refinancing costs for the lending to promote business expansion or in the disadvantage represented by the fact that the cash value of the deposit cannot be invested directly. According to the calculations provided, the interest-rate difference relative to a cash contribution in the case of the non-monetary capital transferred in 1986 was some 6,8 % in respect of lending and some 6,8 % in respect of income-producing, risk-free investments. For the contribution made on 1 January 1993, the difference was around 8,3 % for lending and 7,36 % for risk-free investments. In terms of the gross return, this represented a difference of some 6 % (1996) and 6,6 % (1993) between capital assumed to be provided in cash and the illiquid capital actually provided. A market-economy investor too must take this disadvantage into account when assessing whether his remuneration is appropriate.

V. COMMENTS FROM THE BDB

(53) The BdB considers the remuneration that was actually paid to be insufficient. No remuneration at all had been agreed for the WK shares transferred on 1 January 1986 while, for the shares transferred in 1993, only the interest payable on the silent partnership contribution had been agreed. In terms of the total capital transferred, this corresponded to less than 3 % per annum and could not in any way be regarded as normal for the market. FHH's claim to an appropriate remuneration was not undermined, for instance, by the fact that it had been HLB's sole shareholder. What mattered was the expectation at least of an average return that private banks too regularly associate with the provision of equity capital to their subsidiaries.

(54) Admittedly, it is true that this anticipated return did not figure in the understanding on a fixed interest rate since the return to the parent company could be in the form not only of dividend payments but also of the increase in the revenue and associated value of the subsidiary. Even so, the expected normal market return corresponded to the setting of a fixed interest rate.

(55) As a market-economy investor, FHH should, therefore, have expected a normal market return from HLB. However, it had by no means been able to count on this.

(56) Even for the transfer on 1 January 1986, it appears that, according to the Land Government notice of 17 December 1985, a below-average return of between DEM 0,3 million and DEM 0,5 million (according to the BdB, corresponding to between 0,1 % and 0,2 %) was expected. Since dividends were to be paid only after business had actually expanded, there had clearly been no remuneration at all for FHH in the early years. Even the dividends actually paid out subsequently to FHH were not to be taken into account since, under the circumstances obtaining, a private investor would have demanded a fixed annual remuneration. Similarly, the reserves and revenue converted into share capital could not be taken into consideration.

(57) Possible increases in value could not have been expected here either since the shares in HLB had not been negotiable. In addition, therefore, the shares had not been subject to any ongoing assessment of their value. The transfer in 1997 of 49,5 % of the shares to LSH had not removed the aid element. The sale had taken place after the time of the investment and had, therefore, been quite immaterial as regards the remuneration expectation. For the state aid investigation it was a matter of whether a transaction had taken place under normal economic conditions.

(58) It transpired from all this that, under these circumstances, a private investor would have undertaken the investment only if revenue or cash flows could have been generated promptly, either in the form of fixed dividends or alternatively in the form of variable cash flows. In such a situation, however, a private investor would presumably prefer fixed interest payments. There is also the fact that FHH had not been entitled to reassign the WK shares without any consideration (compensatory payment at book value).

(59) In calculating a normal market return, BdB first assumed that the resources transferred needed to be remunerated in the same way as share capital because they constituted core capital recognised for banking supervisory purposes. It stated that an appropriate return on capital made available would invariably be based on a risk-free return and a risk premium. In other words, the basic principle of 'expected return on a risky investment = risk-free return + risk premium for the risky investment' would be applied.

(60) The BdB then calculated the minimum remuneration applying the so-called Capital Asset Pricing Model (CAPM), which determines the expected individual risk premium with the help of the so-called beta value (statistically measured deviation of the individual risk premium from the general long-term market risk premium).

(61) In determining the risk-free return, the BdB used the returns on long-term government bonds, fixed-rate securities issued by state bodies being the form of investment with the lowest risk or with no risk at all ([15]).

(62) For the purpose of deriving the risk premium, the BdB first determined the so-called general market risk premium, i.e. the difference between the long-term average return on the

([15]) To adjust for inflationary effects, the rate of return on a long-term government bond had first to be determined for each contribution period disregarding inflationary expectations. In estimating the long-term, risk-free basic interest rate, the estimation of the expected long-term average inflation rate of 3,60 % was then added to the 'real basic interest rate' at the relevant moment.

normal market share portfolio and the risk-free return (government bonds). In its comments of 25 June 2003, it assumed in the first place a long-term market risk premium of a uniform 4,6 %.

(63) The BdB stated that it estimated the beta values on the basis of a historical data sample for comparable banks. It concluded first that all beta values for all Landesbanks and for all the periods under consideration were greater then one. In other words, it considered that the risk premium for investments in Landesbanks was higher than the market risk premium.

(64) Assuming a risk-free basic interest rate of 8,05 % (December 1985, for the 1986 transfer) and of 5,90 % (December 1992, for the 1993 transfer) and a beta factor for HLB of 1,1660 (first date) and of 1,0836 (second date), the BdB arrived at an expected minimum remuneration of 13,41 % for the shares transferred on 1 January 1986 and of 10,88 % for the shares transferred on 1 January 1993.

(65) The BdB also noted that the Commission's deduction pursuant to Decision 2000/392/EC from the minimum remuneration to take account of the lack of liquidity of Wfa's assets had been upheld by the Court of First Instance. There was therefore no reason to depart from this method in the present case, with the result that a deduction for liquidity should also be made here. The amount of the deduction for lack of liquidity would be calculated, using the WestLB method, on the basis of net refinancing costs (gross refinancing costs less the applicable corporation tax).

(66) The BdB also took the view that the deduction made by the Commission pursuant to Decision 2000/392/EC (1,5 %) and upheld as such by the Court of First Instance, ought similarly to be made in the case of HLB. In its opinion, if there were circumstances in the other Landesbank cases that had the effect of increasing risk as compared with a 'normal share capital investment', such as the in part exceptionally large size of the asset transfer, the decision not to issue new company shares and the associated absence of additional voting rights as well as the lack of fungibility of the asset, a deduction would be justified here too.

(67) Instead of a normal market return calculated in this way, FHH had not agreed on or received any remuneration whatsoever for the 1986 transfer, and the remuneration for the 1993 transfer had been too small. For the 1993 transfer, which had been recognised as core capital for supervisory purposes only in 1997, HLB had, since 1993, paid out an annual share in profits consisting of a guaranteed remuneration of 7 % and a variable component (fixed interest rate of 0,5 % on the dividend payout from net profit for the year). The BdB did not know the actual amount. However, since it could be compared to share capital, the remuneration appeared to be too low. In addition, it had been paid to HGV, which, although it was a holding company of FHH, was, economically speaking, an independent unit, whereas nothing had accrued directly to FHH. No remuneration at all had been agreed for the transfer of the other shares to the capital reserve.

(68) The limitation period for the transfer of shares on 1 January 1993 had been interrupted by the Commission as a result of the information request dated 1 September 1999 and the decision of 13 November 2002 to initiate the procedure. With regard to the transfer on 1 January 1986, the BdB, in rejecting the time limitation, relied on the legal concept of a continuous series of acts, which also had its equivalent in the case law relating to traditional competition legislation. The conditions for such related acts were met here because all the transfers had been in response to a uniform concept of capital strengthening and business expansion and had followed the same pattern. Accordingly, the transfer of 1 January 1993 could not be viewed separately either on account of the new solvency rules. The transfers in 1986 and 1993 were, therefore, to be regarded as a single capital measure, and the aid was not granted in full until 1 January 1993.

(69) Accordingly, it was also immaterial whether the Commission's requests for information in 1993 could have interrupted the limitation period. However, the BdB maintains here that this period could have been interrupted as regards the aid granted to HLB only if those requests had also related to this aid measure. Since the BdB did not know the exact content of those letters, it could not take a definitive position on the matter.

VI. GERMANY'S RESPONSE TO THE BDB'S COMMENTS

(70) Germany stated first that the BdB had misinterpreted the judgment of 6 March 2003 by the Court of First Instance in the WestLB case (hereinafter 'WestLB judgment'). The BdB apparently felt that the judgment had made it clear that the increase in value attributable to the capital contribution was not a normal market return. However, the Court had not commented in any material way on the decision. The Court's ruling that a private investor would not normally be content with minimum losses or a limited return even where he already held share capital in the company said nothing about the assessment from the viewpoint of state aid legislation of a return that consisted not in a fixed interest rate but, for example, in an increase in the company's value.

(71) The BdB clearly acknowledged this when, in discussing capital contributions by private banks to subsidiaries, it stated that the expected return was not expressed in the setting of a fixed interest rate but in the form of dividends as well as revenue increases and associated increases in value. It should be pointed out in this connection that the BdB was not aware of the facts regarding the possibility — which it itself doubted — of an increase in the value of HLB as, contrary to what BdB believed, 49,5 % of the shares were not negotiable since they were sold to LSH in 1997.

(72) The minimum returns of 13,41 % (1986 transfer) and 10,88 % (aggregate 1993 transfer), which had been calculated on the basis of the CAPM method, were incorrect. On the one hand, fundamental misgivings were expressed regarding the use of the CAPM method and specific misgivings regarding its use by the BdB. Among other things, the BdB had restricted the market portfolio to the German shares making up the CDAX, had estimated the parameters solely on the basis of what were in part past data without checking their validity for the relevant date of the investment, had derived the market risk premium from a study that dealt solely with the average return on German shares in the period 1954-88 and, in calculating the beta factors, had regarded the CDAX banks as companies with the same business and risk profile. As a result, virtually all the factors needed for the CAPM were wrongly estimated and the normal minimum market returns for the transactions in question were overstated.

(73) In addition, the BdB had maintained that a premium charged to take account of the special features of the transactions was simply the result of applying the criteria specified in Decision 2000/392/EC, without however carrying out a quantitative assessment such as that criticised in that decision. Moreover, on account of the lack of liquidity, the full refinancing rate had been deducted since it was not at all admissible to set off the tax-reducing effect claimed by the BdB as a liquidity deduction against the appropriate return. This was based on a fundamental misconception. Expected returns for investors had nothing to do with the tax effects on the balance sheet for companies.

(74) In line with its interpretation of the law, Germany calculated an alternative normal market return to that calculated by BdB. It did so only for the 1993 transaction since the 1986 transfer had been time-barred.

(75) Germany took the view here that a risk profile analysis should be carried out first for the two non-monetary contributions. The silent partnership contribution should be compared with such other contributions with a similarly long period to maturity (16 years). As regards the capital reserve, the comparison should preferably be made with a silent partnership contribution of unlimited duration in view of the risk profile, e.g. the guarantee, if any, afforded by institutional liability in the event of insolvency, the irrelevance of voting rights given that FHH was the sole owner, the participation in losses, the ranking of the dividend claim and the period to maturity. On this basis, Germany, in its reply to the BdB's comments, combined the two instruments when calculating the remuneration but weighted their shares of the overall contribution according to whether they were of limited or unlimited duration. By deducting refinancing costs in full, it arrived at an appropriate remuneration of 1,48 % for the total contribution.

(76) In line with its interpretation of the law, however, Germany also calculated in its reply the return on the capital reserve according to the CAPM. Assuming a market risk premium of 3 % and a beta value for HLB of 0,7861, this gave a hypothetical minimum return on cash deposits of 9,74 % in respect of the increase in the capital reserve although the full refinancing costs had to be deducted on account of the lack of liquidity, with the result that the actual minimum normal market return worked out at 2,36 %. For the silent partnership contribution, because these instruments were not traded on the secondary market, Germany did not use the CAPM but the comparison with similar financing instruments. After deducting again the full refinancing costs, this produced a premium of 1,29 % for silent partnership contributions of unlimited duration similar to HLB's contribution. In weighted terms, this gave an aggregate remuneration of 2,08 %.

(77) As regards the time-bar, which, according to the BdB, had not been triggered because of the linkage between the two transactions, Germany repeated the objections it had raised previously and stated once again that the 1986 transfer had been a transaction that was *de facto* and *de jure* separate from the 1993 transfer as the documents produced at the outset and subsequently proved. For the rest, the legal concept of a continuous series of acts, cited by the BdB, had in the meantime been called into question by criminal court judges at the Federal Constitutional Court. The concept of continuing relationship in European cartel legislation, which had been explicitly dealt with in a regulation on prosecution and enforcement prescription, could not be applied to the state aid legislation relating to other facts, especially as Regulation (EC) No 659/1999 did not recognise that concept.

VII. UNDERSTANDING BETWEEN THE BDB, FHH AND HSH

(78) On 8 October 2004 the Commission was informed of the outcome of an understanding reached between the complainant BdB, FHH and HSH, which resulted from the merger of LSH and HLB in 2003. Irrespective of their basic interpretations of the legal situation, which remained unchanged, the parties to the understanding agreed on the basic method of calculating a return as a comparative

direct, fixed remuneration. In the light of the 1993 transfer of 38 % of WK shares to the capital reserve amounting to some DEM959,4 million, they agreed on the amount of appropriate remuneration. As regards the indirect contribution to a silent partnership reserve that also took place on 1 January 1993 of 19,86 % of WK shares amounting to DEM 300 million, although agreement could be reached on the basic approach of a fixed remuneration criterion, no agreement was reached on the exact calculation method, especially regarding the deduction for lack of liquidity (see paragraphs 81 to 203). The parties asked the Commission to take account of the outcome of the understanding in its decision. The understanding did not concern the 1986 transfer; the parties declared that they would not object to a definitive Commission decision on the limitation period for this transfer.

(79) Applying the CAPM, the parties first determined a minimum normal market remuneration for the contribution to the capital reserve (some DEM 959 million). Assuming a risk-free interest rate of 7,23 %, a general market risk premium of 4 % and a beta value of 0,74, the appropriate minimum remuneration for the shares transferred to the capital reserve should, under this understanding, amount to 10,19 %. Since FHH was the sole owner, no other premium, e.g. for the lack of voting rights, was agreed. Lastly, a deduction of 3,62 % was determined for the capital's lack of liquidity (on the basis of the risk-free interest rate as gross refinancing costs, of which some 50 % company taxes plus solidarity surcharge to determine net refinancing costs). This gives an appropriate remuneration of 6,57 %.

(80) HSH and FHH calculated a remuneration margin of 129 basis points for the DEM 300 million transfer to the silent partnership reserve since the gross refinancing costs had to be deducted. The BdB also preferred a calculation based on the CAPM and, applying a lower beta factor (0,32) for this special transaction, which took place at the same time, and the after-tax liquidity deduction of 3,62 % and deducting solely the (net refinancing costs), arrived at an appropriate remuneration of 4,89 %.

VIII. ASSESSMENT OF THE MEASURES

1. ON THE GENERAL QUESTION OF THE LIMITATION PERIOD

(81) Germany has taken the view that the ten-year limitation period provided for in Article 15 of Regulation (EC) No 659/1999 has elapsed as regards the transfer on 1 January 1986 of 24 % of the shares, which increased HLB's capital by DM 212 160 000, in so far as it constituted state aid. The Commission requests for information dated 12 January, 10 November and 13 December 1993, i.e. those prior to 1 January 1996, were general in nature and so were not measures under Article 15(2) of the Regulation that could have interrupted the limitation period.

(82) After examining the facts of the case closely, the Commission agrees with this view and will not subject the transfer of 1 January 1986 to a further state aid investigation.

(83) It is to be noted that Article 15(1) of the Regulation (entry into force on 16 April 1999), which sets a deadline for the recovery of unlawful aid, applies to any definitive action ordering recovery of aid taken after the date on which the Regulation entered into force, including aid granted before that date ([16]) . The beginning of the ten-year period, within which the Commission may recover unlawful aid, is the day on which the aid was granted, even if the Regulation was not applicable at that time ([17]).

(84) The transfer on 1 January 1986 was a one-off, non-recurrent state measure. It thus differs from state regulations that provide for recurrent measures such as annual grants or tax reliefs. Moreover, it has no *de facto* or *de jure* relationship with the 1993 transfer. The side letter of 22 December 1992, which is mentioned by Germany in a letter dated December 1999 and was subsequently handed over, does not, as originally claimed, speak of a uniform investment objective for both transfers. It refers solely to the 1993 transfer and, for this purpose, takes over a specific rule governing the 1986 transfer and applies it to the 1 January 1993 transfer of additional shares, namely the right of FHH to require the transfer of WK's shares.

(85) The transfer of FHH on 1 January 1986 is to be taken as the time at which the unlawful aid, if any, was granted. As a result of the legally valid injection of resources under the conditions described above, the possible economic advantage at issue here accrued to HLB. The resources were available to HLB with effect from 1 January 1986; they were recognised by BAKred for 1986. Accordingly, the ten-year period ended on 1 January 1996.

(86) In accordance with Article 15(2) of Regulation (EC) No 659/1999, the ten-year period is interrupted by any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid. In *Scott* the Court of First Instance ruled that, although a request made by the Commission prior to the entry into force of the Regulation for information concerning a clearly defined possible aid measure could not possibly interrupt the ten-year period at that time, such an effect could be attributed to it if the Commission exercises its powers to recover the aid in question following the entry into force of the Regulation. ([18])

([16]) [2003] ECR II-1789 ('Scott').
([17]) Ibid.
([18]) Ibid, paragraph 57.

(87) In the present case the Commission requests for information prior to 1 January 1996 do not satisfy the requirements for action interrupting the ten-year period as they do not constitute action *with regard to the unlawful aid*, as provided for in Article 15(2).

(88) Prior to the request for information dated 1 September 1999, the Commission did not, in any letter to Germany, ask about the transfers in Hamburg and did not mentioned either FHH or HLB. The three letters from 1993 refer exclusively to the transfer of WfA to WestLB; what is more, they simply contain general requests relating to other possible transfers to Landesbanks of other *Länder*. In addition to questions concerning WestLB, the request for information dated 10 November 1993 mentions only the Länder of Berlin, Schleswig-Holstein and Lower Saxony. In its two letters of 1994 and its letter of 3 January 1995, the BdB did, it is true, draw attention to the transfers of FHH to HLB. However, the Commission reacted for the first time in its letter dated 1 September 1999 and requested information on the transfers in Hamburg.

(89) Before the end of the ten-year recovery period on 1 January 1996, there was therefore no evidence of a Commission investigation into the transfers to HLB. The correspondence relating to WestLB and the general enquiries regarding possible transfers in other *Länder* cannot replace requests for information with regard to a specific possible aid. Otherwise, general Commission notices sent out every ten years would interrupt the period and would undermine the purpose of any limitation period.

(90) In the Commission's view, Germany and HLB can, under the special circumstances of the 1986 transfer, rely on legal certainty and confidentiality even though the contribution was not notified in accordance with Article 88 of the EC Treaty. It should be borne in mind here that state aid legislation and monitoring was not at that time as developed in all details as it has been since the 1990s. This is particularly true as regards capital injections by public-sector owners and, for example, the market-economy investor principle, which was developed only after the first transfer to HLB and has been examined in practice. To this extent, the German authorities and HLB, which in 1986 undertook share transfers between two companies wholly owned by it, could not assume the existence of possible state aid and hence the need for a notification.

(91) Accordingly, the Commission regards the ten-year period under Article 15(1) of Regulation (EC) No 659/1999 as having expired. Any aid associated with the contribution of 24 % of WK's shares to HLB on 1 January 1986 is to be regarded as existing aid within the meaning of Article 15(3) of the Regulation. The observations below refer exclusively to the transfers carried out on 1 January 1993.

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

(92) Article 87(1) of the EC Treaty states that, save as otherwise provided in the 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, in so far as it affects trade between Member States.

2.1 *State resources and favouring of a particular undertaking*

(93) As stated above, a total of just under 58 % of FHH's shares in WK was transferred directly and indirectly (silent partnership contribution through HGV) to HLB on 1 January 1993. This ranks as state resources within the meaning of Article 87(1) of the EC Treaty.

(94) The economic benefit of a broader capital base resides in a greater lending capacity and the associated possibility of expanding business. If additional capital is made available to the undertaking on conditions better than normal market conditions, this ranks as favouring within the meaning of Article 87(1) of the EC Treaty. In examining this matter, the Commission applies the 'market-economy investor' principle. The Court of Justice and the Court of First Instance have accepted and developed this principle in a number of cases, in particular in the ruling by the Court of First Instance of 6 March 2003 ([19]), which is of relevance to the present case.

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

(95) According to this 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

([19]) See footnote 3.

under normal market-economy conditions' ([20]). In contrast, a financial measure is deemed unacceptable for a market-economy investor if, and this has to be examined, the expected or agreed remuneration for the transferred resources is lower than the remuneration paid on the market for comparable investments.

(96) The market-economy investor principle is likewise applicable to all public undertakings, irrespective of whether they are profit- or loss-making. This position of the Commission has been confirmed by the Court of First Instance in *WestLB* ([21]).

(97) The Commission must base its assessment of a case on the information that was available to the investor when he decided on the financial measure in question. The transfer at issue here was decided by the competent authorities at the end of 1992 and became effective on 1 January 1993. The Commission must, therefore, assess the transaction on the basis of the information available and the economic and market circumstances obtaining at the time. Information in this decision that refers to subsequent years is used only for purposes of illustration.

(98) If a public shareholder decides that a capital injection for the bank is appropriate for meeting capital requirements, the question arises whether the specific circumstances under which the capital is provided would be acceptable to a market-economy investor. If a capital measure is necessary to meet solvency requirements, a market-economy investor might be prepared to undertake such a measure in order to safeguard the value of the existing investment. He would, however, insist on an appropriate return for the new capital injection that took account of the risk profile.

(99) Even if a market-economy investor already holds shares in an undertaking, he will look into other investment options outside that undertaking. As a rule, he will then choose to invest further in the public undertaking only if he can expect a reasonable return on the additional resources. Basically, no account is taken of the mere avoidance of losses or of a better use than previously of the resources in question in deciding whether a capital contribution constitutes state aid. Whatever the motives behind it, a capital injection by a shareholder should be measured instead according to whether the investor can expect a normal return on the additional resources within a reasonable period.

(100) The Court has raised no objections to this interpretation of the market-economy investor principle, which the Commission has already applied in its Decision 2000/392/EC ([22]). It has also adopted as a guiding principle that even a private investor who already owns share capital in an undertaking is not normally content with the fact that an investment does not cause him a loss or produces only limited profits. Instead he will always seek to obtain an appropriate return on his investment according to the particular circumstances and the satisfaction of his short-, medium- or long-term interests ([23]).

(101) According to the market-economy investor principle, the key question in examining this case is, therefore, whether a market-economy investor would have transferred under the same conditions capital that had the same characteristics as the promotion-related assets of FHH, especially in view of the expected return on the investment.

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

(102) Article 295 lays down that the system of property ownership in the various Member States must not be affected. This does not, however, justify any infringement of the competition rules of the Treaty.

(103) Germany has stated that the resources transferred could not have been used in any other profitable manner than by being injected into a similar public institution. Consequently, the transfer represented the commercially most sensible use of those assets. So any remuneration for the transfer, i.e. any additional return on the assets transferred, would be sufficient to justify the transfer in the light of the market-economy investor principle.

(104) This line of argument cannot be accepted. It may be that the contribution of the shares to HLB and the resulting opportunity for the bank to use the capital for solvency purposes was the economically most sensible use to which it could be put. However, as soon as public monies and other assets are used for commercial, competition-oriented activities, the normal market rules must be applied. This means that the State, once it decides to use certain assets (also) commercially for public purposes, must demand a remuneration in line with the normal market remuneration.

(c) **Ownership structure**

(105) The key question, as formulated by the Court of First Instance 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 interest could have been prompted to make the capital contribution in question ([24]). 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 the time' ([25]).

([20]) Commission communication to the Member States: Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3; see paragraph 11. Although this communication deals expressly with manufacturing, the principle doubtless applies likewise to all other sectors of the economy. As regards financial services, this approach was confirmed by a number of Commission decisions, e.g. in *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28) and *GAN* (OJ L 78, 16.3.1998, p. 1).

([21]) See footnote 3 and paragraph 206 *et seq*.

([22]) See footnote 2 and paragraph 161 *et seq*.

([23]) See footnote 3 and paragraphs 241 and 314.

([24]) *WestLB*, paragraph 245.

([25]) *WestLB*, paragraph 246.

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 available information, have had at that time. These expectations essentially relate to the likely return.

(106) FHH was the sole owner of HLB. Even if this fact were to make it possible not to focus simply on an agreed remuneration (here DEM [...] million [...], corresponding to [at most 10 %] on the silent partnership contribution), ownership of FHH cannot be relied on in the present case to justify the low level of direct remuneration.

(107) Reference to FHH's ownership of HLB would necessitate the existence of a business plan, expert report or valuation of the expected return on the investment in question.

(108) This was not the case here. At the time of the investment, there was no business plan, expert report or valuation of the expected return on the investment in question. Except for the agreed direct remuneration, the Commission therefore has no reliable and quantifiable evidence for the return expected by FHH at the time.

(109) Germany stated that not only the reserves built up by HLB itself and regularly converted into capital but also the dividend payments to FHH as the sole owner ought to have been considered since the profits generated by HLB were inevitably also attributable to the resources transferred by FHH. In addition, account must be taken of the increases in value that were produced by the capital contributed and were also achieved in 1997 with the sale of the shares to LSH.

(110) According to the principle of the market-economy investor, who, on the basis of the information available to him at the time of the investment, can either expect or agree on an appropriate return, dividend payments or increases in value occurring *after* the investment are not relevant. Consequently, dividend payments or increases in value that could not be calculated beforehand cannot be determining factors. Nor can the question as to whether or not an increase in value following a sale generates revenue. In addition, dividends are paid on capital and not on reserves, even if these contribute to an increase in earnings per share.

(111) The Commission thus takes the view that, in the present case, an appropriate remuneration should be determined in the light of the direct return that a market-economy investor would have demanded.

(d) **Remuneration and elements of remuneration for the contribution of DEM 659,4 million to HLB's capital reserve**

Capital base for calculating the remuneration

(112) As in the WestLB case and as has been confirmed by the Court, remuneration is basically payable in respect of the entire value of the assets transferred. It may differ for parts of the resources transferred. In setting an appropriate remuneration, a distinction should be made between the different parts of the capital reserve according to their benefit for HLB.

(113) The value of the shares transferred and shown on the balance sheet remained constant after 1 January 1993 at DEM 659,4 million. However, that amount could not be used in full as capital prior to its recognition by BAKred. Until it was recognised as capital on 1 January 1997, its use was tolerated by BAKred only in so far as this was necessary to meet the relevant solvency rules. For instance, from 1993 to 1996 HLB covered parts of the reserve (DEM 182,5 million in 1993, over DEM435,6 million in 1994, DEM 255,1 million in 1995 and DEM 451,1 million in 1996). After 1997, because of the prudential requirement to cover the reserve with capital of DEM [...] million at all times, only DEM [...] million could be utilised in full up to May 2003. The table in paragraph 183 gives the relevant basis for calculating the appropriate return on liable capital.

(114) Although they were not, and could not, be used to expand its competitive business, the parts of the reserve that were not covered up to 1997 and could not subsequently be covered (see the table in paragraph 183) were still of benefit to HLB since the amount of capital shown on the balance sheet provides the bank's lenders with an indication of its soundness and thus affects the conditions on which it can borrow capital. Creditors and ratings agencies take the bank's overall economic and financial situation into account. Since these amounts could not be used each year for business expansion but improved the bank's standing in the eyes of creditors, the economic function of the capital can in this respect at least be compared to a guarantee.

(115) A market-economy investor would also have required a remuneration for these resources on account of the economic benefit they conferred.

Appropriate remuneration for liable capital

(116) Financial assets of differing economic quality demand differing returns. Determining whether an asset is acceptable for an investor operating under normal market conditions must, therefore, be based on the specific economic nature of the capital measure in question and on the value to HLB of the capital made available.

Similarity of the investment to share capital

(117) The Commission takes the view that, apart from its lack of liquidity, the contribution to the capital reserve, which, at least from 1997 onwards, has been regarded as core capital by BAKred, most closely resembles an investment in share capital.

(118) The complainant shares this view. Germany had, on account of the risk profile, compared the capital reserve to a silent partnership contribution. In their understanding, the parties took the similarity to share capital as the basis for calculating an appropriate remuneration.

(119) The special-purpose reserve has been recognised by BAKred as core capital ('tier 1 capital') and can therefore be compared only with equity instruments that were recognised as core capital in Germany in the year of the transfer. According to the information available to the Commission, these were in 1992 simply the equity or share capital of a bank as well as the reserves and silent partnership contributions that satisfied the special requirements laid down in Section 10(4) KWG.

(120) The Commission has already made clear in its Decision 2000/392/EC that a comparison between WfA's assets, which were also recognised as core capital, and hybrid equity instruments that were regarded only as additional capital, such as profit participation certificates and non-voting preference shares, cannot serve as a basis for determining the appropriate remuneration for the transferred capital ([26]). Core capital is of greater benefit to an undertaking because it can be used to raise additional own funds (e.g. profit participation certificates) up to the same amount in order to increase its own funds base. For the capital provided to be recognised as original own funds, there must be greater exposure to risk, which, as a general rule, is also reflected in a higher market remuneration for such instruments. Any point of comparison with 'additional funds' that offer only limited scope for business expansion can therefore be ruled out at the outset.

(121) The Commission considers that the comparison with silent partnership contributions made by Germany and HLB is not suitable as a basis for determining the appropriate remuneration for the capital reserve. Instead, the transfer of the shares is comparable to an investment of share capital in HLB.

(122) An essential point for the Commission is that the transfer of the promotion-related assets was precisely not in the legal form of a silent partnership contribution but consisted in the creation of a reserve. Although it is also true that a capital reserve has a number of characteristics that are typical, if anything, of silent partnership contributions, the Commission considers that the risk that the transferred capital would be used at least in part for cover purposes in the event of insolvency or liquidation was generally no less than that associated with a share capital investment.

(123) Given the above views, notably regarding an analysis of the risk incurred by an investor in carrying out the transaction at issue, the Commission concludes that the starting point for calculating the appropriate remuneration for the transfer to HLB's capital reserve is the amount of share capital made available.

Liquidity costs

(124) Germany takes the view that, on account of the lack of liquidity and the resulting refinancing costs, the transfer of WK's shares can best be compared to a real capital contribution. As it stated in its original position, this meant, in terms of the gross return, a difference of some 6,6 % compared with capital contributed in cash. A market-economy investor must take this cost into account when considering the appropriateness of his remuneration.

(125) The Commission is also of the opinion that the lack of liquidity should be taken into account. 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 extend its business. 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 ([27]).

(126) Since its capital did not provide any liquidity at first, HLB incurred additional financing costs to the extent of the amount of capital if it borrowed on the financial markets the funds necessary to exploit fully the business opportunities opened up by the additional own capital, i.e. to expand the risk-weighted assets by a factor of 12,5 (or to maintain existing assets at this level) ([28]). Because of these extra costs, which do not arise in the case of equity capital provided in liquid form, 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.

([26]) See footnote 2 and paragraph 199.

([27]) 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.

([28]) 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).

(127) The Commission is here of the opinion that the overall refinancing interest rate must 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 cooperation tax. Only the net costs should be taken into account as an additional burden on HLB because of the special nature of the capital transferred. Overall, therefore, the Commission recognises that HLB incurred additional 'liquidity costs' to the amount of 'refinancing costs less company taxes'.

(128) In their understanding, the parties similarly base their calculation on the net refinancing costs. They applied a long-term, risk-free interest rate of 7,23 % for the total refinancing costs ([29]). They also agreed to accept a flat-rate level of tax of 50 % ([30]).

Determination of a likely minimum remuneration for an investment in the share capital of HLB

(129) The expected return on an investment and the investment risk are key determinants in the decision of a market-economy investor to invest. In order to determine their level, the investor incorporates all available firm-related and market-related information into his calculation. He bases himself on historical average rates, which, generally speaking, are also a point of reference for a firm's future efficiency, and *inter alia* on an analysis of the company's business model for the investment period in question, the strategy and quality of management or the relative prospects for the sector in question.

(130) A market-economy investor will undertake an investment only if it produces a higher return or a lower risk than the next-best alternative use of his capital. Similarly, he will not invest in a company whose expected return is lower than the average return expected for other companies with a similar risk profile. It can be assumed in the present case that there are sufficient alternatives to the assumed investment project that promise a higher expected return with the same risk.

(131) Various methods exist for determining the minimum appropriate remuneration. They range from differing variants of the financing approach to the CAPM method. In describing the various approaches, it makes sense to distinguish between two components, viz. a risk-free return and a project-specific risk premium: minimum appropriate return on a risky investment = risk-free basic rate + risk premium for the risky investment. Consequently, the minimum appropriate remuneration for a risky investment can be described as the sum of the risk-free rate of return and the additional risk premium for assuming the investment-specific risk.

(132) The basis for any determination of return is thus the existence of a default-risk-free form of investment with an assumed risk-free return. The expected return on fixed-interest government securities is normally used in determining the risk-free basic rate (or, as the case may be, an index based on such securities), but these represent forms of investment with a comparably low 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 historical capital costs incurred by comparable banks are first of all determined. Their arithmetic average 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.

— *CAPM*: The CAPM is the best-known and most frequently tested model of modern finance with which the return expected by an investor can be determined applying the following equation: 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 determined by multiplying the market's risk premium by the beta factor.

(133) The CAPM is the predominant method of calculating investment returns in the case of large listed companies. However, since HLB is not a listed company, it is not possible directly to infer its beta value. The CAPM can, therefore, be used only on the basis of an estimate of the beta factor. Germany is thus critical of the use of the CAPM for, among other things, a transfer to a Landesbank.

(134) In their calculations, the parties based themselves on the CAPM and applied a risk-free basic interest rate of 7,23 % for NordLB. Determination of this interest rate was based on the assumption that the LTS special-purpose assets were to be made available on a permanent basis. The parties thus

([29]) The REX10 Performance Index of Deutsche Börse AG was used as a generally recognised source in determining the risk-free basic interest rate.

([30]) According to documents provided by the German Government, the corporation tax rate was 46 % in 1992, to which has to be added the solidarity surcharge of 3,75 % (i.e. 49,75 % in total). The overall tax rate fell to 46 % in 1993 before rising to 49,5 % in the period 1994-2000. It has been 30 % since 2001.

decided not to use a risk-free rate obtaining on the market at the time of the capital injection for a fixed investment period (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 interest 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 Federal loans over a period of ten years. The index series used in the present case contains the relevant end-of-year results of the REX10 Performance Index after 1970. The parties then determined the rate per annum, which reflects the trend tracked by the REXIO Performance Index in the period 1970-91 and, in this way, arrived at the risk-free basic interest rate of 7,23 % referred to above.

(135) Since HLB's capital injection was made available on a permanent basis, the method of determining the risk-free basic interest rate appears appropriate in this specific case. Moreover, the REX10 Performance Index is a generally recognised source of data. The risk-free basic interest rate calculated thus appears appropriate here.

(136) The beta factor of 0,74 was estimated on the basis of a KPMG report on adjusted beta factors for all listed credit institutions in Germany that is available to the Commission. In the light of the report and of HLB's business profile, this beta factor is to be regarded as appropriate.

(137) The Commission also regards the market-risk premium of 4,0 % as acceptable. Previously in the procedure, 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 that on government bonds, was applied on several occasions. In the corresponding report on the procedure, a range of some 3 % to 5 % was applied, depending on the method, the period under examination and the basic relevant data. A report prepared for BdB calculated figures of 3,16 % and 5 %. Another report on WestLB drawn up in the first procedure produced figures of 4,5 % and 5 %, while Lehman Brothers, also for WestLB, calculated a figure of 4 %. Against this background, the Commission has no reason to depart from the market-risk premium used in the understanding. On the basis of the CAPM, the Commission considers there to be no doubt that the minimum remuneration determined by the parties can be regarded as appropriate.

(138) The Commission has no reason to believe that the minimum remuneration determined by the parties for a hypothetical share capital investment cannot pass a market test. Accordingly, it sets as the appropriate minimum remuneration a figure of 10,19 % per annum (after corporation tax and before investor tax).

Abolition of the return premium on account of sole ownership

(139) It has to be ascertained whether there are reasons for adjusting the minimum remuneration. In line with the practice in the other Landesbank procedures, the following three characteristics, which are peculiar to the transaction, justify such a premium: (i) the decision not to issue any new company shares and the associated voting rights, (ii) the unusually large transfer of assets; and (iii) the investment's lack of fungibility.

(140) As in the other procedures, the Commission takes the view that premiums in connection with the last two aspects mentioned above are not justified. No premium is possible either for the decision not to issue any new company shares and the associated voting rights since FHH already owns all the voting shares.

No reduction in remuneration for agreement on a flat-rate remuneration

(141) In the case of shares, the remuneration depends directly on the company's results and consists primarily of dividends and a share in the increase in the company's value (e.g. expressed through share price rises). FHH receives a flat-rate remuneration which should reflect these two aspects of the remuneration for a 'normal' capital injection. It could be argued that the fixed remuneration which FHH receives instead of a remuneration linked directly to HLB's results constitutes a benefit that justifies a reduction in the level of remuneration. Whether such a fixed remuneration is actually more favourable than a variable, profit-related remuneration depends on the company's future results. If these deteriorate, the flat-rate remuneration is beneficial for the investor but, if they improve, the opposite is true. The actual trend cannot though be taken into account subsequently when it comes to assessing the investment decision. Accordingly, the Commission takes the view that the rate of remuneration need not be reduced.

Total remuneration

(142) In view of the foregoing and in agreement with the complainant BdB, FHH and HLB, the Commission comes to the conclusion that an appropriate remuneration for the amounts that were transferred to the capital reserve and that were used until 1997 and could be used subsequently as cover would be 6,57 % (after company taxes), i.e. normal return of 10,19 % on the investment less 3,62 % for the financing costs which HLB incurred on account of the lack of liquidity of the assets transferred.

Appropriate remuneration for the uncovered and uncoverable part of the capital reserve

(143) As stated above, the capital share that was not used up to 1997 and could not be used subsequently is of material value to HLB and its economic function can be compared to that of a guarantee or liability. A market-economy investor would demand an appropriate remuneration in return for exposing himself to a risk of this sort. The understanding between BdB, FHH and HSH Nordbank is silent on this matter.

(144) In Decision 2000/392/EC ([31]), Germany regarded a remuneration of 0,3 % per annum before tax as an appropriate initial rate. The grounds given in that decision for increasing the initial rate do not apply to the present case. In that decision a premium of a further 0,3 % per annum was added to the rate of 0,3 % per annum (before tax) because guarantees are normally tied to certain transactions and of limited duration (which was not the case in WestLB) and because the amount of DEM 3 400 million made available to WestLB was higher than that normally covered by such bank guarantees.

(145) On account of the fundamental comparability between WestLB and HLB and for want of other points of reference, the Commission assumes that a rate of 0,3 % corresponds to the remuneration that HLB would also have had to pay on the market in the early 1990s for a guarantee in its favour. It also notes that the amount of the capital in question is much smaller in the case of HLB than in the case of WestLB and that, for this reason, the second reason given in the WestLB decision does not hold. Admittedly, in the case of HLB, the guarantee function was not of limited duration or tied to a particular transaction. On the other hand, there was a *de facto* time limitation since the total amount could be used for business expansion once BAKred had recognised it as core capital. As a result, a separate guarantee commission no longer needed to be paid. The remuneration for the guarantee function was part of the remuneration for the business-expansion function. The fact of the sole guarantee function was, therefore, restricted from the outset, and this distinguishes the HLB case from the WestLB case.

(146) Accordingly, the Commission considers that, in the case of HLB as opposed to WestLB, a premium is not justified and so sets a rate of 0,3 % per annum (before tax) as an appropriate remuneration for the guarantee function of the capital from the time of its inclusion in the balance sheet on 1 January 1993 until its recognition by BAKred. Assuming a corporation tax rate of some 50 % at that time, an after-tax assessment gives a rate of 0,15 %. This after-tax rate of 0,15 % was applied by the parties in calculating the aid element in the table attached to the understanding.

(147) A guarantee premium constitutes an operating expense for HLB and thus reduces the taxable profit. The remuneration payable to FHH comes out of after-tax profits. Consequently, the rate of 0,3 % has basically to be adjusted for the tax rate. As with the refinancing costs, the Commission assumes a single overall tax rate of 50 %. Consequently, it sets a rate of 0,15 % per annum after tax.

([31]) See footnote 2 and paragraph 221.

(e) **Remuneration for the silent partnership contribution**

(148) A remuneration of DEM [...] million, i.e. [at most 10 %] on an amount of DEM 300 million per year, was paid throughout for the silent partnership contribution. In the Commission's view, it is of no relevance to the assessment that this compensation was paid to HGV since the latter was a wholly owned holding of FHH and since the indirect way was chosen only for tax reasons. Whether an investor selects a holding to receive the remuneration or books the remuneration direct cannot be of any importance for the state aid investigation in the present case.

(149) The silent partnership contribution had a 16-year maturity, i.e. it could not be called earlier. And so, in spite of this long period, it has to be regarded as a silent partnership contribution of limited duration.

(150) Germany has stated that a remuneration of 1,29 % would have been appropriate for the silent partnership contribution given the comparison with similar instruments and the lack of liquidity. The BdB considers that, although, compared with the capital reserve, a deduction should be made, there was basically a similarity to share capital so that, as stated above, a higher remuneration should be assumed.

Capital base

(151) From 1 January 1993 onwards, the value of the silent partnership contribution remained unchanged at DEM 300 million. However, as stated earlier, the amount was not used as liable capital before its recognition by BAKred. After 1 January 1997 the DEM 300 million could be used in full until May 2003. The table in paragraph 183 provides details on the calculation basis of relevance to the appropriate return on liable capital.

(152) Although the silent partnership contribution that was not covered prior to 1997 was not, and could not, be used to expand competitive business, it was of benefit to HLB since the amount of equity shown on the balance sheet provides the bank's lenders with some indication of its soundness and thus affects the conditions on which the bank can borrow outside capital. Creditors and ratings agencies take the bank's overall economic and financial situation into consideration. Since this amount cannot be used each year for business expansion but improves the bank's standing in the eyes of creditors, its economic function can in this respect be compared at least to a guarantee.

(153) A market-economy investor would also have demanded a remuneration for these resources on account of the economic benefit they conferred. However, as with the capital reserve, the amount of this remuneration is lower than that for the part of the equity that can be used by HLB for its competitive business.

Legal and economic classification of the transferred capital

(154) As with its approach in Decision 2000/392/EC, the Commission will determine the appropriate remuneration for the promotion-related assets transferred on the basis of their commercial benefit to HLB. As explained above, the starting point for determining the normal market remuneration in this case is the remuneration that would be demanded by a market-economy investor providing a bank with equity capital.

(155) The BdB is of the opinion that this constitutes an investment similar to share capital. However, the comparability with share capital is undermined by the fact that the investment is callable, albeit only after a long time. Even so, in the event of losses, the silent partnership contribution would have equal ranking with the share capital. Lastly, the callability of the investment serves to reduce risk, with the result that the silent partnership contribution should be remunerated with a small discount compared with share capital. However, Germany disputes this similarity to share capital. In its view, the capital is instead a silent partnership contribution, with this being reflected in the level of the remuneration.

(156) Germany, the BdB and the Commission agree that the silent partnership contribution constitutes core capital. Since 1997 at any rate, the silent partnership contribution has been recognised by BAKred as core capital ('Tier 1 capital') and can, therefore, be compared only with such equity capital instruments that were recognised in Germany as core capital at the time of the transfer.

(157) The Commission agrees with the parties on this point. It already made clear in its Decision 2000/392/EC that a comparison between WfA's assets, which were also recognised as core capital, and equity instruments that were recognised only as additional capital, such as profit participation certificates and non-voting preference shares, cannot serve as a basis for determining the appropriate remuneration for the transferred capital ([32]). Core capital is of greater benefit to an undertaking because it can be used to raise additional own funds (such as profit participation certificates) up to the same amount in order to increase the bank's own funds. For the capital provided to be regarded as original own funds, there must be greater exposure to risk, which, as a general rule, is also reflected in a higher market remuneration for such instruments. Any point of comparison with 'additional funds', which offer only limited scope in business expansion, can therefore be ruled out at the outset.

([32]) See footnote 2 and paragraph 199.

(158) The Commission considers that, viewed from a risk analysis angle, the silent partnership contribution is, typologically speaking, a 'normal' silent partnership contribution, and not share capital. To this extent, it agrees with Germany. In the event of insolvency, both the silent partnership contribution in question and other silent partnership contributions of limited duration raised on the capital market would be repaid before the share capital and the investor would receive the relevant percentage in bankruptcy whereas, in the case of a share capital investment, he would come out with nothing. As long as the undertaking does not make any losses, FHH receives the total remuneration agreed, whereas an investor in share capital qualifies simply for the payment of a profit-related, i.e. much smaller, dividend.

Determining an appropriate remuneration for the silent partnership contribution of limited duration to HLB

(159) As explained, the Commission regards the capital measure at issue as a silent partnership contribution. A determining factor in assessing the market appropriateness of the agreed remuneration is whether it can be regarded as normal compared with remunerations agreed on the market for economically and legally comparable transactions involving silent partnership contributions. Starting from the methodology employed by FHH and HLB, the remuneration for the silent partnership contribution in question should be determined on the basis of silent partnership contributions that are of limited duration and otherwise comparable.

(160) Germany has stated that, during the 1990s, silent partnership contributions were used increasingly by the Landesbanks to expand their capital base. The silent partnership contribution resulting from the transfer of WK's assets to HLB was, therefore, one of the first such transactions of appreciable size in the banking sector in Germany.

(161) As a risk profile analysis of various equity capital instruments had shown, silent partnership contributions, given a comparable share of liability and in view of their fungibility as a contribution of limited duration with a fixed remuneration, strongly resembled profit participation certificates. In addition, there were tax advantages for the accepting bank since the interest payable does not involve the use of profits but usually, as in the present case, represented a (tax-reducing) operating expense.

(162) The silent partnership contribution to HLB on 1 January 1993 was the first and — for almost five years — the only transaction of this kind for the bank and HLB knew nothing about simultaneous reference transactions by other Landesbanks. It was not possible, therefore, to determine the appropriate risk premium for the silent partnership contribution directly on the basis of other agreed silent partnership contributions. However, the available data on

silent partnership contributions of limited and unlimited duration that were agreed with third parties in 1997 and 1998 permitted an indirect calculation in cases where the extent to which the appropriate risk premium for HLB instruments similar to equity capital instruments had changed between the end of 1992 and the end of 1997. Changes in the risk premium for long-term HLB profit participation certificates could serve as a benchmark. As a general overview that was submitted showed, the risk premium on HLB profit participation certificates demanded by investors increased appreciably overall during this period ([33]). If, therefore, the market conditions at the end of 1997 are transposed to 31 December 1992, the appropriate risk premium at the end of 1992 is at least not understated ([34]). Accordingly, the risk premium appropriate for the end of 1992 for a silent partnership contribution with a duration i can be determined by applying the following equation: risk premium on silent partnership contributions, i, 1992 = swap spread on Federal loans, i, 1992 + swap spread on silent partnership contributions, i, 1997.

(163) The market data collected for December 1997 and February 1998 and the interest rates on agreed silent partnership contributions would give for such contributions with a duration of 16 years a premium of some 1,25 % over swaps. Taking the market data as at 31 December 1992 (swap spread for Federal loans of 0,04 %), an appropriate risk premium for 16-year silent partnership contributions would be 0,04 % + 1,25 % = 1,29 %.

(164) Alternatively, the fair risk premium could also be derived from the conditions for other financial instruments with a similar risk profile, this being normal practice. Silent partnership contributions of limited duration rank between profit participation certificates and silent partnership contributions of unlimited duration as regards their risk profile. As a result, their risk premium must basically be higher than that for profit participation certificates but lower than that for silent partnership contributions of unlimited duration. Whereas reference values for silent partnership contributions of unlimited duration were available only from October 1999, market data for profit participation certificates were available as early as the beginning of the 1990s since the latter had already been in existence for quite some time and were dealt in daily on the stock exchange. In addition, the report drawn up by Lehman Brothers for WestLB gave risk premiums for profit participation certificates issued by German banks as at mid-December 1991 ([35]).

([33]) The determining factor here in each case is the return premium not on Federal loans but on swaps since the spread of swaps in the case of Federal loans ('swap spread') is determined basically by supply and demand on the swap market and not by considerations of creditworthiness.

([34]) In view of several upheavals on financial markets (e.g. the emerging markets crisis in mid-1997) and the implications of the Commission's state aid investigation into WestLB, the risk premium that an investor would have demanded for a silent partnership contribution of limited duration to HLB at the end of 1992 ought actually to have been lower than the market conditions at the end of 1997 suggest.

([35]) Cf. Lehman Brothers, *Analyse der Kapitalzuführung aus der Einbringung der Wohnungsbauförderungsanstalt des Landes Nordrhein-Westfalen* of 8 July 1997, p. 4, and Annex II, p. 27. This basically lists the issues floated by the leading German private commercial banks (Deutsche Bank, Dresdner Bank, etc.), which at the time had a higher business risk than HLB.

(165) In order to derive from HLB's conditions for profit participation certificates at the end of 1992 the appropriate risk premium for silent partnership contributions of limited duration to HLB, an assessment is needed of the fair return premium as between the two instruments. Here too, because of the incomplete data, reference can be had only to the market conditions at the end of 1997/beginning of 1998 and the resulting risk assessment by investors for HLB can be assumed to be adequate for the end of 1992. The appropriate risk premium for silent participation contributions at the end of 1992 can then be determined by applying the following equation: risk premium for silent partnership contributions, i, 1992 = risk premium for profit participation certificates, i, 1992 + spread for silent participation contributions/profit participation certificates, i, 1997.

(166) Market data as at December 1997 and February 1998 give a premium of 0,35 %-0,40 % over 10-year HLB profit participation certifications for 16-year silent participation contributions as at the end of 1997. Taking the market data as at 31 December 1992 (risk premium on 8-year HLB profit participation certificates of 0,91 %) gives an appropriate risk premium for 16-year silent participation contributions of between 1,26 % and 1,31 %. Applying the risk premium for 10-year profit participation certificates of 0,90 % used in the Lehman Brothers report for the end of 1991 yields virtually identical values ([36]).

(167) Using both methods, the information provided by Germany yields a margin of some 1,26 %-1,31 %. The basic data concerning issues of profit participation certificates and contributions made were sent to the Commission. The Commission also has access to surveys of the risk-free interest rates prevailing in the years under consideration for Federal loans and the Federal swap spreads valid for silent partnership contributions and other relevant spreads. It concludes, therefore, that the margin of 1,29 % communicated by Germany is altogether reasonable.

(168) In the Commission's view, there is no need for a further market investigation in connection with the state aid assessment of the market-like nature of the silent partnership contribution at issue. It is sufficient that the Commission should ensure, on the basis of trend forecasts, that the agreed remuneration falls within the normal market range.

1.1.1. Liquidity costs

(169) The — to this extent concurrent — arguments put forward by Germany and the BdB regarding the liquidity costs can be accepted where a 'normal' capital contribution to a bank provides it with both liquidity and an equity capital base that is necessary for supervisory reasons in order to expand business. As stated above, a bank that wishes to use the capital to its full extent, i.e. to expand its 100 % risk-adjusted assets by a factor of 12,5 (i.e. 100 divided by the solvency ratio of 8 %) must refinance itself on the financial

([36]) Cf. Lehman Brothers, *Analyse der Kapitalzuführung aus der Einbringung der Wohnungsbauförderungsanstalt des Landes Nordrhein-Westfalen* of 8 July 1997, p. 4.

markets 11,5 times over. Put simply, the difference between 12,5 times the interest received and 11,5 times the interest paid on this capital minus other costs of the bank (e.g. administration) gives the profit on the equity ([37]). Since the silent partnership contribution to HLB in question did not provide any liquidity initially, HLB incurred additional financing costs up to the amount of the capital when it borrowed on the financial markets the resources needed to exploit the business opportunities to the full. On account of these additional costs, a corresponding deduction must be made in order to determine the appropriate remuneration. A market-economy investor could not expect to be remunerated in the same way as for a cash injection.

(170) Unlike the BdB, however, the Commission considers that the gross refinancing interest is deductible. Refinancing costs constitute operating expenses and therefore reduce taxable income. The same, however, is true of the remuneration for a silent partnership contribution made in liquid form at the outset. Compared with the latter, which, as shown above, provides the appropriate market test, there is, therefore, no further tax benefit. In both cases, therefore, the bank's net profit is reduced by the amount of the interest paid for the liquidity. As a result, the total refinancing costs are deductible.

(171) This situation is similar to that in the Landesbank Hessen-Thüringen case but differs from the other Landesbanks that were also the subject of an investigation, including WestLB, since the promotion-related assets in the latter case are shown as reserves in the balance sheet and the total remuneration is to be regarded as a use of profits but not as an operating expense and thus has to be met out of taxed profits. The other Landesbanks thus enjoy a tax benefit where the costs for the liquidity that once more has to be found are tax-deductible as an operating expense, whereas this would not be the case for an investment that was in cash at the outset but otherwise identical, such investment providing the relevant benchmark.

(172) Since there is no (other) tax benefit, HLB has therefore to pay only the remuneration for the risk to which FHH is exposed by virtue of its promotion-related assets in the form of the silent participation contribution, i.e. the guarantee remuneration that is expressed in basis points and exceeds the relevant reference interest rate.

Appropriate remuneration for the uncovered part of the silent partnership contribution

(173) As stated above, the silent partnership contribution was not recognised as liable core capital for supervisory purposes in the period 1993-96.

(174) In Decision 2000/392/EC, the Commission assumed a basic rate of 0,3 % before tax for the amount shown in the balance sheet but which could not be used to underpin its competitive business. A premium corresponding to a further 0,3 % was charged on account of the amount in question and the absence of any limitation over time (see paragraph 144).

(175) In addition, unlike in the WestLB case, the Commission does not regard as justified a premium on account of the much larger amount for HLB. Since they are otherwise comparable cases, it also applies here a rate of 0,3 % per annum (before tax) as the appropriate remuneration for the guarantee function of the capital at the time of its inclusion in the balance sheet on 1 January 1993 until its recognition by BAKred (see paragraph 145). Since the remuneration for the entire silent participation contribution is tax-deductible as an operating expense and also differs in this respect from the tax treatment of the remuneration in Decision 2000/392/EC, this premium has to be understood as a before-tax rate that can be claimed in full as an operating expense.

(176) It transpires that the remuneration on the silent partnership contribution, DEM [...] million [...], corresponding to [at most 10 %] was altogether excessive.

(f) Date as of which aid no longer present

(177) Germany has shown that after the merger on 2 June 2003 between HLB and LSH to form HSH Nordbank, the WK shares received by HLB were transferred back to FHH.

(178) After 2 June 2003 HSH was, therefore, no longer able to underpin risk assets resulting from HLB's competitive business with special-purpose assets or to use the latter as a guarantee.

(179) In the Commission's view, it has thus been demonstrated that, with the hiving-off of the special-purpose assets, the aid under investigation ceased to be present on 2 June 2003.

(g) Aid element

(180) The calculation methods, remuneration components and remunerations described for the various forms of transferred capital give the amounts that are shown in the Table 1 in paragraph 183 and would have been payable as appropriate remuneration for the individual components and years.

(181) The amounts agreed as remuneration components at the time of the investment need to be deducted. In the Commission's view, only the remuneration of DEM [...] million [...] for the silent participation contribution is concerned. Other components such as the dividends paid and set by Germany cannot, however, be calculated. As stated above (see paragraph 110), according to the market-economy investor principle, dividend payments and/or increases in value occurring *after* the investment are not relevant.

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

(182) The Commission takes the view, however, that, in spite of the differences between the two capital instruments attributable to the fact that the 1993 transfer by FHH was designed as an overall package, the agreed, excessive remuneration for the silent partnership contribution can be set off as the remuneration paid for this entire investment project. The overpayment can therefore be set against the capital reserve as remuneration. It must though be converted into an after-tax value, something which the parties left open in their understanding.

(183) Accordingly, the aid element is made up of the following ([38]):

Table 1

Calculation of the aid element — HLB (in DEM m)

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	(5 months) 2003
Amount of silent partnership contribution available to HLB	300,0	300,0	300,0	300,0	300,0	300,0	300,0	300,0	300,0	300,0	300,0
Remuneration payable (1,29 %)					3,9	3,9	3,9	3,9	3,9	3,9	1,6
Guarantee commission payable (0,3 %)	0,9	0,9	0,9	0,9							
Paid	30,0	30,0	30,0	30,0	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Overpaid (= imputable against capital reserve)	29,1	29,1	29,1	29,1	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Company taxes	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %	50,00 %
Less tax	- 14,6	- 14,6	- 14,6	- 14,6	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Recoverable overpayment after tax	14,6	14,6	14,6	14,6	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Amount of capital reserve from WK 1993 available to HLB	659,4	659,4	659,4	659,4	659,4	659,4	659,4	659,4	659,4	659,4	659,4
Finally recognised by BAKred	0,0	0,0	0,0	0,0	659,4	659,4	659,4	659,4	659,4	659,4	659,4
of which not usable as liable capital	0,0	0,0	0,0	0,0	[...]	[...]	[...]	[...]	[...]	[...]	[...]
of which used/usable as liable capital (*GS I-Anrechnung*) (as of 1997)	182,9	435,6	255,1	208,3	[...]	[...]	[...]	[...]	[...]	[...]	[...]
of which not used/not usable as liable capital (as of 1997)	476,5	223,7	404,2	451,1	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Remuneration payable (6,57 %)	12,0	28,6	16,8	13,7	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Guarantee commission payable (0,15 %)	0,7	0,3	0,6	0,7	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total remuneration payable	12,7	29,0	17,4	14,4	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Recoverable overpayment from silent partnership contribution	14,6	14,6	14,6	14,6	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Aid element											
	- 1,9	14,4	2,8	- 0,2	[...]	[...]	[...]	[...]	[...]	[...]	[...]

([38]) On 1 January 1999 the German mark was replaced by the euro at a rate of EUR 1 = DEM 1,95583. The annual data on the aid element given in the table must be adjusted accordingly in order to calculate the total amount of aid to be recovered.

(184) An aid element of DEM 177,5 million (EUR 90,75 million) results from the difference between actual payments and the payments that would correspond to market conditions.

2.2 *Distortion of competition and effect on trade between Member States*

(185) 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.

(186) The beneficiary HLB carried on both regional and international banking business. It regarded itself as a universal commercial bank that was engaged above all in shipping finance and now operates under the name of HSH Nordbank. Despite its name, tradition and statutory tasks, HLB was much more than a mere local or regional bank until 2003.

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

(188) It should also be pointed out that there is a very close relationship between a credit institution's equity capital and its banking activities. It is only when it has sufficient recognised equity capital that a bank can do business and expand its commercial activities. Since HLB was provided with such capital for solvency purposes as a result of the state measure, this had a direct impact on the bank's business opportunities.

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

2.3 *Finding*

(190) On the basis of all these considerations, it can be stated that all the criteria laid down in Article 87(1) of the EC Treaty are met and that therefore the transfer of the special-purpose assets involves state aid within the meaning of that Article.

3. COMPATIBILITY WITH THE COMMON MARKET

(191) 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.

(192) 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 aspects, is applicable. Nor does the aid promote the execution of an important project of common European interest. It is not aimed either at promoting culture or heritage conservation.

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

(194) 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, apply also to restructuring aid in the banking sector. However, in the case at hand, the conditions for applying this exemption clause are not met. HLB was not an undertaking in difficulty whose viability had to be restored with the support of state aid.

(195) Article 86(2) of the EC Treaty, which allows exemptions from the Treaty's state aid rules under certain conditions, is also applicable, in principle, to the financial services sector. This was confirmed by the Commission in its report on services of general economic interest in the banking sector ([39]). The formal conditions for this are not met in the present case and were not referred to by Germany.

(196) 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. The contribution of WK's shares to HLB on 1 January 1993 is not existing aid.

(197) The transfer on 1 January 1993 cannot be regarded either as being covered by institutional liability and guarantor liability.

(198) On the one hand, the test of guarantor liability as a default liability vis-à-vis creditors in the event that the bank's assets are not sufficient to satisfy them is not met from the outset. The capital injection was not designed to satisfy HLB's creditors, and HLB's assets were not exhausted.

([39]) 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.

(199) On the other, the test of institutional liability does not apply either. Under institutional liability, the institution concerned is required to provide HLB with the resources necessary to safeguard its orderly functioning in so far as it decides to ensure HLB's continued existence. At the time of the capital injection, however, HLB was in no way unable to continue orderly operations. The capital injection was not, therefore, necessary to maintain the orderly functioning of LBB, which could therefore, on the basis of a conscious economic calculation by the Land as part-owner, also see future market opportunities under conditions of competition. The 'emergency provision' of institutional liability is not applicable to such a normal economic decision by the Land. Since no other existing aid scheme under Articles 87 (1) and 88(1) of the EC Treaty is applicable, the capital injection ranks as new aid within the meaning of Article 88 (3) of the EC Treaty.

IX. **CONCLUSION**

(200) Since the period specified in Article 15(1) of Council Regulation (EC) No 659/1999 has expired, the aid that might result from the transfer of WK's shares on 1 January 1986 can no longer be recovered and is to be regarded as existing aid under Article 15(3) of that Regulation.

(201) The aid resulting from the transfer of WK's shares on 1 January 1993 cannot be regarded as being compatible with the common market either under Article 87(2) and (3) or under any other provision of the Treaty. The aid is, therefore, declared incompatible with the common market and must be discontinued, and the aid element of the measure unlawfully put into effect must be recovered by the German Government,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Germany has implemented for Hamburgische Landesbank — Girozentrale, now HSH Nordbank AG, amounting to EUR 90,75 million in the period from 1 January 1993 to 1 June 2003 is incompatible with the common market.

Article 2

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

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 the Decision.

The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary 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 ([40]).

Article 4

Germany shall inform the Commission, within two months of notification of this Decision, of the measures which were taken and which it intends to take in order to meet the commitments described in this Decision.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Brussels, 20 October 2004.

For the Commission

Mario MONTI

Member of the Commission

([40]) 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 which alternative measures are available in national legislation to bring about recovery of the aid. 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.