II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 21 October 2008

on State aid measure C 10/08 (ex NN 7/08) implemented by Germany for the restructuring of IKB Deutsche Industriebank AG

(notified under document C(2008) 6022)

(Only the German text is authentic)

(Text with EEA relevance)

(2009/775/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 interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

1. PROCEDURE

(1) The case originated from information sent by Germany on 3 August 2007. After various information exchanges, Germany notified the measures by letter dated 15 January 2008, claiming that the measures should in any event qualify as compatible rescue and restructuring aid.

(2) By letter dated 27 February 2008, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures.

(3) The Commission decision to initiate the formal investigation procedure (hereinafter the 'opening decision') was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the aid. The Commission did not receive any observations from third parties.

(4) Germany submitted its own comments after the opening of the formal investigation procedure on 27 March 2008, and in addition to information provided on 15 and 25 January, 5 and 25 February, and 3, 6, 11, 14, 20 and 27 March, supplied further information on 3 and 25 April, 7 and 30 May, 9 and 27 June, 25 July, 4, 22 and 26 August, 2, 3, 4, 5, 16, 18, 19 and 25 September and 14 October 2008. With this information Germany provided 68 different agreements and documents which constitute the basis of the measures. A number of meetings and telephone conferences took place with the German authorities, the beneficiary and Kreditanstalt für Wiederaufbau (hereinafter 'KfW').

2. DESCRIPTION

2.1. The beneficiary

(5) The beneficiary is IKB Deutsche Industriebank AG (hereinafter 'IKB'). IKB is a medium-sized German private bank, listed on SDAX. Its headquarters are located in Düsseldorf. Its main shareholder is the state-owned bank KfW. Before the crisis KfW had a shareholding of 38 %. Stiftung Industrieforschung, which has no business activity of its own, held 12 %, while the remaining 50 % was freely traded. After the envisaged capital increase, KfW's shareholding should increase to 91 %.

[1] OJ C 76, 27.3.2008, p. 5.

[2] See footnote 1.

(6) IKB's main shareholder, KfW, is a German development bank, owned by the federal government (80 %) and the German regional states (20 %). It is one of the ten biggest banks in Germany with a balance-sheet total of EUR 360 billion on 31 December 2006. It is a public-law institution based in Germany, and supports the economy, society and the environment in Germany, Europe and worldwide. KfW's tasks are the promotion of small and medium-sized enterprises, of housing finance and modernisation and of education and advanced training, the financing of municipal infrastructure projects, the promotion of export and project finance, support for developing and transition countries, and the protection of the environment and the climate. KfW raises the bulk of the funds required for those development activities on the capital market. The development function given to it by the State is anchored in the KfW Law ([3]). In the exercise of its *Anstaltslast* public function KfW is covered by the public guarantee mechanism.

(7) IKB's business before restructuring can be broken down into the following four divisions:

1. Corporate banking

IKB's core business is to provide long-term financing to medium-sized companies with annual sales of EUR 7,5 million or more. This has always been IKB's core competence: corporate banking specialised in providing loans, private equity or leasing to medium-sized companies, the focus being on Germany. While IKB's market share in the corporate banking market is only 1 %, its share of the market for long-term loans to medium-sized manufacturing clients amounts to 10 %. The key success factor is a long-term client relationship. However, competition is very intense and profit margins are low. The lending business itself is […] (*) of limited attractiveness and it is important for IKB to develop, on the basis of long-term client relationships, other more profitable activities with the existing client base, like structured finance or real-estate products.

2. Structured finance

The structured financing activities include financing of direct investments, industrial projects, exports, acquisition and infrastructure financing as well as reorganisation of corporate financing structures and syndication of loans for medium-sized clients. The offices in London, Luxembourg, Madrid, Milan, New York and Paris support national and international acquisition finance with their individual access to markets at these important financial centres. IKB helps its clients to optimise their own financing and to sell down loans. In the context of its syndication-desk activity IKB also participates in credit facilities arranged by other institutions. The focus of the structured financing activities is Germany, and IKB German companies in Western Europe.

The structured financing activity is a highly profitable business for IKB. In the initial restructuring plan, which did not include the compensatory measures agreed later, the structured financing division showed a sustainable RoE of about [> 10] %.

3. Real-estate financing

Around [> 10] % of IKB's market activity is in real-estate financing. This activity is focused on the financing of office buildings, trading/retail and logistics sites, managed properties and real-estate packages at locations that can expect sustainable long-term rental income and marketability. IKB is a partner for medium-sized and large enterprises, private and institutional investors, property developers, state development agencies and fund managers. The projects have a minimum financing requirement of EUR 5 million. As a full-service provider for real-estate investment, IKB also develops comprehensive plans and solutions for new-build developments, as well as for refurbishments or change-of-use projects. It offers real-estate financing services not only in Germany, but in other European countries as well. The foreign activities are focused on Belgium, France, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom.

In the initial restructuring plan, which did not include the compensatory measures agreed later, the real-estate financing division showed a sustainable RoE of about [> 5] %.

4. Portfolio investments

At the beginning of the century, IKB started to expand its investments in international loan portfolios in a wide variety of asset categories. The objective of this expansion was to diversify its risk profile with regard to regions and sectors, while simultaneously increasing its earnings in the form of commission income. By using off-balance-sheet special purpose vehicles to hive off the credit risks, capital could be released and IKB could

([3]) The KfW Law was passed in October 1948 by the Economic Council and came into effect on 18 November 1948. It was significantly amended by the Law on the Restructuring of Development Banks (*Förderbankenneustrukturierungsgesetz*) of 15 August 2003 and last amended by Article 173 of the Law of 31 October 2006 (the Ninth Law on the Adaptation of Responsibilities — *Zuständigkeitsanpassungsgesetz*).

(*) Confidential.

continue to invest in other asset classes like medium-sized financing or loan portfolios. As will be described further at points 10 *et seq.*, IKB's significant portfolio investments were at the origin of the crisis. As a consequence, IKB has already exited this business.

(8) In the year 2006/2007, the various business segments achieved the following results:

Table 1

Overview of business segments

(EUR million)

	Operating profit	Credit volume
Corporate banking	92,8	16 065
Structured financing	90,6	4 889
Real estate	23,2	7 870
Portfolio investment	11,3	18 260
Central/consolidation	– 103	4 114
Total	114,5	51 198

(9) Before the crisis IKB had a balance-sheet total of EUR 49,1 billion (on 31 December 2006), increasing to EUR 63,5 billion in the restated accounts when considering all of IKB's off-balance-sheet activities (on 31 March 2007).

2.2. **The reasons for IKB's difficulties**

(10) IKB's difficulties are related to the ongoing US subprime crisis, to which IKB and in particular one of its special purpose vehicles, Rhineland Funding Capital Corporation (hereinafter Rhineland), was heavily exposed ([4]). The crisis triggered significant liquidity needs, which Rhineland (in cases where the commercial paper normally used was not fully subscribed) bridged by credit lines provided by commercial banks.

(11) IKB provided liquidity facilities of about EUR 8,1 billion to Rhineland, which invested in structured credit portfolios, which included exposures to US subprime real-estate loans, and refinanced its investments by issuing asset-backed commercial paper. Besides the direct liquidity facilities given to Rhineland, IKB provided indirect protection for Rhineland assets via the so-called Havenrock structure. The total risk exposure of the Havenrock-structure for IKB amounted to EUR 1,2 billion. Both the direct liquidity facilities given to Rhineland and the Havenrock structure were off balance sheet. IKB also held direct on-balance-sheet portfolio investments (likewise partly in the subprime segment) via subordinated debt instruments in the Rhinebridge structured investment vehicle and in other types of investment portfolios (such as collateralised debt obligations or CDOs). During summer 2007, part of the structured portfolios of Rhineland, Rhinebridge, and the CDOs, which were initially highly ranked, suffered significant downgrading by the rating agencies.

(12) As a result of the ongoing crisis in the US subprime mortgage market and as a direct consequence of the downgrading of subprime-backed assets by the rating agencies, valuations of certain assets traded in this market segment suffered. This was the case in particular for Rhineland, whose ability to refinance its investment portfolio in the commercial paper market was therefore threatened. Given that the commercial paper market had dried up, it was likely that Rhineland would draw upon the EUR 8,1 billion liquidity facilities provided by IKB, for which no provisions had been made in the latter's balance sheet. Furthermore, the other on-balance sheet portfolio investments, such as Rhinebridge, were subject to considerable fair-value fluctuations which had to be accounted for in accordance with International Financial Reporting Standards (IFRS).

(13) IKB's difficulties arose out of portfolio investments of EUR 18,3 billion. The EUR 18,3 billion portfolio investments shown in the restated 2006/2007 accounts were initially held to a large extent off the balance sheet in Rhineland, and to a lesser extent on IKB's balance sheet. The off-balance sheet assets in Rhineland were worth EUR 11,5 billion on 31 March 2007 (and

([4]) A special purpose vehicle (SPV) — also called a conduit or special investment vehicle (SIV) — is a corporate body (usually a limited liability company of some type or, sometimes, a limited partnership) created to fulfil narrow, specific or temporary objectives, primarily to isolate financial risk (usually bankruptcy but sometimes a specific taxation or regulatory risk). SIVs are used because they can remain off balance sheet and need not be consolidated by banks. This allows banks to fund lending at cheaper rates than those they would provide themselves (owing notably to the obligations of regulatory equity liquidity ratios). The SPV refinances investments in asset-backed securities by borrowing in the market for short-term asset-backed commercial paper, which is a money-market security issued by large banks and corporations.

during the crisis). Over time, their value has been reduced through sales and currency adjustments to EUR 6,3 billion in August 2008. The on-balance-sheet portfolio investments were valued at EUR 6,8 billion in the restated 2006/2007 accounts.

2.3. **The measures**

(a) *First measure — risk shield*

(14) On 27 July 2007, the German banking supervisory authority BaFin was informed by a German bank providing liquidity to IKB that it would withdraw the credit line. BaFin subsequently called KfW, the Federal Ministry of Finance and other concerned parties and announced that it would close the bank ([5]) if those parties did not take over the risks for IKB's Rhineland commitment. In addition, it emerged that IKB's subprime exposure was not limited to Rhineland but also included Rhinebridge and other direct subprime portfolio investments.

(15) On 29 July 2007 BaFin, the Federal Ministry of Finance, KfW and the three major German banking associations ([6]) agreed that KfW would intervene, in coordination with BaFin, by providing a risk shield for IKB. The banking associations agreed to take over 30 % of the risks involved in the risk shield; this was confirmed in writing in an agreement between KfW and the three banking associations on 16 August 2007.

(16) In particular, KfW announced that in order to ensure IKB's liquidity position it would:

— provide a risk shield from Monday 30 July 2007 for all of IKB's rights (fees) and obligations under the liquidity facilities provided to Rhineland for an amount of EUR 8,1 billion (this has since been reduced to EUR 6,3 billion, mainly because of exchange-rate movements); the formal assumption on 29 July 2007 of the obligations under the liquidity facilities provided to Rhineland will remain until the maturity or sale ([7]) of the structured credit portfolios; the maturity of such portfolios is generally more than five years,

— protect IKB against losses of up to EUR 1 billion resulting from Rhinebridge and other on-balance-sheet subprime portfolio investments with a total value of EUR 6,8 billion.

(17) Germany originally estimated that the total expected losses from the risk shield given to IKB by KfW and the banking associations would amount to EUR 3,5 billion (EUR 2,5 billion for Rhineland and Havenrock, and EUR 1 billion for Rhinebridge and other direct subprime portfolio investments ([8]).

(18) In the original agreement of 29 July 2007, KfW and the banking associations allocated the expected losses from the risk shield as follows:

— KfW bears 70 % of the expected losses in principle, but with no upper limit concerning Rhineland, i.e. KfW bears 100 % of the losses above the amounts determined by the limits of the banking associations' participation (see below),

— the banking associations bear 30 % of the expected losses, limited to EUR 1 billion.

(19) The risk distribution between KfW and the banking associations applies pari passu within the EUR 1 billion limit of the banking associations' liability (see recital 18) independently of the distribution of the losses between the different portfolio investments (Rhineland, Rhinebridge or direct investments).

(20) In addition to their participation in the risk shield, the three banking associations agreed to use their influence with their members to ensure that they would reopen the credit lines to IKB that they had closed when the crisis emerged.

(21) Furthermore, the agreement of 16 August 2007 indicates that KfW will, in its role as pool leader, negotiate an appropriate fee for the risk shield and arrange for repayment of all expenses incurred by the banking associations and KfW. While arrangements have been made for the repayment of expenses, the planned fee has been agreed and put in place the former idea was abandoned because it could have been interpreted as a […], which would have needed the approval of […].

(22) The 30 % loss participation by the banking associations is distributed as follows between the associations:

([5]) It would impose a so-called moratorium, i.e. measures to be taken in case of a threat of insolvency. See Article 46a of the German Banking Act (*Gesetz über das Kreditwesen*) of 9 September 1998 (BGBl. I p. 2776), last amended by Article 3 of the Law of 16 July 2007 (BGBl. I p. 1330).

([6]) BdB, the Association of German Private Banks; BVR the Association of German Cooperative Banks and DSGV the Association of German Saving Banks and Landesbanken.

([7]) Demand for such portfolios is currently weak and thus market value has decreased considerably. Significant losses would be made if the portfolio were sold.

([8]) In the still outstanding agreement, KfW intends to limit its total exposure concerning Rhinebridge and other direct subprime portfolio investments to EUR 1 billion.

— 50 % (BdB),

— 16,7 % (BVR),

— 33,3 % (DSGV).

(23) BdB took a 50 % share because in the event of IKB's insolvency, the private banks' deposit guarantee fund would guarantee each individual account up to 30 % of IKB's liable equity held by private and wholesale customers (about EUR 662 million per account on 26 September 2007) ([9]).

(b) *The second measure — ancillary risk shield*

(24) Owing to a further deterioration of the financial markets, the risk shield granted in relation to IKB's costs under the Havenrock structure was fully called on and therefore proved to be insufficient. Further loss-covering measures were needed in order to ensure IKB's continued existence. On 30 November 2007, KfW and the banking associations covered additional risks estimated at EUR 350 million (USD 440 million) related to IKB's credit lines in the Havenrock structure. KfW covered EUR 150 million, of which EUR 54,3 million took the form of a convertible bond, which IKB converted into shareholder equity on 14 February 2008 (effective on 28 February 2008), thereby increasing KfW's share in IKB to 43 %. A further EUR 150 million was provided by BdB and EUR 50 million by BVR and DGSV.

(c) *The third measure — capital injection and KfW loan*

(25) In February 2008 the German government mandated KfW to provide an additional EUR 2,3 billion to IKB.

(26) EUR 1,05 billion was provided by way of loans, the repayment of which was immediately waived, subject however to a better fortune clause, under which KfW would receive repayment if IKB made profits again in the coming years. The measures were needed in order to inject own capital into the bank so as to prevent IKB breaching the minimum capital ratios under banking solvency rules.

(27) Moreover, the German financial regulator BaFin demanded that KfW give an ultimately unlimited capital increase guarantee, KfW declared itself ready to provide a capital injection of EUR 1,25 billion. The arrangements for this procedure for the capital increase were in principle made in August, but the actual implementation depends on a positive Commission decision and will thus take place only after such a decision. The capital increase has therefore not yet taken effect. After the capital increase, KfW's participation in IKB would increase to about 90,8 %.

(28) KfW's third measure was assisted by the German government, which made EUR 1,2 billion available to KfW, and by the banking associations, which provided EUR 300 million.

(d) *Liquidity provision*

(29) In addition, KfW has also provided IKB with liquidity facilities totalling EUR [> 2,5] billion since January 2008. This consists of two framework liquidity facilities of EUR […] billion each. The first framework facility, of 24 January 2008, was provided at Euribor plus [< 50] bps up to [> 50] bps against [> 100] % collateral. The second framework facility of 18 July 2008 was provided at Euribor plus [> 100] bps against [> 100] % collateral. The collateralisation was set at the indicated level in order to ensure that the collateral would still be enough to cover the loan even in the worst-case scenario.

(30) IKB also obtained liquidity facilities from other banks. Amongst them are [a large US bank] and [another large US bank], for EUR [> 0,75] billion on a monthly basis, provided at Euribor plus [> 100]-[> 100] bps against collateral of [> 100]-[> 100] %, [a German regional bank] for up to EUR [> 250] million for one year at an interest rate of Euribor plus [> 90]-[> 100] bps against collateral of [> 100]-[> 100] %, and [another German regional bank] for up to EUR [> 500] million for one year at Euribor plus [> 50] bps and corresponding collateral.

2.4. **Increased losses during the restructuring**

(31) The expected losses covered by the risk shield for off-balance-sheet assets in Rhineland increased from the original estimate of EUR 2,5 billion in a worst-case scenario to EUR 7,0 billion ([10]). Within the July 2007 Rhineland risk shield, KfW assumed all risks associated with the off-balance-sheet assets under the liquidity facilities to Rhineland, i.e. transferred the risks to its own balance sheet. This leaves unchanged the ceiling of EUR 1 billion on the banking associations' liability for losses from other sources.

(32) In addition, the first measure covered losses of up to EUR 1 billion on on-balance-sheet portfolio investments of EUR 6,8 billion. In spring 2008, the on-balance-sheet investments fell to EUR 6,31 billion owing to currency

([9]) The private banks' deposit guarantee fund covers all 'non-inter-banking' accounts.

([10]) The EUR 7,0 billion of expected losses consist of EUR 5,8 billion direct losses in Rhineland and EUR 1,2 billion for Havenrock. The off-balance-sheet portfolios were included in the balance sheet in the restated 2006/2007 annual accounts.

adjustments. During the same period, IKB tried to sell the two portfolios by public auction. The sale failed because the bids were far below the expected sales prices owing to the ongoing market turmoil. As a consequence, IKB had to further write down the book values of the portfolios. By August 2008, IKB had lost EUR [< 750] million. Moreover, assets with a nominal value of EUR 990 million were sold on the market. The total nominal value of the remaining portfolio amounted to EUR [< 5] billion in August 2008.

(33) In order to provide a clean break in anticipation of the possible sale of IKB, the remaining risk shield for the portfolios in the IKB balance sheet was called upon in August, and the outstanding EUR 360 million was paid by KfW. The losses have not yet been formally recognised, but the underlying assets have already defaulted. Thus the EUR 1 billion guarantee has been completely drawn and can be considered as fulfilled.

(34) In the context of the negotiations with the bidders, the remaining portfolio investments have been divided into two structured investment portfolios, referred to as SIP 1 and SIP 2. SIP 1 contains mainly [specific securities] with a nominal value of EUR […] billion and a book value of EUR [> 1] billion ([11]). SIP 2 contains IKB's remaining [securities] with a nominal value of EUR […] billion and a book value of EUR [> 1] billion.

(35) Table 2 gives an overview of the movements in the portfolio investments until the end of August 2008. The total realised and expected losses are estimated at about EUR 10,28 billion.

Table 2

Overview of movements in portfolio investments from March 2007 to August 2008

(EUR million)

	Nominal value restated 03/2007	Currency adjustments	Sales (nom. value of assets)	Losses on sales (nom. value — sales price)	Losses realised (nom. value of assets)	Nominal value 08/2008 (IKB or KfW)	Depreciations	Book value 08/2008 (IFRS)	Total losses (realised + expected)
Rhineland	11,5	3,7	[< 1]	—	[< 0,5]	[> 5] (KfW)	[> 3]	[< 2]	[> 3,5]
Havenrock	(1,2)	—	—	—	1,2	0	0	0	1,2
Total on-balance-sheet	6,81	0,5	[< 2]	[< 0,5]	[< 0,75]	[> 5] (IKB)	[> 1,5]	[> 2]	[> 2]
— SIP 1	not existing					[…] (IKB)	[…]	[> 1]	[…]
— SIP 2	not existing					[…] (IKB)	[…]	[> 1]	[…]
— other	6,81	0,5	[< 2]	[< 0,5]	[> 0,5]	0	0	0	[> 0,5]
Total (1-3)	18,3	0,5	[< 2]	[< 0,5]	[> 1,7]	[> 7,5]	[> 4,5]	[> 3,0]	[> 6,0]

2.5. **The sale process**

(36) The process of selling KfW's shares in IKB started in January 2008 and was concluded on 21 August 2008 with the decision to sell IKB to Lone Star Funds VI Financial Holdings LP Dallas, USA (hereinafter 'Lone Star').

(37) The sale was carried out in the form of an open, non-discriminatory and transparent bidding procedure. It was widely publicised at the beginning of January 2008 and [> 40] bidders (including German and international banks as well as financial investors) expressed an interest in the first round. [> 20] of these signed a confidentiality clause and received the information memorandum (end January). [> 5] bidders actually submitted an indicative bid (end February). [> 5] of these were granted access to the data room. Then [< 5] bidders submitted a definite offer (mid-May).

(38) At the end of May 2008, KfW selected three of these [< 5] bidders to make a final binding offer (financial and strategic investors from different countries). [< 5] bidders submitted a valid offer, Lone Star was chosen on the basis of an economic comparison of the [< 5] offers, i.e. as the bid offering the higher net price.

([11]) The IFRS book value reflects the mark-to-market value of the assets in the portfolio.

(39) The structure of the sale of IKB implies in essence a sales price of around EUR […] million (for 90,8 % of the shares), plus a commitment by Lone Star to inject capital of EUR [> 400] million. Lone Star made its bid on the assumption that the better fortune clause would be dropped. In exchange, Lone Star undertook to fund SIP 2 with the above EUR [> 400] million. At the moment, IKB is considering whether to sell the SIP 2 assets to an SPV. KfW has agreed to participate EUR in the refinancing of SIP 2 with a senior loan of EUR 775 million, remunerated at Euribor plus [> 80] bps and senior to EUR [> 200] million capital notes and EUR [> 150] million mezzanine notes provided by Lone Star and IKB.

(40) KfW has bought SIP 1 for EUR 1 billion ([12]). KfW will take a first loss of EUR 150 million, Germany will bear the further risk of EUR 600 million (in the form of unexpected losses ([13]) through a guarantee, and KfW will take the remaining risk of EUR 250 million. KfW is confident that the ultimate losses of the portfolio are reflected in the sale price and considers that no provisions have to be made.

(41) Moreover, the existing two framework liquidity facilities of EUR [> 2,5] billion which KfW provides to IKB are extended […] until at the latest (initially the facilities were to end in April and July 2009). The conditions have been slightly modified. The collateralisation of the first facility decreases from [> 100] % to [> 100] %. The interest rate on the second facility decreases from Euribor plus [> 100] bps to Euribor plus [> 100] bps. According to KfW these changes are justified by the increase in IKB's own capital.

(42) Beyond that, the sale contract contains no deal-specific sale conditions. The only exception is an indemnity clause concerning [certain circumstances] with financial repercussions to a maximum of EUR […] billion. This includes in particular […]. Although this concerns […] which could reach EUR […] billion, Germany argued that the risk […] is very small given that one month before the crisis IKB was the second best-rated bank in Germany with very good results, and the assessment of the […] did not, according to the information available, deviate from the usual business practice. Given that the probability of the risk materialising is very small, but if it were to materialise the […] impact might be […], it is difficult to price such a […]. Germany argues that such […] risks usually remain covered by the former owner within such acquisition transactions. KfW therefore excluded the risk from the sale from the outset. Given the small likelihood of the risk materialising, IKB has made no provisions in its books for any claims.

([12]) Lone Star, was not ready to take over these assets saying that it did not have sufficient time to assess in detail the assets involved and the related risk.

([13]) Germany asked an expert to confirm that the EUR 600 million state guarantee covers only unexpected losses.

2.6. **Summary of support measures**

Table 3

Summary of support received by IKB during restructuring

No	Measure	Nominal value (in EUR billion)
1.	Risk shield (Rhineland EUR 5,8 billion, Havenrock EUR 0,85 billion, and on-balance-sheet assets EUR 1 billion)	approx. 7,65 (of which 1,00 from banking associations)
2.	Ancillary risk shield (EUR 350 million additional loss coverage — Havenrock)	0,35 (of which 0,20 from banking associations)
3.	Capital increase and waived loan (coverage of depreciation of balance-sheet assets)	2,30 (of which 0,30 from banking associations)
4.	Liquidity facility	[> 2,5]
5.	Sale of IKB shares	[…]
5.1.	Senior loan refinancing SIP 2	0,78
5.2.	Transfer SIP 1 to KfW	1,00
5.3.	Indemnity clause	[…]
	Total	[> 15]

2.7. **The restructuring plan**

(43) Germany has submitted several revisions of the restructuring plan for IKB. Documents from August 2007 describe measures to overcome the bank's crisis and avoid future problems. Just after the first measure was granted, IKB commissioned a study by PriceWaterhouseCoopers (PWC) in order to analyse the situation. On the basis of the study, IKB announced on 3 September 2007 that it would withdraw from its involvement in international portfolio investments.

(44) IKB subsequently updated the plan and has now been sold to Lone Star. Lone Star presented a new business plan for IKB that was reviewed by KPMG on 25 September 2008. The plan gives an overview of IKB's relevant core markets, sets out the reasons for the crisis, analyses the problems and identifies the measures to be taken. The plan aims to stabilise the bank's short-term financial situation by securing the required liquidity, and to restore IKB's long-term viability by reducing its risk exposure and concentrating on its core business. As regards the long-term strategy, the plan indicates that IKB will focus on corporate banking for medium-sized clients, while the structured finance business will be maintained only insofar as it is necessary for the corporate banking business.

(45) The plan confirms the exit from the portfolio investment activities that IKB had decided to implement immediately after the crisis.

(46) During discussions with the Commission, IKB also agreed to exit the real-estate financing business as a compensatory measure. This means that IKB will not transact any new business as from the end of 2008, but will also unwind the existing assets smoothly (credit lines cannot be terminated immediately). At the end of the restructuring period, i.e. by 30 September 2011, IKB must have unwound 60 % of existing assets and must have sold the corresponding subsidiaries IKB Immobilien Management GmbH, IKB Projektentwicklungs GmbH Co. KG, and IKB Projektentwicklungsverwaltungsgesellschaft mbH ([14]). The remaining portfolio of EUR [< 3] billion will be unwound as the remaining assets mature. Overall the complete divestiture means a reduction of about EUR 4,9 billion in credit volume of the real-estate financing business.

(47) In addition, Germany has offered that IKB will divest a number of its subsidiaries as a compensatory measure:

— IKB International SA Luxembourg, which was the major entity involved in capital market activities, with a balance-sheet total of around EUR [< 10] billion, will be actively unwound ([15]) by 30 September 2011. No new business will be acquired as of 31 March 2009. Any business which is important for the first and second pillar will be performed in IKB's headquarters in Düsseldorf ([16]),

— IKB Capital Corporation New York was active in structured finance activities in the US with a balance-sheet total of EUR [< 2] billion. It will be actively unwound by 30 September 2011. No new business will be acquired after 31 December 2008,

— finally, IKB AG will cease activities in Amsterdam, where the branch was active in SME financing and the real-estate business, and had a credit volume of about EUR [< 500] million. It will be actively unwound by 30 March 2010. No new business will be acquired as of 31 December 2008,

— the 50 % participation in Movesta Lease and Finance GmbH, which currently has a balance-sheet total of EUR [< 500] million, will be sold by 30 September 2011,

— certain further non-strategic assets of EUR 1,7 billion (balance sheet value at 31 March 2007) will be divested. They will be actively unwound by 30 September 2011.

(48) However, given the difficult market environment, Germany negotiated a revision clause which allows IKB, in the even of unforeseeable circumstances, in particular if the financial crisis continues, or if the sale of some assets is impossible, to change or replace a measure or to extend a deadline as long as this is sufficiently well-reasoned and the Commission agrees.

(49) Finally, Germany has committed itself to ensuring that IKB's balance-sheet total will not exceed EUR 33,5 billion by 30 September 2011 ([17]); this implies a balance-sheet reduction of 47,2 % compared to the EUR 63,5 billion shown in the restated balance sheet of March 2007. According to Germany, implementing these compensatory measures and exiting the portfolio investment business translates in financial terms as follows:

([14]) If the disposal of certain (special purpose) companies or shareholdings in such companies in the real- estate financing business segment adversely affects IKB and the other shareholders any further owing to conveyance duty and agreements with business associates to hold shares of about 5,2 % until the project expires, shareholdings of approximately 5,2 % in the companies concerned may be maintained, and debt financing directly related thereto may be continued, beyond 30 September 2011.

([15]) Actively unwound means (a) sold or unwound by other similar extraordinary measures resulting in liquidity, or (b) not continued including non-prolongation of existing contracts except for what is already contractually committed.

([16]) Some of the business currently carried out in Luxembourg (in particular […]) is necessary in order to serve corporate clients.

([17]) Germany has confirmed that, in accordance with the IFRS accounting rules applied by IKB, all activities which are economically imputable to IKB will be accounted for in the IKB balance sheet.

Table 4

Reduction measures

(EUR billion)

No	Measure	Assets at 31.3.2007	Assets at 30.9.2011
	Remaining assets in core business	[< 35,0]	[< 35,0]
	For viability		
	Exit portfolio investments	18,30	0,00
	For compensation		
1.	Real estate financing	4,90	[< 3,0]
2.	IKB International SA, Luxemburg	[< 10,0]	0,00
3.	IKB Capital Corporation, New York	[< 2,0]	0,00
4.	Amsterdam branch of IKB AG	[< 0,5]	0,00
5.	Divestment of non-strategic assets	1,70	0,00
6.	Divestment of 50 % share in Movesta	[< 0,5]	0,00
	Subtotal: outstanding compensatory measures (subtotal: compensatory measures implemented)	[> 15,0] (0)	[< 3,0] [> 12,0]
	New development of certain business formerly established in Luxembourg	—	[> 2,0]
	Total balance sheet without growth	63,50	[…]
	Committed maximum balance sheet	33,50	33,50
	Remaining margin for new business	—	[…]

(50) Moreover, the plan indicates that IKB, whose Fitch rating has dropped from A + to BBB –, has funding difficulties in the current market environment. The maximum liquidity requirement until the end of the restructuring period is estimated at EUR [< 10] billion. This will essentially be financed by the capital increase, extending KfW's liquidity lines, and an asset-based refinancing operation. Part of the liquidity gap will be covered by a reduction in new activities.

(51) The plan also includes some projections regarding the future performance of the bank in a good, base and bad-case scenario. It concludes that in the base case, IKB would achieve a return on equity (RoE) of […] % at the end of the restructuring period in September 2011. IKB would then achieve profit before taxation of EUR […] million with […] full-time employees The Tier 1 ratio would rise to […] % and the cost-income ratio fall to […] %.

(52) Finally, Germany submitted information about restructuring costs. These comprise costs stemming from losses from the portfolio investments of around EUR [< 6]EUR billion from Rhineland (EUR 5,8 billion), Havenrock (EUR 1,2 billion) and from on-balance-sheet portfolio investments (EUR […] billion) ([18]), restructuring costs proper, comprising the risk shield, portfolio exit costs, and administrative costs of around EUR [> 0,25] billion, capital losses of around EUR [> 1] billion, losses through the reduction of business activities, which are partly already contracted and partly expected from the extension of existing contracts of EUR [> 1] billion and […] of EUR […] billion ([19]). Germany therefore estimates IKB's total restructuring costs at about EUR [> 15] billion.

3. THE FORMAL INVESTIGATION PROCEDURE

(53) In the opening decision the Commission questioned whether KfW's measures in favour of IKB complied with the market-economy investor test, essentially because KfW's exposure as a result of the measures was not limited, whereas the banking associations limited their risk and the other shareholders in IKB did not take part at all.

(54) Moreover, at that stage the Commission doubted whether the measures could be found compatible with the common market pursuant to Article 87(3) of EC Treaty. They did not qualify as aid to remedy a serious disturbance in the economy under Article 87(3)(b). There were no grounds for regarding them as rescue aid, given that they were not temporary in nature. Finally, at that stage the measures did not meet all the conditions for

([18]) Equal to total on-balance sheet investments (after currency adjustments) of EUR 6,0 billion minus EUR 0,545 billion sales and EUR 1 billion SIP 1 transfer, and EUR 1,2 billion SIP 2 transfer.

([19]) This is the sum of […] of EUR […] billion plus the […] from the actively unwound business activities of about EUR […] billion.

restructuring aid set out in the Community Guidelines on aid for rescue and restructuring of firms in difficulty ([20]).

4. COMMENTS FROM GERMANY FOLLOWING THE OPENING DECISION

(55) The German authorities maintain their initial position that most of the measures would not involve State aid because they were taken in conformity with the market-economy investor principle. The intervention was based on market-economy investor considerations because liquidation of IKB would have been more costly for KfW than the support measures. In this respect Germany reiterates that an adequate return on investment is irrelevant. Moreover, Germany indicates that the market-economy investor test must be made *ex ante*.

(56) As regards the assessment of the first measure, Germany therefore claims that only the losses initially estimated should be considered. That would mean losses of EUR 3,5 billion in a worst-case and EUR [< 2,5] billion in a mid-case scenario. Germany argues that a private investor would compare the direct cost of an insolvency of IKB, which would have been EUR 1,5 billion, stemming from maintaining IKB's book value of about EUR 620 million (based on German accounting rules) ([21]) and the cost of writing off about EUR 850 million in loans which IKB had distributed to third parties in the context of KfW's development business ([22]). In addition, Germany claims the insolvency of IKB would produce second-round effects resulting in the write-off of additional loans granted as part of credits from the development activities of at least EUR 1,1 billion and an increased cost of refinancing. Finally, KfW's reputation would have suffered too.

(57) Moreover, Germany argues that even if the support measures were considered to be aid, the amount of aid should be reduced by the losses that KfW would have suffered in case of insolvency.

(58) As regards the second measure, Germany points out that it was only an ancillary to the first and was largely financed by the banking associations. Therefore, in the light of the *Alitalia* case law, it should be 'regarded as satisfying the private investor test and not constituting State aid [given that] it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances' ([23]).

(59) Germany does not, however, dispute the aid character of the third measure.

(60) Nor, in Germany's view, did the sale of IKB result in State aid, because KfW behaved like a market-economy vendor. The purchase price was the result of negotiations conducted with several potential buyers and was therefore on market terms. The several additional measures were necessary to sell the bank and were likewise on market terms.

(61) This applies in the first place to the sale of SIP 1 to KfW, at a price [< 10] % below the IFRS book value. It is true that this price is better than the price that Lone Star negotiated for SIP 2 ([discount > 10,0] %) but it must be borne in mind that SIP 2 contained mainly […] and SIP 1 did not. Germany therefore claims that KfW will be able to sell the portfolio or hold it until maturity without losses. Moreover, KfW needed support from its owner, the State, for the purchase of SIP 1 because it […]; the purchase was facilitated by the guarantee in order to avoid KfW having to commit equity of about EUR […] million ([…]). Second, KfW's involvement in SIP 2 was also market-based since it involved only low risk, owing to the seniority of the loan, while the remuneration was high, at Euribor plus [> 80] bps, for which Germany provided market benchmarks. Finally, the fact that KfW had to provide an indemnity of EUR […] billion for […] is typical in cases where the risk of liability is low but the sum involved is large, and this condition was sought by all interested parties in the last round.

(62) Furthermore, Germany argues that, if the Commission were to consider the measures as involving […] aid elements, they would in any event qualify as compatible restructuring aid. Germany argues that the business segment of the bank which gave rise to the difficulties has been abandoned and that the bank will now focus on its core business.

([20]) OJ C 244, 1.10.2004, p. 2.

([21]) This value was below IKB's stock market value and even below the stock market value on 27 July 2007.

([22]) This corresponds to [> 15] % default of the overall amount of loans distributed by IKB on behalf of KfW, assuming that in the case of an insolvency of IKB, these loans would partially default, which would be directly to the detriment of KfW.

([23]) Case T-296/97 [2000] ECR II-3871, paragraph 81.

(63) Moreover, Germany has committed itself to take all the measures indicated above in recital 46.

(64) Finally, Germany argues that the restructuring is based on a significant own contribution of at least EUR [> 10] billion. It has changed the information supplied in this respect at various times, and has recently included all contributions to the restructuring that were not covered by aid, the reduction of new business, and proceeds from the divestitures minus the losses. The net proceeds from divestitures were estimated at EUR [> 5] billion, calculated by looking at the assets to be sold within the restructuring period […] minus the remaining business in Luxembourg and minus some portfolio investments in Luxembourg. In detail, Germany estimated EUR […] billion from the real-estate business, EUR […] billion from the Luxembourg and EUR […] billion from the New York subsidiary, as well as EUR […] billion from Amsterdam, EUR […] billion from Movesta and EUR […] billion from other non-strategic assets.

5. ASSESSMENT

5.1. Existence of aid

(65) The Commission will first assess whether the measures constitute State aid within the meaning of Article 87(1) EC. According to this provision, State aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings, in so far as it affects trade between Member States.

(a) *The risk shield and capital contribution measures (first three measures)*

(66) The Commission maintains the opinion put forward in the opening decision that none of the three financial interventions would have been provided by a market-economy investor, and thus all measures constitute State aid. Given IKB's cross-border and international activities, it is not disputed that any advantage from State resources would affect competition in the banking sector and would have an impact on intra-community trade ([24]).

(67) The Commission notes first that the German authorities argue that the measures do not provide an advantage to IKB because KfW acted solely in its position as owner and thereby like a private investor, but do not dispute that KfW is a publicly owned credit institution with a public function and that its behaviour is imputable to the State. Germany implicitly confirms that the decisions of KfW are imputable to the State when it admits that the Federal Ministry of Finance was not only present at the meetings of its administrative board, which was involved in all decisions of the weekend between 27 and 29 July 2007, but at the moment of the decision was actually chairing it ([25]).

(68) The Commission therefore concentrated on the question whether KfW's intervention constituted an advantage to IKB that would also have been provided by a market-economy investor operating under similar market conditions. The Commission accepts that in the worst case *ex ante* estimate the risk shield to IKB would have covered total losses of EUR 2,5 billion. The Commission moreover considers, as in similar cases ([26]), that in such unpredictable circumstances, a private investor would have considered this worst-case scenario of expected losses and not the mid case. Moreover, it is important to stress that KfW did not rule out the possibility that is liability might potentially increase up to EUR 8,1 billion.

(69) It is not true that the intervention would be less costly for KfW and Germany than liquidation ([27]), even when evaluated *ex ante* at the time when the investment decision was made ([28]). First, the Commission cannot accept all the liquidation costs put forward by Germany. Although the Commission recognises that the book value of IKB was indeed EUR 620 million, in the opening decision it pointed out that IKB's share price dropped significantly before KfW's intervention, so that KfW's holding in IKB at the time of the intervention was probably not equal to this book value. Furthermore, in the opening decision the Commission questioned

([24]) Commission Decision 2008/263/EC in Case C 50/06 *BAWAG*, recital 127 (OJ L 83, 26.3.2008, p. 7).

([25]) According to settled practice, imputability can be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. This is the case, for example, where the supervisory board is closely affiliated on a personal level with the State. See Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published. Nor was imputability questioned in Commission Decision 2001/695/EC in Case C 1/2000 *Holzmann*, recital 20 (OJ L 248, 18.9.2001, p. 46) or in the Commission Decision of 17 January 2003 in Case NN 115/02 *MobilCom* (OJ C 80, 3.4.2003, p. 5).

([26]) See Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published, recital 72. This conclusion was also in line with the previous paragraph, Commission Decision 2005/345/EC in Case C 28/2002 *Bankgesellschaft Berlin*, recital 140 (OJ L 116, 4.5.2005, p. 1).

([27]) This test is in line with the Commission's constant practice. See Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke* [1999] ECR II-17, paragraph 124. However, winding-up costs are normally difficult to calculate and estimates are faced with uncertainties, see for example Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin*, recitals 163 *et seq*. Also Commission Decision 2008/263/EC in Case C 50/06 *BAWAG*, recital 166.

([28]) Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke* [1999] ECR II-17, paragraph 121.

whether the underlying default risk of around [> 15] % from the loans distributed in the development business was realistic. Germany has not provided sufficient evidence to support the plausibility of KfW's estimate.

(70) The same lack of reasoning applies to the claimed threat of indirect losses as a consequence of a general banking crisis, which as indicated in the opening decision is purely hypothetical. The Commission also remains of the view that structured development financing is part of KfW's public remit and not part of its function as a normal commercial credit institution. The losses from this business cannot therefore be considered as a cost which a market-economy investor would also have considered ([29]).

(71) A crucial argument for the Commission remains that the estimated losses under the risk shield were in fact not limited to EUR 2,5 billion, but unlimited. Although it might be argued that the unlimited nature of the liability was required by BaFin as a *conditio sine qua non* for avoiding the moratorium, it is clear that a market-economy investor would also have considered this in the balancing test. This is evident when looking at the private participation in the risk shield.

(72) In order to compare KfW's behaviour with that of the banking associations, the Commission recalls that a public shareholder must not only act in parallel with other private investors, but the provision of capital needs to be proportionate, and must be provided under the same conditions ([30]) and industrial rationale ([31]). These considerations also guided the Court of First Instance's judgment in *Alitalia* judgement, referred to by Germany, in which the Court likewise required comparable circumstances.

(73) In this context the Commission notes that the banking associations capped their loss participation in the first measure at EUR 1 billion (approximately 30 %), whereas KfW did not do so and is thus far more exposed than the banking associations are. In any event, KfW's participation in the risk shield was still as high as that of the banking pool as a whole, even if the potential direct losses resulting from its ownership and the loans, with a claimed value of EUR […] billion (see recital 56), were deducted and the worst-case estimate were used. It is clear that that KfW did not intervene in a way comparable with the banking pool.

(74) Moreover, there is no validity to the argument that a general crisis in the German banking sector would have been triggered and would have had a drastic impact on KfW. All other banks would have been similarly affected by a crisis. But the share of the banking associations in the risk shield, capped at EUR 1 billion (approximately 30 %), bears no relation to the market share of their member banks in Germany, which is over 95 % ([32]). The Commission therefore sees no commercial reason for the disproportionate involvement of KfW. Thus while KfW might indeed have intervened to some extent in the interest of its subsidiaries, it clearly acted in a way that went beyond what a private investor would have done. A private owner would have limited his involvement much more and relied on additional support from the banking associations or the State. Thus KfW, at least to some extent, did not act like a market investor.

(75) The same applies to the second measure, which, according to information supplied by Germany, was a mere ancillary to the first risk shield. Thus, even if the participations of KfW and the banking associations seem more balanced in absolute terms (in relative terms the participation of the banking associations should still be much higher) this measure must be seen together with the first measure in the overall restructuring context, and settled case-law bars KfW from reverting to the market-economy investor argument after it has not acted as a market investor ([33]).

([29]) See Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke* [1999] ECR II-17, paragraph 119.

([30]) Communication on public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

([31]) Commission Decision 2005/137/EC in Case C 25/02 *Carsid*, paragraphs 67 to 70 (OJ L 47, 18.2.2005, p. 28).

([32]) The Commission further notes that the other owners of IKB did not participate in the support measure.

([33]) In Case T-11/95 *BP Chemicals* [1998] ECR II-3235 it was held that the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as 'aid' does mean that a further capital injection cannot easily be classed as an investment which satisfies the private market-economy investor test, in particular if it cannot reasonably be separated from these first injections and classed as an independent investment. The Court considers that the chronology of the capital injections, their purpose and the subsidiary's situation at the time when each decision to make an injection was made are relevant factors for such a determination.

(76) The same applies even more to the third measure, where the federal State evidently instructed KfW to act, and contributed EUR 1,2 billion to another measure of EUR 2,3 billion. At this point, KfW is much more exposed than the banking associations, even though the insolvency of IKB would trigger a guarantee mechanism which is designed to spread the burden across the banking sector.

(77) In other cases, the Commission has expressed the view that it is difficult to determine the aid amount if the aid is granted by way of a risk shield ([34]). In line with the guidelines and the case law, the aid element involved in a guarantee to a company in difficulty can be as high as the amount potentially covered by the guarantee, but can, on a case-by-case analysis, also be lower ([35]). However, even if the aid element might have been evaluated *ex ante* at below EUR 8,1 billion (Rhineland, Havenrock and EUR 1 billion on-balance-sheet assets), the realistic estimate for the loss coverage is now far in excess of the worst-case estimate and has increased to EUR 6,8 billion (see Table 3, excluding the third measure). Hence the Commission considers that the amount of aid provided under the risk shield and the capital contributions is EUR 8,8 billion (see Table 1 Nos 1 and 3).

(b) *The liquidity facility*

(78) In addition to the capital contribution and loss-coverage measures, KfW also ensured the status of IKB as a going concern by two framework liquidity facilities of EUR [> 1] billion each. These measures were taken in the context of the restructuring and cannot be isolated from the first and second measures. Thus once again KfW cannot plausibly revert to a market-economy investor argument ([36]). Indeed, the Commission does not see that a private investor would have accepted such a significant exposure, in particular in the absence of the risk shield. If KfW nevertheless acted by reference to some market benchmarks, however, this should be reflected in the quantification of the aid element involved.

(79) The Commission notes that the interest rate for the facilities was fixed for the first line, which was already drawn at Euribor plus [< 50] bps up to [> 50] bps, and for the second at Euribor plus [> 100] bps, and that each facility was collateralised […] above 100 % ([…] %). Moreover, the collateral was provided by valuable IKB assets, which are not derived from portfolio investments and should normally not default. In any event, the collateralisation is structured in such a way that the collateral will *de facto* never fall below 100 %. Thus there is indeed an apparent high collateralisation and relatively low risk of the liquidity provision. KfW therefore relied not only on IKB's financial strength, but in addition was secured with valuable collateral.

(80) However, the risk margins applied should be in line with the Communication from the Commission on the revision of the method for setting the reference and discount rates ('Communication on reference and discount rates') ([37]). Given that the company's rating is based on the existence of the risk shield and there is agreement that the company is in difficulty (see recital 96), the Commission must apply the margins given for companies in difficulty. In cases of high collateralisation, this margin is 400 bps ([38]). Hence it will be assumed that the advantage of the first line of EUR [> 1] billion corresponds to an average [> 300] bps for a period of ten months (i.e. from January to October 2008). The second line of July 2008 was granted, although not yet drawn, and thus did resulted in an advantage of [> 200] bps for a period of nine months (i.e. from February to October 2008). The aid involved in this line would therefore amounted to EUR […] million for the first line and to EUR […] million for the second, a total EUR […] million.

(81) As regards the liquidity facilities provided by [a regional bank] and [another regional bank], the Commission has no indication that the terms agreed did not reflect market considerations and would thus confer an advantage on IKB. Furthermore, the circumstances in which the facilities were granted, in particular the fact that interbank business is part of a bank's daily and standard operations, the concomitant participation on a large scale by private operators, and the fact that [a regional bank] and [another regional bank] did not provide these facilities under the direction of the State,

([34]) See Commission Decision of 30 April 2008 in Case NN 25/08, *Rescue aid to WestLB*, not yet published.
([35]) See Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published, recital 71.
([36]) See footnote 33.
([37]) OJ C 14, 19.1.2008, p. 6.
([38]) See also Commission Decision of 2 April 2008 in Case C 14/08 (ex NN 1/08) *Restructuring aid to Northern Rock*, paragraph 96 (OJ C 135, 3.6.2008, p. 21).

leads the Commission to the finding that there is no indication that these transactions are imputable to the State ([39]). The Commission has therefore no reason to conclude that these facilities imply the granting of State aid.

(c) *The sale of IKB*

(82) The Commission also assessed whether the sale of IKB to Lone Star involved elements of State aid. Firstly, this could be the case if IKB had been sold below market price to Lone Star. However, on the basis of a wide range of information provided by Germany in this respect (see section 2.5) the Commission has no indication that the price paid by Lone Star is not the highest offer achieved in an open, transparent, non-discriminatory and non-conditional sale process. Given that this is the decisive criterion under the Commission's rules on privatisation ([40]), it can conclude that the sale does not involve aid in favour of Lone Star.

(83) Second, the Commission assessed whether the sale implied some additional aid to IKB, which would be the case if liquidation would have been less costly for KfW than selling IKB, a criterion sometimes referred to as the market-economy vendor test. The Commission notes that the sale results not only in a sale price but also in some additional contributions by KfW, which need to be considered as part of the sale. These are (1) the maintenance of the two liquidity facilities of EUR [> 2,5] billion, (2) the senior loan by KfW for the refinancing of SIP 2, (3) the transfer of SIP 1 to KfW prior to the sale and (4) the assumption of the risk of liability […]. It is clear that KfW has taken these measures in order to allow a sale and free itself from as many assets as possible within as short period as possible. Although at first sight KfW obtained a positive sale price, the sale was accompanied by measures which were capable of reducing the price to a negative price.

(84) Nor can the fact be ignored that these measures were taken in the context of the restructuring, and thus in the context of the first three support measures. Therefore, the Commission cannot view them in isolation from the first three measures and once more does not see how KfW can revert to a market-economy investor argument ([41]).

(85) Be that as it may, the market-economy vendor test does not, in any event, appear to be fulfilled in this case. The benchmark is indeed whether the price became negative as Germany has not substantiated any credible additional liquidation costs that would have been considered by a market vendor. In particular, the Commission cannot consider the estimated losses from the default risk of loans granted in the development business. The Commission notes that structured development financing is part of KfW's public remit and not part of KfW's function as a normal commercial credit institution. It should therefore not be considered as a cost which a market-economy investor would also have considered, because liabilities stemming from State support activities would not have been granted by a market-economy investor in the first place ([42]).

(86) Hence the Commission assessed whether the support measures resulted *de facto* in a simple negative price. Since the support measures are not given as grants but mainly by way of loans and guarantees, the Commission must, as would be the case for a normal State aid assessment, determine their economic advantage for IKB.

(87) First, KfW continues to provide liquidity to IKB. As already established in recital 77, it is difficult to quantify the advantage since private investors might also have been willing to provide some liquidity under certain conditions, provided the risk shield existed. However, after the sale to Lone Star the risk shield will be removed. The take-over by Lone Star and the Commission's approval of the restructuring aid and restructuring plan shows that a restoration of viability is considered possible. Therefore, while during the restructuring period IKB is officially regarded as a company in difficulty, it should be considered as a 'weak' case (B rating) within the meaning of the Communication on reference and discount rates for the purposes of calculating the aid element ([43]). The benchmark under the reference rate communication is

([39]) 'The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.' Case C-482/99 *Stardust Marine* [2002] ECR I-4397, paragraphs 55 and 56.

([40]) European Commission, Twenty-third Report on Competition Policy, 1993, p. 270.

([41]) See footnote 33.

([42]) See in this respect Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke* [1999] ECR II-17, paragraph 119, Case C-334/99 *Gröditzer Stahlwerke* [2003] ECR I-1139, paragraphs 134 *et seq.*, Commission Decision of 30 April 2008 in Case C 56/06, *Bank Burgenland* (OJ L 239, 6.9.2008, p. 32), and Commission Decision of 4 June 2008 in Case C 9/08, *SachsenLB*, not yet published, recital 73.

([43]) See Commission Decision of 20 April 2008 in Case C 16/04 *Hellenic Shipyards*, not yet published.

220 bps, which would imply that the second line is [> 100] below the reference rate, whereas the first line is [> 100] bps below. This would, if calculated over […] years (from October 2008 until April […]), result in additional aid of about EUR [90] million.

(88) Second, KfW bought SIP 1 for EUR 1 billion. The Commission notes that the price negotiated by KfW is [< 10] % below the IFRS book value and that IKB was previously able to sell part of the portfolio at above IFRS book value. However, it is doubtful that in the present market situation a private investor would have been able and willing to buy such a portfolio, at least not in its entirety. The fact that Lone Star was not willing to do so, and that, KfW was not able or willing to do so without help of the State, is evidence for this. The need for further write-downs of the portfolio cannot be excluded. In a worst case, this would concern the junior tranche of EUR [< 200] million. Hence, in the absence of any other benchmark, the Commission takes the view that KfW's additional potential exposure from SIP 1 runs up to EUR [< 200] million.

(89) Third, KfW provided a senior loan for SIP 2 of EUR 775 million, which is remunerated at Euribor plus [> 90] bps due to its seniority (it is served first from any incoming proceeds). Nevertheless, the loan is given to an SPV which has no credit history as such. According to the Communication on reference and discount rates, the interest rate for such SPVs should be at least Euribor plus 400 bps ([44]). However, given that the loan is a senior loan which is subordinated to involvement of IKB and thus essentially benefiting IKB, in this case the Commission also accepts a benchmark of 220 bps. The aid element in the provision of the senior tranche of EUR 775 million can therefore be quantified at about EUR [< 30] million ([> 100] bps during the period of […] years, from October 2008 until […]).

(90) Finally, the taking over of […] was motivated by the impossibility of putting an acceptable price on the risk if it was transferred together with IKB. Given that the exposure to the indemnity is limited and, on the basis of the available information, the case is unlikely to arise, it would have been disproportionate to make the risk part of the sale procedure. That the risk can be considered small is confirmed by the fact that IKB was not requested by the auditors to provide for it. However, there is of course a residual risk left with […]. In the absence of a quantitative risk evaluation, the Commission would therefore consider that EUR […] million, corresponding to […] % risk, needs to be estimated within the current exercise.

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

(91) The aid involved in the measures provided by KfW as part of the sale of IKB totals EUR 390 million, which exceeds the sale price of EUR [> 100] million by EUR [> 250] million and thus render it negative.EUR Therefore it can be considered that the sale of IKB involved aid to IKB.

(d) *Summary of State aid*

(92) Overall, the total aid involved in all measures indicated in Table 5 amounts to EUR 9,155 billion.

Table 5

Summary of State aid received during restructuring

No	Measure	EUR million	Aid amount involved (in EUR million)
1	1st risk shield (Rhineland EUR 5,8 billion, Havenrock EUR 0,85 billion and on-balance-sheet assets EUR 1 billion)		6 650
2	2nd risk shield (EUR 350 million additional loss coverage — Havenrock)		200
3	Capital increase and waived loan (coverage of depreciation on-balance-sheet assets)		2 000
4	Liquidity facility to IKB (before sale)		[…]
5	Sale of IKB:		
5a.	Price of IKB shares	[…]	
5b.	Liquidity facility to IKB (after sale)	[…]	
5c.	Senior loan refinancing SIP 2	[…]	
5d.	Transfer SIP 1 to KfW	[…]	
5e.	Indemnity clause	[…]	
	Sale of IKB net		[> 250]
		Total	[< 10 000]

5.2. **Compatibility with the common market under Article 87(3)(b): aid to remedy a serious disturbance in the economy of a Member State**

(93) The Commission maintains its position set out in the opening decision that Article 87(3)(b) of the EC Treaty is not applicable in the present case. This provision allows aid to remedy a serious disturbance in the economy of a Member State. The Commission recalls that the Court of First Instance has stressed that Article 87(3)(b) must be applied restrictively.

(94) The investigation has confirmed the Commission's observation that IKB's problems are due to company-specific events. Moreover, the information provided by the German authorities has not convinced the Commission that the systemic effects that might have resulted from a IKB's insolvency could have reached a size constituting 'a serious disturbance in the economy' of Germany within the meaning of Article 87(3)(b) ([45]). Therefore, the present case must be regarded as based on individual problems, and requires tailor-made remedies, which can be addressed under the rules for companies in difficulties. Accordingly, the measures in question cannot be declared compatible with the common market under Article 87(3)(b) EC.

5.3. **Compatibility with the common market under Article 87(3)(c) — restructuring aid**

(95) The investigation allowed the Commission to reach the conclusion that the measures can be considered as compatible restructuring aid because they satisfy all the tests for authorisation under the criteria in the Guidelines for restructuring aid. Consequently it was not necessary to investigate whether any rescue aid was involved, something the Commission had in any event excluded in the opening decision, given the irreversible nature of the risk shield.

(a) *Firm in difficulty*

(96) The Commission considers that IKB was a firm is in difficulty within the meaning of paragraph 9 of the Guidelines, given that without the intervention of KfW it was highly unlikely that IKB would have been able to cope with the liquidity squeeze for much longer. The imminent losses would have led to the bank being closed, thus meeting the conditions of paragraph 10(c) of the Guidelines. Germany has not contested this opinion, which was set out in the opening decision.

([45]) See Commission Decision of 30 April 2008 in Case NN 25/08, *Rescue aid to WestLB*, not yet published.

(b) *Restoration of long-term viability*

(97) The present investigation first confirmed that the restructuring will restore the beneficiary's long-term viability. The Commission considers that the sale of IKB to Lone Star is a central element for solving the difficulties and will support a positive economic development of the bank.

(98) Moreover, the investigation confirmed that IKB has redirected its activities. It has abandoned the loss-making activities and is no longer making portfolio investments. Moreover, IKB intends to focus on its core business, medium-sized corporate clients. All other remaining activities in the structured financing business segment are deemed to serve the corporate clients segment, while [> 20] % of this business as well as the entire real-estate financing business will be abandoned. In addition, IKB has taken measures to improve its risk management and has already reduced its risk exposure considerably. IKB has therefore taken the necessary internal measures to ensure its turnaround.

(99) Furthermore, the Commission acknowledges that IKB's restructuring plan indicates a sustainable restoration of IKB's viability. In particular, the plan, which is based on sound financial projections, makes it clear that the business model would work. The Tier 1 ratio of […] % and the cost-income ratio of […] % in 2011 indicate that the bank's business model can be considered viable. The relatively low RoE of […] % in 2012 has to be regarded in relation to IKB's high Tier 1 ratio, which is a necessary cushion. The Commission recognises the significant cost-cutting measures which will be implemented by 2011. The Commission has also analysed the underlying assumptions of the restructuring plan and has no reason to doubt that they are realistic.

(100) The plan indicates that even in a worst-case scenario, IKB will still show positive growth and will achieve a positive RoE. Even in such a worst-case scenario, the bank will achieve a Tier 1 ratio of […] % and thus be based on solid foundations.

(c) *Aid limited to the minimum — own contribution*

(101) Further, the Commission's doubts as regards the aid being limited to the minimum have been allayed. The Commission can now conclude that the aid has been limited to the minimum and is accompanied by a significant own contribution in line with the targets indicated in the Guidelines, i.e. above 50 % of the restructuring costs.

(102) The restructuring costs include various losses (losses from the portfolios, losses due to higher financing costs, losses stemming from the reduction of business, and losses from the execution of divestitures), as well as costs for setting up the risk shield, staff restructuring costs, administrative costs, and consultancy and lawyers' fees. The Commission does not dispute that these costs amount to EUR [> 15] billion as indicated by Germany (recital 52). The Commission also accepts that the refinancing of SIP 1 and the senior loan for SIP 2 are restructuring costs, since they are needed to restore viability. The overall costs may therefore be estimated at around EUR [> 17] billion.

(103) In accordance with point 43 of the Guidelines, this restructuring can be funded through aid, the beneficiary's own funds, the proceeds of the sale of assets, and other owner and third party contributions at market conditions.

(104) A significant part of the restructuring of the portfolios is borne by the company itself and the previous and new private shareholders, comprising in particular the participation of the banking associations, IKB's own funds ([46]) and Lone Star's capital injection. However, lost business opportunities and a reduction of the business activities due to the crisis cannot be regarded as an own contribution because, under point 43 of the Guidelines, own contributions must be real. The own contribution from this category is therefore around EUR […] billion, i.e. [> 20]%.

(105) This amount increases significantly and reaches at least 50 % if the proceeds from divestments implemented as compensatory measures are taken into consideration. This concerns assets with a nominal value of EUR [> 15] billion (see Table 4). However, the Commission cannot accept the entire amount as an own contribution. First, part of the business of IKB Luxemburg will be re-established in Düsseldorf (EUR […] billion), and so only part of it will actually be divested. Second, part of the funds will not be generated by active sales but by simple maturity of the assets. Third, it is not clear at what value the assets can be wound up. Nevertheless, Germany provided sufficient arguments for the Commission to be able to accept that the active unwinding of the assets will provide at least EUR [< 5] billion in the near future ([47]). This will be monitored by the Commission in order to ensure that a sufficient level of own contribution is actually achieved and that the aid is actually limited to the minimum necessary.

(106) The effect of the divestment is twofold. On the one hand, the divestments reduce the amount of risk-weighted assets and therefore free up capital and increase the capital ratios. On the other hand, the divestments generate liquidity which can be used to finance the restructuring or to strengthen the liquidity basis ([48]). As explained in the above preceding paragraph, part of this is future expected inflow of funds, part has already been realised and another part will be realised in the near future. So, even leaving aside expected inflows of funds which can be realised only in 2011, and considering for precautionary purposes that the projected proceeds may not fully materialise for all of these divestments, the Commission comes to the conclusion that the requirement of a 50 % own contribution to the restructuring is fulfilled.

(107) In reaching this conclusion the Commission has taken into account the following factors.

Table 6

Own contribution

(EUR billion)

Measure	Origin of funds	Value
Risk shield	Banking associations	1,50
Use of company capital reserves and hybrid capital	IKB	[> 1,5]
Capital contributions SIP II	Lone Star	[> 0,25]
	Subtotal	[> 3,25]
Divestments portfolio investments	Market	[…]
Divestments of real-estate business	Market	[…]
Divestments of IKB Int. Luxembourg	Market	[…]

([46]) IKB's own funds in this respect are considered to comprise the total Tier 2 capital (in particular reserves and hybrid capital), which has been used to absorb the losses stemming in particular from the portfolio investments.

([47]) Part of these proceeds were realised as early as March 2008. For example, the non-strategic assets were reduced from EUR 1,7 billion to EUR 1,0 billion. In addition, Germany argues that it does not need to hold a fire sale for the assets because it has some time for the sale.

([48]) Depending on the assets' book value and the maturity of debt. This has been accepted in past Commission decisions, such as Commission Decision 2007/257/EC in Case C 44/05, *Huta Stalowa Wola*, recital 71 (OJ L 112, 30.4.2007, p. 67); Commission Decision 2008/90/EC in Case C 20/06, *Novoles Straža* (OJ L 29, 2.2.2008, p. 7); Commission Decision 2008/145/EC in Case C 54/06, *Bison Bial* (OJ L 46, 21.2.2008, p. 41); and Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published.

(EUR billion)

Measure	Origin of funds	Value
Divestments of IKB CC New York	Market	[…]
Divestments of IKB Amsterdam	Market	[…]
Divestments of Movesta	Market	[…]
Divestments of non-strategic assets	Market	[…]
Subtotal: divestment compensatory measures		[> 5,0] (at least […])

(d) *Avoidance of undue distortions of competition — compensatory measures*

(108) After the investigation, the Commission is convinced that sufficient measures are being taken in order to mitigate as far as possible any adverse effects of the aid on competitors.

(109) The Commission observes that IKB is giving up an entire business segment and is downsizing its most profitable business segment, i.e. structured financing, by [20-30] %.

(110) The Commission cannot accept that the lion's share of the downsizing (i.e. the portfolio investments of EUR 18,3 billion) constitutes compensatory measures, as these were necessary to restore viability. Pursuant to point 40 of the Guidelines, such measures cannot be considered compensatory measures.

(111) Be that as it may, the further reduction by EUR [> 10] billion amounts to about [25] % of the balance-sheet total after deducting the portfolio investments (i.e. EUR [> 10] billion of EUR 45,2 billion) ([49]). In addition, while the exit from portfolio investments cannot be accepted as a compensatory measure, it nevertheless has an impact on the size of the bank and its activities. Overall, the reduction in IKB's balance-sheet total will, on the basis of the measures proposed by Germany, reach 47,2 % (i.e. EUR 18,3 billion portfolio investments and EUR [> 10] billion compensatory measures, minus EUR […] billion margin for growth, in relation to EUR 63,5 billion balance-sheet total).

([49]) This takes into account the fact that EUR [< 2] billion of real-estate business will still be in the balance sheet at 30 March 2011, and the fact that EUR […] billion of the business of IKB Luxemburg will be re-established in Düsseldorf.

(112) Moreover, the Commission recalls that the limitation of the balance-sheet total to EUR 33,5 billion by the end of the restructuring period, i.e. 30 September 2011, will ensure that the closures and divestitures are not circumvented by rebuilding the business in other parts of the bank or simply transferring it.

(113) Furthermore, the former owners of the bank as well as the former top management are no longer involved in IKB's activities, which sends a valuable signal against moral hazard. In addition, the bank has been sold in an open and non-discriminatory manner which gave competitors an opportunity to acquire the bank. This in itself also constitutes a kind of compensation for the competitive harm which the aid caused to them.

(114) In sum, the compensatory measures are in proportion to the distortive effects of the aid granted to IKB and ensure that the adverse effects on trading conditions are minimised as much as possible.

(115) The Commission must be kept informed of progress in implementing these compensatory measures.

6. **CONCLUSION**

(116) The Commission finds that the aid measures have been implemented in breach of Article 88(3) of the EC Treaty. However, the Commission concludes that they constitute restructuring aid which can be considered compatible with the common market pursuant to Article 87(3)(c) provided that the relevant conditions are fulfilled,

HAS ADOPTED THIS DECISION:

Article 1

The measures granted by Germany to IKB Deutche Industriebank AG (hereinafter 'IKB'), based on the agreements and documents provided by Germany, constitute State aid within the meaning of Article 87(1) of the EC Treaty that is compatible with the common market subject to the obligations and conditions set out in Article 2.

Article 2

1. Germany shall ensure that the plan for restructuring IKB, as communicated to the Commission by Germany on 25 September 2008, is fully implemented by 30 September 2011.

2. Germany shall ensure that the following IKB assets are sold to a third party that is independent of IKB and KfW or liquidated:

(a) The entire real-estate business segment, consisting of domestic and international real-estate financing, shall not accept any new business after 31 December 2008 and shall be actively unwound ([50]); […] % shall will be sold by 30 September 2010, […] % by 30 September 2011 and the remainder as it falls due. The unwinding shall include IKB Immobilien Management GmbH, IKB Projektentwicklungs GmbH Co. KG, and IKB Projektentwicklungsverwaltungsgesellschaft mbH ([51]).

(b) The subsidiary IKB International SA Luxembourg shall be actively unwound by 30 September 2011. No new business may be acquired after 31 March 2009. Of, the business carried out by this subsidiary, that which is necessary for the corporate banking and structured finance business shall be taken over by IKB.

(c) IKB Capital Corporation New York shall be actively unwound by 30 September 2011; […] % of the loan portfolio shall be sold by 30 September 2010. No new business may be acquired after 31 December 2008.

(d) The activities of IKB AG in Amsterdam shall be actively unwound by […]. No new business shall be acquired after 31 December 2008.

(e) The 50 % participation in Movesta Lease and Finance GmbH shall be sold by 30 September 2011.

(f) Certain further non-strategic assets originally treated as off-balance sheet items, with a nominal value of EUR 1,7 billion (book value at 31 March 2007), shall be actively unwound by 30 September 2011.

3. Germany shall ensure that IKB's balance-sheet total does not exceed EUR 33,5 billion by 30 September 2011 ([52]).

4. In the event of unforeseeable circumstances, in particular if the financial crisis continues or if the sale of some assets is impossible, the measures referred to in paragraphs 2 and 3 may be amended or replaced, or a deadline may be extended, provided that sufficient justification is given at least two months before the deadline and the Commission does not raise any objection within two months.

5. For the purposes of monitoring compliance with the conditions set out in paragraphs 1, 2 and 3, Germany shall provide regular annual reports until 2012, by 31 April at the latest, on progress in implementing the restructuring plan and the conditions and obligations listed above.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 October 2008.

For the Commission
Neelie KROES
Member of the Commission

([50]) For the purposes of this Decision, 'actively unwound' means (a) sold or unwound by other similar extraordinary measures resulting in liquidity, or (b) cessation of business activity, including not extending existing contracts, except for existing contractual obligations.

([51]) If the disposal of certain (special purpose) companies or shareholdings in such companies in the real-estate financing business segment adversely affects IKB and the other shareholders any further owing to conveyance duty and agreements with business associates to hold shares of about 5,2 % until the project expires, shareholdings of approximately 5,2 % in the companies concerned may be maintained, and debt financing directly related thereto may be continued, beyond 30 September 2011.

([52]) Germany has confirmed that, in accordance with the IFRS accounting rules applied by IKB, all activities that are economically imputable to IKB will be accounted for in the IKB balance sheet.