COMMISSION DECISION

of 27 April 2010

on the State aid implemented by Belgium for the restructuring of the Ostend fish auction

(State aid C 30/08 (ex NN 21/08))

(notified under document C(2010) 2520)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2010/607/EU)

THE EUROPEAN COMMISSION,

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

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2], and in particular Article 7(5) and Article 14 thereof,

Having called on interested parties to submit their comments [3] pursuant to the first subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) [4] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 16 February 2006 the Commission received a complaint concerning aid granted by the Belgian authorities to the Ostend fish auction, registered under reference number CP 40/06. On 31 July 2007 an additional complaint was received pertaining to the same issue.

(2) By letters of 13 March 2006, 26 June 2006 and 11 July 2007, the Commission has requested the Belgian authorities to provide information about these measures, to which they responded by letters of 11 May 2006, 20 October 2006 and 27 November 2007.

(3) After examination of the information and documents provided by the Belgian authorities, the Commission informed the Belgian authorities on 3 July 2008 of its decision to initiate the procedure laid down in Article 108(2) of the TFEU and Article 6 of Regulation (EC) No 659/1999.

(4) By letter of 16 July 2008 the Belgian authorities have transmitted to the Commission certain documents relating to the privatisation of the Ostend fish auction contemplated by the City of Ostend.

(5) By letter of 25 July 2008 the Belgian authorities requested an extension until the 8 September 2008 to submit their comments. The extension was granted on 4 August 2008.

(6) By letter of 8 September 2008 the Belgian authorities submitted their comments on the decision to initiate the formal investigation procedure.

(7) The Commission Decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* [5]. The Commission has invited interested parties to submit their comments within one month of the date of the publication.

(8) The Commission met the Belgian authorities on 9 October 2008. During this meeting, the Belgian authorities gave information about the manner in which they intended to organise the privatisation of the fish auction.

(9) The Commission received comments from the following interested third parties: EAFPA (European Association of Fishing Ports and Auctions), NOVA (Nationaal Overleg Visafslagen), Flanders Ship Repair, Zeebrugse Vis Promotie vzw (ZVP), Grimsby Fish Market, Zeebrugse Visveiling (ZV) and European Fish Centre (EFC) and Gardec (a ship repair undertaking).

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[1] OJ L 1, 3.1.1994, p. 3.
[2] OJ L 83, 27.3.1999, p. 1.
[3] OJ C 238, 17.9.2008, p. 12.
[4] From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.
[5] See footnote 4.

(10) By letter of 4 November 2008, the Commission forwarded these comments to Belgium, which was given the opportunity to react. Belgium did not send any observations further to the comments from third parties.

(11) By letter dated 8 September 2009 with reference C(2009) 6907, Commission issued an information injunction in accordance with Article 10(3) of Regulation (EC) No 659/1999 requiring a complete answer to the questions raised in its letters of 13 March 2006, 26 June 2006 and 11 July 2007 and in the decision to initiate the formal investigation procedure.

(12) By letter of 7 October 2009 the Belgian authorities requested an extension until 9 November 2009 to submit the information. The extension was granted on 9 October 2009. In their letter, the Belgian authorities also asked the Commission to transmit to the Belgian authorities the comments submitted by third parties. Together with granting the delay extension, the Commission re-transmitted the comments of third parties and a copy of the letter of 4 November 2008.

(13) By letter of 22 October 2009 the Belgian authorities informed the Commission that they had never received the Commission letter of 4 November 2008. For this reason, they requested a new period of one month in order to submit their observations further to the comments submitted by third parties.

(14) By letter of 5 November 2009 the Commission granted the Belgian authorities an extension until 27 November 2009 in order to give them the opportunity to react to the comments submitted by third parties.

(15) The Belgian authorities gave their answers to the information injunction as well as additional information on the privatisation of the fish auction.

(16) By letter of 30 November 2009 Belgium transmitted its observations further to the comments submitted by third parties.

2. RESTRUCTURING OF THE OSTEND FISH AUCTION IN 2001

(17) The Ostend fish auction, originally a State owned auction, had been highly fragmented and — according to the Belgian authorities themselves — badly managed for years. It was performing badly. From 1991 to 2001, its share in terms of fish arrivals in Belgian harbours had fallen from approximately 37 % to 20 % ([6]). From 1997 to 2001 its turnover dropped from EUR 20 550 000 to EUR 13 440 000 ([7]) and over many years, the City of Ostend (hereinafter referred to as 'the City'), in relation to the auction, had been recording an average annual loss of EUR 1 850 000 (including in 2001).

(18) In 2001 the City had to make a choice between closing down the fish auction and restructuring it. On 23 November 2001 the City decided to restructure the Ostend fish auction into an autonomous municipal company under Belgian Law, with the City as its sole shareholder.

(19) The decision to restructure the auction was based on a financial plan presenting one hypothesis (described as positive) and a two-page business plan, drawn up by HAMA Consult NV. These documents indicate that the fish auction could become profitable within a period of nine years provided that it was transformed into a separate legal entity with starting capital of BEF 250 million (around EUR 6,2 million), to be paid up in full over a period of five years. This separate company was called the 'Autonoom Gemeentebedrijf Vismijn Oostende' (hereinafter referred to as 'AGVO'). AGVO took over the financial charge relating to the reimbursement of various bank loans relating to the former Ostend fish auction.

2.1. *COMPANY STRUCTURE*

2.1.1. AGVO

(20) As mentioned in recital 18, in order to restructure the fish auction, the City established, on 23 November 2001 ([8]), the autonomous municipal company AGVO. Such an autonomous municipal company is a separate legal entity, established under Article 261 of the New Municipality Law, intended for the organisation of municipal institutions and services outside the general municipal services, focused on institutions or services of a commercial or industrial nature and managed in accordance with industrial and commercial methods.

(21) As regards both shareholding and management bodies, the City, as the establishing municipality, is required by law to have the majority of votes. The City actually has 100 % of shares in AGVO and — according to AGVO's articles of association — appoints all members of the Board of Directors. The majority of the directors must be members of the City Council.

([6]) De Belgische Zeevisserij — Anvoer en Besomming 2007, Vlaamse overheid, Departement Landbouw en Visserij (http://www2.vlaanderen.be/landbouw/downloads/vis/aanvoer_besomming_2007.pdf), p. 12.

([7]) Vlaamse overheid, Departement Landbouw en Visserij, Jaaroverzicht Zeevisserij 1998, 1999, 2000 en 2001 (http://lv.vlaanderen.be/nlapps/docs/default.asp?fid=122).

([8]) AGVO was established on 23 November 2001 by the City. This decision of the City was approved on 14 March 2002 by the Flemish Minister for internal affairs.

(22) AGVO has currently at least two wholly-owned subsidiaries: NV Exploitatie Vismijn Oostende (hereinafter referred to as 'EVO'), and NV Pakhuizen (hereinafter referred to as 'PAKHUIZEN').

2.1.2. EVO

(23) EVO was established on 8 August 2002 to run the auction and all activities relating thereto. EVO was provided with an initial capital of EUR 371 840. The ownership was shared in 15 000 equal shares without nominal value between AGVO, which held 14 999 shares, and Mr Miroir, Member of the City Council, with 1 share.

(24) EVO is managed by a Board of Directors. The board members are appointed by the shareholders for a period of six years, with a possibility of renewal. In terms of shareholding, EVO is fully controlled by AGVO.

2.1.3. PAKHUIZEN

(25) PAKHUIZEN was set up in 1988 by vessel-owners in order to manage moveable and immovable assets. In 2005, PAKHUIZEN was taken over by AGVO through the purchase of all its shares for EUR 350 000.

(26) PAKHUIZEN is managed by a Board of Directors. The board members are nominated by the shareholders for a period of six years, with a possibility of renewal. Since 2005, PAKHUIZEN is owned and controlled by AGVO.

2.2. *TASKS*

2.2.1. AGVO

(27) According to its articles of association, AGVO is entrusted with tasks which are classified by the Belgian authorities as tasks in the public interest and commercial tasks. The 'public tasks' are performed by AGVO itself; the 'commercial tasks' are performed by the wholly-owned subsidiaries EVO and, since 2005, PAKHUIZEN.

(28) As regards the 'public tasks', the Belgian authorities have indicated that AGVO was entrusted with the management of the Ostend fishing port (which includes the management and maintenance of matters falling within the public and private domain situated within the boundaries of the fishing port), the inspection of fish landed for consumption, the setting of tax duties on auction prices while checking that the catch landed is subjected to the VAT requirement, the operation of the locks between the channel and the fisheries dock (which is used not only by fishing vessels), public relations functions on behalf of the local authorities and the renovation and provision of buildings to public-law or semi-public-law institutions such as the Flemish Region, West Flanders Province etc.

2.2.2. EVO

(29) EVO operates the Ostend fish auction. The activities in this context concern mainly organising and running the fish auction, letting warehouses and other subsidiary activities. In the context of the operation of the auction, EVO applies an auction charge of 6 % of the price. Buyers at the auction are charged with a buyer's commission of between 1 % and 3 % and must bear the hire fee for the fish crates. It is not known how much they pay for the latter.

(30) Moreover, EVO grants loans to customer vessel-owners. Some of the recent loans were granted at a rate of Euro Interbank Offered Rate (Euribor) + 2 %. It seems, however, that not all loans were granted under those conditions. In exchange for the loan, the vessel-owners are required to auction their fish in Ostend.

(31) In addition, EVO provides vessel-owners with certain facilities, such as by contributing part or all of the costs of refrigerated transport.

2.2.3. PAKHUIZEN

(32) The activities of PAKHUIZEN are mainly aimed at converting, restoring, (re-)decorating, (re-)constructing, and demolishing, exploiting, managing and letting immovable property.

2.3. *THE AID MEASURES AT ISSUE*

2.3.1. INITIAL CAPITAL AND CAPITAL INCREASES

(33) At the time of its establishment, on 23 November 2001, AGVO was granted a starting capital of BEF 250 million (EUR 6 179 338,12) by the City to be paid in equal yearly instalments over a period of five years. Since 2002, six instalments of the initial capital have been paid, amounting to a total of EUR 3 596 665,62: EUR 619 734 have been paid on 28 June 2002, EUR 570 155 on 26 June 2003, EUR 570 155 on 25 June 2004 and EUR 570 155 on 26 June 2005. In their comments in the context of the formal investigation procedure Belgium has indicated that in 2006 and 2007 two more instalments of EUR 619 734 were paid. So far as the Commission is aware, the remaining part of the starting capital of EUR 2 582 672,5 has not yet been claimed by AGVO.

(34) The Belgian authorities have indicated that AGVO has used the starting capital partly for 'public purposes' and for repayments of current bank loans in capital and interest. It has also used it to buy shares in Pakhuizen. Finally it has used it in order to pay up EVO's initial capital and to grant loans to EVO which were later (31 December 2004, 31 December 2005 and 21 December 2007) converted into capital by means of a remission of debts.

(35) At the time of its establishment on 8 August 2002, EVO was provided with an initial capital of EUR 371 840,29. Subsequently, AGVO has increased EVO's capital by cancelling its debts. On 31 December 2004, the capital was increased by EUR 1 387 044; on 31 December 2005 by EUR 710 000,75 and on 21 December 2007 by EUR 1 500 114,96. In total AGVO has provided EVO with a capital of EUR 3 969 000.

(36) Although the Belgian authorities had informed the Commission that EVO's initial capital had been increased and that it amounted to EUR 2 468 885 by 31 December 2006, they did not inform the Commission of the particular form of the capital increases. Following observations received from third parties, the attention of the Commission was drawn to the capital increase of 21 December 2007 and to the fact that the capital had been increased by way of a remission of debts. Belgium did not comment on this aspect of the third parties' observations.

2.3.2. GUARANTEES FOR LOANS

(37) Apart from the initial capital, the City assisted both AGVO and EVO by providing, free of charge, guarantees for obtaining private loans.

(38) So far as concerns AGVO, the guarantees were for three loans, granted on 26 March (EUR 609 379,40) and 23 April 2004 (EUR 2 117 500) and 22 April 2005 (EUR 550 000), totalling BEF 132 199 987 (EUR 3 276 879).

(39) So far as concerned EVO, the guarantees were for loans, granted on 28 June and 27 September 2002. However, according to the information submitted by the Belgian authorities, in the end the loans concerned were not taken up. On 23 April 2004 and 22 April 2005, the City again provided guarantees free of charge for loans to EVO, which enabled the latter to take up loans amounting to BEF 145 505 820 (EUR 3 606 995). Without mentioning any date, the Belgian authorities have indicated that the City had also guaranteed an additional loan of EUR 78 000. Given that this was indicated in the comments of the Belgian authorities of 4 September 2008 and that the previous comments were dated 23 November 2007, the Commission assumes that this additional guarantee was provided some time between those dates.

(40) AGVO has also provided guarantees free of charge to EVO for two loans for a total of EUR 600 000. No information was given as to the date of the decision to grant the free guarantees. Given that EVO was established on 22 August 2002 and that the document submitted by the Belgian authorities mentioning the two loans was describing the situation on 3 August 2006, the Commission assumes that the guarantee was provided some time between those dates.

2.3.3. LAND AND BUILDINGS

(41) According to Article 30 of its Articles of association of 23 November 2001, AGVO is granted the exclusive right to use, free of charge, the land and buildings of the Ostend fishing port ([9]).

(42) Article 30 of the articles of association also indicates that the City can at a later stage transfer the property rights (or other rights) in those land and buildings to AGVO.

(43) This was the case on 26 March 2004, when the City made a contribution to AGVO by transferring to it its property rights in various buildings located in the Ostend fishing harbour consisting of 57 500 m^2. This contribution was made at the inventory value entered in the municipal accounts, which was EUR 14 891 524. The transfer concerned only buildings (fish auction, offices, and warehouses) and not the ground on which the buildings were erected. The ground itself is used by the City on the basis of an open-ended concession from the Flemish Region, the owner of the plots of land. AGVO continued to have the exclusive right to use these lands on the basis of Article 30 of its articles of association.

([9]) 'De Stad Oostende kan aan het AG Vismijn Oostende de volle eigendom, respectievelijk de bestaande zakelijke rechten en beheersrechten overdragen van de goederen die zich bevinden binnen of behoren bij het in artikel 3.1 omschreven Visserhavengebied of die nodig en/of nuttig zijn voor de realisatie van de doelstellingen van het AG Vismijn Oostende […]. In afwachting van de overdracht van de onroerende goederen krijgt het AG Vismijn Oostende het uitsluitend recht deze goederen zonder vergoeding te gebruiken.'

(44) The transfer of immovable property of 26 March 2004 included 14 754 m^2 of buildings subject to a long-term lease between the City and PAKHUIZEN concluded in 1989 for a period of 45 years. Under this contract, PAKHUIZEN pays a token rent of BEF 1 000 (EUR 25) per year for the use of the buildings. In return, PAKHUIZEN is contractually required, at its expense and without entitlement to compensation, to renovate the warehouses described in the long-term lease so that they will comply with future regulations. Furthermore, after 27 years of lease (in 2016), the City will be granted 50 % every year of PAKHUIZEN's net annual profit. The Belgian authorities have indicated that PAKHUIZEN did not comply with its obligations and the specified warehouses were not renovated, as contractually required, at least not before 2005. However, the Belgian authorities indicated that after AGVO purchased PAKHUIZEN shares, it spent EUR 257 872 in 2005 and EUR 68 816 in 2006 on renovation and maintenance works. The exact amount of the costs of the works undertaken in 2007 is not known.

(45) From 26 March 2004, the date on which the City transferred the ownership of the building to AGVO, AGVO replaced the City as the contracting party in the long-term lease with PAKHUIZEN. By doing so, AGVO became entitled to collect the EUR 25 per year, as well as to obtain after 27 years of lease, 50 % of PAKHUIZEN's net annual profit.

(46) According to the information provided by Belgium, the 57 500 m^2 thus made available to AGVO are distributed as follows:

— 13 600 m^2 used by the subsidiary EVO to house the fish auction, as working/storage space and administrative buildings,

— 14 754 m^2 rented to PAKHUIZEN, of which 955 m^2 are used for port activities,

— 2 700 m^2 of warehouses rented to (semi-) public-law institutions,

— 8 156 m^2 of public roads,

— 2 488 m^2 which are used as free public parking,

— 2 400 m^2 which are used as a container park for fisheries activities,

— 13 402 m^2 of docks.

(47) EVO does not pay rent for the use of the buildings. Belgium has stated that, in return, EVO pays for all maintenance and renovation costs. PAKHUIZEN continues to pay 25 EUR per year.

(48) The Belgian authorities have indicated that between 31 December 2002 and 31 December 2007 EVO and PAKHUIZEN have paid respectively EUR 182 377,31 and EUR 381 835,16 for renovation and infrastructure works and EUR 193 255,70 and EUR 133 895,35 for maintenance costs.

2.4. *COMMERCIAL STRATEGY*

(49) During the years following the restructuring, both AGVO and EVO have registered losses that kept increasing despite a slight profit for AGVO in 2003/04. By the end of 2006, AGVO had cumulated losses of almost EUR 3 000 000 and short- and long-term debts for more than EUR 4 000 000 while, also at the end of 2006, EVO had to carry over losses of an amount of more than EUR 3 400 000, short-and long-term debts for more than EUR 5 800 000 and a negative capital of almost EUR 1 000 000.

(50) Despite those cumulated losses, AGVO and EVO engaged in speculative activities and in expanding their activities. For instance in 2006 AGVO took a 51 % shareholding in a company called HAF Holding BO established in Iceland, while EVO engaged in a King crab project ([10]) in 2006 (Polardrift, an undertaking established in Norway). EVO was also involved in the Icelandic HAF Holding. Furthermore, in 2005 EVO concluded a contract with a sales agent under which the agent was mandated to purchase high quality fish on Icelandic auctions which would then be resold at the Ostend fish auction.

(51) The commercial strategy of EVO has been described by the various stakeholders as unfair competition consisting of offering, among others, to bear all or part of the costs of the transport of fish embarked in foreign harbours to Ostend and of offering loans to vessel-owners at advantageous conditions on the condition that they auction their catches in Ostend.

([10]) Project consisting of fishing/buying crab in Norway in order to (try) to sell it on the Asian market.

(52) These projects, as well as the commercial strategy described by third parties, seem to indicate that EVO undertook to expand its market share and its turnover at any cost. In any event, the annual accounts of AGVO and EVO indicate that EVO could maintain its presence on the market, despite its precarious financial situation, only thanks to the support of the City ([11]).

3. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

3.1. *ADVANTAGES GRANTED TO AGVO*

(53) AGVO has been granted an initial capital of BEF 250 million (EUR 6 179 338). Considering the heavy losses of the past and the very short and incomplete business plan, the Commission concluded in the decision to open the formal investigation procedure that a private investor would not have invested such an amount in the fish auction and that this starting capital therefore qualifies as State aid. The Commission expressed doubts regarding its compatibility with the internal market since the conditions laid down in the Guidelines for aid for rescuing and restructuring firms in difficulty, applicable at the time the aid was granted, (hereinafter 'the 1999 R & R Guidelines') ([12]) did not seem to be fulfilled.

(54) The City also contributed its buildings to AGVO without requiring any consideration or imposing obligations on AGVO of a similar value. The Commission considered that a private investor would have required a reasonable price for such a contribution, so that the contribution of the buildings had to be considered State aid. This aid, which seemed to reduce AGVO's production costs, appeared to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Guidelines for the examination of State aid to fisheries and aquaculture (hereinafter 'the Fisheries Guidelines') ([13]) that would enable it to allow the aid.

(55) The City also provided guarantees for loans for AGVO. While a private operator would have required a premium for the guarantee, the City granted it free of charge. Thus, the Commission concluded that these guarantees had to be considered State aid. Again, this aid appeared to reduce the production costs of AGVO and thus to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would have allowed it to consider it compatible with the internal market.

(56) Finally, the City empowered AGVO to establish and collect community tax duties, and to use the proceeds, an advantage which a private undertaking generally does not have. The Commission considered that the conditions laid down in *Altmark* ([14]) were not fulfilled and that the advantages deriving from the right to levy and collect the community tax duties should be considered State aid. In the absence of any information on that levy, the Commission concluded that it had at first sight to be analyzed as operating aid and that no provision in Article 107 TFEU or in the Fisheries Guidelines would make this aid compatible with the internal market.

3.2. *ADVANTAGES GRANTED TO EVO*

(57) The City and AGVO provided guarantees for loans for EVO. While a private operator would have required a premium for the guarantees, the City and AGVO granted them free of charge and the Commission concluded that they must be considered State aid. This aid appeared to reduce the production costs of EVO and to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would have allowed the Commission to consider it as compatible with the internal market. It therefore expressed its doubts that these measures could be found compatible with the internal market.

(58) AGVO allowed EVO the continuous free use of the buildings owned by AGVO of a total of 13 600 m^2. The Commission considered that a private investor would have required a reasonable price for it and that making the buildings available free of charge had to be considered State aid. This aid, which seemed to reduce EVO's production costs, appeared to constitute operating aid. The Commission could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would have allowed it to consider it compatible with the internal market. it therefore doubted whether these measures could be considered compatible with the internal market.

([11]) Jaarrekening AGVO 2005, p. 26 (verslag van de Raad van Bestuur aan de aandeelhouders over de waardering van de aandelen in EVO): 'Tenslotte is het niet onbelangrijk dat in deze fase de engagementen van de Stad Oostende een wezenlijke buffer vormen om op verantwoorde wijze een waardering in going concern toe te passen zodat de waardering zoals beschreven in art. 66§2 mag aangehouden worden en niet naar een waardering in discontinuïteit moet overgegangen worden.'

([12]) OJ C 288, 9.10.1999, p. 2.

([13]) OJ C 19, 20.1.2001, p. 7; OJ C 229, 14.9.2004, p. 5; OJ C 84, 3.4.2008, p. 10.

([14]) Judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747.

3.3. *ADVANTAGE GRANTED TO PAKHUIZEN*

(59) The effect of the terms of the long-term lease between the City and PAKHUIZEN was that PAKHUIZEN could benefit from a yearly reduction of its operating costs. The Commission concluded that this advantage qualified as State aid and did not fall within the scope of any of the measures mentioned in the Fisheries Guidelines, or within the objectives of other horizontal or specific guidelines which could be applicable to this kind of undertaking. Both under the relevant Fisheries Guidelines as well as the horizontal rules on State aid, such type of aid would be considered operating aid which is incompatible with the internal market. The Commission therefore doubted whether this measure could be considered compatible with the internal market.

3.4. *ADVANTAGES GRANTED TO FISHERIES UNDERTAKINGS*

(60) The Commission further observed that fisheries undertakings making use of the Ostend fish auction were granted advantages by EVO through the provision of services at rates below those which a normal private operator would charge, and by PAKHUIZEN letting buildings at rates below those which a normal private operator would charge.

(61) The Commission considered those advantages to constitute State aid and could not find any provision in Article 107 TFEU or in the Fisheries Guidelines that would make this aid compatible and therefore doubted whether these measures could be found compatible with the internal market.

3.5. *CONCLUSION*

(62) In light of the foregoing and the information at its disposal, the Commission considered that all measures mentioned under section 3 had to be regarded as State aid and had doubts as to the compatibility of these aids with the internal market.

4. **COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES**

(63) All interested third parties which submitted observations on the decision to open the formal investigation procedure agreed with the arguments put forward in that decision. Furthermore they indicated that they had suffered damage as a result of the illegal aid granted to AGVO, EVO and PAKHUIZEN (loss of clients and revenues) and urged the Commission to take the necessary steps to forbid the aid and seek its recovery.

4.1. *EAFPA*

(64) EAFPA stresses that the aid measures at issue distort the market and calls on the Commission to forbid the aid and to seek its recovery.

4.2. *NOVA*

(65) As complainant, NOVA supports the Commission's Decision to open a formal investigation. It considers it important to ensure transparency in the auction market and to guarantee a level playing field. It further calls on the Commission to adopt appropriate steps to ensure recovery of the aid which may be incompatible.

4.3. *FLANDERS SHIP REPAIR*

(66) Flanders Ship Repair explains that the effect of the State aid has been to attract shippers to Ostend. This has led, according to Flanders Ship Repair, to a loss of revenue, since the shippers who have gone over to Ostend no longer had their ships repaired in Zeebrugge. Flanders Ship Repair asks for a negative decision with recovery as well as for provisional measures.

4.4. *ZVP*

(67) ZVP, an association of fish purchasers and processors on the Belgian East coast, states that the unlawful State aid, together with other advantages, has allowed the Ostend fish auction to artificially attract foreign vessels and vessels from Zeebrugge. Moreover, through numerous interviews and press releases by local politicians and members of EVO's Board of Directors (stating in particular that in Belgium there probably is room for only one fish auction, namely Oostende), doubts have been cast concerning the future of the Zeebrugse fish auction and consequently the surrounding business park. This has resulted in loss of revenues and a decrease in, suspension or withdrawal of investments and marketing efforts.

(68) ZVP also mentions that it has tried to make the local authorities aware of this problem, but without success.

(69) Finally ZVP points out that EVO has — by using a 'front' and obtaining public funds — established a filleting company, called Ostend Filleting Factory, which is also engaging in unfair competition.

4.5. *GRIMSBY FISH MARKET*

(70) Grimsby Fish Market, a UK fish auction, indicates that around 2005/06, EVO started to buy fish straight from Icelandic fishermen at (high) fixed prices and sold by Dutch auction in Ostend, frequently at lower prices, and concludes that these losses have been paid for by public money. Grimsby Fish Market urges an audit of EVO's accounts to investigate the means by which the Icelandic fish supplies were financed and the losses incurred by EVO as a result of such sales methods.

4.6. *ZV AND EFC*

(71) ZV and EFC draw the attention of the Commission on other possible unfair practices and State aid measures, namely the use by AGVO/EVO of the City's staff, free of charge, and price guarantees granted by EVO and based on the auction price at the Zeebrugse Visveiling.

(72) They further explain why in their view competition is distorted and trade between Member States affected.

(73) They also draw the attention of the Commission on additional injection of capital into AGVO and in EVO (through remission of debts).

(74) Finally they note that the Belgian authorities have not suspended the aid.

4.7. *GARDEC*

(75) Gardec is a ship repair undertaking located in Zeebrugge. It supports the Commission Decision. It adds that it has suffered injury from the unfair commercial practices in Ostend (decrease in turnover) and notes that the loans granted to firms in difficulty had the effect of allowing them to survive in Ostend while their debts remained unpaid in Zeebrugge.

5. BELGIUM'S OBSERVATIONS FOLLOWING THE DOUBTS EXPRESSED IN THE DECISION TO INITIATE THE INVESTIGATION PROCEDURE

(76) In their observations of 8 September 2008 following opening of the formal procedure, the Belgian authorities consider that the Commission should limit its investigation to the fish auction market. As neither AGVO nor PAKHUIZEN are active on those markets, the measures taken in their favour are irrelevant for the present procedure. More in general they consider that the Commission has not properly defined the scope of the investigation and that there is a risk of double counting of the aid.

5.1. *THE AID TO AGVO*

(77) The Belgian authorities insist upon the fact that AGVO has no commercial activities and that there can therefore be no impact on competition. The aid granted to AGVO cannot therefore qualify as State aid. They add that at most, only the funds that have been used for EVO could be taken into account for the investigation (for instance the part of the initial capital that has been passed on to EVO through AGVO). They submit that the rest has been used for public interest tasks and cannot have any impact on the competition in the fish auction market.

(78) The Belgian authorities note that, even though an initial start capital of EUR 6 197 338,12 has been promised to AGVO, AGVO has so far received only EUR 3 569 667.

(79) With regard to the right to levy taxes or fees, the Belgian authorities consider such a right is linked to AGVO's public interest tasks and cannot be regarded as State aid and that, in any event, AGVO does not have the power to levy taxes for the locks and the slipways.

(80) With regard to the buildings, they submit that it would not make any difference whether the buildings are the property of the City or of another public entity. They consider the contribution of the buildings to AGVO as a merely internal allocation of property. The Belgian authorities recall that AGVO has no commercial activities and that the contribution of the buildings cannot therefore be qualified as State aid. They add that the contribution of the buildings is linked to the obligation to repair and maintain them in a good state and thus dispute that AGVO has been advantaged by the contribution.

(81) They consider further that the free guarantees cannot qualify as State aid because they were provided for loans entered into by AGVO for repair works on buildings rented to public authorities. They however admit that one of the guaranteed loans (loan of EUR 550 000) was used for EVO.

(82) Finally, the Belgian authorities note that the *Altmark* judgment is not relevant because the public tasks of AGVO are non-economic. They add that there is no risk of cross-subsidy because AGVO has no commercial activity.

5.2. *THE AID TO PAKHUIZEN*

(83) Belgium submits that Ostend has only a limited right to the land and the long lease is therefore of reduced commercial value. Moreover, PAKHUIZEN is required to repair and renovate the buildings, which is presented as an onerous obligation which amply makes up for the token rent.

(84) The Belgian authorities add that PAKHUIZEN is only active on the market for the management of buildings used in the fishing sector. They take the view that this activity can hardly be considered commercial because of the renovation obligations involved and because of the poor value of the buildings. Finally, because the buildings managed by PAKHUIZEN can only be rented for activities linked to the fishing sector, the Belgian authorities argue that PAKHUIZEN does not compete with anyone.

(85) The Belgian authorities further observe that AGVO bought the PAKHUIZEN shares at market price and that PAKHUIZEN rents the buildings at market prices (considering that they were not in good state of repair).

5.3. *THE AID TO EVO*

(86) The Belgian authorities indicate that the fact that the buildings are at the disposal of EVO free of charge is compensated by the fact that EVO has to bear renovation costs that normally fall upon the owner of the buildings.

(87) They further submit that the free guarantees granted for loans to EVO are to be analysed in the framework of the privatisation and restructuring plan of the auction. They take the view that, in the framework of the restructuring of the fish auction the City acted like a private investor, in so far as the recapitalisation of the fish auction was more profitable from an economic point of view than the closing of the auction and that through the privatisation, the City would be able to recoup its investment through the rent it will ask from the private owner of the auction. They also stress that already in 2002 there were plans to privatise the fish auction and that privatisation was only possible after restructuring.

(88) More specifically on the free guarantee, they observe that the loans were used to complete the financing of the fish auction, which was primarily financed through a capital injection (to AGVO and, through AGVO, to EVO) from the City. The Belgian authorities note that through the guarantee the City has substantially reduced the costs incurred for the restructuring. They add that without the guarantee of the City no loan would have been granted and point out that it is normal commercial practice that a parent undertaking offers a guarantee for loans engaged into by its subsidiary.

5.4. *THE AID TO FISHING UNDERTAKINGS/SHIP-OWNERS*

(89) The Belgian authorities observe that the Commission has counted the same aid twice and that there is either aid to EVO or to the fishermen but not to both. They take the view that, should the measures concerned constitute State aid, they then constitute State aid at the level of EVO and PAKHUIZEN and distort competition at that level but not at the level of vessel-owners and fishing undertakings. They add that in any event, EVO and PAKHUIZEN do not offer their services below market prices. Specifically, so far as EVO is concerned, they explain that EVO offers services that are also proposed elsewhere. They also observe that EVO does not purport to offer any storage facilities, does not offer electricity free of charge and is not responsible for the manage of the port and the slipways. They indicate that the price for the water is included in the auction fee and that EVO does not grant any loan under market prices to ship-owners. Finally, they state that, in practice, EVO has never enforced the contract articles obliging ship-owners to auction their catches at its auctions.

6. PRIVATIZATION PROCEDURE LAUNCHED AFTER INITIATION OF THE INVESTIGATION PROCEDURE

(90) Belgium has informed the Commission that it has been decided on 22 May 2008 to privatise the Ostend fish auction and that the City has launched a public selection procedure in order to attract an operational partner run EVO.

(91) In its comments, Belgium explains that the privatisation will take place through the establishment of a new undertaking ('NewCo') that will carry out the operation of the fish auction. The buildings of the fish auction will return to the City and NewCo will have to sign a lease agreement with the City. NewCo will not be obliged to take over the other assets of the fish auction (employees, fish boxes, contracts, loans to ship-owners, etc.).

(92) As the sale and the rental agreement will be negotiated at market prices, no aid will be transferred to NewCo and no aid can be recovered from NewCo.

(93) In its letter of 16 November 2009, Belgium informed the Commission of the further developments of the privatisation process.

(94) It indicates that, as a first step, the property of the buildings belonging to AGVO has been transferred back, free of charge, to the City on 4 September 2009, as well as rights and obligations relating to the buildings (rental contracts). The City has also taken over various loans from AGVO and PAKHUIZEN. Subsequently, the property of the buildings was transferred to the Flemish Region which paid the City in various forms: the Flemish Region paid EUR 3 500 000 to the City and the City was granted the right to collect until 1 January or, in certain cases, until 30 June 2010 the rent paid by the public and semi-public organisations renting the buildings. Finally the Flemish Region took over various debts and/or loans from the City.

(95) Belgium argues that the fact that the property of the buildings has been transferred back to the City puts an end to the State aid issue.

(96) Belgium has further indicated that PAKHUIZEN has decided to terminate the long-term lease agreement concluded with the City in 1989. Belgium expects that PAKHUIZEN will be wound-up soon, which would render the State aid procedure devoid of purpose.

(97) So far as EVO is concerned, Belgium has explained that the candidate fulfilling the selection criteria did not offer conditions which were satisfactory for the City. EVO will therefore continue to exist until a suitable candidate is found to take over EVO's assets.

(98) Finally, Belgium indicated that AGVO would continue to exist until all remaining debts/obligations are settled.

(99) Belgium asks the Commission to postpone its decision until the privatisation process is finished.

7. BELGIUM'S OBSERVATIONS FOLLOWING THE COMMENTS FROM THIRD PARTIES

(100) Belgium indicates, so far as the Icelandic issue is concerned, that EVO never directly purchased fish from Icelandic ship-owners or fishermen but only from Icelandic fish auctions, through a sales agent.

(101) Belgium adds that it soon became clear that the resale of the Icelandic fish was not profitable. Thus, after approximately one year, it was decided, on 17 March 2006, to put an end to these purchases and resales. Belgium has submitted a copy of the said decision.

(102) Belgium explains that the reason why fish was bought against high prices at Icelandic fish auctions and then resold in Ostend at lower prices was not due to any strategy aiming at attracting Icelandic fish to Ostend but was due to the fact that the fish of higher quality which was bought by the sales agent in Iceland and meant for EVO never reached EVO but instead was directly bought by a private filleting undertaking, Luna Fish, whereas Icelandic fish of lesser quality arrived at EVO and could then not be sold at profitable prices, given its lesser quality. Belgium concludes that EVO was therefore rather a victim of these practices. The delegated administrator of AGVO/EVO and the commercial director were dismissed when the problem was discovered.

(103) So far as the alleged free secondment of staff for administrative, accountancy and maintenance tasks is concerned, Belgium submits that ZV's statements are based on mere suspicions and that EVO has its own employees to perform those tasks and that, furthermore, some of EVO's employees sometimes discharge public interest tasks (maintenance of the fish auction road).

(104) Belgium also mentions that the statement made by ZV that EVO would guarantee a minimum price by reference to the auction price at the Zeebrugse fish auction is not supported by any evidence. Belgium adds that fishing undertakings might have alleged this when negotiating with ZV, as part of a strategy to obtain better commercial conditions from ZV.

(105) As for the Ostend Filleting Factory (OFF) issue, Belgium stresses that the documents submitted by third parties only indicate that OFF was set up by private parties and do not reveal how OFF would have engaged in unfair competition. Belgium states that it was only in March 2006 that PAKHUIZEN acquired 60 % of the shares in OFF. The name 'OFF' was then changed to 'Ostend Premium Fish bvba' and the company finally went bankrupt on 14 January 2008.

(106) On the alleged losses suffered by Gardec and Flanders Ship Repair as a result of the State aid, Belgium considers that, even if State aid were to induce vessels to go to Oostende instead of Zeebrugge, the causal link with the loss would still not be demonstrated. Belgium submits that ship-owners do not always let their vessel be repaired in their home port and instead make use of cheaper repair services in Eastern Europe (Poland). Belgium observes that there has been a clear decline in ship repair work in Oostende.

8. **INFORMATION INJUNCTION**

(107) By letters of 13 March and 26 June 2006 the Commission asked the Belgian authorities for information about the legal situation of the Ostend fish auction, the involvement of the State and for details about the financial flows between the State and the fish auction.

(108) In their letter of 19 October 2006, the Belgian authorities underlined the fact that in addition to its commercial activity (running of the fish auction), AGVO was entrusted with public interest tasks. The information provided on this point was, however, very sketchy and contained nothing to enable the Commission to assess whether the advantages granted by the City to AGVO could be considered compensation for tasks of general (economic) interest and whether there were no over-compensation and risks of cross-subsidies.

(109) Therefore, by letter dated 11 July 2007, the Commission asked the Belgian authorities, in accordance with Article 10(2) Regulation (EC) No 659/1999, to provide detailed information on the public tasks entrusted to AGVO. In particular, it asked whether and on which basis those tasks could be considered tasks of public service within the meaning of Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ([15]).

(110) By letter of 27 November 2007 the Belgian authorities merely stated that none of the tasks entrusted to AGVO were economic and that Decision 2005/842/EC was not relevant. They stated that AGVO is not compensated for any of the public tasks it performs.

([15]) OJ L 312, 29.11.2005, p. 67.

(111) In its decision of 2 July 2008 to initiate the formal investigation procedure, the Commission found that AGVO, EVO and PAKHUIZEN formed a group of undertakings active on the market for fish auctioning and ancillary services and were given various advantages from the City that distorted competition on the market. On the issue of compensation for public tasks, the Commission noted that there was no element in the file indicating that the criteria developed by the Court of Justice in its *Altmark* judgment were fulfilled. Moreover, given the lack of information on that point, the Commission was not in a position to determine whether in particular the right to establish and collect tax duties could be considered compensation granted for services of public interest and thus doubted the compatibility of the aid. Consequently, in recital 121 of its decision to initiate the formal investigation, the Commission invited the Belgian authorities to communicate any information that might be of use for the assessment of the measures at issue.

(112) In their observations, received on 8 September 2008, and during a follow-up meeting on 9 October 2008, the Belgian authorities did not provide any additional element to enable the Commission to examine whether the advantages granted to AGVO could be considered compensation for tasks of general (economic) interest. Instead, the Belgian authorities reiterated that the *Altmark* criteria were not relevant because AGVO was involved exclusively in public tasks.

(113) This answer was, however, unsatisfactory, since AGVO was also involved in economic activities.

(114) Pursuant to Article 10(3) Regulation (EC) No 659/1999, the Commission thus requested by way of an information injunction of 8 September 2009 any useful information and in particular:

— a list of the various activities entrusted to AGVO divided into economic activities, tasks of non-economic public interest and tasks of general economic interest,

— the parameters for calculating, controlling and reviewing the compensation for the tasks of non-economic public interest on the one hand and the compensation for the tasks of economic public interest on the other hand,

— the arrangements for avoiding and repaying any over-compensation,

— the costs incurred in the discharge of, and the revenue relating to, the economic public services obligation, the non-economic public services obligation and the other services,

— abstracts from internal accounts showing separately the costs and receipts associated with the service of general economic interest and those associated with the service of general non-economic interest and those of other services, as well as the parameters for allocating costs and revenues,

— if available, documents showing that AGVO complies with the fourth criterion laid down in *Altmark*, i.e. that the level of compensation needed has been determined on the basis of an analysis of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the obligations.

(115) In their letter of 16 November 2009, the Belgian authorities reiterate that AGVO is entrusted with the following public interest tasks: management of the fishing port, renovation and renting of buildings to public and semi-public organisations, and management and maintenance of the public domain (including maintenance of the road leading to the fish auction). They submit that those tasks are of public interest since they are not carried out in favour of specific beneficiaries. They do not make a distinction between tasks of general non-economic interest and services of public economic interest but admit that some or all public tasks might be of economic nature.

(116) The Belgian authorities acknowledge that AGVO, through its subsidiary EVO, is engaged in a commercial activity, i.e. the running of the fish auction, which is not of public interest.

(117) The Belgian authorities state that AGVO does not actually receive any compensation for its tasks of general interest. They are financed out of AGVO's budget. There is thus no methodology to calculate the compensation. The Belgian authorities add that it is not possible on the basis of AGVO's and EVO's accounts to distinguish between costs and revenues relating to the tasks of general interest and the commercial tasks.

9. **SCOPE OF THE INVESTIGATION**

(118) It is apparent from various recitals of the preamble (for instance recital 85) to the decision to initiate the formal investigation procedure that the scope of the investigation is larger than the fish auction market and also concerns activities linked to the fish auction (rental of buildings around the fish auction, management of the fishing port, etc.). Therefore, the advantages granted to AGVO or PAKHUIZEN which do not directly relate to the operation of the fish auction also form part of the current procedure.

(119) The Commission has also analysed the advantages granted to EVO, either directly by the City or by AGVO. In the decision to initiate the formal investigation procedure, EVO's initial capital and the subsequent capital increases had not been analysed as separate measures from the capital instalments granted to AGVO. They were merely taken into account as one of the uses that AGVO has made of the capital instalments received from the City. However, in their comments, the Belgian authorities claimed that the Commission had not sufficiently distinguished between the activities and tasks performed by AGVO, PAKHUIZEN and EVO and that, due to the division of tasks between AGVO and EVO, the advantages granted to AGVO were relevant for the current investigation only to the extent that they had been 'transferred' to EVO. Therefore, for the sake of clarity and in order to meet the Belgian authorities' concerns, the provision of EVO with its initial capital and the subsequent capital increases are examined separately in point 10.1.2.2.3. The issue of the real beneficiary of the aid is examined in recital 319.

10. **ASSESSMENT**

10.1. *EXISTENCE OF STATE AID*

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

10.1.1. UNDERTAKINGS

(121) As explained above, this investigation concerns the possible aid granted to AGVO, EVO and PAKHUIZEN, and the fisheries undertakings making use of the Ostend fish auction and EVO's and PAKHUIZEN's services. All these must be qualified as undertakings within the meaning of Article 107 of the TFEU. The only entity in respect of which the Belgian authorities seriously contest this is AGVO, which according to the Belgian authorities only performs public interest tasks.

(122) The Belgian authorities have mentioned that AGVO performs 'public interest tasks' ('taken van openbaar belang'). However, it appears that AGVO engages in economic activities and must therefore be considered an undertaking ([16]) within the meaning of Article 107(1) of the TFEU, for the reasons detailed in recitals 123 to 129 inclusive.

(123) AGVO offers buildings for rent to public and semi-public institutions and to undertakings. AGVO is thus directly offering services (rental services) on the market.

(124) AGVO is also entrusted with the operation and management of the fishing port. As the General Court and the Court of Justice have confirmed in the *Aéroports de Paris* ([17]) case, the management of infrastructure facilities can constitute an economic activity. This has been confirmed, so far as port infrastructure is concerned, among others in the Flemish Ports and Rotterdam port development cases ([18]). The Commission notes that AGVO is offering services, goods and infrastructure facilities against payment. Indeed, according to its articles of association, AGVO is entitled to establish and levy fees for the remuneration of its services.

(125) Moreover, AGVO also offers indirectly, through its subsidiaries EVO and PAKHUIZEN, goods and services on the market.

(126) AGVO holds a controlling interest in EVO and PAKHUIZEN and actually exercises that control by involving itself directly or indirectly in the management:

— almost all members of the Board of Directors in AGVO are also members of the Board of Directors of EVO and PAKHUIZEN. Between 2005 and 2007 AGVO and EVO were members of the Board of Directors of PAKHUIZEN;

— according to its articles of association, AGVO is entrusted with the management, development and operation of the fish auction and the fish dock of Ostend and its annexes as well as with the development of all directly and indirectly related activities. In other words, AGVO is compelled by its articles of association to involve itself in the management of the fish auction.

(127) There are other links between AGVO, EVO and PAKHUIZEN which further illustrate the existence of organisational and functional links between AGVO and its subsidiaries: AGVO has guaranteed loans granted to EVO; AGVO puts buildings at the disposal of EVO and PAKHUIZEN and AGVO's annual accounts reveal that AGVO has regularly granted loans to EVO and PAKHUIZEN.

(128) All these elements allow AGVO to exercise functions relating not only to control, but also to direction and financial support of EVO and PAKHUIZEN. For those reasons AGVO must also be considered an undertaking for the purposes of competition law, in particular through its participation in EVO and PAKHUIZEN ([19]).

(129) The Commission notes that the Belgian authorities have acknowledged that EVO and PAKHUIZEN are the operating arms of AGVO, that through EVO, AGVO participated in commercial activities and that measures favouring AGVO can have an impact on the market through EVO. In their comments and answers they tend to treat AGVO, PAKHUIZEN and EVO as one single undertaking and have also explicitly claimed that AGVO and EVO should be seen as one single entity.

(130) Finally, it should be noted that AGVO does not have any separate accounts for its economic and non-economic tasks, so that cross-subsidies cannot be excluded.

10.1.2. ADVANTAGES FOR THE UNDERTAKINGS CONCERNED

10.1.2.1. ***Advantages for AGVO***

10.1.2.1.1. **Initial Capital**

(131) Public investments are regarded as State aid where it is apparent that a public authority which injects capital in a company is not merely providing equity capital under normal market economy conditions. This is the case where the financial position of the company, and particularly the structure and volume of its debts, is such that a normal return (in dividend or capital

([16]) Judgments in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraph 46; C-222/04 *Ministero dell'Economia* v *Cassa di Risparmio* [2006] ECR I-289, paragraphs 107-112.

([17]) Judgments in Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 78, and Case T-128/98 *Aéroports de Paris* v *Commission* [2002] ECR II-3929, paragraphs 122-124.

([18]) Decision of 20 October 2004, N 520/03 — Flemish ports; Decision of 24 April 2007, N 60/06 — Project Mainportontwikkeling.

([19]) Case C-222/04, cited above, paragraphs 110-117.

gains) cannot be expected within a reasonable time from the capital investment. It is thus necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size in connection with the restructuring of that undertaking or whether it would instead have chosen to wind it up having regard in particular to the information available and foreseeable developments at the date of those contributions ([20]).

(132) The Belgian authorities argue that the decision of the City to provide an initial capital to AGVO of BEF 250 million (EUR 6 179 338) was an economically rational choice. The choice to restructure the auction was made on the basis of a financial and business plan showing that, with a limited investment, the auction could become profitable again after eight years if it did not take over the losses of the past. The Belgian authorities claim that a private investor in the same situation would have made the same decision.

(133) On the basis of the information available to it, the Commission cannot share this opinion.

(134) As indicated above, the Ostend fish auction was performing badly and its market share had been decreasing constantly in the years preceding the restructuring. The Commission considers that a normal private operator, in a similar situation, would not have made the choice to provide an initial capital of more than EUR 6 000 000 on the basis of merely one financial plan, containing the financial forecast for the period 2002/10 in a 'positive hypothesis', and a business plan of just two pages.

(135) This is all the more so since, as set out in greater detail in recital 259, AGVO, as the continuation of the Ostend fish auction, could be described as a company in difficulty at the time when the initial capital was granted. When faced with a company in difficulties, a normal private operator would have sought solid assurances as to the future prospects of the company and would not have been satisfied with the documents on the basis of which the City took its decision.

(136) The Commission points out the scale of the investment on the one hand and the long-term situation of ongoing losses of the Ostend fish auction ([21]) on the other hand. Especially in the light of these facts, combined with the facts that the firm was operating in a highly competitive but shrinking market, a normal private operator would have based its decision on a much more thorough financial and business plan containing different hypotheses and scenarios instead of taking into account a financial plan based only on one hypothesis, which was, moreover, qualified as 'positive'.

(137) It would also seem appropriate for a normal private operator to ask for a study of, in particular, the market space available in the industry at the time, based on existing figures for landings and local demand and to require a plan explaining how the activity was to be restructured as well as what measures were contemplated to avoid the recurrence of the heavy losses of the past and to boost productivity (new investments, new marketing strategy, etc.).

(138) However the business plan does not contain any of these elements.

(139) Moreover, it is based on a number of assumptions and factual elements which are taken for granted but are not explained or justified and sometimes seem to be highly hypothetical or unlikely. It is for instance difficult to accept the assumption that the turnover of the auctioning activities will increase by 10 % during the next five years, although in the period before the restructuring the landings and turnover had been steadily decreasing, the market had become highly competitive and the fish quotas were on a decreasing trend. There are furthermore no explanations concerning the calculation of the social and outsourcing costs and of the water and energy costs. Moreover, in the business plan these costs are indicated as remaining absolutely constant over the nine years following the creation of AGVO. This seems however hardly possible, especially when the turnover is expected to double in the same period.

(140) As a result, the financial plan and the business plan not only appear to be very short and incomplete, they also lack credibility. A normal private investor would not have relied on them in order to invest BEF 250 million in a loss-making undertaking in a shrinking market ([22]).

([20]) Judgments in Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 133; in Case C-482/99 *France* v *Commission* (Stardust Marine) [2002] ECR I-4397, paragraph 70; in Case C-261/89 *Italy* v *Commission* [1990] ECR I-4437, paragraph 8; in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 21 and in Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraph 13.

([21]) At the time, the City was faced with an average annual loss of EUR 1 850 000.

([22]) Judgments in Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 132; in Joined Cases C-328/99 to C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 44 and in C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 18 et seq.

(141) Even if it were accepted that the financial and the business plan were complete and reliable, quod non, the Commission observes that a private investor would still not have invested the same amount as the City. Indeed, on the basis of the financial plan and the business plan, it appears that a smaller amount of capital would have been sufficient. Given the low return on capital, a normal private operator would not have invested such an amount when it was not necessary.

(142) The Belgian authorities consider that the decision to pursue the on-going fish auction activities was more rational than closing down.

(143) However, the Belgian authorities do not give any indication relating to the costs of winding up these activities and neither do they explain why closing down was not a rational decision.

(144) The Belgian authorities further try to justify the rationality of the decision taken in 2001 to inject BEF 250 million in AGVO by means of the decision to privatise the fish auction. They submit that the current privatisation was part of the restructuring plan decided in 2001 and that no privatisation of the fish auction was possible without the restructuring.

(145) The Commission points out that according to consistent case law and practice, in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation ([23]).

(146) The Belgian authorities claim that the current privatisation forms part of the restructuring decision of 2001 and that the rationality of the decision to restructure the fish auction must be assessed in the light of the privatisation procedure. However, the various documents submitted by the Belgian authorities do not support their claim. In particular, this intention to privatise the fish auction is not mentioned in the decision to restructure the fish auction, the business plan nor in the financial plan. Nothing in those documents indicates that the decision to invest EUR 6 200 000 in the fish auction was (among others) motivated or justified by the fact that this investment would make it possible to privatise the fish auction after a certain amount of time. Their claim is also hard to reconcile with AGVO's articles of association that indicate that AGVO is established for an indefinite time, that the City has the intention to control AGVO and that subsidiaries or companies in which AGVO holds shares must be controlled by AGVO (and thus by the City).

(147) Moreover, one would expect that the decision to privatise would be contemplated once the fish auction were again profitable in order to obtain a better price for the fish auction, that is to say a price which would make it possible to recover at least the additional BEF 250 million investment. However, not only was privatisation not mentioned in either the financial or the business plan, the decision to privatise was not even taken when the fish auction had become profitable. It was on the contrary taken after two years of heavy losses affecting both AGVO and EVO and after the Commission had started its investigation. This all seems to indicate that privatisation played no part in the restructuring decision taken by the City in 2001.

(148) In addition, the Belgian authorities have indicated that the future private partner will take over the goodwill of EVO and can choose the assets he wishes to take over (i.e. to take or leave employees, machinery, fish slates, etc.). He will not have to take over the liabilities of EVO. In such circumstances, it is hard to understand why a similar approach could not have been taken in 2001/02 (without investing an additional BEF 250 million).

(149) Moreover, if all this had been part of the restructuring plan of the fish auction in 2002, no private investor would have agreed to invest BEF 250 million in the fish auction with a view to reselling it later, as he could not reasonably expect on the basis of the business plan to be able to recoup this investment by the mere sale of the business a few years later. In this regard, the Court has held that a private investor pursuing a structural policy — whether general or sectoral — and guided by prospects of viability in the long-term could not reasonably allow itself, after years of continuous losses, to make a contribution of capital that is linked to the sale of the undertaking, which removes any hope of profit, even in the longer term ([24]).

([23]) Judgments in Case C-482/99, cited above, paragraph 71; in Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 76; in Joined Cases T-228/99 to T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 246.

([24]) Judgments in joined cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke* v *Commission* ECR II-17, paragraph 124; joined cases C-278/92, C-279/92 and 280/92 *Spain* v *Commission*, cited above, paragraph 26.

(150) The Belgian authorities add that restructuring followed by privatisation will allow recovery of the investments through the rent to be charged for the fish auction buildings.

(151) However, this argument is not convincing either. The financial plan indicated that over the next eight years, the City would lose BEF 121 603 000 (in addition to the accumulated past losses) before being able to recover part of the BEF 250 million capital injection decided in 2001. The Commission notes that the City could already have decided in 2002 to rent the fish auction buildings to a third party. This might have allowed the City already to recover from 2002 part of the considerable amount of money spent for the Ostend fish auction before its restructuring or at least to cover the financial burden of the repaying the bank loans instead of running the very high risk — especially in light of the earlier poor performance of the auction — of increasing the losses that would need to be recovered at a later stage.

(152) The Belgian authorities further stress that the decision to restructure the fish auction was not taken lightly, as the decision was first rejected by the public authority monitoring the City (*toezichtautoriteit*) because there was not enough likelihood that the fish auction could become viable. Indeed, the documents provided to the Commission show that the decision to restructure the auction was first rejected because, on the basis of a first financial plan, cumulated losses of BEF 190 million were to be expected after five years.

(153) Instead of making the decision more rational this element reveals that from the start the intention to restructure the fish auction and provide it with fresh additional capital was not even based on the idea that the fish auction would become profitable again after a certain period. Moreover, it makes the second financial plan appear even less complete and reliable, as no explanation is given as to how it was possible to come to such different results in the first and the second plan. It is thus even less likely that a private investor would have taken the decision to invest an additional BEF 250 million in the auction under the same circumstances.

(154) On the basis of the above elements, the Commission concludes that the decision to invest BEF 250 million in the auction would not have been taken under the same circumstances by a normal private investor. This is also confirmed by the documents provided to the Commission. They show that one of the reasons why it was decided to restructure the auction instead of winding it up was of a political and social nature, since the restructuring would help maintain employment in a city where unemployment rates were over 12 % ([25]), a reason that a private investor would not have taken any account of ([26]).

(155) Consequently, this action provides AGVO with an advantage compared to its competitors and thus favours this undertaking within the meaning of Article 107(1) of the TFEU.

10.1.2.1.2. **Land and buildings**

(156) According to Article 30 of its articles of association, since its establishment AGVO has had the exclusive right to use, free of charge, the land and buildings of the Ostend fishing port.

(157) In 2004, various buildings and infrastructures located in the Ostend fishing port and representing, according to the City's records of that time, 57 500 m^2, were contributed to AGVO by granting it full ownership. According to the municipal accounts, this property had at that time a book value of EUR 14 891 524. The Commission has not received information that would allow it to determine the market value of the real estate at the time it was transferred to AGVO.

(158) The Belgian authorities submit that the decision to transfer the ownership of the real estate to AGVO could never be viewed as State aid as it merely concerned a transfer of real estate between two public authorities as AGVO does not participate in commercial activities.

([25]) Answer of the Belgian authorities of 19 October 2006, p. 2: 'De Stad koos voor deze laatste oplossing: […] — de locale economie rondom de vismijn scheepsherstel, scheepsbenodigheden, opslag- en diepvriesbedrijven, ijsfabrieken, groot- en kleinhandels, toerisme …) bleef behouden, wat in de naweeën van de sluiting (1997) van de plaatselijke (verlieslatende) Regie der Maritiem Transport (verlies van 1,700 arbeidsplaatsen) een belangrijke considerans was binnen een Stad met meer dan 12 % werkloosheid'. Answer of the Belgian authorities of 19 October 2006, p. 6: 'Dit belet niet dat de gedelegeerd bestuurder van een bedrijf dat voor 100 % gehouden wordt door een lokale overheid ook oog heeft voor de maatschappelijke en sociale rol die de vismijn van Oostende binnen de regio kan vervullen en die de Stad anno 2001 heeft gemotiveerd om niet radicaal tot sluiting over te gaan.'

([26]) Judgments in Joined Cases C-328/99 to C-399/00, cited above, paragraph 44; and Case C-303/88, cited above, paragraphs 18 et seq.

(159) However, as shown in point 10.1.1 of this Decision, AGVO participates directly and indirectly through its subsidiaries in commercial activities and must therefore be considered to be an undertaking. Accordingly, the decision to transfer the ownership of the real estate to AGVO cannot be viewed as a mere transfer of real estate between two public authorities, especially since the real estate concerned is largely used for the economic activities concerned (rental services, operation of the fish auction, managing the fishing port).

(160) The Commission considers that a normal private operator would not agree to a transfer of ownership of buildings of such value without obtaining a reasonable price for it.

(161) The Belgian authorities stated that the buildings were in very poor condition and that, therefore, the book value of the buildings was overestimated. Moreover, they argued that the costs for renovation, to be paid by AGVO, were of such magnitude that the transfer of ownership could be viewed as a null operation.

(162) However, the Belgian authorities have not provided the Commission with evidence showing that the book value of the assets in question had been overestimated, nor has the Commission received any evidence showing that the renovation costs would be equal to the actual value of the property rights in the buildings involved.

(163) The information available to the Commission shows on the contrary that the Belgian authorities' argument cannot be accepted.

(164) First and foremost, prior to the transfer of ownership and since its establishment AGVO had been granted the exclusive right to use, free of charge, the lands and buildings of the fishing harbour, including the fish auction. The articles of association do not contain any specific obligation concerning mandatory renovation works to be undertaken by AGVO. According to Article 3 of the articles of association, AGVO has the right to undertake, should it wish to do so, any maintenance, repair or modernisation works on the buildings ([27]) but the articles of association do not contain any provision that would put AGVO under the obligation to renovate certain buildings.

([27]) 'Het AG Vismijn Oostende beslist vrij over het aanleggen, het bouwen, het onderhouden, het herstellen, het verbeteren, het bedienen, het zelf exploiteren en het aan derden ter beschikking stellen van roerende en onroerende goederen'.

(165) AGVO has thus had the lands and buildings of the fishing port at its disposal since its establishment without having to pay any rent or any other kind of remuneration. A private operator would not have agreed to grant exclusive usage rights to an undertaking without receiving a proper remuneration.

(166) The Deed of Transfer by means of Contributing Immovable Property, of 30 December 2004, by which the right of ownership of the buildings was transferred from the City to AGVO, does not contain any particular conditions or obligations for AGVO regarding specific renovation works either. In fact, it is a general deed whereby the City hands over all rights and obligations in respect of the buildings concerned to AGVO. The responsibilities imposed on AGVO in the deed do not seem to be of such a nature as to justify that no payment would be required for taking the ownership of the buildings.

(167) Furthermore, it is not disputed that AGVO also has the right to offer the buildings for rent or to grant concession rights. The buildings, at least part of them, have a commercial value. The Belgian authorities have admitted that a part of them was rented to public and semi-public organisations and a part for private purposes (see recital 46 of this Decision).

(168) Finally, the Commission notes that AGVO has been granted another advantage in relation to the said renovation costs. The Belgian authorities have sent the Commission a list of guarantees that were given, free of charge, for certain loans. According to the list transmitted to the Commission, some of those guaranteed loans aimed at financing the renovation costs. Thus, in addition to the fact that AGVO was not obliged to engage in such renovation, the costs of at least some of the renovations that AGVO performed was reduced by these guarantees. It is for this reason also that the argument that the transfer of ownership took place, free of charge, as a kind of 'compensation' for particularly high renovation costs which AGVO was obliged to perform, cannot be accepted.

(169) Even if the renovation costs could be considered particularly significant and constitute a kind of remuneration for the transfer of ownership of the buildings, which has not been demonstrated by the Belgian authorities, the fact that AGVO had since its establishment already been provided with the exclusive right

to use the land and buildings of the Ostend fishing port free of charge would still have to be considered an advantage to be regarded as State aid. Indeed, the question whether the City acted as a normal private investor must be examined in the light of the elements available at the time the decision was taken ([28]). In the present case, when the decision was taken, the City must have known that it was granting an advantage to AGVO, since point 11 of the business plan prepared by HAMA Consult NV on 9 November 2001 clearly mentions that, since the fish auction had recently been modernised, no significant investments were to be expected in the next 10 years.

(170) Furthermore, according to the Commission Communication on State aid elements in sales of land and buildings by public authorities ([29]), in order for a transfer of the ownership of publicly owned buildings to be considered to conform to market value, the sale would normally either have to be by way of an unconditional bidding procedure, or following an independent expert evaluation. Neither of these procedures has been followed. An expert evaluation of the value of the buildings and the proper remuneration for the exclusive usage right granted to AGVO and then the transfer of ownership would in the present case have been all the more necessary since the Belgian authorities considered that the book value did not correspond to the real value.

(171) Consequently, it appears that the provision free of charge and subsequently the contribution of the buildings by the City to AGVO is an act which cannot be considered to comply with normal economic standards, such as a normal private investor in similar conditions would have undertaken.

(172) The Belgian authorities consider that since the property has been transferred back to the City (without compensation) puts an end to the State aid issue.

(173) The Commission, however, cannot agree with this position.

(174) The Commission would point out that the fact that the property has been transferred back to the City does not affect the fact that from 2002 to 2009 AGVO benefited, free of charge, from the exclusive right to use the concerned buildings, be it on the basis of Article 30 of its articles of association or on the basis of the Deed of Property Transfer of 30 December 2004. In particular, it is not certain that the value of the property as it has been recently transferred back is at least equal to the value of the benefits referred to in the previous sentence, plus the interest which is due under the State aid rules over illegal and incompatible aid which has to be recovered.

(175) Moreover, the Commission considers that to the extent that AGVO would continue to use these buildings free of charge or for a below-market rent after the transfer of property, AGVO would continue to benefit from State aid ([30]).

10.1.2.1.3. **Free guarantees for loans**

(176) According to point 2.1.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form or guarantees (the 'Notice on guarantees') ([31]), a State guarantee is considered to benefit a certain undertaking where it would allow the borrower to obtain better financial terms for a loan than those normally available on the financial markets without paying a market premium for the guarantee. In order to determine the normal market conditions, the conduct of the City ought to be compared with that of a private creditor acting with a view to realising a reasonable profit ([32]).

(177) The Notice on guarantees gives a certain number of indications as to how a guarantee is assessed within the scope of State aid rules. In particular it states that for a guarantee not to be considered State aid, it must fulfil certain criteria. Some of them raise problems in the current case.

(178) No market price has been paid for the guarantees, since the guarantees were completely free of charge.

(179) Moreover, the guarantees covered more than 80 % of the outstanding loan, as they covered the totality of the loan. This reinforces the advantage received because in the case of a 100 % State guarantee there is no incentive for the lender to properly assess the creditworthiness of AGVO and thus to properly determine the financial terms of the loan in accordance with the risk profile of AGVO ([33]).

([28]) Judgments in Case C-482/99, cited above, paragraph 71; in Case T-16/96, cited above, paragraph 76; in Joined Cases T-228/99 to T-233/99, cited above, paragraph 246.

([29]) OJ C 209, 10.7.1997, p. 3.

([30]) For this reason, the operative part of this Decision will also cover the eventuality that the property is currently put at the disposal of AGVO for a fee, but at a rate below the market price.

([31]) OJ C 71, 11.3.2000, p. 14.

([32]) Judgments in Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459; Case C-256/97 *DTM Transports* [1999] ECR I-3913, and Case T-152/99 *HAMSA* v *Commission*, cited above.

([33]) Point 3.4 of the Notice on guarantees.

(180) It is therefore clear that these guarantees allowed AGVO to obtain better financial terms for loans than those normally available on the financial markets ([34]), especially in light of the poor and often negative results of AGVO and its subsidiaries.

(181) The Belgian authorities submit that it would be normal for a shareholder to provide a guarantee free of charge in favour of an undertaking he controls. This statement is, however, not substantiated by any evidence or example. It is moreover particularly difficult to reconcile this with the behaviour of a private creditor.

(182) Indeed, the decision of the City to provide guarantees to financial institutions for loans taken out by AGVO, without any charges, is particularly unusual under normal conditions on the financial markets. In a normal situation, such a guarantee would be remunerated by an appropriate premium, which reflects the risks connected with the guarantee ([35]), even if the guarantor is a shareholder holding a controlling majority ([36]). Moreover, a normal private creditor providing guarantees would take out certain securities before granting it and verify beforehand the conditions of the loan, the risk involved etc. while the information provided by Belgium shows this has not been the case ([37]). This is all the more problematic in the present case given the financial situation of the fish auction, which has suffered recurrent and heavy losses in the past years and operates in a highly competitive and shrinking market ([38]).

(183) As set out in greater detail in recital 259, AGVO must be considered a company in financial difficulties in the sense 1999 R & R Guidelines. According to established practice, guarantees granted to companies in difficulties are deemed as likely to constitute State aid ([39]).

([34]) Decision C 5/03 (ex NN 115/02) of 21 January 2003 — Aid to MobilCom AG (OJ C 80, 3.4.2003, p. 5).

([35]) Judgment in joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 82.

([36]) For a case concerning a guarantee provided by the mother company, see Guarantee of CDC to its subsidiary CDC IXIS: decisions of 21 January 2003 and 30 April 2003 on aid E 50/01 (OJ C 154, 2.7.2003, p. 13). The guarantee had been remunerated but not under market conditions and it was therefore found to contain State aid.

([37]) The Belgian authorities have admitted that the City does not even always have a copy of the contractual documents relating to the loan and the guarantee, see Annex B to letter of 27 November 2007.

([38]) Judgment in Case C-334/99 *Germany* v *Commission*, cited above, paragraph 138; Decision 1999/720/EC, ECSC of 8 July 1999 — aid to Gröditzer Stahlwerke (OJ L 292, 13.11.1999, p. 27, paragraph 45).

([39]) See for instance point 17 1999 R & R Guidelines.

(184) The Belgian authorities argue that the guarantees were granted for loans relating to renovation works to undertake on buildings rented to public and semi-public bodies. They add that since this is part of AGVO's public task, the guarantee must be seen as participating in this public task and consequently cannot be considered State aid.

(185) It should first be noted that it is not certain that the guaranteed loans were actually used for the intended purpose. Even if it is true that the information submitted to the Commission seem to indicate that the City granted the guarantees on the basis of AGVO's intention to use the loans for the financing of renovation works, it also appears that the City did not link the free guarantees to the carrying-out of renovation works, nor did the City withdraw the free guarantees or ask for a remuneration when it was later established that the loans had in fact been used for other purposes.

(186) The Belgian authorities have explained that the loans have at times been used for purposes other than the announced aim. For instance a Fortis loan which was initially intended to finance the purchase of the shares in PAKHUIZEN was finally not used for that purpose but apparently for renovation works.

(187) The Belgian authorities have furthermore admitted that the EUR 550 000 loan from the ING Bank, initially intended for renovation works, was eventually used to support EVO. It is undisputed that the free guarantee for this loan cannot be regarded as a contribution to renovation tasks. In other words, it cannot be said that the City behaved as a normal private guarantor would do (including one that controlled the company concerned), namely to first examine whether the loan for which the guarantee would give cover would in all likelihood be repaid, and then to verify whether the loan was strictly used for the project for which it was originally intended.

(188) As for guaranteed loans which were actually (entirely or partly) used to finance renovation works, it must be recalled that the renting activity of AGVO is an economic activity and that the provision of a free guarantee favours AGVO on the rental market. Moreover, the free guarantee improves AGVO's financial situation in general, allowing it to use the financial resources that, under normal circumstances, it would have had to use in order to pay the premium for other purposes than the renovation of the buildings rented to public and semi-public organisms.

(189) Finally, even if it were to be accepted that the rental of buildings to public and semi-public organisations could be considered a service of general economic interest entrusted to AGVO, the conditions laid down in the *Altmark* case are not fulfilled, so that it must be concluded that the free guarantees constitute State aid within the meaning of Article 107(1) of the TFEU.

(190) In its judgment in *Altmark* the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107(1) of the TFEU if it fulfils the cumulative following criteria: '(…) First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined (…); (…); (…) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (…); (…) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public services obligation, taking into account the relevant receipts and a reasonable profit (…); and (…) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant a public procurement procedure, which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the obligations.'

(191) In the present case, these criteria are not fulfilled. Apart from the fact that it can be disputed whether AGVO was entrusted with public service obligations in connection with the rental of buildings to public or semi-public organisations, the Commission notes that the Belgian authorities have explicitly confirmed that no parameters for compensation had been established. Moreover, AGVO has not opted for a system of separate accounts and nothing prevents overcompensation and cross subsidies between the various activities of AGVO. Moreover, AGVO has not been chosen pursuant a public procurement procedure, and the Belgian authorities did not demonstrate that the services are provided at the least cost to the community.

10.1.2.1.4. **Tax duties**

(192) The City granted AGVO the right to establish and collect the community tax duties for the use of the fishing harbour and the auction.

(193) The tax duties thereby collected by AGVO appear to constitute resources at the disposal of the State, which have partly [40] been transferred to AGVO. Moreover, they constitute an advantage which it would normally not receive and, consequently, favour this undertaking within the meaning of Article 107(1) of the TFEU.

(194) In the present case, the Belgium authorities have indicated that the collection of the levy forms part of, and in fact constitutes a retribution for, the public interest tasks entrusted to AGVO, in particular the task of managing the fishing port. Belgium submits that the transfer of the tasks and the right to collect the tax duties should be seen as a mere allocation of tasks within the State and cannot qualify as State aid.

(195) However, as already demonstrated in point 10.1.1 of this Decision, AGVO qualifies as an undertaking within the meaning of Article 107(1) of the TFEU, which the Belgium authorities have also acknowledged in their letter of 27 November 2009. As explained in recital 124, the management of the fishing port constitutes an economic activity.

(196) The Commission has examined whether the right to collect the tax duties and use the proceeds could qualify as a compensation for services of general economic interest and whether the cumulative criteria laid down in the Altmark judgment were fulfilled.

(197) However, as already established in recital 191 of this Decision, these criteria are not fulfilled, since for instance no parameters for compensation have been established.

(198) Finally, even if it were accepted that the right to collect tax duties and use its proceeds should be seen as a compensation/remuneration for tasks of public (non-economic) interest, it is nevertheless true that AGVO also carries out commercial activities, which has explicitly been acknowledged by the Belgian authorities. Since the Belgian authorities have also admitted that AGVO had no separate accounts and that it was not possible to isolate the costs and revenues relating to AGVO's non-commercial tasks, cross subsidies cannot be avoided and the tax duties must be seen as an advantage.

[40] Belgium has stressed several times that the City had kept the right to establish and collect tax duties for the use of the slipways and harbour locks.

10.1.2.1.5. **Conclusion**

(199) In view of the foregoing recitals, the actions mentioned in 10.1.2.1.1 to 10.1.2.1.4 inclusive provided AGVO with an advantage within the meaning of Article 107(1) of the TFEU.

10.1.2.2. ***Advantage for EVO***

(200) The Commission considers that aid has been granted to EVO directly by the City by way of granting it free guarantees for loans from private banks, and, through AGVO, by allowing it free use of 13 600 m^2 of buildings, by granting free guarantees for loans from private banks and by providing it with an initial capital and capital increases.

10.1.2.2.1. **Free guarantee for loans**

(201) As regards the guarantees from the City and AGVO, the Commission observes that no market price has been paid for the guarantees, since the guarantees are completely free of charge. Moreover they cover more than 80 % of the outstanding loan.

(202) The Belgian authorities submit that it would be normal for a shareholder holding a controlling interest in a company to provide a guarantee free of charge in favour of the company he controls. This statement is, however, not substantiated by any evidence. It is moreover particularly difficult to reconcile with the behaviour of a private investor. In a normal situation, such a guarantee would be remunerated by an appropriate premium, which reflects the risks connected with the guarantee ([41]), even if the guarantor is a parent company ([42]). Moreover, the Court has already found that commercial operations even within a group of public undertakings have to be remunerated according to normal market conditions ([43]).

(203) It should further be noted that, as set out in greater detail in recital 306, EVO must be considered a company in financial difficulties within the meaning of the 1999 R & R Guidelines and the 2004 Guidelines on State aid for rescuing and restructuring firms in difficulty ([44]) ('2004 R & R Guidelines'). Its financial situation remained difficult throughout the whole period 2003/08. At the end of 2003, more than half of its registered capital had disappeared, a situation which did not change in the following years despite the successive increases in capital.

(204) According to established practice, guarantees granted to companies in difficulties are deemed as likely to constitute State aid ([45]).

(205) The Belgian authorities add that without the free guarantee from the City, EVO would not have been able to obtain the loans. In the Commission's view, this acknowledgement and the constant bad financial situation of EVO reveal that the loans granted by private banks under a free guarantee provided by the City (or AGVO) would not have been obtained either without that guarantee. Accordingly, the guaranteed loans also grant an advantage to EVO ([46]).

(206) Finally the Belgian authorities submit that the guarantees should be viewed as being part of the restructuring of the fish auction.

(207) The Commission notes, however, that neither the free guarantee, nor the investments for which the loans were apparently obtained were mentioned in the business plan. Moreover, the loans and guarantees at issue (i.e. those that were actually put in place) were not granted in 2002 when EVO was established but later on in 2004 and 2005. The numerous guarantees provided also reveal that they were granted on demand each time that it was claimed that EVO needed a guarantee to obtain a loan from a credit institution. The Commission also observes that one of the loans granted by Fortis and guaranteed by the City was actually used to grant loans to vessel owners and it is difficult to see how this can be viewed as part of a restructuring or even the privatisation plan of the fish auction.

(208) Accordingly, the Commission takes the view that the free guarantees granted by the City and AGVO favoured EVO within the meaning of Article 107(1) of the TFEU.

([41]) Judgment in joined Cases T-204/97 and T-270/97 *EPAC* v *Commission*, cited above, paragraph 82.

([42]) For a case concerning a guarantee provided by the mother company, see Guarantee of CDC to CDC IXIS, decision of 17 January 2003, aid 50/01. The guarantee had been remunerated but not under market conditions and it was therefore found to contain State aid.

([43]) Judgment in Case C-39/94 *SFEI* v *La Poste* [1996] ECR I-3547, paragraph 61.

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

([45]) See for instance point 17 1999 R & R Guidelines.

([46]) Decision 96/563/EC in case Jadecost (OJ L 246, 27.9.1996), confirmed in the judgment in Case C-288/96 *Germany* v *Commission* [2000] ECR, I-8237, paragraph 41.

10.1.2.2.2. **Buildings**

(209) The Belgian authorities have argued that the decision of AGVO to grant EVO the right to use the buildings without charge can be considered to correspond with normal market standards such as a normal private investor in similar conditions would have undertaken.

(210) The Commission cannot accept such a statement. This statement is already contradicted by the fact that the Belgian authorities have indicated that the future strategic partner will have to conclude a rental agreement for the use of the buildings of the fish auction and will have to pay a rent. Moreover, it cannot be claimed that AGVO, being the full owner of EVO ([47]), expected EVO's profits to be substantial so that the capital gains it would thus realise justified not charging any rent. After all, the auction had been running high average annual losses.

(211) The Belgian authorities submitted that the absence of rent was compensated by the fact the EVO had to bear renovation and repair costs for the fish auction which would normally have to be borne by the owner. According to the Belgian authorities, EVO paid EUR 182 377,31 since 2002 for renovation and infrastructure works on the fish auction.

(212) The Commission first notes that the Belgian authorities have not submitted any documents confirming that EVO was under the obligation to bear all renovation costs for the fish auction buildings; nor have they submitted any documents confirming that EVO actually paid EUR 182 377,31 for renovation works.

(213) The Commission further notes that the Belgian authorities have not demonstrated that it would be so unusual for a tenant to bear renovation costs or that when this is the case he would have no rent to pay. Nor have they indicated what kinds of works were undertaken, so that it is not possible for the Commission to determine whether the works concerned were unusual for a tenant. Moreover, it appears from the document received that AGVO, also, undertook renovation works relating to the fish auction between 2004 and 2007 for an amount of EUR 36 497,40. This does not seem consistent with the statement of the Belgian authorities whereby EVO would have to bear all maintenance and renovation costs.

([47]) Except for one share out of EUR 15 000 shares.

(214) Furthermore, the Belgian authorities have not provided any evidence showing that the EUR 182 377,31 allegedly paid by EVO for renovation works would correspond to the rent to be paid for more than five years of use of 13 600 m^2 buildings under normal market conditions.

(215) Moreover, even if the renovation costs could be considered particularly significant and a kind of remuneration for the use of the buildings, which has not been demonstrated by the Belgian authorities, the business plan of 21 November 2001 clearly mentioned that since the fish auction had recently been modernised, no significant investments were to be expected in the next 10 years. Accordingly, when AGVO decided in 2002 to put the buildings at the disposal of EVO free of charge, without any reasonable expectation that the costs resulting from alleged obligation on EVO to finance their maintenance would be at least equal to the rent which an operator would be prepared to pay for them, AGVO was granting EVO an advantage. As the question whether AGVO acted as a normal private investor must be examined in the light of the elements available at the time the decision was taken ([48]), it must be concluded that EVO received State aid within the meaning of Article 107(1) of the TFEU by being granted the use of 13 600 m^2 of buildings free of charge in 2002.

10.1.2.2.3. **Initial capital and subsequent capital increases**

(216) So far as the initial capital of about EUR 370 000 to EVO is concerned, the Commission would refer to its analysis in point 10.1.2.1.1 of this Decision. Indeed, the Belgian authorities have confirmed that the initial capital in EVO was financed through the initial capital in AGVO. As the Commission has already observed, a private investor would not have chosen to restructure the fish auction and invest BEF 250 million in it; he would certainly not established a 100 % subsidiary with part of the fresh capital.

(217) So far as the capital increases by way of a remission of debt by AGVO are concerned, the Commission would also refer to its analysis in point 10.1.2.1.1 of this Decision. Indeed the Belgian authorities have confirmed that the capital increases had also (partly ([49])) been financed through the initial capital in AGVO.

([48]) Judgments in Case C-482/99, cited above, paragraph 71; in Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 76; in Joined Cases T-228/99 to T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 246.

([49]) EVO's capital has been financed through other means than merely AGVO's initial capital. Indeed, the amount of capital injected into EVO is higher than the amount of capital put into AGVO.

(218) There are, moreover, other reasons why it must be considered that AGVO did not act as a private investor would have done in the same situation.

(219) Public investments are regarded as State aid where it is apparent that the financial position of the company concerned, and particularly the structure and volume of its debts, is such that a normal return (in dividend or capital gains) cannot be expected within a reasonable time from the capital investment.

(220) The Commission observes that the first increase in capital by remission of debt occurred on 31 December 2004 after almost 1,5 years existence of EVO. The increase in capital was evidently conceived as a measure in order to offset the heavy losses of EVO. The same can be said about the increase in capital in 2005 and 2007. The measures were obviously not taken with a view to obtaining some return on capital in the short or even the long-term but merely to offset past losses. A private investor would never have decided to grant the increases in capital, especially not the last two increases. EVO was not in a good financial and economic position and the situation was clearly not developing according to the business plan, according to which the losses were supposed to decrease steadily, instead of growing fast. Indeed, already at the end of 2003 more than half of EVO's registered capital had disappeared, a situation which did not change in the following years despite of the successive increases in capital. Without any prospect of future return on capital, a private investor would not have chosen to increase the capital of the company in order to offset losses ([50]). Instead he would seriously have considered the other options available (winding up, selling, etc.) and would at least have required some guarantees or restructuring measures. Also the particular form the capital increase took (remission of debt) confirms that those capital increases cannot be viewed as part of the restructuring planned in 2001.

(221) In addition, it should be noted that EVO must be considered a company in financial difficulties ([51]). According to established practice, an increase in capital granted to companies in difficulties is deemed to constitute State aid ([52]).

(222) Consequently, the successive increases in capital which EVO benefited from favoured EVO within the meaning of Article 107(1) of the TFEU.

([50]) See also paragraph 99 of Commission Decision 2006/740/EC of 20 October 2004 relating to case Hamburgische Landesbank — Girozentrale (OJ L 307, 7.11.2006, p. 110).
([51]) See recitals 203 and 306 of this Decision.
([52]) See for instance point 17 of the 1999 R & R Guidelines.

10.1.2.3. ***Advantage for PAKHUIZEN***

(223) So far as concerns the long-term lease for the use of buildings ([53]) to PAKHUIZEN, having regard to the information available, the Commission takes the view that it grants an advantage. First, the charge of only EUR 25 per year cannot be regarded as normal pay for a long-term lease of 45 years relating to 14 754 m^2 of buildings, even when in very poor condition and needing renovation. The fact that PAKHUIZEN is required to renovate the buildings does not change this. Indeed, according to Belgian law ([54]), the owner of the buildings is not under the obligation to repair the buildings. By contrast, the tenant is under the obligation to maintain the buildings in good condition and to undertake any ordinary repair works. The Belgian authorities have not demonstrated that the renovation works PAKHUIZEN was bound to undertake under the long-term lease would go beyond 'ordinary repair works'. Moreover, the Belgian authorities have not provided any evidence that the cost flowing from that obligation is equal to the rent which could have been obtained for the buildings under normal market conditions.

(224) In addition, the Belgian authorities have admitted that PAKHUIZEN has not fulfilled its renovation obligations and has not respected the destination of the buildings. The City has obviously not taken any action against PAKHUIZEN in order to enforce the agreement, although it was entitled to do so. Therefore, even if having regard to the renovation costs, the rent of EUR 25 per year could have been regarded as corresponding to the market price — quod non — PAKHUIZEN would in any event have received an advantage from the moment it became apparent that the City had not enforced the contract.

(225) Moreover, as regards the lease of the buildings to PAKHUIZEN subject to the conditions of maintaining and renovating the buildings, according to the market economy investor principle, to the conditions established in the Commission Communication on State aid elements in sales of land and buildings by public authorities, a public authority can be considered to be acting as a market economy operator if it offers its contracts at the highest possible price within an open, transparent and non-discriminating tender, to the highest bidder or following an estimation of the market value by an independent expert. This seems however not to have been the case.

(226) Finally, the fact that after 27 years the owner of the buildings (originally the City, then AGVO) is entitled to half the yearly profit of PAKHUIZEN, does not change

([53]) See recital 44 of this Decision.
([54]) Article 5 of the Law of 10 January 1824 on the long lease, Belgian Official Gazette XIX, No 14.

the above analysis. Such an advantage is too distant and uncertain to have any genuine net present value for the owner of the buildings. Furthermore, even if it had any such value, the Belgian authorities have not shown that this value — even when taken together with the EUR 25 a year plus the (unusual) renovation costs — is so high that it amounts to a market-price rent for the use of the real estate by PAKHUIZEN.

(227) Accordingly, PAKHUIZEN benefits from a yearly advantage in its operating costs which constitutes an advantage within the meaning of Article 107(1) of the TFEU.

(228) As regards the period after 26 March 2004, the date on which AGVO became the owner of the buildings concerned, the Commission notes that the lease continued to apply under the same conditions as before, and that the advantage for PAKHUIZEN therefore continued to exist.

10.1.2.4. ***Advantage for fisheries undertakings making use of EVO's and PAKHUIZEN's services***

(229) In the decision initiating the formal investigation procedure, the Commission observed that EVO and possibly also PAKHUIZEN were offering their services to fisheries undertakings using the auction at a rate below that which a normal private operator would offer.

(230) It appears that EVO repays all or part of the costs of container transport of fish to be auctioned in Ostend from various destinations in Europe. Moreover, EVO provides loans seemingly below market rates on condition that the borrowing undertaking sell its catches at the Ostend auction.

(231) The comments submitted by third parties suggest that EVO has also adopted other practices which distort normal competition on the market but the Commission has not received any evidence to confirm this. The Belgian authorities have contested that EVO have been offering services under market conditions.

(232) Although the Commission has received very little evidence regarding the commercial conditions under which EVO was offering its services, it could still be the case that undertakings using the Ostend fish auction are favoured within the meaning of Article 107(1) of the TFEU. However, for the time being, the Commission also sees some force in the argument of the Belgian authorities that the fact that, thanks to the State aid, EVO was able to offer its services at better conditions than it would otherwise have done does not necessarily mean that State aid was passed on in favour of the vessel-owners and fishing undertakings.

(233) For those reasons, the Commission considers that it is not possible to conclude with certainty that an advantage has been passed on to the ship-owners. Moreover, it is likely that, since the Commission in the present Decision orders the termination and recovery of the aid to AGVO, EVO and PAKHUIZEN, any such advantages will discontinue or at least be strongly diminished. Finally, in any event the main beneficiary of the aid is the restructured fish auction which has used the aid to maintain itself on the market and to increase its market share by offering services at a loss and thereby distorting the normal functioning of the market.

10.1.3. STATE RESOURCES AND IMPUTABILITY

(234) The Commission notes that the activities at issue concern actions of the City itself as well as actions funded through State resources and imputable to the City.

10.1.3.1. ***Aid granted by the public authority***

(235) First, the City granted aid to AGVO by providing it with an initial capital, funded from the City budget; by granting AGVO free guarantees for loans from private banks; by transferring the ownership of its buildings to AGVO and by empowering AGVO to establish and collect community tax duties. It also granted aid to PAKHUIZEN through the long-term lease for the use of its buildings and to EVO by granting it free guarantees for loans from private banks.

(236) These measures are therefore financed from State resources and imputable to the State.

10.1.3.2. ***Actions imputable to the public authority***

(237) Secondly, as regards the advantages granted by AGVO to EVO and by AGVO to PAKHUIZEN, the Commission notes that, according to the articles of association, AGVO is the sole shareholder of EVO (apart from Mr Miroir, who has 1 share out of the 15 000 shares and is in fact a Member of the City Council) and of PAKHUIZEN and that it appoints all members of the Board of Directors of those undertakings. Furthermore, the City is the sole shareholder of AGVO and the City Council appoints all Member of the Board of AGVO. Consequently, the City is in a position where it is able to exercise a dominant influence over AGVO.

(238) Further, according to its articles of association, AGVO is entrusted with the management, development and operation of the fish auction and the fish dock of Ostend and its annexes as well as with the development of all directly and indirectly related activities. In other words, AGVO is compelled by its articles of association to involve itself in the management of the fish auction.

(239) As regards specifically the long-term lease of buildings to PAKHUIZEN, this lease was granted directly by the City.

(240) Thus, in the light of the *Stardust* case ([55]) and given the public assistance provided to those undertakings as outlined above, AGVO must be regarded as a body controlled by the State and its decisions regarding capital injections into EVO, free guarantees for loans to EVO and the right for EVO to use buildings free of charge as decisions financed through State resources and imputable to the public authority.

(241) The Belgian authorities do not dispute those findings. They have on the contrary confirmed that the City controlled EVO and PAKHUIZEN through AGVO ([56]).

10.1.4. DISTORTION OF COMPETITION AND EFFECT ON TRADE

(242) The activities of the City benefit AGVO, EVO and PAKHUIZEN. AGVO, EVO and PAKHUIZEN form a group of companies operating in a common market, auctioning fish and providing related services to the fisheries sector.

(243) The market for fish auctions is a very competitive market in which the auctions from neighbouring Member States compete directly with each other to attract fishermen from various Member States. Consequently, any benefit provided to a player on this market would distort or threaten to distort competition between the auctions and could thus affect trade between the Member States.

(244) This is confirmed by the comments received from third parties. Fish auctions and fish auction associations from the United Kingdom, the Netherlands and other European countries have shown interest in the procedure and described the effect they consider the State aid measures has had on their business.

(245) Finally the Commission notes that the Belgian authorities have indicated that not only Belgian but also other fish auctions from other Member States had shown interest in purchasing the Ostend fish auction.

(246) As for the markets for rental services, aid to undertakings active in those sectors can distort competition with undertakings providing rental services in other fishing ports, including in other Member States, and with undertakings offering buildings for rent close to the Ostend fishing port (which may well include undertakings from other Member States). Moreover, the aid measures could have helped to maintain or strengthen the market position of AGVO and PAKHUIZEN, whose business would or could have been taken over by another undertaking, if there had been no aid. It should be recalled that according to the case law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared to other competing undertakings, by giving it an economic benefit which it would not otherwise have received in the normal course of its business, points to a possible distortion of competition ([57]).

(247) As for the fishing ports management activities, the Commission considers that aid to such undertakings could distort competition with undertakings managing other fishing ports competing with the Ostend fishing port. Furthermore, the aid measures could have helped to maintain or strengthen the market position of an undertaking, the activity of which would or could have been taken over by another undertaking, if there had been no aid ([58]).

(248) The Commission would add that, although AGVO and PAKHUIZEN are not directly active on the fish auction market, they provide services which are auxiliary to that activity and which have an impact on the attractiveness of the fish auction. The Commission notes moreover that AGVO is indirectly active on the fish auction market through its subsidiary EVO. Aid granted to AGVO and PAKHUIZEN cannot therefore only distort competition and affect trade between Member States on the specific market where they are active (rental market and fishing port market) but also on the fish auction market.

([55]) Judgment in C-482/99 *France* v *Commission*, cited above.

([56]) See answer submitted by the Belgian authorities of 19 October 2006, p. 3: 'zowel op het niveau van aandeelhouderschap als dat van de organen (bestuur) dient de Gemeente (achter AGVO) krachtens de wet de meerderheid te hebben in de stemrechten. Dit is hier het geval.'

([57]) See judgment in Case 730/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12.

([58]) See *Philip Morris* judgment, cited above.

10.1.5. CONCLUSION

(249) In view of the foregoing, the Commission takes the view that the following activities must be considered to fulfil the conditions of Article 107(1) of the TFEU and thus to constitute State aid:

(a) The advantages provided to AGVO by the following decisions of the City:

— to provide AGVO with a starting capital of BEF 250 million (EUR 6 179 338),

— to provide AGVO with the exclusive right to use the lands and buildings located within the fishing port,

— to contribute buildings to AGVO, and

— to provide free guarantees for loans for AGVO, and

— to provide AGVO with the right to collect and use the community tax duties;

(b) The advantages provided to EVO by the decision of:

— the City to provide free guarantees for loans for EVO,

— AGVO not to charge EVO rent for the use of its buildings, and

— AGVO to provide EVO with an initial capital and capital increases amounting to EUR 3 969 000;

(c) The advantages provided to PAKHUIZEN, by the City and/or subsequently by AGVO, by the long-term lease for the use of its buildings.

10.2. *COMPATIBILITY*

(250) State aid can be declared compatible with the internal market if it complies with one of the exceptions provided for in the TFEU. The undertakings concerned are undertakings active predominantly in the fisheries sector. They are also active on the market for rental services. The Commission considers that AGVO as a manager of the fishing port and EVO as an operator of the fish auction are undertakings a significant part of whose activities should be considered to come within the scope of the fisheries sector. As regards PAKHUIZEN, it seems less evident that this undertaking can be considered active in the fisheries sector.

(251) As regards State aid to the fisheries sector, State aid measures can be deemed to be compatible with the internal market only if they comply with the conditions of the Fisheries Guidelines. According to point 5.3 of the current Guidelines, an 'unlawful aid' within the meaning of Article 1(f) of Regulation (EC) No 659/1999 will be appraised in accordance with the guidelines applicable at the time when the administrative act setting up the aid entered into force. Consequently, the aid needs to be appraised on the basis of the Fisheries Guidelines of 2001, 2004 and 2008.

(252) Insofar as PAKHUIZEN cannot be considered to be a fisheries undertaking, the Commission notes that the assessment of the aid should be based on the general rules applicable to all sectors and on the basis of the objectives of the aid.

(253) Finally the Commission notes that the Belgian authorities have not contested the analysis of the Commission so far as compatibility was concerned.

10.2.1. AID GRANTED TO AGVO

(254) As regards the State aid granted by the City to AGVO, it is necessary for the assessment to distinguish between the various actions and the dates on which they took place.

10.2.1.1. ***Initial capital***

(255) The Belgian authorities have submitted that the initial capital has to be seen in the framework of the restructuring of the Ostend fish auction.

(256) According to point 2.2.4 of the 2001 Fisheries Guidelines, applicable at the time of the restructuring, aid for the restructuring of firms in difficulty needs to be assessed in accordance with the Guidelines for aid for rescue and restructuring firms in difficulty, applicable at the time the aid was granted, i.e. in this case, the 1999 R & R Guidelines, including when it relates to undertakings active in the fisheries and aquaculture sector ([59]).

([59]) See also point 12 of the 1999 R & R Guidelines that provides that these 1999 R & R Guidelines also apply to the agriculture and fisheries sector.

(257) In point 2.1 of the 1999 R & R Guidelines, a firm is considered to be in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term. The usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(258) In the Commission's view, there is no doubt that the Ostend fish auction bore all the signs of a 'firm in difficulty' in 2001. Indeed, as explained in recital 17, from 1991 until 2001, its share in terms of fish arrivals in Belgian harbours had fallen from approximately 37 % to 20 %. From 1997 to 2001 its turnover dropped from EUR 20 550 000 to EUR 13 440 000 and, over many years, the City had been recording an average annual loss of EUR 1 850 000. Consequently, in 2001 the City had to decide whether it would close the auction or restructure it. The Commission therefore considers that the Ostend fish auction qualifies as a 'firm in difficulty' within the meaning of the 1999 R & R Guidelines. The Belgian authorities have not contested to this conclusion.

(259) Though AGVO is a newly set up legal entity, the Commission notes that the constitution of the initial capital of AGVO was part of the restructuring plan of the Ostend fish auction. As the latter was a company in difficulties and AGVO was only created for the purposes of the restructuring of the Ostend fish auction and as AGVO took over not only the assets of the Ostend Fish auction but also the financial charge of various bank loans, AGVO can be considered a company in difficulty at the time when the initial capital was granted. Hence, it can be considered that the initial capital constitutes restructuring aid ([60]) within the meaning of the 1999 R & R Guidelines.

(260) Though AGVO is eligible for aid under point 30 of the 1999 R & R Guidelines, the aid for the restructuring of the auction, by way of establishing AGVO, providing it with a starting capital of BEF 250 million (EUR 6 179 338), does not comply with the conditions as to compatibility with the internal market laid down in paragraph 32 of the 1999 R & R Guidelines.

([60]) Commission Decision 2008/849/EC of 16 July 2008, State aid C 14/07 (ex NN 15/07), Italy, Restructuring aid to NGP (OJ L 301, 12.11.2008, p. 14).

(261) In particular, according to point 32 of those Guidelines, 'the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions'. The Commission does not consider that the restructuring plan referred to in recital 19 meets those conditions. In this respect, the Commission notes that the plan does not contain specific internal measures to improve the operation of the auction and to abandon loss-making activities.

(262) In addition, contrary to what is required under point 32 of the 1999 R & R Guidelines, the restructuring does not appear to have been based on a market survey providing information on future prospects for supply and demand, an analysis of the market concerned and the other information mentioned in Annex I to the 1999 R & R Guidelines.

(263) Nor does the restructuring plan does not contain the elements mentioned in point 33 of the 1999 R & R Guidelines, that is the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate; the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions, and the firm's specific strengths and weaknesses.

(264) Furthermore, the Commission finds that the available information does not contain any evidence showing that the aid has been limited to the strict minimum needed as required in point 40 of the 1999 R & R Guidelines, or that the beneficiary has been required to make any contributions from its own resources. In this respect, it is also relevant to note that, according to point 41 of the 1999 R & R Guidelines, the aid must be used only for restoring the firm's viability and should not enable the recipient during the implementation of the restructuring plan to expand production capacity. However, as noted above, the financial plan drafted in 2001 suggests that the fish auction could have recovered after eight years without needing the entirety of the BEF 250 million. The business plan also foresees a 10 % increase of the turnover for the first five years the restructured fish auction would operate on the market, which could imply that the fish auction intended to expand. The recovery plan thus appears not to have been designed to ensure that the aid would be used only for restoring the firm's viability and seems to place the fish auction in a position to use the additional liquidities to expand its production capacity, its activities

and/or to act aggressively on the market. From the information received, it appears that the aid was indeed used for extending the auction's activities ([61]) and for aggressive, market-distorting activities ([62]).

(265) The Commission observes further that the restructuring plan does not include any measures ensuring the full implementation of the plan and observance of all conditions thereof.

(266) Moreover, Belgium has not demonstrated either that compensatory measures had been taken in accordance with points 35-39 of the 1999 R & R Guidelines or, alternatively, that the specific (alternative) conditions for agriculture (including fisheries) laid down in points 73-82 of the 1999 R & R Guidelines have been met ([63]). Indeed the City does not appear to have taken any measures to mitigate so far as possible any adverse effects of the aid on the competitors, contrary to what is required under point 35 of the 1999 R & R Guidelines. Yet, having regard to the specific situation of fish auctions in particular with regard to the limited supply due to the restrictive conservation measures adopted annually at Union level, it is highly likely that the aid would adversely affect competing auctions and the City should have paid special attention to that point.

(267) Consequently, the aid granted to AGVO for the restructuring of the fish auction is not compatible with the conditions of the 1999 R & R Guidelines nor with the 2001 fisheries guidelines which refer to the rescue and restructuring guidelines.

([61]) Acquisition by AGVO of Pakhuizen in 2004 and acquisition of a shareholding of 51 % in Haf Holding BO (Ijsland) in 2006. EVO also engaged in several projects, such as Pollar Drift (King Crab project) and Novafish-project (HAF Holding), mentioned in the annual accounts for 2005. See also the comments submitted by Grimsby Market suggesting that 'EVO started around 2005/2006 to buy fish straight from the Icelandic fishermen at (high) fixed prices and auctioned this fish by means of the clock in Ostend, frequently at lower prices'. The Belgian authorities did not contest any of the comments submitted by the third parties. Moreover, the tender documents submitted by the Belgian authorities confirm that EVO had engaged before 2007 in foreign activities but stopped them in 2007 (see Memorandum, p. 39).

([62]) Loans subject to the condition that the borrower would auction his fish in Ostend, intervention (sometimes up to 100 %) in transport costs when the fish is auctioned in the Ostend fish auction, guaranteed minimum auction price, etc.

([63]) Point 70 of the 1999 R & R Guidelines provides that points 35-39 of the 1999 R & R Guidelines apply to all enterprises of the agricultural sector, including SMEs. In the agricultural sector, as far as compensatory measures are concerned, Member States have the possibility to choose between complying either with points 35-39 of the 1999 R & R Guidelines or with the special rules for the agricultural sector contained in points 73-82 of the 1999 R & R Guidelines.

(268) With regard to the question as to whether the provision of capital could be considered compensation for public service obligations, the Commission refers to its analysis in point 10.2.1.4 of this Decision.

10.2.1.2. ***Transfer of ownership of buildings and exclusive rights to use the land and buildings***

(269) As established in point 10.1.2.2.2 of this Decision, the granting of the exclusive right to use the buildings free of charge from 14 March 2002 and subsequently the transfer by the City of the ownership of several buildings representing a surface of 57 500 m^2 occurred without imposing obligations on AGVO of a similar value. As already observed, neither the articles of association nor the transfer deed appear to be linked to any specific and unusual condition or obligation that would justify the absence of rent or remuneration.

(270) Such an action must therefore be considered to be an aid intended to improve the situation of the undertaking and increase its business liquidity, which has the effect of reducing the recipient's production costs.

(271) The Commission has not found that this aid would comply with any of the rules on compatibility with the internal market provided for in the 2001 Fisheries Guidelines, nor have the Belgian authorities submitted any information in this regard.

(272) With regard to the question as to whether the exclusive use rights and the transfer of ownership, free of charge, should be viewed in the framework of the restructuring of the fish auction, the Commission has already established in paragraphs 260 et seq of this Decision that, although AGVO would have been eligible at the time of the granting of the measures for restructuring aid (i.e. qualified as a company in difficulty), the conditions of the 1999 R & R Guidelines are not fulfilled.

(273) With regard to the question as to whether the exclusive use rights and the transfer of ownership could be considered compensation for public service obligations, the Commission refers to its analysis in point 10.2.1.4 of this Decision.

10.2.1.3. ***Loan guarantees***

(274) The Belgian authorities consider that a distinction must be drawn between free guarantees for loans which were used for renovation works and those that were used to support EVO.

(275) They have acknowledged in this regard that a EUR 550 000 loan had been used to support EVO.

(276) The Belgian authorities have submitted that free guarantees for loans which were used to support EVO should be seen in the framework of the restructuring of the fish auction.

(277) The Commission notes, however, that as established in paragraphs 260 et seq of this Decision, though AGVO would have been eligible at the time of the granting of the measures for restructuring aid (i.e. qualified as a company in difficulty), the compatibility conditions provided for in the 1999 R & R Guidelines are not fulfilled.

(278) Moreover, the Commission notes that the free guarantees are aid measures which are not mentioned in the restructuring plan. The Commission recalls that according to point 3.2.3 of the 1999 R & R Guidelines and to point 3.3 of the 2004 R & R Guidelines ([64]), restructuring aid should only be granted once. Therefore, even assuming that the original aid, namely by way of initial capital and so forth, complied with the applicable R & R Guidelines — quod non — the free guarantees do not comply with the 'one time, last time' condition.

(279) The Belgian authorities seem to imply that eventually the City chose to grant free guarantees for loans instead of paying out the further annual instalments of the initial capital. However, the Commission observes that the restructuring plan was not revised in accordance with point 52 of the 1999 R & R Guidelines and the 2004 R & R Guidelines. Moreover, it is not clear whether the amount of aid was increased, decreased or whether the form of the aid was amended. Indeed, although the instalments of the initial capital were not all paid annually as initially intended, it is nevertheless true that AGVO legally had the right to require its shareholder to pay out the rest of the initial capital. In fact, AGVO has exercised this right in 2006 and 2007, when further instalments were paid out to AGVO.

(280) Accordingly, the Commission considers that the free guarantee for the loan of EUR 550 000 is not compatible with the conditions of the 1999 R & R Guidelines and 2004 R & R Guidelines nor with the 2004 fisheries guidelines which refer to the rescue and restructuring guidelines.

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

(281) As for free guarantees for loans which were used for renovation works, the Commission refers to its analysis in point 10.2.1.4 of this Decision.

10.2.1.4. ***Tax duties and public service compensation***

(282) The Belgian authorities have argued that part of the initial capital, part of the buildings and part of the guaranteed loans had been used for the provision of services of general (economic) interest, namely the management of the fishing port and the renting of buildings to public and semi-public organisations. They also considered that the right to collect (and use) tax duties from users of the fishing port should be seen as part of AGVO's public tasks.

(283) The Belgian authorities have not demonstrated that these measures can be declared compatible under Article 106(2) of the TFEU. It must be recalled that it is incumbent on a Member State which invokes Article 106(2) TFEU as a derogation from the fundamental rules of the Treaty, to show that the conditions for application of that provision are fulfilled ([65]). In any event, the Commission has examined whether the aid measures could to some extent be considered public service compensation granted in accordance with the conditions laid down in Article 106(2) of the TFEU.

(284) In this regard, the Commission has — in the 1996 ([66]) and 2001 ([67]) Communications on services of general interest in Europe as well as in the 2005 Community framework for State aid in the form of public service compensation ([68]) — spelled out the conditions under which State aid can be considered to be compatible pursuant to Article 106(2).

(285) One of these conditions is that the undertaking beneficiary of the aid must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest. Such act or acts of entrustment must, at the very least, specify the precise nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned.

(286) The Commission could agree that through its Act of Association AGVO have been entrusted with the management of the fishing port and that this entrustment implies certain specific obligations.

([65]) Judgment in Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 54.
([66]) OJ C 281, 26.9.1996, p. 3.
([67]) OJ C 17, 19.1.2001, p. 4.
([68]) OJ C 297, 29.11.2005, p. 4.

(287) However, so far as the rental activities of AGVO are concerned, the Commission observes that the public service obligations imposed on AGVO are not clearly defined. In particular it could not find any provision imposing specific obligations on AGVO in this respect and the Belgian authorities have not submitted further information on this issue. The Belgian authorities seem to consider that the fact that the organisations renting the buildings are public or semi-public organisations implies necessarily that the undertakings renting buildings to those organisations are themselves discharging a public service. The Commission, however, cannot agree with such a position, since this fact in itself does not imply any entrustment or any imposition of specific public service obligations that would differ from obligations falling upon any private lessor. The Commission therefore concludes that Belgium has not demonstrated that AGVO had been entrusted with public service obligations in connection with its rental activities.

(288) Furthermore, the Commission considers that the aid measures granted to AGVO do not comply with the requirement of necessity and proportionality either.

(289) The requirements of necessity and proportionality of compensation are defined as follows (see among others paragraphs 14, 15, and 17 of the 2005 Community framework for State aid in the form of public service compensation):

— the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,

— the amount of compensation includes all advantages granted by the State or through State resources in any form whatsoever — irrespective of their classification for the purposes of Article 107 of the TFEU,

— the amount of compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation used to operate on other markets is not justified, and consequently constitutes incompatible State aid.

(290) The Commission observes that the necessity and proportionality requirements have not been complied with in this case. Belgium has admitted that no parameters had been defined for the compensation. The Belgian authorities have further explained to the Commission that it was not possible to determine the costs incurred in discharging the public service obligations and the receipts for discharging those obligations. The Commission further observes that AGVO does not operate separate accounts for its various categories of activities. Consequently, compensation for public service obligations can be used to operate on other markets. Several elements in the file indicate that there has actually been overcompensation. For instance, so far as free guarantees for loans are concerned, it has been established in paragraphs 186 et seq of this Decision that guaranteed loans could be used and have been used for other purposes than the intended initial purpose. Since the amount of capital put into EVO (EUR 3 969 000) and the price paid to buy the PAKHUIZEN shares (EUR 350 000) (in total: EUR 4 319 000) go beyond the amount of capital actually paid to AGVO (EUR 3 596 665,62), AGVO has necessarily used loans and possibly tax duties in order to finance them.

(291) For the above reasons, the Commission cannot consider the aid measures to be compatible with the conditions imposed in Article 106(2) of the TFEU.

10.2.2. AID GRANTED TO EVO

(292) As regards the State aid granted by the City and by AGVO to EVO, it is necessary for the assessment to distinguish between the various actions and the dates on which they took place.

(293) The following decisions need to be assessed under the 2001 Guidelines:

— the decisions taken by the City to provide a free guarantee for loans on 28 June 2002, 27 September 2002 and 23 April 2004,

— the decision taken by AGVO to allow EVO from 8 August 2002 onward continuous free use of the buildings owned by AGVO of a total of 13 600 m^2,

— the decision taken by AGVO to provide EVO with a starting capital of EUR 371 840 on 22 August 2002.

(294) The following decisions need to be assessed under the 2004 Guidelines:

— the decisions taken by the City to provide a free guarantee for a loan on 22 April 2005,

— the decisions taken by AGVO to increase EVO's capital by a remission of debts on 31 December 2004, 31 December 2005, 21 December 2007.

(295) The following decision need to be assessed under both the 2001 and 2004 Guidelines:

— the decisions taken by AGVO to provide free guarantees for loans of EUR 600 000 between 22 August 2002 and 3 August 2006.

(296) The following decision need to be assessed under both the 2004 and 2008 Guidelines:

— the decision taken by the City to provide a free guarantee for a loan of EUR 78 000 between 27 September 2007 and 4 September 2008.

10.2.2.1. ***Guarantees for loans, right to use the fish auction free of charge***

(297) According to point 1.2 of the 2001 Fisheries Guidelines and point 3.7 of the 2004 Fisheries Guidelines State, aid which is granted without imposing any obligation on the part of recipients and which is intended to improve the situation of the undertakings and increase their business liquidity or is calculated on the quantity produced or marketed, product prices, units produces or the means of production, and which has the effect of reducing the recipient's production costs or improving the recipients income is, as operating aid, incompatible with the internal market. According to point 3.4 of the 2008 Fisheries Guidelines, operating aid which, for example, increases the business liquidity of the recipient or is calculated on the quantity produced or marketed, product prices, units produces or the means of production, and which has the effect of reducing the recipient's production costs or improving the recipients income is in principle incompatible with the internal market. It may be considered compatible only if the aid clearly and firmly contributes to serving the objectives of the Common Fisheries Policy.

(298) From the information available it appears that the free guarantees for loans and the right to use the fish auction, free of charge, have been granted without imposing any particular obligation on EVO that would render the aid compatible with any of the conditions laid down in the Fisheries Guidelines.

(299) Indeed, the free guarantees for loans appear to have been granted on mere demand for loans serving various purposes and do not seem to have been subject to any particular conditions or obligations.

(300) The information provided by the Belgian authorities even shows that the fact that the guaranteed loan was finally used for a purpose different from the purpose initially announced did not result in any sanction or annulment of the guarantee. For example, it appears that even though it was first announced that the loan of EUR 1 795 000 provided by Fortis was intended among others to buy additional machines and fish crates and to finance several modification works, it (or at least a part of it) was actually used to grant loans to owners of vessels. The guarantee has not been retracted and guarantees have been provided also after this situation occurred without apparently prompting the City to impose any conditions on EVO for the guarantee.

(301) The free guarantees have increased the business liquidity of EVO; not only did it not have to pay for the guarantee it appears also appears that, without the guarantee, EVO would not have obtained the loans.

(302) Also the right to use the auction building, free of charge, has increased EVO's liquidities, since it was spared the costs of the rent that it would have otherwise had to pay under market conditions.

(303) The Commission does not see how the free guarantees of the right to use the buildings, free of charge, can be considered contributing to the objectives of Common Fisheries Policy. The Belgian authorities have not submitted any information in this regard.

(304) The Belgian authorities have submitted that the measures had to be assessed in the framework of the restructuring of the fish auction.

(305) First, it must be assessed whether EVO would be eligible under the Rescue and Restructuring Guidelines. EVO could be considered a company in difficulty within the meaning of the 1999 and 2004 R & R Guidelines respectively.

(306) According to point 8 of the 1999 R & R Guidelines and point 13 of the 2004 R & R Guidelines, a company belonging to a larger business group is normally not eligible for rescue or restructuring aid. It could, however, be eligible if it has been created by a firm in difficulty. EVO was created by AGVO, which itself is the new legal form of the Ostend Fish auction restructured in 2001. It should be noted that AGVO is the continuation of the former Ostend fish auction, which was State owned and had no legal personality. As stated in recital 259 of this Decision, the Commission considers that AGVO, though newly created, qualifies as a firm in difficulty and is eligible under the 1999 R & R Guidelines. Since EVO has been set up in the context of the restructuring of AGVO, EVO, together with AGVO, can be regarded as a company in difficulty and could receive aid under the conditions laid down in the R & R Guidelines.

(307) However, even if EVO is eligible under the R & R Guidelines, it is nevertheless true that it has been demonstrated in recitals 260 et seq of this Decision that the compatibility conditions laid down in the 1999 R & R Guidelines are not fulfilled. Moreover, since the concerned aid measures were not provided for in the restructuring plan, they raise the same concerns as those mentioned in recitals 278 et seq of this Decision.

(308) The free guarantees for loans and the right to use the fish auction, free of charge, must therefore be considered operating aid in the sense of the 2001, 2004 and 2008 Fisheries Guidelines and do not contribute to serving the objectives of the Common Fisheries Policy. They are thus not compatible with the internal market.

10.2.2.2. ***Initial capital and subsequent capital increases***

(309) EVO was established in the framework of the restructuring of the Ostend fish auction. The Belgian authorities have moreover confirmed that part of the initial capital of AGVO (i.e. EUR 371 840) was used as initial capital for the establishment of EVO and for subsequent capital increases.

(310) Hence, it is to be assessed whether the initial capital and subsequent capital increases could be considered Rescue and Restructuring aid within the meaning of the 1999 R & R Guidelines and the 2004 R & R Guidelines respectively.

(311) EVO, together with AGVO, can be considered a company in difficulty within the meaning of the 1999 R & R Guidelines and the 2004 R & R Guidelines respectively as described in point 10.2.2.1.

(312) However, as already indicated above in recitals 260 et seq of this Decision, the compatibility conditions for restructuring aid are not met in this case.

(313) The initial capital and the subsequent capital increases cannot therefore be considered compatible with the internal market.

10.2.3. AID GRANTED TO PAKHUIZEN

(314) The effect of the terms of the lease between the City and PAKHUIZEN was that PAKHUIZEN could benefit from a yearly reduction of its operating costs. This type of aid does not fall within the scope of any of the measures mentioned in the Fisheries Guidelines, or within the objectives of other horizontal or specific guidelines which could be applicable to this kind of undertaking. Under both the relevant Fisheries Guidelines and the horizontal rules on State aid, such type of aid must be considered operating aid which is incompatible with the internal market.

10.2.4. CONCLUSION

(315) In view of all the foregoing, the Commission concludes that the measures mentioned in point 10.1.5 of this Decision must be regarded as State aid, that they are not compatible with the internal market and that they must be recovered as described in section 11.

11. **RECOVERY**

(316) In accordance with Article 14(1) of Regulation (EC) No 659/1999, where negative Decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary. The purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it.

(317) Regulation (EC) No 659/1999 does not lay down any limitation period for the examination of unlawful aid within the meaning of Article 1(f) thereof, i.e. aid implemented before the Commission is able to reach a conclusion about its compatibility with the common market. However, Article 15 of that Regulation stipulates that the powers of the Commission to recover aid is subject to a limitation period of 10 years, that the limitation period begins on the day on which the aid is awarded to the beneficiary and that that limitation period is interrupted by any action taken by the Commission.

(318) The limitation period was interrupted by the request for information sent to Belgium on 13 March 2006. Accordingly, the recovery shall be limited to the aid received after 13 March 1996.

(319) In order to determine what has to be recovered from AGVO, EVO and PAKHUIZEN, account should be taken of the fact that part of the aid granted to AGVO has been transferred to EVO. As pointed out by the Belgian authorities, this aid should be recovered only once from the real beneficiary.

(320) For that reason, in those situations where aid granted by the City finally benefitted EVO, the aid to be recovered from AGVO is the part of the aid which was not transferred to EVO.

11.1. *RECOVERY FROM EVO*

(321) The aid to be recovered from EVO is composed of:

— the initial capital for an amount of EUR 371 840,

— the subsequent capital increases of EUR 1 387 044, EUR 710 000,75 and EUR 1 500 114,96,

— the advantage received thanks to the provision of free guarantees for loans, and

— the advantage derived from the free use of the fish auction between 22 August 2002 and the last day EVO has had the fish auction at its disposal.

(322) As for the aid element of the free guarantees, this is in principle the amount of the loans guaranteed, unless the Belgian authorities provide evidence that it would have been possible for EVO to obtain such guarantees on the market; in that case, the aid element consists of what the likely market premium would have been for the guarantee.

(323) The Belgian authorities have declared that the two loans for which a guarantee was provided in 2002 were in the end not taken up by EVO. As a consequence, though the aid had been granted (the decision to provide the free guarantee had been adopted), EVO has not actually benefited from it. The aid resulting from the free guarantees for loans agreed on 28 June and 27 September 2002 does not therefore need to be recovered. Consequently, an amount of EUR 4 284 995 (3 606 995 + 78 000 + 600 000) should be recovered.

11.2. *RECOVERY FROM PAKHUIZEN*

(324) The aid to be recovered from PAKHUIZEN is composed of the advantage derived from the fact that the long-term lease agreement was not concluded at a market price.

(325) According to Article 15 of Regulation (EC) No 659/1999, the recovery shall be limited to a period of 10 years back from 13 March 2006.

(326) The advantage consists of the remuneration (rent) that would have been paid under normal market conditions for the long-term lease agreement for the buildings minus (a) the EUR 25 paid annually and (b) any renovation costs that PAKHUIZEN has had and which it would not have needed to pay under the normal rules of Belgian law ([69]). The period at issue runs until the day of recovery or — in the case the lease agreement was ended before recovery was ordered — the day the lease agreement was ended.

11.3. *RECOVERY FROM AGVO*

(327) The aid to be recovered from AGVO is composed of the initial capital, the advantage derived from the provision of free guarantees for loans, the advantage derived from the exclusive use of the lands and buildings in the Ostend fishing port between 14 March 2002 and 25 March 2004 (for the buildings that were subsequently transferred to AGVO) and between 14 March 2002 and the day of recovery (for the rest of land and buildings that were not part of the property transfer deed concluded on 26 March 2004) and the advantage derived from the transfer on 26 March 2004, free of charge, of the ownership of 57 500 m^2 of buildings located in the Ostend fishing port.

(328) So far as the initial capital is concerned, the information provided to the Commission shows that though the aid was granted for an amount of BEF 250 million (EUR 6 200 000), it has not been entirely paid out yet. Recovery should therefore be limited to the amount actually paid to AGVO, that is EUR 3 596 665,62 according to the last information submitted to the Commission. If more than this amount has been paid to AGVO the surplus has to be recovered as well.

([69]) As already noted, it is so uncertain that the condition that after 27 years, the lessor is entitled to half the profit of PAKHUIZEN, has any real value that nothing can be deducted on this basis. Moreover, the lease has been terminated so that this clause will never be applied.

(329) As for the aid element of the free guarantees, this is in principle the amount of the loans guaranteed, unless the Belgian authorities provide evidence that it would have been possible for AGVO to obtain such guarantees on the market; in that case, the aid element consists of what the likely market premium would have been for the guarantee, when they were agreed (26 March 2004, 23 April 2004 and 22 April 2005).

(330) Where the market does not provide guarantees for the type of transaction concerned the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate AGVO would have borne without the guarantee and the interest rate obtained by means of the State guarantee. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates ([70]) are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.

(331) So far as concerns the advantage derived from the exclusive use, free of charge of the lands and buildings of the Ostend fishing port, the aid amounts to the rent AGVO would have had to pay under market conditions for the exclusive use of the lands and buildings in the Ostend fishing port between 14 March 2002 and the day of recovery or the last day that AGVO had the right to use the buildings, free of charge, either on the basis of its articles of association, the Deed for transferring the ownership of the buildings or otherwise.

(332) The Commission is aware of the fact that part of the lands and buildings were of limited or no commercial value (for example the roads). The Commission observes however, that part of the lands and buildings had a clear commercial value (fish auction, offices, warehouses) and that another part of the lands and buildings (infrastructure of the fishing port) allowed AGVO to provide services to vessel-owners and that AGVO had the right to levy a fee in exchange for the services provided. These elements must be taken into account in order to calculate the rent.

(333) So far as the advantage derived from the collection of tax duties is concerned, the aid amounts to the tax collected since its establishment and the day of recovery or the last day AGVO was entitled to collect those duties.

(334) Finally, the Commission notes that the amount to be recovered from AGVO should be diminished by the amount of aid that has been transferred to EVO in the form of capital (EUR 3 969 000) and free disposal of the buildings where the fish auction is operated.

(335) The Commission is aware of the fact that AGVO was entrusted with some non-economic public tasks (inspection of fish landed for consumption, checking that the catch landed is subjected to the VAT requirement, public relations functions) and with the management of the fishing port. The Commission considers that the amount to be recovered from AGVO should be diminished by the costs for which it can be proved that they were made when discharging these tasks.

11.4. *IMPACT OF THE RESTRUCTURING OF THE FISH AUCTION ON THE RECOVERY ISSUE*

(336) The Belgian authorities have informed the Commission that the City and AGVO were planning to privatise the fish auction. They have argued that once privatisation was completed, there would no longer be an issue of State aid and the procedure would be rendered devoid of purpose.

(337) The Commission would recall in this regard that though the privatisation could put an end to the aid measures at issue, it does not erase the advantages granted to the beneficiaries of the aid for the period prior to the ending of the aid measures. Recovery precisely serves the purpose of re-establishing the previously existing situation in order to ensure a level-playing field in the internal market. The Commission draws the attention of the Belgian authorities in this respect to the Notice from the Commission 'Towards an effective implementation of Commission Decisions ordering Member States to recover unlawful and incompatible State aid' ([71]), in particular point 3.2.4 thereof which deals with the recovery of State aid from companies which are being wound up and insolvent beneficiaries. As regards the request to postpone taking this Decision (see recital 99), that would be inappropriate since it is important that unlawful and incompatible State aid be recovered as quickly as possible,

([70]) OJ C 14, 19.1.2008, p. 6.

([71]) OJ C 272, 15.11.2007, p. 4.

HAS ADOPTED THIS DECISION:

Article 1

1. The aid granted to NV Exploitatie Vismijn Oostende (EVO) for an amount of EUR 3 969 000 in the form of an initial capital and loans which were later transformed into capital increases is incompatible with the internal market.

2. The aid granted to EVO for an amount of EUR 4 284 995 in the form of free guarantees for loans is incompatible with the internal market.

3. The aid granted to EVO in the form of the right to use, free of charge, the buildings of the fish auction located in the Ostend fishing port, is incompatible with the internal market.

Article 2

1. The aid granted to Autonoom Gemeentebedrijf Vismijn Oostende (AGVO) for an amount of EUR 6 200 000 in the form of an initial capital is incompatible with the internal market.

2. The aid granted to AGVO in the form of free guarantees for loans is incompatible with the internal market.

3. The aid granted to AGVO in the form of the right to use, free of charge and/or at a rate below the market price, lands and buildings located in the Ostend fishing port, is incompatible with the internal market.

4. The aid granted to AGVO in the form of the transfer of ownership, free of charge, between 26 March 2004 and 4 September 2009, of 57 500 m^2 of buildings located in the Ostend fishing port is incompatible with the internal market.

5. The aid granted to AGVO in the form of the right to collect tax duties since 14 March 2002 is incompatible with the internal market.

Article 3

The aid granted to NV Pakhuizen (PAKHUIZEN) and resulting from the long-term lease agreement concluded in 1989 with the City of Ostend, is incompatible with the internal market.

Article 4

1. Belgium shall recover the aid referred to in Article 1 and Article 2(2) to (5) from the beneficiaries.

2. Belgium shall recover the aid referred to in Article 2(1) to the extent it has already been paid to AGVO (EUR 3 596 665,62).

3. Belgium shall recover the aid referred to in Article 3 to the extent it has been granted since 13 March 1996.

4. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiaries until their actual recovery or the last date on which they were placed at the disposal of the beneficiaries, should the aid measures have ended before recovery took place.

5. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([72]) and with Commission Regulation (EC) No 271/2008 ([73]) amending Commission Regulation (EC) No 794/2004.

6. Belgium shall cancel all outstanding payments of and/or other forms of granting the aid referred to in Articles 1, 2 and 3 with effect from the date of adoption of this Decision.

Article 5

1. Recovery of the aid referred to in Articles 1, 2 and 3 shall be immediate and effective.

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

([72]) OJ L 140, 30.4.2004, p. 1.
([73]) OJ L 82, 25.3.2008, p. 1.

Article 6

1. Within two months of notification of this Decision, Belgium shall submit the following information to the Commission:

(a) the total amount (principal and recovery interest) to be recovered from AGVO, EVO and PAKHUIZEN;

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

(c) documents demonstrating that AGVO, EVO and PAKHUIZEN have been ordered to repay the aid.

2. Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Articles 1 to 3 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from AGVO, EVO and PAKHUIZEN.

Article 7

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 27 April 2010.

For the Commission

Maria DAMANAKI

Member of the Commission