DECISIONS

COMMISSION DECISION (EU) 2016/2057

of 2 May 2016

on the State aid and measures SA.29338 (2013/C-30) and SA.44910 (2016/N) in favour of HSH Nordbank AG

(notified under document C(2016) 2689)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) ([1]),

Whereas:

1. PROCEDURE

(1) On 20 September 2011, the Commission adopted a Decision (the '2011 decision') ([2]) approving several State aid measures in favour of HSH Nordbank AG ('HSH' or 'the bank'). HSH is a German Landesbank whose majority owners are two German federal states (the 'Länder' or 'public owners'), the State of Schleswig-Holstein ('Schleswig-Holstein') and the City State of Hamburg ('Hamburg'). Those measures included a second-loss guarantee (the 'guarantee') given by the HSH Finanzfonds AöR (the 'Finanzfonds' or the 'guarantee provider') in the nominal amount of EUR 10 billion. The Commission had already approved temporarily the guarantee in an earlier rescue decision, taken in 2009.

(2) On 9 March, 18 June and 6 September 2011, HSH had agreed with the guarantee provider to cancel parts of the second-loss guarantee, thereby reducing the ceiling amount of the guarantee to EUR 7 billion. Consequently, the restructuring plan on which the 2011 decision was based assumed that HSH would pay guarantee fees only for a EUR 7 billion guarantee ([3]).

(3) On 22 May 2013, Germany notified to the Commission the intention of Schleswig-Holstein and Hamburg to re-increase the ceiling amount of the guarantee from EUR 7 billion back to EUR 10 billion. With the notification, Germany also submitted an updated medium-term business plan of HSH for the period from 2013 to 2015.

(4) By letter dated 21 June 2013 (the 'Opening decision'), the Commission informed Germany that it considered the re-increase of the ceiling amount of the guarantee by EUR 3 billion as new aid, which it temporarily approved, and that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of that aid.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([4]). The Commission called on interested parties to submit their comments.

([1]) OJ C 315, 29.10.2013, p. 81.
([2]) Commission Decision 2012/477/EU of 20 September 2011 on State aid granted by Germany to HSH Nordbank AG SA.29338 (C 29/09 (ex N 264/09)) (OJ L 225, 21.8.2012, p. 1).
([3]) See 2011 decision, recital 48.
([4]) Cf. footnote 1.

(6) Germany submitted comments on the Opening decision by letter dated 30 September 2013. The Commission received no comments from interested parties.

(7) By letter of 20 December 2013, Germany submitted a first restructuring plan together with a commitment to update that plan and to base it on more conservative assumptions following the closure of HSH's annual accounts of 2013. Germany submitted an updated restructuring plan on 28 April 2014 and, following further meetings and correspondence, further updated that plan by submission of 17 April 2015.

(8) In the exchanges between the German authorities and the services of the Commission it remained unclear whether those plans would eliminate the doubts expressed in the Opening decision as regarding the restoration of the viability of HSH. Accordingly, the German authorities sought to propose alternative solutions to the Commission in the course of 2015. Finally, however, those ideas were not pursued any further by the German authorities.

(9) On 19 October 2015, the representatives of the public owners, of Germany and of the Commission reached agreement on the principal outline for a notification. The measures consist mainly of a split of the bank into a holding company and an operating subsidiary with the latter continuing the bank's current operations. That subsidiary is to be subsequently sold, or, in case of an unsuccessful sale, stop new business and manage the assets with a view to wind them down.

(10) On 21 March 2016, Germany re-notified the 2013 re-increase of the guarantee as aid for the sale or winding down of HSH, including corresponding commitments ([5]).

2. **DESCRIPTION**

2.1. **The beneficiary**

(11) HSH is a private joint stock company which was established in 2003 as the result of the merger between former Hamburgische Landesbank and Landesbank Schleswig-Holstein. Hamburg and Schleswig-Holstein hold the majority of HSH's shares. Together they have 85,38 % of the bank's shares, held either directly or via the Finanzfonds, an institution established under public law and controlled by Hamburg and Schleswig-Holstein ([6]). The Savings Banks Association of Schleswig-Holstein holds 5,31 % and a group of nine trusts advised by J.C. Flowers holds 9,31 % of the shares. For historical reasons HSH has two head offices, in Hamburg and Kiel.

(12) With total assets of EUR 105 billion as of 30 September 2015, HSH is the fifth-largest of the seven German Landesbanken groups. Operating primarily in the northern and metropolitan areas of Germany, the bank focuses on corporate banking, real estate and private banking. The business with corporate clients, both domestically and internationally, concerns, apart from energy and infrastructure projects, mainly shipping.

(13) In 2009, Finanzfonds injected EUR 3 billion in capital into the bank and provided it at the same time the EUR 10 billion second-loss guarantee with an effective date of 1 April 2009. In addition, the German Financial Market Stabilisation Fund (SoFFin) granted to HSH guarantees covering new issuances of debt of up to EUR 17 billion. Those aid measures were approved in the 2011 decision on the basis of a restructuring plan and related commitments as well as conditions with respect to remuneration and burden sharing.

(14) The restructuring plan including Germany's commitments comprised a reduction of the bank's exposure to the shipping business and a diversification within its business model. It required the bank to de-risk its balance sheet by limiting its exposure to cyclical business like shipping and aircraft financing, re-balance its business mix by an increased focus on the regional corporates business and real estate, and stabilise its funding by decreasing reliance on wholesale funding, including in USD.

([5]) Germany submitted an amendment of the commitment catalogue, correcting an error in one commitment, on 27 April 2016.
([6]) Via Finanzfonds, the two *Länder* hold 65 %; directly Hamburg holds 10,8 % and Schleswig-Holstein 9,58 %.

(15) In the course of 2011, upon the initiative of HSH, the EUR 10 billion ceiling of the second-loss guarantee was reduced to EUR 7 billion in a stepwise-approach (by EUR 1 billion each time in March, June, and September 2011). That decrease reduced the fees that HSH had to pay to Finanzfonds and was included in the restructuring plan that served as a basis for the 2011 decision.

(16) Although the restructuring plan of 2011 assumed that charter rates would recover, in the year following the 2011 decision charter rates, in particular for container ships, declined by around one-third, with similar developments affecting the market value of ships. Although HSH had considerably reduced its shipping exposures, the shipping loan portfolio remained a key business. As a result, HSH was severely affected by those developments which, together with the EUR/USD exchange rates, were the main drivers of the probability of default of the shipping portfolio of HSH and, consequently, of the required loan loss provisions.

(17) As a consequence, the supervisor required the bank in 2013 to seek a return of the ceiling of the guarantee by EUR 3 billion to its original level of EUR 10 billion. The Commission, when temporarily approving that re-increase as a new aid measure in June 2013, expressed doubts, on the basis of the business plan submitted with the notified re-increase, as to the restoration of HSH's long-term viability and questioned whether HSH, to achieve that goal, needed to adjust its business strategy and consider alternative actions ([7]).

(18) Following the Opening decision, HSH continued not only to underperform significantly the restructuring plan that had been the basis for the approval of restructuring aid in the 2011 decision but also to underperform the various updated intermediary plans provided to the Commission services.

2.2. **The measures**

2.2.1. *The re-increase of the guarantee ceiling in June 2013 (the '2013 measure')*

(19) This measure consists of the re-increase of the second-loss guarantee ceiling as described in recital 17. Second-loss guarantee means that the guarantor is only liable for reimbursing losses on the guaranteed portfolio which exceed a first-loss tranche of EUR 3,2 billion borne by HSH. With the ceiling re-set to EUR 10 billion, the guarantee consequently compensates for losses in the guaranteed portfolio of between EUR 3,2 and EUR 13,2 billion ([8]).

(20) The guaranteed portfolio had an initial book value of approximately EUR 185 billion which represented approximately 75 % of the bank's total balance sheet in 2009. Most of the guaranteed assets were loans to customers (initially EUR 115 billion) but also included fixed income securities (initially EUR 27 billion), bonded loans (initially EUR 15 billion), guarantees on payments (initially EUR 5 billion), and asset-backed securities (initially EUR 9 billion) ([9]).

(21) Only about EUR 50 billion in assets measured at exposure at default ('EAD') ([10]) remained outstanding under the guarantee at the end of 2015. Those remaining assets are almost exclusively loans to customers mainly in shipping, corporate and real estate business segments.

(22) Cash payments from the guarantee arise when guaranteed assets are finally settled at a loss to the bank and after the full first-loss tranche of EUR 3,2 billion is consumed. Currently, only about EUR 1,6 billion of losses have been settled on assets under the guarantee. Moreover, the guarantee also provides a positive book effect by compensating loan loss provisions taken on the guaranteed portfolio, allowing the bank and the supervisor to calculate and monitor the 'virtual' use of the guarantee, i.e. the expected cash payments under the guarantee. Finally, while the guarantee is in place the risk weight of the guaranteed assets is, subject to supervisory discretion, significantly reduced.

(23) To pay for the guarantee effects, HSH pays an annual base premium of 4 % plus an additional premium of 3,85 %.

([7]) See Opening decision, recital 54.
([8]) For the detailed description of the guarantees, see recitals 42 to 47 in the 2011 decision.
([9]) See Opening decision, recital 13.
([10]) Exposure at default means the expected amount of loss to which a bank is exposed in case of a default of a counterparty. It is used to calculate the credit risk of financial institutions.

(24) The annual base premium of 4 % consists of two components — 2,20 % of remuneration and 1,80 % of claw-back — and is calculated on the outstanding ceiling amount. As a result, the fact that the bank uses the guarantee does not reduce the calculation basis for the guarantee premium. The annual base premium needs to be paid by HSH until the guarantee is either used up entirely or cancelled so that no further guarantee is outstanding. Under current projections, the portfolio will not be run down before the end of 2025.

(25) The additional annual premium of 3,85 % has to be paid by HSH between 2009 and 2019 — unless the guarantee is fully used or cancelled before 2019 — on the actual amount of losses settled under the guarantee. The actual amount due pursuant to that premium will therefore only be known once the guarantee is fully settled, either by being used up or cancelled. The additional premium is further subject to a debtor warrant ('Besserungsschein') protecting the capital ratio of the bank. If the bank's common equity ratio falls below the minimum ratio of 10 % core equity capital ratio ('CET1 ratio') payments will be deferred up to at the latest [2030-2040] (*). The guarantee provider has the right to give up its rights to the additional premium in case of a successful sale of the bank.

2.2.2. *The 2016 measures*

(26) On 21 March 2016, Germany notified the following two measures:

(1) the split of HSH into a holding company ('HoldCo') and an operating subsidiary ('OpCo') and the distribution of the guarantee fee payment obligations across those two entities ('2016 measure 1');

(2) the transfer of up to EUR 6,2 billion of assets from OpCo to the *Länder* of Schleswig-Holstein and the City of Hamburg ('Länder') at market prices ('2016 measure 2').

(27) The split and the transfer of up to EUR 6,2 billion of assets EAD are detailed in the relevant commitments that are included in a catalogue ('the commitment catalogue') which Germany submitted with the notification of 21 March 2016 and which is annexed to this decision (see Annex I) ([11]).

(28) Under the 2016 measure 1, OpCo will retain all the operating assets and liabilities of HSH including the assets under guarantee, the guarantee itself and the banking license. As the fee payment for retaining the guarantee benefit, OpCo will pay 2,20 % of remuneration on the unused part of the guarantee ([12]). All other obligations under the guarantee contract will be borne by HoldCo, namely the 2,20 % base premium as remuneration on the used part of the guarantee, the 1,80 % base premium foreseen as claw-back under the 2011 decision and the 3,85 % additional premium including the *Besserungsschein* ([13]).

(29) HoldCo will be a pure financial holding company without any operational business. HoldCo's assets will consist of at least 90 % of the shares of OpCo and some limited liquidity provided by OpCo ([14]) in order to cover HoldCo's operating costs and the guarantee fee payments as they fall due. HoldCo's liabilities will consist of the guarantee fee payment obligations taken over in the split. In order to minimise the risk of insolvency of HoldCo, a subordination agreement will be concluded between HoldCo and the guarantee provider for those liabilities. Under that agreement, any payments which HoldCo cannot service can be deferred to the next payment date against an interest rate of 10 %.

(30) As an accompanying measure, OpCo will be allowed to sell a portfolio of up to EUR 6,2 billion assets EAD to the *Länder* at market prices. That transfer can happen in various tranches ([15]). The Commission has carried out an independent verification of the market price prior to the asset sale based on an independent asset valuation. If any transfer occurs after the end of August 2016, a further valuation by the Commission of the market value will be required ([16]).

(*) Confidential information.
([11]) See points 2 and 4 of the commitment catalogue.
([12]) See point 3.1 of the commitment catalogue.
([13]) See footnote 12.
([14]) See point 2.3 of the commitment catalogue.
([15]) For details see point 4.2 of the commitment catalogue.
([16]) See points 4.1 and 4.2 of the commitment catalogue.

2.3. **Commitments**

(31) Apart from the commitments relating to the split into HoldCo and OpCo and the division of the guarantee fee payments described under section 2.2.2, Germany submitted further commitments. They concern, first, the commitment to sell HoldCo's shares in OpCo by means of an open, non-discriminatory, competitive and transparent bidding procedure by 28 February 2018 at the very latest ([17]). To implement that privatisation in a timely fashion, the German authorities will submit to the Commission a plan with relevant milestones before the sale procedure starts ([18]). If the sale procedure is concluded successfully with an aid-free, positive price offer (while retaining the guarantee), the intended purchase will be notified to the Commission for the latter to assess the viability of the new entity. The purchase will not be implemented before an approval decision of the Commission ([19]). Upon a successful sale the bank will change its name ([20]).

(32) If the sale procedure is not concluded successfully within the deadline, i.e. should the procedure not result in an aid-free, positive price offer (while retaining the guarantee) or if the Commission concludes that the integration of OpCo in the new entity does not lead to a long-term viable business model, Germany has committed that OpCo would stop its new business and only manage its assets with the aim of an orderly winding-down ([21]). During the period up to the sale deadline, the German authorities committed that HoldCo would manage OpCo with the aim of retaining its viability, competitiveness and saleability ([22]). To that end, further measures will be carried out to reduce OpCo's costs (with the administrative costs not exceeding EUR [570-590] million in 2016 and EUR [520-550] million in 2017), to strengthen its capital base (e.g. by voluntary liability management subject to the Commission's approval), to carry out a prudent risk management and not pay dividends or make other payments on instruments, such as hybrid capital instruments, that depend on profitability ([23]).

(33) Furthermore, OpCo's balance sheet total will not exceed EUR [100-110] billion in 2016 and EUR [90-100] billion in 2017 ([24]). As regards ship financing, OpCo will reduce further those activities and restrict its new business in that area to EUR [1-2] billion. ([25]) Germany is, moreover, committed to continue to comply with some of the commitments annexed to the 2011 decision, such as OpCo not pursuing aircraft financing activities ([26]), not engaging in external growth by acquiring control over other companies ([27]), not carrying out dedicated proprietary trading ([28]), and not advertising the grant of State aid or the resulting advantages in comparison with competitors ([29]).

(34) Finally, Germany committed that OpCo would comply with certain liquidity benchmarks ([30]) and with restrictions regarding the remuneration of OpCo's employees and members of its boards and other bodies. Therefore, the total remuneration of any of those individuals will not exceed 15 times the national average salary in Germany or 10 times the average salary of HSH Nordbank (before the split) ([31]).

2.4. **Grounds for initiating the procedure**

(35) As mentioned in recitals 2 and 15, the ceiling amount of the guarantee was reduced to EUR 7 billion in 2011 but had to be re-increased back to the initial level of EUR 10 billion in June 2013 due to a deterioration of the shipping market since 2011 (see recitals 16 and 17).

([17]) See point 5.1 of the commitment catalogue.
([18]) See point 5.4 of the commitment catalogue.
([19]) See point 5.7 of the commitment catalogue.
([20]) See point 5.8 of the commitment catalogue.
([21]) See point 5.9 of the commitment catalogue.
([22]) See point 6 of the commitment catalogue.
([23]) See point 6 (a) to (e) of the commitment catalogue.
([24]) See point 7.1of the commitment catalogue.
([25]) See point 7.5 of the commitment catalogue.
([26]) See point 7.2 of the commitment catalogue.
([27]) See point 8 of the commitment catalogue.
([28]) See point 10 of the commitment catalogue.
([29]) See point 12 of the commitment catalogue.
([30]) See point 11 of the commitment catalogue.
([31]) See point 14.2 of the commitment catalogue.

(36) Germany notified the re-increase. It took the position that the guarantee constituted aid but doubted that re-instating a ceiling amount of EUR 10 billion was to be considered new aid since exactly the same upper threshold had been already approved in the 2011 decision ([32]). It furthermore argued that, even if the Commission were to consider the re-increase to be new aid, it was already found compatible under the 2011 decision ([33]).

(37) However, the Commission decided that re-increase was new aid in the Opening decision. First, the increase of the guarantee was granted by the Finanzfonds, owned by Hamburg and Schleswig-Holstein, thus stemming from State resources and supporting an internationally active bank, thereby affecting competition in the banking sector and having an impact on intra-Union trade ([34]). Since the guarantee at such conditions would not have been provided by a private investor, it gave HSH an advantage constituting State aid within the meaning of Article 107(1) TFEU ([35]).

(38) Secondly, although Germany took the position that the re-increase could not be considered as new aid since the ceiling amount EUR 10 billion had already been approved by the 2011 decision, the Commission explained in the Opening decision that the cancellation of a guarantee is of a binding character and that any re-instatement had to be considered as a new agreement between guarantor and the guarantee holder, based on a new economic assessment of the risk factors that may have changed over time. Since an increase of the ceiling amount of the guarantee was not provided for in the terms and conditions of the guarantee approved by the 2011 decision, it required a change of the previous terms and conditions. Consequently, the Commission decided that the increase was the granting of a new guarantee ([36]).

(39) Regarding the temporary compatibility of the aid, the Commission based its assessment in the Opening decision on Article 107(3)(b) TFEU according to which State aid may be considered to be compatible with the internal market where it is intended to 'remedy a serious disturbance in the economy of a Member State'. In view of the still fragile situation of the financial markets, the Commission acknowledged that a breakdown of HSH could directly affect the financial markets and thus the entire economy of Germany ([37]). As to the principles applicable to State aid for financial institutions the Commission referred to point 15 of the 2008 Banking Communication ([38]), that at the time of the Opening decision had been further elaborated in the Recapitalisation Communication ([39]) and in the 2010 and 2011 Prolongation Communications ([40]).

(40) As mentioned, Germany claimed in 2013 that, even if the Commission were to consider the increase of the guarantee ceiling to be new aid, it had already been found compatible under the 2011 decision so that the Commission would now be bound by that assessment and could not come to a different conclusion ([41]).

(41) The Commission explained in the Opening decision that, although it had indeed decided in 2011 that the EUR 10 billion ceiling amount was compatible with the internal market, that assessment was based on the Commission's evaluation of the guarantee as notified by Germany on 30 April 2009 and in light of the economic situation at the moment it adopted the 2011 decision and of the financial projections that HSH presented as basis for the examination in that decision. Thus, the restructuring plan at that time assumed that HSH would pay guarantee fees for only a EUR 7 billion guarantee ([42]).

(42) The Commission also noted in its Opening decision that the factors relevant for the assessment of the compatibility of the new aid were also relevant for the previous assessment but that they had to be examined in their current form. Against that background, in particular the assessment of HSH's viability had to take account of the prevailing economic situation in order to decide on the compatibility of the aid ([43]).

([32]) See Opening decision, recital 30.
([33]) See Opening decision, recital 31.
([34]) See Opening decision, recitals 38 and 39.
([35]) See Opening decision, recital 40.
([36]) See Opening decision, recital 41.
([37]) See Opening decision, recital 45.
([38]) Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8).
([39]) Commission Communication on the Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2).
([40]) Commission Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 329, 7.12.2010, p. 7) and Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 356, 6.12.2011, p. 7).
([41]) See Opening decision, recital 47.
([42]) See Opening decision, recital 48.
([43]) See Opening decision, recital 49.

(43) In that context, the Commission noted that the economic situation in the shipping sector — HSH's key activity and therefore already identified as problematic for the bank's viability in the 2011 decision — had further deteriorated in the meantime. Thus, the shipping crisis had proven to be longer and deeper than expected, affected the creditworthiness of ship financing in general and resulted in an increase of risk-weighted assets held by HSH ([44]).

(44) The Commission also noted in the Opening decision that the increase of the guarantee would result in higher guarantee fee payments of approximately EUR 1 billion and that those additional costs would significantly affect HSH's future profitability ([45]).

(45) Although the additional guarantee fees were incorporated in the business plan submitted with the notification of the re-increase of the guarantee in 2013, the Commission doubted the robustness of the assumptions on which the business plan was based and also noted that an updated stress scenario was missing. In view of HSH's failure to achieve the base case financial projections of the 2011 restructuring plan and to develop new business to the extent expected, the Commission questioned whether its business strategy needed to be adjusted and whether alternative actions should be taken to restore the bank's long-term viability ([46]).

(46) For those reasons the Commission expressed doubts that HSH would return to viability as assumed in the 2011 decision and asked for further information corroborating the assumptions of the business plan and the submitted outlook for the shipping markets as well as for evidence that the additional guarantee fees would not overstretch the bank's financial capacities even in a stress scenario ([47]).

(47) The Commission, however, did not express doubts in the Opening decision regarding burden-sharing or about the competition measures approved by the 2011 decision and stated that, since the new aid stayed within the boundaries of the measure approved in 2011, those measures were still adequate at that stage ([48]). In view of the necessity of the guarantee increase and the fact that remuneration was considered appropriate, the Commission concluded that the aid was temporarily compatible with the internal market ([49]).

3. **COMMENTS FROM GERMANY**

(48) Germany in its comments on the Opening decision ([50]) repeated, first, the initial position that the re-increase of the guarantee was no new aid measure since the re-increase did not exceed the ceiling of EUR 10 billion approved by the 2011 decision. As such, that position was not changed by the facts that the reduction had a binding effect or that the guarantee contract did not provide for a re-increase and had to be considered as a new agreement. In Germany's view, the economic effect of the re-increase on the situation of the *Länder* as guarantors is decisive, and their situation did not change as a consequence of the re-increase, in particular because there was no significantly increased probability of use of the re-increased guarantee tranche. Moreover, the re-increase was to a large extent congruent with the initial, full guarantee which the Commission had already analysed in the context of the 2011 decision, not only on the basis of a base case but also on the basis of a worst-case scenario ([51]).

(49) Secondly, Germany confirmed its earlier view that the re-increase, even if qualified as new aid, was covered by the reasons for the approval in 2011 as the Commission noted in the Opening decision when stating that it had no doubts — at that stage — that the burden-sharing and competition measures that were considered as appropriate and sufficient in the 2011 decision were still adequate in view of the new aid staying within the boundaries of the measures approved in the 2011 decision ([52]). According to Germany, the Commission is bound by the reasons it had given for approving the aid in the 2011 decision.

([44]) See Opening decision, recital 50.
([45]) See Opening decision, recital 52.
([46]) See Opening decision, recitals 53 and 54.
([47]) See Opening decision, recital 56.
([48]) See Opening decision, recital 57.
([49]) See Opening decision, recital 63.
([50]) Germany submitted the comments — reflecting the joint position of Germany, Schleswig-Holstein, Hamburg and HSH — by letter of 30 September 2013.
([51]) See for example recital 61 of the 2011 decision.
([52]) See Opening decision, recital 57.

(50) Thirdly, Germany submitted that the re-increase of the guarantee ceiling supported the purpose of restoring HSH's long-term viability and, furthermore, was in line with the aims of the restructuring plan approved in 2011. In that context, Germany stated that there were no reasons to doubt the long-term viability of the bank and the sustainability of its business model. It contended that the deviations from the business plan that occurred in the meantime did not justify other conclusions. The delay of the partial guarantee cancellations by 2 to 3 years would ensure a more sustainable and less risky business model, in view of the continuing shipping crisis and having regard to supervisory requirements. The higher fee payments the bank must pay as a consequence of the guarantee re-increase would be sustainable for it given that it has a sufficient capital base and in light of the other measures included in the restructuring plan approved by the 2011 decision.

(51) Finally, Germany noted the need for a re-increased guarantee was caused by exogenous factors such as the continuing financial crisis, the increased regulatory requirements for financial institutions and the change to the accounting standard International Financial Accounting Standards ('IFRS') for the calculation of the capital quotas.

(52) After making those comments, Germany continued to work closely with the Commission and submitted several updated restructuring plans. The first was supplied in December 2013, a revised restructuring plan was provided with more prudent assumptions in April 2014 and a further update of the business planning was sent in April 2015. Moreover, when those plans did not assuage the Commission's doubts as to their ability to restore HSH's viability, the German authorities sought other solutions. Those efforts subsequently resulted in the principal outline of the 2016 measures which Germany agreed with the Commission in October 2015.

(53) Consequently, on 21 March 2016, Germany re-notified the 2013 re-increase of the guarantee as State aid for the sale or, if a sale fails, winding down of HSH.

4. **ASSESSMENT OF THE MEASURES**

(54) With regard to the 2013 measure, i.e. the re-increase of the guarantee from EUR 7 billion to EUR 10 billion which had been approved temporarily in the Opening decision, the Commission has already decided that that measure constituted State aid ([53]). Although Germany, in its comments on the Opening decision (see recital 49), took the view that the re-increase did not constitute new aid — and, even if it did, was covered by the reasons for the approval in 2011 — it did not expand on those positions nor did it submit evidence in support of them. Finally, by re-notifying the re-increase 'as State aid in the meaning of Article 107(1) TFEU' ([54]) to be used for the sale or winding down of HSH, Germany confirmed the assessment of the Commission. As a consequence, the Commission confirms in the present Decision its finding in the Opening decision as to the existence of State aid in that measure and it does so for the reasons set out in that decision and without any reassessment.

(55) However, the Commission has to assess whether there is aid contained in the 2016 measures ([55]).

(56) Finally, the Commission has to assess whether the aid measures in question — the 2013 measure and the 2016 measures (if they contain aid) — can be considered compatible with the internal market.

4.1. **Existence of aid in the 2016 measures**

(57) The Commission observes that, according to the German authorities, no additional State aid will be granted as part of the 2016 measures.

(58) According to Article 107(1) TFEU, State aid means 'any aid granted by a Member State or through State resources in any form whatsoever which distorts, or threatens to distort, competition by favouring certain undertakings, in so far as it affects trade between Member States'. A measure constitutes State aid within the meaning of that provision if all of the following conditions are met: (a) the measure must be imputable to the State and financed through State resources; (b) it must confer an advantage on its recipient; (c) that advantage must be selective; and (d) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

([53]) See recitals 37 and 38.
([54]) Letter submitted with the notification by Germany on 21 March 2016.
([55]) See section 2.2.2.

(59) Regarding State resources, the 2016 measure 1 contains both a subordination clause and a partial deferral mechanism for the guarantee fee obligations towards the public owners. They were included in order to minimise the insolvency risk as regards HoldCo. Those provisions relate to obligations that are payable to the public owners as remuneration and, if the 2016 measure 1 conferred an advantage on HSH, those elements might entail a loss of State resources.

(60) Therefore, the Commission considers that the two 2016 measures involve State resources, the 2016 measure 1 through the subordination agreement and the partial deferral mechanism of fees due as remuneration for the guarantee under the 2011 decision and the 2016 measure 2 through the money paid by the *Länder* to OpCo in return for the transferred assets.

(61) The 2016 measure 2, the purchase of assets by the *Länder*, is a measure undertaken by the State. The 2016 measure 1, the modification of the fee payment structure, is imputable to the public owners of Finanzfonds and thereby to the State. That imputability is demonstrated through the fact that that modification is part of a larger package of measures that the *Länder* were actively involved in putting together.

(62) The 2016 measures are in favour of HSH alone. They are hence selective. They have the potential to distort competition by preventing the normal outcome of market forces. They affect trade between Member States given the liberalised nature of financial services in the Union.

(63) In order to determine the aid nature of the 2016 measures, the Commission therefore has to assess the question whether HSH is given an additional advantage by the 2016 measures extending beyond the advantage provided to it already by the 2013 measure.

(64) Before the question of additional advantage in the 2016 measures can be assessed, the Commission needs to recall the functioning of the guarantee to be in a position to assess the impact that the implementation of the 2016 measures as proposed will have on the working of the guarantee.

4.1.1. *Mechanics of the guarantee and impact of 2016 measures*

(65) The second-loss guarantee as approved in the 2011 decision takes the form of a synthetic securitisation. That means that the entire portfolio under guarantee is artificially split into three tranches:

(1) the junior tranche or first-loss piece of EUR 3,2 billion which is fully covered by the bank and has already been written off;

(2) the mezzanine tranche or second-loss piece of EUR 10 billion which is guaranteed by the State (EUR 7 billion outstanding from 2011 and an additional EUR 3 billion temporarily approved in the Opening decision); and

(3) the senior tranche.

(66) The presence of the guarantee has two main groups of effects, namely, effects on accounting under the IFRS and effects on the capital requirements under regulatory and prudential rules as applied by the supervisor.

Accounting effects

(67) In the first instance, the guarantee compensates overall losses taken on the guaranteed portfolio above EUR 3,2 billion and below EUR 13,2 billion ([56]).

(68) For as long as the guaranteed assets are still on the balance sheet, impairments and provisions taken on those assets according to the IFRS will be offset by a compensation item in the same amount. Only when assets are finally settled and disappear from the balance sheet crystallising the resulting losses are the compensation claims under the guarantee actually settled in cash.

([56]) Losses are compensated in their entirety after the first loss piece of EUR 3,2 billion by the bank has been fully used up and up to a ceiling amount of EUR 10 billion. In effect, every euro lost on the guaranteed portfolio between EUR 3,2 billion plus EUR 1 of losses and EUR 13,2 billion of losses is paid back to the bank by the guarantee provider.

(69) Those different types of compensation claims under the guarantee lead to different measures for the guarantee usage:

(1) the amount of guarantee actually used currently (the 'actually used amount') corresponds to the amount of settled losses on the guaranteed portfolio at a given time. At the end of 2015, EUR [1,2-2,0] billion of losses are actually settled. It is known that that amount will rise by EUR [2-3] billion in 2016 based on claims that are currently in the process of settlement;

(2) conversely, the unused amount of the guarantee (the 'unused amount') is the amount still available for further losses, in this case EUR [8,2-10,0] billion (EUR 10 billion guarantee overall minus the difference between EUR [3,2-5,0] billion of settled and known losses and EUR 3,2 billion of first-loss piece);

(3) the total amount of guarantee used (the 'total used amount') refers to the amount of guarantee that will have been paid out once the entire portfolio originally under guarantee has been worked out. The total amount used cannot be known yet;

(4) the best approximation for the total used amount today is the virtual use of the guarantee (the 'virtual use') calculated as the actual amount used plus provisioning under the IFRS on the portfolio under guarantee. The virtual use is currently EUR [6-8] billion (EUR [9,2-11,2] billion of actual amount used plus provisioning minus EUR 3,2 billion of first-loss piece). The bank also calculates the estimated total used amount (the 'estimated total used amount').

(70) There are two components of fees to be paid for the guarantee: the base premium of 4,00 % (the 'base premium') and the additional premium of 3,85 % (the 'additional premium'). The calculation base for the base premium is the overall amount of guarantee outstanding, EUR 10 billion. The calculation base for the additional premium is the total amount used which cannot yet be known ([57]).

(71) Under the IFRS, fees paid on an outstanding guarantee are interpreted as insurance premiums and result in a simple charge in the profit and loss account.

(72) However, when it becomes likely that the guarantee is going to be used or if the actually used amount is greater than zero, fee payments on that part of the guarantee become foreseeable. Under the IFRS, such charges resemble liabilities (the benefit has been received but needs to be repaid) and the repayment needs to be provisioned. Under the IFRS, the corresponding provisioning levels must increase when the estimated total used amount increases. Therefore, any additional use of the guarantee leads to a rise in the estimated total used amount, to correspondingly larger fee payments in the future and in turn to a rise in required provisions.

(73) The additional premium is subject to a deferral mechanism, the *Besserungsschein*, which is effective at a consolidated capital level for HSH (HoldCo + OpCo) of 10 % CET1. That deferral mechanism allows for the deferral in full of payments due for a period of up to the year [2030-2040]. Moreover, that deferral mechanism includes provisions made for future payments that are themselves included in the *Besserungsschein*. This implies that such provisions can be released as a buffer against losses if those losses would lead to a reduction of the CET1 ratio to below 10 % ([58]).

Prudential effects

(74) Secondly, according to the supervisory formula in Basel II (the 'supervisory formula') applicable to synthetic securitisation structures such as the second-loss guarantee, the presence of the guarantee reduces to 20 % the risk weight to be applied to the senior tranche when calculating risk-weighted assets ('RWA') ([59]).

(75) According to regulatory rules and taking into account supervisory discretion in their application, two limits must be kept in mind for the guarantee to retain that effect. The first limit depends on the prudential calculation of expected losses (in a baseline scenario) while the second limit depends on unexpected losses (additional losses in a worse-case scenario), in the remaining portfolio under guarantee. Levels of expected and unexpected losses in the remaining portfolio have to be covered to a certain extent by the unused amount of the guarantee. Whether

([57]) See recitals 24 and 25.
([58]) See recital 25.
([59]) RWA is calculated by the supervisor in order to determine the absolute amount of capital that a bank must hold.

one or both of those limits is breached therefore depends on the available unused amount of the guarantee which is significantly affected by the amount of settled losses.

(76) If the first limit is breached, the application of the supervisory formula will result in a rise in RWA levels due to the senior tranche, with such an increase occurring in proportion to the extent of the shortfall in coverage from its minimum level of 20 %. If the second limit is breached, the supervisory formula will no longer be applicable at all. In that case, the RWA levels on the senior tranche will immediately increase from the minimum 20 % to the level which would be applicable in the absence of a guarantee (the 'cliff-effect').

4.1.2. *Advantage in the 2016 measure 1*

(77) According to the notification, HSH will be split into HoldCo and OpCo. The guarantee fees according to the guarantee remuneration as approved in the 2011 decision remain unchanged. However, their payment will be split in the following way:

(1) OpCo continues to pay 2,20 % on the currently unused portion of the guarantee;

(2) HoldCo takes over all other guarantee fee payments:

(1) 1,80 % on the overall outstanding guarantee amount;

(2) 2,20 % on the already used portion of the guarantee;

(3) 3,85 % on the ultimately used part of the guarantee subject to the *Besserungsschein*.

(78) That split into OpCo and HoldCo implies that the accounting effect from the guarantee compensation will continue to accrue at the level of OpCo while all provisioning requirements under the IFRS arising from the treatment of fee payments on the used part of the guarantee will now occur in HoldCo. However, the Commission stresses that at the consolidated level of the bank (HoldCo + OpCo) there is no change in the structure of the guarantee or its effects, so the split itself provides no additional advantage to HSH.

(79) According to the commitments provided by Germany, HoldCo will not operate any business itself and therefore will not have any income streams other than those derived from its shareholding in OpCo. HoldCo will however receive EUR 260 million of liquidity from OpCo, EUR 50 million for operational expenses during the sales period and EUR 210 million to service guarantee fee payments when they fall due.

(80) From the split of obligations as outlined above, the Commission points out that the amount of fees due during the sales process payable by HoldCo at the year end of 2016 and 2017 respectively will depend on:

(1) the overall amount of guarantee outstanding (calculation basis for 1,80 % guarantee fee, the 'fee component 1');

(2) the actually used amount of guarantee in 2016 and 2017 (calculation basis for the part of the 2,20 % guarantee fee taken over by HoldCo, the 'fee component 2'); and

(3) the total used amount of guarantee (calculation basis for the 3,85 % guarantee fee which is subject to the *Besserungsschein*, the 'fee component 3').

Base premium component of 1,80 %

(81) Regarding fee component 1, the overall level of guarantee outstanding is currently EUR 10 billion, including the 2013 measure. That level cannot go up further since EUR 10 billion is a fixed ceiling. Equally, that level is unlikely to go down during the sales process.

(82) Because that level of EUR 10 billion serves as calculation basis for fee component 1 of 1,80 %, the Commission considers that the annual fee payment obligation under fee component 1 will be EUR 180 million.

Base premium component of 2,20 %

(83) Regarding fee component 2, the Commission recalls that according to the most recent available estimates the amount of settled losses on the guaranteed portfolio will rise to roughly EUR [3,2-5,0] billion in 2016, that is EUR [0-1,8] billion more than the first-loss tranche of EUR 3,2 billion.

(84) That amount is going to increase further by the amount of losses taken by HSH through the 2016 measure 2, i.e. the transfer of up to EUR 6,2 billion EAD of assets under guarantee to the public owners. According to the commitments, the transfer values of the assets will be determined according to the list appended to the notification which corresponds to the results of the market price valuation of the Commission's experts.

(85) The Commission recalls that according to the commitments the bank is aiming to transfer only EUR 5 billion EAD of assets by the end of June 2016. Until the transfer date, the guarantee remains mainly unused and the related fee payments will therefore be serviced by OpCo.

(86) Based on the list of transfer values (see Annex II to the present decision) and depending on how the guarantee use is going to be optimised, possible additional losses on the transfer of a portfolio of EUR 5 billion EAD chosen out of the list of EUR [8-10] billion EAD of available assets and settled under the guarantee are likely to be in the order of EUR [1-4] billion to EUR [1-4] billion.

(87) Therefore, the Commission considers that the fee payment obligation under fee component 2 for 6 months in 2016 will likely correspond to between EUR [25-35] million and EUR [25-35] million.

Additional premium of 3,85 %

(88) Regarding fee component 3, the Commission recalls that the payment of 3,85 % is subject to the *Besserungsschein* effective at a consolidated capital level for HSH (HoldCo + OpCo) of 10 % CET1. According to the latest available numbers, HSH is already at the lower threshold of 10 % CET1 ratio with roughly EUR [700-800] million of provisioning remaining under the *Besserungsschein*.

(89) Additional losses of between EUR [1-4] billion and EUR [1-4] billion on the transfer of EUR 5 billion EAD of assets from the bank to the *Länder* will lead to an increase in the expected total used amount of the guarantee and, correspondingly, to further requirements for provisioning under the IFRS for both fee components 2 and 3.

(90) According to the Commission's assessment, the additional provisioning need arising under the IFRS for fee component 2 is likely to correspond to roughly between EUR [700-900] million and EUR [700-900] million.

(91) According to the restructuring plan provided by the bank, those additional provisions are not likely to be financed through the net income of the bank and are therefore likely to lead to a claim on the *Besserungsschein* at the consolidated level for roughly the same amount. However, any compensation from the *Besserungsschein* is limited to the amount of the remaining buffer, i.e. EUR [700-800] million. An additional charge of EUR [700-900] million to EUR [700-900] million would therefore cause the CET1 ratio at the consolidated level to fall below 10 %.

(92) Provisioning for fee component 3 is itself subject to the *Besserungsschein* (see recital 73). Therefore, given that after provisioning for fee component 2 the entire provision buffer under the *Besserungsschein* would be used up and the CET1 ratio would already have fallen below 10 %, the additional provisioning for fee component 3 would have to be deferred as well.

(93) Any transfer of assets during the sales period beyond the amount of EUR 5 billion, as is allowed under the commitments provided by Germany, is likely to lead to further losses. Such losses will only further decrease the CET1 ratio at the consolidated level, reducing further the probability that the CET1 ratio will rise above 10 %. Only in such a case would payments or provisioning for fee component 3 be required.

(94) Therefore, the Commission considers it likely that no payment or provisioning under fee component 3 will be required during the sales process. The Commission further recalls that upon successful sale, the *Länder* have the right under the guarantee contract to waive the payment obligation of the additional premium of 3,85 % ([60]).

([60]) That right was already established in the original guarantee contract put in place in 2009.

Fee payments under the 2016 measure 1

(95) Therefore, based on the information provided including the fact that the 2016 measure 2, the transfer of assets, is going to be implemented at the end of June 2016, the Commission concludes that fee payment obligations by HoldCo for 2016 are likely to be between EUR [205-210] million and EUR [210-220] million. The Commission takes positive note of the fact that that range is broadly comparable to the EUR 210 million of liquidity provided to HoldCo by OpCo.

(96) In addition, the 2,20 % of fees on the unused amount of the guarantee is being paid by OpCo without any additional deferral mechanism in place covering in particular the full payment amount during the first 6 months of 2016 before the 2016 measure 2 is implemented.

(97) Therefore, based on the available information, the guarantee fee payments which will be received by the *Länder* for 2016 after implementation of the 2016 measures will in all likelihood not be lower than EUR [385-400] million (EUR [175-190] million OpCo + EUR 210 million HoldCo). This implies an amount of no greater than EUR [0-15] million of fee payments in 2016 which may be deferred to the next payment date. Any such deferral would be remunerated at a 10 % annual interest rate.

Fee payments 2017

(98) Nonetheless, the Commission notes that the level of fee payments due in 2017 at the level of HoldCo may be higher given the possibility of transferring further assets under guarantee to the public owners and the fact that HoldCo will have to pay the 2,20 % guarantee premium during the entire year.

(99) As pointed out before, HoldCo will not have any income so that it seems likely that if the sale of OpCo occurs after the fees for 2017 are payable HoldCo will not be in a position to honour those 2017 fee payment obligations when they fall due. In such a case, according to the commitments provided by Germany, the fee payments will be deferred to the next payment date, compounded by an annual interest rate of 10 %.

(100) The Commission recalls that according to the commitments provided by Germany, the ultimate date for a sale of HSH is 28 February 2018 and that the proceeds flowing to HoldCo from a successful sale will first and foremost be used to pay the fee payment obligations arising under guarantee.

(101) Therefore, any fee payment obligations which cannot be honoured at the end of 2017 will be deferred only if OpCo has not yet been sold by that date. Even in such a case the deferral would be for no longer than 2 months, until OpCo is sold or goes into orderly wind-down or resolution. Such a possible deferral will be remunerated at 10 % annual interest rate.

Conclusion

(102) In conclusion, the Commission notes that there is some likelihood that the fee payments of EUR 400 million which would be due under the current guarantee agreement at the end of 2016 (1,80 % + 2,20 % on EUR 10 billion guarantee outstanding) will not be paid in full, although with no more than EUR [0-15] million being likely to be deferred. Furthermore, while fee payments due in 2017 may have to be deferred in full, any such deferral will be limited to at most 2 months in view of the sales deadline of 28 February 2018.

(103) Under the commitments, any deferrals will be remunerated with an annualised interest rate of 10 %. The most liquid subordinated bonds of HSH ([61]) have traded at annualised yields of between 7,5 % and 8 % in the wake of the agreement reached in October 2015 and they currently trade at about 10,6 %. Those two issuances mature during the sales process in February 2017 with EUR 928 million of outstanding notional to be repaid. They provide an indication of a market price for risk for a capital-like exposure to HSH, and therefore a conservative estimation of what a market level remuneration for a possible fee deferral would be.

(104) Taking into account the trading range of the yields on those subordinate issuances of HSH and the fact that any deferral in 2016 is likely to be limited to no more than EUR [0-15] million, the Commission considers a remuneration of annualised 10 % for the payment risk of EUR [0-15] million deferred for 1 year to be in line with market conditions.

([61]) ISINs DE000HSH2H15 and DE000HSH2H23.

(105) Regarding any possible deferral resulting from obligations due in 2017, the Commission observes firstly that it would occur only if the sale does not take place before the end of 2017. Secondly, while the amount of a possible deferral is likely to be comparable to the outstanding amount of each of the two subordinate issuances, such a deferral will be limited to at most 2 months given the final sales deadline, thereby significantly limiting the risk taken by deferring the charges. Given the significantly shorter maturity of any deferral relating to 2017 compared to the maturity of the subordinate issuances and the correspondingly lower risk, the Commission considers a remuneration of annualised 10 % to be in line with market conditions.

(106) Taken together, the Commission concludes that because any possible deferral of part of the guarantee fee streams due to the public owners is (a) likely to be very small, if any, in 2016; (b) limited in time (should it occur at all, depending on the actual sales date) for fees due in 2017; and (c) in any case remunerated at an interest rate in line with market conditions, there is no additional advantage to HSH resulting from the implementation of the 2016 measure 1 as a result of the risks present from (a) and (b).

4.1.3. *Advantage in the 2016 measure 2*

(107) According to the commitments provided by Germany, HSH is going to transfer a portfolio of up to EUR 6,2 billion in EAD of assets currently under the guarantee to the *Länder*. That transfer can happen in multiple tranches during the duration of the sales process in 2016 and 2017.

(108) In order to define the portfolio to be transferred, Germany and the bank have identified EUR [8-10] billion EAD of assets under the guarantee as eligible for transfer to the public owners. The Commission notes that basically all those assets are non-performing loans, all of which are in the shipping segment which has been one of the main drivers for the difficulties of the bank ([62]).

(109) Because there is currently no market buyer available for those assets, the Commission considers that such a transfer to the public owners corresponds to an impaired asset measure. In line with first principles and as recalled in recent Commission decisions regarding non-performing loans in Italy and Hungary ([63]), such an asset transfer can only be considered free of State aid if the transaction happens at market terms.

(110) In particular, the Commission has clarified that because of the nature of the portfolio and the absence of a market buyer it bases its valuation on the principles of the market value calculation specified in the Impaired Asset Communication ([64]). Therefore, the main aim of the valuation is not to calculate a fair value but a market value which — if used as a transfer price in a transaction with a public authority — allows the Commission to conclude that a transaction at that price does not provide an advantage to the bank and thereby excludes the presence of State aid. The valuation therefore has to be particularly prudent and conservative.

(111) The Commission has employed independent valuation experts to assist it with the determination of the market values of those assets.

Market value assessment

(112) After a first data request by the Commission and its experts in mid-December 2015, the bank made available information on 18 January 2016. Multiple contacts, meetings, discussions and data deliveries occurred between 20 January and 19 March 2016.

(113) The portfolio consists of about […] loan facilities, collateralised by […] ships and some other assets. In order to avoid cross-collateralisation issues, the bank has also provided the so-called formation level which is the lowest level at which collateral can be identified as collateral for exactly one line. There are […] formation lines in the portfolio.

([62]) See section 2.1.
([63]) State aid cases SA.43390 (2016/N) and SA.38843 (2015/N), decisions to be published.
([64]) Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1).

(114) In line with the prudent and conservative valuation principles, and based on the data made available by the bank, the Commission's experts have made a number of assumptions. For example where no data was made available to the Commission's experts, such as on collaterals other than ships, those collaterals were conservatively valued at zero and excluded from the calculation. In addition, in the absence of data on the precise order of different creditors' claims to cash flows resulting from the collaterals, all claims on the shipping collaterals not arising from claims under the guarantee were considered as senior and they were subtracted from the collateral value. Finally no benefit was taken into account where the bank had recently restructured loans.

(115) The model used by the Commission's experts is a discounted cash flow model. All operating cash flows have been calibrated to observable market data such as existing shipping contracts. Liquidation values for ships have been discounted from recent assessors' valuations to take into account sales costs and time to sale as well as to correct statistically observable biases in specific assessors' estimates. The economic lifetime of ships has been adjusted downwards to observable data. All cash flows have been compared to available market benchmarks from third party providers and have been capped at those benchmarks. Growth rates in cash flows and liquidation values have been calculated from those market benchmarks but capped at a five-year horizon.

(116) While the valuation cut-off date agreed with the bank was 31 December 2015, most data provided by it dated from 30 September 2015. The Commission's experts therefore subtracted from the valuation all cash flows arising in the fourth quarter of 2015 according to the applicable projections.

(117) Based on the Commission's experts' valuation, the Commission comes to the conclusion that the market value of the entire portfolio of EUR [8-10] billion EAD is [33,4-56,8] % of EAD. The range of portfolios of EUR 6,2 billion EAD that can be chosen from those assets has market values between 33,4 % and 56,8 %. The valuation has been made available at line-by-line formation level to Germany and the bank.

Conclusion

(118) According to the commitments, bank and public owners will use that line-by-line valuation which was appended to the notification and to the present decision (Annex II) in order to determine the applicable transfer value for a given portfolio. The size of the chosen portfolio including all tranches cannot be larger in sum than EUR 6,2 billion EAD. According to the commitments, any transfer after 31 August 2016 will require a revaluation of the chosen assets by the Commission in order to ensure that the market value is adapted taking into account the evolution of the assets and the market.

(119) Finally, the Commission stresses that selling loans to the *Länder* at those levels will generate additional losses in the bank which will have to be absorbed through profit and loss and to be covered through the available capital position of the bank. The Commission further recalls that any such sale could result in the negative effect on the functioning of the guarantee described in recitals 75 and 76 and would be subject to the discretion of the supervisor. All those effects could further deplete the capital position of the bank. However, the Commission stresses that under no circumstances will further capital aid be provided to the bank.

(120) On the basis of the commitments as assessed, the Commission is satisfied that the 2016 measure 2, the transfer of assets to the public owners, will be implemented at market value and will correspondingly not lead to an advantage. Resulting losses will be absorbed by the current capital position of the bank without any further aid.

4.1.4. *Conclusion*

(121) Based on the preceding assessment, the Commission concludes that the 2016 measures do not contain State aid in the meaning of Article 107(1) TFEU.

4.2. **Compatibility**

(122) As assessed by the Commission in the preceding section, the 2016 measures do not contain State aid.

(123) Regarding the 2013 measure, the Commission has declared it temporarily compatible in the Opening decision but has opened the formal investigation procedure due to doubts over the compatibility of the measure, in particular 'doubts that HSH will return to viability as assumed in the 2011 restructuring decision on the basis of the new business plan' ([65]).

(124) As the 2013 measure has been notified and declared temporarily compatible before the 2013 Banking Communication ([66]) became applicable, the Commission continues to base its assessment of the 2013 measure on Article 107(3)(b) TFEU, as explained in the 2011 Prolongation Communication and according to the general principles applicable for State aid granted to financial institutions set out in the 2008 Banking Communication, further elaborated in the Recapitalisation Communication and the Restructuring Communication ([67]) and subsequently amended by the 2010 Prolongation Communication and the 2011 Prolongation Communication.

4.2.1. *Assessment of the grounds for opening*

(125) Regarding its doubts on viability, the Commission noted in particular three factors in the Opening decision (see section 2.4 for a more comprehensive overview):

(1) the further deterioration in the economic situation in the shipping sector;

(2) the economic under-performance by the bank compared to the base case financial projections of the 2011 decision, also and in particular regarding the development of new business to the extent expected;

(3) the increase of the guarantee fee payments due to the higher guarantee amount.

(126) As mentioned in section 1, Germany sent the Commission a number of restructuring plans provided by the bank. However:

(1) the situation in the shipping sector has further deteriorated significantly since the Opening decision, with the Baltic Dry Shipping Index marking new all-time lows in February 2016, leading to even deeper and far-reaching losses on the remaining shipping portfolio held by HSH;

(2) in every year since the Opening decision, HSH has underperformed its own projections regarding new business volumes — which over various plans had already been significantly revised downwards — in particular in the corporate and the shipping segments;

(3) fee payments have continued to weigh heavily on HSH's profitability with greatly decreased likelihood of the possibility for a reduction in the overall guarantee amount during the lifetime of the guarantee.

(127) Therefore, the Commission cannot consider its doubts expressed in the Opening decision to be allayed by those restructuring plans.

4.2.2. *Change in the purpose of the aid*

(128) The Commission notes the fact that Germany has re-notified the 2013 measure as State aid to be used for the orderly wind-down of HSH Nordbank through either an aid-free sale or stopping new business and winding down. Based on that new purpose of the aid, the Commission deems it unnecessary to assess the restructuring plans received in more detail and does not draw any consequences from the fact that its doubts on the viability of the bank have not been allayed.

(129) Instead, the Commission will assess the compatibility of the aid based on section 2 of the Restructuring Communication and in particular the subsection 'Viability through sale of a bank' as well as on section 5 of the 2008 Banking Communication ([68]) 'Aid for the controlled winding up of financial institutions'.

([65]) See Opening decision, recital 56.
([66]) Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).
([67]) Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (*'Restructuring Communication'*) (OJ C 195, 19.8.2009, p. 9).
([68]) See recital 124 for a more detailed explanation as to why the 2008 Banking Communication is relevant in this case.

(130) According to section 2 of the Restructuring Communication, the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable and capable of absorbing the transfer of the ailing bank. The purchaser should demonstrate to the Commission that the integrated entity will be viable.

(131) According to section 5 of the 2008 Banking Communication, aid for the controlled wind-down of financial institutions needs to be assessed *mutatis mutandis* according to section 3 of the 2008 Banking Communication, in particular

(1) limitation of the aid to the minimum — private sector contribution; and

(2) avoidance of undue distortions of competition.

Those requirements are equivalent to the requirements under section 2 of the Restructuring Communication in case of a successful sale.

(132) Moreover, given that the orderly wind-down of the bank can be fulfilled by selling OpCo, the specific criteria set out in point 49 of the 2008 Banking Communication have to be fulfilled, namely 'in order to ensure that no aid is granted to the buyers of the financial institution or parts of it or to the entities sold, it is important that…:

(1) The sales process should be open and non-discriminatory,

(2) The sale should take place on market terms,

(3) The financial institution … should maximise the sales price …'.

Those requirements are equivalent to the requirements under section 2 of the Restructuring Communication regarding the sales process.

(133) According to point 50 of the 2008 Banking Communication, any new aid to either buyer or sold entity found according to the above criteria will lead to a separate assessment.

4.2.3. *Limitation of the aid to the minimum*

(134) Regarding the limitation of the aid to the minimum and the private sector contribution, the Commission refers to its assessment in recital 57 of the Opening decision where it found that the increase of the second-loss guarantee — while being new aid — stayed within the boundaries of what it had originally approved in the 2011 decision. The Commission concluded therefore that the remuneration approved in the 2011 decision continued to be appropriate for the new measure.

(135) In finding the measure temporarily compatible, the Commission considered further the presence of a one-time payment of EUR 275 million from the bank to the guarantee provider and the fact that the additional EUR 3 billion of guarantee could be considered as senior to the existing guarantee of EUR 7 billion. Those two additional elements allowed the Commission to find that the remuneration adequately takes into account the greater risk to the guarantee provider.

(136) The Commission maintains that assessment while pointing out at the same time that a large part of the guarantee fee structure was implemented in order to ensure sufficient claw-back of the aid amount. By ensuring that those amounts are effectively paid back to the guarantee provider, the new arrangement continues to ensure that the aid received by HSH during the crisis is limited to the minimum.

(137) Burden-sharing measures have been implemented as envisaged under the 2011 decision and the Commission reiterates its assessment from the Opening decision that it has no doubts that those measures are still adequate for the compatibility of the 2013 measure.

(138) On that basis, the Commission concludes that the aid is limited to the minimum and contains sufficient own contribution.

4.2.4. *Avoidance of undue distortions of competition*

(139) Regarding distortions of competition, the Commission takes into consideration that the aid provided serves to ensure that HSH is ultimately going to disappear from the market as a stand-alone entity, either (a) through a sale to a different entity;or (b) through stopping new business, thereby making the market share held by HSH available to other market participants.

(140) During the time of the sales process, the Commission considers that the business commitments provided by Germany serve to fulfil the conditions on minimising distortions of competition as is sought by section 3 of the 2008 Banking Communication, namely:

(1) business restrictions in the form of limiting shipping business to EUR [1-2] billion a year, limiting business with corporate clients to business with a relation to Germany and a commitment to not engage in proprietary trading;

(2) a further decrease in the overall size of the balance sheet to EUR [100-110] billion in 2016 and EUR [90-100] billion in 2017; and

(3) restrictions of conduct which is considered incompatible with receiving aid such as an advertisement ban, an acquisition ban and a cap on remuneration.

(141) The Commission takes positively into account also the fact that Germany commits that the name HSH Nordbank is going to disappear after a successful sale as well as the fact that a sale of HSH in parts or asset bundles to different parties is specifically allowed, as reflected in the commitments.

(142) In case the sales process fails because (a) there are no bidders; or (b) only bidders which do not qualify according to the commitments; or (c) the highest bid results in a negative price; or (d) the Commission's assessment of the viability of the joint entity is negative, Germany and HSH commit that the bank is going to stop new business and manages its assets with the view to wind them down ([69]).

(143) On that basis, the Commission considers that during the sales process as well as after and independent of its final outcome, the commitments provided by Germany ensure avoiding undue distortions of competition.

4.2.5. *The sales process*

(144) As assessed in detail in section 4.1, the 2016 measures will split HSH into a holding company HoldCo and an operating subsidiary OpCo with the latter either being sold by 28 February 2018 or stopping new business. Those measures do not involve new aid.

(145) According to section 2 of the Restructuring Communication and section 5 of the 2008 Banking Communication, there are requirements on the sales procedure in order to be acceptable to (a) achieve viability through the sale of the bank; and (b) contribute to the absence of aid to the buyer.

(146) Regarding the question of aid to the buyer, the Commission notes positively Germany's commitments to sell OpCo through an open, transparent and competitive tender sales procedure as well as at a positive price by 28 February 2018. Germany is going to provide a timeline with monitoring milestones to the Commission once the sales process has been launched. Germany has already included the latest possible dates for major milestones in the commitments.

(147) Regarding the question of whether a viable entity will result from the sales process, the Commission takes positive note of the following two commitments provided by Germany, namely that bidders participating in the sales process (a) should demonstrate the necessary financial resources and relevant expertise to run OpCo as a viable and active competitor; and (b) will be independent from the public sector. Landesbanken and publicly-owned Sparkassen (if bidding jointly with other bidders) are allowed to participate in the tender process.

(148) The Commission also notes positively a number of commitments by Germany aimed at improving the state of the business in OpCo, namely the implementation of further restructuring measures in the form of cost reductions (to EUR [570-590] million in 2016 and EUR [520-550] million in 2017), improvements in the liquidity and risk management of the bank as well as a general commitment to manage the bank's assets and liabilities in a sustainable way to maximise the chances of a successful sale at a maximal price within the constraints provided.

([69]) See point 5.9 of the commitment catalogue.

(149) The Commission stresses that a further Commission decision will be required once a final bid has been received in the sales process. Such a decision will assess (a) whether the joint entity is indeed viable or not; and (b) whether the final bid price is indeed positive, and the implementation of the sales process does not involve aid to either buyer or the sold entity ([70]). The Commission takes positive note of the commitment by Germany to submit the final bid for assessment and approval to the Commission.

(150) Regarding the required assessment of viability, the Commission notes that a mere change of ownership that did not involve a change in business model, for example through an IPO, would encounter the same doubts in terms of viability as have been raised by the Commission in the Opening decision and not subsequently allayed as assessed in the present decision in section 4.1.2.

(151) Based on those commitments and the aforementioned considerations, the Commission concludes that the requirements under point 49 of the 2008 Banking Communication as well as under points 17 and 18 of the Restructuring Communication are met.

4.2.6. *Monitoring*

(152) Finally, the Commission takes positive account of the commitment by Germany to subject the entire set of commitments to rigorous monitoring by a qualified and independent monitoring trustee.

5. **CONCLUSION**

(153) On the basis of the commitments provided and the preceding assessment, the Commission concludes that the 2013 measure, re-notified as aid for the orderly wind-down of HSH, can be considered as compatible with the rules of the internal market,

HAS ADOPTED THIS DECISION:

Article 1

The 2016 measures which Germany is planning to implement for HSH Nordbank do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

The 2013 measure, a re-increase in the second-loss guarantee provided by the Finanzfonds to HSH Nordbank, in the amount of EUR 3 billion constitutes State aid within the meaning of Article 107(1) TFEU and it is compatible with the internal market, in light of the commitments set out in Annex I of the present decision.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 2 May 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

([70]) The Commission stresses the fact that due to the entry into force of the Bank Resolution and Recovery Directive (Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190); 'BRRD'), should there be any new aid found in the sales process, any such new aid could only be provided in resolution and would be subject to a separate Commission decision.

ANNEX I

LIST OF COMMITMENTS IN STATE AID CASE SA.29338 HSH NORDBANK AG

Germany undertakes to implement the following commitments:

1. **[Restructuring phase and monitoring trustee]**

1.1. **[Restructuring phase]** The restructuring phase ends with the conclusion of the sale procedure. The following commitments apply during the restructuring phase, unless the specific wording of the commitment in question states otherwise.

1.2. **[Monitoring trustee]** During the restructuring phase, the full and proper implementation of all the commitments set out in this list will be continuously and thoroughly monitored and checked in detail by a suitably qualified monitoring trustee that is independent of HSH.

2. **[Holding company structure]**

2.1. **[Setting up the holding company]** HSH will be split into a holding company ('HoldCo') and a subsidiary to be sold ('OpCo').

2.2. **[Subsidiary]** OpCo will hold all the assets and liabilities of HSH, including the assets covered by the guarantee (unless they are sold to the *Länder* in accordance with point 4, the guarantee itself and the banking licence. In order to ensure the operation of HoldCo, OpCo will provide HoldCo with cash of EUR 50 million.

2.3. **[Holding company]** The asset side of HoldCo's balance sheet consists of the stake in OpCo, in addition to the cash referred to in points 2.2 and 3.3 HoldCo will hold at least 90 % of the shares in OpCo until the sale.

3. **[Obligations under the guarantee]**

3.1. **[Allocation of obligations under the guarantee]** The contract on the provision of a guarantee framework concluded between HSH Finanzfonds AöR and HSH on 2 June 2009 will be amended as follows:

As remuneration for the receipt of the capital relief effect, OpCo will pay a 2,2 % basic premium on the part of the guarantee that has not yet been drawn.

All other obligations of HSH under the guarantee provision contract described in the authorisation decision of 20 September 2011, C 29/2009 (ex N 264/2009), i.e.

(a) 2,2 % basic premium as remuneration on the drawn part of the guarantee;

(b) 1,8 % basic premium as claw-back payment; and

(c) 3,85 % additional premium, including the debtor warrant,

including all existing balance-sheet reserves relating thereto, will be transferred to HoldCo with effect from 1 January 2016.

3.2. **[Matching clause]** The transfer of the obligations under the guarantee to HoldCo has no effect on the total guarantee liabilities to be paid under the authorisation decision of 20 September 2011, C 29/2009 (ex N 264/2009).

(a) The rules in the guarantee provision contract of 2 June 2009 remain unchanged after the implementation of the Commission's conditions in the authorisation decision, subject to the changes resulting from the allocation of the premium obligations under point 3.1.

(b) The minimum common equity ratio of 10 % relevant to the debtor warrant will be calculated until the sale using the capitalisation of the whole group and, in the event of a successful sale, using the capitalisation of HoldCo. Should the sale procedure not be concluded successfully, the relevant ratio will continue to be calculated using the level of capitalisation of the whole group.

(c) In the event of the sale of shares in OpCo, the amount of the additional premium of 3,85 % taken over by HoldCo may, at the initiative of the public-sector owners, be reduced proportionally to their direct and indirect shareholding.

3.3. **[Performance of guarantee obligations]** The proceeds which HoldCo obtains from the sale of its shares in OpCo will be used primarily to satisfy the transferred premium obligations. In order to ensure that HoldCo is protected from insolvency, suitable measures will be agreed between HSH Finanzfonds AöR and HoldCo, specifically a qualified subordination of claims under the guarantee. If the sale procedure is not concluded successfully, the *Länder* will, as far as legally possible, reverse the effects of the subordination of claims and use the liquidation proceeds primarily to satisfy outstanding obligations under the guarantee.

Furthermore, OpCo will make a lump-sum payment of EUR 210 million to HoldCo in order to service the premium obligations assumed by HoldCo during the current sale procedure. The 2,2 % basic premium assumed by HoldCO as remuneration on the drawn part of the guarantee has to be paid from the moment the guarantee is invoked in particular as a result of the sale of assets according to point 4. The bank intends to sell assets according to point 4 not before the end of June 2016. Up to the point in time of such a sale, OpCo remains obliged to pay this 2,2 % basic premium. Should HoldCo not have sufficient cash at its disposal on a payment due date to fully service the outstanding premium payments, or should legal obstacles stand in the way of payment, in particular because of a breach of the capital maintenance requirements or the existing subordination of claims, or if that results in HoldCo becoming insolvent, then that part of the outstanding premium payments may be deferred until the next payment due date against a market rate of interest of 10 %.

4. **[Sale of assets to the *Länder* and on the market]**

4.1. **[Sale of assets]** HSH may sell assets of up to EUR 8,2 billion Exposure at Default (EAD) and settle the losses arising with HSH Finanzfonds AöR in accordance with the conditions in the existing guarantee agreement, of which up to EUR 6,2 billion EAD to the *Länder*. The bank intends to initially transfer in 2016 a portfolio of EUR 5 billion EAD to the *Länder*. The sale will take place at market value. This will not affect HSH's right to continue to sell assets on the market and settle in accordance with the conditions in the existing guarantee agreement.

4.2. **[Flexibility in the selection of the assets to be transferred]** In order to establish the purchase price of the selected assets, the *Länder* will use the valuation in the annex to this list of commitments. The *Länder* are free to determine the market price for parts of the selected assets on the basis of this valuation and to transfer the assets into their sphere, provided that the selected portfolio does not exceed EUR 6,2 billion EAD. During the sale period, the selected assets may be bought all together by the *Länder* but also individually or in lots. For transfers made after 31 August 2016, the Commission will update the valuation.

5. **[Sale]**

5.1. **[Sale procedure]** Subject to point 5.3, HoldCo will sell its shares in OpCo by 28 February 2018 ('sale deadline') through an open, non-discriminatory, competitive and transparent procedure ('sale procedure'). The sale deadline is observed by the signing of a sale contract.

5.2. **[Extension of the sale deadline]** The deadline referred to in point 5.1 may be extended by 6 months with the agreement of the Commission, if the technical implementation of the model is delayed because of circumstances over which the *Länder* have no direct influence.

5.3. **[Transitional period for *Länder* shareholdings]** The *Länder* are entitled to retain up to 25 % of the shares in OpCo through their direct and indirect holdings in HoldCo for up to four years from the completion of the sale.

5.4. **[Timetable and milestones for the sale procedure]** Before the start of a sale procedure, a timetable containing at least the following milestones will be submitted to the Commission:

(a) preparation of the procedure (no later than […] (*));

(b) submission of provisional bids (no later than […]);

(c) access to the data room (no later than […]);

(d) bidder selection and signing (no later than 28 February 2018).

(*) Confidential information.

5.5. **[Qualification of the buyer(s)]** The bidders taking part in the sale procedure must have the necessary financial resources and demonstrable industry-relevant expertise to manage OpCo as a profitable and active competitor.

5.6. **[Independence of the buyer(s)]** The buyer(s) of OpCo must be independent of HSH and the public sector. That will be the case if neither HSH nor the public sector is able to exercise control within the meaning of Article 3 of Council Regulation (EC) No 139/2004 ([1]) over any of the buyers at the time of sale. The term 'public sector' includes the Federal State, all *Länder* and municipalities and their public institutions as well as undertakings controlled by them. A sale to one or more *Landesbank(en)* is possible. Public savings banks (*öffentliche Sparkassen*) may take part — jointly with a minority shareholding — in a purchase through another buyer that is independent of HSH and the public sector (excluding Landesbanken).

5.7. **[Successful conclusion of the sale procedure]** After a successful completion of the sale procedure with the outcome of an aid-free offer with a positive offer price (while maintaining the guarantee), the intended acquisition will be notified to the Commission for the purpose of an assessment of the viability of the new company structure. The sale will not be implemented until the Commission has adopted an approval decision. The time taken for the assessment does not count towards the sale deadline.

5.8. **[Change of name]** The bank will adopt a new name within 3 months of the successful completion of the sale procedure.

5.9. **[Cessation of new business upon a non-successful conclusion of the sale procedure]** Where the sale procedure by the end of the sale deadline does not result in aid-free offers with a positive offer price (while maintaining the guarantee), or the Commission concludes the viability assessment pursuant to point 5.6 with the conclusion that the integration of OpCo into the new company structure will not lead to a long-term viable business model, OpCo will cease its new business and, as far as legally possible, administer its assets with the objective of an orderly wind-down. In that case the following continue to be permitted:

(a) restructuring of existing loans in order to maintain value, provided that those loans fall under the management of problem loans;

(b) business necessary for OpCo's cash management, with the exception of the acceptance of new deposits, including new deposits by existing customers; the rolling over of maturing deposits on the same terms remains permissible;

(c) prolongations which are necessary to avoid losses, provided that they offer significantly better prospects of final realisation;

(d) derivative transactions which are necessary in order to manage interest-rate, currency and credit risks in the existing portfolio and result in a reduction of OpCo's overall market risk position;

6. **[Obligations during the sale period]** During the sale period, HoldCo will manage OpCo with the aim of retaining its viability, saleability and competitiveness. To that end,

(a) additional cost-reduction and rationalisation measures will be taken at OpCo in accordance with the submitted restructuring plan, so that the administrative costs will not exceed EUR [570-590] million in 2016 and EUR [520-550] million in 2017;

(b) OpCo's risk management, in particular in relation to new business, will be carried out in accordance with the principles of prudent business practice;

(c) measures will be taken to further strengthen the capital base (including liability management), subject to approval by the Commission;

(d) OpCo may not make any payments in respect of profit-related equity instruments (such as hybrid financial instruments and participation certificates [*Genussscheine*]), in so far as those payments are not owed under contract or law. Those instruments will also have to participate in losses, if OpCo's balance sheet, without release of reserves and retained earnings, shows a loss. There will be no participation in losses carried forward from previous years, and

(e) OpCo will not pay any dividends until the sale (i.e. for the period including the business year ending on 31 December 2017). This does not preclude dividend payments by OpCo to HoldCo to the extent legally possible.

([1]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

7. **[Reduction of balance sheet total, and business model]**

7.1. **[Reduction of balance sheet total — OpCo]** OpCo's total balance sheet assets will not exceed EUR [100-110] billion in 2016, and EUR [90-100] billion in 2017 (total balance sheet assets of OpCo). Of this amount, trading assets will account for no more than EUR [5-12] billion.

7.2. **[Withdrawal from object-related aircraft financing]** In accordance with the List of Commitments of the Decision of 20 September 2011, OpCo will not resume the object-related aircraft financing activities discontinued by HSH.

7.3. **[Restriction of the corporate business]** OpCo must restrict its business with corporate clients to German customers and their domestic and foreign participations, and to foreign clients that seek business in Germany. Business is restricted to existing locations, and no new locations will be opened.

7.4. **[Definition of the ship financing business]** OpCo's shipping division acts as a strategic partner for clients, including shipowners in the global shipping and shipbuilding sector. In contrast to the shipping division, the corporate business division will not be active in object-related ship financing.

7.5. **[Downsizing of the ship financing business]** OpCo will cut back its ship financing business by restricting its annual new business in this area to EUR [1-2] billion. New business of this magnitude would not fully compensate for the repayments that are currently planned.

7.6. **[EUR/USD exchange rate]** The commitments in points 7.1 and 7.5 regarding the balance sheet total and the scope of new business in the ship financing division are based on an average EUR/USD exchange rate of 1,10. If the actual rate is lower than that reference rate, the maximum amounts mentioned there must be adjusted upwards accordingly.

8. **[Restriction of external growth]** Until the end of the sale deadline, an expansion of business activities through the acquisition of control of other companies is not permitted (no external growth). Debt-to-equity swaps and other routine credit management measures are not considered to be an expansion of business activities unless carried out with the intention of circumventing the restriction of growth referred to in the first sentence.

9. **[Sale of parts of the business]** The sale of parts or subparts of the business with the approval of the public-sector owners is compatible with this Decision.

10. **[Proprietary Trading]** OpCo does not undertake dedicated proprietary trading. This means that OpCo carries on only trading activities indicated in its trading book that are necessary either (a) for accepting, transferring and executing its customers' sales and purchase orders (i.e. trading with financial instruments as a service, up to a value measured in value at risk (VaR) of EUR […] million/1 day, 99 % confidence); or (b) for hedging customer business, or interest and liquidity management in the treasury sector (so-called trading for own account, up to a value measured with value at risk (VaR) of EUR […] million/1 day, 99 % confidence); or (c) so that the economic transfer of balance sheet items to the restructuring unit or to third parties can be carried out (up to a value measured in value at risk (VaR) of EUR […] million/1 day, 99 % confidence). As those positions can be taken on only within the limits defined above, they cannot jeopardise the sustainability or liquidity situation of OpCo. Under no circumstances will OpCo carry out business activities that serve purely the realisation of profit, outside the purposes mentioned in (a), (b) or (c). Moreover, OpCo will implement punctually the specifications in the supervisory requirements, 'Fundamental Review of the Trading Book' (FRTB).

11. [Liquidity/Funding]

By the end of 2016 and 2017 respectively, OpCo will adhere to the following liquidity ratios:

(a) Net Stable Funding Ratio (NSFR) and Liquidity Coverage Ratio (LCR) of […] to […] %. The calculation will be carried out on the basis of the definitions published at the time by the Basel Committee on Banking Supervision;

(b) the share of the core bank's USD business that is refinanced by means of original USD funding (and not by swaps) will develop as follows from 2016 to 2017: at least 55 % by the end of 2016 and 2017 respectively.

12. **[Advertising]** HSH will not use the granting of the aid measures or any advantages over competitors arising therefrom for advertising purposes.

13. **[Assurances regarding corporate governance]** The following applies in respect of OpCo's corporate governance:

(a) all members of the supervisory board must have the competences stipulated in the first sentence of Section 25d(2), phrase 1 of the German Banking Act (*Kreditwesengesetz* — KWG). Members are competent if they are reliable and have the expertise required to perform control functions, and to assess and monitor OpCo's business transactions.

(b) there may be no more than sixteen supervisory board members.

(c) at least half the seats allocated to the *Länder* of Hamburg and Schleswig-Holstein will be occupied by external experts.

14. **[Remuneration of bodies, employees and vicarious agents]**

14.1. **[Remuneration system]** Within the framework of the possibilities under civil law, OpCo will ensure that its remuneration systems do not encourage undue risk-taking, are in harmony with sustainable, long-term company objectives, and are transparent. That obligation will be satisfied if OpCo's remuneration systems meet the requirements in the Annex 'Obligations of HSH' to the 'Contract on the provision of a guarantee framework' of 2 June 2009.

An appropriate bonus can be paid ('privatisation bonus') following successful privatisation. The maximum amount paid may not cause the total remuneration of individuals to be in conflict with the requirements under point 14.2.

14.2. The total remuneration for OpCo's representatives and employees will be appropriate, and may under no circumstances exceed 15 times the national average salary in Germany or 10 times the average salary at HSH Nordbank (before the split-up).

15. **[Other rules of conduct]** In the context of its lending and investing, OpCo will take into account the borrowing demand of the economy, in particular of small and medium-sized companies (the 'Mittelstand'), through conditions that are market based and appropriate from a supervisory/banking point of view. OpCo's commercial policy will be prudent, sound and oriented towards sustainability. OpCo will conduct its banking business in such a way as to retain the value of the assets and businesses, increase the bank's saleability, and ensure that the sales process is as stable as possible.

16. **[Transparency]** During the implementation of the Decision, the Commission will have unlimited access to all information necessary for monitoring its implementation. The Commission can ask OpCo or HoldCo to provide explanations and clarifications. Germany, OpCo and HoldCo will cooperate fully with the Commission in response to any request in connection with the monitoring and implementation of this Decision. This does not affect compliance with mandatory banking secrecy requirements.

17. **[Cancellation of obligations]** The commitments in this Annex and the previous approval decision cease to apply with the sale, or in any case the expiry of the sale deadline, provided that nothing to the contrary is stated explicitly in the relevant commitment.

ANNEX II

LINE-BY-LINE VALUATION RESULTS — FORMATION LEVEL

[…] (*)

(*) Confidential information.