COMMISSION DECISION (EU) 2018/118

of 31 August 2017

on State aid SA.35818 (2016/C) (ex 2015/NN) (ex 2012/CP) implemented by Spain for Iberpotash

(notified under document C(2017) 5877)

(Only the Spanish 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),

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By complaint of 30 November 2012, the Commission was informed that Spain had implemented several alleged aid measures for Iberpotash S.A., renamed ICL Iberia Súria & Sallent in 2014 (both hereinafter referred to as 'Iberpotash'). The complainant, who wishes that its identity be kept confidential ('the Complainant'), supplemented its complaint by additional submissions of 28 December 2012, 14 February 2014, 24 February 2014, 6 May 2014 and 27 January 2015.

(2) The complaint was forwarded to Spain on 10 January 2013 together with a request for information. Spain replied on 8 March 2013. Additional requests for information were sent to Spain on 14 May 2013, 16 January 2014 and 26 March 2014. By letters dated 13 June 2013, 14 February 2014 and 15 April 2014, respectively, Spain provided the Commission with further information in reply of those requests.

(3) A preliminary assessment letter was sent to the Complainant on 30 January 2015. Reacting to the preliminary assessment letter, the Complainant submitted further information on 5 March 2015 (preliminary reply) and 21 April 2015 (final reply to the preliminary assessment letter). In addition, a meeting was held with the Complainant on 9 March 2015 and additional information was submitted by the Complainant on 4 June 2015.

(4) The final reply of the Complainant to the preliminary assessment letter was sent for comments to Spain on 9 June 2015, together with an additional request for information. Spain replied on 8 July 2015. On the request of Spain, a non-confidential version of the preliminary assessment letter was sent to Spain on 31 July 2015.

(5) By letter dated 26 January 2016, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of two of the alleged aid measures. By the same letter, the Commission concluded that the other three measures complained of do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the two alleged aid measures.

(7) By letter dated 19 April 2016, Spain provided comments on the decision to initiate the procedure. By letter dated 6 October 2016, the Commission asked Spain to provide additional information that was submitted by Spain by letter dated 28 November 2016.

(8) The Commission received comments from three interested third parties including Iberpotash, the alleged beneficiary of the aid. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letters dated 27 July 2016 and 6 April 2017.

([1]) OJ C 142, 22.4.2016, p. 18.
([2]) See footnote 1.

2. DETAILED DESCRIPTION OF THE AID

2.1. *RECIPIENT*

(9) Iberpotash owns and operates two potash mines in the basin of the river of Llobregat in the Bages region in Catalonia, one in Súria and another in Sallent and Balsareny. Potash is used for the production of fertilisers. In addition, Iberpotash also produces and sells salt mainly for industrial purposes.

(10) Iberpotash is a subsidiary of ICL Fertilisers, an Israeli multinational which is the largest producer of fertilisers worldwide. The potash mines operating in the region already as of 1920s had been State owned till 1998. Iberpotash acquired the potash mines in Suria and Sallent/Balsareny on the basis of a sales and purchase agreement concluded on 21 October 1998 with the Sociedad Estatal de Participaciones Industriales — SEPI, a public holding of the Spanish State.

2.2. *ALLEGED STATE AID MEASURES*

(11) According to the Complainant, the Spanish authorities provided illegal and incompatible State aid to Iberpotash through a number of measures. All these alleged aid measures relate to Iberpotash's environmental obligations with respect to its mining sites in the basin of the river of Llobregat and the salt waste heaps created at these sites as a result of decades of operation of the mines. These alleged State aid measures include:

(a) Failure of the Spanish authorities to comply with Article 14 of Directive 2006/21/EC of the European Parliament and of the Council ([3]) ('Extractive Waste Directive') which allegedly led to reduced financial guarantees for obtaining the permits to operate Iberpotash's mines ('Measure 1: reduced level of the financial guarantees').

(b) Investments made by the Spanish authorities in order to limit and/or repair the damages allegedly caused by Iberpotash to the environment in breach of the 'polluter pays' principle. These investments include:

— construction of a new brine collector in function since 2008 ('Measure 2: new brine collector'),

— investments in improvement of water treatment facilities in Abrera and Sant Joan Despí at the Llobregat river ('Measure 3: investments in water treatment facilities'),

— covering of a salt waste heap on Iberpotash mining site of Vilafruns ('Measure 4: covering of Vilafruns waste heap').

(c) Financing of an environmental study concerning the waste heap of Cogulló ('Measure 5: Cogulló waste heap study').

(12) The Complainant estimates that the total alleged aid to Iberpotash due to these measures ranges between EUR 260 million and EUR 407 million.

(13) The Complainant also submitted a separate complaint on an alleged breach of EU environmental law. Based on this complaint, the Commission sent in July 2014 a letter of formal notice to Spain, thus starting the infringement procedure for non-compliance with obligations under the Extractive Waste Directive. In September 2015, an additional letter of formal notice extended the infringement procedure to the non-compliance with Directive 2000/60/EC of the European Parliament and of the Council ([4]) ('Water Framework Directive'). The infringement procedure is pending ([5]).

2.3. *GROUNDS FOR INITIATING THE PROCEDURE*

(14) On 26 January 2016, the Commission adopted a decision to open formal investigation with respect to measures 1 and 4 ([6]) ('the Opening Decision') in order to address its doubts whether these measures constitute State aid within the meaning of Article 107(1) of the Treaty and whether they are compatible with the internal market.

([3]) Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC (OJ L 102, 11.4.2006, p. 15).

([4]) Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

([5]) The alleged breaches of the Extractive Waste Directive put forward in this infringement procedure do not relate to the amount of the financial guarantees under Article 14 of the directive as assessed in the present decision.

([6]) See footnote 1.

(15) At the same time, the Commission concluded that measures 2, 3 and 5 do not constitute State aid within the meaning of Article 107(1) of the Treaty. Since this conclusion has not been disputed, measures 2, 3 and 5 are not the object of the present decision and shall not be further assessed hereinafter.

2.3.1. DOUBTS CONCERNING MEASURE 1: REDUCED FINANCIAL GUARANTEES

(16) The Commission found in the Opening Decision that it could not exclude that Measure 1 may constitute State aid. In particular, it had doubts whether Measure 1 involved transfer of State resources and provided any economic advantage to Iberpotash and it thus invited the Spanish authorities and third parties to provide more evidence in this respect.

(17) To the extent Measure 1 constituted State aid, the Commission had doubts that it could be found compatible.

2.3.2. DOUBTS CONCERNING MEASURE 4: COVERING OF VILAFRUNS WASTE HEAP

(18) The Commission found in the Opening Decision that public financing of the covering of Vilafruns waste heap is likely to constitute State aid. In particular, it considered that Measure 4 was likely to provide a selective economic advantage to Iberpotash by ensuring better prevention against pollution at the waste facility owned by Iberpotash and thus ensuring compliance with its environmental obligations. The Commission thus invited the Spanish authorities and third parties to comment on these preliminary conclusions.

(19) Further, the Commission considered that since the investment costs were fully financed by the public authorities and Iberpotash covers only subsequent maintenance costs, the aid intensity of Measure 4 is well above the intensities for aid for undertakings which go beyond Community standards or increase the level of environmental protection in the absence of these standards under Section 3.1.1 of the *Community guidelines on State aid for environmental protection* (2008/C 82/01) ('the 2008 Environmental Guidelines') ([7]). Therefore, the Commission expressed doubts on the compatibility of such aid and invited the Spanish authorities and third parties to comment on this preliminary finding.

3. **COMMENTS FROM INTERESTED PARTIES**

3.1. *COMMENTS FROM IBERPOTASH*

(20) Iberpotash, for the most part, aligns its comments with the ones submitted by Spain on both measures under investigation.

(21) Iberpotash notes, in addition, that Measure 1 does not involve State resources because there has been no transfer of resources by Spain to Iberpotash up to date. Besides, the risk of this happening is very low, since Iberpotash does not face economic difficulties and will be able to bear the costs of environmental restoration should the amount of the guarantee prove to be insufficient. Iberpotash expresses the same concerns as Spain with regards to the selectivity of the measures and whether they confer an economic advantage or distort competition between member States.

(22) Iberpotash repeats that Measure 4 is compatible with the 2008 Environmental Guidelines and that the applicable aid intensity for the restoration of contaminated sites is 100 %.

3.2. *COMMENTS FROM THE FIRST INTERESTED PARTY (COMPLAINANT)*

(23) The first interested party, who wishes that its identity be kept confidential, supports the opening of the formal investigation procedure and supports the Commission's arguments in the Opening Decision for both Measures.

(24) The first interested party adds that the setting of an insufficient guarantee entails a real burden for the public authorities, who bear the cost of Iberpotash's environmental obligations. It also notes that Iberpotash gained an economic advantage because Iberpotash used the financial resources it saved in order to finance its own economic activities.

(25) The first interested party agrees with the Commission that the aid is incompatible because it constitutes operating aid.

([7]) Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1).

(26) As regards Measure 2, the first interested party draws the Commission's attention to a decision of the Barcelona Provincial Court of 22 February 2016 that confirmed the liability of Iberpotash to restore the lands damaged by its activities. It also adds that the covering of the salt tip is not a 'pilot' project because no documents related to the public financing of this measure describe the project as such, and because the method used is a well-known one that has been used by other mining companies for at least 15 years for similar tips.

3.3. *COMMENTS FROM THE SECOND INTERESTED PARTY*

(27) The second interested party, who also wishes that its identity be kept confidential, supports the Opening Decision of the Commission.

(28) As regards Measure 1, it notes in addition that the question whether the guarantee amount complies with applicable EU or Spanish legislation is irrelevant, because the aid consists in the State's assuming the financial risk of restoring the affected facilities; the quantification of such risk is exclusively a question of fact, not of law.

(29) Furthermore, the second interested party questions Iberpotash's availability to pay for the environmental restoration when the obligation arises, because Iberpotash's only Spanish assets are its mining facilities, which will be closed and therefore be of low value after 2035.

(30) The second interested party also notes that the setting of a sufficient guarantee amount would entail an annual cost of at least EUR 2 806 000 for Iberpotash, which is hardly an insignificant amount. It adds that the setting of the guarantees at the current amount also results in Iberpotash avoiding the collateralisation of its financial reserves.

(31) With regard to Measure 2, the second interested party observes that the Supreme Court judgment of 14 May 2009 along with Council Directive 75/442/EEC ([8]) and the applicable Spanish law provides that Iberpotash is solely responsible for covering the Vilafruns tip from the very moment that mining rights were transferred to it, regardless whether the site is active or not.

(32) As regards Measure 4, the second interested party argues that covering of Vilafruns waste heap is a responsibility of Iberpotash and that Iberpotash thus received a selective advantage due to public financing of the covering. Further, the second interested party disagrees with qualification of the covering as a pilot project of a new technique of restoration. It argues that covering salt waste heaps with geomembranes is an old technique used already for a long time e.g. by Alsatian and German potash companies.

(33) Finally, the second interested party argues that the question whether Iberpotash is the sole potash producer in Spain is irrelevant, because the relevant potash market is global. An effect on trade is unquestionable because, geographically, Iberpotash competes with French salt producers, as apparent by the proximity (less than 100 km away) of the Suria and Sallent sites to the French border.

(34) Both the first and the second interested party provided comments also with respect to other three measures analysed in the Opening Decision (measures relating to (i) new brine collector, (ii) investments in water treatment facilities, and (iii) Cogulló waste heap study). However, as noted in recital 15, the Commission has already concluded in the Opening Decision that these measures do not constitute State aid and are thus not the object of the formal investigation procedure. The comments of the third parties provided exclusively with respect to these measures not covered by the formal investigation are thus considered irrelevant for the purpose of this decision.

4. **COMMENTS FROM SPAIN**

4.1. *COMMENTS ON THE OPENING DECISION*

(35) As regards Measure 1, Spain is of the view that the amount of the guarantee has always been appropriate and set in accordance to the applicable Spanish and Union legislation. More particularly, Spain argues that the possible infringements of Extractive Waste Directive do not include setting the guarantee amount too low, therefore there cannot have been an infringement of the Directive.

([8]) Council Directive 75/442/EEC of 15 July 1975 on waste (OJ L 194, 25.7.1975, p. 39).

(36) In addition, with regards to the issue of determining the appropriate guarantee amount, Spain dismisses as inconclusive the statement dated 2 October 2013 of Ms Assumpta Feran (the Director of the Directorate in charge of the environment at the Generalitat de Catalunya) before the Environmental Committee of the Catalan Parliament, who stated that the financial guarantee should amount to EUR 200 million. According to Spain, the statement was made amidst a debate among opposing political parties and therefore driven by political considerations. Spain also finds the judgment of 11 October 2011 of the Higher Court of Justice of Catalonia inconclusive for the determination of the appropriate guarantee amount, because the court itself refrained from calculating it.

(37) Furthermore, Spain considers as unreliable the study that the complainant supplied and that the Commission cited in recital 71 of the opening decision, because the study did not calculate the appropriate guarantee amount based on the criteria set forth in Decree 202/1994 of 14 of June, i.e. the applicable legislation relative to the guarantee amount.

(38) Spain argues, in addition, that Measure 1 does not confer a selective economic advantage to Iberpotash. Any alleged advantage was fixed based on a legal framework which was equally applicable to all potential competitors. What is more, the exploitations of Sallent and Suria are the only active ones in Spain, therefore Iberpotash could not have gained an advantage since there are no comparable exploitations in Spanish territory.

(39) Spain supports that no State resources are involved because, in case that the guarantee amount proves to be insufficient, Iberpotash's obligation to restore the land affected by the extraction activities remains valid. Spain can enforce Iberpotash's obligation by means of seizure of the latter's rights and property on Spanish territory.

(40) Finally, Spain notes that Measure 1 does not distort competition or affect trade between Member States, because the costs to be incurred by Iberpotash if it were obligated to set a higher guarantee amount are negligible for the standards of the potash extraction industry.

(41) In relation to Measure 4, Spain argues that Iberpotash cannot have gained an economic advantage because, by not being a polluter, Iberpotash did not have the obligation to cover the salt tip of Vilafruns, according to the generally applicable Spanish legislation. In addition, Iberpotash bears the maintenance costs of the covering of the tip and, therefore, even if, thanks to the public financing, it saved the tip's building costs, it is bound to spend a much greater amount on its maintenance for the next decades and therefore loses any economic advantage gained by the measure.

(42) Spain alleges that Measure 4 cannot be selective because Iberpotash is the only undertaking in Spain involved in potash extraction activities.

(43) In addition, the measure does not have a distortive effect on competition between Member States given that the extracted salt, due to transportation difficulties, cannot be transferred between member States.

(44) If, despite the above, the Commission decides that Measure 4 constitutes State aid, Spain considers that it falls within the thresholds for *de minimis* aid of Commission Regulations (EC) No 1998/2006 ([9]) and (EU) No 1407/2013 ([10]).

(45) Finally, Spain asks that Measure 4 be declared compatible on the basis of the 2008 Environmental Guidelines and especially in view of the innovative character of the technology used to cover the Vilafruns salt tip, which, unlike the technology used in other mining facilities, it is also designed to prevent leaks of the deposited material.

4.2. *RESPONSE OF SPAIN TO COMMENTS SUBMITTED BY THIRD PARTIES*

(46) Spain responded to the observations formulated on Measure 1 by the two interested parties by pointing out, once more, to the administrative procedure in place under Spanish law for the enforcement of the environmental obligations of Iberpotash and for the recoupment from Iberpotash of any amount Spain would eventually pay if the guarantee for the environmental restoration proves to be insufficient. The ability to enforce as such Iberpotash's obligation means that there is no burden on the State budget and, consequently, no transfer of State resources.

([9]) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (OJ L 379, 28.12.2006, p. 5).

([10]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1).

(47) Spain responded to the observations formulated on Measure 4 by the two interested parties by explaining that the decision of the Barcelona Provincial Court of 22 February 2016 included a list of areas where Iberpotash was obligated to implement measures of environmental restoration, which neither includes the Vilafruns tip nor mentions that the tip is a source of pollution. What is more, the persons convicted pursuant to the decision belonged to the company that exploited the mines before the acquisition of the mining concession by Iberpotash. Besides, those persons were convicted for actions and omissions that took place long before the covering of the Vilafruns tip.

(48) Spain also reiterates its arguments with regards to the lack of obligation of Iberpotash, according to Spanish law, to cover the Vilafruns tip.

(49) Finally, Spain points out that, although the first interested party highlights that no documents related to the public financing of the covering of the tip describe the project as a 'pilot' project, nevertheless said party does not question that the technology used for the covering of the tip is distinguishable and, unlike the technology used in other potash mines, it is also designed to prevent leaks of the deposited material. The fact that the word 'pilot' is not mentioned does not exclude the innovative character of the technology used.

5. **ASSESSMENT OF THE AID**

(50) This decision first assesses whether the two Measures under scrutiny entail State aid to Iberpotash in the meaning of Article 107(1) TFEU, and then whether such aid, were it to be present, would be lawful and compatible with the internal market.

5.1. *EXISTENCE OF STATE AID*

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

(52) In order to conclude whether State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources and imputability, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the Measures under assessment.

5.1.1. MEASURE 1: REDUCED LEVEL OF THE FINANCIAL GUARANTEES

(53) Under national law and, in case of mines already operated on 1 May 2008 as of 2014 also Union law, operators of mining facilities are obliged to establish a financial guarantee aimed at ensuring that they have sufficient resources set aside for covering the costs of restoration of their sites once their mining activities are closed. Further, these resources may be used by public authorities under the relevant national law to finance environmental protection measures which the operators are obliged to take but fail to do so. The operator may establish such guarantees in the form of a bank guarantee for which they pay a fee. According to the Complainant, Iberpotash received an illegal and incompatible aid by having the amount of the financial guarantee set by the relevant authorities at a very low level.

5.1.1.1. ***Selective economic advantage***

(54) The Commission first needs to assess whether the levels of the financial guarantees as set by the Spanish authorities were indeed lower than required by the applicable rules in the relevant period. This is a necessary requirement for any existence of possible State aid with respect to this particular measure. If, on the contrary, the level of the guarantees had been set in line with applicable rules, then Iberpotash would have been treated as any other undertaking in a similar situation and there would have been no reason to consider it has been selectively favoured by the concrete application in its case of the rules laid down to set financial guarantees.

Applicable legislation

(55) Therefore, it is necessary first to summarise the relevant Union and national rules governing the setting of the financial guarantees.

(56) According to Article 14 of the Extractive Waste Directive, the competent national authorities must, 'prior to the commencement of any operations involving the accumulation or deposit of extractive waste in a waste facility, require a financial guarantee (e.g. in the form of a financial deposit, including industry-sponsored mutual guarantee funds) or equivalent'. The aim of this guarantee is that 'all obligations under the permit issued pursuant to this Directive, including after-closure provisions, are discharged' and that 'there are funds readily available at any given time for the rehabilitation of the land affected by the waste facility'.

(57) According to Article 14(2) of the Directive, the calculation of the guarantee should be made on the basis of (i) the likely environmental impact of the waste facility, and (ii) the assumption that independent and suitably qualified third parties will assess and perform any rehabilitation work needed. The size of the guarantee shall be periodically adjusted in accordance with any rehabilitation work needed.

(58) As regards the national rules, the Extractive Waste Directive has been transposed to the Spanish law by a Royal Decree 975/2009 of 12 June 2009 on waste management in mining and quarrying and protection and rehabilitation of areas affected by mining activities ('Royal Decree 975/2009'). According to First Transitory Disposition (Disposición transitoria primera) of the Royal Decree 975/2009, the provisions of that act concerning the financial guarantees (i.e. in particular Article 43) would apply as from 1 May 2014 to the mining sites already operated as on 1 May 2008 (i.e. including Iberpotash's sites).

(59) However, before the applicability of the Royal Decree 975/2009 transposing the Extractive Waste Directive, in the Catalan region the permits, restoration plans and guarantees in case of mining companies had been governed by Law 12/1981 establishing additional measures for the protection of natural sites affected by mining activities ('Law 12/1981') ([11]) and by Decree 202/1994 establishing the criteria for determining the guarantees related to the restoration programmes for mining activities ('Decree 202/1994') ([12]). According to Article 8(2) of Law 12/1981, the financial guarantee should be established while taking into account the area affected by the restoration and/or the global costs of such restoration. Article 2 of Decree 202/1994 quantifies the amount of guarantees per hectare for various standard restoration measures and indicates that for any other specific measures the amount should take into account their costs ([13]). Further, Article 3 of Decree 202/1994 stipulates that for mining activities not situated in natural sites of special interest (including Ibepotash's sites), the resulting amount on the basis of Article 2 should be reduced by 50 %.

Financial guarantee amounts set for Iberpotash

(60) On the basis of these national rules, Iberpotash obtained from the Generalitat de Catalunya a permit to operate its extractive activity of potash on its site in Súria on 9 November 2006 and on its site in Balsareny/Sallent on 28 April 2008. These permits constitute individual administrative decisions which set the financial guarantees to EUR 1 130 128 for the site in Balsareny/Sallent and EUR 773 682,28 (increased to EUR 828 013,24 in 2008) for the site in Súria. These amounts of the guarantees have been revised only in 2015, when the Spanish authorities proposed significantly higher levels amounting to EUR 6 979 471,83 for the site in Balsareny/Sallent (effective only after the approval by the Higher Court of Justice of Catalonia in December 2016 — see below) and EUR 6 160 872,35 for the site in Súria (effective as of May 2015). The amounts of guarantees were set by individual and specific decisions adopted by the Generalitat addressed to Iberpotash.

Evidence that Ibepotash's guarantee amounts are lower than required

(61) In this respect it needs to be stressed that it is first for the competent environmental authorities to determine and approve the amounts of the financial guarantees under national or regional rules applicable to the case at hand. Even though the Commission is responsible for safeguarding the correct transposition and implementation of the Extractive Waste Directive, which is applicable to Iberpotash's financial guarantees as of 1 May 2014, this Directive leaves a significant discretion to the Member States in determining the exact amount of the guarantees. For this reason, the Commission has not engaged in its own evaluation of the correct levels of the financial guarantees according to the Extractive Waste Directive but limits its assessment to evaluating the existing evidence of the insufficiency of the financial guarantees. In fact, there is a number of pieces of evidence suggesting that the amount of the financial guarantees as set by the public authorities in 2006 and 2008 was actually lower than required under the applicable legislation.

([11]) Ley 12/1981, de 24 de diciembre, por la que se establecen normas adicionales de protección de los espacios de especial interés natural afectados por actividades extractivas.

([12]) Decreto 202/1994, de 14 de junio, por el que se establecen los criterios para la determinación de las fianzas relativas a los programas de restauración de actividades extractivas.

([13]) See Article 2.4(h) of Decree 202/1994.

(62) Most importantly, the Higher Court of Justice of Catalonia (Tribunal Superior de Justicia de Cataluña) ruled on 11 October 2011 that the amount of the financial guarantee for Iberpotash's Cogulló waste heap at its site of Balsareny/Sallent amounting to EUR 585 153 was lower than required. The judgment rules that the amount of the guarantee does not respect the legal and regulatory parameters set by the national legislation, referring in particular to Article 8(2) of Law 12/1981 and Decree 202/1994. The judgment states that, even in the absence of any conclusive proof ('una prueba concluyemente determinada') of the correct amount of the guarantee, the Court is able to conclude that the guarantee amount set to only EUR 585 153 is clearly not in line with these legal provisions. The court thus declares the guarantee as insufficient and not in line with the applicable legislation and orders the Spanish authorities to set a new level of the financial guarantee. This judgment was fully confirmed on appeal by the judgment of the Supreme Court (Tribunal Supremo) of 9 July 2014. Finally, as noted by the Spanish authorities, by its finding of 14 December 2016, the Higher Court of Justice of Catalonia confirmed that a newly proposed amount of EUR 6 979 471,83 for the whole site at Balsareny/Sallent was adequate.

(63) In view of the national judgment of the Higher Court of Justice of Catalonia of 11 October 2011 authoritatively interpreting the relevant national rules, the Commission considers as demonstrated that the original amount of the financial guarantee for Iberpotash's site at Balsareny/Sallent set in 2006 at the level of EUR 1 130 128 (including EUR 585 153 for the Cogulló waste heap) was significantly insufficient. By its finding of 2016, the Higher Court of Justice of Catalonia confirmed that the overall amount for Balsareny/Sallent should have actually been set at a level which is at least six times higher, and most likely even higher for the period preceding the announcement of the Plan Phoenix in 2011 — see recitals 73, 80 and 81 below.

(64) Even though there is no similar court ruling with respect to the guarantee for the site in Súria, there is convincing evidence that the finding of clear insufficiency of the level of guarantee would have been equally probable in case of any court action. The amount of the original guarantee of EUR 773 682,28 (increased to EUR 828 013,24 in 2008) reflects proportionally the fact that the site at Súria is smaller than at Balsareny/Sallent as regards the mass of the waste accumulated and the total area of the waste heaps ([14]). Further, the guarantee for Suria has been significantly increased to EUR 6 160 872,35 at the same time as for Balsareny/Sallent (i.e. only after the order of the court and its confirmation on appeal) and by even higher proportion (more than seven times higher). Therefore, in the absence of any other factors explaining the difference of the amounts of the guarantees for Súria on the one hand and Balsareny/Sallent on the other hand, the amount of the guarantee for Súria can also be considered as insufficient.

(65) Both the Spanish authorities and Iberpotash confirm in their submissions that the Higher Court of Justice of Catalonia has considered that the guarantee for El Cogulló was insufficient. They attempt at mitigating the court's judgment by claiming that: (i) the court acknowledged that, at least partly, the situation dates back to 1929, (ii) the court admitted that it has no conclusive proof, and (iii) the court allegedly did not find any concrete infringement of a particular legal norm. However, none of these arguments with respect to the judgment affect the finding of insufficiency of the guarantee. The fact that the Spanish authorities in fact reviewed the guarantee amount following the confirmation of the judgment in appeal and submitted it for approval to the court confirms the relevance of the judgment. In addition, the judgment of 11 October 2011 explicitly refers to the relevant legislative provisions set out in Article 8(2) of Law 12/1981 and in Decree 202/1994.

(66) In addition to the authoritative finding by a national court, the investigation has revealed several other pieces of evidence corroborating the finding that the original level of the financial guarantees was unduly low.

(67) First, third parties have submitted official transcripts from the hearing before the Environmental Committee of the Catalan Parliament of 2 October 2013 with explicit statements of the Director-General for Environment at the Generalitat de Catalunya according to which the guarantees were clearly insufficient. The Director-General suggested that the required guaranteed amount could possibly reach up to EUR 200 million. Even though the transcripts of a political discussion in parliament do not contain any relevant justification for the amount advanced, and thus need to be treated cautiously, the orders of magnitude and difference with the actual amount do confirm the conclusions reached by experts in the field, who considered the amount of the guarantees set in 2006 and 2008 as clearly insufficient.

([14]) According to the ERF Study submitted by the complainant (see recital 68), in 2011 the active waste heap in Balsareny/Sallent (El Cogulló) had an area of 35 hectares and the mass of waste of 41 Mt while the active waste heap in Suria (El Fusteret) had an area of 27 hectares and the mass of waste of 22 Mt.

(68) Second, the Complainant submitted a study of August 2012 that it commissioned from environmental experts ('ERF Study'). The study is an expert survey analysing and compiling extensive existing information (legal, academic or resulting from market investigation) on the relevant topic. The ERF Study analysed the existing situation as regards the environmental impact of Iberpotash's mining sites and forecasted future developments as regards the total amount of material accumulated on the waste heaps. It concludes that the environmental impacts of the waste heaps were significant and expected to further grow in the future.

(69) Based on available information, the ERF Study estimates the following evolution of the volume of waste accumulated on waste heaps in Suria and Sallent till the end of the mining activities in 2035:

Table 1

Estimated accumulation of the waste on the heaps in Suria and Sallent

	Volume in 2012 (in kt)	Net annual increase of the volume (in kt/year)	Volume in 2035 (in kt)
Sallent	41 000	1 454	74 531
Suria	22 000	525	33 895
TOTAL	**63 000**	**1 979**	**108 426**

(70) Further, the ERF Study analyses possible options for restoration of the waste heaps including: (i) backfilling of the waste material in the underground mines, (ii) dissolution of the salt contained in the waste heaps by pumping water and disposal of the resulting brine either to the sea or underground, or (iii) covering the waste heaps with material preventing infiltration of rain water and preventing leaks of salts in the environment. It concludes that in the situation of Iberpotash's sites the most appropriate method is the covering of the waste heaps. It is a rather simple and well known method since it has been already used in a number of cases, even by the Catalan authorities themselves. In addition, it is the most appropriate method for restoration by public administrations in case the mining company does not fulfil its obligations since, contrary to other methods, it does not require any additional installation of significant industrial infrastructure. Therefore, the ERF Study calculates the expected costs of restoration of Iberpotash's sites by covering the heaps.

(71) The calculation of the expected costs is based on the analysis of the unit costs of the individual components of the covering for the waste heap resulting from a market research by the experts with suppliers of various works and supplies involved and using the 2012 pricing data published by the Catalan Institute of Technology and Construction (Institut de Tecnologia de la Construcció de Catalunya — ITeC). For comparison, the study also uses overall costs of restorations for different restoration options as estimated in the study prepared in 2001 by Symonds Group for DG Environment of the European Commission ([15]). It also includes the costs of maintenance and control of the covered heaps for additional 10 years after the finalisation of the covering. These unit costs are then applied to the estimated amount of the waste material on the heaps in three different moments in time: (i) actual amounts in 2012, (ii) amounts expected in 2015 (year of the expected start of the production of salt from the waste material in a new plant in Suria), and (iii) amounts expected in 2035 (when the mining activities of Iberpotash are planned to be stopped). The resulting total costs of restoration in these periods are summarised in the following table:

Table 2

Estimated restoration costs according to the ERF Study

Year	Estimated restoration costs (EUR million)		
	Suria	Balsareny/Sallent	Total
2012	24,8	46,2	**71,0**

([15]) *A study of the costs of improving management of mine waste*, Symonds Group in association with COWI, report to DG Environment, European Commission, final report October 2001.

Year	Estimated restoration costs (EUR million)		
	Suria	Balsareny/Sallent	Total
2015	26,9	52,3	**79,2**
2035	38,2	83,8	**122,0**

(72) On this basis, the ERF Study considers that the amount of the financial guarantee based on the new legislative rules of the Royal Decree 975/2009 should definitely not be lower than the basic costs of restoration in 2012 amounting to EUR 71 million for both sites and its appropriate amount, taking into account the total costs in the future, should rather be around EUR 100 million.

(73) Finally, the ERF Study analyses the impact of the planned extraction and commercialisation of the salt in the heaps based on the newly announced Plan Phoenix that started to be implemented in 2012. Taking into account various scenarios as regards the expected production of potash and salt in the future (including the most ambitious plans of Iberpotash to sell annually 1,5 million tonnes of salt), the ERF Study concludes that under any of those scenarios, the Plan Phoenix would only slow down but not stop the continued annual growth of the total waste material accumulated at Iberpotash's sites. In the most optimistic scenario, the Plan Phoenix would lead to a reduction of the total waste material deposited on the heaps to 1 213 kt per year (compared to 1 979 kt per year without the Plan Phoenix). Therefore, while the Plan Phoenix has an appreciable impact by reducing the annual waste accumulation by up to almost 40 %, the ERF Study considers that the Plan Phoenix cannot be considered as a self-sufficient restoration measure, but rather as a mitigating factor, since it will at most lead to slow down of the growth of the existing waste heaps but not to their elimination.

(74) Iberpotash argues that the ERF Study cannot serve as a basis for calculating the amount of the guarantee since it itself acknowledges that it is not based on the relevant provisions of the Decree 202/1994 and since it contains a number of imprecise and incorrect statements and data.

(75) The Commission acknowledges that the study does not follow the relevant provisions of Decree 202/1994 and focuses rather on the conditions of Royal Decree 975/2009 transposing the Extractive Waste Directive focussing on the expected costs of restoration. However, its results indicating the estimated restoration costs for individual Iberpotash's sites are based on a sound methodology and reasonable assumptions as described above in recitals 68-73 and are thus indeed relevant for the calculation of the guarantees also under Decree 202/1994. This is demonstrated in particular by Article 2.4(h) of Decree 202/1994, which refers to the costs of any other specific restoration measures that may be necessary and thus not limiting the calculation to the measures individually enumerated in the previous points of Article 2 ([16]).

(76) Further, the relevance of the extent of the damage to the environment and expected restoration costs is also, at least implicitly, evident from the wording of the judgment of the Higher Court of Justice of Catalonia of 11 October 2011, which states with respect to the amount of the financial guarantees that: 'the key and central provision is Article 8(2) of the Law No 12/1981 […] providing that in any case, in relation to the restoration, the amount should be established based on area affected by the restoration, overall costs of the restauration or by both these criteria […] ("el precepto cardinal y central del caso es el artículo 8.2 de Ley 12/1981[…] al disponer que en cualquier caso, en lo referente a la restauración, la cuantía debe fijarse en función de la superficie afectada por la restauración, por el coste global de la restauración o por ambos aspectos conjuntamente […]")' and which then concludes that the authorisation is not in conformity with the applicable law since it 'has not set the guarantees in the present case in conformity with the legal limits […] ("no ha establecido une fianza ajustada al caso en los límites legales […]")'. Finally, such expected restoration costs are clearly relevant for the calculation of the guarantee according to Article 43 of the Royal Decree 975/2009 applicable to Iberpotash as of 1 May 2014.

(77) In addition, the Commission notes that, apart from general criticism of the alleged imprecise and incorrect assumptions of the ERF Study, neither the Spanish authorities nor Iberpotash identify those alleged imprecisions and incorrect assumptions or provide any specific arguments or propose any own alternative estimation of the total restoration costs for Iberpotash's sites.

([16]) The appropriateness of using Article 2.4(h) of the Decree 202/1994 in this respect seems to be also acknowledged by the observations of Iberpotash on the Opening Decision (see in particular paragraph 68 of the observations).

(78) The Spanish authorities argue that the amounts of the guarantees complied with the criteria under the national law by taking into account the expected costs according to the restoration plan existing at the time. In addition, Iberpotash submitted its own expert study with the aim to demonstrate that the guarantee was sufficient with respect to both criteria indicated in the national legislation, i.e. the size of the area affected and the expected costs of restoration.

(79) However, as explained above, the compliance with the criteria under the national law was clearly not confirmed by the court judgment. In addition, the measures contained in the restoration plan and taken into account in the study submitted by Iberpotash were limited to building perimetric canals, basins for the rain brine collected and similar measures aimed at limiting pollution, but clearly not leading to a permanent restoration of the waste heaps. The study does therefore not include nor quantify proper restoration measures for the calculation of expected costs. Since the expected actual costs of restoration are relevant for the calculation of the financial guarantee both under the Catalan (see recital 75 above) and under the Union legislation, the conclusions of the study provided by Iberpotash cannot serve as a basis for calculating the full and correct amount of the guarantees. As shown not only by the ERF Study but also by examples of similar waste heaps in France or Germany ([17]), such restoration normally involves either (a) total removal of the heaps (e.g. by backfilling of the material underground), (b) gradual desalinisation of the heaps by pumping water into the heap and collecting the resulting brine, or (c) permanent covering of the heaps. These proper restoration measures are, however, significantly more expensive than building perimetric canals, basins for the rain brine collected and similar measures aimed solely at limiting pollution. This is also demonstrated by the costs of covering of the Vilafruns dump that amounted to EUR 7,9 million (not including the annual maintenance costs). Considering that Vilafruns with around 3 million tonnes of salt material is a small heap compared to the active Cogulló heap (Balsareny/Salent) with 41 million tonnes or Fusteret heap (Suria) with 22 million tonnes, the total costs of restoring these active mines and covering the corresponding waste heaps are likely to be significantly higher than the costs for Vilafruns.

(80) Further, Iberpotash argues that the amount of the waste on the heaps will be significantly reduced due to its Plan Phoenix announced in 2011 which aims at processing the waste on the heaps in order to produce technical salt to be sold on the market. As part of this project, Iberpotash plans to build a vacuum salt plant extracting salt from the waste material produced during its potash mining activities and sell this salt on the market. It expects to start by selling annually around 750 thousand tonnes of salt and later plans to increase this amount up to 1,5 million tonnes of salt per year.

(81) However, even though the plan to process and commercialise at least part of the waste material could in principle reduce the volume and salinity of the heaps and thus also the expected costs of their restoration, this plan was announced by Iberpotash only in 2011 and its implementation starting as of 2012 is still ongoing. Therefore, the Plan Phoenix clearly should not have been taken into account for the establishment of the amount of the guarantees in 2006 and 2008, as it was still too uncertain at this point in time.

Conclusion on existence of selective economic advantage

(82) In view of the above, the Commission considers that the collected evidence and submitted expert reports corroborate the finding of the national court that the original amounts of the financial guarantees were clearly insufficient to ensure proper restoration.

(83) Therefore, the Commission considers that the financial guarantees set by the Spanish authorities in 2006 and 2008 were indeed lower than the level normally required under the applicable national legislation. Therefore, Iberpotash has been granted an economic advantage in the form of lower banking fees paid annually for the financial guarantee. Since according to Iberpotash its bank fees for the guarantees amounted to 1 % of the amount of the guarantees per year, a significantly lower total level of the guarantees decreased the relevant bank fees paid by Iberpotash accordingly and thus reduced its costs as compared to other operators whose guarantees had to comply with the law. Therefore, the Commission considers that Iberpotash enjoyed an economic advantage due to the reduced level of the financial guarantees.

(84) The arguments of the Spanish authorities and Iberpotash that the public authorities did not provide to Iberpotash any advantage or preferential treatment as a result of a rigorous application of the relevant rules cannot be

([17]) See e.g. Annual Report of the German potash mining company K+S Kali GmbH for 2015, page 48 (http://www.k-plus-s.com/en/archiv/finanzberichte.html), the restoration methods used for Alsatian waste heaps as described in the ACA document provided as Annex 2 to the submission of the Spanish authorities of 19 April 2016 or a book by a German expert Henry Rauche: Die Kaliindustrie im 21. Jahrhundert, Springer-Verlag Berlin Heidelberg 2015, https://mining-report.de/blog/henry-rauche-die-kaliindustrie-im-21-jahrhundert/

accepted since it has been established above that these decisions of public authorities led to a level of the financial guarantees which was lower than normally required. Further, the argument that the Catalan legislation was in fact stricter than similar rules at the State level or in other regions of Spain is not relevant since such costs are site-specific and the rules concerning the financial guarantees to be established by Iberpotash which had to be respected were the ones applicable in Catalonia where the waste heaps were located. Iberpotash was allowed by the public authorities to maintain lower financial guarantees than was normally required by the Catalan legislation applicable to it and thus received a selective advantage in the form of lower bank fees for the reduced guarantees as compared to other operators in a similar position.

(85) The Commission thus concludes that Measure 1 provided a selective economic advantage to Iberpotash.

5.1.1.2. ***Transfer of State resources***

(86) As regards the State resources criterion, the Complainant submits that a too low guarantee not covering the full restoration costs presents a (potential) transfer of State resources. It would allegedly consist of a risk that in case Iberpotash does not fulfil its obligations regarding the restoration of its sites, the State would have to bear these costs. The complainant refers to the Commission decision in the Georgsmarienhütte case ([18]) where the Commission considered as State aid an exemption from a steel producer's environmental obligations with regard to the recycling and disposal of industrial dust.

(87) The Spanish authorities and Iberpotash argue that even in case the guarantee would be lower than required, Iberpotash would still have the general obligation to restore its sites and would be obliged to pay the costs of such restoration. These costs are in no way limited by the amount of the financial guarantee. Therefore, the State does not relieve Iberpotash of its financial obligations. Furthermore, any risk that Iberpotash would not in the future be able to cover all these costs and that the State would need to intervene from the State resources, is extremely remote and unlikely in view of Iberpotash's mother company's healthy financial situation. The Spanish authorities argue that in case Iberpotash in the future does not fulfil these obligations, there are enough Iberpotash assets in Spain that could be seized by the authorities in order to cover the costs of restoration.

(88) The Commission notes that the guarantees at issue in this case are not examined under State aid rules as to the amount of fee possibly foregone in light of the risk or exposure incurred by the guarantor (i.e. a private bank, not the State) but as to the risk for the State in case the guaranteed amount is lower than the actual costs of the environmental damage and in case the guaranteed company does not or cannot pay the full restoration costs.

(89) As regards the precedent case raised by the complainant, the Georgsmarienhütte case was significantly different since the land of Lower Saxony clearly assumed the responsibility for the disposal of the dust and actually paid DEM 64,64 million for such disposal. This is not the case here since, irrespective of the amount of the guarantee, Iberpotash remains responsible for the restoration of its mining sites and the Spanish authorities have until now not committed to pay any restoration costs instead of Iberpotash. The Georgsmarienhütte case thus cannot serve as any precedent for the present case.

(90) The financial guarantee by Iberpotash is provided in the form of a bank guarantee which is not freely available to the State. It can be used only for measures strictly defined by the law, in particular for financing the removal of waste, restoration of the site and other environmental measures in case Iberpotash does not fulfil its environmental obligations. The State does not acquire any interest on the funds of the guarantee or any other financial advantage which would be reduced in case of a lower amount of the guarantee. Further, the State has so far not been in a position where it would need to make any use of the guarantee for any of the above purposes. However, even if the reduced amount of the guarantee has so far not led to any actual effect on State resources, this fact alone does not exclude the existence of a potential effect on State resources due to increased risk for the State to be obliged to spend its resources in the future.

(91) Indeed, the creation of a concrete risk of imposing an additional burden on the State in the future is sufficient for the purposes of fulfilling the notion of State aid, pursuant to Article 107(1) of the Treaty ([19]). The Court of Justice has also held that the link to and effect on State resources of a State aid measure needs not to be direct for this criterion to be met.

([18]) Commission Decision 1999/227/ECSC of 29 July 1998 on aid granted by the Land of Lower Saxony (Germany) to Georgsmarienhütte GmbH (OJ L 83, 27.3.1999, p. 72).

([19]) See also case C-200/97 Ecotrade, ECLI:EU:C1998:579, in particular paragraph 41.

(92) The very purpose of such financial guarantees is to make sure that the mining companies have sufficient resources kept aside to cover future restoration costs whatever their financial situation in the (often rather distant) future might be. It is thus evident that in case the amount of the guarantee is significantly lower than expected restoration costs, there is at the least an increased risk that State resources might be affected in the future. This risk of potential costs to public budget is clearly higher than in case the guaranteed amount would have been correctly set in line with the applicable legislation, taking due account of the expected restoration costs. If these resources are significantly lower than necessary, State resources would ultimately have to cover a greater part of these costs in case Iberpotash is for whatever reason not willing or able to do so. In addition, in case of Iberpotash's inability to pay the restoration costs in the future, the alleged possibility for the Spanish authorities to seize assets of Iberpotash is unlikely to bring significant additional resources since the only Spanish assets of Iberpotash (and the whole ICL group) are its potash mining facilities. However, once the potash mines are closed the value of these assets is doubtful.

(93) The fact that the State would be obliged to step in on its own account in case Iberpotash is not willing or able to take the necessary restoration measures with respect to its waste heaps is well established in the applicable legislation.

(94) Firstly, pursuant to Article 102 of Law 39/2015 ([20]), the State may take measures in lieu of the party legally responsible for taking such measures. Spain would have to (i) enjoin Iberpotash to take specifically defined measures; (ii) inform Iberpotash that the administration will otherwise take such measures itself, and at what cost; (iii) implement such measures; and (iv) attempt to recover the cost from Iberpotash, which by definition will not be possible if Spain must execute the insufficient financial guarantee. While this decision is formally facultative, in the event of Iberpotash defaulting on its obligations to restore its facilities, Spain would have no option other than to pay upfront for such restoration, because Spain would otherwise not comply with its own obligations.

(95) Secondly, as noted in recital 13, Spain may be in breach of its obligations under the Extractive Waste Directive and the Water Framework Directive. Therefore, should Iberpotash abandon its facilities after depleting the mineral resources and not restore such facilities, given the insufficient guarantee, the only way for Spain to meet its obligations under those Directives and eventually avoid daily penalty payments imposed by the European Court of Justice is to pay itself for the removal of the salt tips or an equally effective restoration.

(96) Thirdly, under the provisions of the Spanish Law 27/2006 of 18 July 2006 ([21]) the Spanish authorities can be compelled to comply with their obligations under the environmental legislation. Any non-governmental organisation that meets the criteria set out in Law 27/2006 may, in the event of an environmental infringement listed at Article 18(1) of Law 27/2006 (including e.g. infringements concerning the obligations in the area of water protection), take action in court to force the administration to comply with its environmental obligations.

(97) Fourthly, Directive 2004/35/CE of the European Parliament and of the Council ([22]) indicates in Article 6(3) that where an operator responsible to take remedial actions with respect to an environmental damage fails to comply with its obligations, the competent authority may take these measures itself, as a means of last resort. Similarly, under Article 5(3), the competent authority may, if the relevant operator fails to do so, take necessary preventive measures in order to eliminate an imminent threat of an environmental damage. If Iberpotash does not take necessary restoration measures once its mining activities are closed, the unrestored waste heaps may become an imminent threat for the environment requiring thus remedial or preventive action by the competent public authorities as a means of last resort.

(98) Finally, the Spanish authorities themselves indicate ([23]) that according to Article 9 of Law 12/1981 in case the operator does not comply with its obligations, the Administratión de la Generalitat can forcefully execute these measures at the costs of the operator. They indicate that in practice the administration implements the relevant measures that are then financed from the financial guarantee or, in case the guarantee is not sufficient, from the sale of assets of the operator. Therefore, in case the financial guarantee is significantly lower than required, the public administration runs a risk that the assets of the operator are not sufficient to finance the relevant

([20]) Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas: https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565&p=20151002&tn=1#a99

([21]) Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente.

([22]) Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56).

([23]) See in particular paragraph 11 of the Spanish authorities comments on third party observations submitted on 27 July 2016.

measures it executed. This confirms that a too low financial guarantee increases the risk that the restoration measures taken by the administration will not be sufficiently covered by the assets of the operator (especially in case it does not have any other Spanish activities as in case of Iberpotash) and would need to be paid from the public resources.

(99) Therefore, a level of guarantees which is significantly lower than necessary as required by law is exposing the State to a concrete risk of additional burden on its resources. The increased risk of additional burden on the State is thus sufficiently concrete to constitute at least a potential impact on State resources due to an excessively low level of the financial guarantee.

(100) The level of the financial guarantees to be established by Iberpotash has been set by the administrative decisions of Generalitat de Catalunya approving the permits to operate its extractive activity of potash. Given that the notion of (Member) State for the purposes of application of Article 107(1) TFEU includes all levels of public authorities, regardless of whether it is a national, regional or local authority, the decision to apply a reduced level of the financial guarantees is imputable to the State.

(101) Therefore, the Commission concludes that Measure 1 involved a transfer of State resources and is imputable to the State.

5.1.1.3. ***Potential distortion of competition***

(102) The Commission considers that the reduced costs of Iberpotash due to a level of financial guarantees which is lower than required by the relevant legislation are liable to distort competition on the markets where Iberpotash is active — mainly markets for potash and salt. As explained below (see recital 110 and following), this reduction of costs amounted over the relevant period to around EUR 1,8 million and thus, contrary to the claims of the Spanish authorities, was not negligible.

(103) Further, the fact that Iberpotash is the sole Spanish producer of potash does not exclude a potential distortion of competition since the relevant geographic market is clearly wider than the national Spanish market. The Commission has already in 1993 considered that the potash market was wider than Spain, including as well France, the UK and other Member States except Germany ([24]). Further, Iberpotash in its Sustainability Report of 2014 ([25]) indicates that only 23 % of its production of potash and salt is sold in Spain, while 50 % go to other European countries, 18 % to South America and there are also further sales to North America, Africa and Asia. In all these regions Iberpotash competes with other producers of potash and salt and this competition is liable to be affected by artificially lowered costs of Iberpotash.

(104) Finally, the potential distortion of competition is not put into question by the argument of Iberpotash that irrespective of the level of the financial guarantees its environmental obligations remain the same (i.e. to ensure restoration of its sites and prevent pollution) and it anyway needs to maintain provisions to cover possible environmental liabilities. In addition to these accounting provisions, the obligation of maintaining specific financial guarantees in line with the relevant legislation in fact represents normal but specific operating costs borne by Iberpotash — or any other mining company subject to the same rules — as a result of fees that the bank charges for establishing and maintaining the guarantee and their unduly low level thus has the potential to favour Iberpotash and distort competition.

(105) The Commission thus concludes that Measure 1 has a potential to distort competition.

5.1.1.4. ***Affectation of intra-EU trade***

(106) As already indicated above, the markets for potash and salt are clearly cross-border markets with 50 % of Iberpotash's production being exported to other European countries. Therefore, the reduced level of the financial guarantees is liable to affect trade between EU Member States.

([24]) See Commission Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali- Salz/MdK/Treuhand) (OJ L 186, 21.7.1994, p. 38).
([25]) Memoria de Sostenibilidad 2014, page 15, http://www.icliberia.com/noticia/icl-iberia-presents-the-sustainability-report

(107) The argument of Iberpotash that the markets for salt are only national or even regional due to high transportation costs is thus not supported by the figures provided by Iberpotash in its Sustainability Report of 2014, since 80 % of its production of salt is being exported not only to other European countries but also to Asia, North Africa and America. In addition, the observations of Iberpotash on the Opening Decision are contradictory in this point since they claim on the one hand that the market for salt is national or even regional and on the other hand that a French producer of salt is its direct competitor and is trying to exclude Iberpotash from the market.

(108) The Commission thus concludes that Measure 1 affects intra-EU trade.

5.1.1.5. ***Quantification of the aid***

(109) Establishing the actual amount of the aid first requires establishing at least an approximate 'correct' amount of the financial guarantees under the applicable legislative rules in the relevant period. Then, the aid amount would correspond to the difference between the expected amount of banking fees that Iberpotash would have had to pay to constitute this correctly set guarantee amount, and the actual amount of banking fees that the company paid.

(110) The third party claims that the amount of aid should not be limited to the lower banking fees but should include also the necessity to provide sufficient collateralisation to the bank in the form of financial reserves. However, given that the amount of the 'corrected' guarantees as estimated below is relatively modest in view of the annual turnover of Iberpotash (around EUR 300 million) and the whole ICL group (USD 5,4 billion) it is unlikely that securing a higher guarantee amount would require significant additional costs to the company.

(111) Since, according to the Spanish authorities, the Higher court of Justice of Catalonia has found in December 2016 the increased amount of EUR 6 979 471,83 for Balsareny/Sallent site to be in line with the applicable legislation, the Commission considers that at present the 'correct' amount of the guarantees for Balsareny/Sallent corresponds to this currently applicable amount approved by the court.

(112) Further, the Commission by analogy (see also recital 64 above) considers that the increased amount of EUR 6 160 872,35 for the guarantee for Suria applicable since 2015 can also be considered as in line with the applicable legislation. Even though there is no authoritative court conclusion with respect to this site, the increased amount of the guarantee for a smaller site at Suria is in fact almost comparable to the approved amount for Balsareny/Sallent. This confirms that the amount can be considered as adequate and in line with the applicable legislation.

(113) Therefore, the correct amount of the guarantees at present corresponds in total to EUR 13 140 344,18.

(114) However, the calculation of this amount takes into account the Plan Phoenix announced in 2011 and gradually implemented as of 2012. The plan envisages, among others, investment in a vacuum salt plant in order to process and commercialise salt included in the potash mining waste. According to the plan, Iberpotash should be ultimately selling annually around 1,5 million tonnes of salt.

(115) The Commission agrees with the ERF Study that the Plan Phoenix as such cannot be considered as a restoration measure and would in fact not stop the growth of the waste deposits during the operation of the mines. However, the Commission also recognises the claims of Iberpotash and the Spanish authorities that the plan does have an impact on the total expected restoration costs. The ERF Study does not take into account the fact that the salt processing and sales are likely to continue also once the potash mining activities are stopped. The Plan Phoenix is thus likely to gradually contribute to elimination of the waste heaps in the future and as such can be taken into account for setting the appropriate level of the guarantees as has been the case for the increased levels of guarantees proposed in 2015 and, at least for Balsareny/Sallent, confirmed by the national court.

(116) This fact, however, means that the current level of financial guarantees cannot be considered as adequate for the period before the start of the Plan Phoenix in 2012. Even though also before announcing Plan Phoenix Ibepotash processed and sold rather minor amounts of salt from its waste heaps, most of the salt waste was being simply accumulated on the waste heaps with a hope that it might be commercially used in the future ([26]). However, there was no concrete plan on how and when to increase the salt processing facility so that the amounts of salt waste eliminated in this way would be more substantial and thus have an appreciable impact on the future restoration costs. Therefore, as regards the period before the launch of the Plan Phoenix, such rather hypothetical future reduction of the waste heaps due to the processing and sale of significant amounts of salt should not be taken into account.

(117) The Commission thus has to consider other available evidence for estimating an approximate 'correct' amount of the guarantees in the period 2006-2011 based on the restoration costs as expected at that moment, without the impact of the Plan Phoenix.

([26]) See Iberpotash's comments on the Opening Decision, paragraph 23.

(118) As already explained above (see recitals 68-81), the most reliable estimates of the total expected restoration costs (without Plan Phoenix) were provided in the ERF Study submitted by the complainant. The Commission considers the assumptions of this expert report to be credible, as they are largely based on market research and benchmarking with similar sites elsewhere in the world. On the contrary, as explained above, the study provided by Iberpotash cannot be considered as a reliable estimate of expected restoration costs because it does not consider proper restoration measures (see recital 79).

(119) The ERF Study estimates the total restoration costs to amount to at least EUR 71 million. Moreover, all other indications of possibly correct amounts in the ERF Study or from other sources (see Section 5.1.1.1 above) are even higher. Therefore, the Commission considers that in the absence of any better estimates for the period 2006-2011 the relevant expected restoration costs to be taken into account amount to EUR 71 million (EUR 24,8 million for Suria and EUR 46,2 million for Balsareny/Sallent).

(120) Finally, according to Article 3 of the Decree 202/1994 (the legislation applicable in that period) the resulting amount of the financial guarantee on the basis of Article 2 (i.e. based on expected restoration costs) should be reduced by 50 % for mining activities not situated in natural sites of special interest (including Ibepotash's sites).

(121) Therefore, the Commission considers on the basis of available evidence that the 'correct' amount of the financial guarantees for Iberpotash mining activities amounts to at least EUR 12,4 million for Suria (for the period 2006-2011) and EUR 23,1 million for Balsareny/Sallent (for the period 2008-2011).

(122) According to Iberpotash the current costs of the guarantee amount to 1 % of the guarantee amount per year. Using the above correct guarantee amounts for the two relevant periods, the total aid granted to Iberpotash in the form of lower guarantee fees would then each year amount to 1 % of the difference between the 'correct' amount and the actual amount established for that year, as shown in the following table.

Table 3

Calculation of the amount of aid

(thousand EUR, rounded)	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Balsareny/Sallent											
— actual guarantee	—	—	1 130	1 130	1 130	1 130	1 130	1 130	1 130	1 130	1 130
— 'correct' guarantee	—	—	23 100	23 100	23 100	23 100	6 979	6 979	6 979	6 979	6 979
— difference in the fees	—	—	146,5 (1)	219,7	219,7	219,7	58,5	58,5	58,5	58,5	58,5
Suria											
— actual guarantee	774	774	828	828	828	828	828	828	828	828	6 161
— 'correct' guarantee	12 400	12 400	12 400	12 400	12 400	12 400	6 160	6 160	6 160	6 160	6 160
— difference in the fees	9,7 (2)	116,3	115,7	115,7	115,7	115,7	53,3	53,3	53,3	53,3 (3)	0
Total difference in fees for Iberpotash	**9,7**	**116,3**	**262,2**	**335,4**	**335,4**	**335,4**	**111,8**	**111,8**	**111,8**	**76,3**	**58,5**

(1) Since the guarantee for Balsareny/Sallent was set by the authorisation issued on 29 April 2008, the difference in the guarantee fees for Balsareny/Sallent in this year is calculated as 8/12 of the annual amount.

(2) Since the guarantee for Suria was set by the authorisation issued on 9 November 2006, the difference in the guarantee fees for Suria in this year is calculated as 1/12 of the annual amount.

(3) Since the guarantee for Suria was increased to the 'correct' amount as of May 2015, the difference in the guarantee fees for Suria in this year is calculated as 4/12 of the annual amount.

(123) Therefore, the total amount of aid granted to Iberpotash in the form of lower bank fees for the reduced level of the guarantees for the whole period 2006-2016 amounts to EUR 1 864 622.

This aid was granted at the moment the reduced levels of the guarantees were set in the environmental authorisations issued by the Spanish authorities, i.e. on 6 November 2006 for Suria and on 29 April 2008 for Balsareny/Sallent.

5.1.1.6. ***Conclusion on existence of aid: Measure 1***

(124) In light of the above, the Commission comes to the view that Measure 1 constitutes State aid and will therefore assess its lawfulness and compatibility with the internal market.

5.1.2. MEASURE 4: INVESTMENT TO COVER THE VILAFRUNS WASTE HEAP

(125) On 17 December 2007, the Ministry of Environment of Spain and the Generalitat de Catalunya signed a convention by which they agreed to cooperate and share the costs with respect to the project aimed at covering the waste heap of Vilafruns and thus reducing its negative environmental impact. The Ministry of Finance agreed to contribute EUR 4 million to the investment costs while the rest was to be covered by the Agencia Catalana del Agua, a public undertaking managed by the Generalitat de Catalunya. The works on the project started in August 2008 and lasted 18 months. The total investment costs amounted to EUR 7 887 571 and were entirely covered by public authorities as agreed in the 2007 convention.

(126) The project consisted in covering the Vilafruns waste heap with an impermeable sheeting ('lámina impermeable') which would seal the waste heap and insulate the waste salt from any contact with water from exterior and thus prevent any leaks of salt from the heap. The sheeting was protected by geotextile foils and covered by soil enabling planting vegetation on top of the covered heap.

(127) Vilafruns waste heap is at the premises and in the ownership of Iberpotash. It was transferred to it as part of the sales agreement of 21 October 1998 by which Iberpotash acquired the mining activities in the Catalan region from the Sociedad Estatal de Participaciones Industriales — SEPI a public holding of the Spanish State. At the time of the transfer, the waste heap was already inactive since the operation of the mine to which Vilafruns waste heap belonged was stopped already in 1973.

5.1.2.1. ***Selective economic advantage***

(128) As indicated above, the investment in the covering of the Vilafruns waste heap at the premises of and in the ownership of Iberpotash was fully financed by public authorities. Iberpotash only bears the maintenance costs of the installation during its life-time.

(129) The covering realised in 2008-2009 relates to a waste heap which is owned by Iberpotash since 1998 when the site was privatised together with other potash mining sites in the region. The heap relates to a mine which ceased operations already in 1973 and thus Iberpotash took over the site when it was no longer operational. Iberpotash thus argues that it has no obligation to take any measures to prevent pollution from the heap either under the national or Union legislation since Iberpotash was not the original polluter.

(130) The Spanish authorities do not agree with these arguments of Iberpotash and claim that Iberpotash has a general obligation to take appropriate measures to prevent pollution from the waste heap in its ownership and to manage the heap in line with the applicable legal rules. Iberpotash is thus liable for ensuring environmental protection measures required under the relevant legislation and also for any environmental damage caused by this heap.

(131) Further, third party comments point to the responsibility of Iberpotash to manage Vilafruns from the very moment that mining rights were transferred to it. Such responsibility was based on the Spanish Act 6/1993 of 15 July 1993 on management of waste and also on the Royal Law-Decree 1/2001 of 20 July 2001 recasting the Spanish Water Act. The third party claims that the fact that Vilafruns was no longer active when acquired by Iberpotash is irrelevant since any holder of a mining concession must manage any mining waste in its entirety, i.e. including any waste generated prior to the holder's acquisition of the concession.

(132) The Commission considers that the fact that the mine at Vilafruns waste heap stopped operating already in 1973 does not as such exclude responsibility of Iberpotash as its owner to assure appropriate restoration. As confirmed by the Spanish authorities, all restoration plans including the plan of 2008 included specific restoration measures that Iberpotash was obliged to take with respect to the Vilafruns heap. According to Article 121 of the Spanish Mining Act of 1973, a non-fulfilment of obligations included in the restoration plan constituted a serious infringement. In addition, the Spanish authorities confirm that, in line with the applicable water protection legislation, Iberpotash was always obliged to take necessary measures to avoid water pollution from all its installations, including Vilafruns heap. The Commission also notes that according to Article 4 of the Extractive Waste Directive, the operator shall take all necessary measures to prevent or reduce as far as possible any adverse effects on environment also in case of management of waste facility after its closure.

(133) Also, Iberpotash claims that the sales agreement for the site includes a clause that can be interpreted as excluding responsibility of Iberpotash resulting from activities before 1997, i.e. including any responsibility for the waste heap. Iberpotash in this respect refers to a judgment of the Supreme Court of 14 May 2009 citing the sales contract provision stipulating that the selling party should compensate the buyer for any obligations resulting from third party claims in relation to facts before the transfer that were not reflected in the balance sheet and not evident during the due diligence process. Iberpotash argues that the obligations relating to Vilafruns restoration were not evident before the sale and there were no related provisions in the balance sheet due to the fact that no such legal obligation existed at that time.

(134) However, the Spanish authorities indicate that the share sales agreement of 1998 did not include any specific provisions that would oblige the seller to take over any responsibilities of the buyer following the transfer of shares.

(135) The Commission further notes that the provision cited in the judgment of the Supreme Court is rather a standard contractual provision protecting the seller against subsequent third party claims related to facts not known during the sale. However, Iberpotash cannot claim that it was not aware of the existing Vilafruns waste heap taken over as part of the transaction and of the general responsibility of waste holder to ensure proper management of its waste facilities. The fact that Iberpotash accepted environmental obligations with respect to Vilafruns heap in various restoration plans confirms it was aware of such responsibilities.

(136) The Commission thus considers that as a consequence of the acquisition of the potash mining activities in Catalonia in 1998, Iberpotash was responsible for ensuring proper management of the Vilafruns waste heap in line with the applicable legal rules.

(137) However, while accepting such conclusion, the Spanish authorities claim that the obligations of Iberpotash did not include the covering of Vilafruns waste heap. According to the Spanish authorities, Iberpotash's obligations would have been fulfilled by substantially cheaper measures that had been included in its original restoration plan of 2008 (namely installation of a tubing/drainage system, other types of protection and restoration with total costs of around EUR […] (*)). They thus argue, together with Iberpotash, that the public investment into the covering of the heap does not constitute an economic advantage to Iberpotash since the costs Iberpotash saved (EUR […]) are more than balanced by the maintenance costs it has to bear for the life-time of the installation (amounting to EUR […] only for the period from March 2015 to March 2016) and the opportunity costs of not being able to process and sell the salt from the covered Vilafruns heap as it plans to do for its other heaps ([27]).

(138) The Commission considers that, regardless of the extent of Iberpotash's obligations with respect to Vilafruns, it is not acceptable that public investment of EUR 7,9 million into a significantly better environmental protection amounting in principle to the restoration of the mining site without any investment costs to Iberpotash indeed did not bring any economic advantage to Iberpotash. The installation of the covering of the waste heap aimed at reducing significantly the pollution caused by leaks from the Vilafruns heap. The alternative measures in the absence of aid would have not provided such good and long-lasting protection and would have exposed Iberpotash to risks of having to bear the consequences of the pollution (as demonstrated by the criminal judgments of 18 December 2014 and 25 February 2015 related to its other mining sites — see recitals 27 and 94 of the Opening Decision). Therefore, the construction of the facility paid from public resources enabled Iberpotash to better prevent pollution, lower its environmental risks for the future and provide for a long-lasting restoration of the heap (in line with similar restorations of salt waste heaps in France or Germany as explained above in recitals 26 and 32). Iberpotash would have been ultimately obliged to ensure a proper restoration of Vilafruns waste heap.

(*) Confidential information
([27]) See observations of the Spanish authorities to the Opening Decision, paragraph 55.

(139) Finally, the Commission considers that the measure is selective since it specifically aimed at public financing of the covering of Vilafruns waste heap in the ownership of Iberpotash. The Spanish authorities argue that the measure cannot be selective since Iberpotash is the only potash mining company in Spain and thus there is no possibility of comparison with other companies. However, the fact that Iberpotash is the only potash mining company in Spain does not invalidate the selectivity of the measure that is clearly aimed for a specifically identified waste facility and not any other.

(140) The Commission thus concludes that Measure 4 provided a selective economic advantage to Iberpotash.

5.1.2.2. ***Transfer of State resources***

(141) The total investment costs of the covering of Vilafruns waste heap were paid by public authorities, EUR 4 million by the Ministry of Environment of Spain and the remaining EUR 3 887 571 by the Agencia Catalana del Agua, public undertaking managed by the Generalitat de Catalunya, which thus honoured the commitment to cover the rest of the investment costs that the Generalitat de Catalunyua accepted in the convention of 17 December 2007.

(142) Neither the Spanish authorities nor Iberpotash claimed absence of State resources with respect to this measure.

(143) In addition, the decision to provide public financing for the covering of Vilafruns waste heap was taken by the Ministry of Environment of Spain and the Generalitat de Catalunya and it is thus clearly imputable to the State.

(144) Therefore, the Commission concludes that Measure 4 involved transfer of State resources and is imputable to the State.

5.1.2.3. ***Potential distortion of competition***

(145) As indicated in detail above (see recitals 103 and 105), Iberpotash is in competition with other producers of potash and salt. Therefore, the fact that at least part of its environmental obligations with respect to Vilafruns were financed from public resources is liable to distort competition by artificially reducing Iberpotash's costs and thus providing an undue advantage vis-à-vis its competitors.

(146) The Commission thus concludes that Measure 4 has a potential to distort competition.

5.1.2.4. ***Affectation of intra-EU trade***

(147) Both potash and salt are traded within the EU (see above recitals 106 and 107) and the Commission thus concludes that Measure 4 affects intra-EU trade.

5.1.2.5. ***Conclusion on existence of aid: Measure 4***

(148) In light of the above, the Commission comes to the view that Measure 4 constitutes State aid amounting to EUR 7 887 571 and will therefore assess its lawfulness and compatibility with the internal market.

5.2. *LEGALITY OF THE AID*

(149) Both Measure 1 and Measure 4 were granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Therefore, the Commission considers that both measures thus constitute unlawful State aid.

5.3. *COMPATIBILITY OF THE AID*

5.3.1. MEASURE 1: REDUCED LEVEL OF THE FINANCIAL GUARANTEES

(150) Neither the Spanish authorities nor Iberpotash allege any compatibility grounds for the aid in the form of financial guarantees lower than required under relevant law.

(151) The Commission considers that the measure constitutes operating aid to Iberpotash as it allowed costs from guarantee fees being lower than requisite in the long period between 2006 and 2016.

(152) The Commission has not found any possible compatibility ground for such operating aid granted without pursuing any apparent objective of common interest and thus concludes that the measure consisting in reduced level of the financial guarantees of Iberpotash constitutes incompatible aid in the form of lower banking fees resulting from the unduly low level of the financial guarantees.

5.3.2. MEASURE 4: INVESTMENT TO COVER OF VILAFRUNS WASTE HEAP

(153) The Spanish authorities argue that should the covering of Vilafruns waste heap constitute State aid, it would be compatible on the basis of Section 3.1.1 of the 2008 Environmental Aid Guidelines concerning the environmental aid for undertakings which go beyond Union standards or which increase the level of environmental protection in the absence of Union standards.

(154) They submit that the covering of the waste heap is a pilot project aiming at testing a new technology for preventing salt waste heap leakages. The Vilafruns site has allegedly been chosen for this pilot project due to its particular characteristics (smaller volume, location as a first salt heap most upstream of the Llobregat river, the fact that it has been inactive already for decades). By providing the authorities with data about actual results, it would enable them to better address the general problem of salt waste heaps in the region. In this respect, the project is expected to contribute to the preservation, protection and restoration of environment in the region of the Llobregat river basin and thus pursues an objective of common interest.

(155) The Spanish authorities further explain that the project is part of a general plan for improved management of the Catalan water basin including various measures; some financed from public and others from private resources.

(156) The Commission considers that the 2008 Environmental Aid Guidelines indeed provide a basis for compatibility assessment in the current case. In particular, point 205 of the 2008 Environmental Aid Guidelines, read in conjunction with point 248 of the 2014 Energy and Environmental aid Guidelines ([28]) allows the Commission to apply the rules laid down in the 2008 Environmental Aid Guidelines to unlawful aid granted in 2009-2011.

(157) According to Section 3.1.1 of the 2008 Environmental Aid Guidelines, investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty (now Article 107(3)(c) TFEU) provided that the conditions set out in points 74 to 84 and Section 3.2 of the 2008 Environmental Aid Guidelines are fulfilled.

(158) The Union standards for restoration of extractive waste are set out in the Extractive Waste Directive. However, according to Article 24(4) of the Directive, Article 5, Article 6(3) to (5), Articles 7 and 8, Article 12(1) and (2) and Article 14(1) to (3) shall not apply to the waste facilities that stopped accepting waste before 1 May 2006, as it is the case for Vilafruns waste heap. Therefore, in the case at hand there are no specific Union standards that would set the level to be attained for Vilafruns waste heap in environmental terms.

(159) One third party claims that Iberpotash was already in 2008-2009 under an immediate legal obligation to ensure that the heap was covered, without, however, providing any specific evidence for these claims. In any event, the Commission considers that even though Iberpotash would have ultimately been obliged to ensure proper restoration of Vilafruns waste heap in the future, there was no such obligation in 2008-2009 and, in the absence of the aid, Iberpotash would have been able to continue managing the waste heap by fulfilling its obligations according to the applicable restoration plan.

(160) In line with point 79 of the 2008 Environmental Aid Guidelines, the aid intensity of such aid in case of large enterprises must not exceed 50 % of the eligible costs. Where the investment concerns the acquisition of an eco-innovation asset or the launching of an eco-innovation project, the aid intensity may be increased by 10 percentage points, provided that the conditions of point 78 of the 2008 Environmental Aid Guidelines are fulfilled. In addition, the aid intensity may amount to 100 % where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, effectively ensuring

([28]) Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1).

that the aid is limited to the minimum necessary for achieving the environmental gain (see point 77 of the 2008 Environmental Aid Guidelines). Such a bidding process must be non-discriminatory and provide for the participation of a sufficient number of undertakings. In addition, the budget related to the bidding process must be a binding constraint in the sense that not all participants can receive aid.

(161) According to point 80 of the 2008 Environmental Aid Guidelines, the eligible costs must be limited to the extra investment costs necessary to achieve a higher level of environmental protection, decreased by any operating benefits and increased by any operating costs during the first five years. In the absence of the Union standards, these extra investment costs consist of the investment costs necessary to achieve a higher level of environmental protection than that which the undertaking in question would achieve in the absence of any environmental aid (see point 84(c) of the 2008 Environmental Aid Guidelines).

(162) In the case at hand, the Spanish authorities argue that before the investment in the covering of the heap, Iberpotash's applicable restoration plan included specific restoration measures for Vilafruns waste heap aimed at limiting leakages from the waste heap and thus minimising its impact on the environment. The expected costs of these measures, constituting a counterfactual situation in the absence of State aid in line with point 81(a) of the 2008 Environmental Aid Guidelines, amounted to EUR […]. The Commission understands that these measures were considered sufficient by the Spanish authorities to ensure fulfilment of the environmental obligations applicable at that time to the inactive Vilafruns waste heap.

(163) In addition, as explained by the Spanish authorities, the covering of Vilafruns waste heap was considered as a so called 'pilot project' in order to verify in practice suitability of that restoration method for addressing the environmental problems of the Llobregat region. Therefore, the covering was not made because of any actual legal obligation to do so but rather in view of a more general public interest in finding the most appropriate restoration method to be in the future implemented for all other waste heaps affecting the environment of the region.

(164) Therefore, the covering of Vilafruns waste heap in 2008-2009 enabled Iberpotash to increase the level of environmental protection resulting from its activities in the absence of Union standards in line with point 74(b) of the 2008 Environmental Aid Guidelines.

(165) In view of the above, the extra investment costs for the investment project would amount to investment costs of EUR 7 887 571 minus the costs of EUR […] in the counterfactual scenario. Since Vilafruns has not been in operation for a number of years, there are no operating benefits from the covering of the waste heap. Operating costs for the maintenance of the installation last year amounted according to the Spanish authorities to EUR […]. Presuming they stay at this level during the first five years, the total amount of operating costs to be added to the eligible costs would be EUR […]. The total eligible costs would thus amount to EUR 7 804 922,60 ([29]).

(166) Since the aid amounted to the total investment costs of EUR 7 887 571, it constitutes more than 100 % of eligible costs.

(167) The Spanish authorities have not provided any evidence that Vilafruns waste heap would have been selected in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria from a larger number of possible other projects. In fact, the heap has been chosen by the Spanish authorities only due to its characteristics that were considered as suitable for the project (see above recital 154). Therefore, point 77 of the 2008 Environmental Aid Guidelines allowing an aid intensity of up to 100 % cannot be used in the case at hand.

(168) Further, the Commission considers that the method of restoring a waste heap by covering it with an impermeable layer ensuring its insulation from water cannot be considered as an eco-innovation project within the meaning of point 78 of the 2008 Environmental Aid Guidelines. Despite arguments of the Spanish authorities that the covering is unique and innovative, this method cannot be considered as new or substantially improved compared to the state of the art in the industry in the Union for the following reasons.

(169) There may be technical differences between Vilafruns covering and the covering made in case of Alsace waste heaps as explained by a technical contribution by Agencia Catalana del Agua. However, similar methodologies

([29]) I.e. EUR 7 887 571 minus EUR […] plus EUR […].

aimed at covering and sealing the heap with impermeable material had been already realised, in particular in Germany. According to a book by a German expert specifically dealing with available technologies in the potash industry ([30]), there is a large experience of 30 years of covering of whole potash mining waste heaps in Germany with the aim to prevent entry of water into the heap and thus minimise leakage. The book claims that experiments in covering the waste heaps in Germany date back to 1950s and that as of 1970s, but in particular since 1990s, a number of mainly middle-sized waste heaps were covered in Germany while trying various types of materials and techniques. The 2015 Annual Report of the German potash mining company K+S indicates that small and medium-sized disused tailing piles have been covered as part of their old pile strategy in an effort to avoid and minimise long-term impact on nature and the environment. Overall, 41 disused tailing piles in Lower Saxony and two in Baden-Württemberg are currently being maintained. Fifteen of these have been revegetated and another six are in the process of being revegetated ([31]).

(170) Therefore, even though the technical details of these projects may vary depending on the particular conditions of each site, the project cannot be consider as eco-innovation according to Section 3.1.1 of the 2008 Environmental Aid Guidelines.

(171) The maximum aid intensity for Iberpotash as a large enterprise according to point 76 of the 2008 Environmental Aid Guidelines is thus 50 % of eligible costs.

(172) Therefore, the maximum aid amount that the Commission considers compatible with the internal market under the 2008 Environmental Aid Guidelines as investment aid enabling Iberpotash to increase the level of environmental protection is EUR 3 902 461,30.

(173) Consequently, the Commission considers the rest of the total aid amount for this measure (i.e. EUR 3 985 109,70) as illegal and incompatible aid.

6. **RECOVERY**

(174) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([32]). The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([33]).

(175) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([34]).

(176) In line with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 ([35]) stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'.

(177) Thus, given that the measures in question:

(a) the total amount of aid granted to Iberpotash under Measure 1 in the form of lower bank fees for the reduced level of the guarantees for the period 2006-2016 and amounting to EUR 1 864 622; and

([30]) Henry Rauche: Die Kaliindustrie im 21. Jahrhundert, Springer-Verlag Berlin Heidelberg 2015, http://www.springer.com/de/book/9783662468333. The existence of this book was pointed to us by one of the interested parties. It was written by an expert with 30-year experience in the potash industry and constitutes, also according to independent reviews (see e.g. https://mining-report.de/blog/henry-rauche-die-kaliindustrie-im-21-jahrhundert/) a comprehensive overview of the state-of-the-art techniques and technologies in the potash industry.

([31]) 2015 Annual Report of K+S, page 48, http://www.k-plus-s.com/en/archiv/finanzberichte.html

([32]) See Case C-70/72 Commission v Germany [1973] ECLI:EU:C:1973:87, paragraph 13.

([33]) See Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECLI:EU:C:1994:325, paragraph 75.

([34]) See Case C-75/97 Belgium v Commission [1999] ECLI:EU:C:1999:31, paragraphs 64 and 65.

([35]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

(b) the part of the Measure 4 going beyond the maximum aid intensity for investment aid enabling Iberpotash to increase the level of environmental protection by covering Vilafruns waste heap and amounting to EUR 3 985 109,70, were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.

7. **CONCLUSION**

(178) The Commission finds that Spain has unlawfully implemented the aid granted to Iberpotash under Measure 1 in the form of unduly low guarantee fees resulting from the unduly low level of the guarantees for the period 2006-2016 amounting to EUR 1 864 622 in breach of Article 108(3) of the Treaty on the Functioning of the European Union. The Commission finds that this aid is incompatible with the internal market and must be recovered.

(179) The Commission finds that Spain has unlawfully implemented the investment aid enabling Iberpotash to increase the level of environmental protection by covering Vilafruns waste heap (Measure 4) in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

(180) However, the Commission finds that part of Measure 4 amounting to EUR 3 902 461,30 is compatible with the internal market within the meaning of Article 107(3)(c) as it is in line with the 2008 Environmental Aid Guidelines.

(181) On the contrary, the Commission finds the remaining part of the total aid amount for Measure 4 going beyond the authorised maximum aid intensity, namely EUR 3 985 109,70, is incompatible with the internal market and must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid in favour of Iberpotash in the form of unduly low guarantee fees resulting from the unduly low level of the guarantees for the period 2006-2016 amounting to EUR 1 864 622, unlawfully granted by Spain, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

2. The State aid for covering Vilafruns waste heap amounting to EUR 3 902 461,30 unlawfully granted by Spain, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Iberpotash is compatible with the internal market within the meaning of Article 107(3)(c).

3. The remaining part of State aid for covering Vilafruns waste heap amounting to EUR 3 985 109,70 unlawfully granted by Spain, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Iberpotash is incompatible with the internal market.

Article 2

1. Spain shall recover the aid referred to in Article 1(1) and (3) from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([36]) and with Commission Regulation (EC) No 271/2008 ([37]) amending Regulation (EC) No 794/2004.

4. Spain shall cancel all outstanding payments of the aid referred to in Article 1(1) and (3) with effect from the date of adoption of this decision.

Article 3

1. Recovery of the aid referred to in Article 1(1) and (3) shall be immediate and effective.

2. Spain shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

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

(a) the total amount (principal and interests) to be recovered from the beneficiary;

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

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

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

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 August 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission

([36]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).
([37]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).