

## PROCEDURY ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

## KOMISJI EUROPEJSKIEJ

## POMOC PAŃSTWA – NIEMCY

**Pomoc państwa C 40/09 (ex N 555/09) – Dodatkowa pomoc dla WestLB AG związana z wydzieleniem aktywów**

**Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 TFUE**

**(Tekst mający znaczenie dla EOG)**

(2010/C 66/08)

Pismem z dnia 22 grudnia 2009 r., zamieszczonym w języku autentycznym na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Niemcy o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka pomocy, w odniesieniu do którego Komisja wszczyni postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

European Commission  
Directorate-General for Competition  
State aid Greffe  
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Otrzymane uwagi zostaną przekazane władzom niemieckim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

## STRESZCZENIE

## I. PROCEDURA

- (1) Dnia 12 maja 2009 r. w sprawie C 43/08 Komisja warunkowo zatwierdziła pomoc na restrukturyzację WestLB w formie zabezpieczenia przed ryzykiem związanym z portfelem Phoenix w wysokości 5 mld EUR.
- (2) W dniu 10 grudnia 2009 r. Komisja otrzymała zgłoszenie dotyczące dokapitalizowania WestLB przez państwo niemieckie kwotą 3 mld EUR oraz udzielenia gwarancji przez publicznych akcjonariuszy WestLB na kwotę 1 mld EUR, które to środki są niezbędne do wprowadzenia środka na rzecz ratowania aktywów poprzez utworzenie banku likwidującego złe aktywa. Bank likwidujący złe aktywa ma przejąć aktywa o wartości nominalnej wynoszącej 85,1 mld EUR. Środek na rzecz ratowania aktywów został przewidziany w decyzji o restrukturyzacji z dnia 12 maja 2009 r. Jednakże dodatkowa pomoc, która jest obecnie niezbędna, nie została wcześniej zgłoszona ani zatwierdzona.

## II. FAKTY

- (3) WestLB zamierza wydzielić swoje „toksyczne” aktywa oraz aktywa niemające charakteru strategicznego i przenieść je do banku likwidującego złe aktywa. Przewiduje się, że proces ten będzie przebiegał dwuetapowo: w pierwszym etapie WestLB zamierza wydzielić „toksyczne” aktywa o wartości nominalnej ok. 23,8 mld EUR; w drugim etapie, zaplanowanym na kwiecień 2010 r., zamierza wydzielić aktywa niemające charakteru strategicznego o wartości nominalnej ok. 61,3 mld EUR (ogółem: 85,1 mld EUR).
- (4) WestLB zapewni bankowi likwidującemu złe aktywa bufor w postaci kapitału własnego w wysokości 3 mld EUR na pokrycie przewidywanych strat. Ponieważ WestLB nie dysponuje wystarczającym kapitałem, SoFFin dokapitalizuje WestLB kwotą 3 mld EUR, która stanowić będzie cichy udział. Ponadto straty mają zostać pokryte z gwarancji na kwotę 1 mld EUR udzielonej przez akcjonariuszy WestLB.
- (5) Niemcy wyjaśniły, że rozwiązanie zakładające utworzenie banku likwidującego złe aktywa, przewidziane w decyzji

z dnia 12 maja, nie zostało jeszcze wprowadzone w życie. Ponadto wymaga ono znaczącej kwoty pomocy dodatkowej opisanej powyżej. W tym celu Niemcy przedstawiły uaktualniony plan restrukturyzacji, w którym przewidziano jedynie niewielkie zmiany. Niemcy zaproponowały także kilka zobowiązań, które umożliwią sprzedaż WestLB w przyspieszonym trybie.

### III. OCENA

- (6) Środki obejmujące dokapitalizowanie banku, gwarancję oraz środek na rzecz ratowania aktywów stanowią pomoc państwa na rzecz WestLB.
- (7) Wprowadzenie środka przewidującego dokapitalizowanie banku spełnia wymogi określone w komunikacie o dokapitalizowaniu instytucji finansowych z dnia 5 grudnia 2008 r., ale środek na rzecz ratowania aktywów, który należy oceniać na podstawie komunikatu dotyczącego aktywów o obniżonej jakości z dnia 25 lutego 2009 r., nie może być na obecnym etapie uznany za zgodny ze wspólnym rynkiem. Nie spełnia on warunków dotyczących przejrzystości, ujawniania informacji, wyceny, podziału obciążeń i wynagrodzenia. Ponadto, w kontekście komunikatu dotyczącego restrukturyzacji z dnia 22 lipca 2009 r., środki te budzą również wątpliwości dotyczące szans na przywrócenie rentowności banku, podziału obciążeń oraz łagodzenia skutków zakłócenia konkurencji. W świetle powyższych rozważań Komisja podjęła decyzję o wszczęciu postępowania, określonego w art. 108 ust. 2 TFUE, w odniesieniu do środka na rzecz ratowania aktywów zakładającego utworzenie banku likwidującego zle aktywa oraz w odniesieniu do pomocy restrukturyzacyjnej dla WestLB.
- (8) Zważywszy jednakże na bezpośrednie zagrożenie dla stabilności finansowej, jakie może stanowić niewdrożenie środków, Komisja zezwala na tymczasowe zastosowanie środka zakładającego dokapitalizowanie banku, gwarancji i środka na rzecz ratowania aktywów przez okres sześciu miesięcy jako pomocy nadzwyczajnej na mocy art. 107 ust. 3 lit. b) TFUE.

#### TEKST PISMA

„The Commission wishes to inform Germany that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) <sup>(1)</sup> since the Commission has doubts as to the compatibility of the measures with the internal market.

#### 1. PROCEDURE

- (1) On 12 May 2009, in Case C 43/08 <sup>(2)</sup> the Commission conditionally approved restructuring aid to WestLB AG

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

<sup>(2)</sup> Cf. Commission Decision of 12 May 2009 in Case C 43/08, *Restructuring of WestLB AG*, [http://ec.europa.eu/competition/state\\_aid/register/jii/doc/C-43-2008-WLWL-en-12.5.2009.pdf](http://ec.europa.eu/competition/state_aid/register/jii/doc/C-43-2008-WLWL-en-12.5.2009.pdf)

(“WestLB”) in the form of a risk shield on the Phoenix portfolio of EUR 5 billion. It requires the sale of the bank by the end of 2011.

- (2) On 7 October 2009, in Case N 531/09 <sup>(3)</sup> the Commission approved as compatible emergency aid a risk assumption of EUR 6,4 billion <sup>(4)</sup> of the already protected Phoenix portfolio, which *de facto* further increased the initial risk shield. Germany committed to notify by 30 November 2009 a revised restructuring plan which would take into account any additional State aid not approved by the Decision of 12 May 2009 and therefore provide for additional restructuring.
- (3) An updated restructuring plan was submitted on 15 December 2009.
- (4) On 10 December 2009, Germany notified a recapitalisation of WestLB amounting to EUR 3 billion as well as a guarantee of EUR 1 billion, which are necessary for the establishment of a bad bank by WestLB. The bad bank will relieve WestLB from assets with a nominal value of EUR 85,1 billion. That asset relief measure was envisaged in general terms in the restructuring Decision of 12 May 2009 <sup>(5)</sup>.
- (5) Following discussions with the Commission, Germany provided several commitments and additional information by 16 December 2009.
- (6) Given the urgency to get a Commission decision on these measures, Germany has exceptionally agreed that the authentic language for this decision should be English.

#### 2. DESCRIPTION OF THE AID

##### WestLB AG

- (7) The beneficiary WestLB is a public limited company, with its registered headquarters in North Rhine-Westphalia. WestLB is a service provider for Germany's largest savings banks network and public-sector clients. WestLB has until recently offered a universal bank's range of products and services, including products for private clients, midmarket companies and corporate enterprises, partly in cooperation with savings banks, partly via subsidiaries specialised in consumer loans, private banking and commercial real estate finance. In line with a restructuring plan dated 30 April 2009, which was

<sup>(3)</sup> Cf. Commission Decision of 7 October 2009 in Case N 531/09, *Assumption of Risk for WestLB*, not yet published.

<sup>(4)</sup> According to information sent by Germany on 18 November 2009, the risk shield that was in the end contractually agreed upon was only EUR 5,9 billion, therefore lower than the amount initially notified.

<sup>(5)</sup> Cf. point 1.1 and 3.3 of the Annex to Commission Decision of 12 May 2009 in Case C 43/08, *Restructuring of WestLB AG*, [http://ec.europa.eu/competition/state\\_aid/register/jii/doc/C-43-2008-WLWL-en-12.5.2009.pdf](http://ec.europa.eu/competition/state_aid/register/jii/doc/C-43-2008-WLWL-en-12.5.2009.pdf)

approved in the restructuring Decision of 12 May 2009, WestLB is currently unbundling its core activities and abandoning non-core activities. WestLB's published balance-sheet total was EUR 288 billion on 31 December 2008, while its risk-weighted assets stood at EUR 88,5 billion. As of 30 September 2009, the bank's published balance-sheet total was equal to EUR 258,8 billion and its risk-weighted assets stood at EUR 84,2 billion.

- (8) WestLB is currently owned by the Westfälisch-Lippische Sparkassen- und Giroverband (WLSGV), which accounts for 25,03 % of its shares, the Rheinische Sparkassen- und Giroverband (RSGV), which owns 25,03 % and — both directly and indirectly, via the NRW.BANK (formerly known as Landesbank Nordrhein-Westfalen) — the Land of North Rhine-Westphalia (37,74 %), the Landschaftsverband Westfalen Lippe (LWL; 6,09 %), and the Landschaftsverband Rheinland (LVR; 6,09 %).

### 2.1. The restructuring Decision of 12 May 2009

- (9) At the end of March 2008, WestLB's shareholders granted the bank an "impaired assets relief" measure through a risk shield of up to EUR 5 billion for a portfolio of structured securities with a nominal volume of approximately EUR 23 billion ("Phoenix") in order to prevent bank resolution procedures.
- (10) WestLB is currently in the process of implementing the restructuring plan dated 30 April 2009 which was approved in the restructuring Decision of 12 May 2009. The implementation of the plan gives rise to significant divestures and a reshuffle of the bank's business model. In particular, WestLB will stop proprietary trading activities and, overall, reduce its assets by 50 %. The bank will focus on three core business areas: "transaction banking"; "medium-sized companies, savings banks partnership, and corporate banking", and "capital market activities and structured finance" which all have to be structurally separated.
- (11) In order to achieve the targeted balance sheet reduction, the restructuring plan set out explicitly in Annex 2 point 3.3.1 that the "reduction of the total balance sheet and the risk-weighted assets ... is based on the assumption that WestLB will fully dispose a number of assets grouped in an exit portfolio." However, no additional aid was foreseen or authorised for this purpose. Regarding the exit portfolio it was planned from the very beginning to spin off both structured securities and non-strategic assets of approximately EUR 85 billion (the so-called "PEG" portfolio, of which the Phoenix portfolio is part) to a so-called *bad bank*, set up pursuant to the *Gesetz zur Fortentwicklung der Finanzmarktstabilisierung*, the German bad bank law (FMStFG). This transaction was initially scheduled to be completed well in advance of 31 December 2009, in order to meet the caps on the balance sheet total. Moreover, Germany committed to

initiate the change of the bank's ownership structure through a public tender procedure before the end of 2011.

- (12) The spin-off could not be carried out as initially planned since WestLB's shareholders did not agree upon the set-up of the bad bank. Furthermore, the capital required to enable the spin-off of risky and non-strategic assets had been substantially underestimated.

### 2.2. The Decision of 7 October 2009

- (13) In October 2009, additional aid in the form of a further risk assumption for the Phoenix portfolio in the amount of EUR 6,4 billion was required to address an additional capital shortage that had not been made known previously and was therefore not addressed in the Commission Decision of 12 May 2009. Due to increasing losses and mounting risk weights, the risk shield for the Phoenix portfolio was no longer sufficient to achieve a risk transfer. Therefore, the portfolio became subject to regulatory capital requirements again. As a result, WestLB's overall capital ratio fell to [ $< 7\%$ ] (\*) and, therefore, significantly short of the regulatory minimum capital requirements. Without the provision of additional capital or State aid, the German regulator BaFin would have been obliged to initiate bank resolution procedures.
- (14) This additional aid during the restructuring phase was temporarily approved for reasons of financial stability by the Commission in its Decision of 7 October 2009. However, that decision required a reassessment of the existing restructuring plan and the planned restructuring measures. Additionally, Germany provided a commitment that all shareholders would ensure the sale of the "core" bank, including establishing a core capital ratio of 7 %.

### 2.3. The new measures — Bad bank and additional recapitalisation

- (15) At the end of November 2009, the risk assumption granted under the Decision of 7 October expired before the intended asset relief measure had been implemented. In addition, despite an explicit commitment by Germany that all shareholders had undertaken to inject the capital required to increase WestLB's Tier 1 capital so that it had a Tier 1 ratio of 7 %, the savings banks failed to do so. As a result, the overall capital ratio fell to [ $< 6,7\%$ ] and, thus, again short of regulatory minimum capital requirements.

#### (a) The recapitalisation of WestLB

- (16) On 24 November 2009, Germany and WestLB's shareholders agreed upon the details of the creation of the bad bank under the FMStFG. WestLB is at present not sufficiently capitalized to finance this transaction without external support. Therefore, SoFFin will inject overall EUR 3 billion in at least three partial payments, taking place between 18 December 2009 and 30 April 2010, in form of a silent participation that can be converted into ordinary shares after 1 July 2010 <sup>(1)</sup>.

(\*) Confidential information.

<sup>(1)</sup> It is contractually excluded that SoFFin can become majority shareholder.

- (b) The bad bank for WestLB
- (17) WestLB intends to spin off its toxic and non-strategic assets into a bad bank under Section 8a of the FMStFG<sup>(1)</sup>. Those assets have been assigned to two portfolios, the first called Phoenix portfolio, the second PEG portfolio.
- (18) The Phoenix portfolio contains toxic assets, mainly structured securities, with a nominal value of approximately EUR 23,8 billion (as of 30 June 2009). The Phoenix portfolio will be transferred to the bad bank with the original risk shield of 5 billion.
- (19) The remaining portfolio comprises mainly non-strategic assets, in particular corporate, State, municipal and student loans, as well as collateralized debt obligations, and other structured securities. It has a nominal value of approximately EUR 61,3 billion (as of 30 June 2009).
- (20) The combined nominal value of the two portfolios is EUR 85,1 billion. According to information provided by Germany, the book value of the assets is equal to EUR [65-75] billion and the estimated real economic value equal to EUR [60-70] billion. No market value of the portfolios was submitted although the Commission has repeatedly asked for it.
- (21) Regarding the set-up of the bad bank WestLB proposes a two-step procedure: in a first step, to be implemented before 31 December 2009, the Phoenix portfolio will be split off, with the retroactive cut-off date set at 1 January 2009. In a second step, planned for April 2010, WestLB intends to spin off the remaining portfolio, to be implemented retroactively with effect as of 1 January 2010. Germany requests the temporary authorisation of this measure for 6 months.
- (22) After the spin-off, those assets and liabilities will be held by the bad bank. In order to ensure that expected losses of the assets are sufficiently covered, WestLB will equip the bad bank with equity of EUR 3 billion. It will provide the capital step-by-step, in line with the staggered spin-off of assets and the corresponding need for capital. Germany requests the temporary authorisation of this measure for 6 months.
- (23) Potential further losses will be covered by a guarantee by WestLB's shareholders in the amount of EUR 1 billion in total, provided by the Land North Rhine-Westphalia (EUR 0,482 billion), by the savings banks associations RSGV and WLSGV (EUR 0,501 billion), and by the regional authorities LVR and LWL (EUR 0,017 billion). Germany also requests the temporary authorisation of this measure for 6 months.
- (24) Should the envisaged capital not suffice to cover the losses incurred in the future by the bad bank, such losses — pursuant to the FMStFG — must be covered by the shareholders of the beneficiary bank. However, that obligation to compensate further losses is capped in this case as regards RSGV and WLSGV at an amount of EUR 4 billion in total (EUR 4,5 billion considering EUR 0,5 billion related to the guarantee given as former owners, the so-called "Alteigentümergegarantie"). In order to provide these EUR 4 billion, RSGV and WLSGV are permitted to build up adequate reserves for this obligation over a period of 25 years. Any further losses exceeding the equity of the bad bank and the existing guarantees will be borne by FMSA and the Land North Rhine-Westphalia, releasing RSGV and WLSGV from their corresponding obligations.
- (c) Envisaged further recapitalisation of WestLB
- (25) Finally, SoFFin and the Land North Rhine-Westphalia have agreed to provide further equity for WestLB if such additional support is required to enable the sale of WestLB even after the establishment of the bad bank. 51 % of the capital needs will be provided by the Land North Rhine-Westphalia in the form of a first-loss guarantee, and 49 % will be provided by SoFFin. SoFFin has restricted its commitment to EUR 1 billion; hence, an overall support of EUR 2 billion must not be exceeded. This potential additional measure is not the subject of Germany's request for temporary authorisation for 6 months.
- (d) Key assumptions of the restructuring plan
- (26) The revised restructuring plan — of which a summary was provided on 15 December 2009 — foresees that, as initially planned, WestLB will withdraw from the markets for real estate finance (except for services provided to the saving banks), retail banking, asset management, and private equity. A core feature of WestLB's strategic orientation towards a client-focussed business model remains the withdrawal from proprietary trading. However, WestLB had to revise the targets for profit set in the initial plan, as general market conditions over the last months proved to be worse than expected by WestLB.

<sup>(1)</sup> The FMStFG in section 8a provides the possibility for the SoFFin to create a bad bank, a so-called "Bundesrechtliche Abwicklungsanstalt". Its main objective is to take over — and subsequently to wind-up — risky and non-strategic assets. Usage of a bad bank requires that the requesting bank has a viable business model and is sufficiently capitalized. Upon request, the SoFFin will allow or reject the application after an assessment of the business concept for the bad bank and an evaluation of the assets to be taken over.

The bad bank's take-over of assets shall be accomplished in the form of an asset spin-off by the beneficiary bank which is released from any contingent liabilities ("Nachhaftung") of the bad bank. Instead, the shareholders of the beneficiary bank remain liable for debts of the bad bank and are obliged to loss compensation ("Verlustübernahme"), if required, corresponding to their percentage of equity. The bad bank is an organisationally and economically autonomous entity within the Bundesanstalt für Finanzmarktstabilisierung (FMSA) with the legal capacity to act and take legal action on its own behalf. If a bad bank is created, the SoFFin is responsible for its monitoring, coordination and liquidation, while the bad bank is autonomously responsible to cover its operating costs. Losses or surpluses after the wind-up of the bad bank's asset are allocated to the shareholders of the beneficiary bank. Therefore, the FMStFG requires that potential losses are borne by the shareholders of the beneficiary bank.

Additionally, according to section 8 point 4.5 FMStFG, a beneficiary bank has to disclose all risks associated with the respective assets prior to the asset relief measure. However, there is no obligation to evaluate the assets.

(27) The bank now plans to achieve a target of EUR 500 million in profit before taxes only in 2014 at the earliest, and not by 2012, as initially planned. That revision of targets is not only due to general market conditions, but also due to the fact that its rating was recently downgraded to BBB+. WestLB estimates that a Single-A-Rating will not be reached again before 31 December 2010. Consequently, WestLB now has reduced access to funding whilst simultaneously it is exposed to stricter capital requirements and a significant increase in impairment charges for credit losses. Nevertheless, WestLB's strategic thrust remains unchanged as compared to the initial plan. Deconsolidation will be extended and produce additional saving effects. Sectors without strategic importance and low expertise are to be phased out. WestLB will liquidate or sell at least five more affiliate companies than originally planned. Its offices in Buenos Aires and Santiago de Chile will be closed. WestLB plans to withdraw from the funds business, own issues of closed-end investment funds, the private equity business, and the leveraged finance business. With regard to the substance of the business model, the revised restructuring plan shows overall only minor changes.

(28) Germany agreed to the Commission's proposal to establish concrete parameters that will allow monitoring of WestLB's commitment, given in the context of the restructuring Decision of 12 May 2009, to cease proprietary trading activities.

(29) On 16 December 2009, WestLB issued an ad hoc publication announcing that it might not be able to achieve a positive result in 2009 but probably record a loss. Therefore, it would not be able to pay dividends or coupons and such instruments would participate in the loss.

### 3. COMMENTS BY GERMANY

(30) Due to the fact that WestLB, a systemically relevant bank, would become subject to bank resolution procedures without State aid being granted, and the serious consequences that this event would entail for Germany's financial system and to the German economy, Germany requests an urgent temporary authorisation of the measures for six months.

(31) Germany agrees that the capital injection of EUR 3 billion by SoFFin constitutes State aid. Germany also does not dispute that the taking over of losses of the owners for the assets in the bad bank could constitute aid. However, in this particular case, Germany disputes the existence of elements of State aid. It claims that the spin-off of the assets would be accompanied by sufficient equity (the EUR 3 billion) to cover expected and unexpected losses. The additional explicit guarantee provided by the shareholders and their obligation to bear potential losses resulting from the resolution of the bad bank should be considered as a mere safeguard for eventualities. Potential benefits stemming from State resources would be of theoretical nature only. Whereas Germany acknowledges that, in theory, this could be the case under very unrealistic

assumptions as far as the guarantee is concerned, that possibility is entirely excluded as regards the shareholders obligation to bear losses potentially resulting from the resolution of the bad bank.

(32) Germany commits that WestLB shall pay a remuneration of 10 % p.a. which is to be paid retroactively for the EUR 3 billion recapitalisation.

(33) Germany furthermore commits to adjust the remuneration to bring it in line with the requirements of the Impaired Assets Communication should the valuation to be performed by the Commission reveal additional benefits to WestLB.

(34) Germany commits that the aid shall be limited to the minimum necessary by providing the recapitalisation pro rata and by implementing a redemption mechanism should future developments result in an overcapitalisation.

(35) Additionally, Germany commits that SoFFin will receive proceeds resulting from the sale of WestLB or parts thereof prior to the other shareholders until the capital granted by it is paid back fully.

(36) Germany further commits that until the measures are terminated, WestLB will make payments on capital instruments only to the extent it is under an obligation to do so without releasing reserves or the special reserves pursuant to Section 340(g) of the German Commercial Code. Furthermore, these instruments shall participate in losses if losses could only be avoided through the release of such reserves.

(37) Germany commits to start the sales process of WestLB earlier than initially planned, i.e. [within the first half of] 2010. Furthermore, if the sale has not been concluded at the beginning of 2011, Germany commits to appoint, subject to a corresponding decision by the Commission, a divestiture trustee who has the power to sell WestLB or parts thereof. Germany, however, refuses to commit to additional restructuring or measures limiting distortion of competition.

### 4. ASSESSMENT

#### 4.1. Existence of State aid

(38) Article 107(1) TFEU provides that, save as otherwise provided in the Treaty, 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.

(39) In concurrence with the German authorities, the Commission considers first that the EUR 3 billion capital injection of SoFFin and the guarantee of EUR 1 billion by WestLB's shareholders constitute State aid within the meaning of Article 107(1) TFEU <sup>(1)</sup>. No market investor would grant WestLB the same support under the current circumstances.

<sup>(1)</sup> This also applies to the additional EUR 2 billion for the benefit of WestLB mentioned in point 25.

- (40) Additionally, the Commission considers that the establishment of a bad bank under the FMStFG can comprise additional aid to the beneficiary bank which must be assessed under the Commission's Impaired Asset Communication <sup>(1)</sup> ("IAC"). The IAC provides guidance on the treatment under Article 107(3)(b) EC of asset relief measures by Member States, including in particular bad bank solutions as indicated in Annex II to the IAC.
- (41) The Commission recalls that according to the IAC impaired assets correspond to categories of assets on which banks are likely to incur losses. It defines asset relief as any measure whereby a bank is dispensed from the need for severe downward value adjustments of certain asset classes. In the present case the main purpose of the bad bank is to provide relief from risky and non-strategic assets of WestLB. The bad bank solution is intended to protect WestLB against the risk of future devaluation of assets included in the portfolio. The bad bank, in its design as well in its effects, allows WestLB to avoid considerable write-downs and at the same time reduces the bank's regulatory capital requirements. Therefore, the bad bank constitutes an asset relief measure and falls within the scope of the IAC <sup>(2)</sup>.
- (42) According to point 39 of the IAC an impaired asset measure constitutes State aid in so far as the transfer value exceeds the market value of the total portfolio.
- (43) In this case, the assets will be spun off at the book value of EUR [65-75] billion. However, WestLB provides the bad bank with equity in the amount of EUR 3 billion. Providing equity to the bad bank is, from an economic perspective, equivalent to a write-down before a transfer. Therefore, this equity can be subtracted from the book value in order to obtain the transfer value. The transfer value is thus EUR [62-72] billion.
- (44) As no market value has been submitted, the market value can be deemed to be zero. Hence, the Commission at this stage deems that the aid amount is EUR [62-72] billion.
- (45) Finally, it shall be noted that apart from the risk shield of EUR 5 billion none of the aid to be received by WestLB has been subject to the final Decision of 12 May 2009.

#### 4.2. Application of Article 107(3)(b) TFEU

- (46) Article 107(3)(b) TFEU empowers the Commission to decide that aid is compatible with the internal market if it is intended "to remedy a serious disturbance in the

economy of a Member State". The Commission acknowledges that, overall, the threat of a serious disturbance in the German economy persists and that measures supporting banks are suitable to address that threat.

- (47) Given the significance of its integration and cooperation with other public sector banks, the Commission accepts that WestLB is a systemically relevant bank. The Commission further notes that the measures which are linked to each other contractually and, therefore, interdependent, are suitable to address WestLB's breach of regulatory minimum capital requirements. Without these measures, the shortfall of regulatory minimum capital requirements would trigger bank resolution procedures by the competent regulatory authority. The Commission concludes that such a failure would entail serious consequences for the German financial sector and the real economy. The measures must therefore be assessed under Article 107(3)(b) TFEU.

#### 4.3. Compatibility with Article 107(3)(b) TFEU

- (48) The Commission has already made a first assessment regarding compatibility of some restructuring aid received by WestLB in its Decision of 12 May 2009. However, that decision did not authorise the additional aid which is the subject of the present decision. The compatibility of that additional aid needs therefore to be assessed separately. The Restructuring Communication of 22 July 2009 <sup>(3)</sup> states in point 27 that such additional aid during the restructuring can only be provided if it is justified for reasons of financial stability and is limited to the minimum necessary to restore viability. Pursuant to point 16 of the Restructuring Communication such measures cannot be approved under a scheme but must be authorised *ex ante* individually.

##### 4.3.1. Recapitalisation

- (49) As with any recapitalisation measure, the recapitalisation of WestLB in form of a silent participation by SoFFin amounting to EUR 3 billion needs to be examined in the context of the Communication of 5 December 2008 on the limitation of aid to the minimum necessary and safeguards against undue distortions of competition (Recapitalisation Communication) <sup>(4)</sup> independently of the fact that it is required and intended to establish a bad bank.
- (50) The Recapitalisation Communication sets out that such measures are in principle appropriate if they prevent the insolvency of a bank and thereby serve financial stability as well as supporting the provision with credit of the real economy. However, such measures must limit distortions of competition to the minimum. To this end, section 2 of

<sup>(1)</sup> Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1.

<sup>(2)</sup> As regards the application *ratione temporis* the Commission recalls that it has to apply law and guidelines in force at the time of the adoption of the decision, irrespective of the time at which the aid measures were designed or notified (cf. Case C 334/07 P *Commission v Freistaat Sachsen*, judgment of 11 December 2008, not yet reported) The IAC applies to the present bad bank, since it agreed to and notified after the publication of the IAC, notwithstanding its retroactive entering into force.

<sup>(3)</sup> Commission Communication on the return viability and the assessment of restructuring measures in the financial crisis under State aid rules, OJ C 195, 14.8.2009, p. 9.

<sup>(4)</sup> Communication from the Commission — Recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2.

the Recapitalisation Communication requires an appropriate remuneration. As noted in point 11 of the Recapitalisation Communication, market-oriented pricing of capital injections would be the best safeguard against unjustified disparities in the level of capitalisation and improper use of such capital. Furthermore, section 2.3 of the Recapitalisation Communication explicitly states that such remuneration must be higher in the case of distressed banks, but pursuant to point 44 in any event as close as possible to that required for a similar bank under normal market conditions. The German rescue scheme requires at least 10 % on average for banks that are not fundamentally sound, according to the institution's risk profile. This was confirmed as a benchmark for distressed banks in Commission Decision of 12 December 2008 in Case N 615/08 <sup>(1)</sup>. WestLB is considered to be a distressed bank since it would have been subject to bank resolution procedures without aid being granted. Thus, the capital provided must be remunerated with at least 10 % p.a. to be compatible with the Recapitalisation Communication. According to the commitments provided by Germany, WestLB will pay 10 % p.a. This rate is in line with the above requirements.

(51) The recapitalisation must be seen in the context of the updated restructuring of WestLB which already provides for sufficient behavioural safeguards in line with point 45 of the Recapitalisation Communication. Moreover, Germany has provided several commitments to ensure a restricted dividend policy and that the recapitalisation will be used only to implement the objectives of the original decision.

(52) Therefore, the recapitalisation is compatible with the Recapitalisation Communication. However, pursuant to point 45 of the Recapitalisation Communication, it can only be authorised temporarily for six months until the presentation of a revised restructuring plan.

#### 4.3.2. Asset relief measures

(53) Asset relief measures by Member States, irrespective of their form, need to be assessed under the IAC.

##### — Eligibility of assets

(54) As regards the eligibility of the assets, the IAC indicates in section 5.4 that asset relief requires a clear identification of impaired assets and that certain limits apply in relation to eligibility to ensure compatibility. It notes that assets which have triggered the financial crisis and are subject to severe downward value adjustments appear to account for the bulk of uncertainty and scepticism concerning the viability of banks. In this respect, US mortgage backed securities and associated hedges and derivatives are mentioned. The IAC also notes, however, that an overly narrow relief measure would not be advisable and refers to a proportionate approach permitting the extension of eligibility to well-defined categories of other assets as well.

<sup>(1)</sup> See point 16 in Commission Decision of 12 December 2008 in Case N 625/08, OJ C 143, 24.6.2009, p. 1.

(55) The bad bank does not only consist of structured securities but comprises also corporate, State, municipal, and student loans.

(56) While in principle it would be questionable whether a spin-off of such assets at a transfer price above the market value is compatible with State aid rules, the IAC recognises in point 34 the necessity of a pragmatic and flexible approach to the selection of asset types for impaired assets measures <sup>(2)</sup>. The Commission notes that the range of asset classes affected by the financial crisis became broader due to spillover effects. In particular, student loans and securities related to shipping, aircraft and real estate in general, face illiquid markets and/or are subject to severe downward adjustments. Asset relief for such assets can help to achieve the objectives of the IAC, i.e. to increase transparency and to contribute to financial stability, even if such assets are not included in the assets classes that initially triggered the financial crisis. Therefore, the Commission has in previous cases accepted asset relief measures for those assets <sup>(3)</sup>. As set out in point 36 of the IAC, however, the comparatively broad range of assets affected requires an increased depth of restructuring.

##### — Transparency and disclosure

(57) As regards transparency and disclosure, section 5.1 of the IAC requires full *ex ante* transparency and disclosure of impairments on the assets which are covered by relief measures, based on adequate valuation, certified by recognised independent experts and validated by the competent supervisory authority. This valuation must be provided to the Commission according to point 37 of the IAC.

(58) In that respect, the Commission notes that information provided by Germany so far only covers some of the assets to be taken over by the bad bank. Moreover, no detailed evaluation performed by independent experts has yet been submitted to the Commission.

(59) Consequently, the Commission notes that the IAC's criteria regarding transparency and disclosure are not met and, therefore, questions the compatibility of the measures with the State aid rules.

##### — Management of assets

(60) As regards management of assets, section 5.6 of the IAC requires a clear functional and organisational separation between the beneficiary bank and its shielded assets, notably as to their management, staff and clientele. In this respect, the Commission notes that a bad bank ensures a clear functional and organisational separation, and is thus sufficient to achieve compliance.

##### — Valuation

(61) Section 5.5 of the IAC explains that a correct and consistent approach to valuation is of key importance to prevent undue distortions of competition and to ensure the consistency of valuation methodologies.

<sup>(2)</sup> Commission Decision of 22 October 2009 in Case C 29/09, HSH Nordbank, point 40, OJ C 281, 21.11.2009, p. 42.

<sup>(3)</sup> Commission Decision of 22 October 2009 in Case C 29/09, HSH Nordbank, OJ C 281, 21.11.2009, p. 42, point 40. To some extent also Commission Decision of 15 December 2009 in Case C 17/09 — LBBW, not yet published.

(62) Germany, so far, has only submitted estimated and/or preliminary figures and not disclosed all relevant details of the portfolios concerned and the methodology used for the assessment. Therefore, the Commission has doubts about the valuation of the real economic value of the portfolio being EUR [60-70] billion.

— Burden-sharing

(63) As regards ex ante burden-sharing, section 5.2 of the IAC points out that banks ought to bear the losses associated with the impaired assets to the maximum extent. Burden sharing is usually achieved by a transfer at the real economic value and requires a corresponding write down of the book value. Accordingly, the beneficiary bank must disclose incurred and expected losses of the portfolio, and should limit the transfer price to the real economic value. However, if the beneficiary bank capitalises the bad bank with sufficient equity and thereby enables the bad bank to absorb future losses, the same economic effect is obtained.

(64) As indicated above, the “transfer value” is EUR [62-72] billion. Germany claims that the equity to be provided to the bad bank (i.e. EUR 3 billion) is sufficient to cover so-called expected losses. In the absence of a proper valuation it remains unclear whether this equity is sufficient to cover the write down or first loss required under the IAC as no details regarding the methodology used have been revealed. However, aggregate figures provided by Germany reveal a difference between the book value and the real economic value of EUR [2,5-5,5] billion. Thus, the equity provided appears to be insufficient to cover the difference between the book value and the real economic value, which is at odds with the requirements of the IAC.

(65) Moreover, the Commission notes that the shareholders have granted a guarantee amounting to EUR 1 billion which is already required to compensate for the shortfall of equity mentioned in point 62. Furthermore, the shareholders have an obligation to bear losses resulting from the resolution of the bad bank. Germany claims that both obligations will theoretically not be needed and do not have an economic value. This claim is however contradicted by the need felt by the parties concerned not only to notify the additional guarantee of EUR 1 billion but to cap the saving banks obligation to bear losses incurred by the bad bank. This is, in the view of the Commission, further evidence that the equity provided to the bad bank is not sufficient to cover all potential losses and, therefore, to cover the difference between the book value and the real economic value.

(66) The Commission consequently has doubts that the measures amount to proper burden sharing in line with the IAC and reserves a final judgement on compatibility until the real economic value has been properly established. Nevertheless, the Commission acknowledges that the additional explicit guarantee of EUR 1 billion is part of the asset relief measures and must therefore take part in its approval.

— Remuneration

(67) Point 21 of the IAC notes that correct remuneration is another element of the burden-sharing requirement. The

Commission shall ensure, as noted in Annex IV to that Communication, that any pricing of the asset relief must include remuneration for the State that adequately takes account of the risks of future losses exceeding those projected in the determination of the real economic value. In line with the Commission’s recent practice<sup>(1)</sup> this is based upon the capital relief effect resulting thereof.

(68) The notification does not indicate how WestLB will remunerate the asset relief measure. Instead, Germany claims there is no need to provide remuneration, because the equity provided to the bad bank was sufficient to cover both losses and the capital relief effect. Apart from the fact that the Commission has doubts as to the establishment of the real economic value, it has not received any figures for the calculation of the capital relief effect. Since it is not in a position to verify whether the claim of Germany is correct, the Commission must reserve doubts in this respect.

(69) Furthermore, the Commission highlights again the potential benefit stemming from the shareholders obligation to bear the losses of the bad bank and that apparently it was necessary to cap this obligation as regards the saving banks. This is further evidence that the equity may not be sufficient to cover both losses and the capital relief effect. Nevertheless, no remuneration is envisaged. Therefore the Commission raises doubts regarding remuneration.

#### 4.4. Revised restructuring plan

(70) The recapitalisation and the asset relief measures are provided with the aim of enabling the restructuring of WestLB. WestLB was already previously under the obligation to present a restructuring plan<sup>(2)</sup>, which was recently submitted. Germany claims that its most recent update aims also at incorporating the current measures including the potential EUR 2 billion mentioned in recital 24. They will thus be subject to this preliminary assessment under the Commission’s Restructuring Communication<sup>(3)</sup>.

(71) The updated restructuring plan reveals that the original timetable for the asset relief measure has been delayed. Moreover, the currently assessed measures show that a significant amount of additional aid is required compared to the aid under assessment in the Decision of 12 May 2009. Therefore, in the context of the assessment of the revised restructuring plan, all aid measures, including those which were already examined in the Decision of 12 May 2009, will be considered when evaluating the restoration of viability of WestLB through the spin-off of assets into a bad bank and the sale of the remainder by the end of 2011.

<sup>(1)</sup> Cf. Commission Decision of 15 December 2008 in Case C 17/08 LBBW, Commission Decision of 18 November 2009 in Case C 10/09 ING.

<sup>(2)</sup> The Commission already noted in its Decision of 7 October 2009 that the need for additional aid in the restructuring phase required reassessment of the implementation of the existing restructuring plan.

<sup>(3)</sup> Although the Decision of 12 May 2009 made reference to the 2004 Guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission has clarified in point 49 of the Restructuring Communication that all aid notified to the Commission before 31 December 2010 will be assessed as restructuring aid to banks pursuant to that Communication instead of the 2004 Guidelines.

— Return to viability

- (72) The Commission first doubts whether WestLB can generate sufficient revenues that would enable the bank to pay an appropriate remuneration for the recapitalisation and the asset relief measures. Hence, the Commission doubts that the restructuring plan is suitable to restore the viability of WestLB.
- (73) Furthermore, the restructuring plan raises doubts that it is suitable to ensure that WestLB can be sold in a public tender in whole or in parts. As regards marketability, Germany anticipates that further capital will be required to enable the sale of the bank. The Commission takes this as an indication that Germany does not assume that the restructuring plan is apt to achieve the sale of the bank. According to the business plan, even in a medium-term perspective two of the three core business areas currently break even only because a considerable amount of costs has been accounted for in the Corporate Centre unit and has not been fully allocated to the three core business areas. The Commission therefore has doubts that these core business areas are marketable.
- (74) One of WestLB's core assumptions for the business plan — and a key factor for prospects of its profitability in the future — is that the bank will receive a Single-A rating again in the future. However, in May 2009 WestLB was downgraded to BBB+. Moreover, an analysis of a recent reporting by Standard & Poor's (dated 15 October 2009) shows that this rating agency is sceptical about the business model of WestLB, highlighting the weakness of focussing on cyclical wholesale business areas and the vulnerability to financial stress from recessions and difficult capital market conditions. Hence, the scepticism that is expressed in that report does not justify assuming that the bank's rating will improve in the short-term. Thus, the projected profit and loss figures are unlikely to be achieved as the current plan seems to significantly underestimate WestLB's cost of funding.

— Own contribution

- (75) Germany has provided a commitment to limit payments on capital instruments in case of losses and to achieve loss contribution. According to an ad hoc publication dated 16 December 2009, WestLB will probably post a loss for 2009 and not release reserves to enable payment and coupons or prevent loss participation. Shareholders and other creditors of capital instruments will hence contribute to the restructuring. However, the notified measures limit the potential for losses and thus enable WestLB to serve these instruments in the future. Thus, burden-sharing by shareholders and holders of capital instruments will remain limited.
- (76) In particular, the savings banks, instead of participating adequately in the burden-sharing, benefit significantly from the asset relief measure. As a result of the recapitalisation, they only contribute to the restructuring process of WestLB to a very limited extent. Furthermore, according to the FMStFG, the shareholders of the beneficiary bank should also compensate for losses that may occur at the resolution of the bad bank, corresponding to

their stake. However, this obligation of the savings banks and consequently their participation in future losses of the bad bank has been capped at EUR 4,5 billion.

- (77) On this basis the Commission has doubts that burden-sharing is sufficient. Moreover, should Germany not propose genuine measures for burden-sharing of the savings banks, the Commission would have to ask for recovery of any unlawful and incompatible aid from the savings banks.

— Measures limiting the distortion of competition

- (78) According to point 30 of the Restructuring Communication, the nature and form of measures limiting the distortion of competition depends on the amount of the aid and the conditions and circumstances under which it was granted, as well as on the characteristics of the market or markets on which the beneficiary bank will operate. The Commission doubts that the measures proposed to mitigate the distortive effect of the entire aid (original aid and present aid) are sufficient as no relevant additional measures have been proposed notwithstanding the substantial additional aid to be received by WestLB.
- (79) Given the potential magnitude of the aid stemming from the original measures plus asset relief measures and the capital injection, the Commission, at this stage, cannot exclude that [...] WestLB might be the only alternative to make all the aid compliant with Article 107(3)(b) TFEU.

## 5. CONCLUSION AND TEMPORARY AUTHORISATION OF THE MEASURES

- (80) All measures in favour of WestLB constitute State aid, which can however not be authorised at this stage because the asset relief measure does not fulfil the conditions of transparency and disclosure, valuation, burden sharing, and remuneration and because of doubts regarding the chances of restoration of viability, burden sharing and the mitigation of distortion of competition.
- (81) However, the Commission has established that it will authorise emergency measures temporarily if needed for reasons of financial stability<sup>(1)</sup>, while it is not ready to take a definite decision given doubts on compatibility of the measures as restructuring aid. In the present case the supervisory authorities have confirmed that the aid is necessary in order to prevent of the initiation of bank resolution procedures of a systemically relevant bank.
- (82) It has first been established that the recapitalisation measures fulfil the requirements of the Recapitalisation Communication.

<sup>(1)</sup> Commission Decision of 13 November in Case C 15/08, Hypo RealEstate, not yet published, and Commission Decision of 31 March 2009 in Case C 10/09 ING, OJ C 158, 11.7.2009, p. 13.

(83) Second, as regards the asset relief measures, the Commission has doubts regarding their compatibility with the IAC. These doubts relate in particular to the real economic value, which could not be assessed at this stage. However, these doubts do not hinder a temporary approval for reasons of financial stability, because Germany committed that the measure would be brought in line with the IAC if the real economic value turned out to be lower than submitted. Moreover, the Commission has verified that the other criteria of the IAC are met (in particular eligibility and the management of assets) and that the recapitalisation and the guarantee of EUR 1 billion ensure some limited burden sharing at this stage.

(84) Given the imminent threat of the initiation of bank resolution procedures in the absence of the measures, the Commission considers the recapitalisation measure and the asset relief to be temporarily compatible for six months with the internal market as emergency support under Article 107(3)(b) TFEU. Therefore, the Commission has at this stage temporarily no objection to the transfer of the assets to the bad bank.

(85) In light of the doubts regarding compatibility of the asset relief measure with the IAC and the failure of the current revised restructuring plan to demonstrate that it will ensure the sale of the beneficiary, proper burden sharing and mitigate the distortions of competition, the Commission needs to further investigate the measures and thus to open a formal investigation procedure pursuant to Article 108(2) TFEU.

## 6. DECISION

The Commission concludes that the measures notified by Germany on 10 December 2009 concerning the recapitalisation of WestLB, the guarantee and the associated asset relief measure constitute State aid within the meaning of Article 107(1) TFEU.

In the light of the foregoing considerations, the Commission has decided to initiate the procedure laid down in Article 108(2) TFEU regarding the asset relief in the form of the establishment of a bad bank concerning transparency and disclosure, valuation and burden sharing (including remuneration) as well as on the restructuring aid (asset relief, recapitalisation and guarantee) to WestLB.

On the basis of the commitments provided by Germany, and in order to secure financial stability the Commission authorises the asset relief in the form of the establishment of a bad bank, the recapitalisation by SoFFin in the amount of EUR 3 billion as well as the guarantee of the shareholders of EUR 1 billion temporarily for a period of six months.

Germany is required to provide in addition to all documents already received, information and data needed for the assessment of the compatibility of the aid, and in particular:

- transparency and disclosure including evaluation: the final composition of the portfolios and the evaluation of the assets to be spun off,
- burden sharing and remuneration: detailed information regarding burden sharing and remuneration for the asset relief measure, based upon evaluation,
- suitability of the restructuring plan to enable sale: a revised restructuring plan that takes into account the full amount of State aid granted, comprising adequate remuneration, additional in-depth restructuring, and measures limiting distortion of competition.

Should the Commission come to the conclusion that unlawful State aid was granted to savings bank which are members of Westfälisch-Lippische Sparkassen- und Giroverband and Rheinische Sparkassen- und Giroverband by releasing them from their obligation to contribute to the recapitalisation and by introducing a cap to their liabilities and thus their participation in losses of bad bank, such unlawful aid if incompatible will be recovered from the savings banks.

Germany is requested to forward a copy of this letter to the potential recipients of the aid immediately.

The Commission wishes to remind Germany that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the *Official Journal of the European Union*, and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

The Commission notes, that for the reason of urgency Germany exceptionally accepts the adoption of the decision in the English language.”