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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 24 February 2010

concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08))*(notified under document C(2010) 975)***(Only the Danish text is authentic)****(Text with EEA relevance)**

(2011/3/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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

Having given interested parties notice to submit their comments in accordance with those Articles ⁽²⁾,

Whereas:

complainants. That application was rejected as inadmissible by Order of the Court of First Instance of 25 November 2009 ⁽⁴⁾.

- (3) By letter of 17 December 2009, the Commission invited Denmark and other interested parties to submit their comments concerning the appropriate legal basis for the review of compatibility in this case, taking account of the entry into force of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 ⁽⁵⁾.

1. PROCEDURE

- (1) Following two complaints and numerous exchanges between the Commission and the two complainants on the one hand and the Commission and the Danish authorities on the other, the Commission decided on 10 September 2008 to initiate a formal investigation procedure concerning this case and to publish the relevant decision in the *Official Journal of the European Union* ⁽³⁾, inviting Denmark and other interested parties to submit their comments.
- (2) The Commission's decision to initiate a formal investigation procedure was in part the subject of an application for annulment lodged with the Court of First Instance of the European Union by one of the

2. PRESENTATION OF THE BENEFICIARY AND THE COMPLAINANTS

2.1. THE BENEFICIARY OF THE MEASURES: DANSKE STATSBANER

2.1.1. THE INCUMBENT DANISH RAIL UNDERTAKING

- (4) Danske Statsbaner SV (DSB) is the incumbent rail undertaking in Denmark.
- (5) DSB is wholly owned by the Danish State ⁽⁶⁾. It now operates only rail passenger transport services and related services ⁽⁷⁾. It also operates via its subsidiaries in Sweden, Norway and the United Kingdom in particular.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). Each provision is essentially identical to the previous provision. 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 of the EC Treaty, respectively.

⁽²⁾ OJ C 309, 4.12.2008, p. 14.

⁽³⁾ See footnote 2.

⁽⁴⁾ Case T-87/09 *Jørgen Andersen v Commission*

⁽⁵⁾ OJ L 315, 3.12.2007, p. 1.

⁽⁶⁾ Act No 485 of 1 July 1998, which established the independent public undertaking DSB SV and DSB Cargo on 1 January 1999 ('the DSB Act').

⁽⁷⁾ DSB's freight transport activities were sold to Deutsche Bahn in 2001.

(6) In 1998, the Danish Parliament adopted an act separating the rail infrastructure from DSB's rail transport activities ⁽⁸⁾.

(7) In 2008, DSB had approximately 9 200 employees. Its turnover in 2008 was around DKK 9,85 billion (EUR 1,32 billion).

2.1.2. THE CREATION OF THE INDEPENDENT PUBLIC UNDERTAKING DSB

(8) In 1999 DSB was transformed into an independent public undertaking ⁽⁹⁾.

(9) A new financial management model for the undertaking was established at that time. Its opening balance sheet was prepared on the basis of a valuation of the undertaking's assets and liabilities. The Danish authorities have indicated that for all significant items DSB obtained a second valuation by independent experts.

(10) The Danish authorities have explained that DSB's equity capital was determined by comparison with similar undertakings with substantial fixed assets. The undertaking's final opening balance sheet was based on a 36 % equity ratio and upfront financing.

(11) It should also be noted that the legal framework applying to DSB was supplemented by accounting standards and national guidelines in the area of competition which require the undertaking to keep separate accounts for its most important activities and to avoid any form of cross-subsidisation. The contractual payments made to DSB on the basis of the public transport service contracts are therefore entered in the accounts separately from the other activities carried out on a purely commercial basis.

(12) DSB's revenue accounts are kept for each activity and are based on a documented activity-based cost accounting methodology using formulae for apportioning costs and revenues ⁽¹⁰⁾.

2.1.3. THE DSB GROUP

i. DSB S-tog a/s

(13) The DSB Group also includes the subsidiary DSB S-tog a/s, which is wholly owned by DSB SV and which operates all suburban rail services in Greater Copenhagen.

(14) The accounts of DSB S-tog a/s are kept separately from those of DSB SV because it is an independent company. Similarly, DSB's accounting regulations provide that

transactions between DSB and DSB S-tog a/s are to be conducted in accordance with market conditions.

(15) The profit generated by the subsidiary DSB S-tog a/s is included, after tax, in the consolidated results of DSB SV. The Danish State's dividend policy is defined in relation to the parent company DSB SV in that dividends are paid by DSB SV.

ii. Other holdings

(16) DSB owns 100 % of DSB Sverige AB, DSB Norge and DSB UK Ltd AS whose activities, as mentioned above, involve the provision of passenger transport services and other related activities in Sweden, Norway and the United Kingdom respectively.

(17) DSB also owns 60 % of Roslagståg AB, which operates the Roslag line in the Stockholm region. DSB owns the private company BSD ApS, which is responsible for the protection of intellectual property rights.

(18) In addition, DSB and DSB S-tog a/s jointly own the holding company DSB Rejsekort A/S, which owns 52 % of Rejsekort A/S, a public transport electronic ticketing operator.

(19) Finally, DSB owns 100 % of Kort & Godt, a chain of shops in the stations.

2.2. THE COMPLAINANTS

2.2.1. THE FIRST COMPLAINANT

(20) The first complainant is Gråhundbus, a private undertaking providing passenger transport services by bus (hereinafter 'Gråhundbus').

2.2.2. THE SECOND COMPLAINANT

(21) The second complainant is Dansk Kollektiv Trafik, a professional association representing several Danish transport operators (hereinafter 'DKT').

3. DETAILED DESCRIPTION OF THE PUBLIC TRANSPORT SERVICE CONTRACTS BETWEEN THE DANISH MINISTRY OF TRANSPORT AND DSB

3.1. THE LEGAL FRAMEWORK GOVERNING PUBLIC TRANSPORT SERVICE CONTRACTS IN DENMARK

(22) Until 1 January 2000, DSB held the monopoly on national rail passenger transport services. Since then, the Danish legislator has abolished the monopoly and introduced two alternative schemes for the provision of rail passenger transport services ⁽¹¹⁾:

⁽⁸⁾ Rail infrastructure is now managed and maintained by Banedanmark, which is a separate public undertaking.

⁽⁹⁾ See footnote 5.

⁽¹⁰⁾ The Danish authorities made it clear that the different revenue accounts were prepared on the basis of cost and revenue allocations, and these do not constitute an accounting system. Separate balance sheets for each activity could not be derived from the accounts.

⁽¹¹⁾ Railway Undertakings Act etc. [Lov om jernbanevirksomhed m.v.] No 289 of 18 May 1998 as amended subsequently. The most recent consolidated act is Act No 1171 of 2 December 2004.

- on the one hand, rail passenger transport operated on a commercial basis without compensation from public authorities ('free traffic'),
 - on the other hand, transport operated under public service contracts with compensation from the public authorities ('public service traffic'),
- (23) According to the Danish authorities, no passenger transport service is currently operated in a regular manner under the free traffic scheme.
- (24) As regards public transport service contracts, the Danish regulatory framework distinguishes between two types of contract:
- Public transport service contracts negotiated directly between the competent public authorities and the operator without a prior tendering procedure. The Ministry of Transport is the competent authority in Denmark for the negotiation of public transport service contracts, except in the case of routes run by a number of small regional operators.
 - Public transport service contracts awarded following a tendering procedure. The competent authority for such contracts awarded by tender is Trafikstyrelsen, a regulatory authority established by the Ministry of Transport,
- (25) In this context, DSB operates main line, regional and local rail passenger services under public transport service contracts concluded with the Ministry of Transport.
- (26) Moreover, the use of tendering procedures has evolved gradually over the years. In 2002, Arriva won the right to provide a portion of the regional public transport services in the west of Denmark. In 2007, a joint undertaking between DSB and First Group (DSB First) also won the right to provide a portion of the regional public transport services in eastern Denmark and southern Sweden, including the region's transnational public transport links.
- (27) The Danish authorities also indicated that they intended more contracts to be awarded on the basis of a tendering procedure.

3.2. THE PUBLIC TRANSPORT SERVICE CONTRACT FOR THE PERIOD 2000-04

- (28) This contract concerns main line and regional transport operated as a public service by DSB during the period 2000-04.
- (29) Section 1 provides that 'the objective of this Agreement is to promote the positive development of rail passenger transport by taking as its starting point the sound financial situation of DSB, the Danish public rail undertaking'.

- (30) The following recitals summarise the main provisions relevant to an analysis of this public transport service contract.

3.2.1. CONTENT OF THE CONTRACT ⁽¹²⁾

- (31) Article 3 defines the scope of the contract. It refers to the provision of rail transport services and user services. The contract does not cover public transport services awarded by tender or transport under the free traffic scheme, including the transport of goods under that scheme.
- (32) The transport services provided by DSB are defined in detail in Article 7 of the contract. DSB is obliged to provide a certain volume of services (measured in rail kilometres) over the term of the contract.

Production of rail kilometres over the term of the contract

Year	2000	2001	2002	2003	2004
rail km (million)	41,0	41,7	41,9	42,1	43,3

- (33) Article 7.1.a sets the target of 51 million rail kilometres per year from 1 January 2006.
- (34) Article 8 of the contract states, however, that the Danish Ministry of Transport may decide to launch a tendering procedure for part of the production of rail kilometres, which would entail the end of the contract. The provisions of Article 8 set out in detail the legal regime applicable to putting transport services out to tender. They also specify the consequences of doing this, particularly with regard to the reduction of compensation and the implications relating to rolling stock.
- (35) Article 7 also lays down the rules relating to timetables and the frequency of transport services. With regard to timetables, Article 9 provides for the coordination of schedules. Several provisions seek to ensure that DSB will endeavour to create a coherent public transport system with coordination between buses and trains.
- (36) Article 10 contains provisions concerning the use and acquisition of new rolling stock corresponding to a total amount of DKK 5,6 billion until 2006. This new rolling stock is a new model of diesel train known as IC4. The technical characteristics of these new trains in terms of speed, number of seats or level of comfort are defined in Article 10, as are the conditions for the use of these trains on certain routes. These investments are compensated for via the contractual payments described below.

⁽¹²⁾ The contract contains a preamble, 22 articles and 5 annexes.

(37) The other relevant provisions which should be mentioned are:

— Article 11, which specifies the conditions relating to infrastructure and defines the relationship with Rail Net Denmark,

— Article 12, which contains provisions relating to user services,

— Article 13, which defines the penalties for poor punctuality,

— Article 14, which lays down the conditions for setting transport prices,

3.2.2. THE CONTRACTUAL PAYMENTS

(38) The financial compensation received by DSB is defined in Article 4 of the contract.

(39) DSB retains the income from ticket sales. In addition, DSB receives a contractual payment from the Danish Ministry of Transport for the services provided for under the contract.

(40) The contractual payments are described in the following table:

Contractual payments 2000-04

Year	2000	2001	2002	2003	2004
DKK (million)	2 884,9	2 945,7	2 953,7	3 039,4	3 057,9

(41) Those payments are indexed annually to net retail prices.

(42) The level of the contractual payments is based on DSB's 10-year forward budget, which was adopted on 11 June 1999 and which defines DSB's long-term financial strategy.

(43) Article 4 also provides for a number of adaptations connected with the implementation of the 5-year Framework Agreement of 26 November 1999 for the rail transport sector. The Framework Agreement led to the adoption of several specific addenda to the contract concerning:

— the acquisition and putting into service of new rolling stock (Article 10 of the contract),

— light rail transport pools and station modernisation,

— improving the quality of the Odense-Svendborg rail link,

— financial incentives aimed at promoting sound traffic production on a socioeconomic level,

(44) The contractual payments cover depreciation and interest relating to the rolling stock acquired in accordance with Article 10 of the contract. However, the other addenda may result in an increase in the contractual payments.

(45) Article 5 relates to rail charges. The contractual payments include DSB's costs relating to the rail charges payable for the trains covered by the contract. Article 5 also provides for a mechanism for the annual adjustment of rail charges.

3.2.3. URBAN TRANSPORT

(46) A contract was also concluded between the Danish Ministry of Transport and DSB S-tog a/s concerning the provision of public transport services on the electrified metropolitan rail network during the period 2000-04.

(47) This contract follows the same model as the contract relating to main line and regional public transport services and contains similar provisions. It describes in detail the public transport services on the electrified metropolitan rail network that DSB S-tog a/s is expected to provide, and requires DSB S-tog a/s to carry out a certain volume of services (measured in terms of rail kilometres) over the term of the contract. It includes obligations relating to timetables and the frequency of transport services, as well as provisions concerning the use and acquisition of new rolling stock.

(48) The system of compensation under the contract also corresponds to that in the contract relating to main line and regional public transport services. The contractual payments are determined on the same calculation bases (6 % return on equity after tax).

(49) The contractual payments are described in the following table and are subject to the same conditions as for the contract relating to main line and regional public transport services:

Contractual payments 2000-04

Year	2000	2001	2002	2003	2004
DKK (million)	547,2	701,9	855,7	1 016,6	1 127,3

3.3. THE PUBLIC TRANSPORT SERVICE CONTRACT FOR THE PERIOD 2005-14

(50) The second contract between the Danish Ministry of Transport and DSB concerns the provision of main line and regional public transport services during the period 2005-14.

(51) The purpose of the contract is described in the introduction as follows: '[t]o establish a clear framework for performance so as to guarantee the State the best possible result in terms of rail passenger transport for the financial resources made available to rail transport and to ensure that DSB has a sound financial situation'.

3.3.1. CONTENT OF THE CONTRACT ⁽¹³⁾

(52) Article 1.1 defines the scope of the contract. It refers to the specific sections of the network on which public rail transport services are provided under the negotiated contract.

(53) It should be noted that DSB does not receive the income from ticket sales on two specific routes. The contract also relates to international links with Germany and to the Copenhagen-Ystad route, which was previously operated under the free traffic scheme.

(54) The transport services to be provided by DSB are defined in a traffic plan (number and spacing of trains), a stop plan (servicing of stops) and a line plan (requirements in terms of rail connections). The three plans are described in Article 1, as are the rules relating to seating capacity, frequency, reliability, user satisfaction, service interruptions and other special conditions.

(55) Article 2 concerns all forms of pricing, including specific provisions concerning journeys across the Øresund.

(56) Article 3 concerns the scope of the transport services in relation to those operated under the free traffic scheme. In particular, Article 3.3 states that it is possible to extend the public transport services provided beyond the current framework of the contract, without increasing the contractual payments.

(57) Article 4 lays down the rules, responsibilities and obligations in relation to station modernisation. DSB is to prepare station modernisation plans to be submitted to the Danish Ministry of Transport for information.

(58) Article 5 of the contract lists DSB's obligations relating to the operation of transport activities. Those obligations concern, among other factors, duties of information, equipment inspections, the obligation to make rolling stock available to operators who win tenders on certain routes, or specific conditions for the issue of tickets or passes for certain categories of passenger.

(59) Finally, Article 6 provides for the possibility of tendering procedures, and the conditions for organising such procedures, on certain routes and the resulting reduction of the contractual payments for the services concerned.

3.3.2. CONTRACTUAL PAYMENTS

(60) The financial compensation received by DSB is defined in Article 7 of the contract.

(61) Generally, DSB retains the income from ticket sales ⁽¹⁴⁾. In addition, DSB receives a contractual payment from the Danish Ministry of Transport for the services provided for under the contract.

(62) The contractual payments are described in the following table:

Contractual payments 2005-14

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
DKK (million)	2 985	3 021	2 803	2 669	2 523	2 480	2 486	2 433	2 475	2 470

(63) The contractual payments are fixed and are not subject to automatic adjustments unless indicated otherwise in the contract. However, they are reviewed annually on the basis of the increase in the net prices index presupposed in the Finance Act.

(64) The contract does not specify how the level of the contractual payments was calculated. The Danish Ministry of Transport has stated that the payments are based on a 10-year budget founded on estimates of costs and revenues.

(65) Among other factors, the contractual payments cover depreciation and interest relating to new rolling stock, as described in the following table:

⁽¹³⁾ The contract contains a preamble, 10 articles and 9 annexes.

⁽¹⁴⁾ See exceptions above.

Depreciation of new rolling stock 2005-14

(in DKK millions)

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
IC4	50	167	247	258	258	258	258	258	258	258
IC2	1	24	46	46	46	46	46	46	46	46
Local trains						15	44	74	89	89

- (66) The delivery schedule for the annual investments in new rolling stock is presented in the following table:

Delivery of new rolling stock

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011
IC4	1	31	44	7					
IC2		1	22						
Local trains							14 (*)	14 (*)	14 (*)

(*) Data not available when the contract was concluded.

- (67) Several provisions have been inserted into the contract to take account of delays affecting the delivery of rolling stock under the contract for the period 2000-04.
- (68) Article 7.1.2. provides for the possibility of adjusting the contractual payments annually based on the delivery of new rolling stock. Such adjustments could, however, not lead to DSB receiving greater compensation. The adjustments are not made where they would be of less than DKK 8 million.

3.3.3. URBAN TRANSPORT

- (69) The second contract between the Danish Ministry of Transport and DSB S-tog a/s concerns the provision of public transport services on the electrified metropolitan rail network during the period 1 January 2005-31 December 2014.
- (70) The contract is based on a system of provisions similar to those in the contract relating to main line and regional public transport services. It lays down the performance obligations of DSB S-tog a/s with regard to the lines concerned, transport services, requirements in terms of capacity, regularity and reliability of service as well as levels of user satisfaction and service interruptions. The contract also lays down the conditions relating to price fixing, station modernisation and reporting. It specifies the penalties in the event of non-compliance with the contract.
- (71) The system of compensation under the contract also corresponds to that in the contract relating to main line and regional public transport services. The contractual payments are determined on the same calculation bases (6 % return on equity after tax).
- (72) The contractual payments are described in the following table:

Contractual payments 2005-14

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
DKK (million)	1 340	1 370	1 265	1 160	1 077	1 021	965	918	876	831

- (73) As in the contract relating to main line and regional public transport services, the contract lays down the conditions for reviewing those payments as well as the contractual payments for the depreciation of rolling stock.

4. REASONS LEADING TO THE ADOPTION OF THE DECISION INITIATING THE PROCEDURE

- (74) In its decision initiating the procedure, the Commission expressed doubts regarding the compatibility with the internal market of the public service compensation paid to DSB. The Commission stated that the purpose of the procedure was to determine whether the public transport service contracts in question involved State aid to DSB, and whether the contractual payments entailed overcompensation of the costs incurred by DSB in fulfilling the public service obligations defined in the contracts.

- (75) First of all, the Commission questioned whether the arrangements gave DSB an economic advantage. To that end, it applied the criteria set out by the Court of Justice in the judgment in *Altmark* ⁽¹⁵⁾.

- (76) Although the Commission considered that the recipient undertaking was indeed responsible for fulfilling clearly defined public transport service obligations (recitals 69 to 76 of the decision initiating the procedure), it did, however, express doubts as to the existence of parameters established in advance in an objective and transparent manner, on the basis of which the compensation for 2009-14 was calculated (recitals 77 to 80 of that decision).

- (77) The Commission also expressed doubts about whether the compensation was limited to the amount necessary to cover all or part of the costs incurred in discharging public service obligations, taking into account the relevant revenues and a reasonable profit for discharging those obligations. In that regard, the Commission wished more specifically to examine DSB's surplus profits (recitals 83 to 90 of the decision initiating the procedure), the delays in the delivery of the rolling stock (recitals 91 to 100 of that decision) and the specific circumstances regarding the Copenhagen–Ystad route (recitals 101 to 103 of that decision).

- (78) Moreover, the Commission noted that the public transport service contracts had not been awarded by

tendering procedure. It therefore expressed doubts as to whether the level of compensation needed had been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service obligations, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations (recitals 104 to 107 of the decision).

- (79) Public service compensation constitutes state resources and is likely to distort competition and affect trade between Member States, which is why the Commission expressed concern as to whether the public transport service contracts involved State aid to DSB.

- (80) The Commission then considered whether the public transport service contracts were compatible with the internal market on the basis of Article 14 of Regulation (EEC) No 1191/69 ⁽¹⁶⁾.

- (81) The Commission also expressed doubts as to whether the level of compensation, that is to say the price paid by the Danish Government, was limited to the amount needed to cover the costs entailed in fulfilling public service obligations, for the reasons explained above in the assessment of whether the third criterion established by the case-law in *Altmark* had been complied with. In particular, the Commission expressed doubts as to whether the Danish State's deduction of dividends from DSB's profits and the reduction in the annual contractual payments made it possible to avoid any risk of overcompensation (recitals 129 and 131 of the decision).

5. ARGUMENTS OF THE DANISH AUTHORITIES FOLLOWING THE INITIATION OF THE PROCEDURE

Preliminary remarks

- (82) In their letter of 12 December 2008, the Danish authorities take the view that they have already provided, in response to the Commission's previous requests for information, all the factual and legal information required by the Commission in order to establish that the contractual payments do not constitute State aid or, at the very least, that any State aid would be

⁽¹⁵⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* ('*Altmark*') [2003] ECR 2003, I-7747. 2003 I, p. 7747.

⁽¹⁶⁾ Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1). Corrigendum published in OJ L 169, 29.6.1991, p. 1.

compatible with the Treaty. The Danish authorities have therefore quoted the factual and legal information already presented to the Commission. In addition, they have set out arguments concerning the factual and legal information which requires further explanation due to events occurring in the interim or in the light of comments made by the Commission in its decision to open a formal investigation.

(83) In principle, the Danish authorities also indicate that they support the argument set out by the Commission concerning, first, the verification of the existence of State aid by applying the criteria in the judgment in *Altmark* and, second, the legal basis for assessing compatibility with the Treaty.

(84) On the other hand, the Danish authorities disagree with the Commission's interpretation of the judgment in *Danske Busvognmænd* (also known as the 'Combus' judgment) ⁽¹⁷⁾. The Commission has stated that, if the public transport service contract involves State aid, that aid should have been notified. Conversely, the Danish authorities consider that, if Regulation (EEC) No 1191/69 is applicable and if the compensation provided for under the public transport service contract complies with the Regulation, that compensation is exempt from the notification requirement pursuant to Article 17(2) of Regulation (EEC) No 1191/69.

(85) Lastly, Denmark wishes to emphasise that recent case-law, and particularly the judgment of the General Court of the European Union in *Case T-289/03 BUPA and Others v Commission*, states that the criteria set out in the judgment in *Altmark* should be applied, taking account of the situation in the sector concerned and the fact that the Member States have a wide discretion.

The second criterion in the judgment in Altmark

(86) The Danish authorities note that the Commission has acknowledged that the second criterion in the judgment in *Altmark* was fulfilled with regard to the compensation paid for the period 1998-2008, but that it expresses doubts regarding the period 2009-14.

(87) The Danish authorities take the view that those doubts are based on a misunderstanding, because, as in the case of the preceding period, the compensation was calculated on the basis of a 10-year budget for the period 2005-14.

(88) They have submitted that budget to the Commission, together with the estimates and assumptions underlying the budget, namely:

- general annual inflation of 2,5 %,
- an increase in ticket prices of 2,5 %, in line with inflation,
- an average increase in productivity of 2,5 % a year,
- an annual interest rate of 5,15 %,
- a 6 % return on equity after tax,
- investments in rolling stock amounting to approximately DKK 10 billion,
- an increase of approximately 20 % in the number of kilometres travelled,
- an increase of approximately 20 % in the number of passengers,
- a payroll tax exemption for DSB's staff,

(89) Furthermore, Denmark states that that budget was prepared on the basis of the obligations related to charges connected with infrastructure in 2003. The changes made to those obligations and the subsequent reduction in the compensation paid to DSB were, in the meantime, incorporated into the contract before it was signed. The Ministry of Transport set out the contents of the contract and the budget in Act No 112 of 2004, and those data were included in the Finance Act.

The third criterion in the judgment in Altmark

(90) The Danish authorities have submitted arguments and information on the three aspects in respect of which the Commission expressed doubts concerning a risk of overcompensation.

⁽¹⁷⁾ Case T-157/01 *Danske Busvognmænd* [2004] ECR II-917, paragraphs 77 to 79.

i. DSB's surplus profits

- (91) First of all, the Danish authorities consider that DSB's surplus profits are not due to overcompensation. According to Denmark, the bases of calculation of the compensation were correct and the surplus profits are not therefore attributable to overcompensation, but due to other circumstances.

Equity capital

- (92) Denmark provides a detailed analysis of the changes in DSB's equity capital, which grew from DKK 4,797 billion to DKK 7,701 billion over the period 1999-2004 (an increase of DKK 2,852 billion). The increase in equity capital is due to certain circumstances which had not been taken into consideration when the budget was drafted, including an unexpected marked improvement in DSB's efficiency and higher extraordinary income resulting, for example, from the sale of real estate. These are not circumstances which the Danish Government could reasonably have taken into account in drafting the budget and hence in setting the level of compensation.
- (93) The Danish authorities explain that the increase in equity capital is due, however, not to excessive operating grants paid by the State but to five other, essentially unforeseen factors:

- First, a very substantial part of the increase in DSB's equity capital results from the founding budget (DKK 1,709 billion). Act 249/1999 shows that there was a clear political and economic rationale for DSB's transformation into a sustainable independent public undertaking, according to which DSB was to achieve a solvency ratio of at least 30 % within a few years. That rationale was based on an economic assessment of the necessary solvency ratio for an undertaking of DSB's size;
- Dividends were paid to the State at the end of that period in 2005 (DKK 736 million), which means that DSB could not therefore, in reality, have had that equity capital at the end of 2004,
- Part of the increase in equity capital is due to changes in accounting practices in 1999 and 2001 compared with the practices underlying the 1999 budget (upwards adjustment of equity capital to DKK 594 million). That change in accounting practices did not have any real commercial significance for the undertaking, and a correction should therefore be made. The Danish authorities therefore stress that, if a

correction is made for the effects of the modified accounting practices, the change in equity capital was in fact negative, with a reduction of DKK 135 million;

- The rate of corporation tax, which was 32 % at the time of the founding budget in 1999, was subsequently lowered to 30 % (over the course of 2002, 2003 and 2004). That reduction in the rate of tax resulted in an unforeseen gain of DKK 43 million over the period. Without that gain, there would have been a negative impact on the equity capital of DKK 178 million;
- The downwards revision of the equity capital on the initial balance sheet by an amount of DKK 36 million,

- (94) According to Denmark, those facts show that the increase in DSB's equity capital was not due to high operating grants paid by the State and that it must be seen in relation to the financial, accounting and tax information referred to above. DSB did not therefore use the aid received from the State to increase its equity capital to an extent greater than the amount provided for in the founding budget.

Operating Results

- (95) With regard to the projected operating results before distribution of profits, the Danish authorities point out that the observed improvements in results are not an indication of DSB receiving overcompensation. Rather, the improvements are due to a range of factors – having both positive and negative effects – which could not be taken into consideration when the level of compensation was established.
- (96) Denmark considers that such variations with respect to the initial budget are inevitable in the case of multiannual contracts relating to the discharging of a public service obligation. In such cases, it is not possible to fix the amount of compensation in a way which makes it possible to confirm, following an ex post examination, that it corresponded exactly to the real costs, minus the receipts and a reasonable profit.
- (97) According to the Danish authorities, even in cases where a public service obligation results from the award of a tender, changes may occur in the market and in the situation of the undertaking concerned, such that the results actually obtained do not correspond to the results predicted by the successful bidder when the contract was concluded.

(98) Denmark therefore takes the view that improvements or deteriorations in results attributable to such unforeseen factors cannot be used as an argument to claim that the compensation was fixed in a way such as to involve overcompensation or under-compensation.

(99) In this case, the observed improvements in results are due to the combined effects of several factors such as general economic trends, developments in the market concerned, productivity gains (for example, reductions in the cost of labour or of access to infrastructure following the sale of the cargo branch, reductions in depreciation or improvements in financial management).

(100) Denmark adds that the contracts concluded with DSB are characterised by the fact that the contracting partners agreed on payment on the basis of the usual considerations in a market economy, the level of payment having been determined in such a way as to cover DSB's costs, taking account of the expected revenues and a reasonable profit. The fact that DSB ultimately achieved better results than budgeted for does not mean that the amounts of compensation fixed in the contracts was too high.

Reduction in compensation and distribution of dividends

(101) The Danish authorities point out that, even though, in their opinion, there was no overcompensation, the risk of overcompensation is in any case ruled out by the Danish Government's dividend policy as set out in Finance Act No 249/1999 and by the subsequent reduction in compensation in the agreement concluded with DSB.

(102) Denmark takes the view that it has made sure, with its dividend policy, that DSB will not increase its equity capital beyond the level provided for and hence beyond the level that is necessary. Although no binding legal rule was laid down, the dividend policy was designed to reconcile two considerations:

- the usual considerations in a market economy regarding what is economically justifiable taking account of the economic situation of the undertaking,
- socioeconomic considerations and considerations relating to competition having regard to the size of DSB's equity capital and its operating grants,

(103) The Danish authorities state that dividend payments to the State are to be used as a means of correcting the size of DSB's equity capital in the years following its

founding, and as a means of restoring the operating surplus if it were subsequently to emerge that DSB did indeed achieve better results than expected. That principle follows from Finance Act No 249/1999. The payment of dividends is to be used to regulate on an ongoing basis the structure of DSB's capital and, hence, the real net operating grant. The dividend policy also meant that DSB had an incentive to improve its efficiency because the starting point was that the dividends should amount to half of DSB's surplus after tax. Efficiency improvements would therefore benefit DSB to a certain extent and not solely result in a subsequent refund of the operating grant.

(104) The Danish authorities consider that it is wholly in line with the general considerations of a market economy to be able to use incentives in determining what constitutes a reasonable profit, as advocated by the Commission ⁽¹⁸⁾.

(105) Denmark points out that the application of this dividend policy led, for the period 1999-2006, in relation to the activities undertaken to fulfil the contracts, to the State being paid almost DKK 3 billion more than the figure initially predicted.

(106) According to the Danish authorities, the dividend policy therefore functioned de facto as a 'refund mechanism' making it possible to offset any overcompensation. They emphasise that the part of DSB's compensation which was repaid to the State in the form of dividends is, moreover, much greater than the difference between the surplus anticipated in DSB's budget and that which was actually achieved. As such, the dividend policy therefore helped to guarantee that DSB was not able to profit from the State operating grant in order to obtain a competitive advantage – for example, by increasing its equity capital beyond the specified level or by using annual surpluses.

(107) Moreover, the Danish authorities consider that it is very difficult to establish rules relating to an a posteriori correction of the operating grant. However, the State is able – as a result of the dividend policy, in accordance with Danish company law – to ensure that the net operating grant is effectively corrected, if the profits for the year exceed the level which was expected or anticipated when the contract was concluded. According to the Danish authorities, distributions of dividends are therefore, in practice, an extraordinarily effective tool to guard against overcompensation.

⁽¹⁸⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67); see in particular Article 5(4).

- (108) Moreover, the Danish authorities state that the Court of First Instance also established that Member States could have a wide discretion as to the determination of compensation where that compensation depends on an assessment of complex economic facts⁽¹⁹⁾. They also point out that Community law does not contain any obligation providing that a downwards revision of the net operating grant should always be carried out in a certain way, for example by applying contractual rules or in an equivalent manner. What is important, according to the criteria laid down in the judgment in *Altmark*, is that the State truly ensures that there is no overcompensation. However, it is for the Member States to decide how to proceed in practice.

ii. Delays in the delivery of rolling stock

- (109) According to the Danish authorities, the late delivery of the IC4 and IC2 trains did not lead to an economic advantage for DSB.
- (110) They confirm that the delivery of the new IC4 and IC2 trains, which were ordered before the conclusion of the transport contract for 2005-14 and should have been delivered from 2003, was affected by delays attributable to the manufacturer (Ansaldo Breda). The Danish authorities state that, if delivery had taken place as scheduled, DSB would have borne the net costs corresponding to the depreciation of the trains and to the interest, which were covered by the contractual payments.

2005-14 transport contract

- (111) Since DSB did not bear those costs, the contractual payments were subject to a reduction under the transport contract for 2005-14. The exact amount of the costs avoided is calculated on the basis of the loans actually entered into by DSB and a depreciation period of 20 years, in accordance with DSB's accounting practices (that is to say DKK 4 million saved on account of a 1-year delay on the IC4 train and DKK 2,7 million saved on account of a 1-year delay on the IC2 train).
- (112) The payments to DSB were therefore reduced under the contract by DKK 645 million (DKK 252 million in 2005 and DKK 393 million in 2006).
- (113) Taking those facts into consideration, Denmark is of the view that the late delivery of the IC4 and IC2 trains cannot be regarded as having led to overcompensation for DSB as far as the 2005-14 transport contract is concerned.

Additional contracts

- (114) To have sufficiently modern rolling stock, DSB has been using hired rolling stock since 2001 (additional contracts). The term of those contracts had to be extended after 2006 due to the considerable delays on the part of the supplier, Ansaldo Breda (extension for up to 4 additional years).
- (115) The Danish authorities state firstly that the contractual payment made to DSB under the negotiated contract did not cover the costs of putting the trains into service (depreciation and interest) where those trains were not actually put into service, and, secondly that the negotiated contract did not provide for any obligation on the part of DSB to deploy replacement rolling stock on the aforementioned lines.
- (116) According to the Danish authorities, the additional contracts therefore impose additional public service obligations on DSB (putting into service of modern replacement stock on certain lines) at the same time as compensating it for the hire costs.

2000-04 transport contract

- (117) The Danish authorities consider that the net positive economic impact due to the delay is attributable to the fact that the initial 5-year contract, like the additional contract for 2001-04, did not contain any provisions relating to a reduction in compensation in the event of late delivery of the IC4 trains. Conversely, the 2005-14 transport contract currently in force does contain provisions relating to a reduction in compensation in the event of delay.
- (118) The Danish authorities estimate that net positive effect during the period 2001-04 to be DKK 104 million as a result of the late delivery of the trains. However, that direct effect does not cover the real economic consequences of the delay for DSB, which was unable to use the new trains (maintenance of the older trains, damage in terms of image and goodwill, and loss of income).
- (119) Denmark also states that the compensation received by DSB from Ansaldo Breda represents only provisional compensation for the economic losses resulting from the late delivery of the trains. The final amount of losses suffered by DSB will be determined at the time of delivery, and it will be possible to establish the total amount of compensation payable by Ansaldo Breda.

⁽¹⁹⁾ Case T-289/03 *BUPA v Commission* [2008] ECR II-81, paragraph 214.

(120) The Danish authorities therefore consider that this compensation will correspond exactly to DSB's economic losses and will therefore be neutral in terms of DSB's accounting. For the same reason, the net effect of the compensation from Ansaldo Breda does not constitute overcompensation for DSB. The late delivery of the trains did not therefore confer an economic advantage on DSB and nor will it do so in the future.

(121) Finally, the Danish authorities point out that, even if these factors are not taken into account, the Danish Government's dividend policy ensures that any positive effect of the compensation received by DSB would be eliminated during the payment of dividends.

iii. Specific case of the Copenhagen – Ystad link

Public transport service compensation

(122) The Danish authorities specify that it was only the operation of the route by DSB in the period 2005-14 which gave rise to compensation.

(123) Three time periods should be differentiated regarding the operation of this route:

- until 2002, the route was operated as a 'free traffic activity', that is to say in conditions of full competition, with no compensation paid and no obligation imposed by the State. DSB was therefore required to keep separate accounts for this route, which was to show a surplus over a total period, with only income derived directly from the route being taken into account;

- in 2002, DSB decided to stop operating the route under the 'free traffic' scheme and a negotiated contract was concluded between the Ministry of Transport and DSB, for the operation of the route as 'public traffic' from 2002 to 31 December 2004 inclusive. However, the contract did not provide that any separate or additional payment should be made to DSB for discharging public service obligations.

- when the transport contract for the period 2005-14 was concluded, it became possible for the compensation paid to DSB also to apply to the Copenhagen-Ystad route,

(124) Denmark therefore states that no public funds were paid for the operation of the route before 2005.

(125) The Danish authorities also point out that this route made a loss when it was operated under the free traffic scheme, and the fact that a very small proportion of the revenues actually collected may be due to the indirect consequences of the start of operation of the Copenhagen-Ystad route by DSB cannot be used as an

argument to claim that DSB must have received overcompensation. In any event, DSB would have been naturally entitled to obtain a reasonable profit in the form of a return on the capital invested. In the view of the Danish authorities, this is not sufficient to claim that the actual receipts resulted in overcompensation for DSB, if making a reasonable profit is taken into account.

Ferry crossing

(126) Regarding the question of DSB's costs for the sale of tickets which include the ferry crossing between Ystad and Rønne (the port of arrival on the island of Bornholm), the Danish authorities have submitted explanations of the prices charged by Bornholmstrafikken, the ferry operator. According to the Danish authorities, those explanations show that there was no application of different prices in relation to DSB and Gråhundbus.

(127) The Danish authorities have also provided information about the conditions under which the Rønne-Ystad ferry connection is operated by Bornholmstrafikken A/S. On the basis of a contract concluded with the Danish Government following a tendering procedure:

- the contract between the Danish Government and Bornholmstrafikken stipulates a general obligation requiring Bornholmstrafikken to coordinate its arrival and departure times with those of the operators of bus and train lines between Copenhagen and Ystad,

- it also contains clauses requiring Bornholmstrafikken to develop cooperation in terms of tickets with the bus or train line operator operating the Copenhagen-Ystad route by train or bus during the term of the contract, so that travellers can purchase a combined ferry and bus/train ticket at a discount;

- the maximum prices which Bornholmstrafikken is authorised to charge are fixed by the contract,

- the contract does not contain any other provision relating to price requirements or the introduction of discounts, and the Danish Government has no reason to stipulate further requirements subsequently in that respect,

(128) According to the Danish authorities, it follows therefore that the Danish Government cannot exert any influence over Bornholmstrafikken's operations other than ensuring that Bornholmstrafikken complies with the provisions of the contract. Bornholmstrafikken applies identical prices in relation to DSB and Gråhundbus respectively (and has always done so throughout the period in question since 2000), so DSB has not received an advantage.

(129) The Danish authorities state, nevertheless, that the only price which applies only to DSB is the special price for DSB Orange with Great Belt crossing. This price concerns a very specific type of DSB ticket which can be used only by customers who purchase a DSB Orange ticket when leaving Jutland for Bornholm. According to the Danish authorities, Bornholmstrafikken gives a discount on this particular type of ticket because it wants to attract more custom from Jutland to Bornholm. This special discount is not imposed by the contract between the Danish State and the ferry operator. It is therefore the result of a commercial intention to develop business in Jutland and thereby to develop business as a whole.

(130) In this respect, the Danish authorities regard it as a general commercial measure which involves giving discounts with the aim of growing the business. They specify that Gråhundbus operates the Copenhagen-Ystad route, and so does not cross the Great Belt. In their view, therefore, it is obvious that the discount relating to this journey should not appear in the prices charged by Gråhundbus.

(131) The Danish authorities also specify that this offer was taken up by only around [...] (*) passengers during the period 2003-08. Since the initiative was taken by the operator, this offer could have been opened up to bus companies wishing to offer the same service. The Danish authorities also indicate that this commercial offer was withdrawn in 2009.

(132) Denmark therefore considers that DSB did not receive an advantage associated with the operation of the Copenhagen-Ystad route, either in the form of overcompensation or in the form of particularly low prices for the Rønne-Ystad ferry crossing.

The fourth criterion in the judgment in Altmark

(133) Regarding the question of whether the compensation was determined on the basis of an analysis of the costs which would be incurred by a typical, well-run undertaking, the Danish authorities take the view, in the context of DSB's formation as an independent undertaking, that all the necessary and practically feasible analyses were carried out.

(134) They also point out that DSB's separation from the State was based on the Bernstein report, which contained a detailed analysis of the options for increasing DSB's efficiency ⁽²⁰⁾ and which was subsequently implemented in a

wider-ranging restructuring plan in 1996. These measures had the effect of causing DSB's returns to rise, and its productivity increased by 32 %.

(135) In the context of DSB's formation, the Danish authorities established a 10-year budget, based on several initial assumptions including an improvement in productivity, which was used to fix DSB's operating grant for the period 1999-2004.

(136) The budget, which was contained in Act No 249 of 11 June 1999, was based on the assumptions of a 6 % return on equity after tax, which the Danish authorities had deemed to constitute a reasonable profit.

(137) According to the Danish authorities, the operating grant was therefore the result of an overall assessment of costs, receipts and a reasonable profit carried out on the basis of the information which was available in 1999 and in accordance with market economy principles. They claim that the establishment of the 10-year budget and the subsequent calculation of the contractual payments made to DSB were carried out in compliance with the fourth criterion in the judgment in Altmark.

(138) The Danish authorities also refer to EU case-law ⁽²¹⁾ and emphasise the difficulty, in this case, of making a specific comparison with another operator.

Compatibility

(139) Should the Commission conclude nonetheless that State aid was granted to DSB, the Danish authorities are of the opinion that this compensation is in any case compatible with the internal market.

(140) It is their view that, in the context of the conclusion of the negotiated contracts, the most exhaustive analyses and calculations possible in practice were carried out with a view to guaranteeing the correct calculation of the compensation.

(141) The Danish authorities are in agreement with the Commission's reasoning in its decision initiating the procedure, according to which the compensation may be deemed compatible with the internal market if it fulfils the third criterion in the judgment in Altmark.

(142) As indicated above, the Danish authorities believe that everything that could reasonably be required to guarantee that DSB did not receive any overcompensation was done, and that it should be concluded – at the very least – that the contractual payment received by DSB under the negotiated contracts constitutes aid compatible with the internal market.

(*) Confidential information

⁽²⁰⁾ The Bernstein report was produced in 1993 following an expert report requested by the Danish Ministry of Transport.

⁽²¹⁾ In particular, Case T-289/03 *BUPA v Commission* [2008] ECR II-81, and in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark A/S v Commission* [2008] ECR II-2935.

(143) On the other hand, as stated above, the Danish authorities do not agree with the Commission's reasoning concerning the distinction between public transport service contracts and public service obligations as regards the legality of the aid. They consider that if DSB received State aid, that aid would not have had to be notified. If the Commission were to maintain its reasoning, this would be tantamount to making a fundamental and unwarranted distinction according to whether or not a Member State which imposes an obligation on a wholly State-owned undertaking to discharge transport activities falls under the description of the scope, quality and price of the services in a contract.

(144) In the light of the above, the Danish authorities are of the view that there is no reason to require a refund of State aid which could be regarded as incompatible with the internal market.

Payroll tax

(145) The Danish authorities point out that the Commission, having been informed that the exemption from payroll tax was due to be abolished, had not examined the issue of that tax in this procedure.

(146) For information, the Danish authorities have stated that the changes to payroll tax were introduced by Act No 526 of 25 June 2008 and that they entered into force on 1 January 2009.

The legal basis for the review of compatibility

(147) The Danish authorities stated by letter of 8 January 2010 that they had no particular comments concerning the Commission's determination of the applicable legal basis (Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007).

6. COMMENTS BY INTERESTED PARTIES FOLLOWING THE INITIATION OF THE PROCEDURE

(148) Comments have been submitted by DSB, the beneficiary of the measures in question, and by DKT, the second complainant. It should be emphasised that Gråhundbus, the first complainant, has not submitted any comments.

6.1. COMMENTS SUBMITTED BY DSB

(149) By letter of 30 December 2008, DSB submitted its comments on the Commission's decision initiating the procedure.

(150) DSB indicates that it agrees with all of the Danish authorities' comments and confines itself to examining whether the Commission may require recovery of the aid if it were to conclude that the public transport service contracts involve State aid that is incompatible with the internal market.

(151) DSB considers that the recovery of such aid, in this case, would be contrary to the principle of legitimate expectations, thus obstructing the application of Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²²⁾.

(152) First, DSB considers that it could legitimately take the view that the contractual payments from the Danish Government relating to the 5-year and 10-year contracts did not constitute State aid. It considers that the situation was not clear regarding the controls to be carried out to verify the existence of State aid in the field of land transport.

(153) DSB takes the view that it is necessary to go back to the time when the transaction took place to assess whether the Danish Government granted an advantage to DSB. The fact that there may be a degree of uncertainty concerning the costs to the service provider and other possible sources of revenue could not in itself lead to the State being prevented from concluding an agreement at a price reflecting the market conditions. According to DSB, any agreement generally involves some uncertainty and, in normal contractual relations, it is the undertaking which takes on that risk. An arrangement in which DSB alone bears the risk of unforeseen fluctuations in ticket sales or expenses would, more than any other, give DSB an incentive to improve its services and to attract more travellers ⁽²³⁾, enabling the State to get the best value out of the contractual payments it makes to DSB, which bears the risk in the event of a decline in performance, for example due to poor management or loss of revenue. DSB is therefore of the view that, at the time when the two contracts were concluded, the State acted as a rational investor optimising its options for obtaining the best possible yield from those contracts.

(154) Second, DSB considers that it had a legitimate expectation that the contractual payments would in any case fulfil the criteria laid down by Regulation (EEC) No 1191/69 and qualify for block exemption under that Regulation. It expresses doubts regarding the Commission's interpretation of Article 14 of the Regulation.

(155) DSB points out that Section V of the Regulation – which does not contain any provisions relating to the amount of compensation – contrasts with Sections II to IV of the Regulation where public service obligations are concerned. According to DSB, the underlying aim of the Regulation was to guarantee reasonable compensation for operators. In terms of commitments entered

⁽²²⁾ OJ L 83, 27.3.1999, p. 1.

⁽²³⁾ See, in particular, the Commission Decision of 25 January 2006, N 604/2005 – Germany – Public funding for bus operators in the rural district of Wittenberg (OJ C 209, 31.8.2006, p. 7), paragraphs 78 et seq.

into voluntarily, transport operators bound by public service contracts are in a very different situation from operators on which the State unilaterally imposes public service obligations, and this is reflected in the Regulation. In those circumstances, the Commission cannot interpret Regulation (EEC) No 1191/69 in the light of Article 106(2) of the TFEU ⁽²⁴⁾.

- (156) Finally, DSB does not agree with the Commission's interpretation of Article 17 of the Regulation, according to which the notification exemption provided for applies solely to compensation for public service obligations and not to public transport service contracts.

The legal basis for the review of compatibility

- (157) DSB submitted its comments by letter of 8 January 2010. DSB disputes in principle the Commission's application of Regulation (EC) No 1370/2007 to this case.
- (158) DSB points out that the transport contracts at issue between DSB and the Danish State were concluded before the adoption of the Regulation and before its entry into force. If the Regulation were to be applied, it would be legislation with retroactive effect, which DSB considers to be contrary to fundamental legal principles, including both the principle of legal certainty and the principle of protection of legitimate expectations. DSB also points out that there is no reason to believe that the EU legislator wished to give Regulation (EC) No 1370/2007 retroactive effect.
- (159) DSB points out that, on the contrary, the Regulation provides for a gradual introduction of the new rules and that the provisions of the Regulation are not in general valid for contracts which have already been concluded if they have a limited term. Since the term of the contracts in question is in line with that prescribed in the transitional provisions, DSB considers that they are governed solely by the legislation in force at the time when they were concluded (Regulations (EEC) No 1191/69 and (EEC) No 1107/70).
- (160) DSB also relies on the Commission's most recent decision-making practice, in which the Commission considered that it was not possible to apply Regulation (EC) No 1370/2007 to contracts concluded before the entry into force of the Regulation on 3 December 2009 ⁽²⁵⁾.

⁽²⁴⁾ With effect from 1 December 2009, Article 86 of the EC Treaty became Article 106 of the Treaty on the Functioning of the European Union (TFEU). The two provisions are essentially identical. For the purposes of this Decision, references to Article 106 of the TFEU should be understood as references to Article 86 of the EC Treaty, where appropriate.

⁽²⁵⁾ See in that regard, the Commission Decision 2009/325/EC of 26 November 2008 on State aid C 3/08 (ex NN 102/05) — Czech Republic concerning public service compensations for Southern Moravia Bus Companies, OJ L 97, 16.4.2009, p. 14 (recital 111); Commission Decision 2009/845/EC of 26 November 2008 on State aid granted by Austria to the company Postbus in the Lienz district C 16/07 (ex NN 55/06), OJ L 306, 20.11.2009, p. 26 (recital 104).

- (161) In the alternative, DSB submits information in support of the view that the public transport service contracts comply in any case with the provisions of Regulation (EC) No 1370/2007.

6.2. COMMENTS SUBMITTED BY DKT

- (162) By letter of 16 February 2009, DKT submitted its comments on the decision initiating the procedure. Those comments are summarised below.

Preliminary remarks

- (163) DKT refers to the information submitted to the Commission in the context of its complaint and to the contacts that took place prior to the initiation of the procedure.
- (164) DKT points out that the Commission's decision initiating the procedure appears to refer only to DSB's public transport service contracts concerning its traditional rail transport activities, and not to relate to urban transport activities carried out by its subsidiary DSB S-tog a/s, which are nevertheless referred to in its initial complaint.
- (165) DKT points out that the contracts relating to urban transport are of the same type and raise the same questions. In the light of this, DKT emphasises the fact that the present review by the Commission should relate also to the urban transport public service contracts.
- (166) In general, DKT considers that the criteria in the judgment in *Altmark* are not fulfilled in this case and that the contracts in question therefore involve the granting of State aid. DKT considers that aid to be incompatible and illegal and that the Commission should order its recovery.

The first criterion in the judgment in Altmark

- (167) Even though the Commission did not express any doubts concerning compliance with the first criterion in the judgment in *Altmark*, DKT has nevertheless submitted comments in this respect.
- (168) DKT considers that the wide discretion available to Member States in establishing public service obligations should not lead to arbitrary situations in which third parties are not able to challenge the reason why an activity is carried out under a public transport service contract. According to DKT, the Commission is required to state the reasons for the need to impose a public service obligation.

(169) On the basis of the case-law of the Court of Justice and the decision-making practice of the Commission, DKT disputes the Commission's analysis that there is no manifest error of assessment. DKT considers in particular that the existence of objectives relating to punctuality, quality and regularity of service is not sufficient to establish that a service should be regarded as a public service mission.

(170) Rather, the Commission should conduct this analysis in the light of the criteria set out in Regulation (EEC) No 1191/69 and examine the proportionality of the public service missions. According to DKT, the Commission should examine in particular whether the operation of the services in question in accordance with the requirements of punctuality, quality and regularity would not be profitable.

(171) DKT considers that public service compensation is justified only where transport services are not profitable and where compensation is therefore essential for their operation, which implies carrying out a separate examination of the finances of each of the rail links concerned.

The second criterion in the judgment in Altmark

(172) DKT disputes the Commission's reasoning that the 10-year budgets on which the calculation of DSB's compensation is based would allow the second criterion in the judgment in Altmark to be fulfilled. It takes the view that those budgets do not contain the parameters and detailed cost analysis making it possible to establish the level of compensation required for each of the rail lines concerned.

The third criterion in the judgment in Altmark

(173) DKT considers that fulfilment of the third criterion in the judgment in Altmark should be analysed in conjunction with fulfilment of the fourth since, if an undertaking cannot be regarded as a typical, well-run undertaking, examination of whether or not the third criterion has been met becomes superfluous because it cannot be based on an analysis of that undertaking's costs.

The fourth criterion in the judgment in Altmark

(174) DKT points out that the award of the public transport service contracts in question was not the subject of a tendering procedure. In addition, DKT shares the Commission's doubts as to whether the 10-year budgets and the methodology applied by the Danish State would allow the fourth criterion in the judgment in Altmark to be fulfilled.

(175) In that regard, DKT submits, in particular, that the tendering procedures organised for certain lines showed

that DSB's competitors were able to operate services at a cost around 27 % lower than DSB's costs. Similarly, DKT points out that DSB uses statutory staff, which precludes compliance with the fourth criterion in the judgment in Altmark.

The incompatibility of overcompensation

(176) DKT does not agree with the Commission's reasoning concerning the issue of the compatibility of the aid. It takes the view that Regulation (EEC) No 1191/69 draws a distinction between, on the one hand, an approach based on real costs included in Sections II, III and IV of Regulation (EEC) No 1191/69 and, on the other hand, an approach based on the price quoted by one service provider compared with that quoted by a competitor for providing the same service, included in Section V of Regulation (EEC) No 1191/69. According to DKT, this distinction is reflected in the differences in nature between public service obligations and public transport service contracts, which are based on different procedural requirements.

(177) Consequently, the Commission's reasoning, based on a real costs approach and the principles associated with the implementation of Article 106(2) of the TFEU, cannot be applied to the examination of a price laid down in connection with public transport service contracts. DKT considers such an approach to be contrary to Community case-law (judgment in *Combust*), the Commission's practice (Community framework for State aid in the form of public service compensation⁽²⁶⁾) and the actual decision to initiate a procedure, which confirms the *lex specialis* nature of Article 93 of the TFEU.

(178) Based on the observation that, in this case, the Commission intends to apply an approach based on the real costs where public transport service contracts are concerned, DKT has formulated comments on that approach.

(179) DKT considers that the information submitted by the Danish authorities to support the absence of overcompensation is incorrect. DKT puts forward several arguments:

- DSB was able to reduce its costs significantly during participation in tendering procedures on certain lines,
- Furthermore, the public transport service contracts require DSB to have a sound financial situation, which reflects the fact that the contractual payments are greater than the payments that are strictly necessary to offset costs relating to public service obligations;

⁽²⁶⁾ OJ C 297, 29.11.2005, p. 4.

- The level of the contractual payments is not justified appropriately, and the 10-year budgets were tailor-made to guarantee DSB a certain level of profit without relying on a detailed analysis of DSB's costs and income for each of the lines concerned,
 - The compensation system is based on an anticipated return on equity, without being limited to compensation for additional expenditure,
 - According to the calculations submitted by DKT, the main rail link between Copenhagen and Aarhus is profitable, taking into account the obligations currently imposed on DSB, and should not therefore have been the subject of a public service obligation,
 - Moreover, DSB's claimed productivity gains are not consistent with the financial data showing an increase in staff costs in relation to income over the period concerned,
 - Similarly, DKT challenges the accuracy of the DKK 1 billion reduction in the contractual payments; it claims, rather, that the figure is DKK 647 million according to the company's annual accounts,
 - DKT claims that DSB's targets (in train/kilometres) for the period 2000-04 were not achieved – which would have justified a reduction in the contractual payments – and that DSB received compensation for rolling stock costs which it was not obliged to bear in view of the late delivery;
 - Finally, DKT considers that DSB could itself have borne the costs of the financial consequences of the late delivery of the rolling stock, particularly with regard to the replacement rolling stock, considering its substantial profits. DKT alleges that DSB received DKK 225 million from AnsaldoBreda as compensation for the delays, which should have been transferred to the Danish State which, according to DKT, suffered the related loss. DSB allegedly received surplus contractual payments of DKK 104 million for rolling stock which was not put into service.
- (180) According to DKT, DSB's high profit levels are, for the following reasons, proof that the company was overcompensated:
- DSB's results exceed the profit levels that a company exposed to a similar risk, namely a low risk, could reasonably expect,
 - DKT refers to a study carried out in connection with its complaint which shows that DSB's pre-tax operating margin (12,3 % for 1999-2004 and 12,77 % for 1999-2007) exceeds that of other rail transport companies in Europe (2,21 %-4,47 % in the United Kingdom; 3,35 % in Sweden; 0,49-4,65 % in Germany and 0,8-3,77 % for France's SNCF) and exceeds the level cited by the Commission in another, similar procedure ⁽²⁷⁾;
 - DKT considers that DSB's profits are also far in excess of those of its domestic competitors, as far as public transport service contracts are concerned (DSB (12,77 %); DSB S-tog (10,45 %); Arriva (4,39 %); Metro Service (6,18 %)),
 - DKT emphasises that DSB's profits are clearly in excess of the 6 % return on equity fixed by the Danish State as a target for DSB, and DKT assesses these profits at DKK 3,678 billion,
- (181) Finally, DKT considers that the argument that the payment of dividends made it possible to avoid any overcompensation must be disputed for the following reasons:
- public transport service contracts do not contain any mechanism for refunding contractual payments in the event of their exceeding the level that is strictly necessary for offsetting the costs of fulfilling a public service obligation,
 - in this case the Danish State is confusing its role of investor and shareholder in a public undertaking with its role as a public authority, which allows it to provide compensation for public service obligations,
 - the collection of dividends cannot in itself cancel out either the economic effects of overcompensation or the distortions of competition, the effects of which remain present on the market,
 - the argument relating to the payment of dividends leads to discrimination between public and private undertakings,
 - the Commission's framework for aid in the form of public service compensation provides only for the option of carrying forward up to 10 % of an overcompensation each year,
 - there is no direct link between overcompensation and the amount of dividends collected by the Danish State, the principle of which was stated, moreover, in the 10-year budgets before any overcompensation was established,
- ⁽²⁷⁾ Commission Decision of 23 October 2007 – C 47/07 – Public service contract between Deutsche Bahn Regio and the Länder of Berlin and Brandenburg (OJ C 35, 8.2.2008, p. 13).

Payroll tax

- (182) DKT indicates that the payroll tax exemption was abolished by the Danish State in 2008. It refers to a Danish draft law in which the cost of DSB's no longer being exempt from that tax was estimated at DKK 80 million per annum. On that basis, DKT considers that the tax exemption had a significant negative effect on competition amounting to approximately DKK 800 million over 10 years, a sum which was to be recovered by the Danish State.
- (183) Moreover, DKT has drawn the Commission's attention to the fact that the Danish State had allegedly decided to compensate DSB for no longer being exempt from that tax in the future by increasing the contractual payments.
- (184) DKT would like the Commission to examine this issue as part of this procedure, because procedure CP78/06, to which the Commission referred in the decision initiating the procedure, has since been closed.

The legal basis for the review of compatibility

- (185) On 10 January 2010, DKT sent the Commission its observations on the choice of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007 as the appropriate legal basis.
- (186) DKT considers that, since Regulation (EC) No 1370/2007 did not enter into force until 3 December 2009, the review of the compatibility of the aid measures in question on the basis of that Regulation was an error of law. After recalling a number of principles related to the use of the EU rules on State aid *ratione temporis*, DKT stated that a distinction should be made according to whether or not the case concerns notified aid measures. DKT referred to the judgment by the Court of First Instance in *SIDE* ⁽²⁸⁾ as a basis for establishing that, in this case, the Commission should conduct the review of compatibility on the basis of Regulation (EEC) No 1191/69.
- (187) DKT's conclusion is based in particular on the fact that the public transport service contracts in question cover the periods 1999-2004 and 2005-14 and that the aid is granted at the time when the monthly contractual payments are made. DKT also points out that Regulation (EC) No 1370/2007 does not contain any provision concerning State aid that has already been granted or is the subject of an investigation procedure. In addition, the decision of 10 September 2008 initiating the procedure does not refer to the new Regulation, although that Regulation had already been adopted. Finally, DKT also highlights a contradiction with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽²⁹⁾.

- (188) At the very least, DKT considers that Regulation (EC) No 1370/2007 could constitute the appropriate legal basis for the review of compatibility only for the future effects of public transport service contracts, that is to say contractual payments made after 3 December 2009.

7. DENMARK'S COMMENTS ON THE OBSERVATIONS SUBMITTED BY INTERESTED PARTIES

- (189) According to Denmark, DKT's observations do not result in a different assessment of the facts in question. Denmark maintains that the four criteria in the judgment in *Altmark* are fulfilled in this case and that DSB did not receive any overcompensation.

The extent of the Commission's review

- (190) Denmark takes the view that contracts related to urban and suburban transport are not covered by the formal review procedure and that there is therefore no need to comment on DKT's views with regard to those contracts.
- (191) Denmark indicates nevertheless that DSB S-tog a/s is a wholly-owned subsidiary of DSB SV and that the data relating to DSB S-tog a/s are included in the consolidated accounts of the DSB group and the data submitted by the Danish authorities.
- (192) The Danish authorities have specified that the projected and contractual payments relating to transport by S-tog were also determined on the basis of a 6 % return on equity after tax. The results obtained by DSB S-tog a/s were included in the budget of DSB SV, and the contractual payments to be made to the company for long-distance and regional transport were calculated accordingly. In addition, the operating profit generated by the subsidiary DSB S-tog a/s is included in the consolidated results of DSB SV. The profit from S-tog's activities is therefore included in the overall financial results of DSB SV.

The criteria in the judgment in Altmark

- (193) According to Denmark, the comments submitted by DKT do not challenge the fact that the four criteria in the judgment in *Altmark* are fulfilled in this case.
- (194) With regard to the first criterion, the Danish authorities argue that the Commission has not expressed any doubts in this respect. The question of whether the Copenhagen-Århus line constitutes a public service obligation is, moreover, dealt with below.
- (195) With regard to the second criterion, the Danish authorities argue that the Commission has not expressed any doubts regarding the period up to 2008 and specify that, for the period between 2009 and 2014, the compensation paid to DSB was also calculated on the basis of a 10-year budget submitted to the Commission.

⁽²⁸⁾ Case T-348/04 *Société internationale de diffusion et d'édition SA (SIDE) v Commission* [2008] ECR II-625.

⁽²⁹⁾ OJ C 119, 22.5.2002, p. 22.

(196) With regard to the third criterion, DKT has stated that it is only necessary to examine this criterion if the fourth criterion has been fulfilled. The Danish authorities do not share that opinion and consider that it is perfectly possible to examine the criteria independently of each other and in the order followed by the Court in the judgment in *Altmark*.

(197) Concerning the fourth criterion, the Danish authorities dispute DKT's arguments tending to the conclusion that this criterion is not fulfilled. They specify that the 10-year budgets were prepared on the basis of all the available data and a satisfactory cost analysis including long-term prospects for improvement. In addition, the budget was revised during the negotiation of the second contract, and the contractual payments were reduced to take account of efficiency gains. The Danish authorities have also pointed out that the fact that, for historical reasons, the company bears extraordinary costs as regards employees taken on as public servants has no bearing on whether or not the company is well managed. They also state that there are substantial differences in terms of capital structure, risk profile, etc., between the various rail companies, which makes comparisons with other companies impossible. Similarly, the fact that DSB First was able to tender more cheaply – at first sight – for the Kystbanen line is not a reflection, or indeed an indication, of the fact that the payments hitherto made to DSB were excessive, because that tender was submitted by a separate company and was based on different parameters (contract staff only, newer equipment, fewer staff on board).

Compatibility

(198) Denmark has pointed out its doubts as to the argument set out by the Commission concerning the implementation of Regulation (EEC) No 1191/69, which it regards as fraught with considerable legal uncertainty, particularly with regard to the notification requirement for public transport service contracts.

(199) Denmark does not share DKT's interpretation, in particular as to the use of the word 'price' in Article 14(2)(b) and the non-applicability of the rules on State aid in cases where Regulation (EEC) No 1191/69 applies.

i. General remarks concerning the analysis

(200) Denmark strongly disagrees with DKT's argument that the compensation was to be determined on the basis of analyses of the costs for each individual line. There is no legal basis which makes it possible to require that the compensation paid under a global contract for the discharging of a public service obligation should be calculated on the basis of analyses, at a 'microlevel', of each of the obligations accepted by the service provider.

(201) The Danish authorities also dispute DKT's interpretation of the judgment in *Case T-17/02 Fred Olsen S.A. v Commission* and emphasise that this case concerns a coherent, integrated network operated under a global

negotiated contract. The fixing of the level of compensation on the basis of a line-by-line analysis is superfluous and could lead to misleading results. It would cause greater uncertainty regarding the distribution of common charges than a summary statement of all receipts and costs connected with the discharging of the public service obligations imposed by the contract.

(202) They point out, on the other hand, that DSB's accounting data relating to the services provided under the contract may be examined independently because they are based on separate accounts.

ii. Copenhagen-Århus link

(203) The Danish authorities do not share the view that services which can be provided without financial assistance cannot constitute a public service obligation. The State is quite entitled to decide to include the provision of such services in a service obligation that is fairly wide in scope (requirements in terms of departure times, capacity, fares, etc.), which is the case here because this line is closely integrated with the rest of DSB's services due to the connecting services to the north of Århus, the connection with other lines and the splitting and combining of trains from other sections of line.

(204) In addition, the Danish authorities have stated that the compensation paid to DSB is calculated on the basis of the revenues and costs connected with all of its public service obligations. If lines or certain services likely to make a profit are included, the related receipts are therefore integrated into the accounts as a whole. Consequently, the exclusion of certain lines capable of making a profit in themselves would only result in an increase in the total aid paid to DSB, and the inclusion of a non-loss-making line does not necessarily lead to over-compensation.

(205) Moreover, the Danish authorities have pointed out that DKT's calculations concerning the Copenhagen-Århus line are inaccurate, and put forward evidence confirming that claim. They stress that DKT does not make it sufficiently clear how the calculations were done, and they say they are not familiar with the figures submitted. According to Denmark, an optimistic assessment leads to revenues on this line over DKK [...] million lower than those cited by DKT, [...].

iii. Productivity

(206) The Danish authorities dispute the argument that DSB had not made significant productivity gains in 1999-2007. They challenge DKT's method of calculation based on a ratio between nominal staffing costs and turnover. DSB's turnover is influenced, however, by a number of micro- and macroeconomic factors, which means that there is no constant proportional correlation between DSB's production and turnover (factors: local competition, changes in the economic situation, political priorities, inflation, changes in the social composition of passengers, etc.).

(207) The Danish authorities propose two methods for assessing the productivity of DSB's activities:

- DSB's production, measured in terms of the number of passenger-kilometres (increase of 1,8 % a year between 1999-2007) related to the number of employees (full time equivalents),
- DSB's production related to staffing costs in real terms (that is to say, corrected for wage inflation),

(208) These two methods show an increase in productivity of, respectively, 1,9 % and 2 % per year.

iv. Reduction in the contractual payments

(209) The Danish authorities assert that the figures put forward by DKT in that regard are incorrect. The 'contractual payments' appearing in DSB's accounts and used by DKT concern both the contract concluded with the State which is involved in this case and other payments relating to other contracts (contracts concluded by DSB in Sweden; a contract with Hovedstadens Udviklingsråd (HUR) and a temporary transport contract on the Langå-Struer line).

(210) They explain that the reduction of DKK 1 billion follows clearly from the Finance Act for 2003 (Article 28.61.01, paragraph 10). The Finance Acts for 2003 and 2004 also show that the amounts which had been reduced in 2003 and 2004 were adjusted upwards. Denmark submits a summary table showing that the total reduction amounted to DKK 1,018 billion.

v. Train-kilometres

(211) The Danish authorities state that the obligation provided for in the contract in terms of production of train-kilometres is lower than the figure submitted by DKT, because account has to be taken of the tendering procedure relating to the transport service for Central and Western Jutland in November 2003. They provide the correct figures in a table, which show that, in total, DSB carried out 1,5 million train-kilometres more than was envisaged in the contract, and it cannot be claimed therefore that DSB received compensation for services which were not provided. In addition, they stress that DSB sent a quarterly report on its contractual production to the Ministry of Transport.

vi. DSB's results

(212) Denmark considers that DSB's provisional budget – based on a predicted 6 % profit ratio – was reasonable and realistic. The fact that the profit ratio turned out to be higher than projected is due to a series of unforeseeable circumstances, the effect of which the Danish Government eliminated by means of an extraordinary

reduction in the contractual payments on the one hand, and by collecting dividends on the other.

(213) Moreover, the Danish authorities challenge the relevance of the data on the performance of European passenger rail transport undertakings. They also highlight the difficulty of carrying out such comparisons (differences in capital structure and level of capital invested, operating risks, macroeconomic and structural factors influencing undertakings' accounting data) and cite a report by the European Commission which does not portray DSB as being more profitable than its competitors on the European market.

(214) Moreover, Denmark does not dispute that the progression in DSB's trading performance proved more favourable than envisaged in the initial budgets. However, the Danish authorities provide clarification concerning the effects of the changes in rates of taxation and submit a summary table of DSB's results.

(215) Finally, Denmark has submitted recent data relating to DSB's financial situation, specifying that the after-tax profit for the public service activity was DKK 670 million in 2007 and DKK 542 million in 2008 respectively.

vii. Dividend policy

(216) Denmark takes the view that, combined with a detailed budget, dividend policy is a highly effective way of guarding against overcompensation because it is a tool which offers flexibility in avoiding overcompensation in the event that the working hypotheses in the budget prove deficient. Dividend policy acts as an addition to the detailed budget underlying the transport contract.

(217) The Danish authorities state that the compensation is defined in advance on the basis of a substantiated estimate of income and costs and that it is not an unlimited resource for DSB. They also specify that if the real figures indicate a shortfall compared with the provisional budget – for example, due to an unintended increase in costs (management errors, increases in wages, costs or purchases) or due to a loss of income associated with a decline in business compared with predicted levels, DSB is also unable to obtain additional compensation from the State. DSB therefore assumes a share of the risk in the event of poor performance.

(218) Consequently, dividend policy plays the role of an additional safeguard against overcompensation in cases where the results indicate a positive discrepancy compared with the provisional budget. It is a flexible instrument which the State can use to ensure that a given amount is collected from the company.

(219) Denmark specifies that DSB was not able to profit from any advantage in terms of liquid assets so as to distort competition on the market by offering other services etc., in particular by means of cross-subsidisation.

(220) The Danish authorities specify that DSB has in total paid DKK 3,469 billion more in dividends for the financial years 1999. to 2007 than projected. DSB paid the Danish State dividends of DKK 607 million in 2007 and 359 million in 2008.

(221) Even though it is true that the dividend payments were not made exclusively on the basis of a calculation aimed at determining any overcompensation, the amount of the dividends charged by the Government clearly exceeded the disparity between the predicted results and the actual results. In so far as DSB achieved results in excess of the provisional figures, all of that surplus was taken out of the company in the form of dividends. Consequently, Denmark considers that no overcompensation took place.

viii. Introduction of a refund mechanism

(222) In formulating its observations and in discussions with the Commission, Denmark indicated that it intended to introduce a refund mechanism in the relevant public transport service contracts with DSB.

(223) The mechanism under consideration has the following features.

Operation of the refund mechanism

(224) According to the Danish authorities, if they had perfect information about DSB's performance in advance, the compensation mechanism would have to be expressed using the following formula:

$$\text{Total revenue (passengers + contractual payments)} - \text{reasonable profit} - \text{Total expenditure} = 0$$

(225) The Danish authorities point out, however, that they do not have access to perfect information for the whole term of multiannual contracts and that, consequently, this formula is rarely equal to zero in practice.

(226) In the current system, the formula is in fact adjusted on the results side (right side of the formula) by using the dividend policy. Another solution considered by the Danish authorities would be to carry out adjustments to the total revenue (left side of the formula) by

adjusting the contractual payments using an annual refund mechanism.

(227) The size of the adjustment should correspond to the gross reduction expressed in the formula below.

$$\text{Total revenue} - \text{reasonable profit} - \text{Total expenditure} = \text{gross reduction}$$

Corrections concerning efficiency and qualitative improvements (net reduction)

(228) In order to ensure that DSB continues to have an incentive to improve its efficiency and to attract new passengers, the refund clause should make it possible, according to the Danish authorities, to reward improvements in the undertaking's performance gauged by predetermined parameters. DSB should therefore be able to retain part of the gross reduction in so far as the gross reduction (which is equivalent to a reasonable profit/return on equity greater than that specified in the formula) is due to:

— a reduction in costs per passenger-kilometre and/or,

— an increase in the number of passengers measured in terms of passenger-kilometres.

(229) The Danish authorities are therefore considering modulating the refund mechanism as follows:

— if DSB has reduced its costs (per passenger-kilometre) compared with the average cost over the past 4 years, that improvement will be calculated (cost differential as a percentage multiplied by a total cost base), and

— if the number of passengers increases, the increase in passenger traffic measured in passenger-kilometres will be multiplied by DKK 0,80, and the gross reduction will also be reduced by that amount ⁽³⁰⁾.

(230) The Danish authorities have specified that the total reductions on account of improvements in performance may not exceed the gross reduction in a given year. The net reduction will therefore be between zero and the gross reduction.

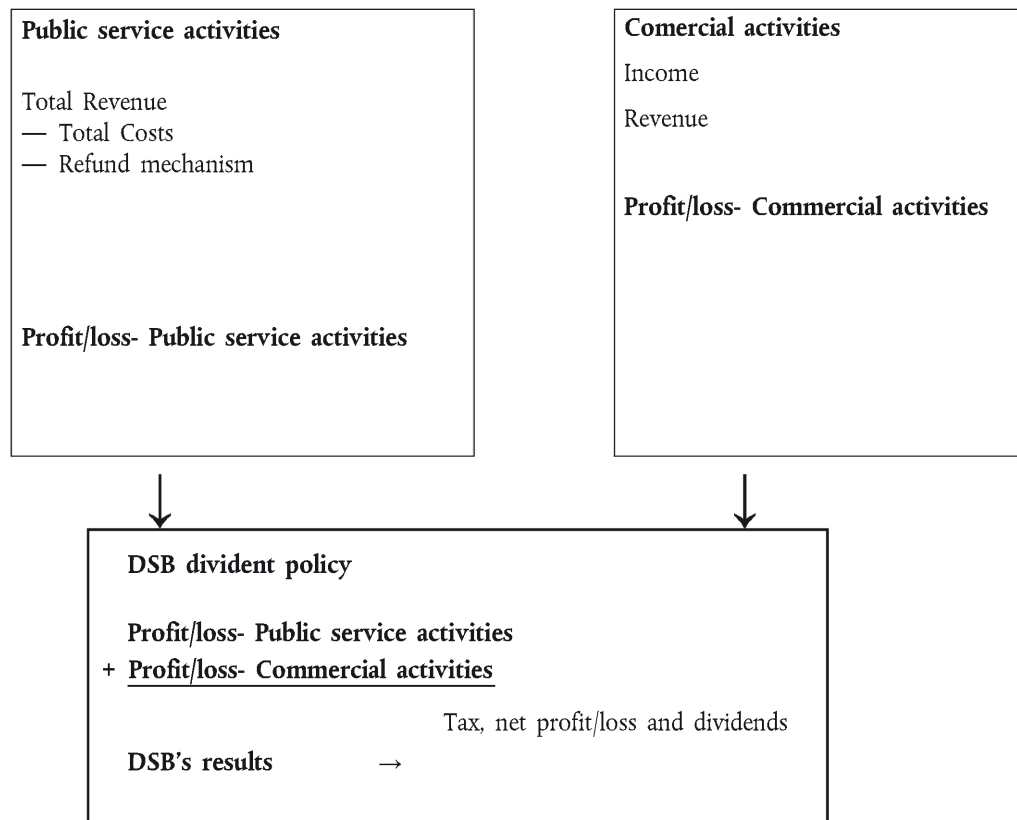
(231) The refund mechanism would therefore have to follow this formula:

$$\text{Refund mechanism} = \text{gross reduction} - \text{variable } (\Delta \cdot \text{Pas.km } \Delta) = \text{net reduction}$$

⁽³⁰⁾ The amount of DKK 0,80 is approximately equal to the unit yield per passenger-kilometre in regional and interregional rail transport.

Effect on dividend policy

- (232) The Danish authorities have stressed that the introduction of such a refund mechanism would have a significant impact on the Danish State's dividend policy, as indicated in the table below:

*Refund mechanism and maximum level of reasonable profit*

- (233) The Danish authorities have also indicated that this refund mechanism would be supplemented by the introduction of an upper limit which will ensure that DSB is not awarded an amount of profit exceeding what is regarded as a reasonable level.
- (234) The Danish authorities are considering setting this upper limit in relation to DSB's return on equity which, above the 6 % level established in the contract, would take account of the additional profits generated by increases in efficiency or in passenger numbers. This upper limit would be established using the following formula:

$$\frac{\text{Reasonable profit (6 \%)} + \text{variable } (\Delta \cdot \text{pas.km } \Delta +)}{\text{Equity capital}} < 12 \%$$

- (235) The incentive factors in the refund mechanism may therefore give DSB an additional advantage if the company improves its costs structure or if passenger numbers increase ($\Delta \cdot \text{pas.km } \Delta$).
- (236) The Danish authorities have specified that the calculation takes into account only the share of DSB's equity capital which corresponds to its public service activity on the basis of the accounting separation.

- (237) According to this mechanism, the upper limit on the reasonable profit could be fixed at a 12 % return on equity capital. The Danish authorities specify that the annual limit is set at 10 % spread over 3 years.

Empirical demonstration

- (238) The Danish authorities have provided the Commission with an analysis demonstrating empirically what the impact of such a refund mechanism would have been over the period 2004-08, as indicated in the table below:

Public service activities (million DKK)	Pre-tax result	Reasonable profit (return on equity 6 % before tax)	Gross refund	Estimate of equity capital	Passenger km (million)	Cost per passenger km (DKK/km)	Difference cost per passenger km (4 years)	DSB's increase in efficiency	Improvements in passenger km	DSB's total improvements	Refund – net reduction	DSB's results	Return on equity after refund mechanism (%)	Average return on equity after refund (%)
2004	943	594	349	6 931	4 353	1,25	3 %	151	78,4	230	119	824	11,9	
2005	919	575	344	6 906	4 392	1,32	– 3 %	0	31,2	31,2	312	607	8,8	
2006	977	583	394	6 994	4 526	1,3	– 2 %	0	107	107	287	690	9,9	10,2
2007	724	569	155	7 108	4 635	1,31	2 %	115	87	202	0	724	10,2	9,6
2008	717	523	188	6 609	4 759	1,33	– 2 %	0	99	99	89	628	9,5	9,9

- (239) The application of the refund mechanism would therefore have led to returns on equity for DSB varying between 8,8 % and 11,9 % over the period 2004-08.

which benefited from it, such as DSB. The exemption was taken into account in the contract, just as it was taken into account during the tendering procedures relating to the transport contracts etc., thus ensuring that all bidders were on an equal footing.

- (240) Due to the rule specifying 10 % on average over 3 years, which was exceeded by 0,2 % in 2006, the refund mechanism would have resulted in a repayment of DKK 38 million for that financial year.

- (243) As regards possible compensation for DSB following its no longer being exempt from payroll tax, the Danish authorities point out that the contractual payments made to DSB had initially been calculated on the basis that DSB was not required to pay payroll tax. The compensation had therefore been 'reduced' by that amount. As DSB is now liable for payroll tax, the basis on which the compensation is calculated was no longer valid, and compensation was paid to DSB to take account of this change in the calculation parameters. The compensation amounts to approximately DKK 80 million a year and relates solely to DSB's public service activities.

Payroll tax

- (241) Denmark states that the payroll tax exemption has now been abolished.
- (242) According to the Danish authorities, that exemption did not result in any economic advantage for the companies

- (244) According to Denmark, the payroll tax exemption and its subsequent abolition consequently had a neutral effect on DSB's finances.

8. ASSESSMENT OF THE MEASURES CONTAINED IN THE PUBLIC SERVICE CONTRACTS

8.1. SCOPE OF THE DECISION

- (245) This Decision concerns the compatibility with the Community rules on State aid of the public transport service contracts concluded between the Danish Ministry of Transport and Danske Statsbaner.
- (246) The initiation of the procedure on 10 September 2008 and, in particular, the comments of the Danish authorities and the observations of the interested parties have enabled the Commission to define the extent and scope of the various public transport service contracts at issue, the procedures for determining the public service compensation and all of the circumstances that could have led to Danske Statsbaner being overcompensated.
- (247) Consequently, the Commission has identified four public transport service contracts relating to the periods 2000-04 and 2005-14 and concerning main line, regional and suburban transport services, which are likely to contain elements of State aid (see recitals 28, 46, 50 and 69 above). There are also the additional contracts concluded to deal with the late delivery of rolling stock (see recital 114).
- (248) The Commission points out in that regard that the interested parties have submitted their observations on the various outstanding problems and doubts expressed by the Commission in its decision initiating the procedure, in relation to all of those contracts.
- (249) The Commission has also examined whether there are any other fiscal measures of relevance to the compatibility of the public service compensation at issue ⁽³¹⁾.

8.2. EXISTENCE OF AID

- (250) Article 107(1) of the Treaty on the Functioning of the European Union reads as follows: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

⁽³¹⁾ The Commission also refers to its decision initiating the procedure, which has shown that DSB did not receive any explicit or implicit guarantee from the Danish State enabling it to obtain more favourable credit terms than those offered to private undertakings. For a similar situation and a similar conclusion, Case T-442/03, paragraphs 121 to 127.

8.2.1. STATE RESOURCES

- (251) The public transport service contract provides for the payment of compensation to DSB for the discharging of the public transport service contract through the budget of the Danish State. That compensation is therefore paid through State resources.

8.2.2. SELECTIVITY

- (252) DSB, an undertaking within the meaning of Article 107(1) of the TFEU, is the sole recipient of the public service compensation provided for in the contracts. The measure is therefore selective within the meaning of Article 107(1) of the TFEU.

8.2.3. ECONOMIC ADVANTAGE

- (253) According to the Court of Justice, an undertaking does not receive an economic advantage where the compensation for a public service complies with the four criteria laid down in the judgment in Altmark. It is therefore necessary to examine whether the public transport service contracts concluded between the Danish Government and DSB fulfil these four criteria cumulatively.
- (254) Since the four criteria laid down by the judgment in Altmark are cumulative, failure to comply with just one of those criteria is sufficient to verify that the measures under review confer a selective advantage. In the interests of clarity and in view of the specific circumstances of the case, the Commission will analyse first whether the undertaking in this particular case really has been charged with a public service obligation and, in that capacity, receives compensation which is established on an objective and transparent basis (the first two criteria in Altmark) and will then examine specifically whether that undertaking was chosen pursuant to a public procurement procedure or, failing that, whether the compensation was determined on the basis of an analysis of the costs that would be incurred by a typical, well-run undertaking in discharging its obligations (fourth criterion in Altmark).

First criterion: recipient undertaking must actually have clearly defined public service obligations to discharge

- (255) In its decision initiating the procedure, the Commission observed that DSB did indeed have clearly defined public service obligations to discharge and that the first criterion in the judgment in Altmark was therefore fulfilled.
- (256) Even though the Commission did not express any doubts concerning that criterion, DKT disputed its reasoning, taking the view that the Commission should have verified the necessity and proportionality of the public service obligations.

- (257) DKT is also of the opinion that their necessity should be examined railway line by railway line and that their proportionality should be assessed in the light of the profitability of each of the lines concerned, taking into account the constraints and requirements imposed by the authority. To support its argument, DKT cites the example of the Copenhagen-Århus railway line, which is covered by the public transport service contracts even though it is profit-making according to an analysis carried out by DKT itself.
- (258) The Danish authorities have disputed those arguments and challenged DKT's calculations concerning the Copenhagen-Århus railway line, stating that the latter are not sufficiently detailed and do not match the figures they have. According to the Danish authorities, the line in question is also loss-making.
- (259) The Commission points out that, in the passenger land transport sector, the necessity of a service of general economic interest is to be assessed on the basis of Article 93 of the TFEU and the legislation, in this case Regulation (EEC) No 1191/69, until 3 December 2009, and after that, Regulation (EC) No 1370/2007.
- (260) Article 1(4) of Regulation (EEC) No 1191/69 provided that:
- ‘in order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking’.
- (261) Article 14(1) of that Regulation defined the content and characteristics of public service contracts – standards of continuity, regularity, capacity and quality, rates and conditions.
- (262) Public service obligations are henceforth defined in Article 2(e) of Regulation (EC) No 1370/2007 as:
- ‘a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward’.
- (263) The Commission thus points out that the specific legislation in force in no way limits the possibility of entrusting service missions covering a set of lines in order to establish a coherent transport system, particularly with the concern of allowing a certain continuity of transport. No criteria are laid down concerning the profitability or otherwise of the individual lines concerned. Finally, that possibility is, furthermore, not limited by the existence or otherwise of comparable transport services, as argued by the first complainant in the specific case of the Copenhagen-Ystad line.
- (264) The Commission also considers that the arguments put forward by DKT concerning other modes of transport are not relevant because the legislator has imposed different rules for each of those modes, which are explained in particular by a different degree of openness to competition of the markets and different inherent characteristics for the user and the public authorities.
- (265) Finally, the fact that a transport service concerns a cross-border or international link is no obstacle to the possibility of operating it as part of a public service. The Commission points out in this respect that, even in sectors which are fully open to competition, services of general economic interest exist for international links ⁽³²⁾.
- (266) The Commission therefore considers that Denmark is not committing a manifest error of assessment by including one or more profitable lines in a public transport service contract, in so far as those lines are part of a coherent transport system, and this irrespective of whether such lines already exist – a state of affairs that Denmark denies in this case. The Commission also notes that, if a line in that system were to be profit-making, the revenue from it should be taken into account in the overall calculation of costs and revenues related to the services concerned with a view to determining the level of compensation. It follows that the earnings from a profitable line would lead ultimately to a commensurate reduction in the financial compensation necessary in order to run the other, unprofitable lines in that system. In the absence of specific rules to the contrary, the Member State remains free to assess the scope of the public service that it wishes to entrust to an undertaking in order to establish an adequate transport system.
- (267) The Commission considers that the foregoing assessments are backed up by established case-law, according to which:
- ‘As regards competence to determine the nature and scope of an SGEI mission within the meaning of the Treaty, and also the degree of control that the Community institutions must exercise in that context, it follows ... from the case-law of the Court of First Instance that Member States have a wide discretion to define what they regard as SGEIs and that the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error’ ⁽³³⁾.
- ⁽³²⁾ See, in that regard, Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, and in particular Article 16 thereof (OJ L 293, 31.10.2008, p. 3); see also the Community guidelines on State aid to maritime transport, and in particular point 9, paragraph 2 thereof (OJ C 13, 17.1.2004, p. 3).
- ⁽³³⁾ Case T-442/03 *SIC-Sociedade Independente de Comunicação, S.A. v Commission* [2008] ECR II-1161, paragraphs 195-196, and also Case T-289/03 *BUPA v Commission* [2008] ECR II-81, paragraph 166, and Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, paragraph 216.

- (268) The Commission's role is therefore limited to investigating whether Denmark has not committed a manifest error of assessment in determining the scope of the public services provided for in the contracts in question.
- (269) Consequently, the Commission maintains that it results from the contract's legal basis in national law, namely the Danish Rail Transport Act, that DSB is responsible for discharging a public service on the basis of contracts negotiated with the Danish Ministry of Transport. It also recalls that the contracts define in detail which lines DSB has an obligation to operate and the punctuality, quality and frequency of the train services to be provided over a specified period (the contracts being concluded for the periods 2000-04 and 2005-14 respectively).
- (270) The Commission points out that Denmark has demonstrated that the objective of the public transport service contracts at issue was to establish a coherent and comprehensive transport system guaranteeing a quality service for passengers and meeting Denmark's transport operation targets.
- (271) In relation to the specific case of the Copenhagen-Ystad link, the Commission notes that the Danish authorities have also clarified the circumstances and the various stages which led to its inclusion in the transport system covered by the public transport service contracts. The Danish authorities have explained how this line was operated successively as a 'free traffic' until 2002, then as 'public service traffic' but without additional compensation until 31 December 2004, and was subsequently included in the public transport service contract for the period 2005-14 (see recital 122 in this respect). They point out that the line was loss-making when it was operated as 'free traffic' and that no public resources were paid for the operation of the line before 2005.
- (272) The Commission also takes note of the Danish authorities' stated objective of connecting the island of Bornholm not only to Copenhagen but also to the rest of Denmark – as attested to by the special fares offer promoting links between Jutland and Bornholm (DSB Orange). The Danish authorities considered that the existence of a rail service could take account of certain specific concerns which were not addressed by the existing bus service, such as the servicing of the neighbouring Swedish towns along the train route, with three stops in the Swedish towns of Fösieby (Malmö), Svedala and Skurup. This service is also part of an intention to reinforce the options for access to the island of Bornholm. As indicated above in recital 263, the Commission notes that the fact that this link crosses national borders and includes stops in another Member State is no obstacle to its being operated as a public service obligation or an SGEL. In this respect, account should be taken, in particular, of Danish citizens' interest in an improved service to the Swedish towns concerned.
- (273) These facts supplement those set out in the decision initiating the procedure and support the Commission's conclusion that the Danish Government did not commit a manifest error of assessment by including the Copenhagen-Ystad line, which is covered by the public transport service contracts system.
- (274) In general, the Commission confirms its initial conclusion and considers that the first criterion laid down by the Court in the judgment in Altmark is fulfilled.
- Second criterion: parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner***
- (275) The Commission stated in the decision initiating the procedure that the level of compensation paid to DSB for fulfilling the necessary public service requirements had been determined on the basis of a 10-year forward budget. At that stage the Commission had at its disposal only the 10-year budget for the period 1999-2008. It therefore expressed doubts concerning the period 2009-14, which is also covered by the public transport service contracts.
- (276) In their observations, the Danish authorities clarified the parameters applying to the latter period by providing the Commission with the 10-year budget for the period 2005-14, prepared on the basis of DSB's operational development prospects during the period concerned. They have therefore confirmed that the compensation provided for in each of the public transport service contracts was based on a 10-year forward budget.
- (277) However, DKT disputed the fact that these forward budgets were sufficient to meet the requirements laid down in the judgment in Altmark, given that they did not give a sufficiently detailed account of the parameters adopted and that the compensation should have been based on a railway line-by-railway line analysis of the costs.
- (278) The first budget for 1999-2008 was established on the basis of a detailed economic forecast by DSB. It was designed as a basis for the act converting DSB into an independent public undertaking (see recital 8). It was then updated in the spring of 1999, presented to the Finance Committee of the Danish Parliament and approved as part of the adoption of Act No 249 of 11 June 1999.
- (279) It was based on the following conditions in particular:
- an increase in ticket prices in line with inflation (net retail prices index),
 - an average increase in productivity of 2 % a year,

- an annual interest rate of 5 %,
 - a 6 % return on equity after tax,
 - investments in rolling stock amounting to approximately DKK 10 billion,
 - levels of production (train km) and sales (passenger km) stated in several tables with 1999 as the starting point: 41 million train km and 4 023 billion passenger km for regional, intercity and international transport, and 15,6 million train km and 1 208 billion passenger km for suburban transport respectively.
- (280) The Danish authorities specified that the second 10-year forward budget for 2005-14 was prepared on the basis of the following hypotheses and conditions:
- general annual inflation of 2,5 %,
 - an increase in ticket prices of 2,5 %, in line with inflation,
 - an average increase in productivity of 2,5 % a year,
 - an annual interest rate of 5,15 %,
 - a 6 % return on equity after tax,
 - investments in rolling stock amounting to approximately DKK 10 billion,
 - an increase of approximately 20 % in the number of kilometres travelled,
 - an increase of approximately 20 % in the number of passengers,
 - a payroll tax exemption for DSB's staff,
- (281) On the basis of that information, the Commission considers that the forward budgets are based on data and hypotheses which are reasonable and sufficiently detailed for the purpose of establishing the parameters for calculating the compensation. In addition, the Commission notes that adjustments were made to take account of the revised revenue base in 2003 and that all those parameters were set out by the Danish Ministry of Transport in the relevant legislation⁽³⁴⁾. The Commission also points out that the contractual payments were established in advance because their amount was specified on an annual basis for the entire term of the contracts.
- (282) As stated above, the Commission takes the view that, in the context of public transport service contracts which provide for a transport system composed of several interdependent lines, the Member State need not necessarily determine the amount of compensation for each line taken individually. The second criterion in the judgment in *Altmark* requires the Member State to establish in advance, in a transparent and objective manner, the parameters making it possible to determine the overall level of payments intended to compensate for all of the obligations resulting from the contract.
- (283) The Commission can therefore conclude that the contractual payments were calculated on the basis of parameters established in advance in an objective and transparent manner and that the second criterion in the judgment in *Altmark* is also fulfilled.
- Fourth criterion: tendering procedure or level of compensation needed determined on the basis of an analysis of the costs incurred by a typical, well-run undertaking appropriately equipped with means of transport***
- (284) The public transport service contract was not the subject of a tendering procedure. It should therefore be clarified whether the size of the necessary compensation was determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the public service requirements laid down, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (285) Denmark considers that that criterion is fulfilled and has submitted observations to dispel the Commission's doubts as to the methodology used to determine the contractual payments and the overall compensation for the public service missions.
- (286) The Danish authorities have pointed out that DSB's establishment as an independent undertaking was accompanied by an in-depth economic analysis (Bernstein report) and steps to enhance the efficiency and productivity of the undertaking. Similarly, objectives in terms of efficiency gains were included in the 10-year budgets on the basis of which the contractual payments were calculated. The Danish authorities claim that the objective of a 6 % return on equity constitutes a reasonable profit. In their view, the approach adopted to determine the amount of compensation was therefore based on a general assessment of the available data and an expectation of efficiency gains in accordance with market economy principles.

⁽³⁴⁾ Danish Act No 112 of 2004.

- (287) Moreover, the Danish authorities had initially provided ratios for making a comparison with other rail undertakings. The observations submitted by Denmark in the context of the procedure highlighted, on the other hand, the difficulties of drawing comparisons between the financial performances of national or European rail operators. Those difficulties can be put down to the inherent characteristics of the undertakings and of the markets in the railway sector and to a lack of comparability of accounting and financial data.
- (288) In addition, DKT pointed out that a subsidiary of DSB was able to participate in tendering procedures and offer services at reduced costs compared with the costs to which DSB had committed itself in the context of the public transport service contracts. The Danish authorities emphasised the fact that DSB and its subsidiary DSB First could not be compared, since the two companies had different characteristics and cost structures (staff, equipment, commercial practices).
- (289) The Commission acknowledges that the Danish Ministry of Transport took measures (financial studies and restructuring measures) in order to establish DSB as an efficient independent undertaking. It also takes note of the quantified objectives in terms of return on equity and productivity gains.
- (290) However, the Commission also points to the insecure basis, acknowledged by both the Danish authorities and DKT, for comparing undertakings in the sector – a state of affairs that does not allow DSB's performance indicators to be compared with those of other operators.
- (291) In addition, the Commission takes the view that the stated example of the performance of the subsidiary DSB First appears to indicate that DSB would have prospects of achieving subsequent productivity gains by applying some or all of the measures implemented by DSB First to reduce its costs.
- (292) It follows that the Commission is not able to conclude with certainty that the compensation granted to DSB was indeed determined on the basis of an analysis of the real costs incurred by a typical, well-run undertaking appropriately equipped with means of transport.
- (293) In those circumstances, the Commission observes that the fourth criterion in the judgment in *Altmark* is not fulfilled.
- (294) Since the four criteria laid down by the Court in the judgment in *Altmark* are to be assessed cumulatively, it

is consequently not necessary to examine the third criterion or to verify, at this stage of the argument, whether any overcompensation has taken place. The Commission therefore considers that the compensation could have conferred an economic advantage on DSB.

8.2.4. DISTORTION OF COMPETITION AND EFFECT ON TRADE BETWEEN MEMBER STATES

- (295) The economic advantage is granted to a transport undertaking which operates in rail transport in both Denmark and neighbouring countries. In Denmark, passenger rail transport markets are open to competition. Consequently, financial support distorts, or threatens to distort, competition.
- (296) As the Court observed in its judgment in *Altmark*, several Member States, including some of Denmark's neighbours such as Sweden and Germany, have also opened up their national markets. The incumbent monopoly operators in those countries, and also some new entrants, have activities in several Member States of the Community. Aid granted to a Danish rail undertaking is therefore likely to affect trade between those Member States which have already opened up rail passenger transport to competition or whose undertakings have a presence on national markets which are open to competition.
- (297) Account should also be taken of competition between the different modes of transport, for example bus passenger transport.
- (298) Consequently, the support measures concerned may affect trade between Member States.
- (299) In conclusion, the Commission considers that the public transport service compensation constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

8.3. COMPATIBILITY WITH THE INTERNAL MARKET

8.3.1. LEGAL BASIS OF COMPATIBILITY

- (300) Article 93 of the Treaty on the Functioning of the European Union provides that aids shall be compatible if they 'meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.' This Article is a *lex specialis* in relation to Articles 106(2) ⁽³⁵⁾, and 107(2) and (3) of the TFEU.

⁽³⁵⁾ Recital 17 in the preamble to the above-mentioned Commission Decision of 28 November 2005.

- (301) According to the Court of Justice, Regulation (EEC) No 1191/69, and Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway⁽³⁶⁾, implement exhaustively Article 93 of the TFEU, which is why this provision of the Treaty can no longer be applied directly⁽³⁷⁾.
- (302) In its decision initiating the procedure, the Commission concluded that the compensation in question cannot be regarded as compatible with the internal market on the basis of Regulation (EEC) No 1107/70.
- (303) In that decision, the Commission determined that the contracts concluded between the Danish Government and Danske Statsbaner constituted public service contracts within the meaning of Article 14 of Regulation (EEC) No 1191/69 and that the compatibility of the aid in question should be examined on the basis of that Regulation.
- (304) However, the Commission notes that Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road entered into force on 3 December 2009 and that it repealed Regulations (EEC) No 1191/69 and (EEC) No 1107/70 concomitantly. The Commission is of the opinion that the examination of compatibility should in future be based on Regulation (EC) No 1370/2007, because that is the legislation which applied at the time when the Commission adopted its decision.
- (305) In this regard, the Commission notes that the Danish authorities have not submitted any observations on this change of legal basis. On the other hand, DSB and DKT have submitted arguments to the effect that the Commission should make its assessment on the basis of the rules in force at the time when the contracts were concluded.
- (306) After examining the arguments of DSB and DKT, the Commission considers however that the arguments put forward do not alter its conclusion regarding the *ratione temporis* applicability of the EU rules on State aid, which leads to the view that the Commission should base its reasoning on the legislation that applies at the time when it takes its decision. The Commission considers that the contracts on public transport should be assessed on the basis of Regulation (EC) No 1370/2007, for the following reasons.
- (307) First, the Commission points out that Regulation (EC) No 1370/2007 itself provides for the procedures concerning its entry into force and its *ratione temporis* application. In accordance with Article 12 thereof, Regulation (EC) No 1370/2007 entered into force on 3 December 2009. Pursuant to Article 10(1), Regulation (EEC) No 1191/69 was repealed with effect from that date. It is consequently no longer possible for the Commission to base its approach on Regulation (EEC) No 1191/69 because it is no longer in force at the time of the Commission's decision. Instead, the Commission must base its assessment on Regulation (EC) No 1370/2007.
- (308) Second, the Commission notes that there is no indication in Regulation (EC) No 1370/2007 that that Regulation was not intended to apply to public transport service contracts concluded prior to its entry into force. Indeed, Article 8(3) of Regulation (EC) No 1370/2007 contains transitional rules for contracts concluded before its entry into force. That provision is in fact a departure from the application of Article 8(2) of the Regulation, which concerns compliance with the rules on the awarding of contracts, which are defined in Article 5. It should be noted, that these exceptional transitional provisions concerning the awarding of contracts would not have been necessary if the public transport service contracts concluded before the entry into force of the Regulation had been excluded from its scope. A contrario, Article 8 confirms that the other provisions of the Regulation apply to those contracts.
- (309) Third, the Commission makes clear that its notice on the determination of the rules for the assessment of unlawful State aid⁽³⁸⁾ is not applicable in this case. That notice indicates explicitly that it does not affect the interpretation of the Council and Commission Regulations in the area of State aid. Regulation (EC) No 1370/2007 specifically lays down rules relating to its provisional application.
- (310) Fourth, the Commission points out that the Court of Justice has also confirmed the principle that a new rule applies immediately to the future effects of a situation which arose under the old rule. The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule⁽³⁹⁾.
- (311) Fifth, the Court has held that the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them⁽⁴⁰⁾. The latter condition is clearly fulfilled in the case of Regulation (EC) No 1370/2007, as indicated above.

⁽³⁶⁾ OJ L 130, 15.6.1970, p. 1.

⁽³⁷⁾ Case C 280/00 *Altmark Trans*, cited above, paragraphs 101, 106 and 107.

⁽³⁸⁾ OJ C 119, 22.5.2002, p. 22.

⁽³⁹⁾ Case C-334/07 P *Commission v Freistaat Sachsen* [2008], ECR II-9465, paragraph 43.

⁽⁴⁰⁾ Judgment in *Freistaat Sachsen* case, paragraph 44.

- (312) Sixth, the Commission also notes that in the aforementioned judgment the Court concluded as a consequence that, where the legal rules under which a Member State notified proposed aid have changed before the Commission takes its decision, the Commission must give its decision on the basis of the new rules⁽⁴¹⁾. The Court also stated that the notification by a Member State of a proposed aid scheme does not give rise to a definitively-established legal situation and does not confer any legitimate expectation which requires the Commission to rule on the aid's or the scheme's compatibility with the internal market by applying the rules in force at the date on which that notification took place. It would be contrary to this reasoning to allow a Member State which, conversely, had not complied with the notification requirement, to establish a definitively-established legal situation by awarding unlawful aid.
- (313) Finally, the Commission considers that the judgment in *SIDE* is not relevant in this case⁽⁴²⁾. That judgment concerns the question of the application of a provision of primary law, namely Article 87(3)(d) of the EC Treaty. As the Court of First Instance established in that case, the EC Treaty did not lay down transitional provisions for the application of that Article or give any indication of how it should be applied to situations which arose prior to the date when it entered into force⁽⁴³⁾. That situation is consequently not comparable to the present case. Indeed, Regulation (EC) No 1370/2007 provides for transitional provisions on the basis of which the Commission is able to infer that the Regulation applies to public service contracts concluded before its entry into force, with the exception of the rules on the actual conclusion of contracts.
- (314) Consequently, Regulation (EC) No 1370/2007 is applicable in the present case.
- (317) According to Article 4(1)(a), public service contracts shall 'clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned'. It follows from the assessment of the contracts at issue made by the Commission in the light of the first criterion of the judgment in *Altmark*, both in its decision initiating the procedure and as described above (see recital 274), that this condition is fulfilled in this case.
- (318) In its assessment of the second criterion of the judgment in *Altmark* (see recital 269), the Commission concluded that the contractual payments were calculated on the basis of parameters established in advance in an objective and transparent manner, which allows it to consider that Article 4(1)(b) of Regulation (EC) No 1370/2007 is also fulfilled in this case. That provision provides that public service contracts shall 'establish in advance, in an objective and transparent manner, i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and ii) the nature and extent of any exclusive rights granted, in a way that prevent overcompensation'. The question of the existence or otherwise of overcompensation in the contracts under examination will be the subject of a detailed analysis below. Similarly, the Commission would point out that these public transport service contracts define the arrangements for the allocation of costs relating to the provision of the services. Regarding the existence of a reasonable profit, the Commission refers to the reasoning below.
- (319) The Commission notes that the public transport service contracts at issue lay down how large a proportion of the revenues from the sale of tickets the operator of the public transport service may keep in accordance with Article 4(2). In this case, those revenues are kept by DSB.

8.3.2. COMPATIBILITY WITH THE INTERNAL MARKET ON THE BASIS OF REGULATION (EC) No 1370/2007

- (315) Article 3(1) of Regulation (EC) No 1370/2007 provides that 'where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract'. In the present case, the public transport service missions were entrusted to DSB by means of several public service contracts as indicated in recital 247 above.
- (320) Moreover, the public transport service contracts are limited in term to 5 and 10 years respectively, which is in accordance with the requirements in Article 4(3), which sets the maximum duration of contracts for passenger transport services by rail or other track-based modes at 15 years.
- (321) Since the other provisions are not relevant in this case, the Commission concludes that the public transport service contracts concluded between the Danish Ministry and DSB comply with Article 4 of Regulation (EC) No 1370/2007.
- (316) Article 4 of Regulation (EC) No 1370/2007 defines the mandatory content of public service contracts. Below, the Commission will examine in turn each of the various aspects of that provision of the Regulation.
- Award of public service contracts**
- (322) Article 5 of Regulation (EC) No 1370/2007 lays down rules on the award of public transport service contracts. However, Article 8 of the Regulation lays down certain transitional rules in this respect.
- Award of public service contracts**

⁽⁴¹⁾ Judgment in *Freistaat Sachsen* case, paragraph 53.

⁽⁴²⁾ See footnote 28.

⁽⁴³⁾ Case T 348/04, *SIDE*, paragraph 56.

- (323) The Commission points out that all of the public transport service contracts under consideration concern passenger transport services by rail and that they were all awarded directly to DSB by the Danish Ministry of Transport. In addition, the contracts were signed either before or after 26 July 2000, but before 3 December 2009. They were concluded for terms of 5 and 10 years respectively. The Commission therefore notes that the award of the public transport service contracts is in accordance with the transitional provisions in Article 8(3) of Regulation (EC) No 1370/2007.
- (324) According to Article 8(2), 'without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019'. On that basis, the public transport service contracts in question could indeed be awarded directly.
- (325) That provision also states that 'during this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity'. It should be noted that Article 5(6) maintains the option for the competent authorities to make direct awards of public service contracts concerning transport by rail.
- (326) Consequently, the Commission considers that the public transport service contracts in question are in accordance with the rules on the award of contracts laid down in Article 5 of Regulation (EC) No 1370/2007.

Public transport service compensation

- (327) Article 6(1) of Regulation (EC) No 1370/2007 provides that 'all compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule shall also comply with the provisions laid down in the Annex'.
- (328) Consequently, the compatibility of the public service compensation should be assessed in the light of the provisions of the Annex to Regulation (EC) No 1370/2007, because the contracts in question were awarded directly in accordance with Article 5(6) of Regulation (EC) No 1370/2007.
- (329) The Annex states that 'the compensation may not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator'. This means essentially that the Commission must check that the contractual payments have not given rise to

overcompensation, taking account of a reasonable profit for DSB. In so doing, it relies on the criteria laid down in the Annex.

- (330) In this case, the Commission points out that the calculation of costs and revenue was carried out in accordance with the tax and accounting rules in force. It notes that the legal framework applicable to DSB in terms of accounting standards and national rules on competition requires the undertaking to keep separate accounts for its different activities. The contractual payments made to DSB on the basis of the public transport service contracts are therefore entered in the accounts separately from the other activities carried out on a purely commercial basis. Those rules therefore make it possible to avoid any form of cross-subsidisation.
- (331) Although the public transport service contracts contain provisions on the monitoring and review of compensation, the Commission points out however that those mechanisms do not enable any overcompensation to be avoided and that the contracts do not contain any mechanism allowing for refunds of overcompensation.
- (332) The Commission considers that overcompensation can be avoided only by establishing a refund mechanism. Consequently, the public service contracts concluded between the Danish Ministry of Transport and DSB should be amended so that they comply with the conditions mentioned above, particularly by introducing a refund mechanism.
- (333) In its decision initiating the procedure, the Commission expressed doubts about whether the level of compensation was limited to the amount needed to cover the costs entailed by fulfilling a public service obligation. Those doubts were based on the reasons set out in the assessment of compliance or otherwise with the third criterion established in the Altmark case-law, that is to say:
- i. *DSB's surplus profits*
 - ii. *Delays in the delivery of rolling stock*
 - iii. *The Copenhagen–Ystad link*
- (334) The Commission will examine these three aspects in turn in order to assess the existence or otherwise of overcompensation in the discharging of the public transport service contracts and to assess the measures needed in order to avoid any overcompensation in the future. To do so, the Commission takes account of the definition of reasonable profit given in point 6 of the Annex, namely 'a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention'.

i. DSB's surplus profits

- (335) The Commission has examined the changes in DSB's equity capital and profits, as far as its public service activities are concerned, for the term of the contracts in question. That examination is based essentially on the detailed analysis of DSB's financial situation over the period 1999-2006 carried out by KPMG on 30 January 2008 on behalf of the Danish State. The Danish authorities have also provided additional information concerning the 2007 and 2008 financial years, as well as clarification in the context of the formal investigation procedure.
- (336) The Commission takes note in particular of the information provided by the Danish authorities to explain these changes in relation to the 10-year budgets, particularly with regard to the establishment of DSB's founding budget in 1999 and the modification of certain accounting rules and of the level of taxation. The changes in depreciation, financial management or interest rates are also explained. The Danish authorities accept that DSB could have achieved efficiency gains enabling it to improve its results and its financial situation.
- (337) The Commission considers, however, that all of those factors were such as to modify the level of DSB's costs or charges for the operation of the transport services provided for in the different public transport service contracts. Consequently, the improvement in DSB's financial situation should have resulted in a decrease in the costs to the Danish State for the operation of those services compared with the forecasts in the 10-year budgets. That decrease implied an overall reduction in the public service compensation.
- (338) In the absence of a corresponding correction to the contractual payments, the Commission considers that these different factors reflect the fact that DSB received compensation in excess of the costs incurred in discharging a public service obligation plus a reasonable profit set at 6 %. The Commission notes that the contractual payments were reduced only for the years 2002, 2003 and 2004, by a total of DKK 1 018 billion.
- (339) However, the Commission observes that it is not disputed by the Danish authorities that, taking all of these factors into account, DSB had higher levels of profitability than had initially been predicted in the 10-year budgets on which the calculation of the public service compensation was based. That finding also follows from the observations submitted by the interested parties, even though the basis for comparing the performances of rail undertakings in Denmark and the rest of Europe remains insecure, as indicated above (see recitals 290-292).
- (340) The Commission also notes that the results of DSB s-tog a/s, a wholly-owned subsidiary of DSB SV, are consolidated at the level of the parent company and that the level of reasonable profit expected is the same for both companies. Consequently, the Commission conducts an examination of the surplus profits under the different public transport service contracts as a whole at the level of DSB.
- (341) The Commission notes that DSB's accounts show that its after-tax profits over the period 1999-2006 were DKK 2,715 billion more than projected in the 10-year forward budget. The information submitted by the Danish authorities shows that DSB recorded after-tax profits of DKK 670 million in 2007 and DKK 542 million in 2008, respectively DKK 227 million and DKK 97 million more than the figures envisaged in the forward budget for those 2 years⁽⁴⁴⁾. Over the whole period 1999-2008, the Commission therefore estimates DSB's surplus profits to be DKK 3,039 billion more than envisaged in the original budget.
- (342) The Commission considers that those surpluses show that the contractual payments exceeded the level that was necessary to cover the costs incurred in discharging a public service obligation plus a reasonable profit.
- (343) The Commission observes, however, that, according to the Danish authorities, those surplus profits did not lead to an accumulation of capital for DSB beyond what was initially envisaged in the 10-year forward budget. The Danish authorities argue that part of the surplus profits was paid back to the Danish State in the form of dividends.
- (344) The Commission notes that DSB actually paid the Danish State DKK 4,826 billion in dividends between 1999 and 2007. That amount corresponds to approximately DKK 3,5 billion more in dividends for the period 1999-2007 than was envisaged in the 10-year forward budgets. In 2008, DSB also paid the Danish State DKK 359 million, or approximately DKK 150 million more than was envisaged in the 10-year forward budgets⁽⁴⁵⁾. The Commission notes that the Danish State collected around DKK 3,65 billion in additional dividends between 1999 and 2008.
- ⁽⁴⁴⁾ Calculations carried out on the basis of the KPMG report submitted to the Commission by the Danish authorities (table 2.4 and tables 2.2, 2.3 and 2.28 updated).
- ⁽⁴⁵⁾ This amount is estimated on the basis of an after-tax profit estimated in the 10-year forward budget at DKK 399 million for 2008 and the dividend collection rule of half of DSB's after-tax surplus set out in recital 102 of this Decision.

(345) Contrary to what the Danish authorities claim, the Commission considers that the dividend policy cannot be equated with a refund clause which makes it possible to adjust compensation for the fulfilment of a public service obligation and to prevent overcompensation. The collecting of dividends does not meet in a structural manner the requirements laid down in Regulation (EC) No 1370/2007 and, in particular, its Annex. The collection of dividends depends on the decision taken by the shareholders of the undertaking and does not have the automatic nature required in order to avoid overcompensation. In addition, dividends are generally collected later in the year compared with the compensation corrections which take place at the end of the financial year.

(346) In the circumstances of the present case, the Commission recognises that the Danish State, during the period 1999-2008, collected additional dividends (compared with

what had been budgeted initially) of an overall amount which clearly exceeds DSB's surplus profits. The Commission notes that the additional dividends collected by Denmark are around 20 % greater than DSB's surplus profits.

(347) In general, the Commission notes that, in accounting terms, the collection of dividends takes place after the determination of the results and does not usually allow overcompensation to be avoided. The Commission is thus obliged to note that by collecting dividends from the undertaking, 100 % of which it owns, the Danish State in reality corrected DSB's surplus situation in such a way that the latter was not overcompensated in practice. The economic effects of the surplus profits in excess of the 6 % initially envisaged were neutralised by the collection of dividends, and DSB was not able to use these surplus profits to increase its equity capital or to benefit financially.

(in DKK millions)

Results of DSB SV	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Real passenger revenue	3 278	3 550	3 789	3 895	3 888	4 052	4 164	4 264	4 391	4 541	
Contractual payments	3 296	3 460	3 820	3 642	4 147	3 968	4 326	4 342	4 247	4 130	
Real costs	(6 728)	(6 869)	(6 304)	(6 362)	(7 362)	(7 182)	(7 647)	(7 792)	(7 940)	(8 326)	
Real operating results, after tax	595	777	846	774	697	664	745	726	767	558	
Dividends paid	135	268	103	610	649	736	895	775	655	364	5 190
Dividends initially forecast	50	51	53	183	188	192	212	205	222	223	1 579
Real additional dividends	85	217	50	427	461	544	683	570	433	141	3 611

(348) The Commission stresses that this conclusion concerns DSB SV, in so far as the results of DSB S-tog a/s are included in the parent company's group accounts and dividend policy is determined at the level of that body.

(349) However, the Commission emphasises that this reasoning does not make it possible to guarantee the absence of overcompensation over the entire term of the public transport service contracts. It is based on an empirical and detailed examination of DSB's accounts over the period in question, but does not offer a structural solution concerning the necessary annual adjustments of the level of public service compensation.

(350) In this regard, the Commission points out that the Danish authorities are considering amending the current public transport service contracts in order to introduce a refund mechanism. The refund mechanism

described above (see recitals 222-240) should make it possible to correct the amount of the contractual payments on the basis of an accounting formula. Under such a mechanism, any surplus would thus be paid back to the State on the basis of the end-of-year accounts, thus ensuring that DSB's return on equity remains within the limits specified by the State.

(351) The refund mechanism provides for an adjustment of the contractual payments at the end of the financial year (see recital 227). Its application will lead to a reduction in the gross contractual payments in order to maintain a level of reasonable profit set at a 6 % return on equity in accordance with the following formula:

$$\text{Total revenue} - \text{reasonable profit} - \text{Total expenditure} = \text{gross reduction}$$

(352) The Commission is of the opinion that this refund mechanism complies with the requirements set out in the Annex to Regulation (EC) No 1370/2007, and those in the Community framework for State aid in the form of public service compensation⁽⁴⁶⁾. The Commission notes that such a system is comparable to the checks described in Section 3 of that framework. It also points out that the basic level of reasonable profit would remain fixed at a 6 % return on equity, which it regards as a reasonable level for this type of activity, taking account of the levels achieved by DSB's current domestic competitors as indicated by DKT.

(353) The Commission also notes that this mechanism includes corrections concerning efficiency and qualitative improvements. The mechanism under consideration provides for a modulation of the gross reduction to enable DSB to retain part of the saved costs per passenger-kilometre and part of the increase in revenue due to increases in the number of passengers measured in passenger-kilometres (see recital 228). These corrections are applied according to the following formula:

$$\text{Refund mechanism} = \text{gross reduction} - \text{corrections (Cost } \Delta. + \text{ Pas.km } \Delta) = \text{net reduction}$$

(354) The Commission also notes that the parameters for determining the net reduction and thus taking these corrections into account are predetermined and quantified (see recital 229). The refund mechanism can be modulated as follows:

— Cost Δ .: if DSB has reduced its costs (per passenger-kilometre) compared with the average cost over the past 4 years, that improvement will be calculated as follows: differential in cost per passenger-kilometre (as a percentage) compared with the average cost over the last 4 years multiplied by a total cost basis, and

— Pas.km Δ .: if the number of passengers increases, the increase in passenger traffic measured in passenger-

kilometres will be multiplied by DKK 0,80, and the gross reduction will also be reduced by that amount⁽⁴⁷⁾.

(355) The Commission points out that those corrections comply with paragraph 7 of the Annex to Regulation (EC) No 1370/2007, which provides that:

'The method of compensation must promote the maintenance or development of effective management by the public service operator, which can be the subject of an objective assessment, and the provision of passenger transport services of a sufficiently high standard'.

(356) In this case, the correction envisaged, based on the increase in passenger numbers and the decrease in unit costs, suitably expresses the concepts of improvements in effective management and quality of the service provided. However, the Commission considers that each of these corrections can be made only in so far as each of the parameters adopted also shows an improvement compared with the results obtained previously on those parameters. This restriction is necessary in order to avoid, in the event of a substantial improvement in one parameter, a bonus being obtained by virtue of the other parameter even though the second parameter shows only a below-forecast improvement.

(357) Finally, the refund mechanism is supplemented by setting an upper limit intended to ensure that the level of profit does not exceed the level of what is considered a reasonable profit according to the following formula (see recitals 233-237):

$$\frac{\text{Reasonable profit (6 \%)} + \text{corrections (Cost } \Delta. + \text{ Pas.km } \Delta)}{\text{Equity capital}} < 12 \%$$

(358) The corrections applied to take account of efficiency gains and/or the improvement in the quality of the service will allow the reasonable profit to be varied between 6 % and 12 %, with an annual cap set at 10 % over 3 years, on the basis of objective criteria (see recitals 235-237).

(359) The Commission considers that, within this range, the profit granted by Denmark to DSB in the context of its public service activities remains reasonable if it is limited to 10 % over 3 years. The Commission's conclusion is based on a range of indications based on the information available to it in order to assess whether the level of profit is reasonable.

⁽⁴⁶⁾ OJ C 297, 29.11.2005, p. 4. Even though this framework does not normally apply to the transport sector, the principles which it contains may be used by analogy particularly in terms of clarifying Regulation (EC) No 1370/2007. See, in that regard, the decision initiating the procedure, cited above, and Decision 2009/325/EC; Decision 2009/845/EC; Commission Decision of 18 July 2007, C 31/07 – Ireland – State aid to bus companies Córas Iompair Éireann (Dublin Bus et Irish Bus) (OJ C 217, 15.9.2007, p. 44); Commission Decision of 23 October 2007, C 47/2007 – Germany – Public service contract between Deutsche Bahn Regio and the Länder of Berlin and Brandenburg (OJ C 35, 8.2.2008, p. 13).

⁽⁴⁷⁾ See footnote 30.

(360) The Commission's assessment is based in particular on a study of the situation of rail undertakings in Europe ⁽⁴⁸⁾ which presents, among other things, a comparison of the economic profitability ⁽⁴⁹⁾ of rail undertakings in 2004. According to that analysis, DSB's return on equity (ROE) in 2004 (9 %) corresponds to a return on assets (ROA) of 3 % for the company; it should be noted that this figure of a 9 % ROE is in the middle of the range granted to DSB under the contract. That analysis also shows that some rail undertakings had low or even negative levels of economic profitability during the period (PKP, Eurostar, NSB). According to the study, several undertakings on the other hand had levels of economic profitability close to DSB's level of a 3 % ROA (SNCF: 2 %, SNCF: 2 %, Trenitalia 3 %) or indeed a great deal higher than it (Arriva Tog a/s 21,3 %, Chiltern Railways 16,1 %, Arriva Trains Wales 16 %, Great North Eastern Railway 12,2 %, DB Regio AG 12 %).

(361) The Commission also relies on its decision-making practice in the area of services of general economic interest ⁽⁵⁰⁾.

(362) The Commission's assessment also takes account of the fact that DSB assumes part of the risk associated with that activity, since the contractual payments are fixed in advance and cannot be increased in the event of a shortfall compared with the forecasts reflecting a deterioration in DSB's performance caused, for example, by an unintended rise in costs or a drop in the company's receipts. The Commission notes that, since the company is exposed to a risk in terms of its profitability and has no guarantee that the 6 % contractual profitability will be achieved, it appears appropriate to encourage it to make efficiency gains and, in so doing, to allow it to retain part of the resulting profits, including profits beyond that contractual level, within the range referred to above.

(363) Finally, the Commission notes on the basis of the Danish authorities' empirical investigation that the application of this refund mechanism in the past would have led to levels of return on equity for DSB in the period 2004-08 ranging between 8,8 % and 11,9 % and that it would have entailed a refund of DKK 38 million for 2006 taking into account the '10 % over 3 years rule' (see recitals 238-240).

(364) Consequently, the Commission concludes that DSB's surplus profits show that the contractual payments exceeded the level that was necessary to compensate

for the costs incurred in discharging a public service obligation under all the public service contracts plus a reasonable profit. In the present case, the Commission considers that the collection of additional dividends of an amount clearly in excess of that surplus made it possible to avoid overcompensation of DSB. Although the Commission concludes that there was no overcompensation in this case, it makes its conclusion dependent on the implementation of the refund mechanism as described in this Decision and specified in recital 356 above.

ii. Delays in the delivery of rolling stock

(365) The Commission points out that it is not in dispute that the delivery of rolling stock provided for under the public transport service contracts by the manufacturer Ansaldobreda was subject to substantial delay. To fulfil its obligations, DSB used rented rolling stock, which was the subject of additional contracts with the Danish Ministry of Transport.

(366) The Commission points out that, under the public service contracts concluded between the Danish Ministry of Transport and DSB, the latter was to bear the costs corresponding to the depreciation of the trains and interest, and that those costs were covered by the contractual payments.

(367) The Commission observes, however, that the financial consequences of the delays and their effect on the contractual payments were not provided for in the public transport service contract for 2000-04. On the other hand, they were provided for in the public service contract for 2005-14.

(368) The Commission therefore considers that three aspects should be distinguished.

(369) First, the Commission points out that, in the context of the public transport service contract for 2000-04, the consequences of the delays were not taken fully into account in the calculation of the contractual payments. The Danish authorities have acknowledged that this resulted in a positive effect of DKK 154 million. DKK 50 million of that figure was paid back to the State in the form of a voluntary reduction in the contractual payments. The Commission consequently considers that DSB received contractual payments of DKK 104 million corresponding to costs which it did not incur.

(370) In this respect, the Commission considers that it cannot be argued that this sum constituted (partial) compensation for the economic losses suffered by DSB in connection with the delays. The question of the harm suffered by DSB concerns the performance of the delivery contract between DSB and its supplier, which could be the subject of settlement procedures (out of court, by arbitration or by litigation). The Commission notes that this issue has not been finally resolved, even though provisional compensation has been paid.

⁽⁴⁸⁾ 'Analysis of the financial situation of railway undertakings in the European Union', by ECORYS for the European Commission, February 2006 http://ec.europa.eu/transport/rail/studies/doc/2006_financial_situation_railway_undertakings.zip

⁽⁴⁹⁾ The Commission carries out its comparisons in particular on the basis of economic profitability (ROA – return on assets) in order to avoid the problems of comparability associated with wide differences in debt/equity structures between rail undertakings.

⁽⁵⁰⁾ Commission Decision of 28 November 2007, State aid N388/2007 – United Kingdom, Post Office Limited (POL) transformation programme (OJ C 14, 19.1.2008, p. 19), in particular paragraph 53.

- (371) Second, the Commission notes that, in the context of the public transport service contract for 2005-14, the consequences of the delays were, on the contrary, taken into account in the calculation of the contractual payments. The Danish authorities have demonstrated how the mechanism for adjusting the contractual payments operated in relation to the delays in delivery and according to the type of rolling stock concerned. The Commission notes that the contractual payments were reduced by DKK 645 million over the first 2 years of the contract. It therefore considers that the late delivery of the rolling stock did not result in any overcompensation under that public transport service contract.
- (372) Third, the Commission notes that the replacement rented rolling stock was the subject of additional contracts between the Danish Ministry of Transport and DSB. It points out that DSB was not obliged, under the public transport service contracts, to use replacement rolling stock. The Commission notes that these additional contracts were concluded to deal with a new situation which had not been taken into account in the contracts, namely the consequences of the late delivery of the new trains. It therefore considers that the compensation paid to DSB covered new obligations of the rail operator and, consequently, was not liable to result in overcompensation under the public transport service contracts.
- (373) The Commission points out in this respect that if the settlement procedures (out of court, by arbitration or by litigation) between DSB and Ansaldobreda concerning the delays in delivery lead to the recognition of certain losses for DSB, if those losses concern the use of hired replacement rolling stock and if compensation is paid by Ansaldobreda to cover these, such compensation will have to be paid back to the Danish State because it bore the cost via the additional contracts. The Commission considers it necessary to impose a condition in this respect on the Danish State.
- (374) In the light of the above, the Commission concludes that DSB received overcompensation of DKK 104 million on account of the late delivery of the rolling stock provided for in the public transport service contracts. The Commission considers, however, that the effects of that overcompensation were avoided by the collection of dividends as described previously. The additional dividends collected by the Danish State remain generally greater than all of the surplus profits plus the amount relating to the late delivery of rolling stock. The Commission therefore concludes that DSB did not receive any overcompensation in practice.
- iii. Specific case of the Copenhagen – Ystad link**
- (375) In its decision initiating the procedure, the Commission expressed specific doubts regarding whether DSB could have received an advantage for operating this particular line. The Commission examined two aspects here.
- (376) First, the Commission checked that, for the period 2000-04, DSB had not received any financial support in the form of aid under the public transport service contract even where the link was operated without a public service obligation.
- (377) The Commission notes in this respect that the Danish authorities have clarified the conditions under which the Copenhagen-Ystad line has been operated since 2000. In particular, they have specified that it was not included in the 'public traffic' scheme by means of a specific contract until 2002, when it emerged that the line was not capable of making a profit. They have also indicated that that specific contract did not provide for any additional compensation for DSB from the Danish State for the operation of the line between 2002 and 2004. The Danish authorities have therefore established that the rail line between Copenhagen and Ystad did not receive any public financing before 2005.
- (378) The Commission notes that the inclusion of that line in the 'public traffic' scheme between 2002 and 2004 without additional compensation compared with the compensation paid under the public transport service contract with DSB for the period 2002-04 is not liable to result in overcompensation. Its inclusion in the public transport traffic scheme had the result of expanding DSB's obligations without increasing the contractual payments. It also meant the inclusion of the revenues from that line in DSB's overall revenues in respect of its public service activities. The Commission notes, however, that the line was loss-making in 2002 and that it was precisely for that reason that it was included in the 'public traffic' scheme. That inclusion is consequently not liable to result in overcompensation.
- (379) In any event, the Commission considers that, if the line had been making a profit, the revenues specific to that line would have increased DSB's total revenues in respect of its public service activities. The assessment of whether overcompensation took place is therefore covered by the overall examination of whether DSB was overcompensated through its surplus profits from the discharging of the public transport service contract for the period 2000-04. The Commission thus refers to its reasoning in recitals 324-353 of this Decision.
- (380) Second, the Commission has examined DSB's costs for the entire Copenhagen-Bornholm route and, in particular, how account was taken of the ferry crossing between Ystad and Rønne⁽⁵¹⁾ in the combined tickets for its passengers.
- (381) The Commission points out that the sea link between these two ports is operated by Bornholmtrafikken A/S, a public undertaking, on the basis of a contract concluded with the Danish State following a tendering procedure. The Danish authorities have clarified the obligations of Bornholmtrafikken A/S under that contract, particularly in terms of coordination of departure and arrival times with bus or train operators. They have also specified that no obligation was laid down in the area of pricing policy apart from the fixing of minimum fares.

⁽⁵¹⁾ The Bornholm ferry's port of arrival.

(382) In the light of the information provided by the Danish authorities, the Commission notes that the prices charged by Bornholmtrafikken A/S are identical in relation to DSB and Gråhundbus. The only fare which applies to DSB alone is the special price for DSB Orange including the crossing of the Great Belt. However, that fare is in line with specific commercial objectives of Bornholmtrafikken A/S in so far as the DSB Orange programme attracts travellers from Jutland to Bornholm. That particular fare is made available on specific conditions (it only applies on certain trains, Internet-based reservation system, limited number of tickets, etc.) and relates to different services from those offered by bus operators on that line. The Commission notes that only a very small number of passengers took advantage of this offer and that it was withdrawn in 2009.

(383) The Commission therefore considers that the prices charged for this ferry trip by Bornholmtrafikken A/S did not confer an advantage on DSB compared with its competitors which offer a bus connection and also apply combined billing. The Commission is therefore of the opinion that the billing of the ferry connections did not result in overcompensation for DSB.

(384) On the whole, the Commission therefore considers that the public service compensation in question was calculated in accordance with the rules laid down in the Annex to Regulation (EC) No 1370/2007.

(385) Consequently, the Commission concludes that the State aid contained in the contractual payments paid under the public transport service contracts between the Danish Ministry of Transport and DSB is compatible with the internal market on the basis of Article 14 of Regulation (EC) No 1370/2007 implementing Article 93 of the TFEU.

8.3.3. EFFECT OF CERTAIN FISCAL MEASURES ON THE COMPATIBILITY OF THE PUBLIC SERVICE COMPENSATION

(386) In its decision initiating the procedure, the Commission noted that Danish private undertakings operating in VAT-exempt sectors such as the public transport sector are subject to a special payroll tax ('lønskat'). It was noted, however, that public undertakings such as DSB were not subject to the tax.

(387) Although DKT, the second complainant, claimed that DSB's exemption from the payroll tax could give it a competitive advantage, the Commission did not examine the issue of payroll tax because it was the subject of a general examination by the Commission in the context of a separate procedure⁽⁵²⁾. The complainant itself had cited a Parliamentary question and the answer given by Mrs Kroes on behalf of the Commission⁽⁵³⁾.

(388) By letter of 9 June 2009, the Commission informed DKT that, after examining the measures in question, it had

decided to close the procedure referred to above. The Commission stated that discussions and exchanges of information had taken place between the Commission and the Danish authorities in order to obtain clarification regarding the potential problems and ambiguities arising from the tax exemption from the perspective of the rules on State aid. In this context, the Danish authorities agreed to amend their legislation.

(389) The Commission therefore notes that Denmark has adopted Act No 526 of 25 June 2008, which eliminates any potential distortion between public and private undertakings with regard to the implementation of the payroll tax. It also points out that that Act entered into force on 1 January 2009 and that DSB has been subject to payroll tax since that date.

(390) For the purposes of this examination, the Commission points out that DSB's exemption from that tax was included in the parameters used in determining the level of DSB's contractual payments under the public transport service contracts, as indicated in recital 88 of this Decision. The Commission notes that the tax exemption reduced DSB's operating costs connected with the transport services provided for in the public transport service contracts. It therefore observes that, in the absence of an exemption, the Danish State would have to increase the amount of its contractual payments accordingly.

(391) Consequently, the Commission considers that, even if DSB's payroll tax exemption were to constitute State aid, that aid would have to be treated in the same way as 'additional contractual payments' of an amount equivalent to the tax burden from which the company was exempt. In that event, the Commission observes that these 'additional contractual payments' would not result in overcompensation for DSB.

(392) The Commission notes, moreover, that DSB has been subject to payroll tax as from 1 January 2009. DSB's tax burden has increased as a result, which has an impact on its operating costs incurred in connection with the transport services provided for in the public transport service contracts. The Danish authorities have indicated that the additional expenditure incurred by DSB will be compensated to take account of this change in the parameters used to calculate the contractual payments.

(393) In this respect, the Commission considers that the compensation of the additional tax costs resulting from the end of DSB's tax exemption must be seen in conjunction with the overall economic aspects of the compensation system for public transport service contracts. The Commission has examined whether that compensation corresponded solely to the additional tax burden borne by DSB in respect of its public service activities.

⁽⁵²⁾ The Commission has received a complaint. The file reference is CP78/2006.

⁽⁵³⁾ Letter from Mrs Kroes to Mrs Riis-Jørgensen of 19 January 2009, D(09)6.

- (394) Consequently, the Commission concludes that the compensation from the Danish State for the payroll tax that DSB has subsequently been required to pay does not result in overcompensation and should therefore be regarded as compatible with the internal market under Regulation (EC) No 1370/2007.

9. CONCLUSION

- (395) The Commission takes the view that the public transport service contracts concluded between the Danish Ministry of Transport and DSB constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.
- (396) The Commission concludes, however, that that aid is compatible with the internal market under Regulation (EC) No 1370/2007, subject to Denmark's introduction into the current public transport service contracts of the refund mechanism described in recitals 222 to 240 and 356 of this Decision. In those circumstances, the aid in question is compatible until the expiry of the current public transport service contracts.
- (397) The assessment of the compatibility of the aid concerned in this Decision was carried out on the basis of Regulation (EC) No 1370/2007, which is applicable at the time when the Commission takes its decision.
- (398) The Commission notes that the assessment rules in Regulation (EC) No 1370/2007 correspond in terms of content to those in Regulation (EEC) No 1191/69, as set out and interpreted by the Commission in its decision initiating the procedure. It observes that, in the present case, the application of Regulation (EEC) No 1191/69 would not have led to a different conclusion.
- (399) Finally, the aid concerned is compatible until the expiry of the current public transport service contracts. The contracts were concluded in 2004, that is to say as from 26 July 2000 and before 3 December 2009, on the basis of a procedure other than a fair competitive tendering procedure and for a term of 10 years. The aid therefore comes pursuant to Article 8(3)(d) of Regulation (EC) No 1370/2007, first paragraph, and the last point of the last paragraph. The Commission points out however that, in accordance with Article 8(2) of Regulation (EC) No 1370/2007, Member States are to take measures to gradually comply with the rules on the award of those contracts in accordance with the rules in Article 5 before 3 December 2019,

HAS ADOPTED THIS DECISION:

Article 1

The public transport service contracts concluded between the Danish Ministry of Transport and Danske Statsbaner constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

The State aid is compatible with the internal market pursuant to Article 93 of the Treaty on the Functioning of the European Union in so far as the conditions of Articles 2 and 3 of this Decision are complied with.

Article 2

Denmark shall introduce into all current public transport service contracts with Danske Statsbaner the refund mechanism described in recitals 222 to 240 and 356 of this Decision, the principal characteristics of which are as follows:

- Adjustment of the contractual payments at the end of the financial year by determining a gross reduction calculated on the basis of the following formula:

$$\text{Total revenue} - \text{reasonable profit} - \text{Total expenditure} = \text{gross reduction}$$

- Modulation of the gross reduction to take account of efficiency gains and improvements in quality of service according to the following formula and parameters:

$$\text{Refund mechanism} = \text{gross reduction} - \text{corrections (Cost } \Delta \text{ + Pas.km } \Delta) = \text{net reduction}$$

- Cost Δ : reduction in costs (per passenger-kilometre) compared with the average cost over the past 4 years in accordance with the calculation: differential in cost per passenger-kilometre (as a percentage) compared with the average cost over the last 4 years multiplied by a total cost basis, and
- Pas.km Δ : increase in passenger traffic measured in terms of passenger-kilometres (DKK 0,80 per passenger-kilometre),
- the total reductions on account of improvements in performance may not exceed the gross reduction in a given year. The net reduction is therefore between zero and the gross reduction.

- Introduction of an upper limit on the refund mechanism making it possible to guarantee that the profit is maintained at a reasonable level according to the following formula and characteristics:

$$\frac{\text{Reasonable profit (6 \%)} + \text{corrections (Cost } \Delta + \text{ Pas.km } \Delta)}{\text{Equity capital}} < 12 \%$$

- the calculation takes account only of the share of equity capital corresponding to DSB's public service activity,

- the upper limit on the reasonable profit is fixed at a 12 % return on equity, but with a maximum of 10 % over 3 years.

Article 3

Any compensation due to DSB from Ansaldo Breda on account of the late delivery of rolling stock should be repaid to the Danish State.

Article 4

Denmark shall inform the Commission of the measures taken to comply with Articles 2 and 3 of this Decision within 2 months being notified of the Decision.

Article 5

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 24 February 2010.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION**of 6 July 2010****on State aid C 34/08 (ex N 170/08) which Germany is planning to implement in favour of Deutsche Solar AG***(notified under document C(2010) 4489)***(Only the German text is authentic)****(Text with EEA relevance)**

(2011/4/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾ on 26 August 2008. The Commission invited interested parties to submit their comments on the aid measure.

(5) By letters dated 7 August (A/16575) and 26 September (A/19789) 2008, the German authorities asked a delay to submit their comments. The Commission received the comments from the German authorities on 31 October (A/22972) and 2 December (A/25961) 2008. The Commission received no comments from third parties.

(6) By letters dated 7 April (A/8226), 29 May (A/13120), 4 (A/25461) and 17 (A/26433) December 2009, and 12 January (A/550), 26 April (A/7045), 14 May (A/8206), and 10 June (A/9628) 2010, the German authorities submitted additional information to the Commission.

1. PROCEDURE

(1) By electronic notification of 28 March 2008, registered the same day at the Commission, Germany notified to the Commission, in line with the individual notification requirement resulting from the Guidelines on national regional aid for 2007-2013 ⁽²⁾ (hereinafter RAG), its intention to provide regional aid for a large investment project in favour of Deutsche Solar AG, for the setting-up of a plant to produce solar wafers in Freiberg, Saxony, Germany.

(7) On 12 October 2009, a meeting took place between the Commission services and the German authorities as well as the investor in Berlin.

2. DETAILED DESCRIPTION OF THE AID**2.1. Objective of the measure**

(2) On 27 February 2008 and on 25 June 2008, a meeting took place between the Commission services and the German authorities. The Commission requested additional information by letter of 28 May 2008 and sent an information letter on 10 June 2008. The additional information was provided by Germany by letter of 16 June 2008.

(8) The aid project aims at promoting regional development. The investment is to take place in eastern Germany, namely Freiberg in the land Saxony, an assisted area pursuant to Article 107(3)(a) TFEU.

(3) By letter dated 16 July 2008, with reference C(2008) 3507 final, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid.

(9) The German authorities intend to provide regional investment aid to Deutsche Solar AG (hereinafter DS) for the setting-up of a plant to produce solar wafers. The total eligible costs of the notified investment amount to EUR 350 million in nominal value.

⁽¹⁾ OJ C 217, 26.8.2008, p. 19.

⁽²⁾ OJ C 54, 4.3.2006, p. 13.

⁽³⁾ Cf. footnote 1. A corrigendum decision was adopted on 28 April 2009 (OJ C 203, 28.8.2009, p. 11).

2.2. The beneficiary

- (10) The beneficiary of the financial support is DS, a company producing crystalline silicon based solar wafers. DS is a 100 % daughter company of SolarWorld AG (hereinafter SW). The SW group is active at worldwide level (production sites in Germany, the US and South Korea) in the solar power industry, combining all stages of the solar value chain, from the raw material silicon to turn-key solar power plants. SW group produces solar wafers, solar cells and solar modules with the exception of solar systems ⁽⁴⁾. In 2009, SW group had 2 000 employees and a consolidated revenue exceeding EUR 1 billion.
- (11) Further to the notified investment in Freiberg East, DS already has two other production plants located in Freiberg, Sachsen (one in the industrial park Freiberg South and one in the industrial park Freiberg Saxonia). The three sites are located within 5-6 km distance from each other. In 2007, DS had a turnover of EUR 318 million. In 2008, DS had 770 employees. Other 100 % subsidiaries of SW group located in Freiberg are Deutsche Cell GmbH (production of solar cells), Solar Factory GmbH (production of solar modules), Sunicon AG (recycling of silicon), SolarWorld Innovations GmbH (R & D), and SolarWorld Solicium GmbH (production of silicon). SW also holds 49 % in the Freiberg based JSi GmbH (production of silicon), a joint venture with Evonik Degussa GmbH.

2.3. The project

2.3.1. Notified project (Freiberg East)

- (12) Germany notified aid for a large investment project by DS, consisting in the setting-up of a new plant for the production of multi-crystalline solar wafers in Freiberg East. The new plant is planned to have a nominal annual capacity of 500 Megawatt peak (MWp) ⁽⁵⁾.
- (13) The project started on 18 December 2007. The investment project should be finalised in 2010 and full production will be reached by end of 2010.

⁽⁴⁾ SW group does not make nor sell solar energy systems. However SolarWorld AG has a 29 % share in SolarParc AG, which has as its main activity to produce and set up solar plants. As this is only a minority shareholding, SolarParc AG was not taken into account for the market assessment of the present State aid case.

⁽⁵⁾ One megawatt peak (MWp) corresponds to 1 000 000 Watt peak (Wp). Watt peak is a measurement unit for the capacity (nominal output) of solar cells and solar modules. Watt peak is the standard usually used in the photovoltaic industry to measure the technical capacity of solar modules; it expresses the nominal output of the module under standard test conditions.

- (14) With the new project, DS intends to create at least 130 direct jobs and the same number of indirect jobs in a region with high unemployment rates.

2.3.2. Previous projects (Freiberg South)

- (15) At the time of the notification, Germany informed the Commission on aid to be granted for another DS investment (project P3 in Freiberg South) started almost simultaneously with the notified project (on 1 September 2007), for the extension of its existing solar wafer plant from 350 to 500 MWp. Eligible costs of this project amount to EUR 49 million (nominal value). The German authorities intended to grant regional aid amounting to EUR 14 million (nominal value) for this investment. The aid for this project was however withdrawn and Germany informed the Commission after the opening of the formal investigation that no aid was paid out or would be granted for this project.
- (16) After the opening of the formal investigation, Germany informed the Commission about aid granted for a DS investment previous to the above mentioned project P3, started also within 3 years (on 1 June 2006) from the start of the notified investment project in Freiberg East. This project P2 relates to an earlier extension of the existing solar wafer plant (from 270 to 350 MWp), involving aid amounting to EUR 16 905 000 (nominal value) for eligible costs of EUR 49 995 991 (nominal value). The aid was granted in 2006 on the basis of existing aid schemes ⁽⁶⁾.

2.4. Legal basis

- (17) The aid for the notified project Freiberg East is to be granted under existing aid schemes in the form of two instruments: a direct grant and an investment premium.
- (18) The direct grant will be based on the aid scheme '36. Rahmenplan der Gemeinschaftsaufgabe Verbesserung des regionalen Wirtschaftsstruktur' ⁽⁷⁾ ('Improvement of the regional economic structure') (hereinafter GA scheme).

⁽⁶⁾ Commission Decision of 1 October 2003 on State aid case N 642/02 — Renewal of the joint task scheme 'Improvement of the regional economic structure' (OJ C 284, 27.11.2003, p. 5), Commission Decision of 19 January 2005 on State aid case N 142a/04 — Law on investment premiums 2005 — standard rules (OJ C 235, 23.9.2005, p. 4), and block-exempted scheme XR 6/2007 — Law on investment premiums 2007 (OJ C 41, 24.2.2007, p. 9).

⁽⁷⁾ In conformity with Article 8 of Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (Block Exemption Regulation for regional aid; OJ L 302, 1.11.2006, p. 29), Germany submitted a summary of the aid that can be granted under this scheme, registered at the Commission under reference XR 31/2007 (OJ C 102, 5.5.2007, p. 11).

- (19) The investment premium will be granted on the basis of the 'Investitionszulagengesetz 2007' ⁽⁸⁾ ('Law on investment premiums 2007') and if necessary its successor scheme 'Investitionszulagengesetz 2010' ⁽⁹⁾ (hereinafter IZ schemes).

2.5. Investment costs

- (20) The notified project in Freiberg East involves a total eligible investment in nominal value of EUR 350 000 000. A breakdown of the eligible costs over the years is given in the table below:

(EUR)

	2008	2009	2010	Total
Eligible costs	136 000 000	164 000 000	50 000 000	350 000 000

2.6. Financing of the project

- (21) DS will finance the notified project in Freiberg East using own resources and (bank) loans, in addition to the aid applied for. An overview of the relevant amounts per source is given in the table below (nominal values):

(EUR)

Source	Amount
Own resources	[...] ^(*)
Grant under GA scheme and IZ schemes	45 395 000
Bank loan (not covered by public guarantee)	[...]
Total	350 000 000

^(*) Covered by the obligation of professional secrecy.

2.7. Applicable regional aid intensity ceiling

- (22) Freiberg, Saxony is an assisted area in virtue of Article 107(3)(a) TFEU with a maximum aid intensity of 30 % gross grant equivalent (GGE) for large undertakings according to the RAG and the German regional aid map ⁽¹⁰⁾ in force at the time of the notification.

2.8. Aid amount and aid intensity

- (23) The beneficiary applied for aid for the notified project on 17 August 2007. By letter dated 22 August 2007, the German authorities informed the beneficiary that the project was eligible for aid. Germany committed to not grant the aid before approval by the Commission and to respect the maximum aid approved.
- (24) Germany initially notified regional aid amounting to EUR 48 million (nominal value) for the DS investment project in Freiberg East. The Commission however initiated the formal investigation against this aid based on doubts that the notified project should be considered a single investment project (point 60 of the RAG) with a previous aided project in Freiberg South, and that hence the notified aid intensity would exceed the maximum allowable (applying the scaling down mechanism of point 67 of the RAG).

⁽⁸⁾ In conformity with article 8 of Commission Regulation (EC) No 1628/2006, Germany submitted a summary of the aid that can be granted under this scheme, registered at the Commission under reference XR 6/2007 (OJ C 41, 24.2.2007, p. 9).

⁽⁹⁾ In conformity with Article 9 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation, OJ L 214, 9.8.2008, p. 3), Germany submitted a summary of the aid that can be granted under this scheme, registered at the Commission under reference X 167/2008 (OJ C 280, 20.11.2009, p. 5).

⁽¹⁰⁾ Commission Decision of 8 November 2006 on State aid case N 459/06 — Regional State aid map for Germany 2007-2013 (OJ C 295, 5.12.2006, p. 6).

- (25) After the opening of the formal investigation, Germany informed the Commission that it had withdrawn the aid for project P3 in Freiberg South. Germany also reduced the notified aid for the DS project in Freiberg East to EUR 40 364 760 (discounted value⁽¹¹⁾), corresponding to an aid intensity of 12,97 % GGE, in order to limit the total aid granted for the combined eligible costs (EUR 402 865 942 in discounted value) of the notified project and previous projects P2 and P3 undertaken within 3 years to the maximum allowable (EUR 55 749 652 in discounted value – 14,06 % GGE) in a 'single investment project' scenario.

2.9. General commitments

- (26) The German authorities have committed to submit to the Commission:
- within 2 months of granting the aid, a copy of the signed aid contract between the granting authority and the beneficiary,
 - on a five-yearly basis, starting from the approval of the aid by the Commission, an intermediary report (including information on the aid amounts being paid, on the execution of the aid contract and on any other investment projects started at the same establishment/plant),
 - within 6 months after payment of the last tranche of the aid, based on the notified payment schedule, a detailed final report.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (27) The Commission, in its decision to initiate the formal investigation procedure in the present case, noted that it had doubts on the compatibility of the aid with the internal market based on Article 107(3)(a) TFEU and with the RAG.
- (28) According to point 60 of the RAG, in order to prevent that a large investment project is being artificially divided into sub-projects in order to escape the provisions of these guidelines, an investment project will be considered to be a 'single investment project' when the initial investment is undertaken in a period of 3 years by one or more companies and consists of fixed assets combined in an economically indivisible way.
- (29) To assess whether an initial investment is economically indivisible, the RAG stipulates in its footnote 55 that the Commission will take into account the technical, functional and strategic links and the immediate geographical proximity.

⁽¹¹⁾ Discounted to the year of granting the first aid to project P2 (12 September 2006), using the discount rate applicable at that date (4,36 %).

- (30) In case the notified project would constitute a single investment project with project P3 in Freiberg South, the scaling down mechanism of point 67 of the RAG would have to be applied to the combined eligible costs of the two projects, and the notified aid together with the aid to be granted for the project P3 would exceed the maximum allowable, and the excess would be incompatible with Article 107(3)(a) TFEU.
- (31) In its decision to initiate the formal investigation procedure, the Commission noted that the distance of only about 5 km between the location of the notified project (Freiberg East) and the previous project P3 (Freiberg South) could be regarded as immediate geographical proximity. The Commission further noted the presence of certain functional and technical links between the two investments, as well as rather strong strategic links. On this basis, the Commission raised doubts against Germany's view that the notified project did not constitute a single investment project (in the meaning of point 60 and footnote 55 of the RAG) with the project P3 in Freiberg South, and invited third parties to comment on the indivisibility of the two DS investment projects in Freiberg.
- (32) In its decision to initiate the formal investigation procedure, the Commission also assessed the compatibility with the general provisions of the RAG and with the specific rules for aid to large investment projects in point 68(a) and (b) of the RAG, concluding that the notified measure was in compliance with them.

4. COMMENTS FROM INTERESTED PARTIES

- (33) The Commission received no observations from third parties.

5. COMMENTS FROM THE GERMAN AUTHORITIES

5.1. Initial comments submitted by Germany

- (34) In its initial comments submitted to the Commission (on 31 October and 2 December 2008), Germany expressed the view that the criteria (geographical proximity, technical, functional and strategic links) specified in point 60 and footnote 55 of the RAG are not suitable to determine whether two investment projects should be considered 'economically indivisible', because these factors do not allow to clarify the circumstances in which a project can be considered to be economically viable without the other project. Germany further argued that to interpret the legal concept of 'economic indivisibility' the sole decisive factor is whether one project is economically feasible without the other.

- (35) Germany further considered that the Commission's argument that there is some kind of functional and technical links between the projects in Freiberg East and South is not sufficient to establish that they are economically indivisible. Germany concluded that the Commission's grounds for initiating the formal investigation procedure were therefore based on a misuse of the discretionary power of the Commission accorded to it under Article 107(3) TFEU, which resulted in a disproportionate decision against the beneficiary of the aid.
- (36) Moreover, Germany stated that the application of the criterion 'geographical proximity' is inappropriate for the purpose of preventing subsidy increases, since not all language versions of footnote 55 of the RAG include the requirement that the investment sites be in 'immediate' geographical proximity to one another (e.g. the French version does not specify 'immediate' but only 'geographical proximity'). Germany argued that the criteria in footnote 55 do therefore not form a uniform legal framework for the regulation of subsidy spirals.
- (37) In view of the above, Germany concluded that the DS projects in Freiberg South and Freiberg East were not economically indivisible and were not to be considered to form a single investment project in the meaning of point 60 and footnote 55 of the RAG. According to Germany, the notified aid for the Freiberg East investment was therefore not to be reduced applying the scaling down mechanism to the combined eligible investment costs of the DS projects in Freiberg South and East.
- (38) With its initial comments, Germany also submitted updated information on the investment projects undertaken by DS in Freiberg South and East within 3 years from the start of the notified project: previously to the project P3 (extension of solar wafer production capacity from 350 to 500 MWp) in Freiberg South, another project P2 (previous extension of solar wafer production capacity from 270 to 350 MWp) had been undertaken at the same site. Aid had also been granted (under existing aid schemes) to this project P2. Furthermore, Germany informed that the planned aid to project P3 would only be granted in the form of investment premium (based on the IZ scheme).

5.2. Further updating information submitted to the Commission — amendment of the initial notification

- (39) Subsequently to its initial comments, Germany at several stages submitted updated information on the investment projects undertaken or to be undertaken by the beneficiary group in Freiberg South within a period of 3 years from the start of the notified investment project.
- (40) The final picture of the situation is summarised in the table below:

	Freiberg South (P2 – P3)	Freiberg East	Freiberg Saxonia
Status	Previous projects P2 and P3, non-notifiable aid	Notified project	Future project
Product	Solar wafers	Solar wafers	Solar modules
Production capacity (in MWp)	From 270 to 350 (P2) From 350 to 500 (P3)	500	300
Start of project	1.6.2006 (P2) 1.9.2007 (P3)	18.12.2007	Summer/Autumn 2010
Eligible costs (EUR, nominal values)	49 995 991 (P2) 49 000 000 (P3)	350 000 000	72 500 000
Aid amount (EUR, nominal values)	16 905 000 (P2) 0 (*) (P3)	45 395 000 (**)	?

(*) Germany withdrew the initially planned EUR 14 million of aid for P3.

(**) Germany reduced the aid for the notified project in Freiberg East.

- (41) The main changes to the initial notification concern the withdrawal of all aid to be granted for project P3 in Freiberg South, and the reduction of the aid to be granted for the notified project in Freiberg East. Germany also committed that no aid had been or would be paid out for project P3.
- (42) Germany informed the Commission in the course of the formal investigation that, even though it did not explicitly admit that the notified project in Freiberg East would form a single investment project in the meaning of point 60 and footnote 55 of the RAG together with the projects in Freiberg South, Germany would limit the total aid granted for the combined eligible costs (EUR 402 865 942 in discounted value) of the three projects P2, P3 and the notified project to the maximum allowable (EUR 55 749 652 in discounted value – 14,06 % GGE) in a ‘single investment project’ scenario.
- (43) Additionally, Germany also included information on a future large investment project SF III by SW group in Freiberg Saxonia (setting-up of a new plant for the production of solar modules), to be started within 3 years from the start of the notified project, and announced its intention to grant aid to this project. Germany committed to notify the aid for SF III separately and make it conditional to Commission approval.

6. ASSESSMENT OF THE AID

6.1. Existence of State aid in the meaning of Article 107(1) TFEU

- (44) In its decision to initiate the formal investigation procedure, the Commission concluded that the financial support to be granted by Germany to DS on the basis of existing regional aid schemes (GA scheme and IZ schemes) constitutes State aid within the meaning of Article 107(1) TFEU. The German authorities have not contested that conclusion.

6.2. Notification requirement, legality of the aid, and applicable law

- (45) By notifying the planned aid measure on 28 March 2008 before putting it into effect, Germany respected its obligations under Article 108(3) TFEU and the individual notification requirement expressed in Article 7(e) of the Block Exemption Regulation for regional aid.
- (46) Having established that the measure involves State aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether the above mentioned measure can be found compatible with the internal market. As the measure relates to a regional investment

aid, the Commission assessed it on the basis of the RAG, and, more specifically, the provisions of section 4.3 of the RAG relating to large investment projects.

6.3. Compatibility of the aid with general provisions of the RAG

- (47) In its decision to initiate the formal investigation procedure, the Commission indicated that the notified aid is to be granted on the basis of, and in conformity with, the provisions of block-exempted aid schemes which respect the general compatibility criteria of the RAG.
- (48) In particular, the project comprises an initial investment within the meaning of the RAG as it concerns the setting-up of a new establishment. The costs eligible for investment aid are defined in line with the RAG, and the rules on cumulation are respected.
- (49) Furthermore, the beneficiary has applied for aid, the German authorities confirmed in writing, before DS started work on the project, that the project was eligible for aid, and agreed to grant the aid subject to the Commission's approval.
- (50) DS has the obligation to maintain the investment in the region for a minimum of 5 years after completion of the project.
- (51) DS provides a financial contribution of at least 25 % of the eligible costs in a form which is free of any public support.

6.4. Compatibility with the provisions for aid to large investment projects

6.4.1. Single investment project and maximum aid intensity

- (52) According to point 60 of the RAG, in order to prevent that a large investment project is being artificially divided into sub-projects in order to escape the provisions of these guidelines, an investment project will be considered to be a ‘single investment project’ when the initial investment is undertaken in a period of 3 years by one or more companies and consists of fixed assets combined in an economically indivisible way.
- (53) Member States might be inclined to notify separate projects because treating them as separate instead of as a single investment project normally allows a higher maximum aid intensity due to the application of the automatic scaling-down mechanism (point 67 of the RAG) ⁽¹²⁾.

⁽¹²⁾ Indeed, for one project above EUR 100 million divided into two projects, the Member State could apply twice the full regional aid ceiling to the first EUR 50 million of the projects (no scaling down of the applicable regional aid ceiling required) and twice half of this ceiling to the next EUR 50 million, while for all eligible costs above EUR 100 million the regional aid ceiling is reduced to one third (by 34 %).

- (54) In the present case, the Commission opened the formal investigation based on doubts that the notified aid would exceed the maximum allowable if the project would form a single investment project with a previously subsidised project (P3) in Freiberg South. Project P3 is a follow-up project of P2 (both projects are related to subsequent extensions of the production capacity of an existing solar wafer plant from 270 to 350 MW and then from 350 to 500 MW), which is a classical example of a 'single investment project' scenario. Indeed, the investments are carried out within 3 years in immediate geographical proximity (within the same integrated production site of SW group in Freiberg South) and present clear technical (same product and production technology), functional (same raw material, common suppliers/customers, common services) and strategic (integrated capacity increase strategy addressing a same market) links.
- (55) In this case, Germany withdrew all aid to project P3 and amended the notification to reduce the aid intensity for the notified project in order to limit the total aid granted for the combined eligible costs of the notified project in Freiberg East and two previous projects (P2 and P3) in Freiberg South to the maximum allowable in a 'single investment project' scenario (covering all projects undertaken within 3 years). The Commission therefore does not need to further investigate and take a position on whether the notified project forms a single investment project with these previous projects.
- (56) As regards the calculation of the aid, Germany agreed that projects P3 and P2 will be taken into account for the calculation of the maximum aid intensity like in a 'single investment project' scenario between the notified project and previous projects.
- (57) Therefore, regarding the calculation of the maximum allowable aid intensity, in line with point 41 of the RAG, all eligible costs were discounted to the year of granting the first aid to project P2 (12 September 2006), using the discount rate applicable at that date (4,36 %): the total costs amount to EUR 402 865 942 in discounted value. The maximum allowable aid in discounted value in this case would be EUR 55 749 652 ⁽¹³⁾, corresponding to an aid intensity of 14,06 % GGE for the single investment project.
- (58) As EUR 15 384 891 (discounted value) has already been granted (for P2), the maximum allowable aid for the notified project would be EUR 40 364 760 (discounted value), corresponding to an aid intensity of 12,97 % GGE. Since Germany committed to respect this maximum, it can be concluded that the scaling down rules under point 67 of the RAG are respected even in case the notified project would constitute a single investment project with previous subsidised projects within 3 years.
- (59) Since Germany committed to notify the aid for the mentioned future project SF III in Freiberg Saxonia separately and make it conditional to Commission approval, the Commission does not need to take a position in the present decision on whether the notified project forms a single investment project with the future project SF III.
- 6.4.2. *Compatibility with point 68 of the RAG*
- (60) The Commission's decision to allow regional aid to large investment projects falling under point 68 of the RAG depends on the market shares of the beneficiary before and after the investment and on the capacity created by the investment. To carry out the relevant tests under point 68(a) and (b) of the RAG, the Commission has to establish appropriate product and geographic market definitions.
- (61) In its decision opening the formal investigation, the Commission noted that the product envisaged by the notified investment project is multi-crystalline silicon based solar wafers.
- (62) In line with point 69 of the RAG (where the project concerns an intermediate product and a significant part of the output is not sold on the market, the product concerned may be the downstream product), since the Commission could not exclude that the solar wafers produced in Freiberg East would not, at least partly, be used internally by the beneficiary group for further production into solar cells or solar modules, the Commission took the view, in its decision opening the formal investigation procedure, that the product concerned by the notified project was thus not only solar wafers but also solar cells and solar modules. The Commission further defined the relevant product markets for the assessment of point 68(a) of the RAG to be the markets for solar wafers, solar cells and solar modules, and defined the geographical market for the assessment as being worldwide.

⁽¹³⁾ Applying a regional ceiling of 35 % GGE for eligible costs related to P2 (based on the German regional aid map in force at the time of granting aid to this project — Commission Decision of 2 April 2003 on State aid case N 641/02 — Regional State aid map for Germany 2004-2006, OJ C 186, 6.8.2003, p. 18), and of 30 % GGE for P3 and the notified project, as the standard regional ceiling was reduced in the new German aid map applicable since 2007.

(63) In its decision to initiate the investigation procedure, the Commission calculated the beneficiary group market shares on all relevant markets before and after the investment (2006 to 2011), taking into account a worst case scenario that the market would not grow after 2010 (as the independent studies available did not provide a forecast for the years after 2010). Since based on these calculations, all market shares were below 20 % before the investment and below 15 % after the investment, the Commission noted that the market shares would not exceed 25 % and concluded that hence the notified aid was in line with point 68(a) of the RAG.

(64) In its decision to initiate the investigation procedure, the Commission also concluded that since the Compound Annual Growth Rate (CAGR) of the apparent consumption for photovoltaic products in the EEA for the year 2001 to 2006 (35 %) was clearly above the CAGR of the European Economic Area's GDP (1,97 %) for the same years, there should be no doubt that the CAGR of the apparent consumption in the EEA for the same years for the intermediate products would also be clearly above this 1,97 % even if there was no data available on these intermediate products in the EEA. The Commission consequently concluded that the notified aid was compatible with point 68(b) of the RAG.

(65) During the formal investigation procedure there were no indications that could raise doubts on the above statements regarding the compatibility with point 68 of the RAG. Moreover, the analysis in the opening decision demonstrated that the SW group expected market shares on all relevant markets in 2011 were below 15 %, there is thus no risk that when recalculated based on more recent studies they would exceed 25 %.

(66) In view of the above, the Commission confirms its conclusion taken in the decision to initiate the formal

investigation that the notified aid is compatible with point 68 of the RAG.

6.5. Conclusion

(67) Based on the above assessment, the Commission concludes that the notified aid measure is in line with the RAG and the regional aid map for Germany in force at the time of the notification,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which the Federal Republic of Germany is planning to implement for Deutsche Solar AG, amounting to EUR 40 364 760 in discounted value, corresponding to an aid intensity of 12,97 % GGE, is compatible with the internal market within the meaning of Article 107(3)(a) of the Treaty on the Functioning of the European Union.

2. Implementation of the aid amounting to EUR 40 364 760 in discounted value, corresponding to an aid intensity of 12,97 % GGE, is accordingly authorised.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 6 July 2010.

For the Commission

Joaquín ALMUNIA
Vice-President

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 28 October 2009

on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07
(ex NN 51/07, ex CP 9/07) implemented by Spain

(notified under document C(2009) 8107)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2011/5/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

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

Whereas:

I. PROCEDURE

- (1) By written questions addressed to the Commission (Nos E-4431/05, E-4772/05 and E-5800/06) several MEPs indicated that Spain had enacted a special scheme allegedly providing an unfair tax incentive for Spanish companies that acquired significant shareholdings in foreign companies, pursuant to Article 12(5) of the Spanish Corporate Tax Act (Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades, hereinafter TRLIS) ⁽²⁾.
- (2) By written question No P-5509/06, Mr David Martin MEP complained to the Commission about the hostile takeover bid by the Spanish energy producer Iberdrola involving purchasing shares of the UK energy generator and distributor, ScottishPower. According to Mr Martin, Iberdrola had unfairly benefited from State aid in the form of a tax incentive for the acquisition. Mr Martin asked the Commission to examine all competition issues arising from the acquisition, which had been notified on 12 January 2007 for review by the Commission pursuant

to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter the Merger Regulation) ⁽³⁾. By Decision dated 26 March 2007 (Case No COMP/M.4517 — *Iberdrola/ScottishPower*, SG-Greffe(2007) D/201696) ⁽⁴⁾, the Commission decided not to oppose the notified operation and to declare it compatible with the common market under Article 6(1)(b) of the Merger Regulation.

- (3) By letters dated 15 January 2007 (D/50164) and 26 March 2007 (D-51351), the Commission asked the Spanish authorities to provide information in order to assess the scope and the effects of Article 12(5) TRLIS as regards its possible classification as State aid and its compatibility with the common market.
- (4) By letters dated 16 February 2007 (A/31454) and 4 June 2007 (A/34596), the Spanish authorities replied to these questions.
- (5) By fax dated 28 August 2007, the Commission received a complaint by a private operator alleging that the scheme set up by Article 12(5) TRLIS constituted State aid and was incompatible with the common market. The complainant asked for his identity not to be divulged.
- (6) By Decision of 10 October 2007 (hereinafter the initiating Decision), the Commission initiated the formal investigation procedure laid down in Article 88(2) of the Treaty in respect of the tax amortisation of financial goodwill provided for by Article 12(5) TRLIS, because it appeared to fulfil all the conditions for being considered State aid under Article 87(1) of the Treaty. The Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty. The Decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁵⁾, inviting interested parties to submit their comments.

⁽³⁾ OJ L 24, 29.1.2004, p. 1.

⁽⁴⁾ See: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4517_20070326_20310_en.pdf

⁽⁵⁾ See footnote 1.

⁽¹⁾ OJ C 311, 21.12.2007, p. 21.

⁽²⁾ Published in the Spanish *Official State Gazette* of 11 March 2004.

- (7) By letter dated 5 December 2007, the Commission received comments from Spain on the initiating Decision.
- (8) Between 18 January and 16 June 2008, the Commission received comments on the initiating Decision from 32 interested parties. The interested parties that did not ask to remain anonymous are listed in the Annex to this Decision.
- (9) By letters dated 9 April 2008 (D/51431), 15 May 2008 (D/51925), 22 May 2008 (D/52035) and 27 March 2009 (D/51271), the Commission forwarded the above comments to the Spanish authorities, in order to give them the opportunity to react. By letters dated 30 June 2008 (A/12911) and 22 April 2009 (A/9531), the Spanish authorities gave their reactions to the interested parties' comments.
- (10) On 18 February 2008, 12 May and 8 June 2009, technical meetings took place between the Spanish authorities and Commission representatives to clarify, inter alia, certain aspects of the application of the scheme in question and the interpretation of the Spanish legislation relevant to the case.
- (11) On 7 April 2008, a meeting was held between representatives of the Commission and Banco de Santander SA; on 16 April 2008 a meeting took place between Commission representatives and the law firm J & A Garrigues SL representing several interested parties; on 2 July 2008 a meeting took place between Commission representatives and Altadis SA; on 12 February 2009, a meeting took place between Commission representatives and Telefónica SA.
- (12) On 14 July 2008, the Spanish authorities submitted further information regarding the measure at issue, in particular data extracted from 2006 tax returns, which provided a general overview of the taxpayers benefiting from the measure at issue.
- (13) By e-mail dated 16 June 2009, the Spanish authorities provided additional elements arguing that Spanish companies still faced a number of obstacles to cross-border mergers in the Community.
- (14) The measure is governed by Article 12(5) TRLIS. In particular, Article 2(5) of Act 24/2001 of 27 December 2001 amended the Spanish Corporate Tax Act No 43/1995 of 27 December 1995, by introducing Article 12(5). Royal Legislative Decree No 4/2004 of 5 March 2004 consolidated the amendments made until then to the Spanish Corporate Tax Act in a recast version.
- (15) The Commission is aware that the Spanish legislation has evolved since the date of the initiating Decision ⁽⁶⁾. None the less, the Commission considers that the latest amendments are unlikely to affect or alter the misgivings expressed in the initiating Decision. For the sake of consistency, the Commission will refer in this Decision to the numbering of the Spanish legislation as given in the initiating Decision, even though it may have undergone amendments. Any new legal provision will be clearly identified as such.
- (16) Article 12(5) TRLIS, which is part of Article 12 'Value adjustments: loss of value of assets', entered into force on 1 January 2002. It essentially provides that a company which is taxable in Spain may deduct from its taxable income the financial goodwill deriving from the acquisition of a shareholding of at least 5 % of a foreign company, in equal yearly instalments, for up to 20 years following the acquisition.
- (17) Goodwill is understood to represent the value of a well-respected business name, good customer relations, employee skills, and other such factors that are expected to translate into greater than apparent earnings in the future. Under Spanish accounting principles ⁽⁷⁾, the price paid for the acquisition of a business in excess of the market value of the assets constituting the business is termed 'goodwill' and must be booked as a separate intangible asset as soon as the acquiring company takes control of the target company ⁽⁸⁾.
- (18) Under Spanish tax policy principles, with the exception of the measure in question, goodwill can only be amortised following a business combination that arises either as a result of acquisition or contribution of the assets held by independent companies or following a merger or de-merger operation.
- (19)

II. DETAILED DESCRIPTION OF THE MEASURE

- (14) The measure in question involves tax amortisation of the financial goodwill resulting from the acquisition of a significant shareholding in a foreign target company.

⁽⁶⁾ Act No 4/2008 of 23 December 2008, which brought in amendments to several tax law provisions.

⁽⁷⁾ See Articles 46 and 39 of the 1885 Commercial Code.

⁽⁸⁾ Result of the implementation of Act No 16/2007 of 4 July 2007 on the reform and adaptation of company law in the field of accounting for its international harmonisation in line with European Union legislation.

- (20) 'Financial goodwill', as used in the Spanish tax system, is the goodwill that would have been booked if the shareholding company and the target company had merged. The concept of financial goodwill under Article 12(5) TRLIS therefore introduces into the field of share acquisitions a notion that is usually used in transfer of assets or business combination transactions. According to Article 12(5) TRLIS, the financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the acquisition price paid for the shareholding.
- (21) Article 12(5) TRLIS provides that the amortisation of financial goodwill is dependent on meeting the following requirements, as set by reference to Article 21 TRLIS:
- (a) the direct or indirect holding in the foreign company must be at least 5 % and must be held for an uninterrupted period of at least 1 year ⁽⁹⁾;
 - (b) the foreign company must be liable for a similar tax to that applicable in Spain. This condition is presumed to be met if the country of residence of the target company has signed a tax convention with Spain to avoid international double taxation and prevent tax evasion ⁽¹⁰⁾;
 - (c) the revenue of the foreign company must mainly derive from business activities carried out abroad. This condition is met when at least 85 % of the income of the target company:
 - (i) is not included in the taxable base under Spanish international tax transparency rules and is taxed as benefits received in Spain ⁽¹¹⁾. Income is specifically considered to meet these requirements when it derives from the following activities:
 - wholesale trade, when the goods are made available to the purchasers in the country or territory of residence of the target company or in any country or territory other than Spain,
 - services provided to clients that do not have their tax domicile in Spain,
 - financial services provided to clients that do not have their tax domicile in Spain,
 - insurance services relating to risks not located in Spain;
 - (ii) is dividend income, provided that the conditions on the nature of the income from the shareholding provided for Article 21(1)(a) and the level of direct and indirect shareholding of the Spanish company are met (Article 21(1)(c)(2) TRLIS) ⁽¹²⁾.
- (22) In addition to the contested measure, it is worth briefly describing the following TRLIS provisions to which this Decision will refer:
- (a) Article 11(4) of the TRLIS ⁽¹³⁾ (Article 11 is entitled 'Value adjustments: amortisation' and is contained in Chapter IV of the TRLIS, which defines the tax base) provides for a minimum of 20 years' amortisation of the goodwill deriving from an acquisition under the following conditions: (i) the goodwill results from an acquisition for value; (ii) the seller is unrelated to the acquiring company. The amendments made to this provision subsequent to the initiating Decision and brought in by Act No 16/2007 of 4 July 2007, also clarified that if condition (ii) was not met, the price paid used for calculating the goodwill will be the price paid for the share acquired by a related company to the unrelated seller and also required that (iii) a similar amount has been allocated to an indivisible reserve.
 - (b) Article 12(3) TRLIS, which is contained in Chapter IV TRLIS, permits partial deduction for depreciation of domestic and foreign shareholdings, which are not listed on a secondary market, up to the difference between the theoretical accounting value at the beginning and the end of the tax year. The measure at issue can be applied in conjunction with this Article of the TRLIS ⁽¹⁴⁾.
 - (c) Article 89(3) TRLIS (Article 89 is entitled 'Holdings in the capital of the transferring entity and the acquiring entity'), is contained in Chapter VII, Section VIII on the 'Special system for mergers, divisions, transfers of assets and exchanges'. Article 89(3) TRLIS provides for the amortisation of goodwill arising from business restructuring. Under this provision, the following conditions must be fulfilled in order to apply Article 11(4) TRLIS to the goodwill arising from a business combination: (i) a shareholding of at least 5 % in the target company before the business combination; (ii) it must be proven that the goodwill has been taxed and charged to the seller (iii) the seller is not linked to the purchaser. If condition (iii) is not met, the amount deducted must correspond to an irreversible depreciation of the intangible assets.

⁽⁹⁾ See Article 21(1)(a) TRLIS.

⁽¹⁰⁾ See Article 21(1)(b) TRLIS.

⁽¹¹⁾ See Article 21(1)(c)(1) TRLIS.

⁽¹²⁾ See Article 21(1)(c)(2) TRLIS.

⁽¹³⁾ Under the current legislation, this provision is numbered as Article 12(6) TRLIS.

⁽¹⁴⁾ As explicitly stated in the second paragraph of Article 12(5): 'The deduction of this difference shall be compatible, where appropriate, with the provisions referred to in paragraph 3 of this Article'.

(d) Article 21 TRLIS, entitled 'Exemption to avoid international double taxation on dividends and income from foreign sources arising from the transfer of securities representing the equity of entities not resident in Spain', is contained in Chapter IV TRLIS. Article 21 lays down the conditions under which dividends and incomes from a foreign company are tax exempt when received by a company which is tax domiciled in Spain.

(e) Article 22 TRLIS, entitled 'Exemption of certain income obtained abroad via a permanent establishment', is contained in Chapter IV TRLIS. Article 22 TRLIS lays down the conditions under which income generated abroad by a permanent establishment not situated in Spain is tax exempt.

(23) For the purposes of this Decision:

(a) Transfer of assets shall mean an operation whereby a company transfers, without being dissolved, all or one or more branches of its activity to another company.

(b) Business combination shall mean an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company or to a company that they form in exchange for the issue to their shareholders of securities representing the capital of that other company.

(c) Share acquisition shall mean an operation whereby one company acquires a shareholding in the capital of another company without obtaining a majority or the control of the voting rights of the target company.

(d) Target company shall mean a company not resident in Spain, whose income fulfils the conditions described under recital 21(c) and in which a shareholding is acquired by a company resident in Spain.

(e) Intra-Community acquisitions shall mean shareholding acquisitions, which meet all the relevant conditions of Article 12(5) TRLIS, in a target company which is formed in accordance with the law of a Member State and has its registered office, central administration or principal place of business within the Community.

(f) Extra-Community acquisitions shall mean shareholding acquisitions, which meet all the relevant

conditions of Article 12(5) TRLIS, in a target company which has not been formed in accordance with the law of a Member State or does not have its registered office, central administration or principal place of business within the Community.

III. REASONS FOR INITIATING THE PROCEDURE

(24) In the initiating Decision, the Commission opened the formal investigation procedure laid down in Article 88(2) of the Treaty in respect of the measure in question because it appeared to fulfil all the conditions for being considered State aid under Article 87(1) of the Treaty. The Commission also had doubts as to whether the measure at issue could be considered compatible with the common market, as none of the exceptions provided for in Article 87(2) and (3) seemed applicable.

(25) In particular, the Commission considered that the measure in question departed from the ordinary scope of the Spanish corporate tax system, which is the tax system of reference. The Commission also held that the tax amortisation of the financial goodwill resulting from the acquisition of a 5 % shareholding in a foreign target company seemed to constitute an exceptional incentive.

(26) The Commission observed that the tax amortisation was available only to a specific category of undertakings, namely undertakings which acquire certain shareholdings, amounting to at least 5 % of the share capital of a target company, and only in respect of foreign target companies subject to the criteria under Article 21(1) TRLIS. The Commission also underlined that in accordance with the case-law of the Court of Justice of the European Communities, a tax reduction favouring only exports of national products constitutes State aid⁽¹⁵⁾. The measure in question therefore seemed selective.

(27) In this context, the Commission also considered that the selective advantage did not appear to be justified by the inherent nature of the tax system. In particular, it considered that the differentiation created by the measure at issue, which departed from the general rules of the Spanish accounting and tax systems could not be justified by reasons linked to technicalities of the tax system. Indeed, goodwill can only be deducted in the case of a business combination or transfer of assets, except under the provisions of the measure at issue. The Commission also considered that it was disproportionate for the measure in question to claim to attain the neutrality objectives pursued by the Spanish system because it is limited solely to the acquisition of significant shareholdings in foreign companies.

⁽¹⁵⁾ See the judgment of the Court of Justice in joined Cases 6/69 and 11/69 *Commission v France* [1969] ECR 523. See also point 18 of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

(28) In addition, the Commission considered that the measure at issue implied the use of State resources as it involved foregoing tax revenue by the Spanish Treasury. Finally, the measure could distort competition in the European business acquisition market by providing a selective economic advantage to Spanish companies engaged in the acquisition of a significant shareholding in foreign companies. Nor did the Commission find any grounds for considering the measure compatible with the common market.

(29) The Commission therefore concluded that the measure in question could constitute incompatible State aid. This being the case, recovery should take place according to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. The Commission accordingly invited the Spanish authorities and interested parties to submit their observations as to the possible presence of legitimate expectations or any other general principle of Community law which would permit the Commission to exceptionally waive recovery pursuant to the second sentence of Article 14(1) of the above Council Regulation.

IV. COMMENTS FROM THE SPANISH AUTHORITIES AND INTERESTED THIRD PARTIES

(30) The Commission received comments from the Spanish authorities⁽¹⁶⁾ and from 32 interested third parties⁽¹⁷⁾, eight of which were associations.

(31) In short, the Spanish authorities consider that Article 12(5) TRLIS constitutes a general measure and not an exception to the Spanish tax system since this provision allows the amortisation of an intangible asset, which applies to any taxpayer who acquires a significant shareholding in a foreign company. In the light of Commission practice and the relevant case-law, the Spanish authorities conclude that the contested measures cannot be considered State aid within the meaning of Article 87 of the Treaty. In addition, the Spanish authorities consider that a different conclusion would be contrary to the principle of legal certainty. The Spanish authorities also contest the competence of the Commission to challenge this general measure as they consider that the Commission cannot use State aid rules as the basis for harmonising tax issues.

(32) In general, 30 interested third parties (hereinafter the 30 interested parties) support the views of the Spanish authorities, whereas another two third parties (hereinafter the two parties) consider that Article 12(5) TRLIS

constitutes an unlawful State aid measure incompatible with the common market. Hence the arguments of the 30 interested parties will be presented together with the position of the Spanish authorities, while the arguments of the two parties will be described separately.

A. Comments from the Spanish authorities and the 30 interested parties

(33) As an opening comment, the Spanish authorities stress that direct taxation falls within the competence of the Member States. Therefore, the Commission's action in this field should comply with the subsidiarity principle in Article 5 of the Treaty. Moreover, the Spanish authorities recall that Articles 3 and 58(1)(a) of the Treaty allow Member States to establish different tax systems according to the location of the investment or the tax residence of the taxpayer, without this being considered a restriction on the free movement of capital.

(34) The 30 interested parties also maintain that a negative Commission decision would breach the principle of national fiscal autonomy laid down in the Treaty, as well as Article 56 of the Treaty, which prohibits restrictions on the free movement of capital.

A.1. The measure at issue does not constitute State aid

(35) The Spanish authorities and the 30 interested parties consider that the measure at issue does not constitute State aid within the meaning of Article 87(1) of the Treaty since: (i) it does not confer an economic advantage; (ii) it does not favour certain undertakings; and (iii) it does not distort or threaten to distort competition between Member States. In line with the logic of the Spanish tax system, they maintain that the measure at issue should be considered a general measure that applies indiscriminately to any type of company and activity.

A.1.1. The measure at issue does not confer an economic advantage

(36) Contrary to the Commission's position as expressed in the initiating Decision, the Spanish authorities maintain that Article 12(5) TRLIS does not constitute an exception to the Spanish corporate tax system since: (i) the Spanish accounting system is not an appropriate point of reference to substantiate the existence of an exception to the tax system; and (ii) even if it were, the characterisation of financial goodwill as a depreciable asset over time has historically been a general feature of the Spanish accounting and corporate tax systems.

⁽¹⁶⁾ See recital 7.

⁽¹⁷⁾ See recital 8.

(37) Firstly, because of the lack of harmonisation of accounting rules, the accounting result cannot serve as a reference point for establishing the exceptional nature of the measure at issue. Indeed, in Spain, the tax base is calculated on the basis of the accounting result, adjusted according to tax rules. Therefore, in the case at hand, accounting considerations cannot, in Spain's view, serve as a reference point for a tax measure.

(38) Secondly, it is incorrect to consider goodwill amortisation not to be within the logic of the Spanish accounting system since both goodwill⁽¹⁸⁾ and financial goodwill⁽¹⁹⁾ can be amortised over periods of up to 20 years. These empirical rules reflect the loss of value of the underlying assets, whether or not tangible. Therefore, Article 12(5) TRLIS does not constitute an exception as it does not depart from the rules on amortisation of goodwill established in the Spanish accounting and tax systems.

(39) Thirdly, the Spanish authorities point out that the measure at issue does not constitute a true economic advantage since, in the case of sale of the acquired shareholding, the amount deducted is recovered by taxation of the capital gain, thus placing the taxpayer in the same situation as if Article 12(5) TRLIS had not been applied.

(40) Fourthly, the Commission incorrectly refers to Articles 11(4) and 89(3) TRLIS to establish the existence of an advantage. In the initiating Decision, the Commission states that neither a business combination nor takeover of the target company is necessary to benefit from Article 12(5) TRLIS. This statement reflects a misunderstanding of the Spanish tax system since these two Articles do not prevent a group of companies that jointly acquires control of a target company from deducting a corresponding fraction of the goodwill resulting from the operation. Hence, application of these two Articles does not require individual control of the target company in order to benefit from the measure at issue. In this context, it would be inappropriate to consider that Article 12(5) TRLIS offers more favourable treatment than Articles 11(4) or 89(3) TRLIS as regards the controlling position of the beneficiaries. Finally, it should be noted that the 5 % shareholding criterion is consistent with the conditions laid down in Article 89(3) TRLIS and also with Commission guidelines and practice⁽²⁰⁾.

(41) The Spanish authorities point out that the Commission also incorrectly refers to Article 12(3) TRLIS to establish an alleged advantage under Article 12(5) TRLIS:

Article 12(3) applies to situations of depreciation in case of an objective loss recorded by the target company, whereas Article 12(5) TRLIS complements this provision and reflects the loss of value attributable to depreciation of the financial goodwill.

(42) Fifthly, the Commission Notice on the application of the State aid rules to measures relating to direct business taxation⁽²¹⁾ (hereinafter the Commission Notice) explicitly states that amortisation rules do not imply State aid. Since the current amortisation coefficient for financial goodwill over a minimum of 20 years is the same as the amortisation coefficient for goodwill, the rule does not constitute an exception to the general tax system.

(43) Finally, the 30 interested parties also consider that if the measure at issue constituted an advantage, the ultimate beneficiaries would be the target company's shareholders since they would receive the price paid by the acquiring company benefitting from the measure at issue.

A.1.2. The measure at issue does not favour certain undertakings or production

(44) Firstly, Spain maintains that Article 12(5) TRLIS is a general measure since it is open to any Spanish company whatever its activity, sector, size, form or other characteristics. The only condition for the taxpayer to be able to benefit from the measure at issue is to be tax resident in Spain. The fact that not all taxpayers benefit from the measure in question does not make it selective. Therefore, Article 12(5) TRLIS is neither *de facto* nor *de jure* selective within the meaning of Article 87(1) of the Treaty. Accordingly, by letter dated 14 July 2008⁽²²⁾, the Spanish authorities provided data extracted from the 2006 Spanish tax returns which show that all types of companies (SMEs and large undertakings), as well as companies active in different economic sectors, had benefited from the measure at issue. The Spanish authorities also stress that in a recent judgment⁽²³⁾, the Court of First Instance indicated that a limited number of beneficiaries is not sufficient in itself to establish the selectivity of the measure since that group can actually represent all of the undertakings in a particular legal and factual situation. In particular, the Spanish authorities stress that the measure at issue bears similarities with a recent case⁽²⁴⁾ that the Commission considered to be a general measure and they therefore request the same treatment.

⁽¹⁸⁾ The Spanish authorities referred to Article 194 of Royal Decree 1564/1989 of 22 December 1989.

⁽¹⁹⁾ The Spanish authorities referred to ICAC (Institute of Accounting and Auditing) Resolution No 3, BOICAC, 27.11.1996.

⁽²⁰⁾ See the Commission Decision of 22 September 2004, N 354/04, Irish Company Holding Regime (OJ C 131, 28.5.2005, p. 10).

⁽²¹⁾ OJ C 384, 10.12.1998, p. 3.

⁽²²⁾ See recital 12.

⁽²³⁾ See the judgment of the Court of First Instance in Case T-233/04 *Netherlands v Commission* [2008] ECR, II-591.

⁽²⁴⁾ See the Commission Decision of 14 February 2008, N 480/07, Reduction in revenue from certain intangible assets (OJ C 80, 1.4.2008, p. 1).

(45) Secondly, according to the Spanish authorities and the 30 interested parties, in its initiating Decision the Commission mixed up the concept of selectivity and the objective conditions of the measure at issue which refer only to certain transactions (i.e. shareholding in a foreign target company). Indeed, the Commission alleges that Article 12(5) TRLIS is selective since the same treatment is not granted to comparable investments in Spanish companies. However, the Commission fails to recognise that the selectivity criterion is not determined by the fact that the beneficiary of the measure at issue is a group of companies or a multinational company that has a share in a target company. The fact that a measure benefits only companies that comply with the objective criterion laid down in the measure at issue does not in itself make it selective. The selectivity criterion implies that subjective restrictions should be imposed on the beneficiary of the measure at issue. The selectivity criterion created for this procedure is inconsistent with previous Commission practice and too vague and broad. Taking this concept further would lead to the erroneous conclusion that most tax deductible expenses fall within the scope of Article 87(1) of the Treaty.

(46) The Spanish authorities add that the fact of limiting the amortisation of financial goodwill to that resulting from the acquisition of a significant shareholding in a target company is not sufficient to remove the general character of the measure at issue, since it applies indiscriminately to any company that is tax resident in Spain with no further requirements. In line with the case-law of the European Court of Justice⁽²⁵⁾, a measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid.

(47) Thirdly, as regards the 5 % threshold, this level does not set a minimum amount to be invested and therefore the measure at issue does not benefit only large undertakings. As for the fact that there is no requirement for the seller to pay capital gains in order for the measure at issue to apply, the Spanish authorities consider this to be irrelevant since control of income received abroad by a seller who is not liable for tax in Spain lies outside their field of competence. Lastly, limiting the scope of a measure — for fiscal technical reasons — to shareholding acquisitions in target companies is consistent with the situation resulting from the implementation of various Community Directives. For example, as a result of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States⁽²⁶⁾ (hereinafter the Cross-border Interest and Royalty Payments Directive) and

Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States⁽²⁷⁾ (hereinafter the Parents-Subsidiary Directive), the tax treatment of dividends, interests or royalties may differ according to whether the payment is made to a domestic or a foreign company.

(48) Fourthly, the introduction of the measure at issue is in any case justified by the principle of neutrality, which underlies all Spanish tax legislation. This principle implies that the tax treatment of an investment should be neutral irrespective of the instruments used, whether transfer of assets, business combination or share acquisition. Therefore, the tax amortisation of an investment should be identical whatever the instrument used to carry out the acquisition in question. The final aim of the measure at issue, in this broader perspective, is to ensure the free movement of capital by avoiding discriminatory tax treatment between transactions with target companies and purely domestic transactions. Given that acquisitions of significant shareholdings in domestic companies could lead to a business combination of the acquiring and the acquired companies with no legal or fiscal barriers, the goodwill that would ensue for tax purposes as a result of the combination could be amortised⁽²⁸⁾. However, goodwill of cross-border operations cannot arise because harmonisation at Community level is not complete or — even worse — because there is no harmonisation outside the Community. According to the Spanish authorities⁽²⁹⁾, the Spanish tax system provides for different tax schemes, as in the case of shareholding acquisitions in foreign companies compared with acquisitions in Spanish companies (impossible to undertake merger operations, risk assumption, etc.), in order to achieve the tax neutrality sought by the Spanish domestic legislation and Community law itself and also in order to ensure that the Spanish tax system is consistent and efficient. Although Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States⁽³⁰⁾ (hereinafter the Cross-border Taxation Directive) has removed tax barriers, Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies⁽³¹⁾ (hereinafter the Cross-border Mergers Directive)⁽³²⁾ has not yet been transposed into national law. In practice, this situation makes business combinations between companies from different Member States impossible. Therefore, the aim of

⁽²⁷⁾ OJ L 7, 13.1.2004, p. 41.

⁽²⁸⁾ Pursuant to Article 89(3) TRLIS.

⁽²⁹⁾ See the Spanish authorities' letter of 5 December 2007 to the Commission, p. 35, as referred to in recital 7.

⁽³⁰⁾ OJ L 225, 20.8.1990, p. 1.

⁽³¹⁾ OJ L 310, 25.11.2005, p. 1.

⁽³²⁾ The comments from the Spanish authorities were received on 5 December 2007 whereas the Member States had to apply Directive 2005/56/EC by 15 December 2007.

⁽²⁵⁾ See the judgment of the Court of Justice in Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365.

⁽²⁶⁾ OJ L 157, 26.6.2003, p. 49.

the measure at issue is to remove the negative impact of these barriers, for whose existence Spain is not answerable⁽³³⁾. Consequently, limiting the scope of the measure at issue to cross-border acquisitions is necessary to enforce the neutrality principle. In this way, still according to the Spanish authorities, the Spanish tax system treats differently taxpayers who are in different situations⁽³⁴⁾, thereby ensuring that the Spanish tax system is neutral as required by the Spanish tax system itself and the Treaty. In particular, on 16 June 2009 the Spanish authorities acknowledged that although the Cross-border Mergers Directive had a positive impact, European companies would still face a number of obstacles⁽³⁵⁾ to cross-border mergers because of non-harmonisation of national legislation (rights of minority shareholders, rights of creditors, trademark issues, wider regulatory aspects including labour law, general political and strategic considerations).

- (49) To conclude, the contested measure is designed to remove the tax barriers that the Spanish tax system generates in investment decisions by penalising share acquisitions in foreign companies as opposed to acquisitions in domestic companies. The measure at issue guarantees the same tax treatment for both types of acquisition (direct acquisitions of assets and indirect acquisitions by purchasing shareholdings): goodwill arising from both of them (direct goodwill and financial goodwill) can thus be identified in order to promote the integration of the different markets, until factual and legal barriers to cross-border business combinations have been removed. The Spanish authorities thus ensure that taxpayers can opt to invest at local or cross-border level without being affected by these barriers. Article 12(5) TRLIS basically restores fair conditions of competition by eliminating the adverse impacts of the barriers.

A.1.3. The measure at issue neither distorts competition nor affects Community trade

- (50) The Spanish authorities state that the Commission has not established to the requisite legal standard that Article 12(5) TRLIS restricts competition, as (i) the alleged 'market for the acquisition of shares in companies' does not constitute a relevant market for the purposes of competition law; and (ii) even if this

were the case, the amortisation of financial goodwill does not per se affect the competitive position of Spanish undertakings.

- (51) First, the Commission qualified the measure at issue as an anti-competitive advantage on the grounds that Article 12(5) allows Spanish taxpayers to obtain a premium for the acquisition of significant shareholdings in a target company. However, the Commission did not carry out any benchmarking study on the economic circumstances of Spanish and international companies.
- (52) Second, since the measure at issue is open to any Spanish company with no restrictions, it cannot distort competition. Indeed, any company in the same situation as a beneficiary of the measure at issue can benefit from the measure, thus reducing its tax burden, which would cancel any competitive advantage that might derive from it. In addition, a lower rate of taxation in a Member State that can increase the competitive edge of local companies should not come under State aid rules as long as it is of a general nature.
- (53) Finally, the Commission has already examined many Spanish cross-border operations under the Merger Regulation⁽³⁶⁾ that could have benefited from the measure at issue. Yet the Commission did not raise any concerns about potential distortions of competition in any of these cases.
- (54) The Commission's allegations are not only far removed from reality but also out of touch with the investment situation of Spanish companies. The measure at issue neither distorts competition nor adversely affects intra-Community trading conditions to an extent contrary to the common interest.
- (55) In a non-harmonised market, as a result of competition between tax systems, identical operations have a different fiscal impact depending on where traders are resident. This situation distorts competition even if the national measures at stake are general measures. In other words, this distortion is not the result of State aid but of a lack of harmonisation. If the Commission's reasoning were followed through, it would have to open formal investigations into hundreds of national measures, which would create a situation of legal uncertainty that is highly detrimental to foreign investment.

⁽³³⁾ See the recitals to Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1), and the opinion of the Economic and Social Committee of 28 April 2004, COM(2003) 703 final — 2003/2077(COD).

⁽³⁴⁾ As stated on page 8 of the Spanish authorities' letter of 30 June 2008 — see recital 9 above.

⁽³⁵⁾ With reference to the Commission's assessment of the implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

⁽³⁶⁾ See the Commission Decisions of 10 June 2005, *Cesky Telecom*; of 10 January 2005, *O₂*; of 23 May 2006, *Quebec, GLC, BAA*; of 15 September 2004, *Abbey National*; and of 26 March 2007, *ScottishPower*, available at <http://ec.europa.eu/competition/mergers/cases/>

A.2. Compatibility

- (56) Even if the Commission considers that Article 12(5) TRLIS constitutes State aid within the meaning of Article 87(1) of the Treaty, this provision is compatible with Article 87(3) of the Treaty since it contributes to the Community interest of promoting the integration of international companies.
- (57) As stated in the State Aid Action Plan ⁽³⁷⁾, a measure can be considered compatible if it addresses a market failure, if it fulfils clearly defined objectives of common interest and if it does not distort intra-Community competition and trade to an extent contrary to the common interest. In the case at hand, the market failure is the difficulty (or virtual impossibility) of carrying out cross-border business combinations. The effect of Article 12(5) TRLIS is to promote the creation of pan-European undertakings, by putting domestic and cross-border acquisitions on the same footing.
- (58) Therefore, for the Spanish authorities, Article 12(5) TRLIS is compatible with the common market since, in the absence of European tax harmonisation, it achieves the objective of breaking down barriers to cross-border investment in a proportionate manner. The measure at issue is effectively aimed at removing the adverse impact of barriers to cross-border business combinations and aligning the tax treatment of cross-border and local business combinations in order to ensure that the decisions taken as regards such operations are based not on fiscal considerations but exclusively on economic considerations.
- (60) Firstly, the Commission seems to recognise, in the initiating Decision, the probable existence of legitimate expectations. Therefore, in line with the case-law of the Court of First Instance ⁽³⁸⁾, this statement constitutes a clear indication of the existence of legitimate expectations. Since the initiating Decision does not prejudice the outcome of the formal investigation, legitimate expectations should be recognised for all the operations that took place before the date of publication of the final decision.
- (61) Secondly, in its answers to written questions from MEPs ⁽³⁹⁾, the Commission stated that Article 12(5) TRLIS does not constitute State aid. This statement constitutes a clear position from the Commission which offers obvious legitimate expectations to the Spanish authorities and the beneficiaries of the measure at issue.
- (62) Thirdly, in line with the conclusion reached by the Commission in similar cases ⁽⁴⁰⁾, the Commission has provided a set of indirect evidence that Article 12(5) TRLIS does not constitute State aid. In view of these Decisions, a prudent undertaking would not have been able to predict that the Commission could take an opposite position.
- (63) Finally, the measure at issue should continue to apply to all operations prior to the publication date of a negative decision until amortisation of the financial goodwill is completed. The measure at issue corresponds to a right to deduct a given amount, determined at the moment of the acquisition, whose deduction is spread over the following 20 years. Moreover, because of the position taken by the Commission in similar cases ⁽⁴¹⁾, it is justified to assume that the legitimate expectations should remain until the date of publication of the final decision.

A.3. Legitimate expectations and legal certainty

- (59) Finally, and in the event that the Commission declares that Article 12(5) TRLIS constitutes State aid incompatible with the common market, the Commission must acknowledge the existence of certain circumstances that justify the non-recovery of the alleged State aid received pursuant to Article 12(5) TRLIS. The beneficiaries should have the right to complete the exceptional amortisation of the financial goodwill corresponding to acquisitions made before the date of publication of the final decision.

⁽³⁷⁾ State aid action plan — Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final (OJ L 1, 4.1.2003, p. 1).

B. Comments from the two parties

- (64) According to the two parties, Article 12(5) TRLIS constitutes State aid. They maintain that there are no legitimate expectations in the case at hand and therefore call on the Commission to order recovery of any unlawful aid granted.

⁽³⁸⁾ Judgment of the Court of First Instance in Case T-348/03 *Koninklijke Friesland Foods v Commission* [2007] ECR II-101.

⁽³⁹⁾ Written questions E-4431/05 and E-4772/05.

⁽⁴⁰⁾ For example, the Commission Decision of 30 July 2004 in case N 354/04, *Irish Company Holding Regime* (OJ C 131, 28.5.2005, p. 11) and the Commission Decision of 13 July 2006 in case C4/07 (ex N 465/06), *Groepsrentebox* (OJ C 66, 22.3.2007, p. 30).

⁽⁴¹⁾ See Commission Decision No 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws (OJ L 60, 1.3.2001, p. 57).

B.1. *The measure at issue constitutes State aid*

B.1.1. *The measure at issue confers an economic advantage*

(65) According to the two parties, Article 12(5) TRLIS is exceptional in nature because the Spanish tax system, with the exception of this provision, does not allow any amortisation of financial goodwill but only a deduction in the case of an impairment test. Until the introduction of Article 12(5) TRLIS the Spanish corporate tax legislation did not allow the amortisation of shareholdings regardless of whether or not there had actually been an impairment. They stress that Article 12(5) TRLIS is probably unique in the European context as no other Member State has a similar system for cross-border transactions not involving the acquisition of controlling shares.

(66) Under the Spanish tax system, goodwill can be amortised only if there is a business combination — the sole exception is the measure at issue, which allows amortisation in an exceptional case: if a minority shareholding is acquired in a target company. This diverges from the general tax system since amortisation is possible not only without there being a business combination but also in cases where the purchaser does not even acquire control of the foreign target company. Article 12(5) TRLIS thus confers a benefit on certain Spanish companies vis-à-vis (a) other Spanish companies that operate only at national level; and (b) other Community operators that compete internationally with the Spanish beneficiaries of the measure at issue.

(67) From an economic point of view, the Spanish authorities are not only providing an interest-free loan that will be drawn over a period of 20 years (interest-free tax deferral), but also effectively leaving the repayment date of the interest-free loan to the discretion of the borrower — if indeed the loan is repaid. If the investor does not transfer the significant shareholding, the effect is the same as cancellation of the debt by the Spanish authorities. In this case, the measure turns into a permanent tax exemption.

(68) One of the two parties estimates that, as a result of the measure at issue, Spanish acquirers, for instance in the banking sector, are able to pay some 7 % more than they would otherwise be able to. However, it also recognises that as the offer price is a combination of various additional elements, the measure at issue is not the only factor, although probably one of the most decisive factors behind the aggressiveness of Spanish bidders

benefiting from the measure at issue. This party considers also that the measure provides a definite advantage to Spanish bidders in international auctions.

B.1.2. *The measure at issue favours certain undertakings or the production of certain goods*

(69) There is a clear parallel between the case at hand and the circumstances which led to the Court judgment of 15 July 2004⁽⁴²⁾. Despite the arguments put forward by the Spanish authorities that the measure at issue in the latter case is not selective because Article 37 TRLIS applies to all Spanish undertakings that invest internationally, the Court concluded that the measure constituted State aid since it was limited to one category of undertakings, namely undertakings making certain international investments. This same reasoning can be applied to Article 12(5) TRLIS. The selectivity of Article 12(5) TRLIS is therefore due to the fact that only companies acquiring shareholdings in foreign companies are eligible for this provision.

(70) Furthermore, only enterprises of a certain size and financial strength with multinational operations can benefit from Article 12(5) TRLIS. Although the company's balance sheet discloses the book values of assets, it is unlikely that it also reflects the tacit market values of assets. Therefore, in practice, only operators with a controlling interest in target companies have sufficient access to a company's records to ascertain the tacit market value of the company's assets. Consequently, the 5 % threshold favours companies that perform multinational operations.

(71) Moreover, only a Spanish operator with existing business in Spain has a Spanish tax base and can benefit from the depreciation. Therefore, only companies resident in Spain with a significant Spanish tax base can in practice benefit from it, since the potential benefit is linked to the size of the Spanish operation rather than of the acquisition. Although Article 12(5) TRLIS is drafted to apply to all operators established in Spain, in practice only a limited and identifiable number of companies with a Spanish tax base, which make foreign acquisitions in the relevant tax year and have a sizeable tax base against which to offset the financial goodwill deduction, can benefit from the application of the measure on an annual basis. As a result, the measure at issue in fact gives a different tax treatment even to Spanish operators in the same position of making acquisitions abroad.

⁽⁴²⁾ Judgment of the Court of Justice in Case C 501/00 *Spain v Commission* [2004] ECR I-6717.

(72) The two parties consider that they have not been able to identify any objective or horizontal criterion or condition that justifies the measure at issue. On the contrary, they are of the view that the basic intention of the measure is to give a benefit to certain Spanish operators. In addition, if the measure at issue is inherent to the Spanish tax system, foreign shareholdings acquired prior to that date should also qualify for the measure, which is not the case since the tax relief is granted only for shareholdings acquired after 1 January 2002.

(73) Accordingly, and in the light of Commission policy ⁽⁴³⁾, the measure at issue must be considered selective.

B.1.3. The measure at issue distorts competition and affects Community trade

(74) The measure at issue is clearly discriminatory as it gives Spanish operators a clear fiscal and monetary benefit that foreign operators are not able to enjoy. In a situation of an auction or other competitive procedure for the acquisition of a company, such an advantage makes a significant difference.

(75) Takeover bids usually presuppose the payment of a premium over the share price of the target company that would almost always result in financial goodwill. On several occasions, the financial press has reported on large acquisitions by Spanish companies and the respective tax benefits accruing from the Spanish tax rules on the amortisation of financial goodwill. For one of those acquisitions by an investment bank, the tax benefit resulting from Article 12(5) TRLIS was estimated to be EUR 1,7 billion, or 6,5 % of the offer price. Another report indicated that the Spanish acquirer had been able to bid about 15 % more than non-Spanish competitors.

(76) The measure at issue also seems to favour certain export activities (export aid for foreign share acquisitions) of Spanish companies, which is at odds with established Commission policy ⁽⁴⁴⁾ in this area.

B.1.4. The measure at issue affects State resources

(77) The measure at issue is of benefit to undertakings that meet certain requirements and enables them to reduce their tax base and thereby the amount of tax that would

normally be due in a given year if this provision did not exist. It therefore provides the beneficiary with a financial advantage, the cost of which is directly borne by the budget of the Member State concerned.

V. REACTION FROM SPAIN TO COMMENTS FROM THIRD PARTIES

(78) The Spanish authorities point out that the vast majority of third parties' comments support their point of view. Only two parties consider that the measure at issue constitutes State aid, whereas all the others conclude that Article 12(5) TRLIS does not constitute State aid within the meaning of Article 87(1) of the Treaty. Otherwise, fewer economic operators would have submitted comments. In addition, the wide range of activities and size of the interested third parties demonstrates the general nature of the measure at issue.

(79) Regarding the exceptional nature of the measure at issue, the Spanish authorities reject this qualification by recalling the common feature of goodwill and financial goodwill amortisation according to Spanish accounting rules ⁽⁴⁵⁾. In addition, the deduction of goodwill amortisation constitutes the general rule of the Spanish corporate tax system in accordance with the provisions laid down in Articles 11(4) and 89(3) TRLIS. Article 12(5) TRLIS follows the same logic. It is incorrect to present Article 12(3) TRLIS as the general rule for amortisation of financial goodwill since this Article refers to the deduction of shareholdings in non-listed entities. This provision is related to the depreciation of the theoretical accounting value and not to financial goodwill. Article 12(3) and 12(5) TRLIS are two complementary general rules: the first refers to the depreciation attributed to the losses generated by the target company, whereas the second refers to the deduction only of the part of the depreciation attributable to the depreciation of financial goodwill. Finally, the fact that no other Member State has a measure similar to the measure at issue is irrelevant since tax systems are not harmonised within the European Union.

(80) Regarding the selective nature of the measure at issue, the parallels drawn with the Court judgment of 15 July 2004 ⁽⁴⁶⁾ are incorrect since in that case the Commission had clearly defined the profile of the beneficiary, whereas in the present case this could not be done. Indeed, Article 12(5) TRLIS does not require any link between the shareholding acquisition and the export of goods and services. Therefore the measure at issue does not have the effect of increasing exports of Spanish goods or services. The fact that this non-selective measure is not available for domestic operations does not affect its general nature.

⁽⁴³⁾ See Section II.1.b) ff) of the Commission Report on the application of the State aid rules to measures relating to direct business taxation, available at http://ec.europa.eu/competition/state_aid/studies_reports/rapportaidesfiscales_en.pdf

⁽⁴⁴⁾ See Commission Decision 82/364/EEC of 17 May 1982 concerning the subsidising of interest rates on credits for exports from France to Greece after the accession of that country to the European Economic Community (OJ L 159, 10.6.1982, p. 44), in particular part IV, which refers to Cases 6/69 and 11/69 *Commission v France*.

⁽⁴⁵⁾ See ICAC Resolution No 3 of November 1996, BOICAC 27.

⁽⁴⁶⁾ See footnote 42.

In fact, the final objective of the measure at issue is the same as that of the Cross-border Tax Directive, which is to ensure that investment decisions are based on economic rather than tax considerations. Therefore, since it is possible to carry out business combinations with domestic acquisitions and not with cross-border acquisitions, treating domestic operations and cross-border operations differently is not only legally justified but also necessary in order to guarantee the neutrality of the tax system.

- (81) Regarding the alleged distorting features of the measure at issue, the Spanish authorities point out that any tax relief that reduces the operating costs of a company increases the competitive edge of the beneficiary. However, this statement is irrelevant since the measure at issue is a general measure. The different tax rates applied across the Member States, which impact on the competitiveness of their resident companies, do not fall under State aid rules. In addition, the measure at issue has not been shown to affect trade between Member States. Moreover, the consequence of amortising financial goodwill is not necessarily to increase the price offered by a competitor.
- (82) As regards the compatibility of the contested measure with the common market, the Spanish authorities consider Article 12(5) TRLIS to be appropriate and proportionate to address a market failure by establishing a neutral tax system for domestic and cross-border operations that fosters the development of pan-European companies.

VI. ASSESSMENT OF THE SCHEME

- (83) In order to ascertain whether a measure constitutes aid, the Commission must assess whether the measure at issue fulfils the conditions of Article 87(1) of the Treaty. This provision states that: 'save as otherwise provided in this Treaty, any aid granted by 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 common market'. In the light of this provision, the Commission will assess below whether the measure at issue constitutes State aid.

A. Selectivity and advantage inherent in the measure

- (84) To be considered State aid, a measure must be specific or selective in the sense that it favours only certain undertakings or the production of certain goods.

- (85) The Commission Notice⁽⁴⁷⁾ states that 'The main criterion in applying Article 92(1) [now Article 87(1)] to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified "by the nature or general scheme" of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned'.

- (86) According to the case-law of the Court of Justice⁽⁴⁸⁾, 'as regards the assessment of the condition of selectivity, which is a constituent factor in the concept of State aid, it is clear from settled case-law that Article 87(1) EC requires assessment of whether, under a particular statutory scheme, a State measure is such as to "favour certain undertakings or the production of certain goods" in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'⁽⁴⁹⁾.

- (87) The Court has also held on numerous occasions that Article 87(1) of the Treaty does not distinguish between the causes and the objectives of State aid, but defines them in relation to their effects⁽⁵⁰⁾. In particular, fiscal measures, which do not constitute an adaptation of the general system to particular characteristics of certain undertakings, but have been conceived as a means of improving their competitiveness, fall within the scope of Article 87(1) of the Treaty⁽⁵¹⁾.

- (88) The concept of State aid does not, however, apply to State measures which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of which they form part. As explained in the Commission Notice⁽⁵²⁾, 'some conditions may be justified by objective differences between taxpayers'.

⁽⁴⁷⁾ See footnote 21.

⁽⁴⁸⁾ See the judgment of the Court of Justice in Case C-143/99 *Adria-Wien*, see footnote 25, paragraph 41; judgment of the Court of Justice in Case C-308/01 *GIL Insurance* [2004] ECR I-4777, paragraph 68; judgment of the Court of Justice in Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; and the judgment of the Court of Justice in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54.

⁽⁴⁹⁾ See the judgment of the Court of Justice in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54.

⁽⁵⁰⁾ See, for instance, the judgment of the Court of Justice in Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79; judgment of the Court of Justice in Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20; judgment of the Court of Justice in Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 25; and judgment of the Court of Justice in Case C-409/00 *Spain v Commission* [2003] ECR I-10901, paragraph 46.

⁽⁵¹⁾ See, for example, the judgment of the Court of Justice in Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 101. See also the Commission Decision of 8 July 2009 on the Groeps-rentebox scheme (C 4/07, ex N 465/06), not yet published in the Official Journal, in particular recitals 75 et seq.

⁽⁵²⁾ See footnote 21.

(89) As explained in more detail in the following section, the Commission considers that the measure at issue is selective in that it only favours certain groups of undertakings that carry out certain investments abroad and that this specific character is not justified by the nature of the scheme, regardless of whether the reference system is defined as the rules on the tax treatment of financial goodwill under the Spanish tax system (see recitals 92 to 114) or as the tax treatment of goodwill deriving from an economic interest taken in a company resident in a country other than Spain (see recitals 115 to 119). The Commission considers that the measure at issue should be assessed in the light of the general provisions of the corporate tax system as applicable to situations in which the emergence of goodwill leads to a fiscal benefit (see recitals 35 to 55), essentially because the Commission considers that the situations in which financial goodwill can be amortised do not cover the whole category of taxpayers placed in a similar factual and legal situation.

(90) Moreover, even if an alternative reference system inspired by the one suggested by the Spanish authorities were chosen (see recitals 56 to 58), the Commission concludes that the measure at issue would still constitute a State aid measure essentially due to the different factual and legal conditions required for the different scenarios to benefit from the provisions on the goodwill that arises from an economic interest acquired in a company resident in a country other than Spain.

(91) Under this alternative scenario, the measure at issue is too imprecise and arbitrary as it does not set any conditions, such as the existence of specific, legally circumscribed situations which would justify different tax treatment. Consequently, situations which have not been demonstrated to be sufficiently different to justify a selective exception from general goodwill rules end up benefiting from the measure at issue. Hence the Commission considers that the measure at issue consists of tax relief for specific types of costs and covers a broad category of transactions in a discriminatory manner, which cannot be justified by objective differences between taxpayers and it therefore results in a distortion of competition⁽⁵³⁾.

A.1. *Tax treatment of financial goodwill under the Spanish tax system as regards intra-Community acquisitions*

A.1.1. *Reference system*

(92) In the initiating Decision, the Commission considered that the appropriate reference system is the Spanish

corporate tax system, in particular the rules on the tax treatment of financial goodwill contained in the Spanish tax system. This approach is in line with previous Commission practice and the case-law of the European Courts, which consider the ordinary corporate tax system as the reference system⁽⁵⁴⁾. The Spanish authorities' comments stress that the constraints on cross-border business combinations place taxpayers that buy shareholdings in domestic companies in a different legal and factual situation from those that buy shareholdings in foreign companies. According to the Spanish authorities, the reason for this situation is the existence of barriers which, following shareholdings acquisitions, do not allow Spanish investors to carry out cross-border combinations, whereas this can be done in a national context.

(93) First, as regards the existence of these alleged barriers, it should be stressed that the Spanish authorities and the 30 interested parties did not provide detailed information on the existence of such barriers and confined themselves, even in their latest submissions, to general and unsubstantiated allegations, highlighting general features such as differences arising from non-implementation of the Company Law Directive, differences concerning minority shareholders' rights, creditors' rights, labour law, the national trademark, and general political or commercial considerations. If unsubstantiated and general elements such as these could be taken into account for determining the scope of Article 87 of the Treaty, the notion of aid would run the risk of becoming largely arbitrary. Furthermore, these subjective statements are neither developed nor justified. In addition, the Spanish authorities also cite the Commission Report on the implementation of the Directive on Takeover Bids⁽⁵⁵⁾ but did not explain the link between the barriers to takeovers and the alleged barriers to cross-border business combinations.

(94) Second, as regards the nature of these alleged barriers, the Spanish authorities and the 30 parties did not explicitly identify any fiscal barrier in the common market. Since 1 January 1992, the date when Member States had to implement the Cross-border Tax Directive, tax barriers to cross-border business combinations have been removed. The tax treatment of business combinations, whether in the context of domestic or cross-border operations, is therefore considered to be harmonised. As regards non-tax barriers and in particular company law barriers attributable to the target company's country of residence, the Commission considers that since 8 October 2004, the date when Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company

⁽⁵³⁾ See footnote 52, Decision on the Groepsrentebox scheme, in particular recitals 83 et seq.

⁽⁵⁴⁾ See, inter alia, the judgment of the Court of First Instance in Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933, paragraph 82.

⁽⁵⁵⁾ See document SEC(2007) 268 of 21 February 2007.

with regard to the involvement of employees⁽⁵⁶⁾, together with Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)⁽⁵⁷⁾ or, at the latest, since the date of transposal⁽⁵⁸⁾ of the Cross-border Mergers Directive, obstacles to business combinations have been eliminated within the common market. Therefore the company law treatment of business combinations is, at least as from 15 December 2007, the same for domestic and cross-border operations. The preamble to Spanish Act No 3/2009 of 3 April 2009 on structural modifications of companies⁽⁵⁹⁾, which transposes the Company Law Directive, confirms this analysis when stating that ‘... the Spanish practice was already familiar with cross-border mergers between companies subject to the laws of different Member States ...’. The Commission has not been notified by the Spanish authorities or the 30 interested parties of any other substantiated barrier that could justify different legal treatment as in the case of the measure at issue. Although the Spanish authorities provided a list of problems⁽⁶⁰⁾ connected with constraints on cross-border business combinations on 16 June 2009, this document does not contain substantiated information or relevant factual elements that justify the discriminatory aspects of the measure at issue.

- (95) Third, the Commission observes that, in line with the case-law of the Court of Justice⁽⁶¹⁾, if the Member States do not treat cross-border business combinations in similar terms to domestic business combinations, this may constitute an infringement of the obligations arising from the Treaty. In effect, when a national law establishes a difference in treatment between companies according to the internal or cross-border nature of the merger, this is likely to deter the exercise of freedom of establishment laid down by the Treaty. More precisely, ‘such a difference in treatment constitutes a restriction within the meaning of Articles 43 and 48 of the Treaty, which is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest’⁽⁶²⁾. Moreover, it should be recalled that the discretion conferred on the Commission in the application of Article 87(3) of the Treaty does not permit it to authorise Member States

to derogate from provisions of Community law other than those relating to the application of Article 87(1) of the Treaty⁽⁶³⁾.

- (96) In the light of the above, the Commission considers that there is no reason to depart from the reference system in the initiating Decision: the appropriate reference framework for the assessment of the measure at issue is constituted by the general Spanish corporate tax system, and more precisely, by the rules on the tax treatment of financial goodwill contained in this tax system.

A.1.2. Existence of an exemption from that reference system

- (97) Under the Spanish tax system, the tax base is calculated from the accounting statement, to which adjustments are then made by applying specific tax rules. As a preliminary remark and on a subsidiary basis, the Commission notes that the measure at issue derogates from the Spanish accounting system. The appearance of financial goodwill can only be computed in abstract by consolidating the accounts of the target company with those of the acquiring company. However, under the Spanish accounting system, the consolidation of accounts is required in case of ‘control’⁽⁶⁴⁾ and is done both for domestic and foreign associations of companies, in order to provide the global situation of a group of companies subject to unitary control. Such a situation is deemed to exist⁽⁶⁵⁾, for instance, if the parent company holds the majority of the voting rights of the subsidiary company. None the less, the measure at issue does not require any such type of control and applies as from a 5 % level of shareholding. Finally, the Commission also notes that as of 1 January 2005⁽⁶⁶⁾, in line with accounting rules, financial goodwill can no longer be amortised by any company. In effect, in this connection the 30 interested parties refer to provisions⁽⁶⁷⁾ that are no longer in force under the current Spanish accounting system. As a result of Act No 16/2007 of 4 July 2007 reforming and adapting commercial law in the field of accounting for the purposes of international accounting harmonisation under EU legislation, as well as Royal Decree 1514/2007 of 16 November 2007 on the General Accounting Plan, from an accounting point of view, neither the amortisation of goodwill nor financial goodwill is allowed any more. These amendments to Spanish accounting law are in line with Regulation (EC) No 1606/2002 of the European Parliament and of the

⁽⁵⁶⁾ OJ L 294, 10.11.2001, p. 22, Directive which entered into force on 10 November 2001.

⁽⁵⁷⁾ OJ L 294, 10.11.2001, p. 1, Regulation which entered into force on 8 October 2004.

⁽⁵⁸⁾ 15 December 2007, pursuant to Article 19 of the Company Law Directive.

⁽⁵⁹⁾ Available at http://noticias.juridicas.com/base_datos/Vacatio/13-2009.html

⁽⁶⁰⁾ Non-implementation of the Cross-border Mergers Directive, minority shareholders’ rights, creditors’ rights, labour law, national trademark, local partners, regulatory system, economic synergies, political, strategic and commercial considerations.

⁽⁶¹⁾ Judgment of the Court of Justice in Case C-411/03 *SEVIC Systems* ECR I-10805, paragraphs 23-31.

⁽⁶²⁾ Judgment in Case C-411/03 *SEVIC Systems*, cited above, paragraph 23.

⁽⁶³⁾ Judgment of the Court of First Instance in Case T-184/97 *BP Chemicals Ltd v Commission* ECR II-3145, paragraph 55; see also the judgment of the Court of Justice in Cases C-134/91 and C-135/91 *Kerafina*, paragraph 20 and the judgment of the Court of Justice in Case C-225/91 *Matra SA v Commission*, paragraph 41.

⁽⁶⁴⁾ Pursuant to Article 42 of the 1885 Commercial Code.

⁽⁶⁵⁾ See Article 42(1) of the 1885 Commercial Code.

⁽⁶⁶⁾ Companies that have issued securities admitted to trading on a regulated market of any Member State within the meaning of Article 1(13) of Council Directive 93/22/EEC, pursuant to Article 4 of the Directive.

⁽⁶⁷⁾ Article 194 of Royal Decree 1564/1989 of 22 December 1989 approving the revised Law on Public Limited Liability Companies.

Council of 19 July 2002 on the application of international accounting standards⁽⁶⁸⁾. Therefore, in the light of these considerations, the measure at issue constitutes a departure from the ordinary accounting rules applicable in Spain.

(98) That being said, because of the fiscal nature of the measure at issue, the existence of an exception must be assessed in comparison to the reference tax system, and not merely on an accounting basis. In this context, the Commission notes that the Spanish tax system has never permitted the amortisation of financial goodwill, except under Article 12(5) TRLIS. In particular, no such amortisation is possible for domestic transactions. This is demonstrated by the following factors:

(99) For Spanish tax purposes, goodwill can only be booked separately following a business combination⁽⁶⁹⁾, which materialises either in case of acquisition or transfer of the assets that make up an independent business, or following a legal business combination. In such cases, the goodwill arises as the accounting difference between the acquisition cost and the market value of the assets that make up the business acquired or held by the combined company. When the acquisition of the business of a company is made by way of the acquisition of its shares, as in the case of the measure at issue, goodwill can only arise if the acquiring company combines subsequently with the acquired company, over which it will then have control.

(100) However, under the measure at issue, neither control nor the combination of the two businesses is necessary. The mere acquisition of a minimum 5 % shareholding in a foreign company is sufficient. Thus, by allowing financial goodwill, which is the goodwill that would have been booked if the companies had combined, to appear separately — even without there being a business combination — constitutes a derogation from the reference system. It must be stressed that the derogation is not due to the length of the period during which financial goodwill is amortised compared with the period that applies to traditional goodwill⁽⁷⁰⁾ but to the different treatment received by domestic and cross-border transactions. The measure at issue cannot be considered a new general accounting rule in its own right because the amortisation of financial goodwill deriving from the acquisition of domestic shareholdings is not allowed. Given all the above considerations, the Commission concludes that the measure at issue derogates from the reference system. As will be demonstrated in recitals 128 to 138, the Commission considers that neither the Spanish authorities nor the 30 interested parties have put forward sufficiently convincing arguments to alter this conclusion.

A.1.3. Existence of an advantage

(101) Under Article 12(5) TRLIS, part of the financial goodwill deriving from the acquisition of shareholdings in foreign companies can be deducted from the tax base by way of derogation from the reference system. Therefore, by reducing the tax burden of the beneficiary, Article 12(5) TRLIS provides them with an economic advantage. It takes the form of a reduction in the tax to which the companies concerned would otherwise be liable. This reduction is proportionate to the difference between the acquisition price paid and the market value of the underlying booked assets of the shareholdings purchased.

(102) The precise amount of the advantage with respect to the acquisition price paid corresponds to the net discounted value of the tax burden reduction provided by the amortisation that is deductible throughout the amortisation period following the acquisition. It is therefore contingent on the company tax rate in the corresponding years and the discount interest rate applicable.

(103) If the acquired shareholdings are resold, part of this advantage would be recouped via capital gains tax. In effect, by allowing the amortisation of financial goodwill, if the foreign shareholding in question is resold, the amount deducted would lead to an increase in the capital gains charged at the time of sale. However, in the event of these uncertain circumstances, the advantage would not disappear completely since taxation at a later stage does not take the liquidity cost into account. As rightly pointed out by the two parties, from an economic point of view, the amount of the advantage is at least similar to that of an interest-free credit line that allows up to twenty annual withdrawals of a 20th of the financial goodwill for as long as the shareholdings are held on the taxpayer's books.

(104) Taking a hypothetical example, already mentioned by the Commission in the initiating Decision, a shareholding acquired in 2002 would yield an advantage corresponding to 20,6 % of the amount of financial goodwill, assuming a discount interest rate of 5 %⁽⁷¹⁾ and considering the existing structure of corporate tax rates until 2022 as currently set by Act No 35/2006⁽⁷²⁾. The third parties have not contested these figures. If the acquired shareholdings were resold, the advantage would correspond to the interest that would have been charged to the taxpayer for a credit line with the characteristics described in the previous recital.

⁽⁶⁸⁾ OJ L 243, 11.9.2002, p. 1.

⁽⁶⁹⁾ Pursuant to Article 89(3) TRLIS.

⁽⁷⁰⁾ Pursuant to Article 11(4) TRLIS.

⁽⁷¹⁾ In accordance with the TRLIS as amended by Act 35/2006, the corporate tax rate used for the calculation was 35 % from 2002 to 2006, 32,5 % in 2007 and 30 % thereafter.

⁽⁷²⁾ Eighth additional provision, Act 35/2006 of 28 November on Personal Income Tax and partial amendment of the Laws on Corporate Tax and on Income Tax for Non-Residents and Tax on Personal Net Wealth, *Official State Gazette* No 285, 29.11.2006.

(105) Lastly, the Commission cannot accept the views of the Spanish authorities and the 30 interested parties that the final beneficiary of the measure at issue would be the seller of the foreign shareholding since it would receive a higher price. First, there is no mechanism guaranteeing that the advantage is passed on in full to the seller. Second, the acquisition price results from a series of different elements, not just from the measure at issue. Third, in the hypothetical situation that an economic advantage were transferred to the seller, as a result of the measure at issue the acquirer would increase its acquisition price, which is of the upmost importance in the case of a competitive acquisition transaction.

(106) Therefore, the Commission must conclude that, in any event, the measure at issue provides an advantage at the moment of the acquisition of foreign shareholdings.

A.1.4. Justification of the measure by the logic of the Spanish tax system

(107) The Commission considers that, under the settled case-law of the Court ⁽⁷³⁾, measures introducing a differentiation between undertakings do not constitute State aid where that differentiation arises from the nature or the overall structure of the system of charges of which they are part. This justification based on the nature or overall structure of the tax system reflects the consistency of a specific tax measure with the internal logic of the tax system in general.

(108) In this regard, the Commission considers, firstly, that the Spanish authorities have not demonstrated that the effect of the measure at issue would be to eliminate double taxation. The scheme does not in fact establish any conditions for proving that the seller has been effectively taxed on the gain derived from the transfer of the shareholding, even though such a condition is imposed for amortising the goodwill arising from a business combination ⁽⁷⁴⁾. It should be underlined that although the Spanish authorities claim not to be competent to exercise control over a foreign seller carrying out operations abroad, the Commission notes that this

condition is required for the application of other Spanish tax provisions ⁽⁷⁵⁾ but not for the measure at issue.

(109) Secondly, the contested measure does not constitute a mechanism to avoid double taxation of future dividends that would be taxed upon realisation of future profits and should not be taxed twice when distributed to the company that holds a significant shareholding for whose acquisition financial goodwill was paid. In fact, the contested measure creates no relation between the dividends received and the deduction enjoyed as a result of the measure. On the contrary, the dividends received from a significant shareholding already benefit from both the exemption provided for by Article 21 TRLIS and the direct tax neutrality provided for by Article 32 TRLIS to avoid international double taxation. In this connection, the amortisation of financial goodwill results in an additional advantage in respect of the acquisition of significant shareholdings in foreign companies.

(110) Thirdly, the Spanish authorities have not demonstrated that the measure at issue would be an extension of the impairment rules which presuppose that there is objective evidence of losses based on a detailed and objective calculation that is not required by the measure at issue. On the contrary, Article 12(3) TRLIS permits partial deductions for depreciation of equity shareholdings in domestic and foreign entities which are not listed on a secondary market for impairments occurring between the beginning and the end of the tax year. The measure at issue which, for the beneficiaries, is compatible with Article 12(3) TRLIS ⁽⁷⁶⁾, provides for further deductions over and above the decrease in the theoretical accounting value linked to impairment.

(111) Fourthly, the Commission notes that the financial goodwill deriving from the acquisition of Spanish shareholdings cannot be amortised whereas the financial goodwill of foreign companies can be amortised under certain conditions. Different tax treatment of the financial goodwill of foreign as opposed to domestic companies is a differentiation introduced by the measure at issue which is neither necessary nor proportionate in terms of the logic of the tax system. In fact, the Commission considers that it is disproportionate for the scheme at hand to impose substantially different nominal and effective taxation on companies in comparable situations just because some of them are involved in investment opportunities abroad.

⁽⁷³⁾ See Case C-88/03 *Portugal v Commission*, paragraph 81, cited in footnote 49; see the judgment of the Court of First Instance in Case T-227/01 *Territorio foral de Álava and others*, not yet published, paragraph 179; and the judgment of the Court of First Instance in Case T-230/01 *Territorio foral de Álava and others*, not yet published, paragraph 190.

⁽⁷⁴⁾ Pursuant to Article 89(3)(a)(1) TRLIS.

⁽⁷⁵⁾ See Articles 89, 21 and 22 TRLIS.

⁽⁷⁶⁾ As explicitly stated in the second subparagraph of Article 12(5): 'the deduction of this difference (i.e. Article 12(5) TRLIS) will be compatible, where appropriate, with the impairment losses referred to in paragraph 3 of this Article'.

- (112) Finally, the Spanish authorities also argue that the measure at issue is justified by the neutrality principle that must be applied in the corporate tax context⁽⁷⁷⁾. Indeed, the explanatory memorandum to the Corporate Tax Act⁽⁷⁸⁾ in force when the measure at issue was introduced made clear reference to this principle. In this connection, the Commission notes that the ‘competitiveness principle’⁽⁷⁹⁾ invoked by the Spanish authorities, who expressly refer to ‘an increase in exports’, also drives this reform. In this context, it should be recalled that according to previous Commission Decisions⁽⁸⁰⁾, it is disproportionate to grant a different effective taxation to companies in comparable situations just because they are involved in export-related activities or pursue investment opportunities abroad. In addition, the Commission recalls that as the Court stated⁽⁸¹⁾ ‘... whilst the principles of equal tax treatment and equal tax burden certainly form part of the basis of the Spanish tax system, they do not require that taxpayers in different situations be accorded the same treatment ...’.
- (113) In the light of the above, the Commission considers that the neutrality principle cannot justify the measure at issue. Indeed, as also highlighted by the two parties, the fact that the acquisition of a 5 % minority shareholding benefits from the measure at issue demonstrates that the measure would include certain situations that bear no real similarity. In this way it could be said that, under the reference system, situations which are both factually and legally different are treated in an identical manner. The Commission therefore considers that the neutrality principle cannot be invoked to justify the measure at issue.
- (114) In the light of recitals 107 to 113, the Commission concludes that the selective advantage character of the tax scheme in question is not justified by the nature of the tax system. Therefore, the contested measure must be considered to include a discriminatory element, in the form of a limitation regarding the country in which the transaction benefiting from the tax advantage takes place⁽⁸²⁾ — and this discrimination is not justified by the logic of the Spanish tax system.
- A.2. *Additional reasoning: analysis of the measure at issue under a reference system consisting of the treatment of goodwill in transactions with third countries*
- (115) The Spanish authorities have explained that the objective of the measure at issue is to avoid a difference of tax treatment between, on the one hand, an acquisition immediately followed by a business combination and, on the other hand, a share acquisition without business combination. On this basis, the scope of the contested scheme would be limited to the acquisition of significant shareholdings in a company non-resident in Spain because some obstacles would make it more difficult to perform a cross-border business combination than a local one⁽⁸³⁾. As a result of these barriers, Spanish taxpayers investing abroad would be placed, legally and factually, in a different situation from those investing in Spain. Indeed, the Spanish authorities state that⁽⁸⁴⁾: ‘In summary, the mere differential nature of certain tax measures does not necessarily imply that they are State aid, since these measures also need to be examined to see whether they are necessary or functional as regards the efficiency of the tax system, as stated in the Commission Notice. Hence the Spanish tax system envisages different tax schemes for objectively different situations, as is the case for acquisitions of shareholdings in foreign companies as against acquisitions in Spanish companies (impossible to perform merger operations, risk management, etc.) with a view to achieving the tax neutrality imposed by Spanish domestic legislation and by Community law itself, and ensuring that the logic of the Spanish tax system is consistent and efficient’.
- (116) According to the Spanish authorities, providing a specific fiscal treatment for cross-border shareholding acquisitions would be necessary to ensure the neutrality of the Spanish tax system and to avoid Spanish shareholding acquisitions being treated more favourably. Therefore, the Spanish authorities and the 30 interested parties consider that the correct reference framework for the assessment of the measure at issue would be the tax treatment of the goodwill for foreign acquisitions.
- (117) Although the Commission considers that under the present procedure the Spanish authorities and the 30 interested parties have provided insufficient evidence to justify different tax treatment of Spanish shareholding transactions and transactions between companies established in the Community (as described in recitals 92 to 96), the Commission cannot a priori completely exclude this differentiation as regards transactions concerning third countries. Indeed, outside the Community, legal barriers to cross-border business combinations may persist, which would place cross-border transactions in a different legal and factual situation from intra-Community transactions. As a result, extra-Community
- ⁽⁷⁷⁾ See, in particular, recital 48.
- ⁽⁷⁸⁾ Corporate Tax Act 43/1995, which was repealed by Royal Legislative Decree 4/2004.
- ⁽⁷⁹⁾ Defined by the Spanish authorities in the explanatory memorandum to Act 43/1995, as ‘The competitiveness principle requires the corporate tax system to support and be consistent with the economic policy measures to enhance competitiveness ..., and it also requires incentives to make businesses more international and thereby give rise to an increase in exports, to comply with this principle’.
- ⁽⁸⁰⁾ See, inter alia, the Commission Decision of 22 March 2006 on direct tax incentives in favour of export-related investments OJ C 302, 14.12.2007, p. 3, recital 51.
- ⁽⁸¹⁾ See paragraph 127 of the judgment cited in footnote 42.
- ⁽⁸²⁾ See the Commission Decision of 8 July 2009 in case C-2/07, *Groepsrentebox*, not yet published in the Official Journal, in particular recital 107.
- ⁽⁸³⁾ See the e-mail of 16 June 2009 from the Spanish authorities cited in recital 13.
- ⁽⁸⁴⁾ See, in particular, page 6 of the Spanish authorities’ letter of 22 April 2009 (A-9531), cited in recital 9.

acquisitions that could have led to the tax amortisation of goodwill — as in the case of a majority shareholding — may be excluded from this tax advantage because it is impossible to perform business combinations. Amortisation of financial goodwill for these transactions, which fall outside the Community factual and legal framework, may be necessary to ensure tax neutrality.

- (118) As the measure at issue now stands, it allows the tax amortisation of financial goodwill to arise separately, including in cases where the beneficiary acquires a 5 % shareholding, and therefore the measure at issue could constitute a derogation from the reference system, even if this were defined as in recital 117.
- (119) In this context, the Commission maintains the procedure, as initiated by the initiating Decision of 10 October 2007, open for extra-Community acquisitions in the light of new elements which the Spanish authorities have undertaken to provide as regards the obstacles to extra-Community cross-border mergers. The procedure as opened on 10 October 2007 is therefore still ongoing for extra-Community acquisitions.

B. Presence of State resources

- (120) The measure involves the use of State resources as it implies foregoing tax revenue for the amount corresponding to the reduced tax liability of the companies taxable in Spain that acquire a significant shareholding in foreign companies, for a period of minimum 20 years following the acquisition.
- (121) The foregoing of tax revenue mitigates the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect. Likewise, a measure allowing certain undertakings to benefit from a tax reduction or to postpone payment of tax normally due amounts to State aid. From a budgetary point of view and in line with the case-law of the Court ⁽⁸⁵⁾ and the Commission Notice ⁽⁸⁶⁾, the measure at issue leads to a loss of tax revenue for the State, as a resulting of the reduction in the tax base, which is equivalent to the use of State resources.
- (122) For these reasons, the Commission considers that the measure at issue involves State resources being used.

⁽⁸⁵⁾ See the judgment of the Court of Justice in Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] EC I-289.

⁽⁸⁶⁾ See footnote 21. In particular, see points 9 and 10 of the Commission Notice.

C. Distortion of competition and trade between Member States

- (123) According to the case-law of the Court ⁽⁸⁷⁾, ‘... for the purpose of categorising a national measure as prohibited State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid... In addition, it not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned’. Moreover, under settled case-law of the Court ⁽⁸⁸⁾, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. The Commission considers that the conditions set out in the case-law are fulfilled for the following reasons:
- (124) First, the measure at issue provides an advantage in terms of financing and, therefore, it strengthens the position of the economic unit that can be formed by the beneficiary and the target company. In that regard, and in line with the case-law of the Court ⁽⁸⁹⁾, the mere fact of owning controlling shareholdings in a target company and exercising that control by involving itself directly or indirectly in the management of it, must be regarded as taking part in the economic activity carried on by the controlled undertaking.
- (125) Second, the measure at issue is liable to distort competition, most clearly among European competitors, by providing a tax reduction to Spanish companies that acquire a significant shareholding in target companies. This analysis is confirmed by the fact that several companies complained or intervened after the initiating Decision to state that the measure at issue provided a significant advantage fuelling the merger appetite of Spanish companies, in particular in the context of auctions. These interventions confirm at least that a series of non-Spanish companies consider that their position on the market is affected by the measure at issue, irrespective of the correctness of their detailed submissions as regards the existence of aid.

⁽⁸⁷⁾ See footnote 42, paragraphs 139 to 143.

⁽⁸⁸⁾ Judgment of the Court of First Instance in Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717.

⁽⁸⁹⁾ See the judgment of the Court of Justice in Case C-222/04 already cited in footnote 85.

- (126) Therefore the Commission concludes that the measure at issue is liable to affect trade between Member States and distort competition, chiefly in the internal market, by potentially improving the operating conditions of the beneficiaries that are directly engaged in economic activities liable to tax in Spain.

D. The Commission's reaction to the comments received

- (127) Before concluding on the classification of the measure, the Commission considers it appropriate to analyse in more detail certain arguments raised by the Spanish authorities and by third parties which have not yet been explicitly or implicitly addressed in the sections concerning the assessment of the scheme (recitals 83 et seq).

D.1. Reaction to the data extracted from the 2006 tax returns and to the comments about the judgment of the Court of Justice in Case C-501/00

- (128) As regards the data extracted by the Spanish authorities from the 2006 tax returns in order to demonstrate that the measure at issue is not selective⁽⁹⁰⁾, the Commission underlines the general lack of precision of the information submitted. First, the data give the distribution of beneficiaries by category (activity, turnover), but do not indicate whether the beneficiaries concerned represent a small or large part of each of the categories concerned. Secondly, although statistics based on the size of the turnover of the beneficiaries could be an interesting indicator in order to demonstrate that the measure at issue applies to all companies in Spain, it must be underlined that the measure at issue is related to the acquisitions of shareholdings. This type of investment does not necessarily generate significant turnover, which implies, for example, that holding companies may be included as SMEs in the data in question. Therefore, for the data to be considered relevant, it would be necessary to take into account additional indicators, such as the total balance sheet figures, as well as whether the beneficiaries can consolidate their tax base with other Spanish taxpayers. Thirdly, the data also appear unrepresentative because they contain no indication of the level of shareholdings acquired (majority or only minority shareholdings) by the beneficiaries. Finally, the data received do not provide any indication making it possible to determine whether the conditions of the 2003 Commission Recommendation on SMEs are fulfilled⁽⁹¹⁾. Therefore the Commission considers that its conclusion that the contested aid measure is selective due to the very characteristics of the legislation in question has not been challenged by the partial and unrepresentative data provided by the Spanish authorities.

- (129) None the less, even if the arguments presented by the Spanish authorities had been complemented by additional evidence, this would not remove the selective nature of the measure at issue as only certain undertakings do benefit from the measure, also in line with the Court of Justice's judgment in case C-501/00 *Spain v Commission* ⁽⁹²⁾. Indeed, as regards the Spanish authorities' classification of the measure as a general measure⁽⁹³⁾ because it is open to any undertaking resident in Spain, it is worth recalling this judgment of the Court. That case also concerned an exception to Spanish corporate tax, more specifically a measure entitled 'deduction for export activities'. The Spanish authorities contended before the Court that the scheme was open to any undertaking with its tax domicile in Spain. However, the Court considered that the tax deduction could 'benefit only one category of undertaking, namely undertakings which have export activities and make certain investments referred to by the measure at issue' ⁽⁹⁴⁾. The Commission considers that also in the case at hand, the contested measure aims at favouring the export of capital out of Spain, in order to strengthen the position of Spanish companies abroad, thereby improving the competitiveness of the beneficiaries of the scheme.

- (130) In this respect it is noteworthy that, according to the Court of Justice, 'in order to justify the contested measures with respect to the nature or the structure of the tax system of which those measures form part, it is not sufficient to state that they are intended to promote international trade. It is true that such a purpose is an economic objective but it has not been shown that that purpose corresponds to the overall logic of the tax system. The fact that the contested measures pursue a commercial or industry policy objective, such as the promotion of international trade by supporting foreign investment, is thus not sufficient to take them outside the classification of "aid" within the meaning of Article 4(c) CS' ⁽⁹⁵⁾. In the present case, the Spanish authorities have simply declared that the measure at issue intends to promote international trade and the consolidation of companies, without proving that such a measure is justified by the logic of the system. In the light of the above, the Commission confirms its analysis that the measure at issue is selective.

D.2. Reaction to the comments on Commission practice

- (131) As regards the reference made to alleged innovative interpretation of the concept of selectivity in the present case, it should first be underlined that this approach is fully in line with the Commission's decision-making practice and the case-law of the Court as described in recital 92. Nor does the approach in this particular case depart from

⁽⁹⁰⁾ See recital 12.

⁽⁹¹⁾ OJ L 124, 20.5.2003, p. 36.

⁽⁹²⁾ See footnote 42.

⁽⁹³⁾ See, in particular, recitals 31 and 44.

⁽⁹⁴⁾ See, in particular, paragraph 120 of the judgment.

⁽⁹⁵⁾ See footnote 42, paragraph 124.

Commission Decision N 480/2007⁽⁹⁶⁾ to which the Spanish authorities refer. Indeed, this Decision took into account the specific nature of the objective pursued by referring⁽⁹⁷⁾ to the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Towards a more effective use of tax incentives in favour of R & D⁽⁹⁸⁾. In the case at hand, the contested measure does not pursue a similar objective. Moreover, unlike the present case, the Spanish measure at stake in this previous Decision did not make any distinction between national and international transactions.

- (132) Finally, as regards the derogation from the corporate tax system resulting from the implementation of Directives⁽⁹⁹⁾ such as the Parents-Subsidiary Directive or the Cross-border Interest and Royalty Payments Directive, the Commission considers that the situation resulting from the implementation of these Directives is entirely consistent with the reasoning developed in this Decision. Following harmonisation within the Community, cross-border operations within the Community and within each Member State should be considered to be in a comparable legal and factual situation. In addition, the Commission would like to underline that the Court of First Instance stated that⁽¹⁰⁰⁾: 'as Community law stands at present, direct taxation falls within the competence of the Member States, although it is settled case-law that they must exercise that competence consistently with Community law (see, in particular, Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 20) and therefore avoid taking, in that context, any measures capable of constituting State aid incompatible with the common market'.

D.3. Reaction to the comments on Article 58(1)(a) of the Treaty

- (133) Firstly, as already pointed out before, it must be borne in mind that, although direct taxation falls within competence of Member States, they must none the less exercise that competence consistently with Community law⁽¹⁰¹⁾, including the provisions of the Treaty on State aid. In other words, Article 58(1)(a) of the Treaty should be interpreted in a manner compatible with the Treaty rules on State aid including those granting control competencies to the Commission in that area.

- (134) Moreover, Article 58 of the Treaty, as invoked by the Spanish authorities, must be read together with Article 56 of the EC Treaty, which prohibits restrictions on the movement of capital between Member States. In fact, Article 58(1) of the Treaty provides that 'the provisions of Article 56 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

- (135) The possibility granted to the Member States by Article 58(1)(a) of the Treaty, of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested, has already been upheld by the Court. According to case-law prior to the entry into force of Article 58(1)(a) of the Treaty, national tax provisions which establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable⁽¹⁰²⁾ or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system⁽¹⁰³⁾. In any case, objectives of a purely economic nature cannot constitute an overriding reason of general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty⁽¹⁰⁴⁾.

- (136) Also as regards the period after the entry into force of Article 58(1)(a) of the Treaty, the Court has examined the possible presence of objectively comparable situations which could justify a legislation restricting the free movement of capital. With reference to certain tax legislations, which had the effect of deterring taxpayers living in a Member State from investing their capital in companies established in another Member State and which also produced a restrictive effect in relation to companies established in other Member States, in that they constitute an obstacle to their raising capital in the Member State concerned, the Court consistently held that such legislations could not be justified by an objective difference in situation of such a kind as to justify a difference in tax treatment, in accordance with Article 58(1)(a) of the Treaty⁽¹⁰⁵⁾.

⁽⁹⁶⁾ See footnote 24 and recital 44.

⁽⁹⁷⁾ See the Commission Decision of 14 February 2008, case N 480/07, already cited in footnote 24.

⁽⁹⁸⁾ SEC(2006) 1515, COM(2006) 728 final, section 1.2.

⁽⁹⁹⁾ See recital 47.

⁽¹⁰⁰⁾ See paragraph 123 of the judgment of the Court of Justice in Case C-501/00, cited in footnote 42.

⁽¹⁰¹⁾ See the judgment of the Court of Justice in Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; the judgment of the Court of Justice in Case C-264/96 *ICI v Colmer (HMIT)* [1998] ECR I-4695, paragraph 19; and the judgment of the Court of Justice in Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19.

⁽¹⁰²⁾ See, in particular, the judgment of the Court of Justice in Case C-279/93 *Schumacker* [1995] ECR I-225.

⁽¹⁰³⁾ See the judgments of the Court of Justice in Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305.

⁽¹⁰⁴⁾ See the judgment of the Court of Justice in Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraph 39; judgment of the Court of Justice in Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41; and the judgment of the Court of Justice in Case C-35/98 *Verkooijen*, already cited; paragraph 48.

⁽¹⁰⁵⁾ See the judgment of the Court of Justice in Case C-315/02 *Lenz* [2004] ECR I-7063; judgment of the Court of Justice in Case C-319/02 *Manninen* [2004] ECR I-7477.

(137) In any case, it must be borne in mind that Article 58(3) of the Treaty states specifically that the national provisions referred to by Article 58(1)(a) are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments ⁽¹⁰⁶⁾.

(138) In the light of the above, the Commission considers that, in the present case, domestic share acquisitions and share acquisitions of companies established in another Member State are, for the reasons highlighted above, in an objectively comparable situation and that there are no overriding reasons of general interest which could justify a different treatment of taxpayers with regard to the place where their capital is invested.

E. Conclusion on the classification of the contested measure

(139) In view of all the above considerations, the Commission considers that the measure at issue, to the extent that it applies to intra-Community acquisitions, fulfils all the conditions laid down in Article 87(1) of the Treaty and should thus be regarded as State aid.

F. Compatibility

(140) As stated in the initiating Decision, the Commission considers that the aid scheme in question does not qualify for any of the exemptions laid down in Article 87(2) and (3) of the Treaty.

(141) In the course of the procedure, the Spanish authorities and the 30 interested parties presented their arguments to demonstrate that the exemptions provided for in Article 87(3)(c) of the Treaty would apply in the case in question ⁽¹⁰⁷⁾. The two parties considered that none of the provisions of Article 87(2) or Article 87(3) of the Treaty applied in the case at hand.

(142) The exemptions in Article 87(2) of the Treaty, concerning aid of a social character granted to individual consumers, aid to make good the damage caused by

natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

(143) Nor does the exemption provided for in Article 87(3)(a) apply, which authorises aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment because the measure is not conditional on realising any type of activity in specific regions ⁽¹⁰⁸⁾.

(144) In the same way, the contested measure adopted in 2001 cannot be regarded as promoting the execution of a project of common European interest or remedying a serious disturbance in the economy of Spain, as provided for in Article 87(3)(b). Nor is its purpose to promote culture and heritage conservation as provided for in Article 87(3)(d).

(145) Finally, the measure at issue must be examined in the light of Article 87(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. In this respect, it should first be noted that the measure at issue does not fall under any of the frameworks or guidelines that define the conditions to consider certain types of aid compatible with the common market.

(146) As regards the arguments raised by the Spanish authorities and by the 30 interested parties based on the State Aid Action Plan of 2005 ⁽¹⁰⁹⁾, where they consider that certain measures can be compatible if they essentially respond to a market failure, the Commission observes that the alleged general difficulties in carrying out cross-border mergers cannot be considered a market failure.

(147) The fact that a specific company may not be capable of undertaking a certain project or transaction without aid does not necessarily mean that there is a market failure. Only where market forces would not in themselves be able to reach an efficient outcome — i.e. where not all potential gains from the transaction are realised — can a market failure be considered to exist.

⁽¹⁰⁶⁾ See the judgment of the Court of Justice in Case C-35/98 *Verkooijen*, already cited, paragraph 44.

⁽¹⁰⁷⁾ See recital 56 et seq.

⁽¹⁰⁸⁾ See other examples of previous Commission practice, such as Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1, recital 73; see also, for similar reasoning, Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, OJ L 180, 18.7.2003, p. 52, recital 105; Commission Decision 2004/77/EC of 24 June 2003 on the aid scheme implemented by Belgium — Tax ruling system for United States foreign sales corporations, OJ L 23, 28.1.2004, p. 14, recital 70.

⁽¹⁰⁹⁾ See footnote 37.

- (148) The Commission does not dispute that the costs involved in some transactions may well be higher than those in other transactions. However, since these costs are real costs that accurately reflect the nature of the projects being considered — i.e. costs relating to their different geographic location or the different legal environment in which they are to take place — it is efficient for the companies to take these costs fully into account when making their decisions. On the contrary, inefficient outcomes would arise if these real costs were ignored or, indeed, compensated by State aid. The same type of real cost differences also arise when comparing different transactions within the same country as well as when comparing cross-border transactions, and the existence of these differences does not mean that inefficient market outcomes would arise.
- (149) The examples provided by the Spanish authorities of alleged increased costs for conducting international transactions compared to national transactions are all related to real costs of conducting transactions, which should be fully taken into account by market participants in order to achieve efficient outcomes.
- (150) For a market failure to be present, essentially there would have to be externalities (positive spillovers) generated by the transactions or significant incomplete or asymmetric information leading to otherwise efficient transactions not being carried out. While these may be, theoretically, present in certain transactions, both international and national (e.g. in the context of joint R & D programmes), they cannot be considered inherently present in all international transactions, let alone in transactions of the type in question. In this respect, the Commission considers that the claim relating to market failures cannot be accepted.
- (151) Moreover it should be recalled that, when assessing whether aid can be deemed compatible with the common market, the Commission balances the positive impact of the measure in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition. The State Aid Action Plan, building on existing practice, has formalised a three-step 'balancing test'. The first two steps address the positive effects of the State aid and the third addresses the negative effects and the resulting balancing of the positive and negative effects. The balancing test is structured as follows:
- (a) assessing whether the aid is aimed at a specific objective of common interest (e.g. growth, employment, cohesion, environment or energy security);
 - (b) assessing whether the aid is well-designed to deliver the objective of common interest, i.e. whether the proposed aid addresses the market failure or other objective. For assessing this, it must be checked whether:
 - (i) State aid is an appropriate policy instrument;
 - (ii) there is an incentive effect, namely if the aid changes the behaviour of undertakings;
 - (iii) the measure is proportional, i.e. if the same change in behaviour could be obtained with less aid;
 - (c) assessing if the distortions of competition and effect on trade are limited, so that the overall balance is positive.
- (152) It is first necessary to assess whether the objective pursued by the aid can indeed be regarded as being in the common interest. Despite the alleged aim of fostering single market integration, in the present case the objective pursued by the aid is not clearly defined as it goes beyond market integration, by promoting the expansion of Spanish companies in the European market in particular.
- (153) The second step requires assessing whether the aid is properly designed to reach the specific objective of common interest. More precisely, State aid must change the behaviour of a beneficiary undertaking in such a way that it engages in activities that contribute to achieving the objective of common interest, which it would not carry out without the aid or would carry out in a limited or different way. The Spanish authorities and the 30 interested parties did not present any specific arguments demonstrating the likelihood that this incentive effect would be produced.
- (154) The third question addresses the negative effects of State aid. Even if it is well-designed to address an objective of common interest, aid granted to a particular undertaking or economic sector may lead to serious distortions of competition and trade between Member States. In this respect, the 30 interested parties consider that the aid scheme does not have an impact on the competitive situation of companies liable to corporate tax in Spain, since the financial effect of Article 12(5) would be negligible. However, as already indicated above in recitals 101 et seq., there are serious indications that the effect of Article 12(5) is far from negligible. Moreover, since the aid scheme is applicable only to foreign transactions, it clearly has the effect of focusing the distortions of competition on foreign markets.

- (155) The last step in the compatibility analysis is to evaluate whether the positive effects of the aid, if any, outweigh its negative effects. As indicated above, in this case the Spanish authorities and the 30 interested parties did not demonstrate the existence of a specific objective leading to clear positive effects. They consider, in general terms, that Article 12(5) TRLIS fulfils the Community objective of promoting cross-border transactions, without embarking on the evaluation of the potential and actual negative effects of the measure at issue. In any case, even assuming that the positive effect of the measure is to promote cross-border transactions by eliminating barriers in such transactions, the Commission considers that the positive effects of the measure do not outweigh its negative effects, in particular because the measure's scope is imprecise and indiscriminate.
- (156) In conclusion, the Commission considers that, as regards the analysis in accordance with Article 87(3)(c) in particular, the tax advantages granted under the measure at issue are not related to investment, job creation or specific projects. They simply relieve the undertakings concerned of charges normally borne by those undertakings and must therefore be considered operating aid. As a general rule, operating aid does not fall within the scope of Article 87(3)(c) since it distorts competition in the sectors in which it is granted and is at the same time incapable, by its very nature, of achieving any of the objectives laid down in that provision⁽¹¹⁰⁾. In line with the standard practice of the Commission, such aid cannot be considered compatible with the common market, as it neither facilitates the development of any activities or economic areas nor is it limited in time, degressive or proportionate to what is necessary to remedy a specific economic handicap of the areas concerned. The result of the 'balancing test' confirms this analysis.
- (157) In the light of the above, it must be concluded that the aid scheme in question, to the extent that it applies to intra-Community acquisitions, is incompatible with the common market.
- (159) Where unlawfully granted State aid is found to be incompatible with the common market, the consequence of such a finding is that the aid should be recovered from the recipients pursuant to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹¹¹⁾. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as possible. No arguments raised by the Spanish authorities or by the 30 interested parties justified a general departure from this basic principle.
- (160) Nevertheless, Article 14(1) of Regulation (EC) No 659/1999 provides that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. The case-law of the Court of Justice and Commission practice have established that an order to recover aid infringes a general principle of Community law where, as a result of the Commission's actions, the beneficiary of a measure has legitimate expectations that the aid has been granted in accordance with Community law⁽¹¹²⁾.
- (161) In its judgment in the *Forum 187* case⁽¹¹³⁾, the Court stated that 'the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted'.
- (162) The Spanish authorities and the 30 interested parties have essentially invoked the existence of legitimate expectations based, firstly, on certain Commission's replies to written parliamentary questions and, secondly, on the alleged similarity of the aid scheme with earlier measures which have been declared compatible by the Commission. Thirdly, the Spanish authorities and the 30 interested parties consider that the principle of legitimate expectation implies that the Commission can ask for recovery neither of the deductions already realised nor all outstanding deductions, up to the 20-year period established by the TRLIS.

G. Recovery of the aid

- (158) The measure at issue has been implemented without having been notified in advance to the Commission in accordance with Article 88(3) of the Treaty. Therefore, the measure, to the extent that it applies to intra-Community acquisitions, constitutes unlawful aid.

⁽¹¹⁰⁾ See the judgment of the Court of First Instance in Case T-211/05 *Italy v Commission*, not yet reported, paragraph 173; see also the judgment of the Court of First Instance in Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 48.

⁽¹¹¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹¹²⁾ See the Decisions referred to in footnote 108.

⁽¹¹³⁾ Judgment of the Court of Justice in Cases C-182/03 and C-217/03 *Forum 187 ASBL* [2006] ECR I-5479, paragraph 147; See judgment of the Court of Justice in Case C-506/03 *Germany v Commission*, not yet reported, paragraph 58; and judgment of the Court of Justice in Case C-265/85 *Van den Bergh en Jurgens BV v Commission* [1987] ECR 1155, paragraph 44.

(163) As regards the alleged similarity of the aid scheme to other measures, which have been considered not to constitute State aid, the Commission considers that the aid scheme is substantially different from the measures assessed by the Commission in its Decision of 1984 concerning Belgian coordination centres⁽¹¹⁴⁾. The measure at issue has a different scope since it does not concern intra-group activities, as in the case of the Belgian coordination centres. Moreover, the measure at issue has a different structure, which renders it selective, most notably because it only applies to transactions linked to foreign countries.

(164) As regards the impact of the Commission's declarations on legitimate expectations of the beneficiaries, the Commission considers that a distinction should be drawn between two periods: (a) the period starting from the entry into force of the measure on 1 January 2002 until the date of publication of the initiating Decision in the Official Journal on 21 December 2007; and (b) the period following the publication of the initiating Decision in the Official Journal.

(165) With reference to the first period, the Commission acknowledges its replies to the parliamentary questions by Mr Erik Meijer and Ms Sharon Bowles regarding the possible State aid nature of the measure at issue. More precisely, in reply to the parliamentary question by Mr Erik Meijer MEP, on 19 January 2006 a Commissioner answered on behalf of the Commission as follows: 'The Commission cannot confirm whether the high bids by Spanish companies are due to Spain's tax legislation enabling undertakings to write off goodwill more quickly than their French or Italian counterparts. The Commission can confirm, however, that such national legislations do not fall within the scope of application of State aid rules, because they rather constitute general depreciation rules applicable to all undertakings in Spain'⁽¹¹⁵⁾. On 17 February 2006, in reply to the parliamentary question by Ms Sharon Bowles MEP, a Commissioner answered, on behalf of the Commission, as follows: 'According to the information currently in its possession, it would however appear to the Commission that the Spanish (tax) rules related to the write off of "goodwill" are applicable to all undertakings in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules. Therefore, they do not appear to fall within the scope of application of the State aid rules'⁽¹¹⁶⁾.

(166) By these statements to Parliament, the Commission provided specific, unconditional and consistent

assurances of a nature such that the beneficiaries of the measure at issue entertained justified hopes that the goodwill amortisation scheme was lawful, in the sense that it did not fall within the scope of State aid rules⁽¹¹⁷⁾, and that any advantages derived from it could not, therefore, be subject to subsequent recovery proceedings. Although these declarations did not amount to a formal Commission decision establishing that the amortisation scheme did not constitute State aid, their effect was equivalent from the point of view of the creation of a legitimate expectation, especially in view of the fact that the applicable procedures ensuring the respect of the collegiality principle had been followed in this case. As the notion of State aid is objective⁽¹¹⁸⁾ and the Commission does not have any discretionary power as regards its interpretation — unlike what happens when assessing compatibility — any precise and unconditional statement on the Commission's behalf to the effect that a national measure is not to be considered State aid will naturally be understood as meaning that the measure was 'non-aid' from the outset (i.e. also before the statement in question). Any undertaking which had previously been uncertain as to whether or not it would in future be liable, under the State aid rules, to recovery of advantages it had obtained under the goodwill amortisation scheme arising from transactions entered into before the Commission statements could have concluded thereafter that such uncertainty was unfounded, as it could not be expected to demonstrate greater diligence than the Commission in this respect. In these specific circumstances, and bearing in mind that Community law does not require the demonstration of a causal link between the assurances given by a Community institution and the behaviour by citizens or undertakings to which such assurances relate⁽¹¹⁹⁾, any diligent entrepreneur could reasonably expect the Commission subsequently not to impose any recovery⁽¹²⁰⁾ as regards measures which it had itself previously classified, in a statement to another Community institution, as not constituting aid, irrespective of when the transaction benefiting from the aid measure was concluded.

(167) Accordingly, the Commission concludes that the beneficiaries of the contested measure had a legitimate expectation that the aid would not be recovered and hence it is not requiring recovery of the fiscal aid granted to those

⁽¹¹⁴⁾ Commission Decision SG(84) D/6421 of 16 May 1984.

⁽¹¹⁵⁾ Written Question E-4431/05.

⁽¹¹⁶⁾ Written Question E-4772/05.

⁽¹¹⁷⁾ On the principle of legitimate expectation, see the judgment of the Court of Justice in *Van den Bergh en Jurgens BV v Commission*, already cited, paragraph 44; judgment of the Court of Justice in Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL v Commission* [2006] ECR I-5479, paragraph 147; and judgment of the Court of First Instance in Case T-290/97 *Mehibab Dordtselaan v Commission* [2000] ECR II-15, paragraph 59.

⁽¹¹⁸⁾ Judgment of the Court of Justice in Case C-487/06 P *British Aggregates v Commission*, paragraphs 111-114 and 185 and 186; judgment of the Court of First Instance in Case T-98/00 *Linde v Commission*, paragraph 33.

⁽¹¹⁹⁾ i.e. it is not necessary to demonstrate that the individual or undertaking engaged in activities which it might not otherwise have done, in reliance on the assurance in question.

⁽¹²⁰⁾ See, by analogy, the Commission Decision of 17 February 2003 on Belgian coordination centres (2003/757/EC) and the Commission Decision of 20 December 2006, GIE Fiscaux (C 46/2004).

beneficiaries in the context of any shareholdings held by a Spanish acquiring company, directly or indirectly in a foreign company before the date of publication⁽¹²¹⁾ in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 88(2) of the Treaty, which could have then benefited from the measure at issue. Indeed, as of the date of the opening of the formal investigation and in line with its practice⁽¹²²⁾, the Commission considers that any diligent trader should have taken into account the doubts it expressed as regards the compatibility of the measure at issue.

(168) The Commission also considers that those beneficiaries should continue to enjoy the benefits of the measure at issue until the end of the amortisation period established by the measure. The Commission acknowledges that the operations were planned and investments were made in the reasonable and legitimate expectation of a certain degree of continuity in the economic conditions, including the measure at issue. Therefore, in line with previous case-law of the Court of Justice and Commission practice⁽¹²³⁾, in the absence of an overriding public interest⁽¹²⁴⁾, the Commission considers that the beneficiaries should be allowed to continue enjoying the benefits of the measure at issue, over the entire amortisation period provided for by Article 12(5) TRLIS.

(169) Moreover, the Commission considers that a reasonable transition period should be envisaged for companies which had already acquired, in a long-term perspective, rights in foreign companies and which had not held those rights for an uninterrupted period of at least 1 year on the date of the publication of the initiating Decision. The Commission therefore considers that companies who fulfilled all other relevant conditions of Article 12(5) TRLIS (see recital 21) by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year, should also benefit from legitimate expectations, if they held those rights for an uninterrupted period of at least 1 year by 21 December 2008.

(170) On the other hand, in cases where the Spanish acquiring company did not hold the rights directly or indirectly until after 21 December 2007, any incompatible aid

will be recovered from this beneficiary unless, firstly, before 21 December 2007 an irrevocable obligation was entered into by a Spanish acquiring company to hold such rights; secondly, the contract contained a suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and, thirdly, the operation had been notified before 21 December 2007. In fact, after the publication of the initiating Decision in the *Official Journal*, it cannot be argued that a prudent trader could not have foreseen the adoption of a Community measure that could affect his interests like the present Decision. In the light of the above, the Commission concludes that the recovery shall take place with respect to all cases not covered by recitals 167 and 169 of this Decision. The Commission also considers that the measure at issue does not constitute aid if, at the time the beneficiaries enjoyed its benefits, all the conditions laid down in legislation adopted pursuant to Article 2 of Regulation (EC) No 994/98 and applicable at the time the tax deduction was enjoyed were met.

(171) In the light of the above considerations, in a given year, for a given beneficiary, the precise amount of the aid corresponds to the net discounted value of the tax burden reduction granted by the amortisation under Article 12(5) TRLIS. It is therefore contingent on the company tax rate in the years concerned and on the discount interest rate applicable.

(172) For a given year and a given beneficiary, the nominal value of the aid corresponds to the tax reduction granted by the application of Article 12(5) TRLIS for rights in foreign companies that do not fulfil the conditions described in recitals 167 and 169.

(173) The discounted value is calculated by applying the interest rate to the nominal value, in accordance with Chapter V of Regulation (EC) No 794/2004, as amended by Regulation (EC) No 271/2008.

(174) When calculating the tax burden of beneficiaries in the absence of the unlawful aid measure, the Spanish authorities must base themselves on the transactions that were carried out in the period prior to publication of the initiating Decision in the *Official Journal*, as indicated above. It is not possible to argue that, had these illegal advantages not existed, the beneficiaries would have structured their transactions differently in order to reduce their tax burden. As clearly stated by

⁽¹²¹⁾ See footnote 1.

⁽¹²²⁾ See, inter alia, Commission Decision 2007/375/EC of 7 February 2007 concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia implemented by France, Ireland and Italy (OJ L 147, 8.6.2007, p. 29) and the Commission Decision of 24 June 2003 on the aid scheme implemented by Belgium, already cited, recital 79.

⁽¹²³⁾ See Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25), and the judgment of the Court of Justice in Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL*, paragraphs 162 and 163.

⁽¹²⁴⁾ See the judgment in the *Forum 187* case, already cited, paragraph 149; see also the judgment of the Court of Justice in Case 74/74 *CNTA v Commission* [1975] ECR 533, paragraph 44.

the Court in the *Unicredito* judgment⁽¹²⁵⁾, these hypothetical considerations cannot be taken into account for the purposes of calculating aid.

VII. CONCLUSION

- (175) The Commission considers that, in the light of the above-mentioned case-law and the specificities of the case, Article 12(5) TRLIS constitutes a State aid scheme within the meaning of Article 87(1) of the Treaty to the extent that it applies to intra-Community acquisitions. The Commission also finds that the measure at issue, having been implemented in breach of Article 88(3) of the Treaty, constitutes an unlawful aid scheme to the extent that it applies to intra-Community acquisitions. However, given the presence of legitimate expectations until the publication date of the initiating Decision, the Commission exceptionally waives recovery for any tax benefits deriving from the application of the aid scheme for aid linked to shareholdings held directly or indirectly by a Spanish acquiring company in a foreign company before the date of publication in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 88(2), except where, firstly, before 21 December 2007 an irrevocable obligation has been entered into by a Spanish acquiring company to hold such rights; secondly, the contract contained a suspensive condition linked to the fact that the operation at stake is subject to the mandatory approval of a regulatory authority and, thirdly, the operation had been notified before 21 December 2007.
- (176) The Commission maintains the procedure initiated on 10 October 2007 open as regards extra-Community operations in view of new elements that the Spanish authorities have undertaken to provide,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid scheme implemented by Spain under Article 12(5) of Royal Legislative Decree No 4/2004 of 5 March 2004, consolidating the amendments made to the Spanish Corporate Tax Act, unlawfully put into effect by the Kingdom of Spain in breach of Article 88(3) of the Treaty is incompatible with the common market as regards aid granted to beneficiaries in respect of intra-Community acquisitions.

2. None the less, tax reductions enjoyed by the beneficiaries in respect of intra-Community acquisitions, by virtue of Article 12(5) TRLIS, which are related to rights held directly or indirectly in foreign companies fulfilling the relevant conditions of the aid scheme by 21 December 2007, apart

from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year, can continue to apply for the entire amortisation period established by the aid scheme.

3. Tax reductions enjoyed by beneficiaries in respect of intra-Community acquisitions, by virtue of Article 12(5) TRLIS which are related to an irrevocable obligation entered into before 21 December 2007 to hold such rights where the contract contains a suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and where the decision and the operation has been notified before 21 December 2007, can continue to apply for the entire amortisation period established by the aid scheme for the part of the rights held as of the date when the suspensive condition is lifted.

Article 2

The tax reduction granted by the scheme referred to in Article 1 does not constitute aid provided that at the time it was granted it fulfilled the conditions laid down by legislation adopted pursuant to Article 2 of Regulation (EC) No 994/98 and applicable at the time the aid was granted.

Article 3

The tax reduction granted by the scheme referred to in Article 1 which, at the time it was granted, fulfilled the conditions laid down by legislation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by any other aid scheme then in force, is compatible with the common market, up to maximum aid intensities applicable to that type of aid.

Article 4

1. Spain shall recover the incompatible aid corresponding to the tax reduction under the scheme referred to in Article 1(1) from the beneficiaries whose rights in foreign companies, acquired in the context of intra-Community acquisitions, do not fulfil the conditions described in Article 1(2).

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004, as amended by Regulation (EC) No 271/2008.

4. Spain shall cancel any outstanding tax reduction provided under the scheme referred to in Article 1(1) with effect from the date of adoption of this Decision, except for the reduction attached to rights in foreign companies fulfilling the conditions described in Article 1(2).

⁽¹²⁵⁾ Judgment of the Court of Justice in Case C-148/04 *Unicredito Italiano Spa v Agenzia delle Entrate* [ECR] 2005 I-11137, paragraphs 117 to 119.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. Spain shall ensure that this Decision is implemented within 4 months of the date of notification of this Decision.

Article 6

1. Within 2 months of notification of this Decision, Spain shall submit the following information:
 - (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;
 - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
 - (c) a detailed description of the measures already taken and planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiaries have 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 granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, upon request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information about the amounts of aid and interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 28 October 2009.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

List of the interested parties that submitted comments on the initiating Decision and have not asked to remain anonymous

Abertis Infraestructuras SA
Acerinox SA
Aeropuerto de Belfast SA.
Altadis SA, Fomento de Construcciones y Contratas SA
Amey UK Ltd
Applus Servicios Tecnológicos SL
Asociación Española de Banca (AEB)
Asociación Española de la Industria Eléctrica (UNESA)
Asociación de Empresas Constructoras de Ámbito Nacional (SEOPAN)
Asociación de Marcas Renombradas Españolas
Asociación Española de Asesores Fiscales
Amadeus IT Group SA
Banco Bilbao Vizcaya Argentaria (BBVA) SA
Banco Santander SA
Club de Exportadores e Inversores Españoles
Compañía de distribución integral Logista SA
Confederacion Española de Organizaciones Empresariales
Confederacion Española de la Pequeña y Mediana Empresa (CEPYME)
Ebro Puleva SA
Ferroviai Servicios SA
Hewlett-Packard Española SL
La Caixa SA,
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Norvarem SA
Prosegur Compañía de Seguridad SA
Sociedad General de Aguas de Barcelona SA (Grupo AGBAR)
Telefónica SA

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