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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2016/2326

of 21 October 2015

on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat

(notified under document C(2015) 7152)

(Only the French text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 19 June 2013, the Commission sent an information request to the Grand Duchy of Luxembourg requesting detailed information on the country's tax ruling practice ⁽³⁾.
- (2) By letter of 17 July 2013, the Luxembourg authorities responded in general terms to that letter and provided part of the requested information. In particular, the response contained a description of the legal principles and national rules that bind the Luxembourg tax administration (*Administration des contributions directes*) when issuing tax rulings ⁽⁴⁾, the procedure to obtain a tax ruling, the information that needs to be submitted by the taxpayer and whether the rulings issued by the tax administration are published. The Luxembourg authorities did not respond to the Commission's request to provide a list of tax rulings issued in 2010, 2011 and 2012 by its tax

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used in this Decision.

⁽²⁾ OJ C 369, 17.10.2014, p. 37.

⁽³⁾ That letter was sent under reference number HT.4020 — *Pratiques en matière de ruling fiscal*.

⁽⁴⁾ In its letters, the Luxembourg authorities refer to the term '*décision anticipative*' as opposed to 'tax ruling'. Both terms, however, refer to the same type of procedure giving the taxpayer some degree of certainty regarding how the corporate income tax law will be applied in a given set of circumstances. In this Decision, the term 'tax ruling' will be used, but it is meant to have the same meaning as '*décision anticipative*'.

administration, including other relevant information such as the name of the companies, the activity of the companies, the date of the rulings, the duration of the rulings and the type of transaction covered by the rulings.

- (3) By letter of 30 August 2013, the Commission sent a reminder to the Luxembourg authorities requesting that a list of tax rulings issued in 2010, 2011 and 2012 be provided ⁽⁵⁾.
- (4) By letters of 20 and 23 September 2013, the Luxembourg authorities expressed their regret that certain information regarding the Commission's request for information had appeared in the press. In addition, they questioned the legal basis for the Commission's request for information.
- (5) By letter of 2 October 2013, the Commission replied to the Luxembourg authorities, indicating the legal basis for its *ex officio* investigation into Luxembourg's tax ruling practice and granting a further extension of the deadline to submit the requested list of tax rulings.
- (6) On 11 October 2013, a meeting was held between the Luxembourg authorities and the Commission, followed by a letter from the Luxembourg authorities dated 14 October 2013 where those authorities expressed their doubts that the legal basis invoked by the Commission could cover the wide and general nature of the information request. The Commission replied to that letter by letter of 15 October 2013.
- (7) A further exchange of letters took place between the Luxembourg authorities (letters dated 11 November and 2 December 2013) and the Commission (letters dated 14 November and 12 December 2013), in which the Luxembourg authorities explained that due to the formation of a new government they could not respond to the Commission's request for information. Accordingly, the Commission granted an extension of the deadline to reply until 15 January 2014, including in both letters a reference to the fact that the Commission could be obliged to adopt an information injunction decision in case of non-compliance with its information request.
- (8) By letter of 15 January 2014, the Luxembourg authorities submitted 22 tax rulings relating to the period 2010-2013, but the taxpayers' names had been redacted from those rulings. According to the Luxembourg authorities, those 22 rulings — one of which related to an advance pricing arrangement with a company referred to as 'FFT' (hereinafter: the 'FFT APA' or the 'contested tax ruling') — were representative of the Luxembourg tax ruling practice.
- (9) The FFT APA contained the following documents ⁽⁶⁾:
 - (a) a letter by [the tax advisor] (*) on behalf of its client FFT dated 14 March 2012, containing a request for the agreement of the Luxembourg tax administration on an advance transfer pricing arrangement;
 - (b) a transfer pricing report containing a transfer pricing analysis, prepared by the tax advisor in support of FFT's APA request (hereinafter: the 'transfer pricing report');
 - (c) a letter by the Luxembourg tax administration dated 3 September 2012 by which that administration agreed to the transfer pricing arrangement proposed by the tax advisor.
- (10) By letter of 7 March 2014, the Commission requested the Luxembourg authorities to confirm that the taxpayer referred to as 'FFT' in the FFT APA was 'Fiat Finance and Trade Ltd'. The Commission also indicated that, based on the information submitted, it could not exclude that the FFT APA represented incompatible State aid in favour of FFT. The Commission requested the Luxembourg authorities to provide additional information which would be relevant for the assessment of the FFT APA. As the Luxembourg authorities did not reply to that letter, the Commission sent a reminder on 7 April 2014 ⁽⁷⁾.

⁽⁵⁾ This letter was sent under case number SA.37267 (2013/CP) — *Pratiques en matière de ruling fiscal* — LU.

⁽⁶⁾ The Luxembourg authorities had blackened selected information, in particular the names of companies and subsidiaries.

^(*) Parts of this text have been hidden so as not to divulge confidential information; those parts are enclosed in square brackets.

⁽⁷⁾ As regards the Commission investigation on FFT, the Commission opened a new case number and sent the reminder of 7 April 2014 and all following communication under case number SA.38375 (2014/CP) — Luxembourg — *Aide présumée à FFT*.

- (11) On 24 April 2014, the Luxembourg authorities replied to the letter of 7 March 2014 and confirmed that they had no additional relevant information necessary for the assessment of the FFT APA. As regards the question whether FFT referred to Fiat Finance and Trade Ltd, the Luxembourg authorities referred to secrecy provisions under Luxembourg law and argued that those provisions prohibited them from confirming the identity of the taxpayer in question.
- (12) On 24 March 2014, the Commission issued an information injunction decision on the basis of Article 10 of Council Regulation (EC) No 659/1999 ⁽⁸⁾, requesting from the Luxembourg authorities the list of tax rulings referred to in recital 2.
- (13) On 11 June 2014, the Commission adopted the decision to initiate the formal investigation procedure under Article 108(2) TFEU on the FFT APA (hereinafter: the 'Opening Decision') ⁽⁹⁾. The Opening Decision was combined with an information injunction decision, enjoining Luxembourg to provide within one month of receipt of the letter all documents, information and data needed for the assessment of the existence and compatibility of the potential aid measure. In particular, the Commission required Luxembourg to confirm the identity of the beneficiary of the measure.
- (14) By letter of 14 July 2014, Luxembourg submitted its comments on the Opening Decision. It also indicated that as the Commission could not identify any State aid measure, it did not have to answer the questions of the Opening Decision or the information injunction.
- (15) On 14 August 2014, the Commission requested Luxembourg to provide the missing information referred to in the Opening Decision and the information injunction. The Commission also asked Luxembourg to authorise the Commission to address its outstanding questions directly to FFT in accordance with Article 6a of Regulation (EC) No 659/1999.
- (16) On 3 September 2014, Luxembourg provided a partial reply to the outstanding questions and indicated that part of the requested information constitutes business secrets of FFT which is not in the possession of the Luxembourg authorities. Luxembourg further confirmed that FFT indeed refers to the company 'Fiat Finance and Trade Ltd.' and it authorised the Commission to address its questions to FFT directly.
- (17) On 17 October 2014, the Opening Decision was published in the *Official Journal of the European Union* ⁽¹⁰⁾. The Commission invited interested parties to submit their comments on the measure. By letter of 30 October 2014, it received comments from FFT.
- (18) On 22 December 2014, Luxembourg submitted a list of beneficiaries of tax rulings to comply with the request for information in the Commission's letter of 19 June 2013. That document lists the rulings issued by the Luxembourg tax administration during the years 2010 to 2012.
- (19) By letter of 5 January 2015, Luxembourg submitted its comments on third party comments on the Opening Decision.
- (20) On 12 February 2015, the Commission adopted a decision informing Luxembourg that, in accordance with Article 6a of Regulation (EC) No 659/1999, it had identified that the formal investigation procedure on the contested ruling was ineffective to date. On this basis, and with the authorisation of Luxembourg ⁽¹¹⁾, the Commission could address its questions to FFT directly.

⁽⁸⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p.1). Regulation (EC) No 659/1999 is repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9) with effect from 14 October 2015. All the procedural steps taken during the course of the proceedings were adopted under Regulation (EC) No 659/1999. Any reference to Regulation (EC) No 659/1999 may be construed as a reference to Regulation (EU) 2015/1589 and should be read in accordance with the correlation table in Annex II to the latter regulation.

⁽⁹⁾ See footnote 2.

⁽¹⁰⁾ See footnote 2.

⁽¹¹⁾ See recital 16.

- (21) By letters of 20 February 2015, the Commission sent an information request to Luxembourg and FFT. The information request sent to FFT was based on Article 6a(6) of Regulation (EC) No 659/1999.
- (22) By letter of 24 February 2015, Luxembourg replied to the Commission's decision of 12 February 2015, expressing its surprise as to the development of the procedure in this case and its doubts as to the appropriateness to declare the procedure ineffective given the large amount of information Luxembourg provided to the Commission in the course of the investigation.
- (23) By emails of 26 February and 3 March 2015, FFT asked for some clarifications on the request for information and an extension of the deadline to respond, which was granted by the Commission by email of 5 March 2015.
- (24) By letter of 5 March 2015, the Commission replied to Luxembourg's letter of 24 February 2015.
- (25) On 23 March 2015 ⁽¹²⁾, the Commission requested Luxembourg, in response to the list of tax rulings provided by its authorities on 22 December 2014, to provide additional information regarding the rulings listed for the years 2010 to 2012. In particular, the Commission requested that Luxembourg specify which of the rulings listed concern a treasury function and which of the rulings listed concern non-integrated or stand-alone companies. The Commission also requested Luxembourg to provide a number of the rulings concerning specific corporate groups.
- (26) By letter of 24 March 2015, Luxembourg replied to the Commission's request for information of 20 February 2015 ⁽¹³⁾.
- (27) By letter of 31 March 2015, FFT replied to the Commission's request for information of 20 February 2015. The submission contained, inter alia, the transfer pricing policy guidelines of the Fiat group.
- (28) On 23 April 2015, Luxembourg submitted additional information on 1 900 rulings of the rulings listed in its response of 22 December 2014. Luxembourg indicated that three of the rulings listed concern a treasury function, two of which were granted in 2010 and one of which was granted in 2011. On 23 March 2015, the Commission requested two of those rulings because they concerned companies listed in Commission's request of 23 March 2015.
- (29) On 27 April 2015, a meeting took place between FFT, the Luxembourg authorities and the Commission.
- (30) On 4 June 2015, Luxembourg submitted the additional information requested by the Commission on 23 March 2015 on 5 327 of the rulings listed in its response of 22 December 2014. In particular, Luxembourg indicated that ten more rulings concern treasury functions [...]. In addition, a ruling concerning company G was provided to the Commission on 25 June 2015.
- (31) On 18 June 2015, Luxembourg provided a ruling concerning company E (ruling of 2011).
- (32) By letter of 10 July 2015, Luxembourg advanced a line of argumentation according to which the Commission, in case of a final negative decision, should be prevented from recovering any aid from the beneficiary retroactively, i.e. from the date of the tax ruling.
- (33) On 15 July 2015, a meeting took place between the Chief Financial Officer of Fiat Chrysler Automobiles NV, the successor of Fiat SpA, the Luxembourg authorities and the Commission.

⁽¹²⁾ Under case number SA.37267 — *Pratiques en matières de ruling fiscal* — Luxembourg

⁽¹³⁾ The letter of 24 March 2015 was provided to the Commission on 24 March 2014 and again on 26 March 2015.

2. DESCRIPTION OF THE AID MEASURE

2.1. Description of the beneficiary

- (34) FFT is part of the Fiat group. At the time of the contested tax ruling, the Fiat group was composed of Fiat SpA, incorporated in Italy with its head office in Turin, and all companies controlled by Fiat SpA (hereinafter collectively referred to as 'Fiat' or 'Fiat group'). Following a merger of Fiat SpA with and into Fiat Investments NV on 12 October 2014, Fiat Chrysler Automobiles NV became the successor of Fiat SpA ⁽¹⁴⁾
- (35) Fiat carries out industrial and financial services activities in the automobile sector. The Commission refers to recitals 20 and 21 of the Opening Decision for a more detailed description of Fiat's activities.
- (36) FFT provides treasury services and financing to the Fiat group companies based (mainly) in Europe (excluding Italy) and also manages several cash pool structures for the Fiat group companies based in the United Kingdom, Denmark, Belgium, the Netherlands, Switzerland, Austria, Germany and Spain. FFT operates from Luxembourg, where its head-office is located, and through two branches, one based in London, United Kingdom and one in Madrid, Spain.
- (37) The transfer pricing report provided by Luxembourg to the Commission on 15 January 2014 contains the information about FFT, summarised in recitals 38 to 51 ⁽¹⁵⁾.
- (38) Fiat decided to centralise its financial and treasury functions, where all funding, corporate finance, bank relationship, foreign exchange and interest rate risk management, cash pooling, money market operations, cash balances management, collection and payment initiation are performed by 'the treasury companies'.
- (39) The treasury companies are organised as follows:
- Fiat Finance SpA (hereinafter 'FF') is the Italian-based treasury company in charge of the coordination of the financing operation for the Fiat group companies based in Italy,
 - FFT performs treasury functions for the Fiat group companies based in Europe (excluding Italy),
 - Fiat Finance North America, Inc. (hereinafter 'FFNA') performs treasury functions for the US-based Fiat group companies,
 - Fiat Finance Canada Ltd. (hereinafter 'FFC') performs treasury functions for the Canada-based Fiat group companies,
 - Fiat Finanças Brasil Ltda (hereinafter 'FFB') performs treasury functions for the Brazilian-based Fiat group companies.
- (40) Cross-border intra-group transactions in which FFT is involved may be grouped into two main categories:
- Transactions between treasury companies (Intra-Sector)
 - T1 — intercompany loans from FFT to FF: FFT sources of funding rely on bonds, banks credit lines and intercompany deposits,
 - T2 — intercompany loans from FFNA to FFT: FFNA sources of funding mostly rely on bond issued with guarantee,

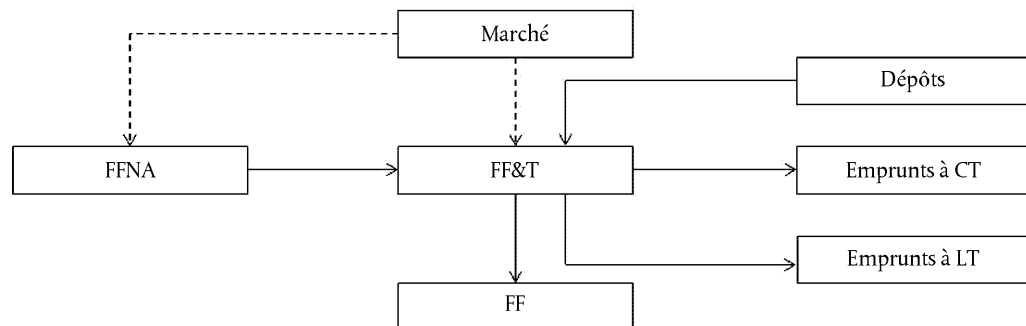
⁽¹⁴⁾ See Annual Report of Fiat Chrysler Automobiles for the financial year 2014. References in this Decision to Fiat SpA. may be construed as references to Fiat Chrysler Automobiles NV and vice versa.

⁽¹⁵⁾ The transfer pricing report refers at some points to FFT and at other points to 'FF&T' when referring to the same entity.

- Transactions between treasury companies and the Fiat group companies (Intra-group)
- T3 — transactions (loans/deposits) between FFT and the group companies located in other countries (mostly European),
- T4 — guarantees provided by Fiat S.p.A ⁽¹⁶⁾ on the bonds issued by FFT and FFNA, bilateral credit lines and ad hoc financing programmes (i.e. *Billets de Trésorerie* in France for FFT).

(41) The figure below illustrates the financing operations (from T1 to T3)

Main cross-border Intra-group transactions



- (42) As regards functions performed, FFT is involved in market funding and liquidity investments; relations with financial market actors; financial coordination and consultancy services to the group companies; cash management services to the group companies; short-term ('S/T') and medium-term ('M/T') inter-company funding; and coordination with the other treasury companies.
- (43) As regards market funding and liquidity investments, FFT raises funds to make them available to support the operations and growth of the group companies and invest them accordingly. In relation to the management of financial risks, FFT follows the guidelines established by the relevant internal group policies (foreign exchange risk and interest rate risk). FFT funding comes from instruments such as bond issuance (via a 'Global Medium-Term Note' or the 'GMTN' programme in which FFT, together with FFNA and FFC, is an issuer), bank term loans, committed and uncommitted credit lines, etc. For liquidity management, FFT invests surplus cash with top-ranked banking institutions or highly-rated liquidity funds.
- (44) With regard to the exposure to currency risk, FFT manages foreign exchange exposure mainly by using forward foreign exchange contracts and currency swaps. Interest rate exposure is substantially linked to the different duration of liabilities and assets and management. FFT mainly employs Interest Rate Swaps (hereinafter: 'IRS') and Forward Rate Agreements (hereinafter: 'FRA').
- (45) With regard to relations with financial market actors, FFT, in coordination with FF, deals with the financial markets and institutions to provide them with group information and data which supports the group's credit-worthiness and financial position.
- (46) Within financial coordination and consultancy services to the group companies, FFT is responsible for providing financial assistance to the group companies, examining their financial needs, identifying the best financial solution, setting up the financial contracts and monitoring the performance of the financial products with respect to the needs of the group companies.
- (47) The cash flows, funding requirements and liquidity of the group companies are monitored by FFT to optimise the efficiency and effectiveness of the management of the group's capital resources. FFT manages cash pooling

⁽¹⁶⁾ The description of the functions carried out 'by Fiat SpA' contained in the version of the contested tax ruling submitted by Luxembourg as described in the Opening Decision was partially blackened out. The phrase 'by Fiat SpA' was added to this description based on the non-edited version of that ruling, provided by Luxembourg on 24 March 2014.

structures in the United Kingdom, Denmark, Belgium, the Netherlands, Switzerland, Austria, Germany, and Spain. On a daily basis, balances by country are centralised into a central FFT master account to manage the whole financial position. More specifically, during the day group companies accounts (held with banks) collect and pay as per normal activity. At the end of the day, account balances of the group companies have a positive or negative position. In both cases, account balances are automatically covered by the FFT master account open in every country. Then, through manual transfers, the amounts of different country master accounts are redirected (in or out) in a single master account. Therefore, on a daily basis, the group companies' current accounts are reset to zero. Depending on the daily current account position, group companies' participants in the cash pooling schemes will be credited or debited for interest calculated following an intercompany pricing grid.

- (48) The interest rate on intra-group loans is set as the sum of the group's weighted average cost of capital ('WACC') and a margin. The deposit interest rate is set at the risk-free rate increased by a margin on short-term deposits with banks as defined by the group liquidity policy.
- (49) Regarding S/T and M/T inter-company funding and coordination with the other treasury companies, FFT proceeds as follows: for the former, FFT makes available to the group companies funds which have been sourced in large volumes at wholesale conditions on regulated markets (bonds market) or through negotiation with financial institutions; for the latter, transfers of funds are recurrent between the treasury companies to meet the financial requests of the group companies without recurring to the market, when the overall financial position of the group is positive.
- (50) The main risks generally faced by the treasury companies outlined in the transfer pricing report are as follows:
- Market risk: FFT regularly assesses its exposure to interest rate and foreign exchange risk (to be fully hedged) and hedges those risks through the use of derivative financial instruments in accordance with the group risk management policies. The instruments used for those hedges are mainly plain vanilla currency swaps, forward contracts and interest rate swaps.
 - Credit risk relative to bank deposits or other similar short-term investments: the transfer pricing report asserts that this risk is mitigated as FFT deals only with major financial institutions and diversifies the allocation of cash. Group assets are not exposed to this risk, since the group has interest to financially support all the group companies ⁽¹⁷⁾; over time, there would not have been any insolvency cases within the group; group companies do not register allowances for doubtful accounts for group debt.
 - Counterparty risk relative to the derivative assets held with third parties (banks): this risk is mitigated since FFT deals only with major financial institutions and the derivative business is allocated among many institutions. Group assets are not exposed to this risk for the reasons mentioned above.
 - Operational risk: FFT performs its financial operations in line with the guidelines and procedures set by Fiat SpA. Financial activities are constantly monitored and subject to risk management control procedures to avoid any failure in the daily process.
- (51) FFT manages a significant amount of financial assets, which are mainly related to intercompany loans, account receivables from group companies and, in a smaller portion, to bank deposits. FFT uses IT systems, which are necessary to perform the day-to-day operations and to monitor financial market performance.

2.2. The contested tax ruling

- (52) This Decision concerns the FFT APA, a tax ruling on transfer pricing granted by Luxembourg to FFT by letter of 3 September 2012. The contested tax ruling endorses a method for arriving at a profit allocation to FFT within the Fiat group, as proposed by the latter's tax advisor, and enables FFT to determine its corporate income tax liability to Luxembourg on a yearly basis.

⁽¹⁷⁾ The transfer pricing report does not contain a justification for this statement.

2.2.1. *The FFT APA*

- (53) The documents provided by Luxembourg to the Commission as constituting all the essential elements to support the contested tax ruling consist of the two letters and the transfer pricing report referred to in recital 9.
- (54) By letter of 3 September 2012, the Luxembourg tax administration confirmed that 'the transfer pricing analysis hereafter has been realised in accordance with the Circular 164/2 of the 28 January 2011 and respects the arm's length principle' (sic). In other words, the Luxembourg tax administration accepted that the tax advisor's transfer pricing analysis in the transfer pricing report resulted in an arm's length remuneration for the functions performed and the risk borne by FFT. The 'arm's length remuneration' of FFT, as established in the transfer pricing report and accepted by the contested tax ruling, is as follows: 'the transfer pricing study determines an appropriate remuneration on the capital at risk and the capital aimed at remunerating the functions performed by the company of EUR 2,542 million on which a range of +/- 10 % is envisaged.' On the net profits earned by FFT on the basis of this remuneration, the standard corporate tax rate in Luxembourg of 28,80 % is applied. The letter further states that the decision of the tax administration is binding for 5 years (i.e. from tax year 2012 to tax year 2016) ⁽¹⁸⁾.

2.2.2. *The transfer pricing report*

- (55) According to the transfer pricing report, the method considered as most appropriate to determine the taxable profit of FFT within the Fiat group is the transactional net margin method (hereinafter: 'TNMM'). According to the tax advisor, the TNMM is particularly adequate when, within the transaction, there is one party not making valuable and unique contributions and since, according to the tax advisor, FFT performs only financial services, this method is the most appropriate to determine arm's length pricing in line with the OECD TP Guidelines. Moreover, since FFT performs its functions to the Fiat group companies only, which do not receive any similar type of services by third parties, an internal comparison is not possible. Consequently, the tax advisor considers an external comparison more appropriate by identifying the net margins that would have been earned in comparable transactions by independent enterprises ⁽¹⁹⁾.
- (56) In the transfer pricing report, the tax advisor determines the remuneration due to FFT, which constitutes the taxable profit, by reference to the capital needed by FFT to perform its functions and to bear its risks, in relation to the assets in use ⁽²⁰⁾.
- (57) That remuneration is determined as follows: (i) estimate of FFT's 'capital at risk'; (ii) identification of FFT's capital used to perform the functions and to support the financial investments; (iii) estimate of the expected remuneration of FFT's 'capital at risk' by using the Capital Asset Pricing Model (hereinafter: 'CAPM') ⁽²¹⁾ and identification of the return to reward the capital used to perform the functions; and (iv) calculate the overall profitability to be left to FFT to remunerate the risks borne and the functions performed by combining the results of steps (i) to (iii).
- (58) As regards step (i), on the basis of the functional analysis contained in the transfer pricing report, the tax advisor considers FFT to bear the following risks: operational, credit and counterparty risks, while the tax advisor

⁽¹⁸⁾ However, the contested tax ruling will terminate if the facts or circumstances described in the application were incomplete or inaccurate, if key elements of the actual transactions differ from the description provided in the request for information or if the advanced pricing agreement is no longer compliant with national or international law.

⁽¹⁹⁾ Recital 44 to 46 of the Opening Decision provide a further explanation of the justifications advanced by the tax advisor in the choice of the TNMM to determine the taxable profit of FFT.

⁽²⁰⁾ See recital 51.

⁽²¹⁾ The CAPM is used to estimate a theoretical required rate of return on assets, more specifically on equity. Recitals 39 to 42 of the Opening Decision provide a detailed explanation of the CAPM.

considers the exchange rate risk FFT bears to be nil. Applying the Basel II framework ⁽²²⁾ by analogy ⁽²³⁾, the tax advisor estimated the minimum capital required for FFT to cover the following risks: operational, counterparty, exchange rate and credit risk, as follows:

- Operational risk: 15 % * (creditor interests accrued on bank deposits – debtor interest accrued on bank loans)
- Counterparty risk: 20 % * 6 % * (future exposure + positive fair value of derivatives)
- Credit risk: 20 % * 6 % * third party account receivables (year average)

- (59) The result of those calculations is what the tax advisor refers to as FFT's 'capital at risk', which corresponds to FFT's hypothetical regulatory capital under the Basel II framework as applied by FFT's tax advisor, summarised in Table 1.

Table 1

FFT's minimum capital requirement

(in EUR thousand)	
Minimum capital requirement	2011
Operational risk	938
Counterparty risk	2 603
Exchange rate risk	0
Credit risk	24 982
Minimum capital required by Basel II framework	28 523

- (60) As regards step (ii), what is referred to in the transfer pricing report as 'the capital used to perform the functions' ⁽²⁴⁾ is estimated by deducting the portion of FFT's minimum capital required by the Basel II framework as estimated by the tax advisor and FFT's capital used to support the financial investments in FFNA and FFC from FFT's total equity.
- (61) According to FFT's tax advisor, as of the end of 2011, FFT's equity amounted to EUR 287,5 million, of which:
- EUR 28,5 million is the minimum capital required by Basel II framework to bear the risks borne by FFT ('Minimum equity at risk' ⁽²⁵⁾),
 - EUR 165,2 million is used to offset FFT's participation interests in FFNA and FFC ⁽²⁶⁾ ('Equity supporting the financial investments in FFNA and FFC'), and
 - EUR 93,7 million is the capital used to perform the functions ('Equity backing the functions performed' ⁽²⁷⁾).

⁽²²⁾ Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards A Revised Framework*, June 2004 (hereinafter: 'Basel II framework').

⁽²³⁾ Since FFT is not a regulated entity, the tax advisor's interpretation of the Basel II framework to FFT for the purpose of obtaining the contested tax ruling was neither reviewed nor validated by a financial institutions regulator.

⁽²⁴⁾ 'Capital used to perform the functions' does not seem to correspond to any specifically defined regulatory category of capital.

⁽²⁵⁾ The terms 'capital at risk', 'Minimum capital requirement', 'Minimum capital required by Basel II framework', 'Minimum equity at risk' and 'minimum capital' are used interchangeably throughout the transfer pricing report but refer to the same concept, namely, FFT's hypothetical regulatory capital as estimated by the tax advisor by applying the Basel II framework by analogy.

⁽²⁶⁾ FFT's equity has been reduced by the value of the participations in FFNA and FFC, the latter being remunerated with dividends.

⁽²⁷⁾ 'Equity backing the functions performed' is another denomination by the tax advisor when referring to 'the capital used to perform functions', which the tax advisor introduced in the report.

- (62) Table 2 provides a breakdown of FFT's total equity as presented by the tax advisor in the transfer pricing report:

Table 2

FFT equity breakdown

(in EUR thousand)	
FFT equity breakdown by the tax advisor	Equity 2011
Minimum equity at risk	28 523
Equity supporting the financial investments in FFNA and FFC	165 244
Equity backing the functions performed	93 710
Total Equity	287 477

- (63) As regards step (iii), first, the tax advisor proposes to remunerate the portion of FFT's equity it designates as 'Minimum equity at risk', which corresponds to FFT's hypothetical regulatory capital as determined by the tax advisor in step (i), by estimating a return on equity investors would expect to receive ('Expected Return Pre-Tax'), using the CAPM, whereby:

$$\text{Expected Return Pre-Tax} = (\text{Risk-Free Rate} + \beta \times \text{Equity Risk Premium}) / (1 - \text{tax rate})$$

- (64) In application of the CAPM, FFT's tax advisor used the following variables:

- Risk-free rate of 2,85 % (10 years German Government Bond 'Bund', 2011 year average),
- Beta (β) of 0,29 estimated ⁽²⁸⁾ on the basis of set of 66 comparable companies performing financial services, provided by the Damodaran website ⁽²⁹⁾,
- Equity risk premium of 5 % for Luxembourg provided by the Damodaran website (July 2011 update),
- Luxembourg tax rate of 28,80 %.

- (65) Applying those variables to the formula in recital 63, FFT's tax advisor arrives at a pre-tax 'expected return on equity, investors would expect to receive for the risks taken' of 6,05 %.

- (66) Table 3 lists the companies FFT's tax advisor selected as comparable companies operating independently in the financial sector and their betas for the calculation of the beta for use in the CAPM.

Table 3

List of comparable companies engaged in financial services

Company Name	Beta
ING Groep NV (EXTAM:INGA)	3,00
UBS AG (SWX:UBSN)	1,80
Wüstenrot & Württembergische AG (XTRA:WUW)	0,41
Deutsche Börse AG (XTRA:DB1)	1,28

⁽²⁸⁾ The 25th percentile of betas was employed by the tax advisor in the CAPM calculation, since it considered FFT to bear limited risks.

⁽²⁹⁾ Data compiled by Professor A. Damodaran, retrievable at <http://pages.stern.nyu.edu/~adamodar/>

Company Name	Beta
Oslo Bors VPS Holding ASA (OTCNO:OSLO)	0,13
London Stock Exchange Group (LSE:LSE)	1,24
Fimalac SA (ENXTPA:FIM)	0,68
International Personal FinancePlc (LSE:IPF)	1,92
GrenkeLeasing AG (XTRA:GLJ)	0,55
Mittel SpA (CM:MIT)	0,93
GlobeOp Financial Services SA (LSE:GO)	0,56
KBC Ancora (ENXTBR:KBCA)	3,61
Aktiv Kapital ASA (OB:AIK)	0,25
IG Group Holdings Plc (LSE:IGG)	0,75
IFG Group plc (LSE: IFP)	1,11
Conafi Prestito SpA (CM:CNP)	0,74
NEOVIA Financial Plc (AIM:NEC)	0,60
H&T Group Plc (AIM:HAT)	– 0,11
Hesse Newman Capital AG (XTRA:RTM)	0,29
Acta Holding ASA (OB:ACTA)	1,70
Manx Financial Group PLC (AIM:MFX)	0,30
PLUS Markets Group plc (AIM:PMK)	– 0,05
Law Debenture Corp. Plc (LSE:LVVDB)	0,95
Hypoport AG (DB:HYQ)	0,70
Perrot Duval Holding SA (SWX:PEDP)	0,16
Albemarie & Bond Holdings plc (AIM:ABM)	0,21
MCB Finance Group plc (AIM:MCRB)	NA
Brightside Group plc (AIM:BRT)	0,11
DF Deutsche Forfait AG (DB:DE6)	0,83
Autobank AG (DB:AW2)	NA
Ambrian capital plc (AIM:AMBR)	0,83
Gruppo MutuiOnline S.p.A (CM:MOL)	0,77
Park Group plc (AIM:PKG)	0,09
OVH Holding AG (XTRA:O4B)	– 0,19
Albis Leasing AG (DB:ALG)	0,57
Hellenic Exchanges SA (ATSE:EXAE)	1,42
FORIS AG (XTRA:FRS)	0,20
Creon Corporation Plc (AIM:CRO)	2,03
Investeringselskabet Luxor A/S (CPSE:LUXOR B)	0,50
Univerma AG	NA
OFL AnlagenLeasing AG (DB:OFL)	0,86

Company Name	Beta
Ideal GroupSA (ATSE:INTEK)	NA
Nøtterø SpareBank (OB:NTSG)	0,20
Apulia Prontoprestitio SpA (CM:APP)	1,07
Ultimate Finance Group plc (AIM:UFG)	0,54
Dresdner Factoring AG (XTRA:D2F)	0,42
Heidelberger Beteiligungsholding AG (DB:IPO)	0,14
ABC Arbitrage SA (ENXTPA:ABCA)	0,48
Baydonhill plc (AIM:BHL)	0,04
London Capital Group Holdings plc (AIM:LCG)	0,72
Imarex ASA (OB:IMAREX)	0,48
Toscana Finanza SpA (CM:TF)	0,49
Banca Finnat Euramerica SpA (CM:BFE)	0,79
S&U plc (LSE:SUS)	0,27
Bolsas y Mercados Españoles SA(CATS:BME)	0,97
Banca IFIS SpA (CM:IF)	0,69
Paris Orleans SA (ENXTPA:PAOR)	0,60
SNS Reaal NV (ENXTAM:SR)	2,37
Close Brothers Group plc (LSE:CBG)	0,94
Provident Fiancial plc (LSE:PFG)	0,35
Pohola Bank plc (HLSE:POH1S)	1,43
Investec plc (LSE:INVP)	1,73
Banque Nationale de Belgique SA (ENXTBR:BNB)	0,49
Credit Suisse Group (SWX:CSGN)	1,43
Deutsche Bank AG (DB:DBK)	1,98
Schweizerische Nationalbank (SWX:SNBN)	0,22

Source: Damodaran

- (67) Table 4 shows the 'arm's length range' of betas of the selected comparable companies at which FFT's tax advisor arrives.

Table 4

Arm's length range of betas of comparable companies

Arm's length range	Beta
Number of companies	66
MAX	3,61

Arm's length range	Beta
90 Percentile	1,79
75 Percentile	1,04
Median	0,64
25 Percentile	0,29
10 Percentile	0,13
MIN	0,19

- (68) Second, FFT's tax advisor proposes to remunerate the portion of FFT's equity it designates as 'Equity backing the functions performed' in Table 2, which corresponds to 'the capital used to perform the functions' identified in step (ii), by using the market interest rate applied to short-term deposits ⁽³⁰⁾, which, according to FFT's tax advisor, is equal to 0,87 %.
- (69) FFT's tax advisor further proposes not to remunerate the portion of FFT's equity it designated as supporting FFT's financial investments in FFNA and FFC, referred to as 'Equity supporting the financial investments in FFNA and FFC' in Table 2, that is, to have a zero remuneration for the purposes of taxation.
- (70) Finally, in relation to step (iv), the tax advisor calculates the overall remuneration due to FFT for its financing and treasury activities and the risks it bears. That remuneration consists of the following components derived from steps (i) to (iii) above:
- a 'risk remuneration', which is calculated by multiplying FFT's hypothetical regulatory capital of EUR 28,5 million, estimated by the tax advisor by applying the Basel II framework by analogy in step (ii), by the pre-tax expected return of 6,05 %, estimated by the tax advisor using the CAPM in step (iii), and
 - a 'functions remuneration', which is calculated by multiplying what the tax advisor designates as FFT's capital used to perform the functions of EUR 93,71 million in step (ii), by the market interest rate applied to short-term deposits, which the tax advisor considers to be 0,87 % in step (iii).
- (71) Table 5 provides for the tax advisor's estimate of the overall profitability to be left to FFT for Luxembourg tax purposes,

Table 5

Estimate of the taxable base of FFT

<i>(in EUR thousand)</i>	
Capital remuneration	EBT 2011
Risk remuneration	1 726
Functions remuneration	816
Remuneration of equity supporting participations in FFNA and FFC ⁽¹⁾	0
Total EBT	2 542

⁽¹⁾ Participation refers to an investment in the shares i.e. equity of a company.

⁽³⁰⁾ 2011 year average EONIA (Euro overnight index average).

- (72) The resulting amount of EUR 2,542 million corresponds to the amount in the contested tax ruling that the Luxembourg tax administration deems to constitute an arm's length remuneration ⁽³¹⁾.
- (73) Table 6 summarises the conclusions of FFT's tax advisor following steps (i) to (iv) above.

Table 6

Computation recap of the minimum capital requirement and impact on the result before taxes of FFT

Minimum Capital Requirement	FFT	
	2011	
<i>(amounts in EUR thousand)</i>		
Operational Risk	938	a
Counterpart Risk	2 603	b
Exchange rate Risk	0	c
Credit Risk	24 982	d
Minimum Capital Requirement	28 523	e = a + b + c + d
Capital offset by participation interest	165 244	x
Excess Capital	93 710	f = g - e - x
Equity	287 477	g
Net Profit Indicator		
Expected return on capital	6,05 %	h
Short-term interest rate	0,87 %	i
Capital remuneration		
Risk remuneration	1 726	k = h * e
Functions remuneration	816	j = i * f
Total EBT (Earnings before tax)	2 542	l = k + j

a = 15 % * (financial revenues on bank deposit – financial charges from bank loans)

b = 20 % * 6 % * (future exposure + positive fair value of derivatives with third parties)

c = 100 % covered by derivatives

d = 20 % * 6 % * account receivables with third parties (year average)

h = estimated by using CAPM

i = 2011 year average EONIA

To be noted: the main assumption is that there is no credit/counterparty risk on operations with Group companies

⁽³¹⁾ Recital 54.

2.3. Description of the Luxembourg rules on transfer pricing

- (74) The tax ruling in favour of FFT was issued on the basis of Article 164(3) of the Luxembourg Income Tax Code (*loi modifiée du 4.12.1967 concernant l'impôt sur le revenu*, hereinafter 'L.I.R') and Circular L.I.R. n° 164/2 of 28 January 2010 (hereinafter 'the Circular') ⁽³²⁾.

2.3.1. Article 164 of the Luxembourg Income Tax Code

- (75) Article 164(3) L.I.R. provides: 'Taxable income comprises hidden profit distributions. A hidden profit distribution arises in particular when a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he normally would not have received if he had not been a shareholder, a stockholder or an interested party.' That provision establishes the 'arm's length principle' under Luxembourg tax law, according to which transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length.

2.3.2. Circular L.I.R. No 164/2

- (76) Article 164(3) L.I.R. is further clarified by the Circular. The Circular is structured as follows: Section 1 defines the terms 'group financing companies' ⁽³³⁾, 'intra-group financing transactions' ⁽³⁴⁾ and 'associated enterprises' ⁽³⁵⁾.
- (77) Section 2, titled 'General Information', first defines the intra group-services to which the Circular applies, as follows: 'An intra-group service (including an intra-group financing transaction) has been rendered if, in comparable circumstances, an independent enterprise had been willing to pay another independent enterprise to carry out that activity, or if it had carried out that activity itself.' Section 2 further contains a description of the arm's length principle as set out in the OECD TP Guidelines and transposed into domestic law. In this regard, the Circular states that '[w]here an intra-group service has been rendered, as with other types of intra-group transfers, one should ascertain whether an arm's length price is charged for such service, i.e. a price corresponding to the price which would have been charged and agreed to by independent enterprises in comparable circumstances.' ⁽³⁶⁾
- (78) As regards the reference to 'comparable circumstances', the Circular provides that the comparability analysis should include factors such as 'the characteristics of the goods or services being transferred, the functions performed by the parties involved, the terms and conditions of the contract, the economic circumstances of the parties and the business strategies pursued by those parties.' ⁽³⁷⁾
- (79) Section 3 of the Circular contains explanations on how to determine an arm's length remuneration specifically in the case of intra-group financing companies. The function of intra-group financing companies that determine the remuneration of each enterprise should, according to the Circular, be comparable to the functions performed by independent financial institutions subject to the supervision of the Commission de Surveillance du Secteur Financier. Thus, the arm's length remuneration for the functions performed (taking into account assets used and risks assumed) 'should be based on the remuneration requested by those financial institutions for comparable credit transactions.' ⁽³⁸⁾
- (80) Furthermore, financial institutions, before granting a loan or advancing money, perform a risk analysis, which includes an analysis of the financial risk related to the transaction, the borrower risk, the business risk and the structural risk. In addition, as regards the expenses relating to granting loans, the additional costs should take into account, among other things, 'additional expenses generated by solvency requirements, additional expenses

⁽³²⁾ Available at: http://www.impotsdirects.public.lu/legislation/legi11/Circulaire_L_I_R_n__164-2_du_28_janvier_2011.pdf

⁽³³⁾ 'Group financing companies' should be taken to refer to entities which mainly conduct intra-group financing transactions to the exclusion of the holding of participations (p. 1 of the Circular).

⁽³⁴⁾ 'Intra-group financing transactions' refer to any activity consisting of the granting of loans or advancing money to associated enterprises, refinanced by funds and financial instruments such as public offerings, private loans, advanced money or bank loans (p. 1 of the Circular).

⁽³⁵⁾ 'Associated enterprises' are two enterprises where one enterprise participates directly or indirectly in the management, control or capital of the other or if the same persons participate directly or indirectly in the management, control or capital of both enterprises (p. 1 of the Circular).

⁽³⁶⁾ The Circular, p. 2.

⁽³⁷⁾ *Ibid.*

⁽³⁸⁾ *Ibid.*

related to credit risk, processing fees or additional expenses related to foreign exchange risk.’⁽³⁹⁾ The credit risk is determined based on the terms and conditions of the loan agreement and based on the outcome of the risk analysis.

- (81) Finally, according to the Circular, independent financial service providers generally set their remuneration based either on the loan amount or on the actual market value of the assets under management. Also, following the example of independent service providers, ‘group financing companies carrying out intra-group transactions should perform a risk analysis before granting a loan to an associated enterprise. They should also take into consideration any other factor which may influence the determination of their transfer prices.’⁽⁴⁰⁾
- (82) Section 4 of the Circular provides that the tax authorities shall only issue binding advice if the company concerned has a real presence in Luxembourg. Section 4 then lists a number of requirements that need to be satisfied for a group financing company to have real presence. It further provides that the company should maintain an adequate level of equity with regard to the functions performed (taking into account assets used and risks assumed). According to the Circular, the equity should amount to at least 1 per cent of the nominal value of the loan(s) granted or EUR 2 million without any further indication.
- (83) The Circular also contains rules as to what information and documents need to be submitted to obtain a binding advice from the tax administration. As such, the request for a binding advice needs to include inter alia ‘a transfer pricing report in line with the transfer pricing guidelines issued by the OECD and including a comprehensive description of the proposed methodology, as well as detailed information and analysis in support of this methodology, for instance the identification of comparables and the expected range of results.’⁽⁴¹⁾ Finally, the Circular specifies that a tax ruling is usually valid for a maximum of 5 years unless the facts and circumstances change or unless the legal provisions on which the ruling was based are modified or if one of the key characteristics of the transaction is altered⁽⁴²⁾.

2.4. Description of the OECD guidance on transfer pricing

- (84) The Organisation for Economic Cooperation and Development (hereinafter ‘OECD’) provides guidance on taxation for its member countries. The OECD’s guidance on transfer pricing can be found in its Transfer Pricing Guidelines (hereinafter the ‘OECD TP Guidelines’), which is a non-binding legal instrument providing guidance on transfer prices⁽⁴³⁾.
- (85) Transfer prices refer to prices charged for commercial transactions between various parts of the same corporate group. Multinational companies have a financial incentive to allocate as little profit as possible to jurisdictions where those profits are subject to higher taxation. This could lead to exaggerated transfer prices which should not be accepted as a basis for calculating taxable income. To avoid this problem, tax administrations should only accept transfer prices between intra-group companies that are remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm’s length⁽⁴⁴⁾. This is known as the ‘arm’s length principle’.
- (86) The authoritative statement of the arm’s length principle is found in paragraph 1 of Article 9 of the OECD Model Tax Convention, which forms the basis of bilateral tax treaties involving OECD member countries and an increasing number of non-member countries. Article 9 provides: ‘[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.’

⁽³⁹⁾ The Circular, p. 3.

⁽⁴⁰⁾ The Circular, p. 4.

⁽⁴¹⁾ The Circular, p. 7.

⁽⁴²⁾ The Circular, pp. 5 to 8.

⁽⁴³⁾ Tax administrations of OECD member countries are encouraged to follow the Guidelines. However, in general, the OECD TP Guidelines serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries.

⁽⁴⁴⁾ Tax administrations and legislators are aware of this problem and tax legislation generally allows the tax administration to correct tax declarations of integrated companies that incorrectly apply transfer prices, by substituting prices which correspond to a reliable approximation of those agreed to by independent companies negotiating under comparable circumstances at arm’s length.

- (87) On 27 June 1995, the OECD's Committee on Fiscal Affairs adopted transfer pricing guidelines in their original version ⁽⁴⁵⁾, which were substantially updated in July 2010 ⁽⁴⁶⁾. Given their non-binding nature, the tax administrations of the OECD member countries are simply encouraged to follow the Guidelines. However, in general, the OECD TP Guidelines serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries those guidelines have been given the force of law or serve as a reference for the purpose of interpreting domestic tax law. To the extent the Commission cites the OECD TP Guidelines in the present Decision, it does so because those guidelines are an existing manual in the area of transfer pricing that are the result of expert discussions in the context of the OECD and elaborate on techniques aimed to address common challenges of the application of the arm's length principle to concrete situations. The OECD TP Guidelines therefore provide useful guidance to tax administrations and multinational enterprises on the application of the arm's length principle. They also capture the international consensus on transfer pricing.
- (88) The OECD TP Guidelines provide five methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price method (hereinafter 'CUP'); (ii) the cost plus method; (iii) the resale minus method; (iv) the TNMM and (v) the transactional profit split method. The OECD TP Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods). Multinational corporations retain the freedom to apply methods not described in those guidelines to establish transfer prices provided those prices satisfy the arm's length principle.
- (89) The CUP and the TNMM are relevant for the present Decision and, therefore, are described in more detail in recitals 90 to 92.
- (90) The CUP method compares the price charged for the transfer of property or services in a controlled transaction (i.e. a transaction between two enterprises that are associated enterprises with respect to each other) to the price charged for the transfer of property or services in a comparable uncontrolled transaction (i.e. a transaction between enterprises that are independent enterprises with respect to each other), conducted under comparable circumstances.
- (91) The TNMM is one of the 'indirect methods' to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group. It approximates what would be an arm's length profit for an entire activity, rather than for identified transactions. It does not seek to establish the price of goods sold, but estimates the profits independent companies could be expected to make on an activity, such as the activity of selling goods. It does this by taking an appropriate base ('a profit level indicator'), such as costs, turnover or fixed investment, and applying a profit ratio reflecting that observed in comparable uncontrolled transactions to that base.
- (92) Because the TNMM does not set a price for individual transactions, the taxable profit of an entity estimated using the TNMM might not have a direct effect on the taxable profit of another entity of the same corporate group. The method is therefore different to using, for example, the CUP, where transfer pricing establishes the price of a specific good or service which is then recorded in the taxable profit for the same amount by the group company selling and the group company buying the particular good or service.

2.5. Additional information submitted after the opening of the formal investigation procedure

2.5.1. Luxembourg's Letter of 3 September 2014

- (93) In response to the questions in the Opening Decision, Luxembourg informed the Commission that credit limits are not applied within the Fiat group.
- (94) Luxembourg also provided information regarding the average pricing of FFT's intra-group borrowing and lending for the years 2011 to 2013. The interest rate applicable to intra-group loans provided by FFT is [...], and was set

⁽⁴⁵⁾ Transfer Pricing Guidelines for multinational enterprises and tax administrations, OECD, July 1995

⁽⁴⁶⁾ Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, July 2010

at Euribor plus [6-9 %] at the end of 2011. The average interest rate received on the current account balances with group companies for the years 2012 and 2013 are [6-9 %] and [6-9 %] respectively. On intra-group deposits, FFT paid on average [0-3 %], [0-3 %] and [0-3 %] in 2011, 2012 and 2013 respectively (these figures are average all-in rates).

- (95) Luxembourg additionally expressed views regarding the remuneration of capital agreed in the contested tax ruling. In particular, Luxembourg indicated that the remuneration of the capital invested in participations consists of dividends and that dividends, by their very nature, are not subject to a transfer pricing analysis, as they are received by a company only in its role of shareholder. Dividends are therefore not to be taken into account in the importance of the functions performed and the risks assumed.
- (96) Luxembourg further explained that the acquisition of the participations of FFT was financed in its totality through own funds and that this mode of financing automatically means that those funds are no longer available to cover other risks borne by FFT.
- (97) Luxembourg also referred to Article 57 of Directive 2006/48/CE of the European Parliament and of the Council ⁽⁴⁷⁾ relating to the taking up and pursuit of the business of credit institutions, according to which the non-consolidated funds of credit institutions have to exclude participations in other credit institutions, which account for more than 10 % of the capital of those institutions.
- (98) Luxembourg further referred to the basic indicator approach under the Basel II framework, which provides the figure of 15 % to be applied to the average of three periods of positive annual gross income.

2.5.2. Luxembourg's Letter of 24 March 2015

- (99) In response to the request by the Commission to provide examples of rulings addressed to other taxpayers in a similar situation as FFT, Luxembourg indicated in its letter of 24 March 2015 that the FFT's situation is very specific. The reason for this would be that FFT operates as a financing company raising funds on the market, contrary to most of the financing companies in Luxembourg, which lend on with a margin funds that have been provided to them by other group companies.
- (100) Moreover, according to the Luxembourg tax administration the situation of each taxpayer is sufficiently specific to not make possible any comparison with the situation of other taxpayers. That would be the reason why the Luxembourg national law only provides for a general provision to provide a framework for transfer pricing (Article 164 L.I.R.) so as to allow the tax administration to capture in the most precise manner the economic reality of each tax case, be it covered by a ruling or not.
- (101) Luxembourg also provided the tax base of FFT for the period 2009 to 2013 based on the tax declarations of FFT ⁽⁴⁸⁾, as reproduced in Table 7.

Table 7

FFT's tax base for years 2009 to 2013

(in EUR)

2009	2 643 424
2010	2 424 869
2011	2 600 416
2012	1 684 103
2013	2 095 969

⁽⁴⁷⁾ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

⁽⁴⁸⁾ These figures have been provided by Luxembourg in their submission of 24 March 2015. The tax base figures do not entirely match the reported taxable profits in the accounts.

- (102) Luxembourg indicated that it is apparent from FFT's 2013 tax declaration that the doubt expressed in recital 64 of the Opening Decision, that the tax base is set to a fixed range from EUR 2 288 000 to EUR 2 796 000, is not substantiated. It is clear that the contested tax ruling only agreed to the methodology and that the market parameters vary.
- (103) Finally, at the request of the Commission, Luxembourg also provided all past rulings of Fiat group companies obtained from the Luxembourg tax administration.
- (104) First, a ruling request dated 9 December 2009, which was approved by the Luxembourg tax administration, requested an agreement on the tax base of FFT [...].
- (105) Second, the Luxembourg tax administration issued two letters on 3 September 2012. The first is the contested tax ruling, based on a ruling request dated 14 March 2012, as indicated in recital 9. That ruling request was provided to the Commission anew and in full with Luxembourg's letter of 24 March 2015, including information that had been previously redacted by Luxembourg in its initial submission of that ruling to the Commission.
- (106) A second almost identical letter, was issued in response to a parallel ruling request submitted [...] to the Luxembourg tax administration on 18 April 2012 concerning a company named [F], which seems to correspond to FFT in an alternative structure of the group treasury companies. In that second ruling request, the functions of [company F] are described in an identical manner to the functions of FFT in the request of 14 March 2012. In this alternative structure, the only difference would be that the company would only have a branch in the UK and would not have any branch in Spain, and that [company F] would not own [any subsidiaries].
- (107) The second ruling request, supported with a transfer pricing report, contains a conclusion presented in the same manner as the FFT ruling request (reproduced in recital 54). However, the outcome of the transfer pricing analysis is significantly different. The arm's length remuneration of [company F], as established in the transfer pricing report, is as follows: 'The transfer pricing study determines an appropriate remuneration on (i) the capital at risk of EUR 44,6 million and (ii) the capital aimed at remunerating the functions performed by the company of EUR 8,8 million on which a range of +/- 10 % is envisaged.'
- (108) Both rulings were reported on the list provided by Luxembourg to the Commission on 4 June 2015 of tax rulings covering a treasury function (see recital 29).
- (109) Third, two other ruling requests [...] approved by the Luxembourg tax administration were also provided to the Commission. Those ruling requests dated from 2002 and 2012 and cover other aspects of the Fiat group structure in Luxembourg. Those rulings are not assessed in this Decision.

2.5.3. Fiat's Submission of 31 March 2015

2.5.3.1. Information on Fiat group companies in direct relation with FFT

- (110) Fiat recalled that FFT is owned approximately 40 % by Fiat SpA and approximately 60 % by FF, which in turn is a wholly-owned subsidiary of Fiat SpA ⁽⁴⁹⁾. FFT in turn holds 100 % of FFNA and FFC ⁽⁵⁰⁾. Fiat also recalled that FFT is one of the treasury companies of the Fiat group, as listed in recital 39.
- (111) At the request of the Commission, Fiat provided detailed financial data on the group treasury companies. In particular, Fiat provided the annual report for the years 2011 to 2013 of FFT, FF, FFNA, FFC and FFB. Fiat also provided a description of the functions of the group treasury companies. According to that information, FF has 52 employees, out of which [20-30] are working for the treasury department and [10-20] in accounting. FFT has

⁽⁴⁹⁾ See recital 21 of the Opening Decision.

⁽⁵⁰⁾ See recital 24 of the Opening Decision.

14 employees, composed of one director, [0-10] front office employees (the front office is based in the United Kingdom), [0-10] back office employees and [0-10] accounting and control employees. FFNA has five employees and FFC has limited activities.

- (112) According to the submission of Fiat, the book value of the subsidiaries of FFT (FFNA and FFC) [...]. The annual report of FFT states that both FFNA and FFC have been acquired from Fiat SpA and FF in 2011. Starting from 2011, FFT prepared consolidated financial statements in Luxembourg.
- (113) FF and FFT are the treasury companies for the euro-area. Financial figures for FF and FFT for the period 2010-2013 based on the provided annual reports are presented in Tables 8 and 9 ⁽⁵¹⁾.

Table 8

FFT's financial figures for years 2010 to 2013

(in EUR thousand)

	2010	2011	2012	2013
Interest and similar income	613 561	650 641	664 707	736 561
Thereof from group companies	605 880	626 806	648 497	731 462
Other income	72 292	76 910	29 185	10 125
TOTAL INCOME	685 853	727 551	693 892	746 686
Operating expense and amortisation	3 419	3 655	2 926	2 499
Interest payable and other financial charges	625 078	640 207	631 854	666 246
Thereof to group companies	59 409	55 520	38 041	20 268
Thereof on bonds and other notes	551 229	574 561	592 099	643 853
Commission on Guarantees on bonds paid to Fiat SpA ⁽¹⁾	3 161	2 851	2 702	3 006
Other expense	51 709	78 211	54 702	72 805
TOTAL EXPENSE (excl. corporate tax)	683 367	724 924	692 185	745 032
Profit before corporate tax	2 485	2 627	1 707	1 652
Tax	748	776	491	508
Net profit	1 737	1 851	1 217	1 146

⁽⁵¹⁾ See recital 51 of the Opening Decision for the financial figures of FFT for the period 2009-2011 presented in the transfer pricing report. In Table 8 reference is made to terminology used in the annual report and the submission of 31 March 2015 by Fiat, which might not perfectly correspond to the terminology used by the tax advisor in the transfer pricing report.

(in EUR thousand)

	2010	2011	2012	2013
Shareholders' equity	285 625	287 477	288 693	289 839
Amounts owned to group companies	4 354 692	2 275 578	1 530 146	1 661 930
Debt securities issued	7 716 844	7 746 301	9 116 345	11 030 180
Other liabilities (bank debt, accruals, ...)	2 470 513	446 444	144 671	158 865
TOTAL LIABILITIES AND EQUITY	14 827 674	10 755 800	11 079 855	13 140 814
Amounts owned by group companies	11 869 312	7 387 279	7 950 092	9 637 038
Cash and transferrable securities	2 705 622	3 028 255	2 853 245	3 221 203
Participation in affiliated undertakings	0	165 244	164 244	165 244
Other assets (fixed assets, accruals, ...)	252 740	175 022	112 274	117 329
TOTAL ASSETS	14 827 674	10 755 800	11 079 855	13 140 814

(¹) It has been specified by Luxembourg that for the years 2011-2013 the guarantee fee is paid to Fiat SpA, for 2010 this information was not specified in the annual report.

- (114) FFT issued guarantees in favour of group companies to different banks for a total amount of EUR 2 560 802, EUR 10 772 314 and EUR 10 155 339 at the end of 2011, 2012 and 2013 respectively.

Table 9

FF's financial figures for years 2010 to 2013

(in EUR thousand)

	2010	2011	2012	2013
Financial income	552 090	752 007	676 177	722 610
Thereof from group companies	528 267	672 225	655 576	711 218
Other income (dividends, financial gains on derivatives, exchange rates, ...)	29 708	18 962	18 117	8 935
Revenue from services to group	6 410	7 616	2 336	2 027
Operating expense	14 616	13 332	8 594	9 280
Financial expense	550 331	729 851	654 763	706 825
Thereof to group companies	523 123	698 009	625 216	687 712
Profit before corporate tax	23 261	35 402	33 273	17 466

(in EUR thousand)

	2010	2011	2012	2013
Tax	5 968	10 112	8 822	6 952
Net profit	17 292	25 290	24 450	10 514
Shareholders' equity	271 047	268 610	268 837	256 053
Liabilities	14 878 871	12 567 582	11 277 171	12 758 761
Financial assets	9 267 614	8 201 011	9 164 768	9 905 386
Cash and transferrable securities	5 519 622	4 349 837	2 201 190	2 928 409
Participation in affiliated undertakings	358 362	264 116	160 833	160 833
Other assets (fixed assets, accruals, ...)	4 320	21 228	19 217	20 186
TOTAL ASSETS	15 149 918	12 836 192	11 546 008	13 014 814

- (115) FF's participation in affiliated undertakings at the end of 2013 (and at the end of 2012) consisted of a participation in FFT for EUR 157 269 000 (representing 60 % of the share capital of FFT), in FFB for EUR 2 013 000 and non-controlling interests in other group companies for EUR 725 000. At the end of 2011, 100 % of the shares of FFT was recorded in the participations of FF for EUR 262 102 000. At the end of 2010, before the sale of FFNA and FFC to FFT in 2011, the participations of FF consisted of EUR 7 213 000 in FFC, EUR 262 077 000 in FFT, EUR 87 055 in FFNA and EUR 2 013 000 in FFB, totalling EUR 358 million of participations in fully-controlled Fiat subsidiaries in 2010, as reported in the Table 8.

2.5.3.2. Detailed information on FFT's assets and liabilities

- (116) Fiat provided the names of the 61 group counterparties with which FFT had relationships over the period 2011-2013. It provided average outstanding positions between FFT and its group counterparties for the six largest creditors and debtors for the years 2011, 2012 and 2013. This information for year 2013 is reproduced in Table 10 (the column of interest over average balance has been added by the Commission).

Table 10

FFT's counterparties over 2013

(in EUR thousand) ()*

Assets	Average Outstanding	Interest Received	Interest divided by average outstanding
Fiat group counterparty 1	[10 000 000]	[500 000]	[...]
Fiat group counterparty 2	[150 000]	[10 000]	[...]
Fiat group counterparty 3	[150 000]	[10 000]	[...]
Fiat group counterparty 4	[100 000]	[5 000]	[...]

(in EUR thousand) (*)

Assets	Average Outstanding	Interest Received	Interest divided by average outstanding
Fiat group counterparty 5	[50 000]	[4 000]	[...]
Fiat group counterparty 6	[20 000]	[3 000]	[...]
Liabilities	Average Outstanding	Interest Paid	Interest divided by average outstanding
Fiat group counterparty 7	[450 000]	[10 000]	[...]
Fiat group counterparty 8	[250 000]	[400]	[...]
Fiat group counterparty 9	[200 000]	[1 000]	[...]
Fiat group counterparty 10	[50 000]	[200]	[...]
Fiat group counterparty 11	[50 000]	[150]	[...]
Fiat group counterparty 12	[50 000]	[150]	[...]

(*) The numbers that are enclosed in square brackets should be read in combination with the prefix 'around'. These numbers are rounded to a multiple of 50, 500, 5 000, 50 000, 500 000 or 5 000 000.

- (117) Fiat also provided information on issuance of debt by FFT since 2009 under the EMTN ⁽⁵²⁾, which is the main source of funding of FFT, as well as issuance prospectus. FFT proceeded to 14 issues over that period with maturities up to 7 years. FFT issued both euro denominated notes with coupons ranging from 5,75 % to 7,75 % (except for one issuance at 9 %) and Swiss franc denominated notes with coupons ranging from 4 % to 5 %.
- (118) The information submitted by Fiat shows the maturity of the intra-group financing transactions. At the end of 2013, EUR 12 613 000 out of the total of EUR 12 858 000 of receivables (presenting the cash and loans to group companies in Table 9) had a contractual maturity shorter than one year.
- (119) The information provided on individual intra-group transactions shows that many transactions are overnight. However, FFT also concludes transactions with different maturities [...]. FFT provides loans to the group in different forms [...]. Almost all deposits had a maturity of [...] at the end of 2013. The notes issues had different maturities, [...].
- (120) Fiat also provided the Group Liquidity Policy document referred to in the transfer pricing report underlying the ruling request. The document sets out internal rules for investments of cash by the group. [...]

2.5.3.3. Information on the Fiat group's transfer pricing policy

- (121) In its letter of 20 February 2015, the Commission requested Fiat to explain which mechanism was used to achieve a net result equal to a stable proportion of equity over 2009, 2010 and 2011 (as is apparent from Table 4 in recital 51 of the Opening Decision), despite important variation in assets, liabilities and financial charges and revenues.
- (122) Fiat provided a document titled 'Transfer Pricing Policy' in response to that request to explain the pricing of intra-group loans and deposits. The Transfer Pricing Policy document clarifies that Fiat sets the prices of intra-group loans provided by the group treasury companies in such a way so as to achieve a pre-determined return for the treasury companies.

⁽⁵²⁾ EMTN stands for euro medium-term note.

- (126) The document further distinguishes between pre-defined term loans, established in the past, for which it is not possible to change pricing conditions and floating revisable intra-group loans. [...]

2.5.4. Luxembourg's Letter of 10 July 2015

- (127) In its letter of 10 July 2015, Luxembourg argues that the Commission would violate the principle of legal certainty should it order recovery from the alleged aid beneficiary in its decision closing the formal investigation procedure. It refers to previous Commission decisions on fiscal aid schemes in this respect where the Commission accepted that that principle could prevent recovery ⁽⁵³⁾ and where the Commission allowed a transitory period on the basis of legitimate expectations ⁽⁵⁴⁾.
- (128) In addition, Luxembourg argues that, given that in transfer pricing the exact arm's length price cannot or does not need to be determined under OECD rules, it is not possible to order recovery of an exact aid amount. Moreover, Luxembourg argues that given the novel character of the aid measure and, in line with previous decisions, the Commission should not order recovery pursuant to the principle of legitimate expectations ⁽⁵⁵⁾.

3. GROUNDS FOR INITIATING THE PROCEDURE

- (129) The Commission decided to initiate the formal investigation procedure because it took the preliminary view that the contested tax ruling grants State aid to FFT within the meaning of Article 107(1) of the TFEU that is incompatible with the internal market.
- (130) In particular, the Commission expressed doubts that the contested tax ruling complied with the arm's length principle. This was based on the considerations, presented in recitals 131 to 137.
- (131) First, the ruling seemed to agree to a fixed tax base of EUR 2,542 million (+/- 10 %) with respect to FFT's activities in Luxembourg that could only vary marginally and remains stable even if FFT, for example, significantly increased its activities underlying the determination of the tax base.
- (132) Second, the Commission expressed doubts as to the appropriateness of the method chosen by FFT's tax advisor to estimate the latter's remuneration for the functions performed by it. The tax advisor used the TNMM, an indirect method, in its transfer pricing analysis to calculate that remuneration, but, according to the Commission, the use of direct methods and, in particular, the use of the CUP method should be preferred in cases where comparable transactions can be observed on the market. In that respect, the Commission noted that Chrysler, the US company of the Fiat group, relies directly on capital market funding for its operations and some of those transactions are comparable to those carried out by FFT.
- (133) Third, as regards the use of the CAPM to estimate the required equity returns, the Commission expressed doubts that the CAPM had been correctly applied by FFT's tax advisor. It pointed out that the two components which determine FFT's remuneration on the basis of the CAPM, i.e. the amount of capital remunerated and the level of remuneration applied to that capital amount, were set at a too low level.
- (134) As regards the amount of capital remunerated, the tax ruling accepted that the CAPM was only applied to a fraction of the capital, labelled 'equity at risk', whereas the equity injected into FFNA and FFC was deducted from the equity to be remunerated without any plausible explanation ⁽⁵⁶⁾. In addition, the calculation of the 'equity at risk' seemed to lead to a too low taxable basis, as it did not include intra-group assets, again without any convincing justification. In its Opening Decision, the Commission questioned the assumption that there was no credit risk on transactions with group companies. The Commission also expressed doubts as to the calculation of the minimum capital requirements for counterparty and credit risk. In particular, the choice of a relatively low risk weight factor of 20 % for the counterparty risk was not justified, nor what would happen if the regulatory

⁽⁵³⁾ Commission Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System (OJ L 114, 16.4.2014, p. 1).

⁽⁵⁴⁾ Commission Decision of 13 November 2007 amending Decision 2003/757/EC on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 90, 2.4.2008, p. 7).

⁽⁵⁵⁾ Commission Decision 2006/621/EC of 2 August 2004 on State aid implemented by France for France Télécom (OJ L 257, 20.9.2006, p. 11).

⁽⁵⁶⁾ This is explained in the transfer pricing report by the fact that the investments in FFNA and FFC would be remunerated with dividends.

framework were to change in a meaningful manner. The tax advisor's transfer pricing report does not contain any explanation why the 'difference between creditor interests accrued on bank deposits and debtor interests accrued on bank loans' is a good indication of operational risk and it does not explain the risk weighting at 15 %. Similarly, that report does not set out why the counterparty risk is multiplied by 6 % instead of 8 %, given that the minimum capital requirement for counterparty risk under the Basel II framework, to which the transfer pricing report makes explicit reference, is 8 %.

- (135) As regards the level of remuneration applied to that capital, the Commission expressed doubts on the determination of the beta as it seemed too low compared to other companies performing financial services. It also expressed doubts on the tax advisor's choice of the 25th percentile and not the median for the calculation of the beta.
- (136) Fourth, as regards the expected return on equity on the capital considered as excess capital in the ruling request, the Commission expressed doubts that the contested tax ruling agreed to the use of a very low rate of 0,87 % without any justification.
- (137) Given that the transfer pricing analysis accepted by the contested tax ruling did not appear to comply with the arm's length principle, the Commission reached the preliminary conclusion that that ruling conferred an advantage on FFT. That advantage was considered to be obtained every year and on-going, when the annual tax liability calculated on the basis of that ruling was accepted by the Luxembourg tax administration. According to the Commission, that advantage was also granted in a selective manner, as it constituted a deviation from administrative practice specifically favouring FFT as compared to companies in a similar legal and factual situation.
- (138) With all other conditions of Article 107(1) of the TFEU being fulfilled and no apparent compatibility ground, the Commission reached the preliminary conclusion that the contested tax ruling constituted incompatible State aid. On those grounds, the Commission decided to initiate the procedure laid down in Article 108(2) of the TFEU with respect to that tax ruling.
- (139) In addition, in its Opening Decision the Commission enjoined Luxembourg to provide all documents, information and data needed for the assessment of the existence and compatibility of the contested measure pursuant to Article 10(3) of Regulation (EC) No 659/1999. In the event that Luxembourg did not fully provide all information requested, it invited Luxembourg to agree on the basis of Article 6(a)(2)(b) of Regulation (EC) No 659/1999 that the Commission will request the beneficiary of the contested measure, i.e. FFT, to provide the requested information.

4. COMMENTS FROM LUXEMBOURG

- (140) Luxembourg submitted its comments to the Opening Decision on 19 July 2014. Luxembourg argues, first, that the procedure is flawed and, second, that the Commission committed substantive errors in the Opening Decision.

4.1. Comments from Luxembourg on the Commission procedure

- (141) As regards the procedure, Luxembourg alleges that the proper procedure for issuing the information injunction has not been followed in the present case, in that Regulation (EC) No 659/1999 does not allow the Commission to issue injunctions in a decision to initiate the formal investigation procedure. Before such an injunction can be issued, the procedure provided for in Article 10 of Regulation (EC) No 659/1999 should have been followed.
- (142) Luxembourg further claims that, as regards the information requested under the injunction decision, the Commission did not explain why the disclosure of the name of the beneficiary was necessary to assess the measure under State aid rules. Given the numerous leaks and careless statements by the Commission in public,

Luxembourg could not disclose the name at that stage. In addition, the injunction decision did not specify any other specific information to be provided, whereas the Commission's own Manual of Procedure provides that an injunction must explain clearly which information is required for the investigation.

- (143) Luxembourg alleges also that, as the Opening Decision does not explain how the contested tax ruling constitutes aid, it is impossible for it to implement the standstill obligation. FFT is required to submit a tax return and given that the Commission has not specified what the right methodology is to calculate FFT's tax liability in the Opening Decision, the Luxembourg tax administration will proceed on the basis of the methodology agreed on in the tax ruling.
- (144) Luxembourg argues further that the Commission infringed the principles of sincere cooperation, impartiality and good administration by, for instance, not responding to its offers to meet so as to allow the Luxembourg authorities to explain the methodology used in the contested tax ruling.
- (145) Luxembourg contests the decision by the Commission to split the procedure relating to FFT (with a new case number SA.38375) from the general investigation into the tax ruling practices of Luxembourg under case number SA.37267. Given that Luxembourg had appealed the information injunction adopted by the Commission under SA.37267 before the General Court, the Commission could thereby artificially circumvent an annulment of the information injunction under SA.37267 by having opened a new case.
- (146) Finally, Luxembourg claims that the Commission misused its powers by confusing the exercise of discretion with the mere interpretation of a rule of ordinary law. In particular, the FFT tax ruling does not constitute an exercise of discretion by the Luxembourg tax administration, but is in line with Article 164(3) L.I.R. and the Circular. According to Luxembourg, when applying those provisions it is inevitable that they will need to be interpreted in the light of the facts of each case to arrive at solutions that are determined by and based on their specific circumstances. The Commission is ignoring that distinction between discretion, on the one hand, and the interpretation of rules that include abstract legal terms and that subsequently need to be applied to the case at issue, on the other. Moreover, by replacing the national authorities in the interpretation of Luxembourg law, the Commission infringes the competence of the Member States in the field of direct taxation.
- (147) According to Luxembourg, given that its tax administration did not exercise discretion in the case of FFT, the Commission failed to prove that the contested tax ruling derogated from normal administrative practice. Luxembourg explains that its administrative action is based on the principles of legality and equality, thereby ensuring the same treatment for all taxpayers whose situations are essentially the same. Luxembourg contends that the Opening Decision is only examined in the light of the OECD TP Guidelines and not in the light of Luxembourg's administrative practice.

4.2. Comments from Luxembourg on substantive errors in the Opening Decision

- (148) As a general matter, Luxembourg claims that the Commission committed a substantive error by taking as the reference system against which to find a selective advantage the arm's length principle as enshrined in the OECD TP Guidelines and not national law and practice.
- (149) In addition, Luxembourg claims the Commission to have misinterpreted the OECD TP Guidelines. At paragraph 65 of the Opening Decision, the Commission seems to establish a hierarchy of transfer pricing methods when it argues that the use of direct methods, namely the CUP, is preferable to the use of indirect methods, such as the TNMM. The Commission thereby disregards the fact that since 2010 the OECD TP Guidelines no longer consider a hierarchy of methods consistent with current requirements and practice. In reference to paragraph 1.13 of the OECD TP Guidelines, Luxembourg indicates that the OECD TP Guidelines acknowledge that 'transfer pricing is not an exact science' and 'that the choice of methodology for establishing arm's length transfer pricing will often not be unambiguously clear'. Given that FFT's tax advisor considered the choice of the TNMM as justified and applied Article 164 L.I.R., the Luxembourg tax administration merely confirmed that that analysis was legally correct.

- (150) According to Luxembourg, the Commission recognises that the interpretation and application of the arm's length principle varies from one tax administration to another and between tax administrations and business ⁽⁵⁷⁾, so it cannot, on the one hand, allow different interpretations and applications of the arm's length principle and, on the other hand, take the view that there is only one correct method that Luxembourg should have applied when using the arm's length principle.
- (151) Furthermore, Luxembourg criticises the Commission for not applying the relevant national law provision, namely Article 164(3) L.I.R. and the resulting administrative practice, to the case at hand, but instead taking as a reference only the OECD TP Guidelines. In doing so, it decides on the calculation method it considers most appropriate whereas Luxembourg law precisely does not provide for the use of specific transfer pricing methods. The Commission therefore entirely disregards Luxembourg's legal framework and administrative practice in this area. In addition, for the purposes of the selectivity analysis, the Commission does not provide a comparison between the tax treatment of FFT and that of other companies in a similar legal and factual situation in Luxembourg.
- (152) As regards the Commission's doubts expressed in the Opening Decision, Luxembourg criticises the Commission for focusing too much and one-sidedly on the alleged tax strategy of Fiat at group level, without considering that Fiat, being a group, may have had other reasons for setting up its structure in the manner it did.
- (153) First, the Luxembourg tax authorities did certainly not agree to a 'fixed tax base' as alleged in recital 64 of the Opening Decision. FFT's taxable revenue depends on the amount of loans granted and the transfer pricing report only establishes a bracket in terms of basis points for the margin to be achieved.
- (154) Second, with respect to the amount of equity required and the Commission's doubts in that respect, Luxembourg considers the choice of the 'Basel II' framework to constitute a reasonable choice, as does the choice to exclude holdings. With respect to the latter choice, Luxembourg claims that it was logical that financial holdings should be excluded from the calculations, since they have no part in an exercise that is restricted to transfer pricing on intra-group loans. Furthermore, according to the transfer pricing report, the amount used to finance the holdings is EUR 165 244 000, which is equivalent to the sale price of the holdings by FFT and hence, according to Luxembourg, cannot be open to criticism. In addition, since the revenue for holdings is tax exempt under Luxembourg law, the related costs, such as interest charges, are not deductible. Finally, as holdings are paid through dividends from subsidiaries, the amount of which can vary according to the results of the subsidiaries and their reinvestment requirements, the notion of a margin to be applied to that flow of revenue makes no commercial sense.
- (155) Third, Luxembourg claims that the exclusion of intra-group debts from the calculation is also justified given that FFT's debts are backed by an explicit guarantee for FFT lenders. Considering the industrial strategy, the commercial interests and the reputational risk of a possible bankruptcy, the risk of default of FFT is very low and the 'open' amount of EUR 93 710 000 more than sufficient to cover that risk.
- (156) Fourth, Luxembourg criticises the Commission for calling into question the way in which the beta was calculated for the determination of the risk premium. Firstly, such calculations are not a purely mathematical calculation and different results can be justified, so that the results arrive at in the transfer pricing report are entirely justifiable and sound. Secondly, even assuming that the Commission arrived at different results, it still has to be examined whether that places FFT at an advantage compared with other undertakings established in Luxembourg. Thirdly, even under an alternative assessment, where the risk premium calculated for FFT is compared with the payment made to shareholders of the quoted company giving a percentage of 3,5-4 % which is considerably lower than the 6,05 % risk premium calculated for FFT, the comparison shows that the risk premium of 6,05 % is entirely justifiable and fully complies with the requirements of Article 164 L.I.R.

⁽⁵⁷⁾ Luxembourg refers in this regard to the Communication of 4 June 2014 from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period July 2012 to January 2014, COM(2014) 315 final.

- (157) Finally, Luxembourg claims that given that the tax ruling practice in Luxembourg has been explicitly confirmed by the Code of Conduct Group (Business Taxation) to be consistent with the OECD Code of Conduct and Guidelines, the principle of legitimate expectations means that FFT should be able to rely on the tax ruling of 3 September 2012 for its full period of validity, namely 5 years.

5. COMMENTS FROM INTERESTED PARTIES

- (158) FFT sent its comments to the Opening Decision on 30 October 2014. The comments arrived in two separate documents.

5.1. FFT's first set of comments

- (159) FFT's first set of comments is divided in two parts. Part one sets out why FFT believes that the Commission misapplied the OECD transfer pricing principles to the FFT APA. Part two describes why the Opening Decision fails to meet the required legal standard to establish selectivity under Article 107(1) of the TFEU.

5.1.1. Misapplication of the OECD principles

- (160) First, contrary to the assertion of the Commission in the Opening Decision, FFT submits that there was no agreement with the Luxembourg tax administration on a fixed taxable income. The agreement related only to a method to remunerate the treasury functions performed by FFT and, each year following 2011, FFT has updated all of the parameters used to estimate its capital at risk and return on equity to calculate its target profit. Moreover, the FFT APA is only valid for a period of 5 years, provided the facts and circumstances on which the APA is based do not change, which is a period of validity consistent with the ruling practice in other Member States.
- (161) Second, there is nothing objectionable to the fact that FFT's tax advisor chose the TNMM, given that no internal comparables to the transactions carried out by FFT exist that could be used for applying a CUP method. That is because (i) FFT does not grant loans to third parties; and (ii) Fiat group companies do not receive similar loans from third parties. FFT refers to paragraph 2.2 of the OECD TP Guidelines according to which the method selection should always aim at finding the most appropriate method. FFT further refers to paragraph 2.4 of the OECD TP Guidelines, according to which there are situations where transactional profit methods are found to be more appropriate than traditional transaction methods.
- (162) According to FFT, if the tax advisor had used the pricing of its bonds in the application of the CUP method to set the transfer prices applied to the loans to the group companies, FFT would have incurred losses, because it would not have recovered the cost of the liquidity to cover any financial needs of the group. FFT constitutes a less complex entity with respect to the other group companies whose margins may be tested with the TNMM. This method is used with increasing frequency in transfer pricing analyses and the 2010 OECD TP Guidelines do not provide for a hierarchy between methods.
- (163) Additionally, according to FFT, equity often may be the result of historical decisions linked to the operations of a company and may not have a direct link with the level of equity necessary to sustain the risks of the company's activity.
- (164) Finally, FFT notes that the OECD TP Guidelines acknowledge that transfer pricing is not an exact science. It refers to paragraph 1.13 of the OECD TP Guidelines in this respect, more precisely, to the following consideration: 'It is important not to lose sight of the objective to find a reasonable estimate of an arm's length outcome based on reliable information. It should also be recalled at this point that transfer pricing is not an exact science but does require the exercise of judgment on the part of both the tax administration and taxpayer'. FFT indicates that they have nevertheless used their best efforts to estimate an arm's length remuneration for their activities.

- (165) Third, as regards the adequacy of FFT's equity, FFT has to evidence that its equity is sufficient to support the risks it assumes in respect of its financing activity. No specific guidance is given by the Circular to determine the appropriate level of equity at risk and, therefore, FFT decided to analyse its equity to ascertain what proportion of capital was necessary to perform its activities and to bear its risks by making reference to the Basel II framework. Also the Circular compares companies performing intermediary financing activities with independent financial institutions. The Circular also requires taxpayers performing intra-group financing transactions to have sufficient equity to support their financing risks from such transactions. To the contrary, holding activities are not considered for the purpose of the FFT APA which is why it was justified to exclude FFT's shareholdings from its equity at risk. Besides, the amount of equity equivalent to the investment in FFT's subsidiaries has been excluded since it reflects non-portfolio investments in affiliates that are remunerated through dividends. However, dividends are not subject to transfer pricing analyses as they do not entail any consideration of the significance of the functions performed or of the risks borne. Such deduction is also consistent with the Basel II framework ⁽⁵⁸⁾ and Article 57 of Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (the Capital Requirement Directive, hereinafter: 'CRD III') ⁽⁵⁹⁾.
- (166) Fourth, with respect to the Commission's analysis of the treatment of intra-group receivables and the fact that the FFT APA disregards all assets other than third party assets, FFT submits that the group credit rating is already incorporated in the group cost of funding sourced by FFT. As FFT and all associated group companies have a credit rating equivalent to Fiat SpA ⁽⁶⁰⁾, there is no additional credit risk to FFT from lending to its associated group companies. Therefore, the interest rate charged by FFT to its associated group companies is set as the sum of the (i) group cost of funding; plus: (ii) the guarantee fees which it pays to Fiat SpA; (iii) the operational costs it incurs to be able to provide its own services to its affiliates; (iv) the 'negative carry' which arises because significant sums borrowed by FFT have to be kept on short-term deposit, at lower rates of interest, to meet group liquidity needs at short notice; and (v) the capital remuneration for risks incurred, which are consistent with the functions assumed by FFT in the management of the group treasury.
- (167) Fifth, according to FFT, it was justified to use the 6 % coefficient applied to its risk-weighted assets (hereinafter 'RWAs') as it corresponds to FFT's understanding of the Basel II framework transposed to non-bank financial institutions in certain EU jurisdictions (for instance, Italy) by local regulatory authorities in accordance with the CRD. Moreover, since the asset exposure of FFT to third parties consists mainly of bank deposits, the 20 % risk weighting was applied consistently with the Standardised Approach of the Basel II framework ⁽⁶¹⁾. Similarly, as regards the 15 % risk weighting applied for operational risk, FFT refers the Commission to the Basic Indicator Approach, where, according to Paragraph 649 of the Basel II framework, such a coefficient should be applied. Similarly, under the same Basic Indicator Approach, the gross income is to be computed as the net interest income plus net non-interest income gross of any provision, or operating expenses, but excluding exceptional profits. Given that FFT has no non-interest income, the reference to creditor interest accrued on bank deposits, net of the debtor interest accrued on bank loans, is justified as the best approximation of the operational risk of FFT. As regards any possible change of the regulatory framework, FFT submits that also under the Basel III
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- ⁽⁵⁸⁾ The following section is quoted: '49(xv). It has been concluded that the following deductions should be made from the capital base for the purpose of calculating the risk-weighted capital ratio. The deductions will consist of: [...] Investments in subsidiaries engaged in banking and financial activities which are not consolidated in national systems. The normal practice will be to consolidate subsidiaries for the purpose of assessing the capital adequacy of banking groups. Where this is not done, deduction is essential to prevent the multiple use of the same capital resources in different parts of the group. The deduction for such investments will be made in accordance with paragraph 37 above. The assets representing the investments in subsidiary companies whose capital had been deducted from that of the parent would not be included in total assets for the purposes of computing the ratio.'
- ⁽⁵⁹⁾ Article 57 provides that unconsolidated own funds of a credit institution exclude '(1) holdings in other credit and financial institutions amounting to more than 10 % of their capital'.
- ⁽⁶⁰⁾ The reason for this being the high level of integration of the group businesses and because of Fiat SpA's historical support for its subsidiaries. According to FFT, credit agencies employ group consolidated accounts to assess Fiat SpA's credit rating.
- ⁽⁶¹⁾ FFT deals only with major financial institutions located in the Euro area countries, essentially where 'Option 1' (the option that allows reference to the rating of the Sovereign instead of the bank's own rating) has been validated by national supervisors. Furthermore, CRD III grants a 0 % risk weighting for sovereigns that issue bonds in their own currency whatever their rating (Annex VI, part 1, 1.2, (4)). Therefore, according to FFT's and [the tax advisor]'s understanding of the Basel II framework and the CRD rules, a risk weight of one notch less than the one applying to the sovereign in which the banks operate could be applied to the banks under consideration. Such an application of the Basel II framework leads to the selection of the 20 % risk weighting for FFT's exposures to banks. This reasoning is applied both for credit and counterparty risks for FFT's exposure towards the banks.

framework ⁽⁶²⁾ and Directive 2013/36/EU ⁽⁶³⁾ of the European Parliament and of the Council ('CRD IV') on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, the relevant criteria are still valid.

- (168) Sixth, as regards the Commission's doubt on the beta used, FFT submits that even when excluding certain comparables (such as national banks), the arm's length range stays almost exactly the same. Since FFT acts as a treasury company and cannot be assimilated to a bank, betas of financing companies are considered by FFT and [the tax advisor] to be the most appropriate comparable. Moreover, the Circular makes a clear reference to financial service providers. On that basis, it is reasonable to consider a set of companies active in the financial services industry to determine an appropriate beta. With respect to the adoption of the 25th percentile of the arm's length range, this is in line with the OECD TP Guidelines that consider that all points within the arm's length range provide for arm's length prices/profits. In addition, FFT is considered to bear limited risks as it works exclusively for group companies, group activities are very integrated and the parent company has every interest to support the activities of its affiliates.
- (169) Seventh, FFT does not concur with the Commission's doubt that the 0,87 % return on equity is too low. The excess capital, i.e. the capital that is not necessary to cover the risks assumed by FFT on its financing activity, is either on-lent in case another group company needs additional funding or used to fund operating expenses incurred by FFT while rendering financial services. As such, it should be remunerated in line with short-term liquidity investments.

5.1.2. *The Commission's selectivity analysis*

- (170) FFT submits that even if the Commission's analysis of the compliance with the arm's length principle was correct, the Opening Decision provides no evidence of FFT being treated more advantageously than any other Luxembourg taxpayer in a comparable legal and factual situation to FFT. The Opening Decision does not contain any comparison of the position of FFT with other Luxembourg taxpayers, such as the 21 other taxpayers whose APAs have been reviewed by the Commission.
- (171) FFT was entitled to an APA from the Luxembourg tax administration, like any other Luxembourg taxpayer having a real presence in Luxembourg.
- (172) Moreover, given that the aggregate Luxembourg corporate income tax rate for FFT was 28,8 % (for the financial year 2011), while in Italy the headline corporate tax rate is approximately 33 %, a higher profit earned by FFT would have resulted in higher deductible costs in Italy, since the majority of the FFT loans are to Fiat Finance SpA. Hence, it is not clear what kind of 'aid' the group as a whole therefore obtained if FFT reported a lower profit in Luxembourg and hence was entitled to lower interest deductions in Italy.

5.2. **FFT's second set of comments**

5.2.1. *The APA does not confer an 'advantage'*

- (173) FFT's second set comments start off by explaining the importance of APAs in general and their acceptance both as a part of the general tax system, as well as their endorsement by the Luxembourg tax system. The FFT APA follows the guidance contained in the Circular and does not depart from the Luxembourg general tax system. The 5-year duration of the FFT APA is in line with the standard length of APAs concluded in other Member States.

⁽⁶²⁾ Basel Committee on Banking Supervision, International regulatory framework for banks (Basel III).

⁽⁶³⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

- (174) Luxembourg transfer pricing rules, which are the basis on which the Circular has been issued, are part of the general tax system, as they apply between related group companies engaged in the carrying out of intercompany transactions. Luxembourg transfer pricing rules do not derogate from the general tax system, as they respect in practice the OECD TP Guidelines and are aimed at identifying an arm's length profit.
- (175) As regards the doubt of the Commission expressed in the Opening Decision on the choice of the transfer pricing methodology, FFT submits that the TNMM is a generally accepted OECD approved methodology that is consistent with the general tax system in Luxembourg. The wide use of the TNMM has been acknowledged by the Commission, as well as the fact that its application can raise complexities ⁽⁶⁴⁾. There is a lack of guidance on certain detailed aspects, but the Commission claims the right to resolve controversial transfer pricing issues based on its own view as to how the TNMM should be applied in this case. In addition, FFT's tax profit is aligned with the statutory profit which further confirms that the use of the TNMM did not provide any economic advantage to FFT.
- (176) According to FFT, tax authorities should be allowed a certain margin of appreciation when applying the TNMM, which, as far as the determination of the taxable profit is concerned, never leads to one single outcome, but to the identification of a range of valid results. Accordingly, the difference between the taxable income obtained by FFT (and accepted by the Luxembourg tax authorities) and the alleged taxable income according to the Commission should not be considered an advantage for State aid purposes. Such an advantage only arises where the measure amounts to a flagrant departure from standard transfer pricing rules and goes beyond the margin of appreciation of the tax administration ⁽⁶⁵⁾. Otherwise, the Commission would interfere with the taxing powers of a Member State.
- (177) Finally, when assessing whether an advantage exists, FFT alleges that the Commission should have considered the overall 'group' effect. To that effect, no advantage exists for the Fiat group because any increase of the taxable base in Luxembourg is offset in full by an increased tax deduction in other European countries (in the latest years mainly in Italy). According to FFT, this effect has been recognised in a number of Commission decisions ⁽⁶⁶⁾.

5.2.2. Lack of selectivity

- (178) According to FFT, the reference system to assess selectivity can only include companies being subject to transfer pricing rules, i.e. dealing exclusively with related parties. This is recognised in the Commission decision on *Groepsrentebox*, ⁽⁶⁷⁾ which states with respect to debt financing activities that related companies are not in a legal and factual situation comparable to that of unrelated companies. Thus, to demonstrate selectivity, the Commission would have to prove that FFT obtained an APA under conditions which are different from those of other Luxembourg group entities engaged in financing activities. However, the Circular explains that APAs are available to all finance group companies. Therefore, there is no selectivity.
- (179) The Commission generally accepts tax rulings as a means to provide taxpayers with legal certainty and predictability vis-à-vis their tax position. Tax rulings issued by the Luxembourg tax administration are not discretionary, since they follow the principles of the Circular, which specifically refers to the arm's length principle as defined in Article 9 of the OECD Model Tax Convention and provides guidance and clarifications with regard to the minimum equity requirements and transfer pricing analysis that a Luxembourg company performing an intra-group financing activity has to meet. Thus, the margin of appreciation of the Luxembourg tax administration, if any, is limited by the guidance offered in the Circular. In addition, this limited margin of appreciation left to the

⁽⁶⁴⁾ FFT supports this point by making reference to § 5.3.2 of the Commission communication on Company Taxation in the Internal Market, COM(2001) 582 final of 23 October 2011.

⁽⁶⁵⁾ In this context, FFT makes reference to the Commission decision on Umicore (Commission decision of 26 May 2010 on State aid granted to Umicore SA, C 76/2003 (ex NN 68/2003)) where the Commission stated that a tax advantage must be 'out of proportion' in order to fall within the scope of State aid scrutiny.

⁽⁶⁶⁾ Notably Commission Decision of 28 October 2009 on State aid C 10/07 (ex NN 13/07) implemented by Hungary for tax deductions for intra-group interest decisions (hereinafter '*Hungarian group interest tax regime decision*').

⁽⁶⁷⁾ Commission Decision 2009/809/EC of 8 July 2009 on State aid C 4/2007 (ex N 465/2006) on the *Groepsrentebox* scheme which the Netherlands is planning to implement (C4/07 (ex 465/06)) (OJ L 288, 4.11.2009, p. 26). (hereinafter '*Groepsrentebox decision*').

tax administration is inherent to the application of the OECD TP Guidelines. This, in itself, cannot trigger the presence of State aid. Furthermore, FFT submits that the FFT APA is subject to periodical review with a maximum period of validity of 5 years.

- (180) FFT further argues that the Commission has not demonstrated that the application of the TNMM method in the FFT APA diverges from other rulings concluded by companies in situations comparable to FFT. According to FFT, there is no doubt that a comparable undertaking in a similar situation to FFT would have been able to request a ruling and to determine its taxable profits on the basis of the TNMM. Since FFT and comparable undertakings are subject to the same tax regime, it also becomes immaterial to establish whether the transfer pricing methodology applied to FFT was compliant with the OECD TP Guidelines (which it was in any event).

5.2.3. *FFT's factual situation differs substantially from the decisions on Coordination Centres*

- (181) According to FFT, the Opening Decision illustrates a number of noteworthy differences vis-à-vis previous decisions in which the Commission challenged the application of a transfer pricing methodology (namely cost-plus) as being the tax measure that gave rise to the selective advantage ⁽⁶⁸⁾. In those decisions, the regime was available only to those taxpayers that met certain requirements, whereas in the Opening Decision the Commission challenges solely the application of the TNMM, i.e. the specific determination of the taxable profits, in the context of an APA procedure available to all Luxembourg taxpayers engaged in related party financing.
- (182) Moreover, in those decisions the income determined under the cost-plus method could depart substantially from the statutory profit, which is not the case for FFT, whose income determined under the TNMM methodology is in line with the accounting result of the company itself. Similarly, the application of the transfer pricing methodology in the earlier decisions was manifestly not in line with OECD TP Guidelines. In the present case, there is no breach of the OECD TP Guidelines. However, unlike the decisions on coordination centres, there is also no clear transfer pricing guidance in the OECD TP Guidelines about some of the activities performed by FFT (such as the performance of financial and treasury activities).
- (183) FFT further alleges that the Commission also did not consider that the FFT APA was based on an economic study in line with the OECD TP Guidelines which shows that the profit determination was not arbitrary and that the Luxembourg tax authorities did not exercise any discretion.

6. COMMENTS FROM LUXEMBOURG ON THIRD PARTY COMMENTS

- (184) By letter of 5 January 2015, Luxembourg expressed its complete agreement to the observations of Fiat.

7. ASSESSMENT OF THE CONTESTED MEASURE

7.1. Existence of aid

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

⁽⁶⁸⁾ 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); 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); Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) — Coordination Centres — implemented by Luxembourg (OJ L 170, 9.7.2003, p. 20); Commission 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); Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres (OJ L 177, 16.7.2003, p. 17).

- (186) According to settled case-law, for a measure to be categorised as aid within the meaning of Article 107(1) of the TFEU, all the conditions set out in that provision must be fulfilled ⁽⁶⁹⁾. It is thus well-established that, for a measure to be categorised as State aid within the meaning of that provision, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition ⁽⁷⁰⁾.
- (187) As regards the first condition for a finding of aid, the contested ruling was issued by the '*Administration des contributions directes*', which is part of the tax administration of the Grand Duchy of Luxembourg. That ruling entails an acceptance by the Luxembourg tax administration of a method of profit allocation to FFT within the Fiat group, proposed by the latter's tax advisor, which binds that tax administration for a period of 5 years, on the basis of which FFT determines its corporate income tax liability to Luxembourg on a yearly basis. The contested ruling is therefore imputable to Luxembourg.
- (188) As regards the measure's financing through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid ⁽⁷¹⁾. In Section 7.2 below the Commission will demonstrate that the contested ruling results in a lowering of FFT's tax liability to Luxembourg by deviating from the tax that FFT would otherwise be obliged to pay under the general Luxembourg corporate tax system. Consequently, the contested ruling should be considered to give rise to a loss of State resources, since any reduction of tax for FFT results in a loss of tax revenue that would otherwise have been available to Luxembourg.
- (189) As regards the second condition for a finding of aid, FFT is part of the Fiat group, a globally active entity operating in all Member States of the Union, so that any aid in its favour is liable to affect intra-Union trade. Similarly, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ⁽⁷²⁾. To the extent the contested ruling relieves FFT of a tax liability it would otherwise have been obliged to pay under the general Luxembourg corporate income tax system, that ruling distorts or threatens to distort competition by strengthening the financial position FFT and the Fiat group, so that the fourth condition for a finding of aid is also fulfilled in the present case.
- (190) As regards the third condition for a finding of aid, the Commission will demonstrate in Section 7.2 why it considers the contested ruling to confer a selective advantage on FFT, in so far as it results in lowering its tax liability in Luxembourg by deviating from the tax FFT would be due under the ordinary tax system, therefore fulfilling all the conditions for a finding of aid under Article 107(1) of the TFEU.

7.2. Existence of a selective advantage

- (191) According to settled case-law, 'Article 107, paragraph 1 of the Treaty requires it to be determined 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 others which, in the light of the objective pursued by the scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity' ⁽⁷³⁾.
- (192) In fiscal cases, the Court of Justice has devised a three-step analysis to determine whether a particular tax measure is selective ⁽⁷⁴⁾. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it is determined whether the tax measure in question constitutes a derogation from

⁽⁶⁹⁾ See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

⁽⁷⁰⁾ See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.

⁽⁷¹⁾ See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, paragraph 72 and the case-law cited therein.

⁽⁷²⁾ See Case 730/79 *Phillip Morris* ECLI:EU:C:1980:209, paragraph 11 and Joined Cases T-298/97, T-312/97 etc. *Alzetta* ECLI:EU:T:2000:151, paragraph 80.

⁽⁷³⁾ See C-172/03 *Heiser* ECLI:EU:C:2005:130, paragraph 40.

⁽⁷⁴⁾ See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550.

that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the reference system, it is then established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation to the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system ⁽⁷⁵⁾. If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.

7.2.1. Determination of the reference system

7.2.1.1. Reference system composed of the general Luxembourg corporate tax system

- (193) As a general rule, for the purposes of the selectivity analysis a reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective.
- (194) In the present case, the Commission considers the reference system to be the general Luxembourg corporate income tax system, which has as its objective the taxation of profits of all companies subject to tax in Luxembourg ⁽⁷⁶⁾. The Luxembourg corporate income tax system applies to domestic companies and foreign companies resident in Luxembourg, including Luxembourg branches of foreign companies. A company is deemed resident in Luxembourg if it has its corporate address or its central management in Luxembourg. Domestic companies and foreign companies resident in Luxembourg are liable to corporation tax on their worldwide profits, unless a tax treaty applies. Non-resident companies are only taxable on specific Luxembourg-sourced income ⁽⁷⁷⁾. Tax is payable on profits realised minus tax-deductible expenses and losses, which may be carried forward indefinitely.
- (195) The Luxembourg corporate income tax consists of a corporate income tax on profits (*'impôt sur le revenu des collectivités'* or *'IRC'*), taxed at a rate of 21 %, and, for companies established in Luxembourg City, a municipal business tax on profits (*'impôt commercial communal'*), taxed at a rate of 6,75 %. In addition, there is a 5 % surcharge on the 21 % tax rate for an employment fund calculated on the IRC ⁽⁷⁸⁾. Since 1 January 2011, the total combined corporate income tax rate in Luxembourg is therefore 28,80 % ⁽⁷⁹⁾, ⁽⁸⁰⁾.
- (196) For the determination of the taxable profit for the purposes of Luxembourg corporate income tax, in principle, the commercial accounts of the taxpayer are followed, subject to adjustments imposed by Luxembourg tax law mainly relating to dividend/capital gains exemption, add-back expenses ⁽⁸¹⁾, corrections to the tax result from transactions not executed at arm's length, and the application of different depreciation rules under tax and accounting rules.
- (197) While the determination of taxable profits in the case of non-integrated/domestic standalone companies that transact on the market is rather straightforward, as it is based on the difference between income and costs in

⁽⁷⁵⁾ See Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 65.

⁽⁷⁶⁾ See also Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 50.

⁽⁷⁷⁾ This includes income attributable to a permanent establishment located in Luxembourg, income from professional services carried on in the country, dividends, interest from profit sharing loans and interest from bonds if the paying agent is the State or a resident individual or company, capital gains from the sale of shareholdings of 10 % or more in resident companies (except venture capital funds).

⁽⁷⁸⁾ In 2012. The solidarity surcharge was increased from 5 % to 7 % with effect from tax year 2013.

⁽⁷⁹⁾ With the changes introduced for tax year 2013, the aggregate income tax rate increases from 28,80 % to 29,22 % for Luxembourg City.

⁽⁸⁰⁾ In addition, Luxembourg companies are subject to an annual net wealth tax, which is levied at a rate of 0,5 % on the company's worldwide net worth on 1 January of each year.

⁽⁸¹⁾ E.g. interest expenses on assets generating tax-exempt income or directors' fees, which are not for the day-to-day running of the company.

a competitive market, the determination of taxable profits in the case of integrated group companies like FFT, requires the use of proxies. Standalone, non-integrated companies can take their accounting profits as a starting point for determining the tax base to which corporate income tax applies, since those profits are dependent on prices dictated by the market for the inputs acquired and the products and services sold by the company. By contrast, an integrated company that transacts with companies of the same corporate group will have to estimate the prices applied to those intra-group transactions for determining their taxable profits for tax purposes, that estimate being determined by the same company controlling the group instead of being dictated by the market.

- (198) However, this difference in determining the taxable profits of non-integrated companies, i.e. those not belonging to a corporate group and thus 'standalone', and integrated companies, i.e. those belonging to a corporate group, has no bearing on the objective of the Luxembourg corporate income tax system, which aims to tax the profits of all companies resident in Luxembourg, whether non-integrated or integrated. Indeed, the IRC lists the entities in Luxembourg that are subject to corporate income tax and it includes '*toute entité économique pouvant être soumise directement à l'impôt sur le revenu des collectivités*'. Neither the legal form of the undertaking, nor its structure (group of undertakings or not) constitute a determinant criterion for the imposition of corporate income tax in Luxembourg. Moreover, even if financing decisions could be expected to be taken in the best interest of a group as a whole, Luxembourg corporate income tax is levied on individual entities, not on groups, and the contested tax ruling relates only to the taxable profit of FFT, so that any reduced tax revenue is based individually on that company's results. While it is true that Luxembourg tax law contains certain special provisions applicable to groups (e.g. fiscal unity ⁽⁸²⁾), these are aimed at putting on equal footing non-integrated companies and economic entities structured in the form of groups, but not at treating groups more favourably ⁽⁸³⁾.
- (199) Accordingly, the different manner in which the taxable profit is necessarily arrived at for integrated and non-integrated companies has no relevance for determining the reference system for the selectivity analysis in the present case. Since under the Luxembourg corporate income tax system, the profits of all companies resident in Luxembourg are taxed in the same manner, without any distinction as to integrated and non-integrated companies, both types of companies should be considered to be in a similar factual and legal situation in light of the intrinsic objective of that system ⁽⁸⁴⁾. Indeed, since the aim of the contested tax ruling is to determine FFT's taxable profit for the purpose of levying corporate income tax under the general Luxembourg corporate income tax system, it is that system that constitutes the reference system against which that ruling should be examined to determine whether FFT has benefitted from a selective advantage.
- (200) Finally, in response to the various arguments FFT advances to support its claim that group companies and standalone companies do not belong to the same reference system, the Commission notes the following.
- (201) According to FFT, the reference system to assess the selectivity of the contested ruling should only include companies being subject to transfer pricing rules, i.e. dealing exclusively with related parties ⁽⁸⁵⁾, so that the Commission, in order to establish selectivity, must demonstrate that FFT obtained a tax ruling under conditions

⁽⁸²⁾ Fiscal unity applies if a number of conditions are fulfilled: the parent company has held, directly or indirectly, a participation of 95 % or more in the share capital of a subsidiary, as from the beginning of the accounting period during which the application for the consolidation regime has been made; the subsidiary is a capital company resident in Luxembourg and fully subject to corporate income tax; the consolidating parent company is a capital company resident in Luxembourg and fully subject to corporate income tax, or a branch of a non-resident company which is subject in its jurisdiction of establishment to an income tax which is comparable to Luxembourg income tax; and the consolidation is requested for at least five accounting years.

⁽⁸³⁾ An integrated company can offset losses experienced in some of its plants against the profits realised in other plants. Tax consolidation assimilates a group of companies to a single taxpayer. It is a means to eliminate the disadvantages that groups of companies experience compared to integrated companies with respect to income taxation. Consolidation is not an aid measure if, once consolidated, a group of companies is not treated more favourably than an integrated company.

⁽⁸⁴⁾ In general, all undertakings having an income are considered to be in a similar legal and factual situation from the perspective of direct company taxation.

⁽⁸⁵⁾ Observations of FFT to the Opening Decision, paragraph 2.1.

which are different from those of other Luxembourg group entities engaged in financing activities ⁽⁸⁶⁾. According to FFT, this approach is confirmed by the Commission's decisions on *Groepsrentebox* and *Hungarian group interest tax regime* ⁽⁸⁷⁾.

- (202) At the outset, the Commission recalls that it is not bound by its decisional-practice. Each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the TFEU, so that even if a contrary decisional practice were shown to exist, that could not affect the findings of the present decision ⁽⁸⁸⁾.
- (203) In any event, contrary to what FFT claims, neither decision confirms that where a tax measure is granted in favour of an integrated company, the reference system must necessarily be limited to those types of company. Moreover, the objective of the tax measure at the basis of both decisions is not comparable to the present case and therefore, the conclusions that can be drawn from those decisions are not applicable to the present case.
- (204) The *Groepsrentebox* scheme was set up by the Dutch authorities to reduce the difference in tax treatment between the provision of equity capital and loan capital in a group context and, as such, to reduce arbitrage between these two forms of intra-group financing ⁽⁸⁹⁾. The Commission observed in the final decision that given the objective of the measure, which was to reduce the difference in tax treatment between the provision of equity capital and loan capital in a group context and, as such, to reduce arbitrage between these two forms of intra-group financing, it is 'only group companies, [and not stand-alone companies,] that are confronted with arbitrage between equity capital and loan capital within their group' ⁽⁹⁰⁾. It was in the light of that observation, as well as of the objective of the scheme which was 'to reduce incentives for arbitrage between financing through a capital injection and a loan, and ensuring tax neutrality in this regard' ⁽⁹¹⁾, that the Commission considered the reference system in that case to include only companies subject to corporation tax and engaged in intra-group financing transactions ⁽⁹²⁾.
- (205) By contrast, the objective of the contested tax ruling is to determine FFT's tax base to calculate the tax due for the purposes of levying the Luxembourg corporate income tax on that amount. First, while it could be argued that the objective underlying the *Groepsrentebox* decision is only valid in a group context (such as the fact that stand-alone companies are not faced with the issue of arbitrage between different forms of financing), the determination of the taxable base for the computation of the annual corporate income tax liability is equally relevant and applicable to entities that are part of a group as well as stand-alone companies.
- (206) Second, FFT functions as a treasury company and only provides services to other companies of the Fiat group. However, the transaction it carries out could also be carried out outside a group context. The Circular compares this type of intra-group financing transactions with transactions carried out by independent financial institutions ⁽⁹³⁾ and requires that the remuneration for these financial services should be based either on the loan amount or on the actual market value of the assets under management, just like it would be done by an independent financial institution. The Circular therefore recognises that the transactions, even though carried out in a group context, are directly comparable to normal market transactions.
- (207) Those characteristics of the present case further confirm that the observation of the Commission in the *Groepsrentebox* decision — that with respect to debt financing activities, related companies are not in a legal and factual situation comparable to that of unrelated companies — cannot be generalised for situations where the objective

⁽⁸⁶⁾ Observations of FFT to the Opening Decision, paragraph 2.1.3.

⁽⁸⁷⁾ See footnotes 66 and 67.

⁽⁸⁸⁾ See C-138/09 *Todaro Nunziatina & C.* ECLI:EU:C:2010:291, paragraph 21.

⁽⁸⁹⁾ The scheme provided that the positive balance between interest received on group loans and interest paid in the context of intra-group financing transactions was not taxed at the standard corporate tax rate of 25,5 % at the time but taxed in a 'group interest box' at the rate of 5 %.

⁽⁹⁰⁾ *Groepsrentebox* decision, recital 85.

⁽⁹¹⁾ *Groepsrentebox* decision, recital 101.

⁽⁹²⁾ *Groepsrentebox* decision, recital 107.

⁽⁹³⁾ The Circular states that '[A]s regards intra-group financing companies, the functions they perform when they grant loans to group entities are, in substance, comparable to the functions performed by independent financial institutions, subject to the supervision of the 'Commission de Surveillance du Secteur Financier' (CSSF)'.

of a tax ruling is to determine the tax base for the purposes of levying corporate income tax on that amount. The statement in the Circular on the comparability of the transactions mirrors the basic principles underlying the arm's length principle according to which commercial and financial relations between associated companies should not differ from relations which would be made between independent companies ⁽⁹⁴⁾. It is precisely the objective of transfer pricing rules that transactions between group/associated companies are compared to transactions between independent companies and any deviation needs to be corrected. On this basis, FFT's reliance on the *Groepsrentebox* decision is misplaced.

- (208) The same conclusion holds for FFT's reliance to the *Hungarian group interest tax regime* decision. That decision concerned a scheme which had as its objective the reduction of arbitrage (in a domestic situation) through approximating the taxation of intra-group dividends and thus reinforcing the technical neutrality of the fiscal scheme ⁽⁹⁵⁾. The objective of reduction of arbitrage, which was considered at the time by the Commission to arise primarily in a group context, is different from the objective underlying the present situation, which is to determine the taxable base of FFT in Luxembourg on which to apply corporate income tax. The latter objective does not differentiate between FFT being a group entity and any other (stand-alone) entity that turns to the Luxembourg tax authorities to have its tax base determined. Admittedly, in the case of FFT, the determination of the taxable base is more complicated, as it involves the application of transfer pricing rules and the arm's length principle, whereas in the case of a stand-alone company, the taxable income would in principle be equivalent to the accounting income, subject to possible adjustments based on tax law. However, the objective of the corporate income tax law as well as of the tax ruling is to tax all profits of companies subject to tax in Luxembourg, which applies irrespective of whether a corporate taxpayer is part of a group or not.
- (209) The Commission therefore concludes that the reference system against which the contested ruling should be examined is the general Luxembourg corporate tax system in the form of the Luxembourg corporate income tax rules (IRC) as set out in recitals 193 to 208. In particular, that reference system is composed of a consistent set of rules that apply on the basis of objective criteria for the taxation of profits of stand-alone companies, where the determination of the taxable profit usually coincides with the accounting profit (subject to certain adjustments based on tax law) and group companies, which resort to transfer prices to allocate profits, alike. In light of the intrinsic objective of that system, both types of companies — non-integrated and integrated companies — should be considered to be in a similar factual and legal situation.

7.2.1.2. Article 164(3) L.I.R., the Circular and/or the relevant administrative practice do not constitute the appropriate reference system

- (210) Luxembourg considers that the reference system should only comprise group companies that fall under Article 164(3) L.I.R. ⁽⁹⁶⁾, whereas FFT seems to go further and considers that the reference system should be based on the Circular and only include group companies engaged in financing activities ⁽⁹⁷⁾. According to those views, the existence of selectivity would require evidence that FFT received a different treatment as compared to other group entities engaged in financing activities, which are in a similar factual and legal situation to FFT in light of the objectives of Article 164(3) L.I.R. and/or the Circular. The Commission should therefore have compared the contested tax ruling with the 21 other taxpayers whose advance pricing agreements were submitted to the Commission (see recital 8) ⁽⁹⁸⁾. Given that, according to Luxembourg and FFT, the treatment of FFT is in line with Article 164(3) L.I.R., the Circular and the relevant administrative practice, there is no selective advantage granted through the tax ruling.
- (211) The Commission does not accept this line of reasoning.

⁽⁹⁴⁾ See Article 9 of the OECD Model Tax Convention.

⁽⁹⁵⁾ In this case, the measure provided for the possibility to deduct from the tax base in Hungary 50 % of the amount of the net interest received from affiliated companies, which is the balance of interest received from affiliated companies less the interest paid to affiliated companies. Under the measure, half of the net interest received is taxed, while in the normal application of the tax system the whole amount would be taxed. On the level of the affiliated company paying the net interest, 50 % of the amount of the net interest is added to the tax base, i.e. instead of a full deduction of the net interest paid under the normal tax system, companies only deduct half of this amount from their tax base. The scheme applied only to interest received from and paid to affiliated companies and it had as objective reducing the difference between equity and intra-group loan financing.

⁽⁹⁶⁾ Luxembourg's observations to the Opening Decision, paragraph 73.

⁽⁹⁷⁾ FFT's second set of comments, paragraphs 2.1.3 and 2.1.4.

⁽⁹⁸⁾ FFT's first set of comments, paragraph 60.

- (212) As explained in recital 198, the objective of the Luxembourg corporate income tax system is to tax the profits of all companies that fall under its tax jurisdiction, irrespective of whether those companies are integrated or non-integrated companies. As explained in recital 194, Luxembourg corporate income tax is levied on the worldwide profits of domestic companies and foreign companies resident in Luxembourg (unless a tax treaty applies), including Luxembourg branches of foreign companies, while non-resident companies are only taxed on specific Luxembourg-sourced income.
- (213) By considering, as Luxembourg and FFT do, that the reference system only includes group companies, since only those companies need to revert to the arm's length pricing to determine their tax base, an artificial distinction is introduced between companies based on their company structure for the purposes of determining their taxable profits that the general Luxembourg corporate income tax system does not recognise when taxing the profits of companies falling within its tax jurisdiction.
- (214) Similarly, FFT's distinction between groups and stand-alone companies based on the activities that the group entity carries out, by arguing that the reference system only includes those companies that apply the Circular, cannot be reconciled with the objective of the Luxembourg corporate income tax system. While it is true that FFT's activities relate almost exclusively to intra-group transactions ⁽⁹⁹⁾, the financial transactions it carries out could equally be carried out outside a group context by independent financial institutions, as noted in the Circular. For the purposes of levying Luxembourg corporate income tax, FFT should therefore be compared to any other type of company, integrated or non-integrated, carrying out economic activities, since under Luxembourg corporate tax law the profits of independent financial institutions is subject to the same corporate income tax rules as the profits arising out of intra-group transactions, determined on the basis of the arm's length principle. The Commission therefore rejects FFT's argument that the reference system should only comprise group companies carrying out group-financing transactions.
- (215) Accordingly, the Commission concludes that, in the present case, the reference system against which the contested tax ruling should be examined is the general Luxembourg corporate income tax system as set out in recitals 193 to 208, irrespective of whether corporate income tax is imposed on the profit of group or stand-alone companies and irrespective of the activities they carry out.

7.2.2. *Selective advantage due to a derogation from the general Luxembourg corporate income tax system*

- (216) Having determined that the general Luxembourg corporate income tax system constitutes the reference system against which the contested ruling should be assessed, it is necessary to establish whether that ruling constitutes a derogation from that reference system, leading to unequal treatment between companies that are factually and legally in a similar situation.
- (217) In relation to that second step of the selectivity analysis, whether a tax measure constitutes a derogation from the reference system will generally coincide with the identification of the advantage granted to the beneficiary under that measure. Indeed, where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the advantage granted by the tax measure and the derogation from the system of reference.
- (218) According to the Court, in the case of an individual aid measure, as opposed to a scheme, 'the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective' ⁽¹⁰⁰⁾. In the present case, the individual aid measure from which FFT benefits is the contested tax ruling, which endorses a methodology for determining its taxable profit in Luxembourg for the functions it performs within the Fiat group, which are subsequently taxed under the general Luxembourg corporate income tax system.

⁽⁹⁹⁾ As noted at recital 206.

⁽¹⁰⁰⁾ See Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, paragraph 60; see also, Case T-385/12 *Orange v Commission* ECLI:EU:T:2015:117.

7.2.2.1. Selective advantage resulting from a deviation from the arm's length principle

- (219) In principle, the function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case, given a set of facts and circumstances specific to that case, for a certain period of time and provided that there is no material change over the application of the ruling in that specific set of facts and circumstances. Where a tax ruling is based on a method of assessment that deviates from what would result from a normal application of the ordinary tax system without justification, that ruling will be considered to confer a selective advantage upon its beneficiary, in so far as that selective treatment results in the lowering of that beneficiary's tax liability in the Member State concerned as compared to companies in a similar legal and factual situation.
- (220) An advantage pursuant to Article 107(1) of the TFEU is any economic benefit that an undertaking would not have obtained under normal market conditions, i.e. in the absence of the State intervention ⁽¹⁰¹⁾. Thus, whenever the financial situation of an undertaking is improved as a result of a State intervention, an advantage is present. ⁽¹⁰²⁾ Such improvement is shown by comparing the financial situation of the undertaking as a result of the contested measure with the financial situation of that undertaking had the measure not been granted ⁽¹⁰³⁾. An advantage can consist both in the granting of positive economic advantages as well as in the mitigation of charges normally included in the budget of an undertaking ⁽¹⁰⁴⁾.
- (221) As explained in recitals 52 et seq., by the contested tax ruling, Luxembourg accepted a methodology for determining FFT's taxable profit in Luxembourg, as proposed by the latter's tax advisor in the transfer pricing report, which allows FFT to determine its corporate income tax liability in Luxembourg on a yearly basis for the period during which that ruling is valid. More specifically, the transfer pricing report endorsed by the contested tax ruling determines, in the absence of transactions dictated by the market as would exist for a non-integrated independent company, the profit to be allocated to that company of the Fiat group and which translates into the pricing of the transactions it concludes with the other group companies of the Fiat group.
- (222) The Court of Justice has already held that a reduction in the taxable base that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer, by virtue of the fact that its tax liability under the ordinary tax system is reduced as compared to independent companies which rely on their accounting profits to determine their taxable base ⁽¹⁰⁵⁾.
- (223) In its judgment on the Belgian tax regime for coordination centres ⁽¹⁰⁶⁾, the Court of Justice assessed a challenge to a Commission decision which concluded, inter alia, that the method for determining taxable income under that regime conferred a selective advantage on those centres ⁽¹⁰⁷⁾. Under that regime, taxable profits were set at a flat-rate amount which represented a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges were excluded. According to the Court, 'in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres

⁽¹⁰¹⁾ Case C-39/94 *SFEI and Others* ECLI:EU:C:1996:285, paragraph 60; Case C-342/96 *Spain v Commission* ECLI:EU:C:1999:210, paragraph 41.

⁽¹⁰²⁾ This advantage does not have to be 'out of proportion' as FFT argues in its observations (paragraphs 1.7.1 and 1.7.2) Any advantage is sufficient to constitute State aid, provided the other conditions of Article 107(1) of the Treaty are met. The *Umicore* decision (Commission decision of 26.5.2010 on State aid granted to Umicore SA, C 76/2003 (ex NN 68/2003)) quoted by FFT is irrelevant to the present case given the fact that the Commission is not bound by its decisional practice (see recital 202). In any event, the difference between the present case and the *Umicore* case does not allow parallels to be drawn between those two cases. The *Umicore* case concerned the application of VAT exemptions by Umicore in the context of certain sales of silver to undertakings established in other Member States. In December 2000, the Belgian tax authorities' Special Tax Inspectorate (*Inspection Spéciale des Impôts-ISI*) reached a settlement agreement with the company. This type of settlement was administrative practice by the Belgian tax authorities but only to the extent that the settlement related to the facts of the case and not to the level of taxation: 'Néanmoins, conformément à l'article 84, CTVA, de telles transactions ne sont possibles que dans la mesure où elles n'impliquent pas exemption ou modulation d'impôt. En application de ce principe, une transaction ne peut donc pas porter sur le montant de la taxe résultant de faits établis, mais bien sur des questions de fait' (paragraph 154).

⁽¹⁰³⁾ See Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, paragraph 13.

⁽¹⁰⁴⁾ See, for instance, Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100.

⁽¹⁰⁵⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* ASBL ECLI:EU:C:2006:416.

⁽¹⁰⁶⁾ *Ibid.*

⁽¹⁰⁷⁾ Commission Decision 2003/757/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).

confers an advantage on them, it is necessary, [...], to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.' The Court then held that 'the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition', which the Court found to '[confer] an advantage on the coordination centres' ⁽¹⁰⁸⁾.

- (224) The Court has thus accepted that a tax measure which results in a group company charging transfer prices that do not reflect those which would be charged in conditions of free competition, that is prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length, confers an advantage on that group company, in so far as it results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system.
- (225) The principle that transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length is generally referred to as the 'arm's length principle'. In the Belgian coordination centres judgment, the Court of Justice endorsed the arm's length principle as the benchmark for establishing whether a group company receives an advantage for the purposes of Article 107(1) of the TFEU as a result of a tax measure that determines its transfer pricing and thus its taxable base.
- (226) The purpose of the arm's length principle is to ensure that transactions between group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by independent companies. Otherwise, group companies would benefit from a favourable treatment under the ordinary corporate income tax system when it comes to the determination of their taxable profits that is not available to independent companies, leading to unequal treatment between companies that are factually and legally in a similar situation in light of the objective of such a system, which is to tax the profits of all companies falling under its tax jurisdiction.
- (227) The Commission's assessment of whether Luxembourg granted a selective advantage to FFT must therefore consist in verifying whether the methodology accepted by the Luxembourg tax administration by way of the contested ruling for the determination of FFT's taxable profits in Luxembourg departs from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle. In so far as the methodology Luxembourg accepted by the contested tax ruling results in a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies whose taxable profit under that system is determined by the market, that ruling will be deemed to confer a selective advantage to FFT for the purposes of Article 107(1) of the TFEU.
- (228) The arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the TFEU of tax measures granted to group companies, independently of whether a Member State has incorporated this principle into its national legal system. It is used to establish whether the taxable profits of a group company for corporate income tax purposes has been determined on the basis of a methodology that approximates market conditions, so that that company is not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit is determined by the market. Thus, for any avoidance of doubt, the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU, which binds the Member States and from whose scope the national tax rules are not excluded ⁽¹⁰⁹⁾.
- (229) Consequently, in response to Luxembourg's argument that the Commission, in undertaking such an assessment, replaces the national tax authorities in the interpretation of Luxembourg law ⁽¹¹⁰⁾, the Commission recalls that is not examining whether the contested ruling complies with the arm's length principle as laid down in Article 164(3) L.I.R. or the Circular, but whether the Luxembourg tax administration conferred a selective

⁽¹⁰⁸⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission*, ECLI:EU:C:2006:416, paragraphs 96 and 97.

⁽¹⁰⁹⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission ASBL* ECLI:EU:C:2006:416, paragraph 81.

⁽¹¹⁰⁾ Observations of Luxembourg to the Opening Decision, paragraphs 38 to 40.

advantage on FFT for the purposes of Article 107(1) of the TFEU by issuing a tax ruling that endorses a profit allocation that departs from the amount of profit that would have been taxed under the general Luxembourg corporate income tax system if the same transactions had been executed by independent companies negotiating under comparable circumstances at arm's length.

- (230) Finally, in response to the argument of Luxembourg and FFT that, because transfer pricing is not an exact science, the assessment by the Commission of the transfer pricing arrangement agreed in the contested tax ruling should necessarily be limited, the Commission recalls that the approximation component of transfer pricing has to be viewed in the light of its objective. While the OECD TP Guidelines do indeed acknowledge that transfer pricing is not an exact science in paragraph 1.13 thereof, that same point first explains that '[i]t is important not to lose sight of the objective to find a reasonable estimate of an arm's length outcome based on reliable information'. The objective of the OECD TP Guidelines is to develop, for the benefit of tax administrations and multinational enterprises, the most appropriate methods for estimating arm's length prices of cross-border transactions between associated enterprises for taxation purposes. The pursuit of that objective would be impossible if the approximative nature of the transfer pricing exercise could be used to disregard the consensus on appropriate transfer pricing methodologies which those guidelines represent. The approximative nature of the arm's length principle can therefore not be invoked to justify a transfer pricing analysis that is either methodologically inconsistent or based on an inadequate comparables selection.
- (231) In conclusion, if it can be shown that the methodology accepted by the Luxembourg tax administration by way of the contested ruling for the determination of FFT's taxable profits in Luxembourg departs from a methodology that leads to a reliable approximation of a market-based outcome and thus from the arm's length principle, that ruling will be found to confer a selective advantage on FFT for the purposes of Article 107(1) of the TFEU, in so far as it leads to a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies whose tax base is determined by the profits they generate under market conditions.

7.2.2.2. Preliminary observation: doubt expressed on the existence of a fixed tax base

- (232) The first doubt expressed by the Commission in the Opening Decision was that FFT's tax base as agreed to by the contested tax ruling appeared to constitute a fixed range. In addition, the documents submitted during the formal investigation show that FFT's tax base had been fixed at EUR 2 million annually before the contested tax ruling was issued. Although the Circular required FFT to renew its previous ruling request on the basis of a transfer pricing report, the transfer pricing report prepared for the contested tax ruling reached an outcome in terms of tax base, which is practically identical to the previously agreed lump sum amount.
- (233) However, on the basis of a clarification provided by Luxembourg during the administrative procedure, explaining that the contested tax ruling agrees on a methodology and not on a fixed range⁽¹¹¹⁾, as well as data demonstrating that for 2012 and 2013 FFT's tax base was lower than the lower bound of the range that was allegedly agreed in that ruling⁽¹¹²⁾, the Commission considers that doubt to have been adequately resolved.

7.2.2.3. Methodological choices, parameters and adjustments underlying the contested tax ruling

- (234) The contested tax ruling accepts a methodology for determining a profit allocation to FFT, which is based on a transfer pricing analysis prepared by the latter's tax advisor that calculates a remuneration for the intra-group financing and treasury functions performed and the risk borne by FFT.

⁽¹¹¹⁾ See recital 102.

⁽¹¹²⁾ See Table 7.

- (235) Several methodological choices underlie that transfer pricing analysis: (i) the choice to use the TNMM to estimate FFT's taxable profit in Luxembourg; (ii) the choice of capital as profit level indicator in the application of the TNMM; (iii) the choice of the Basel II framework to calculate that capital and (iv) the choice of the CAPM based on equity prices to determine a required return on that capital.
- (236) As explained in the following sections, in recitals 241 to 301, choice (i) is a choice between the five methods described and discussed in detail in the OECD Guidelines. The OECD Guidelines also discuss choice (ii) of a profit level indicator when using the TNMM. However, subsequent methodological choices (iii) and (iv) are not covered by the OECD Guidelines.
- (237) FFT's tax advisor then proceeds to a selection of several parameters, i.e. actual figures, for use in estimating the amount of capital to be remunerated (in relation to choice (iii)) and the level of required return to be applied to that capital (in relation to choice (iv)). As regards the amount of capital to be remunerated, the tax advisor selects parameters for the risk weighting and the minimum capital requirement to estimate FFT's hypothetical regulatory capital. As regards the level of required return to be applied to that capital, the tax advisor selects parameters for a risk-free rate, a beta and a market premium that are required for using the CAPM ⁽¹¹³⁾.
- (238) Finally, the tax advisor chooses to disregard FFT's total level of equity for the purposes of calculating an arm's length remuneration, by deducting from that equity FFT's participations in FFNA and FFC and calculating on that remaining amount a remuneration for the functions performed ⁽¹¹⁴⁾. Those choices, however, do not seem to be a choice of parameters. Rather, they seem to introduce adjustments in the methodology for determining profit allocation to FFT which do not correspond to any commonly used methods.
- (239) Based on these methodological choices, choices of parameters for their implementation and [...] adjustments, the tax advisor arrives at a level of remuneration for FFT's intra-group financing and treasury activity that is accepted by the contested tax ruling as respecting the Circular and the arm's length principle.
- (240) In the following sections, in recitals 241 to 301, the Commission will explain why it considers several of those methodological choices, choices of parameters and [...] adjustments to result in a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies whose taxable profits are determined by transactions concluded on market terms and, thus, that the contested tax ruling, by accepting those choices and adjustments, confers a selective advantage on FFT for the purposes of Article 107(1) of the TFEU by deviating from the arm's length principle.

7.2.2.4. The choice of the TNMM and the functional analysis in the transfer pricing report

- (241) As regards choice (i), the remuneration accepted by the contested tax ruling for the functions performed and the risk borne by FFT is estimated by the tax advisor by using the TNMM ⁽¹¹⁵⁾. That choice is a choice of one of the five methods described and discussed in detail in the OECD TP Guidelines. As a general matter, the OECD TP Guidelines require that the most appropriate method is aimed at when estimating an arm's length price in the context of transfer pricing ⁽¹¹⁶⁾.
- (242) The use of a method further requires the use of one or more parameters, so that the method can result in an actual outcome. The choice of method and the choice of parameters cannot be an arbitrary choice. Leaving those

⁽¹¹³⁾ See recital 64.

⁽¹¹⁴⁾ See recital 70.

⁽¹¹⁵⁾ For a description of the TNMM, see recital 91.

⁽¹¹⁶⁾ The Commission does not accept FFT's argument in recital 162 that the fact that the TNMM is relied upon with increasing frequency would justify its use. This argument is in contradiction with the reference made by FFT to paragraph 2.2 of the OECD Guidelines, as reported in recital 161, which states 'the selection of a transfer pricing method always aims at finding the most appropriate method for a particular case.' This objective of the OECD Guidelines is not compatible with the interpretation that the taxpayer would have a free choice of methods, notwithstanding the facts and circumstances of the case.

choices to the sole discretion of the taxpayer would advantage integrated cross-border groups over companies that transact on the market, the former being given the choice of method and parameters for pricing intra-group transactions to determine their tax base, while the latter transact on market terms without any possibility to adjust their tax base. Those choices must therefore be guided by the objective of achieving an arm's length price for intra-group transactions.

- (243) However, when estimating an arm's length price for transfer pricing purposes, the use of a second-best method does not automatically give rise to an advantage for integrated cross-border groups. For example, where such a method is chosen, but that method is used in combination with an overly conservative set of parameters, the remuneration arrived at might nevertheless result in an outcome which is in that specific case equal to a market-based outcome or it might result in an overestimated tax burden, in which case a tax ruling accepting that second-best method would not give rise to an advantage for the purposes of Article 107(1) of the TFEU.
- (244) By contrast, even if the most appropriate method is chosen, when it is used in combination with overly favourable parameters the remuneration arrived at using that method might nevertheless underestimate the tax liability of the taxpayer and thus give rise to an advantage for the purposes of Article 107(1) of the TFEU.
- (245) In the Opening Decision, the Commission expressed a doubt that the TNMM might not be the most appropriate method for determining an arm's length remuneration and thus the taxable profit of FFT. Compared to the other four methods described in the OECD TP Guidelines, the CUP method is more direct and would, if applicable, provide for a more reliable approximation of a market-based outcome.
- (246) However, in light of the information submitted in the course of the formal investigation procedure, the Commission accepts FFT's argument that the CUP method might not be the most appropriate method in the case of FFT. That information shows that FFT concludes transactions with different counterparties of the Fiat group and that the applicable rates, the form and the maturity of the loans provided and the bonds issued by FFT vary, even if the seniority of the transactions does not seem to differ. Consequently, since using the CUP method for transfer pricing purposes would require finding comparable transactions for each individual loan FFT provides, the tax advisor's use of the TNMM to estimate an arm's length remuneration for the functions performed and the risk borne by FFT appears appropriate.
- (247) Moreover, the Commission recognises that the transfer pricing analysis for FFT is based on a return on capital, which is an acceptable performance indicator for the financial industry, and that FFT's functions are comparable to financial institutions. Indeed, the complexity of FFT's asset and liability structure confirms that it ensures a maturity transformation function, as well as a financial intermediation function, since FFT calls upon external investors for the funding of the group financing needs ⁽¹⁷⁾. Thus, the Commission considers the use of the TNMM for transfer pricing purposes in the case of FFT to be an appropriate choice.

7.2.2.5. The amount of capital to be remunerated

- (248) While the Commission considers the tax advisor's use of the TNMM in the case of FFT to be appropriate, the Commission considers several of the methodological choices, choices of parameters and [...] adjustments employed by the tax advisor in the application of that method inappropriate for calculating FFT's tax base in Luxembourg.

⁽¹⁷⁾ This contrasts with the situation where, although engaging in intra-group loans, a company limits its functions to back-to-back transactions, for which a standalone company would not accept to remunerate a third party, because such transactions do not have any economic rationale in isolation of other functions and operations (i.e. back-to-back transactions can be used for hedging risks stemming from a different activity). Therefore, such transactions, as well as other functions which cannot be compared to the principal functions of a financial institution, might not be correctly priced based on capital, as in other industries different indicators, such as return on total assets or return on sales might be more appropriate.

7.2.2.6. The use of FFT's hypothetical regulatory capital as profit level indicator

- (249) First and foremost, the Commission does not consider the tax advisor's choice of regulatory capital as an appropriate profit level indicator in the application of the TNMM for estimating an arm's length remuneration for the functions performed by FFT. Instead, the Commission considers that the tax advisor's choice of the TNMM, in combination with its use of a return on equity estimated through the CAPM, necessitates that FFT's accounting equity is used as the profit level indicator against which a return on equity is applied to calculate that remuneration if the outcome is to result in a reliable approximation of a market-based outcome.
- (250) More specifically, to ensure that FFT's tax base reflects a reliable approximation of a market-based outcome in line with the arm's length principle, the method used to arrive at an arm's length remuneration for the functions it performs should be methodologically consistent from an accounting perspective, which the choices made by the tax advisor are not.
- (251) In the transfer pricing report, FFT's estimated tax base is said to consist of two components: a 'risk remuneration' and a 'functions remuneration' ⁽¹¹⁸⁾. The tax advisor determines the first component, FFT's risk remuneration, by multiplying an estimated amount of capital to be remunerated, which the tax advisor estimates by calculating FFT's hypothetical regulatory capital using the Basel II framework by analogy ⁽¹¹⁹⁾, by an estimated required return on that capital, which the tax advisor estimates by using the CAPM.
- (252) However, the CAPM estimates a theoretical required rate of return on equity investments and the beta used in that calculation is based on a variation of the return on companies' share price (or returns on equity) ⁽¹²⁰⁾. Therefore, the result of a CAPM calculation is by construction a return on equity, rather than a return on any other capital measure, such as a hypothetical regulatory determined through an application of the Basel II framework by analogy ⁽¹²¹⁾.
- (253) A return on equity is a profitability ratio. Equity is remunerated through the net profits of a company, that is, income minus all charges incurred in the course of the business, but also all financial charges paid to debt holders. That net profit is thus the profit left to the company to remunerate equity holders: it constitutes a return on equity either through distribution or through increased value of the company. It is therefore a matter of consistency that return on equity is equal to the net profit in accounting terms left to shareholders after all other charges have been paid, divided by the value of the shares in accounting terms (i.e. equity) that that profit is remunerating.
- (254) By contrast, it is inconsistent to consider the accounting net profit of the company to remunerate regulatory capital. Regulatory capital is the estimate of a regulator of a minimum capitalisation level to be maintained by a bank or other financial institution; it does not constitute, as such, a claim in that proportion to the profits of the regulated entity. Moreover, financial institutions must hold this level of capital at all times, so that, in practice, they generally hold more than the capital required as a buffer to avoid breaching minimum regulatory requirements in case of losses, which in turn reduces available capital. Any capital additional to the minimum required needs to be equally remunerated from the perspective of investors.
- (255) Consequently, to ensure methodologically consistency from an accounting perspective, and thus a reliable approximation of a market-based outcome, FFT's tax advisor should have applied the return on equity it calculated using

⁽¹¹⁸⁾ See footnote 114.

⁽¹¹⁹⁾ See recital 58 and 59.

⁽¹²⁰⁾ See also recital 68 of the Opening Decision.

⁽¹²¹⁾ For further illustration of differences between different profit indicators based on capital see, for example, McKinsey Working Papers on Risk, Number 24, The use of economic capital in performance management for banks, January 2011, in particular Exhibit 10 on page 13.

the CAPM to FFT's accounting equity. The green arrows in table below illustrate which approaches would be methodologically consistent; the diagonal arrow demonstrates the approach used by FFT's tax advisor:

Return measures		Capital bases
Return on Equity (RoE) = Profit / IFRS equity <i>Estimated by FFT using CAPM with β based on a sample of 66 companies</i>		IFRS equity
		Available from FFT's balance sheet
Return on regulatory capital = Profit / Regulatory capital <i>No estimates available</i>		Basel II regulatory capital <i>proxy of regulatory capital albeit incorrectly estimated was provided by FTT</i>

- (256) By applying an inconsistent methodology, consisting of applying a return on equity to FFT's hypothetical regulatory capital, FFT's tax advisor arrives at an estimated level of remuneration for the functions performed and the risks borne by FFT that does not constitute a reliable approximation of a market-based outcome. Indeed, the consequence of the tax advisor's mismatch has a significant impact on FFT's taxable remuneration in Luxembourg. In 2011, FFT's accounting equity was EUR 287,5 million, whereas the tax advisor uses FFT's hypothetical regulatory capital of EUR 28,5 million as profit level indicator in the application of the TNMM. Applying the estimated return on equity the tax advisor arrives at using the CAPM to FFT's hypothetical regulatory capital instead of its accounting equity results in a lowering of FFT's taxable remuneration in Luxembourg by a factor of ten ⁽¹²²⁾. In other words, the methodological choices made by the tax advisor result in a lowering of FFT's tax base in Luxembourg as compared to non-integrated companies whose taxable profits is determined by market conditions.
- (257) Since FFT's equity level is observable and the CAPM provides for an estimate of return on equity, the tax advisor should have used FFT's accounting equity in the application of the TNMM, instead of a hypothetical level of its regulatory capital, to determine FFT's Luxembourg tax base in line with the arm's length principle.
- (258) The Commission rejects FFT's argument in this respect that its actual level of equity should be disregarded for transfer pricing purposes because it results from historical decisions ⁽¹²³⁾. That argument implies that the level of FFT's accounting equity would be too high for historical reasons and need not be remunerated to that extent. That argument is, however, not in line with market requirements, as a suboptimal level of equity is not sustainable in a competitive market. In fact, equity is more expensive for companies to remunerate than debt and therefore if a company in conditions of free competition would be overcapitalised for historical reasons, such as claimed by FFT, that company would return the excess equity to its shareholders (for example through share buy-backs or distribution), because such funds could be deployed more efficiently in alternative investment opportunities. When calculating the tax base of companies in conditions of free competition, such companies are required to remunerate the entirety of their capital provided by shareholders at a level which can be considered in line with market requirements.
- (259) The OECD TP Guidelines, for their part, indicate that return on capital may be an appropriate profit level indicator for the application of the TNMM in capital intensive financial activities ⁽¹²⁴⁾. The OECD TP Guidelines further refer to 'capital employed' as a possible appropriate profit level indicator in the application of the TNMM ⁽¹²⁵⁾. Although 'capital employed' is not more precisely defined in the OECD TP Guidelines, it does not appear to correspond to a regulatory capital denomination used in the Basel II or Basel III frameworks, or the respective transposing directives.

⁽¹²²⁾ In the transfer pricing report, the tax advisor arrives at a risk remuneration of EUR 1 726 000, whereas applying the return on equity calculated by the tax advisor of 6,05 % to FFT's accounting equity would result in a risk remuneration of EUR 17 392 000.

⁽¹²³⁾ Recital 163.

⁽¹²⁴⁾ See paragraph 2.97 of the OECD Guidelines.

⁽¹²⁵⁾ See paragraph 2.86 of the OECD Guidelines.

- (260) The Circular also does not further define the capital to be used as a profit level indicator in the application of the TNMM ⁽¹²⁶⁾. The Circular specifies two possible bases for remuneration of financing and treasury functions, which are the loan value and the amounts of assets under management ⁽¹²⁷⁾. However, by choosing the TNMM with a hypothetical regulatory capital as a base, FFT does not opt for a remuneration directly based on the value of loans, while assets under management refers to assets held in the name of third parties (for example by fund managers), which is a function that FFT does not in principle assume.
- (261) In any event, while accounting equity is commonly used in the financial sector as a base for calculating a company's profitability, the Commission accepts that a different capital base could, in principle, be used for the application of the TNMM for transfer pricing purposes, so long as the methodology used to arrive at a remuneration for intra-group transactions is consistent. However, in the specific case of FFT, the Commission considers the tax advisor's choice of FFT's hypothetical regulatory capital for this purpose to be inappropriate for arriving at a reliable approximation of a market-based outcome for the following reasons.
- (262) Firstly, FFT is not a regulated financial entity to which the Basel II framework applies, so that the application of that framework to estimate its hypothetical regulatory capital is difficult to verify when used only for tax purposes. Indeed, the Basel II framework defines required regulatory capital as a proportion of assets held by the institution weighted by the underlying risk of each such asset. Concretely, the risk-weighting of each asset for that regulatory purpose depends, in particular, on the credit rating of the counterparty, but also on other criteria assessed asset by asset. The burden of the administration for verifying individual asset risk weighting is removed from its prudential supervision context when used to calculate the tax base for transfer pricing purposes instead of minimum capital requirements. It is therefore unlikely that any outcome arrived at as a result of that exercise can be easily verified by the tax administration as constituting a reliable approximation of a market-based outcome in line with the arm's length principle.
- (263) Secondly, as return on minimum regulatory capital is not a commonly used performance indicator in the financial sector, averages of return on minimum regulatory capital in the industry are not commonly analysed and available ⁽¹²⁸⁾. Therefore, any outcome arrived at using that capital base would be less likely to result in a reliable approximation of a market-based outcome than the use of accounting equity as a profit level indicator against which a return on equity in line with industry standards is applied.
- (264) Thirdly, the 66 comparables selected by the tax advisor for estimating a return on equity using the CAPM are clearly inadequate for estimating average regulatory capital in the industry or the required return on that capital, since several of those companies are not regulated entities falling under the Basel frameworks (such as stock exchanges), so that those companies might not in fact calculate an estimate of their regulatory capital requirement and it would be impossible to estimate minimum regulatory requirements for individual unregulated institutions on the basis of publically disclosed information alone.
- (265) Moreover, using accounting equity as profit level indicator in the present case would have obviated the need for the tax advisor to calculate a separate 'functions remuneration', the second component of FFT's estimated tax base in Luxembourg, which itself does not appear to be based on any sound methodology, as explained in recital 80 of the Opening Decision. Indeed, what FFT's tax advisor designates as the 'Capital used to perform functions' in the transfer pricing report does not seem to correspond to any customary capital component used in the calculation of return requirements in market valuation. This concept is not defined in the transfer pricing report

⁽¹²⁶⁾ The Circular notes that service providers covered by the Circular would be in essence performing functions similar to functions performed by regulated institutions. The Circular also refers to possible add-on to costs of credit relating to the obligation to respect solvency requirements. However the Circular does not limit capital to be remunerated to such solvency requirements.

⁽¹²⁷⁾ See recital 81.

⁽¹²⁸⁾ The use of return on regulatory capital is made more difficult in practice because of the different type of regulatory capital held by regulated institutions, such as Tier 1 and Tier 2 capital, whereas the only capital type that FFT has is equity. This complexity is increased under the Basel III framework. Regulated financial institutions do not typically report the amount of the minimum regulatory capital, although it can be indirectly recalculated. Rather, they report the actual level of regulatory capital they hold, which is always higher than the minimum required. Finally, risk-adjusted return on capital, which at an aggregate level could be seen as similar to a return on regulatory capital, is sometimes used by regulated institutions for internal pricing purposes. However, in that case, it is used asset by asset rather than as a profit indicator for the institution in aggregate and it is also therefore not disclosed in principle.

and there is no indication that such a risk based on the denomination used by the tax advisor would not be covered by either of the categories of regulatory capital, for example, capital to cover operational risk, and in particular risk related to process, if FFT's hypothetical regulatory capital would have been correctly estimated by the tax advisor, which is not the case. Further concerns regarding the separation of the capital into distinct components to which different levels of return, as low as zero, are applied is detailed below, in recitals 277 to 289.

- (266) The Commission therefore concludes that the contested tax ruling, by accepting the tax advisor's use of FFT's hypothetical regulatory capital as a profit level indicator in the application of the TNMM, to which a return on equity estimated by using the CAPM has been applied to arrive at a component of FFT's taxable profits in Luxembourg, departs from a market-based outcome in line with the arm's length principle. Since that methodological choice results in a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms ⁽¹²⁹⁾, the contested tax ruling should be considered to grant a selective advantage to FFT for the purposes of Article 107(1) of the TFEU.

7.2.2.7. The inconsistent application of the Basel II framework to calculate that capital

- (267) In addition, and without prejudice to the Commission's objections to the use of FFT's hypothetical regulatory capital in the application of the TNMM, the Commission further considers that the inconsistent manner in which FFT's tax advisor applied the Basel II framework by analogy to arrive at that hypothetical level of regulatory capital confers a selective advantage on FFT for the purposes of Article 107(1) of the TFEU, since it also results in a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms.
- (268) A proper application of the Basel II framework requires, first, an estimate of FFT's RWAs and, then, applying an appropriate regulatory capital ratio to that estimate. FFT's tax advisor underestimates both elements in the transfer pricing report.
- (269) Firstly, FFT's hypothetical RWAs have been miscalculated, since the tax advisor allocates a zero risk weight for intra-group assets ⁽¹³⁰⁾. As is clear from recital 123, the intra-group loans representing most of FFT's assets are not without risk, contrary to what Luxembourg and FFT claim, and there is no indication that those loans have a lower risk than loans provided by banks. In any event, considering Fiat's own Transfer Pricing Policy document qualifies FFT's credit and counterparty risk as 'limited' rather than non-existent, a zero risk-weighting is clearly inappropriate. In addition, FFT's hypothetical RWAs have been miscalculated since the risk weighting of 20 % for third party assets was never substantiated, either by Luxembourg or FFT.
- (270) Applying the average European risk weighting over assets of banks of 36 % in 2010 as a relevant comparator ⁽¹³¹⁾ (which was available when the contested tax ruling was issued) to FFT's total assets of EUR 14 827 674 000, to illustrate what the correct level of FFT's hypothetical RWAs could have been, FFT's hypothetical RWAs would have been around EUR 5 338 000 000. If the 8 % capital requirement ratio under the Basel II framework had been retained as a minimum capitalisation level, FFT's hypothetical Basel II minimum level of regulatory capital would have been around EUR 427 million, rather than the minimum capital estimated by FFT's tax advisor in the transfer pricing report of EUR 28,5 million.

⁽¹²⁹⁾ See recital 256.

⁽¹³⁰⁾ See Table 6.

⁽¹³¹⁾ IMF WP/12/36, *How Risky Are Banks' Risk Weighted Assets?* Sonali Das and Amadou N.R. Sy, 2012, p. 6.

- (271) Secondly, the tax advisor's calculation of FFT's credit and counterparty risk by analogy to the Basel II framework ⁽¹³²⁾, on the basis of which banks are required to hold capital in proportion of their RWAs, is at variance with that framework. For the purposes of determining FFT's capital at risk in the transfer pricing analysis, FFT's tax advisor uses a 6 % capital ratio requirement in the calculation of those risks, whereas the correct ratio under that framework is 8 %.
- (272) In response to the doubt expressed by the Commission on this point in the Opening Decision ⁽¹³³⁾, FFT responded by justifying the use of 6 % in reference to the transposition in Italy of the requirement to non-bank financial institutions ⁽¹³⁴⁾. However, FFT provided no further reference to that transposition, nor has it clarified why a transposition by the Italian legislator would be applicable in Luxembourg or be used as a reference.
- (273) Moreover, while under the Basel II framework half of the 8 % requirement could be provided in the form of Tier 2 capital, FFT does not seem to have any Tier 2 capital which could have been used for the regulatory requirement, had that requirement been applied. In the absence of other eligible forms of capital available, the 8 % would have had to be covered by equity.
- (274) The Commission therefore maintains its view that the capital requirement ratio under the Basel II framework is 8 % and that the tax advisor's use of 6 % and its acceptance by the Luxembourg tax administration calls into question the conclusion reached in the contested ruling that the resulting profit allocation to FFT reflects a reliable approximation of a market-based outcome in line with the arm's length principle.
- (275) Finally, as regards the tax advisor's calculation of the operating risk, while the Commission accepts the use of the figure of 15 % based on the clarifications provided by FFT ⁽¹³⁵⁾ and Luxembourg ⁽¹³⁶⁾, the base to which that 15 % margin is applied does not seem to correspond to a correct estimation of the gross annual income of FFT. FFT's tax advisor applies that percentage to the net income stemming from bank deposits and loans only ⁽¹³⁷⁾, which is not in line with the methodology put forward by Luxembourg ⁽¹³⁸⁾, whereas all intra-group business is ignored for the purposes of calculating FFT's gross income. However, loans and deposits with banks represent only a small part of FFT's assets and liabilities.
- (276) In sum, the Commission concludes that even if FFT's hypothetical minimum regulatory capital would have been acceptable as a profit level indicator for the application of the TNMM, the tax advisor underestimated that capital by using an arbitrary and low risk weighting on the assets (excluding most assets from the risk weighting), by applying a lower ratio than the minimum prescribed by the Basel II framework and by not including income from group assets and liabilities in FFT's gross income. The Commission therefore concludes that the contested tax ruling, by accepting those choices, departs from a market-based outcome in line with the arm's length principle. Since those choices lead to a reduction of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms, the contested tax ruling should be considered to grant a selective advantage to FFT for the purposes of Article 107(1) of the TFEU.

7.2.2.8. Inappropriate deductions from the capital to be remunerated

- (277) In addition to underestimating FFT's hypothetical regulatory capital, the tax advisor engages in several deductions from FFT's remaining capital that depart from a market-based outcome. As follows from Table 2, to arrive at an amount the tax advisor designates as 'Equity backing the functions performed', FFT's remaining equity, less its

⁽¹³²⁾ Recitals 58 and 59.

⁽¹³³⁾ Opening Decision, recital 72.

⁽¹³⁴⁾ Recital 167.

⁽¹³⁵⁾ *Ibid.*

⁽¹³⁶⁾ See recital 98.

⁽¹³⁷⁾ See recital 58.

⁽¹³⁸⁾ See footnote 136.

underestimated hypothetical regulatory capital, is reduced by what the tax advisor designates as FFT's 'Equity supporting the financial investments in FFNA and FFC'. However, had FFT's hypothetical regulatory capital been correctly estimated, it is likely that no capital in excess of regulatory capital would have been found ⁽¹³⁹⁾. Therefore, neither of those two estimated equity components would have been applicable.

- (278) Notwithstanding this observation, the Commission further considers that the tax advisor's decision to isolate the equity component designated as 'Equity supporting the financial investments in FFNA and FFC' and to accord it a zero remuneration for the purpose of estimating FFT's tax base is inappropriate ⁽¹⁴⁰⁾, since it leads to a reduction of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms.
- (279) As a preliminary observation, it is not clear whether the tax advisor choice to separate the two equity components is an alleged application of the Basel II framework or whether the tax advisor's deduction of FFT's participation interests in FFNA and FFC was an ad hoc adjustment, which the tax advisor would also have deducted from FFT's equity for the purpose of calculating FFT's tax base if it had properly chosen FFT's accounting equity as profit level indicator for the application of the TNMM. That is because, as explained at recital 238, the tax advisor does not seem to rely on any commonly used methodology when separating FFT's equity into three components ⁽¹⁴¹⁾.
- (280) In any event, for the reasons given in recitals 281 to 290, the tax advisor's choice to accord that portion of FFT's equity designated as the 'Equity supporting the financial investments in FFNA and FFC' a zero remuneration is inappropriate. Since that choice effectively leads to an unjustified deduction from the capital to be remunerated, and thus from FFT's tax base for taxation purposes, any transfer pricing methodology based on that choice cannot be considered to result in a reliable approximation of a market-based outcome in line with the arm's length principle.
- (281) Firstly, Luxembourg's arguments regarding the deductibility of the participations in other credit institutions under the Basel II framework are not applicable to the case of FFT ⁽¹⁴²⁾. That is not only because, as noted in recital 262, FFT is not a regulated institution, but also because the paragraphs from that framework, referred to by Luxembourg and FFT, apply to non-consolidated entities, whereas, in the present case, FFNA and FFC are consolidated entities. Indeed, as explained in recital 112, FFT provides consolidated accounts to Luxembourg. In principle, consolidated equity would be higher than the equity in FFT's unconsolidated accounts before any deductions for participations would be made. Consequently, if Luxembourg and Fiat had properly and systematically applied regulatory deductions, the capital estimate to which the return on equity would have been applicable would have been higher and, therefore, FFT's resulting tax base in Luxembourg would have been higher.
- (282) Secondly, and more generally regarding deductions to equity in the context of the Basel II framework and in the context of assessing FFT's accounting equity, Luxembourg's argument that FFT's acquisition of the participations was financed entirely through own funds ⁽¹⁴³⁾, a mode of financing which would automatically mean that those funds are no longer available to cover other risks borne by FFT, cannot be accepted by the Commission. Sources of funding, be it equity or debt on the liabilities side of the balance sheet, are not attributed or dedicated to an identifiable asset, unless specific legal provisions bind the liability to a specific asset or pool of assets (this is for example the case of covered bonds). If no specific claims are attached to the liabilities of the company, equity and liabilities contribute jointly to the funding of the assets of a company. In a case of insolvency, those funds would

⁽¹³⁹⁾ In absence of sufficient data for calculating a correct estimate of FFT's regulatory minimum capital, the industry average would have resulted in a minimum regulatory capital of EUR 427 million, see recital 270, which is above FFT's total equity of EUR 287 million.

⁽¹⁴⁰⁾ See recital 69 and Table 1.

⁽¹⁴¹⁾ See recital 61.

⁽¹⁴²⁾ See recital 97.

⁽¹⁴³⁾ See recital 96.

be available to absorb losses stemming from the assets of FFT, contrary to Luxembourg's argument above. The fact that the amount deducted from FFT's equity in the transfer pricing report corresponds to the purchase price of FFNA and FFC ⁽¹⁴⁴⁾, does not have any bearing on the fact that funding sources cannot, in principle, be allocated to specific assets, which would be true for any amount of participation. FFT's equity is fully available to support the solvency of FFT and should be remunerated in full according to the risks of FFT's assets.

- (283) In any event, FFT's annual reports do not seem to confirm Luxembourg's claim that those acquisitions were financed through own funds, if this assertion means that the group provided additional own funds to FFT to acquire FFNA and FFC. Indeed, FFT's equity level (i.e. capital and reserves) in 2010, that is, before the acquisition, was EUR 286 million and that level remained at EUR 287 million in 2011 after the acquisition took place.
- (284) Luxembourg further argues that since charges from holdings are not tax deductible in Luxembourg and that therefore dividends are also not taxed ⁽¹⁴⁵⁾ and because the participations in FFNA and FFC would be remunerated through dividends they should not be taxed and should not be taken into account in the functions performed and risks assumed ⁽¹⁴⁶⁾, should equally be rejected, as should FFT's claim that since the participations are remunerated through dividends they should therefore not be taxed ⁽¹⁴⁷⁾. The Commission observes in this respect that FFNA and FFC did not pay any dividends over the period of the application of the contested tax ruling. However, had either of the companies paid dividends, that fact should not alter the calculation of FFT's taxable remuneration, since that remuneration was established by the tax advisor using the TNMM applied to capital. The TNMM is a transactional profit method applied to the level of capital for the treasury functions ensured by FFT. Had FFT's tax advisor instead used the CUP method for transfer pricing purposes, individual transactions or remuneration streams such as individual loans or, in FFT's case, dividends would have been relevant for calculating FFT's taxable remuneration. That is because the CUP method consists in pricing individual transactions, whereas the TNMM consists in estimating the profitability of a function. However, for the reasons given in recital 161, FFT's tax advisor considered the TNMM a more appropriate method in the case of FFT. Thus, by invoking the relevance of certain types of remuneration paid on some assets of FFT (dividends), Luxembourg and FFT attempt to combine the CUP and TNMM methods for the calculation of FFT's taxable remuneration, without any justification for that hybrid method in the transfer pricing report. Considering the tax advisor justified the use of the TNMM in that report, the use of that combination without any additional justification would not result in a reliable approximation of a market-based outcome.
- (285) Thirdly, in the application of the TNMM based on capital, any estimate of such capital should ensure that FFT is properly capitalised in line with industry standards. This also follows from the approach advocated in the Circular, which considers the functions performed by intra-group financing companies, in substance, comparable to the functions performed by independent financial institutions.
- (286) At the end of 2011, which is the reference date in the transfer pricing report, the average leverage ratio defined as Tier 1 capital to total exposure ⁽¹⁴⁸⁾ was, according to the European Banking Authority, 2,9 % for the monitored group 1 of EU larger banks and 3,3 % for the monitored group 2 of smaller EU banks. Applying a leverage ratio (the ratio of equity to total assets) in line with industry standards (and the new Basel III framework) shows that the IFRS equity of FFT was not in excess of the market. Indeed, based on that calculation, FFT's leverage ratio stood at [2-3 %] ⁽¹⁴⁹⁾, [...]. In other words, FFT's [...] level of equity does not leave room for any deductions, be it of estimated excess capital or of any participations, since such deductions would bring FFT's level of equity [...].

⁽¹⁴⁴⁾ As noted by Luxembourg in recital 154.

⁽¹⁴⁵⁾ See recital 154.

⁽¹⁴⁶⁾ See recital 95.

⁽¹⁴⁷⁾ See recital 165.

⁽¹⁴⁸⁾ Leverage is the proportion of assets financed by equity. Since the remainder of the assets is financed by debt, leverage is a measure of indebtedness and inversely of capitalisation of a company.

⁽¹⁴⁹⁾ In the case of FFT, Tier 1 capital is equal to equity, as FFT does not have other Tier 1 instruments in issue.

- (287) Consequently, FFT's level of capitalisation did not leave any room for reductions of either equity or hypothetical regulatory capital for tax purposes ⁽¹⁵⁰⁾, [...]. The doubts expressed in recital 80 of the Opening Decision concerning the level of the reduced remuneration rate for excess capital are, in view of this conclusion, without object, as there is no room for a differentiated remuneration.
- (288) Fourthly, the inconsistency of deducting FFT's participations in FFNA and FFC from FFT's equity to calculate an estimate of capital to be remunerated as part of the transfer pricing analysis is apparent when applying the same methodology to the accounts of FF. According to Fiat's internal Transfer Pricing Policy document ⁽¹⁵¹⁾, the remuneration of FFT and FF for the pricing of loans is determined through the same method, but that document only describes the application of that method for the purposes of estimating FFT's tax base in detail. However, if FF's equity to be remunerated were estimated through the same method as FFT's in the transfer pricing report, the result of that estimate in 2010, when FF was holding the participations in FFNA and FFC, would be that FF would have had a negative estimated equity ⁽¹⁵²⁾. Indeed, at the end of 2010, FF's equity amounted to EUR 271 million, while the total value of participations which would have to be deducted from that equity, if the same method was adopted as approved by the contested tax ruling, would amount to EUR 358 million. FF's equity to be remunerated would therefore have been negative in the amount of EUR 87 million. As the value of participations was higher than FF's total equity, estimating the capital to be remunerated by the same method as the method applied for determining FFT's Luxembourg tax base in the transfer pricing report, would have resulted in a negative capital, as is the case for insolvent companies. However, as FF was not insolvent at that point in time, this fact alone indicates that the deduction of participations from FFT's equity does not seem appropriate to calculate an estimate of capital to be remunerated for determining FFT's tax base in Luxembourg.
- (289) Moreover, that inconsistent result would equally arise in the case FFT acquires new participations during the lifetime of the contested tax ruling. By validating a methodologically flawed deduction for participations, the contested tax ruling could result in FFT effectively being taxed nothing in Luxembourg, provided the value of the subsequent participations acquired results in reducing FFT's capital to be remunerated to nil or even a negative amount. In that case, the intra-group financing functions performed by FFT could remain identical, but the taxation would be much lower or even nil when applying the method validated by the contested tax ruling.
- (290) If FFT's tax advisor had properly applied the Basel II framework for transfer pricing purposes, those deductions would not have been possible with FFT's current level of capitalisation. However, since FFT is not a regulated entity, information is absent on what would have been the level of FFT's RWAs that would have been acceptable to a financial institutions regulator. That hypothetical level of regulatory capital would also not allow FFT to hold any participations if their value is to be deducted from that capital ⁽¹⁵³⁾.
- (291) In light of these observations, the Commission concludes that the contested tax ruling, by accepting the tax advisor's application of a return estimated through the CAPM to a hypothetical regulatory capital, where that hypothetical regulatory capital was underestimated as a result of a misapplication of the Basel II framework and inappropriate deductions, departs from the arm's length principle. Since that departure results in a lowering of FFT's tax base under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms, the contested tax ruling should be considered to grants a selective advantage to FFT for the purposes of Article 107(1) of the TFEU.

7.2.2.9. The level of required return applied to the capital to be remunerated

- (292) In addition to the Commission's conclusion on the inconsistent manner in which FFT's tax advisor arrives at the estimated amount of capital to be remunerated for the application of the TNMM, the Commission considers that the manner in which FFT's tax advisor arrives at the estimated level of required return to be applied to that

⁽¹⁵⁰⁾ See recital 268.

⁽¹⁵¹⁾ Described in recitals 121 to 126.

⁽¹⁵²⁾ Based on the accounting figures of FF presented in the table in recital 114.

⁽¹⁵³⁾ That hypothetical regulatory capital of EUR 427 million would also be higher than FFT's equity of EUR 286 million held at the moment of the acquisitions of FFNA and FFC.

capital base does not result in a reliable approximation of a market-based outcome and therefore is not in line with the arm's length principle for the reasons presented in recitals 293 to 300.

- (293) Firstly, the beta of 0,29 retained by the tax advisor for use in the CAPM seems at odds with the beta of the financial sector companies considered to be the relevant comparables in the transfer pricing analysis and retained as a reference for the estimated level of required return. The level of the beta of those companies tends to be very high (see Table 3), often many times higher than the market average beta which is 1. The Commission refers, for instance, to the beta of the Stoxx 50 Bank subindex, which amounted to 1,36 for the period 31 December 2009 to 31 December 2011 ⁽¹⁵⁴⁾, and to the fact that almost all banks participating in that subindex had a beta above 1.
- (294) Secondly, the list of 66 companies in Table 3 contains companies which are active in very different business segments than FFT and even contains two central banks: the Banque Nationale de Belgique and the Schweizerische Nationalbank. Many companies present in the sample engage in specialised financial activities, such as leasing and factoring, or are stock exchanges rather than banks ⁽¹⁵⁵⁾, whereas many European banks which in principle would engage in wholesale financing activities are not included in the sample. The comparables selected by the tax advisor for the calculation of the beta are therefore not appropriate for that exercise to result in a reliable approximation of a market-based outcome.
- (295) Thirdly, and notwithstanding the appropriateness of the comparables in the sample retained by FFT's tax advisor, the transfer pricing analysis does not use the median for the calculation of the beta, but rather the 25th percentile, without any further justification. By doing so, FFT retains a relatively low beta of 0,29, whereas the median of the sample would have resulted in a beta of 0,64 ⁽¹⁵⁶⁾. However, according to paragraph 3.57 of the OECD TP Guidelines, the more comparability concerns, the more the arm's length range should adopt the central tendency of the sample.
- (296) The Commission notes, in this regard, that the beta represents the non-diversifiable risk of a capital return. Against this background, loan portfolios of banks would, in principle, be more diversified than FFT's portfolio, the exposure of which is concentrated on car companies of the Fiat Group. For this very reason it could be argued that a higher point in the range of comparables should have been selected by FFT's tax advisor for the determination of the beta, arguably higher than the median, rather than the 25th percentile.
- (297) Indeed, the Circular itself specifically points to the counterparty risk and more specifically the sector risk, which is amplified here by FFT's concentration on only one sector, when setting an appropriate remuneration. Although the indications of the Circular are not specific in terms of how those risks are to be factored in an actual remuneration calculation, the method chosen by FFT's tax advisor, where risks of intra-group loans (as opposed to third party receivable) do not have any risk-weight and therefore also do not result in any capital requirement or any remuneration, is not in line with the Circular. Therefore, considerations regarding the reduced risk of FFT's activities cannot be accepted.
- (298) In addition, Fiat's internal Transfer Pricing Policy document points to an important function not presented in the transfer pricing report. As indicated in recital 123, FFT, in addition to the functions presented in that report, also provides guarantees in favour of the Fiat group companies. In 2013, for instance, those guarantees amounted to EUR 10 million ⁽¹⁵⁷⁾. Moreover, in the Transfer Pricing Policy document it is also acknowledged, contrary to what is presented in the transfer pricing report, that the intra-group loans present a certain counterparty and credit risk ⁽¹⁵⁸⁾. [...]

⁽¹⁵⁴⁾ The transfer pricing report is dated 2011; therefore, this reference period is retained. By comparison, over the period 12 May 2012 to 12 May 2014 the beta of the index was 1,3.

⁽¹⁵⁵⁾ See Table 6 of the Opening Decision.

⁽¹⁵⁶⁾ See Table 4.

⁽¹⁵⁷⁾ See recital 114.

⁽¹⁵⁸⁾ As indicated in recital 123.

- (299) As regards guarantees provided by Fiat SpA to FFT, invoked in the comments by Luxembourg ⁽¹⁵⁹⁾, those guarantees cover FFT's liabilities, not its assets. They therefore benefit the holders of the guaranteed notes issued, but do not reduce the risk of FFT's assets. The benefit in terms of costs of funding from the guarantee of the notes and bonds issued by Fiat SpA is passed to the group companies through the pricing mechanism described in recital 124. In fact, the pricing of the company loans is calculated by applying a margin of the funding costs of the treasury companies, where the benefit of the guarantee by the mother company, if any, is reflected.
- (300) In light of these observations, the Commission considers that neither the implicit nor the explicit guarantees materially decrease the risk borne by FFT when performing its functions. This risk is higher than has been presented in the transfer pricing report because of the existence of guarantees provided to group companies leading to a significant off-balance sheet exposure, so that a beta higher than the 25th percentile should have been chosen.
- (301) In conclusion, the Commission considers that the contested tax ruling, by endorsing the tax advisor's choice of a beta of 0,29 in the application of the CAPM for determining the return on capital to be applied to FFT's hypothetical regulatory capital, results in a profit allocation to FFT that departs from market conditions in line with the arm's length principle. Since that departure results in a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms, the contested tax ruling should be considered to grant a selective advantage to FFT for the purposes of Article 107(1) of the TFEU.

7.2.2.10. Conclusion on the amount of capital to be remunerated and level of required return on that capital

- (302) Given the tax advisor's choice of the TNMM in the transfer pricing analysis and in light of the observations above, the Commission is of the opinion that, to ensure an appropriate market-based level of remuneration to FFT for the financing and treasury functions it performs within the Fiat group in line with the arm's length principle, that remuneration should be established on the basis of FFT's accounting equity on the basis of its specific facts and circumstances.
- (303) The Commission accepts 2012 as reference year for the assessment of FFT's tax base in Luxembourg. The Commission also does not object to the use of comparables database search to estimate arm's length returns, but maintains its objections regarding the appropriate choice of comparables expressed in recital 294.
- (304) Indeed, the analysis in Section 7.2.2.9 indicates that the risks borne by FFT to be considered for the calculation of an arm's length remuneration are higher than the risks presented in the transfer pricing report and that, therefore, the pre-tax return on equity of 6,05 % (and the corresponding 4,3 % post-tax) accepted by the contested tax ruling, calculated by FFT's tax advisor using the CAPM, falls well below the required returns on capital in the financial sector, which has consistently remained at and above 10 %, confirming the Commission's conclusion that the tax advisor's choice of comparables was not appropriate.
- (305) Moreover, a comparison of the declared profitability of FF and FFT, Fiat's euro-area treasury companies, indicates that the difference in profits between FF and FFT, despite the similarities in the structure of assets, functions and income appears to be due to the intention to lower the level of profitability declared in Luxembourg. Based on the structure of assets and liabilities and the profit and loss account of FF and FFT ⁽¹⁶⁰⁾, the two companies have a very similar balance sheet size and structure of assets. Their interest income and expense are also of comparable amounts. FF is the most important counterparty of FFT, which sources funding on the market and passes part of the funding to FF, which in turn lends it on to the Italian companies of the Fiat group. [...]

⁽¹⁵⁹⁾ See recital 155.

⁽¹⁶⁰⁾ As presented in recital 113 and 114.

- (306) Fiat's internal Transfer Pricing Policy document seems to aim at remunerating both companies with similar returns ⁽¹⁶¹⁾. However, the actual returns of equity recorded and subject to taxation at the level of the two companies are much higher for FF compared to FFT. Based on the figures in the tables in recitals 113 and 114, the tables below present the realised return on equity (RoE) calculated for FF and FFT.

FF	2010	2011	2012	2013
Net profit in EUR thousand	17 292	25 290	24 450	10 514
Shareholders' equity in EUR thousand	271 047	268 610	268 837	256 053
RoE (%)	6,4	9,4	9,1	4,1

FFT	2010	2011	2012	2013
Net profit in EUR thousand	1 737	1 851	1 217	1 146
Shareholders' equity in EUR thousand	285 625	287 477	288 693	289 839
RoE (%)	0,6	0,6	0,4	0,4

- (307) As follows from the tables above, presented in recital 306, for the period 2010-2013, the average return on equity was 7,2 % for FF and 0,5 % for FFT, which again confirms that the tax advisor's choice of comparables in the transfer pricing report and the resulting return on capital were not appropriate.
- (308) To determine an appropriate return on equity to apply to FFT's accounting equity, the aggregate statistics for the banking sector seem more adequate than the set of 66 financial companies, which seem in large part to engage in specific financial activities, as the former would in any case better approximate a central tendency.
- (309) As mentioned in recital 304, the currently required return on equity for European banks is around 10 %, a level which has been maintained even during the financial crisis. In fact, information from the time of the contested tax ruling confirms that level of required return on equity. For example, according to the Bank of International Settlements' publication of 2011 'Over a longer time horizon, financial firms have tended to achieve ROEs of 11-12 %' ⁽¹⁶²⁾. In addition, a study by the ECB of 2011 found that 'at the average equity ratio in the sample [of 54 international banks], the required return on equity is about (...) 10,3 %.' ⁽¹⁶³⁾ Equity research from 2011 equally confirms that level; for example, according to Deutsche Bank '[Deutsche Bank] have a [share price target], reflecting low-teens sustainable RoEs and a cost of equity that [Deutsche Bank] expect to stay above 10 % in the current cycle' ⁽¹⁶⁴⁾, while an equity research report by Morgan Stanley and Oliver Wyman of 19 March 2015 set target returns at 10-12 %.
- (310) The Commission further observes that an arm's length remuneration must not be lower than the difference between the income and the charges of the company. Therefore, if the remuneration of loans provided or deposits received by FFT were to be adjusted and the resulting remuneration of FFT would be higher than a remuneration calculated through transfer pricing, the entire recorded profit must be taxed, because a third party would not accept to reduce its remuneration if none of its counterparties would make justified claims to receive a higher remuneration on their deposits or justified claims to pay a lower remuneration on their loans received.

⁽¹⁶¹⁾ See table in recital 125.

⁽¹⁶²⁾ Bank for International Settlements, 81st annual report, 1 April 2010-31 March 2011, 26 June 2011, p. 81

⁽¹⁶³⁾ ECB, Financial Stability Review, December 2011, page 130.

⁽¹⁶⁴⁾ Deutsche Bank, European Banks: Running the Numbers: Spring edition, 5 April 2011; in a Deutsche Bank report of 20 March 2015 the implied cost of equity for European banks is estimated at 10 %.

- (311) The Commission is therefore of the opinion that, if the TNMM is used for transfer pricing purposes to calculate an appropriate remuneration due to FFT for the functions it performs with the Fiat group, the correct estimate of FFT's taxable base in Luxembourg corresponds to at least 10 % post-tax applied to the full amount of its accounting equity, which is considered to be broadly in line with the leverage corresponding to the industry average. A taxable base calculated on that basis would result in a profit allocation reflecting market conditions in line with the arm's length principle, since it is a level of profit standalone financial institutions could expect on the market, so that any tax ruling accepting that base for determining FFT's tax liability under the general Luxembourg corporate tax system would not give rise to a selective advantage for the purposes of Article 107(1) of the TFEU.

7.2.3. 'Group advantage'

- (312) In its comments on the Opening Decision, FFT raises the argument that the Commission should consider the 'group effect' of the measure, namely that no advantage exists for the Fiat group because any increase of the taxable base in Luxembourg would be offset in full by an increased tax deduction in other Member States ⁽¹⁶⁵⁾. According to FFT, that effect has already been recognised in a number of Commission decisions ⁽¹⁶⁶⁾.
- (313) The Commission recalls, as a preliminary matter, that it is not bound by its decisional practice and that each measure must be assessed on the basis of its own merits under Article 107(1) of the TFEU ⁽¹⁶⁷⁾. In any event, the reference by FFT to the *Hungarian group interest tax regime* decision, where the Commission would have recognised such a 'group effect', is based on an incorrect reading of that decision. In that decision, the Commission rejected Hungary's argument to assess the existence of an advantage at group level and concluded that the advantage had to be assessed at the individual entity level.
- (314) The present decision examines whether Luxembourg, by issuing the contested tax ruling, conferred a selective advantage on FFT by lowering its tax liability in that Member State. Therefore, the assessment of whether that ruling gives rise to an advantage should be made at the treatment of the individual company by the Member State in question, namely FFT and Luxembourg, and should not take into account a possible neutral impact of the measure at the level of other Fiat group companies as a result of their treatment by other Member States ⁽¹⁶⁸⁾. In any event, according to the case-law ⁽¹⁶⁹⁾, the mere fact that a specific exemption measure is offset by an increase in a specific charge which is different from and unconnected with the former measure does not save that measure from a categorisation as State aid. In other words, an advantage at the level of one company received from a Member States cannot be compensated with the disadvantage at the level of another company, even if those companies are part of the same corporate group.

7.2.4. Subsidiary line of reasoning: Selective advantage due to a derogation from Article 164 L.I.R. and/or the Circular

- (315) Luxembourg and FFT raised the argument that Article 164 L.I.R. or the Circular constitute the reference system against which the existence of a selective advantage resulting from the contested tax ruling must be determined. Luxembourg also raised the argument that the Luxembourg tax administration merely interpreted the rules and that there is no indication that in FFT's case the Luxembourg authorities have deviated from the generally applicable tax rules had they been examined by the Commission ⁽¹⁷⁰⁾.
- (316) As noted at recitals 210 to 215, the Commission does not agree with the arguments of Luxembourg and FFT concerning the applicable reference system. However, as a subsidiary line of reasoning, the Commission

⁽¹⁶⁵⁾ FFT's first set of comments, paragraph 64; FFT's second set of comments, paragraphs 1.8.1 et seq., paragraph 3.1.8.

⁽¹⁶⁶⁾ Notably *Hungarian group interest tax regime* Decision.

⁽¹⁶⁷⁾ See recital 202.

⁽¹⁶⁸⁾ See also the *Groepsrentebox* decision, paragraphs 80 to 82; *Hungarian group interest tax regime* decision, paragraphs 131 and 132.

⁽¹⁶⁹⁾ See Case C-81/10 P *France Télécom v Commission* ECLI:EU:C:2011:811, paragraph 43, Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, paragraph 34; See also Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* ECLI:EU:T:2009:474, paragraph 207 and paragraph 215.

⁽¹⁷⁰⁾ Observations of Luxembourg to the Opening Decision, paragraph 28.

concludes that the contested tax ruling also grants FFT a selective advantage in the context of the more limited reference system composed of group companies applying transfer pricing to which Article 164(3) L.I.R. and the Circular apply. Article 164(3) L.I.R. and the Circular are considered to establish the 'arm's length principle' under Luxembourg tax law, according to which transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length. Section 2 of the Circular, in particular, contains a description of the arm's length principle as set out in the OECD TP Guidelines and transposed into domestic law ⁽¹⁷¹⁾.

- (317) Considering that the Commission has already demonstrated in Section 7.2.2 that the contested tax ruling endorses certain methodological choices, choices of parameters for their implementation and ad hoc adjustments made by FFT's tax advisor for transfer pricing purposes that cannot be considered to result in a reliable approximation of a market-based outcome resulting in a reduction in FFT's Luxembourg tax base, the Commission can similarly conclude that that ruling also gives rise to a selective advantage under the more limited reference system of Article 164(3) L.I.R. or the Circular, since it results in a lowering of FFT's tax liability as compared to the situation where the arm's length principle laid down in that provision had been properly applied.

7.2.5. The Commission has not identified any consistent tax ruling practice under the Circular that could constitute an appropriate reference system

- (318) FFT also argued that to prove a selective treatment benefitting FFT as a result of the contested tax ruling, the Commission should compare that ruling to the administrative practice of the Luxembourg tax administration under the Circular and, in particular, the rulings granted to other financing and treasury companies that Luxembourg submitted to the Commission as part of a representative sample of its ruling practice ⁽¹⁷²⁾.
- (319) The Commission disagrees with this line of reasoning, as it would mean that the system of reference against which the contested tax ruling would have to be examined is Luxembourg's tax ruling practice under the Circular in relation to other financing and treasury companies. The Commission has already demonstrated why the general Luxembourg corporate tax system constitutes the appropriate reference framework for selectivity analysis ⁽¹⁷³⁾.
- (320) Nevertheless, in a further subsidiary line of reasoning, the Commission will demonstrate why Luxembourg's tax ruling practice under the Circular constitutes an appropriate reference system for determining whether the contested tax ruling grants FFT a selective advantage. That is because, first, the Circular is drafted in an overly broad manner, so that it does not allow for the identification of objective criteria applicable to all financing and treasury companies that request a tax ruling for transfer pricing purposes. Second, the Commission's examination of the rulings submitted to it by Luxembourg further evidence that there is no consistent set of rules that generally apply on the basis of objective criteria against which the contested tax ruling could be examined for determining whether FFT received a selective advantage as a result of that ruling.

7.2.5.1. The Circular is drafted too broadly to constitute an appropriate reference system

- (321) As explained in recital 193, a reference system is composed of a consistent set of rules that generally apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective. The Commission considers that the Circular, as regards group financing and treasury companies that make a ruling request, cannot constitute such a system, due to the lack of objective criteria that allow a consistent application of the arm's length principle to intra-group financing transactions.

⁽¹⁷¹⁾ See recital 77.

⁽¹⁷²⁾ FFT's first set of comments, paragraph 60; FFT's second set of comments, paragraph 1.4.

⁽¹⁷³⁾ Section 7.2.1.1.

- (322) The Circular is phrased in very broad terms and the factors to be taken into account by the tax administration for the application of the arm's length principle to intra-group financing companies are explained in a succinct manner. Those factors include that companies should perform a risk analysis and determine the additional expenses relating to granting loans that translate into additional charges to be applied to the cost base which, in turn, requires a credit risk analysis. The Circular further explains that 'a group financing company must have sufficient equity in order to assume the risks connected' and that 'based on the facts and circumstances of each individual case, it should be assessed what are the risks assumed and whether the group financing company has the appropriate level of equity to assume these risks' ⁽¹⁷⁴⁾.
- (323) The Circular does not, however, contain any information as to how to estimate the expected return of capital, whether the use of the CAPM is acceptable and, if so, how the relevant components of the CAPM should be determined. The Circular also does not contain much information as to the equity to be considered except that it must be '*sufficient in order to assume the risks*'.
- (324) In its observations on the Opening Decision, Luxembourg indicates that the '*tax ruling is based on limited discretion*' afforded by Article 164(3) L.I.R. which lays down the arm's length principle in Luxembourg tax law ⁽¹⁷⁵⁾, but it also indicates that the 'rules for taxation [...] should be interpreted in the light of the facts of each case, which by definition requires consideration of the characteristics of the activities actually carried on by the taxpayer and of the context in which they are carried on' ⁽¹⁷⁶⁾. Luxembourg thus admits, on the one hand, that the rules need to be interpreted in the light of the facts of each case, but does not explain, on the other, how the broad criteria laid down in the Circular translate into a concrete assessment of FFT's tax situation or how a consistent treatment of all taxpayers is ensured when applying the Circular. It is therefore unsurprising that, with the exception of a reference to the Circular at the beginning, FFT's transfer pricing report does not include any further references to the criteria of the Circular nor does it explain how the transfer pricing report applies the Circular to the specific case of FFT.
- (325) Therefore, by concluding that the transfer pricing analysis 'has been realised in accordance with the Circular 164/2 of the 28 January 2011 and respects the arm's length principle', the Luxembourg tax administration did not rely on any objective criteria laid down in the Circular, since that document does not include any precise and objective criteria that could be used to allow a consistent application of the arm's length principle to intra-group financing transactions.

7.2.5.2. Luxembourg's tax ruling practice is too inconsistent to constitute an appropriate reference system

- (326) In addition to the broad wording of the Circular, the Commission has examined the tax rulings submitted to it by Luxembourg and found that its tax ruling practice in relation to group financing and treasury companies further evidences that there is no consistent set of rules that generally apply to all similarly situated taxpayers on the basis of objective criteria.
- (327) Out of the 21 rulings initially submitted, only two concern financing activities which were approved on the basis of the Circular and are accompanied by a transfer pricing report:

— A ruling of [...] 2013 (No 2) ⁽¹⁷⁷⁾ concerns the application of the Circular to intermediary financing activities [...].

— A ruling of [...] 2013 (No 4) also deals with the analysis of the arm's length principle under the Circular to intra-group financing activities. [...]

⁽¹⁷⁴⁾ The Circular, pp. 3 and 4.

⁽¹⁷⁵⁾ Observations of Luxembourg to the Opening Decision, paragraph 34.

⁽¹⁷⁶⁾ Observations of Luxembourg to the Opening Decision, paragraph 36.

⁽¹⁷⁷⁾ The numbering refers to the numbering of the rulings as submitted by Luxembourg to the Commission.

- (328) A cursory reading of those two rulings and a comparison with the contested tax ruling reveals that there is no consistent treatment of treasury companies under the Circular and Luxembourg tax administration's assessment of the taxable profit. Without assessing whether the two rulings properly apply the CUP, the two rulings in question expressly acknowledge that for intermediary financing transactions, the CUP method is in any event the most appropriate method based on the functional analysis and the availability of comparables, which include, among others, banks. This is also in line with the Circular, which considers the functions performed by intra-group financing companies, in substance, comparable to the functions performed by independent financial institutions. Contrary, to those two rulings, the CUP method was not applied in the contested tax ruling because FFT's tax advisor considered the TNMM as most appropriate method based on the fact that the 'TNMM looks adequate' ⁽¹⁷⁸⁾.
- (329) Three other rulings submitted by Luxembourg equally concern intra-group financing activities applying the Circular, but without any accompanying transfer pricing report to justify the request:
- A ruling of [...] 2012 (No 1) concerns a financing activity [...].
 - A ruling of [...] 2012 (No 5) concerns, among others, a tracking loan [...].
 - A ruling of [...] 2013 (No 22) concerns, among others, a financing activity [...].
- (330) As regards a comparison between rulings No 1, 5 and 22 with the contested tax ruling, the obvious difference in treatment by the Luxembourg tax administration is that, contrary to the contested tax ruling, the requests for rulings No 1, 5 and 22 were not accompanied by a transfer pricing report, although this is expressly required under the Circular ⁽¹⁷⁹⁾.
- (331) Two further rulings submitted by Luxembourg to the Commission concern financing activities, but do not refer to the Circular:
- A ruling of [...] 2012 (No 6) concerns a company restructuring. It contains, among others, a tracking loan [...].
 - A ruling of [...] 2012 (No 21) concerns the acquisition of [...].
- (332) Finally, the Commission examined the two tax rulings provided by Luxembourg as part of the 13 rulings covering a treasury function identified in the list of 5 323 rulings provided by Luxembourg on 22 December 2014 ⁽¹⁸⁰⁾. Both of those rulings are based on the Circular.
- A ruling on treasury functions of Company E consists of meeting notes produced by Company E's tax advisor and signed on [...] by representatives of the Luxembourg tax administration. [...]
 - A ruling on treasury functions of Company G dates from [...], approving a request of the same day by company G. [...]
- (333) The Commission observes that, contrary to the contested tax ruling, neither of those two rulings applies the TNMM or the CAPM, and neither ruling seems to determine the taxable profit of the company as a return on a hypothetical regulatory capital. Moreover, although the ruling request of Company G refers to a transfer pricing report to be provided at a later stage, such a report does not seem to have ever been provided to the Luxembourg tax administration ⁽¹⁸¹⁾. Finally, although the ruling of Company G does not clearly indicate the level of the margin nor to what the margin applies, it is distinct from the contested tax ruling because the margin would be,

⁽¹⁷⁸⁾ Page 34 of the FFT transfer pricing report.

⁽¹⁷⁹⁾ See recital 83.

⁽¹⁸⁰⁾ Thereof, two rulings concerned FFT and [company F] requests, see recitals 28 and 29.

⁽¹⁸¹⁾ The request of the Commission of 23 June 2015 requests any transfer pricing reports provided by the company and the submission by Luxembourg of 25 June 2015 does not contain any such subsequent report.

according to the ruling request, based on assets and additional to a return on equity. In short, the tax treatment of those two companies for treasury functions does not seem to follow any coherent method or approach when compared to the contested tax ruling.

- (334) Luxembourg argues that FFT cannot be compared to other treasury companies, since FFT raises funds on the market whereas other financing companies usually obtain financing intra-group. Luxembourg also argues FFT cannot be compared to any other taxable company in Luxembourg: *'la situation de chaque contribuable est suffisamment spécifique, pour empêcher toute comparaison pertinente avec des dossiers d'autres contribuables.'* ⁽¹⁸²⁾
- (335) While the Commission does not agree with those arguments, it submits that the lack of a consistent set of rules that generally apply to financing and treasury companies making a ruling request on the basis of objective criteria is best demonstrated by the existence of an alternative tax ruling in favour of [company F]. The [company F] ruling, issued on the same day and covering the same functions as the contested tax ruling (with [company F] covering the industrial segment [...] in an alternative structure of group treasury companies), arrives at a substantially different conclusion as regards the companies' respective tax bases, without any apparent justification for that difference in treatment. Indeed, the contested tax ruling agrees on a tax base of around EUR 2,5 million, whereas the tax ruling in favour of [company F] agrees to a remuneration of similar financing and treasury activities resulting in a tax base of EUR [...]. This difference in treatment of practically identical companies without any apparent justification further demonstrates that Luxembourg's tax ruling practice, based on the broad wording of the Circular, does not constitute an appropriate reference system for the purposes of the selectivity analysis.
- (336) In sum, an examination of the tax ruling practice of the Luxembourg tax administration does not allow for the identification of a consistent set of rules that generally apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective. That practice can therefore not constitute the framework against which the contested tax ruling is examined to determine whether FFT obtained a selective advantage for the purposes of Article 107(1) of the TFEU.

7.2.6. Justification by the nature or general scheme of the tax system

- (337) Neither Luxembourg nor FFT have advanced any possible justification for the selective treatment of FFT as a result of the contested tax ruling. The Commission recalls that the burden of establishing such a justification lies with the Member State.
- (338) In any event, the Commission has not been able to identify any possible ground for justifying the preferential treatment from which FFT benefits as a result of the contested tax ruling that could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the system, ⁽¹⁸³⁾ whether that reference system is the general Luxembourg corporate income tax system, as established by the Commission, or Article 164 L.I.R. and the Circular, as advocated by Luxembourg and Fiat.

7.2.7. Conclusion on the existence of a selective advantage

- (339) The Commission concludes that the contested tax ruling, by endorsing a method for arriving at a profit allocation to FFT within the Fiat group that departs from a market-based outcome in line with the arm's length principle resulting in a lowering of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies taxable in Luxembourg that transact on market terms, confers a selective advantage on FFT for the purposes of Article 107(1) of the TFEU.

⁽¹⁸²⁾ Letter of Luxembourg dated 24 March 2015, reply to question 6.

⁽¹⁸³⁾ Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550, paragraph 69.

- (340) By a subsidiary line of reasoning, the Commission concludes that the contested ruling, by endorsing a method for arriving at a profit allocation to FFT within the Fiat group that departs from a market-based outcome in line with the arm's length principle resulting in a lowering of FFT's tax liability under Article 164(3) L.I.R. and the Circular as compared to other group companies taxable in Luxembourg, confers a selective advantage on FFT for the purposes of Article 107(1) of the TFEU.

7.3. Beneficiary of the contested measure

- (341) The Commission considers the contested tax ruling to grant a selective advantage to FFT within the meaning of Article 107(1) of the TFEU, since it leads to a lowering of that entity's taxable profit in Luxembourg as compared to non-integrated companies whose taxable profits are determined by transactions concluded on market terms. However, the Commission notes that FFT forms part of a multi-national corporate group, i.e. the Fiat Chrysler Automobiles (hereinafter 'FCA') group, and that FFT's role within that group is the provision of financing and treasury functions to other Fiat group companies, the remuneration of that role being the subject-matter of the contested tax ruling.
- (342) Separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, '[i]n competition law, the term 'undertaking' must be understood as designating an economic unit [...] even if in law that economic unit consists of several persons, natural or legal.' ⁽¹⁸⁴⁾ To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links ⁽¹⁸⁵⁾. In the present case, FFT is owned by Fiat SpA (now Fiat Chrysler Automobiles, NV) and by FF, which, in turn, is wholly owned by Fiat, SpA ⁽¹⁸⁶⁾ FFT is thus fully controlled by Fiat S.p.A which in turn controls the Fiat group ⁽¹⁸⁷⁾.
- (343) Moreover, it is the Fiat group which took the decision to establish FFT in Luxembourg and thus the Fiat group which benefits from the contested tax ruling as that ruling, as indicated in recital 52, establishes the profit that should be allocated to FFT within that corporate group for the financing and treasury functions it provides to the companies of that group. The contested tax ruling is, after all, a ruling that accepts a transfer pricing methodology for transactions within the Fiat group, so that any favourable tax treatment afforded to FFT by the Luxembourg tax administration, benefits the Fiat group as a whole by providing additional resources not only to FFT, but to the entire the group. In other words, as discussed in recital 221, where transfer pricing is required to set prices for products and services within various legal entities of one and the same group, the effects of setting a transfer price affects by its very nature more than one group company (a price increase in one company reduces the profit of the other).
- (344) Accordingly, notwithstanding the fact that the group is organised in different legal personalities, in the context of a transfer pricing arrangement those companies must be considered as a single group benefitting from the contested aid measure ⁽¹⁸⁸⁾.

⁽¹⁸⁴⁾ Case C-170/83 *Hydrotherm* ECLI:EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* ECLI:EU:T:2004:304, paragraph 50.

⁽¹⁸⁵⁾ Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* ECLI:EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* ECLI:EU:C:2006:8, paragraph 112

⁽¹⁸⁶⁾ See recital 110.

⁽¹⁸⁷⁾ See recital 34.

⁽¹⁸⁸⁾ See, by analogy, Case 323/82 *Intermills* ECLI:EU:C:1984:345: paragraph 11 'It is clear from the information supplied by the applicants themselves that following the restructuring both SA Intermills and the three manufacturing companies are controlled by the Walloon regional executive and that, following the transfer of the plant to the three newly constituted companies, SA Intermills continues to have an interest in those companies. It must therefore be accepted that, in spite of the fact that the three manufacturing companies each has a legal personality separate from the former SA Intermills, all those undertakings together form a single group, at least as far as the aid granted by the Belgian authorities is concerned [...]'.

- (345) Finally, in the present case the amount of taxes paid by FFT to Luxembourg influence the pricing conditions of the inter-group loans granted by it to the Fiat group companies, since they are based on the WACC and a margin ⁽¹⁸⁹⁾, so that reductions of FFT's tax liability necessarily reduce the pricing conditions of its inter-group loans. A reduction of FFT's tax liability in Luxembourg therefore not only benefits FFT but all the group companies receiving financing from FFT and therefore the Fiat group.

7.4. Conclusion on the existence of aid

- (346) In light of the foregoing, the Commission concludes that the contested tax ruling granted by Luxembourg in favour of FFT grants FFT and the Fiat group a selective advantage that is imputable to Luxembourg and financed through State resources and which distorts or threatens to distort competition and is liable to affect intra-EU trade. The contested tax ruling therefore constitutes State aid within the meaning of Article 107(1) of the TFEU.
- (347) Since the contested tax ruling gives rise to a reduction of charges that should normally be borne by FFT in the course of its business operations, the contested tax ruling should be considered as granting operating aid to FFT and the Fiat group.

8. COMPATIBILITY OF THE AID

- (348) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the TFEU ⁽¹⁹⁰⁾ and it may be deemed compatible with the international market if it found by the Commission to fall within any of the categories listed in Article 107(3) of the TFEU. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the TFEU.
- (349) Luxembourg has not invoked any of the grounds for a finding of compatibility in either of those provisions for the State aid it has granted to FFT and the Fiat group by way of the contested tax ruling.
- (350) Moreover, as explained in recital 347, the contested tax ruling should be considered as granting operating aid to FFT and the Fiat group. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3)(c) of the TFEU in that it does not facilitate the development of certain activities or of certain economic areas, nor are the tax incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.
- (351) Consequently, the State aid granted to FFT and the Fiat group by Luxembourg through the contested tax ruling is incompatible with the internal market.

9. UNLAWFULNESS OF THE AID

- (352) According to Article 108(3) of the TFEU, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has taken a final position decision on the aid in question (standstill obligation).
- (353) The Commission notes that Luxembourg did not notify the Commission of any plan to grant to contested tax ruling, nor did it respect the standstill obligation laid down in Article 108(3) of the TFEU. Therefore, in accordance with Article 1(f) of Council Regulation (EU) 2015/1589 ⁽¹⁹¹⁾, the contested tax ruling constitutes unlawful aid, put into effect in contravention of Article 108(3) of the TFEU.

⁽¹⁸⁹⁾ See recital 48.

⁽¹⁹⁰⁾ The exceptions provided for in Article 107(2) of the TFEU concern 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, none of which apply in the present case.

⁽¹⁹¹⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

10. RECOVERY

- (354) Article 16(1) of Regulation (EU) 2015/1589 establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 16(2) of Regulation (EU) 2015/1589 establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 ⁽¹⁹²⁾ elaborates the methods to be used for the calculation of recovery interest. Finally, Article 16(3) of Regulation (EU) 2015/1589 states, that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision'.

10.1. Legitimate expectations and legal certainty

- (355) Article 16(1) of Regulation 2015/1589 also provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of law.
- (356) Luxembourg argues, first, that the principle of legitimate expectations mandates that the effects of any decision finding the existence of aid should not take effect until the end of the relevant tax ruling period, i.e. until the end of tax year 2016. According to Luxembourg, both the Code of Conduct Group and the OECD Forum on Harmful Tax Practices assured Luxembourg that its tax ruling practice based on the Circular is consistent with the OECD Code of Conduct and Guidelines. Luxembourg therefore submits that it was explicitly confirmed at the Council meeting of 27 May 2011 that, in view of the adoption of the Circular, Luxembourg's tax ruling practice should not be evaluated according to the Code of Conduct ⁽¹⁹³⁾.
- (357) According to established case-law, a Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 108(3) of the TFEU may not plead the legitimate expectations of a recipient to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it were allowed to do so, Articles 107 and 108 of the TFEU would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct to render decisions taken by the Commission under those provisions of the TFEU ineffective ⁽¹⁹⁴⁾. Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid ⁽¹⁹⁵⁾. Since FFT did not submit any argument to that effect in any of its observations submitted to the Commission, the Commission considers Luxembourg's reliance on legitimate expectations inadmissible for the purposes of the present Decision.
- (358) In any event, for a claim of legitimate expectations to succeed, the expectation must arise from prior Commission action in the form of precise assurances ⁽¹⁹⁶⁾. Luxembourg argues that an agreement in a Code of

⁽¹⁹²⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁹³⁾ Luxembourg's observations to the Opening Decision, paragraphs 104 et seq. Luxembourg quotes paragraph 19 of the report of the Code of Conduct Group (Business Taxation) to the Council (ECOFIN) which reads: 'With respect to the Luxembourg tax measure concerning companies engaged in intra-group financing activities the Group discussed the agreed description at the meeting on 17 February 2011. Luxembourg informed the Group that Circular No 164/2 dated 28 January 2011 determines the conditions for providing advance pricing agreements confirming the remuneration of the transactions. At the meeting on 11 April 2011, Luxembourg informed that Group that Circular No 164/2 bis dated 8 April 2011 ensured that advance confirmations granted prior to the entry into force of Circular No 164/2 would cease to be valid by 31 December 2011. With the benefit of this information, the Group agreed that there was no need for this measure to be assessed against the criteria of the Code of Conduct.'

⁽¹⁹⁴⁾ See Case C-5/89 *Commission v Germany*, ECLI:EU:C:1990:320, paragraph 17, and Case C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, paragraph 104.

⁽¹⁹⁵⁾ See Case T-67/94 *Ladbroke Racing v Commission* ECLI:EU:T:1998:7, paragraph 183; See also Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA and Diputación Provincial de Vizcaya v Commission* ECLI:EU:T:2003:217, paragraph 203.

⁽¹⁹⁶⁾ See Case T-290/97, *Mehibab Dordtselaan v Commission* ECLI:EU:T:2000:8, paragraph 59 and judgement in cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:416, para 147.

Conduct Group meeting that ‘there [is] no need for the [Luxembourg tax measure on companies engaged in intra-group financing activities] to be assessed against the criteria of the Code of Conduct’ constitutes such a precise assurance giving rise to legitimate expectations. The Commission recalls that the Code of Conduct, adopted by the ECOFIN Council ⁽¹⁹⁷⁾, is a non-legally binding instrument which aims at providing a forum of discussion for Member States on measures which have, or may have, a significant impact on the location of business within the Union. The Code of Conduct and the State aid rules pursue different objectives: while the Code of Conduct aims at tackling harmful tax competition between Member States, the State aid rules seek to address distortions of competition between competitors that result from favourable treatment, also in the form of tax reductions, by Member States to certain undertakings. Moreover, while the Code of Conduct group enjoys a certain margin of appreciation, the Commission has no discretion in determining whether a measure falls within the notion of State aid, since that notion is an objective one. Thus, an agreement in the Code of Conduct Group meeting can neither bind nor restrict the Commission’s actions in exercising its powers which are conferred on it by the TFEU in the field of State aid ⁽¹⁹⁸⁾.

- (359) The same is true for agreements reached in the OECD Forum on Harmful Tax Practices. At its meeting on 6 December 2011, the OECD Forum ‘agreed that the following 10 regimes did not need to be examined further [...] Luxembourg — Advance tax analysis for intra-group financing’. The OECD is not a Union institution, nor is the Union a member of that organisation ⁽¹⁹⁹⁾. Its conclusions, which are non-binding, cannot bind the Union institutions. Moreover, far from giving a precise assurance, the OECD Forum refrained from further examining the Luxembourg tax analysis for intra-group financing. It is therefore impossible to draw any kind of conclusions or inferences from this statement as regards the application of the State aid rules to the contested tax ruling.
- (360) Second, Luxembourg argues that the Commission infringed the principle of legal certainty. It refers to previous decision-making practice where the Commission accepted to limit recovery based on that principle.
- (361) However, there is no previous decision-making practice that might have created uncertainty about the fact that tax rulings could lead to the granting of State aid. Indeed, in the decision referred to by Luxembourg, the Commission limited recovery because of uncertainty created by a previous Commission decision. In the present case, to the contrary, the Notice on Direct Business Taxation makes express reference to tax rulings and the circumstances according to which they could be considered to lead to the granting of State aid.
- (362) As regards the argument of Luxembourg that the aid amount cannot be quantified with precision, due amongst others to the novelty of the approach, and recovery should therefore be excluded, the Commission notes that it has applied the arm’s length principle in its past decision-making practice, in particular with respect to measures adopted by Luxembourg, and it concluded that a violation thereof could constitute State aid ⁽²⁰⁰⁾. That conclusion has further been confirmed by the Court of Justice ⁽²⁰¹⁾. There is therefore nothing novel in the Commission’s approach to the contested tax ruling. Member States should be aware that an agreement between a tax authority and a company that leads to a favourable treatment for the company in terms of artificially lowering its tax base, because the transfer prices it employs do not give a reliable approximation of a market-based outcome, lead to a violation of the State aid rules and should, in case of doubt, be notified to the Commission.
- (363) Finally, as regards the allegedly difficulty to quantify the aid amount and therefore not order recovery, the Court has previously held ⁽²⁰²⁾ that the Commission is not required to state the exact amount of the aid to be recovered. Union law merely requires recovery of unlawful aid to restore the position to the status quo ante and that

⁽¹⁹⁷⁾ Council conclusions of the ECOFIN Council meeting of 1 December 1997 concerning taxation policy (OJ C 2, 6.1.1998, p. 1). See also documents at the following link: http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/#code_conduct

⁽¹⁹⁸⁾ See, to that effect, Advocate General Léger’s opinion in Case C-217/03, *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:89, paragraph 376.

⁽¹⁹⁹⁾ In the Supplementary Protocol No 1 to the Convention on the OECD of 14 December 1960, the signatories to the Convention agreed that the European Commission shall take part in the work of the OECD. European Commission representatives participate alongside Members in discussions on the OECD’s work programme, and are involved in the work of the entire Organisation and its different bodies. However, while the European Commission’s participation goes well beyond that of an observer, it does not have the right to vote and does not officially take part in the adoption of legal instruments submitted to the Council for adoption.

⁽²⁰⁰⁾ Commission Decision of 11 July 2001 in Case C 47/2001 (ex NN 42/2000) — Germany: Control and coordination centres of foreign companies (OJ C 304, 30.10.2001, p. 2). Decision 2003/501/EC.

⁽²⁰¹⁾ See footnote 105.

⁽²⁰²⁾ Albeit in the context of ‘impossibility to recover’ and not ‘difficulty to quantify the aid amount’.

repayment be made in accordance with the rules of national law ⁽²⁰³⁾. Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid ⁽²⁰⁴⁾.

- (364) It can therefore be concluded that the arguments of legitimate expectations and legal certainty invoked by Luxembourg are without merit for the purposes of recovery of the aid unlawfully granted to FFT by way of the contested tax ruling.

10.2. Methodology for recovery

- (365) In accordance with the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.
- (366) In relation to unlawful State aid in the form of tax measures, the Notice on business taxation ⁽²⁰⁵⁾ provides in point 35 thereof that the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. In order to arrive at an amount of tax which should have been paid if the generally applicable rules would have been complied with, that is, if arm's length principle had been properly applied for the determination of FFT's tax base in Luxembourg, the Luxembourg tax administration must change the annual calculation method employed by FFT in the context the TNMM method on the basis of the CAPM, i.e. (i) the amount of capital remunerated; and (ii) the level of remuneration applied to this capital amount need, in line with the above assessment, presented in recital 311.
- (367) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty ⁽²⁰⁶⁾.
- (368) The Commission has proposed one possible methodology in Section 7.2.2.10 and, in particular, in recital 311 for eliminating the selective advantage granted to FFT by the contested tax ruling ⁽²⁰⁷⁾, if Luxembourg retains the TNMM to determine FFT's tax base. However, the Commission appreciates that other transfer pricing methods may also result in a reliable approximation of a market-based outcome in line with the arm's length principle. Thus, should Luxembourg propose a method for recovery within the deadline for the implementation of this decision using an alternative transfer pricing method, the Commission would be ready to accept that method provided it results in a reliable approximation of a market-based outcome and provided that whatever method is chosen it does not replicate the choices and adjustments made by FFT's tax advisor in the transfer pricing report that the Commission considers constitute a deviation from an arm's length principle.
- (369) In particular, the Commission sees no reason why any adjustments should be made to FFT's accounting capital for the calculation of the amount of capital to be remunerated. Moreover, regarding the estimated arm's length remuneration on that capital, while the use of the CAPM methodology seems unnecessary cumbersome, there appears to be no reason why it could not be used for transfer pricing purposes, unless it is employed to clearly deviate from a market-based outcome, which is reflected in an observable return on equity for peers.

⁽²⁰³⁾ Joined Cases T-427/04 and T-17/05 *France v Commission* ECLI:EU:T:2009:474, paragraph 297.

⁽²⁰⁴⁾ Joined Cases T-427/04 and T-17/05 *France v Commission* ECLI:EU:T:2009:474, paragraph 299.

⁽²⁰⁵⁾ 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).

⁽²⁰⁶⁾ See Case C-441/06 *Commission v France* ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.

⁽²⁰⁷⁾ See, in particular, recitals 308 to 311.

10.3. Entity from which the aid is to be recovered

- (370) In light of the observations in recitals 341 to 345, the Commission considers that Luxembourg should, in the first place, recover the unlawful and incompatible aid granted by the contested tax ruling from FFT. Should FFT not be in a position to repay the full amount of the aid received as a result of the contested tax ruling, Luxembourg should recover the remaining amount of that aid from Fiat Chrysler Automobiles NV, the successor of Fiat SpA, since it is that entity which controls the Fiat group, so as to ensure that the previously existing competitive situation on the market is restored through recovery.

11. CONCLUSION

- (371) In conclusion, the Commission finds that Luxembourg, by way of the contested tax ruling, has unlawfully granted State aid to FFT and the Fiat group, in breach of Article 108(3) of the TFEU, which Luxembourg is required to recovery by virtue of Article 16 of Regulation (EU) 2015/1589 from FFT and, if the latter fails to repay the full amount of the aid, from Fiat Chrysler Automobiles NV for the amount of aid outstanding,

HAS ADOPTED THIS DECISION:

Article 1

The tax ruling issued by Luxembourg on 3 September 2012 in favour of Fiat Finance and Trade Ltd., which enables the latter to determine its tax liability in Luxembourg on a yearly basis for a period of 5 years, constitutes aid within the meaning of Article 107(1) of the TFEU that is incompatible with the internal market and that was unlawfully put into effect by Luxembourg in breach of Article 108(3) of the TFEU.

Article 2

1. Luxembourg shall recover the incompatible and unlawful aid referred to in Article 1 from Fiat Finance and Trade Ltd.
2. Any sums that remain unrecoverable from Fiat Finance and Trade Ltd., following the recovery described in the paragraph 1, shall be recovered from Fiat Chrysler Automobiles NV
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid granted referred to in Article 1 shall be immediate and effective.
2. Luxembourg shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this decision, Luxembourg shall submit to the Commission information regarding the methodology used to calculate the exact amount of aid.

2. Luxembourg shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

Article 5

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 21 October 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

COMMISSION DECISION (EU) 2016/2327**of 5 July 2016****on State aid SA.19864 — 2014/C (ex 2009/NN54) implemented by Belgium — Public financing of Brussels public IRIS hospitals***(notified under document C(2016) 4051)***(Only the French and Dutch texts are authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letters of 7 September 2005 and 17 October 2005, registered on 12 September 2005 and 19 October 2005, the Commission received a complaint against the Belgian State as regards the alleged granting since 1995 of unlawful and incompatible aid to the five public general hospitals ⁽³⁾ (hereinafter 'IRIS-H') ⁽⁴⁾ belonging to the IRIS ⁽⁵⁾ network of the Brussels Capital Region (hereinafter 'IRIS'). The complaint was lodged by two associations (i.e. the *Coordination bruxelloise d'institutions sociales et de santé* (CBI) and the *Association bruxelloise des institutions de soins privées* (ABISP)) representing hospitals managed by legal persons governed under private law (hereinafter 'private hospitals') and also individually by several hospitals that are members of these associations ⁽⁶⁾.
- (2) The complaint focused on the following groups of arguments: (i) the absence or insufficiently clear definition and entrustment of the specific public service missions that are only conferred to the IRIS-H, but not to the Brussels private hospitals (ii) the compensation of losses of the IRIS-H by public authorities, (iii) the overcompensation of the costs linked to the public service missions of the IRIS-H through the *Fonds Régional Bruxellois de Refinancement*

⁽¹⁾ From 1 December 2009 onwards, Articles 87 and 88 of the EC Treaty have become respectively Articles 107 and 108 of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ OJ C 437, 5.12.2014, p. 10.

⁽³⁾ Together, these five public hospitals operate about 2 425 of the approximately 7 260 beds that are provided by general and university hospitals (i.e. excluding psychiatric, geriatric and other specialised hospitals) in the Brussels Capital Region and employ almost 10 000 staff. Each year, they provide over 1 million medical consultations. The number of approved hospital beds was provided by the Belgian authorities (who consulted the Common Community Commission and the Federal Public Service for Public Health) and concerns the year 2015. The other information is available on the website of IRIS (see: <http://www.iris-hopitaux.be>).

⁽⁴⁾ See Sections 2.2 and 2.4 for more detail about these public hospitals and their activities.

⁽⁵⁾ The abbreviation IRIS stands for *Interhospitalière Régionale des Infrastructures de Soins*.

⁽⁶⁾ The complainants had requested that their respective identities remain confidential. However, given the applications for annulment introduced by these parties and the following annulment judgment of 7 November 2012 by the General Court in Case number T-137/10, these identities are now public (see recitals 4 and 6. It also has to be noted that the ABISP and its members are no longer pursuing the complaint.

des Trésoreries Communales, (iv) the lack of transparency in the method of public financing of the IRIS-H, and finally (v) the presence of cross-subsidisation of the non-hospital activities of the IRIS-H through the State compensation received for the provision of their hospital missions ⁽⁷⁾.

- (3) Following the submission of additional information by the Belgian authorities, the Commission services informed the complainants by letter of 10 January 2008 of their preliminary views on the complaint ⁽⁸⁾ and asked the complainants to submit new information allowing them to reconsider the preliminary assessment of the complaint, failing which the complaint would be considered withdrawn. Following the reply from the complainant, the Commission services confirmed their preliminary assessment in their letter of 10 April 2008.
- (4) Subsequently, the complainants informed the Commission of the fact that they had introduced an application for annulment before the Court of First Instance of the European Communities (as from 1 December 2009 the General Court of the European Union, hereinafter the 'GC') against the letter of 10 January 2008, which they saw as a Commission decision ⁽⁹⁾. Furthermore, on 20 June 2008 the complainants lodged an application for annulment of the letter of the Commission services of 10 April 2008 ⁽¹⁰⁾. Both Court procedures were suspended by the GC until 31 October 2009, based on the information submitted by the Commission that it intended to adopt a decision pursuant to the Council Regulation (EC) No 659/1999 ⁽¹¹⁾. With a view of adopting such a decision, the Commission services requested additional information from the Belgian authorities as well as from the complainant.
- (5) In its decision of 28 October 2009 ⁽¹²⁾ (hereinafter 'the Commission's 2009 decision', see also Section 4.1), the Commission decided not to raise objections to the aid for financing of the public hospitals of the IRIS network in the Brussels Capital Region as the financing at hand was deemed compatible with the common market under the conditions set out in Commission Decision 2005/842/EC ⁽¹³⁾ (hereinafter '2005 SGEI Decision') and directly with Article 86(2) EC Treaty (now Article 106(2) TFEU) with respect to entrustments pre-dating the entry into force of the 2005 SGEI Decision on 19 December 2005.
- (6) Subsequently, the complainants launched an action for annulment of this Commission decision at the General Court. The GC annulled the Commission decision by its judgment of 7 November 2012 in case T-137/10 ⁽¹⁴⁾ (see also Section 4.2), concluding that this decision had been adopted in violation of the procedural rights of the complainants. In particular, the GC concluded that the Commission should have had doubts concerning the compatibility of the measures at hand with the internal market considering the arguments of the complainants with respect to the compatibility. The GC therefore concluded that the Commission was required to initiate the formal investigation procedure, in order to gather any relevant information for verifying the compatibility of all the aid measures at issue with the internal market, and to allow the complainants and other interested parties to present their observations in connection with that procedure ⁽¹⁵⁾.
- (7) By letter dated 1 October 2014, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the TFEU in respect of the public financing measures in favour of the Brussels public IRIS hospitals.
- (8) The Commission's decision to initiate the procedure (hereinafter 'the opening decision') was published in the *Official Journal of the European Union* ⁽¹⁶⁾. The Commission invited interested parties to submit their comments on the measures.

⁽⁷⁾ This latter argument was first raised by the complainants in their letter of 15 December 2008.

⁽⁸⁾ In essence, the Commission services' preliminary assessment was that it appeared that the IRIS-H were duly entrusted with public service missions, that their compensation was clearly defined and that there was no overcompensation. Therefore, the Commission services considered that there were no problems with respect to State aid rules. In addition, they noted that the requirements concerning transparency also seemed to be fulfilled. As a result, the Commission services concluded that there were insufficient reasons to pursue the investigation unless new elements were brought forward by the complainant.

⁽⁹⁾ Case T-128/08, not reported.

⁽¹⁰⁾ Case T-241/08, not reported.

⁽¹¹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

⁽¹²⁾ OJ C 74, 24.3.2010, p. 1.

⁽¹³⁾ 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).

⁽¹⁴⁾ Case T-137/10 *CBI v Commission*, ECLI:EU:T:2012:584.

⁽¹⁵⁾ *Ibid.*, paragraph 313.

⁽¹⁶⁾ See footnote 2.

- (9) By letter of 22 October 2014, the Belgian authorities requested an extension of the deadline to submit their comments on the opening decision, which was accepted by the Commission by letter of 23 October 2014. A further extension of the deadline was requested by email of 1 December 2014, which was accepted by the Commission by letter of 2 December 2014. By letter of 16 December 2014, the Kingdom of Belgium submitted its observations on the opening decision.
- (10) The Commission received comments from interested parties (see Section 5) on 15 December 2014, 5 January 2015 and 9 January 2015. By letters of 13 and 20 February 2015, the Commission forwarded these comments to Belgium, which was given the opportunity to react. Belgium's comments were received by letter dated 13 March 2015, registered on 17 March 2015.
- (11) On this basis the Commission has reassessed the case and interpreted certain elements differently in comparison to the assessment in the annulled Commission's 2009 decision.

2. BACKGROUND

- (12) The IRIS-H operate in a complex legislative and regulatory environment which is shaped by various public authorities. A comprehensive assessment of the compliance with State aid rules of the public financing from which they benefit requires at the outset a brief description of the legislative and regulatory framework as it applies to the IRIS-H. This description encompasses an introduction to the Loi CPAS (on the basis of which the IRIS-H were created), a brief account of the creation of the IRIS-H, a survey of the legislative and other documents regulating the operations of the IRIS-H, a short overview of the main activities of the IRIS-H, as well as an enumeration of the various applicable financing mechanisms.

2.1. The right to social aid and the Loi CPAS

- (13) The right to social aid is a constitutional right in Belgium. In particular, Article 23 of the Belgian Constitution provides:

'Everyone has the right to lead a life in keeping with human dignity. To that end, the laws, the decree or rule referred to in Article 134 guarantee economic, social and cultural rights, taking account of the relevant obligations, and determine the conditions for their exercise. Those rights include, inter alia:

[...]

2° the right to social security, healthcare and social, medical and legal aid.'

- (14) Actual access to social aid by citizens is governed primarily by the Organic Law of 8 July 1976 ⁽¹⁷⁾ (hereinafter 'Loi CPAS') which created the *Centres Publics d'Action Sociale* (hereinafter 'CPAS'). The CPAS are public bodies, with legal personality, and are present in each Belgian municipality. The CPAS are governed by a board the members of which are elected by the municipal council of the respective municipality. According to Article 1 of the Loi CPAS:

'Everyone has the right to social aid. The purpose of such aid is to enable everyone to lead a life in keeping with human dignity. CPAS shall be set up to provide such aid in accordance with the conditions laid down in this Law.'

- (15) In practice, the CPAS provide social aid to persons who do not have the resources to be able to live in dignity and who are ineligible for other forms of social security (e.g. unemployment benefits). In this context, Article 57(1) of the Loi CPAS specifies that the CPAS have the mission to provide individuals and families with the aid that the community is due to provide and describes this aid as follows:

'It shall provide not only palliative and curative assistance but also preventive assistance. It shall encourage social participation by users. The assistance may be material, social, medical, medico-social or psychological.'

⁽¹⁷⁾ Belgisch Staatsblad/Moniteur Belge of 5 August 1976, p. 9876.

- (16) Although each CPAS has the obligation to provide social aid to individuals and families, it does have a certain discretion as to how this aid is provided. More specifically, a CPAS may provide such aid:
- either itself, directly, or
 - ‘where necessary and if appropriate under an existing scheme’ (see also recital 19), through institutions or services which it creates (on the basis of Articles 60(6), 79, 118 Loi CPAS), in which case the CPAS setting up such an institution or service also necessarily determines its purpose; any of its social obligations, which the CPAS delegates to the institution or service, is then exercised in accordance with that purpose, or
 - through institutions or services with which it collaborates (Article 61 Loi CPAS), in which case the respective institutions or services will have been created:
 - either by the CPAS itself (see previous indent), or
 - by a third party which will also have decided the purpose of its institution.
- (17) In the latter two cases, the CPAS will delegate (part of) its social aid obligation solely in so far as this is consistent with the purpose of the collaborating institution. On the one hand, if the institution is set up by the CPAS, it will control this purpose. In the case of an entirely third-party institution, on the other hand, the collaboration will be limited by the purpose of this institution.
- (18) The legal obligation on the CPAS to provide social aid, whether material, social, medical, medico-social or psychological, is the same no matter whether it provides the aid directly or through institutions that it creates or with which it collaborates. Article 57 of the Loi CPAS imposes the obligation to provide such aid on the CPAS (alone) in all cases. Any forms of delegation are arrangements for the exercise of this obligation and do not exempt the CPAS from its responsibility to ensure that its obligation is — and continues to be — fulfilled.
- (19) The requirements that apply when a CPAS wants to create an institution or service (such as a hospital) for the performance of (part of) the CPAS mission to provide social aid are set out in Article 60(6) of the Loi CPAS:
- ‘Where necessary and if appropriate under an existing scheme, the CPAS shall set up, develop and manage social, curative and preventive establishments and services.
- The need to create or develop an establishment or service must be based on documentation including an evaluation of the needs of the municipality and/or region and of similar establishments or services already in existence, a description of their operation, an accurate assessment of the cost price and expenditure involved and, if possible, information allowing a comparison with similar establishments or services.
- The creation or development of establishments or services that will potentially receive either investment or operating subsidies can only be decided on the basis of documentation showing that the conditions laid down in the organic law or regulations on the granting of such subsidies will be satisfied.
- Notwithstanding the authorisation to be obtained from other public authorities, as soon as the decision to create or develop an establishment or service might entail a contribution from or addition to the municipal budget, it shall require the approval of the municipal council.’
- (20) The obligation in Article 57 of the Loi CPAS to provide individuals and families with aid (of social, medical, medico-social or psychological nature) is:
- General: aid is to be provided irrespective of the ideological, philosophical or religious beliefs of the beneficiary (Article 59 of the Loi CPAS) and the person’s possible lack of means. The CPAS has the specific purpose of providing aid in view of the person’s state of poverty. On this basis, each CPAS has the obligation to provide aid to all, and if it sets up an institution or service to fulfil its task the latter will necessarily have the same obligation.
 - Not subject to time limits: the aid is to be provided for as long as the social need exists. The CPAS is therefore obliged to ensure the continuity of the aid and hence of the institution or service that provides it.

- (21) On the basis of the principle of municipal autonomy, each CPAS in its respective municipality takes an autonomous decision, whilst complying with the Loi CPAS, as to the most appropriate means of fulfilling its obligation to provide social aid (including medical aid). The constitutional choice to organise social aid at the municipal level is also driven by the wish and need to establish a social aid policy that is as close as possible to the population. When a CPAS decides to set up a curative healthcare institution in order to cater for the healthcare needs of the local population, the institution thus created is regulated both by the Loi CPAS and the federal regulatory framework for hospitals (see recital 32 for this framework), which applies to all hospitals regardless of their status (public or private) and ensures a common organisational system for the whole country. Unlike private hospitals, the primary purpose of hospitals established by a CPAS, such as the IRIS-H, is however always to contribute to the provision of social aid. The exact nature of the social aid obligations that apply to the IRIS-H (see also Section 7.3.4.1) is specified in the bylaws of the IRIS-H and the IRIS strategic plans in line with the requirements of the Loi CPAS (in particular in its Articles 120 and 135 *quinquies*).
- (22) Finally, on the basis of Article 106 of the Loi CPAS, municipalities are required to cover the deficit of their CPAS when the latter does not have sufficient resources to cover the expenditures connected to the provision of its social aid obligation.

2.2. The creation of the IRIS hospitals

- (23) As explained above (see recital 15), the social aid provided by the CPAS includes medical and medico-social assistance, and can be both of preventive and curative nature. Such assistance may be provided either (i) directly by the CPAS, or, (ii) through a third party (such as a private hospital) in accordance with their statutory autonomy, or, (iii) particularly if the CPAS wishes to control the means of achieving those objectives, by creating an institution or service to perform part of its mission (which will then be defined in the bylaws of that institution or service and in the case of the IRIS-H also in the IRIS strategic plans (see recitals 16 and 21). To achieve their mission in the field of medical assistance, the CPAS have set up and continue to (co-)manage hospitals in several Belgian cities and municipalities.
- (24) Historically, the CPAS in the six Brussels municipalities concerned ⁽¹⁸⁾ have provided social assistance of medical and socio-medical nature themselves via eight public hospitals ⁽¹⁹⁾ spread over eight different sites. These hospitals were managed directly by the respective CPAS and did not have legal personality. Hence, it was clear that these hospitals contributed to fulfilling the social aid obligation of the respective CPAS. However, in the first half of the 1990s, the Brussels public authorities found that the structural deficits of these hospitals jeopardised their continuity. To ensure the continuity and viability (referred to as *pérennité* by the Belgian authorities) of the Brussels public hospitals, these authorities decided to restructure these hospitals.
- (25) The first step of the restructuring operation was taken on 19 May 1994 when the Belgian Federal Government, the Brussels Capital Region and the Brussels *Commission Communautaire commune* signed a cooperation agreement on hospital policy. This agreement provided for the implementation of a restructuring agreement to ensure the continuity of public and local hospital services. As stated in Article 2 of that cooperation agreement:

‘This restructuring agreement must satisfy the following conditions:

1. to provide guarantees of the **maintenance of**, on the one hand, the **specific character of public hospitals, inter alia**, by the choice of legal structures and coordination **ensuring predominance of the public sector in the management bodies** and decision-making procedures, and, on the other hand, **a local basis, through greater representation of directly elected members** in the composition of the management bodies’ ⁽²⁰⁾.
- (26) The preamble to the cooperation agreement states to that effect:

‘Whereas the financial deficit shown by the public hospitals in the territory of the Brussels Capital Region has in fact reached worrying proportions;

⁽¹⁸⁾ Out of the nineteen municipalities that together form the Brussels Capital Region, these six municipalities concerned are: Anderlecht, la Ville de Bruxelles, Etterbeek, Ixelles, Schaerbeek and Saint-Gilles.

⁽¹⁹⁾ More specifically: CHU Brugmann-HUDERF (until 1 January 1997 a single entity), CHU Saint-Pierre, the Institut Bordet, the Centre Hospitalier Baron Lambert, the Centre Hospitalier Bracops, the Centre Hospitalier Molière, the Centre Hospitalier Brien and the Centre Hospitalier Etterbeek-Ixelles.

⁽²⁰⁾ Emphasis added.

Despite several restructuring plans, the financial equilibrium of those institutions is extremely precarious and is accordingly burdening the municipal budgets with a structural debt;

Whereas it is necessary in those circumstances to encourage the establishment of mechanisms for coordination and cooperation between municipalities and the CPAS and associations set up in accordance with Chapter XII of the [Loi CPAS] with responsibility for public hospitals in the territory of the Brussels Capital Region;

Whereas such coordination and cooperation mechanisms **can ensure the continuity of public hospitals**, by encouraging synergies in equipment and infrastructure and their management and development resources and help to offset the deficit in municipal budgets;

Whereas this agreement in no way alters the rules for hospital financing, but is designed solely to offset the structural deficit affecting the CPAS and municipalities' ⁽²¹⁾.

- (27) It was on that basis that the Brussels *Commission Communautaire commune* adopted the *Ordonnance* of 22 December 1995 which inserted a Chapter XII *bis* in the version of the Loi CPAS that applies in the Brussels Capital Region. The preparatory work for this *Ordonnance* ⁽²²⁾ refers to the cooperation agreement of 19 May 1994 (see recital 25) of which the main objective was to guarantee, through the proposed restructuring, the continuity (*pérennité*) of the Brussels public hospitals ⁽²³⁾.

- (28) The restructuring consisted of the following key elements:

- The CPAS relinquishing the direct management of their public hospital(s) to newly created legal persons (so-called 'Chapter XII associations') which the CPAS established (jointly with the respective municipality or municipalities, the association representing the hospitals' doctors and, where relevant, the universities *Université Libre de Bruxelles* and/or the *Vrije Universiteit Brussel*).

In doing so, the CPAS departed from their original choice of managing their own hospitals themselves as they did in the past. As allowed by Articles 60(6) and 118 of the Loi CPAS (see recital 19), the CPAS chose to set up an association through which they can provide medical and medico-social assistance to the community.

As a result, the existing Brussels public hospitals were liquidated and their activities were transferred to eight local hospital associations established on the basis of Chapter XII of the Loi CPAS. In this way, the IRIS-H obtained legal and financial independence ⁽²⁴⁾ on 1 January 1996. The following eight hospital associations were created: the CHU Brugmann — HUDERF, the CH Brien, the CHU Saint-Pierre (CHU-SP), the CH Etterbeek-Ixelles, the CH Baron Lambert, the CH Bracops, the CH Molière, and the Institut Bordet (IB).

These eight hospitals were then further regrouped, while retaining all hospital sites, into the current five IRIS-H as follows. The CHU Brugmann (CHU-B) and Queen Fabiola Children's University Hospital (HUDERF) were split into two separate legal entities on 1 January 1997. On 1 July 1999, the CHU Brugmann and the CH Brien became one entity named CHU Brugmann. On that same date, the CH Etterbeek-Ixelles, the CH Baron Lambert, the CH Bracops, the CH Molière merged into the Iris South Hospitals (ISH). Unless indicated otherwise, where the decision at hand refers to the 'IRIS-H' this concerns these current five local public hospital associations ⁽²⁵⁾.

⁽²¹⁾ Emphasis added.

⁽²²⁾ Ordinary session 1995-1996. Documents of the Assembly of the *Commission Communautaire commune*: Draft order: B-10/1. — Report: B-10/2. Verbatim record. — Discussion and adoption: meeting of 22 December 1995.

⁽²³⁾ In particular, the preparatory work notes that the cooperation agreement of 19 May 1994 was concluded: 'in order to ensure the continuity of Brussels public hospitals, inter alia, by encouraging the establishment of mechanisms for coordination and cooperation between the bodies responsible for the public hospitals in the territory of the Brussels Capital Region, namely the municipalities, the [CPAS] and the associations set up in accordance with Chapter XII of the [Loi CPAS].'

⁽²⁴⁾ Article 121 of the Loi CPAS specifies that the Chapter XII associations have legal personality.

⁽²⁵⁾ Some of the IRIS-H operate on several sites. Currently, CHU-B is active at three sites (Victor Horta, Paul Brien, and Reine Astrid); CHU-SP is active at two sites (Porte de Hal and César de Paep); and ISH is active at four sites (Etterbeek-Ixelles, J. Bracops, Molière-Longchamp, and Baron Lambert).

- Creating an umbrella structure called IRIS (on the basis of Chapter XII *bis* of the Loi CPAS) to coordinate and supervise the hospital activities of each of the Chapter XII associations ⁽²⁶⁾. The main objective of the IRIS umbrella is to reach a sustainable financial equilibrium for the hospital activities performed by the IRIS-H. The main tasks of IRIS are to coordinate the activities of the IRIS-H, determining the strategic plan for the IRIS network, improving the quality of the services offered, and monitoring the budget of the network.

- (29) In line with Chapter XII of the Loi CPAS, each of the local hospital associations is established on the basis of bylaws which among others determine the purpose, the rights and obligations of the members, and the decision-making bodies of the association ⁽²⁷⁾. On this basis, each association has a General Assembly and Administrative Council in which the parties that established the association (see recital 28) are represented; but the representatives of the government (i.e. the municipality and the CPAS) always occupy a majority of the seats in these decision-making bodies ⁽²⁸⁾. As a result, it is clear that each of the IRIS-H is controlled by the public authorities. Likewise, the municipalities, the CPAS have a large majority in the General Assembly and the Administrative Council of the IRIS umbrella structure.
- (30) Chapter XII *bis* of the Loi CPAS determines, among others, the rules with respect to control and administrative oversight that apply to the local hospital associations. More specifically, the IRIS umbrella organisation is required to draw up a strategic plan which is binding on the local Chapter XII associations. On the basis of this plan, each local hospital association has to draw up management and financial plans and submit these to IRIS for approval (see Article 135 *quinquies* Loi CPAS). The local hospital associations are also required to ask the permission of IRIS before taking certain major decisions (see Article 135 *sexies*) and are monitored by IRIS on a quarterly basis (see Article 135 *octies*). IRIS also appoints a representative in each local hospital association who attends the meetings of the decision-making bodies of these associations and who can veto decisions that are not in line with those of IRIS itself (see Article 135 *novies*).
- (31) Finally, as explained in recitals 31 and 32 of the opening decision, the restructuring of the Brussels public hospitals that were supervised and managed by the CPAS also consisted of a financial part. More specifically, via the *Fonds Régional Bruxellois de Refinancement des Trésoreries Communales* (hereinafter 'FRBRTC') the Brussels Capital Region granted a loan of 4 billion Belgian francs (about 100 million EUR) over a period of 20 years to those municipalities that managed a public hospital (via their respective CPAS) ⁽²⁹⁾. In turn, the municipalities awarded these funds to their public hospitals to cover part of their financial liabilities ⁽³⁰⁾. On 6 June 1996, the Brussels Capital Region decided not to demand repayment of the loan and interests, on the condition that the hospital restructuring agreements were fully implemented and the financial plans respected.

2.3. The regulatory framework applying to the IRIS-H

- (32) From the previous section it is clear that the IRIS-H have been established on the basis of the Loi CPAS to enable the CPAS to fulfil their obligation to provide social aid. These hospitals are therefore governed primarily on the basis of the Loi CPAS. However, as hospitals, they are also subject to the Law of 7 August 1987 (*Loi coordonnée sur les hôpitaux*, hereinafter 'LCH') ⁽³¹⁾ Article 147 (now Article 163 of the LCH in the version of the Law of 10 July 2008) ⁽³²⁾ of which specifies:

'In the case of hospitals managed by a CPAS and the doctors working in those hospitals, the provisions of this Coordinated Law supplement the Loi CPAS.'

⁽²⁶⁾ The supervision by IRIS is subject to the conditions specified in the *Ordonnance* (by the Brussel Capital Region) of 22 December 1995 (Belgisch Staatsblad/Moniteur Belge of 7 February 1996, p. 2737).

⁽²⁷⁾ Article 120 of the Loi CPAS specifies the minimum requirements for the bylaws of associations created by a CPAS on the basis of Chapter XII of the Loi CPAS.

⁽²⁸⁾ To this extent, Article 125 of the Loi CPAS requires that: 'Regardless of the ratio of the contribution of the various partners, public entities always have the majority of votes in the various administrative and management bodies of the association.'

⁽²⁹⁾ The FRBRTC was established by the *Ordonnance* of 8 April 1993, Belgisch Staatsblad/Moniteur Belge of 12 May 1993, p. 10889 (modified by *Ordonnance* of 2 May 2002).

⁽³⁰⁾ The amount of EUR 100 million was not sufficient to cover the hospitals' total financial liabilities as they existed at the end of 1995 as the cumulated deficit was estimated to be almost EUR 200 million.

⁽³¹⁾ Belgisch Staatsblad/Moniteur Belge of 7 October 1987, p. 14652, replaced by the coordinated hospital Law of 10 July 2008 (Belgisch Staatsblad/Moniteur Belge of 7 November 2008, p. 58624).

⁽³²⁾ For the ease of reference, this decision will refer simply to Article 147 LCH, this however having to be understood as a reference to Article 163 LCH from the entry into force of the Law of 10 July 2008.

- (33) The LCH sets out, inter alia, the types of hospitals that can be formally authorised ⁽³³⁾, the conditions for the management of a hospital and the structure of the medical activity ⁽³⁴⁾, the hospital programming ⁽³⁵⁾, the conditions for authorisation of hospitals and hospital services ⁽³⁶⁾, the legal relationship between a hospital and the hospital doctors, the financial statute of the hospital doctors including among others the collecting and setting of the fees, what the fees cover, and the allocation of the centrally collected fees ⁽³⁷⁾.
- (34) In addition, the IRIS-H are also subject to the rules laid down in the bylaws of the local hospital associations, specifying among others the purpose of the IRIS-H as well as the rights and obligations of members of the association (see also recital 29).
- (35) Finally, the local hospital associations operate under the oversight of the IRIS umbrella organisation, restricting their ability to autonomously take certain financial and management decisions (see also recital 30). Significantly, the IRIS umbrella organisation adopts multi-annual strategic plans which are binding for the local hospital associations as determined by Article 135 *quinquies* Loi CPAS.
- (36) In conclusion, the regulatory framework in which the IRIS-H operate is made up of the Loi CPAS, the LCH, the bylaws of the local hospital associations, and the binding strategic plans adopted by the IRIS umbrella organisation.

2.4. Main activities of the IRIS-H

- (37) The primary activity of the IRIS-H is the provision of hospital services to patients in the Brussels Capital Region. The IRIS-H together employ nearly 10 000 staff, provide over 1 million consultations per year, and constitute Belgium's largest emergency service. The IRIS-H offer comprehensive medical services across all major medical fields, with two of them specialising in particular disciplines (in particular Queen Fabiola Children's University Hospital specialises in paediatrics, while the Institut Bordet specialises in oncology).
- (38) In addition to medical services, the IRIS-H also engage in a series of related social activities. In particular, social workers employed by the IRIS-H assist disadvantaged patients and their families in solving and managing financial, administrative, interpersonal and social difficulties.
- (39) The five IRIS-H currently provide their medical and related social services across a network of eleven sites in Brussels. These sites are spread over six municipalities (i.e. Anderlecht, la Ville de Bruxelles, Etterbeek, Forest, Ixelles, and Schaerbeek).
- (40) The IRIS-H consider it as their mission to be '*in the service of one and all, at all moments of their existence, from cradle to grave, and irrespective of their medical problems*' ⁽³⁸⁾. Ten of the eleven IRIS-H sites are located in municipalities where the average income does not exceed the median ⁽³⁹⁾ for the Brussels Capital Region. On the basis of a ranking by the Federal Public Service for Public Health (see recital 185 for the table with this ranking), the three large comprehensive IRIS-H (CHU Saint-Pierre, CHU Brugmann, ISH) are the three hospitals whose patient profile in socioeconomic terms is the weakest in Belgium. This is further illustrated by the fact that in 2012 almost 11 % of the total number of admitted patients in CHU Saint-Pierre and CHU Brugmann were not covered by the mandatory Belgian sickness insurance and could not pay for treatment, while 15 % of these hospitals' patients were (also) dependent on CPAS support.

⁽³³⁾ See Articles 2 to 7 of the Law of 7 August 1987.

⁽³⁴⁾ See Articles 10 to 17 of the Law of 7 August 1987.

⁽³⁵⁾ See Articles 23 to 45 of the Law of 7 August 1987. The hospital programming mechanism consists of determining the maximum number of hospital beds per Region based on the medical needs identified by the Federal Government. It follows that unless the demand for hospital beds increases, new hospital beds (or a new hospital) can only be created if existing beds are simultaneously removed elsewhere.

⁽³⁶⁾ See Articles 68 to 76 *sexies* of the Law of 7 August 1987.

⁽³⁷⁾ See Articles 130 to 142 of the Law of 7 August 1987.

⁽³⁸⁾ See <http://www.iris-hopitaux.be/en> (accessed on 19 August 2015).

⁽³⁹⁾ See footnote 246 for more detail about the median average income.

- (41) Finally, the IRIS-H also have a number of ancillary activities (e.g. ambulance transport of patients between hospitals; a nursery for the children of staff members; nursing and elderly homes; nursing schools; research; assisted living; and psychiatric care institutions; a little shop for patients and visitors; renting of TVs to patients, renting of rooms to third parties; a canteen and parking facilities). These ancillary activities represent only a very limited percentage of the IRIS-H's total activities, as reflected by their small share (i.e. on average less than 2 %) of the IRIS-H's total revenues.
- (42) The totality of these activities account for the IRIS-H costs and revenues. Their costs are, in addition to the particular activities they carry out, also influenced by their status as public hospitals which entails a number of constraints that do not apply to private hospitals. In particular, the operating costs incurred by the IRIS-H in the provision of their services of general economic interest (hereinafter 'SGEI') and ancillary activities are among others increased by factors such as:
- the requirement to pay mandatory language bonuses ⁽⁴⁰⁾ that have to be awarded to bilingual employees with an estimated yearly cost ⁽⁴¹⁾ to be borne by the IRIS-H of approx. EUR [...] ⁽⁴²⁾ million,
 - the pension scheme that applies to statutory employees ⁽⁴³⁾ (i.e. civil servants) which is more generous than the one applying to private sector employees and for which the IRIS-H have to contribute an estimated amount of EUR [...] million per year,
 - the costs related to long-term illnesses of statutory employees ⁽⁴⁴⁾ that have to be borne by the IRIS-H (instead of by the social security system) for an estimated yearly amount of EUR [...] million,
 - pay scale increases imposed on the IRIS-H by the Brussels Capital Region ⁽⁴⁵⁾ which sets the pay scales for employees of the municipalities, the CPAS and the IRIS-H and which only pays for 60 % of these increases leaving an annual cost of approx. EUR [...] million for the IRIS-H, and
 - the mandatory contributions by the IRIS-H to the cost of the IRIS umbrella organisation ⁽⁴⁶⁾ for an estimated annual cost of EUR [...] million.
- (43) These residual costs have to be borne by the IRIS-H and are not covered by other public financing sources (such as for instance the BMF, see recital 46(a)).

2.5. The financing and accounting mechanisms of the IRIS-H

2.5.1. Financing mechanisms

- (44) The fundamental principle according to which the IRIS-H are funded is enshrined in Article 46 ⁽⁴⁷⁾ of the bylaws of each of the five local hospital associations (see recitals 28-29), which stipulate that:

'Without prejudice to Article 109 [LCH], the result of the financial year shall be allocated between partners holding at least one fifth of the votes in the General Assembly by decision of the General Assembly' ⁽⁴⁸⁾.

⁽⁴⁰⁾ This obligation is among others based on the Law of 18 July 1966, Article 42(5) of the Loi CPAS, the Law of 24 June 1988, the Decree of 25 July 1991 by the Executive of the Brussels Capital Region, and the Decree of 6 May 1999 by the Government of the Brussels Capital Region.

⁽⁴¹⁾ All cost estimates in this and the following recital are for 2010 and reflect the residual costs to be borne by the IRIS-H after deduction of public financing, where applicable, by the Brussel Capital Region or the Federal Government.

⁽⁴²⁾ Information covered by professional secrecy.

⁽⁴³⁾ This obligation is in particular based on Articles 156, 161(1) and 161(2) of the Law of 24 June 1988, Article 42(5) of the Loi CPAS and Paragraph 3.4 of Trade Union Protocol 95/3 of 27 October 1995.

⁽⁴⁴⁾ This obligation is among others based on the Law of 14 February 1961, Article 42(5) of the Loi CPAS, the Law of 24 June 1988, the Decree of 6 May 1999 by the Government of the Brussels Capital Region.

⁽⁴⁵⁾ These pay scale increases are laid down in Agreements 2003/1, 2004/10, 2007/1 and 2009/1.

⁽⁴⁶⁾ The Brussels Capital Region imposed an umbrella structure responsible for the coordination and supervision of the hospital activities of the IRIS-H in line with Chapter XII bis of the Loi CPAS.

⁽⁴⁷⁾ Note that for some of the IRIS-H, this principle was initially enshrined in Article 44 or Article 47. In terms of substance however, the principle was in each case already mentioned in the original bylaws.

⁽⁴⁸⁾ At the moment of the creation of the IRIS-H, this principle was enshrined in Article 44 of the bylaws and was phrased as follows: 'The operating result shall be allocated between partners holding at least one fifth of the votes in the General Assembly, pro rata to their representation in the General Assembly.'

On this basis, the municipalities and the CPAS are required to fully absorb any deficit incurred by the IRIS-H as reported in their financial accounts. In addition, according to Article 106 of the Loi CPAS, the municipalities have to cover any deficit generated by their CPAS (see recital 22). In consequence, the municipalities (directly and via their funding obligation towards their respective CPAS) ultimately ensure the continuity of the IRIS-H by fully covering any deficit these hospitals may generate.

- (45) The extent to which the municipalities and the CPAS have to intervene to cover any deficit generated by the IRIS-H on the basis of Article 46 of their respective bylaws naturally depends on the degree to which the IRIS-H can cover their costs from other financing sources.
- (46) The LCH describes five financing sources that are available equally for public and private hospitals. The operating costs of Belgian hospitals are mainly covered by the first three financing sources ⁽⁴⁹⁾ while the fourth and fifth sources are related to hospitals' investments costs.
- (a) The first financing source is the *budget des moyens financiers* (hereinafter 'BMF') ⁽⁵⁰⁾, which is established by the Federal Minister responsible for public health, and only takes into account healthcare activities that are covered by the social security. The BMF is determined for each hospital within the boundaries of the global Federal State budget. The available Federal budget is allocated among all hospitals and may not necessarily cover all of their eligible costs. Since 2002, the BMF for each hospital is mainly determined on the basis of the number of days of treatment provided by each hospital during the previous year. This specific amount is then paid out to each of the hospitals in two different ways. In particular, about 85 % (the fixed part) of this amount is being paid to the hospitals on a monthly basis, while the remaining 15 % (the variable part) is paid on the basis of the actual admissions and days of treatment in the hospital during the year. At the end of each year, the BMF is recalculated on the basis of the actual figures for the year and depending on the outcome the hospital either receives or has to repay an amount. The BMF is regulated in more detail by the Royal Decree of 25 April 2002 which defines the conditions and rules for setting the BMF granted to hospitals. In particular, the Royal Decree determines how the BMF is set, which type of costs are accepted for coverage by State funding and what criteria apply in this regard ⁽⁵¹⁾. It is important to point out that the BMF is not set up to cover the actual costs incurred by each hospital but is instead mainly arranged as flat rate financing based on their average actual historical costs. As a result, the BMF may be insufficient in case of significant cost increases, or other evolutions in the organisation and cost structure of a hospital.
- (b) The second source of financing are the social security payments, i.e. made by the *Institut National d'Assurance Maladie-Invalidité* (hereinafter 'INAMI'), to the hospitals for the treatments they offered to their patients. This financing is based on the *Loi Assurance Maladie-Invalidité* ⁽⁵²⁾, respectively its consolidated version laid down in the Law of 14 July 1994 ⁽⁵³⁾, which sets up the Belgian social security system with regard to sickness and invalidity and specifies the medical services and medication that are eligible for compensation by the social security. The hospitals directly charge part of the doctor's fees and the cost of the patients' medication to the INAMI. These payments however do not cover the full costs that the hospitals incur when providing their healthcare activities. As a result, hospitals that have insufficient other sources of revenues risk becoming loss-making.
- (c) A third source of financing are payments made directly by the patient or by their private health insurers to the hospitals. These payments are necessary because the social security does not cover 100 % of doctors' fees nor of medication and other medical supplies (e.g. implants). In addition, if patients choose to have a single room, then supplements can be charged on top of the normal hospitalisation price and on top of the normal

⁽⁴⁹⁾ In September 2013, the *Mutualité Chrétienne*, one of the largest Belgian *mutuelles* (which are the private not-for-profit organisations that are responsible for the reimbursement of medical costs under the social security) published an article which shows that in 2011 Belgian hospitals' revenues were on average divided as follows between these three sources: (1) BMF: 49 %; (2) INAMI: 42 %; and (3) patients (or their private insurers): 9 %.

⁽⁵⁰⁾ See Articles 87 and following of the Law of 7 August 1987.

⁽⁵¹⁾ See Articles 24 until 87 of the Royal Decree of 25 April 2002, Belgisch Staatsblad/Moniteur Belge of 5 July 2002, p. 30290.

⁽⁵²⁾ See Law of 9 August 1963 as amended, Belgisch Staatsblad/Moniteur Belge of 1 November 1963, p. 10555.

⁽⁵³⁾ Belgisch Staatsblad/Moniteur Belge of 27 August 1994, p. 21524.

doctor's fee (i.e. more than the standard rates that apply per treatment). Finally, patients may also be charged for the use of additional services (e.g. rent for a TV, use of the hospital parking, etc.).

All payments made by patients or third parties to compensate hospital doctors for their treatment of hospitalised patients, have to be collected centrally by the hospital ⁽⁵⁴⁾. The hospitals and their doctors conclude agreements that determine the percentages of the fees that the hospitals can keep to cover their collection costs and other costs that are not financed by the BMF ⁽⁵⁵⁾. Similarly as for the normal doctors' fees, part of the abovementioned supplements can also be retained by the hospital to cover part of its costs (again conditional on an agreement between the hospital and its doctors). Part of the doctors' fees are hence not a payment going to the doctors but instead are used to cover the operating costs of the hospitals.

- (d) The fourth source of financing is specifically meant to cover investment costs incurred by the hospitals. The investments of hospitals are mainly covered by the State (the Federal government and the Regions each pay a part) and the remaining part is paid from the hospitals' own resources combined with bank loans. The State financing is aimed at the costs of building or renovating a hospital or hospital ward and the costs of the first acquisition of equipment and medical devices ⁽⁵⁶⁾. Investment subsidies are capped (e.g. a fixed amount per square metre or per unit).
- (e) The fifth general source of public financing is related to investments and concerns damages payments for studies, the development of building projects, but also costs resulting from the closure or non-usage of a hospital or hospital ward ⁽⁵⁷⁾. In practice, this type of financing is not very commonly awarded.

- (47) Article 109 of the LCH (now Article 125 of the LCH in the version of the Law of 10 July 2008 ⁽⁵⁸⁾) sets out a sixth financing mechanism of which only public hospitals (such as the IRIS-H) can benefit. According to this provision, public hospitals' deficits arising from their hospital activities have to be covered by the municipalities that control them (i.e. via their CPAS or via a central structure such as IRIS). The principle of this (partial) deficit cover by the municipalities was already included in the Law of 23 December 1963 ⁽⁵⁹⁾, which preceded the LCH, and was confirmed by Article 34 of the Law of 28 December 1973 ⁽⁶⁰⁾. The criteria to calculate the deficits that the municipalities are obliged to cover are determined in a Royal Decree ⁽⁶¹⁾. On this basis, the Federal Minister responsible for public health each year determines the deficit that must be covered for each public hospital. In practice, the Article 109 LCH deficit that must be covered as determined by the Minister is not exactly equal to the deficit reported in the financial accounts of the hospital, since certain cost elements (e.g., the result of the non-hospital activities which in the case of the IRIS-H are purely ancillary to the hospital activities as will be explained in recital 155) ⁽⁶²⁾ contained in the deficit reported in the financial accounts are excluded from the Article 109 LCH deficit.

- (48) In conclusion, the IRIS-H thus enjoy a comprehensive financing mechanism that ensures coverage of any deficit they may generate. The five general financing measures foreseen by the LCH (see recital 46) cover the majority of the hospitals' operating and investment costs. To the extent that these sources are insufficient to cover the costs arising from the hospitals' activities, Article 46 of the bylaws of the IRIS-H obliges the municipalities to fully cover any deficit generated by the IRIS-H (see recitals 44-45). The accounting deficit addressed by Article 46 of the bylaws necessarily includes the 'Article 109 LCH deficit' ⁽⁶³⁾ (see recital 47) and by fully covering the accounting deficit, the municipalities also fulfil their obligation under Article 109 LCH. The payment modalities of this deficit compensation mechanism will be described below (see Section 7.3.5).

⁽⁵⁴⁾ See Articles 133 until 135 of the Law of 7 August 1987.

⁽⁵⁵⁾ See Article 140 of the Law of 7 August 1987.

⁽⁵⁶⁾ See Article 46 and following of the Law of 7 August 1987.

⁽⁵⁷⁾ See Article 47 of the Law of 7 August 1987.

⁽⁵⁸⁾ For the ease of reference, this decision will refer simply to Article 109 LCH, this however having to be understood as a reference to Article 125 LCH from the entry into force of the Law of 10 July 2008.

⁽⁵⁹⁾ Belgisch Staatsblad/Moniteur Belge of 1 January 1964, p. 2; this Law required that 10 % of the deficit was covered by the municipality where the hospital was located and the remaining 90 % by the Belgian municipalities where the patients reside.

⁽⁶⁰⁾ Belgisch Staatsblad/Moniteur Belge of 29 December 1973, p. 15027.

⁽⁶¹⁾ Originally this was the Royal Decree of 8 December 1986 (Belgisch Staatsblad/Moniteur Belge of 12 December 1986, p. 17023), amended by Royal Decree of 10 November 1989, and later replaced by the Royal Decree of 8 March 2006 (Belgisch Staatsblad/Moniteur Belge of 12 April 2006, p. 20232).

⁽⁶²⁾ Other elements that are excluded from the Article 109 LCH deficit are among others the estimate of the correction payments in the context of the BMF, certain provisions and certain types of depreciation.

⁽⁶³⁾ This is because the Article 109 LCH deficit is calculated by taking the accounting deficit and by then excluding certain elements.

2.5.2. Accounting requirements

- (49) All hospitals (i.e. public and private) are subject to accounting and transparency requirements. In particular, each hospital must keep a set of accounts that allow determining the cost of each service and that respect certain elements of the Law of 17 July 1975 ⁽⁶⁴⁾ on accounting ⁽⁶⁵⁾. It is mandatory to record non-hospital activities on separate accounts. Hospitals are also obliged to appoint an auditor who certifies the hospital's accounts and financial statements ⁽⁶⁶⁾. Finally, hospitals are required to submit certain (financial) information to the Federal Minister responsible for public health ⁽⁶⁷⁾ and its Federal Public Service also monitors compliance with the LCH ⁽⁶⁸⁾.

3. DESCRIPTION OF THE MEASURES TARGETED BY THE COMPLAINT

- (50) According to the complainants, the Brussels Capital Region has chosen to *de facto* take up the role of the relevant Brussels municipalities for the compensation of the deficits of the IRIS-H. In particular, the complaint mentions interventions by the *Fonds Régional Bruxellois de Refinancement des Trésoreries Communales* (or FRBRTC) which was created by the Brussels Capital Region ⁽⁶⁹⁾. In addition, the complaint adds that since 2003 the Brussels Capital Region itself also allegedly granted special subsidies to the municipalities ⁽⁷⁰⁾ (i.e. up to EUR 10 million annually), which were allegedly intended to be passed on as aid for the IRIS-H.
- (51) While the complainants do not put into doubt the competence of the Brussels Capital Region towards these municipalities they consider that what they qualify as regional financing of the IRIS-H goes beyond what is envisaged by the deficit cover as specified by Article 109 of the LCH (see also recital 47). The complainants argue that the IRIS-H benefited significantly from regional financing awarded to the municipalities in which they are located and that this financing cannot be justified on the basis of the provisions of the LCH. The complainants did not refer to the deficit cover obligation in Article 46 of the bylaws of the IRIS-H.
- (52) Finally, the complainants referred to approximately EUR 100 million being awarded via the FRBRTC in the context of the restructuring of the Brussels public hospitals which led to the creation of the IRIS-H (see also Section 2.2). The complainants allege that this operation would have resulted in overcompensation of the IRIS-H.

4. GROUNDS FOR INITIATING THE PROCEDURE

4.1. The Commission's 2009 decision

- (53) As recalled above (see recital 5), on 28 October 2009, the Commission adopted a no objections decision ⁽⁷¹⁾, concluding that the public financing of the IRIS-H in the Brussels Capital Region constituted State aid compatible with the internal market as compensation for the provision of services of general economic interest. The Commission based this decision on the 2005 SGEI Decision as well as directly on Article 86(2) EC Treaty (now Article 106(2) TFEU).

⁽⁶⁴⁾ Belgisch Staatsblad/Moniteur Belge of 4 September 1975, p. 10847.

⁽⁶⁵⁾ See Articles 77 and 78 of the Law of 7 August 1987.

⁽⁶⁶⁾ See Articles 80 until 85 of the Law of 7 August 1987.

⁽⁶⁷⁾ See Articles 86 until 86 *ter* of the Law of 7 August 1987.

⁽⁶⁸⁾ See Article 115 of the Law of 7 August 1987.

⁽⁶⁹⁾ See footnote 29.

⁽⁷⁰⁾ These special subsidies were awarded on the basis of the *Ordonnance* of 13 February 2003 (Belgisch Staatsblad/Moniteur Belge of 5 May 2003, p. 24098).

⁽⁷¹⁾ Commission decision in case SA.19864 (ex NN 54/2009) (OJ C 74, 24.3.2010, p. 1).

- (54) In its decision, the Commission considered that the IRIS-H were entrusted with three hospital public service missions: first, the general hospital mission of all hospitals (public and private) under the LCH ⁽⁷²⁾; second, the obligation to treat any patient in all circumstances, including post-emergency ⁽⁷³⁾; and third the obligation to provide complete multi-site hospital care ⁽⁷⁴⁾. In addition, the Commission concluded that the IRIS-H were entrusted with the non-hospital public service mission of providing social assistance together with medical care ⁽⁷⁵⁾. Finally, reference was also made to a bilingualism obligation ⁽⁷⁶⁾. These missions were considered to have been entrusted to the IRIS-H via the LCH, the Loi CPAS, the IRIS strategic plans, and finally a convention signed by the IRIS-H and the CPAS. The Commission further considered that the compensation parameters were established *ex ante* ⁽⁷⁷⁾ and that sufficient procedures for preventing and correcting overcompensation were in place ⁽⁷⁸⁾. Finally, the Commission was also satisfied that the IRIS-H kept separate accounts for hospital and non-hospital activities ⁽⁷⁹⁾, which in turn ensured the absence of cross-subsidisation of commercial non-SGEI activities of the IRIS-H ⁽⁸⁰⁾.
- (55) The Commission also assessed whether the IRIS-H had been overcompensated in the past (i.e. between 1996 and 2007) ⁽⁸¹⁾, reaching the conclusion that this had not been the case ⁽⁸²⁾. Apart from assessing the financing measures as a whole, the Commission also examined an alleged mechanism of advances. Since the deficit compensation pursuant to Article 109 LCH was regularly only paid out with a long delay of up to 10 years, the IRIS-H allegedly received an advance on these outstanding payments through the FRBRTC. The Commission concluded that since these alleged advances would in any event have to be repaid once the deficit compensation pursuant to Article 109 LCH was paid, they could not lead to overcompensation of the IRIS-H ⁽⁸³⁾.

4.2. The 2012 annulment judgment of the General Court

- (56) In response to the Commission's 2009 decision, the complainants launched an action for annulment of that decision in front of the General Court ⁽⁸⁴⁾. The complainants argued that the Commission violated the complainant's procedural rights by not opening the formal investigation procedure, as the Commission should have noted serious difficulties in the examination at issue ⁽⁸⁵⁾.
- (57) In its judgment of 7 November 2012 in case T-137/10, the General Court annulled the Commission's 2009 decision, concluding that the Commission was obliged to open the formal investigation procedure ⁽⁸⁶⁾.
- (58) The General Court first considered whether the IRIS-H had been entrusted with clearly-defined public service missions ⁽⁸⁷⁾. At the outset, the General Court noted that all parties agreed that the LCH entrusted all hospitals, public and private, with a general hospital public service mission ⁽⁸⁸⁾. It was thus only in doubt whether the Commission had erred in finding, in the preliminary examination, that the IRIS-H were entrusted with additional hospital and non-hospital public service missions ⁽⁸⁹⁾. The General Court concluded that there were doubts

⁽⁷²⁾ *Ibid.*, recitals 140-145.

⁽⁷³⁾ *Ibid.*, recitals 146-150.

⁽⁷⁴⁾ *Ibid.*, recitals.

⁽⁷⁵⁾ *Ibid.*, recitals 151-155.

⁽⁷⁶⁾ *Ibid.*, recital 156.

⁽⁷⁷⁾ *Ibid.*, recitals 175-181.

⁽⁷⁸⁾ *Ibid.*, recitals 182-193.

⁽⁷⁹⁾ *Ibid.*, recitals 204-205.

⁽⁸⁰⁾ *Ibid.*, recital 206.

⁽⁸¹⁾ *Ibid.*, recital 198.

⁽⁸²⁾ *Ibid.*, recital 199.

⁽⁸³⁾ *Ibid.*, recital 201.

⁽⁸⁴⁾ See footnote 14.

⁽⁸⁵⁾ *Ibid.*, paragraph 70.

⁽⁸⁶⁾ *Ibid.*, paragraph 313.

⁽⁸⁷⁾ *Ibid.*, paragraphs 97-188.

⁽⁸⁸⁾ *Ibid.*, paragraphs 119-120.

⁽⁸⁹⁾ *Ibid.*, paragraph 104.

whether the provisions relied on by the Commission in its decision were sufficient to entrust the IRIS-H with the additional missions to treat all patients in all circumstances ⁽⁹⁰⁾, to provide multi-site hospital care ⁽⁹¹⁾, and to provide additional social services ⁽⁹²⁾. In addition, with respect to the alleged mission to provide multi-site hospital care, the General Court pointed out that it was not clear how that mission differed from the general programming and operational requirements applicable to all hospitals subject to the LCH ⁽⁹³⁾.

- (59) Secondly, the General Court examined whether the Commission had demonstrated the existence of clear compensation parameters ⁽⁹⁴⁾. As regards the hospital missions, the General Court addressed the deficit compensation mechanism under Article 109 LCH ⁽⁹⁵⁾ — while noting that this mechanism was explicitly not challenged by the complainant ⁽⁹⁶⁾ — and the alleged regional financing mechanism through the FRBRTC established in order to advance temporarily the amounts needed to make up the deficits of the IRIS-H before the deficit cover under Article 109 LCH takes effect ⁽⁹⁷⁾. With respect to Article 109, the General Court found that the complainants had not put forward any arguments affecting the Commission's positive assessment thereof ⁽⁹⁸⁾. Regarding the alleged advances paid out via the FRBRTC mechanism, however, the General Court concluded that the Commission had not identified any parameters for the calculation of those advances ⁽⁹⁹⁾, thus evincing an incomplete examination of these advances ⁽¹⁰⁰⁾. The General Court added that the Commission contradicted its decision when it claimed, in the hearings, that the FRBRTC was only a mechanism by which the Brussels Capital Region financed the Brussels communes, but not the IRIS-H ⁽¹⁰¹⁾.
- (60) With regards to the public financing in favour of the IRIS-H's alleged additional social mission ⁽¹⁰²⁾, the General Court observed that this financing apparently again originated from the FRBRTC, which had concluded an agreement with the relevant Brussels communes to grant them a special subsidy with a view to enabling the communes to finance the social missions performed by the IRIS-H ⁽¹⁰³⁾. The General Court concluded that this agreement did not specify the prior compensation parameters relating to the alleged additional social missions of the IRIS-H ⁽¹⁰⁴⁾.
- (61) Next, the General Court considered whether the Commission had demonstrated the existence of procedures for avoiding overcompensation and the absence of overcompensation ⁽¹⁰⁵⁾. The General Court first found that the LCH provides for sufficient safeguards to ensure that the procedure pursuant to Article 109 LCH does not lead to overcompensation ⁽¹⁰⁶⁾. It concluded further that the Commission had not established that with respect to the alleged advance payments by the municipalities that a similar mechanism existed ⁽¹⁰⁷⁾, pointing in particular to the apparent lack of a legal obligation of the IRIS-H to repay these advances once the Article 109 LCH deficit-financing was received ⁽¹⁰⁸⁾. With respect to the special subsidy referred to by the Commission as financing the additional social mission, the General Court concluded that the assessment made by the Commission of the procedure for avoiding overcompensation in connection with the funding of the social missions was inadequate ⁽¹⁰⁹⁾.
- (62) With respect to the question of whether the IRIS-H had been overcompensated in practice ⁽¹¹⁰⁾, the General Court merely remarked that the scope of the analysis was very broad, covering all the financial results of the IRIS-H over a period of more than a decade ⁽¹¹¹⁾. Without concluding specifically on the Commission's finding that there

⁽⁹⁰⁾ *Ibid.*, paragraphs 123-151.

⁽⁹¹⁾ *Ibid.*, paragraphs 152-159.

⁽⁹²⁾ *Ibid.*, paragraphs 174-188.

⁽⁹³⁾ *Ibid.*, paragraph 159.

⁽⁹⁴⁾ *Ibid.*, paragraphs 189-244.

⁽⁹⁵⁾ *Ibid.*, paragraphs 194 and 195-202.

⁽⁹⁶⁾ *Ibid.*, paragraph 196.

⁽⁹⁷⁾ *Ibid.*, paragraph 194.

⁽⁹⁸⁾ *Ibid.*, paragraphs 203-207.

⁽⁹⁹⁾ *Ibid.*, paragraphs 208-211.

⁽¹⁰⁰⁾ *Ibid.*, paragraph 215.

⁽¹⁰¹⁾ *Ibid.*, paragraphs 216-218.

⁽¹⁰²⁾ *Ibid.*, paragraphs 231-244.

⁽¹⁰³⁾ *Ibid.*, paragraph 238.

⁽¹⁰⁴⁾ *Ibid.*, paragraphs 239-244.

⁽¹⁰⁵⁾ *Ibid.*, paragraphs 245-301.

⁽¹⁰⁶⁾ *Ibid.*, paragraphs 253-255.

⁽¹⁰⁷⁾ *Ibid.*, paragraphs 257-258 and 265.

⁽¹⁰⁸⁾ *Ibid.*, paragraphs 259-264.

⁽¹⁰⁹⁾ *Ibid.*, paragraphs 266-278.

⁽¹¹⁰⁾ *Ibid.*, paragraphs 279-288.

⁽¹¹¹⁾ *Ibid.*, paragraph 286.

had been no overcompensation, the General Court considered that the breadth and complexity of the assessment made by the Commission constituted, in themselves, support for the complainant's arguments alleging the existence of serious difficulties ⁽¹¹²⁾.

- (63) Finally, the complainants argued that the Commission should have taken the criterion of economic efficiency of the SGEI provider into account in its assessment ⁽¹¹³⁾. The General Court however rejected that argument and concluded that:

'[T]he criterion linked to the economic efficiency of an undertaking in supplying the SGEI is unconnected with the assessment of the compatibility of State aid in the light of Article 86(2) EC [now: Article 106(2) TFEU], and the choice made by the national authorities relating to the economic efficiency of the public operator cannot therefore be criticised in that regard' ⁽¹¹⁴⁾.

- (64) Summarizing its findings, the General Court stated that:

'The [complainant] has presented a body of consistent evidence showing the existence of serious doubts as to the compatibility of the measures under examination in the light of the criteria relating to the applicability of Article 86(2) EC [now: Article 106(2) TFEU] concerning, first, the existence of a clearly defined mandate relating to the hospital and social public service missions specific to the IRIS hospitals, second, the existence of previously established compensation parameters and, third, the existence of procedures for avoiding overcompensation in the funding of the public service missions [...]' ⁽¹¹⁵⁾.

4.3. The Commission's opening decision of 1 October 2014 ⁽¹¹⁶⁾

- (65) In the light of the GC's conclusions ⁽¹¹⁷⁾ that the Commission should have had doubts as to the compatibility with the internal market of the disputed public financing granted to the IRIS hospitals on the basis of Article 106(2) TFEU, the Commission was required to initiate the formal investigation procedure and did so by decision of 1 October 2014. In its opening decision, the Commission noted that according to the Belgian authorities the respective Brussels municipalities and CPAS have chosen to entrust the public IRIS-H but not the private hospitals with the following additional obligations ⁽¹¹⁸⁾, justifying the deficit compensation measures put in place in favour of the IRIS-H:

- (a) Obligation to offer medical assistance to all patients in all circumstances: the IRIS-H cannot refuse to treat patients that are not able to pay and/or are uninsured, even if they do not require urgent medical care. Private hospitals allegedly are only obliged to treat all patients that need urgent medical care, but would not have such an obligation in non-urgent situations.
- (b) Obligation to offer a full range of hospital services at multiple sites: The municipalities and the CPAS have made the deliberate choice to maintain multiple hospital sites that offer a full range of treatments in order to ensure accessibility for patients. The alternative option of regrouping the beds and accompanying services at fewer locations and hence to save costs was deliberately dismissed. This choice is especially relevant for disadvantaged patients and their families, since the IRIS hospitals are mainly located close to or in neighbourhoods with a large disadvantaged population.
- (c) Obligation to provide social services to patients and their families: social workers assist the disadvantaged patients and their families in solving and managing financial, administrative, interpersonal and social

⁽¹¹²⁾ *Ibid.*, paragraph 288.

⁽¹¹³⁾ *Ibid.*, paragraph 290.

⁽¹¹⁴⁾ *Ibid.*, paragraph 300.

⁽¹¹⁵⁾ *Ibid.*, paragraph 308.

⁽¹¹⁶⁾ See footnote 2.

⁽¹¹⁷⁾ See in this respect Case T-137/10, paragraphs 310 and 313.

⁽¹¹⁸⁾ Whether these activities in fact constitute services of general economic interest in the sense of Article 106(2) TFEU and whether the hospitals have been properly entrusted will be assessed below (Section 7.3.4).

difficulties. In addition, the social workers draw up prior social reports to facilitate a financial intervention by the CPAS. While all public and private hospitals are required to employ social workers for certain hospital services (such as geriatrics and psychiatry), the Belgian authorities claim that the IRIS hospitals have a specific additional obligation which results in much larger social services and higher costs than are compensated pursuant to the LCH.

(66) On the basis of the doubts expressed by the GC ⁽¹¹⁹⁾, the Commission invited the Belgian authorities, the complainants and any other interested parties to provide all relevant information for verifying the compatibility of the disputed public financing, in particular as regards the following points:

- the exact definition of the alleged additional missions of the IRIS-H and on what documents the entrustments of these alleged additional missions are based (see recitals 87-89 of the opening decision),
- the legal basis for the compensation of the deficits of the IRIS-H (to which the costs of each of the alleged additional missions contribute) (see recital 91) of the opening decision),
- whether there are (sufficient) measures in place to avoid overcompensation of the alleged additional missions, in particular via the deficit compensation mechanism in combination with the repayable advances (if any), and whether the IRIS-H are under a legal obligation to repay any advances they may have received in order to avoid overcompensation (see recital 95 of the opening decision),
- in the event that the payments of the special subsidies of up to EUR 10 million annually (see above recital 50) are to be considered as a transaction separate from the compensation of deficits of the IRIS-H, whether there are sufficient measures in place to ensure that the compensation does not exceed what is necessary to cover the costs occasioned by the performance of public service obligations (see recital 96 of the opening decision),
- whether no overcompensation was in fact granted to the IRIS-H since they started operating as independent legal structures (see recital 97 of the opening decision),
- any further concrete, specific and detailed argumentation and documentation whether, why and to what extent the public financing measures for the IRIS-H fall under the 2012 SGEI Decision or the 2012 SGEI Framework (see recital 98 of the opening decision) respectively the 2005 SGEI Decision (see recital 100 of the opening decision) and whether, why and to what extent all the compatibility criteria laid down therein would be fulfilled.

(67) The Commission also took the opportunity of adopting the opening decision to seek clarification on the following additional factual matters:

- whether or not any FRBRTC funds, respectively the special subsidies (see above recital 50), were directly transferred to the IRIS-H or whether the FRBRTC and the special subsidies are merely financing mechanisms between the Brussels Capital Region and the Brussels municipalities (see recital 17 of the opening decision),
- the exact nature of the requirement of Article 60(6) of the Loi CPAS (see above recital 19), the possibilities for a public hospital to close down, and the difference with the hospital programming mechanism (see recital 26 of the opening decision),
- whether or not the additional social services carried out by the IRIS-H are economic or non-economic in nature (see recital 48 of the opening decision),

⁽¹¹⁹⁾ See in this respect Case T-137/10, paragraph 308.

- whether or not the passing on of the special subsidies (from the Brussels Capital Region to the municipalities) by the municipalities to the IRIS-H can be considered as a transaction separate from the deficit coverage mechanism (see recital 92 of the opening decision) and, if so, what is the applicable legal basis that sets out its precise modalities,
- whether or not there is a mechanism of advance payments, on what legal basis and how such payments are made (if any) and whether or not they are considered as an aid measure separate from the deficit coverage mechanism, and to clarify whether such advances (if any) were funded via the FRBRTC (see recital 93 of the opening decision),
- further clarification on the concept of *pérennité* (i.e. the continuity and viability of public hospitals, see also below recital 91), its legal basis (in particular at the level of IRIS and the IRIS-H), its implications and how *pérennité* justifies the deficit compensation mechanisms that benefit these hospitals (see recitals 102-103 of the opening decision),
- whether there are any reasons other than those explicitly mentioned in the opening decision (i.e. the existence of additional SGEI missions and the *pérennité* of the public hospitals) that may justify the additional financing for the IRIS-H (see recital 103 of the opening decision).

5. COMMENTS FROM INTERESTED PARTIES

- (68) The Commission received comments from four interested parties (i.e. CBI, ABISP, Zorgnet Vlaanderen and UNCPSY), as summarised below:

5.1. CBI

- (69) In response to the opening decision, CBI, the complainant, notes that in their view that decision does not contain any new element, arguments or explanations to establish the existence of a specific mission entrusted to the IRIS-H or concerning the compensation mechanisms for this claimed mission or the controls which would be put in place in this respect. The complainants therefore mainly refer to the arguments that were developed in their prior submissions.
- (70) The CBI confirms its position that: (1) the IRIS-H are not entrusted with specific SGEI in addition to those incumbent upon all Belgian hospitals (public and private); and (2) even if the Commission would conclude that such additional missions exist they are not defined sufficiently clearly to meet the requirements of Union law in this respect. The CBI also points out that in the proposed policy program by the new Brussels government (published in July 2014) mention is made of 'rewording the Ordonnance of 13 February 2003 to specify the missions of general interest which justify specific subsidies to municipalities'. The complainants consider this to be an indication that no such missions currently exist but would be defined in the future.
- (71) With respect to the requirements of Article 60(6) of the Loi CPAS, CBI considers that these add nothing to the LCH in terms of definition of any additional or specific SGEI that would only apply to public hospitals such as the IRIS-H. The complainants also argue that the additional social mission only appears to consist of a higher volume of social services than that provided by other hospitals and which they refer to as a 'basic social mission (common to public and private hospitals)'. CBI is of the opinion that this is insufficient to consider that the IRIS-H have an additional social mission. Furthermore, with regard to the question whether these services

are economic in nature they argue that the fact that these services are provided free of charge does not make them non-economic. Finally, CBI considers that the additional social services are inseparable from a broader healthcare service which is itself indubitably economic in nature as this has never been put into doubt.

- (72) According to CBI, the mission of universal care exists both for public hospitals and for private hospitals. In their view, there would be no difference between public hospitals and private hospitals with regard to the treatment of 'social patients', whether in an 'emergency' or 'post emergency' situation. In this context, CBI refers to a judgment of the Brussels Court of First Instance ⁽¹²⁰⁾ concerning urgent medical aid ⁽¹²¹⁾ for foreigners living illegally in Belgium (hereinafter 'undocumented migrants') which would demonstrate that in this context such aid can be provided by both public and private hospitals. The CBI adds that according to a February 2004 publication ⁽¹²²⁾ of the *Mutualités Chrétiennes* ⁽¹²³⁾, the private hospitals treat more than 60 % of 'social patients' in the Brussels Capital Region. The complainants also consider that no additional mission is laid down in the Loi CPAS, in the strategic IRIS plans nor in '*domicile de secours*' conventions ⁽¹²⁴⁾.
- (73) As regards the 'multi-site mission', CBI considers that it is still not explained what the obligation to offer complete 'multi-site' hospital care activities comprises, nor to what extent this obligation imposes additional burdens on the IRIS-H. As regards the additional social mission, CBI is of the opinion that Article 57 of the Loi CPAS does not create additional obligations with respect to the IRIS-H and, in any case, does not define them in an intelligible manner (no more than the strategic IRIS plans or the '*domicile de secours*' conventions).
- (74) With regard to the question of a clear definition of the compensation parameters CBI points out that, according to the Belgian authorities, the IRIS-H perform a specific mission distinct from that of private hospitals and that specific mission is not defined in the LCH but has another legal basis. According to CBI, it is clearly excluded that the LCH can establish the compensation parameters with respect to one or more public service mission(s) for which the LCH does not provide. In addition, CBI notes that there is no correspondence between the claimed legal bases for the specific missions in question and the compensation mechanisms. The complainants observe that it seems that no distinction is made between deficits resulting on the one hand from the costs of the claimed specific missions and on the other hand those resulting from the costs of the basic mission. Finally, CBI makes reference to a series of opinions by the Belgian Inspectorate of Finance which concluded that it was impossible to monitor the use of the special subsidies awarded on the basis of the *Ordonnance* of 13 February 2003 because that *Ordonnance* did not specify the tasks of communal interest for which these subsidies were granted.
- (75) CBI also repeats its previous assertions that there are no measures to avoid overcompensation. They add that in the absence of a precise definition of the specific missions performed by the IRIS-H, it is impossible to say what activities should be subject to compensation or not. In CBI's view, it is consequently impossible to verify the existence of a monitoring mechanism to avoid overcompensations.
- (76) Finally, CBI points out that while the *pérennité* of the public hospitals is cited in the cooperation agreement of 19 May 1994, this document does not define such a mission and does not constitute an entrustment. In particular, according to CBI this agreement would in no way indicate that a municipality or a city must have

⁽¹²⁰⁾ See judgment of 25 January 2013 in case RG 2010/15534/A, *ASBL La Clinique Fond'Roy v [...] and Uccle and Anderlecht CPAS*.

⁽¹²¹⁾ The Royal Decree of 12 December 1996 regarding urgent medical aid specifies that the urgency is evaluated and attested by a registered medical doctor or dentist. The urgency is not defined by law but assessed by the health practitioner consulted. Therefore, urgent medical aid can encompass any curative and preventive care, delivered either in hospital or ambulatory settings, as well as drug prescription. Urgent medical aid hence differs from the case of life-threatening emergencies described in recital 97.

⁽¹²²⁾ MC-Information No 211 (February 2004), pp. 8-14.

⁽¹²³⁾ See footnote 49 for a short description of this organisation.

⁽¹²⁴⁾ The '*domicile de secours*' conventions were concluded between the IRIS-H and 17 of the 19 CPAS in the Brussels Capital Region (see also recitals 187-188). These conventions lay down the arrangements for the reimbursement of the treatment costs by the CPAS for patients who cannot pay for treatment and have no insurance cover provided that certain conditions are met. Among others, these conventions specify that the IRIS-H need to collect, to the extent possible, the necessary information for the so-called 'social inquiries' (see also recitals 210-211).

a public hospital on its territory and would also not lay down any rule for hospital service programming in Belgium requiring the operation of a service in a public hospital.

5.2. ABISP

- (77) The *Association bruxelloise des institutions de soins privées* (ABISP), one of the initial complainants (see recital 1), notes in its comments on the opening decision that all Belgian hospitals, regardless of their bylaws (*statuts*) or owners, are required by law to fulfil a mission of general interest. In this context, ABISP makes reference to Article 2 of the LCH ⁽¹²⁵⁾. Finally, ABISP recalls that it has withdrawn its complaint.

5.3. Zorgnet Vlaanderen

- (78) *Zorgnet Vlaanderen* represents over 500 Flemish care providers (such as general hospitals, psychiatric care institutions, and nursing homes). In its observations on the opening decision, *Zorgnet Vlaanderen* emphasises that all Belgian hospitals, whether they are public or private, fulfil the same public service obligations in the framework of the LCH. In addition, *Zorgnet Vlaanderen* points out that the LCH does not set out any conditions regarding the legal form (i.e. public or private) to be recognised as a hospital. Furthermore, *Zorgnet Vlaanderen* observes that the definition of the public service obligations of the hospitals does not refer to a regional specificity. Finally, *Zorgnet Vlaanderen* claims that hospitals in Flanders and in the Brussels Capital Region do not perform a different social task.

5.4. UNCPSY

- (79) The *Union Nationale des Cliniques Psychiatriques Privées* (UNCPSY) is the federation of private psychiatric clinics in France. In its comments on the opening decision, UNCPSY argues that for the check of whether the public funding does not exceed the net costs of the public service, this net cost cannot be without a limit and cannot ignore whether or not the service provider is well managed. In this context, UNCPSY is of the opinion that the Commission should compare public and private hospitals to determine whether or not the aid is proportionate within the meaning of Article 106(2) TFEU.
- (80) In this context, the Commission observes that UNCPSY's comments run counter to the GC's conclusion in paragraph 300 of its judgment of 7 November 2012 (T-137/10) that economic efficiency of an undertaking in supplying the SGEI is not a criterion for the assessment under Article 106(2) TFEU of the State aid compatibility of the public funding which this undertaking receives (see in this respect recital 63).

6. COMMENTS FROM THE KINGDOM OF BELGIUM

6.1. Comments from Belgium on the opening decision

- (81) In their reply to the Commission's decision of 1 October 2014 and in particular to recital 17 of that decision, the Belgian authorities note that the financial interventions by the Brussels Capital Region (i.e. the special subsidies of up to EUR 10 million per year) and by the FRBRTC were financial transfers granted to the municipalities only and not to the IRIS-H. As a result, the Belgian authorities consider these were financial transfers between public authorities which are not covered by Article 107(1) TFEU. According to the Belgian authorities, neither the Brussels Capital Region nor the FRBRTC has granted aid to the IRIS-H. Instead, they consider that

⁽¹²⁵⁾ Article 2 LCH reads: 'With a view to the application of this coordinated law, the following are considered as hospitals: health institutions where at any moment appropriate specialised medical examinations and/or treatments in the field of medicine, surgery and possibly obstetrics can be provided in a multidisciplinary context, within the necessary and appropriate medical, medical-technical, nursing, paramedical and logistical framework, to (patients) who are admitted and can stay there, because their health requires this care to combat the disease in the shortest possible time or to relieve, restore health or improve or stabilise lesions'.

these transfers were made as part of the Region's competence for the general financing of the municipalities, which enables the latter to fulfil their common interest missions, including the missions of the CPAS. In this context, the complainant's reference to the opinions of the Inspectorate of Finance only concerns the Brussels Capital Region and the municipalities but not the IRIS-H. Finally, the Belgian authorities argue that on the basis of the Special Law of 8 August 1980 on institutional reforms and the Opinion of the Belgian Council of State ⁽¹²⁶⁾, the Brussels Capital Region can only finance the municipalities and not the IRIS-H since financing specific hospital missions does not fall within the Region's competences.

- (82) With respect to the doubt expressed in recital 26 of the opening decision, the Belgian authorities clarify the difference between, on the one hand, the requirement of Article 60(6) Loi CPAS and the possibilities for a public hospital to close down with the hospital programming mechanism, on the other hand. According to them, Article 60(6) Loi CPAS ⁽¹²⁷⁾ lays down the conditions that need to be fulfilled for a CPAS to be able to establish a hospital. In particular, a CPAS must analyse whether there is a genuine need for such a hospital taking into account the needs of the area, including the medico-social needs, and the presence of similar facilities. The Belgian authorities further point out that the hospital programming mechanism consists of determining the maximum number of hospital beds per Region by the Federal Government who bases its decision solely on the hospital needs identified without taking into account the level of social needs in each area ⁽¹²⁸⁾. They explain that for the Brussels Capital Region, the maximum number of hospital beds is determined for the region as a whole and not for each of the 19 municipalities separately. In contrast, each of the 19 CPAS in the Brussels Capital Region determined autonomously for their municipality whether or not to establish a hospital based on the local needs.
- (83) The Belgian authorities also explained that the closure of a public hospital or its transfer to a private sector partner are not dealt with formally or specifically in the LCH or the Loi CPAS ⁽¹²⁹⁾. However, according to the Belgian authorities the case law of the Belgian Council of State has clarified the arrangements and conditions for the closure and/or the transfer of institutions set up by a CPAS. In its judgment 113.428 of 9 December 2002, the Council of State ruled that the transfer of a convalescent home belonging to a CPAS to a private operator was to be annulled. In particular, the Council of State found that the need to provide medico-social services also had to be assessed before a decision was taken to close or transfer an establishment. That assessment must take due account of the assessment made when the establishment was created and hence of any changes that had occurred since the decision to create the establishment. Furthermore, the Belgian authorities note that this assessment could not be based purely on the financial situation of the establishment or on the costs incurred for its maintenance. On this basis, the Belgian authorities conclude that a CPAS cannot close its hospital unless it has first established that the medical and social needs the hospital was created to meet no longer exist.
- (84) According to the Belgian authorities, for a public hospital to be established, both the requirements of Article 60(6) Loi CPAS and of the authorities' hospital programming need to be fulfilled while for private hospitals only the latter applies. Under Article 60(6) Loi CPAS, the opening of a new public hospital has to be justified by the existence of a genuine need. Furthermore, the Belgian authorities explain that if a public hospital is opened with a capacity that equals the number of beds foreseen under the hospital programming, then there is no longer room for another (public or private) hospital in that area under that programme, in which case there is no other way of meeting the needs of the population. The Belgian authorities note that if at some point a CPAS wishes to close its public hospital it must first ensure that it is no longer needed in line with the jurisprudence by the Council of State. On the contrary, if a private operator decides to close its hospital, that operator, unlike the CPAS, is not legally required to ensure that the population continues to be provided with healthcare. According to the Belgian authorities, it is only its own choice that motivates a private hospital to remain open, a choice which can be changed at any time. The Belgian authorities refer to the abrupt closure of the private *Hôpital*

⁽¹²⁶⁾ Opinion of the Legislation Section of the Council of State on the preliminary draft of the *Ordonnance* of 13 February 2003 on the award of special subsidies for the municipalities of the Brussels Capital Region.

⁽¹²⁷⁾ See recital 19 for the exact wording of this article.

⁽¹²⁸⁾ The Federal Government adopts the hospital beds plan ('hospital programming') according to their indices (medical, surgical, geriatric, maternity, paediatrics, rehabilitation, psychiatry, neonatology, etc.) in the light of the total population for the Brussels, Flemish and Walloon Regions and for the Kingdom as a whole, on the basis of a proposal by the National Council for Hospital Facilities.

⁽¹²⁹⁾ The Belgian authorities more specifically note that at most the LCH lays down arrangements for the deficit compensation if a public hospital is transferred to a private owner while the Loi CPAS only sets out general principles for the opening and management of establishments created by the CPAS.

Français of Berchem-Sainte-Agathe (Brussels) in 2008 ⁽¹³⁰⁾ as an illustration. To conclude, the Belgian authorities explain that the hospital programming mechanism equally restrains the freedom of public and private operators to establish a hospital (as this is only possible if the maximum number of hospital beds in an area has not yet been reached). In their view, the obligations arising from the Loi CPAS however put additional constraints on both the possibility for a CPAS to establish and to close a public hospital while private hospitals can close at any time.

- (85) With respect to the obligations that allegedly only apply to the IRIS-H (see recitals 87 to 89 of the opening decision), the Belgian authorities argue that these obligations are the direct consequence of the fact that the IRIS-H have been set up to contribute to the provision of social aid by the CPAS (see also Section 2.2). The Belgian authorities consider that these obligations derive from the Loi CPAS, pursuant to which the IRIS-H were created, and are entrusted by means of the bylaws of the IRIS-H and the IRIS strategic plans. The Belgian authorities also refer to these documents for the exact definition of these obligations. For reasons of brevity and in order to avoid repetition, the Commission will only cite the relevant quotations in its assessment (see Section 7.3.4.1).
- (86) In its opening decision (see recital 48), the Commission expressed doubts with respect to the economic or non-economic nature of the additional social services carried out by the IRIS-H. In their reply to the opening decision, the Belgian authorities consider that these social services are non-economic activities. In essence, they argue that the social aid in the form of material, social, medical, medico-social and psychological assistance provided by the Brussels CPAS is not part of a competitive market and that this remains the case even if part of the social aid (i.e. the additional social services) is performed by the IRIS-H on the basis of an entrustment.
- (87) With respect to the legal basis for the compensation of the deficits (see recital 91 of the opening decision), the Belgian authorities consider that the obligation for the municipalities to cover the deficit of their public hospitals is laid down in Article 46 of the IRIS-H bylaws and also in Article 109 of the LCH. They explain that Article 109 LCH lays down a general principle that applies to all Belgian public hospitals and that determines the minimum that municipalities have to do (since it only requires them to cover part of the deficit, see also recital 47). The Belgian authorities also note that Article 46 of the IRIS-H bylaws is a specific obligation that applies only to the six municipalities that established the IRIS-H and who chose to go beyond the minimum of Article 109 LCH by covering the entire accounting deficit of the IRIS-H.
- (88) In recital 92 of its opening decision, the Commission asked whether or not the passing on of the special subsidies (which the Brussels Capital Region grants to the municipalities) by the municipalities to the IRIS-H can be considered as a separate transaction from the deficit coverage mechanism. In their reply, the Belgian authorities argue that the Brussels municipalities only use the special subsidies to (partially) fulfil their obligation to cover the deficits of the IRIS-H. As will be explained in more detail below (see Section 7.3.5), the deficit compensation is paid out in several steps, among which the transfer of the special subsidies from the municipality to the IRIS-H, but all these payments are made on the same basis, namely the municipal obligation to cover the deficit.
- (89) The Commission also asked for clarification regarding an alleged mechanism of advance payments (if any), its legal basis and operation, the difference with the deficit coverage mechanism, and the role of the FRBRTC in its funding (see recital 93 of the opening decision). The Belgian authorities consider that there is no mechanism for advances in place. More specifically, they explain that the obligation to cover the deficit of the IRIS-H comes into effect as soon as the deficit occurs. Indeed, according to the Belgian authorities Article 46 of the IRIS-H bylaws refers to the accounting deficit which is laid down in the hospitals' financial statements no later than six months after the end of the financial year. In contrast, the calculation of the Article 109 LCH deficit by the Federal Public Service for Public Health takes much longer (up to 10 years). However, the Belgian authorities argue that since the Article 109 LCH deficit is merely a part of the accounting deficit which is covered immediately under Article 46 of the IRIS-H bylaws, the IRIS-H are not paid any advances that might be classified as aid distinct from

⁽¹³⁰⁾ The Belgian authorities note that while a buyer was being sought, the *Hôpital Français* abruptly closed its doors to admissions on 9 May 2008. They explain that this hospital had previously closed its paediatric department and its maternity department. According to the Belgian authorities, patients in these departments were moved to other hospitals in the Brussels region throughout the day.

the deficit cover mechanism. Finally, the Belgian authorities repeat that the FRBRTC has provided financing to the municipalities which helped them to fulfil their deficit cover obligation which as explained above does not constitute a mechanism of advance payments.

- (90) With regard to the measures to avoid overcompensation and the absence of overcompensation in fact (see recitals 95-97 of the opening decision), the Belgian authorities provide the following arguments. They first explain that the decisions to compensate the deficit are annual and are taken at a time when the estimated deficit for the respective year is known so that there is no risk of overcompensation. They add that the Belgian legal framework (among others the Law of 14 November 1983 and the Loi CPAS) allows the municipalities to ensure that the IRIS-H use the State aid correctly and to recover this aid in the event of non-compliance or overcompensation. In addition, to show the absence of overcompensation the Belgian authorities refer to several tables submitted to the Commission which contain the deficits and municipal interventions for each of the five IRIS-H over the period 1996-2014 (see also Section 7.3.5 for these figures).
- (91) As requested, in their reply the Belgian authorities also provide further clarification on the concept of *pérennité* (see recitals 102-103 of the opening decision). According to them, the obligation to ensure the continuity (or *pérennité*) of the IRIS-H is based directly on the Loi CPAS. As has been explained above (see Section 2.1), each CPAS can set up establishments to provide social aid, including medical and medico-social assistance, if they can demonstrate that this is necessary to fulfil a genuine need in line with Article 60(6) Loi CPAS. They explain that historically, six of the nineteen CPAS in the Brussels Capital Region established hospitals (without separate legal personality) that they managed themselves until the end of 1995 in order to provide social aid. According to them, the restructuring of these public hospitals which led to the creation of the public IRIS-H that became legally independent of the CPAS on 1 January 1996 (see also Section 2.2) did not alter the obligation on the CPAS to provide social aid whether directly themselves or via the IRIS-H. In this context, the Belgian authorities point out that the primary objective of the restructuring and the creation of the IRIS network and the IRIS-H was to ensure the continuity of public hospital services in the Brussels Capital Region (see also recital 27). Hence, they note that to ensure the continuity of the IRIS-H and hence guarantee that the social needs of the population are fulfilled, the municipalities and the CPAS are required to absorb any hospital deficit on the basis of Article 46 of the IRIS-H bylaws. Furthermore, the Belgian authorities conclude that as long as the genuine need exists, in line with the jurisprudence of the Council of State (see recital 83), the public authorities cannot close the IRIS-H nor transfer them to a private owner.
- (92) Finally, in recital 103 of the opening decision, the Commission asked whether there are other reasons that may justify the additional financing for the IRIS-H. In this respect, the Belgian authorities note that the aim of the IRIS-H is not merely to establish 'viable' hospital services, missions and programmes, as Belgian private hospitals could do. Instead, according to the Belgian authorities, the IRIS-H have to guarantee the widest possible range of healthcare, specifically in order to ensure access for everyone, including the poorest members of society, to whatever treatment their pathology requires, even if that goes well beyond the norms of hospital planning and approval applicable to all hospitals, by and under the LCH. In this context, the Belgian authorities also make reference to paragraph 162 of the General Court judgment of 7 November 2012 which states: '*compensation for public hospital deficits may be necessary for health and social reasons in order to ensure the continuity and viability of the hospital system*'. The Belgian authorities also point out that the status of a public hospital entails certain costs that are not fully compensated by the federal financing measures. They note that these costs include among others: the payment of language bonuses to bilingual staff, higher pension and sickness expenses for statutory employees (civil servants), and pay scale increases imposed (but only partially paid) by the Brussels Capital Region.

6.2. Comments from Belgium on third party comments

- (93) The Belgian authorities start by noting that the observations by CBI, ABISP and Zorgnet Vlaanderen to the Commission's opening decision are founded on the common assertion that in their opinion the IRIS-H are not entrusted with SGEI in addition to those incumbent on any hospital (public or private) in Belgium. In their view, this assertion is based on a single premise, namely the fact that the LCH entrusts private and public hospitals

with the same public service obligation regardless of any particular regional aspect. However, according to the Belgian authorities, the intervening parties do not explain how the Loi CPAS would not apply to the IRIS-H while according to Belgium this law is the specific legal cause for the existence of the IRIS-H. The Belgian authorities point out that Article 147 of the LCH explicitly acknowledges that for hospitals managed by a CPAS (such as the IRIS-H ⁽¹³¹⁾), the LCH supplements the Loi CPAS which confirms that the LCH is not the only relevant legal basis when it comes to a hospital managed by a CPAS.

- (94) The CBI's assertion that the Brussels government's intention to reword the *Ordonnance* of 13 February 2003 to specify the missions of general interest which justify specific subsidies to municipalities (see recital 70) is an indication that no specific missions (only applying to the IRIS-H) currently exist, is deemed incorrect by the Belgian authorities. In particular, they point out that the specific subsidies foreseen by this *Ordonnance* are only awarded to the municipalities and not to the IRIS-H. Belgium furthermore confirms that the interventions by both the FRBRTC and the Brussels Capital Region itself (of up to EUR 10 million per year ⁽¹³²⁾) in support of the municipalities constitute financial transfers between public authorities outside the scope of Article 107(1) TFEU. The Belgian authorities repeat that none of these amounts have been granted by the Region or the FRBRTC to the IRIS-H. On the contrary, according to Belgium they are simply transfers between the Region and the municipalities within the Region's remit in terms of the overall funding of municipalities. This overall funding is designed to enable the municipalities to fulfil their tasks of communal interest which includes the missions of the CPAS. According to the Belgian authorities, the announced reform of the *Ordonnance* of 13 February 2003 in any event cannot amount to an admission that the IRIS-H have no additional SGEI. It is the municipalities that specify the SGEI entrusted to the hospitals they establish and the *Ordonnance* has no relevance in this context as it only concerns intra-State financing.
- (95) The Belgian authorities also refute the allegedly inaccurate portrayal of the social missions made by CBI in its observations. In particular, CBI considered that the LCH defines a 'basic social mission' common to public and private hospitals, but which only the IRIS-H would perform more intensively. From this perspective, the 'additional' social missions of the IRIS-H could not be separated from the hospital services provided and would be an integral part of these. According to the Belgian authorities, this view cannot be followed. The Belgian authorities consider that beyond the fact that CBI expressly recognises here that there is indeed an intrinsic difference between public and private hospitals (i.e. a higher volume of social services being provided by the IRIS-H), CBI does not define what it means exactly by 'basic social mission', which it considers to be a hospital SGEI, or determine the legal basis which supports it or the specific mandate which grants it. The Belgian authorities are of the opinion that only the Loi CPAS can be used to entrust 'basic social missions' to public hospitals. In their view, as far as the public hospitals alone are concerned, the LCH in fact merely supplements the Loi CPAS (see Article 147 LCH). The essential, or 'basic', mission of the IRIS-H is defined by or under the Loi CPAS and is therefore not 'common' to all hospitals. According to them, this mission is not economic in nature. Hence, the IRIS-H are established under the Loi CPAS and, once set up, expected to abide by the LCH's additional rules ⁽¹³³⁾.
- (96) With respect to CBI's observations concerning the universal care mission, the Belgian authorities observe that CBI limits the universal care mission, which it alleges to be common to all hospitals, solely to emergencies and post-emergencies. In this way, the Belgian authorities consider that CBI would implicitly recognise that private Brussels hospitals have no obligation to treat patients outside of emergency and 'post-emergency' cases, which nonetheless account for the bulk of care provided for needy people. Furthermore, the Belgian authorities argue that CBI's reference to the public interest mission described in Article 2 of the LCH does not provide a basis for any such obligation. According to them being entrusted with a basic hospital mission is not sufficient in order to be similarly entrusted with the mission of providing care to all persons in all situations and regardless of their ability to pay. The mere fact that there are specific rules governing emergencies amply demonstrates this. The Belgian authorities argue that a general interest mission cannot be implied, but is imposed. In their view, it was necessary

⁽¹³¹⁾ For the purpose of the LCH, the IRIS-H are considered to be managed by a CPAS.

⁽¹³²⁾ The amount per year depends on the available resources in the budget of the Brussels Capital Region and on the applications from the relevant municipalities. In the period 2003-2014, the special subsidy amounted to 10 million in all but two years (it was only 9 million in 2010 and 9,5 million in 2011).

⁽¹³³⁾ In this context the Belgian authorities point out that private hospitals, which are established for example under the law on non-profit associations ('ASBL law'), once set up, must also comply with the LCH as far as their hospital functions are concerned. However, to the extent that the ASBL law does not entrust the institutions it governs with any specific missions, the missions of these private hospitals are only governed by the LCH.

to lay down specific requirements for emergencies because there is no mention of emergencies in the LCH definition of the basic hospital mission. Indeed, the Belgian authorities argue that the Law of 8 July 1964 ⁽¹³⁴⁾ and its implementing decrees deal with emergency medical assistance ⁽¹³⁵⁾ and emergency services (including ambulances). On this basis, some hospitals, both public and private, carry out certain tasks in the field of emergency medical assistance.

- (97) However, the Belgian authorities argue that the obligation to provide emergency care in both public and private hospitals is not conferred by the LCH. It is, instead, a general obligation to assist persons in danger. According to the Belgian authorities, hospitals are required to provide assistance in cases of medical emergency, according to their structure and available expertise ⁽¹³⁶⁾. Both public and private hospitals are subject to this obligation, as indeed is everyone else, by virtue of their duty to assist persons in danger. The Belgian authorities also explain that under Article 422 *ter* of the Belgian Criminal Code, this obligation only applies in emergency situations, and particularly in medical emergencies of a life-threatening nature. However, they point out that in all other (i.e. non-emergency) situations hospitals that have not been entrusted with a universal care mission, are not obliged to treat patients if these cannot pay for the treatment. Finally, the Belgian authorities observe that while Belgian hospitals are naturally not allowed to discriminate based on a patient's wealth (and hence on the pure fact that someone is poor), they cannot be forced to provide care for free if a patient cannot or will not pay in a non-emergency situation.
- (98) In their comments to CBI's observations, the Belgian authorities also put into context CBI's reference to a judgment of the Brussels Court of First Instance (see recital 72). According to the Belgian authorities, the judgment referred to by CBI only concerns a very specific case of urgent medical aid ⁽¹³⁷⁾ provision for an undocumented migrant who needed psychiatric care. They point out that the IRIS-H do not provide this type of care. In their view, this judgment actually confirms that urgent medical aid for undocumented migrants is normally either provided by hospitals established by a CPAS or by hospitals with which the CPAS have concluded an agreement ⁽¹³⁸⁾. Finally, the Belgian authorities point out that CBI does not justify, or even attempt to justify, an alleged obligation for private hospitals to treat all patients for 'post-emergencies'. According to the Belgian authorities, no such 'post-emergency' obligation exists for private hospitals while the IRIS-H are obliged to treat all patients in all circumstances, even if there is no medical emergency.

7. ASSESSMENT OF THE MEASURES

7.1. Scope of this decision

- (99) The complaint made reference to an aid measure of approximately EUR 100 million in the context of the restructuring operation that led to the creation of the IRIS-H (see Section 2.2). However, as explained in Section 3.1 of

⁽¹³⁴⁾ See Law of 8 July 1964 as amended, Belgisch Staatsblad/Moniteur Belge of 25 July 1964, p. 8153.

⁽¹³⁵⁾ Contrary to the urgent medical aid referred to above (see recital 72) which includes planned care, emergency medical assistance concerns care that is needed immediately for life-threatening conditions.

⁽¹³⁶⁾ This means that even if a hospital does not carry out certain tasks in the field of emergency medical assistance as laid down in the Law of 8 July 1964, it is still obliged to provide assistance in medical emergencies to the best of its abilities (i.e. taking into account its infrastructure and personnel).

⁽¹³⁷⁾ Urgent medical aid is governed by Article 57(2) and the Royal Decree of 12 December 1996.

⁽¹³⁸⁾ In its judgment of 25 January 2013 the Brussels Court of First Instance notes: 'Within the system overall, either the CPAS itself supplies the urgent medical aid by treating a person requiring urgent care in a hospital it administers, or it pays the costs of caring for that person at a private hospital. If **this aid is typically more often provided in an establishment dependent on the relevant CPAS or with which it has concluded an agreement**, the person may be admitted to another establishment, owing to the urgency resulting from the situation of the person to be admitted to hospital. In such a case there is neither prior consultation of the CPAS, nor typically even of the person involved; instead, a rapid decision is taken unilaterally by the paramedics of the emergency service called, or, as in this case, by the Public Prosecutor. The **unusual or exceptional nature of this accelerated procedure** does not authorise the CPAS to refuse to bear the costs of a stay in a hospital other than their own' (emphasis added).

the opening decision, the Commission only took action with respect to the restructuring aid after the limitation period for the recovery of this aid had expired. Therefore, this aid measure was not included in the scope of the formal investigation carried out by the Commission and will hence not be addressed further in this decision.

- (100) Apart from the measure covered by the limitation period, the complaint formally targeted (i) the funds distributed by the FRBRTC to the municipalities in charge of the IRIS-H and (ii) the special subsidies (of up to EUR 10 million per year) granted to these municipalities by the Brussels Capital Region on the basis of the *Ordonnance* of 13 February 2003.
- (101) These two types of funds are however awarded only to the municipalities in charge of the IRIS-H and not to the IRIS-H themselves. They are in reality only financing flows between the Brussels Capital Region and the six Brussels municipalities in charge of the IRIS-H and therefore do not constitute State aid to the IRIS-H.
- (102) It is true that the Commission's 2009 annulled decision tended to confuse the FRBRTC payments and the deficit compensation mechanism of Article 109 LCH and did not separate the assessment of the compensation parameters of these two measures ⁽¹³⁹⁾. Furthermore, the FRBRTC funds are used by the municipalities to compensate the deficit of the IRIS-H ⁽¹⁴⁰⁾ and the municipalities had the obligation to pay the FRBRTC funds to the IRIS-H within a maximum period of seven working days ⁽¹⁴¹⁾.
- (103) Nevertheless, on the basis of the information received in reply to its opening decision and as explained below (see recital 230) the financial transfers from the FRBRTC and the Brussels Capital Region to the municipalities in charge of the IRIS-H are necessary since these municipalities have insufficient own resources to fulfil the municipal deficit compensation obligation towards the IRIS-H. It is in this context that both the FRBRTC and the Brussels Capital Region have required the Brussels municipalities to almost immediately upon receipt of these transfers make the FRBRTC funds and the special subsidies available to the IRIS-H. Regardless of this pass-on obligation, it is only the respective municipalities that have the obligation to compensate the deficits of the IRIS-H and these hospitals have no right to any compensation from the Brussels Capital Region or the FRBRTC. Likewise, the IRIS-H have been entrusted with certain obligations by the municipalities only and not by the Brussels Capital Region (see Section 7.3.4.1). Therefore, it is only the deficit compensation payments from the municipalities to the IRIS-H, whether financed on the basis of the municipalities' own resources or from funds provided to the municipalities by the Brussels Capital Region, that can be qualified as State aid within the meaning of Article 107(1) TFEU.
- (104) The Commission concludes that the intra-State financing (from the Brussels Capital Region, whether directly or indirectly via the FRBRTC, to the municipalities) is only a funding source for the municipal deficit compensation payments and does not constitute a measure of which the IRIS-H can benefit in addition to this deficit compensation. For this reason, the money flows between the Brussels Capital Region and the respective Brussels municipalities and their legal bases (e.g. the *Ordonnance* of 13 February 2003) will not be assessed as such in this decision. Instead, in this decision the Commission will assess the municipal deficit compensation payments of which the IRIS-H benefit, and for which the municipalities rely to a large extent on the intra-State financing they received from the Brussels Capital Region ⁽¹⁴²⁾. However, while not further pursuing the measures that are formally targeted by the complainant, the State aid assessment of the municipal deficit compensation will materially fully address the complainant's State aid concerns since it will *de facto* also cover the funds that were granted by the Brussels Capital Region directly or via the FRBRTC as the municipalities use them entirely for the deficit compensation of the IRIS-H. For this reason, the overcompensation tests that are described below (see Tables 9 to 13 in Section 7.3.5) also identify the deficit compensation payments that were financed using FRBRTC funds and special subsidies from the Brussels Capital Region. Finally, it should be underlined that the

⁽¹³⁹⁾ Case T-137/10, paragraphs 208-215.

⁽¹⁴⁰⁾ *Ibid.*, paragraph 217.

⁽¹⁴¹⁾ *Ibid.*, paragraph 218.

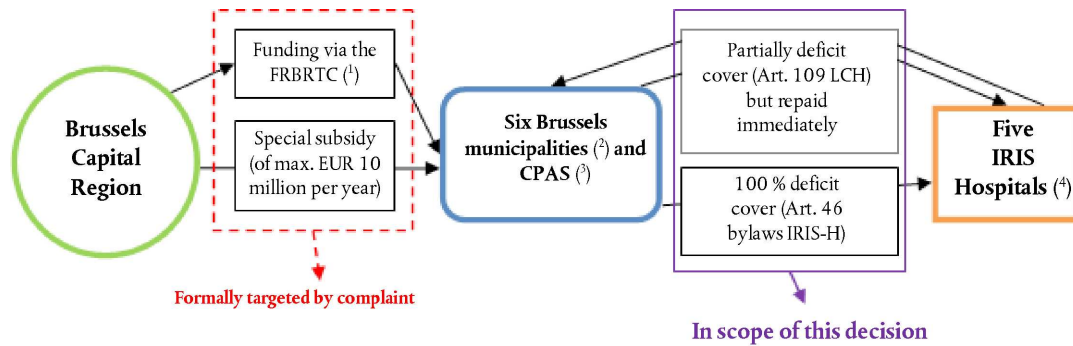
⁽¹⁴²⁾ In doing so, the assessment in this decision differs from the annulled Commission decision of 2009 in which the FRBRTC interventions and the special subsidies were to some extent assessed separately from the deficit compensation.

part of the municipal deficit compensation payments that was funded by the Brussels Capital Region or via the FRBRTC was insufficient ⁽¹⁴³⁾ to cover the entire deficits incurred by the IRIS-H and these payments have at no point in time in the period 1996-2014 lead to a situation where any of the IRIS-H was actually overcompensated and would have had to repay (part of) the deficit compensation (see also recitals 234 and 238).

- (105) The Commission will therefore assess the deficit compensation awarded by the municipalities to the IRIS-H since 1996 ⁽¹⁴⁴⁾. On that basis, Figure 1 below summarises the public financing that is in scope of this decision (in the full line rectangle) and also indicates the intra-State financing measures that were targeted in the complaint (in the dashed line rectangle). More detail on these measures will be provided in Section 7.3.5 below.

Figure 1

Financing flows and scope of this decision



⁽¹⁾ Fonds Régional Bruxellois de Refinancement des Trésoreries Communales.

⁽²⁾ La Ville de Bruxelles, Anderlecht, Etterbeek, Ixelles, Saint-Gilles, and Schaerbeek (until the end of 2013).

⁽³⁾ Centres Publics d'Action Sociale: PublicSocial Welfare Centres attached to the municipalities.

⁽⁴⁾ CHU Saint-Pierre, CHU Brugmann, Institut Bordet, Queen Fabiola Children's University Hospital (HUDERF) and IRIS South Hospitals.

7.2. State aid within the meaning of Article 107(1) TFEU

- (106) Article 107(1) TFEU provides that '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'. Accordingly, a measure constitutes State aid if the following four cumulative conditions are met ⁽¹⁴⁵⁾:

- (a) the measure must give a selective economic advantage to an undertaking;
- (b) the measure must be financed through State resources;
- (c) the measure must distort or threaten to distort competition;
- (d) the measure must have the potential to affect trade between Member States.

⁽¹⁴³⁾ On average between 68 % and 90 % of the respective IRIS-H's deficits incurred over the entire period 1996-2014 has been compensated by the municipalities using FRBRTC funds or the special subsidy of the Brussels Capital Region. For the remainder, the municipalities had to use their own funds and as explained below (see recital 234) at the end of 2014 they still had to pay (again using own funds) additional deficit compensations of approximately EUR 15 million for the five IRIS-H together.

⁽¹⁴⁴⁾ Where calculations have to be done to carry out this assessment, the Commission bases itself on the available figures, i.e. the period 1996 to 2014 (for the exceptions see recital 236).

⁽¹⁴⁵⁾ Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* ECLI:EU:C:2006:8, paragraph 129.

7.2.1. Selective economic advantage to an undertaking

7.2.1.1. The notion of undertaking

General principles

- (107) Public funding granted to an entity can only qualify as State aid if that entity is an ‘undertaking’ in the sense of Article 107(1) TFEU. The Court of Justice has consistently defined undertakings as entities engaged in economic activity ⁽¹⁴⁶⁾. The qualification of an entity as an undertaking thus depends on the nature of its activity, with no regard to the entity’s legal status or the way in which it is financed ⁽¹⁴⁷⁾. An activity must generally be considered to be economic in nature where it consists in offering goods and services on a market ⁽¹⁴⁸⁾. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former ⁽¹⁴⁹⁾. The mere fact that an entity does not pursue a profit does not necessarily mean that its operations are not of an economic nature ⁽¹⁵⁰⁾.

Medical services

- (108) Where healthcare is provided by hospitals and other healthcare providers against remuneration ⁽¹⁵¹⁾, be it directly from the patients or from other sources, it must generally be considered to constitute an economic activity ⁽¹⁵²⁾. The financing which the IRIS-H receive through various allowances from the federal or federated authorities (e.g., see recital 46(a), (d), (e) as regards public financing available to all hospitals and recital 44 as regards the deficit compensation for the IRIS-H), together with direct payments by patients (see recital 46(c)) and payments by the INAMI (see recital 46(b)) remunerates the IRIS-H for the medical services rendered and can therefore, in this context, be considered as constituting the economic consideration for the hospital services provided. In such a system, there is a certain degree of competition between hospitals concerning the provision of healthcare services. The fact that a hospital providing such services against remuneration is public does not render that hospital’s activities non-economic in nature ⁽¹⁵³⁾.
- (109) In the present case, the main activities of the IRIS-H are hospital activities consisting of the provision of healthcare services. These hospital activities carried out by the IRIS-H are also provided by other types of bodies or entities, in particular clinics, private hospitals and other specialised centres, including the private hospitals of the complainants. Therefore, these hospital activities carried out by the IRIS-H against remuneration and in a competitive environment must be regarded as economic in nature.

⁽¹⁴⁶⁾ Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428, paragraph 74.

⁽¹⁴⁷⁾ Case C-41/90 *Höfner & Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161, paragraph 21 and Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428, paragraph 74.

⁽¹⁴⁸⁾ Case C-118/85 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1987:283, paragraph 7 and Case C-35/96 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1998:303, paragraph 36.

⁽¹⁴⁹⁾ Case C-82/01 *P Aéroports de Paris v Commission of the European Communities* ECLI:EU:C:2002:617, paragraph 74 and Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* ECLI:EU:C:2008:376, paragraph 25. See also Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C-8/02), paragraph 9.

⁽¹⁵⁰⁾ Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* ECLI:EU:C:2008:376, paragraph 27 and Case C-244/94 *Fédération Française des Sociétés d’Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d’Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l’Agriculture et de la Pêche* ECLI:EU:C:1995:392, paragraph 21.

⁽¹⁵¹⁾ Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* ECLI:EU:C:2001:404, paragraph 58, where the ECJ ruled that the fact that a medical treatment in a hospital is financed directly by the sickness insurance funds on the basis of conventions and pre-established rates is not such as to remove that treatment from the field of economic activities within the meaning of the TFEU and that payments by the sickness insurance funds ‘albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character’. The ECJ also added in this context that it is not necessary that such remuneration is paid by those benefiting of the service.

⁽¹⁵²⁾ Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* ECLI:EU:C:2001:404, paragraph 53, Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* ECLI:EU:C:1984:35, paragraph 16, Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* ECLI:EU:C:1991:378, paragraph 18, Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* ECLI:EU:C:2001:400, paragraph 43 and T-167/04 *Asklepios Kliniken GmbH v Commission of the European Communities* ECLI:EU:T:2007:215, paragraphs 49-55.

⁽¹⁵³⁾ See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C-8/02), paragraph 24.

- (110) The solidarity aspects underpinning the Belgian national healthcare system do not call into question the economic nature of such hospital activities. Indeed, it is recalled that with regard to a national health system, which is managed by ministries and other bodies and operates 'according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover', the CFI held that the management bodies in question were not acting as undertakings in their management of that national health system ⁽¹⁵⁴⁾. However, the Commission considers that there is a need to differentiate between the management of the national health system, carried out by public bodies implementing for this purpose the prerogatives of the State, and the provision of hospital care against remuneration in a competitive environment (which is at stake in the case at hand, as outlined in recitals 108-109).
- (111) Accordingly, as far as the provision of healthcare services is concerned, the IRIS-H have to be considered to constitute undertakings in the sense of Article 107(1) TFEU.

Social services

- (112) As explained in recital 38 above, the IRIS-H offer a series of social services to their socially disadvantaged patients and their families. These include, according to patients' needs, assistance of psycho-social, socio-administrative or socio-material character. The specific nature of these social services requires that operators eligible to exercise them have specific resources such as specially trained staff.
- (113) It is undeniable that the additional social activities that the IRIS-H are allegedly under an obligation to perform serve an exclusively social purpose. Nevertheless, as the European Court of Justice (hereinafter 'ECJ') stated in its case law, a purely social function of a system under which an organisation is allocated specific tasks, is not in itself sufficient to generally exclude the economic nature of these tasks ⁽¹⁵⁵⁾.
- (114) In the Commission's opening decision, clarification was sought on whether or not the additional social activities allegedly performed by the IRIS-H amounted to an economic activity. In their response to the Commission's opening decision, the Belgian authorities maintain that the social activities are non-economic, as they do not form part of a competitive market. The complainants however argue that the social activities cannot be separated from the hospital activities which are economic in nature. While the Commission has carefully considered the Belgian authorities' arguments, it cannot exclude that the provision of the additional social activities amounts to an economic activity. Furthermore, as will be explained below (see recital 165), the Commission considers that the additional social activities can in reality not be separated from the hospital activities which are economic in nature.
- (115) In order to proceed with the assessment, the remainder of this decision therefore assumes *ex hypothesi* that the provision of the additional social services is indeed economic in nature.

Ancillary activities

- (116) As outlined in recital 41 above, the IRIS-H are also engaged in a series of ancillary activities. The Commission notes that some of these activities would, when assessed in isolation from the main activities of the IRIS-H, appear to be non-economic in nature (e.g. research activities), while others appear on first sight to constitute economic activities (e.g. canteen or shop for patients and visitors). It can be argued, however, that due to their close connection to the main (economic) activities of the IRIS-H, all of the mentioned ancillary activities must be treated as constituting economic activities as well.

⁽¹⁵⁴⁾ Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* ECLI:EU:T:2003:50, paragraph 39. See also Case T-137/10, paragraphs 90, 91 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C-8/02), paragraph 22.

⁽¹⁵⁵⁾ See to that effect Case C-355/00 *Freskot AE v Elliniko Dimosio* ECLI:EU:C:2003:298, paragraph 53. In this case, the ECJ also referred to the fact that the services and contributions on the basis of a compulsory insurance scheme at hand were established in detail by the national legislator.

- (117) In order to proceed with the assessment, the remainder of this decision therefore assumes *ex hypothesi* that the ancillary activities are indeed economic in nature.

7.2.1.2. Economic advantage

General assessment

- (118) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention ⁽¹⁵⁶⁾. Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention ⁽¹⁵⁷⁾. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (119) In the present case, it has to be noted that the various public financing systems (as described in Section 2.5.1) covering the general hospital and additional activities, among which is also the deficit compensation, allowed the IRIS-H to benefit from a package of measures designed to reduce the burdens normally borne by the providers of such activities. Therefore, subject to the examination under the principles of the *Altmark* judgment made in the following recitals, the deficit compensation mechanism that forms the subject of this decision can be considered to grant the IRIS-H an economic advantage they would not have obtained under normal market conditions, i.e. without State intervention.

Altmark

- (120) The Commission notes that the public financing of the IRIS-H would not grant any advantage to them in as far as it merely amounted to compensation for services provided by the IRIS-H on the basis of public service obligation(s) entrusted to them, to the extent that this complied with the conditions set out in the *Altmark* case law.
- (121) In its *Altmark* judgment, the ECJ made clear that compensation granted from State resources for costs incurred to provide a service of general economic interest does not amount to granting an advantage where four cumulative conditions are met ⁽¹⁵⁸⁾:
- (a) the recipient undertaking must actually be required to discharge public service obligations and those obligations must be clearly defined;
 - (b) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
 - (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant revenues and a reasonable profit for discharging those obligations;
 - (d) in case an undertaking entrusted to carry out public service obligations is not chosen pursuant to a public procurement procedure, which allows for selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately equipped, would have incurred in discharging those obligations.

⁽¹⁵⁶⁾ Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* ECLI:EU:C:1996:285, paragraph 60 and Case C-342/96 *Kingdom of Spain v Commission of the European Communities* ECLI:EU:C:1999:210, paragraph 41.

⁽¹⁵⁷⁾ Case 173/73 *Italian Republic v Commission of the European Communities* ECLI:EU:C:1974:71, paragraph 13.

⁽¹⁵⁸⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* ECLI:EU:C:2003:415, paragraphs 87-95.

- (122) The principles and considerations laid down in the *Altmark* judgment are applicable *ex tunc*, i.e. also to those legal relations originating from times before the judgment in question ⁽¹⁵⁹⁾. Consequently, the assessment criteria set out in the *Altmark* judgment are fully applicable to the factual and legal situation of the present case, even as regards support granted to the IRIS-H before the date of the *Altmark* judgment ⁽¹⁶⁰⁾.
- (123) For the present purposes, the Commission has decided first to analyse the fourth *Altmark* criterion (i.e. whether the selection of an undertaking providing an SGEI was based on a public tender procedure or, alternatively, whether the SGEI compensation granted is based on the analysis of the costs of a typical, well-run undertaking). The Commission notes that the IRIS-H have not been selected via public procurement procedures for the public service obligation(s) with which they are entrusted according to the Belgian authorities. It can thus be concluded that the first part of the criterion in question is met in the present case.
- (124) Concerning the second part of the criterion under assessment, the Commission first notes that the Belgian authorities have not argued that the IRIS-H qualify as efficient undertakings in this sense. The Commission secondly observes that the information provided by both the Belgian authorities and the complainants is not sufficient to establish that the systems of compensation for the public service obligation(s) possibly entrusted to the IRIS-H comply with the criterion of the efficient operator within the meaning of the fourth *Altmark* condition. There is no indication that the compensation awarded is based on an analysis of the costs of a typical undertaking with the characteristics required by the relevant case law of the Union courts. There is also no sufficient evidence demonstrating that the IRIS-H can themselves be considered to constitute typical undertakings that are well-run and sufficiently equipped. In determining the compensation awarded, no considerations of sound management or the adequacy of equipment appear to have been taken into account. Finally, it must be noted that a compensation mechanism covering the IRIS-H's deficit resulting from the performance of SGEI and ancillary activities, which does not take account of the efficiency with which these hospitals are run, cannot fulfil the fourth *Altmark* criterion.
- (125) Consequently, the Commission considers that the fourth criterion of the *Altmark* judgment is not complied with in this case. As the conditions set out in the *Altmark* judgment are cumulative, failure to comply with any one of the four conditions necessarily leads to the conclusion that the deficit compensation mechanism under review in this decision grants an economic advantage in the sense of Article 107(1) TFEU.

7.2.1.3. Selectivity

- (126) To fall within the scope of Article 107(1) TFEU, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of aid.
- (127) The Commission notes that the compensation mechanism set up to cover the deficits of public hospitals in Brussels (see recital 44), but not of private ones, must be regarded as being selective in nature as it excludes private hospitals and any other healthcare providers, and operators belonging to other sectors of activity.

⁽¹⁵⁹⁾ Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* ECLI:EU:T:2008:29, paragraph 159. The Court held that '... the interpretation which the Court of Justice gives of a provision of Community law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force. It follows that the provision as thus interpreted may, and must, be applied even to legal relationships which arose and were established before the judgment in question and it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relationships established in good faith.'

⁽¹⁶⁰⁾ Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* ECLI:EU:C:2005:169, paragraphs 66 and 67, and Case C-292/04 *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v Finanzamt Bonn-Innenstadt* ECLI:EU:C:2007:132, paragraphs 34 to 36.

7.2.2. State resources

- (128) For a measure to constitute State aid within the meaning of Article 107(1) TFEU, it must be granted by the State or through State resources. State resources include all resources of the public sector ⁽¹⁶¹⁾, including resources of intra-State entities (decentralised, federated, regional or other) ⁽¹⁶²⁾.
- (129) In the present case, the deficit compensations that the IRIS-H receive from their respective municipalities for the performance of SGEI and ancillary activities, stem from public resources and are imputable to the State.

7.2.3. Distortion of competition and effect on trade

- (130) Public support to undertakings only amounts to State aid in the sense of Article 107(1) TFEU if it ‘distorts or threatens to distort competition’ and only insofar as it ‘affects trade between Member States’.

7.2.3.1. Distortion of competition

- (131) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ⁽¹⁶³⁾. For all practical purposes, a distortion of competition is thus assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.
- (132) Considering that a certain amount of competition exists between public hospitals, private hospitals, and other healthcare establishments, public financing granted to certain health establishments (including the IRIS-H) to finance the hospital activities they carry out, is liable to distort competition. The same applies to the additional social activities of the IRIS-H.

7.2.3.2. Effect on trade between Member States

General principles

- (133) Union courts have ruled that ‘where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid’ ⁽¹⁶⁴⁾.
- (134) Public support can be considered capable of having an effect on intra-Union trade even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply ⁽¹⁶⁵⁾, or to exercise their right of establishment.
- (135) It is settled case-law that the Commission is not required to carry out an economic analysis of the actual situation on the relevant markets, the market share of the undertakings in receipt of the aid, the position of competing undertakings or of trade flows between Member States ⁽¹⁶⁶⁾. In the case of aid granted unlawfully, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade.

⁽¹⁶¹⁾ Case T-358/94 *Compagnie nationale Air France v Commission of the European Communities* ECLI:EU:T:1996:194, paragraph 56.

⁽¹⁶²⁾ Case 248/84 *Federal Republic of Germany v Commission of the European Communities* ECLI:EU:C:1987:437, paragraph 17 and Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava — Diputación Foral de Álava (T-92/00), Ramondín, SA and Ramondín Cápsulas, SA (T-103/00) v Commission of the European Communities* EU:T:2002:61, paragraph 57.

⁽¹⁶³⁾ Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* ECLI:EU:C:1980:209, paragraph 11 and Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission of the European Communities* ECLI:EU:T:2000:151, paragraph 80.

⁽¹⁶⁴⁾ Case T-288/97 *Regione autonoma Friuli-Venezia Giulia v Commission* ECLI:EU:T:1999:125, paragraph 41.

⁽¹⁶⁵⁾ See for instance Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* ECLI:EU:C:2003:415, paragraph 78; Joined Cases C-197/11 and C-203/11 *Libert and Others* ECLI:EU:C:2013:288, paragraph 78; and Case C-518/13 *Eventech* ECLI:EU:C:2015:9, paragraph 67.

⁽¹⁶⁶⁾ See for instance Case C-279/08 P *Commission v Netherlands* ECLI:EU:C:2011:551, paragraph 131.

- (136) Nevertheless, an effect on intra-Union trade cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and is liable to have an effect on trade between Member States, based on the foreseeable effects of the measure ⁽¹⁶⁷⁾.
- (137) In that respect, the Commission has in several cases ⁽¹⁶⁸⁾ considered that certain activities have a purely local impact and no such effect. It seems appropriate to check, in particular, whether the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States, and whether it can be foreseen that the measure will have no more than a marginal effect on the conditions of cross-border investments or establishment.

Assessment

- (138) Following the principles recalled above, the Commission notes that the effect on trade can be established by reference to a variety of factors, chiefly the ‘customer’ side (relating to the area to which goods and services are supplied and the area from where customers are attracted) and the ‘provider’ side (concerning the question whether a measure creates obstacles to cross-border investment and establishment of actually or potentially competing providers). In order to find that a measure affects trade between Member States, it is enough to establish an effect on trade with respect to at least one of these factors.
- (139) As regards the measures’ effect on the ‘customer’ side, the Commission observes that the sector of healthcare in general and in-patient healthcare provided by hospitals in particular is subject to intra-EU trade. The Commission notes that the cross-border mobility of patients is increasing. It is, of course, true that healthcare remains a competence of the Member States and the mobility of patients is being governed by strict provisions regulating interventions by national social security systems. Indeed, in practice, in-patient treatment is generally provided near the place of residence of the patient in a cultural environment familiar to him and which enables him to establish relationships of trust with the treating physicians. The cross-border movement of patients occurs especially in border regions or to obtain highly specialised treatment for specific conditions.
- (140) In the present case, the Commission considers that the measures in question are liable to affect trade between Member States. In particular, the specificities of this case distinguish it from those cases where public support of hospitals was found not to affect trade between Member States ⁽¹⁶⁹⁾. In reaching this conclusion, the Commission relies in particular on the combination of the following indications:
- (a) The IRIS-H include highly-specialised hospitals with an international reputation. Queen Fabiola Children’s University Hospital and Institut Bordet, which specialise respectively in paediatrics and cancer treatment, as well as the university hospitals CHU Saint-Pierre and CHU Brugmann, offer a wide array of highly-specialised treatments and boast an international reputation. The international reputation may render these hospitals attractive for international patients, including from other Member States, regardless of the fact that the IRIS-H’s mission is to provide social healthcare to the local community in Brussels (see Section 7.3.4.1).

⁽¹⁶⁷⁾ See Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others v Commission* ECLI:EU:T:1995:130, paragraph 141.

⁽¹⁶⁸⁾ See for instance, the Commission decisions in State aid cases N 258/2000 *Leisure Pool Dorsten* (OJ C 172, 16.6.2001, p. 16); Commission Decision 2004/114/EC of 29 October 2003 on measures in favour of non-profit harbours for recreational crafts, the Netherlands (OJ L 34, 6.2.2004, p. 63); N 458/2004 *Editorial Andaluza Holding* (OJ C 131, 28.5.2005, p. 12); SA.33243 *Jornal de Madeira* (OJ C 131, 28.5.2005, p. 12); SA.34576 *Portugal — Jean Piaget North-east Continuing Care Unit* (OJ C 73, 13.3.2013, p. 1); N 543/2001 *Ireland — Capital allowances for hospitals* (OJ C 154, 28.6.2002, p. 4); SA.37432 *Funding to public hospitals in the Hradec Králové Region* (OJ C 203, 19.6.2015, p. 1); SA.37904 *Alleged State aid to medical centre in Durmersheim* (OJ C 188, 5.6.2015, p. 1); SA.33149 *Städtische Projektgesellschaft ‘Wirtschaftsbüro Gaarden-Kiel’* (OJ C 188, 5.6.2015, p. 1); SA.38035 *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery* (OJ C 188, 5.6.2015, p. 1); SA.39403 *The Netherlands — Investment aid for Lauwersoog port* (OJ C 259, 7.8.2015, p. 1); SA.37963 *United Kingdom — Glenmore Lodge* (OJ C 277, 21.8.2015, p. 1); and SA. 38208 *United Kingdom — Member-owned golf clubs* (OJ C 277, 21.8.2015, p. 1).

⁽¹⁶⁹⁾ See N 543/2001 *Ireland — Capital allowances for hospitals* (OJ C 154, 28.6.2002, p. 4); SA.37432 *Funding to public hospitals in the Hradec Králové Region* (OJ C 203, 19.6.2015, p. 1); SA.38035 *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery* (OJ C 188, 5.6.2015, p. 1).

- (b) The IRIS-H in Brussels are located in relative proximity to large cities in France, the Netherlands, and Germany. For example, the cities of Aachen, Lille, Eindhoven and Rotterdam are all located less than 150 km away. In addition, Brussels is directly connected to the major European cities of Paris, London, Amsterdam and Cologne by high-speed train lines, with traveling time of two hours or less. Finally, Brussels hosts an international airport with connections to all major European and international centres. The location and connectedness of Brussels means that the IRIS-H can easily be reached by international patients attracted by these hospitals, especially those residing close to the Belgian border or in one of the towns connected by high-speed rail.
- (c) The Brussels Capital Region in general and the IRIS-H are multilingual. French and Dutch are the official languages and the IRIS-H are obliged to offer services in both, rendering them attractive in particular for French and Dutch citizens. In addition, English is widely spoken in the Brussels Capital Region, facilitating access by patients from a large variety of backgrounds.
- (d) The Brussels Capital Region is home to a large number of citizens from other Member States. In fact, of the 321 European cities included in Eurostat's 'Urban Audit', Brussels had the second-highest rate of non-citizen residents (33,8 % in 2012) and the second-highest rate of non-citizen resident from other EU Member States (20,3 % in 2012) ⁽¹⁷⁰⁾. Residents from other EU Member States regularly have a choice regarding where to obtain medical services, typically either in their home country or country of residence.
- (141) As far as the additional social activities of the IRIS hospitals are concerned, the Commission observes that to the extent that it cannot be excluded that the provision of these activities amounts to an economic activity, and taking into account how closely they are related to the general hospital activities of the IRIS-H, the reasoning developed above may hold true in this respect as well. However, in light of the considerations set out below (see Section 7.3), the Commission is satisfied that even if the public financing of the additional social services affected trade between Member States, State financing benefiting this activity would constitute State aid compatible with the internal market. For reasons of procedural economy, it is therefore not necessary to finally conclude on whether the public financing of the additional social activities affects trade between Member States.
- (142) The same considerations apply to the IRIS-H's ancillary activities (see recitals 41, 116 and 117). Assessed in isolation, the Commission considers that there would be room to argue that the public financing (if any) of most of the IRIS-H's ancillary activities (e.g., a nursery for the children of staff members, renting of rooms, a little shop for patients and visitors, the canteen and parking facilities, renting TVs to patients) would have no effect on trade between Member States. However, the close connection between the IRIS-H's ancillary and main activities may be taken to suggest that also the public financing (if any) of these ancillary activities affects trade between Member States. In any event, since State financing benefiting the ancillary activities would constitute State aid compatible with the internal market (see Section 7.3), the Commission does not consider it necessary to finally decide on this point.
- (143) In order to proceed with the assessment, the remainder of this decision therefore assumes *ex hypothesi* that the public financing of the additional social activities and the ancillary activities are liable to affect trade between Member States.
- (144) Having thus found that the measures under investigation in the present case are liable to affect trade between Member States in at least one respect (the 'customer' side), the Commission does not consider it necessary to assess whether they are also liable to affect trade between Member States as regards cross-border investments and the right to establishment (see recital 138).

7.2.4. Conclusion

- (145) On the basis of the foregoing considerations, the Commission considers that with respect to the measures under investigation in this case, the cumulative State aid criteria are fulfilled and these measures thus constitute State aid within the meaning of Article 107(1) TFEU.

⁽¹⁷⁰⁾ http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_European_cities accessed on 8 July 2015.

7.3. Compatibility with the internal market

7.3.1. Legal basis

7.3.1.1. General principles

(146) Since the deficit compensation that applies to the IRIS-H amounts to State aid in the sense of Article 107(1) TFEU, its compatibility with the internal market needs to be assessed. The grounds on which a State aid measure can or must be declared compatible with the internal market are listed in Articles 106(2), 107(2), and 107(3) TFEU.

(147) Considering that the Belgian authorities have consistently asserted that the public financing of the IRIS-H constitutes compensation for carrying out SGEI, the compatibility of the deficit compensation with the internal market has to be assessed primarily on the basis of Article 106(2) TFEU. This Article provides that

‘undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.’

7.3.1.2. Application of Article 106(2) TFEU over time: preliminary remarks

(148) The Commission has laid down the precise conditions according to which it applies Article 106(2) in a series of instruments, most recently, inter alia, the 2012 SGEI Framework⁽¹⁷¹⁾ and the 2012 SGEI Decision⁽¹⁷²⁾ (hereinafter together: ‘the 2012 SGEI package’); previously, the Commission had issued and applied the 2005 SGEI Framework⁽¹⁷³⁾ and the 2005 SGEI Decision⁽¹⁷⁴⁾. Any aid measure that complies with the criteria laid down in the 2012 SGEI Decision is considered compatible with the internal market and exempted from notification. Aid measures which do not fall within the scope of application of the 2012 SGEI Decision because they do not fulfil all the criteria enshrined therein are to be assessed according to the 2012 SGEI Framework upon notification.

(149) In the present case, the IRIS-H deficit compensation under investigation dates back as far as 1996, thus pre-dating the 2012 SGEI Decision and 2012 SGEI Framework. However, the 2012 SGEI package — in Article 10 of the 2012 SGEI Decision and paragraph 69 of the 2012 SGEI Framework — contains rules that provide for its application also to aid granted before the entry into force of the 2012 SGEI package on 31 January 2012. In particular, the 2012 SGEI Decision provides in its Article 10(b) that

‘any aid put into effect before the entry into force of this Decision [i.e. before 31 January 2012] that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempted from the requirement of prior notification.’

As regards the 2012 SGEI Framework, paragraphs 68 and 69 of that Framework specify that the Commission will apply the principles set out in that Framework to all notified aid projects, whether the notification took place before or after the start of application of that Framework on 31 January 2012, as well as to all unlawful aid on which it takes a decision after 31 January 2012, even if that aid was granted before 31 January 2012.

(150) In consequence, the rules on the application of the 2012 SGEI Decision and the 2012 SGEI Framework as described above mean that the public financing of the IRIS-H as from 1996 onward can be assessed pursuant to the 2012 SGEI package. If the deficit compensation mechanism complies with the conditions of either the 2012 SGEI Decision or the 2012 SGEI Framework, it is compatible with the internal market for the whole period since 1996.

⁽¹⁷¹⁾ Communication from the Commission: European Framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

⁽¹⁷²⁾ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union 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 7, 11.1.2012, p. 3).

⁽¹⁷³⁾ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

⁽¹⁷⁴⁾ See footnote 13.

- (151) Finally, attention must be drawn to the transitional provision contained in Article 10(a) of the 2012 SGEI Decision, according to which any aid scheme put into effect before the entry into force of that Decision (i.e. before 31 January 2012) that was compatible with the internal market and exempted from the notification requirement in accordance with the 2005 SGEI Decision shall continue to be compatible with the internal market and exempted from the notification requirement for a further period of two years (i.e. until 30 January 2014 included). This means that aid which was granted under such a scheme in the period between the entry into force of the 2005 SGEI Decision on 19 December 2005 and the entry into force of the 2012 SGEI Decision on 31 January 2012 will be considered compatible with the internal market but only from the date on which it was granted until 30 January 2014 included. In any event, for aid granted in the time from 31 January 2012 onwards, the transitional provision of Article 10(a) of the 2012 SGEI Decision is not applicable and the compatibility assessment has to be made pursuant to the 2012 SGEI Decision.
- (152) In consequence, the Commission first assesses whether the public financing falling within the scope of this decision granted to the IRIS-H from 1996 onward complies with the conditions set out in the 2012 SGEI Decision. Only to the extent that this is not the case will the Commission assess that same financing pursuant to the 2005 SGEI Decision (for aid that was granted between 19 December 2005 and 31 January 2012) and the 2012 SGEI Framework.

7.3.2. *Applicability of Article 106(2) TFEU: genuine SGEI*

- (153) Article 106(2) TFEU and the 2012 SGEI Decision based thereon are only applicable to compensation paid to an undertaking that is entrusted with the operation of a 'genuine service of general economic interest' ⁽¹⁷⁵⁾. The Court of Justice has established that SGEI are services that exhibit special characteristics as compared with those of other economic activities ⁽¹⁷⁶⁾. It is furthermore well-established that in the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider ⁽¹⁷⁷⁾. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI.
- (154) The Commission is satisfied that all economic activities of the IRIS-H that benefit from public funding (i.e. the range of hospital and social tasks performed by these hospitals) either qualify as genuine services of general economic interest, as argued by the Belgian authorities, or as activities purely ancillary thereto. In particular, all medical and social services at issue in this case exhibit special characteristics as compared with those of other economic activities, i.e. primarily their importance for the medical and social well-being of society. Accordingly, the Belgian authorities have not made a manifest error in defining these services as SGEI.
- (155) As regards the ancillary activities detailed in recital 41, the Commission notes that an activity can be considered ancillary to an SGEI where it is directly related to and necessary for the provision of that SGEI, or intrinsically linked thereto. The latter is the case where the activities in question consume the same inputs as that SGEI, e.g. material, equipment, labour, fixed capital. Ancillary activities must also remain limited in scope. The Commission considers that all of the activities outlined in recital 41 above qualify as ancillary to the IRIS-H main SGEI activity. Indeed, the activities considered ancillary are (1) all directly related to and necessary for the provision of the IRIS-H SGEI activity, as they constitute activities that a modern hospital can be expected to perform in addition to the provision of medical and social services; and/or are (2) intrinsically linked thereto as they make use of the hospitals' infrastructures (i.e. its buildings and terrains). Based on the limited share of the ancillary activities in the IRIS-H's overall revenues (on average less than 2 %), the Commission is also satisfied that all ancillary activities remain very limited in scope.

⁽¹⁷⁵⁾ Recital 8 of the 2012 SGEI Decision.

⁽¹⁷⁶⁾ Cases C-179/90 *Merci convenzionali porto di Genova* ECLI:EU:C:1991:464, paragraph 27; Case C-242/95 *GT-Link A/S* ECLI:EU:C:1997:376, paragraph 53; and Case C-266/96, *Corsica Ferries France SA* ECLI:EU:C:1997:376, ECLI:EU:C:1998:306, paragraph 45.

⁽¹⁷⁷⁾ Case T-289/03 *BUPA and Others v Commission* ECLI:EU:T:2008:29, paragraphs 166-169 and 172; Case T-17/02 *Fred Olsen* ECLI:EU:T:2005:218, paragraph 216.

7.3.3. Applicability of the 2012 SGEI Decision

- (156) The Commission further considers that the public SGEI financing granted to the IRIS-H falls within the material scope of the 2012 SGEI Decision, as set out in Article 2 thereof. According to Article 2(1)(b) and (c) of the 2012 SGEI Decision, this Decision applies to State aid in the form of SGEI compensation granted to hospitals providing medical care (including the pursuit of directly related ancillary activities such as, but not limited to, research) and undertakings providing SGEI meeting social needs as regards, inter alia, health and social inclusion of vulnerable groups. As the publically financed SGEI and ancillary activities carried out by the IRIS-H all can be covered by these categories of activities, the Commission finds that the deficit compensation mechanism under investigation in the case at hand falls within the material scope of the 2012 SGEI Decision. Accordingly, the costs arising from the totality of the IRIS-H's activities (SGEI and ancillary activities) are eligible to be covered by compensation granted pursuant to the 2012 SGEI Decision.

7.3.4. The entrustment act

- (157) The first key compatibility condition enshrined in the 2012 SGEI Decision is that the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State ⁽¹⁷⁸⁾. Such act or acts should clearly specify:

- the content and duration of the public service obligations ⁽¹⁷⁹⁾,
- the undertaking entrusted with these obligations and, where applicable, the territory concerned ⁽¹⁸⁰⁾,
- the nature of any exclusive or special rights assigned to the undertaking ⁽¹⁸¹⁾,
- a description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation ⁽¹⁸²⁾,
- arrangements in place for avoiding and recovering any overcompensation ⁽¹⁸³⁾.

- (158) In addition, the 2012 SGEI Decision requires the entrustment act to contain a reference to that Decision ⁽¹⁸⁴⁾.

7.3.4.1. Content and burden of the public service obligations imposed on the IRIS-H

- (159) In its annulment judgment of 7 November 2012, the GC made the preliminary observation that 'where different requirements are imposed on the public and private bodies entrusted with the same public service, which presupposes a different level of costs and compensation, those differences must be clearly shown in their respective mandates, inter alia, in order that it may be verified that the subsidy is compatible with the principle of equal treatment. State aid, certain of the conditions of which contravene the general principles of EU law, such as the principle of equal treatment, cannot be declared by the Commission to be compatible with the internal market (Case C-390/06 Nuova Agricast [2008] ECR I 2577, paragraph 51)' ⁽¹⁸⁵⁾.

- (160) Paragraph 66 of the Nuova Agricast judgment ⁽¹⁸⁶⁾ clarifies that 'The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-248/04 Koninklijke Coöperatie Cosun [2006] ECR I-10211, paragraph 72 and the case-law cited there)'.

⁽¹⁷⁸⁾ Article 4 of the 2012 SGEI Decision.

⁽¹⁷⁹⁾ Article 4(a) of the 2012 SGEI Decision.

⁽¹⁸⁰⁾ Article 4(b) of the 2012 SGEI Decision.

⁽¹⁸¹⁾ Article 4(c) of the 2012 SGEI Decision.

⁽¹⁸²⁾ Article 4(d) of the 2012 SGEI Decision.

⁽¹⁸³⁾ Article 4(e) of the 2012 SGEI Decision.

⁽¹⁸⁴⁾ Article 4(f) of the 2012 SGEI Decision.

⁽¹⁸⁵⁾ Case T-137/10, paragraph 95.

⁽¹⁸⁶⁾ Case C-390/06 Nuova Agricast Srl v Ministero delle Attività Produttive, ECLI:EU:C:2008:224.

- (161) However, the Commission notes that the principle of non-discrimination is not mentioned as a compatibility criterion in the 2012 SGEI Decision. Nevertheless, the Commission will assess whether or not the public IRIS-H and the private Brussels hospitals are in a legally and factually comparable or different situation. In this context, when describing the content of the public service obligations that are entrusted to the IRIS-H, the Commission will indicate whether or not a comparable obligation has been entrusted to the private Brussels hospitals.
- (162) As has been explained above (see Section 2.3), the IRIS-H are subject to a regulatory framework which consists of the Loi CPAS (on which basis the IRIS-H were created), the LCH, the bylaws of the local hospital associations, and the strategic plans adopted by the IRIS umbrella organisation. Since the public authorities (i.e. the municipalities and CPAS) have majority control on the Chapter XII Loi CPAS local associations and the IRIS umbrella organisation, both the bylaws and strategic plans are binding on the IRIS-H and hence qualify to be valid entrustment acts, the content of which will be specified below (see recitals 164, 170 et seq.). In this context, it is also worthwhile to point out that the public authorities can directly monitor the day-to-day operation of the IRIS-H and provide further instructions where necessary.
- (163) It was also noted (see recital 24) that the IRIS-H were initially managed and controlled directly by the CPAS who had created these hospitals to help fulfil their social aid obligation in line with the Loi CPAS. To ensure the continuity and viability of the Brussels public hospitals (see recital 24), a restructuring was necessary which resulted in the creation of the IRIS-H (which took the form of Chapter XII Loi CPAS local associations with financial and legal independence). However, this restructuring did not change the fundamental purpose of the Brussels public IRIS hospitals ⁽¹⁸⁷⁾, namely to provide medical and socio-medical care and as such contribute to the social aid obligation of the CPAS that created them.
- (164) The medical care provided by the IRIS-H is also shaped by the LCH which sets the relevant framework for the organisation of the Belgian hospital sector as a whole. On this basis, all Belgian hospitals, whether public or private, including the IRIS-H are entrusted by the LCH with a basic hospital mission. In particular, Article 2 LCH defines which establishments can be considered as hospitals while Articles 68 to 76 *sexies* LCH set out the conditions for authorisation of hospitals and hospital services (and which are further detailed in implementing decrees that lay down quality conditions, staff requirements, etc.). Articles 23 to 45 LCH determine the requirements concerning the hospital programming mechanism which sets limits to the number of hospital beds, hospital services and certain medical equipment (such as scanners) that can be put and kept in operation. Only authorised hospital services that meet the programming conditions are eligible for public financing. As indicated in the opening decision ⁽¹⁸⁸⁾ and confirmed by the absence of third party comments in this respect, there were and are no doubts with respect to the clarity of the basic hospital mission as defined by the LCH. It is also clear that the IRIS-H fulfil these requirements as they have all the necessary authorisations and their operation is approved under the programming mechanism.
- (165) Beyond the basic hospital mission that is entrusted to all Belgian public and private hospitals the Commission's decision of 28 October 2009 (see above Section 4.1), the General Court's annulment judgment of 7 November 2012 (see above Section 4.2), and the Commission's opening decision of 1 October 2014 (see above Section 4.3), made reference to three additional (or specific) SGEI, in essence relating to (1) universal care; (2) the obligation to provide care at multiple hospital sites; and (3) additional social services, that were only and exclusively entrusted to the IRIS-H. This however does not have to mean that the basic hospital mission and the additional SGEI are necessarily to be assessed in isolation from each other. In this respect, it was mentioned in recital 23 of the opening decision that the Belgian authorities argued that the basic hospital mission is part of, or complementary to, a larger SGEI, namely the obligation to provide social aid as required by the Loi CPAS.

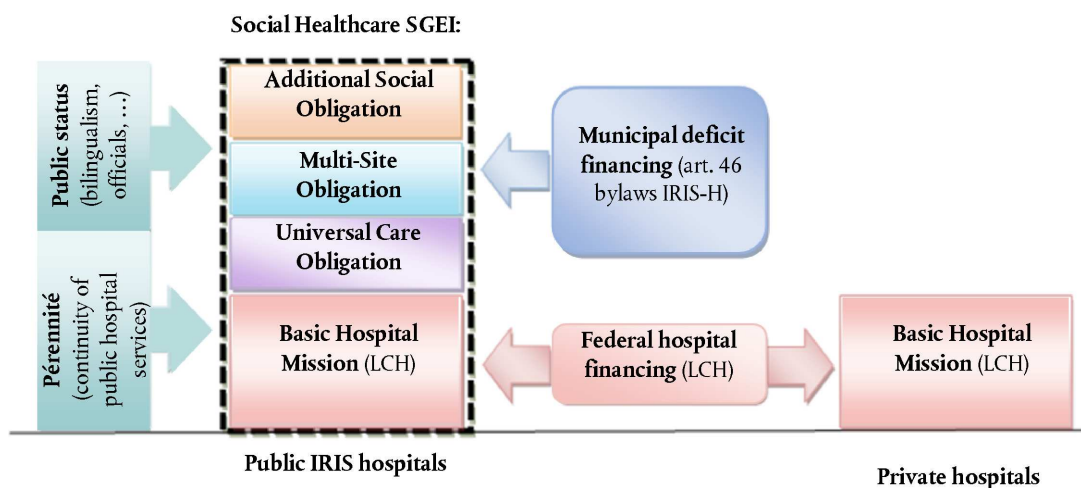
⁽¹⁸⁷⁾ See recital 25 and in particular the mentioning in the cooperation agreement of 19 May 1994 of the need to 'provide guarantees of the **maintenance of [...] the specific character of public hospitals**' (emphasis added). See also the 1996-2001 IRIS strategic plan, in particular: Section 'Structuring axes' (p. 3) 'to continue the dispensation of **medicine devoid of any market logic**' and Section 'Contributing objectives' (p. 54) 'Public hospitals (i.e. the IRIS-H) have the **basic aim of providing a social medicine**; it requires them to **meet the requirements of social missions**' (emphasis added).

⁽¹⁸⁸⁾ See recital 87 of the opening decision.

- (166) Against this backdrop, the Commission considers that the basic hospital mission entrusted to all hospitals under the LCH and the three additional SGEI obligations entrusted ⁽¹⁸⁹⁾ only to the IRIS-H together de facto form one 'social healthcare SGEI' which is specific to the IRIS-H and performed only by them. Looking at the reality of all SGEI obligations entrusted to the IRIS-H and based on its analysis of the content and characteristics of all these obligations, the Commission is of the opinion that it would not be adequate to see the three additional SGEI obligations entrusted at the municipal level in isolation from the basic hospital mission entrusted under the LCH. Indeed, the additional SGEI obligations on the one hand are grounded in and build upon the IRIS-H's basic hospital mission under the LCH and on the other hand also significantly go beyond this basic obligation by obliging the IRIS-H (1) to deliver a wide range of healthcare services to everybody regardless of their ability to pay (universal care, see recitals 170-190); (2) at multiple hospital sites (ensuring proximity care, see recitals 191-204); while (3) attaching special attention to the social needs of the patients (via additional social services, see recitals 205-214). In relation to the basic hospital mission entrusted under the LCH (see recital 164), the three additional obligations cannot be considered standalone activities, as is clear from the fact that these obligations would never have been entrusted without the foundational obligation under the LCH to provide the basic hospital mission. Finally, this approach is to some extent also confirmed by the complainants when making the argument (see recital 71) that the additional social services cannot be separated from a broader healthcare service.
- (167) With regard to the approach developed in the foregoing (see recitals 162-166), the Commission would like to underline the following three points. First, the social healthcare SGEI which is performed by the IRIS-H consists of no more than the basic hospital mission entrusted to them (see recital 164) and the three additional SGEI obligations entrusted to them (see recitals 170 et seq.). Second, as will be demonstrated below, the IRIS-H and the Brussels private hospitals are not in a comparable situation in particular because only the IRIS-H are entrusted with the three additional SGEI obligations (see recitals 170 et seq.) and hence only the IRIS-H perform the social healthcare SGEI as defined above (see recitals 166-167). Third, the IRIS-H are also subject to constraints affecting the performance of the social healthcare SGEI, i.e. their public status (see recital 42), and the necessity to ensure the continuity (*pérennité*, see recitals 91 and 168) of the provision of this SGEI. Figure 2 below illustrates these two points.

Figure 2

Obligations, constraints and public financing mechanisms applicable to the public IRIS hospitals respectively private hospitals



⁽¹⁸⁹⁾ For details of the entrustments for these three obligations see recital 170 et seq.

(168) Since the three additional SGEI obligations go further than the minimum requirements that apply to all hospitals (public or private in Belgium) they lead to costs which are not or only partially covered by the BMF (see Section 2.5.1) and the social security system. Combined with the higher costs that follow from their public status (public servants, bilingualism, etc., see also recital 42) this explains why the IRIS-H have reported deficits for most of the years in the period 1996-2014. Combined, the accounting deficits of the IRIS-H over the period 1996-2014 amount to approximately EUR 250 million (see recital 234). The respective Brussels CPAS and municipalities want and have ⁽¹⁹⁰⁾ to guarantee the continuity (*pérennité*) of their IRIS-H to ensure that the social healthcare SGEI is provided and the social aid obligation of the CPAS is fulfilled (see also Section 2.2). This is why they give a full deficit cover, which compensates the residual costs of the social healthcare SGEI (consisting of the basic hospital mission and the three additional SGEI obligations) ⁽¹⁹¹⁾, hence ensuring the *pérennité* of the IRIS-H (see recital 91). In doing so, the deficit compensation does not distinguish between separate SGEI obligations. Against this backdrop it is appropriate to conduct the overcompensation tests that are described below (see Tables 9 to 13 in Section 7.3.5) on a global basis (i.e. for the different SGEI combined).

(169) As explained in recitals 165-167, the Commission has come to the conclusion that the additional obligations of the IRIS-H are to be considered together with their basic hospital mission as *de facto* constituting one social healthcare SGEI. While the basic hospital mission has been defined above (see recital 164) the exact content of each of the additional SGEI obligations is defined in the remainder of this section. Furthermore, it is also pointed out how these additional SGEI obligations are linked with each other and how they contribute to the social healthcare SGEI.

I. Obligation to treat all patients in all circumstances regardless of their ability to pay (universal care obligation)

(170) According to the Belgian authorities, the IRIS-H have the obligation to treat all patients, even if they are not able to pay and/or are uninsured, in all circumstances including situations where patients do not require urgent medical care. The complainants put into doubt that such an obligation applies to the IRIS-H and claim that the Brussels private hospitals cannot refuse patients and in fact treat a large number of 'social patients'. To support their claims, the complainants argue that the LCH entrusts all hospitals with the same hospital mission and, as stated in paragraph 150 of the annulment judgment of 7 November 2012, also refer to the general principle of non-discrimination which would prohibit them from selecting patients according to their ideological, philosophical or religious beliefs or their situation of poverty. According to them, public and private hospitals have the same obligation to treat patients in both emergency and 'post-emergency' circumstances.

(171) First and foremost, the Commission observes that the LCH does not contain any wording that can be interpreted as obliging hospitals (whether public or private) to treat patients in all circumstances and regardless of their ability to pay. However, under Belgian law there exists a general obligation to assist persons in danger. As pointed out by the Belgian authorities, under Article 422 *ter* of the Belgian Criminal Code, this obligation applies in emergency situations, and particularly in medical emergencies of a life-threatening nature. Hospitals are therefore required to provide assistance in cases of medical emergency, according to their organisation and available expertise. Both public and private hospitals are subject to this obligation, as indeed is everyone else, by virtue of their duty to assist persons in danger. There is hence no doubt that the Brussels public and private hospitals are

⁽¹⁹⁰⁾ As explained above (see recitals 83 and 91), in line with the jurisprudence of the Belgian Council of State, as long as the medical and social needs for which the IRIS-H were created to meet exist, the public authorities cannot close the IRIS-H nor transfer them to a private owner.

⁽¹⁹¹⁾ The costs of the public status of the IRIS-H are reflected in the costs of the basic hospital mission and the additional SGEI obligations and hence may contribute to the deficits of these activities.

obliged to treat patients in emergency situations regardless of their ability to pay. In a similar vein, the deontology code that applies to doctors explicitly allows them to refuse patients with the exception of emergency situations ⁽¹⁹²⁾.

- (172) Second, the complainants referred to a judgment by the Brussels Court of First Instance ⁽¹⁹³⁾, to justify that there is no difference between public hospitals and private hospitals with regard to the treatment of 'social patients', whether in an 'emergency' or 'post emergency' situation. This judgment concerns a very specific case of urgent medical aid which the CPAS have to provide on the basis of Article 57(2) Loi CPAS. The Brussels Court of First Instance noted that the urgent medical aid is in fact never provided by the CPAS itself but by specialised medical services and that nothing can justify making a distinction whether this service is public or private. Nevertheless, the Commission notes that the obligation to provide urgent medical aid applies to the CPAS and not to the hospitals who deliver the care. In the case at hand, an undocumented migrant was urgently admitted by a Brussels private psychiatric hospital which requested the CPAS to pay for this urgent medical aid due to the migrant's manifest state of poverty. The Brussels Court concluded that if a CPAS does not provide the urgent medical aid in a hospital it manages it must pay the costs of care provided by a private hospital where the emergency services due to the urgency had decided to take the patient to a private hospital. This judgment clearly concerns an exceptional situation which derogates from the normal framework for social assistance in which the CPAS relies on its own (public) hospitals. In the case at hand, this derogation was due to the fact that the public IRIS-H do not provide psychiatric care which was needed in that case. Furthermore, the Brussels Court pointed out that 'if this aid is typically more often provided in an establishment dependent on the relevant CPAS or with which it has concluded an agreement, the person may be admitted to another establishment, owing to the urgency resulting from the situation of the person to be admitted to hospital'. The Brussels Court also noted that if the CPAS concerned (i.e. in the case at hand that of Uccle) had created its own psychiatric hospital or had concluded an agreement with such a hospital, the private hospital in question would not have had to provide care to the undocumented migrant in question but could instead have asked for his transfer to that hospital. Since this was not the case, there was no alternative available and as a result the CPAS was ordered to pay the private hospital for the care provided to the patient. As a result, all that can be concluded from the Brussels Court judgment cited by the complainants is that in some cases, owing to the urgency, private hospitals may also provide urgent medical aid to undocumented migrants and that the CPAS, where their obligation to provide urgent medical aid is discharged in this specific way, have to pay these private hospitals. Therefore, the fact that in a limited number ⁽¹⁹⁴⁾ of cases urgent medical aid can be provided by the Brussels private hospitals cannot be interpreted as a general obligation for these hospitals to treat all patients regardless of their ability to pay.

- (173) Third, with regard to the principle of non-discrimination (mentioned by the complainants, see recital 170) it is clear that no hospital in Belgium is allowed to discriminate based on a patient's wealth (and hence on the pure fact that they are rich or poor) nor on any other personal criterion (e.g. religion or ethnic background). However, in a non-emergency situation, the non-discrimination principle cannot force hospitals to provide care for free if it is clearly foreseeable that a patient will not be able to pay. If these conditions are fulfilled in non-emergency situations, there is an objective justification for hospitals to differentiate by refusing these patients ⁽¹⁹⁵⁾. As indicated above (see recital 171) the deontology code that applies to Belgian doctors explicitly allows them to refuse patients in non-emergency situations. A survey of debt counsellors ⁽¹⁹⁶⁾ furthermore indicates that doctors and hospitals sometimes refuse patients who had difficulties paying for treatment in the past. In this context, it is worth pointing out that hospitals do not per se bluntly refuse patients but request them to pay an advance which can be a deterrent for those who are poor. There is also anecdotal evidence suggesting that private hospitals

⁽¹⁹²⁾ See in particular Article 28 of the Code of the Medical Deontology prepared by the National Council of the Order of Doctors (version of 27 July 2015).

⁽¹⁹³⁾ See footnote 120.

⁽¹⁹⁴⁾ Indeed, the figures provided by the Belgian authorities show that in over 85 % of the cases in the Brussels Capital Region urgent medical aid is provided by the IRIS-H. This figure has to be contrasted with the fact that the IRIS-H only operate about 35 % of the number of hospital beds in the Region (see also footnote 3). The remaining cases are treated by other care providers, including general practitioners and private hospitals. Among others this may concern psychiatric care as in the case described in recital 172 as the IRIS-H do not provide this type of care.

⁽¹⁹⁵⁾ A similar justification could be invoked, e.g. by a postal operator fulfilling the universal postal service. This operator is entrusted with an SGEI but cannot be obliged to transport letters for free if the client cannot or will not pay for this service.

⁽¹⁹⁶⁾ See the study published in 2008 by Verbruikerssateljee with the title '*Is uw portemonnee ook ziek? — Een onderzoek naar medische kosten en schulden*'.

sometimes refer patients to a CPAS hospital for treatment ⁽¹⁹⁷⁾. For these reasons, in 2013 a law was proposed (but not adopted) in the Belgian Senate to exclude the refusal of healthcare provision due to the financial difficulties of patients and which would also prohibit charging advances ⁽¹⁹⁸⁾. The non-discrimination principle can hence not be invoked as entrusting all Belgian hospitals (public and private) with an obligation to treat all patients in all circumstances (i.e. outside emergency situations) even if patients cannot pay for the treatment.

- (174) From the above, the Commission concludes that it is appropriate to distinguish between emergency and non-emergency situations. In emergency situations, public and private hospitals are equally subject to the general obligation (based on the Belgian Criminal Code) to treat patients in a situation of medical emergency. However, there is no legal basis which obliges or entrusts the private hospitals to treat patients also in non-emergency situations and regardless of their ability to pay. Indeed, neither the LCH nor the Criminal Code contain such an obligation and the non-discrimination principle can also not be considered as entrusting such an obligation. Finally, the obligation to provide urgent medical aid to undocumented migrants applies to the CPAS, not to the hospitals that deliver such care.

The universal care obligation incumbent on the IRIS-H

- (175) In contrast to the private hospitals, however, the IRIS-H are obliged ⁽¹⁹⁹⁾ to treat all patients in all circumstances, including in non-emergency situations, regardless of patients' ability to pay and/or their insurance status on the basis of the specific rules applying only to the IRIS-H, namely their bylaws and the IRIS strategic plans as specified below. As explained above (see recital 24), the IRIS-H were established by the CPAS to allow the latter to fulfil their task to provide social aid to everyone who needs it. The CPAS are obliged to provide such aid (including medical and socio-medical care) to all individuals and families who require it ⁽²⁰⁰⁾. The CPAS provide their services for free and were created in particular to help the poor and needy. In this context, Article 5 of the IRIS-H bylaws states:

'(1) Without prejudice to the competences of the IRIS umbrella association and the competences of IRIS-Achats [procurement branch] and of any other bodies that the umbrella association might set up pursuant to Article 135 undecies of the Organic Law of 8 July 1976 on Public Social Assistance Centres and in accordance with the laws and regulations, the association shall have the most extensive powers in the **exercise of its hospital mission**.

It shall exercise that mission with a view, firstly, to **providing quality medical care at optimum cost for everyone, irrespective of their income, insurability, origins and philosophical beliefs**, and, secondly, to establishing a sustainable financial equilibrium for the association' ⁽²⁰¹⁾.

- (176) Likewise, the introduction to the IRIS strategic plan 1996-2001 mentions:

'In order to fulfil its social task at any moment, the public hospitals of the IRIS network will offer a range of services **guaranteeing to everyone the best quality care at generally acceptable financial conditions for all** and will be **accessible to all patients, regardless of their income, their insurability**, their origins and their ideological convictions' ⁽²⁰²⁾.

⁽¹⁹⁷⁾ *Ibid.*

⁽¹⁹⁸⁾ Belgian Senate meeting of 16 July 2013, Proposal for a law to improve the accessibility of healthcare by Mrs Leona Detiège et al. The proposal expired due to the 2014 Federal elections.

⁽¹⁹⁹⁾ In practice, the hospitals are responsible for the admission of patients (both for consultations and hospitalisations), for the invoicing and for the follow-up in case of non-payment. The majority of the doctors in the CHU Saint-Pierre, the CHU Brugmann, HUDERF, and the Institut Bordet receive a salary while the remaining doctors are paid based on the invoices for the treatment they provide independently of whether the patient pays. As a result, none of the doctors in these hospitals has any reason to refuse patients who cannot pay. The doctors working for the ISH have to respect the general rules of the hospital during at least 80 % of their time while they can choose to run a private practice for maximum 20 % of the time. During the 80 %, the doctors have to apply the INAMI tariffs and work on the basis of the principle that all patients have to be treated in line with the obligation of the IRIS-H. In this way, the ISH guarantee that all patients are treated regardless of their ability to pay.

⁽²⁰⁰⁾ Article 57(2) Loi CPAS restricts the task of the CPAS in two specific circumstances: i.e. for foreigners residing illegally in Belgium (i.e. the undocumented migrants) and for children of such foreigners.

⁽²⁰¹⁾ Emphasis added.

⁽²⁰²⁾ Section 'General objectives of the strategic plan' (p. 2). Emphasis added.

(177) That same introduction continues:

'The **primary objective** of the IRIS plan is to maintain a reinforced public hospital network in Brussels that is **accessible to all patients, regardless of their income, their insurability**, their origins and their ideological and philosophical convictions' ⁽²⁰³⁾.

(178) In another section of this plan it is noted that the IRIS patient charter guarantees:

'**access for all patients, without distinction as to their origins, income, philosophical and ideological convictions, their situation of insurability**' ⁽²⁰⁴⁾.

(179) Furthermore, the IRIS strategic plan 1996-2001 has a subsection 2.5.4 entitled '*Prise en charge et traitement de toute personne se présentant dans un des hôpitaux du réseau iris*' which contains the following statements:

'Public hospitals [i.e. the IRIS-H] have the basic aim of **providing a social medicine**; it requires them to meet the requirements of social missions, and this **even if this function is not recognised in the legislative and regulatory framework governing the hospital sector**.

The role of the public hospitals is **to admit and treat all patients** irrespective of their origins, circumstances, cultures, beliefs and pathologies. Hence, since they are public, our hospitals must adhere to the principles of universality, equality, continuity and change.

1. **The universality principle requires that all patients be admitted, whoever they may be. The hospital must therefore provide treatment at the highest possible level in order to be able to meet the needs of all.**

2. The equality principle, a constitutional right, requires that everyone be admitted without any discrimination. [...] ⁽²⁰⁵⁾

(180) From the above it is clear that patients' ability to pay and their insurance status are not considered when admitting patients to the IRIS-H so that access to healthcare is guaranteed for all including in non-emergency situations. Several elements in the IRIS 1996-2001 strategic plan also demonstrate the social nature of the hospital care provided by the IRIS-H (e.g. 'to continue the dispensation of **medicine devoid of any market logic**' ⁽²⁰⁶⁾) and the strong desire to offer quality care to all layers of the Brussels population, in particular to the poorest ones ⁽²⁰⁷⁾.

(181) The IRIS strategic plan covering the period 2002-2014 repeats some of the key principles (access for all patients, increasing accessibility for the poor) among others by quoting Article 5 of the IRIS-H bylaws ⁽²⁰⁸⁾ (see also recital 175) and the primary objective of the IRIS strategic plan for the period 1996-2001 ⁽²⁰⁹⁾ (see recital 177), and by also referring to the IRIS patient charter ⁽²¹⁰⁾ (see recital 178) and adds:

'The public services are to be defined on the basis of three fundamental principles, universality, equality and continuity. **On the basis of** those three principles and **their public hospital status**, hospitals in the IRIS network:

— will **accept all patients**, whoever they may be,

⁽²⁰³⁾ *Ibid.*

⁽²⁰⁴⁾ Section 'Contributing objectives' (p. 52). Emphasis added.

⁽²⁰⁵⁾ *Ibid.*

⁽²⁰⁶⁾ Section 'Structuring axes' (p. 3). Emphasis added.

⁽²⁰⁷⁾ See to this extent Section 'Contributing objectives' (p. 74); to increase our accessibility to all strata of the population, and **in particular the least favoured** (emphasis added).

⁽²⁰⁸⁾ See Section 'Introduction' (p. 7).

⁽²⁰⁹⁾ *Ibid.* (p. 10).

⁽²¹⁰⁾ See Section 'The hospital project — A hospital oriented towards the patient' (p. 79).

- will **treat all patients** without discrimination,
- will **undertake to arrange cover for patients and provide any treatment they might require'** ⁽²¹¹⁾.

(182) On the basis of the foregoing, the Commission concludes that the IRIS-H are obliged to treat all patients, in all circumstances (i.e. both in emergency and non-emergency situations), even if they cannot or foreseeably will not be able to pay for their treatment and/or are uninsured. This obligation is laid down and entrusted to the IRIS-H in the above cited bylaws of the IRIS-H and the IRIS strategic plans which are binding on the IRIS-H and which are founded on the obligation in the Loi CPAS to provide social aid (an obligation which is delegated by the CPAS to the IRIS-H by means of these bylaws and strategic plans).

Practical impact of the universal care obligation on the IRIS-H

- (183) The Commission also notes that the above conclusion, namely that the IRIS-H are obliged to treat all patients in all circumstances (i.e. both in emergency and non-emergency situations) and regardless of patients' ability to pay, while the private hospitals are only obliged to treat all patients in emergency situations (i.e. when care is needed immediately for a life-threatening condition), is furthermore reflected in the different profiles of the patients treated by the IRIS-H and the private hospitals in the Brussels Capital Region and their respective pricing policies.
- (184) It should first be noted that the 2002-2014 strategic plan also refers to the lower revenues ⁽²¹²⁾ and higher costs ⁽²¹³⁾ related to the treatment of patients who socioeconomically find themselves in a precarious situation, and who make up a significant part of patients of the IRIS-H. In this context, it is worth pointing out that the IRIS-H have agreed with their doctors that supplements (see recital 46(c) for more background) cannot be charged to CPAS patients and to patients with low incomes (i.e. who are entitled to a higher INAMI reimbursement). In addition, the percentage of admissions to single rooms (i.e. the only rooms where supplements can be charged) is well below the average for the Brussels Capital Region ⁽²¹⁴⁾. The available figures from one of the *mutuelles* ⁽²¹⁵⁾ also show that when a supplement is charged by the IRIS-H, its amount is also much lower than the average for the Region (i.e. between 25 % and 67 % lower). In comparison, for the period in question some private hospitals in Brussels charged their patients on average 180 % more than the prices laid down by the social security system.
- (185) The universal care obligation has been entrusted to the IRIS-H to ensure that patients who cannot pay, have no private insurance and for whom there may not be any (or only partial) reimbursement by the social security, receive the medical care they need. One significant subgroup of these patients concern the abovementioned undocumented migrants as they are not covered by the Belgian social security and usually are not able to pay themselves for care. In 85 % of the cases in the Brussels Capital Region these migrants receive urgent medical aid from the IRIS-H (see recital 172) although these hospitals only operate 35 % of the hospital beds in that Region. Another telling indicator is the Federal Public Service of Health's ranking ⁽²¹⁶⁾ of all Belgian hospitals on the basis of the socioeconomic profile of their patients (see Table 1 below and recital 40 above). This ranking among

⁽²¹¹⁾ See Section 'The specific missions of the public hospital' (p. 85) (emphasis added).

⁽²¹²⁾ See Section 'Introduction' (p. 12) which notes that the IRIS-H treat proportionally less patients to whom the hospital can charge supplements (which are an extra source of revenue for hospitals).

⁽²¹³⁾ See Section 'Introduction' (p. 13) which refers to an estimate (from 2001) of the additional cost of accepting patients with a weak(er) socioeconomic profile. This cost would amount to approximately EUR 10,4 million per year and would be increasing.

⁽²¹⁴⁾ The exception being the Institut Bordet where the percentage is higher than the average which can be explained by the seriousness of the pathology (i.e. cancer) dealt with in this hospital.

⁽²¹⁵⁾ These are the private organisations that are responsible for the reimbursement of medical costs under the Belgian social security system (in particular the mandatory healthcare and invalidity insurance).

⁽²¹⁶⁾ On the basis of this ranking the Section B8 funding of the BMF is allocated (see also recital 189).

others reflects the proportion of patients who cannot pay and are not covered by the social security and for which the CPAS ⁽²¹⁷⁾ can reimburse the costs of treatment (see also recitals 187-188) ⁽²¹⁸⁾. For the period 2007-2013 and for Belgium as a whole, this ranking's top three positions are occupied entirely by the IRIS-H (Institut Bordet and HUDERF being the exceptions due to their specialised nature). For the same period, the Brussels private hospitals on the other hand are not even part of the top 20 positions, which indicates that the average socioeconomic profile of their patients is significantly better than that of the IRIS-H. Even though the criteria used to draw up this ranking do not only concern patients who cannot pay or who are uninsured, it does further put into doubt the complainant's claim that the Brussels private hospitals have an obligation to treat all patients in all circumstances and is further evidence that instead only the IRIS-H have such an obligation. Indeed, if such an obligation applied to the Brussels private hospitals one could expect them to rank higher in the classification.

Table 1

Federal Public Service of Public Health's ranking of the hospitals based on the socioeconomic profile of their patients (*= IRIS-H, += private Brussels hospitals)

	2007	2008	2009	2010	2011	2012	2013
CHU Saint-Pierre*	1st	1st	1st	1st	1st	1st	1st
CHU Brugmann*	2nd	2nd	2nd	2nd	2nd	2nd	2nd
Hôpitaux IRIS Sud*	5th	3rd	3rd	3rd	3rd	3rd	3rd
HUDERF*	62nd	4th	4th	6th	No figures	5th	No figures
Institut Bordet*	23rd	16th	31st	34th	No figures	18th	35th
Clin. Ste Anne St Remi ⁺	52nd	42nd	52nd	62nd	40th	32nd	28th
Clinique Saint Jean ⁺	25th	21st	44th	59th	39th	27th	No figures
Cliniques de l'Europe ⁺	64th	24th	90th	93rd	61st	63rd	62nd
CHIR Edith Cavell ⁺	110th	103rd	108th	105th	No figures	105th	103rd
Clinique Univ. Erasme ⁺	49th	41st	48th	58th	51st	41st	36th
Clinique Univ. St Luc ⁺	93rd	67th	95th	94th	76th	No figures	No figures
UZ Brussel ⁺	80th	74th	91st	97th	78th	No figures	No figures

⁽²¹⁷⁾ The Federal Public Service for Social Integration may then reimburse the CPAS provided that certain conditions are met (see also footnote 258 for the relevant legal basis).

⁽²¹⁸⁾ The ranking also takes into account the proportion of patients who are covered by the social security but who have to pay a lower own contribution to the hospital because they are eligible for either the so-called (1) social maximum invoice; or (2) the maximum invoice for isolated patients with low incomes.

(186) The complainant's reference to a February 2004 publication of the *Mutualités Chrétiennes* (see recital 72), which concerns only the year 2001 and which would show that the private hospitals treat more than 60 % of 'social patients' in the Brussels Capital Region, has to be put into context. The term 'social patients' may create the impression that it concerns patients who cannot pay for treatment and who would therefore all be in scope of the universal care obligation. This is however not the case for the following reasons:

- First and foremost, the publication's definition of 'social patients' ⁽²¹⁹⁾ only concerns persons who are insured by the Belgian social security ⁽²²⁰⁾ and hence does not include those patients who cannot pay and are not covered by the social security. It is however the latter group that benefits most from the universal care obligation and that represents the largest financial burden for the IRIS-H (see also recitals 187-188). Based on the broad definition used in the publication, almost 20 % (respectively about 26 %) of the admissions in private (respectively public) hospitals in Brussels would have concerned 'social patients', and private hospitals would have treated almost 66 % of the total number of these patients in 2001.
- Second, even the 'precarious patients' ⁽²²¹⁾, which the publication defines as a subgroup of the 'social patients', are covered by the social security and there is no reason to assume that they cannot pay their own contribution. However, it could be argued that such 'precarious patients' may have a higher likelihood of not being able to pay the own contribution to the hospital. The publication shows that public hospitals treat about 48 % of 'precarious patients', compared to 52 % being treated by private Brussels hospitals. However, proportionally, the public hospitals treat many more of such patients than would be expected based on their market share (in terms of beds and number of admissions). Indeed, 'precarious patients' would make up 9,5 % of the admissions in public hospitals compared to only 4,1 % in private hospitals.
- Third, in any case, the observation that in 2001 Brussels private hospitals would have treated 52 % (respectively 66 %) of 'precarious' (respectively 'social') patients cannot change the conclusion that only the IRIS-H have a universal care obligation. Indeed, in the absence of any legal obligation for private hospitals to treat all patients regardless of their ability to pay and their insurance status, any possible decision of private hospitals to provide care to 'precarious' or 'social' patients in non-emergency situations would be purely voluntary and could thus be reversed at any moment. Furthermore, the most vulnerable group of patients, i.e. those who are not covered by the social security or any other insurance, are not included in the publication's statistics. This also explains the apparent divergence between the publication's figures for 2001 and the Federal Public Service for Public Health's ranking (see recital 185) for the period 2007-2013. While this Public Service's ranking takes into account the proportion of patients who are not covered by the social security, the publication's statistics only include patients with social security cover.

For all of the above reasons, the Commission considers that the publication of the *Mutualités Chrétiennes* with statistics for the year 2001 cannot be taken as evidence that the IRIS-H would not have a universal care obligation or that the Brussels private hospitals would have a comparable obligation.

(187) The universal care obligation that is entrusted to the IRIS-H ensures that patients facing extreme financial hardship, political refugees, illegal immigrants, etc. receive treatment in all circumstances. If these patients cannot

⁽²¹⁹⁾ The publication of the *Mutualités Chrétiennes* defines social patients as patients who benefit from the 'social franchise' (i.e. pensioners who receive a guaranteed income, those eligible for a higher intervention or invalidity allowance, an integration allowance, higher family allowances, and the long-term unemployed). According to the Belgian authorities the notion of 'social franchise' was abolished already in 1993 and has been replaced in Belgian law by the so-called social maximum invoice.

⁽²²⁰⁾ This is confirmed by the fact that the tables in this publication are based on data from the 'insuring entities' which refers to the organisations, such as the *mutuelles*, that are responsible for the reimbursement of medical costs under the Belgian social security which is governed by the INAMI.

⁽²²¹⁾ The *Mutualités Chrétiennes* publication defines these as patients who are registered with the CPAS.

pay for their treatment and have no insurance cover (neither via the social security nor through private health insurance) the CPAS will only cover these patients' costs provided that certain conditions are met. To lay down the rules that apply for such reimbursement, the IRIS-H and 17 of the 19 CPAS in the Brussels Capital Region have concluded so-called multilateral '*domicile de secours*' conventions. For non-urgent care, the CPAS refer persons to the IRIS-H and provide a written commitment (a so-called *réquisitoire*) that the CPAS will cover the cost of treatment. If patients show this document (*réquisitoire*) the IRIS-H send the invoice directly to the CPAS. For urgent care this procedure can of course not be followed. Instead, the reimbursement by the CPAS is conditional on (i) a medical certificate confirming the need for urgent admission or immediate treatment of the person; and (ii) the person's state of poverty as confirmed by the CPAS using the information collected by the hospital to complete a social inquiry. Collecting the required information is an important task for the social services departments of the IRIS-H (see also recitals 210-211) ⁽²²²⁾.

- (188) Provided that the abovementioned conditions are met (i.e. a *réquisitoire* for non-urgent care and a medical certificate and social inquiry for urgent care), the CPAS reimburses the IRIS-H for the treatment costs of patients who cannot pay for their treatment and have no insurance cover. However, this does not relieve the IRIS-H from the entire burden of the universal care obligation. Indeed, in order to obtain reimbursement by the CPAS, the IRIS-H need to collect information for the social inquiry (which they did for 25 749 cases in 2012). This is one of the reasons why the IRIS-H employ more than twice as many social workers as e.g. university hospitals (see recital 213). The CPAS however do not reimburse the IRIS-H for the cost of collecting the information for the social inquiries ⁽²²³⁾. Furthermore, the CPAS have longer payment delays (sometimes exceeding one year) than the *mutuelles* and insurance companies (both paying within one to two months after receipt of the invoice). As a result, the IRIS-H have to pre-finance these costs for a longer period than for 'regular' patients. On 31 December 2010, the Brussels CPAS owed the IRIS-H almost EUR 35 million (of which about 71 % concerned invoices for 2010, 12 % for 2009 and approx. 13 % for earlier years). Using a nominal annual interest rate of 2 %, the IRIS-H estimated that the cost of the longer payment delays amounted to almost EUR 700 000 at that time ⁽²²⁴⁾. Finally, not all persons who may experience difficulties to pay their bill are eligible for CPAS cover ⁽²²⁵⁾. On the basis of their universal care obligation, the IRIS-H nevertheless treat patients for which they do not have the commitment that the CPAS will pay the costs. In such a situation, the IRIS-H send an invoice to patients who in some cases will not be able to pay. The result is that the IRIS-H have to deal with a level of irrecoverable debt which is much higher than that of other public hospitals and of private hospitals in Belgium ⁽²²⁶⁾. The IRIS-H estimated that in 2010 their amount of debt written off exceeded the average applicable for public hospitals in Belgium by approx. EUR [...] million.

- (189) Finally, it is important to put into context the funding provided under Section B8 of the BMF which is awarded to hospitals with a weak socioeconomic patient profile. This limited Federal financing is meant to compensate some of the costs related to 'social patients' (e.g. due to the fact that on average such patients stay longer in the

⁽²²²⁾ In this context, it is worth pointing out that while the IRIS-H provide the input for the social inquiry, it is the CPAS who decide whether or not a person qualifies for reimbursement of the costs of treatment. The '*domicile de secours*' convention specifies in this respect that the IRIS-H 'shall collect, to the extent possible, the first building blocks for the social inquiry and shall send them to the CPAS'.

⁽²²³⁾ Since the collection of information for the social inquiries is just one of the tasks of the IRIS-H's social services departments, this cost is part of the overall burden of the extensive social services obligation of the IRIS-H which will be discussed below (see recital 213).

⁽²²⁴⁾ The Commission notes that the interest rate applied by the IRIS-H seems to be in line with the market interest rates at that time (i.e. beginning of 2011). Currently (in 2016), interest rates are much lower which reduces the cost for the IRIS-H. Nevertheless, the longer payment delay is in any case a burden for the IRIS-H as they still need to bridge a liquidity gap between outgoing and incoming payments.

⁽²²⁵⁾ The reimbursement by the CPAS is not automatic for poor patients but the result of a case by case assessment by each CPAS on the basis of the social inquiry (for urgent care). In this context, the Belgian authorities note that in the first three quarters of 2015, 749 requests for reimbursement by the IRIS-H have been refused by the CPAS representing an unpaid amount of about EUR 3 million. In 2012, the CPAS refused the requested reimbursement by the IRIS-H of invoices for a total amount of EUR 4 174 200. Approximately 80 % of these invoices concerned care for undocumented migrants.

⁽²²⁶⁾ More specifically, a report published by Belfius Bank indicates that in 2010 the net costs of short-term debts written off (i.e. invoices that will not be paid) represent on average 0,28 % of the revenue of private hospitals in Belgium and 0,40 % of the revenue of public hospitals in Belgium. In comparison, this cost amounts to 1,22 % of revenue for the IRIS-H or three times the average for public hospitals.

hospital than other patients) but is not compensation for a universal care obligation. The Section B8 financing does not compensate the actual costs incurred by hospitals for the treatment of social patients (e.g. the non-paid invoices by social patients, the need to have additional social workers). Instead, a fixed budget (i.e. approx. EUR 25 million per year for Belgium as a whole) is allocated on the basis of the ranking of the hospitals' socio-economic patient profile (see recital 185). Since the top three positions in this ranking are occupied by the IRIS-H these hospitals also receive a larger proportion of the Section B8 financing in comparison to lower-ranked hospitals (such as the Brussels private hospitals). The reason why both public and private hospitals are in principle eligible for this financing is that even in the absence of a universal care obligation like the one entrusted to the IRIS-H, hospitals can freely choose to treat social patients. They may do so because not all social patients are unable to pay or are uninsured. In fact, for social patients that are covered by the social security often lower tariffs apply and the INAMI pays a larger share which reduces the financial risk for the hospital. It is also the case that not every CPAS in Belgium has chosen to establish their own hospital. Therefore, in order to fulfil their social aid obligation, the CPAS can rely on private hospitals. In such situations, a private hospital would naturally treat a number of social patients and could also be eligible for the Section B8 financing foreseen by the BMF. However, in the Brussels Capital Region the CPAS can rely on the public IRIS-H which explains why the ranking in recital 185 shows that the average socioeconomic profile of the Brussels private hospitals' patients is significantly better than that of the IRIS-H. For all these reasons, the Section B8 BMF funding cannot be interpreted as an indication of the existence of a universal care obligation for all Belgian hospitals.

Conclusion on the universal care obligation of the IRIS-H

- (190) Based on the above, the Commission concludes that the universal care obligation only applies to the IRIS-H, is clearly entrusted and defined by the IRIS-H bylaws and the IRIS strategic plans in line with the requirements of the Loi CPAS (see recitals 29-30), and is also reflected in the ranking of the hospitals' socioeconomic patient profile (see recital 185). This obligation ensures that poor people in the Brussels Capital Region receive adequate medical treatment even if they cannot pay including in non-emergency situations. In this way, the IRIS-H provide social healthcare fulfilling the needs of the local population. As explained in the previous recital, only part of the burden of this obligation is covered directly (e.g. via reimbursement of treatment costs by the CPAS). The remaining burden is therefore covered via the deficit compensation at issue in this decision.

II. Obligation to offer a full range of basic hospital services at multiple sites

- (191) The Belgian authorities consider that the IRIS-H also have the specific obligation to offer a full range of basic hospital services at multiple sites in the Brussels Capital Region. According to the complainants it is however not clear what the obligation to offer complete 'multi-site' basic hospital care activities comprises, nor to what extent this obligation imposes additional burdens on the IRIS-H. The complainants however do not claim that the Brussels private hospitals have such an obligation.
- (192) The Commission notes that the LCH does not require hospitals (public or private) to operate on multiple sites. Instead, the hospital programming mechanism determines the maximum number of hospital beds that can be offered in each Region of Belgium. For the Brussels Capital Region, the number of (general) hospital beds is limited to approximately 7 260 and each hospital in Brussels has the permission to operate a number of beds within this limit. In principle, if a hospital's capacity has been approved under the programming system, the hospital can decide freely whether and to what extent to group these beds on one site or to distribute them over multiple sites in that particular region. Likewise, it can decide whether or not to duplicate certain departments or instead to only offer distinct types of care at each of its respective sites. In this context, some of the Brussels

private hospitals have freely chosen to operate at several sites while others operate on just one site ⁽²²⁷⁾. However, private hospitals can decide to regroup their beds and departments to one site at any time ⁽²²⁸⁾. It is also worth noting that, within the limits set by the programming mechanism ⁽²²⁹⁾, private hospitals are also free to choose the types of care they offer which gives them the possibility to specialise in the most profitable types of healthcare ⁽²³⁰⁾.

The multi-site obligation incumbent on the IRIS-H

- (193) With regard to the IRIS-H, the municipalities and CPAS prioritised the maintenance of local care provision over the concentration of hospital beds. They specifically chose to offer a full range of basic treatments on all sites which due to the necessary duplication of infrastructure, equipment and activities led to higher costs. It is on that basis that in the 1995 Brussels hospital restructuring the CPAS and the municipalities deliberately chose to retain the existing multi-site local hospital services offering a full range of treatments, given the needs of the population. They found that the local medico-social need prompting the initial creation of the public hospitals had not ceased to exist. In this context, it must be noted that most of the IRIS-H sites are located in the poorest municipalities of the Brussels Capital Region (see also recital 202). The public authorities hence willingly renounced efficiency gains, to the detriment of their purely financial interest, and chose to keep all existing hospital sites even though they knew that the federal hospital financing measures would not cover all the costs (e.g. due to duplication of infrastructure and operating costs, see also recital 203). This choice is reflected in the IRIS strategic plans and therefore obliges the IRIS-H to maintain all hospital sites so that patients can receive all basic treatments as close as possible to their homes.

- (194) In particular, the structuring axes section of the 1996-2001 IRIS strategic plan refers to:

'Maintaining a decentralised hospital activity and a large outpatient coverage. **The activity will be maintained on the nine sites'** ⁽²³¹⁾ ⁽²³²⁾.

[...]

'Maintaining the core activity on the different sites. Patients, especially elderly patients, can hence **continue to receive hospital care at a reasonable distance from their home'** ⁽²³³⁾.

- (195) The 1996-2001 strategic plan also emphasises that the IRIS-H mainly treat patients who live in their near vicinity and are hence referred to as 'proximity hospitals' ⁽²³⁴⁾. In addition, the IRIS-H want 'to increase the adequacy of [their] services to the **needs of the city's population**, [...] and **strengthen** [their] **accessibility** to all sections of the population, **in particular the less advantaged'** ⁽²³⁵⁾.

- (196) The 2002-2014 strategic plan adds to the above the following:

'Iris adopts the principle of a **patient-centred organisation**, enclosed in a public network of institutions working together between them in order to ensure the **provision of proximity and specialised care'** ⁽²³⁶⁾.

⁽²²⁷⁾ For instance: the private hospital *Cliniques de l'Europe* has a site in Uccle and one in Etterbeek while the private *Cliniques universitaires Saint-Luc* only has a site in Woluwe-Saint-Lambert.

⁽²²⁸⁾ Such a choice could of course entail costs which would have to be offset by efficiency gains or which could be justified by other considerations that the private hospitals' management would deem relevant.

⁽²²⁹⁾ The programming mechanism not only determines the total number of hospital beds per Region but also sets limits per type of service (e.g. maternity, geriatrics, paediatrics, psychiatrics, etc.).

⁽²³⁰⁾ For example, not all private hospitals offer geriatric services which are less profitable.

⁽²³¹⁾ See Section 'Structuring axes' (p. 6). Emphasis added.

⁽²³²⁾ The strategic plan makes reference to nine sites instead of eleven (the current number of sites) because there are two hospital campuses that each house two hospitals, i.e. HUDERF and CHU-B at the *Victor Horta* site in Laeken and IB and CHU-SP at the *Porte de Hal* site in the City of Brussels.

⁽²³³⁾ See Section 'Structuring axes' (p. 10). Emphasis added.

⁽²³⁴⁾ See Section 'Context and environment' (p. 21): '[...] the public hospitals [i.e. the IRIS-H], of which the activity is for at least 80 % a basic activity, are proximity hospitals, attracting a large part of their patients from the municipality in which they are located or from the surrounding neighbourhoods.'

⁽²³⁵⁾ See Section 'Contributing objectives' (p. 74). Emphasis added.

⁽²³⁶⁾ See Section 'The hospital project' (p. 36). Emphasis added.

(197) This strategic plan continues with respect to proximity care as follows:

‘Taking into account the **geographical distribution of the IRIS sites**, their impact on the general population coverage, sometimes in social destitution, the first developed objective is **to ensure at each site quality proximity medicine that is effective and accessible**.

The IRIS hospitals — apart from the Institut Bordet and the Queen Fabiola Children’s University Hospital (HUDERF) ⁽²³⁷⁾ which are mono-specialised reference hospitals — have as their primary vocation **to offer proximity medicine responding to a local demand by patients living in neighbouring municipalities**’ ⁽²³⁸⁾.

(198) The 2002-2014 IRIS strategic plan also specifies that beyond proximity medicine relating to basic care, the IRIS-H also provide specialised care (i.e. a wider and/or more developed range of treatments) ⁽²³⁹⁾. Such care is however not provided on all sites (although it is usually offered on more than one site) and is subject to planning at the level of the IRIS network ⁽²⁴⁰⁾. The goal is always to guarantee to the Brussels population the accessibility for all at the optimal level of care provision (via proximity medicine or via specialised care) ⁽²⁴¹⁾. This strategic plan also contains detailed tables which specify the types of basic care and specialised care that are offered on each of the IRIS-H sites. Basic care activities are labelled as ‘level 1 — proximity level’ while the specialised care activities are marked as ‘level 2 — specialisation level’ and ‘level 3 — reference level’ ⁽²⁴²⁾. It is hence very clear for the IRIS-H which types of care they have to provide at each of their sites.

(199) In order to ensure that each IRIS-H is fully aware of and managed in the light of the medico-social needs of the local population, the creation of the IRIS-H was also specifically linked to the maintenance of a ‘local basis’ for the public hospital services. This is reflected in the restructuring agreement backed by the cooperation agreement of 19 May 1994 ⁽²⁴³⁾ and also in the composition of the management bodies of the IRIS-H ⁽²⁴⁴⁾. More particular, in accordance with Article 11 of the bylaws, the majority of the members of the General Assembly of the IRIS-H associations are elected by the municipal council and the Social Services Council (organised at municipal level) while the Mayor and the Chair of the CPAS are appointed as ex-officio members. Likewise, 10 of the 14 members of the Administrative Council are appointed by members of the public authorities’ delegation to the General Assembly (as required by Article 27 of the bylaws).

(200) The intention to manage the IRIS-H in the light of the medico-social needs of the local population was confirmed by the IRIS network’s Administrative Council meeting on 20 November 1996, at which an amendment to the 1996-2001 strategic plan was adopted, explicitly stating in that connection:

‘That series of constraints, necessitating restructuring, must be addressed in the wider context of our strategic objectives, which may be stated as follows:

- the IRIS public hospitals network must be a key element in the future of the Brussels healthcare system,
- our hospitals must adapt to changes in the **needs of the Brussels population**,

⁽²³⁷⁾ It has to be noted that these two specialised hospitals each share a campus with another IRIS-H (see footnote 232) which ensures that all basic care services are offered at the respective sites. Footnote added.

⁽²³⁸⁾ See Section ‘The hospital project’ (p. 53). Emphasis added.

⁽²³⁹⁾ In this way, the Institut Bordet and HUDERF which mainly offer specialised care complement the other three IRIS-H in order to meet the healthcare needs of the local population.

⁽²⁴⁰⁾ See Section ‘The hospital project’ (pp. 53-54).

⁽²⁴¹⁾ See Section ‘The hospital project’ (p. 62).

⁽²⁴²⁾ See Section ‘The hospital project’ for a description of these levels (p. 37) and the tables (pp. 55-59).

⁽²⁴³⁾ Article 2 of the cooperation agreement between the Federal State, the Brussels Capital Region and the *Commission Communautaire commune* states to this extent: ‘This restructuring agreement must satisfy the following conditions: 1. to provide guarantees of the **maintenance of**, on the one hand, **the specific character of public hospitals, inter alia**, by the choice of legal structures and coordination ensuring predominance of the public sector in the management bodies and decision-making procedures, and, on the other hand, **a local basis, through greater representation of directly elected members in the composition of the management bodies**’ (emphasis added).

⁽²⁴⁴⁾ According to Article 125 of the Loi CPAS the public law entities must hold at least half the votes in the various hospital administration and management bodies and in the IRIS umbrella structure.

- the **network must be restructured for and around patients**,
- the modernisation of the network must be based on a new momentum for the hospital community generally and the medical community in particular.’

(201) This amendment goes on to state:

‘In that context, the restructuring must guarantee:

- **the continuation of medical and treatment activities at each hospital site, consistent with our mission to provide local medical services**,
- the pursuit of financial equilibrium aims,
- harmonious development of the network in order to balance the general and specific interests of each entity,
- greater coordination and collaboration between entities in the network,
- **accessibility of the network and maintenance of its public character**,
- [...]’ ⁽²⁴⁵⁾

Genuine SGEI nature of the multi-site obligation on the IRIS-H

(202) The Commission also considered the complainant’s argument in the context of the case before the GC (see Section 4.2) that the local healthcare needs have to be seen in the context of the large number of public and private hospitals present in the Brussels Capital Region. As explained above, the hospital programming mechanism set the maximum number of general hospital beds in the Brussels Capital Region at 7 260 with the objective to avoid excess supply of medical services. This number of beds is provided jointly by public and private hospitals to meet the need for hospital care in the Brussels Capital Region. However, the programming mechanism only takes into consideration the medical needs at regional level and does not take into account the social needs of a particular population and the specific social conditions in a geographical area. Those social needs are assessed under the social aid policy of the CPAS (i.e. at municipal level). The predecessors of the IRIS-H were established to meet social needs and following the restructuring the different sites of the IRIS-H were maintained because they continue to fulfil a genuine social need (see recitals 82-84 and 91). Indeed, it is because only the IRIS-H perform the social healthcare SGEI that there is also the necessity and obligation to have multiple sites. For poor inhabitants of the Brussels Capital Region it is not only important to be able to go to a hospital close to his or her home but also to be sure that they will receive treatment even if they cannot pay and to be able to request support from the social services department. By obliging the IRIS-H to maintain their different sites, the Brussels municipalities and CPAS want to ensure that social healthcare is provided as close as possible to where there is a need. In this context, it is worth pointing out that ten of the eleven IRIS-H sites are located in municipalities where the average income does not exceed the median ⁽²⁴⁶⁾ for the Brussels Capital Region. On the contrary, five of the eleven private hospital sites are located in municipalities where the average income is higher than this median ⁽²⁴⁷⁾. From the map below ⁽²⁴⁸⁾ (see Figure 3) there also appears to be no significant geographical overlap between the public (dashed line circles) and private general and university hospitals (full line circles) in the Brussels Capital Region. This suggests that the pure fact that there is a large number of hospitals active in the Brussels Capital Region is not sufficient to ensure accessibility to hospital care for all inhabitants.

⁽²⁴⁵⁾ Emphasis added.

⁽²⁴⁶⁾ The median of average incomes for the year 2012 in the 19 municipalities of the Brussels Capital Region amounted to EUR 13 746 per inhabitant. The remaining IRIS-H site is located in Ixelles where the average income is EUR 14 513 which lies between the median and third quartile (i.e. 75th percentile) of the Brussels Capital Region. Source: Centre for Information, Documentation and Research on Brussels (<http://www.briobrusssel.be/ned/webpage.asp?WebpageId=345>).

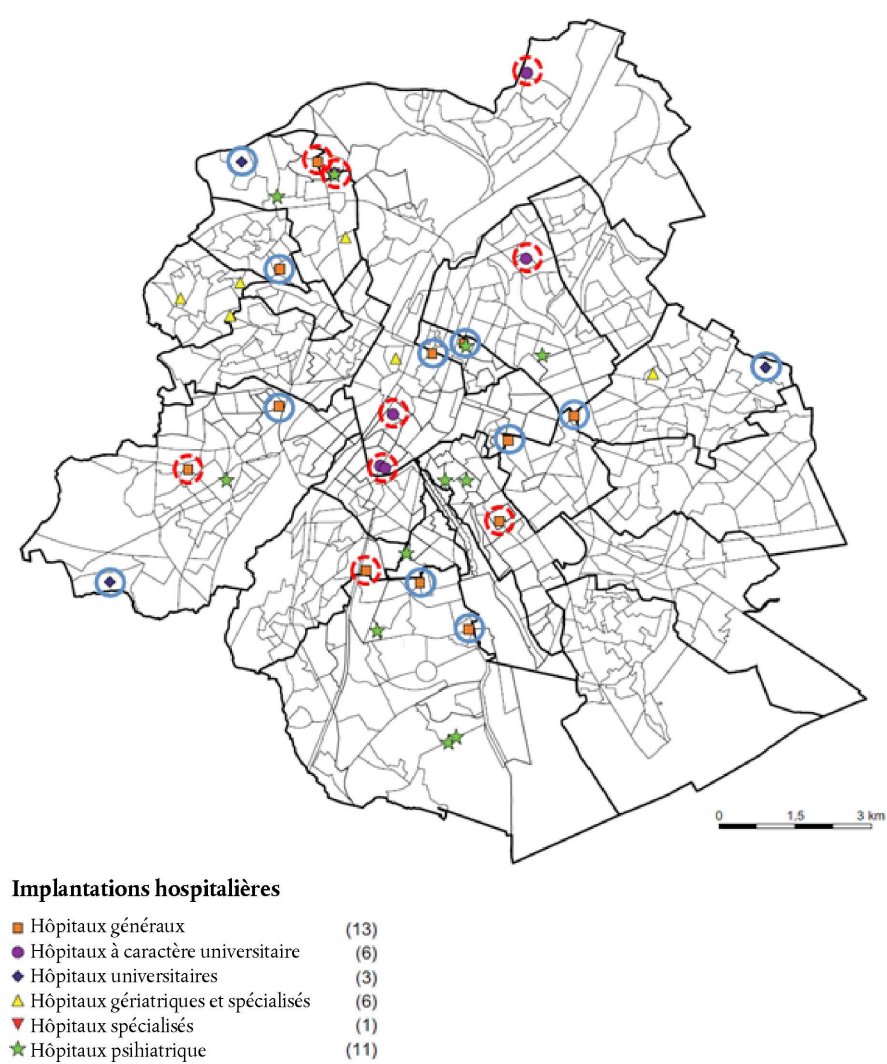
⁽²⁴⁷⁾ Three of those five private hospital sites are located in municipalities where the average income per inhabitant exceeds the third quartile (i.e. 75th percentile) of the Brussels Capital Region.

⁽²⁴⁸⁾ The original map was published in the *Tableau de bord de la santé en Région bruxelloise 2010* and reflects the situation on 1 July 2009. The Commission added the circles and removed one general hospital from the map (Clinique des Deux Alice which was located in Uccle) as it was closed at the end of 2011 (its activities were moved to the Sainte-Elisabeth site of the private *Cliniques de l’Europe*). One of the ISH sites (i.e. Baron Lambert in Etterbeek) is not indicated on the map since it only provides outpatient care and therefore has no hospital beds that are subject to the programming mechanism.

Furthermore, as explained above, the IRIS-H are the only hospitals in the Brussels Capital Region that provide a social healthcare SGEI and the private hospitals can hence not be seen as equivalent when it concerns catering to the social needs of the local population. On the basis of the above, the Commission concludes that the presence of several private hospitals in the Brussels Capital Region is no reason to put into doubt the genuine SGEI nature of the multiple sites obligation that applies to the IRIS-H and not to the Brussels private hospitals, especially in the light of the social healthcare SGEI.

Figure 3

Map of hospital sites in the Brussels Capital Region



Practical impact of the multi-site obligation on the IRIS-H

(203) The multiple sites obligation can also be considered as a burden for the IRIS-H as it requires them to duplicate certain infrastructure and brings higher operating costs. These costs relate mainly to the need to provide each site

with services such as an emergency service, a sterilisation service, a monitoring and security service and its own administration. In fact, the BMF financing (see recital 46(a)) is granted for only one such service for each hospital, irrespective of the number of its sites. The operating costs related to the various areas (maintenance, heating, cleaning, etc.) are added to those additional infrastructure and equipment costs. Based on a study made by the IRIS umbrella organisation in 2009, the costs of the multi-site obligation that were not covered by the BMF financing were estimated at EUR [...] million for 2008 and EUR [...] million for 2009 for the five IRIS-H together.

Conclusion on the multi-site obligation of the IRIS-H

- (204) The Commission concludes that on the basis of the IRIS strategic plans the IRIS-H are entrusted with the clear obligation to (1) maintain all their hospital sites in order to meet the medico-social needs of the respective local populations; and (2) to provide a full range of basic care activities on all these sites. In particular, the IRIS strategic plan lays down the types of activities that are considered as basic care respectively specialised care and indicates for each of the IRIS-H sites what types of care have to be offered. Furthermore, the provisions in the IRIS-H bylaws and the Loi CPAS ensure that the IRIS-H are fully aware of and managed in the light of the medico-social needs of the local population. In addition, the multiple sites obligation goes beyond the requirements of the LCH and the programming mechanisms as the latter does not take into account the social needs of a particular population and the specific social conditions in a geographical area. Private hospitals hence neither are obliged to operate on several sites nor are they required to provide a full range of basic care on each site (in case they choose to have multiple sites). Finally, as explained in the previous recital, the multi-site obligation generates significant costs for the IRIS-H that are not covered by the BMF and hence contribute to the deficit of the IRIS-H.

III. Extensive social services obligation

- (205) Finally, the Belgian authorities consider that the IRIS-H have the obligation to provide extensive social services to patients and their families. According to the complainants the obligation only appears to consist of a higher volume of social services than that provided by other hospitals. In this context, it must be pointed out that neither the LCH nor the conditions for authorisation of hospitals (based on the Royal Decree of 23 October 1964) impose a general obligation to provide social services within a hospital. Only a few isolated rules on specific hospital services (i.e. for geriatric and psychiatric wards ⁽²⁴⁹⁾) stipulate the need for intervention by social workers. In addition, a specific rule for university hospitals only provides that one social worker should be present for every 2 000 admissions ⁽²⁵⁰⁾. Apart from these specific situations, private hospitals have no obligation to provide social services for all their patients. The IRIS-H on the contrary are obliged on the basis of the IRIS strategic plans, to have a social service which helps all patients who need this.

The extensive social services obligation incumbent on the IRIS-H

- (206) The 1996-2001 IRIS strategic plan lays out the general context for the global treatment of patients in the IRIS-H, including psycho-social and environmental aspects:

‘Comprehensive care of patients: The patient cannot be reduced to the medical condition for which he requires care. Certain categories of patients in particular require **comprehensive care, covering** not only purely medical aspects, but **also psychosocial and environmental aspects**: this concerns geriatric patients, paediatric patients, terminally ill patients, psychiatric patients, **socially disadvantaged patients** etc.’ ⁽²⁵¹⁾.

⁽²⁴⁹⁾ For instance Annex 19 to the Royal Decree of 23 October 1964 (Belgisch Staatsblad/Moniteur Belge of 7 November 1964, p. 11709) specifies that for neuropsychiatric services treating adult patients there needs to be at least one social assistant per 120 patients.

⁽²⁵⁰⁾ Royal Decree of 15 December 1978 fixing special requirements for university hospitals, Belgisch Staatsblad/Moniteur Belge of 4 July 1979, p. 7818.

⁽²⁵¹⁾ See Section ‘Structuring axes’ (p. 6). Emphasis added.

(207) The role of the social services and their main tasks are described further in this plan:

'The [IRIS] hospitals must have social services whose main role is to contribute to the welfare of patients, the medical quality and the optimal functioning of the institution. The social service is a colleague of the hospital's manager and partner of all the departments of the hospital. It is responsible for the humanisation of the conditions of a patient's stay in the hospital. It has to **take care of social difficulties of patients ideally before but also during the stay and when leaving the hospital.** It is the privileged link between the hospital and the patient, his family and his environment. To do this, it must:

- have the time and professional capacity to assess the needs of the patient with himself, his family and entourage and with the healthcare teams and to develop with him appropriate responses,
- have access to files regarding the admission and the patient's health which may contain social data which can contribute to the quality of care,
- be kept informed in due time of the date of transfer or exit to implement appropriate arrangements,
- give an opinion on patients with complex profiles and diseases,
- establish, with the financial services, the legal arrangements, given that the limits of its intervention are determined by the professional ethics of patient-centred relationship in all its aspects,
- **coordinate with the CPAS,**
- have knowledge of the existing health and social networks,
- propose improvements of the functioning of the hospital,
- have an infrastructure that guarantees confidentiality of exchanges and data.

The **mission of social medicine** which is the vocation of the public hospitals implies that they fulfil a coordination role among the healthcare stakeholders, that they participate in the health and social networks or even create such networks, and they are directly involved in the creation of IRIS ancillary services **necessary to meet the needs of the population** (*hotel de soins, hotel des familles, palliative care at home, care for drug addicts, homeless, domestic care services, etc.*). They will carry out the accreditation of bodies with whom they will cooperate' ⁽²⁵²⁾.

(208) According to this strategic plan, the social service also plays an important role during the admission of patients:

'The reception should be considered differently according to whether the patient arrives via the emergencies, a consultation or through admissions; the reception must, in any event, ensure discretion and comfort for patients, and to help to allay the patient's concerns and those of his family. The **social services of our hospitals play a crucial role in this respect**' ⁽²⁵³⁾.

(209) The 2002-2014 IRIS strategic plan adds the following to the above:

'Social services are essential in public hospitals to support both in- and out-patients. These involve **assisting patients and their families in resolving and managing administrative, financial, relationship and social problems related to the disease, the hospital stay and treatment,** as well as the new prognosis and circumstances.

The social service:

- accompanies patients in their autonomy and independence,

⁽²⁵²⁾ See Section 'Contributing objectives' (pp. 54-55). Emphasis added.

⁽²⁵³⁾ See 1996-2001 Strategic plan — Section 'Structuring axes' (p. 10). Emphasis added.

- will make sure to incorporate in the overall care the patient's norms, values, and culture, it therefore revolves around administrative assistance, psychosocial support, a role with respect to information, prevention, awareness, collaboration and coordination. The **social services will therefore act at different levels according to whether patients need socio-material psycho-social, or socio-administrative support**,
- requires the technical and interpersonal skills, at the same time conceptual and technical, and also personal and relational qualities.

[...]

In conclusion, **social services have multiple responsibilities:**

- organising the **patient's hospital admission** and making **the best possible arrangements for their discharge to an appropriate place**,
- **helping the patient to obtain social security cover enabling them to meet their medical costs**.

In this respect, the social service and social workers pursue the same objectives and interests as the hospital and their specific activity has **an impact on reducing hospital stays and on the recovery of costs incurred by the hospital'** ⁽²⁵⁴⁾.

- (210) The role of the social services in the recovery of treatment costs from the CPAS (see also recital 187) is also reflected in the subsequent text of the 2002-2014 IRIS strategic plan. In particular, it notes that the tasks of the social services include preparing inquiries into the financial means of the patients:

'The social service establishes an electronic file which can follow the patients throughout the [IRIS] network. It **also carries out the investigation into the financial means** [of the patients], it completes the codes 'V' of the RCM ⁽²⁵⁵⁾ and other records required by the regulations. This [social] file will as soon as possible be linked to the medical file and the central IT systems. The registration of the social file must provide a scoreboard of the social missions of the public [IRIS] hospitals' ⁽²⁵⁶⁾.

- (211) These tasks concern collecting the necessary information for the so-called 'social inquiries' which are necessary to determine whether or not the patients are eligible for CPAS coverage of their medical costs (see also recitals 187-188). More specifically, the hospital's social workers collect the relevant information ⁽²⁵⁷⁾ to allow the CPAS to verify, in line with its legal obligations ⁽²⁵⁸⁾, the indigence of a patient and hence to be able to decide whether or not a reimbursement by the CPAS is justified.

Practical impact of the extensive social services obligation on the IRIS-H

- (212) The staff of the IRIS-H social services departments have received specific training and follow a professional code of ethics taking account of their role as liaison between different services within the hospital (including doctors, nurses, billing and admission) or outside (such as social security cover, home care and support, linguistic and cultural aspects).

⁽²⁵⁴⁾ See Section 'The specific missions of the public hospital' (p. 82). Emphasis added.

⁽²⁵⁵⁾ RCM stands for *résumé clinique minimum* and is a standardised and concise summary of the patient's medical record that general hospitals are required to register since 1990. It is used, among others, to determine the needs for hospital equipment, to define qualitative and quantitative standards for the accreditation of hospitals and their services and to organise hospital funding. The codes 'V' concern factors that influence the patient's health status and contact with health services. These codes can be used to mention the socioeconomic, legal and family issues that can affect the patient's stay.

⁽²⁵⁶⁾ See Section 'The specific missions of the public hospital' (p. 83). Emphasis added.

⁽²⁵⁷⁾ For instance, the social workers in the IRIS-H collected information for 25 749 social inquiries in 2012. This represents approx. 5,4 % of the hospitalised patients in that year.

⁽²⁵⁸⁾ This obligation stems from Article 60(1) of the Loi CPAS, Article 9 bis of the Law of 2 April 1965 (for the possible reimbursement by the Federal Public Service for Social Integration to the CPAS provided that certain conditions are met) and the Circular of 25 March 2010 concerning the social inquiry (Belgisches Staatsblad/Moniteur Belge of 6 May 2010, p. 25432).

- (213) In order to assess the specific cost of their social service departments, the IRIS network compared the real cost of the social workers employed in the IRIS-H with a reasonable standard of one social worker for every 2 000 admissions (i.e. the obligation applying to university hospitals). This analysis shows that the five IRIS-H employed 81,1 social workers ⁽²⁵⁹⁾ while based on the reasonable standard they would only employ 36,7. The difference is hence 44,4 and indicates that the IRIS-H employ more than double the number of social workers than what would be expected based on the rule that applies to university hospitals. This illustrates that the requirements in the strategic plans oblige the IRIS-H to offer a far wider range of social services than the minimum (e.g. for geriatrics and psychiatric departments) that applies to other non-university hospitals (whether public or private). The fact that non-university private hospitals in Brussels also employ social workers can be explained on the basis of these minimum requirements rather than by a comprehensive obligation to provide social services to their patients. Likewise, as demonstrated above the IRIS-H go far beyond the basic requirement of one social worker per 2 000 admissions that applies to university hospitals in Belgium. As a result, the non-financed cost of the IRIS-H social services was approx. EUR [...] million in 2010 ⁽²⁶⁰⁾. The extensive social services obligation therefore represents a significant burden for the IRIS-H which the private Brussels hospitals do not have to bear.

Conclusion on the extensive social services obligation of the IRIS-H

- (214) On the basis of the foregoing, the Commission concludes that unlike the Brussels private hospitals, the IRIS-H have the obligation to operate elaborate social services departments who help patients and their families in resolving and managing administrative, financial, relationship and social problems. This obligation is defined in and entrusted to the IRIS-H by the IRIS strategic plans. The existence of this extensive social services obligation is reflected by the large number of social workers employed by the IRIS-H going far beyond what is applicable to other Belgian hospitals. The tasks of the IRIS-H's social services departments include taking care of the aforementioned difficulties of patients not only during their stay but also when leaving the hospital, helping the patients to obtain social security cover enabling them to meet their medical costs, preparing social inquiries and exchanging information with the other hospital departments and also with the CPAS. This obligation and its burden are closely linked to the other obligations that constitute the social healthcare SGEI (see recital 167). Indeed, it is because the IRIS-H have the obligation to treat all patients in all circumstances and regardless of their ability to pay that there is a greater demand for social workers. It is precisely poor patients and their families who need additional social services and for whom a social inquiry has to be prepared. Furthermore, it is also because the IRIS-H have the obligation to maintain multiple sites that the number of social workers is higher than what can be reasonably expected (i.e. one social worker for every 2 000 admissions, see recital 213).

IV. Conclusion on the additional obligations

- (215) The Commission concludes that the IRIS-H are performing a social healthcare SGEI which on top of their basic hospital mission in addition includes their obligation (1) to treat all patients in all circumstances (including non-emergency situations), regardless of patients' ability to pay; (2) to offer a full range of basic hospital services on multiple sites; and (3) to complement the medical care with extensive support by their elaborate social services departments. This combination of obligations ensures that the specific social needs of the Brussels population with regard to hospital services are fulfilled and guarantees the accessibility to high quality hospital care for all and in particular for the poorest. No such additional obligations apply to the Brussels private hospitals who are only entrusted with the basic hospital mission defined by the LCH. The social healthcare SGEI is therefore only provided by the IRIS-H as only they are entrusted with more stringent and far reaching obligations on top of the minimum requirements (i.e. the basic hospital mission) that apply to all hospitals in Belgium under the LCH. The performance of this social healthcare SGEI entails significant costs for the IRIS-H that are not or only partially covered by the financing sources common to both public and private hospitals, and as a result lead to the deficits

⁽²⁵⁹⁾ The figure represents the number of full-time equivalents (or FTE).

⁽²⁶⁰⁾ The BMF provides some funding for social workers (i.e. for those areas, such as geriatrics, where there is a minimum requirement) but this only amounted to approximately EUR 400 000 in 2010.

reported by the IRIS-H. In order to ensure the continuity of their public hospitals, the respective Brussels CPAS and municipalities therefore compensate the deficits of the IRIS-H as described in Sections 7.3.4.4 and 7.3.5.

7.3.4.2. The undertaking entrusted and, where applicable, the territory concerned

- (216) Each individual IRIS-H has its own bylaws which specify their objective and the IRIS strategic plans apply to each of the five IRIS-H. In addition, like all Belgian hospitals, the IRIS-H have received an individual authorisation which they need in order to be eligible for the other types of public financing (such as the BMF). These entrustment acts do not specify a territory for the performance of their SGEI.

7.3.4.3. Exclusive or special rights

- (217) The IRIS-H are not entrusted with any exclusive or special rights.

7.3.4.4. The compensation mechanism

- (218) The deficit compensation mechanism is described in Article 46 of the bylaws of each of the five IRIS-H. This article currently reads as follows (see also footnote 48):

‘Without prejudice to Article 109 [LCH], the result of the financial year shall be allocated between partners holding at least one fifth of the votes in the General Assembly by decision of the General Assembly.’

- (219) It is clear from Article 46 of the IRIS-H bylaws that:

- This deficit compensation is without prejudice to the mechanism foreseen by Article 109 LCH (now Article 125 of the LCH in the version of the Law of 10 July 2008) which requires that municipalities cover the deficit of their public hospital with the exclusion of certain activities ⁽²⁶¹⁾. However, as will be explained below (see recital 235), the Article 109 deficit compensation has no real impact in this case since upon reception, the IRIS-H immediately fully repay these amounts to the municipality.
- The result to be covered is that which is reported in the hospital accounts (i.e. it concerns the accounting deficit of the hospital as a whole and hence also includes the result of the ancillary activities of the IRIS-H, see also recital 41). Unlike Article 109 LCH, Article 46 of the IRIS-H bylaws does not exclude certain activities from the deficit. However, it is also clear that the compensation cannot go beyond the accounting deficit as the compensation is limited to the result of the financial year.
- Only partners that have at least one fifth of the votes in the General Assembly are required to contribute to cover the deficit. In practice, this means that only the municipalities and the CPAS have to contribute ⁽²⁶²⁾.

- (220) On the basis of the fact that the IRIS-H only perform SGEI and ancillary activities, Article 46 of the bylaws of each IRIS-H establishes a clear compensation mechanism by indicating that the result of the financial year (without any exceptions) has to be covered. This result is determined on the basis of a clear set of accounting principles that apply equally to both public and private Belgian hospitals. Furthermore, each hospital is required (on the basis of Articles 80-85 LCH) to appoint an independent auditor who checks their accounts and results (see recital 49).

⁽²⁶¹⁾ A Royal Decree (currently the Royal Decree of 8 March 2006) sets out the method to calculate the deficit which the municipalities are obliged to cover on the basis of Article 109 LCH.

⁽²⁶²⁾ The association representing the respective hospital's doctors and, where relevant, the *Université Libre de Bruxelles* and/or the *Vrije Universiteit Brussel* always have less than 20 % of the votes in the IRIS-H local associations. Similarly, since 2000 the municipality and CPAS of Jette are members of the CHU Brugmann association but since they have less than 20 % of the votes in that association they do not contribute to the deficit compensation. Finally, since accounting year 2014, the municipality and CPAS of Schaerbeek also have less than 20 % of the votes in the CHU Brugmann association and hence no longer contribute to the deficit of this hospital. This means that from 2014 onwards only the Ville de Bruxelles and its CPAS are obliged to cover the deficit of CHU Brugmann.

- (221) By requiring that the entire deficit of the IRIS-H is covered, Article 46 of the bylaws goes beyond the minimum requirement foreseen by Article 109 LCH. The reason for this full deficit cover for the performance of SGEI and ancillary activities ⁽²⁶³⁾ is that the Brussels local authorities want to guarantee the continuity and viability of the IRIS-H (see recital 91) at all times. Article 46 is also consistent with Article 61 of the Loi CPAS which reads:

‘The CPAS can rely upon the cooperation with persons, facilities or services, which, established either by public authorities or by private initiative, will be able to use the means to achieve the various solutions that present themselves, while respecting the free choice of the person concerned.

The CPAS can bear the potential costs of this cooperation when these are not covered by the implementation of another law, regulation, agreement or a judicial decision.’

- (222) Finally, as explained above (see recitals 22 and 44) municipalities are required to cover the deficit of their CPAS. As a result, it is the municipality that has the ultimate responsibility to cover the entire deficit of its public hospital.

7.3.4.5. Arrangements in place for avoiding and recovering any overcompensation

- (223) As will be explained below, the deficit compensation mechanism operates in such a way that the risk of overcompensation at all occurring is already very limited in the first place (see recital 247). In addition, the Law of 14 November 1983 (see recitals 248-250) and the Loi CPAS (see recitals 251-252) provide the municipalities with the necessary legal means to control for overcompensation and to recover overcompensation, if any.

7.3.4.6. Reference to the 2012 SGEI Decision

- (224) Article 4(f) of the 2012 SGEI Decision requires that the entrustment act includes a reference to that Decision. Article 10(a) of the 2012 SGEI Decision foresees a transition period of two years for aid schemes that were put into effect before 31 January 2012 and that were compatible under the 2005 SGEI Decision. For this reason, in the case at hand, a reference to the 2012 SGEI Decision was only introduced in 2014. In particular, from 2014 onwards each decision of the respective Brussels communes to make a payment to the IRIS-H on the basis of Article 46 of the IRIS-H bylaws also refers to the 2012 SGEI Decision. In addition, it should be noted that a reference to the 2012 SGEI Decision has been added in Article 108 of the current version of the LCH by means of the Law of 10 April 2014 ⁽²⁶⁴⁾. More specifically, this article requires that each decision letter regarding the BMF-amount that is to be awarded to a hospital, contain an explicit reference to the 2012 SGEI Decision. The Commission therefore concludes that this formal condition is fulfilled.

7.3.5. Compensation

- (225) The second key compatibility condition enshrined in the 2012 SGEI Decision is that the amount of compensation paid for the provision of the SGEI shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligation, including a reasonable profit ⁽²⁶⁵⁾. The 2012 SGEI Decision furthermore sets out how the net cost is to be calculated (including by defining the costs and revenues that can be taken into account), indicates how the reasonable profit must be determined, and requires that an undertaking carrying out activities falling both inside and outside the scope of the SGEI must keep separate internal accounts for the SGEI and other activities ⁽²⁶⁶⁾.
- (226) In the case at hand, the IRIS-H only provide SGEI and the above described (see recitals 41 and 155) limited activities ancillary to these SGEI. In performing all these activities (SGEI and limited ancillary activities), the IRIS-H incur costs which to a large extent ⁽²⁶⁷⁾ are covered by the various public and private financing sources described above (see recital 46). Nevertheless, as will be illustrated below (see Tables 3 to 7), in most years since 1996 the performance of these activities by the IRIS-H generated a deficit. The Commission considers that these

⁽²⁶³⁾ All expenses incurred for the performance of SGEI and ancillary activities are public service costs including the cost of the ancillary activities.

⁽²⁶⁴⁾ Belgisch Staatsblad/Moniteur Belge of 30 April 2014, p. 35442. Applicable from 10 May 2014 onwards.

⁽²⁶⁵⁾ Article 5 of the 2012 SGEI Decision.

⁽²⁶⁶⁾ Article 5(2)-(9) of the 2012 SGEI Decision.

⁽²⁶⁷⁾ In the period 2007-2011 on average about [...] % of the IRIS-H's costs were covered by this financing.

deficits are the residual net cost (i.e. the part of the net cost that has not been covered by the financing sources described in recital 46) of the SGEI and limited ancillary activities performed by the IRIS-H. By compensating these deficits, the municipalities cover no more than the residual net cost incurred by the IRIS-H in performing the SGEI and ancillary activities and do not even award a reasonable profit. Therefore, by its very definition, the compensation of deficits incurred by the IRIS-H should not and did not lead to actual overcompensation (see also recitals 234-245).

- (227) Pursuant to Article 77 LCH all hospitals are required to keep separate accounts which show the cost of each service. The accounting principles applicable to both public and private hospitals are enacted by the Royal Decree of 19 June 2007 ⁽²⁶⁸⁾. Under that Royal Decree, non-hospital activities (i.e. in the case at hand the ancillary activities described above in recitals 41 and 155) are to be recorded separately (more specifically they are to be listed under account codes 900 to 999, see also recital 49). The Commission received attestations by the independent auditors of each of the IRIS-H confirming that the account separation is implemented in line with the requirements of Belgian law ⁽²⁶⁹⁾. On this basis, the Commission concludes that the requirement under Article 5(9) of the 2012 SGEI Decision to have separate accounts is fulfilled.
- (228) As explained above (see recital 44), on the basis of Article 46 of the bylaws of the IRIS-H, the Brussels municipalities and CPAS are obliged to cover the full accounting deficit of their hospitals. This obligation which exists since the creation of the IRIS-H goes beyond the partial deficit compensation mechanism foreseen by Article 109 LCH (see recital 47). Nevertheless, the compensation on the basis of Article 46 of the bylaws of the IRIS-H can never exceed the accounting deficit of the financial year. Finally, Article 46, while creating a clear obligation to compensate the deficits, however does not specify explicitly at what point in time the municipalities and CPAS actually have to transfer the money ⁽²⁷⁰⁾.
- (229) In practice, the timing of the payments by the municipalities to the IRIS-H has always depended on the available funds in the municipal treasuries. Since there usually was insufficient money available, the municipalities tended to postpone the payment of the hospital deficit. In theory, they could keep postponing until the moment when the Federal Public Service for Public Health determined the Article 109 LCH deficit since this would then force the municipalities to pay (part) of the hospitals' deficits. However, there was a long delay (of up to 10 years) between the moment when the accounting deficit was known and when the Article 109 LCH deficit was calculated. This meant that between 1996 and 2002, the IRIS-H accumulated enormous deficits (i.e. more than EUR 50 million). To cover this gap in their financing, the IRIS-H were forced to take up bank loans, the costs of which further increased their deficits.
- (230) The municipalities realised that this situation was to their detriment, as they ended up paying for the interest on these loans via the deficit cover and hence wanted to pay the IRIS-H quicker instead of waiting for the moment when the Federal Public Service for Public Health would force them to pay the Article 109 LCH deficit. Given the lack of sufficient financial resources at the municipal level, the Brussels Capital Region had to intervene to make this possible. In particular, the Region provided financing to the respective municipalities (1) indirectly via the FRBRTC (see recital 231); and (2) from 2003 onwards also directly by granting special subsidies (see recitals 232-233). This enabled the municipalities to more quickly, albeit partially ⁽²⁷¹⁾, fulfil their deficit compensation obligation towards the IRIS-H. As explained above (see Section 7.1), the Brussels Capital Region only granted and continues to grant public financing to the respective Brussels municipalities and not to the IRIS-H.

⁽²⁶⁸⁾ Belgisch Staatsblad/Moniteur Belge of 29 June 2007, p. 35929. Applicable from 9 July 2007 onwards. This Royal Decree replaced the Royal Decree of 14 December 1987 concerning the annual accounts of hospitals which laid down very similar requirements.

⁽²⁶⁹⁾ In this context, it must be noted that some accounting flows linked to the hospital activities also have to be recorded on the account codes 900 to 999. This concerns certain flows which are not taken into account in the determination of the BMF financing (which follows a cash accounting logic rather than the accrual accounting approach that applies for the hospital accounting).

⁽²⁷⁰⁾ In theory, the IRIS-H can ask the municipalities to pay the deficit compensation once the result of the financial year has been determined. In practice the IRIS-H did not do this because they are controlled by the municipalities and the latter did not (always) have the funds available to pay immediately.

⁽²⁷¹⁾ In fact, the regional financing awarded to the municipalities was insufficient to fully cover the deficits incurred by the IRIS-H during the period 1996-2014 (see also footnote 143).

- (231) The deficits incurred by the IRIS-H in the accounting years 1996 until 2002 were only compensated by the municipalities from 2002 onwards using the financing they had received from the FRBRTC. The compensation of the deficits for this period was only concluded in 2008. For the compensation of the deficits incurred since 2003, the municipalities have no longer relied on the FRBRTC financing.
- (232) From the accounting year 2003 onwards, the Brussels Capital Region started awarding on average EUR 10 million per year (for the exact amounts see Table 2) in the form of special subsidies to the municipalities. In turn, each municipality paid its share of this special subsidy usually at the start of the following year, based on the hospital's estimated deficit (e.g. at the beginning of 2015 for the 2014 financial year). The deficit is estimated on the basis of the audit of the hospital's activities and the provisional result for the first nine months of the year. Within six months after the end of the financial year (i.e. by the end of June), the General Assembly of each IRIS-H approves the hospital's financial accounts and adopts the final accounting deficit. The amount of the accounting deficit outstanding after payment of the share of the special subsidy is settled in accordance with the available funds in the municipal treasuries. The full settlement can take several more years and during the entire assessment period (1996-2014), the IRIS-H have continuously been waiting for payments by the municipalities (see the tables in recital 234 for details on the outstanding amounts).

Table 2

Payments (financed by the special subsidy) by the municipalities to the IRIS-H

(EUR)

Year	CHU St. Pierre	CHU Brugmann	ISH	HUDERF	Institut Bordet	Total
2003	1 620 000	1 770 000	3 765 000	820 000	2 025 000	10 000 000
2004	1 541 775	1 457 000	3 765 000	781 981	1 321 316	8 867 072
2005	2 132 928	3 657 000	3 765 000	778 000	800 000	11 132 928
2006	—	3 657 000	3 765 000	778 000	1 800 000	10 000 000
2007	278 330	4 125 610	3 765 000	622 529	1 208 531	10 000 000
2008	308 367	3 999 767	3 765 000	871 350	1 055 516	10 000 000
2009	490 002	3 231 504	3 765 000	1 246 998	1 266 496	10 000 000
2010	565 440	3 644 432	3 388 500	1 401 628	—	9 000 000
2011	654 580	3 206 932	3 576 750	1 220 232	841 506	9 500 000
2012	1 091 761	3 380 656	3 765 000	945 316	817 267	10 000 000
2013	1 826 753	2 500 348	3 765 000	635 966	1 271 933	10 000 000
2014	1 390 000	2 847 000	3 765 000	618 000	1 380 000	10 000 000
Total	11 899 936	37 477 249	44 615 250	10 720 000	13 787 565	118 500 000

- (233) Accounting-wise, the part of the special subsidy has in some years been directly accounted for in the hospital's result (hence lowering the remaining deficit) while in other years the amount was accounted as a compensation of the deficit (i.e. in the attribution of the result). In addition, there has been an accounting delay in 2004 for the CHU Saint-Pierre so that its part of the special subsidy was only recorded in the accounts of the next year. This explains why the total amount of special subsidy for the five IRIS-H in 2004 is only EUR 8 867 072 while in 2005 it is EUR 11 132 928, the two summing up to EUR 20 million (or EUR 10 million per year as was the intention). Despite these differences in accounting treatment, the principle behind these payments has always been to give a quick (and usually partial) compensation of the deficit without resulting in overcompensation (see the remainder of this section).

- (234) The below Tables 3 to 7 indicate for each of the five IRIS-H the accounting deficits incurred for each year (combined, these deficits amount to almost EUR 250 million over the period 1996-2014) and the payments made in each year by the municipality (these payments may relate to deficits of previous years). Tables 3 to 7 indicate when (i.e. in which years) the municipalities made payments to compensate the deficits of the respective IRIS-H but do not show for which specific year those payments compensate the deficit ⁽²⁷²⁾. These tables also illustrate the accumulation of deficits during the period 1996-2002 and the delay in payments by the municipalities. Furthermore, it is clear that at any given moment in the period 1996-2014, the respective municipalities owed the IRIS-H significant amounts of unpaid deficit compensation. The open balance until the end of 2014 for the five IRIS-H together exceeds EUR 15 million. In this context, it is worth pointing out that when the IRIS-H generate a profit, these profits are retained and used to cover past or future deficits which lowers the intervention by the municipalities. Finally, it is also clear from these tables that, as argued by the Belgian authorities (see recital 89) and contrary to the complainant's allegation, there is no mechanism of advance payments (see recital 55). Indeed, the payments by the municipality are made with a significant delay after the deficit has been incurred and the obligation on the basis of Article 46 of the IRIS-H bylaws became applicable. Therefore, the timing of the payments of the deficit compensation for the performance of SGEI and ancillary activities cannot be considered as providing an advantage to the IRIS-H.

Table 3

Timing of deficit payments and open balance for CHU Saint-Pierre

(EUR)

CHU Saint-Pierre	Accounting deficit	Payments by municipality	Open Balance
1996	- 5 737 856	0	- 5 737 856
1997	- 6 754 920	0	- 12 492 776
1998	- 3 696 235	0	- 16 189 011
1999	- 752 234	0	- 16 941 245
2000	- 1 072 993	0	- 18 014 238
2001	- 1 416 937	0	- 19 431 174
2002	- 2 914 245	3 368 351	- 18 977 068
2003	- 2 629 012	4 925 162	- 16 680 918
2004	- 1 541 775	11 571 300	- 6 651 393
2005	- 2 248 399	1 000 000	- 7 899 792
2006	98 114	2 886 635	- 4 915 043
2007	- 774 755	2 217 900	- 3 471 897
2008	- 1 054 119	2 356 333	- 2 169 683
2009	- 1 000 933	490 002	- 2 680 614

⁽²⁷²⁾ For instance, Table 3 illustrates that while CHU Saint-Pierre incurred deficits in each year since 1996, the first deficit compensation payment (of EUR 3 368 351) by the municipality was only made in 2002. What cannot be concluded from the table is which of the annual deficits since 1996 was being compensated via the payment in 2002. However, the detailed information provided to the Commission by the Belgian authorities shows that that payment was in fact made to cover part of the deficit incurred in the year 1996.

(EUR)

CHU Saint-Pierre	Accounting deficit	Payments by municipality	Open Balance
2010	– 1 576 429	565 440	– 3 691 602
2011	– 949 668	654 580	– 3 986 690
2012	– 1 079 200	1 091 761	– 3 974 129
2013	– 1 880 205	1 826 753	– 4 027 580
2014	– 1 441 778	1 900 931	– 3 568 427
Total	– 38 423 575	34 855 148	– 3 568 427

Table 4

Timing of deficit payments and open balance for CHU Brugmann ⁽¹⁾

(EUR)

CHU Brugmann	Accounting deficit	Payments by municipality	Open Balance
1996	N/A	N/A	N/A
1997	N/A	N/A	N/A
1998	N/A	N/A	N/A
1999	– 508 171	0	– 508 171
2000	– 3 755 229	0	– 4 263 399
2001	– 5 440 039	0	– 9 703 438
2002	– 1 976 934	0	– 11 680 371
2003	– 1 697 238	1 770 000	– 11 607 609
2004	– 1 442 292	1 457 000	– 11 592 901
2005	– 7 413 186	4 404 420	– 14 601 667
2006	– 14 180 725	10 893 584	– 17 888 808
2007	– 6 954 466	10 151 330	– 14 691 944
2008	– 6 308 290	6 699 647	– 14 300 587
2009	– 6 228 859	3 231 504	– 17 297 942
2010	– 5 011 208	3 644 432	– 18 664 719
2011	– 2 982 442	3 224 315	– 18 422 846
2012	– 2 945 806	16 219 985	– 5 148 666
2013	– 2 799 788	7 090 156	– 858 298
2014	– 2 923 714	2 847 000	– 935 012
Total	– 72 568 385	71 633 373	– 935 012

⁽¹⁾ See recital 236 for the explanation why the figures for the years 1996, 1997 and 1998 are missing.

Table 5

Timing of deficit payments and open balance for HUDERF

(EUR)

HUDERF	Accounting deficit	Payments by municipality	Open Balance
1996	– 1 505 830	0	– 1 505 830
1997	– 1 026 881	0	– 2 532 711
1998	– 245 113	0	– 2 777 825
1999	1 642	0	– 2 776 183
2000	– 484 951	0	– 3 261 134
2001	– 1 218 954	0	– 4 480 088
2002	– 479 490	883 192	– 4 076 386
2003	– 1 117 778	1 583 539	– 3 610 625
2004	– 781 981	1 863 863	– 2 528 742
2005	– 1 279 230	778 000	– 3 029 973
2006	– 2 494 074	1 605 532	– 3 918 515
2007	– 2 687 621	1 688 424	– 4 917 712
2008	– 2 314 050	1 208 667	– 6 023 095
2009	– 1 868 670	1 246 998	– 6 644 767
2010	– 1 823 049	1 401 628	– 7 066 187
2011	– 1 620 663	1 220 232	– 7 466 618
2012	– 945 316	5 525 711	– 2 886 223
2013	– 528 779	635 966	– 2 779 036
2014	– 618 000	2 682 372	– 714 664
Total	– 23 038 788	22 324 124	– 714 664

Table 6

Timing of deficit payments and open balance for Institut Bordet

(EUR)

Institut Bordet	Accounting deficit	Payments by municipality	Open Balance
1996	752 505	0	752 505
1997	170 241	0	922 745
1998	41 349	0	964 094
1999	44 371	0	1 008 465

(EUR)

Institut Bordet	Accounting deficit	Payments by municipality	Open Balance
2000	5 439	0	1 013 904
2001	154 518	0	1 168 423
2002	– 4 929 106	0	– 3 760 683
2003	– 4 916 506	2 025 000	– 6 652 189
2004	– 2 001 995	1 321 316	– 7 332 868
2005	– 771 467	800 000	– 7 304 335
2006	– 1 817 630	1 800 000	– 7 321 966
2007	– 1 874 162	2 673 741	– 6 522 386
2008	– 1 624 347	4 519 412	– 3 627 322
2009	– 688 005	1 266 496	– 3 048 830
2010	– 655 634	0	– 3 704 465
2011	– 838 644	841 506	– 3 701 602
2012	– 833 460	4 465 110	– 69 952
2013	– 2 551 468	1 271 933	– 1 349 487
2014	– 1 943 857	2 023 112	– 1 270 232
Total	– 24 277 858	23 007 626	– 1 270 232

Table 7

Timing of deficit payments and open balance (in EUR) for ISH ⁽¹⁾

(EUR)

ISH	Accounting deficit	Payments by municipality	Open Balance
1996	N/A	N/A	N/A
1997	N/A	N/A	N/A
1998	N/A	N/A	N/A
1999	– 1 248 404	0	– 1 248 404
2000	– 7 220 971	0	– 8 469 375
2001	– 14 782 680	0	– 23 252 055
2002	– 12 978 574	416 079	– 35 814 550

(EUR)

ISH	Accounting deficit	Payments by municipality	Open Balance
2003	– 7 990 196	6 018 822	– 37 785 924
2004	– 5 941 987	13 425 604	– 30 302 307
2005	– 4 440 896	3 765 000	– 30 978 203
2006	– 5 022 247	12 622 542	– 23 377 907
2007	– 3 882 170	10 885 280	– 16 374 797
2008	– 3 779 570	10 885 190	– 9 269 178
2009	– 3 774 545	3 765 000	– 9 278 722
2010	– 3 387 655	3 388 500	– 9 277 877
2011	– 3 572 694	3 576 750	– 9 273 821
2012	– 3 767 190	3 765 000	– 9 276 011
2013	– 3 761 761	3 765 000	– 9 272 772
2014	– 3 760 497	3 765 000	– 9 268 269
Total	– 89 312 036	80 043 767	– 9 268 269

(¹) See recital 236 for the explanation why the figures for the years 1996, 1997 and 1998 are missing.

- (235) In practice, the deficit compensation under Article 46 of the IRIS-H bylaws takes precedence over the deficit compensation under Article 109 LCH. In fact, after the Federal Minister responsible for public health has determined the Article 109 LCH deficit (see recital 47), a letter is sent to the municipality and its bank is ordered to immediately pay this amount to the respective hospital taking into account any deficit compensation payments that have already been made by the municipality to that IRIS-H on the basis of Article 46 of its bylaws. In addition, the municipalities and the IRIS-H have agreed that the latter immediately repay the amounts paid to them under Article 109 LCH to the municipalities to avoid any double coverage of the same deficit. In this respect, the Commission has received a letter and a table from the municipalities' bank Belfius confirming that for each year and all five IRIS-H, these repayments were made immediately and hence a double deficit coverage is ruled out. Table 8 below shows a complete overview of all amounts of the 'Article 109 LCH deficit' compensations that were paid by the municipalities to the IRIS-H and were immediately repaid so that these transactions were neutralised. As a result, the IRIS-H did not derive any advantage from these payments under Article 109 LCH and hence only the deficit compensation under Article 46 of the IRIS-H bylaws is of importance for the further assessment in this decision. Table 8 only includes the payments until the accounting year 2006 since this is currently the most recent year for which the Article 109 LCH deficit has been determined by the Federal Public Service for Public Health. This illustrates the large delay that exists in practice for the payment of compensation of this deficit under the Article 109 LCH mechanism and also explains why the IRIS-H do not rely on it (and hence repay it immediately after receipt). Indeed, the compensation on the basis of Article 46 of the IRIS-H bylaws is a quicker mechanism (especially since the introduction of the special subsidies for the municipalities, see recital 232) than that on the basis of Article 109 LCH. Furthermore, the deficit cover under Article 46 of the IRIS-H bylaws goes beyond the partial deficit cover under Article 109 LCH (see recitals 47-48) as it compensates the entire accounting deficit incurred by the IRIS-H. For these reasons, the assessment in this decision only focuses on the Article 46 deficit compensation mechanism and no longer pursues an assessment of the Article 109 LCH deficit compensation mechanism unlike the annulled Commission decision of 2009 which assessed the Article 109 LCH mechanism.

Table 8

**Complete overview of the amounts of Article 109 LCH deficit ⁽¹⁾ that were paid and immediately repaid
(situation as of 9 November 2015)**

(EUR)

	CHU St. Pierre	CHU Brugmann	ISH	HUDERF	Institut Bordet
1996	560 322,61	0	2 727 844,19	0	0
1997	0	0	3 051 321,12	0	0
1998	0	0	553 331	0	0
1999	0	781 686,52	345 176,04	0	0
2000	1 019 647,97	0	0	0	2 483 585,21
2001	0	2 511 189,37	126 193,12	263 390,41	4 681 594,58
2002	0	0	0	0	0
2003	0	0	3 658 304,97	0	1 699 065,20
2004	0	0	0	0	705 798,98
2005	0	0	0	0	0
2006	0	5 727 775,67	0	384 527,59	0

⁽¹⁾ These are the amounts that were actually paid and repaid after taking into account any deficit compensation payments that had already been made by the municipality.

(236) The Commission has also assessed whether over the period 1996-2014 ⁽²⁷³⁾, the IRIS-H were in fact overcompensated. Due to the mergers which took place on 1 July 1999 (see also recital 28) and the long time period that has expired since then, the overcompensation analysis cannot cover the years 1996-1998 for CHU Brugmann as the relevant records could no longer be retrieved. For the same reasons this analysis can only be performed for the ISH on an aggregated basis for the years 1996-1998. In this context, it has to be pointed out that the Belgian authorities provided all the relevant accounting information of the IRIS-H and the deficit payments made by the municipalities to the extent that these figures were available. Indeed, up until the entry into force of the 2005 SGEI Decision on 19 December 2005, Member States were only required to keep information available for the Commission for five years ⁽²⁷⁴⁾ (instead of 10 years under the SGEI Decisions ⁽²⁷⁵⁾). Despite the fact that the Commission's first request for information was sent only on 22 March 2006, the Belgian authorities nevertheless managed to provide the relevant figures from 1996 onwards for the CHU St. Pierre, HUDERF and Institut Bordet and from 1999 onwards for ISH (and aggregated figures for 1996-1998) and CHU Brugmann.

(237) The Commission has examined whether the deficit compensation payments by the municipalities for a particular year (using financing from the FRBRTC, the special subsidies from the Brussels Capital Region, and their own means) exceeded the accounting deficit of that year. In this context, the Commission recalls that the IRIS-H only receive compensation for deficits incurred in the performance of SGEI and some limited ancillary activities. The below Tables 9 to 13 show the relevant figures for each IRIS-H. It is however important to keep in mind that

⁽²⁷³⁾ 2014 is the most recent accounting year for which figures were available.

⁽²⁷⁴⁾ See Article 5 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980, p. 35).

⁽²⁷⁵⁾ See to this extent Article 7 of the 2005 SGEI Decision and Article 8 of the 2012 SGEI Decision.

these tables do not reflect at what point in time the municipality compensated (part of) the deficit. Indeed, it is Tables 3 to 7 above (see recital 234) which show in which years the municipalities made deficit compensation payments to the IRIS-H. Tables 9 to 13 on the contrary indicate how much the municipalities paid (usually in several instalments) to the IRIS-H to compensate the deficit of a particular year without taking into account when these payments were actually made. While Tables 9 to 13 have been constructed to be able to assess whether there was any overcompensation for that year in isolation, in practice none of the IRIS-H ever benefited from actual overcompensation as explained below (see recital 238).

(238) As will be illustrated by the following tables, the comparison of the accounting deficit and the compensation paid for a particular year reveals only a few cases ⁽²⁷⁶⁾ of technical overcompensation when looking at that particular year in isolation. Tables 3 to 7 in recital 234 make clear however that in practice none of the IRIS-H ever benefited from actual overcompensation since at each moment in the period examined (1996-2014) the municipalities owed the IRIS-H large sums of unpaid deficit compensation. The technical overcompensations may have been motivated by the fact that in a particular year the municipality not only wanted to cover the accounting deficit of that year but also wanted to make up for its arrears in covering deficits relating to previous years. Even if that motivation cannot be proven, the fact remains that in each of the years in which the IRIS-H received payments that would, when looking at that year in isolation, technically amount to overcompensation for the SGEI and limited ancillary activities performed in that year, the recipient IRIS-H was in fact in aggregate terms in a state of actual undercompensation for the same SGEI and limited ancillary activities that it had performed in the previous years and the year at issue ⁽²⁷⁷⁾.

(239) For the CHU Saint-Pierre, it can be observed in Table 9 below that when looking at each year in isolation there were limited technical overcompensations in the years 1996, 1997, and 2012. In each case, these overcompensations amounted to less than 1,5 % of the compensation awarded for that year and as a result these could have been carried over to the next year as foreseen by the SGEI Decision ⁽²⁷⁸⁾. As demonstrated above (see Table 3 in recital 234), in practice however at each moment in the period 1996-2014 the CHU Saint-Pierre was in a state of undercompensation in aggregate terms and the municipality always owed the CHU Saint-Pierre money. Over the entire period 1996-2014, CHU Saint-Pierre was undercompensated for an amount of EUR 3 666 541. In line with their obligation under Article 46 of the IRIS-H bylaws, the relevant municipalities will still have to compensate this residual accounting deficit in the future ⁽²⁷⁹⁾.

⁽²⁷⁶⁾ In particular, in only 4 out of 89 years assessed for the five IRIS-H did the technical overcompensation for that year in isolation exceed 10 % of the amount of the annual compensation.

⁽²⁷⁷⁾ In addition, it has to be kept in mind that the deficit compensation amounts only represent a small portion of the total public financing received by the IRIS-H in view of the SGEI they perform. Over the period 2007-2011, the average yearly BMF payments by the Federal government amounted to about EUR 323 million for all IRIS-H combined. Over that same period, the IRIS-H together reported average accounting deficits of EUR 13,4 million per year while the municipalities on average paid EUR 16,4 million per year in deficit compensations (which also covered deficits of prior years). The deficit compensations hence made up only about 5 % of the Federal BMF financing awarded to the IRIS-H. Therefore, if these significant amounts of public financing via the BMF would have been taken into account when calculating whether overcompensation exceeded 10 % of the compensation paid out for a specific year (and hence whether it could be carried over to the next year as allowed by Article 6(2) the 2012 SGEI Decision), the percentage of overcompensation would likely be significantly lower. This conclusion is based on the relative size of the BMF payments compared to the deficits and on the fact that the risk of overcompensation via the BMF is minimal. In particular, the BMF is mainly arranged as flat rate financing based on real hospital costs from prior years (without overcompensation). Furthermore, the Federal Public Service for Public Health performs detailed *ex post* checks on the actual costs incurred by each hospital and recalculates the BMF amount they are entitled to. Finally, it must be noted that no reasonable profit has been taken into account when comparing the compensation paid by the municipalities and the accounting deficit incurred by the IRIS-H.

⁽²⁷⁸⁾ The relevant part of Article 6(2) of the 2012 SGEI Decision reads: 'Where the amount of overcompensation does not exceed 10 % of the amount of the average annual compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.' Given the absence of actual overcompensation (i.e. because on an aggregate basis the hospital was at any point in time in the period 1996-2014 undercompensated) such a carry-over never had to be executed in practice. This remark is valid for all IRIS-H (see also recitals 240-243).

⁽²⁷⁹⁾ Alternatively, if CHU Saint-Pierre would be profitable in future years, these profits would normally be retained and used to offset the past losses. In such case, the municipalities would not or only partially have to compensate the residual accounting deficit. Such a scenario is however hypothetical since CHU Saint-Pierre has reported a limited profit in only one year (i.e. 2006) over the period 1996-2014.

Table 9

Accounting deficit and compensation awarded for CHU Saint-Pierre

(EUR)

CHU St. Pierre	Accounting deficit	Financed via FRBRTC or Region special subsidy ⁽¹⁾	Additional municipal contributions	Total compensation awarded	Over (+) or Under (–) compensation for the year	Aggregate Over (+) or Under (–) compensation
1996	– 5 737 856	5 738 735	0	5 738 735	879	879
1997	– 6 754 920	6 855 099	0	6 855 099	100 179	101 058
1998	– 3 696 235	3 696 092	0	3 696 092	– 143	100 915
1999	– 752 234	751 117	0	751 117	– 1 117	99 798
2000	– 1 072 993	1 072 993	0	1 072 993	0	99 798
2001	– 1 416 937	1 416 000	0	1 416 000	– 937	98 862
2002	– 2 914 245	2 914 245	0	2 914 245	0	98 862
2003	– 2 629 012	1 620 000	0	1 620 000	– 1 009 012	– 910 150
2004	– 1 541 775	1 541 775	0	1 541 775	0	– 910 150
2005	– 2 248 399	2 132 928	0	2 132 928	– 115 471	– 1 025 621
2006	98 114	0	0	0	0	– 1 025 621
2007	– 774 755	278 330	0	278 330	– 496 425	– 1 522 045
2008	– 1 054 119	308 367	0	308 367	– 745 752	– 2 267 797
2009	– 1 000 933	490 002	510 931	1 000 933	0	– 2 267 797
2010	– 1 576 429	565 440	0	565 440	– 1 010 989	– 3 278 785
2011	– 949 668	654 580	0	654 580	– 295 088	– 3 573 873
2012	– 1 079 200	1 091 761	0	1 091 761	12 561	– 3 561 312
2013	– 1 880 205	1 826 753	0	1 826 753	– 53 452	– 3 614 763
2014	– 1 441 778	1 390 000	0	1 390 000	– 51 778	– 3 666 541
	– 38 423 575	34 344 217	510 931	34 855 148	– 3 666 541	

⁽¹⁾ As explained in recital 104 the FRBRTC and the special subsidies awarded by the Brussels Capital Region to the municipalities are intra-State financing measures that are a funding source for the municipal deficit compensation mechanism. These amounts are reported in a separate column to illustrate that the municipalities use these regional funds entirely for the deficit compensation payments. This presentation cannot be interpreted as an indication that any amounts were transferred from the FRBRTC or Brussels Capital Region to the IRIS-H. These transfers were made to the municipalities who in turn used these funds to finance their deficit compensation obligation towards the IRIS-H.

- (240) As explained above (see recital 236), the overcompensation test for the ISH could not be performed individually for the years 1996-1998 due to the lack of the relevant figures. Nevertheless, the Belgian authorities could retrieve aggregate amounts for this period during which the ISH were still four independent hospitals. Over these three years some of the ISH incurred losses for a total amount of EUR 2 622 714 while other ISH reported total profits of EUR 703 624. The losses were covered entirely using FRBRTC funds that were granted to the municipality. The profits were carried over to the next year which explains why the compensation for the deficit incurred in 1999 covers only part of that deficit. The remainder of the deficit was offset by the retained profits from the period 1996-1998. Table 10 also shows that, apart from very minor technical overcompensations in the years 2000, 2010, 2011, 2013 and 2014 (in each case no more than 0,12 % of the compensation awarded for those years), the ISH have been undercompensated each year. The aggregate undercompensation over the period 1999-2014 amounts to over EUR 9 million.

Table 10

Accounting deficit and compensation awarded for ISH

(EUR)

ISH	Accounting deficit	Financed via FRBRTC or Region special subsidy	Additional municipal contributions	Total compensation awarded	Over (+) or Under (-) compensation for the year	Aggregate Over (+) or Under (-) compensation
1999	- 1 248 404	446 209	0	446 209	- 802 195	- 98 571 (*)
2000	- 7 220 971	7 221 056	0	7 221 056	85	- 98 486
2001	- 14 782 680	14 782 680	0	14 782 680	0	- 98 486
2002	- 12 978 574	12 978 572	0	12 978 572	- 2	- 98 488
2003	- 7 990 196	3 765 000	0	3 765 000	- 4 225 196	- 4 323 684
2004	- 5 941 987	3 765 000	0	3 765 000	- 2 176 987	- 6 500 671
2005	- 4 440 896	3 765 000	0	3 765 000	- 675 896	- 7 176 566
2006	- 5 022 247	3 765 000	0	3 765 000	- 1 257 247	- 8 433 813
2007	- 3 882 170	3 765 000	0	3 765 000	- 117 170	- 8 550 983
2008	- 3 779 570	3 765 000	0	3 765 000	- 14 570	- 8 565 553
2009	- 3 774 545	3 765 000	0	3 765 000	- 9 545	- 8 575 098
2010	- 3 387 655	3 388 500	0	3 388 500	845	- 8 574 253
2011	- 3 572 694	3 576 750	0	3 576 750	4 056	- 8 570 197
2012	- 3 767 190	3 765 000	0	3 765 000	- 2 190	- 8 572 387
2013	- 3 761 761	3 765 000	0	3 765 000	3 239	- 8 569 148
2014	- 3 760 497	3 765 000	0	3 765 000	4 503	- 8 564 645
	- 89 312 036	80 043 767	0	80 043 767	- 9 268 269	

(*) After adding the retained profits of EUR 703 624 from the period 1996-1998.

- (241) For the HUDERF, Table 11 below shows very minor technical overcompensations in the years 1998, 2002 and 2007 (i.e. in each case less than 0,15 % of the compensation awarded for that year). In 2013 there was a more significant technical overcompensation (almost 17 % of the compensation awarded for that year). However, combined with the significant undercompensation for the years 2010 and 2011 HUDERF was on an aggregate basis in 2013 still in a state of important undercompensation for the SGEI and limited ancillary activities it had performed up to that point. For the entire period 1996-2014, the total actual undercompensation amounts to more than EUR 700 000. In addition, as demonstrated above (see Table 5 in recital 234), in practice HUDERF has at no point in time ever been in a situation where it was actually overcompensated and would have had to repay (part of) the deficit compensation. In fact, HUDERF was always in state of undercompensation in aggregate terms and the municipality owed them money at each moment in the period 1996-2014.

Table 11

Accounting deficit and compensation awarded for HUDERF

(EUR)						
HUDERF	Accounting deficit	Financed via FRBRTC or Region special subsidy	Additional municipal contributions	Total compensation awarded	Over (+) or Under (-) compensation for the year	Aggregate Over (+) or Under (-) compensation
1996	- 1 505 830	1 504 714	0	1 504 714	- 1 116	- 1 116
1997	- 1 026 881	1 026 279	0	1 026 279	- 602	- 1 718
1998	- 245 113	245 415	0	245 415	302	- 1 417
1999	1 642	0	0	0	0	- 1 417
2000	- 484 951	484 949	0	484 949	- 2	- 1 419
2001	- 1 218 954	1 218 000	0	1 218 000	- 954	- 2 373
2002	- 479 490	480 000	0	480 000	510	- 1 863
2003	- 1 117 778	820 000	297 778	1 117 778	0	- 1 862
2004	- 781 981	781 981	0	781 981	0	- 1 862
2005	- 1 279 230	778 000	501 230	1 279 230	0	- 1 863
2006	- 2 494 074	778 000	1 716 074	2 494 074	0	- 1 863
2007	- 2 687 621	622 529	2 065 313	2 687 842	221	- 1 642
2008	- 2 314 050	871 350	1 442 700	2 314 050	0	- 1 642
2009	- 1 868 670	1 246 998	621 672	1 868 670	0	- 1 642
2010	- 1 823 049	1 401 628	0	1 401 628	- 421 421	- 423 062
2011	- 1 620 663	1 220 232	0	1 220 232	- 400 431	- 823 493
2012	- 945 316	945 316	0	945 316	0	- 823 493
2013	- 528 779	635 966	0	635 966	107 187	- 716 306
2014	- 618 000	618 000	0	618 000	0	- 716 306
	- 23 038 788	15 679 357	6 644 767	22 324 124	- 716 306	

- (242) For the Institut Bordet, the accounting results between 1996 and 2001 were positive and there was hence no municipal intervention for those years. From 2002 onwards however the accounting result became negative and hence payments were made to compensate the deficits. Table 12 below shows limited technical overcompensations in the years 2005 and 2011 (respectively less than 4 % and 0,5 % of the compensation granted for those years). In the year 2009, there appears to be a significant technical overcompensation of approx. EUR 580 000 (amounting to almost 46 % of the compensation granted for that year). However, in the year 2008 there had been an undercompensation of approx. EUR 533 000 (almost EUR 505 000 on an aggregate basis). Taken together, this leaves an aggregate technical overcompensation of only EUR 73 702 (less than 6 % of the compensation awarded for 2009) which could have been carried over to 2010 ⁽²⁸⁰⁾ (while for 2010 until now no compensation has been awarded). Furthermore, in each year under assessment, the Institut Bordet was still awaiting compensation of incurred deficits (see Table 6 in recital 234). In the year 2009, the municipality owed the Institut Bordet approx. EUR 3 million. For the entire period 1996-2014, the total actual undercompensation amounts to more than EUR 2,4 million. As explained in recital 234, the profits of the years 1996-2001 lower the open balance of the municipalities as they deduct these profits before intervening.

Table 12

Accounting deficit and compensation awarded for Institut Bordet

(EUR)

Institut Bordet	Accounting deficit	Financed via FRBRTC or Region special subsidy	Additional municipal contributions	Total compensation awarded	Over (+) or Under (-) compensation for the year	Aggregate Over (+) or Under (-) compensation
1996	752 505	0	0	0	0	0
1997	170 241	0	0	0	0	0
1998	41 349	0	0	0	0	0
1999	44 371	0	0	0	0	0
2000	5 439	0	0	0	0	0
2001	154 518	0	0	0	0	0
2002	- 4 929 105	4 929 106	0	4 929 106	1	1
2003	- 4 916 506	2 025 000	2 891 506	4 916 506	0	1
2004	- 2 001 995	1 321 316	680 679	2 001 995	0	1
2005	- 771 467	800 000	0	800 000	28 533	28 534
2006	- 1 817 630	1 800 000	17 630	1 817 630	0	28 533
2007	- 1 874 162	1 208 531	665 631	1 874 162	0	28 533
2008	- 1 624 347	1 055 516	35 509	1 091 025	- 533 322	- 504 789
2009	- 688 005	1 266 496	0	1 266 496	578 491	73 702
2010	- 655 634	0	0	0	- 655 634	- 581 932

⁽²⁸⁰⁾ See in this regard Article 6 of the 2005 SGEI Decision and Article 6(2) of the 2012 SGEI Decision.

(EUR)

Institut Bordet	Accounting deficit	Financed via FRBRTC or Region special subsidy	Additional municipal contributions	Total compensation awarded	Over (+) or Under (–) compensation for the year	Aggregate Over (+) or Under (–) compensation
2011	– 838 644	841 506	0	841 506	2 862	– 579 070
2012	– 833 460	817 267	0	817 267	– 16 193	– 595 263
2013	– 2 551 468	1 271 933	0	1 271 933	– 1 279 535	– 1 874 798
2014	– 1 943 857	1 380 000	0	1 380 000	– 563 857	– 2 438 654
	– 24 277 858	18 716 671	4 290 955	23 007 626	– 2 438 654	

- (243) As explained above (see recital 236), the overcompensation test cannot be performed for the CHU Brugmann for the years 1996-1998 due to the lack of the relevant figures. Table 13 below indicates limited technical overcompensation for the years 2000, 2003, 2004, 2008 and 2011 (in each case no more than 7 % of the compensation awarded for those years). In two years, namely 1999 and 2012, the technical overcompensation amounted to more than 10 % of the compensation awarded for that year (respectively 15,3 % and 12,9 %). However in the year 2012, combined with the significant undercompensation for 2009 and 2010, there was in fact undercompensation on an aggregate basis (i.e. amounting to EUR 558 858). Concerning the year 1999, there are no figures available from previous years that could be taken into account to assess the state of CHU Brugmann's compensation in aggregate terms in 1999. However, it is important to note that the first payments by the municipality (on the basis of FRBRTC financing) only started in 2003 and that, as Table 4 in recital 234 demonstrates, CHU Brugmann has at no point in time ever been in a situation where it was actually overcompensated and would have had to repay (part of) the deficit compensation to the municipality. Indeed, at each moment in the period 1996-2014, the CHU Brugmann was in a state of undercompensation in aggregate terms and the municipality owed the CHU Brugmann money to cover past deficits. In total, for that period the actual undercompensation amounts to about EUR 935 000.

Table 13

Accounting deficit and compensation awarded for CHU Brugmann

(EUR)

CHU Brugmann	Accounting deficit	Financed via FRBRTC or Region special subsidy	Additional municipal contributions	Total compensation awarded	Over (+) or Under (–) compensation for the year	Aggregate Over (+) or Under (–) compensation
1999	– 508 171	600 000	0	600 000	91 829	91 829
2000	– 3 755 229	3 755 587	0	3 755 587	358	92 188
2001	– 5 440 039	5 440 000	0	5 440 000	– 39	92 149
2002	– 1 976 934	1 976 933	0	1 976 933	– 1	92 149
2003	– 1 697 238	1 770 000	0	1 770 000	72 762	164 911
2004	– 1 442 292	1 457 000	0	1 457 000	14 708	179 619
2005	– 7 413 186	3 657 000	3 756 186	7 413 186	0	179 619

(EUR)

CHU Brugmann	Accounting deficit	Financed via FRBRTC or Region special subsidy	Additional municipal contributions	Total compensation awarded	Over (+) or Under (–) compensation for the year	Aggregate Over (+) or Under (–) compensation
2006	– 14 180 725	3 657 000	10 523 725	14 180 725	0	179 619
2007	– 6 954 466	4 125 610	2 828 856	6 954 466	0	179 619
2008	– 6 308 290	3 999 767	2 505 046	6 504 813	196 523	376 142
2009	– 6 228 859	3 231 504	2 600 612	5 832 116	– 396 743	– 20 601
2010	– 5 011 208	3 644 432	169 179	3 813 611	– 1 197 597	– 1 218 198
2011	– 2 982 442	3 206 932	0	3 206 932	224 490	– 993 708
2012	– 2 945 806	3 380 656	0	3 380 656	434 850	– 558 858
2013	– 2 799 788	2 500 348	0	2 500 348	– 299 440	– 858 298
2014	– 2 923 714	2 847 000	0	2 847 000	– 76 714	– 935 011
	– 72 568 384	49 249 769	22 383 604	71 633 373	– 935 011	

(244) Finally, the limited profits reported by some of the IRIS-H (i.e. by CHU Saint-Pierre in 2006, HUDERF in 1999 and Institut Bordet between 1996 and 2001) cannot be considered as an indication of overcompensation. Indeed, on the basis of the existing separation of accounts (see recital 226) in these IRIS-H, the Commission concludes that these profits, in all but one case are driven by the profits of the ancillary activities (see recitals 41, 116 and 117) performed by these IRIS-H. The SGEI activities of Institut Bordet made a limited profit in 1996 amounting to about 1 % of the hospital's total revenues for that year. The Commission considers that in any event such a limited profit would be reasonable and would hence not give rise to overcompensation. Furthermore, as explained above (see recital 234), all profits (whether stemming from SGEI or ancillary activities) are retained and used to offset future (or unpaid past) deficits hence lowering the contribution by the municipalities.

(245) On the basis of the foregoing, the Commission concludes that due to the delay in payments of the deficit compensation, the fact that at any given moment in the period 1996-2014 the respective municipalities owed each of the IRIS-H significant amounts of unpaid deficit compensation and the fact that each of the IRIS-H were overall in a state of undercompensation in aggregate terms, in practice no overcompensation of any of the IRIS-H occurred.

7.3.6. Control of overcompensation

(246) The third key compatibility condition enshrined in the 2012 SGEI Decision requires Member States to take steps to ensure that undertakings entrusted with the provision of SGEI do not receive any overcompensation and obliges Member States to carry out regular checks or ensure that such checks are carried out at least every three years ⁽²⁸¹⁾. Moreover, where any overcompensation has in fact been received, Member States are obliged to require the undertaking concerned to repay it ⁽²⁸²⁾.

⁽²⁸¹⁾ Article 6(1) of the 2012 SGEI Decision.

⁽²⁸²⁾ Article 6(2) of the 2012 SGEI Decision.

- (247) First and foremost, it must be noted that with regard to the deficit cover at issue in this decision, the nature of this compensation mechanism as such already strongly reduces the risk of overcompensation and is hence a measure that helps to avoid overcompensation. Indeed, the municipalities can cover no more than the actual deficit incurred by the IRIS-H as a result of their provision of services of general economic interest and the limited ancillary activities. The compensation hence only covers the residual net costs (see recital 226) incurred in the provision of these SGEI and ancillary activities and does not even include a reasonable profit. All payments are made *ex post*, i.e. after the deficits have been incurred (see to this extent the tables in recital 234). The payments are made in instalments (as illustrated by the tables in recital 234) which ensures that the municipalities can withhold a payment if there is any indication of a risk of overcompensation. The municipalities also check the amount of aggregated unpaid deficits before they make a payment to the IRIS-H. As explained above (see recital 235), the municipalities and IRIS-H also agreed to immediately repay the Article 109 LCH deficit compensation thereby avoiding any double coverage of the same deficit. There is hence only a limited and theoretical residual risk of technical overcompensation when the compensation is analysed on the basis of looking at each year in isolation (see recitals 237-238). However, in practice none of the IRIS-H has in aggregate terms ever benefited from any actual overcompensation since at each moment in the period 1996-2014 the municipalities owed the IRIS-H large sums of unpaid deficit compensation (as confirmed by the tables in recital 234).
- (248) Second, the Law of 14 November 1983 ⁽²⁸³⁾ on control of the award and use of certain subsidies lays down the rules applicable to the control of subsidies granted, in particular by local authorities. It contains the same rules as the organic Brussels *Ordonnance* of 23 February 2006 setting out provisions applicable to the budget, accounts and audits ⁽²⁸⁴⁾, which itself incorporates for the Brussels Capital Region the general rules set out in the Law of 16 May 2003 laying down general provisions applicable to budgets, the control of subsidies and accounts of the communities and regions and arrangements for auditing by the Belgian Court of Audit ⁽²⁸⁵⁾. Article 1 of the Law of 14 November 1983 provides that:

‘This law shall apply to any subsidy granted by:

1° provinces, municipalities, establishments of provincial or municipal interest with legal personality, conurbations, federations of municipalities, cultural committees, associations of provinces and associations of municipalities;

2° legal or natural persons directly or indirectly subsidised by one of the providers referred to in 1°.’

Article 2 of this Law also defines its very general scope, stating:

‘Subsidy means [...] any contribution, advantage or aid, irrespective of the form or description, including advances of recoverable funds granted without interest, awarded in order to promote activities of general interest [...].’

It is clear from the above articles that the deficit compensation awarded by the Brussels municipalities to the IRIS-H for the performance of SGEI and ancillary activities is in scope of this Law.

- (249) Article 3 of the Law of 14 November 1983 establishes the principle that the subsidy must be used exclusively for the purposes for which it was granted and the beneficiary must be able to justify its use. Articles 4 and 5 lay down further rules for the grant of such subsidies and the transparency obligations imposed on the beneficiary. Articles 6 and 7 then set out the rules for checking by or on behalf of the subsidy provider on the use of the subsidies. In particular, Article 6 provides that:

‘All [subsidy] providers have the right to have on site checks carried out on the use of the subsidy provided.’

⁽²⁸³⁾ Belgisch Staatsblad/Moniteur Belge of 6 December 1983, p. 15009.

⁽²⁸⁴⁾ Belgisch Staatsblad/Moniteur Belge of 23 March 2006, p. 16710.

⁽²⁸⁵⁾ Belgisch Staatsblad/Moniteur Belge of 25 June 2003, p. 33692.

Article 7 provides for the obligations of repayment and recovery of the subsidy. That Article reads:

‘Without prejudice to the resolute provisions to which the subsidy is subject, the beneficiary shall be required to repay it in the following circumstances:

- 1° when it does not use the subsidy for the purposes for which it was granted;
- 2° when it does not provide one of the justifications referred to in Articles 4 and 5;
- 3° when it refuses to allow the check referred to in Article 6.

However, in the case in 1°, 2°, the beneficiary shall only be required to repay the part of the subsidy that was not justified.

Legal persons under public law who have the power to impose direct taxation shall be authorised to order the recovery of repayable subsidies. The order shall be made by the accountant responsible for recovery. It shall be made enforceable by the administrative authority empowered to enforce the list of direct provisions of the relevant legal person under public law.’

(250) Hence that Law enables the municipalities to ensure that the subsidies are granted in accordance with the necessary conditions and also to check on the use and recovery of sums not required. Thus payment of the deficit compensation by the municipalities is subject to very strict rules. Through their acceptance by the hospitals concerned, these entail a right to inspection by an independent authority, which may ensure that the subsidy has actually been allocated to the use for which it was granted. Otherwise the hospital is required to repay it immediately which guarantees the recovery of any overcompensation to the IRIS-H.

(251) This is corroborated by the Loi CPAS of which Article 60(6) provides:

‘A decision may only be taken to set up or develop establishments or services eligible for investment or operating subsidies on the basis of documentation showing that the conditions laid down by the organic laws or regulations for the grant of such subsidies will be fulfilled.’

Hence if a CPAS sets up a public hospital, evidence must be provided that the rules for the award of the financing will be observed.

(252) Similarly, Article 135 *octies* Loi CPAS sets out arrangements for the monitoring of the Chapter XII local associations (in this case the IRIS-H) by their umbrella association (in this case IRIS) on a quarterly basis. In particular, this means that IRIS checks whether the decisions taken by the IRIS-H are in compliance with:

- 1° the general and specific strategic plan for hospital activity and the decisions taken pursuant to that plan;
- 2° the specific plan and the financial plan adopted by the local association on the basis of the guidelines set by the umbrella association and any amendments and updates to those plans;
- 3° the annual budget adopted by the local association on the basis of the guidelines set by the umbrella association.

In the event of non-compliance, the umbrella association shall take any measures it considers appropriate to end the non-compliance and shall notify them to the local association concerned for implementation within a period which it shall determine.

If the local association concerned fails to implement the measures within the stipulated period, the umbrella association may immediately instruct the auditor referred to in Article 135 *novies* to replace the local association body in default.’

(253) It is apparent from the above provisions that both the Loi CPAS and the Law of 14 November 1983 enable the Brussels municipalities to ensure that subsidies paid to the IRIS-H are used correctly and do not lead to overcompensation. The joint application of those provisions facilitates controlling for overcompensation and provides for the recovery of overcompensation. Furthermore, in the event of non-compliance, a power of substitution is

conferred on a third party, in order to ensure fulfilment of these obligations, particularly in regard to the budget, imposed on the IRIS-H. The municipalities, CPAS and the IRIS umbrella organisation hence have far-reaching control powers even if there is virtually no risk of overcompensation under the deficit compensation mechanism at issue in this decision.

- (254) In addition, where the operating accounts of the public hospital show a deficit, the municipal executive(s) may under Articles 111(2) and 126 Loi CPAS suspend implementation of *'any decision of the CPAS that is detrimental to the municipal interests and in particular the financial interests of the municipality.'*
- (255) Finally, it is worth emphasizing that the granting authorities (i.e. the municipalities and the CPAS) of the aid measure at hand directly control the beneficiaries. In particular, these authorities have the majority of votes in the Administrative Councils of the IRIS-H which, among others, appoints the director general of their respective hospitals. In the unlikely situation where an IRIS-H would hypothetically refuse to repay overcompensation, the public authorities could easily replace the director general to rectify this situation. Furthermore, as required by the bylaws of each IRIS-H, the Administrative Council meets at least eight times per year which allows the granting authorities to closely monitor the financial situation of the IRIS-H (among others via the quarterly reports which cover this subject as required by the bylaws).
- (256) On the basis of the above, the Commission concludes that there are sufficient arrangements to avoid, detect and recover overcompensation while the risk of actual overcompensation seems very limited given the nature of the aid measure at hand.

7.3.7. Duration of entrustments

- (257) Article 2(2) of the 2012 SGEI Decision foresees that the Decision only applies to entrustments the duration of which does not exceed 10 years, unless a longer period can be justified by reference to the entrusted undertaking's need to amortise significant investments over a longer period in accordance with generally accepted accounting principles.
- (258) The duration of the bylaws of the IRIS-H, which at the municipal level are the basic entrustment acts relevant in the case at hand, is set at 30 years. The Commission considers that such long duration is justified by the need for significant investments to be made by the IRIS-H as the entrusted SGEI providers. More specifically, the most important assets of the IRIS-H are their buildings (accounting for more than 60 % of the value of their assets) which are amortised over a period of 30 years in accordance with generally accepted accounting principles ⁽²⁸⁶⁾. Furthermore, the IRIS strategic plans which further specify the additional obligations that the IRIS-H are entrusted with are also limited in time and even have a shorter duration. The first strategic plan covered the six-year period 1996-2001. The second strategic plan initially covered the period 2002-2006 but was subsequently amended and prolonged until the end of 2014. A new strategic plan for the period 2015-2018 was adopted in January 2015.
- (259) Furthermore, the Law of 10 April 2014 ⁽²⁸⁷⁾ limited the duration of the Federal entrustment act for the basic hospital mission ⁽²⁸⁸⁾ by modifying Article 105 of the current version of the LCH ⁽²⁸⁹⁾. In particular, Article 105 now requires that the period for which the BMF is awarded cannot exceed 10 years except for those elements of the BMF which cover the cost of significant hospital investments that need to be amortised over a longer period in accordance with generally accepted accounting principles. Finally, the individual authorisation which the hospitals need to have in order to be eligible for BMF financing also has a limited duration (depending on the region, but typically around five years and in any event not more than 10 years).
- (260) The Commission therefore considers that the requirement under Article 2(2) of the 2012 SGEI Decision to limit the duration of the entrustment act and to justify this duration is fulfilled.

⁽²⁸⁶⁾ This amortisation period is imposed by the Royal Decree of 19 June 2007 which applies to all Belgian hospitals (see also recital 226).

⁽²⁸⁷⁾ See footnote 264.

⁽²⁸⁸⁾ As explained in recital 166, the Commission considers that the three additional obligations would not have been entrusted in the absence of the basic hospital mission. In this context, the Commission considers it appropriate to assess the duration of the entrustment for the basic hospital mission.

⁽²⁸⁹⁾ I.e. the coordinated hospital Law of 10 July 2008 (Belgisch Staatsblad/Moniteur Belge of 7 November 2008, p. 58624).

7.3.8. Transparency

- (261) Finally, the 2012 SGEI Decision requires Member States to publish certain information. More specifically, for compensation above EUR 15 million granted to an undertaking which also has activities outside the scope of the service of general economic interest, Article 7 of the 2012 SGEI Decision requires Member States to publish on the internet or by other appropriate means the entrustment act (or a summary which includes the elements listed in Article 4 of the 2012 SGEI Decision) and the amounts of aid granted to the entrusted undertaking on a yearly basis.
- (262) The transparency requirement of the 2012 SGEI Decision applies to 'compensation above EUR 15 million granted to an undertaking which also has activities outside the scope of the service of general economic interest'. As can be observed in Tables 9-13, the amount of municipal deficit compensation granted per individual IRIS-H does not exceed the EUR 15 million threshold in any year. Therefore, the Commission considers that the transparency requirement under Article 7 of the 2012 SGEI Decision is not applicable in this case.

7.3.9. Summary conclusions on the compatibility with the internal market

- (263) On the basis of the above, the Commission concludes that the compensation of the deficits of the Brussels public IRIS hospitals by the Brussels municipalities since 1996, which forms the subject matter of this decision, complies with the requirements of the 2012 SGEI Decision and is therefore compatible with the internal market pursuant to Article 106(2) TFEU.
- (264) It follows from the foregoing conclusion and the explanations given above under recitals 148-152 that the Commission does not need to assess whether the compensation of the deficits of the Brussels public IRIS hospitals by the Brussels municipalities is also compatible with the internal market pursuant to the 2005 SGEI Decision (for aid that was granted between 19 December 2005 and 31 January 2012) or the 2012 SGEI Framework.

7.4. Final remarks

- (265) As explained above (see recital 159), in its annulment judgment of 7 November 2012, the GC made reference to the principle of equal treatment. In this context, the Commission recalls that the principle of non-discrimination/equal treatment is not mentioned as a compatibility criterion in the 2012 SGEI Decision. Nevertheless, for the case at hand, the Commission concludes that in any event this principle is complied with since the public IRIS-H and the private Brussels hospitals are in a legally and factually different situation due to the fact that the SGEI mission of the public IRIS-H is wider in scope than that of the private hospitals and hence is more costly to perform (as explained above, see Section 7.3.4.1). For the sake of completeness, the Commission notes that the IRIS-H are subject to a number of constraints and also additional costs (see recitals 42-43) in the performance of the SGEI entrusted to them.
- (266) Since the IRIS-H and private hospitals in Brussels are in different/not comparable situations, the compensation of the deficits of the IRIS-H cannot be regarded as a breach of the principle of equal treatment.

8. CONCLUSION

- (267) On the basis of the foregoing assessment, the Commission has decided that the State aid at issue in this case is compatible with the internal market based on Article 106(2) of the TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of compensation of the deficits of the Brussels public IRIS hospitals by the Brussels municipalities since 1996 is compatible with the internal market on the basis of Article 106(2) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 5 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

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